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Intra-EU arbitration under the Energy Charter Treaty

The European Union competence in Foreign Direct
Investment: fundamental change for intra-EU
energy arbitration?

Mémoire de stage - Association for International Arbitration

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Introduction

The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a “unique instrument for the promotion and cooperation in the energy sector (...) which provides an important legal basis for the creation of an open international energy market”.¹ Following an initiative by the Dutch Prime Minister at the European Council in Dublin in 1990, the European Community and its Member States pushed for an East/West understanding in the energy sector. These efforts culminated in the adoption of a political declaration (the Energy Charter of 1991) and in the negotiation of a multilateral treaty (the Energy Charter Treaty of 1994). Moreover, the Contracting Parties adopted the International Energy Charter on 21 May 2015, a non-binding political declaration seeking to strengthen regional cooperation in the energy market. As a primary sponsor of the Energy Charter Treaty, the European Communities became a party along with its member States.² However, the implementation of the ECT may spark controversy as it provides for provisional application pending ratification.³ Provisional application may have prompted Russia to make public its intention to never ratify the ECT after the *Yukos Universal v. Russian Federation* Award.⁴ Such decision to withdraw from the ECT was recently followed by Italy, although this was motivated by financial reasons.⁵ Yet, the ECT remains an essential multilateral investment agreement in the energy sector, as dispute settlement under its article 26 (1) soared since 2013. Indeed, 73 arbitration cases are registered at the Secretariat, the latest one rendered in March 2015.⁶ Moreover, Yemen, Lebanon and Montenegro have signed the ECT and Afghanistan ratified it recently, thus proving the ECT’s attractiveness.⁷ Consequently, the

¹ R. Kemper, Secretary General of the Energy Charter Secretariat, September 2004, *Foreword*, in *The Energy Charter Treaty and Related Documents: a legal Framework for International Energy Cooperation*, Energy Charter Secretariat Publication, (2004), at 3.

² Council and Commission, Decision 98/181/EC, Official Journal 1998, Doc No. L69/1

³ Article 45, Energy Charter Treaty

⁴ “On 20 August 2009 the Russian Federation has officially informed the Depository that it did not intend to become a Contracting Party to the Energy Charter Treaty (...). In accordance with Article 45(3(a)) of the Energy Charter Treaty, such notification results in Russia's termination of its provisional application of the ECT (...) upon expiration of 60 calendar days from the date on which the notification is received by the Depository » - ECT Secretariat, accessible at: <http://www.encharter.org/index.php?id=414>

⁵ L. E. Peterson, *Italy Follows Russia in Withdrawing from Energy Charter Treaty, but for Surprising Reason*, International Arbitration Reporter, 17 April 2015, accessible at: http://www.iareporter.com/articles/20150417_1

⁶ *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015; see also Annex 1

⁷ R. Happ, *The Energy Charter Treaty*, in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.),

ECT strengthens the rule of law on energy issues by creating a level playing field of rules to be observed by participating governments, thus minimising the risks associated with energy-related investment and trade.⁸ As a Multilateral Investment Agreement, it provides for similar substantive guarantees for investors than those of Bilateral Investment Treaties (BITs).⁹ Moreover, the ECT is a “mixed agreement” under European Union (EU) law, which renders its provisions binding on all EU member states individually, between each other and on the EU itself.¹⁰ This means that Member States must insure the effective implementation of such agreements and will assume responsibility otherwise.¹¹ Moreover, the EU agreed to the ECT’s arbitration mechanism in 1994, stating that it may act as respondent in individual claims raised by investors, and that it would establish the appropriate respondent after a request for arbitration had been received.¹²

EU Developments

The EU acquired legal personality with the Lisbon Treaty and therefore succeeded to the European Communities as a party to the ECT.¹³ The EU shares its competence in the energy sector with Member States,¹⁴ although the Common Commercial Policy (CCP) is now extended.¹⁵ Foreign Direct Investment (FDI) has been added to the scope of the CCP by article 207 TFEU, which is now an exclusive competence of the Union.¹⁶ In accordance with article 2 (1) TFEU, exclusive competence means that “only the Union may legislate and adopt legally binding acts [in such areas], the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts”.¹⁷ Article 351 TFEU

International Investment Law: a Handbook, Hart Publishing, 2015, at 260, para 64

⁸ *The Energy Charter and Related Documents*, supra n1, at 14

⁹ Fair and Equitable Treatment and Umbrella clause, article 10(1)-10(12), National Treatment and Most-Favoured Nation clause, article 10 (3) and 10(7)

¹⁰ C. Baltag, *The Energy Charter Treaty: the Notion of Investor*, Kluwer Law International, 2012, at 60

¹¹ *Haegemann v. Belgian State*, Case C-181/73, Judgment of 30 April 1974; *Commission v. France*, Case C-239/03, 7 October 2004, para 26

¹² Statement of the European Communities to the Secretariat of the Energy Charter pursuant to Article 26 (3) (b) (ii) of the Energy Charter Treaty, Statement sent by Council and Commission on 17/11/97, accessible at: http://www.encharter.org/fileadmin/user_upload/document/Annex_ID.pdf

¹³ Article 1(3) and 47 of the Treaty of the European Union (hereinafter TEU); see also: C. Baltag, *The Energy Charter Treaty: the Notion of Investor*, supra n10, at 59

¹⁴ Article 4 (2) (i), Treaty on the Functioning of the European Union (hereinafter TFEU)

¹⁵ Article 3 (1) e) and 207(1), TFEU

¹⁶ C. Brown and I. Naglis, *Dispute Settlement in Future EU agreements*, in M. Bungenberg, A. Reinisch, C. Tietje (eds.), *the EU and Investment Agreements: Open Questions and Remaining Challenges*, Hart Publishing, Studies in International Law, vol. 7, 2013 at 21

¹⁷ S. W. Schill, *Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU*

further provides that in case of incompatibility between previous agreements and the new competences of the EU, Member States “shall take all appropriate steps to eliminate the incompatibilities established”. This article protects the new competences of the EU and raises problematic issues regarding the application of intra-EU BITs (as investment agreements binding Member States *inter se*). The European Commission called for termination of these intra-EU BITs in application of this article. In 2009, the European Court of Justice (ECJ) famously held three States in violation of their obligation to “cooperate loyally” under article 4 (3) of the Treaty on the European Union (TEU) as they were refusing to renegotiate their intra-EU BITs.¹⁸ On 18 June 2015, the European Commission also initiated infringement proceedings against five EU Member States in relation with intra-EU disputes (the Netherlands, Slovakia, Austria, Sweden and Romania)¹⁹ in order to react with intra-EU arbitrations involving these States.²⁰ The EU also adopted the ‘Grandfathering’ Regulation, intended to establish a homogeneous framework regarding extra-EU Bilateral Investment Treaties (BITs) to homogenize the European investment framework.²¹

The ECJ considered that, theoretically, “where an international agreement provides for its own system of courts, including a court with jurisdiction to settle dispute between the Contracting Parties to the agreement, (...) the decisions of that Court will be binding on Community institutions, including the Court of Justice (...). *An international agreement providing for such a system of courts is in principle compatible with Community law*”.²² The ECJ is the only competent jurisdiction to stand on claims related to EU law,²³ and it can easily be foreseen that the EU Commission is not about to stand passively regarding intra-EU Arbitral awards, as intra-EU arbitration would remove the exclusivity of the ECJ’s jurisdiction over Member States. Indeed, the ECJ has already held that Arbitral tribunals do

Investment Agreements, in M. Bungenberg, A. Reinisch and C. Tietje (eds.), *the EU and Investment Agreements: Open Questions and Remaining Challenges*, *ibid*, at 40

¹⁸ ECJ Case C-205/06 (*Commission v. Austria*), 2009, ECR I-1301; C-249/06 (*Commission v. Sweden*), 2009, ECR I-1335; C-118/07 (*Commission v. Finland*), 2009, ECR I-1301

¹⁹ Press Release, *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, Brussels, 18 June 2015, accessible at http://europa.eu/rapid/press-release_IP-15-5198_en.htm

²⁰ *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award, 7 December 2012; *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, PCA CASE No. 2010-17, 22 October 2012 (Austria/Slovakia BIT).

²¹ Regulation (EU) 1219/2012 of 12 December 2012

²² CJEU, 14 December 1992, *Opinion 1/91 – European Economic Area I*, ECR 1991, I-6079, para 39

²³ Articles 267 and 344, TFEU

not actually constitute ‘ordinary’ courts in the sense of article 267 TFEU.²⁴ In the same case, the ECJ also considered that Arbitral Awards that do not comply with EU law should not be executed within EU member states without proper examination of their consistency with EU law.²⁵ Such a situation is likely to occur for Germany for the ECT case opposing it to *Vattenfall*, a Swedish energy company. Indeed, the EU Commission made public that it will engage proceedings against the German government for lowering down environmental requirements that were binding under EU law.²⁶ There, the enforcement of the ECT Award by Germany would violate EU law, thus triggering infringement proceedings before the ECJ. Thus, implementation of ECT Awards may violate EU law and *vice-versa*.

Energy Charter Treaty Dispute Settlement Mechanisms

The Energy Charter Treaty provides several dispute resolution mechanisms. Article 27 provides for State/State dispute settlement on disputes arising under the ECT, except related to competition and environmental concerns. Most importantly, article 26 (1) covers disputes “*between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concerns an alleged breach of an obligation of the former under Part III [that regulates investment protection and promotion]*”.²⁷

Article 26 provides for a ‘cooling off period’, which means that the investor cannot submit a dispute for resolution until three months have elapsed from the date on which either party has requested amicable settlement.²⁸ Then, the investor can submit its unresolved dispute to one of the mechanisms provided for in article 26 (2) (a-c), which provide for resolution in a national court or administrative tribunal of the contracting party where the investment was made, in accordance with a previously agreed dispute settlement procedure or resolution by international arbitration. Investors can choose the following forms of international arbitration, as provided by article 26(4):

²⁴ *Eco Swiss v. Benetton*, ECJ, 1 June 1999, Case C-129/97, ECR I-3055, para 34

²⁵ *Ibid.*

²⁶ J. Hepburn, *European Commission to pursue Germany under EU law for failing to enforce environmental laws at Vattenfall power plant*, Investment Arbitration Reporter, 31 March 2015, accessible at: http://www.iareporter.com/articles/20150331_1

²⁷ Article 26(1)

²⁸ K. Hobér, *Investment Arbitration and the Energy Charter Treaty*, Journal of International Dispute Settlement, Vol. 1 No. 1 (2010) pp. 153-190, at 162

(a) i) *The International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (ICSID Convention), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention;*

(ii) *The ICSID, established pursuant to the ICSID Convention under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;*

(b) *a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or*

(c) *an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules)*

Moreover, each contracting party to the ECT gives its ‘unconditional consent’ to the provisions of article 26 (4).²⁹ Thus, a State cannot withdraw its consent to the dispute settlement mechanisms, even if it withdraws from the ECT. Indeed, article 47 (3) provides that if a State withdraws from the ECT, it is bound to honour its investment protection obligations for a period of 20 years following the effective date of its withdrawal. Finally, almost half of the ECT’s Contracting Parties have contracted a ‘fork in the road’ clause, which provides that if the investor has submitted its dispute to the national courts of the host state, it cannot submit the same dispute to international arbitration.³⁰ This thesis will only focus on the intra-EU situation of ECT arbitration, as it presents interesting grounds for analysis in light of the new investment competence of the European Union. *Thus, is intra-EU arbitration under the Energy Charter Treaty compatible, and to what extent, with European Union law and novel competences of the Union in foreign direct investment?*

Firstly, an analysis of the legal compatibility between the ECT and EU law will be provided, emphasizing on the fact that the ECT enjoys primacy in Arbitral proceedings despite the embedded character of EU law (I). Secondly, an assessment of the conflict between ECT Awards and the investment competence of the Union will be performed, highlighting the difficulty for enforcement of Awards as a result (II).

²⁹ Article 26 (3) a), Energy Charter Treaty

³⁰ Article 26 (3) b), Energy Charter Treaty

I. Normative conflicts in international law and the coexistence of discordant regimes toward application of the ECT in intra-EU arbitration cases

Firstly, it appears necessary to underline that ECT Arbitral tribunals differ in their application of EU law for their proceedings, considering it either as a tool for interpretation or as a mere fact (B) while general international law does not provide for effective provisions in terms of normative conflicts contrary to EU law that provides for its own primacy (A).

A. Conflicts of law under public international law and the EU legal system

Normative conflicts can be illustrated through an overlap of competent dispute settlement mechanisms that interpret and apply their own norms on specific difficulties by discarding other existing norms.³¹ On one hand, EU member states must comply with their international obligations only insofar as they are not incompatible with those contained in the European Treaties.³² On the other hand, the ECT has established a specific ‘self-contained regime’ of international law, independent from other regimes and providing for specific obligations. In cases where conflicts arise between these regimes, international law generally provides for coexistence, whereas EU law steadily sustains its primacy albeit binding only the EU legal system itself.

i) Normative conflicts under public international law

In accordance with the Vienna Convention on the Law of Treaties (hereinafter VCLT), the only obligations that can supersede others are jus cogens norms.³³ Therefore, EU Member States should not have to abide to EU law in priority over ECT obligations under international law. However, article 30 of the VCLT concerns normative conflicts regarding successive treaties and provides that if the treaties relate to the same subject matter, the later treaty prevails.³⁴ In turn, article 59 of the VCLT specifically provides that termination of the earlier treaty may arise if the conflicting treaties cover the same subject matter and “*the provisions of*

³¹ D. Pulkowski, *The Law and Politics of International Regime Conflicts*, Cambridge University Press, 2014, at 197

³² Article 351(2), TFEU

³³ Article 53, Vienna Convention on the Law of Treaties

³⁴ Article 30 (2), VCLT

the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time".³⁵ Moreover, the International Court of Justice considered that it is a generally recognised principle that parties to a multilateral treaty are entitled not to conclude an agreement that frustrates or impairs the *raison d'être* of a prior agreement.³⁶ Thus, the EU or its Member States could not frustrate either the ECT, either the EU Treaties, whichever they were party to first. Article 30 of the VCLT cannot apply to resolve conflicts here, as it is rather unclear for some Member States which treaty is earlier and which is later. For Croatia that acceded to the EU in 2013, the ECT is the prior treaty whereas for Belgium EU obligations have precedence. In any case, the content of multilateral treaties evolve through interpretation and application of their norms as well as by accession of new States, thus rendering the *lex posterior* principle moot to resolve normative conflicts between multilateral treaties.³⁷

Moreover, article 59 of the VCLT would terminate intra-EU BITs only if the posterior European Treaty covered the same subject matter to a degree that the two treaties are not capable of being applied at the same time.³⁸ This is clearly not the case with the ECT and EU law, as the European Commission itself recognised in an intra-EU proceeding.³⁹ In *Eastern Sugar B.V v. Czech Republic*, an intra-EU case, the Arbitral tribunal radically rejected the European Commission's view that EU law automatically terminates intra-EU BITs by application of article 59 of the VCLT. Indeed, the tribunal considered that it did not cover the same 'subject matter' as BITs provide investors with the possibility to sue host states whereas EU law does not.⁴⁰ This was recently confirmed in another intra-EU UNCITRAL arbitration.⁴¹ Such rationale also applies to the ECT, as even if it consists in a multilateral

³⁵ Article 59 (1) b), VCLT

³⁶ ICJ, *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, ICJ Rep. 15

³⁷ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO law relates to Other Rules of International Law*, Cambridge University Press, 2003, at 378; J. Klabbers, *Treaty Conflicts and the European Union*, Cambridge University Press, 2009, at 87-89

³⁸ J. Kleinheisterkamp, *The Next Ten Year ECT Investment Arbitration: a Vision for the Future from an European Perspective*, Report for the SCC / ECT / ICSID Conference on "10 years of Energy Charter Treaty Arbitration", 9 and 10 June 2011 at 9

³⁹ *Eureko B.V v. the Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, UNCITRAL, PCA Case No. 2008-13, 26 October 2010, para 192

⁴⁰ *Eastern Sugar B.V.(Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para 180

⁴¹ J. Hepburn, *In Hitherto Unpublished Ruling, Greenwood/Stern Tribunal Reject Plea that Intra-EU BIT was implicitly terminated under the VCLT due to EU accession*, 2 April 2015, Investment Arbitration Reporter, available at: <http://www.iareporter.com/articles/in-hitherto-unpublished-ruling-greenwoodstern-tribunal-reject-plea-that-intra-eu-bit-was-implicitly-terminated-under-vclt-due-to-eu->

treaty, it provides for higher protection to investors than EU treaties do. Consequently, particular emphasis should be drawn to article 16 of the ECT, which provides that: “*where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern [investment protected by the ECT]: 1. Nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; 2. Nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favorable to the investor or investment*” (emphasis added). Such article works as a conflict clause discarding application of article 30 of the VCLT regarding the *lex posterior* principle. Indeed, parties thereby agreed on the precedence to be given to particular obligations to ensure the most favorable treatment and dispute resolution mechanisms to investors. The ECT standards override those provided by EU law and article 16 ECT implies that EU law is complemented by the ECT but does not supersede it.⁴² EU advocates may however argue that EU law has priority over the ECT as it now governs the same competence regarding investments.⁴³ Moreover, the ECJ adopted a rather broad view regarding the EU’s investment competence.⁴⁴ However, the fact that FDI is not clearly defined cannot encompass implicit abrogation of Member States’ consent to the Energy Charter Treaty dispute settlement mechanisms under the *lex specialis* principle.⁴⁵ The *lex specialis* rule may therefore act as a guideline when conflicting obligations arise, although it is generally agreed that such rule is politically motivated rather than legally sound.⁴⁶ Consequently, such principle cannot solve the normative conflict between the ECT and EU obligations. Thus, it appears that EU law does not preclude ECT arbitration under international law, as both systems are independent of each other.

[accession/](#)

⁴² T. W. Wälde, W. Ben Hamida, *The Applicability of the ECT to the Relations between EC member states*, in G. Coop, C. Ribeiro (eds.), *Investment Protection and the Energy Charter Treaty*, Jurisnet LLC, 2008, at 212

⁴³ C. Söderlund, *The Future of the Energy Charter Treaty in the Context of the Lisbon Treaty*, in G. Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, Jurisnet LLC, 2011, at 104

⁴⁴ ECJ, C-112/05, *Commission v. Germany*, [2007] ECR I-8995, §18; ECJ, C-446/04, *Test Claimants in the FII Group Litigation*, [2006] ECR I-11753, para 181-182

⁴⁵ P. Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment*, Hart Publishing, 2014, at 180 et seq.

⁴⁶ A. A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Kluwer Law International, 2015, at 68

ii) *Intra-EU arbitration EU law in light of article 207 TFEU*

According to the European Commission, intra-EU BITs amount to no less than an “anomaly within the internal market”.⁴⁷ As for the entry into force of the Lisbon Treaty, the European Union has sought to harmonize Member States’ legislations by adopting article 351 of the TFEU, which provides that: “[1]. The rights and obligations arising from agreements concluded [before accession to the Union] shall not be affected (...) [2]. [If] ***such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established***”.

The relation between this article and the ECT is rather complicated, in part because the latter is a mixed agreement under EU law, but also because the accession to the EU was not always prior to the ratification of the ECT. Mixed agreements such as the ECT often contain a "disconnection clause", which aims to ensure that the agreement does not apply in an intra-EU context, where it could conflict with EU law. Thus, by introducing a disconnection clause in a mixed agreement, the EU and its Member States declare that in the relations between Member States and in "internal" EU matters, the agreement does not apply.⁴⁸ As there is no provision regarding a disconnection clause in the ECT, it can be considered as binding EU Member States in their relation *inter se*.

In 2011, the European Commission brought an infringement claim before the ECJ against Slovakia claiming violation of a 2003 Directive related to the internal market in electricity.⁴⁹ Slovakia counterclaimed that the favourable treatment it offered a Swiss investor was a foreign investment obligation provided by both the ECT and the Swiss/Slovakia BIT.⁵⁰ Indeed, Slovakia had discarded its obligation to provide non-discriminatory treatment to EU nationals specified in the Directive in order to accord it to the Swiss investor. Slovakia further argued that since the EU was a party to the ECT, the ECT is an integral part of EU law.⁵¹ Thus, if the Court was to interpret the Directive contrarily to the ECT, it would violate

⁴⁷ *Eureko B.V v. the Slovak Republic*, supra n39, para 177

⁴⁸ *Expert Opinion Of Professor Piet Eeckhout Regarding The Law Applicable To The Dispute Under The Energy Charter Treaty 1994*, In the Matter of an Arbitration before the International Centre For The Settlement of Investment Disputes, ICSID Case No. ARB/07/22, 30 October 2008, at 24

⁴⁹ ECJ, *Commission v. Slovakia*, Judgment of the Court (First Chamber), 15 September 2011, Case C-264/09

⁵⁰ *Ibid*, para 20-24

⁵¹ *Ibid*, para 21

investor's standards of protection regarding fair and equitable treatment, expropriation and the umbrella clause that are all protected by article 10 and 13 of the ECT. Thus, it would breach the Union's obligations if the Directive was to be interpreted in violation of the ECT. In that specific case however, there was margin of appreciation to allow compatibility of the Directive and the ECT, which enabled the Court to avoid standing on this specific problem as it chose to only assess the compatibility between Slovakia's BIT and the Directive.⁵² However, several claims have recently been brought against Spain under the ECT with regard to its revocation of beneficial tariffs on solar panels. Thus, the ECJ may have other occasions to clarify things up regarding the situation of mixed agreements.

Paradoxically, Slovakia had claimed in the *Eureko* arbitration that its accession to the EU had replaced the Netherlands/Slovakia BIT. The European Commission had sustained Slovakia's claim, and stood against the "outsourcing of disputes involving EU law" to Arbitral tribunals.⁵³ However, the tribunal rejected this position by considering EU law supremacy as an nothing less than an 'inner EU problem'.⁵⁴ The *Eureko* tribunal also held that the Lisbon Treaty did not provide a similar protection than BITs and that consequently EU law could not affect the arbitration proceedings.⁵⁵ Such finding was later confirmed, emphasizing the fact that the subject matter of the Lisbon Treaty was not comparable with BIT protection.⁵⁶ Several intra-EU arbitration cases have been decided where the question of the application of EU law was raised when States justify their BIT violations by invoking EU requirements, agreeing on the exclusive competence of the ECJ. Interestingly, Arbitral tribunals seem to agree that EU law must be taken into account in their proceedings as intra-EU BITs need to be interpreted in their normative context. In *Micula v. Romania*, the claimants argued that they suffered lower value on their investments as a result of Romanian new policies that it adopted in application of EU requirements.⁵⁷ Romania claimed that EU law prevails in case of conflict with BIT provisions, while the European Commission intervened as *amicus curiae* to

⁵² C. Liebscher, *BITs and EU Law: the Next Round – A Comment on European Commission v. the Slovak Republic*, in P. Wautelet, T. Kruger, G. Coppens (eds.), *The Practice of Arbitration, Essays in Honour of Hans van Houtte*, Hart Publishers, 2012, at 258

⁵³ *Eureko B.V v. the Slovak Republic*, supra n39, para 184

⁵⁴ J. Kleinheisterkamp, *The Next Ten Year ECT Investment Arbitration: a Vision for the Future from an European Perspective*, supra n38, at 9

⁵⁵ *Eureko B.V v. the Slovak Republic*, supra n39, para 162 and 176

⁵⁶ *Jan Oostergetel and Theodora Laurentius v. the Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, para 74-77

⁵⁷ *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008

submit that the interpretation of the relevant BIT had to take into account the European context.⁵⁸ The ICSID tribunal actually took into account the Commission's provisions as it gave consideration to EU obligations, although it upheld that Romania violated the applicable BIT.⁵⁹

The ECJ reminded that its own legal system prevailed over other norms of general international law, even stemming from the United Nations framework.⁶⁰ Indeed, the only limit settled by EU law regarding conflicts with prior treaties has been elaborated in *Kadi v. Commission* regarding implementation of article 351 TFEU. The ECJ considered that it cannot authorize any derogation from the principles of fundamental freedoms which are a foundation of the EU.⁶¹ Therefore, EU law will prevail in cases of conflicts with other international agreements if the latter violates fundamental principles of the EU. However, investment arbitration or investment protection under the ECT does not contradict such principles, nor can it apply to state-aid.⁶² It is true that the ECT carves out a certain sphere of matters from the supervision and influence of the EU system of judicial control otherwise exercised by the institutions of the EU.⁶³ However, this does not mean that the autonomous or supranational order of the EU affects the implementation of ECT dispute settlement provisions. Indeed, the ECT obeys to an independent framework even if EU Member States could be sued for infringement proceedings if they violate EU law implementing the ECT. However, this does not seem to affect the legality of Arbitral tribunals established under the ECT as they *prima facie* do not have to abide to EU law or standards.

B. ECT primacy and the issue of applicable law in arbitral proceedings

The place to be given to EU law in intra-EU ECT arbitration is unfortunately not uniform. Indeed, there is no real system of precedent in investment arbitration although Arbitral tribunals will 're-use' concepts and notions already elaborated in prior arbitration

⁵⁸ *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para 316-317

⁵⁹ *Ibid*, para 1329(b)

⁶⁰ ECJ, Joined Cases C-402/05P and 6415/05P, *Kadi and Al-Barakaat v. Council and Commission*, judgment of 3 September 2008

⁶¹ *Ibid*, para 285

⁶² *Expert Opinion Of Professor Piet Eeckhout*, supra n49, at 35-36

⁶³ C. Söderlund, *The Future of the Energy Charter Treaty in the context of the Lisbon Treaty*, supra n43, at 103

proceedings. There is disagreement whether EU law should be considered as applicable law in ECT arbitration proceedings or as a mere guide to interpretation. Article 31 (3) of the VCLT provides that “*there shall be taken into account, together with the context, c) any relevant rules of international law applicable in the relations between the parties*”, which would apply to Member States’ relations *inter se*. Moreover, article 26 (6) ECT provides that “*a tribunal established under paragraph (4) [i.e. under the ICSID Convention, ICSID Additional Rules, UNCITRAL Rules or SCC Rules] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*” (emphasis added). Article 26 (4) of the ECT provides for three forum for international arbitration: ICSID arbitration (and ICSID Additional Facility Rules), an ad hoc tribunal under UNCITRAL Rules and arbitral proceedings under the SCC Rules. Evaluation of these practices appears necessary to assess the importance and applicability of EU law in intra-EU ECT proceedings.

i) ECT arbitration under ICSID and ICSID Additional Facility Rules

Article 42 (1) of the ICSID Convention provides that: “*the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply (...) such rules of international law as may be applicable*” (emphasis added). Therefore, the ICSID Convention does not offer any help regarding conflicts that may arise between multilateral treaties or BITs and other applicable agreements. Consequently, Article 26 (6) ECT constitutes the rules agreed by the parties under article 42 (1) of the ICSID Convention. Similar provision is stipulated by the ICSID Additional Facility Rules on Arbitration in its article 52 (1), which provides that “*the Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute (...)*”. The majority of ECT arbitration, intra-EU as well extra-EU, takes place under the ICSID Convention. Thus, several arbitration cases had to determine the applicable law for ECT proceedings, hence circumscribing the place to be given to EU law.

In *AES v. Hungary*, the ECT tribunal had to deal with a similar situation than in the *Micula v. Romania* case.⁶⁴ Here again, the European Commission submitted an *amicus curiae* brief demanding that the ICSID tribunal denies its jurisdiction.⁶⁵ Interestingly, the Commission

⁶⁴ *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Final Award, 23 September 2010

⁶⁵ *Ibid*, para 3.22; European Commission, Written Submission pursuant to article 37 (2) of the ICSID Arbitration rules of 15 January 2009, in the case ARB/07/22, *AES v. Hungary*.

submitted that there is a rebuttable presumption that if State's measures are in accordance with EU law, they cannot be in breach of the ECT.⁶⁶ In that case, the ICSID tribunal rejected such request, albeit considering EU law applicable in the arbitral proceedings as a relevant fact.⁶⁷ Thus, it took into account EU law to assess the arbitrariness of Hungary's conduct and evaluate "whether Hungary was, may have been or may have felt obliged under [EU] law to act as it did".⁶⁸ An expert opinion in *AES v. Hungary* reveals that the absence of a disconnection clause in the ECT clearly aims at establishing *inter se* relations between EU member States.⁶⁹ The tribunal confirmed that unless provided otherwise in the ECT, EU law should be construed as a mere fact or evidence in ECT arbitration cases but should not be considered as applicable "rules and principles of international law" as intended in article 26 (6) of the ECT.⁷⁰ However, such case is of great interest regarding the mixed character of EU law for intra-EU ECT arbitration.⁷¹ Indeed, the tribunal further clarified that EU law applies as municipal law, as, "once introduced in the national legal orders, it is part of these legal orders".⁷² The Arbitral tribunal therefore used the EU's own arguments on judicial autonomy against them.⁷³ Thus, the first approach regarding EU law application in ECT arbitration proceedings is that it does not affect ECT provisions, as it appears logical to consider that EU law is tantamount to national law in intra-EU arbitration. Moreover, EU law can also be used as national law in order to establish a violation of the ECT. As the tribunal "may only decide the issues in dispute in accordance with the applicable rules and principles of international law", it cannot take EU law into account on other levels.⁷⁴ Consequently, if EU law is a mere fact in ECT arbitration, Arbitral tribunals can only assess the legality of a national measure (albeit in application of EU law) in relation with the ECT.⁷⁵

⁶⁶ F. Hoffmeister and G. Ünüvar, *From BITs and Pieces toward European Investment Agreements*, in M. Bungenberg, A. Reinisch, C. Tietje (eds.), *the EU and Investment Agreements: Open Questions and Remaining Challenges*, supra n16, at 60

⁶⁷ *AES v. Hungary*, supra n64, para 7.6.6

⁶⁸ *Ibid*, para 7.6.19

⁶⁹ *Expert Opinion Of Professor Piet Eeckhout*, supra n49, at 24

⁷⁰ *AES v. Hungary*, supra n65, para 7.6.6

⁷¹ R. Happ and J. A. Bischoff, *Role and Responsibility of the European Union under the Energy Charter Treaty*, in G. Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, supra n43, at 160

⁷² *AES v. Hungary*, supra n65, para 7.6.6

⁷³ ECJ, *Flaminio Costa v. E.N.E.L.*, Judgment of July 15 1964, Case 6/64, ECR 1964, at 585; *Parti Ecologiste "Les Verts" v. European Parliament*, Judgment of April 23 1986, Case 294/83, ECR 1986, at 1339 para 23.

⁷⁴ *Ioannis Kardassopoulos v. the Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para 145-146

⁷⁵ R. Happ and J. A. Bischoff, *Role and Responsibility of the European Union under the Energy*

The second view is to take EU law into account when deciding an intra-EU ECT arbitration. In *Electrabel v. Hungary*, Hungary's breach of the ECT had its source in a EU Commission decision of 2008 aiming at eliminating state-aid as an anti-competitive practice, which triggered the termination of the contract between Hungary and the Belgian electricity provider.⁷⁶ The ICSID tribunal used EU law and interpreted it as superseding the ECT, even considering that EU secondary law (such as regulations and directives) enjoy the same status as EU treaties as they stem from their application.⁷⁷ It also indicated that article 351 of the TFEU meant that EU law would prevail in case of conflicts with an earlier treaty.⁷⁸ The tribunal considered that "the ECT's historical genesis and its text are such that the ECT should be interpreted, if possible, in harmony with EU law".⁷⁹ Even if there is no precedent in international arbitration, this reasoning is potentially dangerous for arbitral tribunals and clearly goes against the rationale of the *Eureko* case explained above. Nonetheless, the tribunal took care of explaining that it was required to operate only in the legal framework of the ECT and the ICSID Convention.⁸⁰ Attributing States' violations to EU law is common practice by Member States, whether they seek to escape liability or not.⁸¹ It is also more than likely that such situation will occur in an increasing number of intra-EU arbitration cases under the ECT. Indeed, the position of the ICSID tribunal in the *Vattenfall v. Germany* Award would have been very interesting to assess the overlapping between EU law and ECT provisions if it had not been kept confidential.

ii) *Applicable law under UNCITRAL Rules and Awards*

Article 35 UNCITRAL Rules (as revised in 2010) provides for similar provisions than the ICSID Convention regarding applicable law, as it states that "[1] *The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. (...). [3] In all cases, the arbitral tribunal shall decide in accordance with the terms of the*

Charter Treaty, in G. Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, supra n43, at 158-159

⁷⁶ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable law and Liability, 30 November 2012, para 2.181/2.224

⁷⁷ *Ibid*, para 4.122

⁷⁸ *Ibid*, para 4.183

⁷⁹ *Ibid*, para 4.130; *See also*, F. Hoffmeister and G. Ünüvar, *From BITs and Pieces toward European Investment Agreements*, supra n15, at 60-61

⁸⁰ *Electrabel S.A. v. Republic of Hungary*, supra n76, para 4.112

⁸¹ S. Jagusch and J. Sullivan, *Arbitration under the Energy Charter Treaty: Recent Decisions and a Look to the Future*, in G. Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, supra n43, at 93

contract, if any, and shall take into account any usage of trade applicable to the transaction” (emphasis added). Unfortunately, there is very few public information regarding intra-EU ECT arbitration cases decided under the UNCITRAL.⁸² It is public knowledge that *EDF France v. Hungary* (decided in 2014) was rendered under UNCITRAL Rules but the Award remained confidential.⁸³ However, it is fair to assume that ad hoc tribunals under UNCITRAL Rules would take a similar approach to normative conflicts between the ECT and EU law as ICSID tribunals do. In accordance with article 35 (3) of the Rules, it may also take into account international principles of trade in determining the applicable law.

iii) Applicable law under the SCC Rules

Article 22 (1) of the 2010 Model Rules of the Arbitration Institute of the Stockholm Chamber of Commerce also provides that “*the Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate*”. In *Nykomb v. Latvia*, the ad hoc tribunal admitted that Latvia had adopted a law denying benefits to Nykomb in order to apply EU requirements pending its accession to the Community.⁸⁴ However, the tribunal did not have to settle any conflicts of law, as Latvia was not a EU Member State at the time. Interestingly, the tribunal did not comment Latvia’s source of responsibility. Similar to UNCITRAL arbitrations, there is a lack of public information for intra-EU ECT arbitration under the SCC Rules, although cases at the SCC generally concern extra-EU arbitration cases.⁸⁵

iv) Conclusion regarding application of EU law in ECT arbitration

The scope to be given to EU law remains at the discretion of Arbitral tribunals in the absence of further guidance in their Rules. Such discretion is nonetheless limited by the rules of interpretation provided by the VCLT, but also by the autonomy of the parties. Indeed, it is rather frequent that the parties inquire Arbitral tribunals to apply BITs in force between them as well as the ECT. Therefore, there is no reason for the parties to not be able to include EU

⁸² Investment Arbitration Reporter, *Tribunal Finalized in UNCITRAL and SCC Claims Arising Out of Solar-Power Controversies*, 17 April 2014, accessible at: <http://www.iareporter.com/articles/tribunals-finalized-in-uncitral-and-scc-claims-arising-out-of-solar-power-controversies/>

⁸³ See, Energy Charter Secretariat website: <http://www.encharter.org/index.php?id=213>

⁸⁴ *Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce, Award (Jurisdiction & Merits), 16 December 2003, para 3.1

⁸⁵ See, Energy Charter Secretariat website: <http://www.encharter.org/index.php?id=213>

law as applicable law.⁸⁶ The fact that EU law is not included in the substantive law applicable to ECT arbitral is only because the parties to the dispute did not agree to – probably dreading to overstep the ECJ’s jurisdiction on EU matters. Since the ECT does not have a disconnection clause, it has legal effects between Member States *inter se*. Moreover, no specific provision concerns the EU in the ECT, whereas article 4 and 5 of the ECT establish different regimes for GATT obligations. As a result, it appears that the EU regime was never intended to provide an exception to ECT obligations. It is however legitimate to sustain that as the EU is a Contracting Party to the ECT, the Energy Charter Treaty has become part of the EU legal order. Therefore, this relation differs from the general relation of intra-EU BITs and EU law, where application of article 351 aims at eradicating contradictory provisions to the profit of EU obligations. Although *Electrabel* sustained that secondary legislation of the EU superseded ECT obligations,⁸⁷ the ECT at least enjoy primacy over Union’s secondary legislation as a matter of EU law.⁸⁸ The normative conflicts between the two regimes are exacerbated if one positions itself under the EU ambit; but Arbitral tribunals constituted under article 26 (4) of the ECT do not appear to accord much importance to EU law, as they mainly apply the ECT as provided by its article 26 (6).

The compatibility of these regimes is however likely to be increasingly problematic, as 41 cases over the 73 that have been registered at the ECT Secretariat are intra-EU cases, the latest one having been registered on 22 June 2015.⁸⁹ Moreover, over the four arbitration cases lodged in June 2015, three concerns intra-EU situations, thus demonstrating the increased interest of Member States to ECT arbitration despite the status of EU law. This success is likely to irritate the European Commission that clearly aims at eradicating concurring proceedings between European Member States in international arbitration and has called to a pure a simple withdrawal of any intra-EU BITs Member States may still have.⁹⁰ Most importantly, even in the extreme case that Member States would withdraw from the ECT to

⁸⁶ R. Happ and J. A. Bischoff, *Role and Responsibility of the European Union under the Energy Charter Treaty*, in G. Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, supra n43, at 157

⁸⁷ *Electrabel v. Hungary*, supra n76, para 4.178

⁸⁸ ECJ, Case No. C-61/94, *Commission v. Germany*, 1996, ECR I-3989 para 52

⁸⁹ *JGC Corporation v. Spain*, ICSID Case No. ARB/15/27, see also Annex 1

⁹⁰ J. Hepburn, *Stage is set for Infringement Proceedings over intra-EU BITs as Informal Process between the European Commission and three Member States fail to Resolve EC’s Concerns*, 2 June 2015, accessible at: <http://www.iareporter.com/articles/stage-is-set-for-infringement-proceedings-over-intra-eu-bits-as-informal-process-between-european-commission-and-three-member-states-fail-to-resolve-ecs-concerns/>

let only the EU be a formal member (as is the case for the WTO), the ECT provides for a “sunset clause” extending the ECT’s benefits to investors for 20 years in application of article 47 (3) of the ECT. Thus, even if EU law is residual in the determination of the jurisdiction of Arbitral tribunal, conflicts and tensions between the European Institutions and ECT Arbitral tribunals is unlikely to disappear.

After having established that both the ECT and the EU legal system need to coexist as none of them supersedes the other under general international law, it appears appropriate to turn to the enforcement problem that ECT arbitration Awards may encounter for their enforcement in the EU Member States. Indeed, even if these Awards are lawful from an international point of view, the European Union possesses several tools to interfere with their prompt enforcement.

II. The enforcement intra-EU arbitral Awards under the Energy Charter Treaty in light of the European Union competence in Foreign Direct Investment

As shown in (I), the normative articulation between EU obligations and the ECT is not an unsolvable issue as Arbitral tribunals generally uphold their jurisdiction in arbitration proceedings. Therefore, it is appropriate to evaluate the enforcement of such Awards within the EU, as the communication of an Award does not make it *ipso facto* enforced within Member States. Thus, two issues are likely to arise: how are ECT intra-EU Awards enforced within Member States? And most importantly, how is such enforcement likely to be increasingly affected by the Foreign Direct Investment competence of the EU? The competence of the EU regarding Foreign Direct Investment in application of the Lisbon Treaty is likely to change the *status quo* regarding enforcement of Awards that may not comply with EU obligations (B). However, analysis of the enforcement procedures remains essential to approach the implementation of intra-EU ECT Awards (A).

A. General rules of enforcement for ECT Awards

Article 26 (8) of the ECT provides that “*the awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards*” (emphasis added). A closer analysis of enforcement provisions provided by the rules applicable to the arbitration *fora* of article 26 (4) shows discrepancies regarding national court’s power to review, albeit reaffirming the essential objective to enforce arbitral Awards.

i) Enforcement of Awards under the ICSID Convention and the ICSID Additional Facility Rules

- Enforcement under the ICSID Convention

The majority of ECT Awards have been rendered by the ICSID.⁹¹ Moreover, every EU Member State is a Contracting Party to the ICSID Convention, although the European Union is not.⁹² ICSID Arbitration is exclusive of any other remedy as provided by article 26 of its Convention, although States are allowed to impose exhaustion of domestic remedies. The ICSID Convention provides for several provisions regarding enforcement and the binding character of Awards. Moreover, article 49 provides for rectification of the Award, article 50 for its interpretation, article 51 for its revision and article 52 for the annulment of the Award. Article 52 provides for an internal ad hoc ICSID committee to stand on the annulment, and specifically lays out reasons for granting annulment:

- (i) *The Tribunal was not properly constituted;*
- (ii) *The Tribunal has manifestly exceeded its powers;*
- (iii) *There was corruption on the part of a member of the Tribunal;*
- (iv) *There has been a serious departure from a fundamental rule of procedure; or*
- (v) *The award has failed to state the reasons on which it is based.*

In addition to stipulating the grounds for annulment, Article 52 of the ICSID Convention sets out the general procedural framework for an annulment proceeding. It is implemented by ICSID Arbitration Rules 50 and 52 through 55, which implement the annulment remedy in the Convention. None of these grounds seem to be affected by the EU competence in FDI.

Most importantly, article 53 (1) provides that “***The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the Award (...)***” (emphasis added). This means that a losing party is under a legal obligation to comply with an award and a winning party has a legal right to demand compliance. Non-compliance by a party with an Award would be a breach of a legal obligation. It has been generally recognised that such provision merely encompasses the *pacta sunt servanda* and good faith principle applicable to the Contracting Parties.⁹³ Moreover, article 54 of the ICSID Convention provides that “(1) ***Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State (...). [and] (3)***”

⁹¹ See, Energy Charter Secretariat website: <http://www.encharter.org/index.php?id=213>

⁹² <http://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>

⁹³ R. B. H. Musa, M. Polasek, *The Origins and Specificities of the ICSID Enforcement Mechanism*, in J. Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards: a Global Guide*, Globe Law and Business, London, 2015, at 17

execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought” (emphasis added). This article is the cornerstone of the efficiency of the ICSID mechanism, as the Contracting Parties must enforce the Award as they would enforce a national decision with final character.⁹⁴ The obligation to enforce and recognise an Award applies generally and is therefore not subject to exclusion or variation by agreement of the parties.⁹⁵ Moreover, the recognition and enforcement mechanism applies to both States and investor, whomever ‘won’ the Arbitral Award. Therefore, what is paramount under the ICSID Convention is the lack of possibility to review the Arbitral Award so as to ensure a swift recognition and enforcement in the national system of the Party where enforcement is sought. Indeed, it renders enforcement automatic, as a certified copy delivered to the competent authority is sufficient for recognition of the Award in that State.⁹⁶ Recognition and enforcement of Awards, albeit automatic, nonetheless suffer from immunity of execution from which sovereign States benefit.⁹⁷ Indeed, recognition without judicial enforcement is of no use for the winning investor if it cannot seize the assets of the losing party, and it remains difficult to find non-immune assets to be seized.⁹⁸ As the ICSID forms part of the World Bank framework, Awards have generally been complied with voluntarily, with very few judicial enforcement.⁹⁹

The automatic recognition and enforcement is especially important regarding intra-EU Arbitral Awards. Indeed, national courts do not have the right to review ICSID Awards, as they can only recognise and enforce them. Thus, EU obligations cannot theoretically be involved in this process. Moreover, since ICSID arbitration proceedings are completely independent from the EU legal order, the obligation for Member States to comply with ICSID Awards does not give rise to issues pertaining to the interplay between EU law and the

⁹⁴ G. Coop, A. Nistal, R. G. Volterra, *Sovereign Immunities and Investor-State Awards: Specificities of Enforcing Awards based on Investment Treaties* in J. Fouret (ed.), *ibid*, at 70 et seq

⁹⁵ C. H. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: a Commentary*, article 54, Cambridge University Press, 2009, 2nd Edition, at 1118

⁹⁶ P. Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment*, *supra* n45, at 222

⁹⁷ Article 55, ICSID Convention

⁹⁸ *Mobil Cerro Negro Ltd et al. v. Bolivarian Republic of Venezuela*, Case No. 14 Civ. 8163, United States District Court Southern District of New York, 13 February 2015. *See also*, Cour de Cassation, Première Chambre Civile, *NML Capital v. The Republic of Argentina*, Arrêt n° 394, 28 mars 2013, Case No. 10-25.938

⁹⁹ K. H. Cross, *Upholding Delocalized Enforcement of ICSID Awards*, Kluwer Arbitration Blog, 24 April 2015, available at: <http://kluwarbitrationblog.com/blog/2015/04/24/upholding-delocalized-enforcement-of-icsid-awards/>

procedural law of Member States. Thus, non-compliance with an Award rendered by an ICSID tribunal logically constitutes contravention of the ICSID Convention.¹⁰⁰

- Enforcement under ICSID Additional Facility Rules (Arbitration)

Article 52 (4) of the ICSID Additional Facility Rules provides that: “*The award shall be final and binding on the parties. The parties waive any time limits for the rendering of the award which may be provided for by the law of the country where the award is made*”. If the losing party fails to comply with the Award, the winning party may seek for judicial enforcement in domestic Courts. Under article 3 of these rules, the ICSID Convention is deemed inapplicable. Contrary to the ICSID system, the recognition and enforcement of an Award rendered under the ICSID Additional Facility Rules is governed by the law of the State with the arbitration seat. Such a State must be a party to the 1958 New York Convention (NY Convention) on the Recognition and Enforcement of Awards in application of article 19 of these Rules. Although these Awards do not benefit from the automatic recognition provided by the ICSID Convention, the fact that the Award is rendered within a Contracting Party of the NY Convention facilitates their enforcement.¹⁰¹ As enforcement of Awards rendered under these Rules are similar to those rendered under UNCITRAL Arbitration Rules, further clarifications are provided below.

ii) *Enforcement under the Arbitration Rules of the UNCITRAL (ad hoc arbitration)*

Article 34 (2) of the 2010 UNCITRAL Arbitration Rules provides that “*the parties shall carry out all Awards without delay*”. The enforcement regime is however not specified, which means that it will depend on the law of the State where enforcement is sought. Generally, enforcement obeys to the New York Convention regarding enforcement of Arbitral Awards, as it enjoys more than 150 State Parties.¹⁰² In the majority of cases, the court’s control does not amount to a proper appeal. Most national rules defer to domestic courts to verify the validity of the arbitration agreement or respect for procedural principles, but generally do not enter the Merits phase of the case.¹⁰³ However, some States also provide for review of arbitral

¹⁰⁰ P. Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment*, supra n45, at 223

¹⁰¹ L. Reed, J. Paulsson and N. Blacklaby, *Guide to ICSID Arbitration*, Kluwer Law International, 2nd Edition, 2011, at 1494

¹⁰² <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>

¹⁰³ L. Markert, H. Bubrowski, *National Setting Aside Proceedings in Investment Arbitration*, in M. Bugenberg, J. Griebel, S. Hobe, A. Reinisch, (eds.), *International Investment Law: a Handbook*, supra n7, at 1460 et seq

Awards before deciding on their enforcement, although this remains scarce in the international legal system.¹⁰⁴ Moreover, the national arbitration law that defines the scope of the setting aside proceedings and the courts' powers are generally uniform, as they reflect article V of the NY Convention. Similarly to the ICSID Convention, article IV of the NY Convention provides that a certified copy must be supplied by the party seeking enforcement to the competent authorities of the State where enforcement or recognition is sought .

Most importantly, and contrary to ICSID enforcement proceedings, article V (1) of the New York Convention provides for grounds authorising a national court to not enforce or recognise an Arbitral Award. Although these grounds are quite limited to the competence of the Arbitral tribunal or respect for its procedures, it has been considered as posing an obvious danger to the harmonisation of the legal system regarding enforcement.¹⁰⁵ Although scarce, reliance on States' national laws may trigger discrepancies in what these States regard pointless formalities as invalidating an Arbitral Award.¹⁰⁶ Most importantly for our purposes, article V (2) of the NY Convention further provides that: "*recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

- a) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country;*
- b) *The recognition or enforcement of the award would be contrary to the public policy of that country*" (emphasis added).

Thus, in case the Award explicitly violates public policies or connected principles, national courts can set it aside by depriving it of legal effect in the jurisdiction of the State where the seat of arbitration is. As a consequence, investors strategically look for a more favourable jurisdiction to constitute the seat of arbitration. Consequently, reference to public policy is a dangerous choice made by the drafters of the NY Convention, as it may encompass notions that were not thought of originally in 1958. The lack of definition of 'public policy' may thus allow EU obligations to frustrate enforcement of Arbitral Awards.

¹⁰⁴ I.e. France through article 1514 of the Civil Procedural Code

¹⁰⁵ J. Paulsson, *Awards Set Aside at the Place of Arbitration*, Enforcing Arbitration Awards under the New York Convention Experience and Prospects, New York, 10 June 1998, UNCITRAL Papers, available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> at 24

¹⁰⁶ *Ibid*, at 25

iii) Enforcement under the Rules of the Arbitration Institute of the SCC

Article 47 of the SCC Rules provides that “*in all matters not expressly provided for in these Rules, the SCC, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that all awards are legally enforceable*”. Unless provided otherwise, enforcement and recognition of Awards rendered under the SCC Rules are governed by the NY Convention as well. As the enforcement regime has been provided for regarding UNCITRAL Rules, it does not appear necessary to assess its further implementation regarding SCC Rules.

Consequently, it has been shown that enforcement of intra-EU ECT Awards depends on the arbitration forum chosen by the parties to the arbitration proceedings in application of article 26 (8) of the ECT. As such, an ICSID Award is therefore likely to be swiftly enforced, whereas an Award for which enforcement depends on the EU national courts’ assessment of exceptions provided in the NY Convention will evidently take more time and resources. Thus, it appears appropriate to assess the impact of the FDI competence of the EU in relation with enforcement of intra-EU ECT Awards, as the European Institutions may increasingly question such enforcement as it escapes from the EU framework.

B. The potential restriction on enforcement of intra-EU ECT Awards as a result of the European Union competence in Foreign Direct Investment

The European Commission took the view that “*the Union has exclusive competence to conclude agreements covering all matters relating to foreign investment, that is both FDI and portfolio investment*”.¹⁰⁷ A question on the EU’s competence regarding international agreements in application of the Common Commercial Policy would call for an Opinion of the ECJ in accordance with article 218 TFEU, as portfolio investments are not explicitly mentioned in article 207. However, the ECJ cannot issue an opinion on agreements that have already been concluded, but only for “*envisaged agreements*” – therefore excluding a compatibility assessment with the ECT. Moreover, the European Commission has sustained that there was an ‘implicit disconnection clause’ in the ECT. Indeed, it argues that now that

¹⁰⁷ *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party*, Doc. COM (2012) 335 Final, accessible at: http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf at 3 para 1.2

the Commission has FDI competence, the ECT could not be applicable in intra-EU arbitration.¹⁰⁸ Indeed and in application of the *ERTA* case, the FDI internal competence may create external competence insofar as divergent Member State's agreements in the field would affect EU legislation adopted in the area.¹⁰⁹ As demonstrated before though, the FDI competence of the EU only applies within the EU framework and therefore does not bind arbitral tribunals constituted under the ECT. Moreover, intra-EU arbitration cases are still being decided by the ICSID in 2015, thus showing the limited success of the Commission's initiative to call States to terminate their intra-EU BITs.¹¹⁰ In a recent ICSID Award, a sunset clause of a BIT conferred jurisdiction to an ICSID tribunal even though both EU Member States had withdrawn from their intra-EU BIT following the Commission's proposal.¹¹¹ This could clearly occur in intra-EU ECT Arbitration and therefore frustrate the FDI competence of the Union. As established previously regarding intra-EU BITs, the EU does not intend to stay idle regarding enforcement of intra-EU Awards, and generally submits *amicus curiae* to the tribunals to demand denial of jurisdiction.¹¹² Therefore, it is likely that the European Commission will intent to frustrate enforcement of ECT intra-EU arbitral Awards that would jeopardise the homogeneous character of the EU legal system. However, the mixed character of the ECT and the interest protected by it remain a hindrance for the EU to completely frustrate enforcement of ECT Awards.

i) *General framework for enforcement of arbitral Awards under EU law and the public policy exception*

¹⁰⁸ L. E. Peterson, *Investigation: In Recent Briefs, European Commission Casts Doubt on Application of Energy Charter Treaty to any Intra-EU Dispute*, Investment Arbitration Reporter, 8 September 2014, available at: <http://www.iareporter.com/articles/investigation-in-recent-briefs-european-commission-casts-doubt-on-application-of-energy-charter-treaty-to-any-intra-eu-dispute/>

¹⁰⁹ ECJ, 31 March 1971, *European Commission v. Council (European Road Transport Agreement Case)*, Case 22/70 ECR 263, at 263-275

¹¹⁰ *Postova Banka A.S and Istrokapital SE (Slovakia and Cyprus) v. the Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015; *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013; *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Registration at the ICSID Secretariat on 27 August 2012

¹¹¹ L. E. Peterson, *Romania Loses another intra-EU BIT case, this time under a Treaty that was mutually terminated but whose Sunset Clause provided Arbitral Footing*, 24 April 2015, Investment Arbitration Reporter, available at: <http://www.iareporter.com/articles/romania-loses-another-intra-eu-bit-case-this-time-under-a-treaty-that-was-mutually-terminated-but-whose-sunset-clause-provided-arbitral-footing/>

¹¹² J. Dahlquist, *Prospect Of An Intra-EU BIT Objection By Respondent-State Is Not Enough To Justify Bifurcating Jurisdictional Phase Of Arbitration*, 3 July 2015, Investment Arbitration Reporter, available at: <http://www.iareporter.com/articles/prospect-of-an-intra-eu-bit-objection-by-respondent-state-is-not-enough-to-justify-bifurcating-jurisdictional-phase-of-arbitration/>

The mixed character of the ECT distinguishes it from ‘mere’ intra-EU BITs, as the Union must also respect its provisions. In the *2012 Proposal for a Regulation on Managing the Financial Responsibility of the EU linked to Investor State Dispute Settlement*, the Commission interestingly reaffirmed that it may be sued as sole respondent under the Energy Charter Treaty.¹¹³ Even if that would be the case, enforcement of an ECT Award against the EU may prove difficult for the winning party, as even if the EU now has legal personality,¹¹⁴ it is neither a party to the NY Convention nor to the ICSID Convention. As success is fairly limited as to the *amicus curiae* issued by the EU to Arbitral tribunals to sustain denial of jurisdiction, the only sphere of leverage of the EU against its Member States is to frustrate the recognition or enforcement of intra-EU Awards.

In *Eco Swiss China v. Benetton*, the ECJ held that “it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances”.¹¹⁵ However, it affirmed that refusal to enforce an Award is possible on grounds of public policy.¹¹⁶ The Court affirmed that a State may consider annulment “where its domestic rules of procedure require to grant an application for annulment founded in failure to observe national rules of public policy”, further considering that EU rules on competition law formed part of public policy for Member States.¹¹⁷ Thus, national courts must treat a failure to comply with EU competition law in an arbitral Award as a ground to frustrate enforcement based on public policy.¹¹⁸ Moreover, the ECJ also considered consumer protection to constitute public policy under the NY Convention, affirming that national Courts have the right to raise this incompatibility *proprio motu*.¹¹⁹ Therefore, enforcement of Awards can be made very difficult in EU Member States Courts if the ECJ considers the EU investment competence as forming part of ‘public policy’ meant in article V (2) of the NY Convention. If Member States would enforce an Award against what would later be considered as European

¹¹³ *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party*, supra n107, at 2 para 1.1

¹¹⁴ Article 47, TEU

¹¹⁵ *Eco Swiss China Time Ltd v Benetton International NV*, 1 June 1999, supra n24, para 35

¹¹⁶ *Ibid*, para 7

¹¹⁷ *Ibid*, para 37

¹¹⁸ P. Strik, supra n45, at 222. Reasoning confirmed in *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, Joined Cases C-295/04 and C-298/04, ECR-I-6619, 18 July 2006, para 31

¹¹⁹ Judgment of the Court (First Chamber) of 26 October 2006, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, C-168/05, ECR-I-10412, para 35-39

public policy, the European Commission could launch infringement proceedings against that State.¹²⁰ Consequently, enforcement of an Award under the NY Convention may be hindered by considerations of EU National Courts. In ECT Arbitration, several Awards rendered under UNCITRAL Rules have been challenged in national Courts, with the losing party invoking public policy arguments.¹²¹ Enforcement of the *Yukos v. Russia* case has also been very controversial, although exceptions regarding article V of the NY Convention could not be raised in Belgium as the Minister of Justice rapidly considered every assets in Belgian banks to be immune.¹²² It is however fair to recognise that the diplomatic landscape was not very prone for the enforcement of a \$50bn Award against Russia, although ‘only’ \$1.8bn was frozen in Belgium. It is therefore very unlikely that enforcement of ECT intra-EU Arbitral Award may continue if the European Institutions start considering enforcement of these Awards as violating public policy. Moreover, enforcement of ICSID Awards may also be frustrated by the EU although the ICSID Convention does not provide for public policy as a ground impeaching recognition.

ii) Likely frustration of enforcement for intra-EU ECT Awards

Indeed, there has been turmoil in intra-EU proceedings since the enforcement of the *Micula v. Romania* Award.¹²³ The European Commission recently declared that it “[had] concluded that compensation paid by Romania to two Swedish investors for an abolished investment aid scheme breaches EU state aid rules. The beneficiaries have to pay back all amounts already received, which are equivalent to those granted by the abolished aid scheme”.¹²⁴ Payment of the Award to the Micula brothers would constitute unlawful state-aid from Romania, which in turn may trigger infringement proceedings against that State before the ECJ. The Commission stated that: “if a national court in the EU [was] asked to enforce an ICSID award that is contrary to EU law and EU state aid policy rules, the proceedings would have to be stayed under the conditions of [Article 267 TFEU regarding exclusivity of jurisdiction to the ECJ] so

¹²⁰ Article 258 TFEU

¹²¹ See, Enforcement in Belgium of “*Энергоальянс*” (*Energoalians*) (*Komstroy*) v. the Republic of Moldova, Decision of the Tribunal de Première Instance Francophone de Bruxelles, 9 July 2015

¹²² The Financial Times, 18 June 2015, *France and Belgium freeze Russian State Assets over Yukos case*, available at: <http://www.ft.com/cms/s/0/3ab475a6-15da-11e5-a58d-00144feabdc0.html#axzz3eM6LMjnJ>; De Redactie, 21 June 2015, *Frozen Russian Bank Accounts in Belgium Reopened*, available at: <http://deredactie.be/cm/vrtnieuws.english/News/1.2372826>

¹²³ *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, supra n59

¹²⁴ European Commission, Press Release, *State aid: Commission orders Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme*, Brussels, 30 March 2015, available at http://europa.eu/rapid/press-release_IP-15-4725_en.htm

that the ECJ may decide on the applicability of Article 54 of the ICSID Convention [binding force of ICSID Awards], as transposed into the national law of the referring judge”.¹²⁵ Thus, exclusivity of jurisdiction to the ECJ would be likely to frustrate enforcement of an ICSID Award under EU law, although the ICSID Convention does not provide for any objections to enforcement. Before official infringement proceedings were launched against Romania, the Micula brothers lodged a claim before the General Court of the European Union on 2 September 2014, claiming that the Commission’s decision infringes Article 351 (1) TFEU and Article 4 (3) TEU [‘sincere cooperation’ between European Institutions and Member States], which recognise and protect Romania’s obligations under the ICSID Convention.¹²⁶ On 1 October 2014, the European Commission asked for suspension of the execution of the Award,¹²⁷ which remains suspended today.

Consequently, any payment of an Award that breaches EU law would then itself constitute a violation by the Member State of European state-aid rules, since the damages would *de facto* re-allocate to the enterprise the forbidden economic benefit and thus perpetuate the illegal distortion of the internal market in breach of article 107 TFEU.¹²⁸ Although *Micula v. Romania* is not an Arbitral Award rendered under the ECT, its consequences may very well extend to intra-EU ECT arbitration. The European Commission recently announced that it would launch infringement proceedings against Germany for breaching environmental requirements in executing its ICSID Award against *Vattenfall*.¹²⁹ Indeed, even if this Award has remained confidential, *Vattenfall* surely prevailed in this arbitration as Germany eventually delivered the license necessary for *Vattenfall* to operate its coal power plant.¹³⁰ If the European Commission continues such proceedings against Member States executing

¹²⁵ European Commission’s Written Submission, *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, supra n59, para 122

¹²⁶ Official Journal of the European Union, 8 December 2014, *Action brought on 2 September 2014 — Micula A.O v. Commission (Case T-646/14)*, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014TN0646&rid=2> and <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-646/14>

¹²⁷ See, Communication C (2014) 6848 final, 1 October 2014, Public, available at: http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf

¹²⁸ J. Kleinheisterkamp, *The Next Ten Year ECT Investment Arbitration: a Vision for the Future from an European Perspective*, supra n38, at 6

¹²⁹ European Commission, Press Release, *Environment: Commission refers Germany to Court over coal power plant in Moorburg*, Brussels, 26 March 2015, available at: http://europa.eu/rapid/press-release_IP-15-4669_en.htm

¹³⁰ N. Bernasconi-Osterwalder & R. T. Hoffmann, *Nuclear Phase-Out put to the test, Background to the new dispute Vattenfall v. Germany (II)*, Transnational Institute, 8 October 2013, accessible at: <http://www.tni.org/briefing/nuclear-phase-out-put-test>

ICSID Arbitral Awards, the enforcement procedures provided for in the ICSID Convention will be frustrated and Member States will be in violation of their international obligations. The same applies for Awards for which enforcement depends on article V (2) of the NY Convention regarding public policy. Therefore, the EU is practically able to frustrate enforcement of intra-EU ECT Awards, whether enforcement obeys to the NY Convention or ICSID Convention.

Conclusion

The problem between the EU legal system and the ECT lies in the fact that the latter is a mixed agreement, which means that if the EU frustrates enforcement of intra-EU ECT Awards, it could theoretically be held in breach of article 26 (8) of the ECT. It is however unlikely that a dispute would be launched against the EU for frustrating enforcement of ECT Awards. Indeed, an EU investor could not bring a claim against the Union as it would not be a claimant from “another Contracting Party” as required by article 26 (1) of the ECT. In any event, the EU would benefit from immunity of execution, thus frustrating judicial enforcement of the Award.¹³¹ The fact that ‘public policy’ may be shaped by the EU institutions to accommodate investment protection would subsume ECT standards into EU law when enforcement would be sought by the winning party. Moreover, an ECT Award (even not opposing two Member States) would likewise be frustrated if enforcement was sought within EU Member States. As the energy sector is becoming increasingly important in Europe (especially as Russia is the first gas provider of natural gas and other energy resources to the EU),¹³² it appears rather logical that the EU has an increased interest in the ECT. The ECT indeed provides for other sources of energy and also binds several former-USSR States (such as Kazakhstan, which possesses the world greatest amount of resources for nuclear energy and oil),¹³³ thus providing a bridge across the Ural. The EU cannot discard such benefits in times of political turmoil with Russia. The Commission will seek new energy resources and opportunities, in turn questioning its relation with the ECT regarding investment protection. Moreover, the EU has recently signed the International Energy Charter

¹³¹ Article 1, *Protocole No. 7 on the Privileges and Immunities of the European Union*, Official Journal C-83, 30 March 2010, at 266

¹³² <http://ec.europa.eu/energy/en/topics/international-cooperation/russia>

¹³³ *Investment Climate and Market Structure Review in the Energy Sector of Kazakhstan*, Energy Charter Secretariat Publication, 2013, available at : http://www.encharter.org/fileadmin/user_upload/Publications/Kazakhstan_ICMS_2013_ENG.pdf

in the Hague.¹³⁴ Although such ‘Charter’ is not a treaty and is a mere political declaration, the EU did not clarify its relations with the ECT in signing such Charter under the auspices of the Energy Charter Secretariat. Even if the European Commission is competent in FDI, and even if FDI would cover the investment field protected by the ECT and the substantive basis of ECT arbitration claims, this does not preclude the jurisdiction of arbitral tribunals in these proceedings. Indeed, the European Union cannot force a non-EU tribunal to deny its jurisdiction in international law, nor can it force such tribunal to take into account EU law. Therefore, the exclusive competence of the EU on FDI is likely to frustrate ECT intra-EU arbitration, as it can only use such mean to pressure Member States in compliance with EU law combined with infringement proceedings. The tension between the two legal systems is therefore likely to increase, as protection offered to investors by the EU is not equivalent to ECT protection, but also because Member States cannot escape ECT arbitration as they remain bound by the Treaty individually and *inter se*.

¹³⁴ <http://international.energycharter.org/process/international-energy-charter-2015/>