

# Kluwer Arbitration Blog

## Why the EU Violated Art. 21 TEU by Not Signing the Modernized ECT Text

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In this blogpost I will explain why the European Union (“EU”) failed to meet its own constitutional requirements as set forth in Art. 21 of the Treaty on European Union (“TEU”) when it decided not to sign the [modernized Energy Charter Treaty](#) (“ECT”) text, which was recently adopted.

As a starting point, I will use the recent *Front Polisario* judgment of the Court of Justice of the EU (“CJEU”). Subsequently, I will highlight the importance of Art. 21 TEU as far as the protection of the environment is concerned in the light of the modernized ECT text.

### The Constitutional Importance of Art. 21 TEU

In its recent *Front Polisario* judgment, the CJEU upheld the annulment of the Council Decision concerning amendments to the EU-Morocco Association Agreement affecting the situation in Western Sahara. In that judgment, the CJEU underlined again the importance of [Art. 21 TEU](#) as the guiding principle of the EU’s external actions.

More specifically, the CJEU stressed in that judgment that:

*“277. [...] [B]y virtue of Article 3(5) and [Article 21\(1\) TEU](#), the [EU]’s action on the international stage is based on the values and principles that have governed its creation, development and enlargement. It contributes, in particular, to the strict observance and development of international law, including respect for the principles of the Charter of the United Nations.*

*278. It should be added that, in accordance with Article 207(1) TFEU [...] the common commercial policy [(“CCP”)] is conducted within the framework of the principles and objectives of the [EU]’s external action, including those referred to in paragraph 277 above. The [EU] has an obligation to incorporate those principles and objectives into the conduct of that policy [...].” (emphasis added).*

In other words, the EU’s CCP, which covers *inter alia* the conclusion of international trade and investment treaties in accordance with [Art. 207 of the Treaty on the Functioning of the European](#)

Union (“TFEU”), must be in compliance with Art. 21 TEU.

More specifically, Art. 21 (f) TEU requires that the EU’s actions on the international plane shall “help 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.”

### **Violation of Art. 21(2)(f)—Ensuring Sustainable Development**

It is argued here that Art. 21 TEU—in contrast to what might *prima facie* appear to be only of a “programmatically” nature—is in fact a “foundational” or “constitutional” provision for the EU.

This has been particularly confirmed by the CJEU in its *Opinion 2/15* regarding the conclusion of the EU-Singapore FTA. In that Opinion, the CJEU stressed that the EU is obliged to integrate the objectives and principles of Art. 21 TEU when conducting its CCP under Art. 207 TFEU. Indeed, the CJEU held that the objective of sustainable development henceforth forms an integral part of the CCP (*see Opinion 2/15*, paras. 142-47).

Accordingly, the EU must respect those objectives and principles when concluding international trade and investment agreements, such as the ECT based on Art. 207 TFEU.

This brings us to the ECT, more specifically, to the [modernized ECT text](#), which was “agreed in principle” by all Contracting Parties to the ECT, including the EU and all Member States, in June 2022.

As I have explained [elsewhere](#), the modernized ECT text is arguably the greenest investment promotion and protection agreement agreed so far by States. It fully incorporates the obligations of the [Paris Agreement](#), and it contains an explicit right to regulate. Furthermore, the protection of fossil fuels investments would be limited to 10 years.

In short, the modernized ECT text meets exactly the objectives of Art. 21 (2)(f) TEU.

Therefore, the EU had every reason to sign the modernized ECT text. Instead, it decided to withdraw from the old ECT, which—due to the sunset clause—protects all types of energy-related investments (including fossil fuel ones) made until the formal withdrawal takes effect for another 20 years.

Consequently, it is argued that Art. 21 TEU obliges the EU to follow through its “agreement in principle” by signing the modernized ECT text as it intended to do following the “agreement in principle” in June 2022.

Meanwhile, the non-EU Contracting Parties to the ECT have [adopted the modernized ECT text](#), which will provisionally be applied as of 3 September 2025.

### **Obligation to Negotiate in Good Faith**

However, by suddenly reversing its explicit intention to sign the modernized ECT text for no

convincing reasons, the EU also violated Art. 21 (2)(b) TEU by undermining the Rule of Law and the principles of international law.

More specifically, by first creating the legitimate expectations by “agreeing in principle” to the modernized ECT text but subsequently refusing to sign it, the EU acted in bad faith *vis-à-vis* the other Contracting Parties to the ECT, which had every right to assume that the EU would sign up to the modernized ECT text.

The obligation of States to act in good faith is conceptionally grounded in Art. 26 Vienna Convention on the Law of Treaties (“VCLT”), i.e., *pacta sunt servanda*, and Art. 2(2) UN Charter, which emphasizes that all members must act in good faith in their international relations. For the sake of this argument, it is assumed that these principles are equally applicable to the EU as subject of international law.

More specifically, the International Court of Justice (“ICJ”) has on several occasions emphasized the obligation of States to negotiate in good faith. For example, in *North Sea Continental Shelf* (1969) the ICJ emphasized that States are required to negotiate in good faith and that good faith involves not merely entering negotiations but genuinely seeking to reach an agreement (para. 85). While this case did not directly address “bad faith” as such, it affirmed the principle that good faith is a fundamental requirement in international law, especially in negotiations concerning treaties and agreements.

A detailed analysis on the concept of good faith in international law with more examples can be found in Robert Kolb’s book on Good faith in International Law (Hart, 2017).

Indeed, by withdrawing from the ECT, which is a multilateral agreement with more than 50 Contracting Parties, the EU violated another principle contained in Art. 21 TEU, namely:

(h) to promote an international system based on *stronger multilateral cooperation* and good global governance. (emphasis added).

In sum, by not signing the modernized ECT text, the EU violated its own constitutional principles and objectives as contained in Art. 21 TEU.

Additionally, the EU did not only do a disservice to the protection of the climate, but more broadly, also undermined the respect for international (treaty) law, which will have a knock-on effect in other important policy areas.

Thus, the EU has set a bad example, which may be followed by other States regarding their international agreements. Now, the EU can hardly convincingly remind other States to implement their international treaty obligations in good faith when the EU itself fails to do the same.

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