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# IS ENERGY CHARTER TREATY: AN AGREEMENT OF PROMOTION OF INVESTMENT OR A MISTAKE?(*)

AUTHORED BY - RUCHIRA KAUR BALI[1]

## ABSTRACT

Climate change and investment in sustainable Technologies' have garnered augmented momentum in recent decades considering various UN declarations, conferences and regional bloc deliberations, and in aftermath of catastrophic natural and man-made disasters. Different factors lay a significant role in an investor's decision to whether invest, pool resources in a country or not some of which are: policies of the state, economies, perceptions of the local population, enforcement and judicial mechanism in the host state. The Energy Charter Treaty is meant to improve international cooperation, and investment in green technology and transfer amongst the participating states. Its main objective is to promote and sustain energy security. But the practical misuse of Energy Charter Treaty is an immense challenge for the international trade community to deal with in area of energy. cooperation.

As such, the charter has its own shortcomings in itself as it exposes member states to excessive litigation and placing unequal burden of reducing carbon footprint without considering differing social, political, and economic conditions. In recent times, European States such as: Spain, Netherlands, Poland and France have all decided to withdraw from the treaty, as a response to the uncertainty caused by the 'Zombie clause' , which elaborates about how the parties to an agreement may want to withdraw from the treaty but however they have to still carry on with the old obligations with respect to protection of foreign investments, and this is a point of contestation because it restrains the states from undertaking endeavours to shift toward green climate. What is this clause? Is this the reason why these countries have decided to withdraw from the treaty and ongoing deliberations in the European Parliament is a testament to the ensuing regulatory and arbitrary interpretation problems inherent in the Treaty? The example of such continuing debate would be the recent *RREF Infrastructure (G.P) Limited and*

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*RREF Pan – European Infra case*[2] whereby, the ICSID (International Centre for Settlement of International Disputes) tribunal restrained the regulatory autonomy of the state by holding it to be in breach of its ECT Obligations, however it did hold that it is unreasonable for the investor to expect that the conditions around the investments not to change. However, both arbitral jurisprudence, and scholarly works are divided on the point of retaining right to change conditions of investment upon issuance of notice of withdrawal.

The existing literature acknowledges the controversies and problems surrounding the treaty, but do not provide any comprehensive or generally accepted solutions to resolve the perils. The paper will study and analyse the proposed elucidations to ascertain novel solutions to ensure that the Energy Charter Treaty does not fail in its aspirations. Some of the solutions as propounded include:

The author will be making use of existing legislative sources, precedents in the states contesting the validity and legitimacy of the charter, and their respective domestic and foreign policies in that regard would be studied too, and the article as its approach make use of functional methodology to analyse the core implication identified in a multidimensional manner.

**KEYWORDS:** *Investment protection, green technology, ISDS- investor state dispute resolution mechanism, right to regulate climate change, arbitration, public law, sovereignty, Most Favoured Nation (MFN) principle, National Treatment*

**KEYWORDS:** Investment protection, green technology, ISDS- investor state dispute resolution mechanism, right to regulate climate change, arbitration, public law, sovereignty, Most Favoured Nation principle, National Treatment

## 1. INTRODUCTION

Energy Charter Treaty (ECT) is an international endeavour in the form of a Multilateral Framework signed in September 1994, and having entered into force in April 1998, was entered into with the aims and objectives to 'promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter as envisaged under Article of the ECT Charter.' The cooperation so desired was to be achieved through a set of legal tools popular at the time, namely: *liberalising trade in energy*

[2] *RREF Infrastructure (G.P.) Limited and RREF Pan-European infrastructure Two Lux S.àr.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award (11th December 2019).

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*products*[3], securing *their free transit*[4], *protecting foreign investors in energy sector*[5], *provision of investor-state arbitration*[6], *and state- to -state dispute resolution*[7].

Key features that defined the Energy Charter Treaty included: a) provision of sovereignty over natural resources[8], b) an extensively detailed framework for institutionalisation[9], c) provisions on exceptions[10], and it is also very pertinent to keep in consideration that all the Annexes of the ECT, and decisions undertaken by the Energy Charter Agreement Conference form an integral part of the ECT, and serve as an internal tools for interpreting its provisions[11].

Despite its novel objectives construed of promoting free trade and investment in energy sector, it faces wide ranging criticisms for the reasons that will be later discussed in the article.

Moreover, the objective to minimize environmental problems as established in Article 1 of the ECT has failed to meet its desired goals due to problematic Investor-State Dispute Settlement (ISDS) mechanism under Art. 26 of the ECT. It has become widely resorted to international agreement to bring forth investor claims state[12].

A recent study conducted by *International institute for Sustainable Development (IISD)* indicates that, 'fossil fuels industry has a long proactive history of using ISDS and that arbitration claims challenging environmental measures are on the rise. Additionally, sums awarded in ISDS cases are high adding to the restriction to the regulatory working of a host state[13].' As opposed to dispute settlement process in a trade dispute, a state is given an opportunity to make rectifications on the policy measures, and is retroactive in nature, but in an investment dispute it is not the case as the decision is final, not appealable just subject to cancellation on annulment grounds, and state is to pay compensation to the host often amounting to be huge in value. In regards to which, concerns have also been raised that global

[3] Article 29 ECT, this provision is also has it gerund norms based in WTO GATT regime.
[4] Article 7 ECT
[5] This has been underpinned by the norms formulated in BITs signed over during that time, and see in particular Part III and in specific Article 10 and 13 ECT.
[6] Article 26 ECT
[7] Article 27, 29, Annex D, and Article 7 (7) ECT.
[8] Article 18 ECT.
[9] See Part VII ECT.
[10] Article 24 ECT.
[11] Article 31 (3) (a) and 41 VCLT.
[12] Kaj Hobér, *The Energy Charter Treaty* (Oxford University Press 2020) 4.
[13] IISD Report, 'Investor-State Disputes in Fossil Fuels Industry,' December 2021, https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf

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intensification of investment activity levels, together with commercial practices separated from considerations such as : environment and social, induce unsustainable growth patterns[14].

With this context of ISDS System into consideration, ECT as an investment treaty, which is an example of troubled paradise for old age traditional energy resources, and places problems in transition to a far greener economy, Germany is also looking to do the same by withdrawing from the treaty. It has already induced almost 135 investor – state arbitration disputes, in turn making it as one of the worlds highly litigated investment protection agreement. Worth noting of this situation is infamous cases of *RWE v. Netherlands*[15], *Ascent Resources v. Slovenia*[16], *Vermilion v. France*[17]. Figures also reflect that a massive value of worth £345 billion of fossil fuels infrastructure is protected by the Treaty[18].

With recent withdrawals from the Treaty, comes into question the traditional mindset of states to consolidate and promote investment in non-renewable energy sector, and this eureka moment of applause has arisen in international law, where withdrawals are usually seen from the lens of despair often lamented with accusations of causing the decay of international law, and withdrawals are seen as being anti multilateralism. The most recent calling was of the EU Parliament which, through a plenary resolution called for a, coordinated withdrawal from the Treaty, and has labelled ECT as a failed and an anti-climate legislation as it is not in compliance with either EU Climate Law, or Paris Agreement[19].

Agreements such as Energy Charter Treaty, pose an obstacle to global coordinated effort to transition to clean and green energy, but withdrawal is only a symbolic act, as many have argued in their literature and scholarly work, and go on to state that there is an alternative solution to mere withdrawal by the state due to their discontentment with the investment treaty

[14] Lyuba Zarsky,'Havens, Halos & Spaghetti: Untangling the Evidence About the Relationship Foreign Investment and Environment', Special Reports, (January 29th , 1999) < https://nautilus.org/napsnet/napsnet-special-reports/havens-halos-and-spaghetti-untangling-the-evidence-about-the-relationship-between-foreign-investment-and-the-environment/ >

[15] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4,Award (05th September 2022).

[16] *Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia*, ICSID Case No. ARB/22/21, Notice of Dispute (23rd July 2020).

[17] *Red carpet courts: 10 stories of how the rich and powerful hijacked justice*, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International, June 2019 <www.10isdsstories.org > Accessed on 18th March 2023.

[18] Oliver Moldenhauer & Nico Schmidt, 'ECT Data Analysis: Results and Methods', Investigate Europe, 23rd February 2021, < https://www.investigate-europe.eu/en/2021/ect-data/ > date accessed 15th January 2023.

[19] Parliament Resolution (EU) 2022/2934 of 24th November 2022 on the outcome of the modernisation of the Energy Charter Treaty, < https://www.europarl.europa.eu/doceo/document/RC-9-2022-0498_EN.html >

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regime in particular the ECT[20].

After years of decayed or stagnated growth or investment in Eastern European states, and rich western states looking to afford cheap sources of energy, the two blocs got together to exchange their respective needs of investment and cheap and regular source of energy respectively.

However, as such the historical foundation of the Treaty is highly problematic envisaging an imaginary win -win type of situation, whereby no one loses.

Infact the spiralling cycle of securing profits, and securing supplies through this engagement with Eastern European union, the losses soon were to be found to be externalised thereby indicating deficiency of thought and overdependence upon the approach. As Maslow's hierarchy of needs is to be applied to this legal problem basic needs of a society to a healthy and dignified environment by divesting from non-renewable resources should have been a priority, but this agreement clearly indicated a prejudice to the old players of the market.

Of most relevance to the problematic foundation of the treaty are provisions of Art. 45 and 47 which provide for sunset clauses. The sunset clauses make it imperative for the withdrawing party to provide for protection to the foreign investors property within its jurisdictional limits for a period of 20 years[21] from the date of deposit of notice and instrument of withdrawal. It implies that, even though the party leaving the umbrella of ECT, with no new obligations arising, still has to retain old obligations towards the investors for a period of 20 years, implying unequal parties to be treated equally in unequal situation.[22]

These provisions are very problematic as they tend to provide blanket of protection to the foreign investor instead of those of the contracting parties. Although, the parties would be relieved of few obligations such as alleviating or preventing distortion of market conditions, these however do not override the general importance of the consent of the state to these

[20]Jan Klabbers, 'A Moral holiday: Withdrawal from Energy Charter Treaty,' ESIL Reflections, [2022] 11 (6) <https://esil-sedi.eu/esil-reflection-a-moral-holiday-withdrawal-from-the-energy-charter-treaty/ > accessed 11th November 2022.

[21] Data extracted from the UNCTAD International Investment Agreement Database, https://www.investmentpolicy.unctad.org/international-investment-agreements

[22]Jorge Libereiro, 'What is the Energy charter Treaty and Why is it so controversial ?,' EuronNews, (2022), < https://www.euronews.com/my-europe/2022/10/26/what-is-the-energy-charter-treaty-and-why-is-it-so-controversial >.

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obligations, and as such this article will explore why not all pact need or are worthy of being observed forever.

Withdrawal of parties from ECT is induced by several factors such as the desire of the parties to move towards more greener economy by disabling the protection granted to its investors in other countries as is the case of Germany wanting to end the protection to its investors in Bulgaria for example.

Apart from this, ECT has faced numerous challenges in the light of excessive misuse of dispute resolution to sabotage the states from effectively regulating their domestic sphere is also evident as reason of very recent surge in climate litigation against the countries which are home to some of the largest companies misusing to protect their corporate greed. At the heart of this debate is again the ECHR (European Convention on Human Rights) , one of the instruments providing for protection and promotion of right to private and family life under Art 2 and 8 of the Convention[23].

The type of arrangement that the treaty envisages is very prejudiced against principle of transparency, and the very foundation of rule of law. This article intends to consolidate the problems inherent within the treaty, and the challenges complicated further by external factors.

## 2. CONCEPTUAL ANALYSIS

### 2.1.Problems Threatening The Functions Of The Treaty

Before divulging into the various problematic aspects of the treaty that has dragged it into controversies, it is essential to keep a caveat in mind that politics around ECT is ever evolving, some treaty parties might agree to these set of problems, while the other consider it a major obstacle to continuing their participation in Energy Charter forum.

Some of the inherent problems facing the progress in talks of renaissance of the treaty are in the following paragraphs:

[23]Linnéa Nordlander & Alessandro Monti, 'A new variety of rights based climate litigation: a challenge against Energy Charter Treaty before European Court of Human Rights,' < https://www.ejiltalk.org/a-new-variety-of-rights-based-climate-litigation-a-challenge-against-the-energy-charter-treaty-before-the-european-court-of-human-rights/ > (2022) accessed on 10th December 2022.

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### 2.1.1. Umbrella Clauses And Stabilization Clauses with reference to Energy Charter Treaty

Whether stability requirement of certain and stable legal framework, would fall under broader ambit of umbrella clause, or fall under specific stabilization clause.

Specific commitments breach would lead to contravention of legitimate expectations of the investors, and would fall foul of international acceptable standards of protection.

The investors have a burden to prove that their expectations were reasonable and objective at the time investment was made.

The change should be drastic and radical having an adverse impact on affecting the conditions of investments para 379 of RREF case[24]. The tribunal outrightly held in favour of Spain by holding that since Spain had guaranteed a reasonable rate of return or profitability in various laws regulating REI, the only legitimate expectations that could arise was in relation to receive a reasonable rate not fixed as initially provided for in the FIT regime.

In respect of an argument with respect to transparency and reasonableness with respect to Article 10 of ECT is in reference to the fair and equitable treatment the arbitral tribunal decision held that the government would meet the proportionality and reasonableness standard so long as the measure was not unnecessary, random, or arbitrary under para46[25]. With respect to proportionality and reasonableness question, it was held as an adjoining question to be addressed with assessment of damages, para 515 for damages assessment,

Even the latest round of amendments[26] to the treaty confer additional protection to fossil fuel investments in the countries withdrawing from the Treaty[27], and these changes still confer indefinite period of protection to fossil fuels in other countries, and this is not in conjunction with the objective of reducing dependence, and quick phase out of fossil fuels as is needed to prevent climate catastrophe, and is inconsistent with the international Energy Agency's widely

[24] Supra note 1.
[25] *Supra* note 1.
[26] Each amendment is very challenging to be effectuated in ECT as under Art 36 of the ECT, unanimity amongst those present and voting is required in order to amend a provision.
[27] Amandine Van Den Berghe, Lukas Schaugg, & Helionor de Anzizu, ' The Energy Charter in the Light of Climate Emergency,' JusMundi ( 2022) Blogpost < https://blog.jusmundi.com/the-new-energy-charter-treaty-in-light-of-the-climate-emergency%e2%80%af/>

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recognized goals to contain global warming to 1.5 °c beyond the pre industrial limits. As scholarly articles and tendency of arbitral decisions make note of, in order to meet this target a certain percentage of oil and gas assets will have to be foregone, a stupendous 19 % of which is protected by investment treaties, , and this would lead to an increased or exacerbated ISDS Claims[28].

There will be a) an increased risk of litigation, and b) in turn will prove to diminish the law making authority of the host states.

### 2.1.2. ECT Based Arbitration Risk Flowing From Cop 26 Pledges And Reformatory Drawbacks

As such proposals to reform ISDS mechanism envisaged in ECT have been left out in proposed amendments, and new agreement if put in effect will increase risk of augmented litigation. As such these latest amendments do little to pacify concerns as they sustain in major chunk of protection granted to fossil fuel investment, and only make do with small alterations to greenwash the protection mechanism[29].

Despite the reformatory proposals ongoing since 2017, all efforts have been in vain, as such in order to keep the pledges made at the COP 26, the contracting parties have also deliberated the option of withdrawing from the Treaty in case no satisfactory arrangement could be arrived at with respect to reforming the Treaty. If the treaty is not urgently significantly reformed, will not there be unabated risk of increased litigation by investors, but also various pledges made at COP 26 such as: reduce handing out of unrestrained coal power and fossil fuel subsidies, and at the same time individual commitments to phase out coal power would be jeopardised.

The litigation will be increased as the pledges will be implemented at the national level, thereby having a spill over effect of restrictions on foreign investments in energy sector, hence augmenting the chances of disputes arising between investors and states. This problem is further facilitated by the fact that the ECT grants a wider substantive protection to the investors, paving a way for the investors to claim billions of dollars as compensation in damages, against

[28] As ascertained in Report released by IPCC in April 2022. Refer, IPCC, 'Climate Change 2022: Mitigation of Climate Change- Summary for Policymakers,' <Climate Change 2022 – IPCC https://www.ipcc.ch IPCC_AR6_WGIII_SPM > .

[29] *Rockhopper Italia S.p.A. v. Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB /17/14, Award (23rd August 2022).

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regulatory efforts of the states. As a consequence they will add to the already rising bills of transition to the cleaner technology for a greener future[30].

### 2.1.3. Regulatory Extinguishment Of Powers

In order to realise various commitments adopted in the form of CoP 26 pledges, national action plans, EU Green Deal, these commitments will have to be implemented by the host state, for example states should enact and implement pieces of laws that force operators to close power plants, or modify them to biomass combustion. The measures that will be undertaken to implement the commitments will have a likelihood of having an impact on the entire value chain of coal- based power generation, ranging from upstream exploration and extraction activities to working of coal - based power plants.

ISDS mechanism will restrain the capacity, willingness, and ability to enact such legislation. An example of this can be given of the Dutch Legislation which has already generated two arbitration claims in 2021, when RWE[31] and UNIPER[32] both initiated ISDS process against the Netherlands on the basis of ECT. The tribunals in these both cases have adopted increasingly broad interpretation of what amounts to protection against expropriation, and legitimate expectations to mean that include government measures that in some medium have an adverse effect on the profitability of an investment, and states not permitted to significantly modify their regulatory system that is applicable to a specific investment in discussion. The claimants in the above cases were also able to argue that the proposed conversion of coal plants into biomass were so costly that it would render their investments unprofitable, and are questioning the feasibility of climate friendly policies.

### 2.1.4. Carve Out Problem

Following the judicial decisions meted out by the Court of Justice of the EU in *Achmea*[33],

[30] Lukas Schaugg & Gregg Muttitt, 'How the Energy Charter Treaty risks undermining the outcomes of COP 26,'Investment Treaty News: IISD, (1st March 2022) < https://www.iisd.org/itn/en/2022/03/01/how-the-energy-charter-treaty-risks-undermining-the-outcomes-of-cop-26/ >.

[31] *RWE AG v. RWE Eemshaven Holding II BV v Netherlands, Procedural order no 1,* ICSID Case No ARB/21/4, IIC 1789 (2021), Award (15th October 2021) < https://opil.ouplaw.com/display/10.1093/law-iic/1789-2021.case.1/law-iic-1789-2021?rskey=JU3E5f&result=1&prd=ORIL >

[32] *Uniper SE and Ors v. Netherlands, Procedural Order No 2, Decision on Claimants request for provisional measures,* ICSID Case No. ARB/12/2022, IIC 1802(2022), Award (9th May 2022).

[33] *Slowakische Republik v. Achmea BV,* Judgment, reference for a preliminary ruling , Case 284/16, ECLI: EU: C: 2018: 158, IIC 1316 (2018), NJW 2018, (Case C-284) [2018]. The CJEU for the first time while considering the validity of intra-state investment treaties held that arbitration clauses included in such agreements contravene Article 267 and 344 of the Treaty on the Functioning of the European Union ('TFEU').

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*Komstroy*[34]*, and PL Holdings*[35], it is clear and lucid that the any initiative on arbitral tribunal to adjudge on intra – EU investment is in contravention of EU law, and prior to this clarification, often ISDS arbitral tribunals would disregard the case laws of the CJEU, or refused to decline their jurisdiction in that regard. The scope of ECT dispute resolution provision between EU member states and EU investors has been further lucidly ruled out in *Green Power K/S & Obton AS v. Kingdom of Spain*[36],

Even if the parties to the amended ECT have agreed to expressly and certainly carve out the application of ECT to intra-EU disputes, it however, remains to see whether, and as has been doubted by scholars alike, if the new Regional Economic Integration Organisation clause would be effective or not for the pending cases, and for those prospective cases that may be brought till the time of enforcement of an amended ECT Treaty.

Additionally, there are certain limitations to the phase out as well that EU pledged in accordance with its 2021 legal framework for implementation of EU Green Deal[37], is in contravention of phase out of EU fossil fuels. As is stated by reports released by IEA and IPCC, all new investments in fossil fuels must end immediately, and existing ones should also be phased out immediately. The amendment would have been in consonance with the spirit of climate urgency and protection, had it severed investment protection for fossil fuels prior to end phase out of fossil fuels as it is conventional for arbitral tribunals to consider the impact of legislation on prospective value of investment at a future date. The problem arises with respect to certain exception of protection provided to fossil fuels falling below certain threshold.

### 2.1.5. New Energy Products Added

By increasing the scope and ambit of increased energy products, services, and business activities including biomass, hydrogen, anhydrous ammonia, and carbon capture and storage, the new ECT would have increased the risk of litigation, and as such this extension of scope acts as a backdoor protection of fossil fuels, especially in case of fossil gas used for producing blue and gray hydrogen.

[34] *République de Moldavie v. Komstroy LLC*, request for a preliminary ruling from Cour d' appel Paris, Case C-741/19, ECLI: EU: C: 2021: 655, IIC. The court of justice of EU in this case held that Article 26 of the Energy Charter as being inapplicable amongst member states of the EU. Amongst other matters, it also dealt with concept of 'investment', and dispute between 'third state operator' and a 'third state.'

[35] *PL Holdings Sarl v. Poland*, Final award, SCC Case V 2014/ 163, IIC 1541 (2017), 28th September 2017.

[36] *Green Power K/S & Obton AS v. Kingdom of Spain* SCC Case no. 2016/135, Award (16th June 2022).

[37] EU Commission Communication COM/2019/640 of 11th December 2019 to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions ( EU Commission) concerning, 'The European Green Deal,'.

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For example, the general exception provision embedded in article 24 of the ECT is not applicable to the contravention of the 'fair and equitable principle' and 'expropriation' provisions the basis of which is most frequently relied on by investors to raise their claims. Hence it should be unsurprising that the arbitral awards have not garnered significant attention to the ECTs reliance on the United Nations Framework Convention on Climate change (UNFCCC) or of the environmental protection, and also have not yet taken cognizance of international climate law when inferring the understanding of ECTs investment provisions, (the same has been enlightened by a report released by Climate Change Counsel)[38].

### 2.1.6. Question of reforming investor state arbitration missing in reformatory proposals

The latest rounds of amendments have also not made significant changes or has left the idea of considering making changes to the Investor state dispute resolution mechanism envisaged under article 26 as the Energy Charter Conference did not include it in the list of agenda to be discussed for reformation, and it would be unlikely that the necessary amendments as proposed by the EU will be highly unlikely to be a part of the amended, or modernized ECT[39].

### 2.1.7. Autonomy of EU Law is adversely affected by the provisions of ECT

Last but not the least it is a very controversial dispute that the Dispute settlement undertaken under Article 26[40] is in contravention of EU law principles of autonomy (both juridical and institutional), mutual interest, cooperation, and it would mean that intra – EU arbitration would be would be in direct violation of the treaties as it would encroach on the sovereignty of the EU Members states to conclude agreements on their behalf and it was also been held in *Achmea*[41] case that intra- EU investment BITs are incompatible with the EU Law treaty provisions-. It is also a contravention of EU citizens right to an independent tribunal under Article 47 on the EU Charter on Fundamental Rights[42]. This line of juridical reasoning is consonance with the previous precedents[43]. Therefore, implying that good reasons existed to

[38] Anja Ipp, Annette Magnusson & Andrina Kjellgren, 'The Energy Charter Treaty, Climate Change and Clean Energy Transition- A study of the Jurisprudence', The Climate Change Council ,( 2022) < https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf >

[39] Energy Charter Conference, Decision on Report by the Chair of the Subgroup on Modernisation, CCDEC 2018 21 NOT, 27 November 2018.

[40] Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258.

[41] Supra note 32.

[42] Art. 47 European Union: Council of the European Union, *Charter of the Fundamental Rights of the European Union*, (2007/C 303/01), 14th December 2007, C 303/01, available at https://www.refworld.org/docid/50ed4f582.html > [accessed 18 March 2023]. Article 47 of the Charter of Fundamental Rights of the European Union stipulates 'right to an effective remedy and a fair trial.'

[43] C Eckes, 'Some Reflections on Achmea's Broader Consequences for Investment Arbitration', European Papers, Vol. 4, 2019, No 1, pp. 79-97.

doubt the. Compatibility of ECT with the EU Law.

However in a case of a referral of a question by Belgium about validity of prospective modernised ECT along with its Article 26 ECT[44] applying on intra- EU disputes, it had been held by the CJEU in *Opinion 1 /20*[45] , that it is a function of Article 218 TFEU that, "*'to forestall, by a prior referral to the Court, possible complications at EU level and at international level which would result from the invalidation of an act concluding an international agreement*"[46].

Moreover, recently it has been affirmed in *Komstroy*[47] that intra- EU arbitration under ECT, however, the question of validity of extra- EU arbitration under ECT has not so far been addressed clearly. It is also worth noting that in 2015 the Commission had asked the EU Member states to terminate intra-EU bilateral treaties, and in respect to the same it has time and again present *amicus curiae* briefs[48], and has initiated infringement actions against specific countries[4950]. For instance, in *Aechmea* case, the EU Commission had sent a letter to the Dutch government clarifying that intra- EU arbitration clearly violates EU Law and the national courts are under an obligation to disapply ICSID in case of conflict with EU Law[51].

However, in *Komstroy*[52] has left open the possibility to have an extra- EU arbitration mechanism in its relations with third states. However, in anticipation of illegality of intra- EU arbitration under ECT, the law firms have guided companies to move their seat outside the EU,

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[44] Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258.
[45] *Opinion 1/20* ECLI:EU:C:2022:485, available at < https://curia.europa.eu/juris/document/document.jsf?text=&docid=260993&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3184590 >
[46] Consolidated version of the Treaty on the Functioning of the European Union ('TFEU') [2012] O J C 326, 26.10.2012, p. 47-390.
[47] Paras 28, 29, and 34 *Komstroy* at Supra note 33.
[48] EU Commission Press Release, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', Press release, 18th June 2015,. It is very important to note that following that communication, and after landmark judgments of *Achmea*, the EU Member states reached an agreement in 2020 to terminate their intra-EU bilateral investment treaties. *See*, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJL 169, of 29th May 2020 , p1-41.
[49] ee, e.g., *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, Decision on Jurisdiction (6 June 2016) ICSID Case No. ARB/13/30, para 20; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, Final Award (4 May 2017), ICSID Case No. ARB/13/36, para 70.
[50] Dahlquist Joel, Lenk Hannes, and Ronnelid Love, 'the infringement procedings over intra-EU investment treaties-an analysis of the case against Sweden' Swedish institute for European Policy Studies, European Policy Analysis no.4 (2016).
[51] See at: https://www.iareporter.com/articles/revealed-european-commission-addresses-compatibility-of-icsid-convention-with-eu-law-for-the-purpose-of-intra-eu-arbitrations/.
[52] Supra note 33, *Komstroy*, para. 62.

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thereby ensure the possibility of vicious cycle of arbitration proceedings which will cost both time and resources.

The scope of consideration of in-depth analysis of substantive protection offered to the investors is outside the scope of this piece.

### 2.1.8. No hard commitment for environmental protection

The sceptic , and hesitancy shown by the government towards 'environmental protection', and lobbying by fossil fuel industry during the time of negotiation, resulted in what best can be described as a collection as good will intention, good practices, and neighbourly collaboration[53]. Article 19 of ECT[54] is one such provision which can be construed as 'best efforts provisions' and a one which accentuates more on formulation of 'market oriented', and 'cost effective' practices. Furthermore, the Energy efficiency protocol provides too only for aspirational and best endeavours language on energy efficiency and environmental protection through creation of market based instruments to reduce spillage and promotion of energy efficiency[55]. Energy efficiency protocol structurally subordinates international environmental and climate law obligations to investment protections and trade liberalization[56]. Moreover, Article 19 of the ECT and Energy Charter Energy efficiency protocol are not covered by dispute resolution provisions[57], the decisions on interpretation and application of Article 19 may be taken through unanimity by the parties to the ECT through Energy Charter Conference. This can provide implications for politically filled decision making, and may or may not lead to political gridlock in the process[58].

### 2.1.9. Problem posed by non-derogation clause

EU proposed text for reforms in 2020, however, it did not contain a proposal for amendment of Article 16 ECT, which provides for more favourable treatment for investors in case of similarly worded clause in different investment agreement, and this conflictual clause has been

[53] Thomas W. Wälde, 'European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and energy charter protocol on energy efficiency and related Environmental aspects ' [1995] 34(2) International Legal Materials 360-454, 362.
[54] Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258.
[55] Article 1 Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects; Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258
[56] Article 13 (1) Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects; Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258
[57] Article, 19 (2), 26 (1) and 27 (2) ECT; Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258.
[58] Article 19 (2) and Walde (27) for this view 365.

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relied upon by ISDS tribunal to apply ECT to lesser favourable EU Law provisions in intra-EU disputes[59]. This provision has to be amended so as to leave some leeway for increased margin of appreciation for states to control the matters falling within their domestic domain.

## 3. SOLUTIONS

Energy Charter Treaty was an ambitious step in coordinating efforts towards cooperation in energy sector, however, it faltered in number of areas such as frequent and expensive consequences of ISDS mechanism, obstacles to climate change mitigation measures, and so on as discussed above.

This section will now discuss solutions that are being deliberated at various international organisations and agencies such as UNCITRAL, IPCC, and so among regional groupings such as EU, to ascertain if they can really salvage the treaty from untimely death.

### 3.1.1. Policy exemption clauses to preserve domestic regulatory space

Given the extensive use of ISDS mechanism by investors, it is often a dilemma whether investment treaties can provide for exception clauses to retain the essential rights of the states to regulate. It indeed is possible. These clauses are referred to as 'policy exemption clauses[60].' They permit contractual party or treaty party to exercise their regulatory function smoothly by guiding these measures towards particular policy purpose, industry or sector that are in trials and tribulations with the interests of the investors. It provides stability to not only the arbitrators, but also potential claimants, and hist states, that the aim and objective of the treaty is not mere protection of investors, but also to provide a 'safety valve' to the host state to escape liability for undertaking acts necessary for the well-being and development of their domestic policy space with the aim of success of public welfare objectives.

They can be: a) general exception clauses, b) security exception clauses, c) carve-outs, d) public policy. e) exclusion of certain sectors and areas from ISDS, f) denial of benefits clauses, and g) precision and exactness in treaty provisions.

[59] 10 Kaj Hobér, 'The Energy Charter Treaty' (Oxford University Press 2020), 4318-323.
[60] Article 1.7..1 in Guide to Practice to Reservations to Treaties adopted by ILC in 2011, ' in order to achieve results comparable to those affected by reservations, States and International Organizations may also have recourse to alternative procedures such as "a) the insertion in the treaty of a clause purporting to limit its scope or application".

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First and foremost, it is imperative what is the treatment of and consideration for such a policy clause in International Trade Law. As general exception clause given under Article XX of the GATT[61], provides guidance to the tribunals and trade panels to namely ask three question: a) does the state one of the enumerated aims, b) is the measure relevant or necessary to attain named objectives and aims, and c) does the measure, regardless of the intent, result as a disguised restraint on the trade and is discriminatory. If the measure does meet the conditions, the clauses permit a state to regulate domestic matters within its borders. Nevertheless, the exception clause in Article 24 ECT[62] is much narrower in scope in comparison to Article XX of GATT[63], as not only the list given is closed one but also is constrained by further limitation of the blockage on reliance on the clause for enforcing or implementing measures that 'necessary to protect plant, human life, or animal life or health [64]'. Moreover, right to regulate sovereignty over 'environment and safety aspects 'in 'exploration, development and reclamation of energy resources' ' as given under article 18 is limited by their obligations under the Charter and cannot be a part of ISDS mechanism under Article 26.

However, reliance for persuasive value can also be found in consensus in arbitral decisions as well. It is very well noted in the decision of *S.D Myers vs. Canada*[65] that high level of deference is given to the states to act in wider interest of the public, granting and withdrawing subsidies, protecting environment, imposing zoning restrictions, and regulation of tariff levels. Interpreting this decision using Golden rule of interpretation, it can be a general understanding that domestic regulatory space would be given primacy over stringent investment standards.

However, usage of such exception clauses are not all rainbows, they do have dark clouds hindering their success rates as well. It is important to keep in consideration that if policy exceptions work as limitation on treaties, substantive obligations would nevertheless limit arbitral tribunals scope, but nonetheless would be reviewable under ICSID and New York Convention, but if they are characterized as affirmative defense grounds on merits, they fall outside the limit grounds of annulment proceedings, and domestic court proceedings.

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[61] The General Agreement on Tariffs and Trade, (1st January 1948) < https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm >
[62] Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258.
[63] The General Agreement on Tariffs and Trade, (1st January 1948) < https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm >
[64] Article 24. (2) ECT, and also see Hobér (). 390.
[65] *S.D. Myers Incorporated V. Canada*, Order, 2004 FC 38, (2004) 244 FTR 161, IIC 252 (2004), 13TH January 2004, Canada; Federal Court [FC].

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Overall, a cautious approach to this reformatory proposal suggestion has been emphasized.

### 3.1.2. Counter Claim By States

In order to better protect the interests, a solution can be advanced by the states during arbitral proceedings by raising counter claims, either alleging violations by the investor of the domestic regulations and constitutional provisions essential to the functioning of the state, so core that, upkeep of which would be important to comply with as well. Admission of counterclaims as such depends on a variety of factors such as: rules of jurisdiction of the tribunal to seize issues of counterclaims, procedural and substantive rules of the institution, existence of obligations of the investors, and admissibility of the counterclaims. Hence, a caution has to be taken that admission of counterclaim in an international investment agreement as unique as ECT is not a straightforward question but rather merits a closer examination of the consent of the Parties enmeshed in the Treaty.

It can be advanced by some states that their sphere of regulation overrides the so called loose and vague provisions of international treaty provisions. An example of which can be given of: the interim decision in *Perenco v. Ecuador*[66], in 187 page decision the tribunal set the course of inclusion of environmental rights in investment arbitration by allowing Ecuador to bring a counterclaim against investor on the basis of alleged contravention of Ecuadorian environment law by holding the investor liable to make $54 million damages to be awarded to the State.

However, it is much easier in this case as all the three institutions mentioned in the ECT (namely- ICSID, UNCITRAL, and SCC) consists of rules regulating the admissibility of counterclaims, and also that it is one of such issues which is to be assessed by tribunals on case by case basis, as such the tribunals decisions are not binding precedents, but merely hold persuasive value for the subsequent tribunal to refer to and rely on, and all would depend on concrete realisation and consolidation of such a practice in the form of a treaty provision. Moreover care also has to be taken with respect to compromissory clauses as they are very narrowly drafted in the older treaty, restricting the scope of the treaty to the alleged or presupposed breaches of the contracting party state.

Illustration of arbitral interpretation of narrow and broad interpretation of clauses can be stated

[66] *Perenco Ecuador Ltd. V. Republic of Ecuador and Empresa Estatal Petròleos del Ecuador (Petroecuador),* ICSID Case No. ARB-08-6, Award (27th September 2019).

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with respect to interpretation of the compromissory clause which, in the instant ECT case can root for the one most suitable and promoting the objective of 'minimising environmental harms' by recourse to article 31 (1) of Vienna Convention on the Law of the Treaties, and apply the *Goetz*[67] methodology. This would enable the contracting state to file for counterclaims. There is another catch to this, this interpretation underestimates the strict notion of consent, and is not coercive enough for invoking the responsibility of the investor.

### 3.1.3. Claim By Investors with invocation of responsibility of state to promote investment in green and clean technologies Social impact bonds

An increasingly number of scholars and commentators have advocated for systematic and intentional advancement of human rights agenda, by enabling private parties to bring human rights claims through ISDS mechanism, and as such till date, prospective ability and capacity of the private parties to bring in human rights claims have been ignored. There is a novel suggestion advanced to further this, by purchase of Social Impact Bonds by these private parties, which is in turn a right to influence the government to maintain or comply with human rights obligations and formulate and sustain their policies in that regard[68]. The market according to an estimate for it is to grow up to at least $ 1 trillion in the next decade. It has already been issued both in global north and south with positive views to its testament to bring private parties standing closer in ISDS fora to enforce the human rights commitments of the sovereign states.

**Side agreements**

At the same time many trade agreements provide for side agreements with provisions for private parties to bring human rights claims such as NAFTA, which has provided for side agreements on labour and environment[69]. They enable private parties to file claims to trigger the investigatory procedure, however, they will be less compelled than the investors to do so. Yet discussing this interesting proposal is beyond the limited *rationae materiae* scope of this

[67] *Antoine Goetzet consorts v. République du Burundi*, ICSID Case No. ARB/95/3. An opposite view was taken in *Gustav FW Hamste GmbH & KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18th June 2010) in which the tribunal interpreted the compromissory clause narrowly to exclude or inhibit the state from filing counter-claims.

[68] Adriana Barajas, Kiyadh Burt, Patrick Johnson, Jacobo Licona, Wilson Parker, Lane Sturtevant, 'Social Impact Bonds: A New Tool for Social Financing', [2014] 8 PRINCETON U.PUB. POL'Y & INT'L AFF. PROGRAM PRINCETON. It stipulated that the social impact bonds were first introduced in 2010.

[69] "*See* North American Agreement on Labour Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 (1993); North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993); see also Patricia Isela Hansen, Dispute Settlement in the NAFTA and Beyond, 40 TEX. INT'L L.J. 417,421-22 (2005) (discussing the functionality of these side agreements)."

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article.

### 3.1.4. Coordinated Withdrawal

Withdrawing is not an overnight process, and it almost takes a year for the withdrawal to take effect. But is still a probable option to reduce the brunt of ECT process on domestic regulatory powers.

In response to Italy's withdrawal from ECT in 2015, it was urged by activists that the countries withdraw from the Treaty as a coordinated group in order to negate the effect of 'sunset clause[70].' This is possible through an agreement made between these countries called 'Inter-se'. It would amount to exterminating or putting end to legal effects of the 'Survival clause[71].'This view has been supported and advanced by some scholars and NGOs to eliminate the applicability of sunset clause altogether[72]. But on the other hand, it is uncertain that such inter se modification is compatible with the European Charter Treaty for the reasons to be discussed thereafter[73].

This could be given effect to if parties agree to unanimous amendment, however, due to delay in advancement in reformatory deliberations, and a lack of middle ground arrived at, such a unanimity would be harder to be attained[74]. However, in addition to these problems , existence of 'Safety net' provision under Article 16 of the ECT would pose to be as a pothole on the road to leave the embrace of the treaty as it retains the greatest level of protection for investors and investment or in other words greater leeway for ISDS mechanism to be abused by investors. Any attempt to do so would not only be in violation of Article 16 of the ECT, but would go against the letter and spirit of objectives and purposes of the ECT as enumerated under Article 41 (1) (b) of the VCLT[75].On one hand the arbitral tribunals have rejected the argument that EU Membership amounts to modification *inter se* of ECT (which would have eradicated the

[70] 'Outrage as Italy ordered to pay out millions to oil investor over Energy Charter Treaty claim,' CAN Climate Action Network Europe, 24th August 2022, < https://caneurope.org/outrage-as-italy-ordered-to-pay-out-millions-to-oil-investor-over-energy-charter-treaty-claim/ > accessed on 03rd march 2023 .
[71] Article 47 (3) ECT.
[72] https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty
[73] https://voelkerrechtsblog.org/mission-impossible/
[74] Nathalie Bernasconi, 'Energy Charter Treaty Reform: Why withdrawal is an option', Investment Treat News, International Institute for Sustainable Development, (June 24, 2021), (accessed on 13th March 2023), < https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/ >
[75] https://legal.un.org/ilc/texts/instruments/english/conventions/1_11_1969.pdf

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consent to arbitration- so to speak)[76]. However, it is fascinating to note that in *Green Power v. Spain*[77], the arbitral tribunal ascertained EU law to be reigning or be in a superior position to ECT, including Article 16 ECT. Because of this legal blockade, there is a more than a high likelihood of the tribunals vindicating the jurisdiction in the light of Article 16 and prior case laws on inter se modifications.

It is also opined that the countries could still face reparations claims if they decide to go out on individual basis, and if they decide to undo or block future oil and gas projects, and as such the tax payers would be at the greatest disadvantage. It is also not without problems, and so far studies have indicated that survival clauses have only been terminated so far in bilateral agreements, and not in multilateral agreements, so there is lack of certainty and precedence for multilateral agreement such as ECT, for the parties to terminate this clause. However, this problem can be tackled by only resorting to modification, instead of amendment, and for this support can be traced in the rules of *modification of treaty provisions* in public international law. The modification amounts to, '*variations of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties of the Treaty, the treaty provisions remain intact.*[78] 'However, there is a scholarly consensus as around the two conditions in order this to take effect: firstly, under Article 41 (b) (i) of VCLT[79] : a) should not affect the rights and obligations of the other parties to the Treaty and this condition is satisfied as the rights under the treaty do not operate as *erga omnes partes*, but instead are pool of bilateral collection of rights operating inter se, and b) object and purpose of the treaty should not be altered or interfered with due to modification of rights and obligations between parties as found under Article 41 (b) (ii) VCLT[80], however rules under public international law states that only deviation from interdependent rights and obligations, instead of bilateral rights and obligations, would be in contravention of second condition[81]. Moreover, withdrawal from the Treaty will eliminate protection for all fossil fuels for 10 years later than the phase out period.

[76] *Vatenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/21, Award (31st August 2018), paras *221, 229, Landesbank Baden -Wurttemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45 paras 186, *Eskosol s.P.a. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50 Award (4th September 2020) para 151.
[77] *Green Power K/S and Obton A/S v. Spain*, SC Case No. v 2016 /135, Award (16th June 2022), paras 468-470 of the case.
[78] United Nations (n.d) Glossary of terms relating to treaty actions. https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#amendment
[79] Vienna Convention on the Law of the Treaties (adopted 23rd May 1969, entered into force on 27th January 1980) 1155 UNTS 331.
[80] *I*d.
[81] Supra note 17 at page 5.

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For example, in case of Poland, if it notifies withdrawal by 30th November 2022, the effect to the same will be given on 30th November 2023, and survival period under the sunset clause would be concluded only on 1st December 2043[82].

As can be seen, modification of rights amongst few parties would not have a detrimental impact on the rights of the intra-ECT third parties i.e., non-modifying states and their investors. A careful analysis will have to be seen to understand the decision undertaken in future.

### 3.1.5. Modernisation An Alternative To Withdrawal

Few scholars have also attempted to provide support in for the modernised treaty by stating that despite of its own drawbacks, it greatly reduces the risk of chances of successful arbitration claims raised by investors, as it eliminates intra-EU arbitration under Article 24 (3) ECT,[83]as well as the applicability of Article 16[84].

The general rule would be of applying the new treaty provisionally by 15th August 2023. Contracting states have an opportunity to opt out of provisional one by applying to the new treaty and automatically putting an end to the protection granted to fossil fuels and enable phase out of fossil fuels[85].Most protection granted to existing fossil fuels will be exhausted by the end of 10 year limit[86].

It will not only lead to exclusion of intra- EU disputes, but will also to a large extent diminish quantity of investment disputes arising out of ECT as on August 2023 or 2033 onwards This is a reflection of importance given to the consent of the state in reforming the treaty process.

## 4. CONCLUSION

The Article has made a concerted effort to encapsulate various challenges that endeavours such as Energy Charter Agreement inherently have, despite various reformatory efforts to restructure it. As such problems like sunset clauses prolonging the obligations of the

[82] Johannes Tropper, 'Withdrawing from the Energy Charter Treaty: The End is (not) Near ,' Kluwer Arbitration Blog, (November 4, 2022), < https://arbitrationblog.kluwerarbitration.comn/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/#respond >
[83]EU Directorate -General for Trade, 'Agreement in principle reached on Modernized Energy Charter', 24th June 2022, < 'https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en >
[84] Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev-Foreign Investment L J 258.
[85] Annex NI , https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf
[86] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0522%3AFIN

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withdrawing party is in conflict of *pacta sunt servanda* nature of international treaties, in the sense imposing obligations beyond the consent of the state in question. In addition to the discussed ensuing problems, a critical question of reforming the investor state arbitration has been left out of the recent reformatory proposals, and this I believe will have an adverse impact on implementation of national action plans, specific commitments and pledges made at environmental conferences, and as per the reports of the IPCC will augment the chances of investors using the arbitration mechanism to sabotage smooth transition to increasingly cleaner and greener energy resources and technologies.

Amending the Treaty has also been very problematic because of the quorum and voting requirements at a meeting, and most non-EU members have failed to agree on anything substantive to amend the provisions. The political gridlock would cost the Energy Charter Treaty Agreement the life in long term. Every solution has its own flaws, and it needs to minimize the risk of future arbitration claims that should be weighed against the aim of quick withdrawal of the treaty, as it can be both expensive and time consuming.