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Research article

A modernised ECT reflecting EU values and objectives: a multilateral framework promoting energy investment in a sustainable way?

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Abstract

In recent years, the Energy Charter Treaty has come under immense scrutiny and criticism for allegedly protecting the fossil fuel industry and undercutting sovereignty. As a key stakeholder in the modernisation process, the EU has been determined to reform the investment protection standards and the investor–state dispute settlement mechanism to include new provisions on sustainable development and climate change. However, after three years of protracted negotiations, the proposed reform of the Energy Charter Treaty needs to appropriately address the escalating global challenges regarding climate action and sustainable development. With member states such as Poland, Spain and the Netherlands announcing their intention to withdraw, the future of the Charter is hanging

in the balance. This article focuses on the modernisation of the Energy Charter Treaty and whether the reformed Charter is fit for purpose, from an EU perspective, to address the impacts of climate change. In the absence of meeting core EU objectives and alignment with the Paris Agreement, this article questions whether the EU can deviate from the only multilateral framework in the energy sector to address the EU's climate policy goals. The extent to which the Charter is capable of a new lease of life, moving from the ashes of the Cold War as an instrument facilitating investment protection to a green treaty promoting sustainable development and climate change, remains to be seen.

Keywords modernisation; multilateralism; EU values; climate change; energy transition; Paris Agreement; EU Green Deal

1. Introduction

This article focuses on the modernisation of the European Charter Treaty (ECT) and whether the reformed ECT is fit for purpose from an EU perspective and addresses the impacts of climate change. In the absence of meeting core EU objectives and alignment with the Paris Agreement, the article questions whether the EU can deviate from the only multilateral framework in the energy sector to address the EU's climate policy goals. The EU prefers multilateral frameworks, which stems from its inherent need to institutionalise its external relations with third countries through legally binding instruments in pursuit of a rules-based international order. While a rules-based international legal order alludes to both bilateral and multilateral frameworks, as stated above, the EU has indicated a preference for multilateral frameworks, and this quest for 'effective multilateralism' is evident in its foreign policy agenda. As the ECT is the only multilateral framework specific to the energy sector, the EU has actively promoted it since its inception, so much so that there has been a general misconception that the ECT has been an instrument of the EU's foreign policy towards the ex-Soviet Union. This perception has been fuelled by the fact that the ECT found its impetus when unprecedented opportunities for economic cooperation in the energy sector emerged following the dissolution of the Soviet Union.¹ This dissolution set the stage for economic cooperation within Europe and the internationalisation of European energy markets as a natural progression from the widening geographical scope of energy markets and the international arena.²

Notwithstanding the EU's agenda in the post-Soviet era, the ECT has played an important role in establishing the legal foundation for security in energy-based principles of open, competitive markets and sustainable development, founded mainly on the EU model. The ECT declaration, which was not a legally binding agreement but a declaration of shared principles, represented a political commitment to energy cooperation. Having emphasised two objectives, namely ensuring the security of energy supply in the West and providing capital for energy exploration in the East, the Energy Charter process facilitated the development of economies in transition, serving a broader objective as a legal and political platform for East–West cooperation. The European ECT declaration also highlighted the necessity of an appropriate international legal framework for energy cooperation.³ The consensus among Eurasian states was that an established foundation for developing energy cooperation was required to overcome economic divisions between Eastern and Western European countries. It was widely acknowledged that multilateral rules, rather than bilateral agreements, would provide an efficient framework for international cooperation, given the growing interdependence between the region's net energy exporters and importers.⁴ The ECT was born out of these considerations, which largely reflected the European sentiment to bridge dividing lines in the energy sector between the resource-dependent

¹ Kim Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013) 243.

² Yulia Selivanova, 'The Energy Charter and the International Energy Governance' in Christoph Herrmann and Jörg Philipp Terhechte (eds) *European Yearbook of International Economic Law* vol 3 (Springer 2012) 307.

³ Craig S Bamberger, Jan Linehan and Thomas Walde, 'Energy Charter Treating 2000: In a New Phase' [2000] 331(18) *Journal of Energy & Natural Resources Law* 2.

⁴ Selivanova (n 2) 308.

West needing energy supply and the resource-abundant East requiring investment to exploit their oil and gas fields.⁵ The ECT aimed to strengthen the rule of law by creating a level-playing field in the energy realm through inter-governmental cooperation in the energy sphere, covering the whole value chain.⁶ By establishing a set of rules to be observed by all participating governments, the ECT's ultimate goal was to mitigate risks associated with energy-related investment and trade.

However, in recent years the ECT, which began in the post-Soviet era, has come under immense scrutiny and criticism for protecting the fossil fuel industry and generally undermining sovereignty. Therefore, the ECT is considered incongruous with the Paris Agreement and the European Green Deal objectives because it allows fossil fuel companies to seek legal recourse against countries over their climate policies rather than bolster climate action and energy transition. By protecting all investments in the energy sector, including those in fossil fuels, any state action that affects a company's profits from these investments can be challenged in international tribunals, with governments liable to pay compensation should they be unsuccessful. As a key stakeholder in the ECT modernisation process, the EU has been determined to reform the investment protection standards and the investor–state dispute settlement (ISDS), which includes new provisions on sustainable development and climate change. While the Commission has been committed to the modernisation negotiations, it has indicated that it will not deviate from 'core EU objectives', including alignment with the Paris Agreement and the EU's Green Deal.⁷ Therefore, the Commission is considering withdrawal from the ECT if the core EU objectives are not achieved.⁸

The long-awaited text of the modernised ECT was published on 13 September 2022, which reflects the Agreement in Principle reached on 24 June 2022 after more than three years and fifteen rounds of lengthy and protracted negotiations. Although an agreement in principle on the modernisation of the ECT was reached in June 2022, which the Energy Charter Conference was expected to vote on and formally adopt in Mongolia on 22 November 2022, the question remains whether the modernised ECT is fit for purpose. Or, more specifically, whether the modernised ECT is capable of a new lease of life, moving from the ashes of the Cold War, as an instrument facilitating investment protection (predominantly for fossil fuels), to a green investment treaty capable of promoting sustainable development and climate change. This remains to be seen, especially in light of the recent announcement by the Netherlands, the latest country to confirm its intention to withdraw from the ECT (in addition to Spain and Poland) because the treaty is not sufficiently aligned with the Paris Agreement.

This article assesses whether the modernised ECT reflects EU values and objectives, namely a multilateral framework promoting energy investment in a sustainable way. In undertaking this analysis, the article raises the following important questions in order to address the ECT's relevance in the legal architecture required for the green transition, namely: (a) the ECT modernisation and the need for reform from an EU perspective; (b) whether the modernised ECT is fit for purpose from an EU perspective to address the impacts of climate change; (c) whether the modernised ECT reflects EU objectives, namely, promoting energy investment sustainably; and (d) whether the EU should deviate from multilateralism and a rules-based international legal order as fundamental values and principles of EU external action. For the final question, the analysis looks at the core EU objectives of the reform (namely, consistency with the Paris Agreement and the objectives of the Green Deal), which are aligned with the aims of the EU's energy policy under Article 194 TFEU (namely, promoting energy efficiency and the development of renewable energy) against the backdrop of the objectives of the EU when the ECT first came into being in the aftermath of the Cold War. The aim of the ECT after the Cold War was to promote a level playing field through a multilateral legal framework for energy cooperation and investment in post-Soviet era. The analysis therefore evaluates the extent to which the EU is willing (and able) to deviate from the ECT as a multilateral framework in light of its objectives in its external relations and the EU's changing priorities in the evolving energy landscape.

⁵ Ernesto Bonafé and Natasha A Georgiou, 'The New International Energy Charter and the Rule of Law in the Global Energy Architecture' in Martha M Roggenkamp and Catherine Banet (eds) *European Energy Law Report XI* (Intersentia 2017) 93–120.

⁶ *Ibid.*

⁷ Parliament, 'Answer Given by Executive Vice-President Dombrovskis on Behalf of the European Commission (2.12.2020)' EN P-005555/2020 <https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW_EN.pdf> accessed 7 July 2023.

⁸ *ibid.*

2. ECT modernisation and the need for reform from an EU perspective

As mentioned above, the ECT has been criticised for its perceived chilling effect on the energy transition. This is a significant factor from an EU perspective, given the EU's support for a global, clean and just energy transition, as recently confirmed in the REPowerEU plan,⁹ which ensures sustainable, secure and affordable energy. In 2019, the EU overhauled its energy policy framework to shift from fossil fuels to cleaner energy and deliver on the EU's Paris Agreement commitments to reduce greenhouse gas emissions. The package, adopted in 2019, was the Clean Energy for All Europeans Package.¹⁰ It was intended to help decarbonise the EU's energy system in line with the EU's Green Deal objectives, which marked a significant step towards implementing the EU's Energy Union Strategy.¹¹ The Energy Union Strategy published on 25 February 2015 aims to build an energy union that provides EU consumers with secure, sustainable, competitive and affordable energy.

The regulation on the governance of the energy union and climate action entered into force on 24 December 2018 as part of the EU's Clean Energy for All Europeans Package.¹² The regulation highlights the significance of meeting the EU's 2030 energy and climate objectives. It outlines how EU Member States and the Commission should work together to achieve the energy union goals. One of the fundamental goals of the regulation is to implement strategies and measures that ensure that the objectives of the energy union are consistent with the Paris Agreement; in particular, the EU's 2030 energy and climate targets and the EU's greenhouse gas emissions commitments. As such, EU Member States need to phase out fossil fuels by committing to substantially reducing energy consumption and transitioning to an energy system based on renewable energy sources. The European Green Deal reflects the EU's ambitions to become the first climate-neutral continent by 2050.¹³ The fundamental aim of the Green Deal is to transform the EU into a modern, resource-efficient and competitive economy with no net emissions of greenhouse gases by 2050.¹⁴ Given the EU's ambitions to decarbonise the European energy system consistent with the Green Deal objectives, the ECT poses significant obstacles to the EU's agenda on climate action and decarbonising the economy.

The issue concerning the ECT is that it restricts a country's ability to regulate and expedite the green energy transition through the protection it affords fossil fuels and other dirty energy sources.¹⁵ The challenge with the modernisation reform involves striking a balance between implementing a treaty that facilitates clean green energy and maintaining the investment protection standards needed to promote further energy investments. As a key player in the ECT modernisation process, the EU has been determined to include new provisions on sustainable development and climate change. The EU has also focused on reforming investment protection standards and the ISDS to ensure the compatibility of intra-EU disputes under the ECT with EU law. The ultimate goals are a modernised ECT that reflects EU values and core EU objectives and a reformed treaty that moves towards cleaner and greener energy

⁹ Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (REPowerEU Plan)'. COM (2022) 230 final. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A230%3AFIN&qid=1653033742483>> accessed 7 July 2023.

¹⁰ European Commission, Directorate-General for Energy, *Clean Energy for All Europeans* (Publications Office 2019).

¹¹ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM (2015) 080 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:80:FIN>> accessed 7 July 2023.

¹² Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L328 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.328.01.0001.01.ENG&toc=OJ:L:2018:328:TOC> accessed 7 July 2023.

¹³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal. COM (2019) 640 final. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN>> accessed 7 July 2023.

¹⁴ *ibid.*

¹⁵ Climate Action Network Europe, 'Energy Charter Treaty Reform: Information on the 4th Negotiation Round' (CAN Europe, March 2021) <https://caneurope.org/content/uploads/2021/03/Media-briefing_Energy-Charter-Treaty-reform_March-2021_CAN-Europe.pdf> accessed 7 July 2023.

investments without inadvertently undercutting the investment protection needed to promote energy investments, including green energy. Several avenues were identified for potential modernisation and reform. These included:

- various definitional modifications, including the terms *investment* and *investor*
- the insertion of a *right to regulate* clause and sustainable development and corporate social responsibility rules
- substantive reforms, including to the ECT's 'fair and equitable treatment',¹⁶ protection and security and expropriation and umbrella clauses
- various procedural amendments, including to the rules governing frivolous claims, transparency and security for costs
- amendments to the valuation rules and rules related to third-party funding.

In addition to these avenues for reform, the EU expressed its view that the objective of the ECT reform should be to facilitate investment in the energy sector sustainably so that the modernised ECT reflects climate change and clean energy transition goals and contributes to the achievement of the objectives of the Paris Agreement.¹⁷

Through the modernisation process, Member States contemplated encouraging cleaner and greener energy investments via amendments to the ECT's definitional provisions. This would include amending Article 1(5)'s definition of economic activity in the energy sector. The EU noted that such economic activity is associated with products and materials that are largely fossil fuel-related and may not cover new trends in investment, particularly regarding renewable energy.¹⁸ Therefore, the EU proposed modifying the ECT to address the challenges and opportunities of the transition to a safe and sustainable low-carbon, more digital and consumer-centric energy system.¹⁹

Furthermore, the modernisation process encompassed potential reforms to the ECT's investment protections, particularly the ECT's 'most-favoured-nation'²⁰ clause to prevent investors from invoking more favourable dispute settlement provisions from other investment treaties. The ECT Member States also identified numerous possible reforms to the ECT's 'fair and equitable treatment'²¹ obligation, protection and security provision (focusing on restricting the potential for the provision to be invoked to secure *legal* protection) and the umbrella clause (focusing on clarification of the scope of commitments covered by the clause). Protection from expropriation was raised as a topic for modernisation, showing the need for a clearer definition of 'indirect expropriation' and 'rules about the compensation for expropriation'.²²

3. Is the modernised ECT fit for purpose from an EU perspective to address the impacts of climate change

On 13 September 2022, the long-awaited text of the modernised ECT was published. Still subject to final agreement, this text reflects the Agreement in Principle reached by the parties to the Treaty in June 2022 after more than three years and fifteen rounds of lengthy negotiations. The modernisation process had several objectives, which, significantly for the EU, included providing legal certainty on issues that have been the subject of inconsistent arbitral awards, clarifying the role of intra-EU ISDSs in light

¹⁶ Article 10 (1) ECT.

¹⁷ Parliamentary Question, 'Answer Given by Executive Vice-President Dombrovskis on Behalf of the European Commission' EN P-005555/2020 <https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW_EN.pdf> accessed 7 July 2023.

¹⁸ Commission, 'Report from the Commission to the European Parliament and the Council, Progress on Competitiveness of Clean Energy Technologies'. COM (2022) 643 final. <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0643>> accessed 7 July 2023.

¹⁹ *ibid.*

²⁰ Article 10 (3) ECT.

²¹ Article 10 (1) ECT.

²² Article 13 ECT.

of the CJEU's judgments in *Achmea*²³ and *Komstroy*²⁴ and introducing greater transparency into ISDS procedures. In addition, a core goal of the reform is to ensure that the ECT reflects climate change and clean energy transition goals and contributes to the objectives of the Paris Agreement. Recent claims for compensation from fossil fuel investors such as *RWE*²⁵ and *Uniper*²⁶ for the harm resulting from the Netherlands' decision to phase out coal-fired electricity have raised concerns regarding the ECT's effectiveness as a legal instrument governing energy investment for a just transition to zero-carbon energy systems and economies.²⁷

The stakes are high, as acknowledged by the ECT Secretary General. A failure of the modernisation process may, ultimately, bring the future of the ECT into question, with a flurry of countries seeking to withdraw from the legal architecture.²⁸ This became evident when Italy withdrew from the treaty in 2016. Given the questionable reform that undermines climate action, Poland, Spain and the Netherlands have also indicated an intention to withdraw from the ECT. However, the modernised ECT includes fossil fuel investments within its scope: it provides a *flexibility mechanism* that allows the contracting parties to unilaterally exclude the protection of fossil fuel investment within their territories. The contracting parties may, therefore, opt to carve out fossil fuel protection depending on their energy and climate goals, with the UK and EU being the first to exercise this right.²⁹ As such, new fossil fuel investments in the EU and UK will be excluded from the scope of the Part III investment protection provisions from August 2023, while pre-existing fossil fuel investments continue to enjoy protection for ten years after entry into force or until 2040, whichever is earlier.³⁰ Other contracting parties that have neglected to exclude fossil fuel investments from 'economic activity in the energy sector'³¹ continue to enjoy Part III investment protection for all fossil fuel investments indefinitely.

The indefinite protection for fossil fuel investments fails to address climate emergencies and will continue to make climate action difficult and costly. Even the UK and EU's ten-year timeframe is inconsistent with the science and will continue to ensure the protection of fossil fuel investments well into 2030. Pathways to the reduction of carbon emissions from the energy sector, as set out in the International Energy Agency's (IEA) Net Zero by 2050 report, indicate that there is no need for investment in new fossil fuel supply beyond the projects already committed to as of 2021 and that net-zero targets by 2050 provide limited space for fossil fuels in developed economies beyond 2035.³² The modernised ECT, therefore, appears to fall short as an effective international legal instrument to govern energy

²³ Case C-284/16 *Achmea*, ECLI:EU:C:2018:158. The *Achmea* judgement of the CJEU has triggered a heated debate over the future of intra-EU investment arbitration with ramifications for the ECT. The ECT is the most frequently invoked investment treaty for arbitration against host states for disputes predominantly of an intra-EU nature involving EU investors as claimants and EU Member States as respondents. The European Commission has repeatedly claimed that the application of the ECT in intra-EU investment disputes is an incorrect application of the treaty, which the ECT is not meant to apply in intra-EU relations. The decision of the CJEU in *Achmea* subsequently dealt a major blow to the predictability of the legal regime for the protection of foreign investments within the European single market. J Robert Basedow, *The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration* [March 2020] 23(1) JIEL 271–92 <<https://doi.org/10.1093/jiel/jgz025>>.

²⁴ Case C-741/19, *Republic of Moldova v Komstroy*, ECLI:EU:C:2021:164. The CJEU ruling in *Komstroy* on the compatibility of the EU Treaties and the investor-state arbitration mechanism of Article 26 of the ECT is inapplicable in intra-EU disputes, despite the EU being a contracting party because it threatens the autonomy of the EU legal order. The *Komstroy* ruling sheds some light on the principle of autonomy and international law. Bianca Böhme, 'The Future of the Energy Charter Treaty after Moldova v Komstroy' [2022] 59(3) CML Rev.

²⁵ *RWE v the Netherlands*, ICSID Case No ARB/21/4.

²⁶ *Uniper v the Netherlands*, ICSID Case No ARB/21/22.

²⁷ Christina Eckes and Laurens Ankersmit, 'The Compatibility of the Energy Charter Treaty with EU Law', Amsterdam Centre for European Law and Governance, University of Amsterdam (21 April 2022) <<https://www.clientearth.org/media/2n2po04j/report-on-ect-compatibility-with-eu-law.pdf>> accessed 7 July 2023.

²⁸ Karel Beckman, 'Interview: A New Energy Charter Treaty as a Complement to the Paris Agreement' (Borderlex, 18 June 2020) <<https://borderlex.net/2020/06/18/interview-a-new-energy-charter-treaty-as-a-complement-to-the-paris-agreement-on-climate-change/>> accessed 7 July 2023.

²⁹ The flexibility mechanism allows contracting parties to list in Annex NI investments that are not to be treated as an 'economic activity in the energy sector' in accordance with Article 1(5) ECT for the purposes of investment protection under Part III of the ECT.

³⁰ Article 47 (Withdrawal) of the ECT maintains the sunset or survival clause, which ensures the treaty's continued application for twenty years after withdrawal. This means that Member States will continue to be locked into investment protection and arbitration provisions under the reformed treaty, which negates climate action.

³¹ Article 1(5) ECT.

³² IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector', May 2021. <<https://www.iea.org/reports/net-zero-by-2050>> accessed 7 July 2023.

investment for a just transition to zero-carbon energy systems and economies.³³ The ECT fails to advance climate goals: there is a fundamental misalignment between its existing investment protection regime and the actions needed to meet the objectives of the international climate regime, as intended in the modernisation process and its reforms.³⁴

The modest changes to the ECT's investment protection provisions in Part III, which serve to bolster rather than dilute the protection of foreign investors, have prompted calls for withdrawal from the ECT. However, despite the withdrawals mentioned above, existing investments in a contracting party are protected for twenty years post-withdrawal – as per Article 47(3), which remains unchanged. Therefore, governments adopting legitimate policy measures with potentially adverse effects on fossil fuel investors will continue to be susceptible to international arbitration claims, thus undermining climate emergency regulations. Despite the reforms, the modernised ECT will continue to restrain governments' regulatory space, adding a chilling effect to the urgently needed climate regulation and the fruition of a net-zero energy transition.

However, despite the grim forecast for climate action, the concerns exacerbated by the RWE and the subsequently withdrawn Uniper claims,³⁵ no arbitral tribunal has compensated a fossil fuel company for regulatory measures introduced to decarbonise an economy. This adds to the ongoing debate regarding the ECT's relevance for climate action and the green transition. The proceedings commenced by the energy companies RWE and Uniper against the Netherlands were for a 2019 ban on coal-fired plants by 2030, allegedly in breach of the ECT. In *Rockhopper*,³⁶ the tribunal awarded 190 million euros plus interest to the English oil and gas company as compensation for the Italian government's decision to ban offshore hydrocarbon activities beyond twelve nautical miles. It is important to note that the *Rockhopper* award was primarily in response to measures driven by ecological and environmental concerns rather than decarbonising objectives. Although the distinction is worth noting, the threat of such claims continues to have a chilling effect on regulation and hinders the adoption of climate mitigation policies. Nevertheless, it would be prudent to recall that more than half the awards under the ECT relate to renewable energy, with the ECT arguably invoked to protect investments in the renewable energy arena. Therefore, despite the continued protection for fossil fuel investments under the reformed ECT, this does not suggest continued support for such investments nor the deterrence of investment protection for renewable energy. Investment protection under the ECT is not absolute. It merely ensures fair and equitable treatment to all investors and prohibits any expropriation from the host state without appropriate compensation. If viewed against the backdrop of EU Member States' sovereign right to regulate and their obligation to fulfil their respective climate change obligations in line with the EU's commitments under the Paris Agreement, such provisions under the ECT should not be construed as incongruous to a contracting party's endeavours to promote sustainable development and robust climate action. A modernised ECT is not a panacea. The reform of the ECT is open to interpretation and ultimately hinges on how arbitral tribunals engage with the revised text and inconsistencies with the Paris Agreement. The effects of the new ECT provisions on future investment disputes remain to be seen, assuming the revised text is adopted.

4. Does the modernised ECT reflect EU objectives by sustainably promoting energy investment?

It is arguable whether the modernised ECT addresses the mounting global challenges facing climate action and sustainable development. Despite the revised text of the ECT, including new provisions on sustainable development and clean energy transition, these provisions bear no legal weight; they largely

³³ Columbia Centre on Sustainable Investment, 'Climate Action Needs Investment Governance, Not Investment Protection and Arbitration', March 2022. <<https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-oecd-climate-action-investment-governance-not-protection-isds.pdf>> accessed 7 July 2023.

³⁴ *ibid.*

³⁵ On 1 September 2022, the Higher Regional Court of Cologne issued two decisions granting the Netherlands' anti-arbitration requests to have the German claimants' (RWE and Uniper) ECT-based arbitrations declared inadmissible pursuant to section 1032(2) of the German Code of Civil Procedure due to their intra-EU nature. The Higher Regional Court of Cologne declared the RWE's and Uniper's intra-EU ICSID arbitrations inadmissible and found that such ECT-based arbitrations were, in principle, prohibited. The German government agreed to bail out Uniper subject to it agreeing to withdraw its ICSID claim.

³⁶ *Rockhopper v Italy*, ICSID Case No ARB/17/14, Award (23 August 2022).

affirm existing obligations under other multilateral frameworks, such as the United Nations Framework Convention on Climate Change and International Labour Organization fundamental conventions. The reformed ECT neglects the urgency of the Sustainable Development Goals (SDGs), particularly SDG 13 (Climate Action) and the Paris Agreement goals and commitments, which have been adversely affected by the ECT and its risks. To mitigate climate change and achieve the adaptation goals required by the Paris Agreement, the ECT should expedite and facilitate the transition from high- to low-emission investments to reflect the EU's commitments. This would entail phasing out high-emitting infrastructure and preventing new investment in fossil fuel supply. However, since this would affect foreign investment in the energy sector, investors are more likely to resort to the ECT and file suit for compensation.

Under the ISDS mechanism, foreign investors could seek compensation from governments for measures adopted in the energy sector that would be considered in breach of the ECT's fair and equitable treatment and indirect expropriation. Within the fossil fuel industry, the most litigious sector in the ISDS, it is no surprise that several fossil fuel investors have increasingly resorted to the ECT to challenge environmental and climate action. With recent claims – including the RWE and Uniper claims against the Netherlands for the coal-fired power generation ban to comply with the Paris Agreement and the *Rockhopper* award against the Italian government ban against oil drilling out of environmental concerns – it is clear that such claims have a deterrent effect on the energy transition.³⁷ The constantly looming threat of the ISDS has inevitably been perceived as discouraging governments from pressing forward with regulatory measures, potentially leading to a regulatory chill in the energy sector. With the modernised ECT bolstering the fossil fuel industry's access to the ISDS, the ECT amendment would continue to make it difficult and costly for governments to adopt the urgently needed climate policy. Thus, the ECT's failure to advance climate goals has hindered states' climate action.

The reform continues to protect existing and new fossil fuel investments indefinitely. Although the revised text includes a flexibility mechanism that allows contracting parties to carve out fossil fuels from protection within their territories, only the EU and UK have opted for this exclusion. This means that new investments in fossil fuels after 15 August 2023 will no longer be protected; however, as mentioned above, existing investments made before 15 August 2023 will remain protected until the end of 2030. The modernisation of the ECT also included the extension of investment protection to new energy activities and energy products heavily reliant on fossil fuel inputs, thereby expanding the scope of the ECT and investment protection for fossil fuels.³⁸ Furthermore, the controversial ISDS mechanism remains largely unaltered; it still has unaddressed arbitral awards inconsistencies. Although a new provision attempts to address intra-EU arbitration following the landmark *Komstroy* ruling, which held that disputes between EU investors and EU member states are manifestly inconsistent with EU law, uncertainty remains regarding the ECT's broader compatibility with EU law.³⁹

Despite modernisation efforts, the reformed ECT still bears substantial risks for governments in their environmental, climate and energy policies. The governments of Poland, Spain, the Netherlands, France, Germany, Slovenia and Luxembourg have announced their intention to withdraw from the ECT. The governments have expressed concern that the modernised ECT is insufficiently aligned with the Paris Agreement and their respective national targets and climate commitments. The EU has yet to adopt a coordinated position on the reformed ECT, which was postponed by the final vote at the Energy Charter Conference. With the final vote postponed until April 2023, the European Parliament had adopted a resolution calling on the Commission to prepare a coordinated response to EU withdrawal. Although withdrawal is possible under Article 47, this would trigger the sunset clause, thereby locking in protection for existing investments for an additional twenty years from the withdrawal date. The European Commission has, therefore, advocated for a coordinated EU withdrawal accompanied by an *inter se* agreement based on Article 41 of the Vienna Convention on the Law of Treaties, neutralising the sunset clause. This would facilitate withdrawal from the ECT while limiting the sunset clause. With the continued membership of the EU seeming unlikely, the future of the ECT looks bleak at best. The

³⁷ See *RWE v the Netherlands*, ICSID Case No ARB/21/4 and *Uniper v the Netherlands*, ICSID Case No ARB/21/22.

³⁸ At the ad hoc meeting of the Energy Charter Conference on 24 June 2022, the 'Definition of Economic Activity in the Energy Sector' was further considered, and negotiations focused on the scope of the modernised ECT regarding business activities and energy sources. The definition has now extended to cover the capture, utilisation and storage of carbon dioxide (CCUS) to decarbonise the energy systems. The revised provisions envisage how investments in different energy sources will be protected under the ECT against the backdrop of the contracting parties' clean energy goals.
<<https://www.energychartertreaty.org/modernisation-of-the-treaty/>> accessed 7 July 2023.

³⁹ Case C-741/19, *Republic of Moldova v Komstroy*, ECLI:EU:C:2021:164.

non-paper from the European Commission on the withdrawal from the ECT, made available to the public on 7 February 2023, gives credence to this assertion. The non-paper confirmed that the ECT is not in line with the EU policy on investment protection and the Green Deal. While the European Commission has not adopted the non-paper, the non-paper confirms that an endorsement of the modernised ECT does not seem feasible in the current circumstances. The non-paper suggests that the withdrawal of the ECT from the ECT appears to be unavoidable. Should the Commission officially endorse this position, the future of the modernised ECT remains questionable.⁴⁰

5. Should the EU deviate from multilateralism and a rules-based international legal order? Fundamental values and principles of EU external action

Having established that the modernised ECT still carries substantial risks for governments and their climate and energy policies, which subsequently spurred announcements from Member States of an intention to withdraw from the ECT, the question remains whether the EU can deviate from multilateralism as a fundamental EU value. While the analysis focused on the modernisation of the ECT and the key outcomes and the repercussions for contracting parties' climate commitments, the following section assesses (a) the EU's commitment to multilateralism and rules-based international order as fundamental values in EU external action and (b) the EU's commitment to the ECT as an instrument of norm export in the post-Soviet space, while examining the broader implications of potential withdrawal from the global investment treaty regime.

For the final question, the analysis looks at the core EU objectives of the reform (namely, the consistency with the Paris Agreement and the objectives of the Green Deal), which are aligned with the aims of the EU's energy policy under Article 194 TFEU (namely, promoting energy efficiency and the development of renewable energy) against the backdrop of the objectives of the EU when the ECT first came into being in the aftermath of the Cold War. The analysis will evaluate the extent to which the EU is willing (or able) to deviate from the ECT as a multilateral framework in light of its objectives in its external relations and the EU's changing priorities in the evolving energy landscape.

5.1. The EU's commitment to multilateralism and a rules-based international order as fundamental values in EU external action

The Lisbon Treaty facilitated more coherent external action through the principles and objectives the EU sought to advance in its foreign policies.⁴¹ More specifically, Lisbon expanded and streamlined the EU's objectives by including general objectives in its treaties, including Article 3(5) TEU and the general principles and goals of EU external action (Article 21 TEU), with specific objectives for certain external policies.⁴² In this respect, the constitutional objectives, as stipulated in Article 3(5) TEU and Article 21 TEU, which predominantly focus on the promotion of the EU's fundamental values and interests, such as peace, security and peaceful international relations, allude to the kind of international actor the EU is or aspires to be in the international legal order. It is important to note that while Article 3(5) TEU and Article 21 TEU entail objectives that set agendas and actions guided by certain goals and principles, the objectives are often used interchangeably while including a reference to the pursuit of 'interests' (Article 3(5) TEU and Article 21 TEU). Therefore, the Treaties have a plethora of substantive objectives such as contribution to peace, security, sustainable development, solidarity, mutual respect, free and fair trade, eradication of poverty and protection of human rights (Article 3(5) TEU and Article 21 TEU). The Treaties articulate that the objectives are largely a reflection of, or inspired by, the EU's internal values

⁴⁰ Euractiv, 'Leak: Exit from Energy Charter Treaty 'Unavoidable', EU Commission Says' (8 February 2023). <https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf> accessed 7 July 2023.

⁴¹ Joris Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality', in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013) 7–21.

⁴² *ibid.*

to the outside world (Article 21(1) TEU), which are largely defined by standards of international law and universally defined concepts such as sustainable development and human rights (Article 208(2) TFEU).⁴³

Inevitably, the EU's objectives have a strong emphasis on law-based goals.⁴⁴ This is evident in the EU's obligation to contribute 'to the strict observance and the development of international law' (Article 3(5) TEU) and its promotion of the rule of law (Article 21(2)(b) TEU). Furthermore, the Treaties promote 'stronger multilateral cooperation and good global governance' (Article 21(2)(h) TEU) with an undertaking on the part of the EU to 'promote multilateral solutions to common problems' (Article 21(1) TEU). The EU can be said to be using the law to pursue its agenda. This suggests that, intrinsic to any examination of the role of values in the EU's external policies, the interplay between the EU legal order and international norms is heavily vested in the EU's perception of the link between multilateralism and a rules-based international order.⁴⁵ This nexus is validated by the Lisbon Treaty, which brings to the fore the significance of international law and multilateralism to the EU's external policy.⁴⁶

The significance of the synergy between multilateralism and the international legal order is evident in policy documents; in particular, the European Security Strategy adopted by the European Council in December 2003 declared that a rules-based international order based on effective multilateralism is one of the EU's three strategic objectives:

In a world of global threats, global markets and global media, our security and prosperity increasingly depend on an effective multilateral system. The development of a stronger international society, well-functioning international institutions and a rule-based international order is our objective . . . We are committed to upholding and developing International Law.⁴⁷

The High Representative's Report on the Implementation of the European Security Strategy reaffirmed this commitment in 2008:

At a global level, Europe must lead a renewal of the multilateral order. The UN stands at the apex of the international system. Everything the EU has done in the field of security has been linked to UN objectives. We have a unique moment to renew multilateralism, working with the United States and with our partners around the world.⁴⁸

These policy statements, together with the treaty provisions of Article 3(5) TEU and Article 21(1) TEU, illustrate the dual purpose of the EU's commitment to international law and multilateralism – first, as a value in itself and, second, to develop a rules-based international legal order that will, in turn, promote the EU's fundamental values such as human rights, democracy and the rule of law.⁴⁹ In so doing, the EU endeavours to pursue a multilateral legal order to facilitate the EU's ability to export its values and norms, which affirms its role as a normative global actor.⁵⁰

While the EU's objectives in its internal and external policies are comprehensive, its international action must be pursued through a multilateral approach based on the rule of law. It follows that the provisions in the Treaty on European Union impose substantive requirements on the EU in pursuing its objectives. Based on Article 3(5) TEU and Article 21 TEU, it is evident that the EU's legal order is receptive to international legal norms. In sum, the treaties codify a set of global objectives founded on EU and international law, transforming the role of the EU as a power that shapes not only its relations with its members but also the world at large through its law-based goals and objectives.⁵¹

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury 2011) 276.

⁴⁶ Article 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to . . . the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

⁴⁷ Council of the European Union, General Secretariat of the Council, *European Security Strategy: A Secure Europe in a Better World* (PO 2009) <<https://data.europa.eu/doi/10.2860/1402>> accessed 17 July 2023.

⁴⁸ Secretary General, 'Report on the Implementation of the European Security Strategy – Providing Security in a Changing World' (10 December 2008) Doc 17104/08, 4. <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf> accessed 7 July 2023.

⁴⁹ Cremona (n 47) 277.

⁵⁰ *ibid.*

⁵¹ Larik (n 43).

Applying this rationale to the EU's external relations, one can see how the EU's normative agenda is inevitable when considering its external action and engagement with its neighbourhood, which is deeply embedded in legally binding, multilateral frameworks that promote EU values and universal standards. Fundamental to the EU's role as a normative power is its commitment to a rules-based international order founded on effective multilateralism. The principal reference to multilateralism with respect to the EU's external relations can be found in Article 21(1) TEU, which states:

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations . . . It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

Promoting the EU often advocates increased multilateralism in its external relations. To reinforce its foreign and security policy trajectory, the EU released the European Security Strategy in 2003, which unveiled the notion of *effective multilateralism* as the underlying concept steering the EU's foreign policy agenda.⁵² Concerning external relations, multilateralism refers to the coordination of relations between three or more states under certain principles governing relations among these states.⁵³ Building on the rationale of the EU's leitmotiv of *effective multilateralism* in its external relations is the perception that action at a multilateral level facilitates effective results, which enables the EU to fulfil its foreign policy goals.⁵⁴ Therefore, one can argue that effective multilateralism has become a significant criterion in the EU's external relations and action, which is a fundamental part of the EU's normative agenda in the wider world.

5.2. The EU's commitment to the ECT as an instrument of norm export in the post-Soviet space

The promotion of values is an explicit objective of the EU under Article 3(5) TEU, which has subsequently become an important aspect of the EU's external policy.⁵⁵ Article 3(5) TEU, often dubbed the EU's 'missionary principle', regulates the EU's presence on the global scene and sets the goals by which the EU should undertake its relations with the wider world.⁵⁶ According to the European Security Strategy, the EU's strategic objectives are the pursuit of an overarching aim – defending its security and promoting its values.⁵⁷ There are many ways in which the EU promotes its values and normative agenda, which include bilateral and multilateral agreements, conditionality and strategic partnerships founded on shared values. This suggests that the core values the EU promotes, such as democracy, human rights and the rule of law, are promoted not only as European but also as fundamentally universal values.⁵⁸ In addition to promoting shared values, the EU encourages partner countries to sign up to international agreements,⁵⁹ thereby promoting international standards and norms. This includes accession to the World Trade Organisation (WTO), which indicates the EU's commitment to multilateral frameworks.⁶⁰ It also suggests that the EU is engaged in promoting its values and the principles considered by the EU to be fundamental in international law.⁶¹

⁵² Council of the European Union, 'A Secure Europe in a Better World: European Security Strategy', Brussels, 12 December 2003.

⁵³ John Gerald Ruggie, *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (CUP 1993) 8.

⁵⁴ Jürgen Neyer, 'Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making' [2004] 11(1) JEPP 19–38; Jan Wouters, Sijbren de Jong and Philip De Man, 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice' [2010] 29(1) Yearbook of European Law 167–8.

⁵⁵ K Smith, *European Union Foreign Policy in a Changing World* (2nd edition, Polity Press 2008) Chapter 5.

⁵⁶ Morten Broberg, 'What Is the Direction of the EU's Development Cooperation after Lisbon: A Legal Examination' [2011] 16 European Foreign Affairs Review 539.

⁵⁷ European Security Strategy (n 49) 6.

⁵⁸ Othon Anastasakis and Dimitar Bechev, 'EU Conditionality in South East Europe: Bringing Commitment to the Process' (South East European Studies Programme. 2003) 1–20; Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' [2004] 11(4) JEPP 66, 1–79.

⁵⁹ This includes not only support for the accession to the WTO but also many other agreements such as Codes of Conduct on corruption (eg the Council of Europe Civil Law and Criminal Law Conventions on Corruption of 1999), arms control (eg the EU Code of Conduct of Arms Exports) and mine control (eg The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction).

⁶⁰ By way of example, the EU's involvement in Russia's accession to the WTO after almost twenty years of protracted negotiation.

⁶¹ Cremona (n 47) 303.

By promoting accession to international frameworks and international organisations, the EU throws its weight behind multilateralism and a rules-based international order that could be regarded as a normative principle or value in itself, reflective of the EU's normative agenda.⁶² In so doing, the EU builds and promotes values by spreading the implementation of norms that reflects its values and normative interests in upholding an international legal order.⁶³

There are important aspects to the EU's strategy in norm-building, which include: (a) consensus building that is not limited to the EU and its neighbours (eg the European Neighbourhood Policy) and the development of strategic partnerships (eg Russia) to achieve EU objectives, such as strengthening the international legal order through effective multilateralism (eg the ECT and the WTO);⁶⁴ and (b) treaty-making (eg the ECT) where the EU actively engages in the shaping and development of international norms by concluding international agreements through its Member States or on its own behalf.⁶⁵ It follows that the EU undertakes a process whereby its values are imported into and exported from the EU legal order through international legal norms, providing a source and means of promoting EU values.

The ECT primarily reflected the approach undertaken in the first EU energy market directive.⁶⁶ However, with the second energy market package, the once strong correlation between the ECT and EU energy *acquis* started to diverge with the new EU unbundling and third-party access rules, which were considered more intrusive.⁶⁷ As such, there was a growing gap in the level of liberalisation envisioned by the ECT and the EU. Furthermore, European enlargement eastward increased the number of countries implementing the energy *acquis* and applying EU energy law, with potential conflict between the more liberalised EU energy *acquis* and the ECT standard.⁶⁸ The increasing gap between the two legal systems created a rift between the international law ECT standard and the more liberalised energy regulation of the EU. Although the ECT was inspired by the first liberalisation package of the EU, further integration and regulation of the markets under the ECT mechanism became increasingly complex, with resource-rich countries such as Russia refusing to compromise on their protectionist powers. Nevertheless, the ECT still served as a significant instrument to validate the EU's normative behaviour as a mechanism to export the EU's norms and values, including the EU's liberal market approach to energy markets.

5.3. The broader implications of EU withdrawal from the ECT on the global investment treaty regime

The failed modernisation attempts have increased calls for EU withdrawal from the ECT. However, EU withdrawal from the only multilateral energy treaty could be seen as a form of undermining multilateralism, which, as established above, is incongruous with the initial impetus of the ECT and is inconsistent with a fundamental value of the EU in its external actions. While the legality of the EU withdrawing from an international treaty by the rules of withdrawal of that treaty is not disputed, EU withdrawal from the ECT is politically charged. The question remains whether the EU's discourse about the ECT is purely aligned with its values or policy objectives. As mentioned above, as a key stakeholder in the reform process, the Commission indicated that it would not deviate from core EU objectives, which include alignment with the Paris Agreement and the Green Deal. However, to what extent can the EU pursue its objectives where this entails foregoing its values? EU withdrawal from the only multilateral agreement in the energy sector could be construed as a compromise of EU liberal values for policy aims. Furthermore, withdrawal from the ECT would fragment the legal architecture, with a geopolitical shift

⁶² Ian Manners, 'The Normative Ethics of the European Union' [2008] 84 *International Affairs* 45.

⁶³ *ibid.*

⁶⁴ The European Security Strategy confirmed the EU's willingness to work with 'any country which shares our goals and values and is prepared to act in their support'. Javier Solana, 'A Secure Europe in a Better World', adopted by the Thessaloniki European Council, June 2003, as the EU's Security Strategy, 15.

⁶⁵ Cremona (n 47) 311.

⁶⁶ Talus (n 1) 243.

⁶⁷ The Second Energy Liberalization Package set the stage for the second unbundling regime introduced in June 2003. Directive 2003/54/EC of 26 June 2003 concerning the common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 (Second Gas Directive).

⁶⁸ Talus (n 1) 243.

from multilateral frameworks to unilateralism and bilateral regimes. This would depart from the values fundamental to the EU's normative agenda in its external relations, mainly by promoting values through regional integration and multilateral frameworks that facilitate third countries gravitating towards an EU liberalisation model.

A policy-oriented approach and legal order would inevitably generate additional challenges for energy multilateralism. The ECT has been challenged because of a plethora of cases directed against EU Member States, most of which related to renewable energy, which has had a subsequent impact on Member States' environmental and climate policies. Here, it is important to recall Russia's withdrawal from ECT in the aftermath of the *Yukos* case, which was strategically planned in advance of the unfavourable arbitral ruling. The *Yukos* affair, which was believed to be politically motivated, is arguably the most controversial investment arbitration case of all time. As CEO of Russia's largest oil firm, Mikhail Khodorkovsky was arrested for alleged tax fraud, while *Yukos* was subsequently dismantled and auctioned off.⁶⁹ The *Yukos* arbitrations⁷⁰ have attracted considerable attention, especially following the highest investment treaty award at that date, exceeding US\$50 billion plus costs. Although Russia signed but never ratified the ECT, Russia is bound by the provisional application of the ECT in Article 45(1).⁷¹ The *Yukos* ECT disputes predominantly focused on Russia's provisional application of Part V of the ECT, particularly Article 26, which provides for the ISDS under the ECT. Although Russia officially informed the depository of the treaty on 20 August 2009 that it did not intend to ratify the ECT, Russia's withdrawal did not have immediate consequences for investment protection; the arbitral tribunal for the *Yukos* case held that the ECT bound Russia to investments pre-dating its withdrawal.⁷²

The broader implication of the *Yukos Universal Limited* interim award was that Russia was bound by Article 45(1) of the ECT, which provided for provisional application of the treaty from the date of signature.⁷³ This means that ECT provisions on arbitration and investment protection remain valid for twenty years from Russia's withdrawal until 2029.⁷⁴ This follows from Article 45(3)(b), which provides a twenty-year 'survival mechanism' for states that terminate provisional applications bound by the investment protection obligations in Part III and the dispute settlement provisions in Part V of the ECT.⁷⁵ Although the ruling in favour of the *Yukos* shareholders was on jurisdiction and not the merits of the case, it was considered a victory for the investment community in light of Russia's withdrawal from the ECT, which was seen as manifestly inconsistent with international law.⁷⁶ EU withdrawal from the ECT

⁶⁹ See Richard Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Routledge 2009) 61.

⁷⁰ *Hulley Enterprises Limited (Cyprus) v Russia*, Case No AA 226, Final Award (Perm. Ct. Arb., 18 July 2014). <<https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf>> accessed 7 July 2023.

Hulley Enterprises Limited (Cyprus) v Russia, Case No AA 226, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb., 30 November 2009). <<https://www.italaw.com/sites/default/files/case-documents/ita0411.pdf>> accessed 7 July 2023.

Yukos Universal Limited (Isle of Man) v Russia, Case No AA 227, Final Award (Perm. Ct. Arb., 18 July 2014). <<https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>> accessed 7 July 2023.

Yukos Universal Limited (Isle of Man) v Russia, Case No AA 227, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb., 30 November 2009). <<https://www.italaw.com/sites/default/files/case-documents/ita0910.pdf>>;

Veteran Petroleum Limited (Cyprus) v Russia, Case No AA 228, Final Award (Perm. Ct. Arb., 18 July 2014). <<https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf>> accessed 7 July 2023.

Veteran Petroleum Limited (Cyprus) v Russia, Case No AA 228, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb., 30 November 2009) <<https://www.italaw.com/sites/default/files/case-documents/ita0891.pdf>> accessed 7 July 2023.

⁷¹ Article 45(1) of the ECT states: 'Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.

⁷² *Yukos Universal Limited (Isle of Man) v Russia*, Case No AA 227, Interim Award (n 70) paras 338, 339.

⁷³ Provisional application enables the immediate legal effect of treaties without waiting for the completion of the lengthy and protracted ratification process. The Russian Federation's withdrawal from the provisional application of the ECT means that it is no longer bound by the provisional application rules of the ECT for any new energy investments made after its formal withdrawal came into effect on 20 October 2009. However, Russia's withdrawal has no legal impact on all investments made before 20 October 2009 under the legacy provision, which maintains the binding effect of the ECT for an additional twenty years from the date of Russia's withdrawal. Therefore, the ECT provisions on arbitration and investment protection remain valid for twenty years from Russia's withdrawal until 2029. This follows from Article 45(3)(b) ECT. *Yukos Universal Limited (Isle of Man) v Russia*, Case No AA 227, Interim Award (n 70) paras 338, 339.

⁷⁴ Alan Riley, 'The EU-Russia Energy Relationship: Will the *Yukos* Decision Trigger a Fundamental Reassessment in Moscow?' [2010] 2 IELR 37.

⁷⁵ *Yukos Universal Limited (Isle of Man) v Russia*, Case No AA 227, Interim Award (n 70) paras 338, 339.

⁷⁶ Alan Riley, 'The *Yukos* Decision: Profound implications for the EU-Russia energy relationship?' (CEPS Commentaries, 2009) 2.

would entail adopting a similar approach and inadvertently endorsing the actions of Russia against Yukos, thereby undermining the significance of the *Yukos* case.

Acknowledging that legal regimes need to adapt to the new realities, the ECT must, in line with the global energy transition, evolve beyond an instrument of investment protection predominantly used for fossil fuels to an instrument reinforcing protection for clean and renewable energy. It is only by acknowledging the urgency of climate action that the ECT can fulfil its potential as a multilateral framework that promotes energy investment sustainably. EU withdrawal from the ECT would put renewable energy investments in Europe at risk and diminish efforts to mitigate climate change. Furthermore, ECT reform has shed light on the other international investment agreements in force, the majority of which have investment protection and ISDS provisions in place, which are incompatible with climate objectives.⁷⁷ The Intergovernmental Panel on Climate Change has warned that international investment agreements such as the ECT threaten climate action as fossil-fuel companies predominantly use them to deter national legislation aimed at phasing out the use of fossil fuels.⁷⁸ At the very least, the ECT modernisation debate has created a platform for governments to assess further the investments that need to be promoted and protected, thereby creating an opportunity for coherence between a state's investment and climate policies.⁷⁹

It is important to note that the EU is entitled to political discretion regarding withdrawal from an international treaty regime that no longer reflects its objectives. Following the war in Ukraine, the EU is committed to decoupling European economies from Russian gas and fossil fuels. The war has been a watershed moment in EU energy policy, with decarbonisation and energy transition emerging as priority energy policy goals. The EU's commitment to fundamental values such as multilateralism and a rules-based legal order under the ECT must account for policy objectives concerning the EU's strategic interests, such as energy security. The new dynamics of the energy transition following the war, together with gas supply uncertainty, means that decarbonisation has been securitised.⁸⁰ This fundamental shift in perception means that renewables and climate action will be pushed to the top of the EU agenda to pursue energy security interests at the heart of the REPowerEU plan.⁸¹ Given the change in the way renewables are now perceived, having been elevated from the climate domain to the security domain as 'freedom energy'⁸² in the context of Europe's gas addiction to Russia, the EU now has the political will and prerogative to deviate from an international treaty regime that hinders its energy transition and climate policy objectives.

6. Conclusions

The modernisation of the ECT has offered an unprecedented opportunity to significantly influence the development of investment protection in relation to climate change by setting a global standard for investment protection. However, despite the ambitious intentions initially established, the reform of the ECT has fallen short in the ambition and scope of a treaty that addressed the mounting global challenges concerning sustainable development and climate action. The amended text does not sufficiently address the EU's core objectives, including alignment with the Green Deal and the Paris Agreement commitments. The updated ECT would create considerable risks for governments, making urgently needed climate action costly. Despite reform, the modernised ECT will continue to curb accelerated efforts from governments in their environmental, climate and energy policies. However, the modernisation process is far from complete – the Energy Charter Conference (April 2023) requires unanimity among the

⁷⁷ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2022: Impacts, Adaptation and Vulnerability: Summary for Policymakers' (28 February 2022). <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf> accessed 7 July 2023.

⁷⁸ *ibid.*

⁷⁹ Bart-Jaap Verbeek, 'The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?' [2023] BHRJ 1–6.

⁸⁰ Andreas Goldthau and Nick Sitter, 'Whither the Liberal European Union Energy Model? The Public Policy Consequences of Russia's Weaponization of Energy' [2022] 23(6) *EconPol Forum* 4.

⁸¹ Commission (n 9).

⁸² Euractiv, 'Solar Is "Freedom Energy" – Unless We Depend on Autocracies for the Technology' (15 July 2022). <<https://www.euractiv.com/section/energy/opinion/solar-is-freedom-energy-unless-we-depend-on-autocracies-for-the-technology/>> accessed 7 July 2023.

contracting parties (present and voting). With several EU member states announcing their intention to withdraw, adoption seems unlikely without necessary support within Europe.

Therefore, with the modernisation of the ECT uncertain, there have been increased calls for a coordinated EU withdrawal. However, despite mounting criticism of ECT reform, EU withdrawal will entail wider political risks, with the dismantling of the ECT potentially hampering the ability of the world to meet the Paris Agreement targets.⁸³ However, following the invasion of Ukraine, the EU's decarbonisation efforts have been increased by the EU's transition to a low-carbon economy and a shift away from fossil fuels – a top priority for the EU's energy security agenda. With the EU's green transition elevated to the security domain and bolstered by the REPowerEU plan, more pressing policy objectives dilute the need to uphold multilateralism. As such, the EU needs to take a long-term view of multilateralism as something the EU strongly advocates without eroding its values in pursuit of policy objectives. Striking a balance between the EU's core policy objectives and fundamental values, including its commitment to multilateralism, appears to be key. Still, the degree of gravitation remains to be seen. With no other appropriate multilateral instrument to boost the clean energy transition, the EU would be prudent to continue its reform endeavours with a framework that, at least, upholds investment protection and arbitration during unprecedented uncertainty. Debunking the modernisation process of the ECT in its entirety in favour of climate policy objectives alone would inevitably amount to a self-fulfilling prophecy. The recently published Non-Paper from the European Commission on the withdrawal of the ECT gives credence to this assertion, with the non-paper confirming that endorsement of the modernised ECT does not seem feasible in the current circumstances, and that the withdrawal of the EU from the ECT appears to be unavoidable.⁸⁴ Should the Commission officially endorse this position, the future of the modernised ECT remains questionable; it is a framework that does not adequately address the EU's decarbonisation efforts and drive towards a net zero economy.⁸⁵

Declarations and conflicts of interest

Research ethics statement

Not applicable to this article.

Consent for publication statement

Not applicable to this article.

Conflicts of interest statement

The author declares no conflict of interest with this work. All efforts to sufficiently anonymise the author during peer review of this article have been made. The author declares no further conflicts with this article.

⁸³ Beckman (n 28).

⁸⁴ Kate Abnett, 'Brussels Says EU Exit from Energy Charter Treaty "Unavoidable"' Reuters (7 February 2023) <<https://www.reuters.com/world/europe/brussels-says-eu-exit-energy-charter-treaty-unavoidable-2023-02-07/>>.

⁸⁵ Euractiv (n 40).