Common Market Law Review **60**: 1–14, 2023.

EDITORIAL COMMENTS

The dog that did not bark: The EU and the Energy Charter Treaty

Events that do not take place sometimes have considerable significance. On 22 November 2022 the Energy Charter Treaty (ECT) Conference was due to approve the "agreement in principle" to reform the ECT adopted in June.[1] This did not happen, after the European Commission asked the ECT Conference to postpone the item. The discussion is now scheduled for April 2023,[2] but the future of the ECT reform process – and perhaps the future of the ECT itself[3] – is uncertain, to say the least. The events leading up to the non-event in November, and its implications for the future, pose questions about the institutional and legal framework within which EU external policy-making takes place, and the Union's ability to follow through its policy positions.

The immediate cause of the Commission's pull-back was the refusal of several Member States (Germany, France, Spain and the Netherlands) a few days before the scheduled ECT Conference meeting to support the reform proposal.[4] This took place, however, in a context in which these Member States, alongside several others,[5] have either decided to withdraw from the ECT or have signalled that they are contemplating doing so. The Energy Charter Treaty has 53 parties, was signed in 1994 and came into force in 1998; it was concluded by the EU and its Member States as a mixed agreement.[6] The ECT was intended to provide a secure legal environment for investment and economic development against the background of the transformation of the States of Central and Eastern Europe after the fall of the Berlin Wall and the

1. Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, CCDEC 2022 10 GEN, 24 June 2022, <www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>.

2. See further <www.energychartertreaty.org/modernisation-of-the-treaty/>.

3. The ECT's secretary-general Urban Rusnák has been quoted as saying that: "If the modernization process fails, I don't see a future for the Treaty." Backman, "A new Energy Charter Treaty as a complement to the Paris Agreement" Borderlex 18 June 2020, <borderlex.net/2020/06/18/interview-a-new-energy-charter-treaty-as-a-complement-to-the-paris-agreement-on-climate-change/>.

4. Liboreiro, "EU attempt to reform controversial Energy Charter Treaty falls apart after four countries abstain", Euronews 21 Nov. 2022, <www.euronews.com/my-europe/2022/11/21/eu-attempt-to-reform-controversial-energy-charter-treaty-falls-apart-after-four-countries->.

5. Austria, Belgium, Luxembourg, Poland and Slovenia; Italy withdrew in 2016.

6. Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 Sept. 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, O.J. 1998, L 69/1.

collapse of the Soviet Union.[7] The political, economic, and energy policy landscape has of course changed dramatically since the 1990s, and the need for revision of the ECT has become widely accepted, based *inter alia* on the difficulty of aligning ECT commitments to investors with ECT parties' Paris Agreement commitments on carbon reduction, and on the number of ECT disputes involving fossil fuel investments.[8] A decision to open negotiations on ECT modernization was taken in 2017 and topics for revision agreed in 2018 include the right to regulate, the definition of fair and equitable treatment and indirect expropriation, sustainable development, and corporate social responsibility.[9]

The modernization negotiation

Within the EU, Member States have been divided (and some individual Member States have changed position) on whether the ECT should be abandoned or reformed, but in 2019 the Council authorized the Commission to participate in the negotiations on the modernization of the ECT.[10] The negotiating directives set out the EU's objectives, including that the "modernized ECT should reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement", that it should contain strengthened provisions on the right to regulate, and that changes to the dispute settlement procedures should reflect current EU positions on multilateral reform of investor-state dispute settlement (ISDS).

The EU thus saw ECT modernization as an opportunity to press forward its own multilateral agenda on international investment, especially in relation to climate change, corporate social responsibility, reform of investment

7. Walde (Ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Springer, 1996).

8. Report on investor-state disputes in the fossil fuel industry, International Institute for Sustainable Development, December 2021. According to the report the ECT, with 17% of all fossil fuel cases, is the most used international investment agreement. It should be noted, on the other hand, that 34 out of 64 ECT disputes analysed in a recent report involved renewables: "The Energy Charter Treaty, climate change and clean energy transition: A study of the jurisprudence", Climate Change Counsel report, 2022.

9. <www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201818_-_STR_Modernisation_of_the_Energy_Charter_Treaty.pdf>.

10. Council Decision authorizing the opening of negotiations on the modernization of the Energy Charter Treaty, to the extent this falls within the competence of the Union, 15 July 2019, Council doc. 10745/1/19 REV 1; Annex including negotiating Directives, Council doc. 10745/19 ADD 1. A second decision of the representatives of the Member State parties was also adopted, reflecting the mixed nature of the ECT: see note 29 *infra*.

arbitration, and its external energy strategy.[11] Indeed, one can see ECT modernization as part of the "external dimension" of the Green Deal.[12] The Commission's Green Deal communication of 2019 included rather general references to the EU's leadership ambitions in relation to climate change: the need to factor in the impact of climate change on geopolitics, to develop green diplomacy at multilateral and bilateral levels, and to integrate climate change into all EU external policies, including trade.[13] Many of the "Fit for 55" package of proposals concern external policy fields, including the revision of the emissions trading scheme (ETS) and the carbon border adjustment mechanism (CBAM),[14] and of course energy security is now more than ever linked to the transition away from fossil fuels.[15] Questions of the compatibility of EU trade and investment measures with both international climate commitments and international trade law affect its climate change and regulatory leadership objectives as well as its own policy choices.[16] While current EU policy documents recognize the importance of climate change goals and attempts are made to incorporate these into new external instruments,[17] many of its existing multilateral and bilateral commitments, including the ECT, still reflect earlier priorities.[18] The Council's conclusions on climate and energy diplomacy of January 2021 emphasized the importance of ECT modernization as a necessary element of global energy transition in

11. Council conclusions on Climate and Energy Diplomacy – Delivering on the external dimension of the European Green Deal, 25 Jan. 2021, Council doc. 5263/21. Joint Communication "EU external energy engagement in a changing world" 18 May 2022, JOIN (2022) 23.

12. Commission Communication on the European Green Deal, 11 Dec. 2019, COM(2019) 640 final.

13. Ibid., pp. 20–21.

14. Commission Communication "'Fit for 55': Delivering the EU's 2030 Climate Target on the way to climate neutrality" COM(2021)550 final. At the time of writing several elements of this proposal, including the revised ETS, had reached co-legislative agreement in a combined trilogue.

15. Raimondi, Bianchi, Sartori and Lelli, "The external dimension of the Green Deal, between cooperation and competition", International Arbitration Institute, 2022.

16. On CBAM, see Marin Duran, "Securing compatibility of carbon border adjustments with the multilateral climate and trade regimes", 71 ICLQ (2023) (forthcoming).

17. See e.g. European Commission, "Trade Policy Review – An open, sustainable and assertive trade policy", COM(2021)66, p.12: "As reflected in the European Green Deal, combatting climate change and environmental degradation is the EU's top priority.... The Commission's resolve for the next decade is to ensure that trade tools accompany and support a global transition towards a climate neutral economy, including accelerating investments in clean energy, and promote value chains that are circular, responsible and sustainable."

18. Quirico, *Investment Governance between the Energy Charter Treaty and the European Union: Resolving Regulatory Conflicts* (Brill, 2021). Sattorova, "The foreign investor as a good citizen: Investor obligations to do good", in Ho and Sattorova (Eds.), *Investors' International Law* (Hart Publishing, 2021).

alignment with the Paris Agreement,[19] and the new external energy strategy presented by the Commission and High Representative in May 2022 referred to the ECT's "urgent need of deep modernization in order to align [it] with the 2050 goals."[20]

Against this background, the failure to conclude the ECT reform process, at least for now, presents a setback for EU green diplomacy. Ultimately, this outcome requires an assessment of the EU's political goals and the degree to which they were met by the negotiated result of June 2022, but it also raises issues in relation to the Member States who, by deciding not to support the draft reform deal, have put a major roadblock in its path.[21] It is tempting to argue that the Member States were under a duty of sincere cooperation, based on Article 4(3) TEU, to support the result achieved by the Commission and present a united front in the ECT Conference. As famously expressed by the ECJ:

> "[T]he adoption of a decision authorizing the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation."[22]

And, in this instance, the negotiating directives agreed in Council state that, without prejudice to the division of competence between the Union and the Member States,

> "In accordance with the principles of sincere cooperation and of unity of external representation as laid down in the Treaties, the Union and the Member States of the Union participating in the negotiations shall fully coordinate positions and act accordingly throughout the negotiations.... Member States which are Members of the ECT shall exercise their voting

19. Council conclusions on Climate and Energy Diplomacy – Delivering on the external dimension of the European Green Deal, 25 Jan. 2021, Council doc. 5263/21, paras. 14–15.

20. Joint Communication "EU external energy engagement in a changing world" 18 May 2022, JOIN (2022) 23, para 5.2.

21. The Energy Charter Conference has to act unanimously when adopting revisions to the ECT.

22. Case C-246/07, *Commission* v. *Sweden*, EU:C:2010:203, para 75, citing Case C-266/03, *Commission* v. *Luxembourg*, EU:C:2005:341, para 60 and Case C-433/03, *Commission* v. *Germany*, EU:C:2005:462, para 66.

> rights and express themselves in accordance with these directives and previously agreed EU positions."[23]

The key phrase here is the final one. The discussion on 18 November 2022 was designed to formulate an "agreed EU position" on the basis of a Commission proposal,[24] but failed to do so because four Member States abstained from supporting the reform draft.[25] Within the EU Treaties' framework for treaty-making, while the EU negotiator (here, the Commission[26]) works within the terms of the negotiating directives, it is the Council that takes the decisions to sign, and then (normally acting with the consent of the European Parliament) conclude the agreement.[27] Where a decision is to be taken within the institutional framework of a international agreement, the Union may adopt a position by taking a decision on the basis of Article 218(9) TFEU, and it was such a decision, approving the ECT reform package, that the Commission proposed to the Council.[28] In this case, too, we are in the familiar but complex territory of a mixed multilateral agreement. A decision to open negotiations on the basis of the same negotiating directives was taken at the same time by the representatives of the Member State parties to the ECT, who authorized the Commission to negotiate on their behalf.[29]

In a meeting of Member State representatives within Coreper, four Member States abstained from approving the results of the ECT reform process as proposed by the Commission; there was, therefore, no alignment between the Member State parties and the EU and no "agreed EU position." The agreement on reform would cover matters within shared (such as investor-state dispute settlement[30]) as well as exclusive EU competence, and therefore it cannot be argued that the Member States were compelled to act only through the EU.[31] The duty of sincere cooperation in the context of a mixed agreement certainly requires the EU institutions and the Member States to attempt to arrive at an

23. Council doc. 10745/19 ADD 1, cited *supra* note 10, p. 2.

24. Proposal for a Council Decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, 5 October 2022, COM(2022) 521.

25. Germany, France, Spain and the Netherlands: see note 4 *supra*.

26. Council doc. 10745/1/19 REV 1, cited *supra* note 10.

27. Art. 218 TFEU.

28. See note 24 *supra*.

29. Decision of the Representatives of the Governments of the Member States that are Parties to the Energy Charter Treaty, meeting within the Council, authorizing the European Commission to negotiate, on behalf of the Member States, the modernization of the Energy Charter Treaty, to the extent this falls within the competences of the Member States, 15 July 2019, Council doc. 10747/1/19 REV 1, Art. 1.

30. Opinion 2/15, *FTA Singapore*, EU:C:2017:376.

31. See e.g. Case C-45/07 *Commission* v. *Greece*, EU:C:2009:81.

agreed position, and to abide by a "common strategy" once agreed.[32] This was not, however, a case of Member States dissociating themselves from such a position,[33] and it is difficult to see how even the duty of sincere cooperation can compel acceptance of the results of a negotiation or the adoption of a Commission proposal.

This disagreement over the ECT reform negotiation exemplifies the difficulty of aligning EU and Member State participation in multilateral mixed agreements, a difficulty also recently in evidence in the discussions over the conclusion by the EU of the Istanbul Convention on Violence Against Women. In Opinion 1/19, considering the Istanbul Convention, the Court of Justice accepted the possibility of partial mixity, taking the view that the conclusion of an agreement without the participation of all Member States was ultimately a decision for the Council, exercising its political discretion within the framework of the procedural rules in Article 218 TFEU.[34] The unwillingness of the Court to constrain that political discretion over partial mixity risks leading to legal uncertainty over responsibility for implementation of the agreement.[35] The ECT context is different, but equally demonstrates that in practice it may be difficult for the EU to act – and to project its policy agenda – in the absence of full support from Member State parties. And the threat of, or actual, withdrawal of a number of Member States not only raises tricky issues of partial mixity but also, since its voting strength in the ECT depends on the number of Member State parties, weakens the EU's own participation.

The ECT and the right to regulate

For the EU, the modernization of the ECT was not simply a case of green diplomacy, of promoting its own policy preferences in a multilateral investment context; and a failure is not simply a diplomatic set-back. The ECT as it stands presents compatibility issues with EU law, both substantively and procedurally. In evaluating whether the proposed trade agreement with Canada (CETA), in particular its provisions relating to the freedom to conduct business, indirect expropriation and fair and equitable treatment, comply with the principle of autonomy, the Court of Justice in Opinion 1/17 emphasized the need to safeguard the "capacity of the Union to operate autonomously

32. Case C-246/07 *Commission* v. *Sweden*, paras. 73 et seq. Hillion, "Mixity and coherence in EU external relations: The significance of the duty of cooperation", in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited – The EU and its Member States in the World* (Hart Publishing, 2010).

33. Cf. Case C-246/07 *Commission* v. *Sweden.*

34. Opinion 1/19, EU:C:2021:832; Kübek, "Facing and embracing the consequences of mixity: Opinion 1/19, *Istanbul Convention*", 59 CML Rev. (2022), 1465.

35. Kübek, op. cit. previous footnote, 1498.

within its unique constitutional framework." This includes the ability of the Union's institutions to decide, according to the EU's decision-making processes, on an appropriate level of protection of the public interest.[36]

Whether or not one is convinced by the ECJ's acceptance that CETA did not encroach on this aspect of EU constitutional autonomy, which relied heavily on confidence that the CETA tribunal, if called upon to adjudicate, would share the interpretational perspective of the Court of Justice,[37] there is no doubt that compared with CETA the ECT currently contains less explicit protection of the "right to regulate". The ECT modernization process was designed to strengthen these provisions, defining more clearly the concept of fair and equitable treatment in Article 10 ECT, and inserting a new provision affirming the right to regulate in the interest of legitimate public policy objectives "such as the protection of the environment, including climate change mitigation and adaptation, protection of public health, safety or public morals."[38] Commentators on the revised text have argued that it does not go far enough to meet climate change objectives,[39] especially in its "flexibility mechanism" as regards the protection of fossil fuel investments: the withdrawal of protection for fossil fuel investments is optional and even if opted for, will in most cases only take effect for pre-existing investments 10 years after the revised treaty enters into force. In cases involving pre-existing fossil fuel investments much will thus depend on how arbitrators interpret the right to regulate, fair and equitable treatment, and indirect expropriation provisions. More generally, instead of a driving objective of the ECT itself, climate change appears at best as a justification for State regulatory action; critics point to the absence of provisions designed to achieve the phasing-out of fossil fuel subsidies, and to turn the ECT into a vehicle for promoting investment in renewables.[40]

36. Opinion 1/17, *CETA*, EU:C:2019:341, paras 150–151.

37. Opinion 1/17, *CETA*, paras 152–153.

38. Energy Charter Conference, Public Communication cited *supra* note 1. In addition, the revised Art. 10(4) ECT, on indirect expropriation, provides: "Except in rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it is manifestly excessive, non-discriminatory measures by a Contracting Party that are designed and applied to protect legitimate policy objectives, such as public health, safety and the environment (including with respect to climate change mitigation and adaptation), do not constitute indirect expropriations."

39. See, e.g. Brauch, "The agreement in principle on ECT 'modernization': A botched reform attempt that undermines climate action", *Kluwer Arbitration Blog*, 17 Oct. 0222, <arbitrationblog.kluwerarbitration.com/2022/10/17/the-agreement-in-principle-on-ect-modernization-a-botched-reform-attempt-that-undermines-climate-action/>; "Newly released text for modernized Energy Charter Treaty shows too many potential obstacles for climate action" International Institute for Sustainable Development, 13 Sept. 2022, <www.iisd.org/articles/statement/newly-released-text-modernized-energy-charter-treaty>.

40. Brauch, op. cit. *supra* note 39.

Dispute settlement and the disconnection clause

The provision for ISDS has also been an important focus of critique of the ECT from an environmental / climate change perspective, despite the number of ECT disputes involving investment in renewables.[41] From the perspective of ECT compatibility with EU law, the principle of autonomy has most notoriously arisen in the context of dispute settlement, and in particular the problem of intra-EU ISDS: proceedings before an arbitral tribunal between an EU investor and an EU Member State. While the ECJ has been prepared to accept a form of ISDS in bilateral agreements with third countries,[42] it takes a negative view of intra-EU ISDS as undermining its exclusive jurisdiction over EU law (Art. 344 TFEU), the mutual trust underpinning Member State relations, and the EU's "judicial system intended to ensure consistency and uniformity in the interpretation of EU law," of which the preliminary ruling procedure is a key element.[43] Investment tribunals, on the other hand, have not simply accepted the Court's position on intra-EU ISDS.[44] The *Achmea* ruling, on the incompatibility of ISDS in intra-EU bilateral investment treaties, put into question the compatibility of intra-EU ISDS in the framework of the multilateral ECT.[45] In its judgment in *Komstroy* the ECJ gave a clear (though *obiter*[46]) verdict: "Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first

41. For an analysis of litigation under the ECT, see Climate Change Counsel report, cited *supra* note 8. Schmidl, "The renewable energy saga from *Charanne* v. *Spain* to *The PV Investors* v. *Spain*: Trying to see the wood for the trees", *Kluwer Arbitration Blog*, 1 Feb. 2021, <arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/>.

42. Opinion 1/17, *CETA*.

43. C-284/16 *Achmea*, EU:C:2018:158, para 35.

44. See e.g. *Vattenfall* v. *Germany*, ICSID Case No. ARB/12/12, Decision of 31 Aug. 2018.

45. Case C-284/16 *Achmea*. Following this judgment, on 15 Jan. 2019 the Member States issued a Declaration on its implications, committing themselves to terminating their bilateral agreements; this expressed the view that the *Achmea* reasoning would also apply to the ECT, <finance.ec.europa.eu/system/files/2019-01/190117-bilateral-investment-treaties_en.pdf>. In 2020 a majority of Member States entered into an agreement terminating their bilateral investment treaties: Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, O.J. 2020, L 169/1; this agreement does not cover the ECT.

46. As Dashwood points out, intra-EU ISDS was not at issue in *Komstroy*, was not raised in the questions asked by the French court, and the Court's statement on this point does not therefore form part of the formal ruling (the *dispositif*) on those questions: Dashwood, "*Komstroy* and Opinion 1/20 – curious and curiouser", 59 CML Rev. Rev. (2022), Special Issue, 51, at 52 and 57.

Member State."[47] The Court reached this conclusion from an entirely EU law perspective, its brief reasoning being based on previous case law, especially *Achmea* – the "preservation of the autonomy and of the particular nature of EU law."[48] In effect the Court held that a procedural, or dispute-related "disconnection clause" – a treaty provision to the effect that relations between EU Member States are to be governed by EU law rather than the treaty in question[49] – should be implied into the ECT, removing the possibility of ISDS in intra-EU ECT cases.[50] This would in practice have a considerable impact on ISDS within the ECT: as of August 2021, 98 out of 154 claims filed were intra-EU disputes, although ironically the *Komstroy* case was not one of them.[51] As far as the Court was concerned the conclusion it came to in *Komstroy* was clear, but arbitral tribunals have not all seen it the same way. The seat of the tribunal may affect the outcome, as tribunals in EU Member States may prove more open to *Komstroy*-based arguments;[52] in addition, enforcement of intra-EU arbitral awards may now depend on whether enforcement is sought in an EU Member State court – which would be bound to follow the *Komstroy* ruling. The result has been greater uncertainty for both investor claimants and Member States.

The 2019 negotiating directives on modernization, adopted after *Achmea* but before *Komstroy*, stated expressly that the EU did not support the amendment of the ECT's REIO provision.[53] This negative position was in part the result of different views among Member States on the impact of *Achmea,*

47. Case C-741/19 *Moldova* v. *Komstroy*, EU:C:2021:655, para 66. See further Böhme, "The future of the Energy Charter Treaty after *Moldova v. Komstroy",* 59 CML Rev. (2022), 853; Dashwood, op. cit. *supra* note 46.

48. Case C-741/19 *Moldova v. Komstroy*, para 65.

49. See e.g. Council of Europe Convention on the Laundering of the Proceeds from Crime and Financing of Terrorism, CETS 198, Art. 52(4) "Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties."

50. Cf. the ECJ's insistence that such a clause be expressly included in any treaty providing for accession of the EU to the ECHR: Opinion 2/13, *ECHR*, EU:C:2014:2454, paras. 201–214, especially para 213.

51. Climate Change Counsel report, cited *supra* note 8, p. 16. The seat of the arbitration in Paris was the only factor connecting the *Komstroy* case to the EU: Case C-741/19, *Moldova v. Komstroy*, para 34.

52. See e.g. *Infracapital F1 S.à r.l. and Infracapital Solar B.V.* v. *Kingdom of Spain*, ICSID Case No. ARB/16/18; *Green Power K/S and SCE Solar Don Benito APS* v. K*ingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022. In *Green Power* an arbitral tribunal for the first time accepted the *Achmea / Komstroy* argument to decline jurisdiction in an intra-EU context.

53. Council doc. 10745/19 ADD 1, cited *supra* note 10: "The EU does not support the amendment of the REIO provision in the ECT modernization process." Were any change to be

and also reflected a Commission position that the interpretation of Article 26 ECT, ruling out intra-EU ISDS, was already clear and therefore already applicable to the (unmodernized) ECT.[54] A Belgian attempt to clarify the position, via a request to the ECJ for an Opinion on the compatibility of the "draft modernized" ECT with the EU Treaties, was unsuccessful.[55] At the time of the request no draft had been published, and Belgium's questions related to the incompatibility of Article 26 ECT insofar as it could be interpreted as allowing intra-EU dispute settlement in the absence of a disconnection clause. The Court, ruling on 16 June 2022, held that an assessment of the compatibility of the modernized ECT with the Treaties was "premature" since a text was not yet available, and although the EU had not pressed for an amendment of Article 26 it was possible that an amendment to that provision might in fact be agreed in the ongoing negotiations. The Court was certainly not prepared to say that Article 26 ECT required amendment, but it did reiterate its position in *Komstroy.*[56] And indeed, a few days after this judgment, the Energy Charter Conference published its outline of the agreement in principle, which did in fact include a dispute settlement disconnection clause.[57] Article 24(3) of the revised text states: "For greater certainty, Articles 7, 26, 27, 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organization in their mutual relations." This phrasing, it should be noted, suggests a clarification of interpretation rather than an alteration of obligations and thereby, were it to be adopted, an acceptance by the ECT Contracting Parties of the view of Article 26 taken by the ECJ in *Komstroy*.

The Commission is now proposing to take a belt-and-braces approach to intra-EU dispute settlement. Alongside supporting the modernization proposal, including the disconnection clause just quoted, it is also seeking a "subsequent agreement", within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties, between the EU and the Member States, which should include "a confirmation that the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for intra-EU

made to the REIO clause, the EU said that it was primarily concerned to protect intra-EU preferences from ECT MFN obligations: see Art. 24(2) of the revised ECT text.

54. The EC's original Statement on the conclusion of the ECT addresses the issue only by implication: Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, O.J. 1998, L 69/115.

55. Opinion 1/20, *Modernized Energy Charter Treaty*, EU:C:2022:485. Ankersmit, "Opinion 1/20 and the modernization effort of the Energy Charter Treaty", *European Law Blog*, 6 July 2022.

56. Opinion 1/20, *Modernized Energy Charter Treaty*, para 47.

57. For the Public Communication published on 24 June 2022, see note 1 *supra*.

arbitration proceedings, and that the sunset clause does not apply intra-EU."[58] This, it hopes, would provide greater legal certainty; in other words, it would help to convince arbitration tribunals to decline jurisdiction in intra-EU cases. If the modernized ECT fails to be adopted, this agreement might indeed help to achieve greater certainty and would mitigate the effects of the sunset clause in the case of Member State withdrawals.

Withdrawal from the ECT?

Whatever the shortcomings of the modernization effort, as the tensions between ECT obligations and international climate commitments grow, the EU and its Member States will come under increased pressure to withdraw from an un-modernized ECT. As a recent comment put it, "the ECT's investor protections are broadly drafted and leave it up to tribunals to set the boundaries for state regulatory conduct. States may find that to provide certainty, treaty revision or withdrawal is necessary."[59] A significant number of Member States have already signalled their intention to withdraw.[60] The recent Joint Communication on energy policy put down a marker: "If sufficient reform of the Energy Charter Treaty cannot be achieved, the EU will consider withdrawing its membership."[61] Clearly, withdrawal will not resolve all compatibility issues, at least immediately, given the very long (20 year) sunset clause that will continue to bind the withdrawing party.[62] But let us consider briefly some of the legal issues specific to the position of the EU and its Member States.

Notwithstanding the ECJ's acceptance of the idea of partial mixity in the case of a multilateral agreement, continued EU participation in the ECT alongside a series of Member State withdrawals raises several questions. Member States are entitled to withdraw from a multilateral mixed agreement, as a matter of EU law. But although this withdrawal would impact the non-exclusive parts of the agreement (such as ISDS), provisions within exclusive EU competence (including FDI) would be governed by EU participation, and thus continue to bind those Member States as a matter of EU law. From the point of view of third country ECT parties this position is less than satisfactory: their investors would be unable to use ISDS against

58. Proposal for a Council Decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, 5 Oct. 2022, COM(2022)521, p. 3.

59. Climate Change Counsel report, cited *supra* note 8, p. 74.

60. See note 5 *supra*.

61. Joint Communication "EU external energy engagement in a changing world" 18 May 2022, JOIN (2022) 23, para 5.2.

62. Art. 47(3) ECT.

non-party Member States and they would need to look to the EU to engage in a form of indirect enforcement.[63] And from the point of view of EU law it is also tricky; Member States would be bound by the ECT in different ways: all are bound as a matter of EU law by virtue of EU participation; [64] some (ECT parties) are also bound under international law as parties in their own right. EU participation will mean that the ECT will continue to be relevant to all Member States – for example, potentially questioning EU secondary legislation impacting FDI – but the ECT's ISDS would only be applicable against Member States that remain parties. We may find, therefore, a scenario where Member States are in different positions as regards their implementation of EU secondary legislation: for some, but not others, implementation may leave them open to ISDS claims under the ECT. In addition, Member State withdrawal will impact the EU's position under the ECT, since the EU possesses the number of votes equivalent to its Member State parties.[65]

A different set of issues would arise were the EU to withdraw from the ECT leaving (some at least) Member States as parties. Given the exclusive competence of the EU over parts of the ECT (those parts covered by the Common Commercial Policy, including FDI) it is hard to envisage the Member States remaining parties in the absence of an EU decision authorizing them to do so.[66] But such authorization would hardly be compatible with an EU decision to withdraw, and would also lead to exactly the risk of non-uniformity between Member States in matters of external commercial policy which exclusivity is designed to avoid.[67]

These factors, taken together, lead to the conclusion that the duty of sincere cooperation, binding on both EU institutions and Member States, requires as a minimum a coordinated process of withdrawal, rather than simple unilateral decisions.[68] It might even be argued that this duty, together with the principle of unity of international representation, militates against partial mixity in such a case, where an agreement combines exclusive EU competence and enforcement provisions, such as those on ISDS, and partial mixity creates a risk of differential implementation between Member States. Either we move to

63. The Commission has been known to bring enforcement actions against Member States for breach of international agreements entered into by the EU; for a recent example concerning the GATS, see Case C-66/18, *Commission* v. *Hungary*, EU:C:2020:792.

64. Art. 216(2) TFEU.

65. Art. 36(7) ECT.

66. Art. 2(1) TFEU.

67. Cf. Case C-24/20, *Commission* v. *Council*, EU:C:2022:911, paras. 109–110.

68. Cf., in a different context, Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Czech Republic and Hungary*, EU:C:2020:257.

EU-only participation in the ECT; or (but this pass has already been sold) the EU and *all* Member States should be parties; or the EU and all Member States withdraw. The Commission may decide to try to rescue the package which it had evidently decided was a worthwhile result, even if not achieving all that it might; however, this looks unlikely to succeed, and in such an event a managed withdrawal would be preferable to an unreformed ECT and partial mixity.