The Withdrawal of the EU and the Member States from the Energy Charter Treaty: Who will bear international responsibility for breaches of the Treaty?

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Executive Summary

1. In determining the options for a way forward regarding the EU, Euratom and Member States' membership in the Energy Charter Treaty, the European Commission recently envisaged the possibility that the EU withdraws from the Treaty while some EU Member States remain parties to it. The present paper aims at discussing the allocation of international responsibility between the EU and its Member States in case of an EU withdrawal from the Energy Charter Treaty.
2. According to general international law, a State is responsible for the conduct of its organs, regardless of whether those organs were acting to implement binding act of an organisation of which the State is a member. In principle, such general rules apply also to the conduct of EU Member States when they implement binding acts of the EU.
3. As a consequence, the conduct of an organ of an EU Member State is to be attributed to that Member State, and engages its international responsibility, if it is in contrast with the Energy Charter Treaty, irrespective of whether this conduct was adopted in order to implement binding acts of the EU, such as regulations, decisions of the Commission or judgments of the EU Court of Justice (that is to say, it was *required by Union law*).
4. International law allows the possibility of special rules of responsibility derogating from the general ones set out above. With regard to the allocation of responsibility between the EU and its Member States, international practice and case law, including of investment tribunals, provide some support to the view that there exists under customary international law a special rule of attribution according to which the conduct of a Member State implementing a binding act of the EU is to be attributed exclusively to the EU. This special rule would have the effect of exonerating Member States from international responsibility when their conduct was required to implement a binding act of the EU.
5. However, the existence of such a special rule of attribution is not widely recognised. The practice and case law supporting such rule remain rather limited. Moreover, international courts and tribunals appear inclined to support the existence of this special rule of attribution when both the Member States and the EU are parties to the relevant treaty. This ensures that a potentially responsible party always exists, preventing a responsibility gap for the injured party. If the EU were to withdraw from the Energy Charter Treaty, the risk of a responsibility

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gap will likely deter investment tribunals from exonerating a Member State from responsibility for acts undertaken to implement binding EU measures.

6. For these reasons, the invocation of a special rule of attribution applicable to the EU does not appear to provide a strong legal basis for exonerating a Member State from its international responsibility in case of a breach of the Energy Charter Treaty dictated by the need to implement a binding act of the EU.
7. In light of the above, if the EU withdraws from the Energy Charter Treaty, **the current legal framework suggests that an EU Member State that will remain in the Energy Charter Treaty will most likely bear international responsibility for its breaches of that Treaty, even if those breaches result from the implementation of binding EU acts. The risk of incurring into international responsibility for implementing acts of the EU is a factor that the Member States should take into account when considering whether to remain parties to the ECT after the withdrawal of the EU. In particular, the existence of such risk appears to be a relevant factor in support of the Commission's proposal for a coordinated withdrawal from the ECT.**

Introduction

1. This opinion has been written on the request of a coalition of NGOs.[1] It assesses whether, in case of withdrawal of the European Union (hereinafter 'EU') from the Energy Charter Treaty (hereinafter 'ECT'), an EU Member State that remains a contracting party to the ECT may incur international responsibility for implementing acts of the EU that are in breach of the ECT.
2. In determining the options for a way forward regarding the EU, Euratom and Member States' membership in the ECT, the European Commission recently envisaged the possibility that the EU withdraws from the ECT while some EU Member States remain parties to it.[2] According to the Commission, this option "involves significant complexities". One relates to the allocation of international responsibility for the breach of obligations under the ECT.
3. The ECT covers areas that fall within the competences of the EU. In case of a withdrawal of the EU, the Member States that remain parties to the treaty would assume international obligations on matters over which only the EU has the competence to adopt normative acts (exclusive competence), or the EU and the Member States have concurring normative powers (shared competence).
4. Irrespective of the nature of the EU competence, the remaining Member States may find themselves under a duty to give execution to EU acts that are in contrast with the ECT. These acts may be EU secondary legislation, Commission's decisions and judgments of the Court of Justice of the EU (ECJ). Most typically, one could think of a directive or a decision requiring one or more Member States to take action to reduce greenhouse emissions.
5. It is clear that if the EU withdraws from the ECT, it is no longer bound by that treaty and, therefore, cannot be held responsible for breaching it. It is also clear that an EU Member State that remains a party to the ECT will be the sole responsible for acts adopted in areas falling within Member States' exclusive competence or when it has discretion in the implementation of an act of the EU. The problem arises when the Member State has no discretion in the implementation of an act of the EU. Can an investor bring a case against that Member State

[1] Consisting of PowerShift, Climate Action Network Europe, Friends of the Earth Europe, Veblen Insitute and European Trade Justice Coalition.

[2] This strategy was announced in February 2023, see in particular Non-paper from the European Commission, *Next Steps as Regards the EU, Euratom and Member States' Membership in the Energy Charter Treaty*.

before an arbitral tribunal under the ECT and claim that the Member State is responsible for its breach, irrespective of the fact that the conduct of the Member State has its origin in an act of the EU and the State had no discretion in the implementation? Can the fact that a Member State acted in the execution of EU measures exonerate that State from its responsibility for breaches of the ECT?

6. This opinion will attempt to provide an answer to this question. It will mainly concentrate on the applicable law of international responsibility, as this is the set of rules that arbitral tribunals will have to apply in order to determine what – if anyone – is the party responsible for the violation of investors' rights under the ECT.
7. The examination will unfold as follows. To begin with (Section 1), we will provide an overview of the *general rules* of attribution under the law of international responsibility. The purpose is to establish whether, under these general rules, the conduct of an EU Member State implementing an act of the EU is to be attributed to the Member State or to the EU (Section 1.1). This will be followed by an analysis of whether, under customary international law, a *special rule* of attribution can be said to exist in the case of a EU Member State implementing a binding act of the EU (Section 1.2). We will then move on to analyse whether the ECT establishes a *special regime concerning the allocation of responsibility* between the Union and the Member States (Section 2). Finally, we will offer some conclusions and recommendations (Section 3).
8. Apart for the question of allocation of international responsibility, the scenario in which the EU withdraws from the ECT while some Member States remain parties to it also raises a number of complex EU law issues. These will not be addressed here. For an analysis of EU law matters, particularly those relating to the division of competences and the EU law consequences of a withdrawal from the ECT, we shall refer to the recent article by Ankersmit.[3] It also bears noting that the issues concerning the sunset clause laid down in Article 47 ECT will not be taken into account in this Report.
9. As said, the next section will focus on the rules of general international law concerning the attribution of conduct for the purposes of international responsibility. These rules will provide a first answer to the problem of determining who – between the EU and a Member State – bears international responsibility for the implementation of EU acts.

1. Allocation of responsibility between the EU and its Member States under the law of international responsibility

1.1. The general rules of attribution

2. Under the law of international responsibility, as codified in the Articles on State Responsibility (ASR),[4] and in the Articles on the Responsibility of International Organisations (ARIO),[5] adopted by the International Law Commission (ILC) respectively in 2001 and 2011, two main conditions are necessary for establishing that a certain conduct engages the responsibility of the State (or of the organization). It is required, first, that the conduct in question is attributable to the State (or to the organization) and, second, that such conduct constitutes a breach of an international obligation of that State (or that organization).

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[3] See L Ankersmit, *Withdrawal from Mixed Agreements Under EU Law: the Case of the Energy Charter Treaty*, Europe and the World, 2023.

[4] See 'Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)' UN Doc A/56/10 (2001), p. 26 ff., available here (hereinafter: ASR).

[5] See 'Report of the International Law Commission on the work of its sixty-third session (23 April-3 June and 4 July-12 August 2011)' UN Doc A/66/10 (2011), p. 40 ff., available here (hereinafter. ARIO).

3. The question of attribution is central to determining the allocation of responsibility between the EU and its Member States. The issue is whether the conduct of a Member State implementing a binding act of the EU is attributable to that State or the EU. The conduct implementing an act of the EU can entail the responsibility of a Member State only if that conduct is attributable to the Member State. By contrast, the responsibility of the Member State will be excluded if that conduct will be attributed exclusively to the EU. In such a case, only the EU can be held responsible for the conduct in question.
4. When addressing the problem of attribution, a distinction must be made between the EU acts imposing an obligation to Member States and the conduct of the Member State implementing that act. The EU acts, as such, (a regulation, a decision of the Commission, or a judgment of the EU Court of Justice) is to be attributed exclusively to the EU. As established under Article 6 ARIO, the conduct of *an organ or an agent* of an organisation in the performance of their functions is to be attributed to that organisation.
5. By contrast, the conduct of the Member State implementing an EU act is to be attributed exclusively to that State. This is so because, when a Member State implements an act of the EU, it usually acts through its organs – be it the national Parliament adopting implementing legislation, an administrative authority giving execution to an EU decision, or a domestic court applying a EU rule having direct effect in the domestic legal order. According to the general rule of Article 4 ASR, such conduct, being the conduct of an organ of the Member State (the Parliament, an administrative authority, or a domestic court), is to be attributed to that State.
6. Both ASR and ARIO set forth other rules of attribution. None of these other rules provide a basis justifying the possibility of attributing to the EU the conduct of an organ of a Member State when this organ implements a binding act of the EU. Article 6 ASR and Article 7 ARIO refer to the case where an organ of a State is '*placed at the disposal*' of another State or an international organisation. In this case, the conduct of that organ is to be attributed to the latter State or the latter organisation. In this respect, these rules provide an exception to the general attribution rule. However, under both Article 6 ASR and Article 7 ARIO, the fact that an organ of a Member State is acting in the execution of an obligation imposed by an international organisation is not sufficient to consider that organ as "being placed at the disposal" of the organisation.
7. In this respect, the solution retained by the arbitral tribunal in *Electrabel S.A. v. Republic of Hungary* – to which we will revert later – can hardly be regarded as persuasive. According to that tribunal, if an EU Member State implements EU law, the acts of that State should be considered as acts of the EU following an application by analogy of the rule contained in Article 6 ASR.[6] In fact, and contrary to the view expressed by the Tribunal, what is required for attribution under Article 6 ASR is that the EU exercises *factual control* over the organ of the State. As specified by the ILC, factual control presupposes that, when implementing a binding act of the EU, the organ of the Member State acts "in conjunction with the machinery of [the EU] and under its *exclusive* direction and control".[7] This high threshold does not appear to be met in the case of an organ of a Member State implementing a binding EU act. In this case, the EU exercises only a *normative control* over its Member States. It does not have *factual control* (i.e. *exclusive* direction and control) over State organs.
8. An exception to the general rule of attribution cannot be found in Article 17 ARIO. Under this provision, which was invoked also in relation to the recently brought *Nord Stream 2 v. European Union* dispute,[8] an international organisation incurs international responsibility if it adopts a binding decision mandating a Member State to commit an act that would be wrongful

[6] See *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, para. 6.72.
[7] See ASR Commentaries 44 (emphasis added).
[8] See below fn 22.

if committed by that organisation.[9] Article 17 ARIO does not exonerate the Member State from bearing responsibility for the conduct of its organs. In fact, under this provision, the very conduct of the Member State in question, albeit mandated by a binding decision of the organisation, remains the conduct of that Member State and is not attributed to the IO.

9. One can therefore conclude that, under the general rules of attribution as established by customary international law, the conduct of an organ of a Member State remains attributable to the State, and engage its international responsibility if in breach of the ECT, irrespective of whether that conduct was imposed by a binding act of the EU. In the next section, we will assess whether, under customary international law, a special rule of attribution, derogating from the general rules that we have just examined, has emerged in relation to the implementation of acts of the EU.

1.2. A special rule of attribution applicable to the EU?

10. The EU has repeatedly invoked the existence of a special rule of attribution that would deviate from the general rule set out in Article 4 ASR. According to this special rule, the conduct of an organ of a Member State is to be attributed exclusively to the EU when the organ in question implements a binding act of the EU.[10] If one admits the existence of such a special rule of attribution, this would have a relevant impact on the question of the responsibility of an EU Member State for lack of compliance with the ECT. A Member State that remains a contracting party to the ECT could be exonerated from responsibility in relation to acts implementing binding EU acts by alleging that such conduct is to be attributed exclusively to the EU.
11. Article 64 ARIO recognises the possibility that the conditions for the existence of an internationally wrongful act "are governed by special rules of international law". In its commentary on Article 64, the ILC raised the question of the possible existence of a special rule of attribution which would be applicable to the EU. However, it did not take a position on the existence of such a rule.[11] It simply took note of the "variety of opinions" concerning the possible existence of such a special rule.
12. International practice does not offer clear indications about the existence of this special rule of attribution. The practice within the WTO appears to support the existence of such rule. In a number of cases, WTO panels accepted to attribute to the EU the conduct of Member State organs when they implemented binding acts of the EU.[12] The opposite approach has been taken in the case law of the European Court of Human Rights (ECtHR). In several decisions, the ECtHR moved from the assumption that the conduct of the organs of a Member State must be attributed to that State irrespective of whether such organs were implementing a binding decision of the EU.[13]

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[9] Art. 17(1) ARIO provides as follows: "An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization".

[10] See, for instance, UN doc. A/CN.4/556, p. 32. The position advocated by the EU has been aptly formulated in some scholarly writings. See, *inter alia*, F Hoffmeister, *Litigating Against the European Union and Its Member States: Who Responds Under the ILC's Draft Articles on International Responsibility of International Organizations?*, European Journal of International Law, 2010, p. 723; E Paasivirta and PJ Kuijper, *Does One Size Fit All? The European Community and the "Codification" of the Responsibility of International Organizations*, Netherlands Yearbook of International Law, 2005, p. 169.

[11] See P Palchetti, *The Allocation of International Responsibility in the Context of Investor-State Dispute Settlement Mechanisms Established by EU International Agreements*, European Business Law Review, 2017, p. 185.

[12] See A Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, CUP, 2016, p. 161 ff.

[13] See P Palchetti, *op. cit.*, p. 185.

13. In the absence of a clear practice supporting it, the invocation of a special rule of attribution applicable to the EU appears to provide a weak legal basis for exonerating a Member State from its international responsibility.
14. It must also be noted that the willingness to recognise the existence of this special rule of attribution is likely to be influenced by the particular context in which it is invoked. International courts or tribunals appear inclined to support the existence of such a rule when, as is the case under the WTO, both the EU and the Member States are bound by the treaty. In such circumstances, it may be irrelevant that Member States are not held responsible for their acts taken in execution of EU binding measures, provided that, with regard to such measures, the injured party can still invoke the responsibility of, and obtain reparation from, the EU. When, as in the case of the European Convention on Human Rights, only Member States, but not the EU, are bound by the treaty, a judge may be reluctant to exonerate the Member States from their responsibility, as shown by the case law of the ECtHR. The risk is that of a responsibility gap, which would be detrimental to the position of the injured party. Indeed, the injured party could not invoke the responsibility of the acting Member State because, according to the special rule of attribution, the conduct of that State, being aimed at implementing a binding act of the EU, is to be attributed exclusively to the EU. At the same time, it could not invoke the responsibility of the EU because the EU is not a party to the treaty.
15. It is clear that a risk of a responsibility gap would be present also within the ECT framework if the EU, but not the Member States, withdraws from this treaty. Under this scenario, if one recognises the existence of a special rule of attribution applicable to the EU and its Member States, an investor would remain without protection against a breach of the ECT committed by an EU Member State in order to implement binding acts of the EU. Indeed, the investor could not bring the claim against the EU since the EU would no longer be a party to the ECT. This responsibility gap would likely deter arbitral tribunals from supporting the existence of such a special rule of attribution.
16. Once it has been established that the existence under customary international law of a special rule of attribution applicable to the EU is controversial, it remains to be seen whether the ECT establishes a special regime for the allocation of responsibility between the EU and its Member States.

2. The rules of the Energy Charter Treaty as *lex specialis*?

17. A special treaty regime on the allocation of responsibility between the EU and its Member States is sometimes expressly devised. One obvious example is provided by the post-Lisbon investment agreements concluded by the EU, such as CETA and the like. These agreements, with only minor differences, all include mandatory rules that allow the EU to determine the respondent to an investment dispute unilaterally. The respondent so determined – either the EU or a Member State – automatically assumes international responsibility for breaches of the investment agreement in question, thus internalising all issues regarding attribution and responsibility and deactivating the general rules of international law on the matter.[14]
18. The ECT does not contain special rules regulating expressly the allocation of responsibility between the EU and its Member States. In providing the definition of "Regional Economic Integration Organisation", Article 1(3) of the ECT recognizes that such organisations have "the authority to take decisions binding on [Member States]" in respect of matters over which

[14] See L Pantaleo, *The Participation of the EU in International Dispute Settlement. Lessons from EU Investment Agreements*, Asser Press/Springer, 2019, p. 99-138.

the Member States have transferred their competences to the organisation.[15] In *Electrabel v. Hungary* the Arbitral Tribunal found that Article 1(3) provides support to the view that a Member State may be exonerated from its responsibility under the ECT when it acts in execution of a binding act of the EU.[16] In fact, it seems excessive to infer from this provision an indication about the possible allocation of responsibility between the EU and its Member States.

19. When adhering to the ECT, the EU submitted a statement to the Secretariat pursuant to Article 26(3)(b)(ii) of the ECT. According to this statement, the EU and the Member States are both "internationally responsible for the fulfilment of the obligations contained [in the ECT], in accordance with their respective competences".[17] The statement also provides that "the Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party".[18] By stressing that responsibility is allocated "in accordance with their respective competences", this statement appears to suggest that, when the Member State's role is simply that of implementing a binding act of the EU, liability should fall to the EU, and only the EU should act as a respondent party to arbitration proceedings. Yet, in the absence of a declaration of competence, such statement does not preclude an investor from invoking the Member State's responsibility. In the end, it will be for the arbitral tribunal to determine, by applying the relevant rules of attribution, who is to be held responsible for the conduct in question.
20. It is not here the place for an extensive analysis of the – indeed limited – case law of investment tribunals established under the ECT, which dealt with the question of the allocation of responsibility between the EU and its Member States. However, it might be appropriate to elaborate more on the two cases where such issue has been more clearly addressed, in order to show the solutions so far retained by investment tribunals.[19]
21. In *Electrabel v. Hungary,* a Belgian investor brought an investment claim under the ECT against Hungary. The dispute concerned the termination by Hungary of the so-called power purchase agreements (PPAs), which were found to constitute illegal state aid by a binding decision of the Commission addressed to the Member State in question.
22. In addressing the question of Hungary's responsibility for having implemented the decision of the Commission, the Arbitral Tribunal stated as follows: "Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary".[20]
23. As already observed, the Arbitral Tribunal based its finding on the – misplaced, in our view – application by analogy of the rule of attribution provided by Article 6 ASR, and not on the existence of a special rule of attribution applicable to the EU. Whatever the legal justification provided by the Tribunal, this decision provides support to the long-standing claim of the EU,

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[15] Article 1(3) ECT states that Regional Economic Integration Organisation means "an organisation 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".

[16] See *Electrabel S.A. v. Republic of Hungary*, cit. para. 4.142: "the possible interference with a foreign investment through the implementation by an EU Member State of a legally binding decision of the European Commission was and remains inherent in the framework of the ECT itself."

[17] See 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.

[18] Ibid.

[19] But see also, although only indirectly, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, p. 10.3.15.

[20] See *Electrabel S.A. v. Republic of Hungary*, cit. para 6.72 (emphasis added).

according to which, for the purpose of international responsibility, acts taken by a Member State in execution of a binding obligation under EU law must be attributed to the EU, and not to the Member State.

24. At the same time, while recognizing that Hungary could not be held responsible, the Arbitral Tribunal emphasised that this conclusion did not deprive the investor of the protection granted to it under the ECT. The investor remained free to bring the case against the EU. The link between these two situations comes out clearly from the Tribunal's reasoning. After having observed that "the ECT does not protect the Claimant, as against the Respondent, from the enforcement by the Respondent of a binding decision of the European Commission under EU law", the Tribunal immediately added that "[t]his analysis leaves open the responsibility of the European Union under the ECT for decisions of the European Commission which violate the rights of investors under the ECT".[21]
25. The decision in *Electrabel* confirms the uncertainties surrounding the question of the allocation of responsibility between the EU and its Member States. While it brings clear support to the existence of a special rule exonerating Member States for the responsibility deriving from acts implementing EU binding measures,[22] this decision is based on the assumption that the application of such rule is neutral as far as the interests of the investor are concerned, since the investor can always obtain the protection of its rights by bringing the case against the EU. It is clear that if the EU withdraws from the ECT, this possibility will no longer be available. This would likely become a factor that investment tribunals will consider when assessing whether to follow this precedent. In this respect, it can be observed that, when only the Member State, but not the EU, is party to an investment treaty, arbitral tribunals have refrained from accepting arguments to the effect that the conduct of a Member State would not give rise to international responsibility for breach of the treaty if that conduct was required by EU law. A relevant precedent to that effect is provided by the award rendered in *Micula v Romania*.[23]
26. The other case is the recent *Nord Stream 2 v. European Union* dispute, the first-ever arbitration claim initiated against the EU. In this high-profile claim, a Swiss investor controlled by Russian energy giant Gazprom brought proceedings against the EU, claiming that Directive 2019/692 violated its rights under the ECT. The dispute is currently in limbo due to Nord Stream 2's inability to pursue arbitration.[24]
27. This case raises the problem of determining the extent to which the EU can be regarded to be responsible for the conduct of its Member States in execution of EU acts. The EU maintained that the Member State concerned by the Nord Stream 2 investment, namely Germany, had a wide margin of discretion in implementing the relevant Directive. According to the EU, the breach of the ECT could only stem from Germany's (discretionary) measures and would be attributable solely to that Member State.[25] In its response to the EU's submissions, the investor argued that, in reality, Germany had no discretion in the implementation of the specific provision of the Directive that resulted in the breach of its rights under the ECT. Therefore, only the EU could be held responsible for that directive.
28. The *Nord Stream 2* case reveals the practical difficulties that may arise in determining which subject must be held responsible regarding the implementation of an act of the EU. The parties agree on the principle that the EU can be held responsible only to the extent that the Member

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[21] Ibid., paras 4.169-4.170.

[22] See also the considerations made by A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control*, CUP, 2016, p. 201 ff.

[23] See *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20 (final award of 11 December 2013), para. 297.

[24] See *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07 (Procedural Order No. 10 of 27 October 2022), p. 20 ff.

[25] See *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07 (Respondent Memorial on Jurisdiction and Request for Bifurcation of 15 September 2020), p. 197.

State is strictly required to follow a certain conduct, while the State remains responsible for acts falling within its discretion. Their disagreement is over the interpretation of the relevant EU act, and in particular whether the Directive at issue leaves broad discretion to the implementing State or not. Under this circumstance, it will be for the arbitral tribunal to interpret the Directive in order to establish whether the implementing acts fall within the discretion of the State or are required under EU law.

29. This case confirms that, even in the EU's views, a special rule of attribution would in any case not cover acts that the Member States have adopted to implement EU measures where they had a margin of discretion as to the course of conduct to be taken for the implementation.

3. Conclusions and Recommendations

30. Under the law of international responsibility, a State is responsible for the conduct of its organs irrespective of whether that organ was acting in order to implement a binding measure of an organisation of which that State is member. Applying the general rules of international responsibility to the question of the allocation of responsibility between the EU and its Member States, this entails that *a Member State remains responsible for the conduct of its organs in breach of the ECT, even when this conduct was dictated by a binding act of the EU*.
31. International practice and case law, including from investment tribunals, provide a few precedents supporting the existence of a special rule of attribution to the effect that the conduct of a Member State implementing a binding act of the EU must be attributed exclusively to the EU. Yet, the existence of such a rule is far from being generally recognised. In the absence of an unambiguous practice supporting it, the invocation of a special rule of attribution applicable to the EU *does not appear to provide a strong legal basis for exonerating a Member State from its international responsibility in case of a breach of the ECT dictated by the need to implement a binding act of the EU*.
32. Moreover, even in those cases in which it had been applied, the acceptance of this special rule was generally based on the premise that both the Member States and the EU were parties to the relevant treaty so that there was always a party that was potentially responsible. This avoided the risk of any responsibility gap to the detriment of the injured party. If the EU, but not the Member States, withdraws from the ECT, a problem of responsibility gap would inevitably arise. *This may likely become a factor that investment tribunals will take into account when considering whether to exonerate a Member State from responsibility for acts taken in order to implement binding EU measures*.
33. Based on what precedes, it seems reasonable to affirm that, should the EU withdraw from the ECT, the Member States remaining in the ECT may face a situation whereby investors, as well as arbitral tribunals, will have valid arguments to rely on the general rules of international responsibility in order to support the conclusion that the remaining Member States are responsible for breach of the ECT even if the relevant conduct was dictated by the need to implement binding decisions of the EU.
34. Under these circumstance, the risk of incurring into international responsibility for implementing acts of the EU is a factor that Member States should take into account when considering whether to remain parties to the ECT after the withdrawal of the EU. In particular, the existence of such risk appears to be a relevant factor for supporting the Commission's proposal for a coordinated withdrawal from the ECT.[26]

[26] Recently, the Commission has tabled an official proposal in that direction. See Proposal for a Council decision on the Union withdrawal from the Energy Charter Treaty COM(2023) 447 final of 7 July 2023, available here.