Leaving Without Leaving: Can the EU Switch Off the Energy Charter Treaty's Sunset Clause?

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1. Introduction

In 2026, the exodus from the Energy Charter Treaty (ECT) gained fresh momentum, as Moldova and Sweden deposited notices of withdrawal on 29 September and 6 October respectively (Energy Charter Secretariat, 2026a, 2026b).

Signed in 1994, the ECT protects foreign energy investments and allows investors to bring arbitration claims against host states. Both exits will take effect in 2027; however, leaving the treaty does not immediately free a state from its reach.

Under Article 47(3) of the ECT, the sunset clause extends the protection of existing investments for 20 years after a withdrawal takes effect, exposing

departing states to costly investor-state dispute settlement (ISDS), including over environmental regulation.

To neutralise this threat, the European Union (EU) and 26 of its Member States signed the Agreement on the Interpretation and Application of the ECT (the EU Inter Se Agreement) on 18 February 2026, and it entered into force on 25 June 2026. For the EU, which approved it on 14 October 2026, the Agreement applies from 13 November 2026 (Government of the Netherlands, n.d.).

The Agreement states that Article 26 of the ECT, its ISDS clause, "cannot and never could serve as a legal basis for intra-EU arbitration proceedings", and that the sunset clause does not, and never could, extend to them (*Agreement on the Interpretation and Application of the Energy Charter Treaty*, 2026, art. 2). Its compatibility with the ECT remains contested (Maghooa, 2025; Suciu Gavriloaie, 2025).

This paper asks whether the EU can switch off the sunset clause between Member States: Section 2 explains the clause and the EU's response, Section 3 tests that response against treaty law, arbitral practice and enforcement, and Section 4 provides a conclusion.

2. The Sunset Clause and the EU's Answer

2.1. Twenty Years After Leaving

A departing state cannot unilaterally dismiss the sunset clause, since neither the ECT nor the Vienna Convention on the Law of Treaties (VCLT) provides a means of doing so (Maghooa, 2025).

Under a bilateral investment treaty (BIT), the two parties can agree to remove the sunset clause before terminating the treaty, but for a multilateral treaty such as the ECT this approach is impractical (Maghooa, 2025). Legally, such an amendment requires unanimity at the Energy Charter Conference; politically, achieving such a consensus is difficult (Suciu Gavriloaie, 2025).

Italy, whose withdrawal took effect on 1 January 2016, shows how long the tail can be (*Rockhopper v. Italy*, 2019, para. 196). Four weeks later, on 29 January 2016, its Ministry of Economic Development rejected the production concession sought by Rockhopper Italia S.p.A. for a field in the Adriatic Sea (*Rockhopper v. Italy*, Decision on Annulment, 2025, paras. 8, 80).

Operating under the sunset clause regime, Rockhopper brought a claim before the International Centre for Settlement of Investment Disputes (ICSID), and in August 2022 the tribunal unanimously awarded it €190 million plus interest.

On 2 June 2025, however, an ICSID ad hoc committee annulled the entire award because the tribunal had not been properly constituted, under Article 52(1)(a) of the ICSID Convention (Rockhopper v. Italy, Decision on

Annulment, 2025, paras. 1, 8, 128, 134, 415, 435). Under the sunset clause, existing investments in Italy remain protected until 1 January 2036.

Italy's case demonstrates why the clause matters: a state can be sued over a measure it adopted after leaving the ECT, and the resulting dispute can last almost a decade.

2.2. From *Komstroy* to the Inter Se Agreement

In *Achmea*, the Court of Justice of the European Union (CJEU) held in 2018 that the arbitration clause in a BIT between two Member States was incompatible with EU law.

As the judgment concerned a bilateral treaty, it was unclear whether it also applied to the multilateral ECT, so Member States issued declarations on its legal consequences. On 15 January 2019, 22 Member States declared that it also covered intra-EU claims under Article 26 of the ECT. Five Member States, including Sweden, and Hungary issued separate declarations that did not extend it to the ECT (Suciu Gavriloaie, 2025).

In *Komstroy*, the CJEU ruled that Article 26(2)(c) of the ECT does not apply to disputes between a Member State and an investor from another Member State, reasoning that Article 26, despite the ECT's multilateral nature, governs bilateral relations "in an analogous way" to the BIT in *Achmea* (*Republic of Moldova v. Komstroy LLC*, 2021, paras. 64, 66).

The Commission's position is that the ECT "does not apply, and has never applied" between EU Member States (European Commission, 2023, as cited in Maghooa, 2025). This view is based on the primacy of EU law and the Komstroy ruling, in which the CJEU held that the autonomy of EU law precludes the ECT's arbitration obligations from applying between Member States (Republic of Moldova v. Komstroy LLC, 2021, para. 65; Suciu Gavriloaie, 2025).

On 26 June 2024, the EU and 26 Member States, except Hungary, signed a political declaration reiterating that Article 26 of the ECT could never serve as a legal basis for intra-EU arbitrations and that the sunset clause could not apply to such proceedings. The same day, they initialled an inter se agreement of identical content (Suciu Gavriloaie, 2025).

3. Does the Agreement Switch Off the Clause?

3.1. Interpretation vs. Modification

Although the EU Inter Se Agreement presents itself as an interpretation of the ECT, its legal basis remains ambiguous. The Commission's 2022 draft relied on Article 31(3)(a) of the VCLT, on subsequent agreements regarding interpretation, and Article 41, on inter se modification, whereas the text initialled in 2024 refers only generally to the customary rules codified in the VCLT (Suciu Gavriloaie, 2025).

As a subsequent agreement under Article 31(3)(a), the Agreement would have retroactive effect and could remove the basis of jurisdiction in pending intra-EU cases, but such an agreement is usually considered a common act of all the parties to the treaty.
As an inter se modification under Article 41, by contrast, it would bind only its signatories and only prospectively, so it could prevent new claims but not stop pending ones (Suciu Gavriloaie, 2025).

Most tribunals refused to treat the January 2019 declarations as a subsequent agreement because not all ECT parties had signed them. Hungary has taken a separate line: its declaration of 26 June 2024 addressed only future intra-EU disputes, to be excluded only once the ECT has been amended (Suciu Gavriloaie, 2025).

This lack of consensus among the Member States makes it unlikely that a tribunal would accept the Agreement as an authoritative interpretation (Suciu Gavriloaie, 2025).

3.2. The Point of View of Arbitral Tribunals

Most arbitral tribunals have rejected the intra-EU objection, finding no basis for it in the text of the ECT. In *Antin v. Spain*, the tribunal held that the ECT contains no limitation providing for a wide exclusion of intra-EU disputes and that such an exclusion would have to be "express and clear" (*Antin v. Spain*, 2018, para. 215).

Relying on Article 26, under which each Contracting Party "gives its unconditional consent" to arbitration, it found nothing in EU law "that overrides the rights granted in Article 26" (*Antin v. Spain*, 2018, paras. 205, 226).

In *Rockhopper*, the tribunal held that the 15 January 2019 Declaration, even if read as a collective interpretation, would bring about "an effect akin to an amendment of Article 25 of the ECT" or at least a reservation, which the ECT does not allow. Nor could the Declaration nullify Italy's offer to arbitrate, "whether at the time, or retrospectively" (*Rockhopper v. Italy*, 2019, paras. 195, 197).

Until 2024, the only ECT tribunal to uphold the intra-EU objection was *Green Power v. Spain*, a Stockholm Chamber of Commerce arbitration seated in Sweden, where the arbitration agreement was governed by Swedish and therefore EU law (Vinson & Elkins, 2024).

In 2024, two ICSID tribunals reportedly reached the same result for the first time, both by majority, in *Sapec* and *European Solar Farms*, two cases against Spain (Vinson & Elkins, 2024).

3.3. Enforcement

The EU's leverage lies in enforcement, as the *Antin* award shows. In 2018, an ICSID tribunal ordered Spain to pay €112 million to the Antin companies

over changes to its renewable energy support scheme (*Antin v. Spain*, 2018, para. 748).

Since then, the Commission has found that paying the award would be unlawful State aid and ordered Spain to take all appropriate measures to prevent Antin from seeking its recognition, enforcement and execution. In January 2026, it opened a similar State aid investigation into an ECT award against Bulgaria (Knoebel, 2026).

Outside the EU, courts tend to treat Spain's acceptance of the ICSID Convention as a waiver of immunity from recognition. The High Court of Australia upheld the recognition of the award in 2023, the UK Supreme Court rejected Spain's claim to immunity against its registration in March 2026, and the Singapore Court of Appeal did the same for another ECT award in October 2026 (*Kingdom of Spain v Infrastructure Services Luxembourg*, 2023; 2026; *Kingdom of Spain v NextEra Energy Global Holdings BV*, 2026).

However, the Australian and UK courts made clear that their rulings left Spain's immunity from execution untouched, as Article 55 of the ICSID Convention preserves it (*Kingdom of Spain v Infrastructure Services Luxembourg*, 2023, para. 9; 2026, paras. 21, 86–87). The award is thus final and recognised abroad, yet under EU law it cannot be implemented.

4. Conclusion

The EU Inter Se Agreement faces two limits. First, it is unlikely to be considered an interpretation without the participation of all ECT parties, and as a modification it applies only prospectively and between ratifying states. As of October 2026, only seven of its 27 signatories, the EU among them, had ratified it (Government of the Netherlands, n.d.).

Second, most tribunals outside the EU legal order still reject the intra-EU objection, and courts in Australia, the United Kingdom and Singapore have denied Spain immunity from recognition.

Therefore, the answer to this paper's question is in the negative: the EU cannot switch off the sunset clause, but can only fragment its effects. Within the EU, EU law can prevent the payment of intra-EU awards, but outside the EU, Article 47(3) remains in effect. Sweden's withdrawal will test this division from October 2027, whereas Moldova, outside the Union, will face the clause in full until 2047.

Over the next two decades, Member States will therefore be leaving the ECT without leaving it, and a negotiated settlement of existing claims, as recommended for Spain (Huang, 2025), may prove more useful than any further legal instrument.

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