College of Europe
Collège d'Europe

Brugge

Natolin

Withdrawal from the Energy Charter Treaty in the Light of Mixity

Eleftheria Neframi

DEPARTMENT OF
EUROPEAN LEGAL STUDIES

Research Paper in Law 02 / 2024

College of Europe
Collège d'Europe
Brugge
Natolin
YEARS
1949-2024

European Legal Studies
Etudes Juridiques Européennes

RESEARCH PAPERS IN LAW

2/2024

Eleftheria Neframi

Withdrawal from the Energy Charter Treaty in the Light of Mixity

University of Luxembourg
Visiting scholar at the College of Europe, Bruges

European Legal Studies/Etudes Juridiques Européennes
Dijver 11 | BE-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61
www.coleurope.eu

Withdrawal from the Energy Charter Treaty in the Light of Mixity*

Eleftheria Neframi**

1. Introduction

The Energy Charter Treaty (ECT)[1] was concluded by more than 53 contracting parties, including the European Union (EU) and Euratom, as well as the Member States of the EU. It was approved by the EU in 1998 as a mixed agreement.[2] Establishing a framework for energy cooperation, promoting energy security and the protection of foreign investments in the energy sector, the ECT was heavily criticised for its incompatibility with the objective of phasing out fossil fuels and making a rapid transition to renewable energies.[3]

Such criticism was an opportunity for the EU to promote its environmental standards and reform international investment law in line with its green transition objectives, given its interest in regulating the neighbourhood market through the ECT as a way of ensuring security of supply.[4] The EU participated in the process launched in 2018[5] to modernise the ECT and submitted a proposal.[6] After four years

* This research was funded in part, by the Luxembourg National Research Fund (FNR)[INTER/MOBILITY/2024/LE/18885927/EUGIANorm]. For the purpose of open access, and in fulfilment of the obligations arising from the grant agreement, the author has applied a Creative Commons Attribution 4.0 International (CC BY 4.0) license to any Author Accepted Manuscript version arising from this submission.
**The author would like to thank Professor Inge Govaere and Professor Sacha Garben for giving her the opportunity to spend her scientific leave at the College of Europe.
[1] Energy Charter Treaty (Annex I of the Final Act of the European Energy Charter Conference) (signed 17 December 1994, entered into force 16 April 1998) (1995) 34 ILM 373.
[2] 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 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, OJ L 69, 9 September 1998, 1–116.
[3] Natasha Georgiou, 'A Modernised ECT Reflecting EU Values and Objectives: A Multilateral Framework Promoting Energy Investment in a Sustainable Way? (2023) 7(1): 2. Europe and the World: A law review [15] DOI: https://doi.org/10.14324/111.444.ewlj.2023.02.
[4] Eva Nullens, Mateusz Rys, 'The Participation of the European Union in Treaties: A Focus on the Energy Sector", in Rafael Leal-Arcas (ed), *EU Energy Law and Policy, The External Dimension* (Eliva 2020) 29, 34 et seq.
[5] Council of the European Union, Negotiating Directives for the Modernisation of the Energy Charter Treaty 10745/19, 15 July 2019, https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1-COR-1/en/pdf.
[6]European Union, 'Text Proposal for the Modernisation of the Energy Charter Treaty'(May 2020) https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

of negotiations, the Agreement in Principle of the Modernisation of the ECT (AIP),[7] which was adopted in June 2022, largely reflected the content of the EU proposal.[8] The main changes included a flexibility mechanism allowing parties to exclude fossil fuels from the energies whose investments are protected and to phase out existing fossil fuel investments after 10 years (instead of the 20 years sunset clause),[9] a reference to the International Energy Charter, the application of the United Nations Commission on International Trade Law (UNCITRAL) rules on transparency in investor-state dispute settlement, and recognition of the need to respect the rights and duties of Parties under the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.[10]

However, Member States representing more than 70% of the EU population considered that the modernisation proposal did not meet their environmental ambitions. The modernised text failed to gather the necessary majority in the EU Council. Consequently, under the pressure of sustainability concerns, the door to a vague of withdrawals was opened. Moreover, from the EU law perspective, the application of Article 26 of the ECT, concerning the settlement of disputes between an investor and a contracting party (ISDS) through arbitration, to disputes within the Union, was judged incompatible with the autonomy of the EU legal order.[11] The proposed modernised text included a clause that would end arbitration cases between investors and States that are both located in the EU. The non-adoption of the modernised text maintained the conflict between the ECT and EU law.

Withdrawal from the ECT is in accordance with the autonomy of the EU legal order and the preservation of the Union's sustainability standards. At the same time, however, it undermines the Union's role as global energy and climate actor. Il has been suggested that withdrawal should be preceded by the adoption of the modernisation of the ECT as a contribution to the achievement of the green

---

https://energy.ec.europa.eu/system/files/2021-02/eu_submission_-_revised_definition_of_economic_activity_in_the_energy_sector_0.pdf.

[7] https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf. https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf.

[8] Johannes Traper, Kilian Wagner, 'The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?' (2022) 23 JWIT 813, 823-848.

[9] Under Article 47 of the ECT, in the event of withdrawal by a contracting party, previously agreed investments continue to benefit from the protection of the treaty for 20 years.

[10] https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf.

[11] CJEU, Case C-741/19, *Republic of Moldova v Komstroy LLC* (2021) ECLI:EU:C:2021:655, paras 41–66.

investment objective,[12] but the Union had to deal with its constitutional limits and its Member States' autonomous decisions. Indeed, participation in and withdrawal from the ECT challenge the Union's external representation and credibility, as a result of mixity.

The ECT, approved by the Union and its Member States, became an incomplete or partial mixed agreement, following the withdrawal of five Member States[13] and the announcement by several others of their intention to withdraw.[14] After the withdrawal of the EU,[15] the ECT will be a former mixed agreement. Since a coordinated withdrawal, as proposed by the European Parliament[16] and the European Commission[17] could not be enforced on Member States, the EU institutions recognised that some Member States may remain parties to the ECT upon authorization from the Council.[18]

A non-coordinated withdrawal from the ECT invites us to rethink issues such as the management of mixity and the role of the principle of sincere cooperation according to Article 4 (3) of the Treaty on European Union (TEU),[19] but also the double dimension of the EU's constitutional requirements, as a limit (via the hazards of mixity) and lever (via the obligations of the Member States) of the Union's role as promoter of sustainability goals. Recognising that mixity undermines the efficiency of

---

[12] <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf> ; <https://www.ceps.eu/it-would-be-a-strategic-mistake-for-the-eu-to-ditch-the-energy-charter-treaty/>.

[13] Italy (1st January 2016), France (8 December 2023), Germany (21 December 2023), Poland (29 December 2023), Luxembourg (17 June 2024) https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories; https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty

[14] The Netherlands, Slovenia, Spain, followed by Denmark, Ireland and Portugal. https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf.

[15] Council Decision (EU) 2024/1638 of 30 May 2024 on the Withdrawal of the Union from the Energy Charter Treaty, OJ L, 2024/1638, 5 June 2024.

[16] European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty, P9_TA (2022)0421.

[17] European Commission, 7 July 2023, Proposal for a Council decision on the Union withdrawal from the Energy Charter Treaty COM(2023) 447 final.

[18] https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf.

[19] This provision reads: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

the Union's external action and may have hindered the adoption of the modernised ECT, the first question is whether mixity of the ECT is mandatory (2). The joint participation of the Union and its Member States in the ECT raises next the question of the limits of the principle of sincere cooperation in the modernisation process and in the coordination of withdrawals (3). However, the principle of sincere cooperation entails obligations for the Member States which are inherent in the joint participation in the ECT, but which go beyond the management of mixity, and which can go as far as the exercise of the Union's competence in line with the objective of greening investment law (4).

2. The constitutional requirement of mixity: mandatory presence of the Member States in the modernised ECT

The ECT was adopted jointly by the EU and its Member States as a mixed agreement according to the principle of conferral. Prior to the entry into force of the Lisbon Treaty, in the absence of a specific legal basis relating to energy policy, the Council's decision to conclude the ECT was based on several legal bases, namely the provisions relating to the freedom of establishment, the free movement of capital, the internal market and the approximation of national laws, the common commercial policy and the environmental policy.[20] In addition, because of the impact of the ECT on internal acts adopted on the basis of the flexibility clause, Article 352 of the Treaty on the Functioning of the European Union (TFEU) was one of the legal bases for the concluding decision. The lack of exclusive competence of the Union in the areas concerned led to the conclusion of the ECT in the form of a mixed agreement. However, since the entry into force of the Lisbon Treaty, investment protection is an exclusive EU competence in the field of common commercial policy, under Article 207 TFEU. [21] In addition, the Union's energy policy has a specific legal basis, Article 194 TFEU. Given the evolution of the Union's competences and the complexity stemming from mixity, the question arises whether mixity of the ECT was mandatory under the Lisbon Treaty.

[20] Council and Commission Decision (n 2).
[21] CJEU, Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore* (2017) ECLI:EU:C:2017:376 para 109.

Avoiding mixity is both a legal requirement and a political choice. The absence of mixity is a legal requirement when the EU's competence to conclude an international agreement is exclusive, which means that the Member States must refrain from being contracting parties. Given the development of the scope of the common commercial policy according to Article 207 TFEU, the ECT could fall to a large extent under the EU trade and investment competence. As confirmed by the Court of Justice in a global approach of the Union's external action objectives, the Union's exclusive competence in the field of international trade and investment protection encompasses provisions on sustainable development, which now form an integral part of the common commercial policy.[22] Green transition provisions in the modernised ECT would therefore not affect the Union's exclusive competence. However, the ECT provisions on investment protection are not limited to direct foreign investments; they also cover portfolio investments, which are not part of the Union's trade competence but fall under the Union's shared competence in the field of the internal market.[23] Moreover, the ECT provisions also concern the Union's competence in the field of energy, which is a shared competence.[24] Although a shared competence may become exclusive in the external field if the conditions of Article 3(2) TFEU are met,[25] the EU institutions recognize that this provision does not apply.[26] Consequently, there is no legal requirement to avoid mixity of the ECT.

[22] *Ibid.* paras 139- 147. The global approach of the Union's external action objectives is based on Articles 21 (3) TEU and 205 TFEU.
[23] *Ibid.* paras 225-243. In paragraph 227 the Court of Justice recalls that 'non-direct foreign investment may, inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU'.
[24] Article 4 (2) (i) TFEU.
[25] Especially if the *ERTA* principle applies (CJEU, Case 22/70, *Commission v Council* (1971) ECLI:EU:C:1971:32): where an agreement between the European Union and a third State provides for the application, to the international relations covered by that agreement, of rules that will overlap to a large extent with the common EU rules applicable to intra-EU situations, that agreement must be regarded as capable of affecting or altering the scope of those common rules. The Court of Justice recalls that 'despite there being no contradiction with those common rules, the meaning, scope and effectiveness of the latter may be affected'. CJEU, Opinion 2/15 (n 21) para 201.
[26] The Commission, in its proposal for a Council decision on the position to be taken on behalf of the European Union in the Energy Charter Conference, considers that "the areas covered by the Energy Charter Treaty fall largely under the exclusive Union competence", COM (2024) 104 final, 01.03.2024. In addition, in the ECT modernisation process, the negotiating directives of the Council addressed to the Commission were "without prejudice to the division of competences between the Union and the Member States as laid down in the Treaties", 10745/19, 15.07.2019. It results that exclusivity of the EU's competence does not stem from the *ERTA* principle (see n 24).

The question then arises as to whether the avoidance of mixity is a political choice, which means that mixity is not compulsory but facultative.[27] Facultative mixity implies either that the most important part of an international agreement, falling under the Union's exclusive competence, absorbs provisions falling under shared competence that are of limited scope;[28] or that, according to Article 216 (1) TFEU,[29] the Union exercises its shared competence directly in the external field, if this is necessary to achieve its objectives.[30] In both cases, the political will to enable the Union to exercise its external competence alone must be established, via the Council's decision to conclude the international agreement. Given that the objective of the ECT is to create an enlarged integrated energy market and taking into account the lack of mixity in the Energy Community Treaty,[31] it can be argued that, although the Union's competence by virtue of Article 194 TFEU is not exclusive, it can be exercised directly in the external field via the Union's membership to the ECT. [32] It can also be argued that the Union's exclusive competence covers the largest part of

[27] Merijn Chamon, 'Constitutional Limits to the Political Choice of Mixity', in Eleftheria Neframi and Mauro Gatti (eds) *Constitutional Issues of EU External Relations Law* (Nomos 2018) 137-165; Inge Govaere, 'Facultative and Functional Mixity Consonant with the Principle of Partial and Imperfect Conferral' in Merijn Chamon and Inge Govaere (eds) *EU External Relations Post-Lisbon* (Brill 2020) 22-47.

[28] Opinion 2/15 (n 21) paras 213-217.

[29] 'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'.

[30] CJEU, Case C-600/14, *Germany v Council* (2017) ECLI:EU:C:2017:935, para 52.

[31] 2006/500/EC: Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty, OJ L 335M, 13 December 2008, 374–382.

[32]Yuliya Kaspiarovich and Ramses Wessel, 'Unmixing Mixed Agreements- Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements", in Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous and Ramses Wessel (eds), *The EU and its Member States's Joint Participation in International Agreements* (Hart Publishing 2022) 287, 291. It should be noted that the exercise of the Union's competence is not deducted by the conclusion of a mixed agreement. In Opinion 1/19, the Court of Justice found that 'the conclusion of a mixed agreement by the European Union and its Member States in no way implies that its Member States exercise, in that event, competences of the European Union or that the European Union exercises competences of those States; rather, each of those parties acts exclusively within its sphere of competence.' CJEU, Opinion 1/19, *Istanbul Convention* (2021) ECLI: EU:C:2021:198, paras 240, 258, 259. However, the Union's shared competence can be exercised directly in the external field through the adoption of a decision in the body established by the mixed agreement. See Case C-600/14 (n 30) paras 49-51. It could therefore be argued that the adoption of the Union's position in the ECT would be the expression of the exercise of its shared competence. Although such an exercise can be limited in time in the sense that the Member States will be able to exercise again their competence in the future (see Council Decision (EU) 2022/1158 of 27 June 2022 on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and Ukraine on the carriage of freight by road, OJ L 179, 06 June 2022, 1–3), in the case of the ECT the exercise of the Union's competence through the adoption of the decision on the modernised ECT could be considered as an argument in favour of ending mixity. See also infra Sections 3.1 and 4.

the ECT, thereby absorbing provisions of shared competence. It can thus be argued that mixity of the ECT was no longer mandatory under the Lisbon Treaty.

However, avoiding mixity in the conclusion of an international agreement is not the same as ending existing mixity. The modernised ECT was negotiated and is to be adopted in the Energy Charter Conference, an intergovernmental organization where the Member States of the Union are already parties. In this context, the Union's participation in the modernisation process is based on Article 218 (9) TFEU and the adoption of the modernised ECT by the Energy Charter Conference is subject to the Union's approval.[33] But following Article 42(3) of the ECT, the adopted amendments shall be communicated by the Energy Charter Conference Secretariat to the Depositary, "which shall submit them to all Contracting Parties for ratification, acceptance or approval". In other words, to "unmix" the ECT requires the withdrawal of the Member States from the existing Treaty. The question then is whether non-mixity is mandatory and whether it is possible to find an obligation on the part of the Member States to withdraw from the ECT in order to allow the Union to exercise alone its competence in the modernisation process.

Unmixing a mixed agreement is indeed possible. The Court of Justice acknowledged that since the judgment of 12 December 1972, *International Fruit Company and Others*,[34] concerning the position of the European Community in the GATT, the Union "can succeed the Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences".[35] However, on the one hand, the context of the GATT was different, since in the ECT the exclusivity of the Union's competence does not derive from the principle of conferral, but from the political will of the Member States.[36] On the other hand, even if the Union's exclusive competence is recognised, substitution is a choice and not an obligation for the Member States, since the principle of sincere cooperation is sufficient to ensure that joint participation does not affect the Union's

[33] The decision on whether the Union or the Member States will exercise the participation and voting rights falls under the management of mixity; see infra, under 3.
[34] CJEU, Joint Cases 21/72 to 24/72 (1972) ECLI:EU:C:1972:115, paras 10-18.
[35] Opinion 2/15 (n 21) para 248.
[36] Inge Govaere, argues that 'equating exclusive competence with a quasi-automatic application of the principle of substitution disregards the International Fruit Company conditions'. Inge Govaere (n 27) 45.

competence or jeopardise the objective of unity in external representation.[37] In addition, joint participation of the Union and its Member States in case of EU exclusive competence may be required by legal or practical reasons, in which case mixity is functional.[38] Indeed, Article 36 (7) of the ECT, which states that the number of votes of a Regional Economic Integration Organisation must be equal to the number of its member states, Contracting Parties to the ECT, could be interpreted as requiring joint participation. As a result, even if it is accepted that a new Energy Charter Treaty could be approved by the Union alone, there is no obligation for the Member States of the Union which are parties in the Energy Charter Conference to withdraw with the view to unmix the ECT.[39]

The question of unmixing the ECT is obviously hypothetical, as the end of mixity was not envisaged in the ECT modernisation process.[40] However, it is important for understanding the role of the Member States in the ECT, especially after the withdrawal of the Union, when the remaining Member States will exercise, upon authorization, an exclusive competence of the Union. If the unmixing of the ECT was not an option, it was not only in the name of functional mixity, because of international law constraints. Mixity is, after all, a constitutional requirement of the EU legal order.

More specifically, in Opinion 2/15 the Court of Justice clarified the importance of provisions related to Investor-State dispute settlement (ISDS) from a competence perspective, irrespective of their compatibility with the autonomy of the EU legal order.[41] According to the Court, recourse to arbitration removes disputes from the jurisdiction of the domestic courts and, consequently, ISDS provisions cannot be regarded as ancillary, but fall within the sphere of Member States' competence.[42] They are related to the Member States' systemic obligation to ensure that domestic

[37] This question concerns the management of mixity, see infra under 3.
[38] Inge Govaere (n 27) 40.
[39] Another question is the obligation of withdrawal because of the withdrawal of the Union. This question will be discussed under 3.
[40] The Council's decision authorizing the opening of negotiations explicitly concerned the extent to which the ECT fell within the competence of the Union (Council Decision of 15 July 2019, 10745/19). Moreover, although the EU, Euratom and the Member States acted as a single entity during the negotiating process, the negotiating directives of the Council clearly indicated that this was "without prejudice to the division of competences between the Union and the Member States as laid down in the Treaties".
[41] See infra.
[42] Opinion 2/15 (n 21) para 292. See Gesa Kübek and Isabelle Van Damme, 'Facultative Mixity and the European Union's Trade and Investment Agreements' in Merijn Chamon and Inge Govaere (n 27) 148.

courts participate in the judicial system of the Union, by implementing EU law, providing effective remedies and cooperating with the Court of Justice.[43] In addition, when the Court of Justice referred to the political will to exercise shared competences in the areas covered by Opinion 2/15, it did not include ISDS provisions.[44] Consequently, the existence of provisions allowing recourse to arbitration makes the participation of the Member States indispensable and mixity of the modernised ECT mandatory.[45] In other words, the Union cannot participate in the ECT without its Member States, but the Member States can participate without the Union, after its withdrawal, with the authorization of the Council, because of the distinction between substantive provisions, which fall under the Union's competence, and ISDS provisions which fall under the Member States competence. Therefore, from the perspective of EU law, mixity of the ECT is a constitutional requirement, as long as the Union is a party to the ECT. After the withdrawal of the Union, mixity will continue to exist, but not through a mixed agreement, since the Member States that remain party to the ECT can only act in a field of exclusive substantive competence of the Union with its authorization and in its interest.[46]

The position of the Court of Justice in Opinion 2/15 on ISDS clauses in investment treaties makes mixity a constitutional requirement from the perspective of the EU legal order. In the context of the ECT, as in all mixed agreements, mixity has been framed by the principle of sincere cooperation to ensure unity in external representation. However, in the specific context of the ECT, the requirement of unity was not sufficient to enable the modernised ECT to be adopted. The Member States' status as autonomous contracting parties may have contributed, under political internal pressure, to their opposition to the modernised text, and in any case, it

[43] This obligation derives from Article 19 TEU, according to which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Laurens Ankersmit, 'Withdrawal from Mixed Agreements under EU law: the Case of the Energy Charter Treaty' 2023 Europe and the World: A Law Review *Europe and the World: A Law Review* 4-5 https://doi.org/10.14324/111.444.ewlj.2023.01.

[44] Opinion 2/15 (n 21) para 293; Case C-600/14 (n 30) paras 67-68.

[45] Merijn Chamon (n 27) 140 et seq; Luca Prete, 'Facultative Mixity after the Singapore Opinion: Clarity or Fresh Doubts?' in Merijn Chamon and Inge Govaere (n 27) 216-221. It could be argued that the Court of Justice has qualified the competence of the Member States relating to ISDS provisions as shared, which makes it possible to consider its exercise by the Union alone. However, mixity could be considered to be necessary due to the fact that only States may participate in the ICSID Convention or the UNCITRAL. See the position of the Court in the *Antarctic MPA* judgment, CJEU, Joined Cases C-626/15 and C-659/16, *Commission v Council* (2018) ECLI:EU:2018:925 and Gesa Kübek and Isabelle Van Damme (n 42) 148.

[46] See infra, under 4.

revealed the limits of the principle of sincere cooperation in the face of strategic choices.

3. The management of mixity : the role of the principle of sincere cooperation

As long as the Union is a party to the ECT, joint participation is subject to the principle of sincere cooperation.[47] The Union and its Member States must cooperate closely in the exercise of participation and voting rights in the Energy Charter Conference. In the modernisation process of the ECT, the need for unity was evident in the negotiation and adoption of the modernised text (3.1.), but also in the withdrawal process (3.2).

3.1. Scope and limits of the principle of sincere cooperation in the adoption of the modernised ECT

The modernisation process took place within the institutional framework established by the ECT. The amendments to the ECT and its annexes resulting from the negotiations, as well as the provisional application of these amendments took the form of a decision of the Energy Charter Conference, which had to be approved by the contracting parties.

From the point of view of the EU and its Member States, as in all mixed agreements, the exercise of voting rights is alternative, in the sense that the Union "shall not exercise its right to vote if its Member States exercise theirs, and vice versa."[48] Moreover, when voting, the Union has a number of votes equal to the number of its Member States which are contracting parties.[49] These rules must be

[47] The principle of sincere cooperation (Article 4(3) TEU) requires that Member States and EU institutions have 'an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement'. CJEU, Case C-459/03, *Commission v Ireland (MOX Plant)* (2006) ECLI:EU:C:2006:345, para 175. The Court of Justice clarified that the principle of sincere cooperation is of general application and applies independently of the rules governing the distribution of competence and that the duty of loyal cooperation in case of mixity is reciprocal. CJEU, Case C-246/07, *Commission v Sweden (PFOs)* (2010) ECLI:EU:C:2010:203, para 71. Piet Eeckhout, *EU External Relations Law* (OUP 2011) 241 et seq; Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals', in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (OUP 2018) 1174, 1185; Christophe Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation', in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010) 87; Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 183 et seq.

[48] Article 36(7) ECT; Article 12(4) of the Energy Charter Protocol on energy efficiency and related environmental aspects.

[49] *Ibid.*

read in the light of the principle of sincere cooperation, and taking into account the objectives of unity in external representation and effectiveness of the Union's action.

The principle of sincere cooperation applies at two levels. First, on the question of whether the decision of the Energy Charter Conference on the modernised ECT should be approved by the Council, on behalf of the Union, or by the Member States. In general, the answer to such a question depends on the area of competence to which the matter under discussion belongs. In the case of shared competence, it will be necessary to decide whether the participation and voting rights should be exercised by the Union, through a Council decision on the procedural legal basis of Article 218 (9) TFEU, or by the Member States. Second, if the participation and voting rights are to be exercised by the Union, the principle of close cooperation applies at the stage of the adoption of the Council's position. As is well known, in the modernisation process of the ECT, the decision of the Energy Charter Conference was to be approved by the Council, but the qualified majority required for the adoption of the Council's position in favour of the modernised ECT was not reached.

As regards the exercise of the participation and voting rights in the ECT, it was clear from the adoption of the negotiating directives by the Council that they should be exercised by the Union. Mixity did not affect the negotiating power of the EU, as the Member States agreed on the need not to jeopardise unity and to efficiently promote green transition objectives. However, the note in the negotiating directives that the Commission should conduct the negotiations "without prejudice to the division of competences", [50] raises the question of the exercise of the Union's competence. The Council decision proposed by the Commission for the approval of the modernised ECT mentions Articles 207 TFEU and 194 TFEU as substantive legal basis. The question is therefore whether the approval of the decision of the Energy Charter Conference on the modernised ECT by the Council is to be understood as the exercise of the Union's shared competence in the field of energy. The Union's adoption of the modernised ECT could be seen as an expression of unity in international representation without exercising the Union's shared competence in the field of energy. The new ECT should be approved by the Member States, after the adoption of the decision on its modernisation. But the approval of the modernised ECT by the Union could also be seen as an exercise of its shared

[50] Supra (n 40).

competence in the field of energy, in which case mixity would be imposed only by the ISDS provisions. The question of the exercise of the Union's shared competence through the adoption of the modernised ECT has no practical consequences for mixity, as the new ECT should be approved by the Member States, but it does have an impact on the Member States' obligations in the event of a withdrawal of the Union, which will be discussed below. From the point of view of the management of mixity in the ECT, the approval of the decision of the Energy Charter Conference on the modernised ECT by a decision of the Council, whether it is interpreted as the exercise of the Union's shared competence or merely as a representative mandate conferred on the Union, ensures unity in external representation and thus fulfils the requirement of sincere cooperation.

However, the principle of sincere cooperation reached its limits at the level of the adoption of the Council's decision expressing the position of the Union at the 33rd meeting of the Energy Charter Conference.[51] Most Member States considered the results of the modernisation process to be insufficient, as the modernised ECT did not prohibit the protection of fossil fuel investors and was not in line with the Paris Agreement, the Union's environmental standards and the objectives of the European Green Deal. As a result, the Member States failed to reach a qualified majority in the Council in favour of the modernisation of the ECT.

The exercise of the Council's legislative competence does not fall within the scope of the principle of sincere cooperation, since the exercise of the voting rights in the Council is at the discretion of the Member States.[52] Although the Court of Justice has acknowledged the Member States' obligation, in case of mixity and with the view to the adoption of the Council's position on the basis of Article 218 (9) TFEU, to facilitate the exercise of the Union's competence,[53] that obligation consists in the

[51]European Commission, 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 final.

[52] Marc Blanquet, *L'article 5 du Traité C.E.E,* (LGDJ 1994) 136 et seq.

[53] The obligation not to jeopardise unity in external representation seems to be a more important constraint on the Member States, as it relates to the Union's objective of actorness, irrespective of any concrete limitation of the Member States' competence. In *PFOs* (n 47) the Advocate General referred to the obligation to facilitate the exercise of the Union's competence, given that Sweden had expressed an individual position while the Council had not yet reached a common position. Opinion of AG Maduro, Case C-246/07, *Commission v Sweden (PFOs)* (2009) ECLI:EU:C:2009:589 paras 47, 58-59. However, the Court of Justice referred to the obligation not to jeopardise unity. CJEU (n 47) paras 103-104. Peter Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for

duty to abstain from expressing an individual position and to participate in the adoption of the Council's decision, but does not imply an obligation to vote in favour of that decision.

Similarly, the obligation of the Member States to facilitate the Union's participation in international agreements[54] is a best endeavors obligations as contracting parties and not a voting obligation in the Council. The principle of sincere cooperation does not have a wider scope in the field of energy, despite the reference to the spirit of solidarity in Article 194 TFEU.[55] The Court of Justice recognized in the *OPAL pipeline* judgment, that the principle of energy solidarity entails rights and obligations for both the European Union and the Member States, which are bound by an obligation of solidarity towards each other and towards the common interest of the European Union and the objectives of energy policy.[56] However, the specific legal duties imposed by the principle of energy solidarity consist rather in mutual support in times of crisis to enable the Member States to ensure the effective implementation of EU policies through the principle of sincere cooperation.[57] In other words, the principle of energy solidarity does not interact with the principle of sincere cooperation but precedes its application. Consequently, it does not intervene in the exercise of voting rights in the Council in order to establish an obligation to support the proposed decision.

The question then arises as to whether the withdrawal of the dissenting Member States from the ECT could facilitate the adoption of the Council's decision, even with a reduced number of votes. This would mean that the Union could remain in the ECT without the dissenting Member States and without being obliged to withdraw itself. As it will be discussed in the next session, the Union's participation in a mixed agreement does not necessarily require the participation of all Member States, but all

---

Autonomous Member State Action in the Field of External Relations', in Marton Varju and Veronika Czina (eds) *Between Compliance and Particularism* (Springer 2019), 283, 291.

[54] CJEU, Joined cases 3, 4 and 6-76, *Cornelis Kramer and others* (1976) ECLI:EU:C:1976:114 para 45.

[55] Article 194 (1) TFEU reads: 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, *in a spirit of solidarity* between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

[56] CJEU, Case 848/19 P, *Germany v Commission* (2021) ECLI:EU:C:2021:598, para 49.

[57] Federico Casolari, 'The Odd Couple: A Legal Reflexion on the Interaction between Loyalty and Solidarity in the EU Legal System' (2023) 2 *Nordic Journal of European Law* 84, 93.

Member States participate in the adoption of the Council's decision to conclude the agreement on behalf of the Union. Concluding an agreement as a reduced Union, would be tantamount to establishing an enhanced cooperation, which is not possible as long as the ECT in its substantive part, is considered to fall within the exclusive competence of the EU. Consequently, the Member States that reject the modernised ECT cannot be regarded as obliged to withdraw in order to allow it to be adopted by a reduced EU. The obligation of the Member States under Article 327 TFEU not to impede the implementation of an enhanced cooperation by the participating Member States, presupposes that such an enhanced cooperation can be established.

The failure to adopt the modernised ECT, and the vague of withdrawals that followed, revealed the limits of the Union's efficiency in promoting its sustainability standards in the investment protection regime. The constitutional requirements of the EU legal order made the Union's withdrawal a necessity, raising the question of the obligation of a coordinated withdrawal in the name of unity and efficiency.

3.2. Withdrawal from the ECT: between obligation and choice

The non-adoption of the modernised ECT did not allow the Union to remain a contracting party. Nor was it possible for the Union to adopt the modernised ECT after the withdrawal of the Member States that objected, with the number of votes of the remaining Member States. The EU's participation in a mixed agreement by qualified majority concerns the Union as a whole, even if some Member States are not contracting parties, unless the agreement has a limited territorial scope of application within the Union, which is not the case with the ECT. Moreover, the hypothesis of a reduced Union approving the modernised ECT would be equivalent to an enhanced cooperation, which is incompatible with the exclusive competence claimed by the Union over the substantive provisions of the ECT.[58] Consequently, the withdrawal of the Union from the non-modernised ECT appears to be imposed, not only because of the conflict with the Union's climate goals under the European Green Deal and the Paris Agreement, but also because of the lack of legitimacy following the withdrawal, or the intention to withdraw, of the Member States forming the blocking minority. The rejection of the modernised text and the denunciation of

[58] It could be argued that the reduced Union is exercising a shared competence directly in the external field, via the approval of the modernised ECT. However, the establishment of an enhanced cooperation is dependent on a specific procedure, requiring the approval of the Council. See Articles 329-330 TFEU.

the existing ECT is equivalent to the withdrawal of the consent within the Council that allows the Union to be a contracting party. The Commission had no choice but to propose the Union's withdrawal.

Beyond the substantive reasons for withdrawal, which are related to the Unions regulatory autonomy and the preservation of its sustainability standards, there is also the question of unity and credibility of the Union as an international actor. A coordinated withdrawal would meet these objectives and would allow the Union to consider the establishment of a new legal framework. On 24 November 2022, the European Parliament adopted a resolution on the outcome of the modernisation, calling for the coordinated withdrawal of the EU and its Member States from the ECT.[59] On 7 July 2023, the European Commission proposed a coordinated withdrawal.[60] However, several Member States have expressed their wish to remain parties to the ECT. The question therefore arises as to whether the principle of sincere cooperation entails an obligation for Member States to withdraw and, moreover, to withdraw in a coordinated manner.

Withdrawal could be seen as the counterpart to the ratification of a mixed agreement. It is therefore important to recall the debate on the obligation of result as to the conclusion of a mixed agreement, given the Member States' loyalty obligation to facilitate the accomplishment of the Union's tasks, which has been interpreted as limiting the Member States' discretion each time that the Union has begun to exercise its competence.[61] The negotiation process of a mixed agreement could indeed be considered as the beginning of the exercise of the Union's competence. However, no obligation to ratify a mixed agreement has been recognised. Notwithstanding the status of a mixed agreement in the EU legal order after its entry into force, the conclusion of a mixed agreement is governed, from the point of view of EU law, by Article 218 TFEU. The Council's decision on the signature, provisional application and conclusion of an international agreement under this provision is limited to the scope of the exercised EU competence and the principle of close cooperation does not justify an exemption from the procedural rules of Article 218 TFEU.[62] Consequently, the approval of the mixed agreement by the Member States

[59] Supra (n 16).
[60] Supra (n 17).
[61] CJEU, Case C-246/07 (n 47).
[62] CJEU, Case C-28/12, *Commission v Council* (2015) ECLI:EU:C:2015:282 para 55.

does not fall under EU law, and the principle of sincere cooperation does not apply at this stage. Although the non-ratification of a mixed agreement by the Member States may lead to an incomplete or partial mixed agreement,[63] or even prevent its entry into force,[64] thus jeopardizing the attainment of the Union's objectives, there is no obligation to ratify under EU law.[65] Member States act as contracting parties under international law in the exercise of their own competence. They should do so in accordance with their national constitutional requirements and must refrain from taking a common decision in the Council.[66]

As regards the requirement of unity, the Court of Justice has subsequently clarified that the Council may await the common agreement of the Member States before adopting the decision concluding a mixed agreement on behalf of the Union. However, the common accord should not be expressed by a Council decision, nor should the adoption by the Council of the decision concluding the agreement be made conditional on the prior establishment of such a common accord.[67] Consequently, such a common accord is more a political guarantee than an obligation under EU law.

Does the absence of an obligation under EU law to conclude a mixed agreement and to express a common accord on a coordinated conclusion also apply in the case of withdrawal? If withdrawal is seen as the counterpart of the conclusion, then we could affirm that the principle of sincere cooperation does not entail an obligation to

[63] It is suggested that a partial mixed agreement is based on the fact that the Union and its Member States each act exclusively within their spheres of competence. See Laurens Ankersmit (n 43) 10; CJEU, Opinion 1/19 (n 32) paras 259-260. This argument confirms the absence of an obligation of the Member States to ratify a mixed agreement, that could derive from the principle of sincere cooperation: if the Memher States do not act in the sphere of EU competence, the Union cannot impose on the Member States the ratification of a mixed agreement as an obligation to act on behalf of the Union.

[64] Nanette Neuwahl, 'Editorial Comment' (2018) 23 European Foreign Affairs Review 145, 148.

[65] The obligation to facilitate the exercise of the Union's competence through the conclusion of a mixed agreement, as well as the obligation to refrain from jeopardizing the Union's objectives, are in the case of ratification of a mixed agreement best endeavors obligations, rather than obligations of result. Joni Heliskoski (n 47) 1192; Marcus Klamert (n 47) 203; Guillaume Van Der Loo and Ramses Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 CMLR, 744-745. The obligation to refrain from jeopardizing the Union's objectives also found expression in the duty du remain silent, to refrain from adopting an individual position. See CJEU, Case C-246/07 (n 47). Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 E.L.Rev 524-541. However, the duty to remain silent is an obligation to refrain, while the ratification of a mixed agreement requires taking action. Laurens Ankersmit (n 43) 9.

[66] CJEU, Case C-28/12 (n 62).

[67] CJEU, Opinion 1/19 (n 32) paras 249, 274. Panos Koutrakos and Viktorija Soneca, 'The Future of the Instanbul Convention Before the CJEU' in Nicolas Levrat et al. (n 32) 189, 200-204.

withdraw, nor an obligation to withdraw in a coordinated manner, since the Member States still act as contracting parties under international law. However, the withdrawal takes place after the entry into force of a mixed agreement, which has already acquired the status of an EU agreement and is a source of EU law obligations for the Member States. Is withdrawal to be considered as falling under the management of mixity, which implies an obligation of sincere cooperation to ensure unity in external representation? Is there an obligation to withdraw if the Union's shared competence has been exercised in the context of the mixed agreement and the Member States cannot invoke the exercise of their reserved competence?

Firstly, an obligation of coordinated withdrawal is linked to the status of the EU and its Member States as contracting parties. It should be recalled that the application of the principle of sincere cooperation in the management of mixity entails an increased obligation of result on the part of the Member States. But does the objective of unity imply that the Union and its Member States should be considered as a single contracting party to a mixed agreement once it has entered into force? The practice of mixed agreements shows that the status of contracting party is determined not by EU law, but by international law. It is the mixed agreement that determines the exercise of participation rights and the status of contracting party. Mixed agreements may refer to the 'EU Party' to be defined as 'the Union and its Member States, in accordance with their respective competences',[68] however the Union and its Member States are autonomous contracting parties as it concerns the consent to be bound and the entry into force of the mixed agreement.[69] The objective of unity, which is covered by the EU law obligation of close cooperation, does not affect the perception of the contracting parties beyond what results from the text of the mixed agreement or from its objective. For example, despite the existence of a declaration of competences, in the absence of a clear division of responsibilities for the implementation of a mixed agreement, the Union and its Member States are to be considered as jointly and severally liable.[70] In addition, in the absence of a

[68] Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part, OJ L 216, 24 August 2018, 4, Article 45.
[69] Sabrina Schaeffer and Jed Odermatt, 'Nomen est Omen? The Relevance of 'EU Party' in International Law' in Nicolas Levrat et al. (n 32) 131, 145.
[70] Andrés Delgado Casteleiro and Cristina Contartese, 'International Responsibility of the EU and/or its Member States in International Agreements' in Nicolas Levrat et al. (n 32) 171, 176 et seq.

disconnection clause in multilateral mixed agreements, according to which the obligations entered into do not apply between the Member States of the Union in so far as EU law applies,[71] the Member States of the Union are to be regarded as autonomous contracting parties from the point of view of international law, and the conventional links between them are established. The non-intra-EU application of a mixed agreement is an obligation of EU law arising from the need to preserve the autonomy of the EU legal order without affecting the third States parties to a mixed agreement, in the absence of a disconnection clause. This is particularly important in the context of the ECT, where the intra-EU application of the ISDS provision raises a serious incompatibility with EU law, as will be discussed below. Disconnection clauses are not necessary in the case of bilateral mixed agreements, since in this case the lack of conventional links between the Member States of the Union is inherent in the objective and the structure of the agreement. However, even in this case the Member States of the Union are considered to be autonomous contracting parties.[72]

Consequently, the management of mixity, which is covered by the principle of sincere cooperation, does not include the status of contracting parties after the conclusion of a mixed agreement. The fact that the United Kingdom has not withdrawn from multilateral mixed agreements[73] confirms that, from the point of view of international law, the Member States remain autonomous contracting parties. As such, the Member States of the Union can exercise their prerogative of withdrawal without any obligation arising from the requirement of unity and from the principle of sincere cooperation in this respect. Coordinated withdrawal is therefore not an obligation under EU law.

The next question is whether the withdrawal of the Member States is an obligation under EU law. This is no more related to the management of mixity but to the division of competences. The absence of a Member States' competence does not prevent them from being contracting parties to an international agreement, however,

[71] Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christophe Hillion and Panos Koutrakos (n 47) 160.
[72] Supra (n 69).
[73] The withdrawal of the UK from bilateral mixed agreements was necessary because of the bilateral structure, while in multilateral mixed agreements the UK continued to be contracting party with adjustments as to the exercise of participation rights. Christine Kaddous and Habib Badjinri Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in Nicolas Levrat et al. (n 32) 271, 277.

they can act in an area of exclusive EU competence only with an authorization. [74] It has been argued that the Member States are not obliged to unmix a mixed agreement in the event of preemption following the evolution of the Union's competence.[75] However, this assertion refers to the agreements to which the Union remains a party, and the management of mixity therefore falls under the principle of sincere cooperation. On the other hand, if the Union withdraws from a mixed agreement falling within its exclusive competence, the Member States cannot remain parties to it without the Union's authorization.

In the ECT, beyond the ISDS provisions which fall within the competence of the Member States, the Union's substantive competence is not exclusive, as energy falls under shared competence, as well as non-direct investments. The Union's participation in the modernisation process could be seen as an exercise of its shared competence, under Article 216 TFEU, but this was not the intention of the Council, which mentioned that the negotiating directives were without prejudice to the division of competences.[76] However, at the end of the modernisation process the institutions recognised that the exclusivity of the Union's substantive competence stems from the absorption doctrine, since most of the provisions of the ECT fall within the exclusive competence of the Union. The Member States' competence is limited to the ISDS provisions, which cannot be the basis for their discretion to remain contracting parties.

In the non-paper published on 7 February 2023,[77] following the announcement of the Member States' withdrawal, the European Commission sets out the various options for membership of the ECT. The Commission stresses that the Council's withdrawal decision requires the same legal basis as the decision to conclude an international agreement on behalf of the Union. Specifically, the Council's withdrawal decision is based on the procedural legal basis of Article 218 (6) (a) TFEU, in conjunction with the substantive legal bases concerning the common commercial

[74]Member States can participate in international agreements falling under the Union's exclusive competence if so empowered by the Union. CJEU, Case C-45/07, *Commission v Greece* (2009) ECLI:EU:C:2009:81, paras 30-31 ; CJEU, Case C-399/12, *Germany v Council (OIV)* (2014) ECLI:EU:C:2014:2258, para 52; CJEU, Case C-24/20, *Commission v Council (Accession to the Geneva Act)* (2022) ECLI:EU:C:2022:911, paras 99-102. Marise Cremona, 'Member States Agreements as Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 291.
[75] Supra, under 2.
[76] Supra (n 26).
[77] Supra (n 18).

policy and the energy policy (Articles 207 and 194 TFEU). Withdrawal is thus an exercise of the Union's competence, and, as the Commission points out, if the Member States remain contracting parties, they may affect the obligations arising from the acts of the EU institutions that decided the EU's withdrawal from the ECT.[78] It could be argued that exclusivity derives not only from the exercise of the Union's competence to conclude an international agreement, but also from the exercise of the competence to withdraw. Moreover, as the Commission points out in the non-paper, if the Member States remain contracting parties to the ECT after the Union's withdrawal, they risk jeopardising the attainment of the Union's energy and trade policy objectives. Consequently, in the absence of a coordinated withdrawal, the Member States have an obligation to withdraw from the ECT, both because of the Union's withdrawal and because of the extent of the Union's substantive competence. It is for to the Union to authorize those Member States that wish to remain contracting parties to the ECT to do so, on the basis of Article 2 (1) TFEU, in conjunction with the substantive legal basis of Articles 194 and 207 TFEU. [79] Non-withdrawal is thus a choice for the Union, not for the remaining Member States, while the obligations of the Member States under EU law are not limited to the management of mixity.

4. The Member States' obligations in the ECT beyond mixity

The Member States have a number of obligations in the framework of the ECT, beyond those related to mixity, which derive from the principle of sincere cooperation or are inherent in their status as Member States of the Union. Member States have an obligation not to apply the ISDS provisions of the ECT in their mutual relations (4.1); despite their withdrawal, they are bound by the ECT as an EU agreement (4.2); they have an obligation to ratify the modernised ECT and to promote the Union's sustainability standards after the Union's withdrawal from the ECT (4.3).

4.1 A systemic obligation to preserve the autonomy of the EU legal order

As an obligation arising from the principle of sincere cooperation to ensure effective implementation of EU law, the Member States must eliminate

[78] Ibid, 4.
[79] Laurens Ankersmit, (n 43) 8.

incompatibilities of international agreements with the EU legal order.[80] The conflict between investment protection provided under the ECT and the level of environmental protection in the EU should be resolved by modernising the ECT and promoting the European sustainability standards. The preservation of regulatory autonomy in the EU is a condition for the conclusion of an international agreement on investment protection.[81] However, after the conclusion of the ECT, the Court of Justice recognised another incompatibility with the autonomy of the EU legal order, namely the application of Article 26 of the ECT between the Member States, concerning recourse to arbitration proceedings in disputes between investors and the contracting parties.

In *Komstroy,*[82] along the lines set out in *Achmea*[83] and confirmed by the *PL Holdings* judgment,[84] the Court of Justice held that the application of Article 26 of the ECT to disputes within the Union leads to disregard for the jurisdiction of national courts and, consequently, undermines the principle of mutual trust and the autonomy of the Union's legal order. The autonomy of the EU legal order may also be undermined by the interpretation of EU law by the arbitral tribunals,[85] or by the enforcement of arbitral awards.[86] However, the requirement not to apply Article 26 of the ECT between Member States concerns the systemic obligation of the Member States to preserve the jurisdiction of the domestic courts in disputes within the Union and, thus, mutual trust which is the basis of the EU legal order. This obligation goes beyond the obligation of sincere cooperation to preserve the exclusive jurisdiction of the Court of Justice and to ensure the implementation of EU law. Mutual trust is the basis of the EU legal order in which sincere cooperation applies, and the obligation of Member States not to jeopardise it by resorting to arbitration in their mutual relations is inherent in their membership of the Union.

---

[80] The obligation to eliminate incompatibilities concerns international agreements concluded by the Member States before their accession to the EU (Art 351 TFEU) as well as incompatibilities occurring after the entry into force of an international agreement concluded by the Union or as mixed agreement. Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2015) 321 et seq.
[81] CJEU, Opinion 1/17 *EU-Canada CETA* (2019) ECLI:EU:C:2019:341, paras 137-161.
[82] CJEU, C-741/19 (n 11).
[83] CJEU, Case C-284/16, *Slowakische Republik v Achmea BV* (2018) ECLI:EU:C:2018:158.
[84] CJEU, Case C-109/20, *PL Holdings* (2021) ECLI:EU:C:2021:875.
[85] In Opinion 1/17 the Court of Justice held that respect of the autonomy of the EU legal order implies that arbitral tribunals must treat EU law as a matter of fact. CJEU, *Opinion 1/17* (n 82) paras 120-136. Mustafa Karayigit, 'The Compatibility of the ISDS Mechanism under the Energy Charter Treaty with the Autonomy of the EU Legal Order' (2024) 29 European Foreign Affairs Review 85, 96 et seq.
[86] CJEU, Case C-638/19 P, *Commission v European Food and Others* (2022) ECLI:EU:C:2022:50.

Such an approach affects the external perception of the obligation not to apply Article 26 of the ECT to disputes within the Union. From the perspective of third States, the non-application of Article 26 ECT between the Member States of the Union affects their status as contracting parties and must be reflected in the text of the ECT.[87] An implicit disconnection clause cannot be considered to result from the joint participation of the Union and its Member States. Disconnection clauses are inserted in mixed agreements[88] in order to preserve the autonomy of EU law and imply that the Member States of the Union will apply EU law in their mutual relations and not the provisions of the agreement. Such a disconnection clause does not affect the expectation of third parties that the mixed agreement will be fully respected since the relevant provisions of the agreement apply in substance between Member States via EU law. This is not the case with Article 26 of the ECT, because the requirement of the autonomy of the EU legal order consists in the non-application of a provision of the treaty between some of the contracting parties. Such an exclusion must be explicitly mentioned in the ECT, as a reservation to the enforcement mechanism of an international agreement. [89] Although this is not a question of mixity and of close cooperation, the need to explicitly exclude the intra-EU application of Article 26 of the ECT stems from mixity and the fact that the Member States of the Union are autonomous contracting parties to the ECT.[90]

---

[87] Alan Dashwood argues against the expansive reading of the *Achmea* judgement because arbitral tribunals in the context of the ECT do not apply EU law, and because the dispute settlement mechanism in Article 26 ECT ensures equality of treatment and respect between the Member States and third country parties to the ECT and is created by the collective will of the parties to the ECT. Alan Dashwood, 'Article 26 ECT and intra-EU disputes - the case against an expansive reading of Achmea' (2021) 46 E.L.Review 415-434. Similarly, most arbitral tribunals have held that the Court's position is of limited application and cannot be applied in the ECT. See Venetia Argyropoulou, '*Vattenfall* in the Aftermath of *Achmea*: Between a Rock and a Hard Place?' (2019) 4 EILA Rev. 203; Mustafa Karayigit (n 86), 92.

[88] Disconnection clauses usually concern substantive provisions of mixed agreements, to a large extent covered by the Union's competence and are followed by the affirmation of compliance with the obligations stemming from the agreement. Marise Cremona (n 71) 160, 164.

[89] It should be noted that in order to prevent investors from using shell companies in order to qualify for non-EU home state status and thus benefit from the application of Article 26 of the ECT, the Commission has proposed to limit the definition of investors to those engaged in substantial commercial activities in the home state. In addition, in its proposal to modernise the ECT, the Commission has attempted to exclude from its scope the settlement of disputes concerning the cessation of state aid and subsidies. The aim is for the contracting parties not to undertake not to modify the legal and regulatory framework in the name of investor protection. https://energy.ec.europa.eu/system/files/2021-02/eu_submission_-_revised_definition_of_economic_activity_in_the_energy_sector_0.pdf.

[90] The effect of a disconnection clause could also be derived from the definition of the contracting parties in agreements where it is stipulated that the EU and its Member States form a single contracting party in the ECT.

Article 24 (3) of the modernised ECT provides for such a disconnection clause.[91] However, pending the adoption of the modernised ECT, the Commission has proposed the conclusion of an agreement between the Union and its Member States with the effect of a disconnection clause. Although the compatibility of such an *inter se* agreement with Article 16 of the ECT is debated,[92] it can be argued that is in line with the international law of treaties.[93] Moreover, Article 16 is deleted in the modernized ECT. On 26 June 2024, 26 Member States and the European Union signed an *inter se* declaration with immediate effect the text of which is identical to the *inter se* agreement and launched the approval process of the agreement.[94] The European Commission will present a proposal for a Council decision on the accession of the Union and Euratom to the agreement.

4.2. The ECT as a partial mixed agreement

The withdrawal of the Member States from the ECT raises the question of the effects of the ECT on those Member States as long as the Union remains contracting party.[95]

---

[91] During the negotiation process, as the reform of Article 26 ECT was not included in the list of areas for negotiation, the Court of Justice, in its Opinion 1/20, rejected as inadmissible Belgium's request concerning the interpretation of the compatibility of Article 26 TEC with the autonomy of the EU. CJEU, Opinion 1/20, *Draft modernised Energy Charter Treaty* (2022) ECLI:EU:C:2022:485. Alan Dashwood, '*Komstroy* and Opinion 1/20 - Curious and Curiouser' (2022) 59 CMLR 51, 57.

[92] Article 16 of the ECT provides that any subsequent agreement by parties to the ECT concerning the subject matter of investment protection and dispute settlement cannot derogate from the provisions of the ECT, consequently, the ECT regime prevails over other treaty obligations. Agata Daszko, 'The Energy Charter Treaty at at Critical Juncture: of Knowns, Unknowns, and Lasting Significance' (2023) Journal of International Economic Law 720, 731; Michael De Boeck, *EU Law and International Investment Arbitration. The Compatibility of ISDS in Bilateral Treaties (BITs) and the Energy Charter Treaty (ECT)* (Brill 2022) 101 et seq; Johannes Tropper, 'An inter se Modification of the ECT to Exclude Intra-EU Arbitration -How Can it Work?' (2023) Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2023/06/19/an-inter-se-modification-of-the-ect-to-exclude-intra-eu-arbitration-how-can-it-work/.

[93] Article 16 concerns the relationship between coexisting treaties within the meaning of Article 30 of Vienna Convention on the Law of Treaties. Pursuant to paragraph 5 of this Article, rules on the precedence between coexisting treaties are without prejudice to modification. Cécile Rapoport, 'Moderniser ou quitter le Traité sur la Charte de l'énergie: quels enjeux pour l'Union européenne et son order juridique ?' (2023) 1 R.A.E. 145, 149-150.

[94] https://diplomatie.belgium.be/en/news/energy-charter-treaty-member-states-sign-declaration-and-initial-inter-se-agreement-clarifying-non-applicability-ect-arbitration-provisions-intra-eu.

[95] Pursuant to Article 47(2) of the ECT, withdrawal takes effect upon the expiry of one year after the date of the receipt of the notification by the Depositary. The Union's withdrawal will be effective on 30 May 2025, while the withdrawal of Italy, France, Germany, Poland and Luxembourg is already effective.

Partial or incomplete mixed agreements raise in particular the question of the extent to which Member States which are no longer contracting parties are bound by the EU's participation in the agreement with respect to new investments. On the other hand, existing investments are covered by the sunset clause of Article 47 of the ECT, according to which, in the event of withdrawal by a contracting party, previously agreed investments continue to benefit from the protection of the treaty for 20 years. In this case, the question of the effects of the ECT as a partial mixed agreement concerns the extent to which the Member States that are no longer parties are bound by the Union's participation after the expiry of the sunset clause with regard to them.

It is argued that the Member States are bound by a mixed agreement in which they do not participate as far as the exclusive competence of the EU is concerned.[96] However, the specificity of the ECT, as an international agreement on the promotion and protection of investments and the establishment of an energy market, is that the Union's obligation towards its co-contracting partners is not limited to some of the substantive provisions of the agreement. And even Member States that are not parties to an agreement on investment protection may bear financial responsibility towards the injured investor under the EU regulation on financial responsibility in investment dispute settlement.[97] In other words, the division of competences does not affect the Union's overall commitment which may lead to the financial responsibility of the Member States, after use of Article 26 ECT towards the Union, irrespective of their own participation. However, the non-participation or withdrawal of a Member State from an agreement on investment protection means that the State in question, as a non-contracting party, is not bound by the dispute settlement provisions.

As a result, on the one hand, as long as the EU participates in the ECT, and in particular with regard to new investments, non-participating Member States will also

[96] Editorial Comments, 'The Dog That Did Not Bark, The EU and the Energy Charter Treaty' (2023) 60 CMLR 11; Lena Granvik, 'Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Nijhoff Brill 1998) 255, 262 et seq.

[97] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28 August 2014, 21. Angelos Dimopoulos, 'The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities' (2014) 51 CMLR 1671; Armin Steinbach, *EU Liability and International Economic Law* (2017 Hart Publishing) 151 et seq.

be obliged to comply with the investment protection provisions in order to avoid implicating the responsibility of the Union.[98] On the other hand, as the dispute settlement mechanism would not apply to the non-participating Member States, a domestic court seized of an investor-state dispute on the basis of Article 19 TEU would be obliged to interpret the balance between investment protection and sustainability standards in the light of the ECT as an agreement binding on the Union and thus covered by Article 216 TFEU. The Court of Justice has already considered the application of the ECT, in relation to Italy, a Member State that is not a party to it, [99] as well as the obligation of a national court to give a consistent interpretation in relation to a mixed agreement to which the Member State is not a party. [100]

If, however, it is considered that the Union cannot participate in the ECT without the Member States, even if it exercises its shared competence, because the ISDS provisions fall within the reserved competence of the Member States, the question arises whether the Union can act as a respondent in a case brought under Article 26 ECT for measures taken by the Member State which is no longer a party to the ECT. Laurens Ankersmit argues that in such a situation the Union would be acting ultra vires under EU law, and that the EU institutions should submit a declaration of competences stating that the Union is not exercising powers over Article 26 ECT, even though the ECT does not allow parties to make reservations and such an approach would not avoid the EU' liability under international law.[101] It could also be argued that the withdrawal of the Member States would make the ECT not a partial mixed agreement, but a reduced mixed agreement with no effect on the non-participating Member States. In such a case, an obligation of the domestic courts to interpret investment protection in the light of the ECT and in cooperation with the Court of Justice may be based on the European mandate of the domestic courts, which are bound by the obligation of uniform interpretation in the EU legal order. In *Komstroy,*[102] the ECJ the ECJ acknowledged its competence to interpret the concept of "investment" within the meaning of Articles 1 and 26 of the ECT, in a dispute

[98] Giammarco Rae, 'The Withdrawal of a European State from the ECT in Light of the *Achmea* Case' (2018) 3 EILA Rev 154, 170.
[99]CJEU, Joined Cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others (*2021), ECLI:EU:C:2021:280.
[100]CJEU, Case C-621/21, *Intervyuirasht organ na DAB pri MS* (2024), ECLI:EU:C:2023:314, paras 46-47.
[101] Laurens Ankersmit (n 43) 11.
[102] CJEU, C-741/19 (n 11).

between a Ukrainian investor and Moldova, in the application of the ECT outside the Union. Although the interpretation competence of the ECJ was based on the fact that the question was raised by the court of a Member State which is a party to the ECT[103] and thus on the need for a uniform interpretation of the ECT in case a future dispute would involve the State of the referring court,[104] the obligation of uniformity can be understood beyond the application of the ECT. The Court's assertion in *Komstroy* was not linked to the fact that the ECT is a mixed agreement, but stemmed from the principle of sincere cooperation, which underpins the status of a Member State's courts as judges of EU law, responsible for the uniform interpretation of investment protection rules. Consequently, as the ECT is an EU agreement, its substantive provisions apply in the non-party Member States, either by virtue of Article 216 TFEU or by virtue of the duty of sincere cooperation and, consequently, uniform interpretation incumbent on the domestic courts.[105]

4.3. The ECT after the Union's withdrawal

Failure to adopt the modernised ECT was not in line with the Union's objective of promoting sustainability standards. As remaining in the non-modernised ECT was not an option for the Union, and given the extent of the Union's exclusive competence, Member States remaining parties to the ECT cannot assume the obligations stemming from this treaty, unless the Union explicitly empowers the Member States to do so.[106] Authorising the Member States to remain contracting parties to the ECT could be in the Union's interest in view of the adoption of the modernised ECT.

The Council's decisions on the withdrawal of the EU and Euratom from the ECT are followed by two decisions on the position to be taken on behalf of the Union and

[103] The case concerned the annulment of an arbitration award the parties having fixed Paris as the seat of the arbitration.
[104] CJEU, C-741/19 (n 11), para 34. According to Art 19 TCE, para 1, 2nd sub paragraph, Member States shall establish the legal remedies necessary to ensure effective judicial protection in the fields covered by Union law.
[105] Eleftheria Neframi, 'La loyauté dans l'interprétation des accords internationaux', in Jean-Félix Delile and Maria Fartunova (eds), *La coopération loyale dans le droit des relations extérieures de l'Union* (Larcier, 2023) 138.
[106] Laurens Ankersmit, (n 43) 8.

of Euratom in the Energy Charter Conference.[107] These decisions are adopted on the legal basis of Articles 218 (9), 207 (4) and 194 (2) TFEU and Article 101 of the Euratom Treaty, since the areas covered by the proposed amendments to the ECT fall largely within the exclusive competence of the Union. By these decisions, the Council authorises the Member States to exercise their voting rights in the Energy Charter Conference and to express the Union's position that they should not prevent the adoption of the adoption of the modernisation through the proposed amendments.

More precisely, according to the decisions of the Council:

“In accordance with Article 36(7) of the Energy Charter Treaty (the ‘Agreement’), the Union shall not exercise its right to vote in the Energy Charter Conference voting on the proposed amendments to the Agreement.

The Member States that are Contracting Parties to the Agreement and that are present at Energy Charter Conference shall exercise their vote so as:

a) not to prevent the adoption by the Conference of the proposed amendments to the Agreement.

b) not to prevent the approval of the proposed modifications and technical changes to the Annexes to the Agreement.

c) not to prevent the approval of the proposed changes to decisions, declarations and understandings; and

d) not to prevent the approval of a decision regarding the entry into force and provisional application of amendments to the Agreement and modifications and technical changes to its Annexes.”[108]

As the Union remains a contracting party until the withdrawal takes effect on 30 May 2025, the modernised TEC could be applied provisionally. However, the Council has not taken a decision on provisional application in accordance with Article 218(5)

[107] Council Decision (EU) 2024/1644 of 30 May 2024 on the position to be taken on behalf of the European Union in the Energy Charter Conference, OJ L, 2024/1644, 6 June 2024; Council Decision (Euratom) 2024/1645 of 30 May 2024 on the position to be taken on behalf of Euratom in the Energy Charter Conference, OJ L, 2024/1645, 6 June 2024.

[108] Article 1 of the Council’s decisions 2024/1644 and 2024/1645.

TFEU, so the decisions on the position to be taken by the Member States state that "the Commission shall notify the depositary of the Agreement that the Union and Euratom opt out from provisional application."[109]

The decisions on the position to be taken by the Member States in the Energy Charter Conference specify that this is "without prejudice to the division of competences between the Union and the Member States and any future coordination after the withdrawal of the Union from the Agreement."[110] The question therefore arises as to the status of the modernised ECT in relation to EU law.

International agreements concluded by the Member States on behalf of the Union or positions adopted by the Member States on behalf of the Union in international fora are the expression of the exercise of the Union's competence by the Member States in cases where, for political or other reasons outside the EU legal order, the Union cannot exercise its competence itself.[111] A distinction must be made between action taken by the Member States on behalf of the Union and action taken by the Member States on their own account, with the authorisation of the Union, because the action is taken in an area of exclusive Union competence.[112] In the first case, the international agreements or decisions adopted by the Member States form part of the EU legal order, are binding on the EU institutions and are subject to the jurisdiction of the Court of Justice. In the second case, the authorisation is given on the grounds that the action of the Member States is neither contrary to the interests of the Union nor incompatible with obligations under EU law but has no effect in the EU legal order.

Although the decisions of the Council concerning the position to be taken in the Energy Charter Conference do not explicitly empower the Member States to remain contracting parties to the ECT, as the Union's withdrawal is not yet effective, they mandate the Member States to act on behalf to the Union. It follows that the Member States will not only be authorised to remain parties to the ECT after the Union's withdrawal but will also be obliged to act in accordance with the decisions of the Council and to allow the entry into force of the modernised ECT. The modernised ECT will not be binding on the Union and the Member States that have withdrawn,

[109] Ibid., Article 2.
[110] Ibid., Recital 8.
[111] Supra (n 74).
[112] Marise Cremona (n 74), 315.

and the exclusive competence of the Union will not be affected by the fact that not all Member States have withdrawn. The future legal framework for energy cooperation and investment protection will be elaborated by the Union alone or with its Member States, depending on the division of competences which will not be affected by the acceptance of the modernised ECT by some Member States. In this sense, the decisions of the Council on the position to be taken in the Energy Charter Conference are equivalent to authorising the Member States to act on their own in an area of exclusive substantive competence of the Union. Member States will be bound by the obligation of permanent coordination, similar to the mechanisms established by the Regulation for bilateral investment treaties between Member States and third countries.[113]However, the Council's decisions concern a position to be taken on behalf of the Union on the adoption of the modernised ECT. In this respect, the Member States remaining in the Energy Charter Conference are acting in the interest of the Union, without any margin of discretion and under a duty of loyal cooperation.

5. Conclusion

It has been argued that it would be preferable for the Union to first approve the modernised ECT and then withdraw in order to benefit from the shortening of the sunset clause and the recognition of the non-application of the ISDS provisions within the Union.[114] In the absence of Union approval, the Union's interest is in promoting its sustainability standards in another multilateral context. The obligation of the EU Member States to exercise their voting rights in favour of the modernisation of the ECT, together with the expression of the Union's intention to authorize them to remain contracting parties, is an original and still effective way for the Union to promote its interests and the balance between sustainability objectives and investment protection also for the benefit of non-EU contracting parties. The new situation is not without further complexities, in particular with regard to the obligation of Member States to reconcile the ECT with respect for EU law and their

[113] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20 December 2012, 40.
[114] https://www.politico.eu/article/eu-tries-to-stop-energy-treaty-exit-stampede.

international responsibilities that may arise in case of conflict.[115] However, the constitutional imperatives of the EU legal order, which imposed mixity and prevented the adoption of the modernised ECT, have also proved to be a driving force, as the Member States' obligations under EU law restore the momentum for promoting the Union's environmental standards in the ECT.

[115] Paolo Palchetti and Luca Pantaleo, 'The Withdrawal of the EU and the Member States from the Energy Charter Treaty: Who Will Bear International Responsibility for Breaches of the Treaty?', 18 July 2023, https://www.veblen-institute.org/IMG/pdf/palchetti-pantaleo-2023-ect-withdrawal-and-ms-responsibility.pdf.