Council of the European Union

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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	6233/23
Subject:	Council conclusions on Climate and Energy Diplomacy

Delegations will find in the annex the Council conclusions on Climate and Energy Diplomacy as approved by the Council at its meeting held on 09 March 2023.

ANNEX

Council conclusions on Climate and Energy Diplomacy

"Bolstering EU climate and energy diplomacy in a critical decade"

1. The consequences of the triple planetary crisis of climate change, biodiversity loss and pollution pose a global and existential threat, particularly affecting the most vulnerable, increasing poverty and inequality and affecting stability. As such, EU Climate and Energy Diplomacy is a core component of EU's foreign policy. The EU is determined, to engage and work with partners worldwide through our Climate and Energy Diplomacy: to implement the Paris Agreement; to limit the global temperature increase to 1.5°C compared to pre-industrial levels; to support the most vulnerable, in particular in least developed countries (LDCs) and Small Island Developing States (SIDSs), in adapting to climate change effects; and to increase collective climate finance. The EU will also continue to support just transitions towards climate neutral and resilient economies and societies, in line with the 2030 Sustainable Development Agenda, and the Addis Ababa Action Agenda on development finance. In this context, the EU underlines the importance of a strong rules-based multilateral approach, with the UN at its core, to successfully address these global challenges.

2. Russia's illegal, unprovoked and unjustified war of aggression against Ukraine, which constitutes a manifest violation of the UN Charter, has created untold human suffering, massive environmental damage and increased risks to nuclear safety in Ukraine. It has precipitated an energy security and food crisis with global impacts. The Council rejects using energy and food as a weapon. The EU will phase out its dependency on Russian gas, oil and coal imports as soon as possible. The EU is fully committed to continuing supporting partners and in particular Ukraine, including in responding to Russia's systematic destruction of Ukraine's critical infrastructure, and in particular the energy system. The EU will contribute to its recovery and resilience needs and will assist its long-term economic and energy transition. Greening Ukraine's reconstruction can serve as one of the win-win foundations of Ukraine's closer integration with the EU.

3. In light of the findings of the Intergovernmental Panel on Climate Change (IPCC), the Council strongly underlines that the climate crisis requires immediate, urgent, accelerated action and strengthened ambition. Strong and ambitious mitigation action is the best tool to prevent increased adaptation needs, as well as loss and damage associated with the adverse effects of climate change. Solutions are available in all sectors that could, together, halve global greenhouse gas emissions by 2030, as indicated by the IPCC. The Council encourages partners to embrace the opportunities to create sustainable economic growth and jobs.

4. The world's collective net-zero ambitions have the potential to reduce temperature rise significantly, but actual policies and investments remain vastly insufficient to stay safely within the Paris temperature goal. Limiting the temperature increase to 1.5°C would substantially reduce the impacts of climate change. In this context, the Council urgently calls for increased global action and ambition in this critical decade, in line with the IPCC analyses: limiting warming to around 1.5°C requires global greenhouse gas emissions to peak by 2025 at the latest, and be reduced with 43 percent by 2030 compared to 2019. In the case of methane, collective efforts need to be made to reduce global methane emissions at least 30% from 2020 levels by 2030.

5. The Council calls on all countries, and in particular on all major emitters and G20 members, to redouble their efforts to adopt and implement ambitious, 1.5°C-compatible climate and energy policies. In this context, the Council calls on all countries, in particular the ones that have not yet done so to present as soon as possible in 2023, well before COP28, their new or updated Nationally Determined Contributions (NDCs) with stronger, more ambitious, and absolute economy wide emission reduction targets. These should be underpinned by concrete policies and measures to implement them. The EU is committed to the swift operationalisation of an ambitious Mitigation Work Programme, as an important instrument to urgently scale up mitigation ambition and implementation in this critical decade to promote robust policies and explore how the different sectors and a just energy transition can contribute towards ambitious climate action and enhancement of commitments. The Council also calls on countries to present, as soon as possible, Adaptation Communications and to present or update their long-term low greenhouse gas emission development Strategies (LT-LEDS) towards reaching net-zero emissions by 2050. The EU encourages more ambitious emission reductions in all sectors, and welcomes commitments from sectors such as transport, including shipping and aviation.

6. This year, the world has a unique opportunity to showcase progress and to provide further guidance for the next generation of NDCs and get on track to reach the Paris Agreement goals via, in particular, the Climate Ambition Summit, alongside the second SDG Summit convened by the UN Secretary General in September, and the political phase of the 'Global Stocktake' at the UNFCCC COP28 in the United Arab Emirates. In this context, the EU welcomes the UN Secretary General's report Our Common Agenda and the announced Summit of the Future, scheduled for 2024, as incentives to spur further global action through an inclusive and effective multilateral approach.

7. The EU itself is taking determined and decisive action to reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels, to reach climate neutrality by 2050 at the latest, and to aim for negative emissions thereafter. The Council stands ready, as expressed in the Council Conclusions of 24 October 2022, as soon as possible after the conclusion of the negotiations on the essential elements of the 'FitFor55' package, to update, as appropriate, the NDC of the EU and its Member States, in line with § 29 of the Glasgow Climate Pact and §23 of the Sharm el-Sheikh Implementation Plan to reflect how the final outcome of the essential elements of the Fitfor55 package implements on the EU headline target as endorsed by the European Council in December 2020. The EU shall set its climate target in accordance with the European Climate Law. To that end, at the latest within 6 months of the first Global Stocktake, the Commission shall make a legislative proposal, as appropriate, based on a detailed impact assessment. The Council invites the High Representative and the Commission, together with EU Member States through our Climate Diplomacy to call upon all other countries to also set high ambitions as soon as possible for the next round of NDCs post-2030, well in advance of COP30 in 2025. With the EU Emissions Trading System as a crucial element of the EU's policy response, the EU encourages partners to establish and extend their own carbon pricing instruments to reduce emissions effectively and efficiently.

8. The Council strongly underlines the crucial importance of strengthening adaptation and resilience measures worldwide and the urgent need to scale up action and support in averting, minimising and addressing loss and damage associated with climate change impacts. The Council also stresses the importance of national and local adaptation planning, to support effective and locally-led implementation, and the importance of achieving the Global Goal on Adaptation. In this context, the Council supports the full and effective operationalisation of the Santiago Network, the implementation of the Sendai Framework for Disaster Risk Reduction, as well as its mid-term review, to be conducted in 2023, and the effective implementation of national adaptation plans.

9. The Council confirms the EU's commitment to support the most vulnerable, especially in least developed countries and small island developing states, and to reinforce the existing network of institutions currently providing assistance and capacity building to developing countries in preparing for and responding to climate impacts. In this spirit, the EU and its Member States underline the call of COP 26 in Glasgow, to at least double collective provision of climate finance for adaptation for developing countries by 2025, compared to 2019 levels.

10. The Council calls on the EU and its Member States to continue to increase funding for adaptation and climate resilience, with a focus on the most vulnerable through joint Team Europe Initiatives as well as through other international instruments such as the Global Shield Against Climate Risks of the V20/G7. The EU strongly supports the United Nations Secretary-General's call for a universal coverage of life saving early warning systems within the next five years including through increased support for the Climate Risk and Early Warning Systems Initiative (CREWS) and through the Systematic Observations Financing Facility (SOFF).

11. The Council calls on the EU and its Member States to continue to constructively engage in the discussions on new funding arrangements, including a fund, to assist developing countries that are particularly vulnerable, in responding to loss and damage associated with the adverse effects of climate change. The Council calls on all partners, from all regions, in a position to do so and beyond the traditional base of providers of development finance, to expand their support as well as to identify new sources of funding, including innovative sources, by enhancing complementarity, synergies, coherence and coordination, and seeking to fill priority gaps in the existing mosaic of solutions and institutions.

12. Given the intrinsic interdependencies between climate change, biodiversity loss and land degradation including desertification, and alterations of the water cycle, the Council calls on the EU and its Member States to continue to increase measures, including funding for biodiversity and nature based solutions and partnerships. The Council recognises the critical role of oceans, their 'blue carbon' function, and the critical need to protect, conserve and restore terrestrial ecosystems, including forests, as well as inland and coastal water ecosystems, in mitigating, adapting to and building resilience against the effects of climate change. The Council also recognises the need for a comprehensive approach on water-related challenges, and welcomes the UN 2023 Water Conference. The Council acknowledges the need for enhanced action on water and is committed to drive the forthcoming Water Action Agenda forward, as part of its Climate and Energy Diplomacy. Furthermore, the Council underlines the importance of ending plastic pollution. The Council also stresses the importance of protecting cultural heritage against the devastating effects of climate change and extreme weather events.

13. The Council welcomes the Kunming-Montreal Global Biodiversity Framework, the landmark agreement adopted at the United Nations Conference on Biodiversity (15th Conference of the Parties to the Convention on Biological Diversity (CBD COP15), which is a framework for global action on biodiversity through to 2030 and beyond, and calls for its effective implementation, including through early submission of high quality national biodiversity strategies and action plans (NBSAP), in time for consideration at CBD COP16. Together with the Paris Agreement, the Framework paves the way towards a climate-neutral, nature-positive and resilient world by 2050.

14. The Council welcomes the commitment to double EU external funding to €7 billion for the period 2021-2027 for biodiversity, in particular for the most vulnerable countries, as well as similar commitments taken by some EU Member States before and at CBD COP15, while recognising that significant additional funding and investments from all countries and sources are needed, as well as avoiding investments that might have negative impacts on biodiversity and nature.

15. The EU – including its Member States and the European Investment Bank (EIB) - is the biggest contributor of public climate finance worldwide, and remains fully committed to contribute to reaching the collective USD 100 billion goal as soon as possible and through to 2025, to support climate action in developing countries and the EU calls on other donors to step up their efforts in this regard. The EU Global Gateway strategy and our Team Europe approach are key instruments in ensuring sustainable investments in the EU's partner countries.

16. The Council stresses the urgency of making finance flows consistent with the goals of the Paris Agreement, mobilising substantially more climate finance globally, scaling up sustainable finance in low and middle income countries, and channelling adequate support in particular to the poorest and most vulnerable in LDCs and SIDSs. In this context, the Council emphasises the importance of accelerating the mobilisation of private finance for climate mitigation and adaptation projects, climate-resilient infrastructure and other development activities and global public goods. The Council underlines the need to involve Finance Ministries in this work, including through the Coalition of Finance Ministers for Climate Action, in order to accelerate the green transitions and achieve a wide scale mobilisation of financial resources in line with the Paris goals. The Council will strive to ensure a dedicated space to discuss the alignment of financial flows, consistent with climate neutrality and climate-resilient development pathways, including at COP28 in Dubai. The Council welcomes the ongoing work of the High Level Expert Group on scaling up sustainable finance in low and middle-income countries for the implementation of the external dimension of the European Green Deal and the development of the Roadmap for Circular Finance.

17. Improving access to finance for climate actions and bringing down financing costs for climate mitigation and adaptation projects in countries that are most vulnerable to climate change, taking into account their debt burden, is key for the collective goal of scaling up climate finance and reaching the Sustainable Development Goals. The Council therefore welcomes the call made at COP27 in Sharm El-Sheikh to all the stakeholders of Multilateral Development Banks (MDBs) and International Finance Institutions (IFIs) to reform MDBs' practices and priorities and to make all financial flows consistent with climate neutrality- and climate resilient development pathways and calls for a clear timeframe. The Council also encourages MDBs to strengthen the technical expertise they offer to developing countries to elaborate, amongst others, energy transition projects that will attract domestic and foreign private investors.

18. The Council welcomes the recommendations from the G20 Expert Panel Independent Review of MDB Capital Adequacy Frameworks and supports their swift implementation. The Council calls on MDBs to implement applicable recommendations, following a careful analysis of their implications, without jeopardising the MDBs' preferred creditor status, high credit ratings and long-term financial stability. Representatives of the EU and its Member States, as members of Boards of MDBs and IFIs, will coordinate to encourage and support ambitious proposals to further align MDBs' and IFIs' strategies with the Paris Agreement goals and to significantly increase climate finance and welcomes the ambition of the European Investment Bank (EIB) in this regard. The Council looks forward to the discussions on such matters, including on the World Bank Evolution Roadmap, at the 2023 IMF and World Bank Spring and Annual Meetings and will engage constructively with a view to ensuring that the debates provide positive input to further discussions including at COP28 in Dubai. The Council also supports the IMF's role to help its members address structural climate related policy challenges and welcomes that climate change considerations have been incorporated into existing IMF lending facilities through the Resilience and Sustainability Trust.

19. The Council looks forward to the "Global Financing Pact" Summit in June 2023 in Paris, which should, amongst others, focus on the mobilisation of more climate finance and unlocking new sources of finance for climate vulnerable countries, by improving investment conditions.

20. The EU and its Member States will continue to increase cooperation and work closely with ambitious partners and organisations on the global just transition towards climate neutrality. The Council welcomes the Just Energy Transition Partnerships (JETP) in G7 context with South Africa, Indonesia and Vietnam, and is committed to their operationalization. The Council also supports the ongoing work on other JETPs. The Council looks forward to a strong engagement from all partner countries concerned, necessary for a country-led transformation. In addition to JETPs, the Council invites the High Representative and the Commission to build on ongoing initiatives and to explore the opportunities for increased cooperation with countries that rely heavily on fossil fuels, especially coal, in particular in the Western Balkans, the Eastern Neighbourhood and the Southern Neighbourhood and with developing and middle-income countries with high energy related emissions.

21. The Council recognizes that climate change, biodiversity loss, desertification, pollution and environmental degradation represent increasing risks to human, state and regional security and may aggravate conflict drivers and dynamics, as well as dimensions of fragility. The Council reaffirms its diplomatic engagement on water as a tool for peace, security and stability. The Council also recognises the significant gap in climate finance available to fragile and conflict-affected States. It welcomes the 2020-2022 Joint Progress Report on the Climate Change and Defence Roadmap and the Concept for an Integrated Approach to Climate and Security and recalls the Council conclusions of November 2022 on Women, Peace and Security. The Council underlines the importance of integrating the climate, peace and security nexus in EU's external policy and actions, including in analyses, inclusive climate and disaster risk reduction processes and anticipatory action, the conduct of peacebuilding, mediation, conflict prevention, development cooperation, climate finance and climate diplomacy including dedicated water diplomacy. The Council invites the High Representative to strengthen the EU's analytical, early-warning and strategic foresight capacities, mainstream the climate, peace and security nexus, and issue timely warning and analysis on climate related risks.

22. The Council welcomes the High Representative's and Commission's intention to present a joint proposal in order to enable the EU to better prevent and manage the comprehensive security and defence implications of climate change and environmental degradation. The Council also welcomes and encourages increased cooperation with other international and regional organisations such as United Nations, NATO, the OSCE and the African Union as well as with partner countries in line with the EU institutional framework and with full respect to the EU decision-making autonomy.

23. The Council reconfirms that the primary goal of the EU's external energy policy is to support, intensify and accelerate the ongoing global energy transition as a crucial element towards achieving climate neutrality. An accelerated inclusive and just energy transition is also the key solution ensuring energy security and universal access to safe, sustainable and affordable energy in the EU and our partner countries worldwide while reducing greenhouse gas emissions.

24. The Council acknowledges the Joint Communication 'EU external energy engagement in a changing world' as an essential element of the 'REPowerEU' plan proposed by the Commission, responding to the energy crisis brought about largely by Russia's war of aggression against Ukraine, and Russia's weaponisation of energy against the EU and partner countries. The EU and its Member States will continue to limit the impact of Russia's war of aggression on the energy security and affordability of energy in third countries, in particular the most vulnerable.

25. EU energy diplomacy will actively support the implementation of relevant sanctions and the rollout of the price-cap mechanism on Russian oil and petroleum products.

26. The Council invites the High Representative and the Commission to reinforce, in close cooperation with Member States, outreach, coordination and partnerships with third countries in line with the priorities outlined below. New energy partnerships should complement existing energy cooperation with key partners while safeguarding the EU's own resilience and competitiveness and domestic resources.

27. EU energy diplomacy will promote the increasing uptake and system integration of renewable energy conscious of water and environmental stress, and electricity connectivity. It will also promote the deployment of safe and sustainable low-carbon technologies.

28. EU energy diplomacy will promote the development of rules-based, transparent, and undistorted global hydrogen markets based on reliable international standards and certification schemes.

29. Recognising the crucial role of energy efficiency and savings, the Council invites the High Representative and the Commission to accelerate actions towards making them into a global priority, and to explore the launch of a dedicated initiative, building on existing international efforts, in addition to enhanced bilateral cooperation.

30. The Council highlights the need for investment into increasingly circular industrial processes and value chains aiding the transition towards climate neutrality in hard to abate sectors. The Council further highlights the importance of continuous innovation, in particular in technologies crucial for reaching climate neutrality, and supports further strengthening of bilateral strategic research partnerships and cooperation through global fora such as Mission Innovation, and the Clean Energy Ministerial. The EU will cooperate with international partners to reform regulatory frameworks, will seek to strengthen the technological leadership of EU companies, support the uptake of EU standards globally and promote EU businesses' fair and undistorted access to international markets for resources and technologies, in order to maintain competitiveness, and avoid new dependencies.

31. The Council considers that a dependence on fossil fuels leaves countries vulnerable to market volatility and geopolitical risk and that the shift towards a climate neutral economy will require the global phase-out of unabated fossil fuels, as defined by the IPCC, and a peak in their consumption already in the near term, while recognising a transitional role for natural gas. The EU will systematically promote and call for a global move towards energy systems free of unabated fossil fuels well ahead of 2050. In this regard, the Council recalls the commitment taken at COP 26 to close the book on unabated coal power through a phase down, and, calls for a resolute and just world-wide transformation towards climate neutrality, including a phasing out of unabated coal in energy production and – as a first step – an immediate end to all financing of new coal infrastructure in third countries.

32. While recognising the need to provide targeted support to the most vulnerable groups, EU energy diplomacy will promote the global phase-out of environmentally harmful fossil fuel subsidies, which are not contributing to a just transition towards climate neutral energy systems. The Council welcomes the progress made in the World Trade Organisation's initiative on fossil fuel subsidy reforms.

33. The EU's overall fossil fuel imports from Russia have considerably decreased over the past few months. In this context, EU energy diplomacy will support urgent efforts to reinforce and safeguard the EU's energy security while avoiding new dependencies, which is necessary to preserve the competitiveness of the EU and ensure affordable energy to citizens. While in the immediate and medium-term urgent steps are needed to further diversify natural gas supplies, the Council recalls that, in particular in view of collective Member States action on energy savings and accelerated renewables deployment, there is no need for a one-to-one replacement of former Russian natural gas import volumes. In order to support the energy diversification objective under REPowerEU, EU energy diplomacy will support outreach and coordination with reliable natural gas producers and large consumers, promote relevant infrastructure, interconnections and transparent, rules-based, open and liquid energy markets. EU energy diplomacy will support the EU Joint Purchasing Mechanism under the EU Energy Platform, including Energy Community Contracting Parties, paying particular attention to the energy security and resilience of these partners. EU energy diplomacy will also support ongoing efforts by affected Member States to diversify nuclear fuel supplies, as appropriate.

34. The Council emphasises that EU fossil fuel diversification efforts should not undermine long-term climate neutrality goals globally and should avoid creating fossil fuel lock-ins and stranded assets. Diversification efforts should give preference to using existing fossil fuel infrastructure emphasising their potential for re-purposing, and include systematic action to reduce methane emissions. The Council recalls, in particular, the climate and energy security value of trading schemes building on methane capture, such as 'You Collect/We Buy'. EU external energy action shall aim to link fossil fuel diversification efforts with long-term energy transition partnerships.

35. The Council emphasises the need to support international efforts to reduce the environmental and climate impact of existing fossil fuel infrastructure, including black carbon. In this context, the EU, together with the US and other partners, will continue to further promote and develop action under the Global Methane Pledge. The Council welcomes, in this respect, the development of the Methane Alert and Response System by the International Methane Emissions Observatory. The Council calls on the High Representative and the Commission to take forward work on the Joint Declaration from Energy Importers and Exporters on Reducing Greenhouse Gas Emissions from Fossil Fuels.

36. In order to ensure energy security in the decades ahead, the Council emphasises the need to strengthen and diversify global supply chains of sustainable raw materials needed for the energy transition and looks forward to the Commission proposal on a Critical Raw Materials Act, taking full account of its geopolitical dimensions.

37. EU energy diplomacy will continue to promote and support the highest nuclear safety, environmental and transparency standards, regionally, in the immediate vicinity of EU borders, and globally.

38. The Council recalls the urgent need to deliver on energy poverty and universal energy access in line with the Sustainable Development Goal 7 using innovative finance models and technologies with a particular focus on rural electrification, including decentralised energy systems, and the clean cooking challenge. The Council looks forward to the review of SDG7 at the 2023 high Level Political Forum and second SDG Summit.

39. The Council emphasises the need to ensure effective multilateral architecture and governance mechanisms driving an inclusive and just global energy transition in alignment with the Paris Agreement objectives, and recalls earlier statements in support of ongoing reform processes whilst limiting the further fragmentation of initiatives.

40. The Council recognises that the energy transition toward climate neutrality, pursued at the requisite pace, will have a significant impact on societies, economies and geopolitics globally. EU foreign policy will continue to strengthen foresight capability to anticipate new security and geopolitical challenges and work, in this context, with third country partners and relevant international initiatives and organisations, such as IRENA and the OECD, as appropriate.

41. The Council, together with the High Representative and the Commission, will continue to reinforce existing and initiate new ways of cooperation with partner countries, civil society and youth and women's initiatives, aiming to increase climate action on regional, national and subnational level, emphasizing the principle of solidarity and the UN's 'leave no one behind' approach. In this regard, the Council recalls its Conclusions from October 2022 on the importance to respect and promote human rights, the right to health, the right to a clean, healthy and sustainable environment, the rights of indigenous peoples as set out in the UN Declaration on the Rights of Indigenous Peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, as well as gender equality and the full enjoyment of all human rights by women and girls and their empowerment when taking action to address climate change.

42. The Council is committed to promoting a human rights-based and gender-responsive approach to climate action, promoting social justice, fairness and inclusiveness in the global transition towards climate neutrality, full, equal and meaningful participation and engagement of women in climate-related decision-making and fully meeting our human rights obligations when taking action to address climate change. The EU will also continue to support meaningful engagement of youth and children in climate change decision-making processes, as well as climate education and public awareness on climate change. The Council welcomes the recognition by the UN Human Rights Council and General Assembly that the right to a clean, healthy and sustainable environment is a human right. The EU will actively engage in discussions advancing this right and promote inclusion and non-discrimination. The Council recognises the contribution of environmental human rights defenders, who are facing unprecedented levels of threats and attacks.

43. The Council invites the High Representative, the Commission and all Member States to strengthen EU Climate and Energy Diplomacy as a political priority, through intensified coordination, information exchange and strengthening of the EU Delegations and Member States' embassies, and relevant EU and international networks and working groups. The Council encourages EU and Member States' climate outreach missions and regional initiatives, including joint ones, especially in the run-up to COP 28 and the Global Stocktake. The Council emphasizes the need for increased coordination to respond to misinformation and disinformation campaigns aiming to discredit EU actions. The Council will regularly follow up on joint work to coordinate and enhance the EU's climate and energy diplomatic impact, and invites the High Representative and the Commission to strengthen their capacity dedicated to EU Climate and Energy Diplomacy.

44. The EU and its Member States thank the Government of Egypt for hosting COP27 in Sharm El-Sheikh and look forward to working with the incoming United Arab Emirates COP28 Presidency and all partners towards a successful and ambitious outcome of COP28.

Council of the
European Union

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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
Subject:	Council Conclusions on Green Diplomacy

Delegations will find in the annex the Council conclusions on Green Diplomacy as approved by the Council at its meeting held on 18 March 2024.

ANNEX

Council Conclusions on EU Green Diplomacy

EU diplomacy promoting the just and inclusive green transition and supporting the implementation of global commitments

1. The Council reiterates the gravity of the accelerating, deepening and mutually reinforcing triple planetary crisis of climate change, biodiversity loss and pollution, posing a global and existential threat and aggravating existing security concerns. The Council firmly believes that this crisis must be addressed in a comprehensive and integrated way through enhanced multilateralism and global action and as a core component of EU foreign and security policy.

2. The Council reaffirms the EU's strong commitment to work closely with partners to accelerate the global just and inclusive green transition. The Council emphasises the key role of EU green diplomacy in anchoring and consolidating global commitments and promoting their implementation, including those captured in the outcome of the first Global Stocktake (GST) under the Paris Agreement, agreed in Dubai at the 28th UN Climate Conference, and in the Global Biodiversity Framework. In this context, the EU and its Member States will continue to strengthen collaboration with partners in developing and implementing ambitious Nationally Determined Contributions (NDCs) that effectively address the commitments taken in the GST, including 'transitioning away from fossil fuels'. In addition, the EU and its Member States will work with partners to develop and submit National Biodiversity Strategies and Action Plans (NBSAPs), as well as relevant targets, updated and developed ahead of the 16th UN Biodiversity Conference. The Council urges G20 members to take leadership in this regard, as they represent around 80% of global emissions and have a key role in tackling the world's environmental and climate challenges.The Council strongly underlines the need for immediate, urgent, accelerated action, as underlined by the reports of the IPCC, IPBES and IRP [1] and reaffirms the importance of a science-driven global transition to climate neutrality that is just, inclusive, sustainable, in harmony with nature, and in line with the commitments, policies, principles and values of the EU. The Council calls for enhanced cooperation with partners at all levels, and jointly with businesses and industries, to fully benefit from the opportunities the green transition offers to all including strengthened

[1] Intergovernmental Panel on Climate Change, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and the International Resource Panel

competitiveness, job creation and growth and draws attention to the enabling role of free, open and fair trade.

3. The Council expresses severe concern over the harm to the climate and environment, in addition to the immense human suffering, caused by ongoing armed conflicts worldwide and the risk they pose for effective global action to address the triple planetary crisis.

4. The Council condemns Russia's illegal, unprovoked and unjustified war of aggression against Ukraine, and reaffirms its unwavering support to Ukraine and its people. It has inflicted massive environmental damage, nuclear safety risks, and precipitated energy and food insecurity globally. The Council underlines the need to assess the damage and is committed to address it in the context of Ukraine's recovery and reconstruction. The Council also calls on the international community to hold Russia accountable.

5. The Council calls on all partners to address disinformation and misinformation aimed at creating and disseminating of false or manipulated information related to climate change, biodiversity loss, environmental degradation, pollution and their consequences and points out the importance of science and education.

6. Human rights, democracy and the rule of law remain the EU's common compass and core values including in our green diplomacy. Access to a clean, healthy and sustainable environment is a human right. Specific emphasis should be given to the rights of children and youth, as they play an inextricable role in future challenges and solutions as agents of change. The EU will also continue to uphold, promote and protect gender equality, the full enjoyment of all human rights by all women and girls, and their empowerment. The Council underlines the importance of enhancing the voice and full, equal and meaningful participation and leadership of women and young generations in decision making at all levels aimed to improve climate, energy, environment and water policies. The Council also stresses the importance of cooperation with and protection of civil society, environmental human rights defenders, Indigenous Peoples, local communities, persons with disabilities, and their empowerment.

7. The Council calls for a coordinated approach to tackle climate change, land degradation, desertification and biodiversity loss and underlines the critical role of oceans and ecosystems and the importance of Nature Based Solutions. In this context, the Council calls for enhanced collaboration between Convention secretariats of the UN Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the UN Convention to Combat Desertification (UNCCD) and invites Parties to enhance cooperation between the national focal points, as appropriate to promote stronger synergies at international and national levels.

8. The Council looks forward to the adoption of an action-oriented Pact at the UN Summit of the Future in September 2024. The Pact should reaffirm the commitment to reform the multilateral system and enable the UN to address present and future global challenges, and deliver on its main commitments, including the 2030 Agenda and Sustainable Development Goals (SDGs), the Paris Agreement, the Addis Ababa Action Agenda (AAAA), and the Kunming-Montreal Global Biodiversity Framework (GBF). The Pact should also address interlinkages between climate change, biodiversity loss, environmental degradation, development needs, human rights and peace and security.

9. The Council invites partners to work closely with the EU to accelerate and benefit from the green transition and supports the implementation of global commitments through frameworks such as Green Alliances, Green Partnerships, Green Agendas, high-level dialogues, trade agreements and other important formats for cooperation, such as the Samoa Agreement. The Council reiterates the importance of the Just Energy Transition Partnerships and remains committed to their further operationalization with the support of the relevant partners. The EU will continue to work closely with partners in the Eastern and Southern Neighbourhood, the Western Balkans, Africa and worldwide, in particular with the most vulnerable, including least developed countries (LDCs) and Small Island Developing States (SIDS) and partner countries that have put forward ambitious plans, through the NDICI Global Europe and Team Europe initiatives and under the Global Gateway Strategy, amongst others. The Council underlines the importance of the role of and collaboration with the private sector and businesses in these efforts.

10. In line with their respective EU paths, the Council invites the Commission to strengthen support to and cooperation with the candidates for EU accession to accelerate their alignment with and implementation of the EU acquis on energy, environment, and climate, including in the context of the Energy Community, and to facilitate their just and inclusive green transition.

11. The Council thanks the United Arab Emirates (UAE) for hosting the UN Climate Change Conference (COP28) in Dubai and welcomes the adoption of the UAE consensus. The EU looks forward to working with all partners, including with the troika of the current Presidency, the United Arab Emirates, and incoming COP Presidencies of Azerbaijan and Brazil towards successful and ambitious outcomes of COP29 and COP30.

12. The Council expresses great concern that, despite overall progress made at multilateral level and concrete steps and actions taken at national level, Parties of the Paris Agreement are collectively still not on track towards achieving its purpose and its long-term goals, as acknowledged in the first Global Stocktake (GST).

13. In this context, the Council calls on all partners to follow up on the implementation of the outcome of the first Global Stocktake (GST) as important guidance for enhanced action in this critical decade, as well as for the preparation of the Nationally Determined Contributions (NDCs) to be submitted nine to twelve months ahead of COP30 in November 2025[2], reflecting the highest possible ambition as well as seeking synergies with the 2030 Agenda for Sustainable Development. Increased ambition in this critical decade and beyond requires reaching global emission reductions of greenhouse gas emissions of 43% by 2030 and 60% by 2035, compared to 2019 levels. The Council encourages G20 members to take the lead in implementing the outcome of the first GST, including the transition away from fossil fuels, and invites all partners to work with the EU and its Member States on more ambitious NDCs. The EU is committed to also work with partner countries, development partners, international organisations and organisations such as the NDC Partnership, to develop and implement ambitious NDCs with a 2035 target. The EU recalls the COP28 call to all parties to include, in their NDCs, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and be aligned with the goal of limiting global warming to 1.5˚C. The Council calls also on partner countries to present or update their long-term low greenhouse gas emission development strategies towards reaching net-zero emissions by 2050.

14. The Council reaffirms that the EU is committed to climate neutrality by 2050 at the latest and aims to achieve negative emissions thereafter, and that it has set an intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. The EU is taking determined and decisive action to deliver on these legally binding targets enshrined in European Climate Law, and offers to share experience, lessons-learnt, best practices, and the innovative solutions developed by EU policy, research, industry and business with partners globally, supporting the development and implementation of more ambitious NDCs.

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2 *Decision of the 5th CMA, Outcome of the 1st GST, paragraph 166, advance unedited version* CMA4_AUV_TEMPLATE (unfccc.int).

15. The Council takes note of the publication of the Commission's Communication on Europe's 2040 climate target and path to climate neutrality by 2050 at the latest and its recommendations. It informs the discussion of the EU NDC to be submitted well ahead of COP30. This sends a powerful signal to markets and investors, and to other international partners to increase their own ambition, and to set the world on a trajectory that is compatible with the 1.5˚C temperature goal.

16. The Council invites partners to work with the EU on developing a global approach on carbon pricing, as the most efficient and cost-effective way to reduce emissions and stimulate green investments, and encourages and supports other jurisdictions to introduce or improve their own carbon pricing mechanism, amongst others by aligning carbon markets with the Call to Action for Paris Aligned Carbon Markets. In line with the Carbon Border Adjustment Mechanism, aiming at reducing the risk of carbon leakage in a WTO compatible way, the Council calls for enhanced international cooperation and outreach to partners to lower carbon emissions in production processes.

17. The Council also urgently calls upon the Commission and Member States to work with partners and within International Civil Aviation Organisation (ICAO) and International Maritime Organisation (IMO) to agree on ambitious measures addressing the emissions of international transport including shipping and aviation, and to work on achieving climate neutrality in the buildings sector by 2050. The Council also calls on the EU and its Member States to promote ambitious global phase-down of hydrofluorocarbons (HFCs) under the Kigali Amendment of the Montreal Protocol, as well as a substantial reduction of other F-gases such as SF6 within the next ten years.

18. Acknowledging the progress achieved in the implementation of the Global Methane Pledge, the Council recalls the need for concrete measures to tackle rising methane emissions. The EU will continue to call on partners who have not yet done so to join the Pledge and to include concrete methane reduction measures in their NDCs. The Council stresses the importance of targeted actions in all relevant sectors and underlines the short-term opportunities in the energy sector to address methane leaks, venting and flaring and calls for strengthening engagement with partner countries in support of the work of the International Methane Emissions Observatory. In this context, the Council underlines the importance of creating conditions, including through effective trading schemes to reduce methane emissions, such as 'You Collect/We Buy', in cooperation with producing countries.[3]

19. Building on the GST call to transition away from fossil fuels in energy systems in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science, the Council underlines the need for action based on its Conclusions from October 2023. In this context, the EU and its Member States are determined to engage with partner countries to promote an energy sector predominantly free of fossil fuels well ahead of 2050 in line with the mid-century climate neutrality goal, and work towards implementation, through accelerated action in this critical decade, additional sectorial milestones and ambition, aiming to achieve a fully or predominantly decarbonised global power system in the 2030s, calling for leaving no room for new coal power. In this regard, the Council highlights the importance for effective cooperation with partner countries including through multilateral initiatives such as the Powering Past Coal Alliance. The Council recalls the need for phasing out as soon as possible fossil fuel subsidies which do not address energy poverty or just transition.

[3] Council conclusions of October 2023 on Preparations for the 28th Conference of the Parties (COP28) of the United Nations Framework Convention on Climate Change (UNFCCC) (Dubai, 30 November – 12 December 2023).

20. The Council welcomes partners who joined the Global Renewables and Energy Efficiency Pledge, and encourages all partners to integrate the GST global goals of tripling global renewable energy capacity and doubling the global average annual rate of energy efficiency improvements by 2030 into the NDCs and their implementation. The Council calls on EU diplomacy to continue to promote an accelerated uptake and system integration of renewable energy and the energy efficiency first approach, as among the most market ready and available at scale mitigation technologies, the development of conducive policy and the alignment of financial flows, in particular in support of developing countries. In this regard, the Council notes the importance of electricity interconnections with partner countries, including with the Western Balkans, Eastern and Southern Neighbourhood. The Council calls on EU diplomacy to continue to promote the deployment of safe and sustainable low-carbon technologies.

21. The Council acknowledges the need for rules based, transparent, and undistorted global hydrogen markets based on reliable standards and certification schemes, and the deployment of necessary infrastructure, while conscious of water and environmental stress. The Council underlines that emission abatement technologies which do not significantly harm the environment, exist at a limited scale and are to be used to reduce emissions mainly from hard to abate sectors and that removal technologies are to contribute to global negative emission and should not be used to delay climate action in sectors where feasible, effective and cost efficient mitigation alternatives are available particularly in this critical decade.

22. Given that some partner countries opt for nuclear energy, the Council reiterates the necessity to continue to promote and support the highest nuclear safety, environmental and transparency standards, regionally, in the immediate vicinity of EU borders, and globally.

23. The Council calls for strengthened foresight to assess and for proactive policy to rapidly address the changing geopolitical dynamics of the global energy transition, and engagement with partners in light of the anticipated decline of fossil fuel demand in the EU, in the EU's proximity and globally.

24. The Council welcomes the effective diversification efforts, inter alia through the EU Energy Platform and AggregateEU that contributed to phasing out EU energy dependency on Russia. To ensure energy security and affordability throughout the transition to climate neutrality, the Council calls upon the High Representative and the Commission to continue to support these diversification efforts, in line with the Versailles Declaration, in close engagement with partner countries. The Council emphasises the importance of strengthening transparent, rules-based and liquid markets, and interconnections with third countries, while acknowledging the need to avoid creating fossil fuel lock-ins ensuring a 1.5°C aligned energy planning, the potential for re-purposing and future-proofing infrastructure. The Council notes with concern the increasing cyber and physical threats to critical energy infrastructure, and stresses the importance of bolstering resilient energy systems, including through cooperation with global partners. EU Diplomacy will continue to support ongoing efforts by affected Member States and Ukraine to diversify nuclear fuel supplies, as appropriate.

25. The Council is committed to the full and effective implementation of sanctions against Russia, including in the energy sector, and the prevention of their circumvention, and calls on partners to enhance cooperation on the enforcement of the oil price cap policy.

26. The Council is committed to continue supporting Ukraine in cooperation with partners, including with equipment necessary to repair, restore, and defend its energy system, and to build a more resilient, decentralized and sustainable energy sector closely integrated with the EU.

27. In order to ensure energy security and reduce strategic dependencies in the decades ahead, the Council emphasises the need to strengthen and diversify global supply chains of critical raw materials necessary for the energy transition in line with the Critical Raw Materials Act, ensuring high environmental and social standards and taking full account of its geopolitical dimension.

28. The Council recalls the urgent need to deliver on energy poverty and universal access to affordable, reliable, sustainable and modern energy in line with the Sustainable Development Goal 7, including through gender-responsive finance models to combat gendered effects of energy poverty and to enhance women's access to clean energy jobs. The Council calls for a particular focus on deployment of renewable energy access and rural electrification through decentralised energy systems, and the challenge of clean cooking, including in displacement settings. In this regard, the Council calls on partners to increase their efforts and contributions, in support of the most vulnerable that are most in need.

29. Tackling the triple planetary crisis requires mobilisation of more finance, the bulk of which will have to come from private sources. In this context, the Council reiterates the urgency of making finance flows consistent with the pathway towards low greenhouse gas emissions and climate-resilient development in this decade as a critical enabler of the global effort to mobilise finance at scale and to deepen global sustainable finance and capital markets in this respect.

30. The Council reiterates the importance and urgency of accelerating reform of the international financial architecture and takes note of initiatives such as the Summit for a New Global Financing Pact and the Bridgetown Agenda 2.0. The EU and its Member States call on Multilateral Development Banks, their shareholders and the private sector, to scale up the provision and mobilisation of climate finance significantly and expeditiously and increase its reach in particular to the poorest and most vulnerable communities and countries, including fragile and conflict affected areas, that are often faced in parallel with high debts and lacking fiscal space. The Council emphasises that no country should have to choose between fighting poverty and fighting for the planet. The EU encourages financial institutions to increase their support in particular for adaptation and resilience building initiatives, whilst achieving a balance between mitigation and adaptation.

31. The EU and its Member States look forward to engaging with international partners towards the setting of the new collective quantified goal (NCQG) on climate finance at COP29, taking into account the priorities and needs of developing countries, with public finance as an important component, and better targeted, in particular to the most vulnerable countries and communities, while at the same time underlining its key role in leveraging private investments. There is also a need to strengthen the enabling environment for investments, encouraging more climate ambition and catalysing private investment and domestic resource mobilisation in all countries.

32. The Council reaffirms the need for a broader base of contributors as a prerequisite for setting an ambitious NCQG and calls on all countries according to their financial capabilities, including emerging economies, to contribute to the new goal. Recognising that needs are substantial and conventional sources of public finance alone cannot provide the quantum necessary for the new goal, the Council calls for additional, new and innovative sources of finance from a wide variety of sources, including from the fossil fuel sector and other high-emission sectors, to be identified and utilised to provide climate finance, including to support the poorest and most climate vulnerable countries and communities, in mitigating and building resilience against climate change. The Council looks forward to the work of the Taskforce on International Taxation and to its first assessments on options to be presented at COP29.

33. In 2022, the EU and its Member States contributed €28.5 billion to international public climate finance, with more than half addressing climate adaptation or cross cutting action involving both mitigation and adaptation initiatives, and mobilised an additional amount of €12 billion of private finance, contributing significantly to the USD 100 billion goal on climate finance.

34. Given the already severe consequences of climate change, the Council expresses its determination to work with partners to develop National Adaptation Plans in order to enhance their adaptive capacity, strengthen resilience and reduce vulnerability, notably with the most vulnerable countries including LDCs and SIDS using ecosystem-based adaptation approaches, where possible. The Council welcomes the adoption of the UAE Framework for Global Climate Resilience at COP28, and its agreed targets. The Council calls for enhanced coordination and collaboration between existing structures and climate adaptation processes within and outside the UNFCCC, in order to increase support for, and enhance implementation of, adaptation and resilience building initiatives, particularly in fragile and conflict affected areas and recalls the importance of supporting the UN Secretary General's Early Warnings for All initiative. The Council also reaffirms its commitment to the objectives of the Sendai Framework for Disaster Risk Reduction. The Council encourages cooperation on enhancing resilience and managing climate risk exposure.

35. The Council strongly underlines the urgent need to scale up global action and support from all sources in averting, minimising, and addressing loss and damage associated with the adverse effects of climate change and welcomes the COP28 decision operationalising the new funding arrangements including a fund for assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage. The Council welcomes the pledges made for the initial capitalisation of the fund and for the existing funding arrangements, including significant pledges from the EU and EUMS and the UAE, and calls for a swift start of the fund.

36. The EU and its Member States highlight their commitment to be at the forefront of the collective efforts to scale up adaptation finance provision and mobilisation to developing countries with a specific focus on countries and communities that are particularly vulnerable to the adverse effects of climate change such as LDCs, SIDS, and fragile and conflict-affected states. In this vein, the Council calls on all partners, from all regions, according to their financial capabilities and including those beyond the traditional base of providers of development finance, to expand their support to climate adaptation and to the funding arrangements for responding to loss and damage, including to the fund. Given the magnitude of the challenges, the Council also emphasises the need to identify new and innovative sources of funding.

37. The Council also stresses the importance of protecting cultural heritage against the devastating effects of climate change and extreme weather events.

38. Building on the findings of the Global Resource Outlook 2024 by the UNEP International Resource Panel, and as a follow to the GST, the Council stresses the opportunities of the circular economy and sustainable circular bio-economy to achieve sustainable consumption and production, facilitate resource efficiency, reduce generation of waste, greenhouse gas emissions, environmental pollution and negative impacts on biodiversity. In efforts to fast-track the transition, the Council calls for a high-level UN Conference on SDG12 and invites partners to join the Global Alliance on Circular Economy and Resources Efficiency.

39. In the global fight against pollution, the Council calls for joint efforts to conclude, by 2024, the negotiations of an ambitious International Legally Binding Instrument to end plastic pollution, including in the marine environment, based on full lifecycle approach, and sending a clear signal on the reduction of production of primary plastics polymers. The Council further underlines the need for constructive and active engagement with partners in this regard. The Council also supports full and rapid implementation of the Global Framework on Chemicals – For a Planet Free of Harm from Chemicals and Waste and calls for a timely establishment of a Science Policy Panel to contribute further to a sound management of chemicals and waste and to prevent pollution.

40. Reiterating its strong commitment to implementing the landmark Kunming-Montreal Global Biodiversity Framework (GBF), the Council urges Parties to revise their National Biodiversity Strategies and Action Plans and submit national targets aligned with the GBF to the CBD Secretariat well in time for COP 16 in October 2024.

41. The Council underlines that CBD COP16 must strengthen momentum for implementation of the GBF, and complete work on outstanding issues, notably resource mobilisation, the multilateral mechanism for sharing the benefits from the use of digital sequence information (DSI) and on the monitoring, reporting and review mechanisms.

42. The Council reiterates its commitment to step up funding for global biodiversity and the urgency to align relevant fiscal and financial flows with the GBF goals and targets. The Council therefore calls on all relevant actors, including multilateral development banks, their shareholders and the private sector to scale up biodiversity finance by exploring all sources including innovative financing instruments, maximised synergies with climate finance and enhanced international coordination for the alignment of standards for sustainable finance tools, such as taxonomies. The EU committed to double its external funding for biodiversity to €7 billion for the period 2021-2027 and a number of EU Member States took similar commitments. The Council encourages all relevant actors to support and contribute to the Global Biodiversity Framework Fund established under the Global Environment Facility (GEF) and calls on all countries to identify by 2025, and then phase out or reform incentives, including subsidies, harmful for biodiversity, in a proportionate, just, fair, effective and equitable way.

43. The Council highlights the importance of achieving land degradation neutrality by 2030 and welcomes COP16 to the UN Convention to Combat Desertification in Saudi Arabia as the moment for accelerating national and global action on land restoration, soil health, drought resilience and green transition.

44. The Council recognizes that the stability of the global water cycle is a global concern that underpins the achievement of all SDGs. The Council acknowledges the role of aquatic ecosystems, notably wetlands, in climate and biodiversity actions. In this context, and given the global water crisis, the Council reiterates the importance of a strategic EU approach to water resilience and security and underlines the need for enhanced diplomacy in this regard. The Council encourages joint efforts towards an effective multilateral governance including through the appointment of a UN Special Envoy on Water, enhanced integration of water-related priorities in relevant multilateral processes and a regular intergovernmental dialogue on water with further UN Water Conferences to be organised in 2026 and 2028 and the One Water Summit to be held in New York in 2024. The Council welcomes the Water Action Agenda as a key outcome of the 2023 UN Water Conference and the adoption of a resolution on water at the 6th UN Environment Assembly (UNEA) and calls for their swift implementation. The Council supports the upcoming UN Water-led system-wide strategy on water and sanitation to enhance political momentum to deliver on SDG6. The Council also encourages continued globalisation of the UN Water Convention on the Protection and Use of Transboundary Watercourses and International Lakes that can be conducive to global stability, peace and security.

45. The Council welcomes the COP28 emphasis on the need for more investment, action and support to halt and reverse deforestation and forest degradation by 2030, including through strengthened sustainable forest management and sustainable agriculture and food systems. The EU is doing its part and will engage in dialogue and cooperation with partners, including through an EU strategic framework for engagement, through the framework of country packages for forests, nature and climate, and under the dedicated Team Europe Initiative towards a global transition to deforestation-free value chains.

46. Acknowledging that agriculture and food systems contribute to, are affected by, and are part of the solution to climate change and biodiversity loss, the Council underlines the urgent need for a transition towards sustainable and resilient agriculture and food systems and is committed to continued collaboration with partners in this regard.

47. The Council reiterates the important role of ocean-based action including its 'blue carbon' function, and that of the marine and coastal biodiversity, in the climate mitigation and adaptation efforts and food security. The Council hence underlines the need to deliver on SDG14 and develop a sustainable blue economy. The Council therefore calls for stronger international ocean governance and dialogue and welcomes the 2024 Our Ocean Conference in Greece and the 2025 UN Ocean Conference in France with a commitment to participate at the highest possible level.

48. The Council calls on all members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) for the adoption of new marine protected areas in the Southern Ocean to establish a representative system of Marine Protected Areas as a concrete deliverable, under the 30x30 target of the Kunming-Montreal GBF and implementation of SDGs.

49. Following the adoption of the Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, which is key for the health of our oceans, the Council notes that the EU and its Member States are committed to its swift ratification and calls on partners to accelerate their ratification process so the agreement can enter into force in time for the 2025 UN Ocean Conference.

50. The Council welcomes the Joint Communication on "A new outlook on the climate and security nexus - Addressing the impact of climate change and environmental degradation on peace, security and defence" and calls for its full, comprehensive and swift implementation.

51. The Council stresses the importance of a shared and enhanced understanding that climate change and environmental degradation lead to increased instability and conflicts, and vice-versa, as well as to human suffering, resource scarcity including water and food insecurity, internal displacement and forced migration. They also represent a barrier to achieving the SDGs and affect global health. The Council therefore calls for further engagement on these issues in relevant multilateral and international fora while paying specific attention to the disproportionate effects on vulnerable people, as well as women and children, including children in armed conflict.

52. The Council welcomes the Communication's ambition, to reinforce partnerships including with the UN, NATO, African Union, OSCE and other key relevant partners, consistent with the EU's wider multilateral climate change and environment agenda and in line with the EU institutional framework and with full respect to EU decision-making autonomy. The Council also welcomes the Joint Pledges of the 11 members of UN Security Council (UNSC) and the efforts of the UN Group of Friends on Climate and Security to systematically drive forward and address the mutual understanding and commitment within the UNSC on the interlinkages between climate, peace and security.

53. The Council underlines the need to mainstream the climate, peace and security nexus in the EU and EU Member States' external action based on an integrated evidence-based whole-of-government approach, and a strengthened climate and environment informed planning and decision-making by the EU and its Member States, as well as an enhanced focus on conflict-sensitivity in climate action. The Council invites the High Representative and the Commission to enhance efforts towards better climate preparedness and improved EU capacity to address security-related challenges linked to climate change and environmental degradation in EU external action, including in the context of EU CSDP missions and operations and by making full use of a dedicated training platform.

54. The Council calls for enhanced global cooperation to address international environmental crime, including trafficking in timber, wildlife, minerals, and waste, as one of the most lucrative forms of organized crime, affecting ecosystems as well as security, rule of law, health and livelihoods of people. In this regard, the Council underlines the importance of implementing the revised EU Action plan against wildlife trafficking with its focus on a stronger global partnership between source, consumer and transit countries.

55. The Council highlights the importance of enhancing the efforts to promote the just and inclusive green transition and support the implementation of global commitments, in close cooperation with partner countries. Building on the Team Europe approach, the Council invites the High Representative, the Commission, and all EU Member States, to jointly intensify the EU's green diplomacy as a political priority through increased coordination, information exchange and cooperation through relevant capital-based networks, including the Green Diplomacy Network (GDN) and the Energy Diplomacy Expert Group, dedicated discussions in relevant geographic and thematic Council Working Groups and at local level. In this vein and through these channels, the Council invites EU Member States, the High Representative and the Commission to regularly exchange views on EU green diplomacy. At local level, the Council encourages an even closer coordination and cooperation between EU Member States' Embassies and EU Delegations, in a Team Europe spirit including through exploring informal green diplomacy hubs, working closely with international partners, to maximise the impact of the EU outreach and support. With these Conclusions, the Council underlines the EU's determination to work with partners to anchor and consolidate global commitments, and to translate these into goals, policies and instruments, with more ambitious NDCs as one of the key vehicles to achieve this. The Council will regularly follow up on EU green diplomacy.

3. External competences in energy and climate change

Ries Kamphof, Thijs Bonenkamp, Joren Selleslaghs and Madeleine O. Hosli

1. INTRODUCTION

One of the cornerstones of Europe's modern society is energy. Without energy the day-to-day needs of lighting, heating and transport would become impossible, leading to the serious malfunctioning of its businesses. The European Union (EU) and its Member States are (partly) dependent on *external* energy sources. The way that – and the pace at which – the old continent is consuming its energy sources is unsustainable, as is its high level of energy imports. In parallel, the EU and Member States need to keep track of their climate mitigation pledges to make their 'emission pathways consistent with holding the increase in the global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels', as stipulated in the recent Paris Agreement.[1] Without proper European regional cooperation and harmonization in the strategic fields of energy and climate change policies, many European households will be left in the dark and cold, and universal climate agreements may be trampled on by the EU and Member States.

Energy security and climate change are therefore 'hot topics' in the external relations of the EU and its individual Member States. The Paris Climate Change Agreement of 2015 has firmly and urgently established the reduction of greenhouse gas emissions and, hence, the 'decarbonization'[2] of the world economy as a global policy objective to be achieved in the next few decades. The EU has been very active in setting a (global) climate agenda and the Paris Agreement has been hailed as a success of EU climate diplomacy.[3] At the same time, the EU is currently to a large degree dependent on (fossil) energy imports and faces related challenges in achieving energy security (security of supply) and ensuring affordability of energy in the shorter and longer term. The EU is the biggest energy customer in the world, depending on 'a very sparse number of energy suppliers' who could use this situation as a 'political weap-

[1] Paris Agreement [2015], https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf (accessed 13 December 2016).

[2] While the word 'decarbonization' does not feature in the official text of the Paris Agreement, many authors believe this strategy is necessary in view of the implementation of Nationally Determined Contributions (NDCs). See e.g. Jeffrey Sachs, 'Implementing the Paris Climate Agreement – Achieving Deep Decarbonization in the Next Half Century' [2016], http://www.cirsd.org/en/horizons/horizons-winter-2016--issue-no-6/implementing-the-paris-climate-agreement---achieving-deep-decarbonization-in-the-next-half-century (accessed December 2016).

[3] Sebastian Oberthür, 'Where to Go from Paris? The European Union in Climate Geopolitics' [2016] *Global Affairs*, pp. 1–12.

on'.[4] Both climate and energy policy are areas of 'shared competences' between the EU and its Member States.[5] As a result, both the relevant European institutions and the Member States engage in energy diplomacy and policy-making externally, that is, on the international stage.

Where the global forum of the United Nations Framework Convention on Climate Change (UNFCCC) and its annual Conference of the Parties (COP) render external multilateral action crucial in the area of climate change, the multilateral forums on energy are much less influential. Energy security is therefore still primarily framed as a topic within the realm of national sovereignty. Many EU Member States conclude their own bilateral deals. Some energy experts, however, favour rendering it a Union task to formulate energy security policy,[6] while others emphasize this should be at the discretion of national governments and/or a 'smaller coalitions' of Member States.[7] Some are even of the opinion that the practice of describing energy as a shared competence under Lisbon Treaty rules in terms of the Community method, contrasting with intergovernmentalist practices, should be abandoned.[8] Instead, as suggested by German Chancellor Angela Merkel in 2010, we could explain EU energy policy in terms of a new 'Union method', that is, a combination of the Community method and the intergovernmental method. In the words of the Federal Chancellor, this would resemble 'coordinated action in a spirit of solidarity'.[9]

These external representation and autonomy questions of the EU and its Member States point to the crucial importance of the institutional context in the EU's external relations. The link between the division of competences between the EU and its Member States have been part of the (legal) research agenda, especially in the phase of the constitutional review preceding the Lisbon Treaty.[10] This research agenda, however, may need to be reviewed after assessing the functioning of the respective provisions of the Lisbon Treaty in the first years after its entry into force, and especially now that the Paris Agreement and energy security considerations in the EU have moved the agenda of climate change and energy security to the forefront.

Our chapter is focused on the institutional context of the EU and its Member States and its external functioning and effects for the most important EU priorities in energy and climate policy, namely energy security and climate change mitigation. Conversely, we do not focus on the technical aspects related to these policies. The chapter starts with the substance of the

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4 Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), p. 24.

5 Art 4 TFEU, Consolidated Version of the Treaty on European Union [2010] OJ C 83/01, see also Chapter 2 of this handbook.

6 Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), p. 24.

7 Simone Tagliapietra, 'Building Tomorrow's Europe: The Role of an "EU Energy Union"' [2014] *Review of Environment, Energy and Economics* (Re3), pp. 1–10.

8 Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' [2011] EPIN Working Paper no. 31, p. 8.

9 Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010, https://www.coleurope.eu/content/news/Speeches/Europakolleg%20Brugge%20Mitschrift%20englisch.pdf> (accessed 29 November 2016).

10 Sanam S. Haghighi, 'Energy Security and the Division of Competences between the European Community and its Member States' [2008] *European Law Journal* 14(4), pp. 461–82.

most important European energy and climate priorities and action plans. This is followed by a section on the shared (external) competences, based on the Treaty and on case-law. Thereafter, the most important institutional actors in EU external action on climate and energy are introduced. This EU institutional and legal context co-determines external action, which is analysed in section 5. Some challenges and opportunities of the practical workings of shared external competences will be dealt with in the following section. In the concluding section, a future research agenda on shared external competences in energy and climate will be sketched.

2. EU PRIORITIES AND ACTION PLANS IN THE AREA OF ENERGY SECURITY AND MITIGATION OF CLIMATE CHANGE

Ever since its nascence, European integration has been characterized by continuous efforts among Member States to ensure a secure, stable and affordable supply of energy on the European continent. During the 1950s, the European Atomic Energy Community was created, and since then, various energy-related policies and institutions have followed. Since Spring 2007, when the EU adopted the so-called 'Energy/Climate package', European leaders have also committed to common EU energy (supranational) governance.[11] In doing so, European leaders have responded to the requests from EU citizens who, as a Eurobarometer Survey (2011) has shown, believe that greater solidarity between EU Member States in an energy crisis and intensified energy policy coordination are needed.[12] In 2015, the EU launched the 'Energy Union', stating that 'Our vision is of an Energy Union where Member States see that they depend on each other to deliver secure energy to their citizens, based on true solidarity and trust, and of an Energy Union that speaks with one voice in global affairs'.[13] The overall aim of this new ambitious initiative was to create 'a resilient Energy Union with an ambitious climate policy at its core, to provide EU consumers – households and businesses – with secure, sustainable, competitive and affordable energy'.[14] By doing so, the EU has initiated a series of working programmes and policies to address the two most important challenges that its external energy policy faces today: energy security and climate change mitigation.

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[11] Daan Rutten, 'CIEP Briefing Paper on the Energy Union' [2016] *Clingendael International Energy Programme*, p. 1.

[12] European Parliament, 'The European Union and Energy' (*Eurobarometer*, June 2011), http://www.europarl.europa.eu/pdf/eurobarometre/2011/2011_01_74.3/ReportEB743PARLenergy_EN.pdf (accessed 16 December 2016).

[13] Commission, 'Towards an Energy Union: a Resilient Energy Union with a Forward-looking Climate Change Policy' COM (2015) 80 final. See also Chapter 5 in this handbook, 'The European Energy Union' by Thomas Pellerin-Carlin.

[14] Ibid.

Table 3.1 EU energy imports (2016)

Commodity	Percentage of total energy usage	Mostly from
Energy (overall)	53%	Russia, Norway, Libya, Qatar, Saudi Arabia
Natural gas	90%	Russia, Norway, Algeria, Qatar
Crude oil	66%	Saudi Arabia, Norway, Libya, Nigeria
Coal and other solid fuels	42%	Russia, Colombia, US, Australia
Uranium and other nuclear fuels	40%	Kazakhstan, Canada, Russia, Niger

Source: Authors' own calculations based on Eurostat data.

2.1 Energy Security

In 2016 the EU imported around 50% of its energy needs.[15] Whereas oil, natural gas and coal account for 80% of the energy consumed in the EU, the variation in terms of origins and sources is limited. Regarding crude oil, the OPEC countries and Russia, in 2015, accounted together for almost 70% of all EU imports, and Russia was by far the biggest partner for natural gas imports, accounting for no less than one-third of all EU gas imports (see Table 3.1). As has become clear over the last couple of years, various problems arise with such a high dependency on energy imports. In addition to the well-known supply cut-offs due to geopolitical and geo-economic issues, terrorist groups have also targeted pipelines and production facilities throughout the Middle East and Iran has threatened several times to cut back oil production if forced to abandon its nuclear power programme.[16]

Importing energy from abroad comes at a high price, as it is estimated that the European states spend over €350 billion every year on importing most notably gas and (crude) oil from different continents.[17] Next to uncertainty regarding a stable and assured supply, questions are also raised regarding the future availability of global oil and gas reserves for Europe. According to the International Energy Agency (IEA), global energy demand will rise by more than one-third by 2035, especially in the Middle East, China and India.[18] This will have repercussions on the energy availability for Europe, as well as on the price that will be charged.

2.2 Climate Change Mitigation

Another key priority of the EU's external energy policy is related to the environment and more specifically, focused on limiting climate change. With a current global average temperature that is 0.85 degrees higher than it was in the late 19th century, rising sea-levels, extreme

[15] Barring significant changes, the European Commission expects this figure to rise to 65% by 2030. See also http://www.fas.org/sgp/crs/row/RL33636.pdf (accessed 11 December 2016).

[16] Paul Belkin and Vince L. Morelli, 'The European Union's Energy Security Challenges' [2007] *Congressional Research Service, RL 33636*, Washington DC, http://www.dtic.mil/dtic/tr/fulltext/u2/a473788.pdf (accessed November 2016).

[17] 'Energy Strategy' (*European Commission Energy*) https://ec.europa.eu/energy/en/topics/energy-strategy (accessed 15 December 2016).

[18] 'World Energy Outlook 2013' (*International Energy Agency*, 2013) https://www.iea.org/Textbase/npsum/WEO2013SUM.pdf (accessed 16 December 2016).

weather patterns, food insecurity and other serious challenges also loom large for Europe in the near future. The recent emissions of greenhouse gases were the largest in history; the atmosphere and oceans have warmed; the amounts of snow and ice have diminished; and the sea level has risen.[19] Since CO2 is the greenhouse gas which is most commonly produced by human activities and is responsible for 64% of man-made global warming, the EU – together with other actors – will have to *decarbonize* its economy and way of living drastically and urgently. As (the use of) energy accounts for almost 80% of all greenhouse gas emissions worldwide,[20] 'The energy sector has a direct link to the climate change challenge'.[21] It is a key sector in which climate mitigation efforts are required. As has been demonstrated in more technical contributions, the link between energy security and climate change is 'rather tenuous' as there are 'many trade-offs' involved.[22]

Climate change has been regarded as a 'saviour issue' for the EU integration project more generally.[23] The EU has been able to 'shape global environmental governance'.[24] At the heart of the EU's *internal* strategy for limiting climate change – the so-called 20-20-20 strategy and the 2030 and 2050 energy roadmaps – is the objective of reducing greenhouse gas emissions by at least 20% by 2020, 40% by 2030 and 80% by 2050.[25] To limit its greenhouse gases, the EU has to use less energy, but also embark on using cleaner energy. The latter involves a shift towards more renewable energies such as wind power, solar and photovoltaic energy, biomass and biofuels, geothermal energy and heat-pump systems. Increasing the amount of renewable energy within the EU, however, not only serves the climate; it also helps the EU to become less dependent on (sometimes unstable) energy imports and reduces the costs associated with it. Nonetheless, as the EU countries together 'only' account for 10% of global greenhouse gas emissions, it is also in this area that it might be beneficial for them to collectively develop and implement a shared stance on global climate change mitigation initiatives, in order to have a meaningful impact. Action and new stimulus by the EU (in coordination with national, regional and local governments) is therefore needed, be it through public investment, support plans or any other measures.

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[19] Rajendra K. Pachauri (ed.), *Climate Change 2014 Synthesis Report* (The Intergovernmental Panel on Climate Change 2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (accessed 16 December 2016).

[20] 'CO2 Emissions from Fuel Combustion: Highlights' (*International Energy Agency*, 2015), https:// www .iea .org/ publications/ freepublications/ publication/ CO2E missionsFr omFuelComb ustionHighlights2015.pdf (accessed 16 December 2016).

[21] Commission, 'Staff Working Document Accompanying the Communication on Next Steps for a Sustainable European Future: European Union Action for Sustainability' SWD (2016) 390 final.

[22] Gal Luft, Anne Korin and Eshita Gupta, 'Energy Security and Climate Change: A Tenuous Link' in Benjamin K. Savocool (ed.), *The Routledge Handbook of Energy Security* (Routledge 2010).

[23] Louise van Schaik and Simon Schunz, 'Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm- or Interest-Driven Actor?' [2012] *Journal of Common Market Studies* 50(1), p. 169.

[24] Tom Delreux, 'EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs' [2014] *Journal of European Public Policy* 21(7), p. 1017.

[25] 'Energy Strategy' (*European Commission Energy*), https://ec.europa.eu/energy/en/topics/energy-strategy (accessed 15 December 2016).

Focusing on the most recent policy strategies and action plans, these two overarching themes have been at the centre of the EU's energy/climate change response over the last decade. In total, more than 400 legal acts have been signed on a European level regarding energy-related issues.[26] With the 2030 Energy and Climate package, targets were created in three key areas in order to realize the above-mentioned ambitions: (1) a 40% cut in greenhouse gas emissions compared to 1990 levels; (2) at least a 27% share of renewable energy consumption; and (3) at least 27% energy savings compared with the business-as-usual scenario.[27] With the Paris Agreement, the European Commission has upgraded its targets. The recently adopted Energy Winter Package (December 2016) consists of more than 40 legislative proposals, with accompanying documents, aimed at further completing the internal market for electricity and implementing the Energy Union, further reducing the EU's carbon footprint. The Energy Winter Package complements the Energy Security Package of February 2016 which essentially focused on security of (gas) supply.[28] Also in the EU Global Strategy (2016) energy and climate change feature in all kinds of external priorities.[29]

3. SHARED (EXTERNAL) COMPETENCES ON ENERGY AND CLIMATE CHANGE POLICY

While climate does not feature literally as an area of 'shared competence' in the Treaty, it is widely considered that the shared competence in 'environment' culminates in a shared competence in 'climate', seeing the explicit recognition to 'combat climate change' in the specific environment Treaty article.[30] Even when this is questioned, shared competences are seen as the 'default category of competences' into which climate as a policy area would then

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[26] According to the EURLEX website (http://eur-lex.europa.eu/nl/index.htm), there are currently five legal acts on statistics, 98 on general principles and programmes, 81 on coal, 23 regarding electricity; no fewer than 187 have nuclear energy as a subject; 14 are on oil and gas and 10 are on other energy sources.

[27] European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030' (Communication) COM (2014) 15 final.

[28] 'Commission Proposes New Rules for Consumer Centred Clean Energy Transition' (*European Commission Energy*), https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition (accessed 15 December 2016). 'Towards Energy Union: The Commission Presents Sustainable Energy Security Package' (European Commission Press Release Database) http://europa.eu/rapid/press-release_IP-16-307_en.htm (accessed 15 December 2016).

[29] 'Energy' is mentioned 43 times and 'climate' 26 times in the EU Global Strategy. European External Action Service, 'Shared Vision, Common Action: A Stronger Europe, a Global Strategy on the European Union's Foreign and Security Policy' [2016], http://europa.eu/globalstrategy/sites/globalstrategy/files/pages/files/eugs_review_web_13.pdf (accessed 16 August 2017).

[30] 'Union policy on the environment shall contribute to pursuit of the following objectives [...] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change', Art 191 TFEU.

automatically fall.[31] However, how do these shared competences on energy and climate work externally, both in theory and practice?

3.1 Shared External Competences

While the EU internal division of competences is delineated in the Treaty, the *external (shared)* competences are not clearly demarcated by the Lisbon Treaty. As a consequence, many academics see the external relations arrangements of the Lisbon Treaty as 'rather unsatisfactory'[32] or 'fuzzy'.[33] Accordingly, decades of pre-Lisbon case-law of the Court of Justice of the European Union define whether the competences are 'pre-empted' by the Union. The fluidity of competences in external relations has 'provided a fertile field for ingenious legal argument' over the interpretation of the Treaties before and after the Lisbon Treaty.[34] One of these ingenious legal inventions is the concept of 'shared external competences' coined by Van Vooren and Wessel (2014).[35] Although this concept is not part of the Treaty, it was already mentioned as applicable to policy domains such as environment in the run-up to the (failed) European Constitution.[36] Other terms include, *inter alia*, 'joint responsibility'[37] or, as used in the area of energy, 'coordinated action'.[38]

The arbitrator of the use of competences in the EU is the Court of Justice of the European Union. With an absence of the concept of shared *external* competences in the Treaty, it is all the more important to see which case-law exists on this topic. The Court has been a significant, but often disregarded, actor in EU external relations. The Court of Justice favours the participation of the EU in international organizations as a way to exercise its competence. Academic authors are even of the opinion that the Court of Justice could 'accelerate the process' of the

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[31] Paul Craig, 'EU Competences' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2015) p. 88.

[32] Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014) p. 110.

[33] Christophe Hillion and Ramses A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?' [2009] *Common Market Law Review* 46(2), p. 586.

[34] Jan Wouters, Jed Odermatt and Thomas Ramopoulos, 'The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities' [2013] Leuven Centre of Global Governance Studies Working Paper no. 121, p. 4.

[35] Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014).

[36] Angelika Hable, 'The European Constitution: Changes in the Reform of Competences with a Particular Focus on the External Dimension' [2005] EI Working Papers/Europainstitut, 67, WU Vienna University of Economics and Business, Vienna.

[37] Andre Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements. The External Environmental Policy of the European Union' [2011] Amsterdam Law School Research Paper No. 2011-47, Amsterdam Center for International Law No. 2011-14.

[38] Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010, https://www.coleurope.eu/content/news/Speeches/Europakolleg%20Brugge%20Mitschrift%20englisch.pdf (accessed 29 November 2016).

EU becoming a respected actor in international organizations.[39] Especially noteworthy is the ERTA effect of 'implied powers': EU external competences exist because there are internal rules which form the basis for implying external competence.[40] Therefore, when legislation is internally (within the EU) negotiated, it has external repercussions and the EU can enter into negotiations and agreements. Thus, these implied powers find their sources in the general competences the Union enjoys in the different policy areas, as well as in legislation. Even when Member States are not excluded from acting on their own in international organizations based on 'implied powers', they are not entirely free to act, as they still have obligations stemming from EU law, such as the principle of loyal cooperation.[41] The Court of Justice seems to see this principle of loyalty as very important, not only in terms of results, but also in terms of the conduct of international negotiations.[42]

3.2 Application to Energy and Climate External Action

How did this shared (external) competence historically grow in external climate and energy action by EU and Member State actors? Environmental policy received a basis in European governance relatively late, with the Single European Act in 1987. It has, however, 'quickly developed an external dimension'.[43] Even stronger, some argue that the EU established itself as an international leader on climate change in the mid-1980s and that it has 'considerably improved its leadership record' since then.[44] Seeing the nature of shared competences, Member States are represented in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) separately alongside the European Commission, but they 'largely act jointly' and are 'recognized as one unitary actor'.[45]

This is different in the area of energy. While the EU has its origins in cooperation on energy policies such as those focused on coal, the actual external cooperation of EU institutions and Member States has proven to be weak, partly due to the lack of respective competences. Energy is even considered to perhaps constitute 'the only field' in which the EU has shifted its common drive towards a lesser extent of integration, never being able to regain the shared

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[39] Frank Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies' [2007] *Common Market Law Review* 44(1), p. 68.

[40] See Case 22/70, *Commission v. Council* [1971] ECR 263 ('ERTA') and Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014), p. 105. Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. See also Marise Cremona, 'Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010' [2011] *Common Market Law Review* 48(5), pp. 1639–65.

[41] Art 4(3) TEU.

[42] Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. See also Marise Cremona, 'Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010' [2011] *Common Market Law Review* 48(5), pp. 1639–65.

[43] Sandra Lavenex, 'EU External Governance in "Wider Europe"' [2004] *Journal of European Public Policy*, 11(4), p. 691.

[44] Sebastian Oberthür and Claire Roche Kelly, 'EU Leadership in International Climate Policy: Achievements and Challenges' [2008] *The International Spectator* 43(3), pp. 35–50.

[45] Ibid.

vision of the 1950s.[46] In its 2001 Green Paper on energy security, the Commission therefore regrets that the 'Union suffers from having no competence and no community cohesion in energy matters'.[47] As compared to the more unified EU climate policies, the external energy policies mostly refer to creating more solidarity between the Member States.[48]

At the external stage, the EU and Member States 'shall cooperate with third countries and with the competent international organizations', 'within their relative spheres of competence' on climate change and energy.[49] Seeing that the EU is neither a state nor a typical international organization, however, the EU's role in international affairs has often been seen as 'confusing' for third countries, since the Union is not always perceived as a unified actor, even on climate policies.[50] The external action of the EU in both climate and energy has historically been Member State-led.[51] Therefore, while the initiative has been mainly with the European Commission, national policies also exist and clearly matter. Some argue that the shared energy competences can become exclusive competences at the external stage, as a legal development seen earlier in trade issues.[52] This gradual acquisition of competences is a necessity to some authors, because the shared competences are often perceived as an 'obstacle' to effective external action.[53]

4. INSTITUTIONAL ACTORS IN EU ENERGY AND CLIMATE DIPLOMACY AS WELL AS DECISION-MAKING

The creation of external EU energy and climate policy is a complex issue involving many actors. In addition to formal EU institutions, a wide variety of other key stakeholders is involved in EU decision-making and external diplomacy. For example, private sector organ-

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[46] Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), p. 27 and Sami Andoura, Leigh Hancher and Marc Van der Woude, 'Towards a European Energy Community: A Policy Proposal by Jacques Delors' [2010] *Notre Europe*, p. 7.

[47] See also Sandra Lavenex, 'EU External Governance in "Wider Europe"' [2004] *Journal of European Public Policy* 11(4), p. 692.

[48] European Commission press release – Towards Energy Union: The Commission presents sustainable energy security package, 16 February 2016, http://europa.eu/rapid/press-release_IP-16-307_en.htm (accessed 10 December 2016).

[49] Art 211 TFEU.

[50] Chad Damro, 'EU-UN Environmental Relations: Shared Competence and Effective Multilateralism' in Katie Verlin Laatikainen and Karen E. Smith (eds), *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave, 2006).

[51] Maurizio Carbone, 'Mission Impossible: The European Union and Policy Coherence for Development' [2008] *European Integration* 30(3), p. 328, citing also Christian Egenhofer (ed.), *Policy Coherence for Development in the EU Council: Strategies for the Way Forward* (Centre for European Policy Studies, Brussels, 2006).

[52] Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), pp. 24–60.

[53] Chad Damro, 'EU-UN Environmental Relations: Shared Competence and Effective Multilateralism' in Katie Verlin Laatikainen and Karen E. Smith (eds), *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave, 2006).

izations and companies,[54] Civil Society Organizations (CSOs), utility providers, consumer (protection) organizations, local authorities,[55] academics, other international organizations (e.g. the International Atomic Energy Agency (IAEA)) and third countries (e.g. Russia) influence European policymaking in the domain of energy (security) and climate change. Given the complexity of policymaking in view of the variety of actors involved, the present chapter will constrain itself to an analysis of the role of different EU institutions and of individual Member States.

The division of responsibilities between the EU and the Member States is primarily defined by the Treaty of the European Union. Article 17(1) ensures that the European Commission is responsible for external representation, with the exception of Common Foreign and Security Policy (CFSP). As stipulated in this article, the Council of the European Union and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy 'shall ensure the consistency' of the EU's foreign policies and 'shall cooperate to that effect'.[56] The HR/VP also has the possibility to engage the European External Action Service (EEAS) and its EU delegations.[57] Furthermore, the European Council 'identifies strategic interests and objectives of the Union', including external policies.[58] As regards energy and climate policies, the 'increased institutional and political stature' should however not be overestimated as it 'relies primarily on the "unmatched" expertise within the Commission and Council bureaucracy'.[59] Apart from these actors, the European Parliament and the Court of Justice of the European Union play a role as EU institutions in external (climate and energy) policies. Moreover, various EU agencies such as the EURATOM Supply Agency play a role in decision-making on EU external policies. The European Investment Bank may be involved in financing or executing various energy related projects and programmes, for example in developing countries.

The Treaty also contains specific titles on shared external action on energy and climate policy. The 'energy' article – Article 194 TFEU – primarily has an *internal* focus, with the main aim to ensure energy policy supports functioning energy markets, promoting energy efficiency and strengthening the interconnection of energy networks. However, 'ensuring the security of supply' in the Union clearly is related to EU external affairs. Some hold that Article 194 TFEU provides 'fertile legal ground' for the development of a fully-fledged European external energy policy'.[60] Nevertheless, the separate energy title since the Lisbon

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[54] José Célio Silveira Andrade and José Antônio Puppim de Oliveira, 'The Role of the Private Sector in Global Climate and Energy Governance' [2015] *Journal of Business Ethics* 130(2), pp. 375–87.

[55] Kristine Kern and Harriet Bulkeley, 'Cities, Europeanization and Multi-level Governance: Governing Climate Change through Transnational Municipal Networks' [2009] *Journal of Common Market Studies* 47(2), pp. 309–32.

[56] Art 21(3) TEU.

[57] Art 221 TFEU.

[58] Art 15(1) TEU and Art 22(1) TEU.

[59] Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' [2011] EPIN Working Paper, no. 31.

[60] Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), p. 28. See also Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014).

Treaty has also been coined a 'double edged-sword' by officials of the European Parliament, seeing its respective opportunities and limitations.[61] According to the Treaties (Articles 4 and 191 TFEU), the EU and Member States share competences in the environmental (and climate change) fields and therefore also in climate change negotiations.

Finally, and not of the least importance, national governments and parliaments continue to play a paramount role as the EU can only act in those areas in which it has received the competence from the Member States; large parts of energy policy are still governed on the basis of coordinated action by the Member States. The EU Member States by themselves have 'some 124 energy-related intergovernmental agreements' with other countries of which 'around one-third' are not EU-compliant.[62] Despite this, the European Commission has contributed to a shift in political norms, successfully framing import dependency as a problem requiring an EU-level solution. Whilst Member States retain a significant extent of sovereignty in this area, since 2006 the Commission has achieved more competences in the internal and, to a lesser extent, external dimensions of EU energy policy.[63] Furthermore, while there are specific titles in the Treaty, both energy and climate 'constitute a horizontal issue' and are linked with many other external policy areas, such as development cooperation and trade.[64] To enable coherent and consistent external action on energy and climate, recent initiatives include the successful Climate Diplomacy Action Plan[65] and the Energy Diplomacy Action Plan.[66]

5. ARE THE EU AND MEMBER STATES SHAPING GLOBAL CLIMATE AND ENERGY GOVERNANCE?

The EU has had a major stake in developing 'effective multilateralism'[67] and international commitments, certainly on climate change, and to a lesser extent on energy. With the Paris Agreement, the success of a universal multilateral agreement on climate change mitigation

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[61] Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' [2011] EPIN Working Paper 31, p. 7.

[62] EU Observer (2016) 'EU Commission to Oversee National Energy Deals', 8 December 2016, via https://euobserver.com/tickers/136189 (accessed 17 November 2016).

[63] Tomas Maltby, 'European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism' [2013] *Energy Policy* 55, p. 435.

[64] Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' [2011] EPIN Working Paper 31, p. 3. See for a critical overview of energy and climate policies compared to other EU policies, Robert Falkner, 'The Political Economy of "Normative Power" Europe: EU Environmental Leadership in International Biotechnology Regulation' [2007] *Journal of European Public Policy* 14(4), pp. 507–26 and Stavros Afionis and Lindsay C. Stringer, 'European Union Leadership in Biofuels Regulation: Europe as a Normative Power?' [2012] *Journal of Cleaner Production* 32, pp. 114–23.

[65] 'Foreign Affairs Council calls for continuing European climate diplomacy following landmark Paris deal', http:// ec .europa .eu/ clima/ news/ articles/ news _2016021601 _en (accessed December 2016).

[66] 'Energy Diplomacy', https:// eeas .europa .eu/ topics/ energy -diplomacy _en (accessed December 2016).

[67] Edith Drieskens and Louise G. Van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge, 2014).

can be claimed. The development of multilateral energy governance, however, has been more difficult. Daniel Yergin and others emphasize the fact that energy sectors and markets are posited to closely match the national interests of states, so that energy security becomes part of national security schemes.[68] Decreasing GHG emissions globally has become a challenge in a debate where self-interest and collective goods are contradictory in terms of Member States' goals. The main stumbling block, also in climate negotiations, has been the notion that the richest, most developed economic actors need to bear the heaviest economic burden to reduce GHG emissions, as they (have) contribute(d) the biggest share in worldwide energy consumption and pollution.[69] This 'common but differentiated responsibilities' approach has, at least until the 2015 Paris Agreement, clashed with the agenda of some economic superpowers, notably the US under the Bush Administration.[70]

Accordingly, for import-dependent blocs and states such as the EU the objective has long been to prevent energy from endangering national interests and objectives.[71] Other notable geopolitical catalysts during the last 30 years have prompted the EU (and the US), as with many other states, to safeguard security of supply for themselves, rather than relying on consultations and international institutions that would determine matters for them. How did the EU and the Member States nevertheless help shape the global energy and climate change agenda? Illustrations on this will be provided in the following sections.

5.1 EU Involvement in Global Climate Frameworks

5.1.1 UNFCCC and the Paris Agreement

Since the early 1990s, the EU has been a leading actor in constructing international climate policy frameworks and creating leading discussions.[72] In doing so, it has been deeply committed to creating a multilateral response to combat climate change. The 1992 United Nations Framework Convention on Climate Change (UNFCCC), adopted during the 1992 United Nations Conference on Environment and Development (the Rio Conference), can be considered the principal framework instigating the discussion on global climate efforts under the umbrella of the UN. Although non-binding in nature, the Convention listed climate change as a salient matter on the global agenda, while the parties committed to meeting during the yearly Conference of Parties (COP) to discuss, and if possible act upon, climate change challenges. The EU, although having a relatively new institutional structure after the Treaty of Maastricht,

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[68] Daniel Yergin, *The Prize: The Epic Quest for Oil, Money and Power* (Free Press, 2008); Robert Gilpin, *Global Political Economy – Understanding the International Economic Order* (Princeton University Press, 2001), p. 38.

[69] Bruce Podobnik, 'Global Energy Inequalities: Exploring the Long-Term Implications' [2002] *Journal of World-Systems Research*, p. 252.

[70] Jeffrey McGee and Jens Steffek, 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law' [2016] *Journal of Environmental Law*, p. 37; Guri Bang, 'The United States: Obama's Push for Climate Policy Change' in Guri Bang et al. (eds), *The Domestic Politics of Climate Change: Key Actors in International Climate Cooperation* (Edward Elgar, 2015), pp. 160–81.

[71] Daniel Yergin, 'Energy Security in the 1990s' [1988] *Foreign Affairs*, pp. 110–32.

[72] Jürgen Lefevere, Artur Runge-Metzger and Jake Werksman, 'The EU and international climate change policy' in Jos Delbeke and Peter Vis (eds), *EU Climate Policy Explained* (Routledge, 2015), p. 109.

was deeply involved in negotiating the basis for the convention that was adopted in the 1992 Earth Summit in Rio.[73] COP is the supreme decision-making body of the UNFCCC and all of its 195 members are invited to participate in these meetings. The EU is a Party to the UNFCCC as are all EU Member States in their own right.[74]

After various rounds of failed negotiations to define a universal climate framework,[75] a series of subsequent COPs led to the successful COP21 in Paris in 2015. During this Conference, the European delegation of EU and Member States built a robust coalition of both developed and developing nations, which added to the successful international climate agreement.[76]

5.2 EU Involvement in Global Energy Frameworks

5.2.1 United Nations 2030 Agenda for Sustainable Development

In the absence of a universal binding energy treaty, the UN 2030 Agenda for Sustainable Development, a more action-oriented framework falling under the auspices of the UN, remains the closest thing to a universal energy 'commitment' there is.[77] As regards the creation of this agenda, the European Commission maintained that:

> [. . .] the EU has played an important role in shaping the 2030 Agenda, through public consultations, dialogue with our partners and in-depth research [. . .] the EU will continue to play a leading role as we move into the implementation of this ambitious, transformative and universal Agenda that delivers poverty eradication and sustainable development for all.[78]

5.2.2 International Energy Agency

Various researchers in the energy area consider the International Energy Agency (IEA) to be the core institution in the splintered field of global energy governance.[79] The organization was created shortly after the 1973 oil crisis, to form an adequate response to physical oil supply

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[73] Alexandra Lindenthal, *Leadership im Klimaschutz: Die Rolle der Europäischen Union in der Internationalen Umweltpolitik* (Campus-Verl., 2009), p. 132.

[74] https://ec.europa.eu/clima/policies/international/negotiations_en (accessed 8 August 2017).

[75] Probably the most outspoken failure in this regard, also for the EU, was the Copenhagen conference in 2009. See, e.g. Stavros Afionis, 'The European Union as a Negotiator in the International Climate Change Regime' [2011] *International Environmental Agreements: Politics, Law and Economics* 11(4), pp. 341–60.

[76] Sebastian Oberthür, 'Where to Go from Paris? The European Union in Climate Geopolitics' [2016] *Global Affairs*, pp. 1–12 and 'How the EU Helped Build the Ambition Coalition' (EUClimateAction Storify, January 2016), https:// storify .com/ EUClimateAction/ how -the -eu -helped-build-the-coalition-ambition (accessed 30 November 2016).

[77] United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' [2015], https:// su stainabled evelopment .un .org/ post2015/ transformingourworld (accessed November 2016).

[78] Commission, 'The 2030 Agenda for Sustainable Development', http:// ec .europa .eu/ euro peaid/policies/european-development-policy/2030-agenda-sustainable-development_en (accessed 1 December 2016).

[79] See, e.g., Flynt Leverett, 'Consuming Energy: Rising Powers, the International Energy Agency, and the Global Energy Architecture' in Alan S. Alexandroff and Andrew F. Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance* (Brookings Institution Press, 2010), pp. 240–65. See also Thijs van der Graaf, 'Obsolete or Resurgent? The International Energy Agency in a Changing Global Landscape' [2012] *Energy Policy*, p. 233.

disruptions, while providing information and data about the international oil market and other energy sectors. The IEA falls within the framework of the Organization for Economic Cooperation and Development (OECD).

Membership of the IEA is limited: the mandate of the organization stipulates that only OECD Members are eligible to join the IEA. With 20 out of the total of 29 IEA members, the EU provides the largest number of members of this organization. The EU holds a collective seat in the IEA as well, thereby having its own external representation in the primary organization dealing with international energy matters. The EU has been applauded by the IEA as a global leader considering its 'unprecedented renewable energy boom, its action on energy efficiency and [...] drop in greenhouse gas emissions', giving it an exemplary role in the IEA.[80]

5.2.3 The energy charter, the energy community and IRENA

The Energy Charter Treaty is a multilateral energy agreement in which the EU has a separate voice. Thus, the EU, having a membership role, provides it with collective external representation in another main global energy framework.[81] The Energy Community, by comparison, is an international organization focusing on international energy policy. The Energy Community's foremost goal is to enhance energy infrastructure between the EU and South East Europe, and the Black Sea region. Since the Energy Community only operates in Europe, the role of the EU in this framework is important, necessitating the EU to provide its own representation. Effectively, the European Commission represents the EU in this respect.

The International Renewable Energy Agency (IRENA) is based in Dubai. This multilateral organization promotes the transition from conventional fossil forms of energy to renewable ones. The Agency has the important function of supporting countries in their transition to renewable forms of energy. The EU (next to its Member States) is also represented in IRENA.

6. EU EXTERNAL ACTION ON CLIMATE AND ENERGY: INSTITUTIONAL CHALLENGES AND OPPORTUNITIES

While the EU often proclaims that 'sustainability is a European brand',[82] a closer look reveals a 'dual agenda' of both (normative) climate change mitigation as well as a defensive energy security agenda. The combination of 'benevolent civilian milieu goals' and strategic 'possession goals' in the EU's and Member State's common agenda is certainly not new, but has become more problematic over time.[83] Activities in equally important policy areas where the EU and Member States also share competences, for example development cooperation, seem

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[80] International Energy Agency, 'Energy Policies of IEA Countries' (2014) European Union 2014 Review, https://www.iea.org/publications/freepublications/publication/energy-policies-of-iea-countries---the-european-union-2014-review.html (accessed 1 December 2016).

[81] For more information about the International Energy Charter, see Chapter 10 of this handbook by Sijbren de Jong.

[82] Commission, 'Next Steps for a Sustainable European Future: European Action for Sustainability' SWD(2016) 390 final, p. 17.

[83] Karen E. Smith, 'Still "Civilian Power EU"?' [2005] *European Foreign Policy Unit Working Paper Series*, p. 1.

to be conducted in 'silos' and are not coherent.[84] In this regard, the somewhat 'double-standard action' by the EU in its external climate and energy policies is not really helpful: while countries such as Colombia work together closely with the EU on climate change affairs, Colombia remains the single largest exporter of coal to the EU as a whole.[85] This raises questions as to the EU's full commitment to being a global leader in climate affairs.

Concurrently, the EU may be faced with the problem that it is unable to deliver on the international energy and climate promises it makes. The capabilities-expectations gap, introduced by Christopher Hill in 1993, provides a possible concept to describe this issue.[86] Hill's concept draws on the assumption that the European Communities in 1993 were unable to pursue the actions they promised to deliver due to a lack of capabilities. Similarly, today there are those who claim that in the post-Lisbon era, the EU's foreign policy is still characterized by a 'capability-expectations gap'.[87] To close its 'foreign policy gap', especially in the area of energy, '[...] the EU's capabilities would either need to be increased, or expectations decreased'.[88]

Additionally, among the Member States there is a clear variation in the understanding of how to achieve, for example, a secure energy of supply status.[89] This is related to the 'east vs. west paradox' of underdeveloped, vulnerable energy markets and developed, less vulnerable ones, as the extent of market 'maturity' differs in the East and West. In this respect, Eastern European states seem more willing to integrate the EU internal market and develop the external energy policy, in comparison to the Western, more developed nations, which are less vulnerable to fluctuations in import-fluxes.[90] The Energy Union is not always met with similar enthusiasm by the EU Member States that remain keen on deciding energy market-related policies for themselves.[91] Tariffs, for example, have remained a strategic domestic affair for some EU energy transit countries.[92] Transit tariffs provide the country with revenue and economic gain, making it unattractive to alleviate them. At the same time, however, tariffs are a key impediment to the development of a single harmonized market. In this way, EU

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[84] Maurizio Carbone, 'Mission Impossible: The European Union and Policy Coherence for Development' [2008] *Journal of European Integration*, p. 323.

[85] Eva Maas, Louise van Schaik and Ries Kamphof, 'EU and Colombia: Climate Partnership Beyond Aid and Trade' [2015] *Clingendael Policy Brief*, p. 1.

[86] Christopher Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role' [1993] *Journal of Common Market Studies* 31(3), p. 305.

[87] Niklas Helwig, 'EU Foreign Policy and the High Representative's Capability-Expectations Gap: A Question of Political Will' [2013] *European Foreign Affairs Review* (18), p. 235.

[88] Christopher Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role' [1993] *Journal of Common Market Studies* 31(3), p. 305.

[89] Ole Gunnar Austvik, 'The Energy-Union and Security-of-gas Supply' [2016] *Energy Policy*, p. 372.

[90] Ibid.

[91] Daan Rutten, 'CIEP Briefing Paper on the Energy Union' [2016] *Clingendael International Energy Programme*, p. 4.

[92] Stefan Bouzarovski and Sergio Tirado Herrero, 'The Energy Divide: Integrating Energy Transitions, Regional Inequalities and Poverty Trends in the European Union' [2015] *European Urban and Regional Studies*, p. 8; 'Bringing Gas to the Market: Gas Transit and Transmission Tariffs in Energy Charter Treaty Countries', Energy Charter Secretariat [2012], http:// www .energycharter.org/fileadmin/DocumentsMedia/Thematic/Gas_Tariffs_2012_en.pdf.

Member States have to choose between a common EU voice on energy (trade) policy and own revenues, which constitutes another trade off.

Of course, there also are opportunities for more cohesive external action in the area of energy policy. The EU energy diplomacy action plan 'needs to be backed by a coherent set of tools to ensure coordination of efforts between EU Member States and European institutions'.[93] In this way, the energy diplomacy action plan could benefit from experience based on the more successful examples of climate diplomacy. Nevertheless, common external EU and Member State action on energy security is complicated by the fact that there is a general lack of international fora operating in this domain. This is all the more visible when compared with climate change mitigation, where a general and universal Conference of the Parties (COP) takes place every year.

To close the 'capabilities-expectations gap', the EU could pursue less ambitious energy goals, that is, lowering the international expectation that it is truly able to speak with one voice in energy-related areas. Alternatively, notably in the energy policy domain, the EU could aim to enhance its ability to agree on external policies, augment the resources it has available for this and aim to establish more adequate instruments to implement its commitments. Hence, there are both institutional challenges and opportunities as regards the development of coherent and cohesive EU external climate and energy policies, but hurdles in view of energy policy seem to be more extensive and would need more efforts and adaptations to close the 'capabilities-expectations gap' in this area.

7. CONCLUSION AND FUTURE RESEARCH AGENDA

The lack of a clear guidance in the Treaties on who represents the EU externally in the case of shared competences has caused tensions between EU institutions such as the European Commission, the Council and the European External Action Service. These tensions have become more visible since the entry into force of the Lisbon Treaty, in general terms, but more specifically also in the areas of climate and energy policies. Our chapter shows that the institutional framework, both within the EU and in terms of international institutions, affects the EU's capacity to act cohesively. As Tom Delreux stated in 2006, the EU's external actions are to a large extent 'determined by its internal interactions between the different actors'.[94] Accordingly, this chapter can be seen as complementing the preceding one in this book.[95]

The 'shared (external) competences' make it difficult for the EU to establish coherent external policies. Climate change and energy security policies are increasingly tied together in the ways they are referred to, creating the impression that there is a direct, inextricable link between the two areas. As Luft et al. (2011) stated, however, this link 'is more tenuous' than

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[93] Thomas Raines and Shane Tomlinson, 'Europe's Energy Union: Foreign Policy Implications for Energy Security, Climate and Competitiveness' [2016] *Chatham House Research Paper*, March 2016, p. 24.

[94] Tom Delreux, 'The European Union in International Environmental Negotiations: A Legal Perspective on the Internal Decision-Making Process' [2006] *International Environmental Agreements* (6), p. 232.

[95] See Chapter 2 by Kim Talus and Pami Aalto, 'Competences in EU energy policy'.

it seems, as there are 'many trade-offs' between the two areas, also in substantive terms.[96] Furthermore, in terms of power and competence distribution, 'energy security' is a core area of national sovereignty, while to achieve climate change mitigation, there needs to be global partnerships to attain countries' respective aims, demanding a different strategy related to the provision of 'global public goods'.[97] In this sense, the EU being more eager to 'speak with one common voice' in external relations on climate change issues than in those related to energy security makes sense. The absence of clear-cut global multilateral fora on energy makes it even more difficult for the EU to align its own policies and those of its Member States on this issue.

A new research agenda could be beneficial in which shared external competences in terms of both energy security and climate change mitigation are being addressed in a combined way. Lessons from the more successful climate diplomacy could then possibly be transferred to the energy diplomacy domain. Future research could also address ways in which challenges to the coordination of EU external policies in the climate and energy areas can be overcome, for example by potential institutional or organizational adaptations, or increased coordination between Member States and EU institutions in such areas. Next to this, a potential focus could be on the extent to which the 'securitization' of energy and climate change may have an effect on the 'pendulum' swinging either towards the wish to maintain sovereignty or to enhance the EU's common external representation. Recently there has been increasing attention on the 'climate security' agenda where military and climate threats are combined.[98] However, this 'securitization' of the climate agenda is not automatically linked with energy security.

Another issue worth addressing might be the rise of populism, which has fed the ongoing 'existential crisis' of the EU, which is characterized by, for example, Brexit. Although little research has been conducted measuring the effect of populism on EU foreign policymaking, a recently published report by the European Policy Centre provides an early comprehensive account of this topic. The findings are relatively moderate, as the report argues that '[...] contemporary European populists on both the left and right have so far shown limited transformative power in terms of their ability to determine actual policy choices'.[99] Nevertheless, a future research agenda on this issue is both meaningful and essential, as the unfolding of [parliamentary] elections across the European continent may provide right-wing parties with more transformative power. Finally, there could be a special focus on how EU populist parties' support for Russia might affect the EU's position as Russia's largest importer of conventional energy sources.

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[96] Gal Luft, Anne Korin and Eshita Gupta, 'Energy Security and Climate Change: A Tenuous Link' in Benjamin K. Savocool (ed.), *The Routledge Handbook of Energy Security* (Routledge, 2010).

[97] Michèle B. Bättig and Thomas Bernauer, 'National Institutions and Global Public Goods: Are Democracies More Cooperative in Climate Change Policy?' [2009] *International Organization* 63(2), pp. 281–308.

[98] See e.g. the 'Planetary Security Initiative', https://www.clingendael.nl/sites/default/files/PSI_flyer_A5_web_0.pdf (accessed 7 December 2016). Climate change is considered a 'threat multiplier that catalyzes water and food scarcity, pandemics and displacement' according to the EU Global Strategy.

[99] Rosa Balfour et al., 'Europe's Troublemakers: The Populist Challenge to Foreign Policy' [2016] *European Policy Centre*, p. 49.

Another promising research avenue would be to see how the EU could link agendas and strategic partnerships. More detailed accounts on the intersection between the EU's climate change policy and development programmes could, for example, offer a more comprehensive understanding of this topic. In what way, for instance, do the negotiations on a 'post-Cotonou agreement' with African, Caribbean and Pacific countries work in conjunction with the EU goals in terms of energy security and climate change mitigation? How could this be structured externally to create more efficient, problem-driven diplomacy in this domain? How can researchers, for example with political-institutional background research, help to demonstrate how contradictions in the EU's external policy could be prevented? Another challenge is the relative strength of the carbon-intensive industry as a major deterrent to the adoption of climate change mitigation policies.[100] This nexus could also be addressed.

It would also be worthwhile to come up with a research agenda that explicitly incorporates the positions and interests of other global actors, including large energy-producing countries such as Russia, Nigeria and Algeria and explore how the private sector, which is increasingly involved in 'de-risking' the political process, and local authorities could play a role in terms of finding innovative climate and energy solutions from which the EU's external policies could also benefit. Science diplomacy may, especially in the areas of climate and energy, prove effective in depoliticizing issues that are, for example, closely intertwined with national interests. Such knowledge exchange might again decrease the 'information deficit' the EU has as compared to the energy security schemes of its Member States, which would probably make it easier to 'speak with one voice' externally. More institutional issues could be part of this research agenda. All in all, a clearer description of the role of the competences of the EU and its Member States would not only be 'highly pertinent towards understanding energy within the EU context',[101] but also in the *external* institutional context. Studying the activities of EU actors in conjunction with those of external (third) parties is therefore of crucial importance.

[100] Franklin Steves and Alexander Teytelboym, 'Political Economy of Climate Change Policy' [2013] *Smith School Working Paper Series, Working Paper 13/06*, p. 25.

[101] Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing EU Energy Security through a Constitutional Law Perspective' [2013] *Fordham International Law Journal* (36), p. 1225.

26. The Paris Agreement, EU Climate Law and the Energy Union

Estelle Brosset and Sandrine Maljean-Dubois

1. INTRODUCTION

The European Union has gradually developed a comprehensive body of legislation aimed at protecting the environment, consolidating its competences in this field in successive stages. Within this framework, climate change has been given a high priority and is one of the most prominent areas of the EU's external and internal policy.

From the precursory European Economic Community (Treaty of Rome, 1957) to the European Union (Treaty on European Union, Maastricht, 1992), the EU has progressively developed a prevention-oriented and comprehensive environmental policy in which climate change received particular attention since the 1990s. The Lisbon Treaty (2008) acknowledged this specificity, stating that, in addition to its internal environmental objectives, the Union is aimed at 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change' (Art. 191(1) TFEU). The Lisbon Treaty is also significant as it confers upon the EU a shared competence in the energy sector for the pursuit of objectives defined in the new Article 194(1) TFEU, including the objective to 'c) promote energy efficiency and energy saving and the development of new and renewable forms of energy'.

The EU has played a significant role in the development of the international legal regime for climate change. After setting out the approach from the Paris Agreement and its implications for the EU (2), this chapter will show that international interactions played a major role in the shaping of the external (3) and internal (4) climate EU policy. Section 5 concludes.

2. THE NEW APPROACH OF THE PARIS AGREEMENT AND ITS IMPLICATIONS FOR THE EU

2.1 The Paris Agreement

The international climate regime was built in stages.[1] Its foundation was laid with the creation of the Intergovernmental Panel on Climate Change (IPCC) in 1988. States then developed a specific international legal regime, based on the United Nations Framework Convention on Climate Change (UNFCCC, 1992). In 1997, the Kyoto Protocol set out obligations for the reduction of greenhouse gas emissions for the period 2008–12 relative

[1] See Ph. Pattberg and O. Widerberg, 'The Climate Change Regime', *Climate Science*, Oxford Research Encyclopedias (2017).

to 1990 levels. Negotiations on the post-2012 regime, and later on the post-2020 regime, were slow and arduous. As scientific papers and IPCC reports came out, a very strong consensus emerged as to the need to take action. States thus found themselves caught up in a paradox: on the one hand, increasing shared awareness of the risks and willingness to act in order to contain those risks, and on the other hand, a negotiation process at a standstill. The Copenhagen Accord, the substance of which was then repeated in the decisions of the Conference of the Parties in Cancun, governs the period up until 2020. The Paris Agreement, a new treaty adopted in 2015, lays down the framework with regard to new commitments to reduce emissions starting from 2020. The treaty was signed by a large number of countries and quickly ratified. It came into force within a year, despite the very strict conditions set therefor, and by March 2019 the number of Parties increased to 185, including the European Union and its Member States.[2]

The Paris Agreement is very different from its 'predecessor', the Kyoto Protocol. The compromise reached in Paris illustrates a certain evolution in the way States commit themselves. In terms of substance, it represents a subtle combination of bottom-up and top-down approaches.

2.1.1 A bottom-up approach

Under the Paris Agreement, the Parties themselves establish their contribution's level of ambition, at a national level, keeping in mind the collective objective of holding global warming well below 2°C, and pursuing efforts to limit the temperature increase to 1.5°C.[3] National contributions should ultimately follow synchronised time frames based on five-year cycles.[4] The collective effort is therefore the result of the aggregation of 'nationally determined' contributions. At the global level, there has been no burden sharing of the implementation of this collective objective, as had been the case pursuant to the Kyoto Protocol. However, Regional Economic Integration Organisations (REIO) – such as the European Union – and their Member States have the possibility to act jointly and send a common 'nationally determined' contribution. In that case, they shall notify the secretariat of the terms of their agreement, which shall in turn inform the Parties and signatories to the Convention of the terms of that agreement.[5]

As contributions are nationally determined, the question arises as to whether the Agreement retains its *raison d'être*. The answer is yes, for two reasons. The first *raison d'être* of the treaty is to create momentum by encouraging States first to commit, and then to gradually increase their level of commitment. The second *raison d'être* is to guarantee the transparency of actions and policies.

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[2] Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, *OJ* L 282, 19.10.2016, 1–3.

[3] See for this aim Art. 2 of the Paris Agreement. See for a discussion: S. Dröge and O. Geden, 'After the Paris Agreement New Challenges for the EU's Leadership in Climate Policy', *Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, SWP Comments* (April 2016), 1.

[4] Paris Agreement, Art. 4(9); Decision 1/CP.21, (2015), *Adoption of the Paris Agreement,* §24.

[5] Paris Agreement, Art. 4(16).

2.1.2 Raising the level of ambition

Each nationally determined contribution must constitute a progress from the previous contribution.[6] However, the Parties are free under the Paris Agreement to determine this progression, which may lie in the form and/or substance of their contributions. Alongside the obligation to submit a contribution at its highest possible ambition, which must be more ambitious than the previous one, Parties may 'at any time' amend their contribution 'with a view to enhancing its level of ambition'.[7] In order both to assess the adequacy of the efforts aggregated together as against the desired global trajectory according to the Paris Agreement, and to increase the pressure on States, Article 14 lays down the principle of a global review, referred to as a 'global stocktake', that will take place every five years. The first one has to be carried out in 2023.

2.1.3 Ensuring transparency and building confidence

The provisions ensuring transparency and control are particularly important in a flexible system based on contributions nationally determined by States. These provisions reintroduce more or less top-down aspects into an approach that is mostly bottom-up, and they are given a major role to play: establishing trust between States and enabling the monitoring of the Parties' efforts, in order to confront them with the target emissions trajectory. Negotiators were well aware of this and special care was dedicated to this matter on which a great part of the robustness of the Paris Agreement depended.[8] The transparency framework[9] and compliance mechanism[10] have been further detailed in the rulebook of the Paris Agreement, adopted in Katowice at the Conference of the Parties (COP) 24.[11]

2.2 Implications for the European Union

Regarding the challenge of implementing the Paris Agreement, which extends largely beyond mitigation to adaptation and finance, 'the EU may be under particular scrutiny because it has long been a "leader" in international climate politics, including through the pursuit of ambitious domestic policies'.[12] However, the EU faces growing difficulties in completing its internal decision-making. In the wider EU of 27 countries, effective decisions on climate and energy issues are much harder to adopt.

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6 Ibid., Art. 3; Decision 1/CP.20 (2014), *Lima call for climate action,* §10.

7 Ibid., Art. 4(11).

8 C. Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' (2016) *RECIEL* 25(2), 161–73.

9 Paris Agreement, Art. 13.

10 Ibid., Art. 15.

11 See the COP 24/CMA 1 decisions on *Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement* and *Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement* (16 December 2018).

12 S. Oberthür, 'Perspectives on EU Implementation of the Paris Outcome' (2016) *Carbon & Climate Law Review* 1, 34.

2.2.1 The ratification step and the first EU 'nationally determined contribution'

Among only a few other parties to the UNFCCC, the EU had communicated its 'intended nationally determined contributions', as requested, 'by the first quarter of 2015 by those Parties ready to do so'.[13] Following the view of the European Council expressed in October 2014,[14] the EU Environment Council meeting communicated in March 2015 its objective of reducing greenhouse gas emissions by at least 40 per cent below 1990 levels by 2030 as the EU's official contribution to the ongoing climate talks in order to prepare for the Paris Agreement negotiations.[15] The EU's target was presented as unconditional, regardless of the outcome of the COP 21.

Ratifications of the Paris Agreement took place at a steady pace, raising fear that the Paris Agreement 'may enter into force before the EU and its member states would be able to become parties, which would limit their role in follow-up decision-making'.[16] However, having signed the Paris Agreement during a formal ceremony in New York on 22 April 2016, the EU approved it on 5 October 2016, just before the COP 22.[17] According to its Article 20(2), as a REIO, the EU 'shall be bound by all the obligations under this Agreement'. Because they are together Parties to the Agreement, the EU and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Agreement. Article 20 (3) asks REIOs to clarify the allocation of competences between the organisation and its Member States. In fact, the EU's declaration offers little indication from this point of view.[18]

2.2.2 The raising of the level of ambition of the first national contributions

Since 2015, in this tense context, the EU endeavours to prepare the implementation of the Paris Agreement from 2020 onwards. To limit conflicts, the Commission has progressed cautiously in proposing new legislative measures, including amendments to existing ones, in order to implement its international commitment. Thus, it postponed the adoption of a detailed regulation for the accounting of land use, land-use changes, and forestry (LULUCF). This very important legislation for Member States with a strong agricultural sector was finally adopted in 2018.[19] Similarly, the Commission had some trouble achieving the adoption of its 'Roadmap for Moving to a Competitive Low Carbon Economy in 2050' put forward in 2011[20] but rejected by the Council because of Poland's opposition. On 28 November 2018, the Commission presented its strategic long-term vision, calling for a 'both climate neutral and prosperous' Europe by

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13 UNFCCC, Decision 1/CP.20, *Lima call for climate action* (2014).

14 Conclusions of the European Council of 23–24 October 2014.

15 Outcome of the Council Meeting, 3373rd Council meeting, Environment Brussels, 6 March 2015.

16 Oberthür (2016) o.c., 34–45.

17 Council Decision (EU) 2016/1841 of 5 October 2016, o.c.

18 Declaration by the Union made in accordance with Article 20(3) of the Paris Agreement, *OJ* L 282, 19.10.2016, 4.

19 Regulation (EU) 2018/841 o.c.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Roadmap for moving to a competitive low carbon economy in 2050*, COM/2011/0112 final.

2050.[21] The EU was able to submit, on 6 March 2020, its mid-century long-term low greenhouse gas emission development strategies to the UNFCCC as requested under the Paris Agreement Article 4(19).

2.2.3 Implementation and compliance mechanisms

From an implementation and compliance point of view, an interesting feature is the coexistence of an international regime – a mixed agreement to which both the EU and its Member States are parties – and a regional regime within the framework of the European Union. In both regimes, one of the key challenges remains to ensure the effective application of the law, which requires the setting-up of compliance control mechanisms. However, under the Paris Agreement, States' obligations are mainly procedural and the compliance mechanism adopted during COP 24 in 2018 takes a managerial approach.[22] The monitoring of its implementation by Member States with ultimate supervision of the ECJ will be all the more complementary and necessary.

Furthermore, the implementation of the Paris Agreement still raises interesting questions regarding the sharing of competences and responsibilities between the EU and its Member States, as illustrated by the Dutch climate litigation case 'Urgenda'.[23] The Dutch court (first instance) did 'not assess the legality of the EU overall greenhouse gas reduction target of 20%', nor did it assess:

> the legality of the Effort Sharing Decision target for the Netherlands, which is set at a 16% greenhouse gas emission reduction compared to 2005 levels. However, since the Dutch court ruled that the EU overall target is insufficient, this implies a negative assessment on the lawfulness of the core aim of EU climate law.[24]

3. THE EU AS A GLOBAL ACTOR FOR CLIMATE?

The EU now has a long-standing practice and a growing role on the international environmental scene, as well illustrated in the field of climate change. Yet, as the only regional organisation member of the UNFCCC, the Kyoto Protocol and the Paris Agreement, the EU can be seen as a *sui generis* international climate actor.[25] More than that, since the

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[21] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy*, Brussels, 28.11.2018 COM (2018) 773 final.

[22] See above.

[23] *Urgenda Foundation and 886 Individuals v. The State of the Netherlands*, The Hague District Court, 200.178.245/01, ECLI:NL:RBDHA:2015:7196, 09-10-2018; upheld on appeal by the Supreme Court of the Netherlands, Civil Division, 20 December 2019, Number 19/00135.

[24] M. Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) *RECIEL* 25(1), 125.

[25] Using the concept of 'actorship' to describe the ability to exert influence on the external world according to J.-U. Wunderlich, 'The EU an Actor Sui Generis? A Comparison of EU and ASEAN Actorness', *Journal of common market studies* (50)4, 653–69. See Carolina B. Pavese and Diarmuid Torney, 'The Contribution of the European Union on Global Climate Change

early 1990s, the EU has had high aspirations to leadership and has been widely viewed as a global leader among academics.[26] The EU has tried to 'make a virtue of its relative lack of "hard power" by relying heavily on "soft power"'[27] or "normative power"'.[28] But its influence within and outside the Paris regime has varied, which raises the question: is it well-equipped to conduct its ambitious climate external policy?

3.1 A Shifting Influence on the International Climate Regime

For many years, the EU pursued the strategy of 'leading by example' in international climate negotiations. During and after the Copenhagen Conference, given a new international context, its perceived leadership dropped significantly, the EU recalibrated its leadership role to win it back – at least partially, being 'more realistic and skilful in strategically combining its resource-based leadership with its instrumental leadership'.[29] As noted by Oberthür, 'it invested in building a broad coalition of ambitious parties across the North–South divide and built bridges with and between other actors: it became a "leadiator" (i.e., a leader and mediator)'.[30] Due to its new 'leadiator' role, the EU was quite successful in influencing the negotiations in Paris and shaping their outcome. However, 'at the time of the Paris conference, the EU was a middle power in international climate politics in an international constellation characterized by a trend toward multi-polarity, but with two heavyweights: the US and China'.[31] Pushing for a relatively ambitious outcome regarding mitigation, it has been taking more defensive stances on climate finance and ambition.[32] In a more 'fragmented leadership landscape',[33] the weakening of EU influence has been confirmed by the next COPs, the EU having disappointed many of its partners 'as it did not deliver as a constructive negotiator and bridge builder'.[34] At the COP24 in Katowice, Poland, the international context was morose in particular due to the announced withdrawal of the US

Governance: Explaining the Conditions for EU Actorness' (2012) *Revista Brasileira de Política Internacional* 55, 125.

[26] S. Afionis, 'The European Union as a Negotiator in the International Climate Change Regime' (2011) *Int Environ Agreements* 11, 341–60. We agree that political leadership is 'a complex phenomenon, ill-defined, poorly understood, and subject to recurrent controversy'. See O. Young, 'Political Leadership and Regime Formation: On the Development of Institutions in International Society' (1991) *International Organization* 45(3), 281–308.

[27] R. K. W. Wurzel and J. Connelly, 'European Union Political Leadership in International Climate Change Politics', in R. K. W. Wurzel and J. Connelly (eds), *The European Union as a Leader in International Climate Change Politics* (Routledge, 2010) 14.

[28] T. Christiansen, 'The European Union and Global Governance', in Anna Triandafyllidou (ed), *Global Governance from Regional Perspectives: A Critical View* (OUP, 2017).

[29] Ch. Parker and C. Karlsson, 'The European Union as a Global Climate Leader: Confronting Aspiration with Evidence' (2017) *Int Environ Agreements* 17(4), 468.

[30] S. Oberthür, 'The European Union and the Paris Agreement: Leader, Mediator, or Bystander?' (2016) *Climate Change* (8)1 445.

[31] Ibid.

[32] Ibid.

[33] C. Parker, C. Karlsson and M. Hjerpe, 'Climate Change Leaders and Followers: Leadership Recognition and Selection in the UNFCCC Negotiations'(2015) *International Relations* 29(4), 434–54.

[34] S. Droge, 'International Climate Policy Leadership after COP23: The EU Must Resume its Leading Role, but Cannot Do So Alone' in Nicolai von Ondarza, *Stiftung Wissenschaft und Politik*, German Institute for International and Security Affairs (2018) 1–7.

from the Paris Agreement and potentially of Brazil too. There was much expectation from the EU for instance on the raising of ambition or on finance but, because of its internal disunity, it was unable to be anything more than a bystander.[35]

3.2 The EU External Climate Policy Outside the International Climate Regime

Beyond the UNFCCC, the EU has increasingly sought to use its political and economic influence and advance climate change objectives through its bilateral and interregional external relations.[36] In particular, the EU, as a major provider of development assistance, has the potential to support climate action.[37] Climate funding from the EU and its Member States amounted to 20.4 billion in 2017.[38] In the near future, it could invest in intensifying partnerships with key countries and other actors supporting the model of the Paris Agreement.[39] Some stand for the rise of minilateralism,[40] of multiple bilateralism, involving the EU, China, India and other key emitters considering that it 'holds the potential to develop into a networked form of co-leadership',[41] or even of trilateralism between the EU, China and African countries, to pursue 'joint approaches' to 'speed up the implementation of the Paris Agreement wherever possible, including the implementation of Nationally Determined Contributions'.[42]

3.3 Is the EU Well-equipped to Pursue an Ambitious External Climate Policy?

The climate change field illustrates the fact that the EU has a 'range of political resources and diplomatic capabilities that is unique among any other actor in international affairs'.[43] A specific feature in climate change negotiations is that the EU has used since 2004 a system of 'lead negotiators'[44] and 'issue leaders'[45] acting under the formal authority of

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[35] To use the Oberthür's categories. Oberthür (2016) *CC*, o.c., 445.

[36] K. Kulovesi, 'Climate Change in EU External Relations: please follow my example (or I might force you to)', in E. Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012) 115.

[37] See for instance the founding text of the European Commission, Using Innovative and Effective Approaches to Deliver Climate Change Support to Developing Countries, 2011.

[38] See https://ec.europa.eu/clima/sites/clima/files/docs/climate_finance_leaflet_en.pdf (last accessed 12 February 2020).

[39] Droge (2018), o.c., 1–7.

[40] M. Naim, 'Minilateralism; the Magic Number to Get Real International Action' (2009) *Foreign Policy*; R. Eckersley, 'Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?' (2012) *Global Environmental Politics* 12(2), 24–40.

[41] D. Belis, S. Schunz, Simon, T. Wang and D. Jayaram, 'Climate Diplomacy and the Rise of "Multiple Bilateralism" between China, India and the EU' (2018) *Carbon & Climate Law Review* 12(2), 85–97.

[42] M. Weigel and A. Demissie, 'A New Climate Trilateralism? Opportunities for Cooperation between the EU, China and African Countries on Addressing Climate Change' (Deutsches Institut für Entwicklungspolitik, Bonn, 2017).

[43] Droge (2018) o.c., 1–7.

[44] These '*lead negotiators*' represent the EU and their main role is to conduct negotiations on a day-to-day basis in the various formations.

[45] The '*issue leaders'* do not represent the EU but support the work of lead negotiators on specific issues of the negotiations.

the Presidency.[46] This allows negotiations on behalf of the EU to take place over a longer period than the six-monthly rotating European Presidency. It also allows the Presidency to share the burden of the negotiation task, since climate change negotiations are often too complex to be appropriately handled by a single Presidency.

But the Union (more precisely the Commission and the Commission jointly with Member States) remains torn between its aspiration to international leadership, and the hurdles to becoming a global actor. Because of its internal contradictions, the EU is not always able to perform, beyond its Member States, as a powerful negotiator, even if the EU and its Member States are bound by the principle of loyal cooperation.[47] From this point of view, the EU policy 'has purposefully given rise to (too) high expectations, without having either the resources or the political will among national governments to actually be able to deliver on these expectations'.[48]

4. THE EU'S INTERNAL CLIMATE POLICY

In order to understand the EU's internal climate policy, its foundations as well as its main objectives must be examined.

4.1 Foundations: Climate Instruments and the Nature of Regulation

4.1.1 Overview of the 'climate' instruments of the EU

The first instruments date back to the adoption of the UNFCCC. Indeed, one of the first acts adopted on this issue was decision 93/389/EEC of the Council of 24 June 1993, for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions[49] which related[50] to the commitment of the European Community at the international level. On the same date, the fifth EC Environmental action programme acknowledged the fight against climate change as a key issue of European policy and set out the actions necessary to reach the objective of stabilising GHG emissions at the 1990 level laid down in the Framework Convention.[51] The adoption of the first European Climate Change Program (ECCP)[52] in 1999 is traditionally seen as marking the beginning of the Community's

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[46] T. Delreux and K. Van den Brande, 'Taking the Lead: Informal Division of Labour in the EU's External Environmental Policy-making' (2013) *Journal of European Public Policy* 20(1), 113–31.

[47] Art. 4(3) TEU.

[48] Christiansen (2017) o.c., 211.

[49] 93/389/EEC: Council Decision of 24 June 1993 for a monitoring mechanism of Community CO2 and other greenhouse gas emissions*, OJ L 167,* 9.7.1993, 31–33.

[50] Ibid., Art. 2.

[51] Recital 5, Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development – A European Community programme of policy and action in relation to the environment and sustainable development, *OJ* C 138, 17.5.1993, 1–4.

[52] Communication from the Commission to the Council and the European Parliament, *Preparing for implementation of the Kyoto Protocol*, COM/99/0230 final. Communication from

internal policy on climate, although here as well the objective was to create a framework for the adoption of measures necessary to meet the Kyoto requirements. Following the discussions led pursuant to the ECCP, the European Parliament and Council adopted Directive 2003/87/EC, establishing the Scheme for Greenhouse Gas Emissions Allowance Trading (ETS),[53] which was clearly the first step in a long and rich list of instruments adopted since then.

These pieces of legislation fit into two main categories. The first one includes instruments incorporating international agreements within EU law, mainly those approving the conclusion of the UNFCCC, of its Kyoto Protocol, and later of the Paris Agreement,[54] as well as those implementing these international undertakings.[55] It is worth remembering that, when the EU enters into an agreement, its provisions form an integral part of the legal order of the EU as from its entry into force, even if the internal effects may ultimately be limited.[56] The second category includes instruments that have shaped European policy, designed to pursue objectives assumed at the international level or for the purpose of building a European climate policy, or both in an intertwined manner. The adoption of the energy-climate package in 2009, which comprises three directives and one decision,[57] was certainly a key moment. A large part of these instruments was

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the Commission to the Council and the European Parliament on *EU policies and measures to reduce greenhouse gas emissions: towards a European Climate Change Programme (ECCP)* COM/2000/0088 final.

[53] 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, *OJ L 275,* 25.10.2003, 32–46.

[54] 94/69/EC: Council Decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change*, OJ L 33,* 7.2.1994, 11–12; 2002/358/EC: Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder*, OJ L 130,* 15.5.2002, 1–3; aforementioned Council Decision (EU) 2016/1841, 1–3.

[55] Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol*, OJ L 49,* 19.2.2004, 1–8; Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC*, OJ L 165,* 18.6.2013, 13–40.

[56] Judgment of the Court (Grand Chamber) of 21 December 2011, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, Case C-366/10, *Reports of Cases* 2011 I-13755: 'Consequently, the Kyoto Protocol cannot be relied upon in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101' (pt. 78).

[57] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ* L 140, 5.6.2009, 16–62; Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, *OJ* L 140, 5.6.2009, 63–87; Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/

recently revised.[58] Furthermore, these various pieces of legislation are supplemented by a range of implementing acts.[59] These two categories are completed by a third one, which includes all instruments that, without systematically laying down specific obligations, have incorporated the fight against climate change as a general objective, for instance (but not limited to) in the sector of trans-European transport networks,[60] civil protection,[61] protection of the marine environment[62] or energy efficiency.[63]

The complexity of the regulatory framework is obvious. For example, many sectoral Union acts in the energy and climate field set planning and reporting requirements at the national level, but those requirements have been introduced at different times and in different fields, leading to overlaps and cost-inefficiency. That is why Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action seeks to contribute to greater regulatory certainty by amending 12 legislative acts and by integrating their planning, reporting and monitoring obligations into the integrated national energy and climate plans.[64]

EC, 2008/1/EC and Regulation (EC) No 1013/2006, *OJ L* 140, 5.6.2009, 114–135; aforementioned Decision No 406/2009/EC, 136–148.

[58] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments. See also aforementioned Regulation (EU) 2018/842, 26–42, which thus extends decision n° 406/2009. See also Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, *OJ* L 328, 21.12.2018, 82–20.

[59] Especially under the ETS Directive, for example in order to determine the quantity of allowances to be issued: 2010/634/EU: Commission Decision of 22 October 2010 adjusting the Union-wide quantity of allowances to be issued under the Union Scheme for 2013 and repealing Decision 2010/384/EU, *OJ L 279,* 23.10.2010, 3–35. See also Commission Regulation (EU) No 1193/2011 of 18 November 2011 establishing a Union Registry for the trading period commencing on 1 January 2013, and subsequent trading periods, of the Union emissions trading scheme, *OJ L 315,* 29.11.2011, p. 1–54. It was also the case for non-ETS sectors: the latest: Commission Decision (EU) 2017/1471 of 10 August 2017 amending Decision 2013/162/EU to revise Member States' annual emission allocations for the period from 2017 to 2020, *OJ* L 209, 12.8.2017, 53–55.

[60] Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, *OJ L 348,* 20.12.2013, 1–128, recital 33.

[61] Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, *OJ L 347,* 20.12.2013, 924–947, recital 1.

[62] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy, *OJ L 164,* 25.6.2008, 19–40, recital 34. See also Regulation (EU) No 1255/2011 of the European Parliament and of the Council of 30 November 2011 establishing a Programme to support the further development of an Integrated Maritime Policy, *OJ* L 321, 5.12.2011, 1–10, Art. 3(e).

[63] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, *OJ* L 315, 14.11.2012, 1–56, recital 1.

[64] 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, *OJ L* 328, 21.12.2018, 1–77.

4.1.2 The new governance approach

In terms of form, EU instruments on climate change do not, at first glance, seem very unusual: they include directives, a number of regulations, and decisions addressed to Member States and their economic sectors that lay down obligations in order to achieve a harmonised objective.

However, among those, some feature a more original content, such as the lead directive on the EU ETS. Indeed, the fight against climate change has enabled EU law to test the market as a regulation tool. The chosen option is referred to as 'cap and trade'. An overall emission 'cap' is established for a given period[65] together with a number of corresponding emissions rights (or allowances).[66] These allowances are allocated (gratuitously at first, then through an auction process) to polluting facilities targeted by the directive,[67] that can then 'trade' them according to their needs. This market-based approach should, in theory, have led to an automatic reduction of emissions, without the intervention of public authorities. In reality, even if the EU ETS instrument has a very high compliance rate,[68] reliance on the market has required, in many places, the intervention of public authorities, at the national or EU level, specifically in order to allow the market to function.[69] The intervention of public authorities, or the 'management' of the market, has in fact clearly increased,[70] as the functioning of the market turned out to be defective.[71]

Another original feature is the Governance of the Energy Union and Climate Action

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[65] The determination of this 'cap' took place in three successive stages: an experimentation phase from 1 January 2005 to 31 December 2007; a phase corresponding to the first commitment period of the Kyoto Protocol (2008–12); the current phase which began in 2013 and will end in 2020.

[66] Each allowance gives the holder the right to emit one tonne of carbon dioxide (CO_2), the main greenhouse gas, or the equivalent amount of two more powerful greenhouse gases, nitrous oxide (N_2O) and perfluorocarbons (PFCs).

[67] Annex I of the ETS Directive sets out five types of activities that produce significant amount of CO2: (1) energy activities (three types of facilities are subject to the system: combustion installations with a rated thermal input exceeding 20 MW (except hazardous or municipal waste installations)); mineral oil refineries and coke ovens), (2) production and processing of ferrous metals, (3) the mineral industry, (4) the production of pulp from timber or other fibrous and (5) the production of paper and board for plants with a production capacity exceeding 20 tonnes per day.

[68] 'In 2017 approximately 1% of the installations reporting emissions did not surrender allowances covering all their emissions by the deadline of 30 April 2018. These installations accounted for approximately 0.4% of EU ETS emissions.' Report from the Commission to the European Parliament and the Council on the functioning of the European carbon market, COM/2018/842 final, 17-12-2018.

[69] During the first two phases, it was up to Member States to decide the overall amount of allowances to allocate as well as the way to achieve such allocation as between the facilities targeted at the national level. These choices were to be set out in the National Allocation Plans (NAP). However, given the over-allocation of allowances, the quantity of allowances is now set for the whole Union every year since 2013 and this amount shall decrease in a linear fashion by 1.74% (compared to the average annual amount of allowances issued by Member States for the 2008–2012 period) and then by 2.2% starting from 2021.

[70] As a long-term solution**,** a market stability reserve has been established under Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC, *OJ L 264,* 9.10.2015, 1–5.

[71] See on this matter: Kingston et al. (2017) o.c., 293.

Regulation from 2018. In its conclusions of 23 and 24 October 2014, the European Council agreed on the 2030 climate and energy policy framework for the European Union and explained that 'a reliable and transparent governance mechanism with sufficient flexibility for Member States should be developed to help ensure that the Union meets its energy policy goals, while fully respecting Member States' freedom to determine their energy mix'.[72] To this end, EU chose a specific governance approach. The Governance of the Energy Union and Climate Action Regulation provides a strict procedural obligation: each Member State shall establish an 'integrated national energy and climate plan'[73] and from 2021 on, according to Article 17, Member States will be required to submit biennial progress reports on the implementation of their national plans. But, at the same time, the content is rather soft: indeed, for establishing such plan, each Member State could take into account any relevant circumstances such as economic conditions and potential, including GDP per capita, potential for cost-effective renewable energy deployment geographical or environmental and natural constraints, including those of non-interconnected areas and regions.[74] Besides, while the Commission 'shall assess' on the basis of such plan 'the objectives, targets and contributions are sufficient for the collective achievement of the Energy Union objectives',[75] there is, except the Member State's binding national target for greenhouse gas emissions pursuant to Regulation (EU) 2018/842,[76] no binding national targets formulated to achieve the European targets.[77] Furthermore, while the Commission can issue recommendations to Member States, these recommendations are not binding; Member States should only take due account of them and explain in subsequent progress reports how they have done so. Thus, the effectiveness of this governance depends almost entirely on the goodwill of the Member States, although the transparency provided by the national plans and the monitoring and reporting process could open the door for 'naming and shaming' type processes. While the effectiveness of the governance approach has yet to be assessed, literature has already qualified the new energy governance regulation as a 'harder' form of soft governance.[78]

4.2 Objectives: Ambition of its Objectives and Acceptability of its Mechanisms

The EU climate policy seeks to combine two requirements that must necessarily go hand in hand: ambition of its objectives (and of its results) and acceptability of its mechanisms.

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[72] Pt 6, European Council (23 and 24 October 2014), Conclusions on 2030 Climate and Energy Policy Framework.

[73] These plans (covering a first period from 2021–2030) should pay particular attention to the Member States' binding national targets for greenhouse gas emissions, the annual binding national limits pursuant to Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions and the indicative national energy contribution to achieving the Union's energy efficiency targets of at least 32.5 % in 2030.

[74] Regulation 2018/1999, Art. 5(1).

[75] Ibid., Art. 13(a).

[76] Ibid., Art. 4(1)(i).

[77] Ibid., Art. 29.

[78] M. Ringel and M. Knodt, 'The Governance of the European Energy Union: Efficiency, Effectiveness and Acceptance of the Winter Package 2016' (2018) *Energy Policy* 112, 209–20.

Such a balance between ambition (4.2.1) and acceptability (4.2.2) is complex and necessarily raises the question of the effectiveness of EU policy (4.2.3).

4.2.1 Ambition of its objectives

Although the EU's leadership in international negotiations has clearly fluctuated, the Union has always presented an exemplary level of ambition, both in terms of timing and of scope.[79] The current objective seeks a reduction by at least 40 per cent[80] before 2030, compared to 1990s levels.[81] To achieve the 40 per cent minimum target, ETS sectors would have to cut emissions by 43 per cent (relative to 2005), and non-ETS sectors by 30 per cent (relative to 2005). There are also targets for reduction in energy efficiency.[82] In November 2018, the Commission published a communication on its vision for a Long-term Strategy (LTS) on low emissions with a higher ambition: a carbon-neutral society by 2050.

Furthermore, for each of these targets, the EU has put in place a corresponding set of measures seeking to ensure the achievement of said level. The pursuit of an exemplary policy explains for example the expansion of the scope of the ETS directive in order to include,[83] from 1 January 2012, all flights arriving at or departing from an aerodrome situated in the territory of a Member State.[84] It also explains why the EU decided to impose obligations on non-ETS sectors, thus reaching beyond facilities covered by the ETS Directive, to reduce greenhouse gas emissions by around 10 per cent in total EU emissions before 2020[85] and by 30 per cent before 2030, compared with 2005 levels.[86] Finally, it should be noted that until very recently, land use, land use change and forestry (LULUCF) were excluded from the EU climate and energy package, but a regulation on the inclusion of this sector was adopted on 14 May 2018.[87]

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[79] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Limiting global climate change to 2 degrees Celsius – The way ahead for 2020 and beyond*, COM/2007/0002 final.

[80] In November 2018, the Commission has proposed that the EU reduce its greenhouse gas emissions by 80% before 2050, compared to 1990 levels: see its Communication, *A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy*, o.c.

[81] Communication from the Commission to the Council and the European Parliament, *The Paris Protocol – A blueprint for tackling global climate change beyond 2020*, COM/2015/081 final.

[82] Directive 2012/27/EU, o.c. which has set the Union-level target for improvements in energy efficiency in 2030 to at least 32.5%.

[83] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *OJ* L 8, 13.1.2009, 3–21.

[84] However, to support the development of a global measure by the International Civil Aviation Organization (ICAO), the EU has decided to limit the scope of the EU ETS to intra-EEA flights for a period of time**.** Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021*, OJ L* 350, 29.12.2017, 7–14.

[85] Decision 406/2009/EC, then aforementioned Regulation (EU) 2018/842, o.c.

[86] Regulation (EU) 2018/842, o.c., Art. 1.

[87] LULUCF is included on the basis of 'no debit', which means that each Member State has to ensure that emissions from land use are compensated by a removal of CO_2 from the atmosphere through action in the LULUCF sector.

The pursuit of exemplariness does not stem solely from the EU's desire to be a global player on this issue. Climate change is also a serious concern for Europe and Europeans.[88] In fact, '(. . .) EU's climate change policy (..) offers a chance for European citizens to find out what Europe can do, and to show the wider world what Europe can offer. An ambitious common climate change policy clearly increases the EU's legitimacy domestically'.[89]

4.2.2 Acceptability of its mechanisms

However, the specificity of the EU's internal policy lies in the fact that ambition had to be combined, every step of the way, with the pursuit of acceptability of the EU's policy especially by Member States represented on the EU Council (although European Parliament, under the ordinary legislative procedure, jointly determine the level of acceptability). Indeed, as between Member States, economic contexts vary, positions on climate change differ and energy options are quite diverse. Furthermore, discrepancies have increased with the enlargements that have taken place throughout the construction of the EU's climate policy. These differences have led to difficulties in agreeing on the European position to uphold in international negotiations and to opposition when adopting internal measures. For example, the governance regulation was the result of a political struggle between Member States such as the UK and Eastern European countries[90] in favour of more flexibility for Member States to achieve the energy and climate goals, and other Member States arguing for binding national-level targets for 2030 such as Germany, France, Italy and the Scandinavian countries.

The pursuit of acceptability also explained the negotiation of differentiation of national obligations in the legal mechanisms. Visible in the context of the ETS Directive,[91] these differentiations appear even more clearly in the instruments adopted for non-ETS sectors. The very title of the first one (the 2009 Effort Sharing Decision[92]) testifies to this. Indeed, for this non-ETS sectors, the emission reduction targets are based on Member States' relative wealth, (measured by gross domestic product per capita) and so vary significantly from one State to the other.[93] In the new regulation, the same 'methodology to set the national reduction targets for the non-ETS sectors (. . .) should be continued until 2030 with efforts distributed on the basis of relative Gross Domestic Product per capita'.[94]

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[88] According to the Eurobarometer report on climate change, published in September 2017, around three-quarters of European Union (EU) citizens (74%) consider climate change to be a very serious problem and more than nine in ten (92%) see it as a serious problem.

[89] Wurzel and Connelly (2010) o.c., 9.

[90] M. Vandendriessche, A. Saz-Carranza and J-M. Glachant, 'The governance of the EU's Energy Union: bridging the gap?' Working Paper, European University Institute, 2017, Series/Number: EUI RSCAS; 2017/51.

[91] For example, the allowances to be auctioned are allocated, in part, to the least wealthy EU Member States as an additional source of revenue to help them invest in reducing the carbon intensity of their economies and adapting to climate change.

[92] Decision 406/2009/EC, o.c.

[93] The national emission targets for 2020 range from a 20% reduction by 2020 (from 2005 levels) for the richest Member States to a 20% increase for the least wealthy one, Bulgaria.

[94] Recital 2, Regulation (EU) 2018/842, o.c.

This methodology is also applied in other matters, for example for the promotion of renewable energies.[95]

4.2.3 The issue of the effectiveness of EU policy

The indicators are rather positive with regard to the achievement of the emission reduction goals for 2020.[96] Compared to 1990, the decrease of EU emissions is about 23 per cent. Thus, the EU has already surpassed its target of a reduction by 20 per cent that was set for 2020.

The EU's target for 2030, a reduction of GHG emissions by at least 40 per cent compared with 1990 levels, means that this downward trend should be maintained and even reinforced. However, it needs to be observed that 'EU emissions have been increasing since 2014 (on average 1 percent/year), reversing the long-term trend.'[97] The EU itself 'recognizes that it is not on track to meet its 2030 target with current policies and has adopted a large package of measures aimed at accelerating the reduction of GHG emissions in different areas'.[98] Only if the measures adopted by the EU in 2018 are fully implemented could a reduction of the Union's emissions by around 45 per cent occur between now and 2030.

It should also be mentioned that the EU set its 2030 objectives based on a 2°C temperature rise limit, which is not fully in line with the Paris Agreement. A claim has in fact been brought to the Court of First Instance precisely on the basis that the targets authorise emissions in quantities that significantly exceed the objective set by the Paris Agreement of a maximum increase in global average temperature well below 2°C, keeping in mind a more ambitious target of 1.5°C.[99] The applicants request the Court to annul some recent climate acts[100] and to order the defendants – the Council and the Parliament – to adopt measures leading to a reduction in greenhouse gas emissions by 2030 by 50–60 per cent of 1990 levels, or even more. For the moment, the action is dismissed as inadmissible but an appeal was brought by the appellants against this decision before the ECJ.[101]

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[95] The 2009/28/EC Renewable Energy Directive similarly sets out specific objectives for each Member State with the overall aim of making renewable energy sources account for 20% of EU energy by 2020. National reduction objectives set out in Annex I of the directive go from 10% for Malta to 49% for Sweden or 23% for France.

[96] Report from the Commission to the Council and the European Parliament, the Paris Climate Agreement: Taking stock of progress at Katowice COP, COM/2018/716 final.

[97] UNEP (2018) o.c., 14.

[98] Ibid., 13.

[99] Action brought on 23 May 2018 — *Carvalho and Others v Parliament and Council* (Case T-330/18) (2018/C 285/51).

[100] In particular, Art. 9, paragraph 2, of Directive 2003/87/EC, as last amended by Directive 2018/410, o.c.; Art. 4(2) of and Annex I to a Regulation 2018/842, o.c. and Art. 4 of Regulation 2018/841, o.c.

[101] Case C-565/19 P*: Appeal brought on 23 July 2019 by Armando Carvalho and Others against the order of the General Court (Second Chamber) delivered on 8 May 2019 in Case T-330/18: Carvalho and Others v Parliament and Council*, *OJ C* 372, 4.11.2019, 16–17.

5. CONCLUSION

In the course of improving the ambition and content of EU climate law that has almost continuously taken place since the beginning of this century, the pressure on the EU intensified in 2018 at COP 24 after the publication of the IPCC report on the consequences of an increase higher than 1.5°C. The EU has useful tools notably a binding EU-wide cap in ETS sectors and binding differentiated emission reduction commitments for Member States in non-ETS sectors. However, it is difficult to predict the effects of these 'hard law' approaches. Meanwhile, in the energy field, the governance approach established by the EU is reliant on a rather soft 'bottom-up' approach, dependent on the actions and policies of individual member states, over which the Commission has little control. As aptly expressed by Keay and Buchan, 'Governance of the Energy Union will, from 2020 on, be based on the "building blocks" of national climate, renewable and energy efficiency programmes (. . .) in the hope that they can be used to construct a Lego-like Energy Union out of separate elements'.[102] Similarly, in its strategic vision for a climate neutral economy, little explanation is given[103] about actions planned by the Commission nor what is envisaged by the Commission on energy, industry and research and innovation policies in the framework of the long-term strategy. However, climate neutrality is now, thanks to the Green Deal, clearly on the table and some new developments can be reasonably expected even if achieving climate neutrality will require overcoming serious challenges.[104]

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[102] M. Keay and D. Buchan, 'Europe's Energy Union: A Problem of Governance', *Oxford Institute for Energy studies,* November 2015.

[103] Q. Genard and J. Gaventa, Energy Union Governance and the European Strategic Vision for a Climate Neutral Economy: How Will They Work Together? (2018) *European Energy Journal* 8(2), 10–14.

[104] EU's ambition to become the first climate-neutral bloc in the world by 2050 is at the heart of the European Green Deal (Communication from the Commission, 11.12.2019 COM (2019) 640 final). To set out clearly this objective, the Commission proposed the first European 'Climate Law' (Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU)) 2018/1999, 4-3-2020, COM (2020) 80.

5. The EU's External Action after Lisbon: Competences, Policy Consistency and Participation in International Environmental Negotiations

Antonio Cardesa-Salzmann and Elisa Morgera

1. INTRODUCTION

EU environmental law is a body of law that emanates from the EU treaties and institutions. As much as this opening statement seems obvious, it is nevertheless important to keep in mind that, while instruments are formally adopted by the EU's institutions, their normative content and regulatory approaches are deeply interrelated with the domestic law of Member States and with international law. As Nicolas de Sadeleer points out, the intertwinement especially with international law has presently reached such an intensity that 'we no longer know whether EU law originates from international law or vice versa'.[1]

The initial ad hoc pieces of secondary environmental legislation from the 1970s, as well as the title on European Environmental Policy that the Single European Act introduced into the EEC Treaty, were the result of the internal market's economistic logic. In Charlotte Burns' and Neil Carter's words, 'key elites accepted the need for environmental regulation at European level as a way to ensure harmonization and prevent unfair competition' throughout the Single European Market.[2] Arguably, after several enlargements and amendments of EU primary law, this fundamental reality has not changed after the entry into force of the Lisbon Treaty in December 2009.

However, environmental impacts of ever more globalised economic activities are increasingly perceived as critical governance challenges at an international level. Therefore, the development of the environmental *acquis* was hardly to remain a confined, uniquely European phenomenon. Rather, from its very beginnings the European environmental policy has featured a clear external connection with international developments. Since the 1990s, moreover, the EU has become a key international actor in regional and global environmental negotiations and has even sought a role of global leadership in that field.[3] At present, in view of the provisions introduced by the Lisbon Treaty, the sustainable development of the Earth, seeking to accommodate economic growth with social and environmental protection, is among the key objectives of the EU's external action.[4] Over the years, the EU has more and more engaged in shaping and implementing international

[1] Nicolas De Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014) 186.

[2] Charlotte Burns and Neil Carter, 'Environmental Policy', in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 511–25, 514.

[3] Ibid., 519.

[4] Arts 3(5) and 21(2)(d), (f) and (g) TEU.

environmental regimes. Under the integration mandate enshrined in its primary law,[5] moreover, the EU has shaped a transversal environmental dimension across its external action at bilateral, inter-regional and global levels.[6] More recently, this external policy deliberately emphasises a strategy of global leadership in climate change policy to achieve a competitive, low-carbon economy in 2050.[7]

Therefore, in this chapter we will first sketch out the competence and legal bases for EU external environmental action in the light of the interpretation of the CJEU (Section 2). Against this backdrop, we will look into how the EU has implemented the mandate of integration of environmental concerns into all other policy areas, in order to ensure the consistency of its external environmental policy with other areas of EU external action, such as in particular the CCP (Section 3). Finally, we will assess how the EU participates in international environmental negotiations (Section 4). The chapter concludes with an evaluation of the EU's track record as a global actor in international environmental governance.

2. COMPETENCE AND LEGAL BASES FOR EU EXTERNAL ENVIRONMENTAL ACTION

2.1 Overview

Since its very inception, the European Environmental Policy has always had an outward, international dimension. Indeed, by July 1977, the then European Communities had already ratified two sets of international environmental treaties.[8] These comprised the 1976 Barcelona Convention for the protection of the Mediterranean Sea against pollution, together with the Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft, as well as the 1976 Berne Convention for the protection of the Rhine against chemical pollution, together with an additional agreement for acceding the International Commission for the Protection of the Rhine against pollution. As was the case for the adoption of environmental legislation by the Council at the time, the above international agreements were adopted on the basis of implicit powers drawn

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[5] Art. 11 TFEU.

[6] G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations. Beyond Multilateral Dimensions* (Hart 2012).

[7] Communication from the Commmission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, 'A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, COM(2018) 773 final (28 November 2018), 21–22.

[8] Council Decision 77/585/EEC of 25 July 1977 concluding the Convention for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of the pollution of the Mediterranean Sea by dumping from ships and aircraft [1977] OJ L 240/1; Council Decision 77/586/EEC of 25 July 1997 concluding the Convention for the protection of the Rhine against chemical pollution and an Additional Agreement to the Agreement, signed in Berne on 29 April 1963, concerning the International Commission for the Protection of the Rhine against pollution [1977] OJ L 240/37.

from article 235 EEC Treaty, the precursor to article 352 TFEU. For the conclusion of the Berne Convention and the additional agreement, in addition, the Council also relied on the ERTA case law, as the convention was complementary to the implementation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.[9] Indeed, in ERTA, the Court of Justice had held that:

> . . . each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.[10]

Therefore, notwithstanding article 235 EEC Treaty, the ERTA doctrine laid the ground for an implicit, exclusive competence of the European Communities to engage in external relations under the aforementioned conditions.[11] With the 1986 Single European Act, a title on the environment was introduced in the EEC Treaty, thus shaping a new community policy with its own legal bases, including one specifically for external action. Indeed, what has in the meantime become article 191(4) TFEU clearly states:

> Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned. [. . .]

The competence of the EU for external environmental policy has henceforth been footed on a predominantly explicit power. The option of resorting to implicit powers, however, remains open where necessary, as the TFEU now codifies the ERTA case law in EU primary law.[12] These far-reaching external powers of the EU match the overarching, ever more ambitious objectives that it has given itself over time also in the field of international relations. The EU has explicitly recognised international legal personality[13] and enunciated in its highest legal framework its ambition to contribute globally, amongst others, to 'the sustainable development of the Earth',[14] as well as explicitly included environmental protection among the objectives for the EU external action ('foster the sustainable economic, social and environmental development of developing countries' and to 'help to develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development').[15] This reflects a pre-existing external dimension of the EU environmental policy, which is expressed in the TFEU as 'promoting measures

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9 [1976] OJ L129/23.
10 Case 22/70, *Commission v Council* [1971] ECLI:EU:C:1971:32.
11 Ibid., para. 18.
12 Arts 3(2) and 216(1) TFEU.
13 Art. 47 TEU.
14 Art. 3(5) TEU.
15 Art. 21(2)(d) and (f) TEU. Note that these objectives are also applicable to the EU common foreign and security policy (art. 23 TEU). See Marín Durán and Morgera (2012) o.c. 29.

at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'.[16]

Over the years, the EU has indeed engaged extensively in multilateral environmental negotiations at global and regional levels, eventually concluding around 50 multilateral environmental agreements (MEAs).[17] This is not to say, however, that a series of legal issues has not risen over the past decades regarding the scope and inherent limitations to the EU's external powers in the field of environmental protection, especially after the revision of the power conferring provisions in EU primary law.[18] In particular, the last major revision of the EU Treaties through the Lisbon Treaty has introduced a series of novelties with regards to the conferral of competences to the EU, as well as the exercise of external powers by the EU, that have impacted also the conduct of EU external environmental policy.[19] Indeed, a significant portion of the EU's competences in the field of environmental protection are shared with the Member States.[20] This power sharing arrangement is mirrored in the field of external action, where both the EU and the Member States have each the power for external environmental policy 'within their respective sphere of competence'.[21] Yet, a number of issue areas remain with respect, in particular, to (1) the relationship between the shared, explicit external powers of the EU in the field of the environmental policy[22] with the explicit exclusive competence derived from the Common Commercial Policy;[23] (2) the enduring significance of the implicit, exclusive competence based on the ERTA doctrine; and (3) the relevance of the duty of sincere cooperation under article 4(3) TEU in the conduct of EU external environmental policy as a matter of shared competence with Member States.[24]

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[16] Art. 191(1) TFEU, the emphasis on climate change was added by the Lisbon Treaty. See Marín Durán and Morgera, ibid.

[17] See <http://ec.europa.eu/environment/international_issues/agreements_en.htm> (accessed 4 April 2019).

[18] Piet Eeckhout, 'Express and Implied Competences under the TFEU', *EU External Relations Law* (Oxford University Press 2011).

[19] Dries Van Eeckhoutte and Tim Corthaut, 'The Participation of the EU and Its Member States in Multilateral Environmental Negotiations Post Lisbon' (2017) *Yearbook of European Law* 36, 749–809.

[20] Art. 4(2)(e) TFEU.

[21] Art. 191(4) TFEU.

[22] Ibid.

[23] Arts 3(1)(e) and 207 TFEU. Together with the CCP, the conservation of marine biological resources under the Common Fisheries Policy (CFP) is another area of exclusive competence of the EU (art. 3(1)(d) TFEU), with evident connections to the EU's external environmental policy. On that basis, the EU has over time concluded a significant number of bilateral and multilateral agreements, including bilateral Sustainable Fisheries Partnership Agreements, Regional Fisheries Management Organisations (RFMOs), the UN Convention on the Law of the Sea, as well as different instruments adopted under the aegis of the UN Organisation for Food and Agriculture (FAO), of which the EU is a member. See David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (Oxford University Press 2016) 126; Hubert Zimmermann, 'Balancing Sustainability and Commerce in International Negotiation: The EU and Its Fisheries Partnership Agreements' (2017) *Journal of European Public Policy* 24(1), 135–55.

[24] Suzanne Kingston, Veerle Heyvaert and Aleksandra Cavoski, *European Environmental Law* (Cambridge University Press 2017) 22–5.

2.2 Shared, Explicit External Powers of Environmental Policy and Exclusive, Explicit Powers of the CCP

Most international environmental treaties, to which the EU is a party, feature policies and regulatory approaches that foresee restrictions and supervision of international trade and/or transboundary movements of controlled commodities. This is the case, for instance, of the 1973 Convention on International Trade in Endangered Species of Fauna and Flora (CITES); the 1987 Montreal Protocol on Ozone Depleting Substances; the 1989 Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal; the 1998 Rotterdam Convention on Hazardous Chemicals, the 2000 Cartagena Protocol on Biosafety; the 2001 Stockholm Convention on Persistent Organic Pollutants; or the 2013 Minamata Convention on Mercury. The trade control measures envisaged in these treaties are crucial for fulfilling the regimes' underlying objectives of environmental protection. From the perspective of the legal basis for their ratification by the EU and its Member States, however, the question arose whether these treaties had to be concluded as 'mixed agreements' under article 191(4) TFEU or whether the EU's (exclusive) external competence under the CCP was also relevant, given the significant external trade component of those regimes.

As so often with EU competences and the choice of legal bases, the answer to this question is not clear cut and turns out to be quite casuistic. In accordance with the Court of Justice's general case law regarding the choice between (potentially) concurring legal bases initiated with the *Titanium Dioxide* case,[25] the pertinence of either legal basis (or indeed both) depends very significantly on objective factors amenable to judicial review, such as the aim and the actual regulatory content of the international treaty that the EU and/or the Member States intend to conclude.[26] As regards in particular the above-mentioned set of international treaties for environmental protection, which rely heavily on trade-related measures, the Court of Justice considered article 192 TFEU to be the adequate legal basis for the conclusion of the Cartagena Protocol on Biosafety,[27] whereas it ruled that the conclusion of the Rotterdam Convention had to be effectuated on the concurrent basis of articles 192 and 207 TFEU.[28]

In the former case, the Court of Justice concluded from the examination of the context, aim and content of the Cartagena Protocol 'that its main purpose or component is the protection of biological diversity against the harmful effects which could result from activities that involve dealing with LMOs, in particular from their transboundary movement'.[29] With respect to the latter treaty, however, the Court held that in contrast with the Cartagena Protocol, in the context of which 'trading in [living modified organisms] is . . . merely one of the aspects governed by that protocol', the trade in the hazardous chemical substances included within the scope of application of the Rotterdam Convention 'constitutes the element upon which the application of the [prior informed

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25 Case C-300/89, *Commission v Council* [1991] ECLI:EU:C:1991:244.
26 Case C-269/97, *Commission v Council* [2000] ECLI:EU:C:2000:183.
27 Opinion 2/00 [2001] ECLI:EU:C:2001:664.
28 Case C-94/03, *Commission v Council* [2006] ECLI:EU:C:2006:2.
29 Opinion 2/00, para. 34.

consent] procedure is conditional'.[30] The Court concluded this line of reasoning by stating that:

> [a]s defined in the Convention, that [prior informed consent] procedure also involves a number of measures that must be classified as measures 'governing' or 'regulating' international trade in the products concerned and therefore fall within the scope of the common commercial policy.[31]

As we shall see in subsequent sections, the above considerations are crucially relevant for determining not only the decision-making procedure in order to conclude international treaties in the field of environmental policy on behalf of the EU, but also for the role of the EU's delegation within the relevant forums of international environmental governance, in which the implementation of those treaties is shaped.[32]

2.3 The Enduring Significance of the ERTA Doctrine for EU External Environmental Policy

The question around the significance of the ERTA doctrine in the context of the EU's external environmental policy was at the heart of the more recent *Green Energy* case.[33] In that case, the Italian *Consiglio di Stato* requested a preliminary ruling amongst other questions on the compatibility with EU law of a bilateral agreement concluded between Italy and Switzerland, on the basis of which Italian domestic legislation exempted green energy imported from the Switzerland from the green certificates scheme adopted pursuant to article 5 of the Renewable Energy Directive (Directive 2001/77/EC).[34] To the extent that this piece of EU legislation had vastly harmonised the regulation of the renewable energy sector across Member States, the issue arose about the extent to which Member States were able of entering individually into international commitments under the ERTA doctrine and article 3(2) TFEU. The Court of Justice held that the bilateral agreement '[was] liable to alter the scope of the common rules contained in Article 5'[35] of the Renewable Energy Directive, hence ruling that, '[o]n a proper construction of the [TFEU], having regard to the provisions of Directive 2001/77/EC . . ., the [EU] enjoys exclusive external competence precluding a provision of national law, such as that at issue in the main proceedings'.[36]

It is important to bear in mind, however, that the degree of regulatory harmonisation

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30 Case C-94/03, para. 45.
31 Ibid., para. 46.
32 Art. 218 TFEU. See section 4 below.
33 Case C-66/13, *Green Energy Network SpA v Autorità per l'energia elettrica e il gas* [2014] ECLI:EU:C:2014:2399.
34 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L 283/33. In the meantime, this Directive has been repealed and substituted by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.
35 Case C-66/13, para. 49.
36 Ibid., para. 76.

that is required in order for the implicit, exclusive external competence under the ERTA doctrine to arise is qualified. As can be inferred from the *Green Energy* case, the ERTA effect kicks in whenever international obligations entered into individually by a Member State with a third country can be held liable for altering the operation of the common rules established in a given sector for the internal market. It does not come into effect, however, if the degree of regulatory harmonisation is only partial. This was found by the Court of Justice in Opinion 2/00 when it rejected the Commission's argument that the EU legislation related to genetically modified organisms at the time[37] provided implicit, exclusive competence to the EU in order to conclude the Cartagena Protocol. In that occasion, the Court held that 'the harmonisation achieved at Community level in the Protocol's field of application covers in any event only a very small part of such a field'.[38]

van Eeckhoutte and Courthaut argue that Opinion 2/00 has led to a marginalisation of article 191(4) TFEU as a legal basis for the conclusion of international environmental agreements, as opposed to article 192(1) or, the case being, also 192(2) TFEU in combination with article 3(2) TFEU (ERTA doctrine).[39] Moreover, the increasing harmonisation of legislation across the EU in the fields of energy and climate change on the basis of what has now become article 194 TFEU, has also expanded the ambit of the implied, exclusive competence of the EU under the ERTA doctrine.[40]

2.4 The EU's External Environmental Powers and the Autonomy of Member States

With the exception of possible interactions with the aforementioned legal bases that provide either explicit or implicit exclusive external competence to the EU, its external competence in matters related to environmental protection is shared with Member States under article 191(4) TFEU. As the closing sentence of this latter provision states, '[t]he previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. Member States do therefore enjoy a certain degree of autonomy to pursue their own angles within their respective external environmental policies. This autonomy, nevertheless, finds an evident limitation in the principles of institutional balance and the duty of sincere cooperation, [41] which have now been enshrined un EU primary law under article 4(3) TEU.

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[37] Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms [1990] OJ L 117/1; Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms [1990] OJ L 117/15; and Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106/1.

[38] Opinion 2/00, para. 46.

[39] Van Eeckhoutte and Corthaut (2017) o.c. 759–60; see more generally on the post-Lisbon development of the ERTA case law, Merijn Chamon, 'Implied Exclusive Powers in the ECJ's Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine' (2018) *Common Market Law Review* 55(4), 1101–41.

[40] Hans Vedder, 'The Formalities and Substance of EU External Environmental Competence: Stuck between Climate Change and Competitiveness' in Elisa Morgera (ed.), *The External Environmental Policy of the European Union* (Cambridge University Press 2012).

[41] In the *MOX Plant* case, the Court of Justice held Ireland liable for a breach of its duty of loyal cooperation under EU primary law, for submitting its dispute with the United Kingdom over

In the *PFOS* (Perfluorooctane sulfonate) judgment,[42] the Grand Chamber of the Court of Justice ruled that Sweden had breached its duty of sincere cooperation with the EU institutions and other Member States in the context of multilateral environmental negotiations in the Conference of the Parties (COP) of the Stockholm Convention on Persistent Organic Pollutants. As Marise Cremona highlighted, the case underscored the constraints imposed by the duty of loyal cooperation on Member States to introduce 'more stringent protective measures' *externally* by way of unilateral international action when the EU and Member States act in multilateral environmental fora under a mixed agreement on the basis of shared competence.[43] Notwithstanding the fact that Sweden's unilateral proposal for a more stringent protective measure under the Stockholm Convention on Persistent Organic Pollutants preceded an EU proposal on the matter and regardless of Sweden's efforts through Union mechanisms to achieve a joint proposal, the Court still held that Sweden had 'dissociated itself' from a common strategy that was being formulated within the Council and that its unilateral proposal under the MEA could have 'had potential legal consequences for the Union as a party' to that MEA that 'would have had to be reflected in Union legislation,' as well as undermining the unity of the Union's external representation as a party to the MEA.[44]

3. ENVIRONMENTAL INTEGRATION IN THE EU'S EXTERNAL RELATIONS

Article 11 TFEU obliges the EU political institutions to integrate environmental protection requirements into all Union policies and activities, which include external ones. This can also be derived from the general requirements for EU external action: articles 3(5) TEU, which provides that 'in its relations with the wider world' the EU 'shall contribute to . . . *the sustainable development of the Earth*, . . . *the strict observance and the development of international law*' and article 21(2) TEU, which includes among the objectives, values and principles for all EU external action 'help to develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development';[45] 'foster the sustainable economic, social and *environmental* development of developing countries, with the primary aim of eradicating poverty'[46] and 'assist populations, countries and regions confronting natural or man-made disasters'.[47] These objectives apply to all fields of EU

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the radioactive pollution of the Irish Sea from the Sellafield Plant to the International Tribunal on the Law of the Sea under the UN Convention on the Law of the Sea. The Court of Justice held that the resort to these international adjudicative procedures did not respect its exclusive competence under the EURATOM Treaty. See Case C-459/03, *Commission v Ireland* [2006] ECLI:EU:C:2006:345, para. 169.

42 Case C-246/07, *Commission v Sweden* [2010] ECLI:EU:C:2010:203.

43 Marise Cremona, 'Coherence and EU External Environmental Policy', in Morgera (ed.) (2012) o.c. 33–54.

44 Case C-246/07, paras 92–104. Cremona (2012) o.c. 41–5.

45 Art. 21(2)(f) TEU (emphasis by authors)

46 Art. 21(2)(d) TEU (emphasis by authors).

47 Art. 21(2)(g) TEU.

external action (common foreign and security policy, development, trade and cooperation policies), as well as in the external aspects of the agricultural, fisheries, transport and energy policies.[48] The EU is furthermore called upon to promote 'multilateral solutions to common problems' as well as 'an international system based on stronger multilateral cooperation and good global governance',[49] which can be read as including the development of international environmental law and governance.[50] While all these provisions do not attribute priority to environmental requirements, they entail a duty (art. 11 TFEU) and an objective to consider environmental concerns as a matter of policy integration, the effect of which needs to be assessed on a case-by-case basis due to the ample discretion left to the EU legislative and executive 'with which the EU judiciary is unlikely to interfere.'[51]

The relevance of these provisions can be discussed in particular with reference to the EU external trade policy. Since 2006, the EU external trade policy has developed more systematic tools for environmental integration due to a combination of factors: the limited results of the EU's efforts to address environmental concerns at the multilateral level (notably under the WTO) and the opportunity to use the EU's market and economic power to 'export' its own environmental standards through unilateral and bilateral approaches to trade cooperation.[52] Thus, negotiations on a new wave of 'competitiveness-driven' Free Trade Agreements (FTAs) was launched, which included the incorporation of 'cooperative provisions in areas related to labour standards and environmental protection'.[53] These agreements have included clauses on climate change, biodiversity, and other global MEAs that are related to trade[54] but also support the EU's position in multilateral environmental negotiations,[55] mainly fostering a cooperative approach in a conscious effort to distance the EU approach from that of US bilateral trade agreements.[56] In parallel, the EU has relied on prior assessments (Sustainability Impact Assessments for trade agreements, and Strategic Environmental Assessments /Environmental Impact Assessments for its external funding) to support a more systematic and transparent balancing between environmental and other objectives of the EU's external policies.[57]

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48 Art. 21(3) TEU.

49 Art. 21(2)(h) TEU.

50 Marín Durán and Morgera (2012) o.c. 43.

51 Ibid.

52 Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) *Common Market Law Review* 41(2), 553–73, 557; Marín Durán and Morgera (2012) o.c. xx.

53 European Commission, 'Working paper on global Europe – competing in the world. A contribution to the EU's growth and job strategy SEC (2006) 1230, endorsed by the Council, 'Conclusions on Global Europe – competing in the world', Council Doc. 14799/06 (13 November 2006), 12.

54 Rok Žvelc, 'Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements' in Morgera (ed.) (2012) o.c. 174–203.

55 Marín Durán and Morgera (2012) o.c..

56 Sikina Jinnah and Elisa Morgera, 'Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda' (2013) *Review of European, Comparative & International Environmental Law* 22(3), 324–39; E Morgera, 'Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) *European Journal of International Law* 23(3), 743–67.

57 Marín Durán and Morgera (2012) o.c. 234–53 and 173–90.

Compliance with MEAs is being more systematically supported as part of the trade and sustainable development chapters (through 'best-endeavours' commitments, cooperation measures, and specific institutional mechanisms), but not as a fully-enforceable legal obligation. These chapters establish a specialised Committee (or Sub-committee) to oversee implementation, as well as special procedures for settling trade and environment disputes, requiring the involvement of environmental experts and also allowing for advice to be sought from MEA Secretariats. As with other EU agreements, they tend to favour decision-making by consensus and dispute settlement through consultations (though arbitration is also available).[58] These agreements, in addition, seek to allow for public participation more systematically, including specific procedural guarantees or adjustments to the institutional structure of the bilateral/inter-regional partnership or association.[59]

The actual effects of EU bilateral efforts to support multilateralism are quite uneven in different areas of environmental cooperation, and remain to be further studied, including from an international law perspective[60] and from the viewpoint of their interface with human rights protection. On the latter, it should be underscored that the protection of human rights is another goal of EU external policies,[61] and that environmental integration is also called under the EU Charter of Fundamental Rights,[62] to which the Treaty of Lisbon recognized the legal value of EU treaty law.[63]

This increasing degree of integration of social and environmental protection concerns into the formulation of the EU's external action, especially in the context of the CCP, has once again spurred anxiety by some Member States about the fact that the EU might be pursuing external environmental policy goals on the basis of an exclusive competence that has not been granted under articles 191(4) and 192(1) TFEU. This is particularly the case of the aforementioned new-generation FTAs, which include very detailed sustainable development chapters.[64]

In its Opinion of 16 May 2017, the Court had to address a series of observations by the Council and the Member States in order to clarify whether chapter 13 (on sustainable development) of the EU-Singapore FTA did fall within the exclusive competence of the EU under article 207 TFEU, or whether it would fall under the shared competence under article 191(4) TFEU.[65] The Court relied as usual on a systematic interpretation of articles

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[58] By way of example, see EU-Singapore Free Trade Agreement (signed 19 October 2018, in force 21 November 2019), chapter 12, arts 12.16 and 12.17. See also chapters 14 and 15.

[59] See e.g. EU-Singapore Free Trade Agreement, art. 12.15 (4) and (5).

[60] Elisa Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' (2014) *Cambridge Yearbook of European Legal Studies* 16, 109–42.

[61] Elisa Morgera, 'Protecting Environmental Rights through the Bilateral Agreements of the European Union: Mapping the Field' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods : Normative Perspectives on Human Rights, Culture and Nature* (Hart 2014) 421–41.

[62] Elisa Morgera and Gracia Marín Durán, 'Article 37 – Environmental Protection' in Steve Peers and others (eds), The EU Charter of Fundamental Rights: A Commentary (2nd edn, Hart Publishing forthcoming).

[63] Art 6(1) TEU.

[64] See EU-Singapore Free Trade Agreement, chapter 12.

[65] Opinion 2/15, EU-Singapore Free Trade Agreement [2017] ECLI:EU:C:2017:376, para. 22.

21 TEU, 9, 11, 205 and 207 TFEU in order to crucially state that the objective of sustainable development 'forms an integral part of the common commercial policy'.[66] According to the Court, the integration mandate means that the concerns for social protection of workers and for environmental protection have to be built into the objectives of the CCP and that:

> it would . . . not be coherent to hold that the provisions liberalising trade between the European Union and a third State fall within the common commercial policy and that those which are designed to ensure that the requirements of sustainable development are met when that liberalisation of trade takes place fall outside it.[67]

At the same time, the Court held the view that the sustainable development chapter of the FTA itself does not regulate the social protection of workers and environmental protection, but rather ensured that the conduct of trade between the signatory parties is conducted in such a way as to respect and comply with international obligations signed up to by both parties under other international agreements in those fields.[68] This conclusion, however, has been questioned in the literature, as some of the provisions of the FTA sustainable development chapters aim to ensure respect for international environmental standards '*per se* and across each party's territory, even where no trade occurs between them in the good or service concerned.'[69] Nevertheless, according to the Court, the inclusion of sustainable development chapters of the likes of that in the EU-Singapore FTA does not call into question the exclusive competence of the EU under the CCP and article 207 TFEU.

Finally, it is noteworthy that the integration of sustainable development and, more specifically, of environmental considerations into the EU's external trade policy has consolidated and increased in ambition over time. The 2016 Global Strategy, for instance, identified a new priority area with regard to sustainable development in the marine environment, by making reference to the 'universalisation and implementation of the UN Convention of the Law of the Sea', as well as the promotion of 'the conservation and sustainable use of marine resources and biological diversity and the growth of the blue economy by working to fill legal gaps and enhancing ocean knowledge and awareness', as well as to global maritime security as a way of ensuring trading routes and access to natural resources.[70]

4. THE PARTICIPATION OF THE EU IN INTERNATIONAL ENVIRONMENTAL NEGOTIATIONS

Given the predominantly 'mixed' or 'shared' nature of the external powers of the EU in the field of environmental policy, the representation of the EU and the Member States

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66 Ibid., para. 147.
67 Ibid., para. 163.
68 Ibid., paras 155–156.
69 Gracia Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues', *Common Market Law Review*, forth 2020.
70 Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy (June 2016), 41. At <https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf> (accessed 5 April 2019).

in international environmental negotiations has been quite a complex matter. The lack of consistency and coordination between the respective delegations from the Member States and the EU itself has often hindered them from operating in those international forums in a strong and consistent way, as a global actor. The clearest example of the failure of the EU and its Member States to act in a consistent and coordinated way was at the 15th Conference of the Parties to the UN Convention on Climate Change, held in Copenhagen in December 2009, shortly after the entry into force of the Lisbon Treaty. On that occasion, the inability of Member States' and the EU's delegations to coordinate effectively led to their marginalisation within the negotiating process and cast a significant shadow over their ability to exert 'leadership' in international climate change negotiations.[71] Arguably, the EU and the Member States have learned from the somewhat traumatic experience from December 2009 and have performed much better in the following stages of the climate change negotiations.[72] This evolution is, however, the result of a learning process that has required finding a pragmatic interpretation of the institutional and procedural novelties that the Lisbon Treaty offers for EU external action in a context of 'mixity',[73] as is the case in international multilateral environmental negotiations.

Indeed, the latest major revision of EU primary law operated through the Lisbon Treaty has tried to address the aforementioned issues of EU external representation, seeking to improve coordination and increase the visibility of the EU in global forums.[74] While articles 191(4) and 192(1) TFEU provide the substantive legal basis for EU external environmental policy, as discussed in the previous section, article 218 TFEU lays down the procedural legal basis.[75] According to article 218 TFEU, the Commission holds the initiative for submitting to the Council recommendations for the adoption of a decision authorising the opening of negotiations and the nomination of a Union negotiator or head of the Union's negotiating team.[76] However, the actual decisions on authorising the opening of negotiations, the adopting of negotiating directives and, eventually, authorising the agreements' signature and concluding it, all belong to the remit of the Council.[77] The default decision-making procedure foreseen in this context is qualified majority voting, unless the agreement to be concluded covers a field for which unanimity is required for the adoption of an EU act.[78] Any decision of concluding the agreement, nevertheless,

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[71] Sebastian Oberthür, 'The European Union's Performance in the International Climate Change Regime' (2011) *Journal of European Integration* 33(6), 667–82.

[72] Claire Dupont, Sebastian Oberthür and Katja Biedenkopf, 'Climate Change: Adapting to Evolving Internal and External Dynamics', *European Union External Environmental Policy* (Springer International Publishing 2018) 105–24; Sebastian Oberthür and Lisanne Groen, 'Explaining Goal Achievement in International Negotiations: The EU and the Paris Agreement on Climate Change' (2018) *Journal of European Public Policy* 25(5), 708–27.

[73] Alan Dashwood, 'Mixity in the Era of the Treaty of Lisbon' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Hart 2010) 351–66.

[74] Art. 221 TFEU.

[75] Tom Delreux, *The EU as International Environmental Negotiator* (Routledge 2011) 18–23.

[76] Art. 218(3) TFEU.

[77] Art. 218(2) and (4)–(6) TFEU.

[78] Art. 218(8) TFEU. Unanimity is required for decision-making on any of the areas covered by art. 192(2) TFEU.

crucially requires the consent of the European Parliament for any 'agreements covering fields to which . . . the ordinary legislative procedure applies',[79] which is overwhelmingly the case of the legal bases of the EU's environmental policy.[80] Where the special legislative procedure applies and the European Parliament's consent is not required,[81] the decision for concluding an international agreement only requires the Parliament's consultation.[82]

In the case of 'mixed agreements' allowing the joint participation of the EU and its Member States,[83] which is the vast majority of MEAs, the Member States take part in the negotiation process with the European Commission, as well as concluding and ratifying the agreement in question in accordance with each Member State's constitutional requirements. The EU's participation has been accommodated, as a 'regional economic integration organisation' (REIO), through the so-called REIO clauses.[84] However, even after the entry into force of the Lisbon Treaty, EU primary law only deals with the external representation of the EU in areas of its competence[85] and therefore addresses this 'mixity'[86] of the EU's participation in international multilateral environmental forums in quite a minimalistic way: the Council, on a proposal from the Commission, establishes the positions to be adopted on the Union's behalf 'in a body set up by an agreement'.[87] The Council may also authorise the EU's negotiator or negotiating team to approve on behalf of the EU any modifications to the agreement adopted following a simplified procedure or a decision of a relevant treaty body.[88] Article 218 TFEU, however, does not provide any explicit guidance as to the coordination with Member State delegations in such contexts of 'mixity'.

It is important to bear in mind, moreover, that article 218 TFEU only covers international negotiations leading to the adoption of international legally binding instruments. Crucially, negotiations not aimed at adopting such a legally binding instrument, as is usually the case within treaty-bodies of MEAs, such as the Conference of the Parties (or indeed any of their subsidiary body) are not covered by the procedures set out in article 218 TFEU. Rather, as van Eeckhoutte and Corthaut argue, these aspects of the conduct of international environmental negotiations on behalf of the EU for which the EU Treaties provide little guidance ought to be addressed from the perspective of general principles, such as the principle of inter-institutional balance[89] and the principle of sincere cooperation,[90] with the latter being interpreted by the Court as entailing enforceable

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79 Art. 218(6)(a)(v) TFEU.
80 Arts 192(1) and 194 TFEU.
81 E.g. in the areas covered by art. 192(2) TFEU.
82 Art. 218(6)(b) TFEU.
83 Note that 'mixed agreements' are not explicitly recognised in the TFEU and no specific procedure is thus found for their conclusion.
84 See generally Ludwig Krämer, 'Regional Integration Organizations: The European Union as an Example' in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 853–76.
85 Van Eeckhoutte and Corthaut (2007) o.c. 807.
86 Dashwood (2010) o.c.
87 Art. 218(9) TFEU.
88 Art. 218(7) TFEU.
89 Case C-409/13 *Council v Commission* [2015] ECLI:EU:C:2015:217, para. 64.
90 Van Eeckhoutte and Corthaut (2017) o.c. 765.

substantive and procedural obligations with a view to protecting the unity in the international representation of the EU.[91]

Post-Lisbon, in general, the Commission is explicitly mandated to represent the Union externally,[92] without reference to the role for the rotating Presidency of the Council, which had in practice spoken for the Union and its Member States in MEA fora both to allow the Commission, informally, to draw on qualified experts from Member States and to represent Member States' political and financial interest in EU international environmental policy-making. Member States' interests in MEA negotiations have to do with the opportunity to introduce more stringent environmental protection measures than EU minimum standards,[93] and to have a voice in matters of parallel competence,[94] such as finance and technology transfer, that are linked to discussions on the common but differentiated responsibilities of industrialised and developing countries under MEAs. While in the immediate aftermath of the entry into force of the Lisbon Treaty, the Commission and Member States disagreed on whether the Commission had in effect been authorised to negotiate without the Presidency in MEA fora,[95] the practice of joint representation by the Commission and the Presidency, with a team approach to allow experts from different Member States to lead particular subject-specific negotiations, has continued.

In 2011, the Council endorsed the *General Arrangements for EU Statements in multilateral organisations*[96] that provide some guidance, even if they are deliberately vague and avoid addressing any of the most controversial aspects of the EU's representation in those forums.[97] The overarching principle under which the General Arrangements are set out is that, 'the preparation of statements relating to the sensitive area of competences of the EU and its Member States should remain internal and consensual'.[98] Accordingly, under the General Arrangements, Member States' and the EU's delegations commit to coordinating their action to the fullest extent possible, ensuring the fullest possible transparency through adequate and timely prior consultation. Member States, moreover, decide on a case-by-case basis whether to agree on a common representation, and whether it is to be

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[91] Marín Durán and Morgera (2012) o.c.; Case C-266/03, *Commission v Luxembourg* [2005] ECLI:EU:C:2005:341, para. 60 and Case C-433/03, *Commission v Germany* [2005] ECLI:EU:C:2005:462, para. 66; Case C-246/07, para. 104. See Christophe Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Hart 2010) 87–115. As regards the relevance of the principle of institutional balance in this context, see also Case C-425/13, *Commission v Council* [2015] ECLI:EU:C:2015:483, paras 90–1.

[92] Arts 17(1) and 27(2) TEU.

[93] Under art. 193 TFEU: Dashwood (2010) o.c. 364. But see case C-246/07 discussed above.

[94] Art. 4(3)–(4) TFEU.

[95] Matthias Buck, 'The EU's Representation in Multilateral Environmental Negotiations after Lisbon' in Morgera (ed.) (2012) o.c. 76–95; Jolyon Thomson, 'A Member State's Perspective on the Post-Lisbon Framework for the EU's Representation in Multilateral Environmental Negotiations' in Morgera (ed.), ibid., 96–112.

[96] EU Statements in multilateral organisations – General Arrangements, *Council Doc.* 15901/11 (24 October 2011).

[97] Van Eeckhoutte and Corthaut (2017) o.c. 767.

[98] EU Statements in multilateral organisations – General Arrangements, para. 2.

exerted by an EU actor or a Member State (e.g. the Member State holding the Presidency of the Council) on their behalf.[99]

5. CONCLUDING REMARKS

In general terms, EU environmental law and governance may be seen as the regulatory and institutional reaction of the political and legal systems to the negative environmental externalities of the operation of the economic system. In so doing, it contributes to managing and mitigating the impact of economic activity on the environment, while promoting the conditions for economic development in the EU. Therefore, as a global actor, the EU promotes a specific understanding of sustainable development as normative paradigm of global socio-environmental governance. Its understanding of sustainability advocates an 'ecological modernization' towards a low-carbon economy, by contrast to alternative, more radical understandings of this concept that question present neo-liberal modes of capitalism and reproach it for past and present socio-environmental equity deficits.[100] Therefore, the EU has a vested interest in ensuring over time its relevance in international environmental governance.[101] It does so to globally uphold specific cultural values, rooted in liberal democracy and free-market economy, on which the Union's and its Member States' societies' reproduction are based. Grounded on economic power, as well as scientific and technological expertise, the EU seeks global environmental leadership in a growingly multipolar world through performance in intergovernmental gatherings and by driving up standards via global regulatory competition.[102]

The evolution of EU primary law, especially that of the provisions of the EU and FEU Treaties regarding the EU's external action that have been discussed in the previous sections have to be seen in that general context. As the paradigmatic example of the failure of the EU and its Member States in the 2009 Climate Change Summit in Copenhagen shows, the EU faces a series of challenges in order to live up to its ambition to become a global environmental leader.

Some of these challenges are, indeed, structural in nature. The complex power-sharing arrangements between the EU and its Member States in the field of environmental protection clearly add to the complexity of EU external environmental action and demand substantial efforts of coordination in order to ensure the required consistency of action. And while the relevant EU and FEU Treaty provisions cannot possibly address all issue areas regarding the coordination and consistency of the EU's external representation, pragmatic ad hoc solutions have been found in practice, allowing for more consistent performance in international environmental negotiations over the past years.[103] In this context, the Court of Justice has played a crucial role of constitutional arbitrator,[104] facilitating on the one hand the articulation of bespoke, pragmatic solutions to the

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99 Ibid., para. 3.
100 Burns and Carter (2012) o.c.
101 See 2016 EU Global Strategy (n 70).
102 Burns and Carter (2012) o.c.
103 Van Eeckhoutte and Corthaut (2017) o.c. 809.
104 Ibid., 807.

complexities of the EU's external representation, whilst ensuring on the other hand, their consistency with the principle of inter-institutional balance, protecting in particular the prerrogatives and autonomy of the Commission vis-à-vis the Council in international environmental negotiations,[105] and the principle of loyal cooperation of Member States with the European Institutions.[106]

Although not discussed in this chapter, internal political factors and internal EU policy and legal developments are also very significant to understanding EU external action related to the environment and to assess the EU's capacity to further its environmental policy ambitions in international relations. On the one hand, the economic and financial crisis that has hit the EU in its recent past, the lowering of development aid commitments, Brexit and an uncertain economic outlook in the immediate future contribute to destabilise the international environmental ambitions of the EU and undermine its credibility as a global environmental leader.[107] On the other hand, EU external action related to the environment also interacts with, and is influenced by, developments in the EU's internal environmental policy and its experimentation with internal environmental instruments with extraterritorial implications.[108]

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[105] Case C-425/13 [2015], paras 90–91.

[106] Case C-246/07 [2010].

[107] Charlotte Burns and Paul Tobin, 'The Limits of Ambitious Environmental Policy in Times of Crisis', *European Union External Environmental Policy* (Springer International Publishing 2018) 319–36, 328 and 330.

[108] E.g. Hans Vedder, 'Diplomacy by Directive: An Analysis of the International Context of the Emissions Trading Directive' in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders* (Oxford, Hard Publishing, 2011) 105–24; K Kulovesi, E Morgera, and M Muñoz, 'Environmental Integration and Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) *Common Market Law Review* 48(3), 829–91; Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) *American Journal of Comparative Law* 62(1), 87–126.

The Legal Significance of Trade and Sustainability Chapters in EU Free Trade Agreements

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Contents

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Abstract

The article recalls the evolution and content of Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements. They usually contain commitments of both parties to exercise their domestic law without undermining labour and environmental standards. Moreover, parties commit to respect their international obligations in the field and create joint bodies with participation of civil society. Comparing the panel reports on South Korea (2021) and on Ukraine (2020), the authors argue that their practical effect does not depend so much on their legal status, but more on the political will to implement them. The article also tackles the question of whether a breach of TSD commitments by one party can justify trade sanctions by the other. While TSD dispute settlement provisions create a special mechanism for ordinary breaches, recourse to trade sanctions is possible under Article 60 of the Vienna Convention on the Law of Treaties in case of material breaches on core labour rights or important environmental obligations. Finally, the authors sketch the policy change of the European Commission of 2022, according to which the Paris Agreement on Climate Change should become an essential element of EU FTAs, so that also breaches of that instrument may be enforced by trade sanctions.

Keywords: EU Free Trade Agreements, Trade and Sustainability Chapters, Labour and Environmental Standards, EU-South Korea Panel Report, EU-Ukraine Panel Report, Enforcement, Vienna Convention on the Law of Treaties, State Responsibility, Trade Sanctions

A. Introduction

When the World Trade Organization was established in 1994, its members recalled in the first recital of the Marrakesh Agreement that their trade and economic relations should be conducted with a view of raising standards of living, ensuring full employment and increasing trade, "while allowing the optimal use of the world's resources in accordance with the objective of sustainable development" (…). Until now, however, the WTO has been unable to clarify how the liberalisation of trade could deliver also more sustainable development. Instead, a number of WTO States tackled the issue in their bilateral free trade agreements. In this respect, European practice deserves particular attention.

One of the Treaty of Lisbon's major innovations in 2009 was the proclamation of horizontal foreign policy objectives for the European Union (EU). According to Article 3(5) TEU, the Union shall contribute to (…) "the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights". Article 21(1) TEU enumerates the goals of fostering "the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty" (lit. d) and helping "develop international measures to preserve and improve the quality of the environment and the sustainable management of global resources, in order to ensure sustainable development (…)" (lit. f). Moreover, Article 207(1), second sentence, TFEU created a new link between these objectives and the EU's powerful trade policy by stating that "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

One result of this linkage is the EU's practice of the last decade to include provisions on trade and sustainable development in its free trade agreements (TSD chapters). While the inclusion of such TSD chapters has been generally welcome as a useful policy contribution to balance economic interests with non-economic values, their precise legal significance remains controversial: do the TSD chapters contain legal commitments that are enforceable?

In this article, we will first briefly recall the historic evolution and major content of the TSD chapters until 2021 (B.) and the litigation practice to date (C.). In Section D., we will then examine the possibility to counter the breach of TSD commitments by one party with trade sanctions by the other party. A short presentation of the 2022 reform with the most recent practice up to 2024 follows in Section E. before concluding (F.).

B. Evolution and Content of TSD Chapters until 2021

I. Evolution of TSD Chapters

Already prior to the entry into force of the Lisbon Treaty, in 2008, the EU signed its first trade agreement with sustainable development aspects with the countries of the CARIFORUM.[1] However, the first trade agreement with a designated TSD chapter was the EU-Korea free trade agreement (EU-Korea FTA) of 2010.[2] Most of its provisions applied provisionally since July 2011 until it entered into force in December 2015. Serving as a model for future texts,[3] all EU trade agreements that followed the EU-Korea-FTA include TSD-related provisions.[4]

To date, this is true for the following agreements that have entered into force: Colombia/Peru/Ecuador,[5] Central America,[6] Ukraine,[7] Georgia,[8] Moldova,[9] Canada,[10] Japan,[11] Singapore,[12] Viet Nam[13] and the United Kingdom[14].

Moreover, we can find TSD chapters in a number of FTA agreements that have been signed and await ratification, namely the recent texts from 2020 with Mexico, from 2022 with Chile and 2023 with New Zealand. The Economic Partnership Agreement with Kenya from July 2023 contains similar commitments. The TSD chapter with Mercosur is subject to an ongoing debate between the partners, and the EU has proposed relevant texts in negotiations with Australia, Eastern and Southern Africa, India, Indonesia and Thailand.[15] In the following summary, we will focus on the most relevant provisions of the agreements that are already in force. In turn, TSD-related provisions in more restricted agreements, such as the Investment Agreement with China, will not be analysed.

1 Art. 3(1) and (2) EU-CARIFORUM agreement (OJ 2008, L 289/91).
2 OJ 2011, L 127/6.
3 *Hoffmeister*, in: Obwexer (ed.), p. 257.
4 *Velut et al.*, LSE 2022/2, p. 39.
5 OJ 2012, L 354/3 (Colombia/Peru), OJ 2016, L 356/3 (accession of Ecuador).
6 OJ 2012, L 346/3.
7 OJ 2014, L 161/3.
8 OJ 2014, L 261/4.
9 OJ 2014, L 260/4.
10 OJ 2017, L 11/1.
11 OJ 2018, L 330/3.
12 OJ 2019, L 294/3.
13 OJ 2020, L 186/3.
14 OJ 2021, L 149/10.
15 For a list of all the FTAs that are in force, are awaiting ratification or a being negotiated, see *European Commission*, Sustainable development in EU trade agreements, available at: https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en (17/2/2024).

II. Content of TSD-Chapters

Most EU FTAs cover TSD objectives (environment, labour, cross-cutting) in a dedicated single TSD chapter.[16] Only the agreement with Canada, where those issues are spread over chapters 22–24, and the agreement with the UK, whose Title IX on "level playing field for open and fair competition and sustainable development" contains several chapters touching upon SD matters, are structured differently. EU FTAs sometimes also venture into the territory of transparency, corporate social responsibility and gender issues, which will not be dealt with here.
The standard TSD chapters define the context or objectives of the chapter and usually include provisions relating to domestic law (1.), international standards and agreements (2.), the institutional set up (3.) and dispute settlement (4.).

1. Exercise of Domestic Law

A central provision of each TSD Chapter is the clause, according to which the parties recognise each other's *right to regulate* in the environmental and the labour field and/or the field of sustainable development. That right should be exercised in a manner that is consistent with their commitment to internationally recognised standards and agreements. According to the Commission, the protection of domestic regulatory space also reserves the right to be more ambitious.[17]

Moreover, the TSD chapters underline in varying ways that the parties shall strive to *improve* their law, policies and/or to ensure that they provide for and encourage high levels of protection.[18]

Finally, the chapters contain a "non-regression" and a "non-enforcement" clause.[19] The parties should not weaken/reduce/waive the environmental and labour protections in their domestic law, nor fail to enforce them effectively.[20] These clauses relate to the application of domestic law and are hence not dependent on a breach of the parties' international obligations.[21] However, they are contingent on a link to trade: either the clause contains the subjective condition that the parties cannot regress or non-enforce domestic law as an "encouragement for trade or

16 *Velut et al.*, LSE 2022/2, p. 44.
17 *European Commission*, Sutainable development, (fn. 15), second bullet point.
18 Compare Art. 13.3 EU-Korea FTA; Art. 268 EU-Colombia/Peru/Ecuador FTA; Art. 285(2) EU-Central America FTA; Art. 290(1) EU-Ukraine Association Agreement; Art. 228(2) EU-Georgia Association Agreement; Art. 364(2) EU-Moldova Association Agreement; Artt. 23.2, 24.3 CETA; Art. 16.2(1) EU-Japan EPA; Art. 12.2(2) EU-Singapore FTA; Art. 13.2(2) EVFTA, Artt. 387(4), 391(5) EU-UK-TCA.
19 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 30.
20 Compare Art. 13.7 EU-Korea FTA; Art. 277(1) and (2) EU-Colombia/Peru/Ecuador-FTA; Art. 291(2) and (3) EU-Central America FTA; Art. 296 EU-Ukraine Association Agreement; Art. 235(2) and (3) EU-Georgia Association Agreement; Art. 371(2) and (3) EU-Moldova Association Agreement; Artt. 23.4(2) and (3), 24.5(2) and (3) CETA; Art. 16.2(2) EU-Japan EPA; Art. 12.12 EU-Singapore-FTA; Art. 13.3(2) and (3) EVFTA; Artt. 387(2), 391(2) EU-UK-TCA.
21 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 30.

investment", or they lay down the objective condition that the parties cannot do so in a manner that is "affecting trade or investment between the parties". The wording and the practice is varied. Some agreements make both clauses dependent on a subjective trade condition.[22] The EU-Singapore-FTA and the EU-UK-TCA subject both clauses to the objective trade condition.[23] Other agreements use a mix of both techniques.[24]

In both alternatives (subjective or objective trade link), the question arises of how to substantiate such a link between the domestic measure and its (intended) impact on international trade. In the US-CAFTA-Dominican Republic FTA, the relevant article stipulates that a "Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement". In a dispute brought by the US government against Guatemala, the first TSD dispute under any FTA worldwide, the Panel established under the agreement found that Guatemala had failed to effectively enforce its labour laws at eight sites, affecting 74 workers.[25] Nevertheless, there was no breach of the relevant article. Even if the panel assumed *arguendo* that the eight failures of Guatemala fulfilled the "sustained or recurring course of action or inaction" condition, it found that only one of them met the trade condition. That one failure did not constitute a sustained or recurring course of inaction by itself.[26] For the panel, the trade condition is only fulfilled when the alleged failure "confers some competitive advantage on an employer or employers engaged in trade between the Parties".[27]

While this US-American case does not constitute a binding precedent for EU FTAs, the trade-effect condition in European non-regression clauses may nevertheless be interpreted as requiring a similarly high evidentiary standard.[28]

2. Compliance with International Standards and Agreements

EU FTA TSD chapters usually also contain clauses concerning international labour and environmental standards and agreements.

22 Art. 235 EU-Georgia Association Agreement; Art. 371(2) and (3) EU-Moldova Association Agreement; Artt. 23.4(2) and (3), 24.5(2) and (3) CETA.
23 Art. 12.12 EU-Singapore-FTA; Artt. 387(2), 391(2) EU-UK-TCA.
24 For the differing combinations (sometimes also splitting the links between trade and investment) compare: Art. 13.7 EU-Korea FTA; Art. 277(1) and (2) EU-Colombia/Peru/Ecuador-FTA; Art. 291(2) and (3) EU-Central America FTA; Art. 296 EU-Ukraine Association Agreement; Art. 16.2(2) EU-Japan EPA; Art. 13.3(2) and (3) EVFTA.
25 Final Report of the Panel, 14 June 2017, paras. 426 et seq., 594, available at: https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf (17/2/2024).
26 Ibid., paras. 444 et seq., 491, 497 et seq., 594.
27 Ibid., para. 190.
28 *Marín Durán*, CMLR 2020/4, p. 25 of the open access version.

a) Labour Standards and ILO Conventions

Referring to labour norms, one can distinguish between the references to core labour standards and specific ILO Conventions.

The notion of core labour standards can be traced back to the 1996 Declaration of the WTO Ministerial Conference in Singapore. While rejecting the insertion of a "social clause" in the rulebook of the WTO, Ministers renewed their commitment to "the observance of internationally recognized core labour standards".[29] Seizing on this recognition, the ILO adopted the "Declaration on Fundamental Principles and Rights at Work" (the 1998 ILO Declaration) two years later. It recognizes four principles:

1. The freedom of association and the right to collective bargaining;
2. The elimination of all forms of forced or compulsory labour;
3. The effective abolition of child labour; and
4. The elimination of discrimination in respect of employment and occupation.

The 1998 ILO Declaration rapidly became a reference across a range of FTAs among ILO members.[30] Although not being a formal member of the ILO, the EU prominently figures among the supporters of these standards in its FTAs. While the precise wording of the duty to promote and implement the principles may differ,[31] it is clear that they are binding on the parties even if they have not ratified relevant ILO Conventions in the field.[32] Moreover, unlike US agreements, EU TSD chapters do not require a trade link. Rather the obligation to comply with the core labour standards is self-standing.

The TSD chapters also include commitments regarding specific ILO Conventions. Their levels may vary: some provide for an exchange of information regarding the ratification of certain conventions, some regulate that parties cooperate in promoting ratification, some regulate that the parties "consider" ratification, and in some cases the parties commit to make "continued and sustained efforts" towards ratifying certain conventions. Most TSD chapters also include commitments of the States to implement certain ILO Conventions effectively.[33]

While the EU-Korea FTA only refers to the international labour standards mentioned above, all of the subsequent trade agreements except the EU-Japan EPA refer to other standards, sometimes inside and sometimes outside of the TSD chapters. CETA and the EU-UK TCA refer additionally to minimum wage, occupational

29 Singapore Ministerial Declaration, 13 December 1996, para. 4, available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (16/6/2024).
30 *Gustafsson/Bahri*, in: Bethlehem (ed.), p. 630.
31 Art. 13.4(3) EU-Korea FTA; Art. 269(3) EU-Colombia/Peru/Ecuador-FTA; Art. 286(1) EU-Central America FTA; Art. 291(2) EU-Ukraine Association Agreement; Art. 229(2) EU-Georgia Association Agreement; Art. 365(2) EU-Moldova Association Agreement; Art. 23.3(1) CETA; Art. 16.3(2) EU-Japan EPA; Art. 12.3(3) EU-Singapore FTA; Art. 13.4(2) EVFTA; Art. 399(2) EU-UK-TCA.
32 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 28.
33 For a comparative list see *Velut et al.*, LSE 2022/2, pp. 228 et seq., Annex 1, Table 1a.

health and safety, labour inspection and the rights of migrant workers, while most of the other agreements only refer to one additional standard (mainly occupational health and safety).[34]

Another important difference to US FTAs, which may contain a pre- and/or post-ratification conditionality on improving labour standards, is the fact that the EU usually does not ask a trade partner to ratify new ILO Conventions as a condition for signing or ratifying the FTA. Instead, the EU may include best-efforts clauses, which allows it to monitor the efforts (or absence thereof) of the trading partner to advance with the ratification of certain ILO Conventions. For example, such clause played a role in the EU-Korea dispute with respect to Conventions No. 87, 98, 29 and 105 (see Section C.I.2).

In the case of the EU-Viet Nam FTA, an exception to the EU practice of including "only" best-efforts clauses post-ratification occurred in 2020. Here, the Vietnamese government made changes to domestic labour laws described as "path-breaking reforms"[35] even before ratification of the free trade agreement. In November 2019, Viet Nam revised its labour code with four significant improvements according to the ILO. From 2021 onwards, the Code is applicable to 55 million workers (instead of 20 million before), increases protection against gender discrimination and sexual harassment at work, allows for negotiations on wages and grants workers a right to establish and join a workers representation of their own will.[36] Viet Nam also ratified two out of three outstanding ILO core conventions (No. 98, 105) in 2019 and 2020. However, Convention 87 on Freedom of Association and Protection of the Right to Organize is still not ratified as of early 2024.

According to *Marslev* and *Staritz*, the EVFTA played "a crucial role as an external reform catalyst".[37] They argue that the Commission's position was unusually strong against the background of the US leaving the Trans Pacific Partnership Agreement. Inside the Union the Commission was forced to take a tough negotiation stance in order to reflect wishes of the European Parliament and some Member States. Moreover, the reformists inside the country (a minority) used the agreement strategically to make progress on the internal reform process and actors in Viet Nam itself with connections to both sides were also important. They conclude there was a specific historical context for the Viet Nam example, which will not be easy to replicate.[38]

34 Ibid., pp. 46, 52 et seq., Table 5.
35 *Marslev/Staritz*, Review of International Political Economy 3/2023, p. 1126.
36 https://www.ilo.org/hanoi/Informationresources/Publicinformation/Pressreleases/WCMS_765310/lang--en/index.htm (18/5/2024).
37 *Marslev/Staritz*, Review of International Political Economy 2023/3, p. 1144.
38 Ibid.

b) Green Standards and Multilateral Environmental Agreements

In the environmental field, the parties reaffirm their commitment to effectively implement multilateral environmental agreements (MEAs) to which they are a party.[39] An important detail concerns the question of whether this reference is static (only MEAs to which a State is party at the time of signature?) or dynamic (also MEAs, which a State may sign up in the future?). In this respect, only Article 270(2) of the EU-Colombia/Peru/Ecuador-FTA contains a closed list of MEAs covered by the commitment.

Normally, there is no commitment to ratify new MEAs but only to exchange information concerning ratification and/or to cooperate in promoting ratification.[40] Art. 287(3) and (4) EU-Central America FTA is special in this regard, because the parties undertake (if they have not done so) to ratify the Amendment to Article XXI of CITES and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

An important evolution concerns the Paris Agreement on Climate Change, adopted in December 2015 and entered into force in November 2016. The Commission observed in 2018:

> Whereas all TSD chapters in recent EU trade agreements include provisions on trade and climate change; those negotiated after the Paris Agreement (including the EU's agreements with Singapore, Vietnam, and Japan) will contain stronger and more detailed provisions to this end. These will (i) reaffirm a shared commitment to the effective implementation of the Paris Agreement, (ii) commit the parties to close cooperation in the fight against climate change, (iii) and commit the parties to agree on and carry out joint actions.[41]

Accordingly, the EU-Japan EPA, the EU-Singapore FTA, the EVFTA, and the EU-UK TCA contain such a new obligation to implement the Paris Agreement effectively.[42]

This clause triggers three legal consequences: First, it reinforces the weight of the nationally determined contributions (NDCs) by making them also an obligation between the parties of the FTA. Second, the obligation can be enforced under the dispute settlement mechanism included in the TSD chapters. Third, there is no trade

39 Art. 13.5(2) EU-Korea FTA; Art. 287(2) EU-Central America FTA; Art. 292(2) EU-Ukraine Association Agreement; Art. 230(2) EU-Georgia Association Agreement; Art. 366(2) EU- Moldova Association Agreement; Art. 24.4(2) CETA; Art. 16.4(2) EU-Japan EPA; Art. 12.6(2) EU-Singapore FTA; Art. 13.5(2) EVFTA; Art. 400(2) EU-UK-TCA; For a comparative list see *Velut et al*., LSE 2022/2, pp. 228 et seq., Annex 1, Table 1a.

40 *Velut et al*., LSE 2022/2, pp. 60, 228 et seq., Annex 1, Table 1a.

41 Non paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26/2/2018, p. 10.

42 See *Velut et al*., LSE 2022/2, pp. 61, 231 et seq., Annex 1, Table 1a.

condition for this commitment, which means that possible breaches do not need to have an effect on trade with the EU.[43]

For the EU FTAs signed prior to 2015, all EU trading parties (except Colombia/Peru/Ecuador, due to the mentioned closed list) will have to implement the Paris Agreement effectively anyway, due to the general clause to implement all MEAs binding on them.

CETA was signed on 30 October 2016, i.e. after the signing of the Paris Agreement, but before its entry into force. Therefore, it does not contain a reference to the Paris Agreement. However, CETAs' Joint Committee adopted a recommendation on 26 September 2018, in which it affirmed "the Parties' commitment to effectively implement the Paris Agreement, as a multilateral environmental agreement within the meaning of Article 24.4 of CETA(…)".[44]

Importantly, the last FTA in the decade under consideration (2010-2020), namely the EU-UK TCA, upgraded the significance of the Paris Agreement. According to Article 771 thereof, the obligation under Article 764(1) to "respect the Paris Agreement" and to "refrain from acts or omissions that would materially defeat" its object and purpose, is declared an "essential element" of the partnership. This foreshadows already the reform of 2022, after which the EU sought to establish the Paris Agreement as an essential element of all FTAs (see below Chapter E.).

3. Institutional Set Up

The institutional set-up under the TSD chapters is straightforward. On the governmental level, a committee, board or sub-committee is established, which *inter alia* oversees the implementation of the provisions and is usually comprised of senior/high-level representatives of the parties.[45]

An important innovative feature is the participation of civil society. Each party shall make use of existing/create new domestic consultative mechanisms (e.g. Do-

43 *Bronckers/Gruni*, Journal of International Economic Law 2021, pp. 28 et seq.

44 CETA Joint Committee Recommendation 001/2018, 26/9/2018, para. 2, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/rec-001.aspx?lang=eng (17/2/2024); see also Joint Activity Report to the CETA Joint Committee, First 18 Months of the CETA Joint Committee Recommendation on Trade, Climate Action and the Paris Agreement, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2020-report-activ-rapport.aspx?lang=eng (17/2/2024).

45 Art. 13.12(2) and (3) EU-Korea FTA; Art. 280(2)-(7) EU-Colombia/Peru/Ecuador FTA; Art. 294(2) and (3) EU-Central America FTA; Art. 300(1) EU-Ukraine Association Agreement; Art. 240(2) and (3) EU-Georgia Association Agreement; Art. 376(2) and (3) EU-Moldova Association Agreement; Artt. 22.4(1), 23.8(3), 24.13(3) CETA; Artt. 16.13, 22.3 EU-Japan EPA; Art. 12.15(2) and (3) EU-Singapore FTA; Art. 13.15(2) and (3) EVFTA; Art. 8(1j), (2) and (5) EU-UK-TCA.

mestic Advisory Groups (DAGs)).[46] Often they are supposed to meet together as a Civil Society Forum,[47] but sometimes the parties just agree to organise a public session of the committee/board/sub-Committee with stakeholders to exchange views on issues related to the implementation of the Chapter.[48] Such dialogues are usually held once a year.

4. Dispute Settlement

Each TSD chapter operates its own dispute settlement mechanism (TSD DSM). Most of them contain a provision, according to which the parties can explicitly "only" use the special mechanism of the TSD chapter.[49] As summarized by the Commission, they usually contain the following features:

- government-to-government consultations,
- setting up a panel consisting of independent experts on trade, labour and environment,
- drafting a panel report that is public and that neither party can block,
- monitoring of the implementation of the panel report.[50]

In contrast to the general dispute settlement chapter, where binding arbitration reports must be complied with under the threat of trade sanctions, the TSD panel reports in the FTAs until 2021 are non-binding and not beefed up with the possibility to enact sanctions in case of non-compliance.[51]

Again, a significant exception occurred in the EU-UK TCA of 2020, which contains an Article on "rebalancing measures". According to Art. 411 TCA, they can be taken, if material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas of labour, social, en-

46 Art. 13.12(4) EU-Korea FTA; Art. 281 EU-Colombia/Peru/Ecuador FTA; Art. 294(4) and (5) EU-Central America FTA; Art. 299(1) EU-Ukraine Association Agreement; Art. 240(4) EU-Georgia Association Agreement; Art. 376(4) EU-Moldova Association Agreement; Artt. 23.8(4), 24.13(5) CETA; Art. 16.15(1) EU-Japan EPA; Art. 12.15(5) EU-Singapore FTA; Art. 13.15(4) EVFTA; Artt. 12, 13(1) EU-UK-TCA.

47 Art. 13.13(1) EU-Korea FTA; Art. 295(1) EU-Central America FTA; Art. 299(3) EU-Ukraine Association Agreement; Art. 241(1) EU-Georgia Association Agreement; Art. 377(1) EU-Moldova Association Agreement; Art. 22.5(1) CETA; Art. 16.16(1) EU-Japan EPA; Art. 13.15(5) EVFTA,

48 Art. 282(1) EU-Colombia/Peru/Ecuador FTA; Art. 12.15(4) EU-Singapore FTA.

49 Art. 13.16 EU-Korea FTA; Art. 300(7) EU-Ukraine Association Agreement; Art. 242(1) EU-Georgia Association Agreement; Art. 378(1) EU-Moldova Association Agreement; Article 23.11(1) and Article 24.16(1) CETA; Art. 16.17(1) EU-Japan EPA; Art. 12.16(1) EU-Singapore FTA; Art. 13.16(1) EVFTA. A different wording is used in Art. 285(5) EU-Colombia/Peru/Ecuador FTA; Art. 284(4) EU-Central America FTA; Artt. 357, 389(2), 396(2), 407(2) EU-UK-TCA.

50 Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11/7/2017, pp. 3 et seq., Art. 12.17(8) sentence 8 leaves the option for the parties to decide against the report being made publicly available.

51 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 37.

vironmental or climate protection, or with respect to subsidy control. *Bronckers* and *Gruni* describe the possibility to adopt rebalancing measures as a "fundamental break with the EUs traditional softer approach".[52] However, this overlooks that the EU had an interest to deter against the risk of unfair regulatory competition of a highly competitive neighbour and former Member State by deliberately lowering such standards as a policy premium for leaving the Union. The changes are hence the result of specific exigencies and negotiations in the context of Brexit.[53] In our view, the EU-UK TCA provision on "rebalancing" is thus not setting a new trend for dispute settlement provisions in the EU's TSD chapters in general. Rather, it opens two possible enforcement mechanisms for labour, social and environmental issues: either a Party triggers a case for a Panel of Experts, or it goes through rebalancing measures. It appears that the first avenue is mainly designed to hear complaints about the (alleged) violation of commitments (including on non-regression), while the second avenue envisages more disagreements about future divergences which might infringe the level playing provisions (Article 355–357 TCA),[54] which are not present in a usual TSD chapter of an EU FTA.

III. Interim Conclusion

By now, TSD chapters are an established feature of any EU FTA. Their substance has grown over time, both in the labour and the environmental field. Importantly, the EU demands compliance with core labour norms irrespective of any trade link. At the same time, the EU remains cautious not to demand the ratification of Conventions that a country has not yet signed. Moreover, the dispute settlement system works on the basis of cooperation and contracts out from the general dispute settlement mechanism in FTAs, which are modelled along the binding WTO system with a possibility to impose trade sanctions in case of non-implementation of a Panel report. Compared to the US and Canada, this approach may be characterized as being "more ambitious in terms of substantive commitments but also less coercive with regards to their implementation and enforcement".[55]

C. Dispute Settlement Practice

In order to ascertain the legal significance of the EU's TSD chapters more closely, we will now look at the FTA dispute settlement practice. So far, the EU has activated the dispute settlement mechanism that is included in the TSD chapters only once: in a dispute with South Korea over trade union rights (1). In a second case, TSD obligations played a role in a dispute run under the general dispute settlement mechanism against Ukraine relating to certain export bans (2).

52 Ibid., p. 32.
53 *Gustafsson/Bahri*, in: Bethlehem (ed.), p. 635.
54 *Hoffmeister*, in: Heger/Gourdet (eds.), p. 141.
55 *Marín Durán*, CMLR 2020/4, p. 2; supported by *Kübek*, in: Fahey (ed.), p. 287.

I. South Korea

1. Consultations and Panel Request

The case has its origins in political calls from the Korean Domestic Advisory Group and the EU-Korea FTA Civil Society Forum. The European Parliament supported their cause in 2017,[56] and only after having made a promise in the 2018 non-paper to become more "assertive",[57] the Commission requested consultations in December 2018.[58] Failing a satisfactory resolution in the government consultations of January 2019, Commissioner *Malmström* sent a letter in March 2019 to the Korean government announcing the next step, if Korea were to fail addressing the EU's concerns shortly.[59] The latter reacted by initiating the formal process to ratify three of four ILO Conventions referred to the FTA.[60]

In July 2019, the Commission requested the establishment of an Expert Panel pursuant to Art. 13.15(1) EU-Korea FTA, making two requests: First, it argued that Art. 2(1), (4d)), Art. 23(1), Art. 12(1-3) of the Trade Union and Labour Relations Adjustment Act (TULRAA) were inconsistent with Art. 13.4(3) first sentence lit (a) EU-Korea FTA. It provides that

> [t]he Parties in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights.

Lit. (a) refers to the right to "freedom of association and the effective recognition of the right to collective bargaining". Second, the EU argued that the efforts Korea made towards the ratification of ILO Conventions No. 87, 98, 29 and 105 were "inadequate" considering Korea's commitment to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions" pursuant to Art. 13.4(3) last sentence of the agreement.[61]

56 European Parliament resolution of 18 May 2017 on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea (2015/2059(INI)), P8_TA(2017)0225, para. 5, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0225_EN.pdf (18/2/2024).

57 For details see below Section E.II.1.

58 *Nissen*, EJIL 2022/2, p. 609.

59 Letter of Commissioner Malmström to Minister of Trade Yoo and Minister of Employment and Labour Lee, 4/3/2019, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/7416e6ad-a6c3-449b-9f9a-c4841f591902/details (18/6/2024).

60 *Han*, European Foreign Affairs Review 2021/4, p. 537.

61 Request for the establishment of a Panel of Experts by the EU, 4/7/2019, available at: https://circabc.europa.eu/rest/download/dfc6a2fa-eb47-4f37-85d0-c8d6cbb266c7?ticket (18/2/2024).

2. Findings

In its report of 20 January 2021, the Expert Panel first affirmed its jurisdiction.[62] It rejected the South Korean objection[63] that the EU had not raised issues arising under the chapter as required in Artt. 13.14, 13.15 EU-Korea-FTA, because Art. 13.2(1) on the scope ("Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour and environmental issues in the context of Articles 13.1.1 and 13.1.2.") required a general trade link for all disputes under the chapter. Rather, it found that "the proper scope of Article 13.4.3 is established by its own terms, and thus falls within the 'except as otherwise provided' clause of Article 13.2.1. It is not appropriate, or even possible, to apply the limited scope bounded by 'trade-related labour' to the terms of Article 13.4.3, as proposed by Korea".[64] In its reasoning, the panel *inter alia* refers to other parts of the TSD chapter, where provisions explicitly limit the scope and finds a lack of limitation to be significant.[65] This reasoning allows the conclusion that TSD provisions without an express trade-link can be enforced even in a purely domestic situation.[66]

With respect to the first EU claim, the Expert Panel rejected the claim concerning Art. 12(1–3) TULRAA but found that Art. 2(1), (4 d)), Art. 23(1) TULRAA did not conform to the "principles concerning freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA".[67] Importantly, it held that the commitment regarding the principles concerning the fundamental rights included in that Article was legally binding.[68]

In contrast, the Panel rejected the second EU claim. While the obligation of the parties to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions" was also legally binding,[69] without "explicit targets or at least any informal understanding on expected milestones towards ratification", it contained only "an on-going obligation (…) affording leeway for the Parties to select specific ways to make continued and sustained efforts".[70] In the Panel's view, Korea's efforts since 2017 concerning ILO Convention Nos. 87, 98, 29 satisfied the requirements of the provision.[71] It did express some criticism concerning Korea's lack of progress with respect to Convention 105.[72]

62 Report of the Panel of Experts, 20/1/2021, p. 27, para. 96 et seq., available at: https://circabc.europa.eu/sd/a/d4276b0f-4ba5-4aac-b86a-d8f65157c38e/Report%20of%20the%20panel%20of%20experts.pdf (18/2/2024).
63 Ibid., p. 16, paras. 54 et seq.
64 Ibid., p. 19, para. 68.
65 Ibid., pp. 20 et seq., paras. 71 et seq.
66 *Kübek*, in: Fahey (ed.), p. 292.
67 Report of the Panel of Experts, (fn. 62), p. 70, para. 257; p. 53, para. 196; p. 56 para. 208; p. 61, para. 227; pp. 78 et seq.
68 Ibid., p. 30, para. 107; p. 36, para. 127.
69 Ibid., p. 74, para. 277.
70 Ibid., p. 74, para. 278.
71 Ibid., p. 76, para. 288.
72 Ibid., p. 77, para. 290.

3. Implementation

Although the Expert Panel did not find an infringement, the EU was able to congratulate Korea on the ratification of ILO Convention Nos. 87, 98 and 29 in the 7th session of the TSD Committee in March 2021.[73]

In the 8th session of the TSD Committee in September 2022, Korea also announced the full implementation of the Panel's recommendations by amending the law.[74] Concerning the full implementation of the recommendations, the EU still saw space for improvement in the 9th session of the TSD Committee in September 2023. With regard to the ratification of Convention 105, Korea announced that it had started the review for the procedure to amend two national laws that include provisions on imprisonment with work. The EU invited Korea to accelerate its actions and criticised the lack of ratification of the mentioned Convention. In particular, it referred to the fact that the EU-Korea FTA had entered into force more than 12 years ago and that the Expert Panels Report had been issued more than two years before the meeting.[75]

4. Assessment

Not surprisingly, the Commission gave a positive assessment of the exercise. Already after the adoption of the Panel report, Commissioner Dombrovskis argued that the case had shown the effectiveness of the Commission's "cooperation-based approach".[76] Later on, in its 2021 Report on the Implementation and Enforcement of EU Trade Agreements, the Commission referred to the case to underline "the importance of the assertive use of the enforcement tools foreseen in TSD Chapters, when needed".[77]

However, with hindsight, a more careful assessment seems in place. In fact, with respect to the first claim, the Expert Panel made clear that ILO standards, which might "have previously been assumed to be soft persuasive provisions without 'bite', can be regarded as legally binding".[78] On the second claim, although South Korea finally ratified three additional ILO conventions, the relative weakness of the

73 Joint Minutes, 7th Committee on Trade and Sustainable Development, 13–14 April 2021, p. 2, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/2e6ac3df-18ba-4328-9571-4225c7f86468/details (18/2/2024).

74 Joint Minutes, 8th session of the Committee on Trade and Sustainable Development, 15–16 September 2022, p. 2, available at: https://circabc.europa.eu/rest/download/3d1d9557-4318-45b1-b277-77da4eaba260?ticket (18/2/2024).

75 Joint Minutes, 9th session of the Committee on Trade and Sustainable Development, 6-7 September 2023, p. 3, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/26cdef87-a20b-4b85-9062-d5201aa1df70/details (18/2/2024).

76 Press Release, 25 January 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203 (18/2/2024).

77 Report on the Implementation and Enforcement of EU Trade Agreements, 27.10.2021, COM(2021) 654 final, p. 17, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0654 (18/2/2024).

78 *Novitz*, European Law Review, 2022/1, pp. 37 et seq.

"best efforts" clauses was exposed.[79] At the time of completing the manuscript in June 2024, South Korea has still not ratified ILO Convention No. 105.

II. Ukraine

The Ukraine case was the first dispute resolved under the general dispute settlement mechanism of an EU FTA. It focused on Art. 35 EU-Ukraine Association Agreement ("the AA"), which forbids "any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other Party".

1. Consultations and Panel Request

After unsuccessful consultations in February 2019, the EU requested the establishment of an Arbitration Panel under Art. 306 AA in June of that year. It claimed that a permanent export ban of 2005 and a temporary export ban of 2015 on certain wood products by Ukraine would be inconsistent with Art. 35 AA.[80] In its defence, Ukraine stated that they would be justified under Articles 36 AA, XX(b) and XX(g) of the GATT. Moreover, it would make use of its right to regulate its own level of environmental protection, laid down in Art. 290 EU-Ukraine AA. In its view, the measures have to be read together with Articles 294 and 296(2) AA, which are included in the TSD chapter (chapter 13).[81] These provisions regulate the cooperation concerning trade in forest products and contain the non-regression and non-enforcement clauses. Moreover, for the first time during the oral hearing of October 2020, Ukraine made the procedural point that the entire dispute should have been brought under Chapter 13 and not under Chapter 14.[82]

2. Findings

In its decision of 11 December 2020, the Arbitration Panel first assessed Ukraine's procedural objection as a "preliminary issue".[83] Since Ukraine had accepted to run the dispute under Chapter 14, it was precluded from raising a jurisdictional objection as late as during the oral hearing, which was in any case "untimely".[84] Moreover, the subject matter of the dispute was the compatibility of the two export bans

79 Ibid., p. 37; *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 27.
80 Position of the EU, referred to in the Final Report of the Arbitration Panel, 11/12/2020, p. 31, paras. 73–77, available at: https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/ukraine-wood-export-ban_en (18/2/2024).
81 Ibid., p. 32, paras. 79 et seq.
82 Ibid., p. 18, para. 25 and pp. 32 et seq., paras 81–85.
83 Final Report of the Arbitration Panel, (fn. 80), pp. 34–44, paras. 91–138.
84 Ibid., p. 39, paras. 117; pp. 39–41, paras. 118–125.

with Art. 35 AA, which falls under Chapter 14, even if the forestry products at issue are also regulated under Chapter 13.[85]

On substance, the Panel affirmed that the two measures were incompatible with Article 35 AA, which incorporated in substance Article IX GATT (and hence not requiring an "actual effect test").[86] It then turned to the legal significance of the TSD chapter and found that "the provisions of Chapter 13 are not self-standing or unqualified exceptions that could justify measures that are *per se* in breach of Article 35 of the AA".[87] However, it also acknowledged that they could "serve as relevant 'context' for the interpretation of other provisions of Title IV, which allow the Parties to introduce or maintain measures in derogation to Article 35 of the AA, including for environmental reasons based on Article 36 of the AA in conjunction with Article XX of the GATT 1994".[88] The relevant analysis of the 2015 temporary ban under Articles XX(g) GATT showed, however, that the ban was not made effective in conjunction with restrictive measures on domestic production and hence not justified.[89] For that very reason, the invocation by Ukraine of Chapter 13 was also deemed irrelevant.[90] In turn, Ukraine was able to defend the 2005 export ban as a necessary measure to protect public health under Article XX(b) GATT.[91] In its conclusion, the Panel hence concentrated only on the 2015 temporary ban and recommended that

> Ukraine takes any measure necessary to comply in good faith with the above Arbitration Panel's ruling, as prescribed by Article 311 of the AA ('Compliance with the arbitration panel ruling') in respect of the 2015 temporary export ban found in paragraph (3) above to be in breach of its obligations pursuant to Article 35 of the AA, taking into due account all relevant provisions of the Association Agreement, including those of Chapter 13 on 'Trade and sustainable development', specifically Article 293 of the AA on 'Trade in forest products', which commits the Parties to 'improve forest law enforcement and governance and promote trade in legal and sustainable forest products'.[92]

3. Implementation

Although the Panel report is binding on Ukraine, it was not implemented to date. While the government had introduced a draft amendment to the Parliament during the course of the proceedings, the latter was never adopted. Moreover, since the full-scale invasion of the country by Russia in February 2022, attention has shifted

85 Ibid., p. 43, paras. 135 et seq.
86 Ibid., p. 60, paras. 215–218.
87 Ibid., p. 66, para. 244.
88 Ibid., p. 67, para. 251.
89 Ibid., pp. 115–117, paras. 458–465.
90 Ibid., p. 118, paras. 466 et seq.
91 Ibid., pp. 69–96, paras. 264–376.
92 Ibid., p. 126, para. 508.

away from this file and the Commission refrained from taking trade countermeasures for non-implementation.

III. Interim Conclusions

In view of the above, we draw two important lessons from the dispute settlement practice so far. First, the TSD chapters may contain binding obligations of a different degree: strict standards or best efforts clauses. Both of them are enforceable. Moreover, they may also become relevant as context when interpreting the exceptions for trade-restrictive measures elsewhere in the FTA. All this speaks in favour of a high degree of legal relevance. At the same time, the fact that the Panel report under a TSD chapter is only exhortatory does not seem to be decisive, as even binding Panel reports risk non-implementation as the EU-Ukraine case shows. Hence, the level of compliance may more depend on other factors, such as the persuasiveness of the report and the domestic political willingness of the losing party to eradicate the trade irritant with the European Union.

D. Trade Sanctions for TSD Breaches

The latter observation also leads to our final analysis about the possibility to impose trade sanctions in case of TSD breaches. While the FTA chapters on general dispute settlement expressly foresee such a possibility in a case of non-compliance with a Panel report, such powers are not included in the TSD dispute settlement chapters. This raises the question whether trade sanctions are excluded in reaction to a breach of a TSD provision. For that purpose, we will examine two potential legal bases, namely Art. 60 of the Vienna Convention on the Law of Treaties (VCLT) and the law of State responsibility, as codified in the International Law Commission (ILC) Articles on Internationally Wrongful Acts (ARSIWA).

I. Art. 60 VCLT

According to Article 60(1) VCLT, a party can invoke a material breach of a bilateral treaty "as a ground for terminating the treaty or suspending its operation in whole or in part". As a norm codifying customary international law, it also applies to EU FTAs with third states.[93] Two points merit particular attention: Does the breach of a TSD provision amount to a "material breach" under Article 60(3) VCLT? And does the TSD dispute settlement mechanism under the TSD chapter not constitute a *lex specialis* under Article 60(4) VCLT?

93 ECJ, Opinion 2/15, ECLI:EU :C:2017:376, para. 161.

1. Material Breach

Under Article 60(3)(b) VCLT a material breach consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty". Whether or not a TSD provision satisfies this criterion will rely on a case-by-case analysis.

a) Core Labour Rights

A clear indicator to affirm the essential nature of a treaty provision is the fact that the parties jointly regard it as such. In this respect, the EU uses standard "essential elements" clauses since 1995. They may be laid down either in the FTA itself, or in the corresponding political agreement. When the clause is only found in the political agreement, the FTA will usually contain a "bridging clause". A typical example thereof is Art. 15.14(2) of the EU-Korea FTA stating that "[t]he present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement". The latter then contains the following general clause in Article 1(1):[94]

> 1. The Parties confirm their attachment to democratic principles and human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and *human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments*, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and *constitutes an essential element of this Agreement*.

It follows that a breach of human rights, as laid down in the Universal Declaration of Human Rights and the corresponding provisions of the two UN Covenants, by one side may be sanctioned by suspending or terminating the treaty by the other side. This is true not only of the EU-Korea Framework Agreement, but also of the free trade agreement by way of incorporation under Art. 15.14(2) FTA. Sometimes, this cross-retaliation possibility is even expressly laid down in the political agreement. For example, the non-fulfilment clause under Article 28(7) of the Strategic Partnership Agreement with Canada of 2016[95] says:

> In addition, the Parties recognise that a particularly serious and substantial violation of human rights or non-proliferation, as defined in paragraph 3, could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in accordance with Article 30.9 of that Agreement."

This analysis leads to the question of which precise labour rights are covered by the essential elements clause. Art. 20 (freedom of association and assembly) UDHR, Art. 23 UDHR (right to work, equal pay, just remuneration, join trade unions), Art. 24 UDHR (right to rest and leasure, including reasonable limitation of working

94 EU-Korea Framework Agreement, OJ 2013, L 20/2.
95 EU-Canada Strategic Partnership Agreement, OJ 2016, L 329/45.

hours and periodic holidays with pay), all form part of the Universal Declaration, which is referenced *en bloc*. However, not all of them are essential. For *Velut* and others the essential elements clauses in EU FTAs are "covering human rights *and thus core* labour standards".[96] This restrictive reading is justified by the fact that realization of economic, social and cultural rights usually depends on "national effort … in accordance with the organization and resources of each State", as stated by Art. 22 UDHR. Consequently, such economic, social or cultural rights are generally not directly enforceable against the State.[97] Nevertheless, certain rights within this group of economic, social and cultural rights form an exception, as they are of fundamental importance, formulated in a sufficiently precise manner and enforceable irrespective of the economic resources of a State. In our view, this selective list of UDHR rights coincides with the four components of the regular TSD provision on fundamental principles and rights at work. Accordingly, any breach of such a TSD core labour right provision would amount to a "material" breach of the political agreement within the meaning of Article 60(3) VCLT and thus also of the FTA containing a bridging clause.

b) Other TSD Provisions

In addition, it may be possible to identify other TSD provisions as "essential" to accomplish "the object or purpose of the treaty" even if they are not expressly qualified as such. For that, it must be shown that a provision was a key element for the conclusion of the treaty.

In its commentary on the Draft Articles, the ILC explained that the choice of the wording "material" instead of "fundamental" breach allows the inclusion of ancillary provisions that one party found "essential to the effective execution of the treaty" and that "may have been very material in inducing it to enter into the treaty at all".[98] Whether such a material breach exists, must be determined objectively.[99]

With regard to the EU, it can be argued that TSD chapters are material for the EU to enter a FTA.[100] As observed in the introduction, Art. 207(1) second sentence TFEU obliges the Union to include sustainable economic, social and environmental development (Art. 21(2) lit.(d) TEU) in its commercial policy. Consequently, primary law directs the Commission to pursue trade and sustainability goals together.

Moreover, the European Parliament established a clear conditionality. According to its resolution of 6 October 2022, "the conditions in which goods and services are produced in terms of human rights, the environment, labour and social develop-

96 *Velut et al*., LSE 2022/2, p. 61 (emphasis added).
97 *Hoffmeister*, p. 322.
98 ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission 1966, Vol. 2, p. 255, Art. 57, para. 9.
99 *Giegerich*, in: Dörr/Schmalenbach (eds.), Article 60 VCLT, para. 20.
100 *Hoffmeister*, Archiv des Völkerrechts 2015, pp. 35, 63 et seq.

ment are of the same relevance as the trade of those goods and services itself".[101] In many cases, MEPs indicated that they would only support the ratification of a FTA if it contained a solid TSD chapter. Furthermore, public opinion in some Member States is very critical towards FTAs, and thus, the inclusion of TSD chapters is one way to gain public support for FTAs as a TSD chapter can mitigate the fears of opponents that FTAs could lead to lower social and environmental standards.

Finally, against the contrary position of Advocate-General *Sharpston* (who argued that a breach of TSD provisions in the EU-Singapore Agreement would not empower the parties to suspend the treaty),[102] the ECJ concluded in its Opinion 2/15 that the TSD chapter of the Draft EU-Singapore Agreement "plays an essential role in the envisaged agreement".[103] Therefore, it held that the other party can "terminate or suspend the liberalisation, provided for in the other provisions of the envisaged agreement, of that trade" following customary law as enshrined in Art. 60(1) VCLT.[104]

It follows that also other TSD provisions beyond the duty to comply with core labour rights might qualify as essential elements of an EU FTA. However, suspension would only become available if also the breach itself is "of serious character".[105] For that, a case-by-case analysis of the alleged facts is warranted. Typical examples may be national decisions of a certain scale, which clearly infringe the environmental commitments of a partner country flowing from ratified MEAs. Moreover, any suspension would have to be proportionate to the breach in question.

2. TSD Dispute Settlement Chapters as lex specialis

The application of Art. 60 VCLT could, however, be excluded under Art. 60(4) VCLT, which reads: "The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach".

This paragraph is an expression of the *lex specialis* rule. It applies, for example, when the treaty "establishes a self-contained regime, exhaustively regulating the permissible responses to a material breach and thereby prohibiting others, including those in Art. 60 paras. 1–3".[106] It must, therefore, be examined whether the dispute settlement mechanism included in the TSD chapters represents such a specific regime. For *Bronckers* and *Gruni* that is not the case. For them, the TSD dispute settlement chapters only constitute a *lex specialis* over the general dispute mecha-

101 European Parliament resolution of 6 October 2022 on the outcome of the Commission's review of the 15-point action plan on trade and sustainable development (2022/2692(RSP)), P9 TA(2022)0354, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0354_EN.html (18/2/2024).

102 Opinion of Advocate General Sharpston, Opinion 2/15, 21/12/2016, paras. 490 et seq.

103 ECJ, Opinion 2/15, ECLI:EU:C:2017:376, para. 162.

104 Ibid., paras. 161 et seq.

105 ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission 1966, Vol. 2, p. 255, Art. 57, para. 9.

106 *Giegerich*, in: Dörr/Schmalenbach (eds.), Article 60 VCLT, paras. 68 et seq., direct quote in para. 69.

nism in the very same FTA.[107] *Marín Durán* comes to the opposite conclusion. For her, the dispute settlement mechanism for breaches of TSD-provisions under the EU-Singapore FTA has primacy over Art. 60 VCLT and represents a *lex specialis*. More generally, she concludes that TSD DSMs

> do not impose any form of 'trade conditionality' in a proper legal sense: neither does it give the other party the right to adopt trade sanctions in cases of non-compliance, nor does it make a specific trade benefit dependent upon compliance with environmental and labour standards.[108]

She also argues that the fact that the Commission carried out a consultation in 2018 on whether to move to the sanctions based model supports the reading that the imposition of trade sanctions for breaches of the TSD chapter is currently not possible.[109] Similarly, *Kübek* finds for the EU-Korea FTA, that "[t]his specific TSD dispute settlement system is self-contained",[110] and *Gustafsson* and *Bahri* state that the TSD dispute settlement chapter "preclude any suspension of trade benefits in response to violations".[111]

Applying the rules of interpretation under Article 31 VCLT, we plead in favour of a differentiated approach. Clearly, the wording of the TSD DSM speak in favour of a *lex specialis*. For example, Art. 13.16 EU-Korea FTA (under the heading "Dispute settlement") reads: "For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 [government consultations] and 13.15 [Panel of Experts]." Both the use of "only" and "any matter" indicate that the TSD DSM trumps other dispute settlement mechanisms. All but the EU-Colombia/Peru/Ecuador FTA[112] and the EU-Central America FTA[113] include very similar language.[114] The most recent agreements (Japan, Singapore, Viet Nam) even include two sentences: one that is very similar to Art. 13.16 EU-Korea FTA and one that explicitly regulates the relationship to the other DSMs included in the FTAs.[115] Finally, various provisions in Title IX of the EU-UK TCA contain

107 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 41.
108 *Marín Durán*, CMLR 4/2020, p. 12.
109 Ibid., pp. 12 et seq.
110 *Kübek*, in: Fahey (ed.), p. 290.
111 *Gustafsson/Bahri*, in: Bethlehem (ed.), p. 633.
112 Art. 285(5) EU-Colombia/Peru/Ecuador FTA: "This Title is not subject to Title XII (Dispute Settlement)".
113 Art. 284(4) EU-Central America FTA: "The Parties shall not have recourse to dispute settlement procedures under Title X (Dispute Settlement) of Part IV of this Agreement and to the Mediation Mechanism for Non-Tariff Measures under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement for matters arising under this Title".
114 Art. 13.16 EU-Korea FTA; Art. 300(7) EU-Ukraine Association Agreement; Art. 242(1) EU-Georgia Association Agreement; Art. 378(1) EU-Moldova Association Agreement; Article 23.11(1) and Article 24.16(1) CETA; Art. 16.17(1) EU-Japan EPA; Art. 12.16(1) EU-Singapore FTA; Art. 13.16(1) EVFTA.
115 Art. 16.17(1) EU-Japan EPA; Art. 12.16(1) EU-Singapore FTA; 13.16(1) EVFTA.

specific rules how the TSD-related dispute settlement provisions relate to the general dispute settlement provisions in Title I of Part Six.[116]

This leads to the systemic part of the interpretation. As in particular the latest examples make clear, the TSD DSMs operate as *lex specialis* with respect to the general DSMs of the FTAs. The EU-Ukraine Panel also inquired whether the subject matter of the dispute before it fell either under Chapter 14 (general trade disputes) or Chapter 13 (disputes under the SD chapter).[117] However, none of the clauses explicitly excludes a recourse to general international law.

In this situation, recourse to the object and purpose of the TSD DSM is of particular importance. On the one hand, subjecting the TSD chapter to a special DSM shows the willingness of the parties to avoid ordinary DSM, which could lead to binding Panel reports with trade sanctions in case of non-implementation. That seems to carry a joint will, to avoid trade sanctions for ordinary TSD breaches. In line with the "cooperative" approach, disputes about the proper implementation of TSD obligations are generally subject to the TSD DSM only. On the other hand, a few TSD obligations are much more fundamental than others. In particular those TSD provisions, which we identified in the previous section as "essential elements" (core labour standards and important environmental standards), cannot be regarded as being "downgraded". It would be exactly contrary the object and purpose of the EU's insistence to *add* a TSD chapter to the usual "essential elements" clause on human rights (either in the FTA or the political agreement), if that had the effect of excluding core labour rights from the enforcement mechanism. Therefore, a nuanced view comes to the conclusion that all TSD provisions, which cannot be qualified as "essential" fall exclusively under the TSD DSM, whereas the exceptionally important TSD provisions, whose breach would be "material" can also be enforced by recourse to Article 60 VCLT.

This conclusion is even more compelling, if the material breach concerns an *erga omnes* obligation,[118] to which compliance is owed to the international community as a whole (and the EU as part thereof) independently of the FTA concerned. In this case, compliance by the treaty partner is already owed to the EU based on customary international law before entering into the FTA. Thus, the recommitment in the FTA cannot limit the EU's enforcement possibilities that existed before. If so, this would need to be explicitly determined in the FTA, which is not the case. In addition, it is contrary to the aim of TSD chapters, namely to strengthen the relevant provisions, not to derive thereof new limits to their enforcement. Examples for such *erga omnes* obligations include all *ius cogens* norms.[119] Among them figure

116 Artt. 357, 389 (2), 396(2), 407(2) EU-UK-TCA.

117 Final Report of the Arbitration Panel, (fn. 80), p. 42, para. 132.

118 ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgement, I.C.J. Reports 1970, pp. 3, 33, paras. 33 et seq.

119 ILC, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*ius cogens*), with commentaries (2022), A/77/10, p. 64, Conclusion 17.

the prohibition of slavery[120] and the prohibition of child labour.[121] Furthermore, there are *erga omnes* obligations that do not have *ius cogens* character,[122] like the prohibition on forced labour in its blatant forms[123] and perhaps the joint commitments to save the world's climate under the Paris Agreement.[124]

In such a situation, the procedure agreed by the Parties under the non-fulfilment clause for essential elements in the political agreement would have to be observed, or in the absence thereof, customary international law on the suspension of treaty obligations.[125]

II. The Law of State Responsibility

The second legal basis for trade sanctions in reaction to a breach of the TSD chapter could be the law of state responsibility. More specifically, it needs to be verified whether such a reaction could qualify as a countermeasure regulated under Artt. 49 et seq. of the 2001 ILC Draft Articles. While the EU is not a State, it may have recourse to these rules as a subject of international law, which may have been injured by a wrongful act of its treaty partner.

1. Proportionate Reaction to a Wrongful Act

The starting point of the analysis is the affirmation, as confirmed by the EU-Korea Panel, that the TSD provisions are legally binding. Hence, their breach would constitute an internationally wrongful act committed by the EU's trading partner. Official conduct by the legislature, the executive or even the judiciary could be attributed to the State in question and trigger its international liability. As the obligation is owed to the EU, the latter could therefore take countermeasures as injured party under Artt. 42 and 49(1) ARSIWA, as long as they are proportionate according to Art. 51 ARSIWA.

On that point, the ILC explained in its commentary that not only "quantitative" but also "'qualitative' factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach" need to be taken into account[126]. While it may be difficult to quantify the injury of the EU because of a TSD breach in another country, the qualitative assessment may help in the analysis. As *Bronckers* and *Gruni* point out, the ECJ faced similar problems when assessing the

120 Ibid., p. 88, Conclusion 23, para. 12.
121 *Humbert*, p. 119.
122 *Martin*, Saskatchewan Law Review 2002, p. 353.
123 *Von Unger,* Kritische Justiz, 2004/1, pp. 44 et seq.
124 For an overview of the discussion see *Jean*, New York University Journal of International Law & Politics 2022, pp. 94–96.
125 *Hoffmeister,* pp. 452–470.
126 ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission 2001, Vol. II, Part 2, p. 135, Art. 51, para. 6.

proportionality of financial penalties in response to persistent obligations of an environmental obligation by an EU Member State.[127] Therefore, it seems theoretically possible to construe countermeasures commensurate to the TSD breach occurred in the partner country.

2. Relationship to Article 60 VCLT

More problematic could be the relationship between the Law of State responsibility and Art. 60 VCLT. This time, Art. 60(1) VCLT could be a *lex specialis* vis-à-vis the general rules on countermeasures in the area of treaty law within the meaning of Art. 55 ARSIWA, reading:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

At first sight, there are good reasons to see Art. 60 VCLT as such a special rule. It was construed to balance the different interests of the treaty parties, which could be circumvented if the Law of State Responsibility was applicable.[128] At second sight, however, one can also discover important differences between the two regimes with respect to their aim and effect. While Art. 60 VCLT "aims at restoring the balance of performances within the treaty",[129] the rules on state responsibility "aim to compel the defaulting State to cease its violation of international law and/or restore the situation that would have existed had there been no such violation".[130] Their effect is also different: if a State suspends or terminates a treaty on the basis of Art. 60 VCLT, this results in a "temporary or permanent extinction of the norm".[131]If the State takes a countermeasure the affected norm remains binding and is being violated by the state that takes the countermeasure.[132] Against that background, the ILC emphasises in its ARSIWA commentary that "[c]ountermeasures are to be clearly distinguished from the termination or suspension of treaty relations (…), as provided for in Article 60 of the 1969 Vienna Convention".[133] Moreover, Art. 73 VCLT contains the disclaimer that "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty (…) from the international responsibility of a State (…)". In its commentary, the ILC explains that

> [i]t decided that an express reservation in regard to the possible impact (…) of the international responsibility of a State on the application of the present articles was

127 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 42.
128 *Giegerich*, in: Dörr/Schmalenbach (eds.), Art. 60 VCLT, para. 75.
129 Ibid., para. 74.
130 *Simma/Tams*, in: The Oxford Guide to Treaties, pp. 581 et seq.
131 Ibid., p. 582.
132 Ibid.
133 ICL, Draft articles on Responsibility, (fn. 126), p. 128, Introduction of Chapter 2 of Part 3 ASR, para. 4.

> desirable in order to prevent any misconceptions from arising as to the interrelation between the rules governing those matters and the law of treaties.[134]

Against that background, the VCLT rules do not generally supersede the law of State responsibility when a party reacts to treaty breaches of the other side.

At the same time, the ILC wrote that Art. 60 VCLT only applies to material breaches, "whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity".[135] This seems to indicate that the specific Article 60 VCLT would supersede the law of state responsibility when the internationally wrongful act constitutes a material breach of treaty, but the rules of ARISWA would remain available for reacting to all other international wrongful acts, including non-material treaty breaches.

This is a plausible position, as Article 60 VCLT would be useless if a State could ignore its conditions by resorting to countermeasures instead when facing a material breach of the other side. Therefore, the Law of State responsibility may only provide a basis for countermeasures in reaction to a breach of a TSD provision, which can be considered non-material. However, when introducing the specific TSD DSM into the FTA, the EU and its FTA partners agreed to hold dialogues for such non-material breaches. Therefore, we come to the conclusion that, by virtue of Article 55 ARSIWA, the possibility of taking countermeasures is excluded in such scenarios.

III. Interim Conclusion

Seen as a whole, we maintain that TSD dispute settlement provisions are the main avenue to settle disputes relating to potential breaches of labour or environmental obligations in TSD chapters. When a case relates to a non-material breach within the meaning of Article 60 VCLT, they are *lex specialis* and exclude the possibility to resort to countermeasures under the law of State responsibility. They also do not allow for the suspension of trade commitments under Article 60 VCLT, because they do not reach the threshold of a material breach.

When a TSD violation can qualify as material breach of the FTA, though, such as disregarding core labour rights under the human rights clause or serious infringements of fundamental environmental commitments under a ratified MEA, the EU may either activate the TSD dispute settlement procedure or resort to unilateral trade sanctions under Article 60 VCLT.

E. The 2022 Reform

Since the beginning, the effectiveness of TSD chapters was subject to heavy political debate between the EU institutions. As their positions have evolved over time and

134 ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission 1966, Vol. 2, p. 267, Art. 69, para. 1.

135 ILC, Draft articles on Responsibility, (fn. 126), p. 117, Art. 42, para. 4.

led to a reform in 2022, the chapter would be incomplete without capturing these newer developments.

I. The Position of the European Parliament in 2010

Already back in 2010, the EP asked to introduce a TSD dispute settlement mechanism, which would be equivalent to other parts of the agreement. It found it important that the chapter would provide for a power to impose fines "or at least a temporary suspension of certain trade benefits provided for under the agreement, in the event of an aggravated breach of these standards".[136] In July 2016, the Parliament elaborated on the theme:[137]

> 18. Stresses that provisions on human rights, social and environmental standards, commitments on labour rights based on the ILO's core conventions and principles of corporate social responsibility (CSR), including the OECD principles for multinational companies and the UN Principles on Business and Human rights, should be binding and must form a substantial part of EU trade agreements through enforceable commitments;
>
> calls on the Commission to include sustainable development chapters in all EU trade and investment agreements;
>
> considers that, in order to make these sustainable development provisions binding, a 'three-step approach' needs to be implemented, with government consultations, domestic advisory groups and expert panels involving the ILO, and with, as a last resort, the general dispute settlement provision of the agreement used to address disputes with the possibility of financial sanctions;
>
> points out that labour and environmental standards are not limited to Trade and Sustainable Development Chapters, but must be effective throughout all areas of trade agreements.

II. The Position of the European Commission

1. The two non-Papers of the Commission Services of 2017 and 2018

In May 2017, the Swedish Trade Commissioner *Malmström* received a letter from five trade Ministers (Belgium, Finland, Luxemburg, the Netherlands and Sweden) calling for "improving the implementation of TSD provisions". Responding to

136 European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, (2009/2219(INI)), P7_TA(2010)0434, para. 22, available at: https://www.europarl.europa.eu/doceo/document/TA-7-2010-0434_EN.html?redirect (19/2/2024) .

137 European Parliament resolution of 5 July 2016 on a forward-looking and innovative future trade and investment, (2015/2105/INI), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2016-0299_EN.html (9/6/2024).

these and other calls,[138] the Commission services released a non-paper in July 2017.[139] It outlined two options as a basis for the discussions: First, the EU could continue "with its broad TSD scope", but strengthen its policy.[140] Second, certain aspects of the US and Canadian system for implementation and enforcement, *inter alia* sanctions, could be included in the EU model.[141] After consultations of the institutions and civil society, the Commission published a second non-paper in February 2018.[142] It concluded that there was "a clear consensus that the implementation of TSD chapters should be stepped-up and improved".[143] The participants wanted to keep the broad scope of the chapters, but saw the need for more effective means to achieve more effective implementation. The non-paper then laid out a 15-point action plan with seven commitments concerning a more assertive enforcement.[144]

Among them was the promise to step up the efforts to ensure early ratification of certain labour Conventions,[145] which can be read as a "recognition of pre-ratification conditionality".[146] According to the Commission, participants had differing views on trade sanctions, though. While a minority wished to move into that direction, a majority supported the EU's enforcement model at the time.[147] Due to the lack of consensus, the Commission found it "impossible to move to" a sanctions-based approach.[148] It saw two main difficulties in combining such an approach with the EU's model: first, trade sanctions would compensate the EU for a breach of labour and environmental norms, but would not guarantee that there was "effective, sustainable and lasting improvement of key social and environmental standards on the ground".[149] Second, if sanctions were introduced, a way to translate the breaches into economic compensation would need to be found. The Commission services, come to the conclusion that this would narrow the scope of the chapters, referring to the scope of the relevant norms in treaties of countries that follow the sanctions-based approach and to an unwillingness of negotiating partners to accept a broad scope combined with trade sanctions.[150]

138 *Hradilová/Svoboda*, Journal of World Trade 6/2018, pp. 1030 et seq., available at: https://www.researchgate.net/publication/330352591_Sustainable_Development_Chapters_in_the_EU_Free_Trade_Agreements_Searching_for_Effectiveness (19/2/2024).
139 Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11/7/2017, p. 2.
140 Ibid., pp. 5 et seq.
141 Ibid., pp. 7 et seq.
142 Non paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26/2/2018, pp. 1 et seq., available at: https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf (19/2/2024).
143 Ibid., p. 2.
144 Ibid., pp. 2 et seq.
145 Ibid., pp. 8 et seq.
146 *Marslev/Staritz*, Review of International Political Economy 2021, p. 1129.
147 2018 Non paper of the Commission services, (fn. 142), p. 2.
148 Ibid., p. 3.
149 Ibid.
150 Ibid.

2. The Trade Strategy of 2021

The situation further evolved in the aftermath of the EU-MERCOSUR draft FTA. After having reached a political agreement in June 2019, the text came under fire, *inter alia* for environmental concerns relating to the rain forests in Brazil and the weak enforcement mechanisms of the TSD chapter. In October 2020, the EP found that "the EU-Mercosur agreement cannot be ratified as it stands".[151] France also held this position.[152] Parliaments in Austria, Wallonia (Belgium), Ireland and the Netherlands opposed the agreement.[153] The then chancellor of Germany, *Angela Merkel*, representing a country that previously supported the agreement, expressed in August 2020 "considerable doubts" about whether to support the agreement due to environmental concerns.[154] In March 2021, the European Ombudsman found that the Commission's failure to finalise the sustainability impact assessment "in good time, notably before the end of the EU-Mercosur Trade negotiations (…) constitutes maladministration".[155]

In addition, the Dutch and French Trade Ministers released a non-paper in May 2020. They called for "the EU to (…) increase its ambition regarding the nexus between trade and sustainable development in all its dimensions, consistent with the implementation of the European Green New Deal".[156] They proposed, *inter alia*, the introduction of "staged implementation of tariff reduction linked to the effective implementation of TSD provisions" and wished to have the power to withdraw specific tariff lines for TSD breaches.[157]

Against the background of the Mercosur controversy and increasing calls to strengthen the TSD chapters, the Strategy of the new Trade Commission Dom-

151 European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018, (2019/2197(INI)), P9_TA(2020)0252, para. 36, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html (19/2/2024).

152 *EPC*, Mixed feelings about the EU–Mercosur deal: How to leverage it for sustainable development", 14/4/2021, available at: https://www.epc.eu/en/Publications/Mixed-feelings-about-the-EUMercosur-deal-How-to-leverage-it-for-su~3dad10 (19/2/2024).

153 Austria: https://www.reuters.com/article/idUSL5N26A11K/; Wallonia: https://www.brusselstimes.com/93770/wallonia-votes-against-eu-trade-pact-with-mercosur-countries-brazil-argentina-uruguay-paraguay-agriculture-environment; Ireland: https://www.politico.eu/article/irish-parliament-rejects-eu-mercosur-deal-in-symbolic-vote/; Netherlands: https://iede.news/en/european-union/dutch-parliament-votes-against-eu-mercosur-free-trade-treaty/ (all of them: 12/6/2024).

154 https://www.dw.com/en/merkel-amazon-deforestation-threatens-eu-mercosur-deal/a-54651194 (19/2/2024).

155 Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated "sustainability impact assessment" before concluding the EU-Mercosur trade negotiations, p. 7, Conclusion, available at: https://www.ombudsman.europa.eu/export-pdf/en/139418 (19/2/2024).

156 Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, 8/5/2020, p. 1, available at: https://www.tresor.economie.gouv.fr/Articles/73ce0c5c-11ab-402d-95b1-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81d08 (12/6/2024).

157 Ibid., p. 1.

brovskis of 2021, entitled "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy",[158] marks another important evolution in the Commission position. He announced that "[t]he EU will propose that the respect of the Paris Agreement be considered an essential element in future trade and investment agreements".[159] Moreover, the Commission would "strengthen the enforcement of trade and sustainable development commitments on the basis of complaints made to the Chief Trade Enforcement Officer (CTEO)".[160] The strategy also announced an early review of the 15-point action plan in 2021 that would encompass all relevant aspects of TSD implementation and enforcement.[161] In order to unblock the Mercosur agreement, the Trade Commissioner promised "assertive enforcement of both its market access and sustainable development commitments" and referred an ongoing dialogue "on enhancing cooperation on the sustainable development dimension of the Agreement, addressing the implementation of the Paris Agreement and deforestation in particular".[162]

3. The Communication of June 2022

In February 2022, the Commission published an independent comparative study[163] and conducted an open public consultation[164]. This laid the ground for the new Communication in June 2022 dedicated to TSD.[165] On the enforcement side, the Commission proposed to align TSD enforcement with the general state-to-state dispute settlement (SSDS). If a party does not comply within the named period, trade sanctions should be possible as a matter of last resort in instances of serious violations of core TSD commitments. There would be a breach of environmental provisions if a party fails to comply with its obligations under the Paris Agreement in a way that "materially defeats the object and purpose of the agreement".[166] When it comes to labour rights "serious instances of non-compliance" with the ILO fundamental principles and rights at work would constitute such a violation.[167]

158 *European Commission*, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, pp. 12 et seq.
159 Ibid., p. 12.
160 Ibid., p. 13.
161 Ibid., pp. 13 et seq.
162 Ibid., p. 19.
163 *Velut et al.*, LSE 2022/2.
164 Open public consultation on the Trade and Sustainable Development (TSD) Review, available at: https://policy.trade.ec.europa.eu/consultations/open-public-consultation-trade-and-sustainable-development-tsd-review_en (19/2/2024).
165 Communication of the Commission of 22 June 2022, The power of trade partnerships: together for green and just economic growth, COM(2022) 409 final, p. 1.
166 Ibid., p. 11 (the direct quote is also included on p. 11).
167 Ibid., p. 11.

A few days later, on 30th of June 2022, the negotiations for a trade agreement between the EU and New Zealand were concluded.[168] Signed on 9th of July 2023, it "is the first one to integrate the EU's new approach" according to the Commission.[169] Indeed, under Article 26.2 its TSD commitments are enforceable through the general dispute settlement mechanism. Moreover, the fulfilment of obligations clause (Article 27.4) contains in its paragraph 3 the following new language:

> (3) This Agreement forms part of the common institutional framework referred to in Article 52(1) of the Partnership Agreement. A Party may take appropriate measures relating to this Agreement in the event of a particularly serious and substantial violation of any of the obligations described in Article 2(1) or Article 8(1) of the Partnership Agreement as essential elements, which threatens international peace and security so as to require an immediate reaction. A Party may also take such appropriate measures relating to this Agreement in the event of an act or omission that materially defeats the object and purpose of the Paris Agreement. Those appropriate measures shall be taken in accordance with the procedure set out in Article 54 of the Partnership Agreement.

The clause hereby amends the "essential elements clause" of the Partnership Agreement. Seen together, Articles 26.2 and 27.4(3) of the EU-NZ Trade Agreement create "the possibility of trade sanctions as a matter of last resort, in instances of serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change".[170]

III. The Council Position of October 2022

In response to the June 2022 Communication, the Council followed suit. In its conclusions of October 2022 relating to the Trade and Sustainability Review, the Council made the following points on enforcement:

> 8. The Council supports the Commission's commitment to strengthen further the implementation and enforcement of TSD provisions in all future negotiations of trade agreements and to reflect it in the ongoing negotiations as appropriate, including by proposing to apply the compliance stage of the general state-to-state dispute settlement to the TSD chapter of such agreements. The Council invites the Commission to use review clauses and, where relevant, joint committees to align existing trade agreements with the new TSD approach, as appropriate. Moreover, the involvement of DAGs in monitoring the compliance stage must also be strengthened in line with the Communication. Furthermore, trade sanctions, which may take the form of suspension of trade concessions, could be applied, as a matter of last resort, after exhausting possibilities

168 Key elements of the EU-New Zealand trade agreement, available at: https://policy.trade.ec.europa.eu/news/key-elements-eu-new-zealand-trade-agreement-2022-06-30_en (19/2/2024).

169 Press release, EU and New Zealand sign ambitious free trade agreement, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3715 (19/2/2024).

170 Key elements of the EU-New Zealand trade agreement, available at: https://policy.trade.ec.europa.eu/news/key-elements-eu-new-zealand-trade-agreement-2022-06-30_en (19/2/2024).

for an amicable settlement. They can be applied for serious violations of agreed commitments concerning ILO fundamental principles and rights at work as well as cases of failure to comply with obligations that materially defeat the object and purpose of the Paris Agreement on Climate Change. Any such trade sanctions should be temporary, targeted and proportionate. In addition, the respect of the Paris Agreement on Climate Change will be proposed by the EU to be an essential element in future trade agreements".[171]

IV. Subsequent Practice with Chile and Mercosur

In view of these clear demands, the Commission then approached its treaty partners in ongoing negotiations. However, the December 2022 text of the EU-Chile Interim Trade Agreement (ITA) follows the established practice with a specialised TSD DSM. A joint statement commits both sides to conclude a review process under Article 26.23 within twelve months upon the entry into force of the ITA, which could introduce stronger enforcement of the TSD chapter. Moreover, and regardless of the outcome of this review, the Parties will also consider the possibility of including the Paris Agreement as an essential element of the ITA and the modernized EU-Chile Agreement.[172]

For the stalled EU-Mercosur FTA, the Commission proposed in March 2023 a Joint Instrument within the meaning of Art. 31 VCLT for the interpretation of the FTA. The proposal includes specifications for the TSD chapter as well as a Joint Declaration to review it. The review may relate to the inclusion of a compliance phase and countermeasures as last resort in the dispute settlement mechanism of the TSD chapter and the designation of the Paris Agreement as an essential element of the agreement.[173] However, Mercosur has ruled out to accept the admissibility of sanctions. In addition, Mercosur demands a new compensation mechanism for EU regulations that reduce market access, which is targeted against the EU Deforesta-

171 Council Conclusions of the Trade and Sustainability Review, 21/10/2022, para. 8, https://www.consilium.europa.eu/en/press/press-releases/2022/10/17/council-conclusions-on-the-trade-and-sustainability-review/ (9/7/2024).

172 See The EU-Chile agreement explained, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/agreement-explained_en#TSD (19/2/2024) and Joint Statement on Trade and Sustainable Development by the European Union and Chile, 2 December 2022, p. 2, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (15/6/2024).

173 EU proposal for a Joint instrument, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/documents_en (15/6/2024).

tion Regulation[174] and the Carbon Border Adjustment Mechanism[175] (CBAM).[176] By the end of 2023, the text was still not agreed.

V. Interim Conclusion

Five years after the start of the review process in 2017, the institutions have agreed to change the practice from 2010–2022 on TSD chapters on two main points. First, it should be made clear that the breach of certain TSD commitments may lead to trade sanctions as a matter of last resort. Second, the Paris Agreement will be elevated to an essential elements clause. However, in our view, the first point is in reality not so new, but rather a confirmation of the legal possibilities that already exist under the existing TSD chapters. In return, declaring the Paris Agreement as an essential element removes any doubt that the breach of a Paris commitment will constitute a material breach, which could lead to sanctions according to Article 60 VCLT.

F. Overall Conclusion

In sum, we conclude that the TSD chapters in EU FTAs are legally significant in various ways.

First, their substantive scope covers both labour and environmental measures in the partner country, which are subject to a non-regression obligation. Moreover, labour-related domestic measures must comply with core international labour standards and relevant ILO Conventions, referred to in the FTA, whereas domestic measures affecting the environment need to be in line with multilateral environmental agreements identified in the FTA and the Paris Agreement. Depending on the wording used in any given precise clause, violations thereof may become a legitimate concern of the EU even if the breach does not affect the trade between the parties.

Second, the TSD clauses contain legally binding commitments, which can be enforced via the special TSD Dispute Settlement Mechanisms. The EU-Korea Panel report is a good example that enforcement may lead to results, even if the report as such is not binding and its non-implementation could not be followed-up by trade retaliation. Moreover, the case of the EU-Viet Nam FTA shows how effective pre-ratification conditionality can be.

174 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ 2023, L 150, p. 206.

175 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ 2023, L 130, p. 52.

176 *Kafsack*, Endlich ist die Antwort der Mercosur-Staaten da, Frankfurter Allgemeine Zeitung, 15/9/2023, available at: https://www.faz.net/aktuell/wirtschaft/mercosur-staaten-erklaeren-bedingungen-fuer-handelsabkommen-mit-eu-19178118.html (20/11/2023).

Third, in case of material breaches of a TSD commitment on core labour rights or important environmental obligations, recourse to trade sanctions is already possible under Article 60 VCLT, as the TSD dispute settlement chapter does not exclude such possibility. In turn, non-material breaches of a TSD commitment may only be dealt with under the TSD dispute settlement mechanism. The law of State responsibility cannot be invoked according to the *lex specialis* rule in Article 55 ARSIWA.

Fourth, the 2022 reform further broadens the possibility of trade sanctions. The EU-New Zealand FTA of 2023 did so by making the general dispute settlement system applicable to the TSD chapter. The reform also broadens the scope of future TSD provisions, whose breach may be considered material. It added the Paris Agreement (which the EU considered as an essential element of the partnership only in its TCA with the United Kingdom of 2020, a rather special agreement with a former EU Member State) to the arsenal of the essential elements clause, which the EU wishes to include from now on with each of its trading partners. At the same time, the reluctance of Chile and Mercosur to subscribe to these new elements serves as a stark reminder that the EU cannot unilaterally impose its TSD policy on a trading partner, but that TSD chapters in EU FTAs need to be consented by both sides.

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Chapter 4
'Green Conditionality' in the EU's Trade and Investment Policy: *Quo Vadis?*

Belen Olmos Giupponi and Hannes Hofmeister

Contents

Abstract With the entry into force of the Lisbon Treaty in 2009, the external dimension of the European Union's (EU) trade and investment policy has prominently emphasized sustainable development as a pivotal component of its external agenda. This emphasis has solidified over the years through the negotiation of various treaties and has received legal support from the Court of Justice of the European Union (CJEU). Nevertheless, significant variations and subtleties exist in how sustainability is conceptualized and incorporated into international agreements concluded by the EU. A pivotal moment in this context was Advisory Opinion 2/15 concerning the Free Trade Agreement between the European Union and the Republic of Singapore. This Opinion offered critical insights into the scope and character of sustainable development chapters within the framework of trade and investment policy, taking into consideration key EU constitutional law provisions such as Article 218(11) TFEU, Articles 3(5) and 21 TEU, and Articles 11 and 191 TFEU. Subsequent agreements

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have embraced distinct approaches to sustainability, particularly within the realm of environmental protection, where provisions range from general principles to comprehensive regulations governing specific aspects. This chapter aims to examine the concept of 'green conditionality' with the Sustainable Development Chapters of the EU's Trade and Investment Agreements, with a particular focus on the environmental provisions. It seeks to shed light on the extent to which these agreements prioritize and enforce environmental sustainability, thus contributing to a more nuanced understanding of the EU's evolving approach to green conditionality within its trade and investment policy framework.

Keywords Sustainable Development Chapters · EU External Commercial Policy · Trade and Investment Agreements · Multilateral Environmental Agreements (MEAs) · Sustainable Development Goals · Sustainability · Sustainability Impact Assessments

4.1 Introduction

Following the entry into force of the Lisbon Treaty in 2009, sustainable development has emerged as a predominant dimension within the European Union's (EU) trade and investment policy in its external sphere.[1] This trend has consolidated in recent years through proactive treaty negotiations, and it has received validation from the rulings of the Court of Justice of the European Union (CJEU). Nevertheless, notable distinctions and subtleties emerge concerning the conceptualization and incorporation of sustainability within the Free Trade and Investment Agreements (FTIAs) that the EU has concluded during this period.[2]

Within and outside its borders, the EU has intricately crafted a comprehensive policy framework pertaining to sustainable development and trade. This multifaceted strategy seeks to stimulate economic advancement while concurrently upholding environmental integrity, fostering societal welfare, and perpetuating sustainable development within its partner nations. The foundation of the EU's sustainable development and trade policy is firmly rooted in a tripartite structure, comprising economic, social, and environmental dimensions. The economic dimension is primed to propel sustainable economic growth, the social facet is resolutely committed to upholding principles of social justice and the safeguarding of human rights, while the environmental aspect is steadfastly dedicated to environmental preservation and the efficient management of finite natural resources.

Indicators of sustainability play a pivotal role, illustrating varying degrees of commitment within the EU, including leadership demonstrated by certain Member States. The manner in which these nations report their progress also serves as a significant aspect to consider in this context.

[1] Damro 2012, pp. 55–75.

[2] European Commission. Negotiations and Agreements. Available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (last accessed on 3 March 2024).

The Trade and Sustainable Development (TSD) chapters within the EU's trade agreements are specifically designed to harmonize trade activities with the imperatives of sustainable development. Their core objectives encompass the safeguarding of environmental integrity and the advancement of labor rights.

In this realm, the EU's priority is to meet Sustainable Development Goals and deliver sustainability globally. Against this backdrop, the chapter's main purpose is to explore the extent of the so-called "green conditionality" in the Sustainable Development Chapters (SDCs) of the Trade and Investment Agreements (TIAs) entered into by the EU with a focus on the enforcement of the provisions in cases of breach.

This Chapter comprehensively explores several crucial dimensions within the domain of Sustainable Development Clauses (SDCs). One significant focus is the diverse typologies of "sustainability" clauses, each encompassing specific content related to environmental law, intellectual property (IP) law, Corporate Social Responsibility (CSR), energy law, and more. The analysis extends beyond the mere identification of these clauses to an in-depth examination of their substantive provisions and implications.

A pivotal aspect of this Chapter involves an investigation into the applicability of EU constitutional law principles within the context of SDCs. This includes an examination of treaty provisions endowed with constitutional significance, accompanied by an exploration of prevailing theoretical underpinnings. Such scrutiny is crucial for a more nuanced understanding of the legal framework governing sustainable development.

Furthermore, this Chapter critically dissects the intricate interactions between EU law and both international and domestic realms of environmental and labor law. This exploration aims to unravel the complexities arising from the intersection of these legal domains, shedding light on potential synergies or conflicts.

In tandem, this Chapter will delve into the nuanced interplay between trade, investment, and sustainable development. This involves dissecting the ways in which trade and investment activities align with or challenge the principles of sustainable development. By doing so, the paper contributes to the discourse on the role of economic activities in fostering or hindering sustainable practices.

Lastly, the Chapter directs its attention to the mechanisms available for ensuring compliance and enforcement in the event of a breach of SDCs. This includes an analysis of the legal tools and frameworks designed to uphold the commitments laid out in sustainable development agreements. By examining these questions, we aim to shed light on the issue of sustainability in terms of "green conditionality" in the arena of trade and investment external relations pinpointing constraints and progress achieved so far.

4.2 Conceptualising "Sustainability" in the European Union

In the EU, sustainable development is a core principle of the Treaty of the EU, and also a priority objective for the EU's internal and external policies. On the international level, the EU is committed to achieving the 17 Sustainable Development Goals (SDGs) included in the United Nations 2030 Agenda. Under EU law, rather than a comprehensive framework obligating Member States to raise sustainability across diverse contexts, there are various provisions and obligations scattered in different texts. Moreover, a duty exists to perform environmental impact assessments.

Sustainability, as a concept, is shown through a multitude of norms, policies and actions in the EU. Within the EU, sustainable development is a pivotal objective that is intricately linked with other aims and it is embedded in different legal tools Member States have at their disposal. The synergy of these measures, coupled with due diligence facilitates cooperation within specific policy areas such as with regard to addressing deforestation and fosters opportunities for inter-state cooperation.

Collaboration in the realm of external relations is equally vital. Sustainable development clauses included in international agreements concluded by the EU indicate that they do not only deal with carving out sustainable development protection but that they are also about sanctioning the breach of specific sustainable development provisions. In each of the Sustainable Development chapters, the non-regression principle has been upheld within commercial aspects to prevent a race to the bottom. The legal framework that underpins the preservation and protection of sustainability within the EU comprises an array of various instruments and policies. Nestled beneath the expansive cover of the EU's sustainable development doctrine, various trade policy measures, initiatives, and agreements are incorporated within this framework, which includes a wide range of both soft law and hard law instruments, of multilateral and regional scope, such as:

- *Sustainable Development Goals (SDGs).* At the multilateral level, the EU is committed to attaining and cooperating to achieve the 17 SDGs set by the United Nations, which include ending poverty, reducing inequality, and protecting the environment.[3]
- *The EU's Generalized Scheme of Preferences (GSP).* In the international trade realm and within the WTO, the EU has committed to assist developing countries through preferential trade arrangements. The GSP scheme provides preferential access to the EU market for products from developing countries that meet certain social and environmental standards.[4]
- *The EU's Circular Economy Action Plan.* This plan aims to promote a more sustainable and resource-efficient economy by reducing waste, promoting recycling, and increasing the use of renewable energy sources.[5]
- *The EU's Green Deal.* This initiative aims to make the EU climate-neutral by 2050 by reducing greenhouse gas emissions and promoting sustainable agriculture, forestry, and fisheries.[6] The Green Deal primarily focuses on domestic actions and the implementation of additional measures to confront the global environmental impact while fostering novel sustainability paradigms.

At the international level, the EU's sustainable development and trade policy encompasses a main aim to ensure that environmental and labor clauses are respected in partner countries.[7] For many years, the allocation of competences between the EU and Member States in external relations was controversial.[8] Opinion 2/15 on the Free Trade Agreement between the EU and the Republic of Singapore[9] clarified the legal basis, scope and nature of sustainable development chapters in the context of the new trade and investment policy, in light of Article 218(11) TFEU and other relevant EU constitutional law provisions, such as Articles 3(5) and 21 TEU, and Articles 11 and 191 TFEU.[10]

Different international agreements concluded after the adoption of this Opinion, embody "differential" approaches to sustainability, i.e. they present innovations in terms of the provisions included and mechanisms to ensure compliance. In the environmental protection realm, these agreements comprise a panoply of diverse provisions ranging from generic clauses referring to Multilateral Environmental Agreements (MEAs) to more detailed and specific clauses regulating specific aspects of international environmental protection. These chapters are in line with relevant international labor and environmental law frameworks.

[3] European Commission. Sustainable Development Goals. Available at https://commission.europa.eu/strategy-and-policy/sustainable-development-goals_en#:~:text=Sustainable%20development%20is%20a%20core,Sustainable%20Development%20Goals%20(SDGs) (last accessed on 3 March 2024).

[4] European Commission, EU's Generalized Scheme of Preferences (GSP), https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en (last accessed on 3 March 2024).

[5] European Union, Circular Economy Action Plan, available at https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf (last accessed on 3 March 2024).

[6] European Commission, The Green Deal Industrial Plan: putting Europe's net-zero industry in the lead (1 February 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_510 (last accessed on 3 March 2024).

[7] Pelkmans 2020, pp. 391–400.

[8] The allocation of competences between the EU and Member States in external relations was controversial. After the Lisbon Treaty, Opinion 2/15 on the Free Trade Agreement.

[9] Yotova 2018, pp. 29–32.

[10] G. Van der Loo, The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity?, No 2017/17, May 2017, available at https://www.ceps.eu/wp-content/uploads/2017/05/PI2017-17 (last accessed on 3 March 2024).

4.3 Types of "Sustainability" Clauses/Provisions Included in EU Free Trade and Investment Treaties: Content and Commitments

Recent years witnessed a considerable expansion of trade and investment treaties and important changes in the ambition, scope, and density of sustainability provisions in the EU's internal and external policies. The EU has articulated a comprehensive approach to sustainability to encompass various elements as discussed below. Notwithstanding this progress, the broader picture of sustainability in international law looks quite scattered and fragmented, offering different levels of enforcement and compliance which is revealed in the relationships of the EU with third countries. Law-making in this specific area of EU External Relations is vested in the EU Commission with a considerable participation of the EU Parliament, under the monitoring of the CJEU. More recently, the EU Ombudsman has gained a more active role, especially regarding the sustainability impact assessments that are conducted before the signature and entry into force of the Trade and Investment Agreements.[11]

In relation to the content of the Sustainable Development (SD) Chapters of EU's Free Trade and Investment Agreements (FTIAs), they include references to MEAs and to the International Labor Organization's (ILO) core labor standards as regulated in the main conventions.[12] It is worth mentioning that sustainability provisions can be also placed in other chapters of the FTIAs and that are not necessarily contained in the environmental and labor law clauses. To illustrate, these can be provisions regarding Intellectual Property (IP) rights and law, Corporate Social Responsibility, and those concerning energy law as incorporated in other chapters.[13] The content and shape of these SD chapters vary greatly across EU free trade agreements. Hence, characterizing and assessing the nature of the provisions and the institutionalization that surrounds them is far from easy.

In an attempt to systematize them, SD provisions in international trade and investment agreements concluded outside the EU sphere, vary considerably. SD chapters constitute now a core component of the external dimension of the revised EU's trade and investment policy. Since the Lisbon Treaty entered into force in 2009, the EU's TSD chapter on environmental and labor matters combining both types of clauses have been shaped in different ways. Although these SD provisions are binding upon the parties, compliance with them has not been required in practice.[14] Clearly, the main motivation for seeking consensus around these environmental and labor issues relates to the EU's role in global climate change negotiations. Furthermore, the EU holds a considerable responsibility in global value chains as it generally outsources economic, social and environmental impacts.[15]

Looking at the broader picture, the current legal framework encompasses the European Green Deal (EGD) launched in 2019, which increases the reach of green provisions in the Union's trade and investment policy, calling for mainstreaming of social and environmental sustainability goals into the EU's trade external trade policy.[16] The EGD was followed by the EU Trade Policy Review in 2021, placing sustainability at the center of the EU external policy.[17]

It is worth noting that not all sustainability issues can be effectively dealt with by trade agreements. Hence, the Commission has indicated that there are many other tools at the EU, Member State, and regional levels to tackle the negative effects of globalization. Notably, the 2017 European Consensus on Development, provides a common EU and Member State response to the 2030 Agenda from a development perspective. In the Commission's words, "sustainability issues feature prominently and stronger coherence between trade and development policies".[18]

While EU FTIAs have included environmental protection provisions and commitments on labor standards, there are still shortcomings concerning their application. This is observed in three particular areas: protection of the environment, mitigation of negative impacts of trade, and their use to enhance sustainability on a global scale.[19] To address these shortcomings, the EU institutions are seeking to overhaul the current policy as stated in the Communication "The power of trade partnerships: together for green and just economic growth".[20] In the document, the European Economic and Social Committee outlines strategies to further strengthen the implementation and enforcement of the Trade and Sustainable Development (TSD) chapters of the EU's trade agreements.

Considering this context, in the next sections this Chapter delves into the execution and enforcement of Sustainable Development (SD) Chapters in Free Trade and Investment Agreements (FTIAs) established by the EU. It explores the concept of

[11] Sustainability impact assessments, https://environment.ec.europa.eu/law-and-governance/environmental-assessments/environmental-impact-assessment_en (last accessed on 3 March 2024).

[12] Environmental and labour clauses in Sustainable Development Chapters.

[13] See, for instance, the Agreement with New Zealand.

[14] The Lisbon Treaty introduced modifications to the Common Commercial Policy by adding investment and sustainable development under that framework.

[15] Eurostat, EU and global value chains, available at https://ec.europa.eu/eurostat/web/economic-globalisation/globalisation-in-business-statistics/global-value-chains (last accessed on 3 March 2024).

[16] European Commission, Statistics for the European Green Deal, available at https://ec.europa.eu/eurostat/cache/egd-statistics/ (last accessed on 3 March 2024).

[17] Brussels, 18.2.2021 COM(2021) 66 final, Communication from the Commission to the European Parliament, The Council, the European Economic And Social Committee And The Committee of The Regions, Trade Policy Review—An Open, Sustainable and Assertive Trade Policy, available at https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf (last accessed on 3 March 2024).

[18] European Commission, *Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)*, available at https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf (last accessed on 3 March 2024).

[19] Blot and Kettunen 2021.

[20] European Economic and Social Committee, *The power of trade partnerships: together for green and just economic growth*, available at https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/power-trade-partnerships-together-green-and-just-economic-growth (last accessed on 3 March 2024).

green conditionality and its integration into associated domains. While "green conditionality" lacks a universally agreed-upon definition, in this Chapter, it refers to the conditions mandated in international treaties, whether trade or cooperation agreements, which necessitate adherence to environmental regulations for trade and aid cooperation.[21]

4.4 Examining Sustainability Through the Lens of EU Law: EU Constitutional Law Principles and Prevailing Theoretical Underpinnings

From a constitutional EU law's perspective, TSD chapters raise the issue of their integration into the legal framework of the EU and the choice of the appropriate legal basis for secondary legislation.[22] Traditionally, the distribution of sustainable development competences in the context of the external commercial policy has been controversial due to the mismatch between internal and external allocation, i.e. environmental policy is a shared competence, whereas the external commercial policy is an EU's exclusive competence. Opinion 2/15 of the CJEU clarified that TSD provisions should be included under the umbrella of the EU's exclusive competence.[23] In the new scenario that emerged after the Lisbon Treaty, this would imply the possibility of carrying forward legal actions in cases of treaty breach by any of the parties to the EU FTIAs.

Though the AO shed light on competence allocation, the underlying problem continues to be compliance with the specific SD provisions of the agreements. Taking a critical viewpoint, Meunier and Nicolaidis contend that the efforts to align the EU's international investment agreements with sustainable development goals have reinforced the interests of individual States and heightened the politicization of the EU's Common Commercial Policy.[24]

Taking stock of the EU treaty-making experience, different cases brought before the EU Ombudsman illustrate controversial issues as observed in practice. In light of these cases, main obstacles to building a coherent and consistent sustainable development policy in line with SDGs become clear. These EU FTIAs are also

[21] The concept was coined in the 1990s to describe the greening of international aid, in other to promote environmental policies in developing countries donors seek to promote environmental policies in developing countries, according to their own objectives.

[22] From an EU constitutional law standpoint, sustainable development has been incorporated into different provisions of the treaties, see the Preamble to the TEU, Article 3(3) TEU and Article 11 TFEU, and Article 37 CFREU. Additionally, in terms of the EU's external action, see Article 3(5) TEU, Article 21(2)(d) TEU, and Article 21(2)(f) TEU See, also, Morgera and Marín Durán 2014, pp. 987–989, 992–994.

[23] Opinion 2/15 of the Court, of 16 May 2017, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN (last accessed on 3 March 2024). For an analysis of the Opinion and its implications for EU constitutional law, see Cremona, 2018, pp. 231–259.

[24] Meunier and Nicolaidis 2019, pp. 103–113.

disclosing new perspectives and contributing recommendations to improving current EU policies, enhancing its significant role in preserving sustainability globally.

Consistent with this approach, Sustainability Impact Assessments (SIAs) and Human Rights Impact Assessments (HRIAs) carried out before finalizing FTIAs with other regions or third-party states are commonly deployed as mechanisms to identify specific areas of concern and action for both the EU and its external partners. SIAs' main goals are to identify, address and lessen the negative or detrimental impacts of EU FTIAs. SIAs are particularly relevant to monitor compliance with environmental standards and the protection of labor rights during the negotiations and before the entry into force of the agreements.

In some specific cases, civil society organizations have even complained about the timing for the HRIAs and the lack of an appropriate level of protection, with cases reaching the EU Ombudsman. In the EU Ombudsman's words "[t]he EU projects its values through its trade deals. Concluding a trade agreement before its potential impact has been fully assessed risks undermining those values and the public's ability to debate the merits of the deal. It also risks weakening European and national parliaments' ability to comprehensively debate the trade agreement."[25]

Amongst these controversial cases, in a complaint regarding the EU-Mercosur Agreement, as the negotiations were protracted, the claim was that the European Commission should have concluded an updated sustainability impact assessment (SIA) before the EU-Mercosur trade deal was agreed. The European Ombudsman urged that, in future trade negotiations, such assessments should be finished ahead of the final agreement.[26] As the European Commission failed to ensure the finalization of the SIA in good time (i.e. before the conclusion of the EU-Mercosur trade negotiations), there was maladministration. In a different case, the EUO examined the complaint submitted by a group of civil society organizations, which were concerned about the European Commission's failure to ensure human rights risks were assessed before providing support to African countries to develop surveillance capabilities, notably in the context of the EU Emergency Trust Fund for Africa (EUTFA).[27] The complainants contended that, before agreeing to support projects with potential surveillance implications, such as introducing biometric databases or mobile phone monitoring technologies, the Commission should have carried out prior risk and impact assessments to ensure that the projects do not result in human rights violations (such as the right to privacy).[28] In both cases, the Ombudsman found that the measures taken were not appropriate to guarantee a proper assessment of

[25] EU Ombudsman. EU Commission 'failed' on assessing Mercosur trade deal, available at https://euobserver.com/green-economy/151302 (last accessed on 3 March 2024).

[26] Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations, available at https://www.ombudsman.europa.eu/en/decision/en/139418 (last accessed on 3 March 2024).

[27] Decision on how the European Commission assessed the human rights impact before providing support to African countries to develop surveillance capabilities (case 1904/2021/MHZ). Decision. Case 1904/2021/MHZ—Opened on Tuesday 130 November 2021—Decision of 28 November 2022.

[28] Ibid.

the human rights impact of EUTFA. The implication of this main outcome of the inquiry is that no adequate mitigation could have been put in place. To tackle this, the Ombudsman recommended that future EU Trust Fund projects would always include a prior human rights impact assessment.[29]

Another related area in which the EU has achieved significant progress is corporate due diligence. In its approach to dealing with sustainability, the EU has adopted three different pieces of legislation. The proposed directive on CSDD would require EU Member States to adopt legislation regulating due diligence aspects of adverse human rights and environmental effects. In a nutshell, the Directive aims at requiring large EU companies and foreign companies operating in the EU to meet due diligence obligations with respect to human rights and environmental standards, setting forth an enforcement mechanism with possible sanctions and civil liabilities for non-compliance.[30] Another piece of EU legislation which is relevant in this field is the Corporate Sustainability Reporting Directive (CSRD) in force since January 2023.[31]

Specific milestones to improve the negotiation and implementation of EUFTIAs depend upon different scenarios. Some other existing tools include post-assessments and the new EU taxonomy.[32] In addition, the adoption of a Rapid Response Mechanism (RRM) to be incorporated into the EUFTIAs has been suggested.[33] A similar RRM has been incorporated under the USMCA (formerly known as NAFTA), which can be triggered by some contracting parties "for expedited enforcement of workers' free association and collective bargaining rights at the facility level".[34] The RRM is understood as an innovative dispute settlement mechanism that can be relied upon to prompt enforcement of TSD provisions.

The effectiveness of Strategic Environmental Assessments (SIAs) varies according to the individual agreement, the timing of the assessment, the scope of its

[29] Decision on how the European Commission assessed the human rights impact before providing support to African countries to develop surveillance capabilities (case 1904/2021/MHZ), of 22 November 2021, available at https://www.ombudsman.europa.eu/en/decision/en/163491 (last accessed on 3 March 2024).

[30] EU Commission, Proposal for a Directive of The European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final).

[31] The Directive was published in the Official Journal of the European Union on 16 December 2022, after the European Parliament and the Council of the European Union formally adopted it. The CSRD entered into force on 5 January 2023. Available at https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (last accessed on 3 March 2024).

[32] European Commission, EU taxonomy for sustainable activities, available at https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en (last accessed on 3 March 2024).

[33] See Blot et al. 2022.

[34] USMCA, Chapter 31 Annex A; Facility-Specific Rapid-Response Labor Mechanism, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31-Dispute-Settlement.pdf (last accessed on 3 March 2024).

recommendations, and the degree of acceptance of those recommendations.[35] Recent assessments of the mechanism have found that the majority of the SIA processes reviewed can be considered good practice in terms of timely stakeholder engagement (i.e., engaging with stakeholders during the initial stages of the SIAs) and in terms of concluding negotiations after the delivery of the SIA, thus allowing the SIA recommendations—in principle—to feed into the negotiation process.

However, there are examples of failures to synchronize FTA negotiations with the SIA process. The EU-Mercosur agreement concluded negotiations before the final SIA report was published, and the EU-Singapore and EU-Vietnam agreements were negotiated using an obsolete SIA (EU-ASEAN). The involvement of trade partners takes place not only during the negotiations but also throughout the life of the agreement and during its revision. This ties in with the internal and external allocation of competences between the EU and Member States. Internally, the SIAs fall under the competence of different DGs (namely, trade and environment).

Regarding the evolution of different "generations" of FTIAs/TSD Chapters, specific wording and tailor-made clauses have varied over the years. Some of the early TSD clauses contained a reference to Multilateral Environmental Agreements (MEAs) as a way to reinforce the application of international environmental law norms, such as the climate change law. Hence, the baseline for compliance is determined by specific commitments as set out in the respective environmental treaty. More modern FTIAs include a binding framework aimed at evaluating compliance with different TSD commitments. In more recent agreements, for instance, the binding force of the Paris Agreement is reflected in the treaty provisions.

It is worth underlining that environmental and labor-related clauses are also found outside the specific TSD chapters, such as in chapters/provisions dealing with specific trade issues. The examination of sustainability within treaties extends beyond the confines of specific TSD chapters. It encompasses diverse dimensions woven into other treaty chapters, addressing aspects such as trade tariffs and various trade-related measures, including Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). The broader canvas of sustainability considerations within these chapters forms a critical facet of EU Free Trade and Investment Agreements (EUFTIAs), incorporating various types of TSD clauses. This nuanced approach acknowledges the multifaceted integration of sustainability principles across diverse treaty sections, reflecting the intricate intersection of trade and sustainable development objectives. Sustainability standards vary across treaties and depend on the TSD provisions on environmental and labor issues included in the treaties.

An additional clause of a procedural nature pertains to the "trigger" clause, designed to instigate a dispute settlement process in the event of a violation of the sustainable development provisions outlined in the agreement. Dispute settlement

[35] IEEP, *Enhancing sustainability in EU Free Trade Agreements* (2022). The report's main findings indicate that the majority of SIA processes reviewed showed a timely stakeholder engagement. Sustainable development in the European Union—A statistical glance from the viewpoint of the UN Sustainable Development Goals, available at https://ec.europa.eu/eurostat/documents/15234730/15228899/KS-02-16-996-EN-N.pdf/e4f0a6bc-c051-1b0a-1d14-78f2f99c73de?t=1667248035644 (last accessed on 3 March 2024).

chapters serve a crucial function in upholding compliance with TSD provisions, facilitating the engagement of civil society organizations throughout the resolution process. Due to the imbalance often noted in agreements signed by the EU with developing or emerging contracting parties, in those agreements, it becomes imperative to ensure the assurance of technological transfer and financial support for the realization of sustainability commitments.

During the review of existing FTIAs, new proposals for enhancing sustainability commitments have been put forward. The first EU Free Trade Agreement to include the new generation of TSD clauses was the EU-South Korea FTA treaty and the 2023 EU-New Zealand treaty. The former establishes a structured foundation for collaborative engagement concerning sustainability and agricultural development. This encompasses areas of significance, notably sustainable food systems, which hold the potential for enhancing the resilience of farmers in mitigating the impacts of climate change and environmental degradation.[36]

The recently concluded Free Trade Agreement (FTA) between the EU and New Zealand signifies a substantial enhancement of sustainability commitments within EU FTAs. This agreement reflects, in part, a more progressive stance on sustainability matters. The agreement mandates both contracting parties to actively pursue the objectives outlined in the Paris Agreement and adhere to fundamental conventions established by the International Labor Organization (ILO).[37] Additionally, the agreement seeks to bolster collaboration in the realms of fossil fuel subsidy reform and the advancement of sustainable food systems.[38]

4.5 Synergies and Crossroads: EU Law's Interplay with International and Domestic Environmental and Labor Regulations

Another significant issue that these TSD Chapters pose concerns the implementation of treaty clauses in domestic environmental and labor law. One of the stumbling blocks in this respect is the absence of a level playing field in practice, with a considerable unevenness of levels of protection across the different trade partners. An additional hurdle is the exhortatory language used in the environmental and labor provisions of the TSD chapters. Taking the environmental realm as an example, the agreements usually compel the parties to comply with the commitments acquired under various Multilateral Environmental Agreements (MEAs). However, there is a weak follow-up of compliance and, often, no consequences are foreseen for the lack of observance of the treaty or related to the withdrawal from the MEA.[39]

In the environmental law realm, areas of particular concern are those relating to climate change provisions and deforestation. In terms of deforestation, most trade and investment treaties do not deal with these issues as demonstrated in specific cases. For instance, despite discussions about halting negotiations between the EU and MERCOSUR due to the forest fires in the Amazon region, no specific action was taken.[40] To address this concern, the EU has recently introduced legislation through a regulation to minimize EU-driven deforestation and forest degradation.[41]

Turning now to analyzing labor provisions in TSD Chapters, according to the International Spillover Index, EU Member States also create negative socio-economic spillovers outside the region.[42] To illustrate this, the 2021 report indicates that "imports of clothing, textiles, and leather products into the EU are related to 375 fatal workplace accidents and 21,000 non-fatal accidents every year".[43] In response to this trend, the EU has tried to progressively cover social aspects through its Free Trade Agreements. These labor provisions are modelled upon the clauses of the EU-Korea FTA. In practice, all EU FTIAs refer to ILO core labor standards as set out in the fundamental ILO Conventions, particularly acknowledging and protecting, freedom of association, the right to organize and collectively bargain, and the elimination of forced labor. Looking at the TSD Chapters from a comparative analysis perspective, a difference can be appreciated between the different TSD chapters of the FTAs between the EU and South Korea (EU-Korea), Canada (CETA) and Japan (JEFTA).[44]

The new generation of EU trade and investment treaties has introduced improved transparency in the TSD dispute settlement process compared to earlier agreements. This is evidenced by the strengthened language, such as the use of "shall", which imparts a sense of commitment in these agreements. Nevertheless, there remains inconsistency and variation across different treaties.

Civil society has played a crucial role in these FTIAs by creating networks of diverse NGOs that help with compliance with national legislation. These networks offer valuable feedback and foster cooperation on critical issues. However, the aspect of dispute resolution presents challenges, as the FTIAs lack sufficient safeguards to ensure compliance and the delivery of treaty outcomes. For instance, there is a gap

[36] The EU-New Zealand Agreement was signed on 9 July 2023. Following signature, both Parties must complete the required legal processes before the FTA can enter into force, which is expected to occur in the first half of 2024. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/agreement-explained_en (last accessed on 3 March 2024).

[37] EU-New Zealand Agreement, Article 19.6. Trade and climate change.

[38] Ibid., Article 19.7. Trade and fossil fuel subsidy reform.

[39] *In arguendo*, this would mean in practice that if a trade partner would decide to leave the Paris Agreement no specific treaty mechanism would be set in motion.

[40] EU Observer, *Amazon deforestation and the EU-Mercosur trade deal*, 2 August 2021, available at https://euobserver.com/opinion/152572 (accessed on 3 March 2024).

[41] EU Commission, *Proposal for a regulation on deforestation-free products*, available at https://environment.ec.europa.eu/publications/proposal-regulation-deforestation-free-products_en (last accessed on 3 March 2024).

[42] Sustainable Development Report 2022, available at https://dashboards.sdgindex.org/map/spillovers (last accessed on 3 March 2024).

[43] Ibid.

[44] Van't Wout 2022, pp. 81–98.

in follow-up mechanisms when either party fails to adhere to the expert panel's decision.[45]

A controversial question revolves around the existence of a genuine "green conditionality" in the EU's trade and investment policy, particularly, in terms of a weak enforcement system and the absence of a robust sanctions scheme. Altogether, these factors suggest a relatively weak green conditionality, which has prompted the revision of the enforcement and compliance mechanisms.

A consistent and coherent approach to sustainable development in external policy would have a tangible impact on EU citizens. This impact can be particularly observed in specific supply chains, where contentious issues arise concerning the importation of "risk commodities". In this regard, there is emerging case law in the EU about sustainability and trade, for instance, the case of palm oil serves as an instructive example, notably highlighting concerns related to its elevated indirect land-use change risk (ILUC-risk). This particular instance has triggered the potential for climate change-related litigation within the EU, as evidenced by *Santiga Lipids v. Commission* (2019).[46] The legal matter in this case revolves around the exclusion of palm oil from the category of renewable sources. Such cases underscore the intricate legal and environmental implications associated with palm oil production and its broader consequences on climate change.

The ongoing revision of the Trade and Sustainable Development chapters is pivotal in addressing emerging concerns in the realm of trade agreements. Concurrently, the European Commission has taken proactive measures to enhance compliance with obligations by introducing a comprehensive 15-point Action Plan on Trade and Sustainable Development.[47] This multifaceted plan not only seeks to bolster participation from civil society but also aims to fortify regulatory oversight through the implementation of effective dispute-resolution mechanisms. The evolving landscape of international trade agreements, underpinned by these revisions and proposals, reflects the broader commitment to fostering sustainability and accountability. It remains to be seen whether the application of the new rules would extend to agreements already in force or in those under negotiation, such as those with South Korea and MERCOSUR, and on the possibility of expanding the rules to cover raw materials and energy goods.

[45] Paolo Mazzotti, "Stepping Up the Enforcement of Trade and Sustainable Development Chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions" (European Law Institute Paper 2021), available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/Submission_ELI_Young_Lawyers_Award_Paolo_Mazzotti_2021.pdf (last accessed on 3 March 2024).

[46] Order of the General Court (Fourth Chamber) of 11 June 2020. *Lípidos Santiga, SA v European Commission*. Action for annulment—Energy—Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, available at https://curia.europa.eu/juris/liste.jsf?num=C-402/20&language=EN (last accessed on 3 March 2024).

[47] European Commission, European Parliament resolution of 6 October 2022 on the outcome of the Commission's review of the 15-point action plan on trade and sustainable development (2022/2692(RSP), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0354_EN.html (last accessed on 3 March 2024).

4.6 Navigating Trade, Investment, and Sustainable Development

Due to the substantial volume of trade encompassed by the EU-signed agreements, the EU possesses the capacity to take a global leadership role in establishing environmental and labor standards. As we have seen, the sustainable development elements in EU Trade and Investment Treaties encompass environmental and labor issues. In international law, international trade and investment systems take different approaches to mainstreaming sustainable development. Overall, sustainable development and climate change issues are part of broader initiatives at both the EU and the global level to promote decarbonization and articulate a just transition.

Yet, the SDGs offer a soft law framework by providing standards for assessing success in different areas. In the overall context of international trade and investment law, the SDGs emphasize certain areas that are considered a priority, but some significant transformations must take place in external relations to reinforce collaborative external relationships with other countries, such as capacity-building. There are major SDGs challenges for EU Member States in terms of the external policy, to offset the negative spillover effects that European Member States cause outside the region. This is measured by the Spillover Index, determining the transboundary impacts of one State's action on other States. These negative effects include CO2 emissions, biodiversity threats and profit shifting, biodiversity loss, poor labor standards and deforestation, which have a limiting effect on the achievement of the SDGs.[48] The index demonstrates that there are intrinsic relations between economic growth and environmental spill-overs from EU activities.

Regarding the manner in which the treaties integrate the Multilateral Environmental Agreements (MEAs), the core of conditionality is made up of the various commitments made through the Paris Agreement, other Multilateral Environmental Treaties, and the environmental and climate change clauses specifically incorporated into trade and investment treaties. In the context of multilateral environmental diplomacy, the EU has historically taken a leading role in negotiations. This leadership is exemplified, for instance, by its initiatives during COP27, where it advocated for the decarbonization of the economy and the widespread adoption of renewable energy sources.[49] To ensure coherence within the diverse domains of external policy, it is imperative to bolster adherence to environmental provisions within the sustainable development chapters. The recent convening of COP27 offered a valuable opportunity to contemplate the formulation of more robust objectives and strategies, assess regional advancements, devise recovery plans, and leverage the insights gained from the challenges posed by the pandemic.

[48] Spillover Rankings. The spillover performance of all 193 UN Member States https://dashboards.sdgindex.org/rankings/spillovers (last accessed on 3 March 2024).

[49] United Nations—Climate Change, COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries, 20 November 2022, available at https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries (last accessed on 3 March 2024).

In turn, the SDGs serve as a foundational "road map" delineating a comprehensive global framework for international cooperation in the realm of sustainable development, encompassing diverse dimensions including economic, social, environmental, and governance aspects. The far-reaching impact of the pandemic was compounded by deficiencies in social protection, fragmented healthcare systems, and the exacerbation of disparities among countries, notably intensifying poverty indicators. Consequently, imperative emphasis must be placed on prioritizing social inclusion and striving for heightened equality, aligning these goals with the fundamental tenets of the SDGs. Simultaneously, the implementation of the Paris Agreement exhibits variances in the pace at which objectives, such as achieving "net zero" emissions and decarbonization, are being realized, necessitating a rigorous legal analysis of the diverse trajectories in climate action.

Within the sustainable development domain, it is crucial to recognize that labor and social standards constitute a fundamental component of this multifaceted concept. This entails a holistic examination that extends to labor rights, thereby engendering a series of intricate inquiries. In the context of the EU's trade agreements, an integral feature is the inclusion of a]TSD chapter, which amalgamates the stipulations of multilateral environmental agreements (MEAs) with the core labor standards established by the International Labor Organization (ILO). Under the aegis of the TSD chapters, trade, labor, and environmental considerations are intrinsically linked. However, despite the advancements in this realm, the interplay between these differing sets of priorities remains contentious, marked by a discernible diversity in the standards of protection across nations. It is noteworthy that the foundational framework of labor standards hinges on four primary ILO conventions, each carrying a significant weight in shaping the landscape of international labor rights.

This intricate interplay between trade, labor, and environmental concerns within TSD chapters underscores a critical area of scrutiny and debate in the realm of international law and policy. The amalgamation of environmental and labor standards in trade agreements represents a complex endeavor fraught with challenges, as it strives to strike a balance between fostering economic growth, ensuring the protection of labor rights, and promoting sustainable environmental practices. The variances in the levels of protection across countries further compound the complexities of harmonizing these priorities within the SD framework, necessitating rigorous legal analysis and policy deliberations to advance a more equitable and sustainable global trade landscape.

The objectives within EU Treaties serve as the foundational framework guiding the Union's external policy initiatives. This alignment is manifest in the numerous trade agreements, such as the 2011 EU-Korea Free Trade Agreement (FTA), which underscores the significance of these objectives. Specifically, the Trade and Sustainable Development (TSD) chapters within these agreements encompass a spectrum of standards. Notably, these chapters incorporate substantive standards, which necessitate the commitment of the involved parties to the effective execution of pertinent MEAs or ILO Conventions.[50] Secondly, within the framework of TSD chapters, there exists a set of procedural provisions that facilitate and regulate the discourse and collaboration between the involved parties. These provisions encompass critical aspects such as dialogues, cooperation mechanisms, and the ongoing assessment of the sustainability impacts resulting from the agreement's implementation. It is through these mechanisms that the parties engage in a continuous process of monitoring and revising the sustainability objectives and outcomes, thereby ensuring that the agreement remains aligned with its intended goals.

Thirdly, an essential facet of these TSD chapters is the rigorous adherence to the commitments outlined within the agreement. This aspect serves as a linchpin, embodying the fundamental principles upon which the agreement is founded. Typically, the enforcement of these commitments is entrusted to the dispute settlement section, which provides a structured mechanism for addressing any deviations or breaches that may arise during the agreement's tenure. This dispute settlement process plays a pivotal role in upholding the integrity of the TSD chapters by providing recourse for resolving disputes and reinforcing the commitment to the agreed-upon sustainability standards.

It is essential to note that the structural arrangement of TSD chapters and the interplay of these multifaceted provisions are contingent upon the specific treaty in question. The precise configuration and the level of integration of these elements may vary, reflecting the unique characteristics and objectives of each individual agreement. As such, the intricacies of the TSD chapters are intricately linked to the particularities of the treaty at hand, thereby underscoring the need for a case-by-case analysis when evaluating their design and effectiveness. To illustrate, the EU-UK Trade and Cooperation Agreement (TCA) includes the "Level playing field" chapter encompassing sustainable development provisions incorporating standards, but it does not comprise a robust dispute settlement mechanism.[51]

4.7 Ensuring Compliance: Mechanisms in Sustainable Development Chapters

Regarding the institutional mechanisms responsible for supervising the implementation of TSD chapters, they encompass a diverse array of options. These options encompass a panoply of options ranging from a panel of experts tasked with scrutinizing grievances and furnishing pertinent recommendations to more sophisticated mechanisms including quasi-judicial bodies. In cases of non-compliance, the dispute resolution apparatus embedded within the TSD chapters primarily entails government-to-government consultations. It also involves an impartial panel

[50] Harrison et al. 2019.

[51] Briefing Paper Number 9190, 20 May 2021, *The UK-EU Trade and Cooperation Agreement: Level Playing Field*, available at https://researchbriefings.files.parliament.uk/documents/CBP-9190/CBP-9190.pdf (last accessed on 3 March 2024).

composed of trade, labor, and environmental experts, along with the ongoing process of implementation monitoring.[52]

When considering adherence to TSD chapters, it is imperative to underscore three specific aspects relating to enforcement mechanisms that merit consideration. These aspects encompass specific labor and environmental obligations articulated within the treaty, the carefully crafted mechanisms aimed at securing compliance with these commitments, and the various stages of the enforcement process.

Chapters on trade and sustainable development in the free trade agreements of the EU reflect international consensus around main issues. Most of the trade-related issues could also be dealt with in the framework of the WTO system, however, the current dispute system is stalled. There are some useful precedents in the WTO that could be relied upon for the future.[53] Precisely, in the WTO realm, the compatibility of EU measures with the multilateral system has long been debated. Along these lines, in the framework of the Committee on Trade and Environment (CTE), WTO members have addressed the trade-related dimensions of the European Green Deal. Additionally, various developing countries (EU partners) have outlined their respective national environmental efforts.[54]

With regard to the current situation and the characteristics of treaty provisions, there is no strict "green conditionality" in the foreign policy of the EU. In view of this, there are new proposals aimed at strengthening sustainability and compliance with environmental regulations within the framework of the common commercial policy. The inclusion of chapters pertaining to trade and sustainable development within free trade agreements occurs within the broader context of the legal framework provided by the WTO and the principles of international law governing foreign investments.

At this point, it is worth noting that TSD chapters in trade agreements embrace environmental and labor aspects. When viewed through an environmental law lens, these chapters show connections with significant international treaties, such as the Paris Agreement. Notably, these multilateral environmental agreements (MEAs) often incorporate precise mechanisms for resolving disputes. Nonetheless, despite the introduction of the SDGs, which provide a novel framework for action, these goals do not offer explicit strategies for putting them into practice.

While emphasizing the opportunity for countries to enhance their commitments in various areas, the Paris Agreement has shown limited progress in achieving emission reductions, notably in meeting the Nationally Determined Contributions (NDCs).[55] While it enshrines core provisions related to adaptation, sustainable development, participation, inclusion, and transparent progress monitoring systems, countries are struggling to effectively reduce emissions to limit global temperature increases to 1.5 °C. The absence of a clear link between non-compliance with the Paris Agreement and the Sustainable Development chapters indicates some shortcomings in these commitments.

To address these issues, the European Commission has initiated the examination of proposals for "green conditionality" while also recommending the reform of Sustainable Development chapters. In early 2021, the European Commission published a new communication on EU trade policy. [56] In light of increasing civil society activism against trade agreements, the EU Commission expedited the review of its 2018 15-point action plan on trade and sustainable development, originally slated for 2023.[57]

Yet, at present, the deepening of SD commitments is not guaranteed. Many efforts were made to include commitments in the treaty between the EU and South Korea, however, ILO commitments were breached.[58] The Republic of Korea was required to adjust its labor laws and practices to comply with the principle of freedom of association. Despite these recommendations, the Republic of Korea failed to take steps towards the ratification of fundamental ILO Conventions. Another controversial area concerns risk commodities is a sensitive field for external trade policy.

Another controversial area concerns the possibility of resorting to sanctions to reinforce compliance with TSD provisions. Proponents of this option submit that sanctions will reinforce compliance with TSD provisions.[59] Conversely, those who are opposed to the use of sanctions, allege that they are futile, and argue that soft measures based on litigation would be more effective to encourage compliance. The critics of the use of sanctions and the view that sanctions could lead to the opposite outcome by undermining the attainment of commitments in TSD Chapters. Table 4.1 presents a summary of the main features of SD in FTAs recently signed or negotiated by the EU.

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[52] Mazzotti, P., 'Stepping Up the Enforcement of Trade and Sustainable Development Chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions', available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/Submission_ELI_Young_Lawyers_Award_Paolo_Mazzotti_2021.pdf (last accessed on 3 March 2024).

[53] Non-Paper of the Commission services (2018), Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements (26/02/2018), available at https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf (last accessed on 3 March 2024).

[54] EU-Palm Oil (Indonesia), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm (last accessed on 3 March 2024).

[55] United Nations. (2018). 'Sustainable Development Goals'. Available at https://sustainabledevelopment.un.org/?menu=1300 (last accessed on 3 March 2024).

[56] United Nations. (2018). 'Sustainable Development Goals'. Available at https://sustainabledevelopment.un.org/?menu=1300 (last accessed on 3 March 2024).

[57] European Commission, Non-paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, available at https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (last accessed on 3 March 2024).

[58] European Commission, Panel of experts confirms the Republic of Korea is in breach of labour commitments under our trade agreement, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203

[59] European Commission, Sustainable development in EU trade agreements (2022), https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en (last accessed on 3 March 2024).

Table 4.1 EU FTAs—Sustainable Development Chapters

EU Trade Agreement	Type of Agreement	Status	Sustainable Development Chapter
EU-Chile agreement	EU-Chile Advanced Framework Agreement	Being adopted or ratified	Chapter 26 includes reinforced cooperation regarding climate change, forests, biodiversity. In terms of labor law provisions, it encompasses specific provisions on core labor issues
EU-India agreement	EU-India Free Trade Agreement, Investment Protection Agreement and Geographical Indications Agreement	Being negotiated	TBD (To Be Determined) Negotiations are still ongoing. The agreement may introduce a tailored approach. The Trade Sustainability Impact Assessment (SIA) in Support of Negotiations with India has already taken place[60]
EU-Kenya agreement	EU-Kenya Economic Partnership Agreement	Being adopted or ratified	The agreement includes strong and binding provisions on labor standards, climate change and biodiversity, and gender equality. In addition, it prevents both parties from lowering labor and environmental standards to attract trade or investment. These commitments are binding and enforceable
EU-Mercosur agreement	EU-Mercosur Trade Agreement	Being adopted or ratified	TBD The Chapter has been hailed as putting forward an advanced SD approach. However, scholars like Harrison conclude that the SD Chapter does not significantly reinforce countries' climate change commitments as set out in the Paris Agreement. Nor does it provide a strong framework for addressing other important environmental and social issues. There is also a lack of a proper monitoring system of the treaty's effects, so that State parties can react accordingly[61]
EU-Mexico agreement	Trade part of new EU-Mexico Association Agreement	Being adopted or ratified	TBD Modernization of the agreement, the EU and Mexico have agreed to a common sustainable development framework establishing a set of rules for both labor and the environment[62]

(continued)

[60] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en

[61] Harrison and Paulini 2020.

[62] European Commission, EU-Mexico agreement explained (europa.eu) (last accessed 3 March 2024).

Table 4.1 (continued)

EU Trade Agreement	Type of Agreement	Status	Sustainable Development Chapter
EU-New Zealand agreement	EU-New Zealand Trade Agreement	Being adopted or ratified	TBD The EU-New Zealand Free Trade Agreement was signed on 9 July 2023.[63] The Trade and Sustainable Development (TSD) Chapter of the NZ–EU FTA incorporates key provisions relating to labor standards, gender equality, climate change, emissions trading, environmental goods and services, forests, fisheries subsidies, and fossil fuel subsidy reform
EU-Singapore agreement	EU-Singapore Free Trade Agreement, Investment Protection Agreement, Digital Trade Agreement	In place	The EU and Singapore Free Trade Agreement and Investment Protection Agreement entered into force on 21st November 2019. From a legal perspective, the EU-Singapore FTA ought to be comprehended in tandem with two intertwined instruments
EU-South Korea agreement	EU-South Korea Free Trade Agreement, Digital Trade Agreement	In place	The EU and South Korea have agreed on high labor and environmental standards that protect workers and the environment. The agreement sets up mechanisms to make sure these commitments are met, including through involving civil society

Note: Authors' own elaboration based on the information available on the European Commission's website[64]

A persistent point of contention revolves around the disparities in approaches between the EU and the United States regarding trade and sustainable development chapters. While the United States has chosen to adopt a robust system featuring specific punitive measures, the EU's model emphasizes a more cooperative approach that does not incorporate punitive actions.[65] The paradigmatic case at hand related to the dispute between the US and Guatemala in the textile sector which did not lead to an effective resolution as it did not solve the non-compliance issue.[66]

[63] Ballingall 2023.

[64] The EU is also negotiating other agreements, e.g. EU-Indonesia Free Trade Agreement.

[65] Hradilová and Svoboda 2018, pp. 1019–1042.

[66] In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, available at https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr (last accessed on 3 March 2024).

4.8 Conclusion

The Trade and Sustainable Development chapters within the EU free trade and investment treaties have undergone a significant evolution. The EU's trade policy is now intrinsically linked to its environmental objectives, reflecting a growing emphasis on sustainability. However, amid these advancements, the issue of consistency remains a paramount challenge when it comes to compliance with the pertinent sustainable development provisions. A notable observation within the current framework is the existence of a relatively weak "green conditionality", which pertains to the assurance of compliance. One notable feature is the absence of a centralized mechanism for monitoring and ensuring compliance. Notably, some clauses integrated into Free Trade and Investment Treaties mirror obligations found within international environmental agreements.

A development on the horizon is the proposal to institute sanctions against EU trading partners found in violation of labor or environmental standards. This proposal is a subject of ongoing debate, and irrespective of its final outcome, it serves as a catalyst for generating innovative ideas that could potentially lead to the implementation of a more efficient compliance mechanism.

Within the global arena, the EU's ambition to establish a regional legal framework that aligns with ambitious goals and objectives is driving reforms that herald a new era for trade and investment treaties. These transformative changes signify a shift towards a more holistic and sustainable approach to international trade and investment, reflecting the EU's commitment to environmental and social responsibility.

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Chapter 6
The Carbon Border Adjustment Mechanism: Reconciling the Principles of Sustainability and Free Trade in the EU's External Action?

Patrick Abel

Contents

Abstract The Carbon Border Adjustment Mechanism (CBAM) is key for the European Union's (EU) climate action and trade policy. Yet, many criticize it as a disguised protectionist measure that violates the EU's obligations under World Trade Organization (WTO) law. This Chapter proposes a different view. It claims that CBAM may be considered to conform with WTO law subject to certain conditions. CBAM should be understood as a regulation by which the EU contributes to reshaping WTO law that is currently undergoing a fundamental crisis. The Chapter argues that the European Treaties allow and even call upon the EU to engage in a balanced reshaping of WTO law. CBAM is a way by which the EU tests the waters how to reconcile

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various constitutional goals that it is obliged to follow in its external actions: to combat climate change by internalizing the costs for polluting the atmosphere in a coherent manner, while at the same time promoting free trade and respecting the positions of developing countries.

Keywords Climate change · Sustainability · Carbon border adjustment mechanism · Developing countries

6.1 Introduction

The Carbon Border Adjustment Mechanism (CBAM) is a new EU unilateral and extraterritorial climate change law: Importers of certain goods into the EU will have to pay a price for greenhouse gasses (GHG) emitted abroad in the production process. CBAM is a crucial element in the EU's external relations, and developing countries in particular claim that CBAM does not comply with WTO law. This chapter analyzes this debate and proposes a dynamic, process-oriented perspective on the issue. After introducing climate change mitigation as an internal and external problem of sustainability for the EU (Sect. 6.2), it explains the main features of CBAM and how it aims at promoting coherence in the EU's sustainability policy, internally and externally (Sect. 6.3). Then, the analysis turns to how CBAM conforms with WTO law based on WTO jurisprudence (Sect. 6.4). Lastly, it explains that CBAM should also be understood as a dynamic contribution by the EU to reshape and recreate WTO law (Sect. 6.5).

6.2 Climate Change Mitigation as an Internal and External Problem of Sustainability

Following the famous Brundtland Report of 1989, we can define "sustainability" as a policy that meets the needs of the present generations without compromising the ability of future generations to do the same.[1] Broadly speaking, modern understandings of sustainability refer to a triangle of the economy, ecology and social policy, and call for a balance between these three dimensions in all governmental and societal actions.[2] Climate change challenges the ability of future generations to live healthy lives and to prosper in a stable economy.[3]

[1] UN (1987) Report of the World Commission on Environment and Development: Our Common Future ('Brundtland Report'). UN Doc A/42/427 Annex, para 27.

[2] Beyerlin 2013, para 11.

[3] See the most recent report by IPCC 2023, paras A.1 et seq.

Climate change mitigation constitutes a well-established part of the EU's environmental policy pursuant to Articles 191 and 192 TFEU.[4] Specifically, Article 191(1) TFEU stipulates that the Union's environmental policy "shall contribute to [...] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change." It is fair to read this passage as having a constitutional function, that is, to set a binding objective for the EU to address climate change in its external relations, similar to comparable provisions in the TEU[5] and TFEU.[6] Indeed, it seems that the EU must pursue this objective with a certain urgency, since it is supposed to "combat" (and not only, for example, merely "address") this global environmental problem. Given the GHG-emissions of third states, especially China and the USA, the EU alone cannot successfully halt global warming even if all the EU GHG-emissions were stopped immediately. The atmosphere is a global public good, a "common concern of mankind".[7] Therefore, any climate action must necessarily look outward, and indeed, EU secondary law on climate action is inextricably linked to international climate law, in particular the Paris Agreement.[8]

Conversely, it follows that at least some, if not all "internal" EU climate mitigation measures have an effect on third countries. Indeed, the Treaties do account for the external dimensions of internal action in Article 21(3)(1) TEU. It states that the Union shall respect the principles and pursue the objectives set out in Article 21(1) and (2) TEU in the development and implementation not only of the EU's external action, but also "of the external aspects of its other policies". More specifically, the EU must act coherently (Article 21(3)(2) TEU) by preventing contradictions in its internal and external policies, attempt to find cooperative, preferably regional and multilateral solutions (see Article 21(1)(2) TEU) and respect international law (Article 21(1) TEU). Furthermore, according to the integration clause in Article 11 TFEU, the EU must integrate environmental protection requirements into the definition and implementation of its policies and activities, internally and externally. While Articles 11 TFEU and 21 TEU impose legally binding restraints, the EU organs enjoy substantial discretion in their implementation. In particular, due to their general nature, the

[4] Treaty on the Functioning of the European Union (opened for signature 13 December 2007) OJ 2012 C 326/47 (entered into force 1 December 2009) TFEU.

[5] Treaty on the European Union (opened for signature 13 December 2007) OJ 2012 C 326/13 (entered into force 1 December 2009) TEU.

[6] On the constitutional and binding character of the EU's objectives in the European Foreign and Security Policy, see for example Kiss 2003, pp. 107 et seq. on the constitutional character of the environmental goal of the EC Treaty; Wessel 2016, pp. 444 et seq.; Thym 2022, § 18 para 33 on the objectives of EU primary law for the EU's external affairs as a form of "horizontal constitutionalization".

[7] The principle is mentioned for example in UN General Assembly, Res. 43/53, 6 December 1988, no 1; UN Framework Convention on Climate Change, preamble; Paris Agreement, preamble; for a comprehensive analysis of the principle, see Cottier 2021.

[8] See for example Scott 2011, pp. 25 et seq.

principles and objectives that the EU must observe often collide and require reconciliation by political decisions that allow and demand for setting priorities.[9] As we will see, the case of CBAM is an excellent example of a complex balancing of policy goals.

6.3 CBAM as a Means to Promote Coherence in the EU's Sustainability Policy

CBAM can be understood as a means to promote coherence in the EU's internal and external climate change mitigation strategy. It complements the market-based sustainability strategy of the EU emissions trading system (ETS) (Sect. 6.3.1) by finding a new way to prevent carbon leakage (Sect. 6.3.2) and mitigate climate change (Sect. 6.3.3).

6.3.1 The EU ETS as a Market-Based Sustainability Strategy

The EU's main internal instrument for reducing GHG emissions is the ETS which was first introduced in 2005.[10] The ETS is a so-called "cap-and-trade"-mechanism.[11] It sets a maximum amount of GHG that can be emitted in a year. Above this "cap", the ETS regulation prohibits emitting any further GHG. The ETS divides this "cap" into allowances which function as permits to emit GHG, measured in CO_2-equivalents per ton. Companies that want to emit GHG, for example by generating electricity in coal-fired power plants, must acquire the respective number of allowances that corresponds to the amount of GHG emitted.[12] Most of the allowances must be purchased through auctions.[13] Allowance holders can also trade allowances instead of using them as permits for their own GHG emissions. Currently, the EU ETS covers the energy sector, large industrial installations, and aviation, which together account for around 45 per cent of total EU GHG emissions.[14] In this way, the EU ETS puts a price on GHG emissions and internalizes the cost to society of polluting the atmosphere.

[9] Cf Cremona 2012, pp. 39 et seq.

[10] Directive 2003/87/EC of 13 October 2003, OJ L 275/32 (hereafter: "EU ETS").

[11] See Hsu 2016, pp. 244 et seq. for a comparison of international market mechanisms.

[12] Hsu 2016, pp. 244 et seq.

[13] See in particular Article 10 EU ETS.

[14] Knodt 2023, p. 205. In 2024, the EU ETS will be extended to the maritime sector.

6.3.2 The External Dimension of the EU ETS: Carbon Leakage

The EU ETS presented above is an internal EU mechanism that requires consideration of how it operates with imports. The ETS has already proven to reduce GHG emissions.[15] However, it suffers from the structural problem of carbon leakage.[16] In a globalized economy, energy-intensive industries based in the EU may decide to relocate their production to third states that are not subject to an ETS or other types of carbon pricing in order to save costs. From there, they can then export their products into the EU, potentially to a more competitive price than EU-producers: They do not need to buy any ETS allowances and will thus have lower production costs. For example, the EU cement industry could build new plants in the US and export cement from the US to the EU. If the price of allowances required under the EU ETS to produce cement in the EU is sufficiently high, it may exceed the transport costs and any tariffs applied to cement imported from the US. Then, there would be a business case for the company to leave the EU. As a result, the EU would lose an important industry without contributing to climate change mitigation, as GHG would continue to be emitted in the US. This would run counter to the EU's obligation to pursue coherent environmental protection in all its internal and external policies and activities, as reflected in Articles 11 TFEU and 21(2) TEU.[17]

Currently, the EU ETS accounts for carbon leakage by granting "transitional free allocation" of allowances to certain energy-intensive industries.[18] It follows that the EU ETS does not internalize the costs that these corporations cause by polluting the atmosphere. While this prevents carbon leakage, it also exempts the very industries that emit particularly large amounts of GHG from the scope of the ETS. The market-based mechanism to incentivise decarbonisation does not apply to these corporations even though the environmental need for it remains urgent. For this reason, the EU considers free allocation as a temporary solution only.[19]

6.3.3 CBAM as a Tool for Internal and External Climate Change Mitigation

The Carbon Border Adjustment Mechanism (CBAM), a regulation adopted and in force since 2023, aims to provide an alternative solution to the problem of carbon

[15] The price for ETS allowances has increased sharply since 2018, leading more and more to the desired steering effect, see for example Knodt 2023, p. 205.

[16] For a general legal analysis of carbon leakage, see for example Shoyer et al. 2016, pp. 285 et seq.

[17] On coherence of the EU's environmental policy, see Cremona 2012, pp. 36 et seq.

[18] Articles 10a and 10b EU ETS; for further analysis of EU regulation on carbon leakage, see Carević 2015, pp. 47 et seq.

[19] See Regulation (EU) 2023/956 of 10 May 2023, OJ L 130/52 (hereafter: "CBAM") rec. 12.

leakage.[20] From 2026 onwards,[21] EU importers of certain energy-intensive products originating in a third country will have to purchase CBAM certificates from national authorities. To do so, they must declare the GHG emissions embedded in their products, including indirect emissions of some goods from the production of electricity consumed during the production process.[22] The price of the certificates corresponds to the price of the ETS allowances that importers would have had to pay if they had produced the imported goods in the EU (and thus been subject to the EU ETS).[23] The products covered are cement, iron and steel, aluminum, fertilizers (which receive free allocations under the EU ETS so far), hydrogen and electricity[24] including imported processed products from these aforementioned goods that underwent an inward processing procedure referred to in Article 256 of Regulation (EU) No. 952/2013.[25] CBAM thus prevents carbon leakage in these sectors, as there is no competitive advantage to be gained by relocating the EU production to third countries and exporting goods from there to the EU to avoid paying for ETS allowances. In turn, as CBAM is being phased in, free allocations under the EU ETS will gradually be phased out.[26] The idea is that then, also the energy-intensive industries concerned will have an incentive to decarbonize. This is highly desirable from the perspectives of climate change mitigation, the EU's international climate law obligations, and of sustainability. CBAM also promotes the coherence of the EU's climate action policies in line with Article 21(3)(2) TEU.

6.4 CBAM and the EU's Obligations to Find Cooperative Solutions and to Respect International Law in its External Actions

While CBAM serves to protect the integrity of the EU ETS and promotes the EU's policy coherence, at first glance, being a unilateral measure, it does not rest very well with the obligation to promote cooperative, pluri- and multilateral solutions to common problems enshrined in Article 21(1)(2) TEU. What is more, the EU must

[20] See n 19. Cf Trachtman 2017, pp. 469 et seq. on the potentials of a national carbon consumption tax as an alternative policy measure.

[21] Until then, CBAM defines a transitional period with reporting obligations only, see Article 32 CBAM.

[22] Articles 6 et seq. CBAM. Specifically on indirect emissions, see Article 23(22), Article 7(7) and Annex IV CBAM.

[23] Article 7 CBAM.

[24] Article 2(1) and Annex I CBAM. On the sectors defined as being at risk of carbon leakage, see Commission, Delegated Decision (EU) 2019/708 of 15 February 2019, OJ L 120/20.

[25] Article 2(1) CBAM and Regulation (EU) No 952/2013 of 9 October 2013, OJ L 269/1.

[26] Article 10a(1a) EU ETS. In line with that, Article 1(3) CBAM explicitly defines that CBAM aims to replace the mechanism for the free allocation of allowances established under the EU ETS to prevent the risk of carbon leakage. See Espa et al. 2022, pp. 16 et seq.

respect the rule of law and comply with WTO law as a branch of international law (Article 21(1) TEU).[27] This leads to the question if CBAM violates WTO law.

The WTO Agreement contains multilateral disciplines on trade in goods, the most relevant for the present purpose to be found in the General Agreement on Tariffs and Trade of 1994 (GATT 1994) which will be analyzed in this section. The GATT adopts a two-tiered system. First, there are numerous obligations that the WTO members have to comply with, such as most-favored nation treatment (MFN) and national treatment, and indeed, CBAM does violate some of these disciplines (Sect. 6.4.1). Second, even if WTO members violate a GATT obligation, this violation may be justified under Article XX GATT (Sects. 6.4.2 and 6.4.3). As a starting point, the analysis will look at CBAM based on the WTO's jurisprudence.

6.4.1 *Breach of GATT 1994 Obligations*

Most observers agree that CBAM violates at least some GATT obligations.[28] The exact legal analysis on national treatment depends on how one qualifies the type of trade barrier that CBAM creates.[29] For the sake of brevity, at the very least, CBAM violates the MFN obligation (Article I(1) GATT) which prohibits discrimination between like foreign goods with origins in different WTO members. The very purpose of CBAM is to discriminate in pursuit of climate protection. WTO members have varying domestic environmental and climate protection standards. EU importers producing in countries with weaker standards will have to buy more CBAM certificates, making their products more expensive and thus creating a competitive disadvantage. An even more open discrimination is the fact that CBAM explicitly exempts the members of the European Economic Area and Switzerland from the system because they have linked their ETS with the EU's.[30]

For a long time, both the literature and the WTO jurisprudence have discussed whether one could argue that there is no discrimination (and thus no GATT 1994

[27] Because the EU itself is a member of the WTO, the WTO Agreement itself has the status of EU law of superior hierarchy to secondary EU law (Article 216(2) TFEU).

[28] See for example Leal-Arcas et al. 2022, pp. 230 et seq.; Dias et al. 2020, pp. 16 et seq.

[29] Broadly speaking, the GATT distinguishes between trade-restrictive measures at the border and internal measures. There is no scholarly consensus on how to qualify CBAM. This may lead to additional breaches of GATT disciplines, for example the obligation to respect "bound tariffs" subject to Article II(1) GATT. For more details on this question, see for example Pauwelyn 2020, 8 et seq.; Quick 2020, pp. 571 et seq.; Venzke and Vidigal 2022b, pp. 10 et seq. On the breach of national treatment, see for example Leonelli 2022, p. 625. Cf with the comparable question of how to qualify the integration of aviation into the EU ETS, as analysed by Bartels 2012, pp. 438 et seq.

[30] Article 2(4) and Annex III point 1 CBAM. On the linkages, see Agreement on the European Economic Area of 3 January 1994, OJ L 1/3, Article 74 and Annex XX no 21al; Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems of 7 December 2017, OJ L 322/3.

violation) because the products compared here are not "like". The idea was to distinguish "green" products with low embedded GHG emissions from other products—to say that, for example, steel produced with renewable electricity was not "like" steel produced with electricity generated by coal plants, and that WTO members would, hence, not discriminate if they treated "green" steel better. Yet, it is well-established WTO jurisprudence that this line of reasoning has no merit. This is not the place to go into the details of this case-law. In essence, the WTO Appellate Body rejected to distinguish products according to so-called non-product-related process and production methods; to determine "likeness", only consumer preferences and habits, end-uses tariff classification, physical characteristics of the products may be considered which usually do not change because products have low embedded GHG emissions.[31]

6.4.2 *Provisional Justification Under Article XX(b) and (g) GATT 1994*

The main and decisive arena for determining whether CBAM complies with WTO law is Article XX GATT. This provision covers the "general exceptions" for justifying violations of GATT obligations. Under certain conditions, these exceptions allow unilateral trade-restrictive measures. WTO jurisprudence has upheld them even if they exert an extraterritorial effect,[32] a case-law that has remained controversial until the present day.[33] Article XX GATT provides two relevant justification grounds for the present context. CBAM could be a measure "necessary to protect human, animal or plant life or health"[34] or a measure "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".[35] Indeed, CBAM pursues both policy objectives. Climate change mitigation reduces the negative impacts of global warming on human, animal and plant life and health. And the atmosphere qualifies as a global public good and an exhaustible natural resource.

Under Article XX(b) and (g) GATT, the EU would have to show that CBAM is "necessary" or that it "relates to" the respective policy goals. These requirements

[31] See for example Dobson 2021, pp. 64 et seq. On the four criteria that are allowed to determine discrimination, see WTO, Appellate Body Report, *EC—Asbestos*, 12 March 2001, WT/DS135/AB/R, paras 87 et seq.

[32] See for example WTO, Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 121; *EC—Seals*, 22 May 2014, WT/DS400, 401/AB/R, para 5.173.

[33] See for example Dobson 2021, pp. 86 et seq. with further references.

[34] Article XX(b) GATT 1994.

[35] Article XX(g) GATT 1994.

enshrine a proportionality test,[36] but with different thresholds. The standard of "relating" is more lenient than that of "necessity",[37] which is why this paper will focus on the former for the sake of brevity. According to the Appellate Body, the test requires "a close and genuine relationship of ends and means" between the measure under scrutiny and the conservation objective.[38]

As a *general* concept, CBAM should meet the test of "relating to" the conservation of the atmosphere.[39] It seems plausible that CBAM may hinder the energy-heavy EU industry from realizing competitive advantages by moving their production to states with poorer climate protection standards. Notwithstanding that empirical proof is generally not necessary under Article XX(g) GATT, the EU is well-advised to prepare substantiated data on carbon leakage and CBAM's positive effect on climate change mitigation,[40] in particular in light of some interventions that carbon border tax measures—if designed poorly—may be ineffective to combat climate change.[41] More importantly, the EU will have to make it plausible that preventing carbon leakage overall contributes to climate change mitigation on a global scale—and not only to protect the EU's own industries.[42]

6.4.3 *Chapeau of Article XX GATT 1994*

Even if there are solid grounds to find for a provisional justification under Article XX (g) GATT—and perhaps even (b)—, CBAM must also conform with the *chapeau* of Article XX GATT.[43] It prohibits applying measures in a manner amounting to arbitrary or unjustifiable discrimination between countries where the same conditions prevail or amounting to a disguised restriction on international trade—three alternatives which the Appellate Body has treated as one uniform standard so far.[44] The

[36] Cottier et al. 2017, pp. 644 et seq.

[37] WTO, Appellate Body Report, *China—Rare Earths*, 7 August 2014, WT/DS431-433/AB/R, paras 5.87 et seq.

[38] WTO, Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 136; *China—Raw Materials*, para 355; *China—Rare Earths*, 7 August 2014, WT/DS431-433/AB/R, para 5.90.

[39] See for example Pauwelyn 2020, 11; Venzke and Vidigal 2022a, pp. 203 et seq.

[40] But see the critical analysis of Pirlot 2022, pp. 25 et seq. that CBAM contributes less to climate change mitigation because it does not cover EU exports.

[41] See for example Colares and Rode 2015, pp. 423 ff.

[42] Cf Dias et al. 2020, p. 22; Sato 2022, pp. 390 et seq. on the problematic rationale of leveling the playing field for European industries.

[43] See WTO, Appellate Body Report, *US—Gasoline*, 29 April 1996, WT/DS2/AB/R, p. 22; *Korea—Meat*, 11 December 2000, WT/DS161,169/AB/R para 157; *Indonesia—Importation of Horticultural Products, Animals and Animal Products*, 9 November 2017, WT/DS477/AB/R, paras 5.95 et seq.

[44] See already WTO Appellate Body Report, *US—Gasoline*, 20 May 1996, WT/DS2/AB/R, p. 25; cf Bartels 2015, p. 97, who considers that panels and the Appellate Body have "ignored" the requirement of "disguised restriction on international trade" so far.

chapeau is thus about how the relevant WTO member applies the measure in practice.[45] In WTO dispute settlement, the *chapeau* has proven to be the greatest hurdle to justify trade restrictive measures under Article XX GATT, which is why its exact requirements remain controversial until the present day.[46] Looking back how Panels and the Appellate Body have interpreted and applied the *chapeau* in other cases, one may identify three main concerns against CBAM that will be discussed in the following subsections: It would have to maintain a rational relationship between how the financial burden is imposed on EU importers and CBAM's actual climate change mitigation effect (Sect. 6.4.3.1). It must refrain from coercing other WTO members to use carbon pricing as the only viable climate protection policy (Sect. 6.4.3.2). And the EU would have to negotiate bi- and multilateral agreements for climate change protection in a serious and even-handed manner (Sect. 6.4.3.3).

6.4.3.1 Rational Relationship Between CBAM and Climate Change Mitigation Effect?

In *Brazil–Retreaded Tyres*, the Appellate Body held that discrimination is "arbitrary or unjustified" if there is no rational relationship of the discriminatory state action to the policy objective pursued and provisionally justified under Article XX GATT.[47] This means that the EU must always interpret and apply the conditions and exceptions of CBAM in a manner that actually contributes to the goal of climate change mitigation. This resonates well with the EU's obligation to act coherently in its external actions (Article XXI(3)(2) TEU). Furthermore, the measure must be applied even-handedly between countries in which the same conditions prevail. In doing so, one must take account of context-specific conditions related to the policy objective under the applicable subparagraph of Article XX GATT[48]—thus, here, all conditions that relate to climate action policies.

In the first place, the EU would have to make sure that CBAM internalizes the costs of damaging the atmosphere, reflecting as closely the real harmful effect as possible. This means that the system must operate in a manner that accurately takes account of the GHG of goods imported into the EU. It is for CBAM declarants to present verified calculations of the emissions to the authorities.[49] Thus, much depends on the methodology that CBAM provides for the calculation—for direct emissions from the production processes of goods, including emissions from the production of heating and cooling that is consumed during the production processes and (for some goods)

[45] WTO Appellate Body Report, *US—Gasoline*, 20 May 1996, WT/DS2/AB/R, p. 22; for a critique, see Bartels 2015, pp. 98–101.

[46] On the lack of clarity, see e.g. Bartels 2015, p. 96; Durán 2016, p. 474; Riffel 2018, p. 143: "The chapeau is rife with ambiguity […]".

[47] WTO, Appellate Body Report, *Brazil—Retreaded Tyres*, 3 December 2007, WT/DS/332/AB/R, paras 227, 246.

[48] See for example WTO, Appellate Body Report, *EC—Seals*, 22 May 2014, WT/DS400, 401/AB/R, paras 5.298 et seq.

[49] See Article 8(1) CBAM.

for the indirect emissions from the production of electricity that is consumed during the production processes.[50]

CBAM sets a methodology for calculation of emissions that generally seems capable of reflecting the actual harm caused to the atmosphere by producing a good. To that end, Annex IV contains a framework with general rules for calculation. It distinguishes between "simple" goods, produced only out of raw materials, "complex" goods (defined as all goods other than simple goods)[51] and electricity. Direct emissions of simple and complex goods must be calculated based on the actual values or, if not available, from the literature that may be country- or region-specific for the exporting state.[52] If such values are not available or not reliable, default values apply.[53] In the case of indirect emissions, default values apply as the standard method but the declarant can present actual values if adequate.[54] How to determine default values differs depending on whether they are related to assessing the emissions of the electricity used. In the case of default values for production processes, as the last resort, the EU can use the average emissions intensity of the X% worst performing EU ETS installations for that type of goods. It is for the Commission to set the value of "X" in an implementing act.[55]

This example shows that default values can be problematic in case they do not adequately reflect the real emissions in the exporting country. For example, the X% rule could inadequately benefit goods from an exporting country in which production processes cause much higher GHG emissions than the worst EU installations. On the other hand, default values as a residual rule seem inevitable—and thus not arbitrary or unjustified—to make CBAM practically applicable for scenarios with a lack of available reliable data.[56] Indeed, also the ETS provides for default values as a calculation method of last resort for EU companies.[57] Therefore, much will depend on how the Commission concretizes CBAM calculation methodology through implementing acts.[58] To provide for even-handedness with domestic cases, it should mirror as closely as possible the EU ETS emissions calculation method.

That CBAM *completely exempts* goods from the regulation if they have their origin in countries that have an ETS linked with the EU ETS appears less problematic in most cases. Generally, such linkages will prevent any carbon leakage effect between the respective partners. A rational relationship to climate change mitigation would

[50] Article 3(21) and (22) CBAM. See Espa et al. 2022, pp. 21 et seq. who generally welcome the orientation towards actual emissions as favouring GATT-compliance.

[51] Annex IV, No 1(b) CBAM.

[52] Article 7 and Annex IV CBAM.

[53] Article 7(2 s. 2) CBAM.

[54] Article 7(2 s. 2) and (4) CBAM.

[55] Annex IV, no 4.2 CBAM.

[56] See Dias et al. 2020, p. 23 on questions of practicability; but see Sato 2022, pp. 389 et seq. criticizing scenarios in which emissions cannot be accurately determined.

[57] See especially Article 31 of the Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018, OJ L 334/1.

[58] Article 7(6) CBAM.

thus be present. However, this may only be true in some cases. The EU would have to make sure that the newly linked ETS overall provides for the same or even lower maximum number of emissions allowed than the two ETS foresaw before the linkage.

It is particularly contentious in the public and in the legal literature how to take account of the conditions prevailing in developing countries, the development of which the EU is obliged to foster pursuant to Article XXI(2)(d) TEU. They often do not have the economic capacity to employ costly environmental measures without compromising their competitiveness and development goals.[59] While the EU may counter that it is allowed to make a unilateral call for a high climate action standard under Article XX GATT notwithstanding, there is another argument that is harder to rebut: One may say that applying the *chapeau*, the conditions for climate policy vary between developing and developed countries because the former have historically contributed much less to global warming. The principle of "common but differentiated responsibilities and respective capabilities", enshrined for example in Article 2(2) Paris Agreement, thus calls on developed countries such as the EU to take the lead and carry a greater share of the transitory burden.[60] Reading the principle into Article XX GATT based on Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT), it seems possible to argue that CBAM arbitrarily discriminates products from developing countries by expecting the same climate action ambition in their production processes as from developed countries such as the US.[61] Nevertheless, one may also take a perspective that looks into the future: Then, any GHG emissions inevitably contribute to further warming the planet and CBAM's comprehensive coverage of products from developing and developed countries alike could be seen as rational. All in all, because the *chapeau* requires a holistic analysis of the application of the measure, much will depend on other problematic aspects of how CBAM addresses developing countries to which the analysis will turn now.

6.4.3.2 Coercion to Adopt Carbon Pricing as the Only Viable Climate Protection Policy?

The *chapeau* requires that measures based on Article XX GATT should not coerce other WTO members to apply specific policy instruments (chosen by the trade restricting state) to overcome the trade restriction. Rather, in restricting trade and construing possible exceptions, states must give due regard to alternative policy options of other states having a similar effect on the policy goal that the trade-restricting measure pursues. The Appellate Body elaborated on this in *US–Shrimp*. The US had enacted an import ban on shrimp if they were not caught in line with

[59] See for example Leal-Arcas et al. 2022, p. 233.

[60] On the principle, see for example Stone 2004, pp. 276 et seq.; Rajamani 2018, pp. 291 et seq. For a critical analysis of CBAM in light of the EU's obligations under the Paris Agreement, see Quick and Das 2023, pp. 76 et seq.

[61] Hertel 2011, pp. 660 et seq.; Ladly 2012, p. 79; Pauwelyn 2020, p. 11; Espa et al. 2022, pp. 20 et seq. See Quick 2020, pp. 584 et seq.; Durán 2023, pp. 80 et seq. who consider this argument to lead to the incompatibility of CBAM with the GATT.

US guidelines that assured that shrimp trawl vessels do not accidently catch and kill sea turtles. The Appellate Body held that the US had unjustifiably discriminated by exerting "intended and actual coercive effect" on other countries to "adopt *essentially the same* policies and enforcement practices".[62] It found that in the way the US drafted implementing guidelines and applied the rules on the ground, they exclusively checked if the country of origin applied a standard that is essentially the same as the US one.[63] In the words of the Appellate Body, the import ban thus did "not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries".[64]

Nevertheless, WTO members may condition market access by requiring a programme "comparable in effectiveness" (instead of: "essentially the same") operable in the country of origin.[65] In the enforcement stage (Article 21(5) DSU) of *US—Shrimp*, the Panel and the Appellate Body considered a modified US import ban to be WTO-conformant. The changed US ban explicitly allowed importing shrimps if "the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing".[66] The Appellate Body considered this ban to comply with the *chapeau*. It ruled that trade-restrictive measures must only be sufficiently flexible to take into account the specific conditions "prevailing in *any* exporting Member" but do not need to provide for "specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member".[67]

At first glance, CBAM appears to force a "market-based approach" on third countries because only linkages of ETS and carbon pricing mechanisms in third states can lead to an exemption or reduction of CBAM levy—and only by doing so can third countries receive the revenues rather than leaving them for the EU.[68] Yet, CBAM would in many cases also give due regard to alternative policies such as command-and-control legislation (e.g. technical standards for the production of cement, for example on energy efficiency) and incentives (e.g. subsidies for the use of green hydrogen in the production of cement). To the extent these alternative instruments actually reduce the GHG emissions in the production of the respective goods,

[62] WTO Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 161 (emphasis in the original).

[63] WTO Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, paras 162–163.

[64] WTO Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 165.

[65] Appellate Body Report, *US—Shrimp (Article 21(5) DSU)*, 22 October 2001, WT/DS58/AB/RW, para 144.

[66] Appellate Body Report, *US—Shrimp (Article 21(5) DSU)*, 22 October 2001, WT/DS58/AB/RW, para 146.

[67] Appellate Body Report, *US—Shrimp (Article XXI(5) DSU)*, 22 October 2001, WT/DS58/AB/RW, para 149.

[68] Leonelli 2022, p. 627; Sato 2022, pp. 402 et seq. For that reason, Quick 2020, p. 584 considers CBAM to be incompatible with the GATT. For a general critique on the use of CBAM revenues, see Espa et al. 2022, pp. 26 et seq.

these products will also receive better treatment under CBAM because the calculated embedded GHG emissions will be lower accordingly.[69]

However, CBAM could put countries at a disadvantage that adopt non-market-based climate change mitigation measures which distribute GHG emissions unevenly between different national sectors. These might be third countries which aim at developing certain "national champion" industries with high GHG emissions while offsetting these in other industry sectors (without also applying a market-based mechanism). Similarly, negative emissions techniques, such as growing forests, reduce the net emissions of a country without an effect on the embedded emissions in a product, and thus do not appear to be adequately grasped by CBAM. To comply with the *chapeau* of Article XX GATT, it thus seems that the EU product based-methodology for calculating embedded GHG emissions would have to account for such non-market based, cross-sectoral distribution of GHG reduction measures and for negative emissions technologies, for example in the implementing regulation of the Commission.[70]

6.4.3.3 Serious and Even-Handed Attempt to Negotiate a Bi- or Multilateral Agreement?

Furthermore, in *US—Shrimp*, the Appellate Body required "serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles" to conform with the *chapeau*.[71] The Panel and the Appellate Body pointed out that the US had not actually attempted to negotiate an international agreement on sea turtle conservation.[72] This had shown that there was a real alternative to a unilateral import ban that the US should at least have attempted to pursue, and that the US had only seriously negotiated with some, but not with other WTO members that export shrimp.[73]

However, the Appellate Body Report in the dispute settlement enforcement stage (Article XXI(5) DSU) relativized this inclination for bi- and multilateral cooperation to some extent. As seen, the US had kept the import ban in place with some modifications. The Appellate Body held that the US were now complying with Article XX GATT as long as "in particular the ongoing serious good faith efforts

[69] In the same vein Leonelli 2022, p. 626; Galiffa and Bercero 2022, pp. 198 et seq.

[70] Otherwise, charging imports would amount to a discriminatory "double counting" of GHG emissions, see Bartels 2012, p. 457.

[71] WTO, Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 166.

[72] The Appellate Body pointed out that this omission ran counter to the facts that US Congress had directed the Secretary of State to enter into negotiations, that the Rio Declaration as well as the Conventions on Biological Diversity and on Migratory Species of Wild Animals underlined the importance of bilateral and multilateral cooperation in this area, and that the US had already concluded the Inter-American Convention that provided for protection of sea turtles, see Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, paras 166–171 with further references.

[73] WTO, Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 172.

to reach a multilateral agreement" remained satisfied; it was not necessary to actually conclude bi- or multilateral agreements but to attempt comparable negotiations with all affected WTO members.[74] This rests well with the EU's obligation to find cooperative, preferably pluri- and multilateral solutions (Article XXI(1)(2) TEU).

Therefore, the mere fact that the EU plans to exclude goods with origins in Switzerland and the European Economic Area from CBAM alone does not run counter to the *chapeau*. Rather, it is decisive if the Commission will follow equal attempts to negotiate with all interested third countries. For a fair negotiation attempt, the Commission will at least have to start negotiations with all countries from which substantial imports of the goods to be covered by CBAM originate. Arguably, the EU has already attempted to negotiate a multilateral solution for a long time under the auspices of the UNFCCC, in particular by the EU's involvement in the negotiation of the Paris Agreement and subsequent conferences on detailing its rules.[75]

6.5 CBAM as WTO-Norm (Re-)Creation by the EU in the Spirit of Sustainability

Having analyzed how CBAM stands in light of the WTO's jurisprudence, it is submitted that the analysis must take one step further. The WTO (and indeed, multilateralism in general) has now been in a severe crisis for some years. As will be shown in the following subsections, there are strong calls by the Members and by scholars that WTO law must change (Sect. 6.5.1). In this light, CBAM can be understood as a regulation by which the EU contributes to reshaping WTO law (Sect. 6.5.2). It is submitted that the European Treaties allow and even call upon the EU to walk the fine line between complying with international law and creatively changing and developing it to promote sustainability (Sect. 6.5.3).

6.5.1 The WTO in Crisis and Reform Discussions

The analysis of WTO law presented in the previous section builds on the jurisprudence of the Appellate Body before its paralysis in 2019 which by and large led the dispute settlement system to a deadlock.[76] Some of the Appellate Body's core findings relevant for the present analysis go back to reports from the 1990s. Then,

[74] WTO, Appellate Body Report, *US—Shrimp (Article 21(5) DSU)*, 22 October 2001, WT/DS58/AB/RW, paras 115 et seq.; direct quote in para 153.

[75] For a comprehensive analysis of EU climate diplomacy, see Minas and Ntousas (eds) 2018. For a different perspective, see for example Mbengue and Cima 2022, pp. 120–121 who criticize that the EU moves forward unilaterally.

[76] The US has been blocking the reappointment of new Members of the Appellate Body. Since December 2019, Appellate Body proceedings cannot be conducted anymore, causing any appeals to lead "into the void", see for example Pauwelyn 2019, pp. 297 et seq.

the global political landscape (or at least the widespread perception of it) was very different than it is today. There was trust in a growing multilateralism, reflected in the move to international trade law as a "rule-based system" with the WTO dispute settlement as one of its elementary pillars.[77] Today, multilateralism is in a crisis, pushed back by a renaissance of geo-economic conflicts that call for strengthening national security and the reduction of dependencies on trade with (potentially) problematic states.[78] At the same time, international climate law has taken various important steps, leading to the elaborate Paris Agreement.

In light of these challenges, there is a widespread opinion amongst WTO members that the law and the institutional setting of the WTO must change. Members heatedly discuss possible reforms of the WTO dispute settlement system to overcome its deadlock.[79] The EU has been a pioneer in defending the adjudicatory, rule-based trade system by supporting the creation of the Multi-Party Interim Appeal Arbitration Agreement.[80]

Necessarily, this development has an effect on the interpretation of WTO law and the provisions of the GATT analyzed above. WTO law is at a crossroad. It is not very likely that the jurisprudence of the 1990s and even the 2000s and 2010s contain the answers to the contemporary problems of free trade and climate change.[81] A "static" legal analysis as conducted in the previous section is thus prone to disregard that most probably, WTO law will in some form adapt to the challenges presented in the 2020s. There are different avenues for that change. Of course, the WTO agreement provides for the possibility for treaty changes or amendments and authoritative interpretations by the WTO members.[82] But a multilateral coalition for a comprehensive "green reform" of the WTO does not appear realistic in the current political climate.

6.5.2 *CBAM as an EU Contribution to Reshape WTO Law*

Apart from formal treaty changes, WTO law may also be reshaped on the level of the interpretation of the WTO agreement and the application of its norms to the facts. Importantly, the rules of treaty interpretation under Articles 31 and 32 VCLT generally allow for an "evolutionary" interpretation of international law if that conforms with the original intention of the parties. As the ICJ held—among other decisions—in the *Navigational and Related Rights*-case, especially treaties that have been concluded to apply over a long time usually allow for an evolutive meaning of treaty terms to adapt to changing circumstances in the real world and

[77] Pauwelyn 2019, p. 319.

[78] On the broader backlash against international law, see for example Krieger 2019, pp. 971 et seq.

[79] From the ample literature on this matter, see for example Gao 2021, pp. 534 et seq.

[80] WTO, Multi-Party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU, 30 April 2020, JOB/DSB/1/Add.12.

[81] In the same vein Pauwelyn 2020, p. 5.

[82] See in particular Article 10 WTO Agreement.

developments in international law[83]—in our case, an escalating climate crisis, a crisis of multilateralism and the developments in international climate law. Indeed, and famously, the Appellate Body has already engaged in evolutive interpretation of Article XX(g) GATT and the term of "exhaustible natural resources" in *US—Shrimp*.[84] Furthermore, interpretation of treaties must take account of the subsequent practice in the application of the treaty which establishes the agreement of the parties (Art 31(3)(b) VCLT).[85]

It is true that any evolutive reinterpretation of multilateral treaties is difficult[86] and leads to complex legal questions on how the various paragraphs of Articles 31 and 32 VCLT are to be interpreted and applied to WTO law that cannot be discussed here.[87] Indeed, the Appellate Body has been reluctant to identify a subsequent interpretive practice of the WTO Members so far.[88] Notwithstanding, CBAM can well be understood as an attempted contribution by the EU to a dynamic (re-)interpretation of WTO law. In essence, CBAM is the EU's try to craft a new and fairer way of understanding international competition in trade in goods—one that internalizes the costs of damaging the global atmosphere by emitting GHG. By drafting CBAM and concretizing its content in its upcoming administrative practice, the EU contributes to the global discussions on how we should understand and apply WTO law, or how we should change its text in a possible treaty reform. Naturally, the EU is only one voice among many other WTO Members, even if an important one, and much will depend on the EU's capacity to persuade others to join in. An interpretive evolution of WTO law would require other WTO members to agree with the EU position. With CBAM, the EU sets a political precedent and steers the discussion by proposing a carbon border mechanism that in its view conforms with WTO law. In a potential future dispute settlement procedure on the WTO-compliance of CBAM, memorials and pleadings by the EU thus not only serve to fend off any claims by the complainant but also speak to the right (re-)interpretation of WTO law for the future.

The potential for such reinterpretation is significant, appreciating that some key questions of WTO law, relevant for examining the legality of CBAM, are considered

[83] ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment of 13 July 2009, ICJ Rep 2009, p. 213, paras 63 et seq.

[84] WTO, Appellate Body Report, *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, paras 128 et seq. For a comprehensive analysis of other Panel and Appellate Body decisions that applied (or refused to apply) evolutive treaty interpretation, see van den Bossche 2019, pp. 224 et seq. For further examples of how WTO dispute settlement has engaged in evolutionary interpretation related to renewable energies, see Grigorova 2019, pp. 241 et seq.

[85] See ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (2018) UN Doc A/73/10, Chapter IV. On the possibility of treaty modification by subsequent practice, see Buga 2018.

[86] See for example van den Bossche 2019, pp. 221 et seq.

[87] On the many complex questions on the interpretation of Articles 31 and 32, see Dörr (2018a) and Dörr (2018b) with further references.

[88] See for example WTO, Appellate Body Report, *Japan—Alcoholic Beverages*, 4 October 1996, WT/DS8,10,11/AB/R, pp. 12 et seq.; discussed by Nolte 2011, pp. 138 et seq. with further references to WTO case law in comparison to the jurisprudence of the ICJ; Cook et al. 2019, pp. 184 et seq. with further critical analysis.

to remain unresolved even under the WTO's jurisprudence until 2019. This is, for example, the case for the exact requirements of the *chapeau* of Article XX GATT, as shown above. But also the application of the law to the facts requires the interpreter to concretize the legal norm to the specific factual circumstances.[89] This leaves room for a context-sensitive application of WTO law. Even more so, the *chapeau* of Article XX GATT operates as a legal test that takes account of all circumstances and details of the trade-restrictive measure at stake. Being an expression of the good faith principle,[90] it provides for substantial judicial leeway in ascertaining and evaluating CBAM in the relevant global context that the EU faces.

6.5.3 *Complying with and Shaping International Law in the EU's External Action for Sustainability*

From a bird's-eye perspective, the presented dynamic perspective on CBAM and WTO law may serve as a case study for a more fundamental observation on the EU's external actions for sustainability. Article 3(5) TEU states that the EU "shall contribute to the strict observance and the development of international law". It is submitted that this calls upon the EU to walk the fine line between complying with international law as understood at the relevant point in time, and creatively changing and developing it, for example to combat climate change and further sustainability.[91]

To be clear, this is not to say that the EU may disregard international law, which would be contrary to Article XXI(1) TEU.[92] However, in contrast to domestic law, it is a defining feature of international law that it lacks a central legislator. Treaty law, customary law and general principles are thus always potentially subject to constant and successive interpretive change. For the EU, this means that promoting international law not only entails conserving the (perceived) current state of the art, but also to support its development in line with the EU's values, for example, by engaging in treaty (re-)interpretation.

Bringing the presented static and dynamic stances to international law together, the EU must on the one hand respect and comply with the established understanding of international law at a given point in time, for example, with uncontroversial aspects of WTO law and with interpretative questions that the Appellate Body has clarified. On the other hand, the EU can also engage with unclear, precarious or contested international norms. The EU may promote its understanding of these rules, and act accordingly and unilaterally to the extent it does not undermine multilateral institutions.[93] If and to the extent multilateral solutions could not be found, the EU can push the development of international law as a "norm entrepreneur".[94] It seems that this also serves to comply with the EU's obligation to act coherently in its external affairs (Article 21(3)(2) TEU) because such action contributes to consolidating and clarifying international law.

Reconciling a static and dynamic stance to applying international law also means allowing a different perspective on the various, often-colliding constitutional goals that the European Treaties call upon the EU to pursue in its external relations. Following this line of argument, we may say that CBAM does not cause such a severe conflict between the goals to promote international law, free trade (Article 21(1)(1), (2)(e) TEU) and combating climate change in the EU's external relations (Article 191(1) TFEU) as sometimes brought forward.[95] Rather, in the WTO's currently precarious status, the EU may be seen as a potential (re-)creator of WTO law, hopefully aligning climate action and free trade better than WTO law used to do until 2019.

As a result, future WTO law may then better mirror the EU's internal values (such as combating climate change) in line with the EU's obligations under the European Treaties to promote its internal values in its external relations (Article 21(1)(1) TEU). To be sure, this can only prevent an overly Eurocentric position if the EU engages sufficiently with developing countries in line with the legal analysis presented above. The point made here is that the EU Treaties, correctly interpreted, require the EU to take account of the interests of lesser developed countries and find a balance with the objective to combat climate change. Importantly, as seen, this includes giving due regard to the interests of developing countries in the "Global South".

[89] Kelsen 1934, pp. 94 et seq. describes this as the "constitutive function" of the judicial decision. Cook 2019, pp. 182 et seq. describes this as "evolutionary application" of the law to the facts in distinction from "evolutionary interpretation" of the law itself, drawing on traditions of domestic constitutional law in various jurisdictions.

[90] WTO Appellate Body Report, *US—Gasoline*, 20 May 1996, WT/DS2/AB/R, p. 22; *US—Shrimp*, 12 October 1998, WT/DS58/AB/R, para 151, 158; *Brazil—Retreaded Tyres*, 3 December 2007, WT/DS/332/AB/R, paras 224.

[91] Generally on the EU's contribution to the development of international law, see Hoffmeister 2008, pp. 38 et seq.; Klabbers 2015, pp. 53–54; for a critical assessment of the EU as an exporter of European values, see Herlin-Karnell 2015, pp. 1227 et seq.; for a complex analysis of the EU as a "regulatory actor" that shapes international law through the bidirectional interaction of EU and international law, see Cremona 2019, pp. 100 et seq. based on the example of money laundering. For a progressive position that criticises an overemphasis on the "strict observation of international law" in the interpretation of Article 3(5) TEU, see Dunbar 2021, pp. 479 et seq.

[92] Indeed, with Cremona 2019, p. 70, "the EU derives its power from and through law" and is thus "profoundly committed to law and to the legality of its actions, both internally (constitutional legality) and externally (with respect to international law)."

[93] In the same vein Odermatt 2020, pp. 49 et seq who submits that unilateral and extraterritorial action of the EU may contribute to developing international law but may also risk undermining multilateralism.

[94] Scott and Rajamani 2012, p. 472.

[95] See for example Dobson (2023), pp. 375–379 with further references.

6.6 Conclusion

CBAM will be at the center of political and legal debates on the EU's external policies in the coming years, particularly in relation to developing countries. Not least because of its complex nature and its connection to the EU ETS, it is not easy to assess whether it is compatible with WTO law. Based on the WTO jurisprudence until 2019, CBAM would have to meet several conditions in the way it is interpreted and applied in practice in order to be consistent with WTO law. However, this paper argues that the legal analysis should be taken one step further. Given the crisis of the WTO and the calls for reform, it is necessary to take a dynamic perspective on WTO law. In this light, CBAM can be understood as a regulation by which the EU does not only test the boundaries of WTO law, but also contributes to the reshaping of WTO law in a discursive interaction with other concerned WTO members. It is submitted that the European Treaties allow and even require the EU to walk the fine line between adhering to WTO law and creatively changing and developing it to promote sustainability.

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2024/1638

5.6.2024

COUNCIL DECISION (EU) 2024/1638

of 30 May 2024

on the withdrawal of the Union from the Energy Charter Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 194(2) and 207(4), first subparagraph, in conjunction with Article 218(6), second subparagraph, point (a)(v), thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament [1],

Whereas:

(1) The Energy Charter Treaty (the 'ECT') was concluded by the Union by Council and Commission Decision 98/181/EC, ECSC, Euratom [2], and entered into force on 16 April 1998.

(2) In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated.

(3) In 2019, the Contracting Parties to the ECT (the 'Contracting Parties') engaged in negotiations aimed at modernising the ECT in order to bring it into alignment with the principles of the Paris Agreement [3], the requirements of sustainable development and the fight against climate change, as well as with modern standards of investment protection.

(4) During an ad-hoc Conference on 24 June 2022, the Contracting Parties reached an agreement in principle on the modernised text, thus concluding the negotiations, without prejudice to the final assessment by the Contracting Parties. The negotiated outcome was meant to be adopted at the 33rd meeting of the Energy Charter Conference (the 'Conference') on 22 November 2022.

(5) Ahead of the meeting of the Conference, the Union has not adopted a position on the modernisation of the ECT.

(6) In the absence of a Union position, the Union is unable to vote on the adoption of the modernised ECT at the Conference.

(7) Considering all the above, the Union should withdraw from the ECT.

(8) Several Member States have expressed their support for the proposed amendments to the ECT and have indicated their intention to remain Contracting Parties, subject to its modernisation. Those Member States should therefore be allowed, through a separate Council decision, to approve or not oppose the modernisation of the ECT at the Conference that will adopt that modernisation.

(9) Pursuant to Article 47(1) of the ECT, a Contracting Party can give written notification of its withdrawal from the ECT to the Depository of the ECT, namely the Portuguese Republic. Pursuant to Article 47(2) of the ECT, such a withdrawal takes effect upon the expiry of one year after the date of the receipt of the notification by the Depositary.

(10) The Union should withdraw from the ECT,

HAS ADOPTED THIS DECISION:

Article 1

The Union shall withdraw from the Energy Charter Treaty ('the ECT').

[1] Consent of 24 April 2024 (not yet published in the Official Journal).
[2] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L 69, 9.3.1998, p. 1).
[3] OJ L 282, 19.10.2016, p. 4.

Article 2

The President of the Council shall, on behalf of the Union, give written notification in accordance with Article 47(1) of the ECT, of the withdrawal of the Union from the ECT.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 30 May 2024.

For the Council

The President

T. VAN DER STRAETEN

The Energy Charter Treaty at a Tipping Point – Modernization Efforts, Withdrawal Plans and their Legal Consequences

Philipp Kehl & Sebastian Wuschka*

Contents

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Abstract

Driven to a large extent by the EU Commission, a modernization process for the Energy Charter Treaty (ECT) has been underway since 2017. While an agreement in principle (AIP) was reached in 2022, that agreement's adoption and with it the modernization process was put on hold after the EU and its member states could not align their positions. Instead, several states – amongst them France, Germany and Poland – moved to withdraw from the treaty, followed by calls from the European Parliament and then also the EU Commission for the EU and all its member states to follow suit. These developments have left the ECT in a limbo state, with the future of the modernization process and the treaty in general now being highly uncertain. Against this background, this article analyzes the legal implications of the ECT modernization efforts and specifically the effects of the AIP, should it still enter into force. It further addresses the consequences that would follow from the realization of the current withdrawal plans, as well as their interactions with the modernization process.

Keywords: Energy Charter Treaty, Komstroy, ECT Modernization, EU Investment Policy, Intra-EU Investment Disputes

A. Introduction

The *Energy Charter Treaty* (ECT)[1] is best known for its investment protection framework. Indeed, it is the most used basis for investment claims presently and generally.[2] Over the last few years, the ECT and its investment protection framework also have received an unprecedented amount of attention. Civil society organizations have launched several campaigns calling for the ECT contracting parties to terminate the treaty, which they consider "an axe to climate action"[3] and a "climate killer"[4]. This perception stands in stark contrast to statistics of the Energy Charter Secretariat (ECT Secretariat), according to which most ECT-based arbitrations re-

1 The Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

2 According to UNCTAD data, the ECT has been the basis of 106 investment cases out of 697 known ones initiated during the period 2011–2020; *UNCTAD*, Investor–State Dispute Settlement Cases: Facts and Figures 2020, IIA Issues Note, Issue No. 4 (September 2021), p. 3, available at: https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf (21/12/2023).

3 *Dauphin and others*, The Energy Charter Treaty: an axe to climate action – 10 reasons the EU and governments must quit the Energy Charter Treaty (Friends of Earth Europe, May 2020), available at: https://friendsoftheearth.eu/publication/the-energy-charter-treaty-an-axe-to-climate-action/ (21/12/2023).

4 *Dauphin*, The unknown climate-killer deal we'll have to tackle next (Friends of Earth Europe, May 2020), available at: https://friendsoftheearth.eu/news/the-unknown-climate-killer-deal-well-have-to-tackle-next (21/12/2023).

late to investments in renewables.[5] Still, also some posts on legal blogs have endorsed the calls for termination.[6]

Further, on a more technical level, a need has arisen for the European Union (EU) and its member states to tackle the question of intra-EU investment arbitration under the ECT. While such arbitrations between an investor from one EU member state and another EU member state had been subject to heated debates for quite some time,[7] the European Court of Justice (ECJ) eventually declared them incompatible with EU law in its *Komstroy* judgment.[8]

The contracting parties to the ECT had initiated formal discussions about a modernization of the treaty already in 2017, with the European Commission as one of the driving forces behind this process. As the Commission's 2019 negotiation directives set out, "the Modernised ECT should […] facilitate investment in the energy sector in a sustainable way between the ECT Contracting Parties by creating a coherent and up-to-date legally binding framework that provides for legal certainty and ensures a high level of investment protection" and, in particular, "reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement."[9] The issue of intra-EU investment arbitration was equally to be addressed in this process.

In mid-2022, an agreement in principle (hereinafter: the AIP) was reached and illustrated in a communication by the ECT Secretariat.[10] Shortly thereafter, the detailed text of this agreement[11] was leaked.[12] The ECT contracting parties were originally scheduled to adopt the AIP on 22 November 2022. Yet, the European Commission requested to have the agreement's adoption rescheduled for the Energy Charter Conference's April 2023 meeting, which ultimately did not occur either.

5 *Energy Charter Secretariat*, Statistics of ECT Cases as of 1 May 2023, p. 3, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501_-_Statistics_-_Cases_under_the_Energy_Charter_Treaty.pdf (21/12/2023).

6 See for example *Müller-Hoff/Duarte*, Don't Stick to a Fossil Treaty – Pull the Plug on the Energy Charter Treaty, Völkerrechtsblog, 31 January 2022, available at: https://voelkerrechtsblog.org/dont-stick-to-a-fossil-treaty-pull-the-plug-on-the-energy-charter-treaty/ (21/12/2023); *Schaugg/Nair*, The Reform That Isn't, Verfassungsblog, 18 November 2022, available at: https://verfassungsblog.de/the-reform-that-isnt/ (21/12/2023).

7 For further details, see *Happ/Wuschka*, in: Kröll/Bjorklund/Ferrari (eds.), p. 2006.

8 CJEU, case C-741/19, *Republic of Moldova v. Komstroy*, ECLI:EU:C:2021:655, para. 66.

9 *Council of the European Union*, Negotiating Directives for the Modernisation of the Energy Charter Treaty, doc. 10745/19 ADD 1.

10 *Energy Charter Secretariat*, Decision of the Energy Charter Conference. Subject: Public Communication Explaining the Main Changes Contained in the Agreement in Principle, CCDEC 2022 10 GEN, 24 June 2022. As set out in the Communication, the draft text of the amended ECT was to be communicated to the Contracting Parties by 22 August 2022 for adoption by the Energy Charter Conference on 22 November 2022.

11 *Energy Charter Secretariat*, Agreement in Principle on the Modernisation of the Energy Charter Treaty, CC 750 Rev, 24 June 2022, available at: www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (21/12/2023).

12 Responsible for the leak was the American daily newspaper "Politico", see *IISD*, Newly Released Text for Modernized Energy Charter Treaty Shows Too Many Potential Obstacles for Climate Action (13 September 2022), available at: https://www.iisd.org/articles/statement/newly-released-text-modernized-energy-charter-treaty (21/12/2023).

A certain number of EU member states had announced their intention to withdraw from the ECT in fall of 2022, and the EU Council failed to approve the AIP for the modernized ECT only a few days before the ECT contracting parties were meant to vote on it.[13]

As the EU and its member states represent roughly half of the ECT's membership, their position has a significant impact on the treaty's fate. The European Parliament called for a coordinated exit of all EU member states from the ECT on 24 November 2022.[14] France, Germany, and Poland then submitted their notifications of withdrawal to the ECT's depositary, Portugal, in December 2022, which all became effective before the end of 2023.[15] Luxembourg submitted its notification on 16 June 2023.[16]. Further actions by other EU member states are to be expected but remain unclear for now. As a major development, however, also the EU Commission joined the call for a coordinated withdrawal of the EU and its member states in early February 2023,[17] after having advocated for the ECT's modernization until that point.

On the other side of the spectrum, looking at non-EU ECT member states, Switzerland already announced that it would not follow suit but remain party to the ECT instead.[18] Also, the ECT Secretary General responded to the European Parliament's call for the EU to exit the ECT with an open letter of 13 February 2023,[19]

13 This, in turn, was celebrated by the ECT's critics. See e.g. *ClientEarth*, EU rejection of reformed Energy Charter Treaty 'historic moment' for climate action (21 November 2022), available at: https://www.clientearth.org/latest/press-office/press/eu-rejection-of-reformed-energy-charter-treaty-historic-moment-for-climate-action/ (21/12/2023).

14 *European Parliament*, Resolution on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934(RSP).

15 *Energy Charter Secretariat*, Written notifications of withdrawal from the Energy Charter Treaty, 22 March 2023, available at: https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty (21/12/2023); for France, the date of cessation of the ECT membership was determined to be 8 December 2023, for Germany 20 December 2023 and for Poland 29 December 2023.

16 *Energy Charter Secretariat*, Written notification of withdrawal from the Energy Charter Treaty, 30 August 2023, available at: https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/ (16/12/2023); the withdrawal would take effect on 17 June 2024, accordingly.

17 *European Commission*, Non-paper on the Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty, available at: https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf (21/12/2023).

18 *Lo*, Switzerland says won't follow EU out of beleaguered Energy Charter Treaty (Euractiv, 10 February 2023), available at: https://www.euractiv.com/section/energy/news/switzerland-says-wont-follow-eu-out-of-beleaguered-energy-charter-treaty/ (21/12/2023).

19 *ECT Secretary General*, Letter to the President of the European Parliament, SG/23/E/0047, 13 February 2023. This call was reiterated after the EU Commission adopted a draft Council Decision proposing the withdrawal of the European Union from the ECT, see *ECT Secretary General*, Statement on the draft Council Decision proposing the withdrawal of the European Union from the Energy Charter Treaty, 11 July 2023, available at: https://www.energycharter.org/media/news/article/statement-by-the-secretary-general-of-the-energy-charter-secretariat-on-the-draft-council-decision-p/ (21/12/2023).

calling for a potential withdrawal from the ECT to be conducted separately from the modernization process.

These developments have left the ECT in a limbo state, with the future of the modernization process and the treaty in general now being highly uncertain. Against this background, this article analyzes the legal implications of the ECT modernization efforts and specifically the effects of the AIP, should it enter into force. We further address the consequences that would follow from the realization of the current withdrawal plans, as well as their interactions with the modernization process. We will first give a more detailed overview of the ECT modernization process, the content of the AIP and the withdrawal plans (B.), before providing an in-depth analysis of the different facets of their legal ramifications (C.) and turning to brief conclusions (D.).

B. Current Developments

I. The ECT Modernization Process

As set out above, one of the main goals of the ECT modernization process was to amend the treaty to further sustainable investment in the energy sector with a particular view to clean energy transition goals and the achievement of the Paris Agreement's objectives. In line with these goals, the ECT membership agreed on several amendments to the treaty. These also include significant changes to its investment protection provisions.

In that respect, the probably most noteworthy changes the AIP foresees include an amendment to the ECT's definitions and a "flexibility mechanism" that allows contracting parties to unilaterally exclude fossil fuels from the ECT's protections in their territories. As the ECT Secretariat's Communication already sets out,

> the EU and the UK have opted to carve-out fossil fuel related investments from investment protection under the ECT, including for existing investments after 10 years from the entry into force of the relevant provisions and for new investments made after 15 August 2023 as of that date with limited exceptions.[20]

As an additional temporal limit, no fossil fuel related investments would enjoy protection under the modernized ECT after 31 December 2040, regardless of the date of the AIP's entry into force.[21] The "limited exceptions" mentioned in the ECT Secretariat's communication refer to new investments in gas power plants which allow for the use of renewable gases in addition to petroleum gases and emit less than 380 g of CO2 per kWh of electricity produced. Such investments would be protect-

20 *Energy Charter Secretariat*, Decision of the Energy Charter Conference (n 10), p. 3 (emphasis added).

21 See Annex NI, Section B, paragraph 1, subparagraph (b), Section C, paragraph 1 AIP (n 11).

ed even after 15 August 2023 under the modernized ECT as envisioned by the AIP.[22]

Secondly, the AIP foresees a refinement of the ECT's specific investment protection provisions, stressing the contracting parties' right to regulate, and ultimately offering more restricted protection to foreign investors. Specifically, the definition of a qualifying "investor" and a qualifying "investment" under the ECT are intended to be narrower.[23] In relation to Article 10(1) ECT, the fair and equitable treatment (FET) standard, the AIP follows the model adopted in the EU's further investment agreements,[24] setting out an exhaustive list of measures that would constitute FET violations.[25] Moreover, while the AIP recognizes that indirect expropriations are compensable, it stipulates that non-discriminatory measures by which a state pursues legitimate policy objectives like environmental protection can constitute indirect expropriations only under exceptional circumstances.[26] Regarding the standard of most constant protection and security as currently enshrined in Article 10(1)(3) ECT, the AIP replaces it with the more commonly used term of "full protection and security", while also stipulating that only physical security is guaranteed thereunder.[27] The AIP also contains a refined umbrella clause, which only applies to specific written commitments by contracting parties in the exercise of governmental authority.[28]

Thirdly, in relation to the EU's push to exclude intra-EU investment arbitration from the ECT, the AIP includes a new article according to which certain provisions

22 Annex NI, Section B, paragraph 1, subparagraph (b) AIP (n 11); this protection would generally expire on 31 December 2030, except for investments in gas power plants made to replace existing power generation from fossil fuels, which would, like the protection for investments made before 15 August 2023, expire on 31 December 2040 but no later than 10 years after the entry into force of the modernized ECT.

23 Art. 1(7) AIP (n 11) would require that a natural person must not have the nationality of the state they invested in and that a legal person carries out "substantial business activities" in the state under the laws of which it is constituted to qualify as an investor under the ECT, respectively; Art. 1(6) AIP would now explicitly set out multiple criteria an asset has to fulfill to be protected under the ECT, such as legality under the laws of the host state.

24 See e.g. Article 8.10 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJEU L 11, 14 January 2017, p. 23.

25 Art. 10(2) AIP (n 11); the same article of the EU proposal for a modernized ECT also provided for an exhaustive list from which the version contained in the AIP differs insofar as it also includes frustrations of legitimate expectations into the scope of FET, see *European Union*, EU text proposal for the modernisation of the Energy Charter Treaty (ECT), available at: https://ccsi.columbia.edu/sites/default/files/content/docs/tradoc_158754%20(1)_0.pdf (21/12/2023).

26 Art. 10(4) AIP (n 11).

27 Art. 10(1), (3) AIP (n 11); this is likely owed to the perception that the expression "most constant protection and security" is stronger and more far-reaching than the expression "full protection and security" (ICSID, case No. ARB/87/3, *AAPL v. Sri Lanka*, Final Award of 27 June 1990, para. 47) and, more specifically, that it also guarantees legal security and not only physical security (cf. *Schreuer*, Journal of International Dispute Settlement 2010/2, pp. 358–359).

28 Art. 10(13) AIP (n 11).

of the ECT, including Article 26 (which provides for investor-state dispute settlement) "shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations". As already the ECT Secretariat's Communication stated, the EU is currently the only Regional Economic Integration Organization (REIO) among the contracting parties.[29]

In that respect, the AIP would also remove Article 16, which, under the ECT as it currently stands, gives preference to the provisions more favorable to investors in cases of conflict with other investment protection treaties, entirely and without replacement from the treaty.[30] This provision had been considered decisive in numerous investment tribunals' decisions dismissing arguments that EU law would render them without jurisdiction under the ECT (as further discussed below in Section C.2.b)).

II. The Withdrawal Plans

While the European Commission's approach towards the ECT until its change of course in February 2023 clearly was to follow through with the modernization, the EU member states developed different positions over the course of fall 2022. Following in Italy's footsteps, which had notified its withdrawal from the ECT already at the end of 2014, Poland was the first member state to openly take issue with the results of the modernization process as reflected in the AIP. On 25 August 2022, the Polish government presented a draft bill[31]to the state's lower chamber, the Sejm, foreshadowing the country's withdrawal.[32] Instead of climate considerations, the Polish government appears to have been more troubled by the ECT's perceived continued incompatibility with EU law also under the new version, the costs it would face as a respondent in investment disputes, general systemic concerns relating to investment arbitration,[33] and the general possibility of external arbitral and

29 *Energy Charter Secretariat* (n 10), p. 7; while *EURATOM* technically remains a member, it has effectively been represented by the European Union since the entry into force of the Treaty of Lisbon, and by the European Economic Community before. Consequently, the *United Nations Treaty Collection (UNTC)* only lists the "European Communities" as a participant to the treaty, instead of mentioning both organizations separately, see https://treaties.un.org/Pages/showDetails.aspx?objid=080000028009ac15 (21/12/2023).

30 P. 47 of the Annex containing the AIP (n 11).

31 *Sejm of the Republic of Poland*, Government bill on termination of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Relevant Environmental Aspects, done in Lisbon on 17 December 1994 (25 August 2022), available at: www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2553 (21/12/2023).

32 For an analysis of the rationale behind the draft bill, see *Daszko*, No Longer Feeling the Energy – Unpacking Poland's reasoning behind its decision to withdraw from the ECT, Verfassungsblog, 9 September 2022, available at: https://verfassungsblog.de/not-feeling-the-energy-anymore/ (21/12/2023); *Sadowski*, Poland to Withdraw from the ECT: Who Does It Benefit?, Kluwer Arbitration Blog, 25 September 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/09/27/poland-to-withdraw-from-the-ect-who-does-it-benefit/ (21/12/2023).

33 Cf. *Daszko* (n 32).

judicial scrutiny.[34] In what can only be described as a pattern of uncoordinated announcements, Spain[35], the Netherlands[36], France[37], Belgium[38], Slovenia[39], Germany[40], Luxembourg[41], Denmark[42] and, most recently, Portugal[43], followed suit by proclaiming their own withdrawal plans. The United Kingdom declared that it would conduct a review of its ECT membership, with withdrawal being an option in case the modernization process fails.[44]

For now, as noted in the introduction, France, Germany, Poland and Luxembourg appear to be the only countries that formally notified their withdrawal to the ECT's depository. The coordinated withdrawal which the European Parliament called for in November of 2022 – and which the EU Commission now endorses – is presently not in sight. The only step in that direction taken since the initial calls for a coordinated withdrawal was a proposal for a Council Decision adopted by the EU Commission in July 2023.[45] These calls by the European Commission and Parliament are not legally binding. Even if the EU Council were to join them in demanding that the member states withdraw from the ECT, the question arises (which this

34 Cf. *Sadowski* (n 32).

35 *Fisher*, Spain announces withdrawal from ECT (Global Arbitration Review, 13 October 2022), available at: https://globalarbitrationreview.com/article/spain-announces-withdrawal-ect (21/12/2023).

36 *Fisher*, Netherlands moves to quit Energy Charter Treaty (Global Arbitration Review, 19 October 2022), available at: https://globalarbitrationreview.com/article/netherlands-moves-quit-energy-charter-treaty (21/12/2023).

37 *Fisher*, France joins rush to exit ECT (Global Arbitration Review, 24 October 2022), available at: https://globalarbitrationreview.com/article/france-joins-rush-exit-ect (21/12/2023).

38 *Belga News Agency*, Belgian Climate Minister wants to withdraw from Energy Charter Treaty (24 October 2022), available at: https://www.belganewsagency.eu/belgian-climate-minister-wants-to-withdraw-from-energy-charter-treaty (21/12/2023). It is, however, questionable whether this statement accurately reflects the position of the Belgian government, as no further information on Belgian withdrawal plans is available.

39 *Fisher*, Slovenia joins European exodus from ECT (Global Arbitration Review, 10 November 2022), available at: https://globalarbitrationreview.com/article/slovenia-joins-european-exodus-ect (21/12/2023).

40 *Moens*, Germany to leave Energy Charter Treaty (Politico, 11 November 2022), available at: https://www.politico.eu/article/germany-to-leave-energy-charter-treaty/ (21/12/2023).

41 *Ballantyne*, Luxembourg at ECT exit door (Global Arbitration Review, 18 November 2022), available at: https://globalarbitrationreview.com/article/luxembourg-ect-exit-door (21/12/2023).

42 *Szumski*, Denmark to withdraw from Energy Charter Treaty (EURACTIV, 14 April 2023), available at: https://www.euractiv.com/section/politics/news/denmark-to-withdraw-from-the-energy-charter-treaty/ (21/12/2023).

43 *Fisher*, Portugal considers ECT withdrawal (Global Arbitration Review, 21 July 2023), available at: https://globalarbitrationreview.com/article/portugal-considers-ect-withdrawal (21/12/2023).

44 *UK Department for Energy Security and Net Zero*, Press release: UK reviewing membership of energy treaty (1 September 2023), available at: https://www.gov.uk/government/news/uk-reviewing-membership-of-energy-treaty (21/12/2023).

45 *European Commission*, Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023) 447 final.

article cannot address) whether the member states would have to follow suit or whether those willing to could – from the EU law perspective – remain ECT contracting parties.

Nevertheless, considering the doubts voiced by several EU member states and the Commission's call for the EU and its member states to leave the treaty, it is by far not clear that there will be sufficient political support for the AIP as it presently stands. In that respect, Article 36(1) ECT presents a first legal obstacle for the adoption of the AIP. Under that provision, "[u]nanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference" is required for treaty amendments to be adopted.[46] Even in case of adoption, amendments only enter into force ninety days after ratification by ¾ of the ECT contracting parties under Article 42(4) ECT.

As the EU and its member states form a majority of the ECT contracting parties, sufficient opposition within the block could put the modernization process to an end (at least as long as their status as contracting parties lasts). In fact, it would already be sufficient for one of them to oppose the adoption of the AIP. Further, even if most EU member states after all decided to opt for the adoption of the modernized ECT and the skeptical ones – including those from outside the EU – abstained from voting at the relevant meeting, the ratification process would certainly not be a smooth one. Political pressure and opposition by civil society actors will persist, making it appear likely that the necessary quorum of ratifications will only be reached in 2025 or even later, if at all.

C. Legal Ramifications

Against this political background and the corresponding uncertainties, two main legal issues arise: The first is which consequences follow from the withdrawal from the ECT of some and potentially all EU member states, as well as the EU itself and EURATOM, for the modernization efforts and for their treaty commitments (I). The second is which implications an implementation of the modernized ECT between certain parties only, even though this would need to be at least ¾ of the ECT's membership, would have (II.).

I. The implications of a withdrawal by certain states

The EU Commission's and EU member states' withdrawal plans will bring about at least two different sets of consequences, if followed through: On the one hand, for those states that remain committed to the ECT, the question arises whether an exodus of some or all members states of the EU would still allow for the modernization to proceed (1.). On the other hand, there are specific issues related to the withdrawal for the withdrawing states. These include, most importantly, how the withdraw-

46 Cf. *Hobér*, p. 502 for a definition of "unanimity" in contrast to "consensus".

ing members would foresee to approach the ECT's continued application for 20 years under its sunset clause (2.), given that there are already calls to "neutralize"[47] it. We address these in turn, before drawing some preliminary conclusions (3.).

1. Impact of the withdrawal plans on the modernization process

The most notable consequence of a withdrawal of several member states from the ECT would likely be the role the withdrawing members would play in relation to the voting process for the modernized ECT's adoption. As already noted, Article 36(1) lit. a of the ECT requires "unanimity" among the contracting parties present and voting for an amendment to be adopted, while such an amendment will take effect ninety days after its ratification by ¾ of the ECT membership under Article 42(4) ECT. Both clauses use the term "Contracting Parties" when referring to the actors relevant for adoption and ratification of an amendment.[48] A "Contracting Party" is defined in Article 1(2) ECT as "a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force".[49] A withdrawal, conversely, takes effect one year after the notification of withdrawal has been received by the ECT's depository, Portugal, under Article 47(2). After that time, the ECT ceases to be in force for a state that has effectively terminated its membership, and such a state loses its "Contracting Party" status.[50]

During that one-year period for which withdrawing states remain contracting parties, however, their voting behavior will necessarily play a role for the quora of Articles 36(1) lit. a and 42(4) ECT, and therefore in particular for the adoption of the AIP. Yet, the withdrawing members could always make use of the possibility not to participate in the relevant vote to not derail the modernization process.[51] Indeed, it would be a politically odd behavior for the EU and its member states not to support the other member states in completing the ECT's modernization, even when they are exiting the treaty. The only coherent policy approach would be to abstain from voting or supporting the adoption of the AIP.

Consequently, unless the EU or certain of its member states reveal themselves as even more of an irrational actor, their withdrawal from the ECT should not put an end to the modernization efforts for the remaining states. Instead, under Article

47 *Simon*, Legal expert: ECT withdrawal 'is the only possible course of action' (EURACTIV, 8 February 2023), available at: https://www.euractiv.com/section/energy/interview/legal-expert-ect-withdrawal-is-the-only-possible-course-of-action/(21/12/2023).

48 *Hobér*, pp. 502, 512.

49 The distinction drawn by the text of this definition between "consent[...] to be bound" and the condition that the "[t]reaty is in force" highlights that these are two separate conditions, which a state must fulfill cumulatively to acquire the status of a "Contracting Party", see PCA, Case No. 2005-04/AA227, UNCITRAL, *Yukos (Isle of Man) v. Russia*, Interim Award on Jurisdiction and Admissibility of 30 November 2009, para. 385.

50 Cf. *Hobér*, p. 61; *Geraets/Reins*, in: Leal-Arcas (ed.), Art. 1 ECT, para. 1.11

51 See also *ECT Secretary General*, Letter to the President of the European Parliament (n 19), p. 3.

42(4) ECT, the amendments to the treaty would "enter into force *between Contracting Parties having ratified, accepted or approved them*". In turn, under the general rule of international law provided for in Articles 40(4) and 30(4) lit. b of the Vienna Convention on the Law of Treaties (VCLT) and also reflected by Article 42(4) ECT, the relationship between those treaty parties that may have ratified the modernized ECT and those which have not will remain governed by the pre-existing regime – in this case, the "old ECT". What remains to be seen, however, is whether the remaining states themselves retain their appetite for the ECT's modernization, given that these efforts were mainly driven by the EU.

2. Withdrawal and the sunset clause dilemma

The more intricate legal questions relate to the withdrawing states' approach to putting an end to their ECT obligations, and especially to eliminate the implications of the ECT's sunset clause. Article 47(3) ECT provides:

> The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

Under this clause, the full effect of a withdrawal from the ECT would be deferred by 20 years. Ironically, even though the states' intention of leaving the ECT is to exit a legal framework that is perceived as an obstacle to climate action, their withdrawal would perpetuate the allegedly problematic situation beyond the time at which the modernized treaty could enter into force. It appears that those states which already have outlined their concrete withdrawal plans also accept this legal position. The Polish government's draft bill acknowledges the sunset clause's effect but appears to have been motivated more by the intention to exclude future investments from the ECT's protection.[52] France also appears to recognize that its definitive exit from the ECT might not be soon accomplished.[53]

For the states now pursuing withdrawal in light of climate concerns, a possible way to at least mitigate the effect of the sunset clause would have been to join the AIP instead and to use its flexibility mechanism.[54] This would have allowed them to avoid being bound by the ECT's investment protection regime insofar as (most) future fossil fuel investments are concerned, while investments already made would only have enjoyed a further ten years of ECT protection, instead of the 20 years

52 Cf. *Daszko* (n 32); *Sadowski* (n 32).

53 *Malingre*, La France concrétise son retrait du traité sur la charte de l'énergie (Le Monde, 19 December 2022), available at: www.lemonde.fr/planete/article/2022/12/19/la-france-concretise-son-retrait-du-traite-sur-la-charte-de-l-energie_6155047_3244.html (21/12/2023).

54 See also *ECT Secretary General*, Letter to the President of the European Parliament (n 19), p. 3.

provided by the sunset clause.[55] Naturally, however, this would have required an entry into force of the modernized treaty as such for the relevant states, and hence their continued membership until such time, since only contracting parties can ratify amendments.[56]

Considering the decision by France, Germany, Poland and Luxembourg not to take this step, and the EU Commission's as well as civil society organizations' call for a neutralization of the sunset clause's effect, it is worthwhile addressing other ways in which the withdrawing states might seek to tackle their sunset clause dilemma: The (mutual) termination of sunset clauses to dodge a treaty's continued application has triggered academic and – to a lesser degree – practical debates for quite some time now.[57] In the following, we therefore review the suggested avenues to terminate the sunset clause separately from the ECT. We will be doing so by looking, first, at unilateral options for the withdrawing state (a)), before turning to multilateral approaches (b)).

a) Termination of the sunset clause?

As set out in greater detail by *Klabbers*, the law of treaties and the ECT itself do not generally offer a possibility to terminate the ECT' sunset clause separately from the treaty as such.[58] Indeed, it is the very function of the sunset clause, in particular against the long-term stability needed and envisaged for energy investments at the time of the ECT's conclusion,[59] to create a durable regime of investment protection that outlives the treaty's end. The states withdrawing from the ECT would hence be left with potential justification of a unilateral withdrawal under Articles 60 (material breach by a Contracting Party), 61 (*force majeure*) and 62 (fundamental change of circumstances) of the VCLT[60], which could be used to release them from the regime under the sunset clause. Yet, presently there is no room to argue for a situation of a material breach or *force majeure*, leaving only the argument based on a fundamental

55 See above, II.a) for details on the AIP's flexibility mechanism.

56 See Art. 42(4)(2) ECT: "Amendments shall enter into force *between the contracting parties*"; Art. 42(4)(3) ECT: "Thereafter the amendments shall enter into force *for any other Contracting Party*". Consequently, scholarly literature does not even discuss the possibility of the ratification of an amendment by a state that has already withdrawn from the ECT and is under the effect of the sunset clause, cf. *Morelli*, in Leal-Arcas (ed.), Art. 42 ECT, para. 42.01 et seq.

57 For an overview, see *Nowrot*, in: Hindelang/Krajewski (eds.), p. 227; *Voon/Mitchell*, ICSID Review-FILJ 2016/2, p. 413.

58 *Klabbers*, A Moral Holiday: Withdrawal from the Energy Charter Treaty, 11(6) ESIL Reflections (2022), p. 4–5, available at: https://esil-sedi.eu/esil-reflection-a-moral-holiday-withdrawal-from-the-energy-charter-treaty/ (21/12/2023).

59 Ibid, p. 3.

60 Vienna Convention of the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

change of circumstances under Article 62 VCLT[61]. This possibility, however, received some attention recently, especially in light of a communication by the ECT Secretariat on its website's news section.[62] In that communication, the Secretariat stressed the rule's application to exceptional cases only, and highlighted that it applies only to unforeseen changes of circumstances.[63]

And indeed, it appears hardly tenable to argue that the obligations under the ECT were radically transformed by new circumstances compared to the time of the treaty's conclusion. If a state attempted to rely on the need to combat climate change as a new circumstance, any such argument cannot surpass the high threshold of a lack of foreseeability under Article 62 VCLT,[64] which the International Law Commission (ILC) in any event "attempted to frame […] as restrictively as possible."[65] Moreover, already the ECT's preamble acknowledged this need, referencing the United Nations Convention on Climate Change.[66]

b) Derogation from the sunset clause by multilateral steps?

Consequently, of greater importance are those avenues under discussion which rely on a multilateral solution. States have developed quite a portfolio of approaches to dealing with sunset clauses in relation to the mutual termination of investment treaties, where some uncertainty exists whether or not such clauses actually apply (or different treaty wordings may lead to different results).[67] For instance, when terminating bilateral investment treaties, states have resorted to the "sleight of hand" of first amending the relevant treaty to remove its sunset clause and then terminating the treaty without the interference of the so removed clause.[68]

A debate already exists as to whether states, as the masters of their treaties, can simply extinguish the investors' rights under investment treaties by way of a treaty

61 Art. 62 VCLT also reflects customary international law, see ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep 7, paras. 46, 99; ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction of the Court, [1973] ICJ Rep 49, para. 36.

62 *Energy Charter Secretariat*, Sunset Clause (Article 47 of the ECT) in relation to Article 62 of the Vienna Convention on the Law of Treaties (VCLT), 3 November 2022, available at: www.energycharter.org/media/news/article/sunset-clause-article-47-of-the-ect-in-relation-to-article-62-of-the-vienna-convention-on-the-law/ (21/12/2023).

63 Ibid.

64 Cf. *Klabbers* (n 58), p. 6. For a different perspective on this question see *Daszko*, Journal of International Economic Law 2023/4, forthcoming, p. 12.

65 *Binder*, Leiden Journal of International Law 2012/4, pp. 909, 912.

66 Preamble of the ECT, recital 14.

67 Most recently on this, *Lauvaux*, Arbitration International 2022/3, pp. 203–212.

68 For instance, this is the practice adopted by the Czech Republic and its treaty partners. See *Peterson*, Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments (IA Reporter, 1 February 2011), available at: www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/ (21/12/2023).

amendment anytime,[69] or whether certain principles protecting the acquired rights and interests of investors limit their control.[70] In relation to the ECT, the discussion would lead to the same questions if its entire membership agreed to remove the sunset clause, which appears highly unlikely. The need to remove the sunset clause in a group of ECT contracting parties *inter se*, for which also the EU Commission advocates in its non-paper,[71] raises again separate, yet similarly intricate questions.

An *inter se* agreement removing the sunset clause's application naturally would only apply among its parties.[72] It therefore would in any case not be capable of nullifying the sunset clause entirely. Whether a group of contracting parties could, however, remove the sunset clause's application among themselves is a question governed by Article 41 VCLT. Essentially, the same legal considerations come into play at this point as the ones relevant before multiple investment tribunals that already had to discuss whether EU member states would hypothetically have been entitled to exclude the ECT's application *intra* EU.[73]

Under Article 41 VCLT, where the treaty does not provide for the option to conclude *inter se* agreements (as the ECT does not), such agreements are only allowed under three cumulative conditions: the modification in question is not prohibited by the treaty, it does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, and it does not relate to a provision from which a derogation is incompatible with the effective execution of the object and purpose of the treaty as a whole.[74]

While the VCLT's *travaux preparatoires* appear to indicate that a prohibition within the meaning of Article 41 VCLT would need to be explicit,[75] several arbitral tribunals have at least considered an *inter se* agreement inadmissible where it would strip investors of the right to dispute settlement under Article 26 of the ECT. In *Vattenfall v. Germany*, for instance, the tribunal considered that Article 16 of the

69 Most prominently, *Crawford*, in: Nolte (ed.), pp. 29, 31: "it is too often forgotten that the parties to a treaty, that is, the states that are bound by it at the relevant time, own the treaty. It is their treaty. It is not anyone else's treaty. In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them … That is not what international law says." See also *Voon and others*, ICSID Review 2014/2, p. 451.

70 See for example ICSID, case No. ARB/17/27, *Magyar Farming v. Hungary*, Award of 13 November 2019, paras. 222–223, referring to "general principles of legal certainty and "res inter alios acta, aliis nec nocet prodest". See also below, C.II.2.c).

71 Non-paper from the European Commission (n 17), p. 6.

72 Ibid.

73 On these, *Happ/Wuschka*, in: Kröll/Bjorklund/Ferrari (eds.), pp. 2031 et seq. See also *Tropper*, Withdrawing from the Energy Charter Treaty: The End is (not) Near, Kluwer Arbitration Blog, 4 November 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/ (21/12/2023).

74 *International Law Commission*, Draft Articles on the Law of Treaties, Article 37, commentary 2, YILC 1966, vol. II, p. 187.

75 Ibid., Article 37, commentary 3 (reference to Article 20 of the Berlin Convention of 1908 for the Protection of Literary Property, which laid down an express prohibition of *inter se* modifications; inclusion of non-prohibition requirement into chapeau).

ECT, even though not explicitly precluding modifications by *inter se* agreements, represented a prohibition within the meaning of Article 41 VCLT.[76] Further investment tribunals took a similar stance.[77] Other tribunals found that depriving investors of access to dispute settlement would be contrary to the effective execution of the ECT's object and purpose, likewise referring to Article 16 ECT to sustain this point.[78] For example, the tribunal in *Silver Ridge v. Italy* held:

> [U]nder Article 41 of the VCLT, it is further required that the modification does not affect the enjoyment by other parties of their rights or the performance of their obligations under the ECT and that the modification does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. With respect to the latter requirement (which must be cumulatively fulfilled with the former one), the Tribunal is not convinced by the Respondent's submission […] that the purported treaty modification was about reinforcing the treatment of investors and investment within the EU. In fact, the dispute settlement provision entitling investors to have recourse to international arbitration is often perceived as the most essential element of an investment treaty and is also considered by the present Tribunal as a decisive element in conceiving of the ECT as being more favorable than EU law for purposes of the Article 16 ECT assessment.[79]

Although all of these tribunals addressed the question whether the EU treaties could be considered to constitute an *inter se* agreement between EU member states to exclude dispute settlement under the ECT's Article 26 among themselves, their reasoning is equally relevant with respect to the sunset clause. A removal of the sunset clause among certain states would also remove dispute settlement between them and investors from other EU member states altogether. This cannot be compatible with the effective execution of the ECT's object and purpose.[80] As the tribunal in *BayWa r.e. v. Spain* stressed, "Article 16 of the ECT […] evinces an intent […] to preserve the rights of investors and investments, which constitute a major plank of that multilateral treaty".[81]

76 ICSID, case No. ARB/12/12, *Vattenfall AB et al. v. Germany*, Decision on the *Achmea* Issue of 31 August 2018, para. 221.

77 See e.g. ICSID, case No. ARB/15/45, *Landesbank Baden-Württemberg et al. v. Spain*, Decision on the "Intra-EU" Jurisdictional Objection of 25 February 2019, para. 186.

78 ICSID, case No. ARB/15/16, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 276.

79 ICSID, case No. ARB/15/37, *Silver Ridge Power BV v. Italy*, Award of 26 February 2021, para. 229 (footnote omitted).

80 See also *ECT Secretary General*, Letter to the President of the European Parliament (n 19), p. 3.

81 See e.g. ICSID, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 276.

3. Preliminary Conclusions

Overall, while a withdrawal of the EU, France, Germany, Poland and the other states dissatisfied with the ECT in its current form would not necessarily prevent a successful conclusion of the modernization process, it would leave the withdrawing states with the effect of the twenty-year sunset clause under Article 47(3) ECT. The "old ECT", and its investment protections for fossil fuels, would thus remain binding for those states for a much longer period than the modernized ECT envisages. Once a state has completed the withdrawal process, the option of shortening the sunset period for investments in fossil fuels provided for by the AIP will no longer be available. And it appears highly unlikely that arbitral tribunals would allow such a state to escape the sunset clause by way of unilateral termination or by modification per an *inter se* agreement with the other withdrawing states.

While the states which have recently announced plans to withdraw from the ECT are not likely to change course and make use of the AIP's benefits, such a change could still take place at this stage. Except for France, Germany, Poland, and Luxembourg, none of these states have formally notified their intention to withdraw to the depository and therefore remain free to reconsider their choice. For those states that have already submitted their notification of withdrawal or may do so in the future, there is still a way to reverse their decision: Under Article 68 VCLT and customary international law,[82] states may revoke a notification of withdrawal from a treaty "at any time before it takes effect", i.e. in this case before the one-year period provided by Article 47(2) ECT elapses.[83] Of the four states that have already embarked on the formal withdrawal process, this would only concern Luxembourg, which would otherwise cease to be an ECT member state on 17 June 2024.[84]

82 Art. 68 of the VCLT likely reflects customary international law, since the ICJ stated that the rules on the termination of a treaty laid down in the VCLT could "in many respects" be considered a codification of existing custom, see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1970] ICJ Rep 4, para. 94; for a different opinion see *Tzanakopoulos*, in: *Corten/Klein* (eds.), Art. 68 VCLT, paras. 3–4.

83 Some writers appear to read the term "effect" in Art. 68 of the VCLT as referring to the practical as opposed to the legal effects of a withdrawal, thus concluding that a withdrawal notification may not be revoked after the other state parties have begun to undertake preparations with respect to the notifying state's withdrawal; this view is, however, not in consonance with the article's object to strengthen treaty relations by encouraging revocations of withdrawals, see *Schäfer*, Withdrawing from the 'Withdrawal Doctrine', Völkerrechtsblog, 21 January 2021, available at: https://voelkerrechtsblog.org/de/withdrawing-from-the-withdrawal-doctrine/ (21/12/2023), and does not reflect the intention of the ILC, see *ILC*, Draft Articles on the Law of Treaties, YILC 1966, vol. II, Art. 64, commentary 2.

84 *Energy Charter Secretariat*, Written notification of withdrawal (n 8).

II. Implementation of the modernized ECT among certain parties only

Turning to the implementation of the modernized ECT among the treaty's remaining members, it is for now uncertain which states will form part of this latter group, if any. The EU and its member states might all withdraw. Yet, at present it is equally possible that a majority of EU member states decides to move ahead with the modernization process irrespective of the EU's – or rather the EU Commission's – position. What is certain, however, is that the relationship among all those parties willing to support the modernization effort by ratifying the AIP would instead be governed by the modernized ECT as soon as it enters into force, rendering the "old ECT" inapplicable insofar.[85]

The following sections will focus on the consequences that an entry into force of the AIP would bring about for those states willing to ratify it. We will be covering the impact of the new substantive protections (1.) and the AIP's provision on the intra-EU objection (2.) on pending and future arbitrations, before turning to some preliminary conclusions (3.). Especially the effect of the AIP's provision seeking to exclude the ECT's application intra-EU will be of relevance to many EU member states. Arguably, the earlier that provision effectively precludes the ECT's application between EU member states and investors from other member states, the sooner these states will have brought their ECT obligations in compliance with the ECJ's decisions in *Achmea* and *Komstroy*.

1. The substantive protections of the modernized ECT in pending and future arbitrations

The changes to the ECT and in particular its substantive treatment standards will, should they enter into force, be of direct relevance to future investments and future investment cases. They should have no bearing, however, on pending ECT cases. Treaties generally do not take retroactive effect under Article 28 of the VCLT[86], which is equally the case for their amendments. Article 28 VCLT embodies the fundamental rule of intertemporal law according to which the "legality of a state's conduct must be assessed in light of the law that was in force at the time of its conduct".[87] This rule, sometimes referred to as the non-retroactivity principle, has a longstanding history in international law. Already in 1928, Judge Huber as sole arbitrator in the *Island of Palmas* case held:

85 This consequence is clearly provided for by Art. 42(4) ECT, see *Hobér*, p. 512, and also envisioned by general international law in the form of Art. 30(3), (4) lit. a VCLT.

86 Art. 28 VCLT is reflective of customary international law, see ICJ, *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, [2012] ICJ Rep 422, para. 100.

87 *Schreuer*, McGill Journal of Dispute Resolution 2014/1, pp. 1, 20.

> A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[88]

This position was also reaffirmed by the ILC in relation to its work on state responsibility. Article 13 of the ILC's 2001 Articles on State Responsibility reflects the rule that the legality of a state's actions under international law must be measured against the obligations it was under at the time of the relevant conduct. In the ILC's commentary on Article 13, rapporteur Crawford specifically stressed that

> once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law.[89]

ECT investment arbitrations pending at the time the modernized ECT enters into force – ninety days after surpassing the threshold of ratification by ¾ of the ECT's membership – would necessarily relate to alleged wrongful acts committed by states *before* that date. Consequently, under Article 28 VCLT, the merits of the respective arbitrations would be governed by the substantive standards of protection of the "old ECT". Nothing in the AIP would suggest that the parties intended to give retroactive effect to the "updated" substantive protections contained therein.

The line of reasoning generally followed by investment tribunals reinforces this result. Invoking the need to safeguard vested rights of investors that have commenced proceedings, tribunals have been reluctant to give retroactive effect to amended treaties or authentic interpretations that were in effect disguised amendments. For instance, the tribunal in *Enron v. Argentina* stressed that, while states are free to amend their treaties, this "would not affect rights acquired under the Treaty by investors or other beneficiaries".[90] That means states "cannot move the goalposts with regard to pending disputes or disputes arising out of facts that occurred before the amendment of the treaty".[91]

2. The future of the intra-EU objection under the modernized ECT

The question of the modernized ECT's temporal application becomes more delicate, however, with respect to one of the central issues the modernization process – at least from the EU's perspective – aimed to resolve, namely the removal of intra-EU investment arbitrations from the scope of the investor-state dispute settlement mechanism established by Article 26 ECT.

88 PCA, Case No. 1925-01, *Island of Palmas case (Netherlands, USA)*, 4 April 1928, UNRIAA Volume II, pp. 829, 845.
89 *Crawford*, The ILC's Articles on State Responsibility, p. 133.
90 ICSID, case No. ARB/01/3, *Enron v. Argentina*, Award of 22 May 2007, para. 337.
91 *Gazzini*, Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties, ejil:talk!, 17 August 2020, available at: https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/ (21/12/2023).

As it is well-known, the European Court of Justice (ECJ) first declared intra-EU investment arbitration incompatible with EU law in its 2018 *Achmea* judgment[92], and extended this holding also to the ECT in 2021.[93] Yet, although the ECJ clarified this position from the perspective of EU law, the overwhelming majority of arbitral tribunals has rightly continued to reject the so-called intra-EU objection under general international law.[94] While the majority of EU member states meanwhile has signed a multilateral agreement to terminate all BITs in force between them (hereinafter: the Termination Agreement),[95] and the few member states that did not join this Termination Agreement undertook to terminate their intra-EU BITs otherwise,[96] the ECT had so far remained unaddressed.[97]

The AIP seeks to tackle the issue of intra-EU investment arbitrations in its Article 24(3), which reads:

> For greater certainty, Articles 7, 26, 27, 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations.[98]

As with the application of the modernized ECT's substantive provisions, it should be rather uncontroversial that also Article 24(3) AIP will apply to future arbitrations under the ECT, i.e. arbitrations initiated and consent to arbitration perfected after the AIP enters into force.[99] In this way, the adoption of the modernized ECT would bring the EU member states closer to and sooner in compliance with the

92 CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2013:411, para. 60. For a discussion of the judgment, see amongst many *Janssen/Wahnschaffe*, in: Chen/Janssen (eds.), pp. 263, 265–70; *Segoin*, Revue du droit de l'Union européenne 2019/1, p. 225; *Wuschka*, ZEuS 2018/1, pp. 25, 27–33.

93 *Republic of Moldova v. Komstroy* (n 8).

94 The sole exception so far has been the award in the Stockholm-seated case of SCC, Case No. V 2016/135, *Green Power v. Spain*, Award of 16 June 2022, paras. 117 et seq.

95 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 206 of 29 May 2020; for an analysis see *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, p. 301.

96 This includes Austria, Finland, Sweden, and Ireland, ibid., p. 332.

97 See also the preamble of the Termination Agreement, which expressly postponed the question of the ECT's intra-EU application.

98 Art. 24(3) AIP (n 11).

99 The only argument that might be raised against such an application may be based on the sunset clause contained in Art. 47(3) ECT, under which investments made prior to the ECT's denunciation by any state will enjoy the treaty's protection for further 20 years. As Art. 47 ECT governs only unilateral withdrawals from the ECT, however, the context of Art. 47(3) seems to indicate that the sunset period does not apply to modifications of the treaty such as the AIP, see *Reinisch/Mansour Fallah*, ICSID Review-FILJ 2022/1–2, p. 112. Nevertheless, some arbitral tribunals have applied sunset clauses to mutual termination agreements concluded by the member states to an investment protection treaty and found that those treaties continued to protect investments made before the mutual termination; see PCA, Case No. 2012-07, *Bahgat v. Egypt*, Decision on Jurisdiction of 30 November 2017, para. 313; UNCITRAL, *Walter Bau v. Thailand*, Award of 1 July 2009, para. 9.5. It therefore cannot be completely ruled out that future arbitral tribunals will adopt a similar approach regarding Art. 24(3) AIP and the sunset clause contained in Art. 47(3) ECT.

ECJ's approach than a withdrawal from the ECT could in light of the operation of its sunset clause.

By contrast, a retroactive effect of the "clarification" in the AIP appears doubtful. Investment tribunals generally operate under the assumption that determinations of jurisdiction are to be made in light of the legal situation as it existed when consent to arbitration was established. That is normally the moment at which the investment claim is filed. The rationale for the date of the acceptance of the state's offer to arbitrate as the critical date is that "an arbitration agreement between a claimant and respondent state cannot simply be unilaterally extinguished by the respondent".[100] Specifically, Article 25 (1) 2nd sentence of the ICSID Convention reaffirms this position by stating that, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally". According to *Schreuer*, this necessitates that the arbitration agreement "remains in existence even if the States parties to the BIT agree to amend or terminate the treaty".[101] And the now agreed "clarification" of the intra-EU inapplicability of the ECT would formally just be such an amendment of the treaty.

As we will show in the following, these assumptions in investment law scholarship and practice have equally firm roots in general international law. The most obvious way in which Article 24(3) AIP could affect pending intra-EU ECT arbitrations would be direct retroactivity, i.e. the application of the article to facts and situations predating the entry into force of the modernized ECT. Unlike the 2020 Termination Agreement, which contains provisions that explicitly seek to govern its effects on pending and concluded arbitrations,[102] however, the AIP does not address this question in any way. Consequently, in the absence of a *lex specialis* in the treaty,[103] the question whether Article 24(3) AIP affects pending and concluded arbitrations is governed by general international law as reflected by Article 28 VCLT.

We will first further illustrate why an application of Article 24(3) AIP to pending arbitrations would constitute a retroactive application of this norm (a)). Then, we will set out why Article 24(3) must not be given any retroactive effect under the law of treaties (b)) and illustrate the role that principles protecting the individual rights of investors play in this regard (c)). Thereafter, we will analyze whether Article 24(3) AIP could be read as a "subsequent agreement" to be considered when interpreting the ECT's dispute settlement clause (d)). Finally, we will take a brief look at the proposed EU subsequent agreement to the ECT, which aims to complement the AIP (e)).

100 *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, p. 329.
101 *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), pp. 830, 837
102 See *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, p. 306 et seq.
103 States are, in principle, free to derogate from general international law by establishing a special regime for the regulation of certain questions, see ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Merits, [1960] ICJ Rep 6, 42.

a) Would an application of Article 24(3) AIP to pending arbitration proceedings constitute a retroactive application?

As a threshold question, we first need to clarify whether, once the modernized ECT has entered into force, an application of Article 24(3) AIP in pending ECT arbitrations would fall within the ambit of the non-retroactivity principle as enshrined in Article 28 VCLT. It is not in question that the principle applies to actions that have already been completed and lie fully in the past when a new rule of international law comes into effect (*acta praeterita*).[104] These are to be distinguished from actions that have commenced in the past but have not yet concluded and are still ongoing in the present (*acta pendentia*).[105] The non-retroactivity principle only applies to *acta praeterita*, meaning that *acta pendentia* are affected by new treaty provisions as soon as they enter into force.[106]

Consequently, whether pending arbitrations are presumed to be excluded from the scope of Article 24(3) AIP under the non-retroactivity principle depends on their characterization as either *acta praeterita* or *acta pendentia*. This question must be differentiated strictly from the characterization of the alleged wrongful acts by the respondent states forming the substance of such arbitrations. The latter can easily be classified as *acta praeterita*, meaning that they are unaffected by the AIP under the non-retroactivity principle (see above).

Although it would at first seem logical to classify pending (i.e. still ongoing) arbitrations as *acta pendentia*, this would ignore the fact that every arbitration is based on the consent of the parties, which is manifested in an arbitration agreement. While the arbitration proceeding itself is an ongoing process, the conclusion of the arbitration agreement that legitimizes it is a singular act that takes place on a specific date.[107] For treaty-based investment arbitrations, the respondent state's consent is usually given by way of a unilateral permanent offer contained in the respective investment protection treaty,[108] in case of the ECT in Article 26. Investors can then accept this offer, perfecting the arbitration agreement on the date of the accep-

104 *von der Decken*, in: Dörr/Schmalenbach (eds.), Art. 28 VCLT, para. 21.

105 Ibid.

106 Ibid., para. 23–24; this is confirmed by jurisprudence of the European Court of Human Rights (ECtHR), see *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, App.-No. 15318/89, paras. 102–104, as well as arbitral tribunals, see ICSID, case No. ARB(AF)/99/2, *Mondev v. USA*, Award of 11 October 2002, paras. 68–69 and has been accepted by the ILC during the VCLT's drafting process (see ILC (n 74), Article 24, commentary 3).

107 Cf. *Schreuer*, in: Waibel and others (eds.), pp. 361–62, highlighting that a precise determination of the date of consent is necessary for many provisions of the ICSID Convention to operate.

108 *Dolzer/Kriebaum/Schreuer*, pp. 364–367.

tance.[109] Once an agreement to arbitrate is perfected, it cannot be invalidated unilaterally, what renders a withdrawal of consent by either party impossible.[110]

This nature of an arbitration agreement as a singular act in time which irrevocably creates the foundation for the future arbitration proceeding characterizes it as an *actum praeteritum* rather than an *actum pendens*. There is nothing "pending" about an agreement that has been concluded once and for all. As Article 24(3) AIP aims at rendering the consent to arbitrate given in Article 26 ECT inapplicable in the relations between EU member states, it relates to the arbitration agreement rather than the subsequent proceeding. Consequently, the act in time relevant for the application of the non-retroactivity principle is the arbitration agreement; whether the proceeding based on it is still ongoing is irrelevant.[111]

From this follows that an application of Article 24(3) AIP to the detriment of pending arbitration proceedings would constitute a retroactive application of this provision. Under the non-retroactivity principle as contained in Article 28 VCLT, Article 24(3) AIP must be presumed not to apply in such a manner.

b) Does an interpretation of the new Article 24(3) mandate retroactive application?

Article 28 VCLT does not, however, prohibit states from giving treaty provisions retroactive effect. It merely establishes a presumption against retroactivity, which can be overcome.[112] The determination whether Article 24(3) AIP defies the presumption against retroactivity and eliminates the arbitration agreements on which pending arbitration proceedings are based requires an interpretation of the provision in accordance with the rules enshrined in Articles 31 et seq. VCLT.[113] Under these rules, Article 24(3) AIP must primarily be analyzed in the light of its wording, context as well as object and purpose.[114]

Article 24(3) AIP's introductory clause – "For greater certainty" – seems to indicate that the parties have always understood the ECT's dispute settlement procedure as inapplicable to intra-EU disputes and merely wished to clarify this. It could

109 *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), p. 361; *Dolzer/Kriebaum/Schreuer*, pp. 364–367.

110 For ICSID arbitrations, this is explicitly stipulated in Art. 25(1)(2) of the ICSID Convention, cf. *Schill and others*, Schreuer's Commentary on the ICSID Convention, pp. 420 et seq.

111 Cf. *Reinisch/Mansour Fallah*, ICSID Review-FILJ 2022/1–2, pp. 110–11 and *Lauvaux*, Arbitration International 2022/3, p. 211, both discussing the question whether the termination of an investment protection treaty would affect pending arbitrations and relying on the concept of the perfected agreement to answer this question in the negative.

112 See the wording of Art. 28 VCLT: "Unless a different intention appears from the treaty or is otherwise established […]".

113 Cf. *von der Decken*, in: Dörr/Schmalenbach (eds.), Art. 28 VCLT, paras. 10–11; the rules of interpretation contained in Articles 31 and 32 VCLT also reflect customary international law, see ICJ, *Application of the ICERD (Qatar v. United Arab Emirates)*, Preliminary Objections, [2021] ICJ Rep 71, para. 75.

114 Art. 31(1) VCLT.

therefore be read as mandating a retroactive application of Article 24(3) AIP. This result is, however, by no means compelling.

A look at state practice reveals that the phrase "for greater certainty" is also used where a clause is not intended to produce retroactive effects. For instance, in 2017, India and Bangladesh adopted Joint Interpretative Notes regarding their BIT[115], which sought to clarify the scope of the FET standard contained therein. The relevant part of the joint notes also begins with the phrase "for greater certainty", even though the notes themselves explicitly provide that they shall only be applied by tribunals constituted *after* their issuance.[116] This example illustrates that the general understanding of the phrase "for greater certainty" in international law does not necessarily support a retroactive application of Article 24(3) AIP.

Thus, as the wording of Article 24(3) AIP is inconclusive, resort to the other means of interpretation provided for in Article 31 VCLT is necessary.[117] Jurisprudence on the retroactivity of treaty provisions, although rather scarce, can assist in this task.

The ICJ, in its first judgment in the *Ambatielos* case, mainly relied on the context of the relevant clause to find that it did not apply retroactively: The treaty before the Court in that case contained a ratification clause stipulating that it would enter into force after ratification by both parties. As this provision regulated the point in time the treaty would begin to produce effects without indicating retroactivity of any provisions, the Court reasoned, the clause in question could not be interpreted as applying to past events.[118] The AIP too contains a ratification clause, which stipulates that the treaty shall enter into force ninety days after the deposit of the thirtieth instrument of ratification (see above) and does not provide for earlier entries into force of any particular provisions.[119] The context of Article 24(3) AIP, analyzed in the light of relevant ICJ jurisprudence, thus seems to militate against a retroactive application of the clause to arbitration agreements already concluded.

Relying on the relevant treaty's object and purpose, the Permanent Court of International Justice (PCIJ) found in the *Mavrommatis* case that certain provisions of

115 Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments ("Bangladesh-India BIT") (signed 2 September 2009, entered into force 7 July 2011), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/371/bangladesh---india-bit-2009 (21/12/2023).

116 *Department of Economic Affairs of the Republic of India*, Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (signed 4 October 2017), Art. 9(3)(1), available at: https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf (21/12/2023); see also *Gazzini* (n 91).

117 Only a wording so clear and unambiguous as to leave no questions open would render resort to the other means of interpretation superfluous, see ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, [1950] ICJ Rep 4, 8.

118 ICJ, *Ambatielos Case (Greece v. United Kingdom)*, Preliminary Objection, [1952] ICJ Rep 28, 19–20.

119 Art. 44(1) AIP.

the Treaty of Lausanne applied retroactively. The Court held that, because the treaty had *inter alia* been concluded to remedy actions already taken by the United Kingdom against certain foreign concessionaires, it could not fulfill its function if it applied only to future events. Retroactive application, in the Court's opinion, was therefore necessitated to ensure the operation of the Lausanne Treaty in accordance with its purpose.[120] While it could be argued that a retroactive application of Article 24(3) AIP would be conducive to its purpose of ending intra-EU investment arbitrations, it cannot be said that this purpose necessitates retroactivity. Even without retroactive application, Article 24(3) AIP would still effectively prevent any such intra-EU arbitrations for the future (see above), while the Treaty of Lausanne would have been deprived of almost its entire effect if applied only to future events.

The only historical case supportive of giving retroactive effect to Article 24(3) AIP appears to be the *Chamizal* case, which was decided by the US-Mexican Border Commission in 1911. The commission found that an interpretative agreement concluded in 1884 between the USA and Mexico, which sought to clarify some ambiguities in an older border convention between the same parties, was applicable to border disputes arising prior to its entry into force.[121] The border commission explicitly relied on the interpretative character of the 1884 agreement to justify this reasoning, stating that an agreement intended to remedy ambiguities in an earlier treaty should be applied retroactively.[122] The guidance provided by this case alone, however, seems insufficient to establish retroactive applicability of Article 24(3) AIP against all the considerations discussed above. This is reinforced by the fact that the *Chamizal* commission did not consider any rights or legally protected interests of individuals affected by its interpretation of the 1884 agreement, which we will turn to now.

c) Principles protecting individual rights of investors

Above all, the prospect of applying a treaty provision retroactively to the detriment of investors – whose pending arbitration actions would be terminated in a *deus ex machina* kind of way if Article 24(3) AIP were to apply retroactively – creates a feeling of unease. National legal orders around the world tend to impose strict limitations on retroactive lawmaking if the rights of individuals are adversely affected by it. Such limits are mostly based on fundamental rule of law considerations enshrined in the respective constitutions.[123] As already indicated above, there are several rules of international law which might equally operate to this effect. Among the

120 PCIJ, *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Rep Series A No 2, 7, p. 34; see also *ILC* (n 74), Article 24, commentary 1.

121 *Chamizal Case (Mexico, United States)*, Award of 15 June 1911, UNRIAA Volume XI, pp. 316, 325.

122 Ibid.

123 See, for example, for India: *Jawaharmal v. State Of Rajasthan And Others* [1966 AIR 764, 1966 SCR (1) 890], where the Indian Supreme Court held that legislation with retroactive effect is not permissible under the Indian Constitution if its effects for the ad-

rules discussed by scholarly literature and arbitral jurisprudence are the customary protection of the vested rights of foreigners, the protection of legitimate expectations as well as international human rights law.[124] These principles, if they were to prohibit states from interfering in pending arbitrations to the detriment of investors, would have to be considered when interpreting Article 24(3) AIP under the principle of systemic integration as enshrined in Article 31(3) lit. c VCLT.[125]

The concept of vested rights forms part of the customary international law protecting aliens from detrimental actions of their host states.[126] While it is not entirely clear when a right qualifies as "vested" under this standard, mere favorable business conditions or goodwill are not protected.[127] The protection of legitimate expectations derives from the FET standard contained in many investment treaties, i.a. in Article 10(1) ECT.[128] Likewise, under the *European Convention on Human*

dressed individuals are "excessive"; for the United States see *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994), pointing to various provisions in the U.S. Constitution that limit the possibility of retroactive legislation, i.a. the 5th Amendment's Takings and Due Process Clauses; for Germany see BVerfG, Order of the First Senate of 17 December 2013 – 1 BvL 5/08 –, para. 63, where the Federal Constitutional Court inferred a prohibition of burdensome retroactive laws from the principles of legal certainty and legitimate expectations as reflected in Article 20(3) of the German Basic Law.

124 See *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, pp. 321 et seq.; *Reinisch/Mansour Fallah*, ICSID Review-FILJ 2022/1–2, pp. 117–118; *Lauvaux*, Arbitration International 2022/3, p. 206. Further principles often discussed in this context are the concepts of *res inter alios acta aliis non nocet* embodied in Art. 37(2) VCLT as well as estoppel and abuse of rights. These will, however, not be further discussed in this paper. Article 37(2) VCLT only applies in the relations between states and is therefore irrelevant for the rights of investors, see *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, pp. 322–323; estoppel and abuse of rights, while suitable to protect the interests of investors against retroactive amendments, would operate in a manner different from the concepts discussed above, and could not influence the interpretation of Art. 24(3) AIP via Art. 31(3)(c) VCLT. They are therefore beyond the scope of this paper.

125 As applied by the ICJ for example in *Oil Platforms (Iran v. USA)*, Merits, [2003] ICJ Rep 161, para. 41 and *Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] ICJ Rep 177, paras. 112–113. The application of this principle is permitted by Article 24(3) AIP's openness to interpretation that has been elaborated on in section C.II.2.b). If the clause were to set forth its retroactivity in clear and unambiguous terms, the principle of systemic integration could not apply, since states are free to conclude treaties that entail breaches of their other obligations under international law, see ICJ, *Obligation to Prosecute or Extradite* (n 86), para. 111.

126 See PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, PCIJ Rep Series A, No. 7, 5, p. 21; PCIJ, *Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ Rep Series A, No. 17, 5, p. 46.

127 PCIJ, *Oscar Chinn Case (United Kingdom v. Belgium)* PCIJ Rep Series A/B No. 63, 65, p. 27.

128 *Hobér,* p. 193 ("The general philosophy underlying the concept of legitimate expectations is that the investor has a right to expect that the framework existing at the time of the investment will remain stable and predictable"); ICSID, case No. ARB/03/24, *Plama v. Bulgaria*, Award of 27 August 2008, paras. 175–176.

Rights[129], Article 1 of the *Protocol No. 1*[130] protects legitimate expectations as part of the human right to property guaranteed therein.[131]

All three concepts referred to might prohibit the termination of a pending arbitration against the will of the claimant investor. This depends on whether a pending arbitration constitutes a sufficiently solidified right of the investor, or a mere hope or opportunity that falls outside of the ambit of protected rights. Some arbitral tribunals have already recognized that investors have a legitimate expectation protected by Article 10(1) ECT that pending arbitrations are not terminated against their will by subsequent actions of the ECT member states.[132] The European Court of Human Rights, on its part, has recognized that at least final arbitral awards are protected by Article 1 of Protocol No. 1,[133] which indicates that such protection could be extended to pending arbitrations.

Given that, once an investor accepts the host state's unilateral permanent offer to arbitrate enshrined in Article 26 ECT, there is a perfected agreement entitling them to an award, it appears plausible that pending arbitrations are solidified enough to qualify for protection under the principles of vested rights and legitimate expectations as well as the human right to property. Support for this position can also be found in the jurisprudence of the ICJ, which has recognized that, once a case is referred to an international tribunal and both parties have taken procedural steps in the case, their respective interest in the continuation and successful conclusion of the proceeding is worthy of protection.[134] Therefore, Article 24(3) AIP must, in accordance with Article 31(3) lit. c VCLT, be interpreted as not applying retroactively to pending arbitrations, as this would infringe on the legal principles just mentioned.

d) Bypassing non-retroactivity: Article 24(3) AIP as a "subsequent agreement" under Article 31(3) lit. a VCLT?

The conclusion just reached could be subverted, however, by the argument that Article 24(3) AIP should not be *applied* to pending arbitrations, but that the "old ECT" be *interpreted* in its light instead in pending arbitrations, i.e. by viewing it as a subsequent agreement regarding the ECT's interpretation in the sense of Article 31(3) lit. a VCLT. Such an argument would, however, face multiple obstacles and therefore be unlikely to succeed:

129 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTC 221, ETS No. 005.
130 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed 20 March 1952, entered into force 18 May 1954) ETS No. 009.
131 *Grabenwarter*, Article 1 Protocol No. 1 ECHR, para. 3.
132 ICSID, case No. ARB/15/50, *Eskosol v. Italy*, Decision on Termination Request and Intra-EU Objection of 7 May 2019, para. 226.
133 ECtHR, *Regent Company v. Ukraine*, Judgment of 3 April 2008, App.-No. 773/03, para. 61; ECtHR, *BTS Holding A.S. v. Slovakia*, Judgment of 30 June 2022, App.-No. 55617/17, para. 49.
134 ICJ, *Barcelona Traction (Belgium v. Spain)*, First Phase, [1964] ICJ Rep 6, 18.

First, a subsequent agreement can only be considered for the interpretation of a treaty under Article 31(3) lit. a VCLT if it has been entered into by all parties to the treaty in question.[135] Thus, if not every single ECT contracting party ratifies the AIP, Article 24(3) cannot be used to interpret the "old ECT" in pending proceedings. Given the currently debated exodus of EU member states and the EU from the ECT, this will be a major obstacle.

Secondly, whether subsequent agreements in the sense of Article 31(3) lit. a VCLT are binding on tribunals tasked with the interpretation of a treaty is subject to debate. Some scholarly voices, on the one hand, insist that such agreements constitute authentic (or authoritative) interpretations of the respective treaty and that tribunals therefore must abide by them.[136] Several arbitral tribunals, on the other hand, have pointed to the fact that Article 31(3) VCLT merely requires that such agreements be "taken into account" when interpreting a treaty, inferring from this language that they are not binding.[137] The ILC took a similar position in its work on "Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties":

> According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only 'be taken into account' in the interpretation of a treaty, which consists of a 'single combined operation' with no hierarchy among the means of interpretation that are referred to in article 31 (see draft conclusion 2, paragraph 5). For this reason, and notwithstanding the suggestions of some commentators, *subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily legally binding*.[138]

Following this approach, the "clarification" in Article 24(3) AIP would not have any higher value than other elements relevant in the interpretation of the ECT.[139] In

135 ICJ, *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, [2014] ICJ Rep 226, para. 83.

136 For example, *Dörr*, in: Dörr/Schmalenbach (eds.), Art. 31, para. 74. In the preamble to the EU Subsequent Agreement, discussed below (section II.b.ii.5), the EU Commission also relies on the position of the PCIJ in *Jaworzina (Polish-Tchekoslovakian Border),* Advisory Opinion, PCIJ Rep Series B No. 8, 7, p. 37. See *EU Commission*, EU Subsequent Agreement, Annex to the communication 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 on the interpretation of the Energy Charter Treaty, COM(2022) 523 final.

137 ICSID, case No. ARB/17/27, *Magyar Farming v. Hungary*, Award of 13 November 2019, para. 218; PCA, Case No. 2017-15, *A.M.F. v Czech Republic*, Final Award of 11 May 2020, para. 337.

138 *International Law Commission*, Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, Conclusion 3, commentary, YILC 2018, vol. II, Part Two, p. 187 (footnotes omitted, emphasis added).

139 See further *Berner*, HJIL 2016, p. 866: "In other words, Art. 31 VCLT does not establish a hierarchical relationship between the various primary means of interpretation; it requires, as Waldock [the ILC's special rapporteur during the drafting of the VCLT] vividly described it, that all primary means of interpretation are "thrown into the crucible".".

the ILC's words, authentic interpretations are not "conclusive."[140] Instead, the "clarification" would form part of all the elements under Article 31 VCLT – "together with the context"[141] – that a tribunal has to take into account in its exercise of interpretation.[142] Even though a tribunal could hardly disregard the authentic interpretation by the ECT member states without valid reasons, such reasons exist in relation to Article 24(3) AIP.

Specifically, the new interpretation can hardly be reconciled with the ECT's text as it presently stands as well as a systematic reading of Article 26 in the light of its context within the treaty and the ECT's object and purpose. That is to say that all other elements of the interpretative exercise speak against the meaning which the "clarification" will seek to ascribe to Article 26 ECT. Against the long line of jurisprudence on the ECT's intra-EU applicability, the new "clarification" would rather appear as a means for the ECT membership to put an end to a politically unwelcome, yet perfectly reasonable, interpretation. It would retroactively declare several dozens of intra-EU ECT arbitral awards baseless. This in itself should form a valid reason for a tribunal to disregard the clarification, since any other approach would ignore the disputing parties' legal relationship under the ECT, including their trust placed in the arbitration agreement concluded before any amendments to the ECT (and before the clarification was foreseeable). The "clarification" would constitute an attempt to use the treaty amendment process to "move the goal post" for pending arbitral proceedings.

In essence, the ECT contracting parties' "clarification" can therefore only be portrayed as a political declaration in form of a treaty amendment that conflicts with the *lege artis* interpretation of Article 26 ECT undertaken by more than 50 ECT tribunals by now. It consequently cannot be accepted as a valid interpretation for pending disputes under the ECT as it presently stands. Disregarding the "clarification" would therefore be the appropriate approach. It would also pay due regard to principles protecting the individual rights and interests of investors described above, preventing a retrospective interpretation of the clause.[143]

As a result, the compelling reasons against a retroactive application of Article 24(3) AIP to pending arbitrations cannot simply be bypassed by labelling Article 24(3) AIP a "subsequent agreement". An interpretation of the ECT in light of the AIP should be out of the question, just as the AIP's direct retroactive application.

140 *International Law Commission*, Report of the International Law Commission on the Work of its 65th Session (8 July – 9 August 2013), UN Doc. A/68/10.

141 Art. 31(3) VCLT.

142 Art. 31(1) VCLT reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.".

143 See *Eskosol v. Italy* (n 136), para. 226, explicitly holding that the protection of legitimate interests under Article 10 ECT might preclude the retroactive application of subsequent agreements.

e) A final straw: The EU Commission's subsequent agreement proposal

Even though it does not technically form part of the ECT modernization process, the "Subsequent Agreement on the Interpretation of the Energy Charter Treaty" (hereinafter: EU subsequent agreement) should be briefly addressed in this context. Proposed by the EU Commission in October 2022, the EU subsequent agreement is presently a draft treaty that seeks to interpret the entirety of the ECT as inapplicable between EU member states.[144] Explicitly referring to Article 31(3) lit. a VCLT in its preamble, the EU subsequent agreement stipulates that "the ECT does not apply, and has never applied to intra-EU relations".[145]

The fact that the Commission even found it necessary to prepare such an agreement indicates that it shares the concerns against the AIPS's retroactive applicability. The EU subsequent agreement seems to be intended as an insurance policy for the case that arbitral tribunals, for the reasons discussed above, find that Article 24(3) AIP cannot be interpreted as retroactively applying to pending arbitrations.

A detailed legal analysis of the EU subsequent agreement would exceed the scope of this article. In the light of the considerations outlined above, however, a few brief remarks on the agreement can be made: Unlike the AIP, the wording of the EU subsequent agreement explicitly requires its application to pending arbitrations, thereby defying the presumption against retroactivity established by Article 28 VCLT. Since a treaty cannot be interpreted against its express wording,[146] it also does not seem possible to harmonize the agreement with the principles protecting legitimate expectations and vested rights by means of systematic integration. As, however, a subsequent agreement in the sense of Article 31(3) lit. a VCLT can only be taken into account for interpretation if joined by all member states of the original treaty, an agreement concluded only among EU member states could not be considered under Article 31(3) lit. a VCLT. Equally, for the reasons set out above in relation to Article 24(3), it appears highly doubtful that arbitral tribunals would accord a binding effect to the EU subsequent agreement in their interpretation of Article 26 ECT. Therefore, the proposed EU subsequent agreement, should it be further pursued in light of the Commission's present policy changes, appears equally incapable of affecting pending arbitrations as the AIP.

144 See *Deepak*, European Commission proposes subsequent agreement on interpretation of the Energy Charter Treaty, reiterating that intra-EU arbitration is incompatible with the EU treaties (IA Reporter, 6 October 2022), available at: https://www.iareporter.com/articles/european-commission-proposes-subsequent-agreement-on-interpretation-of-the-energy-charter-treaty-reiterating-that-intra-eu-arbitration-is-incompatible-with-the-eu-treaties/ (21/12/2023).

145 Art. 2(1) of the EU Subsequent Agreement (n 126).

146 Cf. ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations* (n 117), 4, 8: ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Second Phase, Advisory Opinion, [1950] ICJ Rep 221, 28–9.

3. Preliminary Conclusions

Based on the arguments discussed above, we conclude that neither the substantive protections of the ECT as amended by the AIP nor the AIP's provision on intra-EU arbitrations will produce any effect for pending arbitration proceedings or those to be commenced before a potential entry into force of the modernized treaty. Thus, while the modernized ECT, if ratified by enough states to enter into force, would certainly shape investment arbitration in the energy sector in a significant way in the future, present proceedings would remain largely untouched by this development. Still, even though EU member states would not be able to remove the ECT's intra-EU application for already initiated cases, only very few arguments can be made that the initiation of new intra-EU ECT arbitrations would not be precluded after the AIP's entry into force. A ratification of the AIP would therefore have the potential to bring EU member states sooner in compliance with EU law and the ECJ's jurisprudence on intra-EU investment arbitration than a withdrawal, which (as discussed above) triggers the continued application – also intra-EU – of the "old ECT" under its sunset clause.

D. Conclusions

Overall, as this article has shown, the ECT is presently at a tipping point. The EU Commission's initiative to have the EU and its member states leave the treaty instead of further promoting its modernization may well reduce the treaty's membership by half in the long run. This does not mean, however, that the modernization process will necessarily be blocked. Yet, should a major group of member states leave without ratifying the modernized treaty first, this will lead to a situation in which the remaining members will be bound by the new version, once ratified, whereas the current ECT will continue to bind the withdrawing members with respect to investments made before the withdrawal – irrespective of their kind – under the sunset clause.

Withdrawing from the ECT with that consequence, while new and future investments so badly needed for the energy transition will be stripped of such protection, appears to be a particularly ironic side-effect of the EU Commission's change in policy. It remains to be seen whether the EU and its member states will follow through with this plan. It is apparent, however, that the legal issues which will need to be addressed in disputes before arbitral tribunals and state courts one way or the other will only become more complex.

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Research article

Withdrawal from mixed agreements under EU law: the case of the Energy Charter Treaty

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Abstract

This article argues that under EU law, the EU and its Member States can withdraw from a multilateral agreement such as the Energy Charter Treaty independently of one other. While loyalty obligations may require the EU and its Member States to coordinate their actions under a mixed agreement closely, all can withdraw. The autonomous nature of EU law does not allow Member States to prevent the EU from taking decisions within its competence. Similarly, as the European Court of Justice maintains, under EU law, the EU and its Member States are only ratifying those parts of the agreement that fall within their competence – thus, Member States are entitled to cease exercising their powers through withdrawal. However, this power to withdraw unilaterally is not without complications. First, it may affect the ability of others to remain a party to the Energy Charter Treaty under EU law. Second, where not all Member States and the EU withdraw, 'incomplete

mixity' raises several complicated questions under international law, particularly those concerning international responsibility and investor-state dispute settlement provisions. Coordinated withdrawal by all Member States and the EU is, therefore, the preferred policy option.

Keywords withdrawal; mixed agreement; Energy Charter Treaty; Article 218 TFEU; incomplete mixity; investor-state dispute settlement; coordinated withdrawal

1. Introduction

On 24 November 2022, the European Parliament adopted a resolution calling for the coordinated withdrawal of the EU and its Member States from the Energy Charter Treaty (ECT).[1] The ECT is a multilateral agreement negotiated and concluded after the collapse of communist regimes in Eastern Europe. Its primary purpose was to encourage and protect foreign investments in the energy sector in those countries while they were transitioning to a more market-based economy. However, the ECT has come under intense criticism because its investor-state dispute settlement (ISDS) system has allowed foreign investors to litigate against states' climate and environmental protection measures. Most recently, Italy was required to pay over 250 million euros in compensation for denying a UK-based 'Rockhopper' application for an oil drilling concession in the Adriatic Sea under the ECT.[2]

As a result, Germany, France, Spain, Poland, the Netherlands, Slovenia and Luxembourg announced their intention to withdraw from the Energy Charter Treaty. Italy had already withdrawn from the ECT in 2015. Together, these countries represent more than 70 per cent of the population of the EU. Initially, these announcements did not result in the Commission changing its position. In October 2022, it maintained that 'the Commission is not preparing a coordinated withdrawal' and that 'the EU will remain a party to the ECT in its own right'.[3] The Commission had invested significantly in reforming the ECT rather than withdrawing from it. However, the Commission changed its position following a resolution of the European Parliament and after it failed to secure a qualified majority in the Council to proceed with its strategy to 'modernise' the ECT by renegotiating parts of the agreement, including provisions that would partially phase out the protection of fossil fuels.[4] In an unpublished non-paper addressed to its Member States, the Commission observed that 'a withdrawal of the EU and Euratom from the Energy Charter Treaty appears to be unavoidable' and that a coordinated withdrawal from the ECT by all Member States, the EU and Euratom is the best option going forward.[5] Yet, as the non-paper suggests, not all Member States announced their intention to withdraw from the ECT.

This raises the question of how, under EU law, the withdrawal by the EU or its Member States from a multilateral agreement, to which both the EU and its Member States are parties, should occur. There are no provisions in the EU treaties that prescribe how withdrawal by the EU from an international agreement should take place, let alone how its Member States can withdraw from a mixed agreement. Furthermore, the 'mixed' nature of the ECT raises several further legal questions and complications. The ECT covers areas that fall, to a large extent, within the exclusive competence of the EU and also (rather crucially)

1 European Parliament resolution of 22 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html> last accessed 1 December 2022, points 18–20.

2 Rockhopper Exploration plc, 'Successful arbitration outcome' (Investis Digital, 24 August 2022) <https://otp.tools.investis.com/clients/uk/rockhopperexploration2/rns/regulatory-story.aspx?cid=441&newsid=1618241> last accessed 26 August 2022. FN to A Arcuri in this special issue.

3 Karl Mathiesen and Sarah Anne Aarup, 'EU tries to stop energy treaty exit stampede' *Politico* (Brussels, 20 October 2022).

4 The Council blocked the Commission's proposal to 'participate in the vote [at the Energy Charter Conference] on 22 November 2022 and to raise no objection to' initialling the modernised text. See Council, 'Council decision on the position to be taken on behalf of the European Union at the 33rd meeting of the Energy Charter Conference' 14399/22. This failure made it impossible for the Energy Charter Conference on 22 November 2022 to proceed with initialling the modernised text. Article 36 (6) ECT requires a simple majority of parties to support any decision of the Conference. As the EU could not agree to vote as a block, there were no 27 parties that could support modernisation.

5 The European Commission, 'Non-paper from the European Commission – Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty available on file with the author.

contains an ISDS. These agreements cannot be established 'without its Member States' consent'.[6] Can the EU and its Member States withdraw from a mixed agreement without formally coordinating such an action or is there a duty under EU law to coordinate such a withdrawal? What would be the extent of a commitment to coordinate a retreat? And suppose the EU decides to withdraw unilaterally. What would the legal consequences be for its Member States under EU law, given that they would be a party to an agreement partially within EU exclusive competence? Vice versa, what would be the legal consequences for the EU or a Member State should they withdraw from the ECT?

This article will argue that under EU law, the EU and its Member States can withdraw from a multilateral agreement, such as the ECT, independently of each other. While loyalty obligations may require both the EU and its Member States to coordinate their actions under a mixed agreement closely, they can still withdraw. The autonomous nature of EU law, following Opinion 1/19, does not allow Member State decision-making to prevent the EU from taking decisions that fall within its competence.[7] Similarly, as the European Court of Justice (the Court) maintains, under EU law, the EU and its Member States are only ratifying those parts of the agreement that fall within their competence – Member States are entitled to cease exercising their powers through withdrawal.

This power to withdraw unilaterally is not without complications. First, it may affect the ability of others to remain a party to the ECT under EU law. Second, where not all Member States and the EU withdraw, 'incomplete mixity' raises several complicated questions under international law, particularly in relation to international responsibility and ISDS mechanisms. Therefore, a coordinated withdrawal by all Member States and the EU is the preferred policy option because it avoids these legal risks relating to international responsibility and ISDS provisions.[8]

This article will further argue that the procedure for the EU to withdraw mirrors the decision-making process for ratifying such an international agreement, which often involves the consent of the European Parliament by (at least) a qualified majority in the Council. This makes decision-making at the EU level (in relation to withdrawal) a comparatively heavy procedure, as most Member States allow the executive to take such decisions.

This article proceeds as follows. Section 1 first outlines the nature and reasons for the ECT as a mixed agreement. It then continues in Section 2 by setting out the EU withdrawal procedure, including whether the EU can only legally withdraw from the ECT if it coordinates with all Member States. Section 3 outlines the legal consequences for the Member States consequent to a unilateral withdrawal by the EU. Section 4 turns to a unilateral withdrawal by its Member States and the obligations of its Member States under the duty of loyalty in relation to withdrawal. The last section analyses the legal consequences for the EU of Member State withdrawal.

2. Division of powers on investment and the ECT as a mandatory mixed agreement

Before we assess how and under what conditions the EU and Member States can withdraw from a mixed agreement such as the ECT, it is worth recalling why the ECT was concluded as a mixed agreement in the first place and what type of mixed agreement the ECT is. Therefore, we start by outlining several features related to the content and nature of the ECT.

First, the ECT is a multilateral agreement to which several, but not all, Member States are parties.[9] The ECT is not a bilateral mixed agreement or a bilaterally structured mixed agreement to which the EU and its Member States are parties to one part and a third state or international organisation a party to another, such as the Comprehensive Economic and Trade Agreement (CETA). The fact that the ECT is a multilateral agreement means that the relationship between the EU and its Member States is slightly

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

7 Opinion 1/19 *(Istanbul Convention)* EU:C:2021:198.

8 Paolo Palchetti, 'The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanisms Established by EU International Agreements' (2017) 28(2) European Business Law Review, 185–95; see also The European Commission, 'Non-paper from the European Commission – Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty'.

9 Italy already withdrew in 2015. Since 2022, Germany, France, Spain, Poland, the Netherlands, Slovenia and Luxembourg either decided to withdraw or have withdrawn.

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looser in terms of how the agreement can enter into force.[10] A bilaterally structured mixed agreement generally only allows the agreement to enter into force after all Member States and the EU have ratified the agreement. However, under their termination provisions, even bilaterally structured agreements allow for unilateral withdrawal by a Member State or the EU.[11]

Second, the ECT is a mixed agreement because the agreement falls only partially within the exclusive competences of the EU and its Member States. The ECT is an example of an agreement where mixity is *mandatory* because neither the EU nor each of its Member States has the competence to conclude an agreement on their own. Most significantly, the ECT contains a part on 'investment promotion and protection' (Part III). That part establishes standards of protection of foreign investments in direct and portfolio investments in the energy sector. While the former is an exclusive competence of the EU (since the entry into force of the Treaty of Lisbon), the latter is a shared competence between the EU and its Member States.[12] Moreover, Article 26 ECT establishes an ISDS available to foreign investors regarding investments that fall within the scope of the agreement protected by the standards under Part III of the ECT. According to the Court in Opinion 2/15, including an ISDS in an international agreement is a 'competence shared between the European Union and its Member States'.[13]

However, the shared competence referred to in relation to ISDS differs from other shared competences, such as portfolio investments. In Opinion 2/15, the Court made clear that an ISDS cannot 'be established without its Member States' consent' because an ISDS 'removes disputes from the jurisdiction of the courts of its Member States'.[14] This language suggests an important departure from the traditional reading of 'facultative mixed agreements' and 'mandatory mixed agreements'.[15] A mandatory mixed agreement must be concluded by both the EU and its Member States because it contains matters that fall within the EU's exclusive competence and provisions that fall within the exclusive competence of its Member States. Under EU law, Member States and the EU must jointly conclude an international agreement if they want to assume all the rights and obligations of that agreement. They cannot do so without each other, as they would be acting outside their respective competences when concluding the agreement. A facultative mixed agreement, on the other hand, is only mixed because of the political choice by the Council not to exercise EU powers that are shared with its Member States. Instead, these competences are exercised by the Member States. Under EU law, the Member States, and not the EU, assume the rights and obligations under those parts of the agreement that fall within those shared competences.

Opinion 2/15 suggests that even though an ISDS is a competence shared between the EU and its Member States, international agreements containing ISDS agreements can only be legally concluded with the participation of Member States. Several commentators have relied on a subsequent ruling in the International Organisation for International Carriage by Rail (OTIF) to suggest that the EU alone can conclude agreements containing an ISDS.[16] In OTIF, the Court sought to clarify its findings over the nature of the EU's competences for portfolio investments by stating that the EU could exercise these shared competences alone in the conclusion of an international agreement.[17] However, it did not make such a clarification in relation to ISDS agreements. There was no legal reason specific to the case in OTIF to make such a clarification with regard to portfolio investment only. Hence, one can only assume that the Court views the nature of competence concerning ISDS agreements differently from that of portfolio

10 Joni Heliskoski and Gesa Kübek, 'A Typology of EU Mixed Agreements Revisited' in Nicolas Levrat et al. (eds) *The EU and Its Member States' Joint Participation in International Agreements* (Bloomsbury Publishing 2022), 29.

11 Guillaume Van der Loo and Ramses A. Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017), 54(3) Common Market Law Review, 735–70, at 748. See also, Articles 1.1 and 30.9 of the Comprehensive Economic and Trade Agreement (CETA) between Canada on the one part and the European Union and its Member States on the other part [2017] OJ L11/23.

12 Opinion 2/15 EU:C:2017:376, paras 78–110 and 225–44.

13 Ibid, para 293.

14 Ibid, para 292.

15 Heliskoski and Kübek, 'A Typology of EU Mixed Agreements Revisited' (n 9); Allan Rosas, 'The European Union and mixed agreements' in Alan Dashwood and Christophe Hillion (eds) *The General Law of E.C. External Relations* (Sweet & Maxwell 2000).

16 Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14(1) *European Constitutional Law Review*, 231–59; Heliskoski and Kübek, 'A Typology of EU Mixed Agreements Revisited' (n 9).

17 Case C-600/14 *Germany v Council* (OTIF) EU:C:2017:935, para 68. See also Hannes Lenk and Szilárd Gáspár-Szilágyi, 'Case C-600/14, *Germany v Council* (OTIF). More Clarity over Facultative 'Mixity'?' *European Law Blog,* <https://europeanlawblog.eu/2017/12/11/case-c-60014-germany-v-council-otif-more-clarity-over-facultative-mixity/> last accessed 2 December 2022.

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investments. What is more, ISDS agreements touch on a far more important constitutional issue than the division of powers in relation to portfolio investments. An ISDS removes disputes from the courts of its Member States and, in so doing, directly interferes with the preliminary reference procedure in the EU.[18] This procedure is the 'keystone' of the EU's judicial system because it allows the ECJ to work with national courts to oversee the correct and uniform interpretation and application of EU law by all Member States. Therefore, the conclusion should be that agreements containing an ISDS, such as the ECT, are mandatory mixed agreements.[19] The Dutch government has already taken this view publicly. In a letter to the Dutch Parliament on the ECT, the Dutch government made clear that an ISDS is an exclusive competence of the Member States and that any international agreement containing an ISDS requires ratification by the Netherlands.[20] Furthermore, the government made clear that it would not be possible to give 'consent' within the meaning of Opinion 2/15 through a Council decision.

Third, the ECT's current text is incompatible with EU law, following Achmea, Komstroy and Opinion 1/17.[21] First, the ECT does not contain a disconnection clause (a clause that ensures that an ISDS does not apply between investors from Member States and other Member States under the ECT). This results in ISDS tribunals claiming that jurisdiction under the ECT (over disputes) is contrary to EU law.[22] Second, the ISDS provisions in the ECT do not contain the same safeguards present in CETA that the Court considered necessary (in Opinion 1/17) to protect the autonomy of EU law by safeguarding the jurisdiction of the Court in giving a definitive interpretation of EU law.[23] Third, the investment protection standards in the ECT do not contain the same safeguards present in CETA that the Court considered necessary in Opinion 1/17 to protect the regulatory autonomy of EU law. Finally, the current ECT does not sufficiently circumscribe the definition of 'fair and equitable treatment' or contain provisions that seek to preserve public interest decision-making.[24]

This incompatibility means that, under EU law, the EU and its Member States cannot remain a party to the ECT as it currently stands. Instead, they must either renegotiate or withdraw from the ECT to respect their obligations under the EU Treaties. In that sense, the modernisation effort seeks to address several of these incompatibility issues.[25]

3. Withdrawal by the EU

3.1. Procedure for withdrawal

Article 218 TFEU governs the procedures for decision-making by the EU institutions in respect of international agreements. This provision lays down the procedure for several key elements concerning the formation and implementation of international agreements by EU institutions. It contains decision-making procedures for the signature, provisional application, conclusion and suspension of international agreements, as well as a decision-making procedure for adopting the positions of the EU within bodies set up by international agreements that produce legal effects. However, an explicit decision-making procedure for termination or withdrawal from an international agreement is absent.

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18 Laurens Ankersmit, 'The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System' (2016) 13(1) *Journal for European Environmental & Planning Law*, 46–63; Christina Eckes and Laurens Ankersmit, The compatibility of the Energy Charter Treaty with EU law (Client Earth, 2022) <https://www.clientearth.org/latest/documents/the-compatibility-of-the-energy-charter-treaty-with-eu-law/> last accessed 12 June 2023.

19 For a similar view, see Allan Rosas, 'Mixity and the Common Commercial Policy after Opinion 2/15' in Michael Hahn and Guillaume Van der Loo, *Law and Practice of the Common Commercial Policy* (Brill 2020), 27–46.

20 Dutch government, 'Kamerbrief over Energy Charter Treaty (ECT)' (Letter by the Dutch minister for economic and climate affairs to the Dutch parliament DGKE/22548182) 22 November 2022.

21 Christina Eckes and Laurens Ankersmit, The compatibility of the Energy Charter Treaty with EU law (Client Earth, 2022) <https://www.clientearth.org/latest/documents/the-compatibility-of-the-energy-charter-treaty-with-eu-law/> last accessed 12 June 2023.

22 Case C-741/19 *Komstroy* ECLI:EU:C:2021:655, para 66. Some have argued that there is no need for an explicit disconnection clause in the case of the ECT. For this discussion, see Marise Cremona, 'Disconnection Clauses in EU Law and Practice', in Christophe Hillion and Panos Koutrakos, *Mixed Agreements Revisited, The EU and its Member States in the World* (Hart Publishing 2010), 179–81.

23 Christina Eckes and Laurens Ankersmit, *The compatibility of the Energy Charter Treaty with EU law* (Amsterdam Centre for European Law and Governance 2022), 21–6.

24 Laurens Ankersmit, 'Regulatory autonomy and regulatory chill in Opinion 1/17' (2020) 4(1) *Eur. World.*

25 Eckes and Ankersmit, *The compatibility of the Energy Charter Treaty with EU law* (Amsterdam, UvA-DARE 2022).

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There seem to be two possibilities if no explicit provision is present. The first is that the procedure of Article 218 (9) TFEU is followed. This procedure allows the EU to take positions in bodies set up by international agreements and to (partially) suspend international agreements. Given that the European Parliament is not involved, the choice of this procedure could be characterised as being more in line with the 'executive prerogative' used by some states to terminate international agreements.[26,27] The other possibility is that the same procedure would need to be followed to conclude an international agreement, as provided for by Article 218 (6) TFEU.[28] The procedure to terminate would then mirror the procedure for conclusion. This option is based on an 'actus contrarius' principle in the literature.[29] The second possibility, the procedure based on Article 218 (6) TFEU, would generally ensure greater participation by the European Parliament in decision-making. However, given the involvement of an additional institution, the procedure would generally be more cumbersome. This second possibility appears to be the better option.

First, if one looks at the constitutional traditions of the Member States, practice is so diverse that one cannot speak of a practice 'common' to all. Member State practice cannot point to one possibility over the other. On the one hand, fourteen Member States, including France and Germany, favour a system based on 'executive prerogative'.[30] On the other, thirteen Member States favour a system whereby their parliaments are involved in termination to a varying degree.[31] Nine of the latter group follow a procedure whereby the powers of their national parliament mirror the powers of the EU Parliament at the ratification stage.[32]

Second, the practice of the EU institutions suggests a procedure that mirrors the process that would have to be followed for the conclusion of that international agreement rather than the procedure provided by Article 218 (9) TFEU. Kuijper and others identify five agreements concluded by the EU that have since been terminated, the termination occurring in all instances before the entry into force of the Lisbon Treaty.[33] In four instances, it is clear from the decision that the procedure for conclusion was followed rather than that of suspension. In the fifth instance (on the data transfer of airline passenger information to the United States), no internal decision was necessary as the decision to conclude the agreement was annulled by the Court. Hence, the Commission issued a notice to the United States.[34] Of those four decisions, the European Parliament either consulted or consented to the decision to terminate the international agreement in two instances.[35] In two cases involving trade matters, the European Parliament was not involved, as was prescribed for the conclusion of trade agreements at the time. The text of the decision refers to the procedure for the conclusion of an international agreement rather than the procedure for suspending an international agreement.[36]

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26 For the approach in the United States, see Abigail L. Sia, 'Withdrawing from Congressional-Executive Agreements with the Advice and Consent of Congress' (2020) 89(2) Fordham Law Review, 787–836.

27 Pieter Jan Kuijper et al. *The Law of EU External Relations* (2nd edn, OUP 2015), 88–92.

28 This possibility is supported by Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (CUP 2014), 400–1.

29 Kuijper and others refer to this view as the 'actus contrarius' principle, see Kuijper et al. (n 27).

30 These Member States are Belgium, Croatia, the Czech Republic, Cyprus, Germany, France, Greece, Italy, Luxembourg, Malta, Austria, Ireland, Slovakia and Latvia.

31 Portugal, Hungary, Slovenia, Romania, the Netherlands, Bulgaria, Denmark, Estonia, Spain, Finland, Lithuania, Poland and Sweden.

32 These are the Netherlands, Bulgaria, Denmark, Estonia, Spain, Finland, Lithuania, Poland and Sweden.

33 Kuijper et al. (n 27), 90–1.

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

35 Article 300 EC (Nice) and its predecessor Article 228 EEC made it clear at the time that the European Parliament was only involved in the conclusion of some international agreements. No involvement by the European Parliament was foreseen in suspending international agreements or taking positions in international bodies set up by international agreements. For the decisions, see Council Decision 91/602/EEC of 25 November 1991 denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia [1991] OJ L325; Council Regulation 1185/2006 of 24 July 2006 denouncing the Agreement between the European Economic Community and the Government of the People's Republic of Angola on fishing off Angola [2006] OJ L214, 10.

36 Both decisions refer to the first sentence of Article 300 EC. Council Decision 2007/627/EC of 28 September 2007, denouncing on behalf of the Community Protocol 3 on ACP sugar [2007] OJ L255, 38; Council Decision 2004/589/EC of 19 July 2004 concerning the notification to the Republic of Korea of the withdrawal of the European Community from the Agreement on telecommunications procurement between the European Community and the Republic of Korea [2004] OJ L260, 8.

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Third, the principle of institutional balance would suggest that the institutions involved in making international law should be involved to the same extent when such laws are unmade.[37] The Court made clear in *Somali Pirates (I)* that the procedure of Article 218 TFEU 'must take account of the specific features which the Treaties lay down in respect of each field of EU activity, particularly as regards the powers of the institutions'.[38] Accordingly, Article 218 TFEU 'establishes *symmetry* between the procedure for adopting EU measures internally and the procedure for adopting international agreements to *guarantee that the Parliament and the Council enjoy the same powers in relation to a given field*, in compliance with the institutional balance provided for by the Treaties'.[39] By analogy, the termination of an international agreement in a given field should, based on the principle of institutional balance, equally respect those powers in relation to that area internally, as provided for by Article 218 (6) TFEU.

3.2. Unilateral or coordinated withdrawal by the EU

A further question is whether the EU can unilaterally withdraw from a mixed agreement without doing so jointly with its Member States. As the Court has made clear, the duty of loyal cooperation (Article 4 (3) TEU) requires that Member States and EU institutions have 'an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement'.[40] At the very least, this duty involves informing and consulting one another.[41]

However, as Opinion 1/19 (the Istanbul Convention) has made clear, this duty cannot go as far as preventing the EU from taking decisions within its sphere of competences and cannot require the EU to reach a 'common accord' with its Member States in relation to mixed agreements before deciding on Article 218 TFEU.[42] The autonomy of EU law means that the EU Treaties govern decision-making by the EU and cannot be made dependent on the actions of its Member States.[43] In particular, the duty of close cooperation 'cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU'.[44] The EU Treaties, therefore, 'not only do not require the Council to wait' for a 'common accord' for the withdrawal from a mixed agreement, they even 'prohibit' the Council from making the initiating of that procedure contingent on the prior establishment of a 'common accord'.[45]

4. Consequences for its Member States of withdrawal by the EU

What are the legal consequences for Member States, as parties to the ECT, when the EU unilaterally withdraws? In Opinion 1/19, the Court draws important conclusions from the fact that, under mixed agreements, the EU and its Member States only act within their respective competences. The Court found that 'the conclusion of a mixed agreement by the European Union and its Member States in no way implies that its Member States exercise, in that event, competences of the European Union or that the European Union exercises competences of those States; rather, each of those parties acts exclusively within its sphere of competence.'[46]

As a result, the Court explained that if a Member State does not conclude a mixed agreement, it does not automatically follow that the EU is acting outside its competences by concluding the agreement. On the contrary, according to the Court, the use of the correct legal bases and the use of declarations of competences, as well as other provisions in the mixed agreement itself, should make clear that the EU, in such a case, would stay within its competences when concluding and implementing the agreement. Likewise, in principle it cannot be automatically inferred from the withdrawal by the EU from a mixed

37 See for a different view, Kuijper et al. (n 27), 91–2.

38 Case C-658/11 *Parliament v Council (Somali Pirates I)* EU:C:2014:2025, para 53.

39 Ibid, para 56.

40 Case C-459/03 *Commission v Ireland (MOX Plant)* EU:C:2006:345, para 175.

41 Andres Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36(4) *European Law Review,* 524.

42 Opinion 1/19 *(Istanbul Convention)* EU:C:2021:198.

43 Ibid, para 235.

44 Ibid, para 242.

45 Ibid, para 249.

46 Ibid, paras 240, 258 and 259.

agreement that the Member States are exercising their competences over the entirety of the agreement. If that were the case with the ECT, Member States would be acting ultra vires under EU law.

The ECT covers investment protection standards for foreign direct investment in the energy sector, an exclusive competence of the EU. Member States remaining party to the EU agreement cannot assume these obligations under the ECT after the EU withdraws unless the EU explicitly empowers its Member States to do so.[47] The EU's Grandfathering Regulation does not allow such delegation to the Member States.[48] First, the Regulation applies to *bilateral* investment agreements of Member States, not to multilateral investment agreements such as the ECT. Second, the ECT is an agreement the Member States signed before 1 December 2009. As such, it should have been notified to the Commission to benefit from the provisions that allow Member States to maintain their existing bilateral agreements.[49]

While the Court in Opinion 1/19 considers it cannot be automatically assumed that in cases of incomplete mixity the EU would be acting ultra vires, the Court does indicate how the EU can avoid acting outside its authority.[50] These contain a declaration of competences by the EU institutions, explicit provisions in the international agreement itself, and the legal basis for the conclusion of the agreement. However, these instruments are only of limited value for Member States who wish to remain a party to an agreement from which the EU has decided to withdraw. Member States are states, unlike the EU. Therefore, the limited nature of their competences to conclude an international agreement cannot be assumed. Moreover, the current definition of 'Regional Economic Integration Organisation' under Article 1 (3) of the ECT indirectly offers support that, in the case of withdrawal by the EU, Member States only remain a party to the ECT to a limited extent. In addition, the current declaration of competences submitted by the EU to the ECT Secretariat offers limited guidance as to the extent of Member State responsibilities under the ECT.[51] Finally, while the legal basis for the decision to withdraw from the ECT by the EU may offer some indications as to the extent to which its Member States are exercising their competences, the lack of clarity over the legal basis of EU competence for ISDS agreements and portfolio investments makes this instrument a risky basis to establish the limited nature of Member States' responsibilities under the ECT.

Moreover, the ECT as it currently stands remains incompatible with EU law. Therefore, the remaining Member States do not have the option to remain a party to the agreement. This means that the Member States concerned must either renegotiate the agreement or withdraw. Given that the ECT is a multilateral agreement, amendments to the agreement's text are complex, as demonstrated by the failed effort to modernise the ECT. If renegotiation is pursued, however, Member States would need to convince third states that the ECT would only bind them in areas of Member State competence. It is highly unlikely that this would be an acceptable outcome for those other parties since an ISDS is very much at the heart of the agreement. Alternatively, the EU could empower those Member States to remain a party to a renegotiated ECT, either through an amended Grandfathering Regulation or through a similar EU legal instrument. This would allow Member States to assume all responsibilities under an international agreement, even if that agreement partially covers an area of EU-exclusive competence.

5. Member State withdrawal

Member States can withdraw from mixed agreements, such as the ECT, provided that they respect their loyalty obligations towards the EU under Article 4 (3) TEU. Furthermore, as the Court considers that the EU and its Member States act 'exclusively within [their] sphere of competence', under mixed agreements Member States can choose to no longer exercise their competences by withdrawing from a mixed agreement.[52]

47 Article 2 (1) TFEU.

48 Article 1 of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40.

49 Articles 2 and 3 of the Regulation.

50 Opinion 1/19 (n 7), paras 261–3.

51 See, in particular, point 2 of the Declaration of the EU, EURATOM, and its Member States. Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities [2019] OJ L115, 1.

52 Ibid, paras 240, 258, and 259.

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When the EU and its Member States are parties to a mixed agreement, they have 'an obligation of close cooperation' to fulfil the commitments undertaken by them under joint competence when they conclude a mixed agreement.[53] As Delgado and Larik (initially) pointed out, the Court 'routinely characterised the duty of co-operation through general statements in favour of inter-institutional co-operation without specifying the concrete results required to achieve that co-operation'.[54] However, more recent case law suggests that, at the very least, this duty amounts to an obligation to 'inform and consult' the Commission and, in certain instances, to refrain from certain actions on the international stage.

This so-called 'duty to remain silent' follows from the PFOS (perfluorooctane sulfonate) ruling.[55] In PFOS, the Commission had started infringement proceedings against Sweden for unilaterally proposing to the Conference of the Parties under the Stockholm Convention to add a substance, PFOS, to Annex (A) to eliminate that substance. The matter fell within shared competence, which allows the EU and its Member States to go beyond the levels of environmental protection sought by the EU under Article 193 TFEU. However, the Court found that Sweden had violated its loyalty obligations because it had 'disassociated' itself from a common strategy within the EU not to list the substance, and the proposal would have had consequences for the EU. In particular, following PFOS, a duty to 'abstain' from international action exists where (1) there is an existence of a 'common strategy' of the EU; (2) Member State action would amount to a 'disassociation' from that common strategy; and (3) that disassociation has 'consequences' for the Union.

The PFOS ruling concerned the implementation of international agreements where unilateral actions by Member States would have impacted EU legislation. However, as Heliskoski pointed out, 'one should probably exercise caution drawing general conclusions from the PFOS judgment insofar as [it] concerns the constraints imposed by Union law on Member States exercising their shared competence as parties to mixed agreements'.[56]

The withdrawal by Member States, particularly in the context of an EU-led effort to renegotiate an agreement, the ECT, raises several issues that would qualify any 'duty to remain silent'.[57] First, the duty of loyalty finds its logical limits with the division of powers between the EU and its Member States. Contrary to the situation in PFOS, a renegotiation of the ECT would require ratification by the parties to the ECT. It would not result in an obligation to refrain from an action (a duty to 'remain silent'); it requires taking action. Member States would be forced to ratify an international agreement. In most cases, this would result in putting such an agreement up for a vote in national parliaments and informing the parliamentarians that they have only one choice under EU law, notwithstanding the Member States' competences. While the duty of loyalty can require Member States and the EU institutions to cooperate closely, it cannot go so far as to encroach upon the division of powers between the EU and its Member States. In other words, the Member States, acting exclusively within their sphere of competence, can reject the outcome of negotiations. A national parliament cannot be required under EU law to ratify an agreement partially within the exclusive sphere of competence of that Member State because of loyalty obligations. If it were otherwise, the duty of loyalty would upend the very logic of mixed agreements. If this is the political choice of the Member State in question, the only logical option left for the Member State would be to withdraw, given that the current ECT is incompatible with EU law.

Where a common strategy by the EU to renegotiate can be discerned, Member States should facilitate the EU's ability to secure the renegotiated text's entry into force. Interestingly, by remaining a party to the ECT, Member States may do the opposite. In other words, withdrawal would facilitate the EU's tasks. This is, perhaps, a counterintuitive conclusion that follows from how amendments to the ECT text can be made. Under the ECT, amendments need to be ratified by three-quarters of the contracting parties.[58] If there is no support within a Member State to ratify amendments, acting within its sphere of competences, but does not withdraw, reaching this threshold would be more difficult.

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53 Case C-459/03 *Commission v Ireland (MOX Plant)* EU:C:2006:345, para 175.

54 Andres Delgado Casteleiro and Joris Larik, 'The duty to remain silent: Limitless loyalty in EU external relations?' (2011) 36(4) *European Law Review,* 524–41, at 526.

55 Case C-246/07 *Commission v Sweden* EU:C:2010:203.

56 Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals', in Professor Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Law: The European Union Legal Order: Volume I* (OUP 2018), 1198.

57 Delgado Casteleiro and Larik (n 54), 526.

58 Article 42 (4) ECT.

In any event, for there to be any loyalty obligations based on *PFOS*, one would need to establish the existence of a 'common strategy' of the EU to do something that would not allow for Member States to withdraw. As pointed out above, the fact that the EU seeks to renegotiate the current ECT text cannot force Member States, based on loyalty, to accept such a result. Regardless, such a strategy might not exist in the first place. While the Commission obtained authorisation to negotiate amendments to the ECT, and the Commission had proposed to (passively) endorse the negotiated result at the Energy Charter Conference by participating in the vote and raising no objection to the initialling of the modernised text,[59] the proposal failed to obtain a qualified majority in the Council.[60]

Following PFOS, the threshold for engineering a new 'common strategy' is low. In *PFOS*, the Court maintained that a common strategy could be discerned from discussions within a working party of the Council.[61] In those discussions, the substance Sweden wanted to list was discussed but was not part of the subsequent proposal of the Commission. In any event, a new proposal from the Commission would amount to the initiation of such a strategy, or as the Court states are 'the point of departure for concerted [EU] action'.[62]

Summarising the above, where the EU has a common strategy to renegotiate the ECT, loyalty obligations result in an obligation to consider the negotiated result and inform and consult the Commission of the political choices made by its Member States in accepting the negotiated result (or not). Where the Council adopts a position to be taken at the Energy Charter Conference that would allow for the initialling of the negotiated results, Member States, following Article 36 (7) ECT, cannot exercise their voting rights and block such a decision. However, such obligations do not prevent Member States from withdrawing, even before a decision of the Energy Charter Conference is made, as withdrawing has no negative consequences for the decision to initial the negotiated text.

6. Consequences for the EU of Member State withdrawal

Under EU law, can the EU remain a party to a mixed agreement such as the ECT when one or more Member States withdraw? As elaborated above, Opinion 1/19 suggests this is possible, as the Court considers that the EU and its Member States each act exclusively within their spheres of competence.[63] Therefore, one cannot automatically assume that the EU would be acting ultra vires under the agreement if not all Member States are party to a mixed agreement, as that would incur international liability. The Court bases this argument on the fact that the third parties to the Istanbul Convention are 'aware of the limited nature' of the EU's competences.[64] In that sense, the EU 'gives indications' as to the extent of its limited powers under the international agreement through the legal bases used in the conclusion of that agreement and through a possible declaration of competences.[65]

While a number of academics have criticised this approach, it appears that the ECT does not currently meet the low threshold set by the Court.[66] Under Article 1(2)–(3), the ECT indirectly suggests that the EU's membership is based on limited competences.[67] However, neither the original legal bases nor the EU and the Member States' 'Joint Statement pursuant Article 26 (3) (b) (ii) ECT' allow for a meaningful understanding of the extent of the EU's competences.[68] On the contrary, the Joint Statement

[59] See fn. 4.

[60] Frédéric Simon, 'Brussels calls for pause in ECT reform talks after losing key EU vote' Euractiv 21 November 2022, <www.euractiv.com/section/energy/news/brussels-calls-for-pause-in-ect-reform-talks-after-losing-key-eu-vote/#msdynttrid=o0_LNy4jgBASlCSBL45WwtgxUa_4snkwYSdHm_V6KBc> last accessed 12 December 2022.

[61] Case C-246/07 *Commission v Sweden* EU:C:2010:203, paras 74–89.

[62] Ibid, para 74. One could consider the non-paper (n 5) a new point of departure for concerted action.

[63] Ibid, paras 259–60.

[64] Ibid, para 261.

[65] Ibid, paras 262–4.

[66] Merijn Chamon, 'The Court's Opinion in Avis 1/19 regarding the Istanbul Convention', EU Law Live, 12 October 2021, and references there.

[67] Those provisions make clear that a Regional Economic Integration Organisation (REIO) can be a party to the ECT and, as such, REIO 'means an organization constituted by States to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters'.

[68] The joint Council and Commission decision concluding the ECT on behalf of the EU contains no less than ten legal bases found in the Treaty of Maastricht. This predates the current division of powers under the Treaty of Lisbon as interpreted by the Court in Opinion 2/15.

suggests that the EU is exercising competence over the ECT's ISDS, something it cannot do without its Member States' consent.[69] This may lead to a situation where an investor of a third state submits a dispute for arbitration against the EU for actions taken by a Member State that it considers as falling under EU competence (for instance, unlawful expropriation of foreign direct investment). Given that an increasing number of Member States are withdrawing from the ECT, this situation is likely to occur often. To no longer act ultra vires under EU law, the EU institutions should, at the very least, remedy this situation by submitting a declaration of competences declaring that the EU is not exercising powers over Article 26 ECT and does not have the power to act as a respondent in any cases brought under that article even if the ECT does not allow parties to make reservations.[70] It should be emphasised, however, that such an approach would not likely avoid EU liability under international law.

7. The competence to neutralise the sunset clause

The ECT contains a so-called sunset clause in Article 47(3) ECT. The sunset clause extends the applicability of the entire agreement in relation to investments made in the region of one party by investors from another for an additional twenty years. An important question is who, under EU law, would be competent to conclude any subsequent inter se agreement between (former) parties to neutralise or terminate this sunset clause.[71]

Previously, the Member States and not the EU have – through an international agreement – terminated bilateral investment agreements between themselves.[72] That international agreement contained provisions neutralising any sunset clauses that might be present in such bilateral investment agreements.[73] This solution makes sense from an international law perspective because the EU was not a party to these agreements. However, in the context of the ECT, the situation is comparable as it concerns the termination of the sunset clause between EU Member States. Such intra-EU disputes are between Member State investors and Member States and do not concern the EU as a party to any such agreement. Moreover, termination does not involve third states. Therefore, from an EU law perspective, such agreements do not concern 'foreign direct investment', an exclusive EU competence. Consequently, it seems evident that an inter se agreement between Member States neutralising the ECT's sunset clause is not an exclusive EU competence and can be exercised by Member States.

However, in Opinion 2/15, the Court takes the view that terminating international agreements with *third states* follows the substantive division of powers, as discussed in Section 1. Under the Court's 'theory of succession', where the EU obtains exclusive competence over a particular area, the EU succeeds its Member States in their international commitments and thus has the power to modify or terminate such obligations.[74] Accordingly, an international agreement that would neutralise the sunset clause in the ECT with third states would follow the division of powers between the EU and its Member States. In other words, the question of who is competent to conclude such an agreement would need to be answered by the scope of the inter se agreement with the third state itself. This would mean, for instance, that if the agreement results in the termination of or the continuation of an ISDS, this would remain a Member State competence or, at the very least, any EU competence to do so that can only be exercised with the Member States' consent. On the other hand, if the agreement removes all direct investment from the scope of the sunset clause, it would be possible, under EU law, for the EU to conclude this agreement.

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69 Declaration of the EU, EURATOM, and its Member States. Statement submitted to the Energy Charter Treaty (ECT) (n 47).

70 Article 46 ECT.

71 On the public international law dimension of terminating sunset clauses, see M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010), 419; Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) ICSID Review – Foreign Investment Law Journal, 451–73, at 469–72.

72 Agreement for the termination of Bilateral Investment Treaties between its Member States of the European Union [2020] OJ L169, 1.

73 Ibid, Article 3.

74 Opinion 2/15, paras 248–9.

8. Conclusion

By concluding the ECT, the EU and its Member States have created a genie that is difficult to put back in the bottle. Withdrawal by the EU or its Member States from the ECT creates such complicated international and EU law questions that one is not surprised by the reluctance of Commission officials to engage with this issue. This contribution has sought to answer two main EU law questions: who has the power under EU law to decide on withdrawal from the ECT, and can this power be exercised unilaterally? In other words, is there an EU legal obligation for a 'coordinated withdrawal' by the EU and its Member States?

This contribution argues that unilateral withdrawal by the EU and its Member States is possible, subject to loyalty obligations to inform and consult one another. This concerns the view taken by the Court in Opinion 1/19 on mixed agreements. Under mixed agreements, the EU and its Member States act 'exclusively within [their] sphere of competence', thus allowing them to exercise these powers in a disjointed fashion. Loyalty, moreover, may require Member States to refrain from acting in certain instances. However, given that the ECT is incompatible with EU law, refraining from withdrawal is not an option in the case of the ECT if a Member State rejects a renegotiated text. Member States cannot remain a party to an international agreement that violates EU law. Thus, while the Member States, within their sphere of competences, remain empowered to reject any negotiated result, even if that result is part of a 'common strategy', they are essentially left with one option – to withdraw from the agreement.

This is not to say that unilateral withdrawal is without legal problems. Most of those are of an international law nature, but those problems may also touch upon the division of power issues between the EU and its Member States. Member States that have withdrawn may still face claims through the backdoor should the EU decide to act as a respondent in ISDS cases, triggering complicated questions of what to do with such apparent ultra vires actions by EU institutions. Likewise, the withdrawal of the EU puts Member States in the position of being party to an agreement that falls only partially within their competence, which risks trespassing on exclusive EU powers. Coordinated withdrawal would remedy many of these problems. Given that eight Member States, representing over 70 per cent of the EU population, have withdrawn or are in the process of withdrawing, and there is no support for a renegotiated text, it is much more politically expedient for the EU to commit to a joint effort rather than remain stuck with an agreement that is incompatible with EU law.

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