

# Sunset Clauses in International Law and their Consequences for EU Law <sup>1</sup>

## ABSTRACT

Sunset clauses in International Treaties account for numerous benefits. However, their entrenchment effect disproportionately burdens future policymakers.

This is the case of the Energy Charter Treaty, which poses unique challenges for two main reasons. First, compared to other treaties, the ECT contains a 20-year sunset clause. Second, the treaty is a multilateral with a rigid amendment procedure, which empowers the entrenchment effect of that treaty.

Within this context, the study explores the policy options to disengage from the ECT and the entrenchment effect of its sunset clauses.

In the field of international law, the use and utility of sunset clauses has remained largely unnoticed despite the fact that they have been employed in major international treaties and agreements.

The construction of sunset clauses varies, as there is no specific configuration. However, in specific types of treaties, the construction of sunset clauses included took a standardized form. The identification and documentation of the major classifications of sunset clauses is necessary for understanding, first, their legal effect, and second, the variety of options such clauses provide to policy makers and drafters of treaties.

The typology of sunset clauses between entire and sectional, direct and indirect, and conditional and unconditional underlines that they are a flexible legal mechanism that can fulfill a variety of public policy purposes.

There is the assumption that the temporary validity of treaties accounts for a number of benefits. Obviously, the regulation of temporary and transitional issues is one of them, but also such clauses play a key role in safeguarding the sovereignty of the states. With the utility of sunset clauses in investment agreements, more benefits emerge. Nowadays, such clauses have become a core feature in international investment agreements, playing an underappreciated role with the ability to enhance legal certainty in regards to the tension between

<sup>1</sup> Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL\\_STU\(2022\)703592\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU(2022)703592_EN.pdf)



stability and flexibility. Moreover, sunset clauses complement the protection to investors with the entrenchment effect.

However, with the entrenchment effect of sunset clauses in relation to investments, particularly if the duration is too long, disproportionately burdens future policymakers and lawmakers. This is the case of the 20-year sunset clause in the Energy Charter Treaty (ECT), which offers protection to investments already made in the energy sector. Provisionally, such a clause is triggered in case of unilateral withdrawal, unless the construction of the clause has defined differently. Such a long duration is not unique to the ECT. For instance, the recently agreed bilateral investment agreements between the EU and Singapore, and the EU and Vietnam also contain sunset clauses with long duration, 20 years the former and 15 years the latter.

The entrenchment effect of the ECT provisions due to the sunset clause, contradicts the Court of Justice of the European Union (CJEU) on whether Article 26 of the ECT is compatible with EU law clearly stated in the *Komstroy* decision, and in practice concerns the commitments of the EU and the EU Member States vis a vis the Paris Agreement.

In relation to the *Komstroy* decision, CJEU on 2 September 2021, stated that investment arbitration according to Article 26 of the ECT at the intra-EU level is not compatible with EU law, echoing its previous ruling in the *Achmea* decision.

On the other hand, the Paris Agreement is the reigning legal text on all matters concerning climate change and the environment under the UNFCCC. Such Agreement requires the members to reduce their carbon footprint and implement significant changes to their infrastructure to one that is more sustainable. On the other hand, the ECT protects the usage and sale of fossil fuels (such as coal) as it is a very lucrative industry. As it stands, if signatory states to the ECT wish to exit the treaty in order to comply with the provisions of the Paris Agreement may find themselves in the following paradoxical position.

The ECT's sunset clause requires signatory states who wish to exit to comply with its provisions for 20 years; hence, posing an immense challenge. On the top of that, what makes the ECT a distinct case is the combination of different features. Apart from the 20-year sunset clause, ECT is a multilateral treaty. By default, multilateral treaties are more difficult to amend with a very rigid amendment procedure requiring unanimity. Therefore, the entrenchment effect of the ECT and the limits imposed on the agenda of policymakers at the EU level is unparalleled.

Fortunately, the legal effect of sunset clauses could be limited if not eliminated under certain conditions. This study presents different scenarios that could lead to a positive outcome. In particular, it explores the option of (i) remaining in the ECT, complying with the spirit of the Paris Agreement, and raising procedural and substantive objections before Investment Tribunals.; (ii) mutual termination of the ECT; (iii) the amendment of the duration of the 20-year sunset clause; (iv) the revision of the ECT to make its substantive provisions more compatible with the spirit of the Paris Agreement, and (v) the unconventional approach of the modification of the sunset clause in ECT between certain of the Parties, namely between EU Member States and the EU, followed by their withdrawal. Nonetheless, the Treaty protection for investments already made will endure for the remaining Parties to the ECT according to the 20-year sunset clause.

The impossibility to foresee every future eventuality when drafting rules that remain in force for an indefinite period of time creates obstacles. It is advised to avoid very rigid legal frameworks, unless the drafters of a legal document have a very good reason to establish a very stable a legal framework; namely a very stable legal framework is established with sunset clauses with long duration in combination with other entrenchment mechanisms such as initial validity periods, restrictions in the withdrawal process, and rigid amendment processes.

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External Authors: Antonios KOUROUTAKIS, IE University, Madrid, Spain.

Research Administrator responsible: Eeva PAVY Editorial assistant: Fabienne VAN DER ELST

Contact: [poldep-citizens@europarl.europa.eu](mailto:poldep-citizens@europarl.europa.eu)

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