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THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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THE AUTONOMY OF THE EU LEGAL ORDER: THE CASE OF THE ENERGY CHARTER TREATY

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ABSTRACT: The autonomy of EU law is what makes the EU legal order what the Court of Justice of the European Union (CJEU) claims it to be, namely a domestic legal order that allows the EU to be an international actor in its own right. Investor-State-Dispute-Resolution (ISDS) mechanisms have recently been examined by the CJEU as to their compatibility with the jurisdictional normative autonomy of EU law and the regulatory autonomy of the EU institutions (*Achmea*, Opinion 1/17, *Komstroy*). The EU is only party to one international agreement in force that contains an ISDS mechanism. It is also the most litigated investment treaty in the world: the Energy Charter Treaty (ECT). In 2022, the negotiations between the Contracting Parties to the ECT have led to an 'agreement in principle' on a reformed treaty text. This *Article* examines the compatibility of the current ECT and of its reformed text with the normative and regulatory autonomy of the EU. It also argues that the Commission's actions in the period between the agreement in principle on the revised text of 24 June 2022 and the adoption of a resolution of the European Parliament calling on the EU to withdraw from the ECT on 23 November 2022 demonstrate the dark, undemocratic side of vesting the EU with external regulatory autonomy *vis-à-vis* the Member States. It highlights in particular that greater external regulatory autonomy of the EU may lead to an usurpation of executive powers and comes at the price of parliamentary control.

KEYWORDS: jurisdictional normative autonomy – regulatory autonomy – Energy Charter Treaty – Opinion 1/17 – International State Dispute Settlement – Commission as negotiator of international agreements.

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I. Introduction

The autonomy of EU law is what makes the EU legal order what the Court of Justice of the European Union (CJEU) claims it to be and what, in any event ordinary, national courts accept it to be: a new legal order in its own right that can take a dualist position towards international law, and, according to some, towards national law.[1] It is the very foundation of the effectiveness of EU law via national law.[2] The relevance of this autonomy claim can therefore be hardly overstated.

Currently, not only the autonomy of the EU legal order but also the regulatory autonomy of the EU institutions is put under pressure by the only EU agreement in force that foresees the possibilities of individuals (investors) to bring claims against the EU and that is also the most litigated investment treaty in the world: the Energy Charter Treaty (ECT).

This *Article* conceptually introduces the different forms of EU autonomy and examines the current ECT but also the renegotiated text of the ECT in light of these different forms of autonomy. It argues that not only the ECT as it is binding on the EU and 26 of its Member States but also the renegotiated text, as confirmed by the parties to be the outcome of the negotiations on 24 June 2022, breach the autonomy of the EU. Intra-EU arbitration under the ECT in its current form breaches EU law. This was confirmed by the CJEU in 2021.[3] This *Article* argues that also the reformed text as it was agreed in June 2022 undermines the EU's right to regulate.

This *Article* further concludes that reading the ongoing reform process of the ECT through a lens of separation of powers demonstrates that vesting the EU with greater external regulatory autonomy may result in a concerning power grasp of the Commission and deteriorates control by national parliaments and the European Parliament.

Normative or jurisdictional autonomy, on the one hand, and regulatory or political autonomy, on the other, are the very foundation of the EU legal order, its ability to pursue its own policy objectives, and its ambition as an international actor in its own right. The Court of Justice is very protective of the normative or jurisdictional autonomy of the EU legal order.[4] In the past 10 years, this has become particularly apparent in relation to international agreements that set up international courts and tribunals.

The EU's regulatory or political authority refers to the EU institutions' ability to determine their own course of action. This has an internal dimension; this is the right to regulate within the EU and under EU law. It also has an external dimension; this is the capacity of the EU to be an autonomous international actor in its own right, not depending on the will and approval of individual Member States.

[1] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1; See in relation to national law *e.g.*, P Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020), and J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271.

[2] C Eckes, *EU Powers under External Pressure* (Oxford University Press 2019) chapter 1.

[3] Case C-741/19 *République de Moldavie v Komstroy* ECLI:EU:C:2021:655 (hereinafter *Komstroy*).

[4] C Eckes, 'The Autonomy of the EU Legal Order' cit.

Futhermore, the reform process as we have seen it up to 31 December 2022 painfully demonstrates the dark, undemocratic side of allowing the EU to become an international actor autonomous not only from external influences (right to regulate) but also from national will-formation and control mechanisms. While the constraints imposed by closed-door arbitration tribunals on the EU's ability to regulate are highly problematic, autonomy of the EU institutions from national will-formation and control mechanisms also raise democratic concerns. The EU lacks a deeply integrated political community and is structurally reliant on national sources for its legitimacy. The reform process of the ECT illustrates exceptionally well how weak the link between "the EU position" and any public debate, debate in national parliaments, or national media can become. The Commission appears so invested in the reform process and afraid of public pushback that it tries to keep the substantive points of change and how reform compares to withdrawal, which is supported by an increasing number of civil society actors and Member States, out of the public debate. The EU's external regulatory autonomy, *i.e.*, capacity to act autonomously from the Member States also means that it is largely acting under the radar of public scrutiny. This gives the Commission, as the EU's 'technocratic' and politically independent, *i.e.*, not directly politically controlled, executive institution, great power.[5]

In 2021, the CJEU held that intra-EU arbitration under the ECT, *i.e.*, arbitration between and investor of one Member State against another Member State, infringes the autonomy of the EU legal order.[6] However, convincing reasons also speak in favour of extra-EU arbitration equally infringing the autonomy of the EU legal order. The ongoing process of amending the ECT may potentially lead to a re-evaluation of this problematic treaty, including by the CJEU, as it reopens the possibility of asking for an opinion under art. 218(11) TFEU.

This *Article* explains, first, the meaning and relevance of the normative autonomy of the EU legal order (section II) and, second, its relationship to and the meaning of the regulatory autonomy of the EU (section III). Section IV then examines how the current ECT affects the normative and regulatory autonomy of the EU. Section V assesses whether and to what extent the conclusions of section IV are also applicable to the amended text of the ECT as agreed by the negotiators on 24 June 2022 that was meant to be approved by the Contracting Parties on 22 November 2022 before the Commission asked to remove the item from the agenda.[7] Section VI reflects on the process of reform so far (until 31 December 2022) and argues that, irrespective of whether the reformed ECT will ever see the light of day, the way the reform debate is suppressed should be a warning to those in favour of democratic control of external relations. The conclusions set out that the ECT both in its current form and in form of the amended text subject to approval by

[5] See on the Commission's expertise and independence: art. 17 TFEU.

[6] *Komstroy* cit.

[7] F Simon, 'Brussels calls for pause in ECT reform talks after losing key EU vote' (21 November 2022) Euractiv www.euractiv.com.

the Contracting Parties is incompatible with both, normative and regulatory autonomy and outlines possible ways in which the CJEU could be asked to rule on this issue.

II. Normative autonomy as the very foundation of the EU legal order

The normative or jurisdictional autonomy of EU law is what makes EU law a legal order.[8] It means that EU law does not legally depend for its validity on norms originating from outside of its own legal order, be it national or international. In practice, this means that the CJEU has exclusive jurisdiction to determine the definitive meaning, scope, and validity of EU law. This claim to normative autonomy is defensive in the sense that it aims to protect EU law from external interference but makes no claim that the EU institutions, including the Court, should be in the position to create or even interpret international or national law external to the EU legal order.

The CJEU *justifies* the normative autonomy of EU law "by the essential characteristics of the EU and its law, relating to the constitutional structure of the European Union and the very nature of that law".[9] It refers to the "independent source of law", the "primacy over the laws of the Member States", and the "direct effect" within the national legal order.[10] In other words, the Court justifies its conception of the normative autonomy of the EU legal order in a circular reasoning: the essential characteristics of EU law justify its autonomy and autonomy makes its essential characteristics as a domestic legal order possible. The CJEU takes in its reasoning a meta-teleological approach to interpretation referring on a very high level of abstraction to systemic values.

All legal orders, including national ones, establish their necessary self-contained nature in a circular reasoning.[11] To establish the self-contained and self-sufficient nature of national legal orders, national courts and constitutions routinely refer to the pre-existing sovereign, the people, that created the legal order by a constituent act, which itself could not yet be governed by the constitution that it created.[12] The CJEU construes EU law to stem from a separate independent source that originally derived from sovereign rights transferred from and by the Member States. However, the transfer is seen as having cut the link to the national legal order in a way that the validity and interpretation of EU law is now autonomous and no longer depending on the sovereignty of the Member States. Autonomy in this normative sense ensures the Court's jurisdictional authority as the final authority within this complete epistemic system. It allows the Court to protect the EU legal order from normative interference that could be "liable to adversely affect the specific characteristics of EU law and

[8] This section draws on C Eckes, *EU Powers Under External Pressure* cit. See section III of chapter 1 for a detailed conceptualization of the autonomy of EU law.

[9] *Komstroy* cit. para. 43; see also case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 33.

[10] *Ibid.*

[11] *E.g.*, T Flynn, *The Triangular Constitution* (Hart Publishing 2019).

[12] Comprehensively, J Colón-Ríos, *Constituent Power and the Law* (Oxford University Press 2020).

its autonomy".[13] This internal autonomy, that is autonomy from national law and the authority of national courts, gives the CJEU the necessary distance from national law that allows it to call on national courts to ensure the effectiveness and uniform application of EU law.

This conception of an autonomous legal order and the logical consequences that ensue from this conception are precisely what allows construing EU law as a domestic legal order and what lies at the very core of what makes the Union different from international organisations. At the same time, this conception of autonomy remains essentially contested by other international actors, as well as the highest national courts of the EU Member States.[14] Both the centrality of the claim of EU law to autonomy and the fact that it is contested may explain why the CJEU has attached so much value to this principle and has given strong rulings aiming to exclude even the possibility of undermining the autonomy of EU law.[15]

In short, the EU law's very claim to being a domestic legal order depends on its autonomous character, that is, its self-referential nature of not depending on national and international law for its validity and interpretation. This claim to normative autonomy allows the CJEU to uphold the claim that the effects of EU law within the national legal orders are a matter of EU law, rather than national or international law.

In turn, normative autonomy ensures the effectiveness of EU law on the ground, which is its most distinctive characteristic. The preliminary ruling procedure (art. 267 TFEU) was termed by the Court to be the "keystone" of the EU's judicial system.[16] It also is the institutional backbone of this effectiveness. It is the mechanism that ensures the "consistency and uniformity of the interpretation of EU law"[17] and allows regular confirmation of the CJEU's autonomy claim by national courts.[18] The EU's history of integration and ability to achieve a unique level of effectiveness of EU law within the national legal order has largely been triggered by and hinges on the decentralized enforcement of EU law by individuals in national courts and with the possibility of involving the CJEU via a preliminary ruling request. Under EU law, direct actions of individuals before the CJEU were much less relevant in the transformation of EU law than the ability and willingness of national courts to give effect to EU law and to refer questions to the CJEU under the preliminary ruling procedure.

With the EU becoming a powerful international actor, the CJEU's focus shifted towards external autonomy and the relationship between EU law and international law. The tensions

[13] Opinion 2/13 *Accession of the European Union to the EC* ECLI:EU:C2014:2454, para. 178.

[14] Recent illustrative examples: German Federal Constiuttional Court, judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 (PSPP judgment); Polish Constitutional Court's ruling of 7 October 2021 (case K 3/21).

[15] See in particular Opinion 2/13 cit.; C Eckes*, EU Powers Under External Pressure* cit.

[16] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376.

[17] *Komstroy* cit. para. 45.

[18] See C Eckes, *EU Powers Under External Pressure* cit.

in this respect arise when (quasi-) judicial bodies established under international agreements to which the EU is a party are vested with the authority to give binding decisions that may interpret EU law (other than the international agreement itself). The fundamental nature of the Court's normative autonomy concern and its position that even potential interference with the self-referential nature of EU law is sufficient to render the external (quasi-) judicial mechanism contrary to EU law become apparent in a long list of rulings.[19]

More specifically, the CJEU held both in *Achmea* and in *Komstroy* that the protection of the normative autonomy of the EU legal order requires that no field of EU law be removed from the substantive reach of the preliminary reference procedure.[20] This is also fully in line with Opinion 1/09 on the European Patent Court.[21] In *Komstroy* the ECJ emphasised in particular that "by concluding the ECT the European Union and the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law".[22] This point is also confirmed by the Court's rulings in *Commission v. Poland*[23] and in *Associação Sindical dos Juízes Portugueses,*[24] which confirm the constitutional role of the Member States' courts under art. 19(1) TEU as the prime guardian of the rule of law and the entry point for the institutionalised judicial dialogue under the preliminary ruling procedure.

In Opinion 1/17, the Court further engaged with *procedural safeguards* of the EU's normative autonomy. CETA contained an elaborate provision (art. 8.31.2), ensuring that the Investment Court System (ICS) does not give binding interpretations of EU law but treats EU law as facts and follows the CJEU's interpretation.[25]

III. Regulatory autonomy

Construing the EU legal order as a domestic legal order that is normatively autonomous in the fashion explained in the previous section also form the necessary basis for the EU's regulatory autonomy. The term "regulatory autonomy" refers to the EU institutions' ability to determine their own course of action. It enables the EU to take the role of an actor, who is not remote controlled either by the Member States or international bodies but can take its own position and exercise power in its own right. Normative autonomy from

[19] Joined Cases C-402/05 P and C-415/5 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461; Opinion 2/13 cit.; *Achmea* cit.; *Komstroy* cit.

[20] *Komstroy* cit. para. 62.

[21] Opinion 1/09 *Istanbul Convention* ECLI:EU:C:2011:123.

[22] *Komstroy* cit. para. 60.

[23] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531 paras 47-50 and case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586.

[24] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 paras 29-37.

[25] See for more detail section IV.2. below.

national and international law ensures that neiter national courts nor international (quasi-) judicial bodies can determine what is legal or illegal under EU law. This creates and protects a legal space for regulatory decision-making of the EU institutions.

The Court explicates Opinion 1/17:

> "if the Union were to enter into an international agreement capable of having the consequence that the Union – or a Member State in the course of implementing EU law – has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework." [26]

The Court's starting point was that, in the context of the ISDS-mechanism of CETA, arbitrators would be weighing "the interest constituted by the freedom to conduct business" against "public interests".[27] They would be able to render decisions binding on the EU on questions of whether EU acts violated the standards of 'fair and equitable treatment' or "indirect expropriation".[28] The Court added that such situations "are likely to occur often".[29] However, in terms of outcome, these considerations did not lead the Court to conclude CETA adversely affect the EU's regulatory autonomy. By contrast, the Court confirmed that CETA offered the *necessary legal safeguards* to prevent arbitrators from calling into question the policy choices of the EU institutions. It concluded that CETA was therefore compatible with the jurisdictional autonomy of EU law and the regulatory autonomy of the EU.

In its reasoning, the Court followed a two-step assessment of whether the EU's regulatory autonomy was affected.[30] First, it examined whether the international agreement contained *problematic features*, i.e. features that potentially interfere with the EU's regulatory autonomy. Problematic features are in particular (1) a broad definition of 'investment';[31] (2) compulsory jurisdiction for the EU and EU Member States as a respondent to claims by investors;[32] (3) that measures of general application can be challenged;[33] and (4) that a tribunal may award damages and this award is final.[34]

[26] Opinion 1/17 *CETA* ECLI:EU:C:2019:341 para. 150; see for more detail: L Ankersmit. 'Regulatory Autonomy and Regulatory Chill in Opinion 1/17' (2020) Europe and the World: A Law Review 1.

[27] *Ibid*. para. 137.

[28] *Ibid*. para. 138.

[29] *Ibid.*

[30] The summary of the Court's reasoning draws on: C Eckes and L Ankersmit, 'The compatibility of the Energy Charter Treaty with EU law' (22 April 2022) Client Earth www.clientearth.org.

[31] Opinion 1/17 cit. para. 139.

[32] *Ibid*. para. 140.

[33] *Ibid*. paras 141-143.

[34] *Ibid*. paras 144-146.

Second, and after confirming the presence of problematic features, the Court examined whether the agreement contained the *necessary legal safeguards* to ensure that the regulatory autonomy of the EU remained protected. These safeguards are in particular (1) a general exceptions clause for public interest measures;[35] (2) provisions guaranteeing the "right to regulate";[36] (3) a commit of the contracting parties to not lowering levels of protection of public interests;[37] and (4) the agreement circumscribes the scope of investment protection.[38]

The Court does not explicate whether *all safeguards* need to be present for an agreement that contains problematic features to be compatible with the EU Treaties. From the way the Court presented its considerations, the Court appeared to have assessed the various provisions together and drawn the overall conclusion that the contracting parties had sufficiently protected their regulatory autonomy.[39]

Regulatory autonomy has taken in Opinion 1/17 a more prominent place than in the earlier case law of the CJEU. Regulatory autonomy is key for the EU to be able to realize its ambitions as a global leader in climate change policies. The EU's Green Deal in general and commitment to an energy transition, in particular, require deep socio-economic changes in carbon-depending societies that can only be realized if the EU is in the position to determine its own course of action, with a certain distance to vested interests of other international actors but also private investors. However, it has convincingly be argued that it is almost impossible to violate regulatory autonomy.[40] While *prima facie* it might require repeated damages awards that would force the EU to retract legislation to pinpoint a specific violation the opinion procedure under art. 218(11) TFEU puts the Court in the exceptional but important position to assess future clashes between the envisaged agreement and EU law. This, by its very logic, opens the door for an assessment of *probability*.

IV. The Energy Charter Treaty (ECT) in its current form

This section examines the ECT as it is *at present binding* on the EU and 26 of its Member States. The amendments to the ECT, as they were negotiated between 2019 and June 2022 but have not so far (31 December 2022) been formally agreed by the Contracting Parties, are examined in the next section.

The ECT was signed in 1994 and entered into force in 1998. It aimed to incentivise and protect Foreign Direct Investments (FDIs) in the energy sector, in particular from Western European countries into fossil rich countries in the East. In many respects, the

[35] *Ibid.* paras 152-153.
[36] *Ibid*. para. 154.
[37] *Ibid*. para. 155.
[38] *Ibid*. paras 157-159.
[39] See also: L Ankersmit, 'Regulatory Autonomy and Regulatory Chill in Opinion 1/17' cit.
[40] *Ibid*.

ECT is an unusual and anachronistic investment treaty that would not meet current standards of protecting the right to regulate, in particular in order to meet other legal obligations, including obligations to reduce emissions.[41]

Since 2019, the Contracting Parties have been negotiating to modernise the ECT. On 24 June 2022, the *ad hoc* meeting of the Energy Charter Conference endorsed the outcome of the modernization negotiations and gave an "agreement in principle".[42] At the regularly scheduled meeting of the Energy Charter Conference on November 2022, the formal agreement and approval of the amended text was taken off the agenda because at that that point there was insufficient support for the revised ECT amongst the Contracting Parties.

On the side of the EU, the Commission has conducted the negotiations pursuant to art. 218 TFEU based on a negotiating directives adopted by the Council.[43] Besides a public communication of a summary of the changes made to the text, the reformed text endorsed by the Energy Charter Conference has remained secret. It was however leaked by POLITICO pro on 12 September 2022.[44] It is this leaked version that I have used for my analysis below.

IV.1. Substantive tensions

a) Sustainability

Substantively, EU law and the ECT may *prima facie* appear pursuing similar or at least compatible objectives. Both EU law and the ECT promote international economic integration in a way that appears based on a paradigm that further integration is inherently positive and capable of promoting other values, such as economic growth and energy efficiency but also environmental protection, with the ECT even making specific reference to the United Nations Framework Convention on Climate Change (UNFCCC).[45]

However, the ECT structurally subordinates environmental protection to investment protection and trade liberalisation provisions and includes weaker language for its environmental provisions than its investment provisions. It is no surprise therefore that arbitration awards have not given much significance to the ECT's references to the UNFCCC or environmental protection.[46]

The inherent substantive tensions are growing between the ECT, which protects the *status quo*, by protecting expected future profits for past and present investments, in-

[41] See C Eckes and L Ankersmit, 'The compatibility of the Energy Charter Treaty with EU law' cit.

[42] International Energy Charter, *Public Communication of the Ad Hoc Meeting of the Energy Charter Conference of 24 June 2022 Explaining the Main Changes Contained in the Agreement in Principle* www.energychartertreaty.org.

[43] Council of the European Union, *Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption*, 2 July 2019, 10745/19 ADD 1 LIMITE.

[44] Politico, *Energy Charter Mod 24 Secretariat* www.iisd.org.

[45] See Energy Charter Treaty [1994], preamble paras 5, 13-15 and art. 19 and 24(2).

[46] A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition - A Study of the Jurisprudence* (Climate Change Council 2022).

cluding of the fossil fuel industries, and both the urgent need and far-reaching commitments of the EU and its Member States to reduce CO2 emissions in the present and immediate future.[47] The increase of sustainability policies and sharply growing numbers of (strategic) climate cases intended to speed up the transition towards renewable energy may be reasonably expected to result in a growing number of "phase-out cases" under the ECT. The cases of RWE and Uniper against the Netherlands are in this respect likely to be but the first signs of a new wave.[48]

b) Relevance of EU law

One way how EU law has been considered by arbitral tribunals and may be considered even more forcefully in the future is "as a fact" in the assessment of whether the claimant can argue that at the time of the investment it could reasonably expect legal stability.[49] With increasing EU law obligations to reduce emissions, it will be more difficult for future investments to establish such expectations. However, for past investments, depending on the time they were made, this line of argument will only apply to a more limited extent. Similar points can be made with regard to climate litigation.[50]

The EU has adopted a range of instruments with the objective to create a legal framework for achieving the objectives of its political plans under the so-called European Green Deal and meeting its international commitments of reducing emissions. These instruments include for example the EU climate law,[51] the EU Emissions Trading System (EU ETS),[52] Effort Sharing,[53] and emission performance standards for cars.[54] These legislative

[47] Intergovernmental Panel on Climate Change (IPCC) Assessment Report 6 (AR6) (2021); Communication COM(2021) 550 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 July 2021 on 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality.

[48] A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* cit.

[49] See *e.g.*, ICSID case of 21 January 2020 n. ARB/15/44 *Watkins Holdings S.à.r.l and Others v Kingdom of Spain* para. 527; PSA case of 15 May 2019 n. 2014-21 *Photovoltaik Knopf Betriebs-GmbH v The Czech Republic* para. 522.

[50] C Eckes, 'The Courts Strike Back – The Shell Case in Light of Separation of Powers' Verfassungsblog (15 June 2021), verfassungsblog.de.

[51] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law").

[52] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

[53] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) n. 525/2013.

[54] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) n. 510/2011.

measures only further increase the substantive tensions with the ECT, aimed at protecting existing investments in the energy sector, including by fossil fuel industries.

c) Level of investor protection

The ECT offers higher protection to international investors than to other rights-holders. Scholarly literature on ISDS in general and the ECT in particular has widely criticized that ISDS/the ECT treat international investors inequitably favourably as compared to ordinary persons or national investors. Art.16 ECT illustrates this point. It stipulates that "[w]here two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern [...] this Treaty, [...] nothing in such terms of the other agreement shall be construed to derogate from [...] this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is *more favourable to the Investor or Investment*".[55]

In line with this provision, the European Communities made a declaration under art. 25 ECT. This declaration establishes a carve-out from the ECT in that it allows the extension of EU law benefits between the Member States to the extent that these rules are more favourable for investors. It does not shield respondent states from obligations under the ECT if the rules under the ECT are more favourable for investors.

This leads to a situation that the ECT logically is set up in a way that gives investors, including the fossil fuel industries, greater protection for their investments. It is correct that the ECT may also give greater protection to investments into renewables where Member States withdraw originally offered preferential schemes or subsidies for investment into renewables. However, the growing climate emergency will only require more fundamental socioeconomic changes[56] and the tremendous gap between states' international commitments and their actual reduction policies at present[57] lead to the reasonable expectation that the greatest future beneficiary of the enhanced investment protection under the ECT will be the fossil fuel industries. They will necessarily be subject to the most far-reaching restrictions as a result of the necessary sustainability policies at national and EU level.

In addition, and more importantly, the case law of the CJEU on investment arbitration in general and the ECT in particular, highlights numerous institutional and constitutional conflicts between the ECT and EU primary law. These institutional and constitutional conflicts have led the CJEU to conclude that intra-EU arbitration on the basis of the ECT as it is currently binding on the EU and 26 of its Member States breaches EU law.

IV.2. A CLASH WITH NORMATIVE AUTONOMY?

Investor-State-Dispute-Settlement (ISDS) mechanisms established under international agreements to which the EU is a party have in recent years been the context in which the

[55] Emphasis added.

[56] IPCC Assessment Report 6 cit.

[57] Climate Action Tracker, *Climate Action Tracker* climateactiontracker.org.

CJEU has engaged with the EU's normative and regulatory autonomy. Offering an *alternative* route for dispute settlement and, as a consequence, removing disputes from the ordinary judiciary is the *very purpose* of ISDS mechanisms, including the ISDS provision of the Energy Charter Treaty (ECT). This is the core reason why ISDS mechanisms may interfere with the normative autonomy of the EU. *Ad hoc* arbitral tribunals are not courts or tribunals in the sense of art. 267 TFEU. They cannot refer questions to the CJEU. This was specifically confirmed for *ad hoc* arbitral tribunals such as those referred to in art. 26(6) ECT.[58]

As a result, *potential questions about EU law* are removed from the preliminary ruling procedure. Potential questions about EU law can also arise from *prima facie* purely national legal issues, because they fall within the widely defined scope of EU law or because they touch upon the Union's interest.[59] In 2014, the Court rejected the EU's planned accession to the European Convention on Human Rights (ECHR) in a controversial opinion that focused on all eventualities and excludes even the remote possibility of a challenge to the autonomy of EU law.[60] Also, in *Achmea* and in *Komstroy,* the ECJ did not focus on the specific arbitration at hand but considered how the international agreement set up arbitration and whether any (hypothetical future) arbitration could have negative effects for the (autonomy of the) EU legal order.[61]

Not only the cases' outcomes but also the Court's reasoning make *Achmea* and *Komstroy* bad news for extra-EU arbitration on the basis of the ECT. The Court introduced the *Achmea* ruling with eight paragraphs of principled considerations on the *autonomy of the EU legal order* before turning to the central question about the compatibility of the ISDS mechanism with EU law. It found the ISDS mechanism in *Achmea* to be in conflict with the *autonomy of the EU legal order* because it *removes disputes from the jurisdiction of the courts of the Member States*. [62] This is not a new criticism. In fact, the ECJ had highlighted this point also in Opinion 2/15 as the decisive feature of the investment chapter in the Free Trade Agreement between the EU and Singapore (EUSFTA) that requires Member States to give their formal consent the investment arbitration mechanism in that agreement.[63] In *Achmea* and *Komstroy*, the Court added more specifically that the autonomy of the EU legal order can only be preserved by an internal EU judicial system that remains able "to ensure the consistency and uniformity in interpretation of EU law".[64]

Opinion 1/17 confirms the legality of the ICS envisaged under CETA. One core contextual difference between the Court's rulings in *Achmea* and *Komstroy,* on the one hand, and Opinion 1/17, on the other, is the fact that the former concerned *intra*-EU arbitration

[58] *Komstroy* cit. para. 52.

[59] See for the ECJ's interpretation of the scope of EU law, case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 22 and case C-206/13 *Siragusa* ECLI:EU:C:2014:126.

[60] Opinion 2/13 cit.; C Eckes, *EU Powers Under External Pressure* cit. chapter 6.

[61] *Achmea* cit. paras 50–52; Komstroy cit.para. 60.

[62] See also: *Achmea* cit. paras 50–52.

[63] Opinion 2/15 cit. ECLI:EU:C:2017:376 para. 292.

[64] *Achmea* cit. para. 35 (see also above).

while the latter concerns *extra*-EU arbitration under CETA. However, this is not the only difference. Even in light of Opinion 1/17, good reasons support that extra-EU arbitration on the basis of the ECT is incompatible with the normative autonomy of EU law.

First, EU agreements containing ISDS mechanisms are rare exceptions. Besides the ISDS mechanism under the ECT, in fact, the EU is not currently subject to the jurisdiction of any binding international court of tribunal that allows *individuals* to act as parties or directly receives complaints from individuals. While provisionally applied, CETA has not yet entered into force.

Second, the CJEU was more protective of the EU's normative autonomy in Opinion 2/13 than in Opinion 1/17. The stringent approach in Opinion 2/13 may be explained in light of the exceptional authority of the ECtHR, the broad scope of the ECHR having the potential to affect all areas of life, and the fact that it concerns a multilateral agreement with 47 Contracting Parties. By comparison, the arbitral tribunals established under the ECT do not have the exceptional authority of the ECtHR and the ECT is limited to the economic sector of energy. At the same time, the ECT is a multilateral treaty with 53 Contracting Parties. In addition, in relation to the issue of how protective the ECJ may be of the jurisdictional autonomy of the EU in relation to the ECT, it should not be disregarded that the ECT has, as we have seen above, the structural potential to trigger a large number of arbitrations in relation to an already ongoing and irreversible deep socioeconomic transition.

Third, the ECT is different in nature from CETA in that it is a legal framework that permits both intra- and extra-EU arbitration. This is conceptually very different from a separate agreement between the EU and the Member States as one party to an agreement with one or several third states. As explained above, the dividing line between intra- and extra-EU arbitration under the ECT is not static. Whether a particular arbitration is intra-EU (between an investor from one Member State against another Member State) or extra-EU (between an investor from a third state against a Member State or the EU) depends on the seat of the investor and company seats can be moved.[65] The presence of both intra- and extra-EU arbitration under the same agreement is the core conceptual difference that distinguishes the ECT from CETA. In light of the fact that extra-EU arbitration may have effects on intra-EU arbitration, this is a relevant difference to consider in the evaluation of whether the ECT can adversely affect the normative autonomy of EU law.

While ISDS in general and the ECT in particular do not rely on precedents, arbitral tribunals regularly reason their awards in light of the position of earlier arbitration.[66] Hence, interpretations of the ECT but also potentially of EU law in extra-EU arbitration have an indirect effect on the interpretation of the ECT and potentially EU law beyond the ECT, including in intra-EU arbitration, to the extent that it still takes place. This becomes

[65] See for more detail: C Eckes and L Ankersmit, *The Compatibility of the Energy Charter Treaty with EU law* cit.

[66] For ECT in particular, see: A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* cit.

particularly apparent in areas of EU law that have extraterritorial effects, such as EU competition law, the CFR, or EU financial regulations related to derivatives trading.[67]

Fourth, an important difference between the ECT and CETA is that the ECT does not offer comparable *procedural safeguards* of the EU's normative autonomy as CETA. CETA contains a procedural separation provision (art. 8.31.2), which takes a four-pronged approach. It states, first, that the ISDS mechanism "shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of [CETA]"; second, it "may consider, as appropriate, the domestic law of a Party as a matter of fact"; third, it "shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party"; and, fourth, "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party". The ECT does not offer any of these procedural safeguards, aiming to separate the activities of the arbitral tribunals from the EU legal order.

As a result of the missing separation provision, the status of EU law in arbitral tribunals established on the basis of the ECT is entirely uncertain. From the perspective of the ECT and hence the tribunals established on the basis of the ECT, EU law could either be seen as a distinct legal order constituting domestic law or as international law. However, even if accepted to be domestic law, this does not allow the EU (or its Member States) to rely on domestic law as a defence for avoiding responsibility under an international agreement, *i.e.,* the ECT. Pursuant to art. 27 of the VCLT/VCLTIO 1986 (the latter is not in force but widely accepted to constitute customary international law) a State cannot rely on domestic law as an excuse for failing to comply with treaty obligations.[68]

If, by contrast, EU law was seen as international law and hence as at least potentially "applicable rules and principles of international law" under art. 26(6) ECT,[69] its applicability would still depend on whether the substantive protections that it provides are more favourable to investors than are the investment protection of the ECT.[70] The latter is the condition for applicability in the conflict clause of art. 16 ECT. In other words, EU law could not easily justify a restriction of the investor's rights under the ECT. It should be added that a different

[67] M Cremona and J Scott (eds), *EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law* (Oxford University Press 2019).

[68] ICSID case of 31 July 2019 n. ARB/15/38 *SolEs Badajoz v Spain* para. 150.

[69] See also: Vienna Convention on the Law of Treaties (1969) art. 31(3)(c), stipulating that courts and tribunals should interpret a treaty taking into account "any relevant rules of international law applicable in the relations between the parties".

[70] *SolEs Badajoz v Spain* cit. para. 164; ICSID case of 6 June 2016 n. ARB/13/30 *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Kingdom of Spain* (Decision on Jurisdiction) para. 75; ICSID case of 31 August 2018 n. ARB/13/30 *Vattenfall v Germany II* (Decision on the Achmea Issue) para. 229; SCC case of 8 March 2021 n. 2017/060 *FREIF Eurowind Holdings Ltd v Kingdom of Spain* (Final Award) para. 325.

position was taken in *Electrabel v. Hungary*,[71] which, however, appears not to have been followed by subsequent tribunals as far as information is publicly available.

Finally, the ECT does not contain a clause stipulating the limited legal bindingness of the arbitral tribunals' findings for the national courts of the Member States or the CJEU. However, while claims on the basis of the ECT primarily aim for financial compensation, the primary remedy sought in some claims based on the ECT appears to request specific performances. An example is the by NordStream2 case against the European Union[72] and the first Vattenfall case against Germany.[73] The former requests the 'disapplication' of the Gas Directive from the project. The latter concerned the amount of Elbe water that could be used by the investor without harming the ecosystem of the river.

Pursuant to Opinion 1/17, arbitration systems must (1) guarantee that arbitration panels do not interpret EU law "other than the provisions of the [international investment agreement]" and (2) not have "*effect on the operation of the EU institutions* in accordance with the EU constitutional framework".[74] An assessment of the ECT in light of these two conditions demonstrates, first, that the ECT tribunals interpret EU law, including as (international) law; second, that they are likely to carry out balancing tests that entail the interpretation of EU policies and their assessment in light of the ECT; and, third, and most importantly, that the fundamental concerns of the CJEU regarding the removal of disputes from the preliminary ruling procedure as the backbone of the autonomy and effectiveness of EU law also apply to extra-EU arbitration on the basis of the ECT. Matters that at least potentially affect EU law and hence fall within the widely interpreted scope of EU law are decided by judicial bodies that cannot refer preliminary rulings to the CJEU.

In other words, good legal arguments support that the ECT in its current from adversely affects the EU's normative autonomy. The third subsection below offers an assessment as to whether the reformed text of the ECT gives reason for a different conclusion.

IV.3. Limiting regulatory autonomy?

The CJEU was more protective of the EU's regulatory autonomy in Opinion 2/13 than in Opinion 1/17. This becomes particularly apparent in the comparison of the discussions of the effects on the operation of the EU institutions. Opinion 2/13 aims to exclude the

[71] ICSID case of 30 November 2021 n. ARB/07/19 *Electrabel SA v Republic of Hungary* (Decision on Jurisdiction, Applicable Law and Liability) paras 4.187-4.191. See also: A Ipp, A Magnusson and A Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* cit. 39.

[72] PCA case of 3 July 2020 n.2020-07 *Nord Stream 2 AG v EU*.

[73] ICSID case of 11 March 2011 n. ARB/09/6 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany (I)*, see also ISDS Platform *Vattenfall vs. Germany I: Coal-fired electric plant* www.isds.bilaterals.org.

[74] Stated in Opinion 1/17 cit. para. 119 and elaborated in paras 120 ff. and 137 ff.,respectively.

possibility of effects on the institutional interaction ('stress test').[75] Opinion 1/17 by contrast examines the *probability* of effects.[76] What would be the assessment of the effects of the ECT on the EU's regulatory autonomy?

The ECT contains all problematic features identified in the section on regulatory autonomy above. First, the ECT contains a broad definition of investment, although it is – in line with the subject matter of the ECT – limited to investments "associated with an economic activity in the *energy sector*".[77] "Investment" under the current ECT is defined as "every kind of asset, owned or controlled directly or indirectly by an investor". Second, art. 26(3)(a) ECT establishes that the EU and the EU Member States that are party to the ECT give "unconditional consent to the submission of a dispute to international arbitration". Third, the ECT does not preclude that a dispute can concern a measure of general application or an act implementing a measure of general application. Any dispute may be brought "relating to an investment" of an investor of one party in the area of the other party.[78] Recently, the EU itself has found itself in a dispute with a Swiss company Nord Stream 2 AG over its amendment of the Gas Directive 2009/73/EC as an example of a claim challenging a measure of general application.[79] Fourth, art. 26 (8) ECT provides that the "awards of arbitration [...] shall be final and binding upon the parties to the dispute. [...] Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its area of such awards". Accordingly, this element has also been satisfied in relation to the ISDS-mechanism in the ECT.

While containing all the features that are problematic for internal regulatory autonomy, the ECT does not offer all the required safeguards considered by the Court in Opinion 1/17. First, the ECT contains an exceptions clause. However, the clause is more limited than that of CETA. In addition, the more limited exceptions clause is only partially applicable to the relevant part III of the ECT on investment protection. Significantly, parties cannot rely in the context of ISDS disputes on the exception that allows parties to adopt or enforce any measure "necessary to protect human, animal or plant life or health".[80] These grounds of public interest protection are explicitly listed by the Court in Opinion 1/17.[81]

Second, the ECT has a "right to regulate" clause (art. 18 ECT on resource sovereignty) that is somewhat comparable to art 8.9.1 CETA although it only applies to resource sovereignty. However, art. 18 ECT is located in Part IV of the ECT, not part III of the ECT. Art. 26 ECT limits the jurisdiction of the tribunals to disputes concerning "an alleged breach of an obligation of the former under Part III". Hence, the right to regulate is not protected

[75] C Eckes, 'Autonomy of EU Law' cit. 8.
[76] Opinion 1/17 cit. para. 138.
[77] Energy Charter Treaty cit. art. 1(6) ECT, emphasis added.
[78] *Ibid*. art. 26(1).
[79] *Nord Stream 2 AG v European Union* cit.
[80] Energy Charter Treaty cit. art. 24(2)(b).
[81] Opinion 1/17 cit. para. 152.

in ISDS disputes. In addition, the ECT does not feature a clause similar to 8.9.2 CETA. Therefore, the current ECT does not meet this particular safeguard.

Third, no Annexes or Decisions under the ECT offer interpretative safeguards as to the levels of protection established by the Parties in their respective territories. Fourth, the ECT does not circumscribe the scope of the "fair and equitable treatment" and indirect expropriation standard as referred to by the Court in Opinion 1/17. The text of the ECT does not state that non-discriminatory public interest measures can only constitute "indirect expropriation" where such measures "are so severe in light of its purpose that it appears manifestly excessive". Oddly, though, this provision in CETA seems to specifically allow tribunals to call into question the level of protection sought by a party. The limitations (excessive measures) nonetheless appear to satisfy the Court. In relation to the "fair and equitable treatment" standard in the ECT, art. 10 ECT does not contain an exhaustive list, nor have the parties to the ECT explicitly "concentrated on [...] situations where there is abusive treatment, manifest arbitrariness and targeted discrimination". Rather, "fair and equitable treatment" is neither defined nor does art. 10(1) ECT provide an exhaustive list when a violation of this standard has occurred.

Furthermore, the ECT and CETA differ in other respects. While both agreements predominantly seek to liberalise trade and protect foreign investment, the parties to the CETA have been more explicit in underlining the importance of protecting the ability for parties to regulate in the public interest and to have the freedom to set the levels of protection of those public interests. The Joint Interpretative Instrument of CETA refers to the CETA as a "modern and progressive trade agreement" with various provisions that seek to protect the ability of the Parties to protect public interests such as environmental protection and to choose the appropriate level of protection.

What is more, the ECT contains two provisions that negatively affect the regulatory autonomy of the EU institutions that are not present in CETA. First, the ECT contains the above sketched non-derogation clause in art. 16 ECT. Even if the ECT is the only agreement to which the EU is party, Opinion 1/17 makes clear that regulatory autonomy can also be adversely affected were Member States are implementing EU law and Member States are party to a significant number of investment agreements with states that are party to the ECT. Second, the ECT is explicit in structurally subordinating environmental protection to investment protection in the text. For instance, art. 13(1) of the Energy Efficiency Protocol contains a hierarchy clause that subordinates the provisions of the protocol to the ECT and both the Energy Efficiency Protocol and art. 19 of the ECT are not covered by the dispute settlement procedures of art. 26 (ISDS) and art. 27.[82]

By way of conclusion, the ECT in its current form is incompatible with the EU's internal regulatory autonomy, because the ECT gives ISDS tribunals relevant powers to interfere with internal policies without offering sufficient legal safeguards.

[82] Energy Charter Treaty cit. art. 19(2), 26(1) and 27(2)

V. The reformed text of the ECT

This section examines whether the reformed text as it was agreed by the negotiating parties on 24 June 2022 gives reasons for a different assessment. It engages in turn with the substantive difference, normative autonomy, and regulatory autonomy.

V.1. Substantive incompatibilities are a ticking bomb

Substantively, the amended ECT text aims to reduce the tension between the ECT and EU law, in particular by bringing the former in line with the Paris Agreement and restricting the scope for claims by the fossil fuel industries; yet, it does not resolve the inherent tension between the "fuel-neutral" protection of the *status quo* and the need to quickly realize deep socio-economic changes. Fuel-neutral is used to refer to the fact that it protects both fossil fuel and renewable energy.[83] Protecting the *status quo* at this point in time means protecting 340 billion US dollars of investments into fossil fuel.[84] Hence, the term "fuel-neutral" https://borderlex.net/2022/11/14/energy-charter-treaty-preserving-a-forum-for-energy-transition-diplomacy/ while legally correct, both fossil fuels and renewable are protected under the reformed text, is questionable in light of the factual situation of much higher investments in fossil fuel than renewable energy. In any event, continuing to protect fossil fuels is contrary to the EU's and national climate policies and the Paris agreement. For *existing* investments on the territory of the EU protection continues for ten years beyond entering into force. *New* investments into fossil fuel remain protected until 15 August 2023. The protection of fossil fuel investments in non-EU states remains unlimited in time.[85] The extensive sunset clause in current art. 47(3) ECT protects the effects of the ECT for 20 years after a contracting party withdraws will remain in place in the reformed ECT.[86]

While *prima facie* the protection of existing fossil fuel investments to a period of 10 years may seem significantly shorter than the twenty years of the so-called sunset clause that is in principle triggered by withdrawal, the devil is in the detail. The protection extends ten years beyond entering into force. This took three, four years for the current text.[87] However, the reform is must more controversial and several parliaments have

[83] U Rusnák, 'Energy Charter Treaty: Preserving a Forum for Energy Transition Diplomacy', Borderlex 14 November 2022 borderlex.net; see the understanding added by the contracting parties to the definition of "economic activity" in art. 1(5), clarifying that economic activity refers to "(i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium; (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources".

[84] K Tienhaara, R Thrasher, A Simmons, and K Gallagher, 'Investor-State Disputes Threaten the Golbal Green Energy Transition' (2022) 376 Science 701.

[85] The only non-EU states that have committed to limiting the protection of certain fuels are the UK and Switzerland, see Annex NI.

[86] Art. 47 ECT remains unchanged.

[87] The current text of the ECT was signed in December 1994 and entered into force in April 1998.

voiced strong criticism.[88] The reformed text states in anticipation of looming ratification difficulties that protection will end at the latest on 31 December 2040.[89] The greatest problem, also from a justice perspective, *i.e.*, that the Commission speaks of a just transition, is that fossil fuel investments of EU investors in non-EU states remain protected without any time limit.[90] In other words, while the EU (limitations of fossil fuel protection) and the Member States (by withdrawing) aim to escape investor claims for billions of euros, the Commission/DG Trade and at present several Member States that do not want to stand in the way of reforming and extending the ECT[91] actively pursue or at least allow for roping in developing and usually financially struggling countries into an investment treaty that exposes them to excessive claims for compensation in the future. If the reformed ECT is financially risky and climate policy incompatible for EU states, why would one want to extend it to African countries?

Another important aspect of current and above all future substantive incompatibility of the reformed text of the ECT with EU climate policies is the newly introduced protection of renewables, *i.e.*, hydrogen, ammonia, biomass, biogas, and synthetic fuels.[92] First, by protecting the interests of investors above and beyond other rights and principles protected under domestic constitutional law (by exceptionally protecting uncertain future earnings) the balance is tilted towards economic interests of private persons and the common interest in maintaining a habitable climate. Second, while we do not understand all the implications of the unprecedented socio-economic changes necessary in the energy transition, we do know that our understanding and technological possibilities will increase. Locking public policy in regulatory frameworks and subsidy schemes that appeared sensible to reduce emissions in the past (*e.g.*, biomass) have proven and are likely

[88] European Parliament resolution P9_TA(2022)0268 of 23 June 2022 on the future of EU international investment policy. The EP has scheduled a debate about the reformed text for 21 November 2022, the day before the meeting of the Energy Charter Conference.

[89] Tweede Kamer (Dutch Parliament, 2nd chamber), Appreciatie van de moderniseringsvoorstellen voor het Verdrag inzake het Energiehandvest (Energy Charter Treaty), 10 November 2022, available at: www.tweedekamer.nl See Annex NI Section C 1 of the leaked text of the reformed Energy Charter Treaty.

[90] See however Japan as the only country in the Annex IA-NI, which contains a "[l]ist of Contracting Parties not allowing to submit to international arbitration a dispute related to an Investment in their Area by an Investor of another Contracting Party regarding Energy Materials and Products *excluded* by the latter" (emphasis added); in other words, Japan excludes the protection of fossil fuel investments by investors from a contracting party that itself does not protect fossil fuel investments. All other contracting parties to not introduce any limitation of the protection of fossil fuel investments by EU investors.

[91] See the ambition of the ECT Secretary-General Guy Lentz to extend to forty African countries: K Mathiesen and SA Aarup, 'The world's biggest dirty energy club is cracking up' (24 October 2022) Politico www.politico.eu.

[92] See Annex EM I of the leaked text of reformed Energy Charter Treaty (Energy Materials and Products in accordance with art. 1(4) ECT); low carbon hydrogen, also called blue hydrogen, is highly problematic: Environmental Defense Fund, *For hydrogen to be a climate solution, leaks must be tackled* www.edf.org.

to continue to prove outdated and insufficient in the future. Any such straightjacket on policy reactions to technological advances is likely to be costly and counterproductive.

Some of the precise limits of what constitutes "green investments" are already contrary to the EU's own taxonomy of what is 'green' at present. The reformed ECT for example transitionally protects the production of energy emitting less than 380 grams of CO2 per kilowatt hour, while the EU taxonomy classifies power plants with more than 270 grams of CO2 emissions per kilowatt hour as "significantly harmful".[93] Fact is that the ECT will continue to protect activities by EU investors in non-EU countries that are outlawed within the EU. Yet, climate change remains a *cumulative global action problem*, where every ton of CO2 contributes to irreversible temperatures increases that will change life on Earth – irrespective of where it is emitted.

By way of conclusion, the reformed ECT continues to clash with EU climate policies at present and is likely to do so even more in the future. An increasing number of disputes as result of the energy transition are all but certain. This makes the questions of whether the reformed ECT, if it sees the light of the day, would be compatible with the EU's normative and regulatory autonomy particularly relevant. The high likelihood of many disputes challenging EU policy should also mean that if the Court was consulted it would take a close look at the reformed ECT.

V.2. Limiting normative autonomy – how far is too far?

As to the *normative* autonomy of EU law, the reformed text of the ECT replicates the procedural separation mechanisms of CETA.[94] The reformed text of the ECT hence *textually* offers the same safeguards as CETA. Whether the same level of procedural safeguards however is sufficient to reduce the likelihood of conflict to a legally acceptable level is a different issue. In this assessment, one would need to consider the multilateral nature of the ECT with 53 contracting parties and plans of extension into 40 additional countries (as opposed to Canada as the only non-EU state that is party to CETA), the fact that at present the ECT protects fossil fuel investments of 340 billion US dollars that are likely to be affected by climate policies, as well as the continuous possibility of arbitration by former EU investors against another EU Member State by move their seat to a non-EU state. The reformed text of the ECT contains a clause aiming to limit this possibility by requiring 'substantial business activity' in the area of the Contracting Party under which law the investor is constituted.[95] Overall, the normative effects on the EU legal order are likely to be greater than those of CETA. Whether this leads to classifying the reformed text of the ECT as violating the normative autonomy of EU law becomes a decision based on the degree of interference that the

[93] Klimareporter, *Die EU steuert auf einen Ausstieg aus der Energiecharta zu* www.klimareporter.de.
[94] See footnote 13 attached to art. 26(6) of the leaked text of the reformed Energy Charter Treaty.
[95] Art. 1(7)(ii) leaked text of the reformed Energy Charter Treaty.

Court is willing to tolerate. In light of the low normative legitimacy of arbitral tribunals,[96] the Court may feel insufficiently threatened in its jurisdictional authority.

V.3. EU REGULATORY AUTONOMY INTERPRETED BY ARBITRATORS

As to *regulatory* autonomy, the reformed text continues to contain all the identified problematic features, with certain qualifications. Under the amended ECT, the definition is limited by the need for the investment to entail "the commitment of capital or other resources, the expectation of gain or profit, a certain duration or the assumption of risk."[97] Nonetheless, even with these qualifications the definition of investment remains broad and hence problematic.

The amended ECT text offers several, but not all, of the safeguards included in CETA. The reformed text includes a "right to regulate" clause in Part III of the ECT. It also essentially introduces the same texts for the "fair and equitable treatment" standard and "indirect expropriation" standard as under CETA. Notably, the reformed text includes 'understandings' of the contracting parties and footnotes are added to several provisions serving as interpretative tools.[98]

However, even if the amended ECT text offers several safeguards the ECT remains a very different agreement than CETA. Importantly and unlike the Joint Interpretative Instrument in CETA, the reformed text of the ECT does not explicitly state that the ECT does "not lower [the standards and regulations of each Party] related to food safety, product safety, consumer protection, health, environment or labour protection" or that "imported goods, service suppliers and investors must continue to respect domestic requirements, including rules and regulations". The ECT only states that '[t]he Contracting Parties *shall not encourage* trade or investment in energy *by relaxing or lowering* the levels of protection afforded in their respective environmental or labour laws'.[99] This is a provision of a very different order as it only relates to the actions of the parties in terms of encouraging investment by lowering protection by changing domestic law. In short, while these sections of the Joint Interpretative Instrument were cited by the Court in Opinion 1/17 in finding CETA compatible with the regulatory framework in the EU they do not find an equivalent in the reformed ECT.[100]

Overall, the reformed text of the ECT aims at better protecting regulatory autonomy; however, the interpretation of these provisions lies in the hands of arbitrators appointed by the parties, who have so far been very reluctant to give weight to environmental and

[96] Many scholars have written on the legitimacy problems of ad hoc ISDS tribunals, see *e.g.*, C Olivet and P Eberhardt, 'Profiting from Crisis. How Corporations and Lawyers are Scavenging Profits from Europe's Crisis Countries' (TNI CEO 2012) corporateeurope.org.

[97] Art. 1(6) leaked text of reformed Energy Charter Treaty.

[98] See as an example footnote 13 added to art. 26(6) leaked text of the reformed Energy Charter Treaty, that clarifies the relation of international law to the law of the contracting parties.

[99] Art. 19(3) leaked text of the reformed Energy Charter Treaty.

[100] Opinion 1/17 cit. para. 155.

social protection.[101] The difficulty of finding arbitrators that are not captured by the industries does not lead to greater trust in the system.[102] The ISDS provision in the ECT does neither meet the standard of the Investment Court System under CETA nor the standards of independence and coherence that the EU strives for in its general investment protection policy.[103] It remains hence likely that also arbitration under the reformed text will continue to interfere with the regulatory autonomy of the contracting parties, particularly in light of the significant and growing substantive incompatibilities between the ECT and the EU's climate ambitions.

The combination of the exceptionally intensive use of the ECT by investors, the high amount of fossil fuel investments protected under the ECT, and the EU's ambition to reduce emissions sharply in the coming years could very well meet the threshold of a probability assessment carried out by the Court under the opinion procedure. If the ECT reform is (partially) successful and the EU and some of its Member States remain a party it would certainly be worth testing.

VI. The dark side of the EU's external regulatory autonomy

External regulatory autonomy, it should be recalled, refers to the EU institutions' ability to act externally without being dependent on either the Member States or any external actors, such as non-EU states or non-state actors. However, as the reform of the ECT illustrates EU external regulatory autonomy can translate into executive power unbound, *i.e.*, the Commission pushing for its preferred policy without public debate and without the support of either the Council or the European Parliament. This is highly problematic from a separation of powers perspective.

In October and November 2022, Member States one after the other announced that they planed to withdraw from the ECT,[104] all at least also because the ECT, including in the reformed version, constitutes an obstacle to climate policies. States predominantly point at the continuous protection of investments into fossil fuels. Civil society organisations have in large numbers criticised the amended ECT as a continuous obstacle to domestic climate policies, including because it extends protection to renewable energy

[101] Climate Change Counsel, *The Energy Charter Treaty, Climate Change and Clean Energy Transition, A Study of the Jurisprudence* www.climatechangecounsel.com.

[102] A Neslen, 'Revealed: secret courts that allow energy firms to sue for billions accused of 'bias' as governments exit' (14 November 2022) The Guardian www.theguardian.com; see also: A Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in L Sachs, L Johnson and J Coleman (eds), *Yearbook on International Investment Law and Policy* (Oxford University Press 2018); C Olivet and P Eberhardt, 'Profiting from Crisis' cit.

[103] European Parliamentary Research Service, *Investor-state protection disputes involving EU Member States – State of Play* www.europarl.europa.eu.

[104] France, Germany, the Netherlands, Slovenia, Spain, Poland and Luxembourg have done so, B Moens, 'Germany to leave Energy Charter Treaty' (11 November 2022) Politico www.politico.eu.

sources, such as biomass and hydrogen and that this is likely stand in the future in the way during the search for the best way to realise the energy transition.[105] However, the European Commission remains silent on the either of these two points of criticism, continues to refer to the sunset clause (which remains unchanged in the reformed text) and keeps the legal advice on the requirements and consequences of EU withdrawal secret.[106] It simply emphasises that in principle the plan remains that the EU in its own right will remain a party of the ECT and that the Commission will have to conduct further legal assessments of EU withdrawal at this point.[107]

In the context of a mixed agreement that contains ISDS provisions at its heart, the EU and its Member States must cooperate closely. Opinion 2/15 explicates that Member States must consent to ISDS because it removes disputes from national judiciaries and the institutional mechanism of judicial dialogue that is the "keystone" of European integration, namely the preliminary ruling procedure under art. 267 TFEU.[108] As has been pointed out, the choice of words of the Court of "shared competence" in Opinion 2/15 may be confusing but the meaning of the judicial reasoning of the court leaves little doubt that the EU alone cannot conclude international agreements that contain ISDS provisions.[109] A contextual reading of paras 292 and 293 of Opinion 2/15 demonstrate that consent of the Member States would require ratification as a party to a mixed agreement.

However, the vital question is whether, in the future, after eight Member States, representing more than 70 per cent of the EU's population, have left the ECT (France, Germany, Italy, Luxembourg, the Netherlands, Slovenia, Spain, and Poland), the EU can actually remain a contracting party to an investment treaty that is centrally built around an ISDS mechanism. Withdrawal for these Member Sates would have no effect if at the same time they gave consent for the EU remaining a party in its own right. This question is an intricate question of EU competences. It stands next to the strong substantive criticism that the reformed ECT continues to hinder domestic climate policies, including those adopted by the EU.[110]

[105] See *e.g.*, the letter of 12 NGOS to the Dutch government: Urgenda, 'Dringende oproep aan kabinet: stap nu uit het Energiehandvestverdrag' (10 October 2022) www.urgenda.nl.

[106] P Leino-Sandberg and C Eckes, 'The European Commission's Assessment of EU Withdrawal from the Energy Charter Treaty' cit.

[107] Previously, the Commisson refused to further investigate withdrawal: B Moens, Germany to leave Energy Charter Treaty, politico, available at: www.politico.eu; however, early December, Cristina Lobillo Borrero mentioned a change in position in this respect, as reported by Anna Hubert on her Twitter account (@AnnaHbrt) on 6 December 2022 at twitter.com.

[108] Opinion 2/15 cit.

[109] L Ankersmit, 'Opinion 2/15 and the future of mixity and ISDS' European Law Blog (18 May 2017) europeanlawblog.eu and D Thym, 'Mixity after Opinion 2/15: Judicial Confusion over Shared Competences' Verfassungsblog (31 May 2017) verfassungsblog.de.

[110] M Peigné, 'ECT: "ecocide" treaty puts Member States and EU Commission at odds' (25 July 2022) Investigate Europe www.investigate-europe.eu; K Tienhaara and L Cotula, *Raising the Cost of Climate Action? Investor-state Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development 2020) www.iied.org.

The Commission does not engage with the discussion of how the EU can remain a party to the ECT in its own right, when eight Member States have left. The Commission, led by DG Trade, appears to stick, for the moment, to its course of action of pushing the reform of the ECT, irrespective of the increasing opposition of the Member States. The only publicly available reaction of the Commission so far is that it amended the proposal for the Council decision on the EU's position at the Energy Charter Conference. The first proposal dating from 5 October 2022 suggested for the EU "to support the adoption [...] of the proposed amendments".[111] The proposal of 14 November 2022 by contrast states "The position to be taken on the Union's behalf, as regards matters falling within Union competence, at the 33rd meeting of the Energy Charter Conference shall be to participate in the vote and to raise no objection".[112] However, no public position has been taken by the Commission on what its position is what "matters falling within Union competence" means and more specifically what this means with regard to the ECT's ISDS mechanism. Hence, this remains a matter of speculation.

As the Commission explains in its proposal of 5 October 2022: "At the 33rd meeting of the Energy Charter Conference on 22 November 2022, the decisions related to the modernisation of the ECT will be subject to a unanimity vote. If the vote is successful, i.e. if no Contracting Party raises an objection, the decisions for the modernisation of the ECT will be considered "adopted" by the Energy Charter Conference. This adoption will trigger subsequent processes for the ratification, provisional application, and eventual entry into force of the various elements of the reform package." In other words, for the moving forward of the ECT reform, the change of the text of the proposal does not seem to matter.

After having been put on the Council's agenda and removed again, on 17 November 2022, the preparation for the adoption of the Council decision on the EU's position at the Energy Charter Conference was put back on the agenda of COREPER I for 18 November 2022. At this meeting, a blocking minority of Member States (DE, ES, FR & NL) blocked the adoption of the Commission proposal to "vote and raise no objection" at the Energy Charter Conference on 22 November 2022.

Effectively, if the Council had adopted the Commission's proposal the reform had moved forward, and the EU and its Member States would have been in principle expected by the other Contracting Parties to the ECT to conclude/ratify the amendments. The decision to take a position at the Energy Charter Conference is similar to a decision to sign an international agreement or to initial its text. Hence, while it creates expectations of third countries, it is not legally binding under international law.

[111] Proposal COM(2022) 521 final of 5 October 2022 for a Council decision on the position to be taken on behalf of European Union in the 33rd meeting of the Energy Charter Conference.

[112] Draft Council decision on the position to be taken on behalf of the European Union at the 33rd meeting of the Energy Charter Conference, 14 November 2022, 14399/22, Interinstitutional File: 2022/0324(NLE) data.consilium.europa.eu.

The intra-EU discussions between the Commission and the Member States all take place behind closed doors and it is ultimately impossible to know why a Member State like France, which was one of the first to announce withdrawal, changed its position from voting in favour of the Commission's proposal on the position of the EU at the Energy Charter Treaty to voting against. What we do know is that besides the Slovakian minister of foreign affairs, who is also the former Secretary-General of the ECT, no Member State or representative of a Member State has publicly argued in favour of reforming and staying in the ECT.[113] That no public debate on the position of the Member States has taken place.

While the Parliament was kept out of the discussions of the Commission proposals for a Council position at the Energy Charter Conference, the position of the European Parliament is vital at the later stages of provisional application and conclusion.[114] Already on 23 June 2022, the European Parliament had adopted a very critical resolution, calling on the Commission to withdraw from the ECT if the reformed text, which was endorsed a day later, did not deliver what was asked of the Commission in the negotiating directives, crucially the exclusion of intra-EU arbitration and compliance with the 2015 Paris Agreement.[115] On 23 November 2022, the EP adopted a resolution calling on the EU to withdraw from the ECT.[116] It emphasised several important points regarding first the reform procedure and second lack of support for the outcome. First, the EP concluded that "the legal text of the final agreement has not yet been formally published, which does not meet the level of transparency of other EU trade and investment agreements".[117] The EP further stressed 'that the Commission ha[d] not adequately prepared th[e] coordinated withdrawal nor shared any information about it, despite Parliament's several demands since the beginning of the modernisation negotiations, as an alternative in case of unsatisfactory results or the failure of the modernisation process'.[118]

In terms of lack of support, the EP recalled that "since the conclusion of negotiations, Germany, France, Spain, the Netherlands, Poland, Slovenia and Luxembourg, who combined represent more than 70 % of the EU's population, announced their intention to withdraw from the ECT".[119] Finally, the EP "[u]nderline[d] the need to act in a coordinated manner in order to be stronger in the withdrawal negotiations and to limit the negative

[113] See, *e.g.*, U Rusnák, 'UNFCC COP23 on International Energy Charter' (16 November 2017) unfccc.int and U Rusnák, 'Mission statement for the International Energy Charter in 2022-2026' (February 2021) www.euractiv.com.

[114] Legally speaking, the EP's consent is not necessary pursuant to art. 218(5) TFEU. It is necessary for conclusion pursuant to art. 218(6) TFEU.

[115] European Parliament resolution P9_TA(2022)0268 of 23 June 2022 on the future of EU international investment policy.

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

[117] *Ibid*. section J.

[118] *Ibid*. section 20.

[119] *Ibid*. section K.

effects of the sunset clause and to effectively prevent intra-EU disputes"; it "urge[d] the Commission to initiate immediately the process towards a coordinated exit of the EU from the ECT and call[ed] on the Council to support such a proposal" as it "believes this to be the best option for the EU to achieve legal certainty, and prevent the ECT from putting the EU's climate and energy security ambitions in further jeopardy".[120]

The EP's resolution of 23 November 2022 leaves DG Trade isolated with eight Member States that have either already left or plan to leave, a minority of Member States blocking a positive EU common position on the reform, an EP that calls for coordinated exit of the EU and its Member States. However, what is more shocking is that no vocal defender of the pro-reform, pro-ECT position has emerged in the EU context. It seems difficult to imagine that the Commission can further refuse to consider EU withdrawal from the ECT. However, for the moment it seems to be playing for time and perhaps also a shift of public opinion away from the ECT reform.

Against the backdrop of an increasing number of Member States announcing withdrawal from the ECT as parties in their own right, complex legal considerations come into play. On the side of the withdrawing Member States, if the Council had adopted a positive EU common position and Member States had then – as announced – unilaterally withdrawn, without having made the intention to withdraw formally clear when they supported amendment of the ECT withdrawal could trigger loyalty obligations. In light of stringent loyalty obligations in external relations, unilateral withdrawal could arguably be considered to undermine the EU's unity in external representation.[121] This would mean that those Member States that withdraw shortly after a – now hypothetical - positive Council vote on the EU's participation in the reform, withdraw in full knowledge that the EU needs their participation in the reformed ECT for the ISDS provisions to take effect would breach EU loyalty obligations.

At the same time, if the EU wishes to stay in the ECT, while Member States are withdrawing the question arises to what extent the EU is able to bind Member States under international law to a Treaty that largely governs FDI, which is an exclusive competence of the EU, but contains ISDS provisions that cannot be concluded by the EU without the consent of the Member States. The Commission has throughout taken the position that the EU is competent to stay; yet, this is far from uncontroversial, as it would have to make clear that it does not bind the withdrawing Member States to the ISDS provision, and it is very unlikely that any non-EU-Contracting Party to the ECT would accept this.

All in all, the reform process demonstrates the difficulty arising from the legal requirement that 28 international actors, with their own interests and political constraints, must approve and conclude a multilateral agreement as one party. This difficulty is well

[120] *Ibid*. section 21.

[121] See art. 4(3) TEU as the provision setting out the general duty of EU loyalty C Eckes, 'Disciplining Member States: EU Loyalty in External Relations' (2020) CYELS 85.

known in the context of mixed agreements, in particular multilateral mixed agreements. However, international trade and investment agreements have increasingly become politicised.[122] An increasing part of society (and certainly of academics) questions the inherent value of more and freer trade and greater protection of investors in light of what this contributes to the planetary degradation and inequality. This makes an open public debate about the desirability of such agreements stand in conflict with their smooth conclusion. The negotiation process of CETA and TTIP are illustrative in this respect. The public debates surrounding MERCOSUR are just another example. Seemingly, the Commission quite routinely shuts down public debate the Member States and civil society.[123] However, how the Commission failed to push through the amendment of the ECT may indicate that public opinion cannot structurally be ignored. The Commission's attempt of silently pushing for a Council decision approving an expansion of the controversial ISDS mechanism under the ECT demonstrates the legitimacy crisis of EU decision-making in the field of trade. It exposes the Commission to strong criticism from a separation of powers perspective. Its actions of pushing through a reform without public debate and its refusal to consider withdrawal lack democratic legitimacy and go beyond what an executive body should do without support of the other branches.

What would be desperately needed from a democratic legitimacy perspective is a public debate on the legal and other consequences of a coordinated EU withdrawal that is preferred by eight EU Member States representing more than 70 per cent of its population. This debate should also address whether it is possible for the EU to remain a party to the ECT and for which parts of the ECT after these Member States have withdrawn. Similarly, what are the options of the Member States that wish to remain a party to the ECT, despite the fact that it is contrary to EU climate policy.

The compatibility of the amended text of the ECT with EU law could be challenged before the CJEU via different avenues. As long as the EU itself remains a party to the ECT the revised text could be made subject to an opinion procedure before the Court. After the agreement in principle, the text would qualify as an "envisaged agreement" within the meaning of art. 218(11) TFEU.[124] If the EU withdraws but some Member States remain party to the amended ECT, their continuous participation in an international treaty that contradicts and hinders EU climate policy could be challenged under arts 258 or 259 TFEU. However, in both cases, one of the priviledged parties mentioned in these provisions would have to initiate proceedings. Actions for annulment could equally be brought

[122] D De Bièvre and A Poletti, 'Towards Explaining Varying Degrees of Politicization of EU Trade Agreement Negotiations' (2020) Politics and Governance 243; S Meunier and R Czesana, 'From Back Rooms to the Street? A Research Agenda for Explaining Variation in the Public Salience of Trade Policy-Making in Europe' (2019) Journal of European Public Policy 1847.

[123] In the case of Mercosur, the EU did not even wait for the sustainability impact assessment to be concluded.

[124] Opinion 1/20 was declared inadmissible on 16 June 2022 because no "envisaged agreement" existed yet. At the time, the negotiating parties had not yet agreed on a text.

by privileged applicants under art. 263 TFEU against EU actions that are not in line with EU powers, *e.g.*, if the EU acts *ultra vires* by taking a position at the Energy Charter Conference on matters that do not fall under EU competences.

More importantly in the current context, the reform process of the ECT demonstrates how vesting the EU with greater external regulatory autonomy by expanding its competences and external relations objectives places the Commission and DG Trade as the negotiator of this and future trade and investment treaties in a very powerful position. The process also demonstrate that the Commission/DG Trade is willing to use this power to push through the approval of reforming a highly controversial agreement even if this requires ducking away from public scrutiny and debate in a way that violates the EU's commitment to democratic values.

VII. Conclusion

The normative autonomy of EU law, as it is construed by the CJEU, is the basis of allows the Court and the other EU institutions to conceive of the EU legal order as self-contained and not depending in its validity on either national or international law. In turn, it is the foundation of the EU's regulatory autonomy, *i.e.*, its ability to take the position of an (international) actor in its own right. The EU Treaties and the legal practice of the EU institutions presuppose both normative and regulatory autonomy.[125] At the same time, both the construction of the EU legal order as autonomous and the EU's ability to determine its own position internationally remains contested by national actors, in particular highest courts and governments, and international actors, for example arbitration tribunals. Furthermore, the regulatory autonomy of the EU remains constrained in practice by the intricate and dynamic division of competences between the EU and its Member States. In 2022, the attempted reform of the ECT was the context in which the different constraints on the normative autonomy of EU law and regulatory autonomy of the EU and their practical consequences became most apparent. At present, the way forward for the EU and its Member States as (former) Contracting Parties of the ECT remains unclear. From the competence division (EU exclusive competence for FDI and Member States' consent necessary for ISDS) it appears that neither can remain a party to the ECT without (at least explicit consent) of the other. This leaves the EU and the Member States paralyzed in the face of an international agreement that is in its current form incompatible with EU (constitutional) law and that remains in its revised form contrary to the EU's climate policy.

The ECT as the only international treaty to which the EU itself is a party that contains a mechanism of quasi-judicial review open to individuals, namely ISDS, conflicts with EU law. For intra-EU arbitration, the CJEU has ruled in September 2021 in *Komstroy* that the current ECT violates the jurisdictional autonomy of EU law. The Court left open the issue of whether extra-EU arbitration under the current ECT equally violates the jurisdictional autonomy of

[125] See *e.g.* for the EU as an international actor arts 3(5) and 21 TEU.

EU law. A close analysis of the CJEU's acceptance of the investment chapter in CETA in Opinion 1/17 demonstrates that the positive assessment cannot easily be transferred to the ECT. The legal implications for the EU legal order of having intra- and extra-EU arbitration taking place under on treaty framework suggest the conclusion that the ECT undermines the jurisdictional autonomy of EU law. In addition, the Court's positive analysis in Opinion 1/17 that CETA does not impinge on the regulatory autonomy of the EU cannot be transferred to the current ECT. The ECT, while containing many of the problematic features that endanger regulatory autonomy, does not offer the necessary legal safeguards.

The reformed text of the ECT, as leaked in the summer of 2022, rules out intra-EU arbitration through the so-called REIO clause.[126] This formally brings the ECT in line with the Court's ruling in *Komstroy*. However, in practice EU investors may for example move their seat, use an existing seat, or have shareholders bring the claim to continue to be able to bring claims, which could avoid a formal conflict with the jurisdictional autonomy but still removes disputes that would otherwise be decided by European courts to arbitral tribunals. A similar argument could be made for the case of withdrawal and sunset clause termination but the issue could be partially tackled through tighter rules against circumvention in the *inter se* agreement. Furthermore, because of the (growing) substantive inconsistencies between the EU's climate policies and the ECT's 'neutral' position of protecting all energy sources equally, extra-EU arbitration will also likely have to engage frequently with EU law and policies. By way of conclusion, the reformed text may meet the formal requirements of sufficiently protecting the jurisdictional autonomy of EU law, while tensions and clashes between EU law and the reformed ECT (if provisionally adopted/entered into force) are nonetheless not only possible but likely.

In terms of the regulatory autonomy, the reformed text introduces several of the necessary safeguards, such as an explicit right to regulate. Yet, the reformed text of the ECT is not accompanied by the commitment that the ECT will not lower the protection of the environment or the climate ambitions of the contracting parties. On the contrary, the ECT's logic continue to prioritize investment protection over public policy objectives. This does not change with the reference to climate change mitigation and adaptation.[127] Ultimately, the scope of regulatory autonomy is the hands of ad hoc arbitration tribunals that do not meet the standards of transparency and consistency that the EU aims for in its general investment strategy.

In addition, but importantly, the reform process of the ECT demonstrates that the autonomy of the EU has a dark side. In particular, giving the EU greater external regulatory autonomy strengthens the role of the Commission as the EU's negotiator. In the debate around the reform of the ECT, the Commission, with DG Trade in the driving seat,

[126] Art. 24(3) of the leaked text of the reformed Energy Charter Treaty.

[127] New article on the right to regulate: "The Contracting Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of the environment, including climate change mitigation and adaptation, protection of public health, safety or public morals".

has not acted with the necessary commitment to democracy or respect for national parliaments. In fact, it has failed to make public its assessment of and position on the scope and consequences of national or EU withdrawal, including when withdrawal plans were announced by Spain, the Netherlands, France, Slovenia, and Germany. The Commission has simply reiterated that they will not propose withdrawal of the EU. In public debates, Commission representatives, if participating,[128] continued to emphasize that the current ECT contains a 20-year sunset clause without engaging with the legal possibility – that the Commission itself confirmed and promoted[129] - of concluding an inter se modification treaty that ends the sunset clause for all those participating. The Commission has not engaged in a public debate of why the EU should want a treaty like the ECT. All arguments are based on the starting point that the current ECT is less desirable, but no positive argument is made why the reformed text is desirable beyond being – in some respects – an improvement on the current text. In addition, this later point, namely that reform is overall an improvement, may hold true from an EU constitutional perspective, it does not hold true from a sustainability perspective.

No public argument is made how the ECT is compatible with the EU's emission reduction objectives in general or the Green Deal in particular. Instead, the Commission lobbies behind the scenes to convince Member States, including those withdrawing, to allow for a positive vote in the Council to continue EU participation in the ECT without offering any public arguments. The attempted reform of the ECT demonstrates that the EU's regulatory autonomy cannot be achieved at the cost of public debate.

The ECT may be in several respects an extreme example. It is not only institutionally incompatible with the EU's normative and regulatory autonomy, but substantively incompatibility with the EU's climate laws. However, there is also a general lesson to learn: The complex competence division within the EU and the diverging interests of 28 international actors make policy change difficult and hence structurally work in favour of the *status quo*. This stands in obvious conflict with the deep socio-economic changes urgently required by the green transition. The existing fundamental constitutional tensions within the EU, including with regard to the EU's normative and regulatory autonomy, are likely to resurface in light of the diverging levels of commitment to move away from the *status quo* of carbon dependency.

[128] *E.g.*, no Commission official joined Calling Europe for an online debate on the ECT with more than 1,200 registrations.

[129] Communication COM(2022) 523 final from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community of 5 October 2022 on the interpretation of the Energy Charter Treaty.