

# The European Union, the Energy Charter Treaty, and the tightrope between law and conscience

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## Annotation

This paper examines the European Union's decision to withdraw from the Energy Charter Treaty and its refusal to endorse the modernised version, focusing on its legal implications under both EU and international law. The analysis explores whether the EU's actions align with its obligations under Article 21 of the Treaty on European Union and the Vienna Convention on the Law of Treaties, particularly regarding the principles of good faith and *pacta sunt servanda*. It considers the tension between the EU's commitment to international investment protection and its ambitious climate goals. The paper also investigates how these legal challenges affect the EU's role in global energy governance and treaty negotiations, offering insights into the broader implications of balancing political, environmental, and legal priorities in future multilateral agreements.

## Keywords

EU, ECT, withdrawal, investment, Article 21, treaty, ISDS

## Introduction

The European Union (EU) and the Energy Charter Treaty (ECT) share a history that reflects the evolving dynamics of international investment law and regional governance. Established in 1994, the ECT aimed to facilitate cooperation in the energy sector, fostering cross-border investments and ensuring legal protection for investors.<sup>1</sup> Over the years, however, tensions have emerged between the EU's evolving legal and policy priorities - particularly its ambitious climate goals - and the provisions of the ECT, which some perceive as favouring fossil fuel investments and investor-centric dispute resolution mechanisms.<sup>2</sup>

One of the most disputed developments in this relationship is the EU's recent decision to withdraw from the ECT without endorsing the modernised treaty text negotiated over several years.<sup>3</sup> This decision has sparked significant debate regarding its alignment with international legal principles, particularly those codified in the Vienna Convention on the Law of Treaties (VCLT), and with the EU's own obligations under Article 21 of the Treaty on European Union

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<sup>1</sup> Rumford, C. (2000). *European Cohesion*. Palgrave Macmillan. 116-117. Available at: <https://www.perlego.com/book/3499411> (Accessed: 03. 03. 2025).

<sup>2</sup> Alvarez, G. M. (2018). *Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension*. ICSID Review - Foreign Investment Law Journal, 33(2), 562-569. Available at: [https://aura.abdn.ac.uk/bitstream/handle/2164/14571/Redefining\\_the\\_Relationship\\_Between\\_the\\_Energy\\_Charter\\_Treaty\\_and\\_the\\_Treaty\\_of\\_Functioning\\_of\\_the\\_European\\_Union\\_From\\_a\\_Normative\\_Conflict.pdf;jsessionid=A1C17F063AF515DD6379F7EC764D8162?sequence=1](https://aura.abdn.ac.uk/bitstream/handle/2164/14571/Redefining_the_Relationship_Between_the_Energy_Charter_Treaty_and_the_Treaty_of_Functioning_of_the_European_Union_From_a_Normative_Conflict.pdf;jsessionid=A1C17F063AF515DD6379F7EC764D8162?sequence=1) (Accessed: 03. 03. 2025).

<sup>3</sup> Energy Charter Treaty: EU notifies its withdrawal. European Council. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/> (Accessed: 01. 03. 2025).

(TEU). Article 21 of the TEU<sup>4</sup> obliges the EU to promote the rule of law, human rights, and the principles of international law in its external actions. The refusal to ratify the modernised ECT raises critical questions about the EU's adherence to these obligations and its commitment to *pacta sunt servanda*, which is the foundational principle of treaty law.

Italy's withdrawal from the ECT in 2016<sup>5</sup>, followed by announcements from other EU member states such as Spain<sup>6</sup>, France<sup>7</sup>, Germany<sup>8</sup> and Poland<sup>9</sup>, underscores a broader trend of discontent with the treaty among EU stakeholders. These withdrawals, coupled with the EU's leadership in modernisation negotiations that ultimately failed to reconcile the diverging interests of member states, have challenged the treaty's legitimacy and the coherence of the EU's collective approach to international agreements.<sup>10</sup> The "sunset clause"<sup>11</sup> within the ECT, which extends protections to existing investments for 20 years post-withdrawal, further complicates this landscape by exposing withdrawing states to potential investor-state dispute settlement (ISDS) claims.

This paper seeks to examine these issues from a legal perspective, addressing the question of whether the EU's withdrawal strategy and its refusal to endorse the modernised ECT align with its obligations under international and EU law. Specifically, the analysis will focus on Article 21 TEU,<sup>12</sup> the principle of good faith as outlined in Article 31 of the VCLT,<sup>13</sup> and the broader implications for international investment law. By analysing these questions, the paper aims to provide a detailed legal assessment of the EU's relationship with the ECT and propose a framework for navigating future treaty engagements, particularly in the context of climate transition and energy governance.

The relevance of this analysis is multifaceted. First, it contributes to the ongoing debate about the compatibility of international investment treaties with regional and global climate goals. Second, it examines the role of legal obligations in shaping the EU's policy decisions, particularly when these obligations intersect with political and environmental priorities. Finally,

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<sup>4</sup> Treaty on European Union. Article 21. Available at: [https://eur-lex.europa.eu/eli/treaty/teu\\_2008/art\\_21/oj/eng](https://eur-lex.europa.eu/eli/treaty/teu_2008/art_21/oj/eng) (Accessed: 04. 03. 2025).

<sup>5</sup> Italy withdraws from Energy Charter Treaty. Global Arbitration News. Available at: <https://www.globalarbitrationnews.com/2015/05/06/italy-withdraws-from-energy-charter-treaty-20150507/> (Accessed: 10. 03. 2025).

<sup>6</sup> Withdrawal by the Kingdom of Spain. International Energy Charter. Available at: [https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal\\_notifications/2024.05.17\\_-\\_Withdrawal\\_notification\\_Spain.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal_notifications/2024.05.17_-_Withdrawal_notification_Spain.pdf) (Accessed: 04. 03. 2025).

<sup>7</sup> Withdrawal by the French Republic. International Energy Charter. Available at: [https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal\\_notifications/2022.12.07\\_-\\_Withdrawal\\_notification\\_France.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal_notifications/2022.12.07_-_Withdrawal_notification_France.pdf) (Accessed: 04. 03. 2025).

<sup>8</sup> Withdrawal by Germany. International Energy Charter. Available at: [https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal\\_notifications/2022.12.19\\_-\\_Withdrawal\\_notification\\_Germany.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal_notifications/2022.12.19_-_Withdrawal_notification_Germany.pdf) (Accessed: 04. 03. 2025).

<sup>9</sup> Withdrawal by Poland. International Energy Charter. Available at: [https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal\\_notifications/2022.12.28\\_-\\_Withdrawal\\_notification\\_Poland.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal_notifications/2022.12.28_-_Withdrawal_notification_Poland.pdf) (Accessed: 04. 03. 2025).

<sup>10</sup> EU withdrawal from the Energy Charter Treaty. European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS\\_BRI\(2023\)754632\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf) (Accessed: 05. 03. 2025).

<sup>11</sup> Energy Charter Treaty. Article 47(3). Available at: <https://www.energychartertreaty.org/treaty/energy-charter-treaty/> (Accessed: 11. 03. 2025).

<sup>12</sup> *supra* note 4

<sup>13</sup> Vienna Convention on the Law of Treaties. Article 31. Available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (Accessed: 11. 03. 2025).

it offers insights into the broader implications of treaty withdrawal for the integrity of multilateral frameworks and the future of international investment law.

This introduction sets the stage for an in-depth exploration of the legal intricacies at the intersection of the ECT and EU law, highlighting the need for a coherent and principled approach to treaty engagement and withdrawal. Central to this analysis is the question: does the EU's withdrawal from the ECT align with its obligations under international and EU law? Through this analysis, the paper aims to address not only the immediate legal questions but also the broader challenges of harmonising international investment protection with the EU's commitment to sustainable development and climate leadership.

## 1. The Energy Charter Treaty and its key features

The ECT - signed in 1994 and entering into force in 1998 - stands as one of the most significant multilateral agreements governing the energy sector. Born out of the post-Cold War environment, the ECT was initially designed to foster energy cooperation between Western Europe and former Soviet states. Its overarching goals were to ensure energy security, promote foreign investments in energy infrastructure, and establish a reliable framework for resolving disputes.<sup>14</sup>

### a) Investment protection

The ECT offers significant and robust investment protection, with Articles 10 and 13 mandating fair and equitable treatment (FET) and prohibiting expropriation without compensation. It provides extensive guarantees to foreign investors, creating a stable and predictable environment for energy investments. The treaty's definition of "investment" is broad, encompassing tangible assets like energy infrastructure and intangible rights such as permits and intellectual property.

Article 10 requires Contracting Parties to create stable, transparent, and favourable conditions for foreign investments. It incorporates the principles of FET, protection against unreasonable or discriminatory measures, and the obligation to provide constant protection and security.<sup>15</sup> The FET standard is flexible, covering legitimate expectations, transparency, due process, and non-arbitrary behaviour. This standard has been invoked in cases such as *Petrobart*, where state intervention in judicial proceedings was found to violate it,<sup>16</sup> and *Nykomb*, where Latvia's discriminatory tariff measures breached the provision.<sup>17</sup> However, damages in such cases are determined independently of expropriation principles. This "security" clause obligates states to safeguard investments against harm, traditionally related to violence or civil unrest but now extended to legal and economic protection. However, one should not overlook the most significant aspect of Article 10, which is the umbrella clause, elevating state commitments to investors into treaty obligations and providing a pathway for breach of contract claims under the ECT.

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<sup>14</sup> Omonbude, E. (2016). *Cross-border Oil and Gas Pipelines and the Role of the Transit Country*. Palgrave Pivot. 103-104. Available at: <https://www.perlego.com/book/3485066> (Accessed: 30 December 2024).

<sup>15</sup> Energy Charter Treaty. Article 13. Available at: <https://www.energychartertreaty.org/treaty/energy-charter-treaty/> (Accessed: 11. 03. 2025).

<sup>16</sup> *Petrobart Ltd. v. The Kyrgyz Republic*. SCC case.

<sup>17</sup> *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*. SCC case.

Article 13 of the ECT prohibits expropriation or measures equivalent to expropriation of investments unless specific conditions are met. These conditions include (i) public interest, meaning the measure must serve a legitimate public purpose; (ii) non-discrimination, ensuring that it does not unfairly target a particular investor; (iii) due process, requiring that the expropriation follows legal procedures; and (iv) compensation, which mandates that the investor receives prompt, adequate, and effective compensation.<sup>18</sup> The provision recognises both direct expropriation<sup>19</sup> and indirect expropriation.<sup>20</sup> Indirect expropriation includes instances such as regulatory measures or a series of actions that collectively deprive an investor of economic benefits. In the *Nykomb* case, the tribunal rejected claims of indirect expropriation, emphasising the absence of state interference with property control.<sup>21</sup> Similarly, the *Petrobart* case tribunal dismissed claims of de facto expropriation, finding no evidence of measures specifically targeting the investor or transferring economic value to the state.<sup>22</sup>

Many investment treaties also include sunset or survival clauses that maintain treaty protections for a specific period even after a state officially withdraws. These clauses primarily aim to support investor confidence by ensuring continued protections, but they also limit a state's ability to disengage from its treaty obligations fully.<sup>23</sup> The ECT incorporates such a provision in Article 47(3), which extends investment protections for 20 years after withdrawal.<sup>24</sup> This ensures that investors remain safeguarded even after a state's exit, complicating efforts to completely sever treaty obligations. A notable example is the case of *Rockhopper Exploration*, where the company sued the Italian government under the ECT following Italy's withdrawal in 2016, highlighting the lasting impact of the sunset clause.<sup>25</sup>

#### b) Dispute resolution mechanisms

The ECT boasts one of the most comprehensive and widely utilised dispute resolution frameworks in international investment law, making it both a significant asset and a source of controversy.<sup>26</sup> Its mechanisms, particularly those under Articles 26 and 27, provide distinct pathways for resolving conflicts, ensuring legal recourse for investors and states alike while fostering an environment of accountability within the energy sector.

Article 26 of the ECT establishes the cornerstone mechanism for ISDS, enabling private investors to directly initiate arbitration proceedings against host states.<sup>27</sup> This provision is particularly significant because it circumvents the traditional requirement of diplomatic protection, allowing investors to pursue claims independently in response to alleged breaches of the treaty's obligations. ISDS under the ECT is designed to provide a neutral forum for

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<sup>18</sup> *supra* note 15

<sup>19</sup> complete seizure of property

<sup>20</sup> substantial interference with ownership or economic use

<sup>21</sup> *supra* note 17

<sup>22</sup> *supra* note 16

<sup>23</sup> Bernasconi-Osterwalder, N. et al. (2020). *Terminating A Bilateral Investment Treaty*. The International Institute of Sustainable Development. Best Practices Series. 4. Available at: <https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf> (Accessed: 09. 03. 2025).

<sup>24</sup> *supra* note 11

<sup>25</sup> ICSID tribunal finds that Italy committed an unlawful expropriation under ECT's Art. 13(1). The International Institute of Sustainable Development. Available at: <https://www.iisd.org/itn/en/2023/04/02/icsid-tribunal-finds-that-italy-committed-an-unlawful-expropriation-under-ects-art-131/> (Accessed: 11. 03. 2025).

<sup>26</sup> Energy Charter Treaty Dispute Mechanisms: An Overview. Transnational Matters. Available at: <https://www.transnationalmatters.com/energy-charter-treaty-dispute-mechanisms/> (Accessed: 12. 03. 2025).

<sup>27</sup> Energy Charter Treaty. Article 26. Available at: <https://www.energychartertreaty.org/treaty/energy-charter-treaty/> (Accessed: 11. 03. 2025).

dispute resolution, thereby mitigating risks associated with potential biases in national legal systems.<sup>28</sup>

Since its inception, the ECT's ISDS mechanism has been utilised in over 150 publicly known cases,<sup>29</sup> underscoring its role as a critical platform for investment arbitration. The disputes often involve high-stakes claims, with some exceeding billions of euros,<sup>30</sup> reflecting the substantial economic impact of energy investments. These cases typically arise from alleged violations of core treaty provisions, such as FET, expropriation, or breaches of contractual obligations.<sup>31</sup> Prominent cases such as *Vattenfall* exemplify the complex interplay between investment protection and public policy.<sup>32</sup> In this case, the Swedish energy company Vattenfall brought a claim against Germany under the ECT following the country's decision to phase out nuclear power after the Fukushima disaster. The arbitration highlighted tensions between Germany's sovereign right to implement environmental and energy policies and the treaty's protective framework for investors. Such cases have sparked broader debates about the extent to which ISDS mechanisms constrain states' regulatory autonomy, particularly in areas related to climate action and public welfare.<sup>33</sup>

In addition to ISDS, Article 27 of the ECT provides a framework for state-to-state arbitration. This mechanism allows Contracting Parties to resolve disputes regarding the treaty's interpretation or application.<sup>34</sup> The rarity of such cases is underscored by the limited number of publicly known instances. A notable example is *Azerbaijan v. Armenia*, initiated on February 27, 2023, when Azerbaijan filed a Notice of Arbitration against Armenia under Article 27 of the ECT.<sup>35</sup> This ongoing case highlights the mechanism's potential to address intergovernmental disputes, further reinforcing the multilateral nature of the treaty.

The ECT has faced significant criticism over the years.<sup>36</sup> Its ISDS mechanism is often accused of privileging investor interests over state sovereignty, particularly in cases involving public

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<sup>28</sup> Karayigit, M. T. (2024). *The Compatibility of the ISDS Mechanism under the Energy Charter Treaty With the Autonomy of the EU Legal Order*. European Foreign Affairs Review. 29(1). 85-114. Available at: <https://kluwerlawonline.com/journalarticle/European+Foreign+Affairs+Review/29.2/EERR2023031> (Accessed: 14. 03. 2025).

<sup>29</sup> Energy Charter Treaty, List of cases, Available at: <https://www.energychartertreaty.org/cases/list-of-cases/> (Accessed: 11. 03. 2025).

<sup>30</sup> In Brief: The merits of former Yukos Shareholders' expropriation claim will be heard. The International Institute of Sustainable Development. Available at: <https://www.iisd.org/itn/fr/2010/01/12/in-brief-the-merits-of-former-yukos-shareholders-expropriation-claim-will-be-heard/> (Accessed: 17. 03. 2025).

<sup>31</sup> Energy Charter Treaty. List of ECT Dispute Cases. Available at: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/Chart\\_ECT\\_cases\\_-\\_1\\_June\\_2022.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/Chart_ECT_cases_-_1_June_2022.pdf) (Accessed: 30 December 2024).

<sup>32</sup> *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Award (2021, August 31). International Centre for Settlement of Investment Disputes. Available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/12> (Accessed: 11. 06. 2025)

<sup>33</sup> *A Battle on Two Fronts: Vattenfall v. Federal Republic of Germany*. Kluwer Arbitration Blog. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/02/18/a-battle-on-two-fronts-vattenfall-v-federal-republic-of-germany/> (20. 03. 2025).

<sup>34</sup> Energy Charter Treaty. Article 27. Available at: <https://www.energychartertreaty.org/treaty/energy-charter-treaty/> (Accessed: 11. 03. 2025).

<sup>35</sup> *Republic of Azerbaijan v. The Republic of Armenia*, Case No. 2023-65, Permanent Court of Arbitration. Available at: <https://pca-cpa.org/en/cases/312/> (Accessed: 11. 06. 2025)

<sup>36</sup> *The Modernised Energy Charter Treaty: Key Takeaways from the Amended Text*. WilmerHale. Available at: <https://www.wilmerhale.com/en/insights/blogs/international-arbitration-legal-developments/20241223-the-modernised-energy-charter-treaty-key-takeaways-from-the-amended-text> (Accessed: 14. 03. 2025).

policy measures like environmental regulations.<sup>37</sup> Moreover, the treaty's alignment with fossil fuel investments has drawn scrutiny for being incompatible with global climate objectives.<sup>38</sup> Studies reveal that a large proportion of ISDS claims under the ECT arise from disputes related to fossil fuel investments, raising concerns about its role in hindering energy transitions.<sup>39</sup>

Recognising these shortcomings, the EU spearheaded modernisation negotiations beginning in 2018.<sup>40</sup> These efforts sought to align the treaty with the Paris Agreement and the EU Green Deal,<sup>41</sup> focusing on reducing protections for fossil fuel investments and enhancing environmental standards. However, the finalised modernised text in 2022 failed to satisfy EU expectations,<sup>42</sup> leading the bloc and several member states to initiate withdrawal.

## 2. The EU's legal framework in international relations

Article 21 TEU serves as a cornerstone for assessing the EU's external action. It emphasises respect for international law, human rights, and the promotion of sustainable development. The principle of *pacta sunt servanda*, enshrined in Article 26 of the VCLT, further underscores the EU's obligation to honour treaty commitments. Tensions between EU law and the ECT have emerged, particularly concerning the compatibility of the ECT's dispute resolution mechanisms with EU law. This has prompted debates on whether the ECT undermines the EU's autonomy, especially under Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

The EU's approach to international relations is underpinned by a robust legal framework that governs its external actions. This framework seeks to align the EU's international commitments with its internal legal principles, ensuring coherence between its role as a global actor and its foundational values. Article 21 of the TEU is central to this, which sets the normative direction for the EU's external engagements, emphasising respect for international law, human rights, and sustainable development.<sup>43</sup> However, the EU's participation in treaties such as the ECT has brought to light significant legal tensions, particularly concerning the compatibility of external agreements with the autonomy of EU law.<sup>44</sup>

### a) Article 21 of the TEU and the principle of *pacta sunt servanda*

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<sup>37</sup> THE ENERGY CHARTER TREATY (ECT): Assessing its geopolitical, climate and financial impacts. OPENEXP. Available at: [https://openexp.eu/sites/default/files/publication/files/ect\\_rapport-numerique.pdf](https://openexp.eu/sites/default/files/publication/files/ect_rapport-numerique.pdf) (Accessed: 14. 03. 2025).

<sup>38</sup> Energy Charter Treaty modernisation adopted, still undermining climate action. Climate Action Network. Available at: <https://caneurope.org/energy-charter-treaty-modernisation-adopted/> (Accessed: 17. 03. 2025).

<sup>39</sup> Adoption of the modernised Energy Charter Treaty: retaining the key role of cross-border investment in the energy transition. Freshfields. Available at: <https://riskandcompliance.freshfields.com/post/102jr5s/adoption-of-the-modernised-energy-charter-treaty-retaining-the-key-role-of-cross> (Accessed: 17. 03. 2025).

<sup>40</sup> Modernisation of the Treaty. International Energy Charter. Available at: <https://www.energychartertreaty.org/modernisation-of-the-treaty/> (Accessed: 19. 03. 2025).

<sup>41</sup> *supra* note 38

<sup>42</sup> The EU and UK Withdraw from the Energy Charter Treaty: A New Era for Climate Action?. Center for International Environmental Law. Available at: <https://www.ciel.org/energy-charter-treaty-withdrawal-new-era-for-climate-action/> (Accessed: 19. 03. 2025).

<sup>43</sup> *supra* note 4

<sup>44</sup> Odermatt, J. (2016). *When a fence becomes a cage: the principle of autonomy in EU external relations law*. EUI Working Paper MWP. 2016/07. European University Institute. Available at: [https://cadmus.eui.eu/bitstream/handle/1814/41046/MWP\\_2016\\_07.pdf?isAllowed=y&sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/41046/MWP_2016_07.pdf?isAllowed=y&sequence=1) (Accessed: 19. 03. 2025).

Article 21 TEU reflects the EU's commitment to conducting its external relations in a manner consistent with international law and its internal legal framework.<sup>45</sup> The provision establishes principles that include promoting democracy, the rule of law, and respect for international agreements. As a normative guide, Article 21 obligates the EU to uphold these values while engaging in multilateral and bilateral treaties, framing its external policies as an extension of its internal constitutional ethos.

A core principle in international law is *pacta sunt servanda*, which essentially means that agreements must be kept. This principle is set out in Article 26 of the VCLT, which states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Simply put, when states or international organisations sign a treaty, they are expected to honour their commitments. For the EU, this principle is especially important - it's what helps maintain its credibility and legitimacy on the global stage. A clear example of this in action is the case concerning the EU-Morocco trade agreements and their applicability to Western Sahara.<sup>46</sup> The European Court of Justice (ECJ) had to assess whether the EU was truly living up to its international obligations. In doing so, the Court reaffirmed that treaties must be respected in good faith, reinforcing *pacta sunt servanda* as a guiding rule in international relations. This case shows just how important it is for the EU to balance legal commitments with real-world complexities.

The EU's involvement with the ECT demonstrates the complexities of balancing these principles with evolving policy priorities. While the ECT initially aligned with the EU's energy security and investment goals, its provisions, particularly those concerning investor protections, have increasingly come into conflict with the EU's climate ambitions and legal principles. This has prompted a re-evaluation of the EU's commitments under the ECT, culminating in its decision to withdraw from the treaty.

At the same time, one might argue that relying on Article 21 TEU to support the EU's endorsement of the modernised ECT conflicts with the CJEU's reasoning in *Komstroy*<sup>47</sup>, which confirmed that the ISDS mechanism under Article 26 ECT is incompatible with the autonomy of EU law. However, this apparent contradiction dissolves when the scope and purpose of Article 21 TEU are properly understood. Article 21 is not an instruction to uphold any and all international obligations, but rather a constitutional obligation to promote international law and multilateralism in a manner consistent with EU values and legal order.<sup>48</sup> As confirmed by the CJEU in *Front Polisario*, "[u]nder Article 3(5) and Article 21(1) TEU, the Union's action on the international scene is to contribute, in particular, to the strict observance and the development of international law, including respect for the principles of the Charter of the United Nations".<sup>49</sup> In this context, the modernised ECT sought to reconcile external engagement with internal constitutional coherence. The signature of the EU of the revised text,

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<sup>45</sup> *supra* note 4

<sup>46</sup> Case C-266/16. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0266> (Accessed: 22. 03. 2025).

<sup>47</sup> Case C-741/19. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0741> (Accessed: 22. 03. 2025).

<sup>48</sup> Cremona, M. (2016). *Structural Principles and their Role in EU External Relations Law*, Current Legal Problems, Vol. 69, Issue 1, 39-43, Available at: <https://academic.oup.com/clp/article-abstract/69/1/35/2738853?redirectedFrom=fulltext> (Accessed: 11. 06. 2025).

<sup>49</sup> Judgment of the Court (Grand Chamber) of 4 October 2024. European Commission and Council of the European Union v Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario). Joined Cases C-779/21 P and C-799/21 P. Available at: <https://eur-lex.europa.eu/legal-content/EN/SUM/?uri=CELEX:62021CJ0779> (Accessed: 11. 06. 2025)

potentially accompanied by interpretative declarations or reservations, might have fulfilled both Article 21's mandate and the CJEU's autonomy doctrine. The EU's refusal to sign, however, opted for institutional exit over normative adjustment, leaving unresolved the question of whether a more integrated legal solution was prematurely rejected.

#### b) The autonomy of EU law and conflicts with the ECT

The principle of autonomy is fundamental to the EU's legal system, ensuring that EU law operates independently from national laws and has priority within its areas of competence. This means that EU rules cannot be overridden by national legislation, and their interpretation remains the exclusive responsibility of the Court of Justice of the European Union (CJEU). This autonomy is safeguarded by the EU treaties, particularly Articles 267 and 344 of the TFEU, which protect the consistency of EU law and confirm the CJEU's role as the final authority on its interpretation.

Article 267 TFEU establishes the CJEU's exclusive authority to interpret EU law through preliminary rulings, stating that “[t]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.” This ensures uniformity in the application of EU law across member states. Article 344 TFEU reinforces this principle by providing that “[m]ember States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.” Together, these provisions form the backbone of the EU's legal framework, ensuring that the interpretation and application of EU law remain exclusively within the EU's judicial system.

The ECT's ISDS mechanism, codified in Article 26, poses a direct challenge to this autonomy. Article 26 ECT provides that “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former [...] shall, if possible, be settled amicably.” However, by allowing private investors to initiate arbitration proceedings against states outside the EU judicial framework, ISDS undermines the exclusivity of the CJEU's jurisdiction.<sup>50</sup> This conflict was highlighted in key rulings by the CJEU, such as in *Achmea* (Case C-284/16), where the Court ruled that investor-state arbitration clauses in intra-EU bilateral investment treaties (BITs) are incompatible with EU law, and *Komstroy* (Case C-741/19), which confirmed that the ECT's ISDS mechanism cannot be applied within the EU.

In the *Achmea* case, the CJEU concluded that arbitration clauses in intra-EU bilateral investment treaties (BITs) are incompatible with EU law.<sup>51</sup> The Court stated that such clauses could prevent disputes from being resolved in a manner that ensures the full effectiveness of EU law, thereby undermining the autonomy of the EU legal system. Specifically, in paragraph 58 of the judgment, the Court noted:

*„In the present case, however, apart from the fact that the disputes falling within the jurisdiction*

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<sup>50</sup> Is ISDS in EU Trade Agreements Legal under EU Law?. The International Institute of Sustainable Development. Available at: <https://www.iisd.org/itn/2016/02/29/is-isds-in-eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/> (Accessed: 22. 03. 2025).

<sup>51</sup> Fanou, M. (2024). *Intra-EU Claims as an Objection to Jurisdiction*. JusMundi. Available at: <https://jusmundi.com/en/document/publication/en-intra-eu-claims-as-an-objection-to-jurisdiction> (Accessed: 22. 03. 2025).



*of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.*<sup>52</sup>

This reasoning was later extended to the ECT in *Komstroy*, where the court concluded that ISDS mechanisms under the treaty could not be applied to disputes between EU member states. These rulings have had profound implications for the EU's relationship with the ECT, reinforcing the legal basis for the EU's withdrawal and its efforts to modernise the treaty.<sup>53</sup> In paragraph 66 of the judgment, the Court stated:

*„In the light of the foregoing, it must be concluded that 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 Member State.*<sup>54</sup>

### c) Broader implications and the EU's treaty engagements

The tensions between the ECT and the EU's legal framework highlight broader challenges in reconciling regional and international legal systems. As a supranational entity, the EU must navigate the dual demands of fulfilling its treaty obligations under international law and maintaining the coherence of its internal legal order.<sup>55</sup> This balancing act is further complicated by the EU's evolving policy priorities, particularly its commitment to climate action under the Green Deal.<sup>56</sup> The ECT, with its strong protections for fossil fuel investments, has become increasingly misaligned with the EU's climate goals. The treaty's inability to accommodate the EU's transition to sustainable energy systems has prompted calls for modernisation. However, the failure of these negotiations to address the EU's legal and policy concerns has left the bloc with little choice but to withdraw.

The decision to withdraw from the ECT raises critical questions about the limits of the EU's external commitments. While the principle of *pacta sunt servanda* obliges the EU to honour its treaty obligations, its legal framework also allows for withdrawal when a treaty is no longer compatible with its fundamental values or policy objectives. The sunset clause in Article 47 of

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<sup>52</sup> Case C-284/16. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0284> (Accessed: 22. 03. 2025).

<sup>53</sup> CJEU Ruling in *Moldova v. Komstroy*: the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty (and a Restrictive Interpretation of the Notion of Protected Investment). Kluwer Arbitration Blog. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/09/07/cjeu-ruling-in-moldova-v-komstroy-the-end-of-intra-eu-investment-arbitration-under-the-energy-charter-treaty-and-a-restrictive-interpretation-of-the-notion-of-protected-investment/> (Accessed: 22. 03. 2025).

<sup>54</sup> *supra* note 47

<sup>55</sup> Eckes, C., Ankersmit L. (2022). *The compatibility of the Energy Charter Treaty with EU law*. Amsterdam Centre for European Law and Governance. Available at: <https://www.clientearth.org/media/2n2po04j/report-on-ect-compatibility-with-eu-law.pdf> (Accessed: 22. 03. 2025).

<sup>56</sup> Delivering A Strong European Green Deal In Stormy Times. European Movement International. Available at: <https://europeanmovement.eu/policy/delivering-a-strong-european-green-deal/> (Accessed: 22. 03. 2025).

the ECT, which extends investment protections for 20 years post-withdrawal<sup>57</sup>, further complicates this issue, as it binds the EU to obligations even after its formal exit. These developments have significant implications for the EU's role as a global actor. They underscore the difficulties of maintaining legal and policy coherence in a rapidly changing international landscape. At the same time, they challenge the EU to demonstrate leadership by aligning its treaty engagements with its normative commitments, offering a potential blueprint for other regions facing similar tensions between international and regional legal systems.

In addition to the normative and policy considerations surrounding the EU's withdrawal from the ECT, it is also necessary to reflect on the legal and procedural mechanisms that govern the EU's capacity to enter into international agreements. Article 218(11) TFEU provides that a Member State, the European Parliament, the Council, or the Commission may request an opinion from the CJEU on whether an agreement is compatible with the Treaties.<sup>58</sup> Where the Court delivers an adverse opinion, the agreement may not enter into force unless it is amended, or the Treaties are revised. Although such a request was never submitted in the case of the ECT or its modernised version, the existence of this mechanism highlights a deeper legal limitation: the EU cannot conclude agreements that conflict with primary law. In the case of the ECT, such a conflict may be seen in relation to Article 191(1) TFEU, which requires the EU to promote international measures to address environmental challenges and combat climate change.<sup>59</sup> The continued legal protection of fossil fuel investments under the ECT stands in tension with this objective. Had Article 218(11) TFEU been triggered, it is admissible that the CJEU would have issued an adverse opinion, making ratification legally impossible without substantial treaty revision or reinterpretation.

### 3. The EU and the modernised ECT

The ECT has long been criticised for its perceived inadequacy in addressing contemporary challenges, particularly those related to climate change and the energy transition. In response, the modernisation process of the ECT was initiated in 2017 to update its provisions to reflect new realities in energy investment and environmental policy.<sup>60</sup> However, despite concerted negotiations and the introduction of significant reforms, the EU ultimately chose not to endorse the modernised text of the ECT.<sup>61</sup> This decision highlights critical tensions between the EU's legal principles, policy priorities, and international treaty commitments.

The modernisation process sought to address the ECT's outdated framework, which had become increasingly incompatible with the EU's climate objectives under the European Green Deal and the Paris Agreement. The proposed reforms aimed to strike a balance between protecting foreign investments and ensuring compatibility with global climate goals.

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<sup>57</sup> Beyond EU and UK's Exit from ECT: Addressing the Sunset Clause and Fossil Fuel Investment Challenges. Centre for International Environmental Law. Available at: <https://www.ciel.org/ect-sunset-clause-fossil-fuel-investments-challenges/> (Accessed: 22. 03. 2025).

<sup>58</sup> Treaty on the Functioning of the European Union. Article 218(11). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E218> (Accessed: 11. 06. 2025)

<sup>59</sup> Treaty in the Functioning of the European Union. Article 191(1). Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E191:EN:HTML> (Accessed: 11. 06. 2025)

<sup>60</sup> *supra* note 40

<sup>61</sup> EU rejection of reformed Energy Charter Treaty 'historic moment' for climate action. ClientEarth. Available at: <https://www.clientearth.org/latest/press-office/press-releases/eu-rejection-of-reformed-energy-charter-treaty-historic-moment-for-climate-action/> (Accessed: 22. 03. 2025).

One of the most controversial aspects of the ECT is its ISDS mechanism, which allows investors to sue states for alleged breaches of treaty obligations.<sup>62</sup> The modernised ECT sought to limit ISDS claims, excluding fossil fuel investments in developed economies.<sup>63</sup> This was intended to reduce the risk of litigation against states implementing climate policies, such as phasing out coal or restricting fossil fuel exploration. Additionally, the revised treaty text incorporated provisions aimed at promoting environmental sustainability.<sup>64</sup> These included obligations for states to adhere to international environmental agreements and commitments to support the transition to low-carbon energy systems.

To address criticisms of opacity in ISDS proceedings, the modernisation process introduced measures to enhance transparency and public participation in dispute resolution processes, aligning with the standards of the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules.<sup>65</sup> Moreover, recognising the growing hesitation of states to remain bound by long-term investment protections, the modernised ECT included provisions allowing states to tailor their commitments, particularly in sectors where fossil fuels play a dominant role.<sup>66</sup> Despite these advancements, the EU refrained from endorsing the modernised ECT. This decision reflects deep-seated concerns regarding the treaty's alignment with the EU's legal framework and climate ambitions.

First, the modernised ECT was perceived as insufficiently ambitious in phasing out protections for fossil fuel investments. While the reforms introduced limitations on ISDS claims related to fossil fuels, these changes were not deemed adequate to meet the EU's objective of achieving climate neutrality by 2050. The EU argued that continuing to protect fossil fuel investments, even in a limited capacity, contradicted its commitments under the Paris Agreement<sup>67</sup> and the European Green Deal. Second, the EU expressed concerns over the potential fragmentation of international energy law. By excluding fossil fuel investments only in developed economies, the modernised ECT created a dual standard that could undermine the uniform application of treaty provisions. This selective approach raised questions about the treaty's coherence and legitimacy as a global framework for energy investment.<sup>68</sup> Finally, the EU highlighted the risks posed by the ISDS mechanism to its legal autonomy. While the modernised ECT attempted to address some of these concerns, the EU remained unconvinced that the proposed changes sufficiently safeguarded its legal order. The CJEU had previously ruled in cases such as *Achmea* and *Komstroy* that ISDS mechanisms incompatible with EU law could not be

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<sup>62</sup> *supra* note 26

<sup>63</sup> ECT Modernisation Perspectives: Revamping International Investment Law: A Comparative Look at Substantive ISDS Reform in the ECT and Beyond. Kluwer Arbitration Blog. Available at: <https://arbitrationblog.kluwerarbitration.com/2023/05/10/ect-modernisation-perspectives-revamping-international-investment-law-a-comparative-look-at-substantive-isds-reform-in-the-ect-and-beyond/> (Accessed: 22. 03. 2025).

<sup>64</sup> A modernised ECT reflecting EU values and objectives: a multilateral framework promoting energy investment in a sustainable way?. UCL Press. Available at: <https://discovery.ucl.ac.uk/id/eprint/10176658/1/EWLR-7-2.pdf> (Accessed: 22. 03. 2025).

<sup>65</sup> Modernised ECT: Narrower Protection, Greater Transparency, Fewer Parties. Debevoise&Plimpton. Available at: <https://www.debevoise.com/insights/publications/2025/01/modernised-ect-narrower-protection-greater> (Accessed: 24. 03. 2025).

<sup>66</sup> Verbeek, B. (2023). *The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?*. Business and Human Rights Journal. 8. 1-6. Available at: [https://www.researchgate.net/publication/367191519\\_The\\_Modernization\\_of\\_the\\_Energy\\_Charter\\_Treaty\\_Fulfilled\\_or\\_Broken\\_Promises](https://www.researchgate.net/publication/367191519_The_Modernization_of_the_Energy_Charter_Treaty_Fulfilled_or_Broken_Promises) (Accessed: 24. 03. 2025).

<sup>67</sup> Tropper, J. (2024). *The ECT's Long Road to Modernisation: A Story of Delays and Miscalculations*. Völkerrechtsblog. Available at: <https://voelkerrechtsblog.org/the-ects-long-road-to-modernisation/> (Accessed: 24. 03. 2025).

<sup>68</sup> *supra* note 61

enforced within the bloc. This jurisprudence underscored the EU's position that external dispute resolution systems should not interfere with its internal legal framework.

The EU's refusal to endorse the modernised ECT has significant implications for international energy law and multilateral treaty reform. First, the EU's decision signals a shift in its approach to multilateralism. By opting to withdraw from the ECT rather than work within its framework, the EU has set a precedent for prioritising regional legal and policy objectives over global cooperation.<sup>69</sup> This could embolden other states to pursue similar strategies, potentially leading to further fragmentation of international legal regimes. Second, the non-signature has increased uncertainties for investors and member states alike.<sup>70</sup> The ECT's sunset clause, which extends investment protections for 20 years post-withdrawal, ensures that disputes arising from existing investments will remain subject to the treaty's provisions. This creates a protracted period of legal uncertainty, during which the EU must navigate the complexities of exiting the treaty while addressing ongoing investor claims. Ultimately, the EU's stance on the modernised ECT raises broader questions about the viability of multilateral treaty reform.<sup>71</sup> The modernisation process was widely regarded as a test case for updating investment treaties to reflect contemporary policy priorities. The EU's withdrawal has cast doubt on the effectiveness of such efforts, highlighting the difficulties of reconciling diverse state interests within a single legal framework.

#### **4. Member states' withdrawals from a legal perspective**

Italy's withdrawal from the ECT in 2016 and its decision set a precedent for other EU member states. In the years that followed, this initial step led to a domino effect, with several other member states, including Spain, France, Germany, and the Netherlands, announcing their intentions to withdraw.

Articles 47 and 48 of the ECT govern withdrawal procedures, providing a clear legal mechanism for state parties seeking to exit the treaty. Under Article 47, a contracting party must give one year's notice of its intention to withdraw. Even after withdrawal becomes effective, the ECT's so-called "sunset clause" under Article 47(3) extends the treaty's investment protections for a further 20 years for investments made prior to the withdrawal.<sup>72</sup> This clause ensures that investors retain the ability to bring claims under the treaty's provisions against the withdrawing state for an extended period, thereby mitigating the immediate impact of withdrawal on existing investments.

The operation of the sunset clause presents a significant legal and policy challenge. While it aims to provide stability and predictability for investors, it also constrains states' abilities to fully extricate themselves from the treaty's obligations, especially in the context of shifting national and supranational policy priorities.<sup>73</sup> For EU member states, this creates a scenario

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<sup>69</sup> *supra* note 59

<sup>70</sup> European states seek to exit the Energy Charter Treaty what does this mean for energy investors. Ashurst. Available at: <https://www.ashurst.com/en/insights/european-states-seek-to-exit-the-energy-charter-treaty-what-does-this-mean-for-energy-investors/> (Accessed: 24. 03. 2025).

<sup>71</sup> Climate crisis: Energy Charter Treaty reforms languish as EU heads for exit. International Bar Association. Available at: <https://www.ibanet.org/Energy-Charter-Treaty-reforms-as-EU-heads-for-exit> (Accessed: 24. 03. 2025).

<sup>72</sup> Energy Charter Treaty. Article 47. Available at: <https://www.energychartertreaty.org/provisions/part-viii-final-provisions/article-47-withdrawal/> (Accessed: 24. 03. 2025).

<sup>73</sup> Jackson, E. (2024). The Energy Charter Treaty: Letting the sun set on sunset clauses. *RECIEL*. 33(3). 619-632. Available at: <https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12583> (Accessed: 27. 03. 2025)

where the perceived benefits of withdrawal are tempered by the ongoing risk of ISDS claims, particularly as many member states continue to face disputes related to fossil fuel phase-outs and other climate policies.

Italy's withdrawal set a critical precedent, signalling to other member states that exiting the ECT was a viable policy choice despite criticisms about the treaty's alignment with contemporary priorities. Spain, Germany, France, and others soon followed suit, citing similar concerns about the treaty's compatibility with their climate goals, as well as its potential to stymie ambitious energy transitions due to the threat of investor claims.<sup>74</sup> The EU's broader climate agenda, embodied in the European Green Deal and its commitments under the Paris Agreement, has only amplified these concerns, making the ECT increasingly untenable for many EU states. However, the domino effect also reflects underlying tensions within the EU's approach to collective action. While the European Commission has advocated for a unified withdrawal strategy, member states' independent decisions underscore significant divergences in national priorities and risk assessments.<sup>75</sup> This lack of unanimity complicates the EU's ability to present a cohesive front on the international stage, undermining its credibility as a leader in global climate governance.

The EU's refusal to endorse the modernised ECT text in late 2022 is both a symptom and a cause of the broader unravelling of the EU-ECT relationship. While the modernisation process sought to address many of the treaty's shortcomings, the EU ultimately concluded that the reforms did not go far enough to align the treaty with its climate ambitions or safeguard its legal principles.<sup>76</sup> This decision, which was driven in part by growing scepticism among member states about the treaty's value, reinforced the trend toward withdrawal and likely emboldened states to proceed with their own exits. At the same time, the EU's non-signature reflects a broader recognition that the modernisation process could not fully resolve the inherent tensions between the ECT's provisions and the EU's evolving legal and policy framework. In this sense, the EU's stance can be seen as both a consequence of the domino effect initiated by Italy and a contributing factor to the broader fragmentation of the ECT's membership.

The wave of withdrawals by EU member states, coupled with the EU's non-signature of the modernised ECT, has profound implications for the future of international energy law. The fragmentation of the ECT's membership undermines its legitimacy as a global framework for energy investment, creating uncertainty for both investors and states.<sup>77</sup> At the same time, the EU's stance highlights the limitations of existing multilateral frameworks in addressing contemporary challenges, particularly those related to climate change and sustainable development. Looking ahead, the EU and its member states face an emergency in their approach to international energy governance. While withdrawal from the ECT may align with the EU's

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<sup>74</sup> EU notifies exit from Energy Charter Treaty and puts an end to intra-EU arbitration proceedings. European Commission. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_3513](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513) (Accessed: 27. 03. 2025)

<sup>75</sup> Deadlock as member states disagree over withdrawal from Energy Charter Treaty. EuroNews. Available at: <https://www.euronews.com/green/2024/01/10/deadlock-as-member-states-disagree-over-withdrawal-from-energy-charter-treaty> (Accessed: 27. 03. 2025)

<sup>76</sup> *supra* note 38

<sup>77</sup> Marhold, A. (2015). *Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later*. The Journal of World Investment & Trade. 16. 389-435. Available at: [https://www.researchgate.net/publication/277351763\\_Fragmentation\\_and\\_the\\_Nexus\\_between\\_the\\_WTO\\_and\\_the\\_ECT\\_in\\_Global\\_Energy\\_Governance\\_-\\_A\\_Legal-Institutional\\_Analysis\\_Twenty\\_Years\\_Later](https://www.researchgate.net/publication/277351763_Fragmentation_and_the_Nexus_between_the_WTO_and_the_ECT_in_Global_Energy_Governance_-_A_Legal-Institutional_Analysis_Twenty_Years_Later) (Accessed: 27. 03. 2025)

immediate policy objectives, it also underscores the need for alternative frameworks that can effectively balance investment protection with the imperatives of climate action and legal coherence. Whether such frameworks can be developed and implemented in a fragmented international landscape remains an open question, but the EU's experience with the ECT offers important lessons for future treaty design and reform.

## 5. Analysis of potential violations

By refusing to sign the modernised ECT, the EU failed to respect its constitutional obligations under Article 21 of the TEU, which governs the EU's external actions. This provision requires the EU to promote sustainable development, support international law, and foster multilateral cooperation. In its *Front Polisario* judgment<sup>78</sup>, the CJEU made clear that Article 21 TEU is not merely aspirational - it is a binding standard that must guide all external policies, including Article 207(1) of the TFEU<sup>79</sup>, the Common Commercial Policy<sup>80</sup>. The modernised ECT, which incorporates climate commitments and limits fossil fuel protections, would have aligned with Article 21(2)(f) TEU's goal of improving environmental quality and ensuring sustainable resource management. Instead, the EU chose to withdraw from the treaty entirely - despite having previously agreed in principle to the reform - leaving outdated investment protections in place through the ECT's sunset clause. This reversal not only contradicts the EU's climate agenda but also undermines the rule of law and principles of good faith under international law. In doing so, the EU weakened its own credibility as a promoter of global governance and set a problematic precedent for future treaty practice.

Article 31(1) of the VCLT - which says, that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”<sup>81</sup> - is central to treaty interpretation and performance. This principle obligates parties to engage in negotiations, implement treaties, and withdraw from them in a manner that respects their spirit and purpose. The EU's actions in the context of the ECT raise several questions regarding its compliance with this fundamental principle. The EU played a leading role in advocating for ECT reforms, proposing amendments to exclude fossil fuel investments and enhance environmental protections.<sup>82</sup> Despite these efforts, the EU ultimately refused to endorse the revised text, arguing that it fell short of its Green Deal objectives.<sup>83</sup> While the EU's concerns may be legitimate, its withdrawal following an extensive negotiation process risks being perceived as a lack of good faith. This perception is particularly acute given that the EU's demands significantly shaped the modernisation efforts. Furthermore, the EU's encouragement of member states to collectively withdraw from the ECT further complicates its adherence to the principle of good faith. Although collective withdrawal may be justified as a policy strategy, it raises concerns about whether the EU has fulfilled its duty to respect the ECT's objectives and mechanisms during the transition period.

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<sup>78</sup> *supra* note 49

<sup>79</sup> Treaty on the Functioning of the European Union. Article 207(1). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E207> (Accessed: 02. 04. 2025)

<sup>80</sup> The Common Commercial Policy is a framework through which EU Member States transfer competence to the European Commission to conduct external trade negotiations, with the goal of fostering internal trade integration and strengthening the EU's collective bargaining power globally.

<sup>81</sup> *supra* note 13

<sup>82</sup> EU text proposal for the modernisation of the Energy Charter Treaty (ECT). Columbia Center on Sustainable Development. Available at: [https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/tradoc\\_158754%20\(1\)\\_0.pdf](https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/tradoc_158754%20(1)_0.pdf) (Accessed: 02. 04. 2025)

<sup>83</sup> *supra* note 10

The ECT's ISDS mechanism has been a significant point of contention, with several high-profile cases illustrating the tension between investment protection and state sovereignty.

i. Vattenfall v. Germany (II)

In this landmark arbitration, Vattenfall, a Swedish energy company, sought compensation for losses incurred due to Germany's nuclear phase-out following the Fukushima disaster.<sup>84</sup> The case exemplifies the ECT's potential to constrain states' ability to pursue public policy objectives, particularly in the context of energy transitions. Critics argue that the EU's withdrawal from the ECT reflects an attempt to shield member states from similar claims in the future.

ii. Rockhopper v. Italy

Rockhopper's claim against Italy, following the latter's denial of permits for offshore oil and gas projects, underscores the challenges posed by the ECT's "sunset clause." Despite Italy's withdrawal from the ECT, the sunset clause preserved investor rights for 20 years, enabling Rockhopper to pursue arbitration.<sup>85</sup> This highlights the legal complexities and financial risks associated with treaty withdrawal, both for individual member states and the EU as a whole.

In summary, the EU's actions regarding the ECT raise fundamental questions about the future of multilateral treaties in addressing global challenges. While the EU justifies its withdrawal as a step toward achieving climate neutrality, this approach risks eroding trust in multilateralism and the rule of law. As a global actor, the EU must balance its internal policy objectives with its external obligations to avoid undermining its role as a leader in international law and governance.

## Conclusion

The EU's evolving relationship with the ECT illustrates the complexity of aligning multilateral treaty frameworks with regional legal orders and environmental imperatives. This study has examined the growing dissonance between the ECT's investment protection standards and the EU's constitutional and climate-oriented commitments. It has shown that the EU's shift from reform engagement to coordinated withdrawal is not merely political but rooted in deep legal incompatibilities, most notably concerning the autonomy of EU law, principles of mutual trust, and adherence to the rule of law within the internal market. Yet, in taking a step that has extraterritorial legal effects and global repercussions, the EU arguably breached its obligation under Article 21 TEU, which requires consistency between its external actions and internal policies, as well as fidelity to the principles of international law.

Key findings demonstrate that the post-Achmea jurisprudence of the CJEU and the subsequent *Komstroy* judgment have significantly limited the application of intra-EU investment arbitration under the ECT, thereby undermining the Treaty's practical operability within EU

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<sup>84</sup> Bernasconi-Osterwalder, N., Brauch, M. D. (2014). The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark. The International Institute on Sustainable Development. Available at: <https://www.iisd.org/system/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf> (Accessed: 02. 04. 2025)

<sup>85</sup> Polluter Doesn't Pay: The Rockhopper v Italy Award. EJIL: Talk!. Available at: <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/> (Accessed: 02. 04. 2025)

borders. Additionally, the study reveals that the ECT's modernisation efforts have proven insufficient in meeting the EU's climate goals under the European Green Deal and international commitments such as the Paris Agreement.<sup>86</sup> Nevertheless, the EU's refusal to endorse the modernised text raises important questions about legal consistency and credibility on the international stage.

This paper has further identified that the provisions of the ECT - especially the ISDS and the sunset clause - are increasingly difficult to reconcile with the EU's founding treaties. These provisions directly conflict with Articles 267 and 344 TFEU,<sup>87</sup> which safeguard the exclusive jurisdiction of the CJEU and the autonomy of EU law. The result is a fragmented legal landscape where EU law and international investment law no longer operate harmoniously. Moreover, the application of the sunset clause following withdrawal creates legal uncertainty, as future arbitrations brought under its scope remain untested and unpredictable.

From a legal standpoint, the European Union's withdrawal from the ECT and its refusal to endorse the modernised version result in a partially inconsistent approach with its obligations under both international and EU law. On the one hand, the withdrawal follows a procedure permitted under Article 47 ECT<sup>88</sup> and may appear consistent with international law when interpreted through the lens of Article 31(1) of the VCLT. However, the broader constitutional framework of the Union calls this legality into question. The modernised ECT - agreed in principle by all contracting parties, including the EU and its Member States - incorporated climate objectives, a right to regulate, and alignment with the Paris Agreement.<sup>89</sup> These features directly reflect the environmental and sustainability commitments required by Article 21(2)(f) TEU. Refusing to sign this updated treaty, despite having actively shaped it, undermines the Union's declared commitment to promoting sustainable development and multilateral treaty reform.

This inconsistency is legally significant. In its *Front Polisario* judgment, the CJEU reaffirmed that Article 21 TEU is not merely programmatic but a binding constitutional standard.<sup>90</sup> It emphasised that the Union must conduct its external action in conformity with international law and its founding values, including the promotion of sustainable global governance. Moreover, in *Opinion 2/15*, the Court held that these principles form an integral part of the Common Commercial Policy under Article 207 TFEU and must inform the conclusion of international trade and investment agreements.<sup>91</sup> The EU's abrupt reversal - rejecting the modernised ECT after creating legitimate expectations of approval<sup>92</sup> - raises further issues under Article 21(2)(b) TEU, which commits the EU to respect the rule of law and the principles of international law. Such conduct breaches the principle of good faith as enshrined in Article 26<sup>93</sup> of the VCLT. In

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<sup>86</sup> *supra* note 38

<sup>87</sup> see *Section 2, part (b) of the given paper*

<sup>88</sup> *supra* note 72

<sup>89</sup> ECT Modernisation Perspectives: Revamping International Investment Law: A Comparative Look at Substantive ISDS Reform in the ECT and Beyond. Kluwer Arbitration Blog. Available at: [https://arbitrationblog.kluwerarbitration.com/2023/05/10/ect-modernisation-perspectives-revamping-international-investment-law-a-comparative-look-at-substantive-isds-reform-in-the-ect-and-beyond/#:~:text=The%20Modernized%20ECT%20\(article%2019\)%20contains%20a,safeguard%20the%20environment%2C%20health%2C%20or%20regulatory%20objectives](https://arbitrationblog.kluwerarbitration.com/2023/05/10/ect-modernisation-perspectives-revamping-international-investment-law-a-comparative-look-at-substantive-isds-reform-in-the-ect-and-beyond/#:~:text=The%20Modernized%20ECT%20(article%2019)%20contains%20a,safeguard%20the%20environment%2C%20health%2C%20or%20regulatory%20objectives). (Accessed: 11. 06. 2025)

<sup>90</sup> *supra* note 49

<sup>91</sup> *Opinion 2/15* of the Court (Full Court) of 16 May 2017. Para. 142. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=190727&doclang=EN> (Accessed: 11. 06. 2025)

<sup>92</sup> reference to the fact that the EU actively participated in the negotiation and finalization of the modernised ECT text before reversing course

<sup>93</sup> *supra* note 27



this light, the EU's decision to abandon the modernised ECT - while remaining bound by the original version's broader investor protections via the sunset clause - cannot be regarded as fully aligned with its obligations under either international or EU law.

Ultimately, the EU's withdrawal from the ECT represents a decisive shift in energy governance and treaty practice. Yet, it also exposes the fragile intersection between legal obligation and political choice. While individual states have previously withdrawn from treaties,<sup>94</sup> the coordinated exit of a supranational entity like the EU has set a precedent that may weaken confidence in the reliability of international treaty commitments. This episode raises larger questions about treaty adaptability, legal certainty, and multilateral cooperation in the age of climate urgency. As we observe how arbitral tribunals interpret claims brought under the ECT's sunset clause, one principle remains clear - *Ubi jus incertum, ibi jus nullum*.

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<sup>94</sup> As an example, under President Donald Trump, the United States announced its intention to withdraw from the Paris Agreement, which focuses on global climate change mitigation. The withdrawal process was initiated in 2017 and was officially completed in 2020.

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