

The Energy Charter Treaty (ECT) as a Mixed Agreement

Prof. Eleftheria Neframi, University of Luxembourg

Abstract:

From the perspective of EU law, the pressure on the EU to either reform the ECT or withdraw from it is high, both for sustainability reasons and because of the ECT's incompatibility with EU law as far as intra-EU arbitration is concerned. In light of the rejection of the Council's decision to endorse the modernized ECT, new questions with regard to the joint participation of the EU and its Member States arise. Following several Member States' announcements to withdraw from the ECT, and the European Parliament's resolution of 22 November 2022, calling for a coordinate withdrawal, the European Commission proposed such coordinated withdrawal on 7 July 2023. Although coordinated withdrawal is an optimal management of mixity, the question whether a legal obligation can be derived from the principle of sincere cooperation (Art 4(3) TEU) is to be discussed.

In case no legal obligation to withdraw is established, Member States remaining parties to the ECT will be bound only to the extent of their reserved competence unless they obtain empowerment from the EU. The question of division of competences in the context of the ECT needs further clarification, following the evolution of the EU's competence in the field of investment protection and energy policy and the ECJ's position as to the lack of EU competence with regard to ISDS provisions. Member States as parties to the ECT without the EU will still be bound by the obligation not to apply ISDS provisions in their mutual relations and will have to balance their international responsibility with EU law obligations. On the other hand, withdrawal of some Member States while the EU and other Member States remain parties to the ECT will lead to an incomplete mixed agreement, raising questions of division of responsibilities and clarification of the binding part of ECT as EU law obligation for the Member States having withdrawn.

Regardless of the question of withdrawal, the joint participation of the EU and its Member States in the ECT, raises questions of division of financial responsibility, interpretative competence of the ECJ, non-application of the ISDS intra-EU (disconnection) and preservation of the regulatory autonomy of the EU as to sustainability standards.