The EU's Strategy for More 'Rules-Based Trade' and the EU's Withdrawal from the Energy Charter Treaty

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For a while now, the EU has been framing international relations as a battle between those that want a 'rules-based' international order and those that do not. This narrative is familiar in the international security context but appears regularly outside it as well. For instance, former Trade Commissioner Cecilia Malmström wrote in the Financial Times in 2018 that 'the EU will stand up for rules-based trade'.[1] This framing has intuitive appeal. It suggests that the EU's push for more international agreements that liberalize trade and protect investment is inherently good and those who oppose it are inherently bad. A 'rules-based' international order suggests opposition to anarchy and a position in favour of civilized and consensual international relations, based on dialogue and mutual understanding. Who could possibly argue against a rules-based order?

The truth is that the EU's framing of international relations and trade relations this way is misleading. The EU does not adopt any and all international agreements simply because they contain 'rules'. The EU has not been able to accede to the European Convention on Human Rights, for instance, and it remains opposed to the UN initiative for a Binding Treaty on Business & Human Rights. What is more, the 'rules-based' narrative obscures the debate about the actual *content* of these rules. Those who oppose EU agreements that seek trade liberalization or investment protection for environmental reasons, for instance, will inherently be seen under the 'rules-based' framing as anarchists that want international strong-men to govern international relations.

Yes, the intellectual and policy foundations of the EU's 'rules-based' trade have been crumbling in recent years. For decades, the policy of trade liberalization and investment protection through international agreements stood unopposed thanks to two fundamental liberal pillars on which this policy was built: economic growth and the preservation of peace and spread of democracy. In the tradition of mainstream economic thinking based on the teachings of Smith and Ricardo, trade liberalization (understood mainly as cutting tariffs on goods rather than anything else) is *always* a

[1] Cecilia Malmström, *The EU Will Stand Up for Rules-Based Trade* (Financial Times 26 Jul. 2018), https://www.ft.com/content/ddb1fa0e-8ff7-11e8-9609-3d3b945e78cf (accessed 3 Apr. 2023).

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good thing because it generates economic growth for *all* trading countries, measured in terms of goods produced. Free trade allows countries to use their comparative advantages, which leads to specialization; specialization leads to economies of scale, which will lead to an increase in consumer welfare.[2] In short, free trade leads to more goods being available for those countries that engage in free trade, or to speak in Ricardian examples: more cloth and wine for everyone.

However, it has been clear for a while now that perpetual accumulation of goods produced is simply not sustainable. By 2050, the world will require the equivalent of three planets to provide the natural resources needed to sustain current lifestyles, consumption of raw materials will double in the next forty years, and annual waste generation is projected to increase by 70%.[3] To avoid the global collapse of our planet, one needs to be more prudent about policies that fundamentally spur increase in goods production. Trade policy based on the 'rules-based' narrative in that sense contradicts government efforts in the shift from a linear economy based on extraction, production, use, and disposal to a circular economy. Such an economy operates within planetary boundaries. It is not based on endless economic growth measured in terms of resource consumption (the policy foundation of the current 'rules-based' trade of the EU).

The second pillar of the EU's 'rules-based' trade framing – preservation of peace and promotion of democracy – is equally facing challenges. In line with the Kantian ideal that fostering economic integration inherently prevents war because of its great economic costs, the EU has been pushing for 'rules-based' trade as a security policy. It has also been the foundation for the EU to 'spread its norms', such as democratic values. According to this logic, economic integration would inherently lead autocratic countries to adopt superior democratic and human rights values. As Bill Clinton once said: 'Just as democracy helps make the world safe for commerce, commerce helps make the world safe for democracy'.[4]

Yet, the EU's welcoming of two major autocratic regimes – China and Russia – into the global trading system is leading to the opposite results. These countries are not becoming beacons of democracy. Moreover, it is the EU that is becoming dependent on these countries as much as the other way around. China has

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2 GATT, *Trade Policies for a Better Future: Proposals for Action* (GATT 1985); Milton Friedman, *The Case for Free Trade*, Hoover Digest No 4 (1997); *see* critically for a more elaborate discussion and references Dani Rodrik, *What Do Trade Agreements Really Do?*, 32(2) J. Econ. Persps. 73–90 (2018), doi: 10.1093/jiel.

3 United Nations, *Sustainable Development Goals: Goal 12* (2015), https://www.un.org/sustainabledevelopment/sustainable-consumption-production/ (accessed 3 Apr. 2023); European Commission, A new Circular Economy Action Plan For a cleaner and more competitive Europe COM/2020/98 final.

4 Bill Clinton, *Between Hope and History: On Free Trade* (Issues 2000), http://www.issues2000.org/Archive/Hope_+_History_Free_Trade.htm (accessed 3 Apr. 2023).

been 'weaponizing globalization' by using its global economic interconnectedness to shore up support for the Chinese communist party – at home and abroad.[5] EU Member States have spent 148 billion euros on Russian fossil fuels since Russia invaded Ukraine in February 2022 (Ukraine has received around fifty-five billion euros in various forms of aid from the EU Member States).[6] Despite the EU's use of sanctions, it has left the Partnership and Cooperation Agreement (PCA) between the EU and Russia untouched. It remains fully in force and has not been suspended as is the case with the cooperation agreement with Syria.[7] Following the ECJ's decision in *Simutenkov*, provisions of this PCA can have direct effect and have primacy over any Member State law.[8] This means that individuals can rely on its provisions before national courts and that *any* incompatible Member State law must be set aside if it conflicts with its provisions. Is this 'rules-based trade' bringing us any closer to the current Russian government embracing democracy?

It is no coincidence that the EU in particular would consider a debate on these foundations problematic. It is the essence of its own making. The European project started with the idea that economic interdependence would not only lead to economic growth for the states participating in it, but would also make war 'not merely unthinkable, but materially impossible'.[9] Yet, for the EU to survive and thrive in this century it must face these challenges head on and not hide behind unhelpful narratives. It must not pretend that in international relations there is only a choice between 'rules' (good) and 'no rules' (bad), but it must critically reflect upon what type of rules it wants, how these rules are formulated, and whether they are in line with the wishes of EU constituents.

This also means that it must look critically at current trade and investment agreements and scrutinize their content. Where such agreements cannot be renegotiated and replaced by international agreements, withdrawal, where legally possible, is an option. Withdrawal would not lead to anarchy, and remaining party to such agreements is no longer in line with the EU's goals such as achieving the goals of Paris.

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5 Matt Schrader, *China Is Weaponizing Globalization* (Foreign Policy 5 Jun. 2020), https://foreignpolicy.com/2020/06/05/china-globalization-weaponizing-trade-communist-party/ (accessed 3 Apr. 2023).

6 *See* the Fossil Fuel tracker by Beyond Fossil Fuels (2023), https://beyond-coal.eu/russian-fossil-fuel-tracker/ (accessed 3 Apr. 2023). *See* for support to Ukraine the Ukraine support tracker from the Kiel Institute, https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/(accessed 3 Apr. 2023).

7 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3. While the accession of Russia to the WTO has led to further liberalization between the EU and Russia, WTO law does not have direct effect in the EU legal order. *See* Case C-377/02 *Van Parys* [2005]ECLI:EU:C:2005:121.

8 Case C-265/03, *Igor Simutenkov v. Ministério de Educación y Cultura, Real Federación Española de Fútbol*, [2005] EU:C:2005:213.

9 Robert Schuman, *Schuman Declaration* (European Union 9 May 1950), https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en (accessed 3 Apr. 2023).

1 'MODERNIZING' THE ENERGY CHARTER TREATY (ECT)

The recent debate surrounding the ECT is an important example in this regard. Negotiated in the early nineties of the twentieth century, this multilateral agreement protects investments and liberalizes trade in the energy sector among fifty-three contracting parties, including the EU, Euratom and its Member States. Initially, the ECT was intended to encourage foreign investments in the energy sector in former communist states in Eastern Europe. The legal provisions in the ECT are typical instruments popular in the nineties: liberalizing of trade in energy products based on the more general WTO-GATT regime, securing their free transit, protecting foreign investors in the energy sector (with the typical provisions common to bilateral investment agreements and Investor-State Dispute Settlement (ISDS)).[10] It has come under severe and increasing criticism for obstructing the energy transition to a green economy by protecting investments in fossil fuels and obstructing government efforts to decarbonize or green the economy. The ECT's investment provisions offer foreign investors one of the most beneficial terms to claim compensation for damage resulting from violation of the ECT's investment provisions ISDS with insufficient regulatory space for governments.[11] It also offers protection in those geographic areas where significant fossil fuel resources can be found. Accordingly, it has been labelled 'the most significant single treaty obstructing the transition'.[12]

Recognizing this, the European Commission had sought to renegotiate the terms of the ECT under what has become known as the 'modernization' of the ECT. At the instigation of the EU, the Energy Charter Conference adopted a decision to approve a list of topics for modernization of the ECT in November 2018.[13] The European Commission subsequently made several proposals on textual amendments to the ECT.[14] According to the Commission, these proposals had two main aims. First, to change the substantive and procedural rules on investment protection to the approach taken in recent EU investment agreements, such as the Comprehensive

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10 Christina Eckes & Laurens Ankersmit, *The Compatibility of the Energy Charter Treaty With EU law* (Client Earth 2022), https://www.clientearth.org/latest/documents/the-compatibility-of-the-energy-charter-treaty-with-eu-law/ (accessed 3 Apr. 2023), s. 1.1.

11 *Ibid*.

12 Kyla Tienhaara et al., *Investor-State Dispute Settlement: Obstructing a Just Energy Transition*, Climate Policy 1–16 (2022).

13 Decision of the Energy Charter Conference on the list of topics for modernization of the Energy Charter Treaty, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201818_-_STR_Modernisation_of_the_Energy_Charter_Treaty.pdf (accessed 3 Apr. 2023).

14 The Commission received a mandate in 2019, *see* European Commission, *Energy Charter Treaty Modernisation: Commission Welcomes Council's Mandate* (European Commission 15 Jul. 2019), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2049 (accessed 3 Apr. 2023). The proposals can be found at European Commission, *Energy Charter Treaty: Further Progress in Modernisation Negotiations* (European Commission 15 Nov. 2019), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2049 (accessed 3 Apr. 2023).

Economic and Trade Agreement (CETA) between the EU and Canada. Second, to bring the ECT more in line with the goals of the Paris agreement.

The Commission believed that the results of the negotiation were sufficient to warrant the approval of the EU and the Member States. While it did not manage to convince the other parties to endorse the EU's so-called Investment Court System (a quasi-permanent ISDS), the investment chapter did broadly take the same approach as under CETA.[15] The EU also managed to secure a weak but novel carve-out for the protection of fossil fuels. This so-called 'flexibility mechanism' allowed parties that 'opt in' to exclude investment protection for new investments fossil fuels in their territories. Other parties could then choose to no longer offer protection for foreign investments in their territories for those parties that opt in. In a nutshell, this 'flexibility mechanism' came down to excluding protection of new investments in fossil fuels from outside the EU into the EU.

Maintaining the same approach as in CETA, the Commission must have thought it had done enough. It had sought to save 'rules-based trade' in light of criticism of a rapidly aging agreement. And it must have thought that nobody would reject 'rules-based trade'. However, the approach was far from adequate to reach the goals of Paris. Already in late 2021, the International Energy Agency warned that new oil and gas projects must stop and no new coal-fired power plants can be built from December 2021 if the world is to stay within the zero-emissions target by 2050.[16] The EU has committed to this goal.[17] The modernized ECT text, however, did not ban such projects. Quite the contrary, it would still protect (and, in the rationale of investment agreements, encourage investments) such projects until 14 August 2023, a year and a half too late. This would also be insufficient, given the limited territorial scope of the 'flexibility mechanism'. EU investors (energy companies, for instance) could still invest in fossil fuels and receive protection under the terms of the modernized ECT, for investments made in other ECT member countries, such as Azerbaijan (a fossil rich country that, according to president of the Commission Ursula von der Leyen, is a trustworthy, reliable, and crucial energy supplier of the EU).[18] Moreover, the negotiated text continued to protect existing investments in fossil fuels for an additional ten years.

The Commission nonetheless pushed forward, expecting the Council and the European Parliament to endorse 'rules-based trade'. After all, the European

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15 *See* Eckes & Ankersmit, *supra* n. 10, s. 1.5.

16 Stéphanie Bouckaert et al., *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA 2021).

17 Article 2 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 Jun. 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ 2 243/1.

18 Ursula von der Leyen, *Statement by President Von Der Leyen With Azerbaijani President Aliyev* (European Commission 18 Jul. 2022), https://ec.europa.eu/commission/presscorner/detail/da/statement_22_4583 (accessed 3 Apr. 2023).

Parliament consented to a future Council decision to conclude CETA and the Council had already decided to sign and provisionally apply CETA. This did not happen. The Commission encountered stiff opposition in the Member States. Unlike CETA, however, the fate of the modernized ECT would not be decided by ministers responsible for trade in their Member States but by ministers with a climate and energy portfolio. They were therefore much more likely to be concerned about the impact of the agreement on their climate policies and their commitments under Paris. Spain was one of the first EU Member States to decide to withdraw from the ECT rather than to endorse the modernized text over climate change concerns.[19] Its intention to withdraw was announced by the Spanish minister for ecological transition, Teresa Ribera. A week later, Dutch minister for climate and energy, Rob Jetten, took the same decision for the Netherlands, also citing as a reason that the modernized text was not in line with the goals of Paris.[20] Within a few weeks, Germany, France, Poland, Slovenia, and Luxembourg had also announced their intention to withdraw. Italy had already withdrawn from the ECT in 2015. Together, these countries represent more than 70% of the population of the EU. One wonders if Commission officials behind the 'rules-based trade' narrative would think of these Member States as anarchists.

Undeterred, and perhaps because of a staunch commitment to 'rules-based trade', the Commission initially sought to go ahead with the modernization process. It maintained that 'the Commission is not preparing a coordinated withdrawal' and that 'the EU will remain party to the ECT in its own right'.[21]

However, this position was becoming rapidly untenable in the EU itself, after both the European Parliament and the Council refused to endorse the new text. The Council's approval was essential for the whole modernization process to move forward. The Commission could not simply endorse the new text at the Energy Charter Conference,[22] on 22 November 2022, on behalf of the EU and, on that basis, initiate the ratification process in the EU. Since the decision to approve the negotiation results of the Energy Charter Conference was bound to have legal effects, the Council was required to adopt a decision based on a Commission proposal.[23]

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19 Karl Mathiesen, *Spain Pulls Out of Energy Treaty Over Climate Concerns* (Politico 12 Oct. 2022), https://www.politico.eu/article/spain-pulls-out-of-energy-treaty-over-climate-concerns/ (accessed 3 Apr. 2023).

20 Arjan Meesterburrie, *Nederland stapt uit omstreden energieverdrag ECT* (NRC 18 Oct. 2022), https://www.nrc.nl/nieuws/2022/10/18/nederland-stapt-uit-omstreden-energieverdrag-ect-a4145575?t=1680518393 (accessed 3 Apr. 2023).

21 Karl Mathiesen & Sarah Anne Aarup, *EU Tries to Stop Energy Treaty Exit Stampede*, Politico (Brussels 20 Oct. 2022), https://www.politico.eu/article/eu-tries-to-stop-energy-treaty-exit-stampede/ (accessed 3 Apr. 2023).

22 For the modernized ECT to take effect, the Energy Charter Conference of the ECT needed to approve the amendments to the ECT first. Subsequently, most of these amendments would have to be put up for ratification with the members of the ECT. *See* The Energy Charter Treaty [1998] OJ L 69/26, Arts 42 (2) and 34 (3) (m).

23 Article 218 (9) TFEU.

The Commission's initial strategy was to ask the withdrawing Member States not to stand in the way of the EU endorsing the modernization effort. Thus, for the Commission, even if all these Member States rejected modernization, the EU could go ahead without them. However, this initial strategy ran into legal complications as it became unclear what this strategy meant for the withdrawing Member States. Could they still withdraw and was withdrawal legally meaningful?

Several legal issues suggested that the Commission's course of action would result in a very messy legal situation. First, agreements concluded by the Union are binding upon its Member States as well as on the institutions of the Union.[24] Moreover, the extent to which the EU could *alone* commit itself (and thereby the Member States) to the entire ECT following the division of powers after *Opinion 2/15* was a source of serious contention between the Commission and withdrawing Member States. What is more, the duty of loyalty in EU external relations can force Member States under certain conditions to not 'dissociate' themselves from any 'common strategy' that the EU institutions have formulated before international bodies.[25]

After a while, it became clear that, for the withdrawing Member States, the initial strategy of the Commission presented a legal risk that the EU was going to drag them into commitments they had already rejected. The Commission's efforts to water down the position of the EU in the Energy Charter Conference, from endorsing the modernized text to not opposing it, were to no avail. On Friday 18 November, it became clear that there was no qualified majority in the Council for the EU to take a position at the Energy Charter Conference that following Tuesday. As a result, modernization of the ECT was taken off the agenda at the Energy Charter Conference and the meeting proceeded merely online.

A second major blow to this initial strategy was the resolution of the European Parliament on 24 November.[26] The European Parliament underlined that the modernized ECT:

> is not aligned with the Paris Agreement, the EU Climate Law or the objectives of the European Green Deal, is not in line with the objectives laid down by Parliament in its resolution of 23 June 2022 on the future of EU international investment policy, including, most notably, the immediate prohibition of fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels, in line with their international commitments,

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24 Article 216 (2) TFEU.

25 Case C-246/07 *Commission v. Sweden (PFOS)* EU:C:2010:203, paras 74–89. *See* for a discussion Andres Delgado Casteleiro & Joris Larik, *The duty to remain silent: limitless loyalty in EU external relations?*, 36 Eur. L. Rev. 524 (2011).

26 European Parliament resolution of 22 Nov. 2022 on the outcome of the modernization of the Energy Charter Treaty (2022/2934(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html (accessed 30 Mar. 2023).

> the significant shortening of the time frame for phasing out the protection of existing investments in fossil fuels, and the removal of the ISDS mechanism.[27]

The European Parliament therefore welcomed the decision of the Member States announcing their withdrawal from the ECT. The resolution calls for coordinated withdrawal and 'urges the Commission to initiate immediately the process towards a coordinated exit of the EU from the ECT and calls on the Council to support such a proposal'.[28]

Recognizing that the Council and the Parliament did not support the modernization effort, the Commission switched course earlier this year to coordinated withdrawal by both the Member States and the EU from the ECT. On 7 February, Euractiv published a leaked 'non-paper' from the Commission on the future of the EU's membership of the ECT.[29] The paper states that EU withdrawal from the ECT is 'unavoidable' following the Commission's failure to secure sufficient political support in the Council and the European Parliament for its efforts to modernize the ECT. It also notes that a new effort to renegotiate 'does not seem feasible'. The paper therefore set out three options available to the EU and the Member States:

1. Coordinated withdrawal of the EU, Euratom and the Member States;
2. Withdrawal of the EU and Euratom with prior authorization for some Member States to remain party to a modernized ECT;
3. Council decision allowing adoption of the modernization followed by the (coordinated) withdrawal of the EU, Euratom and Member States.

The non-paper suggests coordinated withdrawal (first option) 'as the most adequate option'. The non-paper subsequently deals with a number of interesting EU legal issues that warrant further discussion.

First, the Commission's non-paper suggests that the same procedure would need to be followed in the event of a withdrawal as for the conclusion of the ECT. Withdrawal therefore would need a proposal from the Commission and subsequently consent from the European Parliament to a Council decision to withdraw.[30] That Council decision would need to be taken based on qualified majority voting. Interestingly, the article that sets out the procedures to be followed for the life-cycle of international agreements (Article 218 TFEU) does not mention withdrawal (it does mention suspension of

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27 *Ibid.*, point 5.

28 *Ibid.*, point 20.

29 Euractiv, *LEAK: Exit from Energy Charter Treaty* '*Unavoidable*'*, EU Commission Says* (Euractiv 8 Feb. 2023), https://www.euractiv.com/section/energy/news/exit-from-energy-charter-treaty-unavoidable-eu-commission-says/ (accessed 3 Apr. 2023).

30 The Commission states in the non-paper: 'the withdrawal of the European Union from the ECT requires the adoption of a Council decision based on Article 218(6)(a) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with the relevant substantive legal bases (in principle, Articles 207 and 194 of the TFEU), and the consent of the European Parliament'.

international agreements). There is also no case-law from the Court of Justice on the procedure to be followed in the case of withdrawal from an international agreement. Moreover, there is little practice of the EU in withdrawing from international agreements. Only in five instances did the EU withdraw from an international agreement: in four cases, the EU institutions followed the procedure for conclusion of the agreement when terminating the agreement; in one case, no internal decision was necessary as the Court had annulled the decision to conclude the agreement.[31]

This approach is known in literature as the 'actus contrarius' approach.[32] Withdrawal would mirror the internal procedure for the entry into force of the agreement. Another approach is 'executive prerogative' whereby withdrawal is a prerogative of the executive. Fourteen Member States have constitutional arrangements that follow this latter approach. The procedure for suspension of international agreements under Article 218 (9) TFEU is more in line with this approach. For the EU, the 'actus contrarius' approach would have the benefit of ensuring greater democratic control and legitimacy of a decision to withdraw in most instances. Although the European Parliament does not always need to consent to a decision concluding an international agreement (in some instances, it merely needs to be consulted), in most cases it would need to give its consent. Not surprisingly, the European Parliament is of the opinion that it should give its consent to a decision on withdrawal from the ECT by the EU and has expressed its willingness to do so.[33] In any event, it seems likely that the Council would need to decide on the matter, even if the procedure for suspension were to be followed. Currently, those Member States who wish to remain party to the (modernized) ECT do not have a blocking minority in the Council.[34] If such a blocking minority were established, however, it would put the EU in a deadlock. There would be no qualified majority for modernization, nor would there be such a majority for withdrawal, even if Member States representing over seventy percent of the EU population support withdrawal.

One possible way in which withdrawal could happen is through a preliminary reference to the CJEU by a national court on the validity of the Council and Commission decisions to conclude the ECT on behalf of the EU, following the path that led to the Court's *PNR* decision annulling the Council decision to conclude the agreement between the US and the EU on the transfer of personal data by air carriers.[35] This permitted the Commission to merely give notice to the US

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31 *See* for a more elaborate discussion Pieter Jan Kuijper et al., *The Law of EU External Relations* 88–92 (2d ed., OUP 2015) and Laurens Ankersmit, 'Withdrawal from mixed agreements under EU law: the case of the Energy Charter Treaty', *Europe and the World: A Law Review, forthcoming*.

32 Kuijper, *supra* n. 31.

33 European Parliament resolution of 22 Nov. 2022, *supra* n. 26, Point N and 18.

34 The camp of hard 'remainers' consists out of Sweden, Finland, Czechia, Slovakia, Bulgaria, Cyprus, Malta, and Hungary. This is not enough for a blocking minority in the Council.

35 Joined Cases C-317/04 and C-318/04 *European Parliament v. Council (PNR)* EU:C:2006:346.

authorities that it denounced the agreement without involvement of the Council or the European Parliament.[36] The ECT is, after all, incompatible with EU law as it does not meet the constitutional standards set by the Court of Justice in *Opinion 1/17*.[37] It is not unthinkable that such a reference would be made by a national court seized by one of the many public interest organizations opposing the ECT if the deadlock continues.

Second, a common complicating factor in the life-cycle of many international agreements of the EU is that such agreements are mixed. This is no different in the case of withdrawal. Mixity often obscures the question of who (the Member States or the EU) is responsible for which part of the agreement. What is more, mixity results in significant international law complications in the case of 'incomplete mixity', where not all the Member States and the EU are party to an international agreement. Third parties should be able to expect that other parties to the agreement (the EU or the Member States) are able to perform all the obligations under the international agreement unless agreed otherwise. Yet, under EU law, neither the EU nor the Member States can assume international obligations for which they have no competences. In such instances, therefore, the EU and Member States resort to mixed agreements, exercising their respective powers jointly so as to cover the entirety of the agreement. According to the ECJ in *Opinion 1/19*, Member States and the EU when concluding mixed agreements should act 'exclusively within [their] sphere of competence'.[38] This uncomfortable relationship between international law and EU law is workable only when both the EU and the Member States remain party to an international agreement. If either the EU or a Member State withdraws unilaterally, the tension between EU and international law becomes problematic. For instance, ISDS in an international agreement which cannot be established 'without the Member States' consent'.[39] If a Member State withdraws and thus revokes such consent, can the EU still act as a respondent when an investor brings a claim against the EU for conduct attributable to that Member State or even attributable to the EU institutions? Coordinated withdrawal avoids these types of legal minefields and it is understandable that the Commission and the European Parliament express a preference for this option. However, *Opinion 1/19* makes it clear that there is no legal necessity to do so under EU law. The autonomous nature of EU law means that decision-making by the EU is governed by the EU Treaties and cannot be made dependent on actions of the Member States.[40]

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36 Notice concerning the denunciation of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2006] OJ C219, 1.

37 Eckes & Ankersmit, *supra* n. 10.

38 *Opinion 1/19 (Istanbul Convention)* EU:C:2021:198, paras 240 and 258, 259.

39 *Opinion 2/15* EU:C:2017:376, para. 292.

40 Opinion 1/19, para. 235.

Lastly, the Commission points out that, under option 2, any Member State that seeks to remain a party to the modernized ECT would need prior authorization of the EU. Member States can only act in areas of EU exclusive competence (such as adopting the modernized standards of protection of foreign direct investment in an agreement such as the ECT) 'if so empowered by the Union'.[41] The Commission makes clear that this authorization would need to be established anew through a legislative act adopted in accordance with the legislative procedure and cannot be based on the Grandfathering Regulation. This is undoubtedly correct, as that Regulation can only be used in relation to bilateral investment agreements of the Member States that have been notified or are new. The ECT is not a bilateral investment agreement, nor has it been notified by Member States. The adoption of a new instrument specifically allowing some Member States to proceed with modernization makes it politically much less likely to succeed. The European Parliament has already indicated that it prefers a coordinated withdrawal and those Member States seeking modernization instead would need to secure support of not only the Commission but also a qualified majority of Member States in the Council.

It appears, then, that the most likely scenario is that the EU will succeed in a coordinated withdrawal. This position has support within the EU institutions involved and those Member States that oppose this option have little choice but to go along or risk violating EU law. After all, Member States no longer have the competence to act in areas covered by the (modernized) ECT and there is little prospect of securing authorization from the EU. What is more, the current ECT is also incompatible with EU law, offering another legal issue to possible remainers.

All in all, the saga around exiting the ECT makes clear that withdrawal from a mixed agreement (and abandoning 'rules-based trade' in this instance) is a complicated affair. The EU unintentionally makes it hard for itself constitutionally to pull out of international agreements. This should not be taken as an encouragement for those endorsing the 'rules-based' narrative, however. The fact that EU law makes it hard to exit international agreements does not automatically mean that the EU should thoughtlessly adopt them, because they contain 'rules'. If anything, it makes it clear that the EU should think much more carefully about which rules it wants to commit itself to and future generations of Europeans. They are hard to change, may have profound effects on the ability of future generations of politicians to make political choices, and, once opposed to the point where part of the Member States or the EU want to withdraw, present significant legal risks.

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[41] Article 2 (1) TFEU.