The Mixed Participation of the EU and its Member States to the Energy Charter Treaty and Italy's Withdrawal Therefrom: Consequences on the Promotion and Protection of Foreign Energy Investments

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ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
AU	*Autorizzazione Unica*
BIT	Bilateral Investment Agreement
CJEU	Court of Justice of the European Union
CUP	Cambridge University Press
DARIO	Draft Articles on Responsibility of International Organizations
DIA	*Dichiarazione di Inizio Attività*
EC	European Community
ECmHR	European Commission of Human Rights
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEC	European Energy Charter
EIA	Environmental Impact Assessment
EJIL	European Journal of International Law
EU	European Union
EuConst	European Constitutional Law Review
EURATOM	European Atomic Energy Community
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIT	Feed In Tariffs
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSE	*Gestore dei Servizi Energetici*
ICSID	International Centre for the Settlement of the Investment Disputes
IEC	International Energy Charter
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
JENRL	Journal of Energy and Natural Resources Law
JIDS	Journal of International Dispute Settlement

KW	Kilowatt
KWh	Kilowatt per Hour
MIA	Multilateral Investment Agreement
MIT	Multilateral Investment Agreement
MPILux	Max Planck Institute Luxembourg
MW	Mega Watt
OECD	Organisation for Economic Co-operation and Development
OGEL	Oil, Gas & Energy Law Intelligence Journal
OJ	Official Journal
OUP	Oxford University Press
PEEREA	Protocol on Energy Efficiency and Related Environmental Aspects
PV	Photovoltaic
RECIEL	Review of European Comparative & International Environmental Law
REIO	Regional Economic Integration Organization
RELP	Journal of Renewable Energy Law and Policy
SCC	Stockholm Chamber of Commerce
SPV	Special Purpose Vehicle
TDM	Transitional Dispute Management Journal
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nation Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations
VIA	*Valutazione d'Impatto Ambientale*
WTO	World Trade Organization

INTRODUCTION

Energy security is among the key issues in political agendas worldwide. Developed and developing economies, in fact, are increasingly concerned to secure constant flows of energy for fuelling their economic and social development. Despite there is no universally accepted definition of energy security, there is widespread consensus on that it relies, *inter alia*, on appropriate international instruments for promoting and, more important, protecting cross-border energy investments.

Energy investments, effectively, are capital-intensive, long-lasting and highly-risky. This is particularly so as far as foreign energy investments are concerned. Investors investing in foreign Countries, in fact, are particularly exposed to non-commercial risks such as nationalizations, expropriations or discriminatory treatments. In order to carry out their investments and, more important, to protect them, therefore, said investors require proper guarantees on that their activities will not be undermined by unjustified or unreasonable measures which may be put into place by the host States. Of paramount importance, to this respect, is the prevision of impartial mechanisms for the settlement of disputes that may arise between foreign investors and host States concerning the activities carried out by the former in the territory of the latter. Indeed, a response to this need is represented by international arbitration, by which possible conflicts are settled by arbitral tribunals external to the host States' judicial systems.

In the course of time, international law has provided for numerous instruments by which promoting and protecting foreign energy investments. The Energy Charter Treaty (ECT or "Treaty") is the most relevant instrument to this regard, considering its geographical scope and the matters treated therein. As such, it represents the main attempt to provide for global rules on energy security. The ECT, in fact, encourages the energy cooperation between its around fifty Contracting Parties in a wide range of sectors, such as trade, transit, environmental protection and investment promotion and protection. As regards investment promotion and protection, the ECT provides for a regime which is unique at the international level. It safeguards energy investments by providing, in particular, for fair and equitable treatment, most constant protection and security, no discrimination and most favoured nation treatment standards. A major feature of the ECT investment regime is the prevision of an investor-State dispute settlement (ISDS) mechanism, laid down in Art. 26, by which investors can bring claims before international arbitral tribunals for alleged breaches of ECT investment commitments which undermine the investments made by them in host Countries.

Since the first dispute was filed on April 2001, namely *AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/01/4), nearly a hundred and seventeen arbitral proceedings have been incepted so far, eighty of which – amounting to about the 70% of all cases – have been commenced during the last six years. A state of things suggesting how the Treaty's ISDS regime, after a slow start, has become an important tool by which energy investors can protect their investments.

Notwithstanding such a remarkable achievement, however, there are many shortcomings that prevent the ECT from becoming the reference legal framework for

international energy security. To this respect, it is worth mentioning the non-participation of major economies such as the USA and China and the decision of Russia to not ratify the Treaty after having applied it provisionally until 2009. In addition, it is worth highlighting also the decision of Italy to withdraw – first and unique case – starting from 1 January 2016. The withdrawal took effect during a turning point of the ECT: by that time, the ISDS mechanism had just started to be fully-tested by investors, especially within the EU context; in addition, the Treaty was experiencing a process of relaunching and updating which culminated with the adoption of the International Energy Charter, a political declaration aimed at bringing the ECT in line with current challenges in energy security.

While Italy's withdrawal undisputedly undermined the authority of the Treaty, it had the merit of reviving the doctrinal debate on unsettled and not entirely explored issues concerning its application, especially within the EU context. To this respect, the issues posed by the mixed accession of the EU and its Member States to the ECT stand out. For long, the doctrine has pointed out many interpretative concerns about to what extent the Treaty, in particular the investment regime and, more specifically, its ISDS mechanism, applies to relations between EU Member States and between them and the EU. Following the Italian withdrawal, such issues have gained new momentum and are likely to be explored more in depth in the foreseeable future.

This thesis examines three broad subjects: the attempt of the ECT to become the reference set of rules on international energy security; the many issues posed by the mixed accession of the EU and its Member States to it; the implications of the Italian withdrawal in terms of investment promotion and protection. Accordingly, this work consists of three chapters.

Chapter I provides for an overview of the ECT as the reference set of rules on international energy security. To this respect, it describes the main steps of the Energy Charter process, i.e. the process that, starting with the European Energy Charter of 1991 and arriving to the International Energy Charter of 2015, led to the adoption of the ECT on 1994 and its entering into force on 1998. Moreover, the chapter describes the main fields of energy cooperation dealt with by the ECT, markedly trade, transit and, more important, investment promotion and protection. The purpose of the chapter is to point out the importance of the Treaty for the promotion and protection of energy investments and the complex issues that prevent its vocation to become the reference international framework for global energy security.

Chapter II focuses on the complex procedural issues that the mixed accession of the EU and its Member States poses with respect to the ECT ISDS mechanism. After having examined the *status* of the EU as a REIO party to the ECT, the qualification of the latter as a "mixed agreement" under EU law and the division of competences within the EU on the matters dealt with by it, the chapter focuses on the following issues: questions of international responsibility of the EU and its Member States for the performance and for breaches of ECT investment provisions; the applicability of the ECT investment regime and, more specifically, its ISDS mechanism, to EU internal relations; the relevance and, more specifically, the applicability of EU law in investor-State disputes filed under Art. 26; the relationship between EU law and the ECT.

Chapter III deals, in the first place, with Italy's withdrawal from the ECT. More precisely, the chapter investigates the reasons of the withdrawal and its consequences in terms of investment promotion and protection and on the future of the Energy Charter process. In the second place, the chapter examines the disputes filed against the Italian State under Art. 26. To this regard, after having taken into account the wider context of the ECT ISDS regime and the reasons of the sudden raise of disputes against Italy, it focuses on two cases, namely *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) and *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50). Both cases are still pending. As to earlier, which is the first case filed against Italy under Art. 26 ECT, an award has been rendered by the tribunal established to settle the dispute. Currently, a proceeding for annulment of the award is underway. Regarding the latter, a decision on an application under Rule 41(5) of the ICSID Rules of Procedures for Arbitration Proceedings has been rendered by the tribunal constituted to settle the controversy.

Finally, the work is closed by some conclusive remarks with respect to the matters treated therein.

As it will be seen, the issues discussed in this thesis have found – and indeed are increasingly founding – much attention in academic and specialised literature, since they touch very sensitive questions of international, EU and national law. Said issues, however, are far from being comprehensively investigated by the doctrine. As things stand, in the course of the analysis, the state of the art of the doctrinal debate will be taken into account first. Then, the issues at hand will be examined in light of relevant ECT case law. To this respect, some of the awards and decisions rendered by ECT arbitral tribunals – notably those established to settle disputes involving EU Member States and investors therefrom – will be examined with particular attention. By following this methodology, it will be possible to appreciate how said issues emerge or are likely to emerge in investment disputes and are or are likely to be dealt with by ECT arbitral tribunals. In other words, it will be possible to appreciate how said issues affect, *in practice*, the ECT and process.

The aim of the present investigation is to contribute to the debate on the ECT and process, a debate which has just started, and which is likely to get academics and practitioners busy in the future. To this respect, it must be highlighted that ECT practice, now more than ever, is in a state of constant evolution. As a result, additional food for thought is likely to emerge in the future.

Indeed, this work is the result of a research started in February 2015 at the Centre for Climate Change, Energy and Environmental Law of the University of Eastern Finland and completed in Rome on August 2018. In the intervening period, subsequent decisions and awards rendered by ECT arbitral tribunals as well as by the Court of Justice of the EU – namely the *Achmea* Judgement rendered on March 2018 – shed some light on the issues discussed in this work while at the same time raised new questions and interpretative concerns, with the result that a constant work of adaption has been necessary in order to take into account the latest developments on the matter. Accordingly, this work can be seen as a starting point for addressing the many interpretative issues which affect the ECT and which will assume further complexity as far as new awards and decisions are rendered by ECT arbitral tribunals.

CHAPTER I
THE ENERGY CHARTER TREATY AND PROCESS: TOWARDS GLOBAL RULES ON ENERGY SECURITY?

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1. Introduction

Energy security has always been a relevant concern for industrialized Countries[1]. Developed economies, in fact, have constantly sought to secure regular flows of energy in order to fuel their economic and social development. Nonetheless, it was only following the 1973 and 1979 oil crisis that energy security became a major issue in State energy policies. Until then, it was essentially understood as *oil* security – given that oil was by far the most traded energy resource in emerging and consolidating international energy markets – and was mainly seen from the perspective of energy-importing Countries. In short, energy security meant security of energy *supply*, i.e. stable energy flows towards energy-dependent States.

Starting from the 1990's, however, the concept of energy security began to change: it now encompassed other energy resources, markedly gas, and included also the perspective of energy-producing States, being thus understood also as security of energy *demand*. In short, it started to mean stable energy flows from producing to consuming Countries at fair prices.

More recently, the term has been extended in order to encompass also the perspective of transit States and contemporary issues such as climate change mitigation, environmental protection and sustainable development and energy poverty, although it is disputed whether transit Countries represent a category different from that of energy-dependent States – since transit countries are often

[1] On energy security see, *ex multis*: VV.AA. (eds.), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment*, OUP, Oxford, 2004; S. F. KRISHNA-HENSEL (ed.), *New Security Frontiers: Critical Energy and the Resource Challenge*, Ashgate, Farnham-Burlington, 2012; H. DYER – M. J. TROMBETTA (eds.), *International Handbook of Energy Security*, Edward Elgar, Cheltenham-Northampton, 2013; R. LEAL-ARCAS – A. FILIS – E. S. ABU GOSH, *International Energy Governance. Selected Legal Issues*, Edward Elgar, Cheltenham-Northampton, 2014; ENERGY CHARTER SECRETARIAT, *International Energy Security: Common Concept for Energy Producing, Consuming and Transit Countries*, 2015 (available online).

energy-importers – and whether said issues can be considered as directly related to the concept of energy security[2].

Today, energy security is *the* issue in all political agendas worldwide, from the EU[3] to the US, from Canada to India, despite there is no consensus on what in practice it means: the main contrast of views remains that between energy-consuming and energy-producing Countries, despite such contrast is not always straightforward: nearly all States, in fact, are at the same time exporters and importers of energy resources[4].

In sum, the meaning of energy security constantly develops, depending on the historical and economic context, the energy priorities of each State, the international challenges that affect societies in a given period of time and technological progress[5].

Despite the lack of a generally-accepted definition of energy security, there is widespread consensus on that energy security relies, among others, on international law instruments by which promoting and protecting foreign energy investments[6]. Producing and delivering energy, in fact, requires capital-intensive, long-lasting and highly-risky investments, which are particularly exposed to non-commercial risks such as nationalizations, expropriations or discriminatory treatment by the host State. Therefore, foreign energy investors need appropriate guarantees in order to carry on and, above all, protect, their investments. Against this, international law has provided for means by which promoting and protecting foreign energy investments and, therefore, energy security. The Energy Charter Treaty (hereinafter ECT or "Treaty") is part of these efforts and, indeed, represents the most relevant attempt to this respect[7].

Against this backdrop, this chapter provides for an overview of the ECT as the reference set of rules on international energy security. In particular, it illustrates the main steps of the Energy Charter process, i.e. the process that, starting with the European Energy Charter of 1991 (§ 2) and arriving to the International Energy Charter of 2015 (§ 4), led to the adoption of the ECT on 1994 and its entering into

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[2] See ENERGY CHARTER SECRETARIAT, *op. cit.*, pp. 10-20.

[3] On EU energy security see: S. S. HAGHIGHI, *Energy Security: The External Legal Relations of the European Union with Major Oil- and Gas-Supplying Countries*, Hart Publishing, Oxford-Portland, 2007; K. TALUS, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and the EU Competition Law*, Wolters Kluwer, Alphen aan den Rijn, 2011; R. LEAL-ARCAS – C. GRASSO – J. A. RÍOS, *Energy Security, Trade and the EU: Regional and International Perspectives*, Edward Elgar, Cheltenham-Northampton, 2016.

[4] See ENERGY CHARTER SECRETARIAT, *op. cit.*, pp. 6-9.

[5] Technological progress is often seen as an unpredictable factor that may play a fundamental role for combining energy demand with current energy challenges such as climate change and energy poverty. On this point, see: L. MAUGERI, *Beyond the Age of Oil: The Myths, Realities, and Future of Fossil Fuels and Their Alternatives*, Praeger, Santa Barbara, 2010; G. RECCHI, *Nuove energie: Le sfide per lo sviluppo dell'Occidente*, Marsilio, Venezia, 2014.

[6] See: P. D. CAMERON, *In Search of Investment Stability*, in K. TALUS (ed.), *Research Handbook on International Energy Law*, Edward Elgar, Cheltenham-Northampton, 2014, pp. 124-148; J. KARL, *FDI in the Energy Sector: Recent Trends and Policy Issues*, in E. DE BRABANDERE – T. GAZZINI (eds.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*, Brill Nijhoff, Leiden-Boston, 2014, pp. 9-28; L. MISTELIS, *Contractual Mechanisms for Stability in Energy Contracts*, in M. SCHERER (ed.), *International Arbitration in the Energy Sector*, OUP, Oxford, 2018, pp.153-174.

[7] See A. V. BELYI, *The Energy Charter Process and Energy Security*, in B. DELVAUX – M. HUNT – K. TALUS (eds.), *EU Energy Law and Policy Issues*, 1st ed., Intersentia, Cambridge, 2011, pp. 301-323.

force on 1998. Furthermore, it describes the main fields of energy cooperation dealt with by the Treaty (§ 3), notably trade (§ 3.2), transit (§ 3.3) and, more important, investment promotion and protection (§§ 3.4 and 3.5). The purpose of this chapter is to point out the importance of the Treaty for the promotion and protection of energy investments and the complex issues that prevent its vocation to become the reference international framework for global energy security (§§ 5 and 6). In short, this chapter provides the reader with the basis required for approaching and addressing the central topics of this work, i.e. the issues posed by the mixed participation of the EU and its Member States to the Treaty (Chapter II) and the Italian withdrawal therefrom (Chapter III).

2. The Energy Charter process: from the European Energy Charter to the Energy Charter Treaty

The origins of the ECT date back to the early 1990's, when the end of the economic and ideological divisions of the Cold War and the increasing expansion of global energy markets opened up unexpected opportunities for the energy cooperation between western and eastern European States. This new scenario, in fact, required proper global instruments by which stabilising the international relations in such a strategic sector of State economies[8].

As it has been highlighted[9], three were the main solutions put forward by western States to address the challenges posed by the collapse of the Soviet Union: the then European Communities offered EU membership to eastern European States; developed economies pushed towards their involvement in the then 1947 General Agreement on Tariffs and Trade (GATT); finally, European States called for the institutionalization of the east-west energy cooperation through an *ad hoc* international framework. As is known, all these options had a follow up. However, it was the latter that brought to the inception of the Energy Charter process[10], that is the process that led to the adoption of the ECT and its subsequent, progressive, geographical enlargement.

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[8] See: K. TALUS, *EU Energy Law and Policy. A Critical Account*, OUP, Oxford, 2013, pp. 233-234; A. A. KONOPLYANIK, *Multilateral and Bilateral Energy Investment Treaties: Do We Need a Global Solution? The Energy Charter Treaty As an Objective Result of the Evolution of International Energy Markets and Instruments of Investment Protection and Stimulation*, in K. TALUS (ed.), *Research Handbook on International Energy Law*, cit., pp. 79-82.

[9] See P. D. CAMERON, *International Energy Investment Law. The Pursuit of Stability*, OUP, Oxford, 2010, p. 152. For an historical "contextualization" of the Energy Charter Treaty and process, see: Part I of T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, Kluwer Law International, The Hague, 1996, with contributions of: J. P. DORIAN – E. M. KHARTUKOV, *International Oil and Gas Investment in the CIS States*, pp. 37-67; M. ÖĞÜTÇÜ, *Eurasian Energy Politics and Prospects: Need for a Longer-Term Western Strategy*, pp. 68-109; A. SECK, *Investing in the Former Soviet Union's Industry: The Energy Charter Treaty and its Implications for Mitigating Political Risk*, pp. 110-136.

[10] As we will see below (see *infra*, § 3.1), the ECT played a crucial role also for the accession of former communist Countries to the EU and their involvement into the GATT/WTO system.

The Energy Charter process[11] officially begun with the proposal, launched by then Dutch Prime Minister Ruud Lubbers at the European Council of Dublin of June 1990, for an European energy charter by which laying the political and legal foundations for east-west energy cooperation. A year and a half later, on 17 December 1991, the European Energy Charter (hereinafter EEC) was adopted[12].

The EEC was meant as a first step towards the creation of a pan-European energy community aimed at ensuring energy security for both western and eastern European Countries: the earlier were, in fact, technologically advanced but energy dependent; the latter, conversely, were rich in energy resources but deprived of know-how and appropriate legal frameworks for protecting energy investments.

The EEC is a political declaration lacking any legally binding effect on its signatories[13]. Nonetheless, it was, and still remains, the founding document of the Energy Charter process as well as a reference text for the interpretation of the ECT[14]. The EEC, in fact, establishes principles, objectives and implementing measures that are included in, and, to some extent, are made mandatory by, the ECT, and are further strengthened by the International Energy Charter (see *infra*, § 4). Objectives relate to security of energy supply and energy efficiency and to the creation of a pan-European energy market in accordance with the principle of non-discrimination, a market-based price formation mechanism and environmental protection[15]. Means by which

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[11] On the origins and evolution of the ECT, see J. DORÉ, *Negotiating the Energy Charter Treaty*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 137-155. See also A.A. KONOPLYANIK – F. VON HALEM, *The Energy Charter Treaty: A Russian Perspective*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 156-178.

[12] The official title of the EEC is "Concluding Document of The Hague Conference on the European Energy Charter". The text of the EEC is available online at: https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf#page=28.

[13] To date, signatories of the EEC are: Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chad, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritania, Moldova, Mongolia, Montenegro, Morocco, The Netherlands, Niger, Norway, Pakistan, Palestine, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uzbekistan and Yemen. An updated list of the EEC's signatories is available at: www.energycharter.org/process/european-energy-charter-1991/ (last accessed on 17 August 2018).

[14] The Preamble of the ECT is full of references to the EEC: "*Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991*"; "*Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter*"; "*Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter*"; "*Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalise investment and trade in energy*". In addition, pursuant to Art. 2 ECT, the general purpose of the Treaty is to establish "*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the* [European Energy] *Charter*" (parenthesis added). See: C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, in VV.AA. (eds.), *Energy Law in Europe*, OUP, Oxford, 2007, p. 148; M. MARLETTA, *Energia: integrazione europea e cooperazione internazionale*, Giappichelli, Torino, 2011, pp. 351-354.

[15] See Title I EEC ("Objectives").

achieving these goals encompass: the improvement of energy trade according to major multilateral international agreements such as the GATT/WTO; cooperation in the energy field, notably coordination and harmonization of State energy policies and exchange of technology and expertise; energy efficiency and environmental protection[16]. Finally, many fields of activity are pinpointed, such as access to energy sources, liberalisation of trade in energy, access to energy markets and promotion and protection of investments[17].

In order to pursue the above-mentioned objectives and principles, the EEC's signatories undertook for "*negotiating in good faith a basic agreement establishing legal safeguards on energy investment, transit and trade, and open to future developments through amendments and additional protocols in other fields of activity*"[18]. Negotiations were conducted within the European Energy Charter Conference and were successfully finalized on 17 December 1994, when the text of the ECT was finally agreed and opened for signature. The ECT entered into force on 16 April 1998, three months after the achievement of the thirty required ratifications[19].

3. The ECT

3.1. General features

The ECT has been largely examined in academic literature[20]. According to the scope and purpose of the present investigation, we will describe its main features and most recent developments, with particular attention to the investment regime.

The ECT is the main international instrument existing in the energy field, considering the wide range of matters it deals with and both its geographical and Country coverage. Unlike other relevant international agreements, notably the North

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[16] See Title II EEC ("Implementation").

[17] *Ivi*.

[18] See Title III EEC ("Specific Agreements").

[19] According to Art. 44 ECT ("Entry into Force"), "*(1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organisation which is a signatory to the Charter as of 16 June 1995. (2) For each state or Regional Economic Integration Organisation which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organisation of its instrument of ratification, acceptance, approval or accession. (3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to those deposited by member states of such Organisation*".

[20] See, *ex multis*: T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit.; E. PAASIVIRTA, *The European Union and the Energy Sector: the Case of the Energy Charter Treaty*, in M. KOSKENNIEMI (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague-London-Boston, 1998, pp. 197-214; C. S. BAMBERGER – J. LINEHAN – T. WÄLDE, *Energy Charter Treaty in 2000: in a New Phase*, in *JENRL*, 18, 4, 2000, pp. 331-352; ENERGY CHARTER SECRETARIAT, *The Energy Charter Treaty. A Reader's Guide*, 2002 (available online); Special issue on *The Energy Charter Treaty*, in *OGEL*, 5, 2004; A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, in *JENRL*, 4, 2006, pp. 523-558; C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 145-194; M. MARLETTA, *op. cit.*, pp. 351-389; T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, in E. DE BRABANDERE – T. GAZZINI (eds.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*, cit., pp. 105-129.

American Free Trade Agreement (NAFTA), it deals exclusively with energy and covers many sectors of energy cooperation, markedly trade, transit and investment promotion and protection. Today, it involves around fifty States and international organizations from different parts of the World[21] – including both energy exporting and energy importing Countries as well as developed, developing and transitional economies[22] – but the number nearly doubles if one considers all the participants to the Energy Charter constituency[23]. It provides for a multilateral framework for energy cooperation that is unique at international level: it represents the first application of rules on energy transit, the first multilateral treaty that provides for compulsory dispute settlement as a general rule, the first international agreement combining investment protection and trade and, finally, the first binding agreement on energy investments[24]. It is no coincidence, therefore, if the ECT is often described as the main step towards the creation of an international energy community based on common rules by which ensuring global energy security[25].

To this end, the ECT has shown a remarkable "flexibility" in adapting to the swift changes that characterize the energy sector: a Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) was negotiated and adopted together with

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[21] To date, Contracting Parties to the ECT are: Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, EURATOM, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan. Belarus did not ratify the Treaty, but applies it provisionally in accordance with Art. 45 ECT. Australia and Norway signed the ECT but did not ratify it. The Russian Federation signed the Treaty and applied it provisionally until 18 October 2009. Italy ratified the Treaty but withdrew from it starting from 1 January 2016. See: https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (last accessed on 17 August 2018).

[22] See A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., p. 531.

[23] In addition to the Signatories and Contracting Parties to the ECT, which are Members of the Energy Charter Conference, Signatories of the EEC (which have not signed or ratified the ECT) are Observers to the Energy Charter Conference: Burundi, Canada, Chad, Indonesia, Italy, Jordan, Mauritania, Morocco, Niger, Pakistan, Palestine, Russian Federation, Serbia, Syria, United States and Yemen. All Signatories of the International Energy Charter (other than those which also signed the EEC) are Observers to the Energy Charter Conference: Bangladesh, Benin, Burkina Faso, Cambodia, Chile, China, Colombia, East African Community, Economic Community of Central African States, Economic Community of West African States, G5 Sahel, Gambia, Guatemala, Iran, Iraq, Kenya, Mali, Nigeria, Panama, Republic of Korea, Rwanda, Senegal, Swaziland, Tanzania, Uganda, United Arab Emirates. Finally, also the following international organizations have the *status* of Observers to the Energy Charter Conference: Association of Southeast Asian Nations (ASEAN), Baltic Sea Region Energy Cooperation (BASREC), Organisation of the Black Sea Economic Cooperation (BSEC), CIS Electric Power Council, Economic Cooperation Organization European Bank for Reconstruction and Development (EBRD), International Atomic Energy Agency, International Energy Agency, International Renewable Energy Agency (IRENA), Organisation for Economic Co-operation and Development (OECD), United Nations Economic Commission for Europe (UNECE), The World Bank, World Trade Organization (WTO). See: www.energycharter.org/who-we-are/members-observers/ (last accessed on 17 August 2018).

[24] See M. MARLETTA, *op. cit.*, p. 355.

[25] See A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., pp. 529-530.

the Treaty, thus entering into force on 16 April 1998[26]; in order to adapt the ECT's trade regime – which was originally based on the 1947 GATT trade system – to the WTO rules and practice, a Trade Amendment was adopted in 1998 and entered into force on 21 January 2010[27]; negotiations on a Transit Protocol started on 2000 but, despite being repeatedly interrupted and started again, were suspended on 2011 and deferred to a later stage; talks on a supplementary Investment Treaty started in 1996 but, despite being expected to be finalized by the beginning of 1998[28], have never been concluded[29].

The Treaty, in fact, was negotiated in a relatively short period (from 1991 to 1994), if one considers its scope, the number of States and organizations involved and the political sensitivity of the matters treated therein. In order to reach a minimum consensus on a binding basis, therefore, many questions were left to supplementary negotiations, with the result that the it remained opened to further, future developments[30].

To this regard, it is worth noting that not only the Treaty directly mandates for supplementary negotiations on different topics[31] but, additionally, foresees policy reviews on the implementation of its provisions to be conducted at least every five years within the Energy Charter Conference, i.e. the governing and decision-making institution of the ECT and process[32]. The first review was finalized in 1999[33] and was

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[26] Title III EEC ("Specific Agreements") mandates its signatories to negotiate, alongside a Basic Agreement (the ECT), other Protocols by which implementing and broadening the areas of energy cooperation, including, among others, energy efficiency and environmental protection. The PEEREA provides for a forum in which its Contracting Parties can share good practices on energy efficiency and environmental issues, especially regarding taxation and pricing policy in the energy sector, and other means by which financing energy efficiency policies. On the environmental aspects of the ECT and the PEEREA, see: C. SHINE, *Environmental Protection Under the Energy Charter Treaty*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 520-544; S. QUADRI, *Energia sostenibile: diritto internazionale, dell'Unione europea e interno*, Giappichelli, Torino, 2012, pp. 26-33.

[27] Art. 30 ECT ("Developments in International Trading Arrangements) states that "*Contracting Parties undertake that in the light of the results of the Uruguay Round of Multilateral Trade Negotiations embodied principally in the Final Act thereof done at Marrakesh, 15 April 1994, they will commence consideration not later than 1 July 1995 or the entry into force of this Treaty, whichever is the later, of appropriate amendments to this Treaty with a view to the adoption of any such amendments by the Charter Conference*".

[28] According to Art. 10(4) ECT, "*A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998*." Understanding 10 of the Final Act of the European Energy Charter Conference further specifies that "*The supplementary treaty will specify conditions for applying the Treatment described in Article 10(3). Those conditions will include, inter alia, provisions relating to the sale or other divestment of state assets (privatization) and to the dismantling of monopolies (demonopolization)*".

[29] On these developments see: M. MARLETTA, *op. cit.*, pp. 356-357; P. D. CAMERON, *International Energy Investment Law. The Pursuit of Stability*, cit., pp. 162-163.

[30] See C. S. BAMBERGER, *An Overview of the Energy Charter Treaty*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 2-3.

[31] A part from Articles 30 and 10(4) ECT (see NN 27 and 28 above), Art. 33 ECT ("Declarations and Protocols") states that "*The Charter Conference may authorize the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter*".

[32] Art. 34(7) ECT: "*In 1999 and thereafter at intervals (of not more than five years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Treaty in the light of the extent*

followed by those conducted in 2004[34], 2009 (no agreement reached) and, finally, 2014[35].

As a major global instrument in the energy sector, the Treaty presents a great degree of complexity. It deals with five broad areas, namely promotion and protection of foreign energy investments, free trade in energy materials, freedom of transit through energy networks, energy efficiency and, finally, dispute settlement. Said areas were originally developed in eight Parts ("Definitions and Purpose", "Commerce", "Investment Promotion and Protection", "Miscellaneous Provisions", "Dispute Settlement", "Transitional Provisions", "Structure and Institutions" and "Final Provisions"), nineteen Annexes, five Conference Decisions and one Protocol (the above-mentioned PEREEA)[36]. Although it does not allow reservations[37], it is enriched by several understandings, declarations and interpretative statements made by the Chairman of the European Energy Charter Conference on the occasion of its adoption, which make it difficult to interpret and barely accessible to non-specialists[38].

In addition, the ECT is not a stand-alone treaty, since it borrows and incorporates concepts, definitions and rules from other relevant international instruments, markedly the NAFTA and Bilateral Investment Treaties (BITs)[39]. This is particular evident if one focuses on the ECT trade regime, which has constantly adjusted to international trade's developments and applies, by reference, the WTO framework.

As seen above, the main promoters of the ECT and Process were the European Communities, today the European Union (EU) and the European Atomic Energy Community (EURATOM), which are Contracting Parties alongside their Member States. Indeed, the ECT can be seen as an EU creation, a state of things that is reflected in the objectives of the EEC[40] and in the ECT's original east-west European vocation. What is more, the Energy Charter process was meant also as an EU pre-accession instrument for eastern Countries, which were required, among others, to adopt the EU (energy) *acquis communautaire*. Twenty years after its entry into force, the ECT still represents for the EU the main international instrument in the energy sector and a consistent part of its energy *acquis*.

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to which the provisions of the Treaty and Protocols have been implemented. At the conclusion of each review the Charter Conference may amend or abolish the functions specified in paragraph (3) and may discharge the Secretariat".

[33] www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC199911.pdf.

[34] www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200408.pdf.

[35] www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201406.pdf.

[36] According to Art. 48 ECT ("Status of Annexes and Decisions"), "*The Annexes to this Treaty and the Decisions set out in Annex 2 to the Final Act of the European Energy Charter Conference signed at Lisbon on 17 December 1994, as well as the Decisions adopted in connection with the adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty are an integral part of the Energy Charter Treaty*".

[37] Art. 46 ECT ("Reservations"): "*No reservations may be made to this Treaty*".

[38] See C. S. BAMBERGER, *An Overview of the Energy Charter Treaty*, cit., p. 2.

[39] On the relationship between BITs and the ECT see J. W. SALACUSE, *The Energy Charter Treaty and Bilateral Investment Treaty Regimes*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 321-348.

[40] See, for example, the eight clause of the EEC's Preamble, according to which the signatories are "*Resolved to promote a new model for energy co-operation in the long term in Europe and globally within the framework of a market economy and based on mutual assistance and the principle of non-discrimination*".

As we will see more in detail below (see *infra*, §§ 3.3 and 5), however, its relevance for the EU is changing due to many factors, in particular the unwillingness of Russia, one of the most important EU energy partners, to ratify it[41].

In next chapter we will largely discuss the thorny issues arising from the joint accession of the EU and its Member States to the ECT. Suffice to remark, here, how the Treaty is closely linked to EU integration, enlargement and external relations law, and how its development strongly relies on the future evolution of EU energy law and policy[42].

According to Art. 2 ECT ("Purpose of the Treaty"), the Treaty's aim is to "*promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the* [European Energy] *Charter*" (parenthesis added). More specifically, the Treaty is aimed at facilitating energy cooperation and investment promotion and protection among its Contracting Parties, without obliging States to renounce to their energy sovereignty.

To this respect, Understanding 1 to the Final Act of the European Energy Charter Conference specifies that: "*a) The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term co-operation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations. (b) The provisions of the Treaty do not: (i) oblige any Contracting Party to introduce mandatory third party access; or (ii) prevent the use of pricing systems which, within a particular category of consumers, apply identical prices to customers in different locations. (c) Derogations from most favoured nation treatment are not intended to cover measures which are specific to an Investor or group of Investors, rather than applying generally*".

Furthermore, Art. 18 ECT ("Sovereignty over Energy Resources") states that "*(1) The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law*" and adds that " *(2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources*".

Finally, Art. 21 ECT ("Taxation") specifies, in paragraph (1), that "[…] *Nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency*"[43].

In addition to the official purpose stated in Art. 2 ECT, the Treaty's main political aims have been outlined as follows: halting the decline of former Soviet Union economies through a level playing field of rules on energy trade and investment, by which reducing the "transition" risks related to the passage from State-oriented to

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[41] The Russian federation signed the ECT on 17 December 1994 and provisionally applied it until 18 October 2009.

[42] See A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., p. 528.

[43] References to State sovereignty can be found also in the EEC. In any case, as specified in Declaration V of the Final Act of the European Energy Charter Conference and in the Chairman's Statement at the Adoption Session on 17 December 1994, the principle of State energy sovereignty and, more in general, national law provisions, cannot be used to circumvent the Treaty's application.

marked-based economies[44]; setting an energy community able to facilitate the flowing of energy resources from eastern to western Countries and know-how and technology from western to eastern States; reducing western European States' energy dependence from the Middle East, especially following the energy crisis of the 1970s and 1990s; making the EU more competitive, especially against the US, by improving its energy security[45].

It goes without saying that present ECT's objectives have partially departed from its original ones. As noticed in academic literature[46], in fact, the international context within which the Treaty operates today has changed significantly following many relevant facts that took place since its adoption. To this respect, it is worth mentioning the following events: the entry into force of the Treaty establishing the WTO; the subsequent accession to the WTO system of, amongst others, Ukraine and the Russian Federation; the subsequent EU enlargements; the progressive liberalization of the EU energy sector; the enlargement of the EU competences on Foreign Direct Investment (FDI) following the entry into force of the Lisbon Treaty; the setting up of the Energy Community[47].

In any event, it is clear that its fundamental goal was, and still remains, granting energy security for energy producing, consuming and transit Countries, in accordance with the principles of open and competitive markets and sustainable development[48].

The ECT provides for both soft and hard-law commitments on a wide range of sectors of energy cooperation. In addition, it provides for multiple dispute settlement mechanisms that differ depending on the field of activity considered. Accordingly, in the following paragraphs, we will examine the main fields of energy cooperation dealt with by the ECT and the dispute settlement mechanisms provided therein, notably the investment dispute settlement regime.

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[44] It must be kept in mind that transitional risks affect also developed economies. In the EU, for example, the progressive liberalization of energy markets through the three subsequent energy packages adopted respectively on 1996/1998, 2003 and 2009, produced uncertainties regarding energy investments, which, as said, are high-capital, long-lasting and, therefore, highly economically risky. On this point, see A. A. KONOPLYANIK, *Multilateral and Bilateral Energy Investment Treaties: Do We Need a Global Solution? The Energy Charter Treaty As an Objective Result of the Evolution of International Energy Markets and Instruments of Investment Protection and Stimulation*, cit., pp. 86-89.

[45] See: M. MARLETTA, *op. cit.*, p. 358; A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., pp. 524-525.

[46] See T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, cit., p. 106.

[47] The Energy Community is an international organisation formed by the EU, Albania, Bosnia and Herzegovina, Georgia, the Former Yugoslav Republic of Macedonia, Kosovo, Moldova, Montenegro, Serbia, and Ukraine, aimed at extending the EU's energy *acquis* to south-eastern Europe and the Black Sea region. On the Energy Community, see: D. BUSCHLE – K. TALUS (eds.), *The Energy Community: A New Energy Governance System*, Intersentia, Cambridge, 2015; C. CAMBINI – A. RUBINO (eds.), *Regional Energy Initiatives: MedReg and the Energy Community*, Routledge, London-New York, 2014; R. LEAL-ARCAS – A. FILIS – E. S. ABU GOSH, *International Energy Governance. Selected Legal Issues*, cit., pp. 332-379;

[48] See: A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., pp. 531; S. S. HAGHIGHI, *op. cit.*, pp. 192-194.

3.2. The trade regime

The trade regime is essentially regulated in Part II ECT ("Commerce") – which, more specifically, deals with "International markets" (Art. 3), "Non-Derogation from WTO Agreement" (Art. 4), "Trade-Related Investment Measures" (Art. 5), "Competition" (Art. 6), "Transit" (Art. 7), "Transfer of Technology" (Art. 8) and "Access to Capital" (Art. 9) – and in Part VI ECT ("Transitional Provisions"), notably Art. 29 ("Interim provisions on trade-related matters")[49].

The general aim of the trade regime is set out in Art. 3, according to which "*The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products and Energy-Related Equipment*", an objective which is largely dealt with also in the Preamble of the Treaty[50].

The most remarkable feature of the trade regime is that it pursues the objective of the progressive liberalization of trade in energy markets by largely referring to the WTO system. By the time the Treaty was negotiated, in fact, the most reasonable solution was submitting the trade of energy goods and products – or, as defined in the ECT, "Energy Materials and Products" and "Energy-Related Equipment"[51] – to the rules then governing international trade, that is the 1947 GATT. As said above, the setting up the of WTO with the 1994 Marrakech Agreement required the ECT to be brought in line with the new rules and practices in international trade. Such goal was achieved with the adoption of the 1998 Trade Amendment and its entry into force on 2010.

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[49] For an in-depth analysis of the ECT trade regime, see: Part 5 of T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit. pp. 445-498; S. S. HAGHIGHI, *op. cit.*, pp. 237-320; M. MARLETTA, *op. cit.*, 358-361. See also: Y. SELIVANOVA (ed.), *Regulation of Energy in International Trade Law. WTO, NAFTA and Energy Charter Treaty*, Kluwer Law International, Alphen aan den Rijn, 2012; R. LEAL-ARCAS – C. GRASSO – J. A. RÍOS, *Multilateral, Regional and Bilateral Energy Trade Governance*, in *RELP*, I, 2015, pp. 38-77; N. A. GEORGIOU, *A Rule-Based Architecture for the Energy Sector: the WTO and the ECT*, Energy Charter Secretariat Knowledge Centre, 2016 (available online); ENERGY CHARTER SECRETARIAT, *Applicable Trade Provisions of the Energy Charter Treaty*, 2003 (available online); ENERGY CHARTER SECRETARIAT, *Trade in Energy – WTO Rules Applying under the Energy Charter Treaty*, 2001 (available online).

[50] To this end, it is worth quoting the following passages of the Preamble: "*Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy*"; "*Having regard to the objective of progressive liberalization of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the Agreement Establishing the World Trade Organisation and as otherwise provided for in this Treaty*"; "*Determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and Energy-Related Equipment, technologies and services*"; "*Looking to the eventual membership in the World Trade Organization of those Contracting Parties which are not currently members thereof and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership*"; "*Mindful of the rights and obligations of certain Contracting Parties which are also members of the World Trade Organization*"; "*Having regard to competition rules concerning mergers, monopolies, anti-competitive practices and abuse of dominant position*".

[51] According to Art. 1(4) ECT, "*"Energy Materials and Products", based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the European Communities, means the items included in Annexes EM I or EM II*", while according to Art. 1(4[bis]) ECT, "*"Energy-Related Equipment, based on the Harmonised System of the World Customs Organization, means the items included in Annexes EQ I or EQ II*".

To this regard, it is worth noting that the reference to the GATT/WTO system implies that rules on international trade not only are expressly extended to the energy sector[52] but, what is more, apply also to ECT States that are not parties to the WTO, with respect to both their mutual relations and their relations with ECT States parties to the WTO, although under certain conditions and limitations. On the one hand, in fact, Art. 4 ECT expressly clarifies that "*Nothing in this Treaty shall derogate, as between particular Contracting Parties which are members of the WTO, from the provisions of the WTO Agreement as they are applied between those Contracting Parties*". On the other hand, Art. 29 ECT, while affirming, in paragraph (1), that "*The provisions of this Article shall apply to trade in Energy Materials and Products and Energy-Related Equipment while any Contracting Party is not a member of the WTO*", specifies, in paragraph (2), lett. (a), that "*Trade in Energy Materials and Products and Energy-Related Equipment between Contracting Parties at least one of which is not a member of the WTO shall be governed, subject to* […] *the exceptions and rules provided for in Annex W, by the provisions of the WTO Agreement, as applied and practised with regard to Energy Materials and Products and Energy-Related Equipment by members of the WTO among themselves, as if all Contracting Parties were members of the WTO*". In other words, the ECT avoids superimpositions and contrasts with the WTO regime, notably as regards relations between Contracting Parties that are WTO members, and foresees exemptions to the application of WTO rules to ECT Contracting Parties that are not WTO parties, according to Annex W ("Exceptions and Rules Governing the Application of the Provisions of the WTO Agreement")[53].

To this end, it is worth noting that Art. 29 ("Interim provisions on trade-related matters") is included in Part VI on transitional provisions, a state of things suggesting that ECT trade rules are meant as a provisional regime to be applied as long as not all ECT Contracting Parties are parties to the WTO. It has been noticed, to this respect, that the ECT trade regime has reduced in significance following the accession to the WTO of many Contracting Parties to the Treaty, markedly Kyrgyzstan (on 1998), Georgia (2000), Armenia (2004), Ukraine (2008), the Russian federation (2012)[54], Tajikistan (2013), Kazakhstan (2015) and Afghanistan (2016). As a result, only few Contracting Parties to the ECT are, to date, not WTO members, namely Azerbaijan, Belarus (which actually did not ratify the Treaty but applies it provisionally), Bosnia and Herzegovina, Turkmenistan and Uzbekistan[55].

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[52] On the issues arising from the application of GATT/WTO rules to the trade of energy resources, see: M. MARLETTA, *op. cit.*, pp. 313-350; Y. SELIVANOVA (ed.), *op. cit.*

[53] See: C. S. BAMBERGER, *An Overview of the Energy Charter Treaty*, cit., pp. 4-6; C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., p. 169.

[54] As said, the Russian Federation did not ratify the Treaty, although it provisionally applied it until October 2009. To this respect, it must be noticed that, according to the "sunset clause" laid down in Art. 45(3)(b), "*In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c)*". In other words, the Treaty binds Russia, although on a limited extent.

[55] See T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, cit., p. 108. For an updated list of WTO Members, see www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed on 17 August 2018).

Finally, disputes that may arise on compliance with trade provisions are to be settled under the mechanism provided in Annex D, which is modelled on the WTO "panel" system, a part from the exceptions provided for in Art. 29(9) ECT[56].

3.3. The transit regime

The transit regime, which is included in Part II on commerce and is regulated in Art. 7 ECT, represents a major feature of the Treaty[57]. As said, ECT transit provisions represent the first application of rules on transit through energy networks – or "Energy Transport Facilities", as defined in Art. 7(10)(b) ECT[58] – thus conforming what has been defined as a "WTO-plus" trade commitment establishing unprecedented rights and obligations in a very sensitive area of the energy realm[59]. As shown by the multiple crisis occurred over the past years between Russia (gas-producing) and Ukraine (transit Country), regulating transit through energy networks, especially in the gas sector, is of paramount importance in order to secure energy supply and demand, considering the conflicts that may arise between producing and transit Countries and the long distances that often separate energy-producing from energy-consuming States[60].

That being said, the ECT provides for both soft and hard-law provisions on transit. The latter is defined, in Art. 7(10), as "*(i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third*

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[56] Art. 29(9) ECT: "*Annex D shall apply: (a) to disputes regarding compliance with provisions applicable to trade under this Article; (b) to disputes regarding the application by a Contracting Party of any measure, whether or not it conflicts with the provisions of this Article, which is considered by another Contracting Party to nullify or impair any benefit accruing to it directly or indirectly under this Article; and (c) unless the Contracting Parties parties to the dispute agree otherwise, to disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a member of the WTO, Except that Annex D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that: (i) has been notified in accordance with and meets the other requirements of sub-paragraph (2)(b) and Annex TFU; or (ii) establishes a free-trade area or a customs union as described in article XXIV of the GATT 1994*".

[57] On the ECT transit regime and related issues, see: M. M. ROGGENKAMP, *Transit of Network-bound Energy: the European Experience*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 499-519; S. S. HAGHIGHI, *op. cit.*, pp. 321-335; Part IV of G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, Juris Publishing, Yonkers, 2011, pp. 283-356; L. EHRING – Y. SELIVANOVA, *Energy Transit*, in Y. SELIVANOVA (ed.), *Regulation of Energy in International Trade Law. WTO, NAFTA and Energy Charter Treaty*, cit., pp. 49-107; E. J. OMONBUDE, *Cross-border Oil and Gas Pipelines and the Role of the Transit Country: Economics, Challenges, and Solutions*, Palgrave Macmillan, Basingstoke-New York, 2013, pp. 101-116; K. YAFIMAVA, *Transit: The EU energy acquis and the Energy Charter Treaty*, in K. TALUS (ed.), *Research Handbook on International Energy Law*, cit., pp. 593-623; T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, cit., pp. 115-119; D. AZARIA, *Treaties on Transit of Energy Via Pipelines and Countermeasures*, OUP, Oxford, 2016.

[58] According to Art. 7(10)(b) ECT, "*"Energy Transport Facilities" consist of high-pressure gas transmission pipelines, highvoltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products*".

[59] See C. S. BAMBERGER, *An Overview of the Energy Charter Treaty*, cit., p. 6.

[60] See: M. MARLETTA, *op. cit.*, pp. 361-362; J. G. WESTERHOF, *The Transit Conflict Between Russia and Ukraine From a Legal Perspective*, in M. ROGGENGKAMP – U. HAMMER (eds.), *European Energy Law Report VII*, Intersentia, Antwerp-Oxford-Portland, 2010, pp. 267-275.

state, so long as either the other state or the third state is a Contracting Party; or (ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N […]". Under the ECT, therefore, transit means not only the "carriage" involving at least three "areas"[61] (area of origin, transit area and area of destination), but also the carriage involving only two areas (area of origin and destination, which is the same, and transit area), excepting for Annex N Contracting Parties requiring the involvement of at least three separate areas[62].

As seen, ECT transit provisions are included in Part II on commerce, being, therefore, largely borrowed from the GATT/WTO system. Such provisions include: access conditions, i.e. the commitment of Contracting Parties to facilitate the transit of energy materials and products in accordance with the principle of freedom of transit and on a non-discriminatory and reasonable basis (Art. 7(1) ECT); obligations to modernize, develop and facilitate the interconnection of energy transport facilities, to mitigate the effects of interruptions in the supply of energy materials and products and not to set obstacles to the creation of new capabilities (Art. 7(2) ECT); exceptions and derogations to such obligations (Art. 7, paragraphs (3)[63], (4)[64] and (5)[65] of the ECT); finally, and more important, an obligation for the transit Country to ensure the non-interruption or reduction of existing flows of energy materials and products in the event of disputes arising from transit, prior to the conclusion of the dispute under the resolution mechanism foreseen in Art 7(7) ECT[66].

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[61] Pursuant to Art 1(10) ECT, "*"Area" means with respect to a state that is a Contracting Party: (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction. With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation*".

[62] To date, only Canada and the US have so decided and recorded their decision by a joint entry in Annex N.

[63] Art. 7(3) ECT: "*Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise*".

[64] Art. 7(4) ECT: "*In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1)*".

[65] Art. 7(5) ECT: "*A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to (a) permit the construction or modification of Energy Transport Facilities; or (b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply. Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties*".

[66] Art. 7(6) ECT: "*A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision.*".

Art. 7(7) ECT[67], in fact, provides for an *ad hoc* mechanism which has a complementary nature – i.e. it is subject to the prior exhaustion of all relevant contractual or other dispute resolution remedies previously agreed – and is characterized by the appointment of a conciliator by the ECT's Secretary-General.

The transit regime is a formidable sword of Damocles on the future of the Energy Charter process, since it raises many controversial issues that have so far undermined the ECT's vocation to become the reference framework for energy security. The doctrine has highlighted, in particular, the contrasting interpretations that may be rendered on the provisions included in Art. 7 ECT[68], their correlation with other Treaty's obligations[69] and the practical relevance of the transit dispute settlement mechanism governed by Art. 7(7) ECT[70]. It is no coincidence, therefore, if negotiations started on a tailor-made protocol by which clarifying and improving the ECT transit provisions, to valorise the transit dispute settlement mechanism and, finally and more importantly, to favour the ratification of the Treaty by the Russian Federation, which expressly subordinated its accession to the ECT to the adoption of the protocol. As we will see in next pages (see *infra*, § 5), the main obstacle to the conclusion of the transit protocol and, therefore, to the Russian accession to the Treaty, consisted in disagreements between the EU and Russia on whether and to

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[67] Art. 7(7) ECT: "*The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute: (a) A Contracting Party party to the dispute may refer it to the Secretary General by a notification summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral. (b) Within 30 days of receipt of such a notification, the Secretary General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned. (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved. (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier. (e) Notwithstanding subparagraph (b) the Secretary General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute. (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators*".

[68] See, for example, Art. 7(3) ECT, according to which "*Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise*" (underlining added). As noticed by T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, cit., p. 116, depending on whether the conjunction "or" is considered as inclusive or exclusive, Contracting Parties to the Treaty would have or would not have to apply to international transit the same transportation tariff applied domestically.

[69] See, for example, the possible overlap between the dispute settlement mechanisms laid down, respectively, in Art. 7(7) ECT (on transit dispute settlement), and Art. 27 ECT (governing State-State dispute settlement on the interpretation and application of the Treaty).

[70] It is worth noting that the mechanism governed by Art. 7(7) was not used to settle the disputes arisen between Russia and Ukraine, namely that occurred in 2009. On this point, see T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, cit., p. 118.

what extent the transit regime applies with respect to the EU and its Member States, both of which are Contracting Parties to the Treaty[71].

3.4. The investment regime

3.4.1. Preliminary considerations

As said, energy investments are capital-intensive and long-lasting and, consequently, are more exposed than investments made in other economic sectors to "political" risks such as expropriation or similar measures, breaches of contractual obligations and discrimination or unjustified restrictions[72]. The ECT investment regime is aimed at minimizing the non-commercial risks to which foreign energy investments are exposed in host Countries. As such, is probably the most remarkable feature of the ECT, as shown by the great attention found in academic and specialised literature[73].

Indeed, the ECT represents the culmination of several efforts made in the course of time for providing a set of rules to promote and protect investments in the energy sector[74]. The protection of foreign energy investments, in fact, is an old challenge that has emerged within, and has been so far dealt with by, general international law. If originally the protection of foreign investments was ensured by the diplomatic channels possibly activated by the investor's home State with the host State, more recently it has been guaranteed by BITs, international agreements such as the ICSID Convention of 1966, the Convention establishing the Multilateral Investment Guarantee Agency of 1985 (also known as the "Seoul Convention") and the 1994

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[71] See: M. MARLETTA, *op. cit.*, p. 367-370; A. A. KONOPLYANIK, *Multilateral and Bilateral Energy Investment Treaties: Do We Need a Global Solution? The Energy Charter Treaty As an Objective Result of the Evolution of International Energy Markets and Instruments of Investment Protection and Stimulation*, in K. TALUS (ed.), *Research Handbook on International Energy Law*, cit., pp. 115-117.

[72] See A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., p. 532.

[73] See, *ex multis*: Part 4 of T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 251-444; C. RIBEIRO (ed.), *Investment Arbitration and the Energy Charter Treaty*, Juris Publishing, Yonkers, 2006; A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., pp. 532-541; C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 150-172; S. S. HAGHIGHI, *op. cit.*, pp. 194-236; G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, Juris Publishing, Yonkers, 2008; T. ROE – M. HAPPOLD, *Settlement of Investment Disputes Under the Energy Charter Treaty*, CUP, Cambridge, 2011; G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit.; M. MARLETTA, *op. cit.*, pp. 370-384; Part I of I. A. LAIRD – B. SABAHI – F. G. SOURGENS – T. J. WEILER (eds.), *Investment Treaty Arbitration and International Law*, Vol. 7, Juris Publishing, Yonkers, 2014, pp. 1-99.

[74] Starting from the end of the Second World War – but the process dates back to the first half of the twentieth century – these efforts include: the Charter of the International Trade Organization of 1948 (the so called "Havana Charter"); the failed 1976-1991 attempts to create a UN Code of Conduct on Transnational Corporations; the 1966 ICSID Convention; the 1986 Multilateral Guarantee Agency Convention; the Lomé Conventions; the US-Canada Free Trade Agreement; the NAFTA; the Colonia Protocol of the Mercosur Agreements; and many BITs. For a comprehensive analysis of these attempts, see: P. MUCHLINSKI, *The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 207-217; C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., p. 152.

General Agreement on Trade in Services (GATS), as well as by other soft-law means such as the "codes of conduct"[75]. As seen by way of introduction, protecting foreign energy investments is of fundamental importance for granting energy security, which conforms the most relevant issue of present State energy policies and the main long-term objective of the Energy Charter process[76].

The ECT investment regime is characterized by a great degree of complexity. Investment provisions are basically harboured in Part III ECT ("Investment Promotion and Protection"), Articles 10-17, and Part V ("Dispute Settlement"), Articles 26-28 ECT, but there are other provisions, especially those enclosed in Part IV ECT ("Miscellaneous Provisions"), that have to be taken into consideration as well, since they specify, enlarge or reduce, in other words have implications on, the meaning and scope of the provisions included in Parts III and V ECT.

Further complexity derives from the fact that the investment regime has to be interpreted in light of the international instruments that influenced its drafting, notably the BITs (especially those concluded by the US and the UK), the NAFTA (markedly Chapter 11 on "Investment"), the Organisation for Economic Co-operation and Development (OECD)'s failed project on a Multilateral Agreement for Investment (MIA), the first European Community energy directives and, finally, national legislation dealing with foreign investment[77]. To this respect, the ECT can be seen as a codification of the customary international law which is at the base of the above mentioned instruments, notwithstanding that it provides for a greater level of investment protection and for original features such as the distinction between a pre and a post-investment phase, the specification of State liability over sub-national authorities and companies vested with particular rights for non-compliance with the Treaty's provisions, the stress accorded to the "*pacta sunt servanda*" principle and, finally, the incorporation of better-treatment standards from both customary and conventional international law[78]. Such a complex framework, unsurprisingly, poses countless interpretative challenges on the numerous investment obligations and rights provided by the Treaty.

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[75] See M. MARLETTA, *op. cit.*, pp. 371-372.

[76] See A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., pp. 529-530.

[77] The influence of national investment legislation on the ECT investment regime is particularly evident if one takes into consideration the circumspection that characterizes the access conditions (i.e. the pre-investment stage) to which foreign investors are subject under the ECT (see *infra*, § 3.4.3). On the antecedents of the ECT investment regime, see T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 257-268.

[78] See: T. WÄLDE, *Energy Charter Treaty-based Investment Arbitration – Controversial Issues*, in *OGEL*, 5, 2004, p. 7; P. D. CAMERON, *International Energy Investment Law. The Pursuit of Stability*, cit., pp. 156-157.

3.4.2. The scope of the investment regime

Interpretative doubts arise starting with the definitions of "investment" and "investor"[79]. It must be noticed, to this regard, that qualifying an investment and an investor as, respectively, an "investment" and an "investor" under the ECT, is of central importance, given that the Treaty provides foreign energy investors with the right to directly sue States (or international organizations party to the Treaty) for alleged breaches of ECT investment provisions that supposedly undermine their investments (see *infra*, § 3.5.1).

Art. 1(6) ECT defines "investment" as "*every kind of asset, owned or controlled directly and indirectly by an Investor*"[80] and provides for a non-exhaustive list that encompasses: "*tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges*"; "*a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise*"; "*claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment*"; "*Intellectual Property*", which, according to Art. 1(12) ECT, includes "*copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information*"; "*Returns*", which, pursuant to Art. 1(9) ECT, "*means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind*); finally, "*any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector*".

Art. 1(6) ECT further specifies that an investment, in order to be qualified as such under the ECT, has to be "associated" with an "Economic Activity in the Energy Sector", that is, pursuant to Art. 1(5) ECT, "*an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises*"[81], or has to be an investment or class of

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[79] On the definition of investor and investment in international investment law, see R. DOLZER – C. SCHREUER, *Principles of International Investment Law*, 2nd ed., OUP, Oxford, 2012, pp. 46-71. On the definition of investor and investment under the ECT, see: T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 270-276; E. GAILLARD, *Investments and Investors Covered by the Energy Charter Treaty*, in C. RIBEIRO (ed.), *Investment Arbitration and the Energy Charter Treaty*, cit., pp. 58-66; C. BALTAG, *The Energy Charter Treaty: The Notion of Investor*, Kluwer Law International, The Hague, 2012.

[80] Understanding 3 of the Final Act of the European Energy Charter Conference clarifies that "*For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists*".

[81] Annex NI ("Non-Applicable Energy Materials and Products for Definitions of "Economic Activity in the Energy Sector"") lists: "*(27.07) Oils and other products of the distillation of high temperature coal tar; similar*

investments "*designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat*" [82].

Finally, Art. 1(6) ECT clarifies that "*a change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date*".

It must be noticed that, pursuant to the so-called "denial of benefit clause" included in Art. 17 ("Non-Application of Part III in Certain Circumstances"), paragraph (2), of the ECT, a Contracting Party can deny the advantages of Part III ECT to investments made by investors of a third State with which it "*(a) does not maintain a diplomatic relationship; or (b) adopts or maintains measures that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments*" [83].

As regards "investor", pursuant to Art. 1(7) ECT, it is conceived as follows: "*(a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable in that contracting Party; (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party*". According to Art. 17(1) ECT, Contracting Parties can deny Part III advantages to "*a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized*".

As it is easy to see, the definition of "investment" under the ECT is wide-ranging, especially if one considers the far-reaching scope of the term "association with an economic activity in the energy sector". To this respect, it is worth quoting the tribunal in *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No.

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products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents. (Ex 44.01) Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms. (4401.10) Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms. (44.02) Wood charcoal (including shell or nut charcoal), whether or not agglomerated".

[82] With respect to Art. 1(5) ECT, Understanding 2 of the Final Act of the European Energy Charter Conference states that: "*(a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector. (b) The following activities are illustrative of Economic Activity in the Energy Sector: (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium; (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources; (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines; (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations; (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants; (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency*".

[83] On the denial of benefit clause, see S. JAGUSCH – A. SINCLAIR, *Investment Dispute Resolution and the Energy Charter Treaty. Part II: Denial of advantages under Article 17(1)*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and The Energy Charter Treaty*, cit., pp. 17-45.

ARB/03/24), hereinafter "*Plama*"[84], according to which "*As defined by Article 1(6) ECT, "Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor"; and there follows a broad, non-exhaustive list of different kinds of assets encompassing virtually any right, property or interest in money or money's worth, including "(b) ... shares, stock or other forms of equity participation in a company....*" (underlining added)[85].

Similarly, for the tribunal in *Limited Liability Company Amto v. Ukraine* (SCC Case No. 080/2005), hereinafter "*AMTO*"[86], "*the interpretation of the words 'associated with' involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector. The open-textured phrase 'associated with' must be interpreted in accordance with the object and purpose of the ECT, as expressed in Article 2. The associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector*" (underlining added)[87].

As to the definition of "investor", it appears clearer than that of investment. Nonetheless, it is not exempted from interpretative concerns, considering its strict relationship with the definition of investment. Indeed, the qualification of an investor as an "investor" under the ECT is a frequently-discussed question in ECT investor-State disputes: to this respect, a good case study is offered by the disputes filed against the Italian State, notably *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) and *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), which are discussed in detail in Chapter III.

3.4.3. The pre-investment regime

The ECT deals with both a pre-investment stage – or, as defined in Art. 1(8) ECT, "make investments" or "making of investments" – and a post-investment phase. The earlier consists of the access conditions that Contracting Parties are encouraged to maintain towards prospective foreign investors; the latter involves the obligations encumbering on Contracting Parties towards investments already made by foreign investors within their territories. As we will see, such distinction, however, is not

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[84] On *Plama*, see: A. ANTONIETTI, *Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24)*, in *ICSID Review*, Vol. 20, 1, 2005, pp. 259-261; J. CHALKER, *Making the Energy Charter Treaty Too Investor Friendly: Plama Consortium Limited v. the Republic of Bulgaria*, in *TDM*, 5, 2006; H. ESSIG, *Balancing Investors' Interests and State Sovereignty: The ICSID-Decision on Jurisdiction Plama Consortium Ltd. v. Republic of Bulgaria*, in *TDM*, 5, 2007; J. C. HAMILTON – P. POLÁŠEK – S. T. TONOVA, *Investment, Arbitration Under the Energy Charter Treaty: The Novel Case of Plama Consortium Limited v. Republic of Bulgaria*, in G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit., pp. 23-43.

[85] *Plama*, Decision on Jurisdiction, para. 125.

[86] On *AMTO*, see S. VOITOVICH – D. GRISCHENKO, *AMTO case Presentation*, in G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit., pp. 55-65.

[87] *AMTO*, Final Award, para. 42.

always straightforward, since pre-investment dispositions are, to some extent, mixed with post-investment ones[88].

There is widespread consensus on that the pre-investment regime would mainly consist of soft-law and best endeavour commitments, while the post-investment regime would provide for legally binding obligations on Contracting Parties and corresponding rights on foreign energy investors[89]. As a result, only post-investment provisions would be enforceable under Art. 26 ECT which, as we will see below (see *infra*, § 3.5.1), limits the investor-State dispute settlement (ISDS) mechanism to controversies concerning finalized investments[90]. Determining whether an activity falls within the pre-investment or, conversely, the post-investment phase, therefore, is of fundamental importance in order to trigger the protection mechanisms provided for in the Treaty.

To this end, Art. 1(8) ECT, pursuant to which "*"Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity*", is of little value, since its interpretation relies on the wide definition of "investment" provided in Art. 1(6) ECT. Indeed, ambiguities and uncertainties, far from being limited to the definitory profile, affect also the contents of the core provisions dealing with the access phase.

The pre-investment regime is laid down in Art. 10 ECT ("Promotion, Protection and Treatment of Investments"). According to the first two sentences of Art. 10(1) ECT, "*Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*". To this respect, it is interesting to note, here (but see *infra*, § 3.4.4.), that while the first sentence clearly relates to the pre-investment phase, the second sentence, which supposedly specifies the first, refers to "investments of investors" (i.e. the post-investment phase), with the result that a certain margin of confusion can be appreciated as to the scope and interplay of said provisions.

According to Art. 10(2) ECT, "*Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area the treatment described in paragraph (3)*", that is to say the "*treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable*". This provision puts a soft-law commitment to extend the national/most favoured nation (N/MFN) treatment standard, which consists in one of the most relevant means by which the Treaty protects foreign investments (see *infra*, § 3.4.2), to the pre-investment phase,

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[88] See T. WÄLDE, *Energy Charter Treaty-based Investment Arbitration – Controversial Issues*, cit., p. 12.

[89] See: M. MARLETTA, *op. cit.*, pp. 376-378; C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 150-151.

[90] To this regard, A. A. KONOPLYANIK – T. WÄLDE, *Energy Charter Treaty and its Role in International Energy*, cit., p. 533, clarify that, if on the one hand, States should be free to decide on the accession of a specific investor in a specific area of investment within their territory, on the other hand, investors, once admitted, should be protected against the remarkable political risks to which they are exposed in host Countries.

pending the adoption of the already mentioned supplementary Investment Treaty by which making such commitment compulsory. As already seen, in fact, Art. 10(4) ECT states that "*A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3)* […]"[91].

Pursuant to Art. 10(5), "*Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to: (a) limit to the minimum the exceptions to the Treatment described in paragraph (3); (b) progressively remove existing restrictions affecting Investors of other Contracting Parties*".

Finally, Art. 10(6) states that "*A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3)*" and that "*A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty*". Art. 10(6) ECT is particularly interesting: despite no commitment has been so far notified and listed in Annex VC, and pending the adoption of the supplementary Investment Treaty referred to in Art. 10(4) ECT, it represents an "open door" by which Contracting Parties can extend, on a binding basis, the N/MFN treatment also to the pre-investment phase, with the result of making such decision enforceable under Art. 26 ECT.

The above examined provisions, together with those having implications on pre-investment activities although dealing with other matters (and being therefore included in other Treaty's sections)[92], pose a series of interpretative issues that can be summarized, here, only in brief[93]. We already said that, in principle, pre-investment provisions would conform a soft-law regime. It must be noticed, however, that the Treaty adopts an ambiguous "aptitude" towards the pre-investment regime. On the one hand, in fact, the very language of the Treaty – whose pre-investment provisions are mainly introduced by the "shall endeavour" locution, contrary to post-investment obligations which are mainly accompanied by the wording "shall" – together with the multiple references to the supplementary investment treaty, suggests the hortatory

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[91] Understanding 10 of Final Act of the European Energy Charter Conference specifies that "*The supplementary treaty will specify conditions for applying the Treatment described in Article 10(3). Those conditions will include, inter alia, provisions relating to the sale or other divestment of state assets (privatization) and to the dismantling of monopolies (demonopolization)*".

[92] Other relevant Articles for the pre-investment regime are: Art. 5 ("Trade-Related Investment Measures"); Art. 11 ("Key Personnel"), notably paragraph (1); Art. 18 ("Sovereignty over Energy Resources"), particularly paragraphs (2) and (4) on resource licensing; Art. 20 ("Transparency"); Art. 21 ("Taxation"); Art. 22 ("State and Privileged Enterprises").

[93] For a more extensive analysis on the interpretative issues accompanying the ECT pre-investment regime, see T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 277-284.

nature of the pre-investment commitments, especially those dealing with the N/MFN treatment[94].

On the other hand, however, the ECT does not explicitly excludes the compulsoriness of pre-investment provisions. To this regard, it is worth mentioning that pre-investment provisions, unlike those dealing with competition and environmental aspects, are not expressly excluded from the scope of Art. 27 ECT, which governs the settlement of "State-State" disputes on the application or interpretation of the ECT (see *infra*, § 3.5.2). This state of things would demonstrate, at least, the greater consideration that the Treaty pays towards the pre-investment phase in comparison with other matters it deals with. In the light of this, the question of whether investors are or are not able to enforce their pre-investment rights under Art. 26 ECT is at least questionable.

In any case, since it is not always easy to distinguish clearly between a pre and a post-phase in the realm of energy investments, considering that they require a long and lasting sequence of increasingly capital-intensive operations, it can be argued whether and to what extent pre-investment activities could be covered by ECT post-investment provisions, with the result of being in any case shielded by Art. 26. As we will see in Chapter III, the issue at hand may have great practical effects on the protection of incoming foreign investments in Italy and Italian outflowing investments following Italy's withdrawal from the Treaty (see *infra*, Chapter III, § 2.2).

3.4.4. The post-investment regime

Post-investment provisions, too, are mainly regulated in Part III ECT and are not exempted from interpretative concerns. The ECT protects foreign energy investments by providing, in the first place, for an absolute minimum standard of treatment in Art 10(1). As seen before, pursuant to the first sentence of Art. 10(1) ECT, Contracting Parties are committed to encourage and create "*stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments*" in their territories, a provision which, despite referring to the make of investment phase, can be extended to the post-investment stage, especially if read in connection with the second sentence of Art. 10(1) ECT. The latter, in fact, specifies that "*Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*".

Art. 10(1), second sentence, bears particular importance in terms of investment protection, since it embodies the fair and equitable treatment (FET) standard. The FET standard has been largely examined in academic literature[95]. In particular, it has

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[94] To this respect, it is worth noting that the ECT was agreed only after the decision to extend the application of the N/MFN standard to the pre-investment stage was deferred to additional negotiations on the supplementary Investment Treaty.

[95] See, *ex multis*: I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, OUP, Oxford, 2008; R. KLÄGER, *'Fair and Equitable Treatment' in International Investment Law*, OUP, Oxford, 2011; R. DOLZER – C. SCHREUER, *op. cit.*, pp. 119-149; M. PAPARINSKIS, *The International Minimum Standard and Fair and Equitable Treatment*, OUP, Oxford, 2013; K. NADAKAVUKAREN SCHEFER, *International Investment Law: Text, Cases and Materials*, 2nd ed., Edward Elgar, Cheltenham-Northampton, 2016, pp. 377-427; T. WÄLDE, *Energy Charter Treaty-based Investment*

been noticed that the treatment, despite the concurrent development of similar principles in arbitral practice such as good faith, protection of legitimate expectations, due process, transparency, proportionality and prohibition of arbitrariness, has become an important principle of investment protection, especially through the jurisprudence rendered in BITs and NAFTA arbitrations[96]. For some commentators[97], in fact, the treatment is meant to provide a basic standard of protection for foreign investments detached from host States' laws, notwithstanding that its concrete application inevitably remains fact-specific, thus requiring an in-depth analysis on the application of the standards of good-government conduct within each national context[98].

The third sentence of Art. 10(1) further asserts that "*Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*". Regarding the "constant protection and security" clause, discussions have mainly focussed on whether it requires effective rule of law or mere physical security[99], while the prohibition of "unreasonable or discriminatory measures" poses greater interpretative challenges, especially as regards its relationship with the N/MFN treatment standard foreseen in paragraphs (3) and (7) of Article 10 and the already seen FET standard enunciated in the second sentence of Art. 10(1) ECT[100].

The fourth sentence establishes that "*In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations*", while the fifth sentence finally concludes the paragraph providing that "*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*". The latter provision consists in an "umbrella clause"[101] and is often seen as emphasizing the *pacta sunt servanda* or "sanctity of contracts" principle: it implies, in fact, that obligations deriving from contracts stipulated by a Contracting Party with a foreign investor are directly binding under the ECT, being therefore enforceable through the mechanisms provided in Part V of the Treaty, notably Art. 26[102].

The most relevant question as to the umbrella clause concerns its scope, i.e. whether it conforms a pure commercial clause, pursuant to which non-compliance by a Contracting Party is to be considered as a contractual breach and, therefore, a violation of Art. 10 (1) ECT), or whether it requires a governmental abuse of specific powers. To this regard, it is worth noting that BITs' practice mostly excludes the mere

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Arbitration – Controversial Issues, cit., pp. 20-28; R. HAPP, *Dispute Settlement under the Energy Charter Treaty*, in *OGEL*, 5, 2004, pp. 18-23; K. HOBÉR, *Investment Arbitration and the Energy Charter Treaty*, in *JIDS*, Vol. 1, 1, 2010, pp. 157-158; C. H. SCHREUER, *Selected Standards of Treatment Available Under the Energy Charter Treaty. Part I: Fair and Equitable Treatment (FET): Interaction With Other Standards*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 63-100.

[96] See K. HOBÉR, *op. cit.*, p. 157.

[97] See R. HAPP, *op. cit.*, p. 19.

[98] See K. HOBÉR, *op. cit.*, p. 158.

[99] See T. WÄLDE, *Energy Charter Treaty-based Investment Arbitration – Controversial Issues*, cit., pp. 28-30.

[100] See: K. HOBÉR, *op. cit.*, pp. 158-159; R. HAPP, *op. cit.*, pp. 23-25.

[101] On umbrella clauses see: R. DOLZER – C. SCHREUER, *op. cit.*, pp. 153-162.

[102] See C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 153-154.

commercial nature of similar clauses[103]. Moreover, it has been pointed out the possible far-reaching implications of the clause, if read in connection with Art. 22(1) ECT (which extends State liability for non-compliance with Part III of the Treaty also to actions or omissions of State and privileged enterprises)[104], Art. 18 ECT (on State sovereignty over energy resources) and Art. 13 ECT (on expropriation)[105].

Finally, it must be kept in mind that, pursuant to Articles 26(3) and 27(2) ECT, Contracting Parties are allowed to opt out from the umbrella clause by listing themselves in Annex IA ECT ("List of Contracting Parties Not Allowing an Investor or Contracting Party to Submit a Dispute concerning the Last Sentence of Article 10(1) to International Arbitration")[106].

To sum up, the standards of treatment enunciated in Art. 10(1) pose several interpretative concerns, considering the ambiguity of their formulation (as the relationship between the first and the second sentence of the paragraph), their reciprocal connection (e.g. the relation between the FET standard and the prohibition of "unreasonable or discriminatory measures") and, above all, their relationship with other specific commitments arranged in the Treaty (e.g. the connection between the prohibition of "unreasonable or discriminatory measures" under Art. 10(1) ECT and the N/MFN treatment standard under Art. 10(7) ECT). More importantly, a major question is whether said standards are to be considered as merely hortatory statements introducing the Treaty's core provisions on investment protection (such as Art. 10(7) ECT), or as having direct enforceability under Art. 26 ECT[107], and, therefore, whether their scope could be narrowed by agreements eventually concluded between Contracting Parties and foreign investors (i.e. the *lex generalis* vs. *lex specialis* issue)[108].

Besides the absolute minimum standard of treatment laid down in Art. 10(1) ECT, the most relevant protection accorded to foreign investments is the N/MFN standard provided in Art. 10, paragraphs (1), (3) and, above all, (7), of the ECT[109]. Art. 10(7) ECT states that "*Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable*". The treatment applies exclusively to the post-investment phase, with an

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[103] See T. WÄLDE, *Energy Charter Treaty-based Investment Arbitration – Controversial Issues*, cit., pp. 31-39.

[104] See K. HOBÉR, *op. cit.*, p. 159.

[105] See T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., p. 297.

[106] So far only Australia, Canada, Hungary and Norway have so done.

[107] See C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., p. 152;

[108] See T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 286-290.

[109] On the N/MFN standard, see: R. DOLZER – C. SCHREUER, *op. cit.*, pp. 178-191; K. NADAKAVUKAREN SCHEFER, *op. cit.*, pp. 353-360; P. D. FRIEDLAND, *Selected Standards of Treatment Available Under the Energy Charter Treaty. Part. II: the Scope of Most Favoured Nation Treatment Under the Energy Charter Treaty*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 101-114.

exception regarding intellectual property: pursuant to Art. 10(10) ECT, in fact, "*the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties*". Under the N/MFN standard, Contracting parties have to provide foreign investments, including their "related activities such as management, maintenance, use, enjoyment or disposal", with a treatment at least as favourable as the treatment they accord to their own investors or to investors from third Countries, whichever is the most favourable.

Regarding the interpretative problems posed by the treatment, the most discussed issues concern the meaning to be given to the word "treatment" and, what is more, the extent to which the principle could be understood as allowing for differentiations in treatment[110]. Other problematic questions concern the relationship with the non-discrimination standard laid down in Art 10(1) ECT, as well as its application by infra-State authorities or State companies vested with special or exclusive rights (Articles 22 and 23 ECT)[111].

The Treaty further protects foreign investments from non-commercial risks by establishing rights and obligations regarding the following areas: access and employment of key personnel by foreign investors or investments (Art. 11 "Key Personnel")[112]; compensation for losses suffered owing to wars, armed conflicts, states of national emergency, civil disturbances, or similar events (Art. 12 "Compensation

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[110] See T. WÄLDE, *Energy Charter Treaty-based Investment Arbitration – Controversial Issues*, cit., pp. 17-19. It is worth quoting, here, Declaration 4 of the Final Act of the European Energy Charter Conference made by Canada and the US with respect to Art. 10 ECT: "*Canada and the United States each affirm that they will apply the provisions of Article 10 in accordance with the following considerations: For the purposes of assessing the treatment which must be accorded to Investors of other Contracting Parties and their Investments, the circumstances will need to be considered on a case-by-case basis. A comparison between the treatment accorded to Investors of one Contracting Party, or the Investments of Investors of one Contracting Party, and the Investments or Investors of another Contracting Party, is only valid if it is made between Investors and Investments in similar circumstances. In determining whether differential treatment of Investors or Investments is consistent with Article 10, two basic factors must be taken into account. The first factor is the policy objectives of Contracting Parties in various fields insofar as they are consistent with the principles of non-discrimination set out in Article 10. Legitimate policy objectives may justify differential treatment of foreign Investors or their Investments in order to reflect a dissimilarity of relevant circumstances between those Investors and Investments and their domestic counterparts. […] The second factor is the extent to which the measure is motivated by the fact that the relevant Investor or Investment is subject to foreign ownership or under foreign control. A measure aimed specifically at Investors because they are foreign, without sufficient countervailing policy reasons consistent with the preceding paragraph, would be contrary to the principles of Article 10. The foreign Investor or Investment would be "in similar circumstances" to domestic Investors and their Investments, and the measure would be contrary to Article 10*".

[111] See C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 154-157.

[112] Art. 11 ECT: "*(1) A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine in good faith requests by Investors of another Contracting Party, and key personnel who are employed by such Investors or by Investments of such Investors, to enter and remain temporarily in its Area to engage in activities connected with the making or the development, management, maintenance, use, enjoyment or disposal of relevant Investments, including the provision of advice or key technical services. (2) A Contracting Party shall permit Investors of another Contracting Party which have Investments in its Area, and Investments of such Investors, to employ any key person of the Investor's or the Investment's choice regardless of nationality and citizenship provided that such key person has been permitted to enter, stay and work in the Area of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such key person*".

for Losses")[113]; expropriation, excepting in particular cases (public interest) and under certain circumstances (no-discrimination, due process of law and compensation) (Art. 13 "Expropriation")[114]; freedom to transfer funds (Art. 14 "Transfers Related to Investments")[115]; and subrogation (Art. 15)[116]. All these provisions are contained in Part III ECT and are, therefore, enforceable under Art. 26 ECT[117].

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[113] Art. 12 ECT: "*(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state. (2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from (a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or (b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective*".

[114] Art. 13 ECT: "*(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment. (2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1). (3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares*". On the ECT expropriation regime, see: P. M. NORTON, *Back to the Future: Expropriation and the Energy Charter Treaty*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 365-385; M. SORNARAJAH, *Compensation for Nationalization: The Provision in the European Energy Charter*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 386-408; ENERGY CHARTER SECRETARIAT, *Expropriation Regime under the Energy Charter Treaty*, 2012 (available online).

[115] Art. 14 ECT: "*(1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of: (a) the initial capital plus any additional capital for the maintenance and development of an Investment; (b) Returns; (c) payments under a contract, including amortisation of principal and accrued interest payments pursuant to a loan agreement; (d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment; (e) proceeds from the sale or liquidation of all or any part of an Investment; (f) payments arising out of the settlement of a dispute; (g) payments of compensation pursuant to Articles 12 and 13. (2) Transfers under paragraph (1) shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency. (3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor. (4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations. (5) Notwithstanding paragraph (2), Contracting Parties which are states that were constituent parts of the former Union of Soviet Socialist Republics may provide in agreements concluded between them that transfers of payments shall be made in the currencies of such Contracting Parties, provided that such agreements do not treat Investments in their Areas of Investors of other Contracting Parties less favourably than either Investments of Investors of the Contracting Parties which have entered*

Part III ECT is closed by Articles 16 ("Relation to other Agreements")[118] and 17 ("Non-Application of Part III in Certain Circumstances") [119]. Art. 16 clarifies that Parts III and V ECT must not be used as a mean for derogating from similar provisions contained in other international agreements possibly concluded by two or more Contracting Parties and that, conversely, such international agreements must not be used to derogate from Parts III and V ECT when the latter provides for more favourable conditions for foreign investors or investments. As we will see in Chapter III, Art. 16 ECT assumes particular relevance as far as the thorny question of the relationship between the ECT and EU law is concerned (see *infra*, Chapter II, § 8.4.3)

As to Art. 17 ECT (the so called "denial of benefit" clause), we already said that it allows a Contracting Party to deny Part III advantages to companies from third States when such companies do not carry substantial activities in the territory of the Contracting Party in which they are organized, or when the Contracting Party do not have diplomatic relationships or prohibits transactions with the third State.

By way of conclusion, we can list other Treaty provisions that, despite dealing with other subjects and being included in other sections of the Treaty, are nonetheless

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into such agreements or Investments of Investors of any third state. (6) Notwithstanding subparagraph (1)(b), a Contracting Party may restrict the transfer of a Return in kind in circumstances where the Contracting Party is permitted under Article 29(2)(a) or the WTO Agreement to restrict or prohibit the exportation or the sale for export of the product constituting the Return in kind; provided that a Contracting Party shall permit transfers of Returns in kind to be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and either an Investor of another Contracting Party or its Investment".

116 Art. 15 ECT: "*(1) If a Contracting Party or its designated agency (hereinafter referred to as the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the "Party Indemnified") in the Area of another Contracting Party (hereinafter referred to as the "Host Party"), the Host Party shall recognise: (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation. (2) The Indemnifying Party shall be entitled in all circumstances to: (a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and (b) the same payments due pursuant to those rights and claims, as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned. (3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract*".

117 For an overview of these provisions, see T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 297-304.

118 Art. 16 ECT: "*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 the subject matter of Part III or V of this Treaty, (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; and (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 favourable to the Investor or Investment*".

119 Art. 17 ECT: "*Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party: (a) does not maintain a diplomatic relationship; or (b) adopts or maintains measures that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments*".

closely related to the investment regime. These provisions concern: "Trade-Related Investment Measures" (Art. 5)[120], "Competition" (Art. 6)[121], "Transit" (Art. 7), "Transfer of technology" (Art. 8), "Access to Capital" (Art. 9), "Sovereignty over Energy Resources" (Art. 18), "Environmental Aspects" (Art. 19), "Transparency" (Art. 20), "Taxation" (Art. 21), "State and Privileged Enterprises" (Art. 22), "Observance by Sub-National Authorities" (Art. 23), "Exceptions" (Art. 24), "Economic Integration Activities" (Art. 25), Part V, "Transitional Arrangements" (Art. 32) and "Provisional Application" (Art. 45)[122]. Regarding these provisions, it has been argued that, since they often specify, enlarge or narrow the scope of the investment obligations, being therefore closely related to them, they may fall within the reach of Art. 26 ECT[123].

3.5. The investment dispute settlement regime

3.5.1. The ISDS mechanism

As mentioned in the introduction, providing foreign energy investors with appropriate means by which protecting their investments is of fundamental importance in order to grant energy security. To this respect, the ECT provides for an original system by which settling disputes concerning the interpretation or application of its provisions. Indeed, the Treaty foresees different dispute settlement mechanisms which vary depending on the matter concerned. In addition, it provides, in Articles 27 and 28 ECT, for a "State-State" mechanism for the settlement of disputes concerning the interpretation and the application of the Treaty as a whole.

As seen before, disputes on trade provisions are to be settled in accordance with the panel mechanism provided in Art. 29(9) and Annex D of the ECT. Disputes relating to transit are to be accommodated according to the "conciliator" procedure envisaged in Art. 7, paragraphs (6) and (7), of the ECT. Finally, pursuant to Art. 19(2) ECT[124], controversies on environmental provisions are to be submitted to the review of the Energy Charter Conference.

As to investment disputes, in addition to the State-State mechanism laid down in Articles 27 and 28 ECT, Art. 26 ECT ("Settlement of Disputes between an Investor

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120 See M. E. FOOTER, *Trade and Investment Measures in the Energy Charter Treaty*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 445-458.

121 On competition, see: K. HOLMES, *Legal Implications of the Energy Charter Treaty, Competition-Rules and Liberalization*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 546-560; ENERGY CHARTER SECRETARIAT, *Analysis on Issues Related to Competition under the Energy Charter Treaty*, 2012 (available online).

122 See T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 311-314.

123 *Ibid.*, p. 284.

124 According to Art. 19(2) ECT, "*At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution*".

and a Contracting Party") provides for an ISDS regime[125]. Both mechanisms are included in Part V ECT ("Dispute settlement").

According to Art. 26(1) ECT[126], the ISDS mechanism is limited to "*Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the*

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[125] On the ECT investment dispute settlement regime see: T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 304-311; K. J. VANDEVELDE, *Arbitration Provisions in the BITs and the Energy Charter Treaty*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 409-421; J. PAULSON, *Arbitration Without Privity*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 435-440; C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 161-166; S. S. HAGHIGHI, *op. cit.*, pp. 204-234; J. BLANCH – A. MOODY – N. LAWN, *Investment Dispute Resolution and the Energy Charter Treaty. Part I: Access to Dispute Resolution mechanisms under Article 26 of the Energy Charter Treaty*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 1-15; G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit.; T. ROE – M. HAPPOLD, *op. cit.*; E. DE BRABANDERE, *The Settlement of Investment Disputes in the Energy Sector*, in E. DE BRABANDERE – T. GAZZINI (ed.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*, cit., pp. 130-168.

[126] Art. 26 ECT: "*(1) 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 concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably. (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article. (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41. (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1). (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (a) (i) The International Centre for Settlement of Investment Disputes, 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 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "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 (hereinafter referred to as "UNCITRAL"); or (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce. (5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and (iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules. (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention. (6) A tribunal established under paragraph (4) shall decide the issues in dispute in*

latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III". For an investor-State dispute to be incepted under the ECT, therefore, three conditions must be fulfilled at the same time: the dispute must be transnational, i.e. the investor's home State and the respondent State must be different Contracting Parties to the Treaty (condition *ratione personae*); the dispute must relate to an investment made in the area of the defendant (condition *ratione loci*); finally, the dispute must concern an alleged breach of an obligation in force for the respondent under Part III ECT (condition *ratione materiae*).

As specified in the last clause of Art. 26(1), investor-State disputes have to be settled amicably. However, according to Art. 26(2) ECT, if a dispute cannot be so settled, after the expiration of a period of three months since the amicable settlement is requested, the investor concerned can submit the unresolved controversy, to: a) the courts or administrative tribunals of the Contracting Party where the investment is made; b) a previously agreed dispute settlement procedure; c) international arbitration.

According to Art. 26(4) ECT, if the investor chooses to submit the dispute to international arbitration, he can choose between: 1) ICSID arbitration, provided that both the Contracting Party of the investor and the respondent Contracting Party to the dispute are parties to the ICSID Convention; 2) arbitration under the ICSID Additional Facility Rules, provided that the Contracting Party of the investor or the respondent party, but not both, is party to the ICSID Convention; 3) a sole arbitrator or an *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); 4) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (AISCC).

International arbitration is of paramount importance for investors, since it provides them with a flexible and, what is more, neutral mechanism for settling disputes with host Countries. This is particular so for small and medium investors, which have less changes than multinational companies to lobby their host governments in order to protect their interests[127]. As to the ECT, the choice to provide for different arbitration options can be explained with the fact that each *forum* has its own specific features, which make them more or less attractive depending on the characteristics of the dispute concerned. As we will see in Chapter II, the choice made by investors as to the *forum* of arbitration is of primary importance, since such choice has great, practical implications on how the disputes are settled. For example,

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accordance with this Treaty and applicable rules and principles of international law. (7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State". (8) 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".

[127] See K. HOBÉR, *Overview of Energy Charter Treaty Cases*, in M. SCHERER (ed.), *International Arbitration in the Energy Sector*, cit., p. 179.

UNCITRAL and AISCC arbitrations are, traditionally, more confidential than ICSID proceedings, despite there have been attempts to render the former more transparent[128]. AISCC arbitration, in addition, has demonstrated to be particular effective for the settlement of "East-West" disputes. Finally, the ICSID Convention provides for certain jurisdictional limitations to ICSID arbitral tribunals, especially as regards the definition of "investment" and "investor", with the consequence that disputes that may be covered by the ECT may not meet ICSID Convention requirements[129].

In light of this, it is easy to understand why Art. 26 ECT represents the most relevant provision of the ECT investment protection regime. As mentioned above, the ECT, together with the NAFTA, is the only multilateral international system allowing privates to protect their investments without the need to draw upon the less effective State diplomatic channels[130]. What is more, the Treaty provides for what has been called "arbitration without privity", i.e. it entrusts foreign investors with the right to activate international arbitration without the need for a prior arbitral agreement with the host Contracting Party[131]. In fact, pursuant to Art. 26, paragraph (3), letters (a) and (b), of the ECT, Contracting Parties are meant as giving their unconditional consent to the submission of a dispute to international arbitration or conciliation, excepting for Annex ID[132] and Annex IA Parties[133], i.e. Contracting Parties that do not give such unconditional consent where the investor previously submits the dispute to the courts or administrative tribunals of the Contracting Party where the investment is made or to a previously agreed dispute settlement procedure (the so called "fork in the road" clause)[134], or Contracting Parties that do not allow investors to submit a dispute concerning the last sentence of Article 10(1) ECT (the already examined "umbrella clause").

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128 See D. EULER – M. GEHRING – M. SCHERER (eds.), *Transparency in international Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, CUP, Cambridge, 2018.

129 See E. DE BRABANDERE, *op. cit.*, pp. 139-142.

130 See M. MARLETTA, *op. cit.*, p. 382.

131 The term "arbitration without privity" was coined by Jan Paulsson for describing a change in arbitral consent: while arbitration is generally consensual, i.e. the parties to a dispute agree to submit the dispute to arbitration, in international investment law has emerged a model according to which foreign investors are able to initiate arbitral proceedings against the host State by referring to the arbitration clause included in the investment treaty, despite the lack of an arbitration agreement between them. See J. PAULSSON, *Arbitration Without Privity*, in *ICSID Review - Foreign Investment Law Journal*, Vol. 10, 2, 1995, pp. 232-257; Id., *Arbitration Without Privity*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 435-440.

132 Annex ID ECT ("List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26"), lists the following Contracting Parties: Australia, Azerbaijan, Bulgaria, Canada, Croatia, Cyprus, The Czech Republic, European Union and EURATOM, Finland, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Norway and Poland.

133 See N 106 above.

134 On the "fork in the road" clause, see E. GAILLARD, *Questions and Observations: Interactive Section. Part. II: How Does the So-called "Fork-in-the-road" Provision in Article 26(3)(b)(i) of the Energy Charter Treaty Work? Why Did the United States Decline to Sign the Energy Charter Treaty?*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 221-233.

Art. 26 ECT adds further interpretative dilemmas to the already complex and ambiguous ECT investment protection regime. Questions firstly arise regarding its scope: despite paragraph (1) clearly refers to alleged breaches of Part III obligations, it has been argued that also other provisions, especially those laid down in Part IV ECT, could be covered by Art. 26 ECT, inasmuch as they closely or directly relate to Part III provisions, a circumstance that, as seen before, is not unlikely to occur[135].

Secondly, since Art. 26 ECT offers to investors multiple arbitration *fora* where enforcing the rights descending from Part III, the eventuality of a super-appeal procedure before international arbitral tribunals against decisions delivered by national courts or from an agreed dispute settlement procedure is not to be excluded (excepting in the case of Annex ID Countries). A state of things that lead us to the very problematic issue of the relationship between international arbitration and the other investment dispute settlement mechanisms foreseen in the ECT. To this regard, the doctrine has pointed out the following questions: can investors initiate national litigation and then switching over international arbitration? Is *lis pendens* allowed? Can investors turn to other mechanisms after having opted for contractual arbitration? Are investors allowed to activate arbitral proceedings when it is the respondent Contracting Party, and not himself, to bring the dispute before a national court or a contractually set tribunal? What is the relationship existing between Treaty-based and contractual arbitration, i.e. which mechanism has precedence?[136].

Finally, and more importantly, Art. 26 ECT poses the crucial question of the law applicable to settle the disputes, that is the issue of the relationship between international, contractual and national law (especially when Treaty provisions become part of national law). On the one hand, in fact, pursuant to Art. 26(6), if the investor opts for international arbitration, arbitral tribunals "*shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*" (underlining added).

On the other hand, however, it has been noted[137] that the choice of the arbitral *forum* among the multiple options provided by the Treaty (ICSID, UNCITRAL, AISCC) could lead to different outcomes, since not all of them give priority to the same applicable law. For example, if the chosen forum is the ICSID, according to Art. 42 of the ICSID Convention "*(1) 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 the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of* non liquet *on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute* ex aequo et bono *if the parties so agree*". If the option is UNCITRAL arbitration, Art. 35 of the

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135 See T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., p. 284.

136 *Ivi*, pp. 306-307. See also: R. HAPP, *op. cit.*, pp. 31-33; E. DE BRABANDERE, *op. cit.*, pp. 163-167.

137 T. WÄLDE, *International Investment under the 1994 Energy Charter Treaty. Legal Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, cit., pp. 308-309.

UNCITRAL Arbitration Rules establishes that: "*1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.2. The arbitral tribunal shall decide as* amiable compositeur *or* ex aequo et bono *only if the parties have expressly authorized the arbitral tribunal to do so. 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction*".

It is therefore clear how the reference made by Art. 26(6) to "*this Treaty and applicable rules and principles of international law*" may indirectly conflict with other Treaty provisions, namely paragraph (4) of Art. 26 ECT.

As to the applicable law, a core question discussed in ECT arbitral proceedings is the applicability and, more in general, the relevance of EU law for the purposes of dispute resolution. As we will see extensively in next chapter, such issue has been contended in disputes where both the investor's home State and the respondent Country are EU Member States parties to the ECT (the so-called "intra-EU" disputes).

Moreover, alongside arbitral tribunals, also national courts (i.e. courts or administrative tribunals of a Contracting Party) can be requested to decide over the Treaty's interpretation and application. To this regard, a related and remarkable issue is that of the direct effect of the Treaty within the national laws of its Contracting Parties. It has been suggested, to this regard, that Part III ECT – together with the provisions clarifying, expanding or limiting its scope, such as Articles 22 and 23 on State responsibility for privileged enterprises and sub-national authorities – is to be considered as having direct effect, since it does not require further, implementing measures by national legislation and considering the effectiveness of Art. 26 in directly establishing an enforceable mechanism by which investors can protect their investments[138].

Finally, even more complex issues arise with respect to the ISDS regime if one takes into account the mixed participation of the EU and its Member States to the ECT. As we will see extensively in next chapter, in fact, the conditions required by Art. 26 ECT in order to incept an investor-State dispute under the Treaty put many procedural and substantial questions as far as disputes involving parties from the EU are concerned.

3.5.2. The State-State (investment) dispute settlement mechanism

As said, Art. 27 ECT ("Settlement of Disputes Between Contracting Parties") governs the resolution of State-State controversies on the application or interpretation of the whole Treaty, being therefore not limited to the investment regime. According to Art. 27(1) ECT, "*Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels*". If a dispute has not been so settled "*within a reasonable period of time*", it can be submitted to an *ad hoc* tribunal according to

[138] On this issue, see G. LOIBL, *The Energy Charter Treaty: Implementation and Compliance Issues*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 565-583. See also C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 176-178.

the procedure foreseen in Art. 27(3) ECT[139]. The mechanism does not apply, according to Art. 27(2) ECT, when otherwise provided by the Treaty or agreed in writing by the Contracting Parties, as well as regarding the application or interpretation of Art. 6 (competition), Art. 19 (environment) and, for Annex IA Contracting Parties, Art. 10(1), last sentence, of the ECT. Furthermore, according to Art. 28 ECT ("Non-Application of Article 27 to Certain Disputes"), the entire procedure provided in Art. 27 ECT does not apply regarding the application or interpretation of Art. 5 (trade-related investment measures) and Art. 29 (interim provisions on trade-related matters), unless the Contracting Parties parties to the dispute so agree.

Similarly to Art. 26 ECT, also Art. 27 ECT is not exempt from controversial profiles. Commentaries on the ECT remark, in particular, the possible overlapping between Articles 26 and 27 ECT, or, more interestingly, the possible conflict of jurisdiction which may oppose and *ad hoc* tribunal settled under Art. 27 ECT and the Court of Justice of the EU (CJEU), as long as the potential dispute opposes EU Member States[140].

Such conflicts, however, are unlikely to emerge, considering the traditional reluctance of States to interfere with the domestic affairs of other States, in this case as regards the implementation of international law within national law. What is

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[139] Art. 27(3) ECT: "*Such an ad hoc arbitral tribunal shall be constituted as follows: (a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party; (b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2), request that the appointment be made in accordance with subparagraph (d); (c) A third member, who may not be a national or citizen of a Contracting Party party to the dispute, shall be appointed by the Contracting Parties parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the receipt of the notice referred to in paragraph (2), the Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with subparagraph (d), at the request of either Contracting Party submitted within 180 days of the receipt of that notice; (d) Appointments requested to be made in accordance with this paragraph shall be made by the Secretary General of the Permanent Court of International Arbitration within 30 days of the receipt of a request to do so. If the Secretary General is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the most senior Deputy; (e) Appointments made in accordance with subparagraphs (a) to (d) shall be made with regard to the qualifications and experience, particularly in matters covered by this Treaty, of the members to be appointed; (f) In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members; (g) The tribunal shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law; (h) The arbitral award shall be final and binding upon the Contracting Parties parties to the dispute; (i) Where, in making an award, a tribunal finds that a measure of a regional or local government or authority within the Area of a Contracting Party listed in Part I of Annex P is not in conformity with this Treaty, either party to the dispute may invoke the provisions of Part II of Annex P; (j) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties parties to the dispute; (k) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall sit in The Hague, and use the premises and facilities of the Permanent Court of Arbitration; (l) A copy of the award shall be deposited with the Secretariat which shall make it generally available*".

[140] C. S. BAMBERGER – T. WÄLDE, *The Energy Charter Treaty*, cit., pp. 165-166.

confirmed by the fact that the Energy Charter Secretariat is aware of only one dispute activated under Art. 27 ECT, that is a controversy arisen between Slovenia and Croatia about transit restrictions on oil, which was eventually settled amicably through diplomatic channels[141].

3.6. The other fields of energy cooperation

Beyond trade, transit, investment promotion and protection and dispute settlement, the Treaty deals with other matters which, in many cases, have implications also on the investment and trade regimes.

Part II ECT on commerce contains provisions on trade-related investment measures (Art. 5), competition (Art. 6), transfer of technology (Art. 8) and access to capital (Art. 9).

Part IV ECT contains miscellaneous provisions dealing with: sovereignty over energy resources (Art. 18), environmental aspects (Art. 19), transparency (Art. 20), taxation (Art. 21), State and privileged enterprises (Art. 22), observance by sub-national authorities (Art. 23), exceptions (Art. 24) and economic integration agreements (Art. 25). With specific regard to Art 19 ECT, it has been underlined that its inclusion in the ECT represents an innovative approach in investment protection, since investment treaties usually pay little attention to environmental protection[142].

Part VI ECT contains "transitional" provisions, the most remarkable of which, as seen before, is Art. 29 providing for "interim" provisions on trade-related matters (see *supra*, § 3.2.).

Part VII ECT regulates the institutional aspects of the Treaty (Energy Charter Conference, Secretariat, voting, funding, etc.), while, finally, Part VIII ECT provides for final provisions on signature (Art. 38), ratification (Art. 39), accession (Art. 41), amendments (Art. 42), provisional application (Art. 45), withdrawal (Art. 47) *etc*. To this respect, it is worth spending some words on Articles 45 and 47.

Art. 45 ECT[143], in fact, found great attention in academic literature[144] – especially following the Russian decision to terminate the provisional application to the Treaty – and in ECT case law, especially in the disputes filed against the Russian Federation[145].

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[141] See K. YAFIMAVA, *op. cit.*, p. 619.

[142] See T. GAZZINI, *op. cit.*, p. 113.

[143] Art. 45 ECT: "*(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository. (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1). (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations. (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository. (b) In the event that a signatory terminates provisional application*

Art. 47 ECT[146], conversely, found practical relevance following the Italian withdrawal from the Treaty, which took effect on 1 January 2016.

Articles 45 and 47 include a so-called "sunset clause", i.e. a provisions according to which the ECT, notably the investment promotion and protection regime laid down in Parts III and V, continue to protect investments made until the termination of the provisional application and the withdrawal for an additional period of time of 20 years. According to Art. 45(3)(b) ECT, "*In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those*

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under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c). (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor. (4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38. (5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat. (6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty. (7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article".

144 See: W. M. REISMAN, *Investment Dispute Resolution and the Energy Charter Treaty. Part III: the Provisional Application of the Energy Charter Treaty*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 47-61; S. ÇAL, *Reciprocity and Provisional Application Under the Energy Charter Treaty: Legal Aspects*, in M. M. ROGGENKAMP – U. HAMMER, *European Energy Law Report VI*, Intersentia, Cambridge, 2009, pp. 189-226; T. GAZZINI, *Provisional Application of the Energy Charter Treaty: A Short Analysis of Article 45*, in *TDM*, Vol. 7, 1, 2010; A. BOUTE, *Access to International Arbitration by Foreign Energy Investors in Russia: The Impact of the Yukos Decision on Jurisdiction*, in M. M. ROGGENKAMP – U. HAMMER, *European Energy Law Report VIII*, Intersentia, Cambridge, 2011, pp. 165- 182; E DE BRABANDERE, *op. cit.*, pp. 156-159; Part III of G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit., pp. 185-282;

145 To date, the Energy Charter Secretariat is aware of six cases filed against the Russian Federation under Art. 26 ECT: *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227); *Hulley Enterprises Ltd. v. The Russian Federation* (PCA Case No. AA 226); *Veteran Petroleum Trust v. The Russian Federation* (PCA Case No. AA 228); *Financial Performance Holdings BV (FPH) v. The Russian Federation* (PCA Case No. 2015-02); *Luxtona Limited v. The Russian Federation*; *Yukos Capital SARL v. The Russian Federation*. For an updated list of the cases involving The Russian Federation, see: https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/ (last accessed on 17 August 2018).

146 Art. 47 ECT: "*(1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Treaty. (2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal. (3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date. (4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty*".

Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c)".

Similarly, Art. 47(3) ECT states that "*The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date*". Which means that foreign investments made in Russia and Italy and, conversely, investments made by Russian and Italian investors in other Contracting Parties until the termination of the provisional application and the withdrawal will continue to be protected until 2029 (Russia) and 2036 (Italy).

4. The International Energy Charter

4.1. The relaunch of the ECT and process

In previous paragraphs we have examined the main landmarks of the Energy Charter process, that is the EEC and the ECT. We can turn, now, to the latest outcome of such process: the International Energy Charter (hereinafter IEC)[147].

The IEC was adopted at the end of the Ministerial Conference on the International Energy Charter held in The Hague on 20 and 21 May 2015. It consists in a political declaration aimed at modernizing the EEC and enhancing international energy cooperation, in order to deal with contemporary energy challenges[148]. So far, ninety-eight States and international organizations have adopted the Charter, eighty-eight of which signed it[149].

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147 On the IEC, see: ENERGY CHARTER SECRETARIAT, *International Energy Charter – Agreed text for adoption in The Hague at the Ministerial Conference on the International Energy Charter on 20 May 2015* (available online); S. DE JONG, *The International Energy Charter: a new impetus for global energy governance?*, in R. LEAL-ARCAS – J. WOUTERS (eds.), *Research Handbook on EU Energy Law and Policy*, Edward Elgar, Cheltenham-Northampton, 2017, pp. 179-191; R. LEAL-ARCAS – C. GRASSO – J. A. RÍOS, *Energy Security, Trade and the EU: Regional and International Perspectives*, cit., pp. 375-378; P. ALTO, *The new International Energy Charter: Instrumental or Incremental Progress in Governance?*, in *Energy Research & Social Science*, 11, 2016, pp. 91-96.

148 The text of the IEC, included in the Concluding Document of the Ministerial ("The Hague II) Conference on the International Energy Charter, can be found at: https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf#page=11.

149 Signatories of the IEC are: Afghanistan, Albania, Armenia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Chad, Chile, China, Colombia, Croatia, Cyprus, Czech Republic, Denmark, East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Estonia, European Union and Euratom, Finland, France, G5 Sahel, The Gambia, Georgia, Germany, Greece, Guatemala, Hungary, Iran, Iraq, Ireland, Italy, Japan, Jordan, Kazakhstan, Kenya, Republic of Korea, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Mali, Malta, Mauritania, Moldova, Mongolia, Montenegro, Morocco, The Netherlands, Niger, Nigeria, Norway, Pakistan, Palestine, Panama, Poland, Portugal, Romania, Rwanda, Serbia, Senegal, Slovakia, Slovenia, Spain, Swaziland, Sweden, Switzerland, Tanzania, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uzbekistan, Yemen. Other Countries that adopted the Charter and therefore are expected to sign it in the future are: Botswana, Burkina Faso, Cambodia, Iran, Israel, Kyrgyzstan, Lebanon, Philippines, Republic of Korea

The IEC is the result of a four-round negotiations carried out on 2014 at the headquarters of the Energy Charter Secretariat and marks the latest step of the process for updating the EEC since the "Warsaw Process" was launched in 2012 (see *infra*, § 4.2). Around eighty States joined the negotiations, including the signatories of the EEC[150] and other non-signatories States[151]: the starting point of the talks was in fact the EEC, which, as previously said, is the founding document of the Energy Charter Treaty and process.

Similarly to the EEC, the IEC does not contain legally binding obligations. Nevertheless, it represents the latest, major, attempt to promote the ECT as the global reference legal framework in the energy sector and attempts to address the main contemporary issues affecting the energy realm by drawing common principles and areas of international cooperation.

The IEC is firstly committed in recognizing the emerging realities in the energy field. To this regard, it stresses the growing importance of developing and emerging economies in global energy markets as well as the interests of both present and prospecting participants to the Energy Charter constituency. Such commitment is proven by the involvement of non-signatories of the EEC into the negotiations on the IEC and, more importantly, by the attention accorded to new energy issues like "social development", "energy poverty alleviation" and "better quality of life".

Secondly, the IEC deals with the "trilemma" posed by the combining of energy security, economic development and environmental and social protection. The many references included in the IEC to "energy security", "energy efficiency", "environmental protection" and "sustainable development" reveal, in fact, the increasing awareness of the International Community as to the crucial role played by energy in promoting sustainable development[152]. With specific regard to "energy security", it is worth noting that its definition was among the most critical issues dealt with during the negotiations on the IEC. As said, energy security is a major issue in current global political agendas, although it lacks of a comprehensive and universally

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and Tajikistan. For an updated list of the IEC's signatories and adopting Countries see www.energycharter.org/process/international-energy-charter-2015/ (last accessed on 17 August 2018).

150 See N 13 above.

151 A part from the signatories of the EEC, negotiations were joined also by observers to the Energy Charter Conference by invitation (Algeria, Bahrain, China, Egypt, Iran, Korea, Kuwait, Nigeria, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates and Venezuela) and other States (Argentina, Bangladesh, Bhutan, Brazil, Brunei Darussalam, Cambodia, Chile, Colombia, India, Iraq, Israel, Lao PDR, Lebanon, Libya, Malaysia, Maldives, Mexico, Mozambique, Myanmar, Nepal, Niger, Philippines, Singapore, South Africa, South Sudan, Sri Lanka, Sudan, Tanzania, Thailand, and Vietnam).

152 "Sustainable development" is a complex and controversial principle that expresses the present need for economic growth without affecting environmental protection and social development. The contribution of energy in achieving this goal is therefore clear, as well demonstrated by the EU, whose energy policy has to be pursued according to environmental and climate concerns. For an overview of the principle of sustainable development in international law, see K. BOSSELMANN, *Sustainable development in international environmental law*, in VV.AA.., *Routledge Handbook of International Environmental Law*, Routledge, Abingdon-New York, 2013, pp. 667-679. For the sustainability profiles of EU energy policy, see S. L. PENTTINEN – K. TALUS, *Development of the sustainability aspects of EU energy policy*, in G. VAN CALSTER – W. VANDENBERGHE – L. REINS (eds.), *Research Handbook on Climate Change Mitigation Law*, Edward Elgar, Cheltenham-Northampton, 2015, pp. 33-50.

accepted definition. Its meaning, in fact, varies depending on whether one assumes the perspective of consuming Countries or the viewpoint of energy-producing States. Since the IEC is meant as an instrument for involving in the global energy governance energy importing, exporting and transit States of both developed and developing countries, it does not give a precise definition of energy security, while it does emphasize the mutual responsibilities and benefits for all the international entities concerned[153].

Fourthly, the IEC aims at expanding the scope of the ECT and process and extending the principles of the EEC to those States or international organizations that have not yet signed it, thus favouring the development and strengthening of a global framework for energy cooperation and a closer political cooperation through the active observership within the Energy Charter Conference. Enhanced cooperation, in fact, is essential in order to deal with current energy challenges at national, regional and international levels, and to adapt to the evolution of the global energy architecture and governance.

This international "vocation" emerges also if one takes into account the many international energy-related documents and initiatives referred to by the IEC in its Annex, a state of things that confirms the will to promote global energy governance in accordance with the principles and the provisions developed in other international contexts[154].

Fifthly, with respect to the general principles at the base of international energy cooperation, the Charter reiterates "*the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations*", and its commitment in promoting "*long-term energy*

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153 The Preamble of the IEC expressly recognizes "*the importance of energy security of energy producing, transit and consuming countries, regardless of their state of economic development, as well as access to modern energy services, which needs to be based on environmentally sound, socially acceptable and economically viable policies, with emphasis on mutual responsibilities and benefits*".

154 Apart to the UN Charter, the Annex to the IEC mentions: the already seen PEEREA; the Plan of Implementation of the World Summit on Sustainable Development adopted in Johannesburg on 2002; the "Global Energy Security" declaration of the G8 Summit held in St. Petersburg on 16 July 2006; the "Riyadh Declaration" of the Third OPEC Summit of 18 November 2007; the Statute of the International Renewable Energy Agency (IRENA); the Joint Statement by the G8 Energy Ministers Meeting in Rome on 25 May 2009; the Rome Statement adopted by the Energy Charter Conference on 9 December 2009; the Agreements of the UNCCC reached in Cancun on 11 December 2010; the International Energy Forum Charter of 2011; the "Sustainable Energy for All" (SE4All) initiative of the UN of 2011 and the "2014-2024 World Decade for Sustainable Energy"; the "EU-Africa Energy Partnership"; the Doha Declaration of 15 November 2011; the conclusions of the Council of the European Union of 24 November 2011; the document 'The Future We Want' annexed in the UN General Assembly Resolution 66/288; "The St. Petersburg Resolution" of the 2012 APEC Energy Ministerial Meeting of 24-25 June 2012; the OSCE Parliamentary Assembly Resolution "Promotion and use of new and renewable sources of energy" adopted at the 21st OSCE PA Annual Session in Monaco on 9 July 2012; the Final Document of the 16th Summit of Heads of State or Government of Non Aligned Movement of 2012; the Concluding Declaration of the Rabat Energy Forum of 21 September 2012; the UN General Assembly Resolution 67/263 "Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation" of 2013; the Ministerial declaration on regional cooperation for enhanced energy security and the sustainable use of energy in Asia and the Pacific adopted at the Asian and Pacific Energy Forum on 2013; the Leaders' Declaration of the Summit of the G20 in St. Petersburg of 2013.

cooperation at regional and global levels within the framework of a market economy and based on mutual assistance and the principle of non-discrimination, being understood as most-favoured nation treatment as a minimum standard"[155]. What confirms, on the one hand, the very nature of the Energy Charter process, i.e. the creation of an international energy community based on market rules and, on the other, the strict correlation existing between the non-discrimination principle and the MFN treatment, principles that have been so far well established in both BITs' and Multilateral Investment Treaties (MIT)'s practice[156].

Finally, it is worth mentioning the importance that the ECT accords to the promotion of energy trade and investments as well as to the freedom of movement of energy products through energy transport facilities. To this regard, the IEC highlights the close relationship existing between investments, transit infrastructures and energy security: as previously noticed, in fact, constant energy flows rely on well-interconnected energy transmission networks that, in turn, need capital-intensive, long-lasting and high-risky investments.

More specifically, the IEC draws three main objectives, to be achieved in line with the principles of State energy sovereignty and non-discrimination and according to a market-based approach. The objectives are: a) the development of trade in energy according to major MITs such as the WTO Agreement and related instruments; b) cooperation in the energy field, especially as regards the coordination and, to some extent, the harmonization of States' energy policies as well as the exchange of technology and know-how and the promotion of investments; c) energy efficiency and environmental protection, with particular attention to the potentialities offered by renewable energy sources[157].

In order to implement these objectives, the IEC pinpoints ten fields of intervention and exemplifies the measures to be taken accordingly[158]:

1) access to, and development of, energy sources, by providing for transparent and no-discriminatory access conditions for economic operators;
2) access to national, regional and international markets, in order to promote competition;
3) liberalisation of trade in energy by removing the existing barriers and in accordance with the WTO regime (to this regard, the Charter recognizes the centrality of the transit of energy products and the need for interconnected international energy transmission networks);
4) promotion and protection of investments, by removing the barriers which affect energy investments and providing for a stable and transparent legal framework for investments at national level. To this end, the IEC encourages States to enter into BITs and MITs, in order to minimize the non-commercial risks related to energy investments. Furthermore, in order to ensure legal

[155] See the Preamble of the IEC.
[156] See F. BAETENS, *Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law*, in S. W. SCHILL, *International Investment Law and Comparative Public Law*, OUP, Oxford, 2010, pp. 290-291.
[157] See Title I ("Objectives") IEC.
[158] See Title II ("Implementation") IEC.

security and predictability, the Charter stresses the need for adequate dispute settlement mechanisms, including both national and international arbitration.
5) Safety principles and guidelines, in particular with a view to the protection of health and environment;
6) research, technological development, technological transfer, innovation and dissemination, in a spirit of cooperation;
7) energy efficiency, environmental protection and sustainable and clean energy, to be pursued in particular through the promotion of renewable energy sources and according to market-based mechanisms;
8) access to sustainable energy, especially to fight energy poverty;
9) education and training, in order to boost research in the energy sector;
10) diversification of energy sources and supply routes, that is to say improvement of energy security[159].

To sum up, the IEC is a declaration of political intentions that does not bear binding obligations on its signatories. Nonetheless, it has the merit of relaunching the Energy Charter process by updating the EEC and pinpointing the main current global issues in the energy field[160]. To this respect, it is worth noting that it did so in a crucial passage, that of 2015, which witnessed the adoption of the Paris agreement on climate change and other relevant energy-related events, such as the inception of the European Energy Union[161].

4.2. The relationship between the EEC, the ECT and the IEC

As seen before, there exists a strict relationship between the EEC, the ECT and the IEC: the IEC, in fact, represents the latest attempt to update the EEC as the founding document of the process of implementation and expansion of the ECT.

Such attempt dates back to 9 December 2009, when, at the 20th Meeting of the Energy Charter Conference held in Rome, the decision to modernize the Energy Charter process was formalized through the "Rome Joint Statement"[162] and the proposal for creating a standing Strategy Group to guide the process, issued during

[159] Diversification of energy sources and energy routes, as well as of suppliers (or consumers, if the point of view is that of energy-producing Countries), is one of the main policy measures to ensure energy security, although not the only one. Other measures relate to stockpiling, demand control, subsidies and measures on energy trade and pricing. See ENERGY CHARTER SECRETARIAT, *International Energy Security. Common Concept for Energy Producing, Consuming and Transit Countries*, cit., pp. 21-26.

[160] On the contemporary issues in the energy realm see Parts V, VI and VI of K. TALUS (ed.), *Research handbook on international energy law*, cit., pp. 361-650.

[161] The Energy Union was officially launched on 25 February 2015 with the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy", COM(2015) 080 final of 25.02.2015. For the latest developments on the state of the Energy Union, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Third Report on the State of the Energy Union" and its annexes, COM(2017) 688 final of 23.11.2017. On the EU Energy Union, see: R. LEAL-ARCAS, *The European Energy Union: The Quest for Secure, Affordable and Sustainable Energy*, Claeys & Casteels, Deventer, 2016; S. S. ANDERSEN – A. GOLDTHAU – N. SITTER (eds.), *Energy Union: Europe's New Liberal Mercantilism?*, Palgrave Macmillan, London, 2017.

[162] www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200914.pdf.

the 2009 Political Review, was finally embraced. The process followed up with the adoption, at the 21th Meeting of the Charter Conference held in Brussels on 24 November 2010, of the "Road Map for the Modernisation of the Energy Charter"[163] provided by the Strategy Group, and with the adoption of the "Energy Charter Policy on Consolidation, Expansion and Outreach (CONEXO)"[164] in July 2012. After the 23th Meeting of the Charter Conference held in Warsaw on November 2012 issued the "Warsaw process" for an "Updating Energy Charter"[165], and after the "Astana Declaration of the Energy Charter Process for Global Energy Architecture (2015-2019)"[166] was adopted during the 25th Meeting of the Charter Conference of November 2014 held in Astana, the process finally ended with The Hague Meeting of 2015, which shortly followed the 2014 Energy Charter Review[167].

Beyond the principles and general statements examined in the previous paragraph, the IEC's most relevant contribution for the relaunch of the Energy Charter process consists in the observbership arrangements foreseen with respect to the Energy Charter Conference that, as said, is the governing and decision-making institution of the ECT and process.

According to the Energy Charter Secretariat[168], signatories of the IEC benefit from the *status* of "Observers" within the Energy Charter Conference. Consequently, although they do not have the right to vote, they can take part to the meetings of the Conference and other subsidiary bodies, access the official documentation of the Conference and its subsidiary bodies, send experts to the Energy Charter Secretariat and, finally, take part to other forums and activities of the latter. In other words, IEC's signatories are expected to be closely involved with energy producing, consuming and transit countries, including both developed and developing economies, in the areas of cooperation drawn by the ECT, being therefore enabled to adopt an informed decision to access the Treaty.

To this regard, it is worth remarking that misinterpretations on the ECT, especially those arisen on transit issues between key ECT participants such as the EU and the Russian Federation, halted in the past the Energy Charter process, and still prevent its further developments. What is more, the signing of the IEC or the EEC is intended as a condition for maintaining or obtaining the observer *status* within the Charter Conference, since the *status* of "Observers by invitation" was abolished on 31 December 2016[169].

In the view of the Energy Charter Secretariat, the signing of the IEC will be favourable for the Energy Charter process. For ECT signatories and Contracting Parties, signing the IEC will strengthen the Treaty's authority by reiterating its principles and ability to adapt to current global issues. Since the signing of the IEC is

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163 www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201010.pdf.
164 www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201203.pdf.
165 www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201219.pdf.
166 www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201407.pdf.
167 www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201406.pdf.
168 See ENERGY CHARTER SECRETARIAT, *International Energy Charter – Agreed text for adoption in The Hague at the Ministerial Conference on the International Energy Charter on 20 May 2015*, cit., p. 22.
169 https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201638.pdf.

expected to expand the territorial scope of the ECT constituency and improve cooperation with non-members of the Charter Conference, new opportunities to strengthen energy security by means of trade and investment are therefore likely to be opened up. For the EEC signatories, signing the IEC will mean the relaunching of the Energy Charter process and the promotion of a favourable environment for foreign direct energy investments with strategic Countries. Finally, for non-EEC signatories, benefits relate to their involvement in defining a global energy governance architecture able to meet the needs of both advanced and developing economies.

5. The ECT's main achievements and shortcomings

There is no doubt that the ECT represents a successful attempt to provide for an appropriate and comprehensive international legal framework on energy security, by which combining the interests of energy-producing, energy-consuming and transit Countries[170]. To this end, it is worth noting that, from an original east-west European scope, the Treaty has expanded towards new areas, notably the Mediterranean, the Middle East and Asia. It is now an important component of the energy *acquis* of the EU, the Commonwealth of Independent States (CIS), the central Asian Countries, Azerbaijan, Georgia and Turkey, and is the first economic agreement involving the Former Soviet Union (FSU) Republics, central and eastern European Countries, EU Member States, European Countries parties to the OECD as well as Japan and Australia (although ratification by the latter is still pending)[171]. Furthermore, following the process of modernization and relaunching culminated with the adoption of the IEC, the Treaty's scope is likely to expand in the future.

There is widespread consensus on that the promotion and, more important, the protection of energy investments is the most remarkable achievement of the Treaty. The first arbitration under the ECT, namely *AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/01/4), was incepted on 25 April 2001. Seventeen years have passed since then, and the number of cases invoking the ECT (sometimes together with BITs) has increased.

To date, the Energy Charter Secretariat is aware of a hundred and seventeen cases filed under Art. 26 ECT[172]. It is worth noting that this figure includes the so-called

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170 See T. GAZZINI, *op. cit.*, pp. 112-113.

171 M. MARLETTA, *op. cit.*, p. 356.

172 Considering that arbitration, especially in the energy sector, is traditionally confidential, and that there is no requirement to notify the Secretariat on the inception of a dispute, the number of litigations is probably higher. Presently, the Secretariat is aware of the following disputes: *AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/01/4); *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC Case No. 118/2001); *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24); *Petrobart Ltd. v. The Kyrgyz Republic* (SCC Case No. 126/2003); *Alstom Power Italia SpA and Alstom SpA v. Republic of Mongolia* (ICSID Case No. ARB/04/10); *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227); *Hulley Enterprises Ltd. v. The Russian Federation* (PCA Case No. AA 226); *Veteran Petroleum Trust v. The Russian Federation* (PCA Case No. AA 228); *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18); *Limited Liability Company Amto v. Ukraine* (SCC Case No. 080/2005); *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24); *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8); *Azpetrol International*

Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan (ICSID Case No. ARB/06/15); *Barmek Holding A.S. v. Republic of Azerbaijan* (ICSID Case No. ARB/06/16); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2); *Europe Cement Investment and Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14); *Electrabel S.A. v. Hungary* (ICSID Case No. ARB/07/19); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (064/2008); *Mercuria Energy Group Limited v. Republic of Poland* (SCC); *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13); *Remington Worldwide Limited v. Ukraine* (SCC Case No. V (116/2008)); *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6); *Electricite de France (EDF) International S.A. v. Republic of Hungary* (Uncitral); *EVN AG v. Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/09/10); *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/10/16); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC Case No. V (116/2010)); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. The Government of Mongolia* (PCA Case No. 2011-09); *Türkiye Petrolleri Anonim Ortaklığı v. Republic of Kazakhstan* (ICSID Case No. ARB/11/2); *The PV Investors v. Spain* (PCA Case No. 2012-14); *Slovak Gas Holding BV, GDF International SAS and E.ON Ruhrgas International GmbH v. Slovak Republic* (ICSID Case No. ARB/12/7); *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12); *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012); *ČEZ v. The Republic of Albania* (Uncitral); *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic* (Uncitral); *EVN AG v. Republic of Bulgaria* (ICSID Case No. ARB/13/17); *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain* (SCC Case No. 2013/153); *CSP Equity Investment Sarl v. Kingdom of Spain* (SCC Case No. 094/2013); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31); *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia* (ICSID Case No. ARB/13/32); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36); *G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L. v. The Czech Republic* (PCA Case No. 2013-35); *Voltaic Network GmbH v. The Czech Republic* (Uncitral); *I.C.W. Europe Investments Limited v. The Czech Republic* (Uncitral); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic* (Uncitral); *WA Investments-Europa Nova Limited v. The Czech Republic* (Uncitral); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11); *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12); *Elektrogospodarstvo Slovenije - razvoj in inzeniring d.o.o. v. Bosnia and Herzegovina* (ICSID Case No. ARB/14/13); *Energoalliance Ltd. v. the Republic of Moldova* (Uncitral); *State Enterprise Energorynok v. the Republic of Moldova* (SCC Case No. 2012/175); *Cem Cenzig Uzan v. Republic of Turkey* (SCC Case No. 2014/023); *RENERGY S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18); *Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania* (ICSID Case No. ARB/14/26); *Alpiq AG v. Romania* (ICSID Case No. ARB/14/28); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34); *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1); *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4); *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine* (SCC); *Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan* (ICSID Case No. ARB/15/8); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24); *9REN Holding S.a.r.l v. Kingdom of Spain* (ICSID Case No. ARB/15/15); *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (ICSID Case No. ARB/15/20); *Mathias Kruck and others v. Kingdom of Spain* (ICSID Case No. ARB/15/23); *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/25); *JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27); *Nabucco Gas Pipeline International GmbH in Liqu. v. Republic of Turkey* (ICSID Case No. ARB/15/26); *Financial Performance Holdings BV (FPH) v. The Russian Federation* (PCA Case No. 2015-02); *Luxtona Limited v. The Russian Federation*; *Yukos Capital SARL v. The Russian Federation*; *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34); *E.ON SE,*

Yukos cases[173], which resulted in the largest award rendered in arbitral history with over US $50 billion in damages awarded. At least forty-two awards have been rendered by ECT arbitral tribunals[174], thirty-five of which are public knowledge[175].

In some cases, the parties to the disputes have discontinued the proceedings. In others, they have settled the disputes by way of agreements which, occasionally, have been embodied in final awards. Finally, various awards have been submitted to rectification proceedings, revision proceedings, annulment proceedings and/or judicial review by national courts.

Almost 70% of all cases (eighty out of a hundred and seventeen) have been commenced during the last six years (sixteen new cases in 2013, twelve in 2014,

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E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/35); *Greentech Energy Systems and Novenergia v. Italy* (SCC Case No. 095/2015); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36); *Silver Ridge Power BV v. Italian Republic* (ICSID Case No. ARB/15/37); *ENERGO-PRO a.s. v. Republic of Bulgaria* (ICSID Case No. ARB/15/19); *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38); *Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine* (SCC Case No. V 2015/092); *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain* (ICSID Case No. ARB/15/42); *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (ICSID Case No. ARB/15/44); *Landesbank Baden-Wiirttemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45); *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50); *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain* (ICSID Case No. ARB/16/4); *Alten Renewable Energy Developments BV v. Kingdom of Spain*; *Federal Elektrik Yatırım ve Ticaret A.Ş. and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/9); *ENGIE SA, GDF International SAS and ENGIE International Holdings BV v. Hungary* (ICSID Case No. ARB/16/14); *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic* (ICSID Case No. ARB/16/5); *Sun-Flower Olmeda GmbH & Co KG and others v. Kingdom of Spain* (ICSID Case No. ARB/16/17); *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/16/18); *ČEZ, a.s. v. Republic of Bulgaria* (ICSID Case No. ARB/16/24); *Sevilla Beheer B.V. and others v. Kingdom of Spain* (ICSID Case No. ARB/16/27); *Amlyn Holding B.V. v. Republic of Croatia* (ICSID Case No. ARB/16/28); *Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček v. Bosnia and Herzegovina* (ICSID Case No. ARB/16/36); *VC Holding II S.a.r.l. and others v. Italian Republic* (ICSID Case No. ARB/16/39); *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14); *Portigon AG v. Kingdom of Spain* (ICSID Case No. ARB/17/15); *KazTransGas JSC v. Georgia*; *Novenergia v. Spain* (SCC Case No. 2015/063); *Lotus Holding Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/17/30); *CEF Energia BV v. Italian Republic* (SCC Case No. 158/2015); *Sun Reserve Luxco Holdings SRL v. Italy* (SCC Case No. 132/2016); *DCM Energy GmbH & Co. Solar 1 KG and others v. Kingdom of Spain* (ICSID Case No. ARB/17/41); *EDF Energies Nouvelles S.A. v. Kingdom of Spain*; *Green Power K/S Y Obton A/S v. Kingdom of Spain* (SCC Case No. V2016/135); *Foresight Luxembourg Solar 1 S. Á.R1., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy Ii S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150); *FREIF Eurowind v. Kingdom of Spain* (SCC Case No. 2017/060); *Solarpark Management GmbH & Co. Atum I KG v. Kingdom of Spain* (SCC Case No. 2015/163); *ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1); *Mohammed Munshi v. The State of Mongolia* (SCC Case No. 2018/007); *LSG Building Solutions GmbH and others v. Romania* (ICSID Case No. ARB/18/19); *Veolia Propreté SAS v. Italian Republic* (ICSID Case No. ARB/18/20). See: https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/.

[173] *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), *Hulley Enterprises Ltd. v. The Russian Federation* (PCA Case No. AA 226) and *Veteran Petroleum Trust v. The Russian Federation* (PCA Case No. AA 228). For an in-depth analysis of these cases, see the *Yukos Special*, in *TDM*, 5, 2015.

[174] This figure includes those awards embodying the parties' settlement agreement.

[175] This figure includes those cases regarding which only excerpts of the awards have been made publicly available.

twenty-nine in 2015, thirteen in 2016, six in 2017 and, as to date, four in 2018), against an average of approximately three new cases per year from 2001 to 2012 (two new cases in 2001, none in 2002, two in 2003, one in 2004, six in 2005, four in 2006, four in 2007, four in 2008, three in 2009, three in 2010, four in 2011 and four in 2012)[176]. What confirms, on the one hand, the increasing interest showed by investors on the procedural guarantees offered by the ECT and, on the other hand, the role of the ECT investment dispute mechanism as a mean to "uniform" international arbitral practice, thus granting a mayor certainty in the field of energy investments[177].

Disputes have been mainly brought before the ICSID (seventy-four cases), while proceedings under the AISCC and the UNCITRAL amount to twenty-four and nineteen respectively.

If originally disputes were mainly directed against Asian and former communist Countries, more recently western and central European States, namely Spain and Italy, have become the main respondents. Spain alone has been called to respond to forty cases, by far the largest number, corresponding to around one-third of the entire amount. Italy, on its part, has been named as respondent to eleven cases[178]. As we will see, the sudden increase of cases against western and central European States in recent years is due to the change of legislation introduced in the renewable energy sector, notably in the photovoltaic (see *infra*, Chapter III, § 3.2.)

As regards the claimants, three categories have been pinpointed: 1) multinationals (such as the AES Corporation and the EDF Group); 2) private investors (such as Anatolie Stati, from Moldova, and Ioannis Kardassopoulos, from Greece; 3) trusts, funds or investment companies holding shares in corporations involved in the energy sector, e.g. Plama Consortium (Cyprus) and the claimants in the Yukos cases. Claimants are mainly from western European States or are European subsidiaries of US and Canadian companies, although more recently also eastern European investors have filed cases against central and eastern European States[179].

The increasing case law rendered by arbitral tribunals established under Art. 26 ECT is clarifying the meaning and scope of ECT provisions. As a result, an ECT *acquis* on energy investment promotion and protection is emerging and consolidating[180]. To this regard, the number and type of investor-State disputes so far filed under the ECT is confirming the prevision according to which "*future ECT awards will involve issues of general interest for the application of the ECT. In this regard it may be noted that after a somewhat 'slow start' for the investment protection regime of the ECT, investors have now*

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176 Data has been developed by the Author on the base of the information found on: https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/; http://investmentpolicyhub.unctad.org/.

177 See M. MARLETTA, *op. cit.*, p. 387.

178 The following is a list of the States against which disputes have been initiated under Art. 26 ECT (with the respective number of cases): Albania (3), Azerbaijan (2), Bosnia and Herzegovina (2), Bulgaria (5), Croatia (2), Czech Republic (6), FYROM (1), Georgia (2), Germany (2), Hungary (5), Italy (11), Kazakhstan (5), Kyrgyzstan (1), Latvia (1), Moldova (2), Mongolia (3), Poland (1), Romania (2), Russian Federation (6), Slovak Republic (1), Slovenia (1), Spain (40), Tajikistan (1), Turkey (6), Turkmenistan (1), Ukraine (4), Uzbekistan (1).

179 See K. HOBÉR, *Overview of Energy Charter Treaty Cases*, cit., pp. 179-180.

180 See T. GAZZINI, *op. cit.*, pp. 112-114.

started to discover the treaty"[181]. However, it may be premature to talk about a well-established ECT jurisprudence. As seen before, ECT investment disputes can be submitted to different arbitration *fora*, characterized by different rules and administered by different arbitration institutions. In addition, while arbitral tribunals try to conform to decisions rendered on previous, similar cases, there is no *stare decisis* principle that oblige them to do so[182]. Indeed, as we will see in Chapter II, ECT arbitral tribunals have even expressly distanced themselves from the conclusions previously reached by other arbitral tribunals on similar issues.

Notwithstanding such a remarkable achievement, there are several factors that undermine the ECT's vocation to become the reference global framework on energy security[183]. As regards the geographical scope, it must be noticed that, despite the significant enlargement described above, the Treaty's importance is reduced by the non-participation of major economies such as the US[184] and China[185]. What is more, its meaning and relevance, especially if seen from the EU perspective, has deeply changed following the Russian decision to terminate the provisional application of the Treaty and not to ratify it[186]. Always from the EU standpoint, it must be added that none of the main EU gas suppliers (in addition to Russia, also Algeria and Norway)[187] have yet ratified the Treaty[188].

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[181] K. HOBÉR, *Investment Arbitration and the Energy Charter Treaty*, cit., p. 190.

[182] See K. HOBÉR, *Overview of Energy Charter Treaty Cases*, cit., pp. 201-202.

[183] For an account of the ECT see: C. S. BAMBERGER, *Epilogue: the Energy Charter Treaty as a Work in Progress*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 591-602; G. COOP, *The Energy Charter Treaty: What Lies Ahead?*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 319-328; S. A. ALEXANDROV, *Renewed Questions in ECT Investment Arbitration*, in G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit., pp. 357-371; T. GAZZINI, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, cit., pp. 105-129.

[184] The US signed the EEC as well as the IEC, and is therefore an Observer to the Energy Charter Conference. Although it played an active role during the negotiations of the ECT, it did not ratify it, alleging that the BITs and MITs to which it was party by that time offered higher standards of protection than those provided by the ECT. For an analysis of the reasons at the base of US's refusal to ratify the Treaty see W. FOX, *The United States and the Energy Charter Treaty: Misgivings and Misperceptions*, in T. WÄLDE (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment and Trade*, cit., pp. 194-203. See also A. J. MENAKER – H. VAN SLOOTEN WALSH, *The Energy Charter Treaty and U.S. Investment Treaties: An Overview of Key Contrasts*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 307-318; E. GAILLARD, *Questions and Observations: Interactive Section. Part. II: How Does the So-called "Fork-in-the-road" Provision in Article 26(3)(b)(i) of the Energy Charter Treaty Work? Why Did the United States Decline to Sign the Energy Charter Treaty?*, cit., pp. 228-233.

[185] China signed the IEC on 20 May 2015 and is therefore an Observer to the Energy Charter Conference (since 17 December 2001, it was an Observer by invitation). For an in-depth study on a possible China's accession to the ECT see Z. WANG, *Securing Energy Flows from Central Asia to China and the Relevance of the Energy Charter Treaty to China*, 2014 (available online).

[186] See K. TALUS, *EU Energy Law and Policy. A Critical Account*, cit., pp. 232-233; R. LEAL ARCAS – A. FILIS – E. S. ABU GOSH, *International Energy Governance. Selected Legal Issues*, cit., p. 348.

[187] Algeria was an Observer by invitation until 31 December 2016 (when the *status* of "Observers by invitation" was abolished), while Norway is a full Member of the Conference (it signed the EEC, the ECT, the PEEREA and the IEC, although it has not yet ratified the ECT).

[188] See P. D. CAMERON, *International Energy Investment Law. The Pursuit of Stability*, cit., p. 347.

As is known, Russia's decision not to ratify the Treaty and to suspend its provisional application from 19 October 2009 was mainly due to disagreements with the EU on transit issues[189]. A major obstacle was the adoption of the transit protocol by which complementing the transit regime laid down in Art. 7 ECT. As said, negotiations started on 2000 but were never completed due to contrasts on its application within the EU: for the EU, in fact, there would be "transit" when energy flows across the territory of the EU as a whole and not through the territory of its single Member States, with the result of excluding the EU from the application of the Protocol[190]. A position not shared by Russia that, conversely, subordinated the ratification of the ECT to the conclusion of the negotiations on the Protocol, and even proposed the adoption of a new treaty to replace the very ECT, an intent which eventually failed[191].

To this respect, it is worth noting how an inner-European issue, that is the applicability of the ECT transit regime within the EU, halted the Energy Charter process. To this end, it has been highlighted how the EU's aptitude towards the ECT, notably as regards its relations with Russia, translates into the prioritization of its energy *acquis* into the ECT and in the unwillingness to solve potential conflicts arising from the overlap of EU law and the ECT[192].

In any event, the future of the ECT and process largely relies on the Russian accession to the ECT and, therefore, on the willingness and ability of both the EU and Russia to conciliate their interests as, respectively, energy importer and energy producer. To this regard, transit questions remain the main obstacle for a real relaunch of the ECT process.

In light of this, the IEC could be seen as a response to the Russian claims for modernizing the ECT, often seen by Moscow as too energy-consumer friendly, with a view to the needs of participants to the Energy Charter constituency others than the EU[193]. Nonetheless, the position of Russia within the Energy Charter constituency appears today particularly thorny, especially following the conflicts that erupted in Crimea and in Southeast of Ukraine, which led to the establishment of economic

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189 For an in-depth analysis of the EU-Russia relations, see the special issue on *EU-Russia relations*, in *OGEL*, 2, 2009 (available online). See also: K. HOBÉR, *Russian Energy Policy and Dispute Settlement: an Overview*, in M. ROGGENGKAMP – U HAMMER (eds.), *European Energy Law Report VII*, cit., pp. 235-266; Id., *Interplay of the Energy Charter Treaty With Other Treaties. Part I: The Role of the Energy Charter Treaty in the Context of the European Union and Russia*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 235-305.

190 See A. A. KONOPLYANIK, *Multilateral and Bilateral Energy Investment Treaties: Do We Need a Global Solution? The Energy Charter Treaty As an Objective Result of the Evolution of International Energy Markets and Instruments of Investment Protection and Stimulation*, cit. pp. 114-117.

191 See S. SELIVERSTOV – M. ROGGENKAMP – G. COOP, *The Draft Convention on Ensuring International Energy Security – A Successor of the Energy Charter Treaty?*, in M. ROGGENKAMP – O. WOOLEY (eds.), *European Energy Law Report IX*, Intersentia, Cambridge-Antwerp-Portland, 2012, pp. 213-232; B. E. OBAFEMI, *The New Russian Initiative on Energy Transit - Should it replace the Energy Charter Treaty?*, in *OGEL*, Vol. 12, 4, 2014.

192 See K. TALUS, *EU Energy Law and Policy. A Critical Account*, cit., pp. 242-244.

193 *Ibid.*, p. 239. See also A BELYI – S. NAPPERT – V. POGORETSKYY, *Modernizing the Energy Charter Process? The Energy Charter Conference Road Map and the Russian Draft Convention on Energy Security*, in *OGEL*, Vol. 9, 5, 2011.

sanctions between different Parties to the Energy Charter constituency, with all their negative impact on energy cooperation[194]. This troubled situation was further confirmed by the fact that the Russian Federation did not signed the IEC. To this regard, the participation to the Energy Charter Conference may represent a useful instrument to clarify issues related to the ECT, notably on transit, and therefore to favour the accession to the Treaty by Russia as well as by new States and international organizations worldwide.

Finally, we must consider another fact that will have a great impact on the future of the Treaty: the decision of Italy to withdraw from the ECT. The withdrawal took effect on 1 January 2016 and posed new questions on the already problematic relationship between the EU and the ECT, as far as it is the first case that a Contracting Party, additionally an EU (founding) Member State recedes from the Treaty. As we will try to point out in Chapter III, if the withdrawal undoubtedly undermines the authority of the ECT, it is likely to revive the debate on the unresolved questions that, like transit issues, prevent further developments of the ECT.

6. Conclusions

In the light of previous considerations, it could be argued that if so far the Treaty failed in its political aim to involve key players in global energy security, on the other hand it succeed in promoting and protecting energy investment, which is a fundamental precondition to assure energy security.

To this respect, it must be kept in mind that, according to the so-called "sunset clause" included in Art. 47(3) ECT, in the case of a Contracting Party withdrawing from the Treaty, "*The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date*". Similarly, according to Art. 45(3)(b) ECT, "*In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c)*". Which means that investment promotion and protection provisions will continue to apply to both the Russian Federation (or Belarus, which is today the only signatory applying the Treaty provisionally) and Italy until, respectively, 2029 and 2036.

The ECT is, today, at a crossroads. Despite the recent attempt to relaunch and modernize the Treaty with the adoption of the IEC and the increasing recourse by investors to the ISDS mechanism provided in Art. 26, the Treaty's authority is

[194] On the effects of the Crimea crisis see A. KONOPLYANIK – E. ORLOVA – M. LARIONOVA, *What is the Future of Russian Gas Strategy for Europe after the Crimea?*, in *OGEL*, Vol. 12, 4, 2014. For an analysis of the Russian participation to the ECT see I. POMINOVA, *Risks and Benefits for the Russian Federation from Participating in the Energy Charter Comprehensive Analysis*, Energy Charter Secretariat, 2014 (available online).

undermined by the non-participation of major economic and energy-producing Countries and the Italian withdrawal therefrom.

The doctrine has pointed out five main phases of the ECT:

- I phase (1991-1994), characterized by the adoption of the EEC and the negotiations on the ECT and the PEEREA;
- II phase (1994-1998), marked by the opening for signature of the ECT (1994) and its entry into force (1998). This phase was also characterized by the attention given to the implementation of the Treaty and the PEEREA and by the kick-off of negotiations on the supplementary investment treaty and the trade amendment;
- III phase (1999-2004), which, following the first Policy Review carried out according to Art. 34(7) ECT on 1999, was characterized by the negotiations on the transit protocol and the monitoring of ECT and PEEREA implementation;
- IV phase (2004-2009), during which the 2004 Policy Review – second review under Art. 34(7) ECT – took place, attention to the new challenges posed by global energy markets emerged, negotiations on the Transit protocol and monitoring of ECT and PEEREA implementation continued;
- V phase (2009-2014), characterized by the failure of the 2009 Policy Review, the Russian decision not to ratify the Treaty and the beginning of the process of modernization of the ECT. This process included, on the one hand, the Russian proposal for a new instrument by which substituting the ECT and, on the other hand, the "Warsaw Process" for updating the EEC and relaunching the Energy Charter process[195].

We can add a sixth phase, started on 2014 and marked by the 2014 Policy Review, the attempt of relaunching the ECT and process through the IEC, the striking recourse to the ISDS mechanism and the revive of discussions on the relationship between the EU and the ECT following the Italian decision to abandon the Treaty. These latter aspects are discussed in next Chapters.

[195] See A. A. KONOPLYANIK, *Multilateral and Bilateral Energy Investment Treaties: Do We Need a Global Solution? The Energy Charter Treaty As an Objective Result of the Evolution of International Energy Markets and Instruments of Investment Protection and Stimulation*, cit. pp. 108-110.

CHAPTER II
THE MIXED PARTICIPATION OF THE EU AND ITS MEMBER STATES TO THE ECT AND THE ISDS REGIME: ISSUES, THEORY AND PRACTICE

TABLE OF CONTENTS: 1. Introduction. – **2.** The EU as a REIO party to the ECT. – **3.** The ECT as a mixed agreement. – **3.1.** The conclusion of the ECT as a mixed agreement. – **3.2.** The division of competences within the EU on the matters dealt with in the ECT: energy and investment in the post-Lisbon era. – **4.** Mixity and the ECT ISDS mechanism. – **5.** The proper respondent issue. – **5.1.** Premise. – **5.2.** Addressing the question. – **5.3.** The international responsibility of the EU and its Member States for the performance of ECT commitments. – **5.4.** The international responsibility of the EU and its Member States for breaches of ECT Part III commitments. – **5.4.1.** Premise. – **5.4.2.** General principles of international responsibility. – **5.4.3.** Responsibility of States and international organizations for their internationally wrongful acts. – **5.4.4.** The international responsibility of EU Member States by virtue of their involvement in the conduct of, or by virtue of their membership to, the EU. – **5.4.5.** The international responsibility of the EU by virtue of its involvement in the conduct of its Member States. – **5.4.6.** *Lex specialis*. – **5.4.7.** Articles 22 and 23 ECT. – **5.4.8.** Findings. – **5.5.** The Statement provided by the European Communities in accordance with Art. 26(3)(b)(ii) ECT. – **5.6.** ECT case law. – **6.** The admissibility of EU "internal" disputes to the ECT ISDS mechanism. – **6.1.** Premise. – **6.2.** The admissibility of intra-EU disputes to the ECT ISDS mechanism: the doctrinal debate. – **6.3.** The admissibility of intra-EU disputes to the ECT ISDS mechanism: ECT case law. – **6.4.** The admissibility of other EU internal disputes to the ECT ISDS regime. – **6.5.** Conclusions. – **7.** The applicability of EU law in ECT arbitral proceedings. – **7.1.** Premise. – **7.2.** The nature of EU law. – **7.3.** ECT case law. – **7.4.** Conclusions. – **8.** The relationship between EU law and the ECT. – **8.1.** Premise. – **8.2.** EU law and the ECT: overlapping or complementary subject matters? – **8.3.** The alleged incompatibility between the ECT and EU law. – **8.3.1.** Premise. – **8.3.2.** The compatibility between the ECT ISDS mechanism and EU law under ECT case law. – **8.4.** Solution of possible inconsistencies between EU law and the ECT. – **8.4.1.** Premise. – **8.4.2.** The harmonious interpretation of EU law and the ECT. – **8.4.3.** The hierarchy between EU law and the ECT. – **8.5.** Conclusions. – **9.** Conclusions.

1. Introduction

Under EU law, the ECT qualifies as a "mixed agreement", i.e. an agreement concluded by both the Union and its Member States. Generally speaking, the accession of the EU to the Treaty does not represent *per se* a problem, especially if one considers that, after all, the Union was, and still remains, the main promoter of the ECT and process. Problems rather emerge since the Treaty does not expressly deal with actual or potential issues related to mixity, notably as regards the investment promotion and protection regime laid down in Parts III (investment promotion and protection) and V (dispute settlement) ECT. Mixity, in fact, raises many questions as to whether and, if so, to what extent, the Treaty applies to EU "internal" relations, i.e. relations between EU Member States and between them and the EU. The transit regime examined in the previous chapter (see *supra*, Chapter I, §§ 3.3 and 5) provides for a good case study to this regard. The complexity of the issue at stake, however,

can be fully appreciated if one focuses on the ECT ISDS regime that, indeed, will be at the base of our inquiry.

In this chapter, we will examine the main procedural issues that mixity poses with respect to the ECT ISDS mechanism, with special attention to the relevant case law rendered by ECT arbitral tribunals. More specifically, said issues include: questions of international responsibility for breaches of ECT investment provisions (§ 5); the applicability of Part V ECT to EU internal relations and questions of citizenship/nationality recognition (§ 6); the relevance of EU law in investor-State disputes (§ 7); the relationship between EU law and the ECT (§ 8).

In order to better understand the issues at hand, we will make some preliminary clarifications on the following aspects: the *status* of the EU as a REIO party to the Treaty (§ 2); the qualification of the ECT as a "mixed agreement" under EU law and the division of competences within the EU on the matters dealt with by the Treaty (§ 3); mixity and the ISDS mechanism (§ 4).

The chapter closes with some conclusive considerations on the matters treated therein (§ 9).

2. The EU as a REIO party to the ECT

According to Articles 38 ("Signature")[1] and 39 ("Ratification, Acceptance or Approval")[2] ECT, the Treaty can be acceded, other than by States, also by "Regional Economic Integration Organizations" (REIOs). The latter are described, in Art. 1(3) ECT, as organizations "[…] *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*". As it is easy to see, the definition of REIO provided by the ECT perfectly suits the EU, which, indeed, acceded the Treaty together with its Member States. From an EU law perspective, therefore, the ECT qualifies as a "mixed agreement", i.e. an international agreement acceded by both the Union and its Member States[3].

The Treaty was originally acceded by the European Communities, i.e. the European Community (EC, former European Economic Community), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community

[1] Art. 38 ECT: "*This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organisations which have signed the Charter". As clarified by Art. 1(1) ECT, ""Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter*".

[2] Art. 39 ECT: "*This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary*".

[3] Following Italy's withdrawal from the ECT (see *infra*, Chapter III, § 2), the latter should be described, more appropriately, as an "incomplete" mixed agreement, since not all EU Member States are presently parties to it. To this respect, it must be borne in mind that the withdrawal took effect from 1 January 2016 and that, pursuant to the "sunset" clause laid down in Art. 47(3) ECT, investments made in Italy by investors of other Contracting Parties – as well as investments made by Italian investors in other Contracting Parties – will remain covered by the ECT until 1 January 2036. In other words, the Treaty still binds Italy, although on a limited extent.

(EURATOM). To this respect, the (then) European Communities specified, in a statement provided in compliance with Art. 26(3)(b)(ii) ECT, that "*The European Communities are a regional economic integration organization within the meaning of the Energy Charter Treaty. The Communities exercise the competence conferred on them by their Member States through autonomous decision-making and judicial institutions* […]" (underlining added)[4].

The Communities signed the European Energy Charter (EEC) on 17 December 1991. Four years later, on 17 December 1994, they signed both the ECT and the PEEREA and deposited the respective instruments of approval on 16 December 1997[5]. In compliance with Art. 45 ECT ("Provisional Application")[6], they provisionally applied the ECT from the date of the signature until 16 April 1998, that

[4] Art. 26(3)(b)(ii) ECT requires all Contracting Parties listed in Annex ID – i.e. Contracting Parties that do not give their unconditional consent to the submission of a dispute to international arbitration or conciliation in as much as the same dispute is previously submitted for resolution to their courts or administrative tribunals or in accordance with any applicable, previously agreed dispute settlement procedure – to provide, for transparency reasons, a written statement of their policies, practices and conditions which do not allow an investor to resubmit the same dispute to international arbitration at a later stage in accordance with Art. 26(3)(b)(i) ECT. The statement provided by the European Communities will be examined more in depth in next paragraphs. The text is included in the Transparency Document of the Energy Charter Secretariat (available online).

[5] See 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998, pp. 1-116.

[6] Art. 45 ECT: *"(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository. (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1). (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations. (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository. (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c). (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor. (4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38. (5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat. (6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty. (7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article*".

is until the ECT and the PEEREA entered into force[7]. They ratified the Amendment to the Trade related provisions of the ECT on 13 July 2001 and deposited the instrument of approval on 21 December 2001[8]. Finally, the EU and the EURATOM signed the International Energy Charter (IEC) on 20 May 2015.

While the ECSC ceased to exist on 2002 with the expiry of its founding treaty (Treaty establishing the European Atomic Energy Community or Treaty of Paris of 1951), the EURATOM maintained its own legal personality, thus remaining a Contracting Party to the ECT alongside the EU. The latter, following the entry into force of the Lisbon Treaty, replaced and succeeded the EC, as expressly stated in Art. 1(3) of the Treaty on European Union (TEU)[9]. As a result, the EU and the EURATOM are, to date, the only REIOs party to the Treaty.

A quick read of the ECT shows that there are many Articles concerning REIOs, such as: Art. 1 ("Definitions"), paragraphs (2)[10], (3) and (10)[11]; Art. 36 ("Voting")[12]; Art. 38; Art. 39; Art. 40 ("Application to territories")[13]; Art. 41 ("Accession")[14]; Art.

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[7] See: 94/998/EC: Council Decision of 15 December 1994 on the provisional application of the Energy Charter Treaty by the European Community, OJ L 380, 31.12.1994, pp. 1-2; 94/1067/Euratom: Council Decision of 15 December 1994 approving the provisional application of the Energy Charter Treaty by Decision of the Commission on behalf of the European Atomic Energy Community, OJ L 380, 31.12.1994, p. 113.

[8] See 2001/595/EC: Council Decision of 13 July 2001 on the conclusion by the European Community of the Amendment to the trade-related provisions of the Energy Charter Treaty, OJ L 209, 2.8.2001, p. 32.

[9] Art. 1(3) TFEU: "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community*".

[10] Art. 1(2) ECT: "*"Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force*".

[11] Art. 1(10) ECT: "*"Area" means with respect to a state that is a Contracting Party: (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction. With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation*".

[12] See, in particular, Art. 36(7) ECT: "*A Regional Economic Integration Organisation shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organisation shall not exercise its right to vote if its member states exercise theirs, and vice versa*".

[13] Art. 40 ECT: "*(1) Any state or Regional Economic Integration Organisation may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depositary, declare that the Treaty shall be binding upon it with respect to all the territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party. (2) Any Contracting Party may at a later date, by a declaration deposited with the Depositary, bind itself under this Treaty with respect to other territory specified in the declaration. In respect of such territory the Treaty shall enter into force on the ninetieth day following the receipt by the Depositary of such declaration. (3) Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification to the Depositary. The withdrawal shall, subject to the applicability of Article 47(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depositary. (4) The definition of "Area" in Article 1(10) shall be construed having regard to any declaration deposited under this Article*".

[14] Art. 41 ECT: "*This Treaty shall be open for accession, from the date on which the Treaty is closed for signature, by states and Regional Economic Integration Organisations which have signed the Charter, on terms to be approved by the Charter Conference. The instruments of accession shall be deposited with the Depositary*".

44 ("Entry into force")[15]. For the purposes of our investigation, it is worth focussing on the combined reading of Articles 40 and 1(10) ECT.

Pursuant to Art. 40, paragraph (1), States and REIOs parties to the Treaty may extend – or conversely exclude – its application to one, more or all the territories for the international relations of which they are responsible, while according to paragraph (4), such territories shall be included within the definition of "area" provided in Art. 1(10). According to Art. 1(10)(b) ECT, the "area" of a REIO consists of the areas of its member states, in accordance with the relevant provisions included in the agreement establishing the organization. Accordingly, the area of the EU is tantamount to the areas of its Member States, in accordance with Art. 52 TEU[16], Art. 355 of the Treaty on the Functioning of the European Union (TFEU)[17] and Annex II to the TFEU ("Overseas Countries and Territories to which the provisions of part

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[15] Art. 44 ECT: "*(1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organisation which is a signatory to the Charter as of 16 June 1995. (2) For each state or Regional Economic Integration Organisation which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organisation of its instrument of ratification, acceptance, approval or accession. (3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to those deposited by member states of such Organisation*".

[16] Art. 52 (TEU) "*1. The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland. 2. The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union*".

[17] Art. 355 TFEU: "*In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply: 1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349. 2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II. The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list. 3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible. 4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden. 5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article: (a) the Treaties shall not apply to the Faeroe Islands; (b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol; (c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972. 6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission*".

four of the Treaty on the Functioning of the European Union apply")[18], which specify the territorial application of the TEU and the TFEU[19].

Given the territorial identity between the EU and its Member States, one may thus wonder whether and, if so, to what extent, a REIO and its member States are provided with special rules as regards the application of the Treaty. To this end, it has been noticed that, except for Art. 36(7) ECT, which regulates the exercise of the right of voting by a REIO and its member States within the Energy Charter Conference, and Art. 44(3), on the counting of the instruments of ratification, acceptance or approval for the purposes of the entry into force of the Treaty, there are no express rules that would provide REIOs and their member States with a treatment different from that granted to other Contracting Parties[20]. As we will see more in detail below, this is a fundamental finding for addressing the thorny questions arising from mixity with respect to the ECT investment promotion and protection regime.

3. The ECT as a mixed agreement

3.1. The conclusion of the ECT as a mixed agreement

The realm of mixed agreements has been explored far and wide in academic literature. In particular, the doctrine has outlined the issues arising from their employment as an instrument for handling the EU external relations[21]. For the purposes of our investigation, it must be pointed out that mixity is required when a treaty covers matters that do not fall entirely within the competences of the EU, so as accession by Member States is as well required[22].

That said, it is generally accepted that the ECT was jointly acceded by the European Communities and their Member States since, by the time of its negotiation and adoption, the matters covered therein fell partly within the competences of the Communities (e.g. trade in energy) and partly within those of their Members States (e.g. foreign investment and arbitration proceedings)[23].

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[18] Annex II to the TFEU: "*Greenland; New Caledonia and Dependencies; French Polynesia; French Southern and Antarctic Territories; Wallis and Futuna Islands; Mayotte; Saint Pierre and Miquelon; Aruba; Netherlands Antilles: Bonaire, Curaçao; Saba; Sint Eustatius; Sint Maarten; Anguilla; Cayman Islands; Falkland Islands; South Georgia and the South Sandwich Islands; Montserrat; Pitcairn; Saint Helena and Dependencies; British Antarctic Territory; British Indian Ocean Territory; Turks and Caicos Islands; British Virgin Islands; Bermuda*".

[19] See R. HAPP – 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*, cit., pp. 163-165.

[20] *Ibid.*, p. 165.

[21] See, *ex multis*: A. ROSAS, *The European Union and Mixed Agreements*, in A. DASHWOOD – C. HILLION (eds.), *The General Law of E.C. External Relations*, Sweet & Maxwell, London, 2000, pp. 203-207; P. EECKHOUT, *EU External Relations Law*, 2nd ed., OUP, Oxford, 2011, pp. 212-266; P. KOUTRAKOS, *EU International Relations Law*, 2nd ed., Hart Publishing, Oxford-Portland (Oregon), 2015, pp. 161-206; J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Kluwer Law International, The Hague, 2001; C. HILLION – P. KOUTRAKOS (eds.), *Mixed Agreements Revisited*, Hart Publishing, Oxford-Portland (Oregon), 2010.

[22] See P. EECKHOUT, *op. cit.*, p. 212.

[23] See: R. HAPP – J. A. BISCHOFF, *op. cit.*, pp. 166-167; C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, in *TDM*, 1, 2009, p. 7.

This state of things is well reflected in Decision 98/181/EC, ECSC, Euratom on the conclusion of the ECT and the PEREEA by the European Communities[24], where the legal basis allowing the Communities to accede the Treaty are pointed out. The decision indicates Art. 73c(2) of the Treaty establishing the European Community (TEC)[25], now Art. 64(2) TFEU[26], as the legal basis for the adoption of the Treaty, since the latter imposed certain obligations on the Communities regarding the movement of capital and payments between the Communities and the other Contracting Parties to the ECT. Reference is also made to Art. 235 TEC[27], present Art. 352 TFEU[28], since by that time the TEC did not provide for other powers by which complying with the obligations imposed by the ECT in the field of energy cooperation.

The decision gives little information as to how the powers on the matters covered in the ECT were apportioned between the European Communities, notably the European Community, and their Member States. Nonetheless, it shows how the former had limited competence to conclude the Treaty and, therefore, why accession by the latter was required[29].

3.2. The division of competences within the EU on the matters dealt with in the ECT: energy and investment in the post-Lisbon era

Since the adoption of the ECT, the division of competences within the EU on the matters treated therein has constantly changed by way of amendments to the EU

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[24] See N 5 above.

[25] Art. 73c(2) TEC: "*Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment - including investment in real estate -, establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalization of the movement of capital to or from third countries*".

[26] Art. 64(2) TFEU: "*Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets*".

[27] Art. 235 TEC: "*If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal form the Commission and after consulting the European Parliament, take the appropriate measures*".

[28] Art. 352 TFEU: "*1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article*".

[29] See 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*, cit., p. 116.

founding treaties and the doctrine of implied powers[30]. Investigating how the competences on the matters dealt with by the ECT are apportioned between the Union and its Member States, therefore, represents a complex task that falls outside the scope of the present investigation. Nonetheless, it will be worth dwelling on the modifications introduced by the Treaty of Lisbon in the fields of energy and investment. The Treaty of Lisbon, in fact, provided the EU with an express and exclusive competence on Foreign Direct Investment (FDI), despite it did not provide for a definition of the latter. As a result, a heated debate arose as to the contents and scope of this new competence and, what is more, on its impact on the future implementation of the ECT within the EU[31].

In light of the jurisprudence of the Court of Justice of the European Union (CJEU), the Treaty of Lisbon tried to clarify the division of competences between the Union and its Member States[32]. To this end, it distinguished between three main categories of competences:

a) EU exclusive competences, i.e. fields where only the Union can legislate and adopt legally binding acts[33];
b) shared competences, that is areas where Member States can exercise their competence in as much as the Union does not exercise, or decides not to exercise, its own competence[34];
c) supporting competences, i.e. areas where the Union is allowed to intervene only in order to support, coordinate or complement the Member States' action[35].

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[30] Since the Treaty was opened for signature (17 December 1994), the EU founding treaties have been amended by the Treaty of Amsterdam (signed on October 1997 and entered into force on 1 May 1999), the Treaty of Nice (signed on February 2001 and entered into force on 1 February 2003) and the Treaty of Lisbon (signed on 13 December 2007 and entered into force on 1 December 2009).

[31] See C. SÖDERLUND, *op. cit.*, pp. 99-104.

[32] For an overview on the modifications introduced by the Treaty of Lisbon, see A. BIONDI – P. EECKHOUT – S. RIPLEY (eds.), *EU Law After Lisbon*, OUP, Oxford, 2012.

[33] See Art. 3 TFEU: "*1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*".

[34] See Art. 4 TFEU: "*1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs*".

[35] See Art. 6 TFEU: "*The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of*

In addition, the Treaty of Lisbon specified that the competences not conferred upon the Union remain with the Member States (principle of conferral) and that the Union's action is subject to the principles of subsidiarity and proportionality[36].

For the purposes of our investigation, it is worth noting that, on the one hand, energy was qualified as a shared competence, together with environment and trans-European networks, including energy networks. On the other hand, FDI was encompassed within the Common Commercial Policy (CCP), which, in turn, was included within the EU exclusive competences.

Starting with energy, it was only with the Treaty of Lisbon that an express provision in this field was introduced at treaty's level, namely Art. 194 TFEU[37]. This Article establishes, on the one hand, the EU energy policy's goals, i.e. ensuring the functioning of the energy market and the security of energy supply, promoting energy efficiency, energy saving and the development of new and renewable energy sources and promoting the interconnection of energy networks (Art. 194(1) TFEU). On the other hand, it recognizes and safeguards the EU Member States' energy sovereignty, i.e. their right to determine the conditions for the exploitation of their energy resources, the composition of their energy mix and the structure of their energy supply (Art. 194(2) TFEU).

Art. 194 TFEU, as expected, found wide attention in academic literature, where the difficulty to conciliate the ambitious goals pursued by the EU energy policy with

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human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation".

[36] See Art. 5 TEU "*1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality*".

[37] Art. 194 TFEU: "*1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks. 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c). 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature*".

State energy sovereignty has been particularly debated[38]. Here, it is sufficient to note that the qualification of energy as a shared competence formalized the *status quo* existing in the pre-Lisbon period[39]. On the one hand, in fact, Member States traditionally retained large powers in this sensitive field of economic activity. On the other hand, despite the lack of express provisions on energy, the Union was able to legislate in the field through provisions on internal market (Articles 47, 55 and 95 TEC) and environment (Art. 175 TEC)[40]. To this end, starting from the 90's, the Union issued, among others, three energy packages on electricity and gas market liberalization[41]. Whether it will be the Union or its Member States to prevail in the regulation of the energy sector is still to be seen: to this respect, we already saw that the Union has recently embarked on the ambitious project of building a fully-fledged Energy Union[42].

As regards FDI, we already saw that it was included, as part of the CCP, among the EU exclusive competences. If the recognition of trade as an area where only the EU can legislate and adopt binding acts can be seen as the formalization of the case law rendered by the CJEU in the pre-Lisbon era[43], the inclusion of FDI within the scope of the CCP represented one of the most relevant innovations brought about by the Treaty of Lisbon[44]. Until then, in fact, Member States retained large powers on

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[38] See L. HANCHER – F. M. SALERNO, *Energy Policy after Lisbon*, in A. BIONDI – P. EECKHOUT – S. RIPLEY (eds.), *op. cit.*, pp. 367-402.

[39] See W. VANDENBERGHE, *EU Rules Concerning Energy and Investment After the Lisbon Treaty*, in M. ROGGENKAMP – U. HAMMER (eds.), *European Energy Law Report VIII*, cit., p. 148.

[40] *Ivi*, p. 147

[41] The First Energy Package consisted of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas. The Second Energy Package consisted of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC. The Third Energy Package consisted of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. More recently, on 30 November 2016, the European Commission presented a new package aimed at facilitating the transition towards a sustainable economy, in the context of the European Energy Union and in compliance with the commitments assumed with the Paris Agreement. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Clean Energy For All Europeans", COM(2016) 860 final of 30.11.2016.

[42] See Chapter I, § 4.1.

[43] On the reform of the CCP following the Treaty of Lisbon, see: M. BUNGENBERG – C. HERRMANN (eds.), *Common Commercial Policy after Lisbon*, special issue of the *European Yearbook of International Economic Law*, 2013; M. KRAJEWSKI, *The Reform of the Common Commercial Policy*, in A. BIONDI – P. EECKHOUT – S. RIPLEY (eds.), *op. cit.*, pp. 292-311.

[44] On the EU investment policy see: M. BUNGENBERG – J. GRIEBEL – S. HINDELANG (eds.), *International Investment Law and EU Law*, special issue of the *European Yearbook of International Economic Law*, 2011; A. DIMOPOULOS, *EU Foreign Investment Law*, OUP, Oxford, 2011; S. FINA – G. M. LENTNER,

investment regulation, as shown by the countless BITs they concluded between themselves ("intra-EU" BITs) and with third Countries ("extra-EU" BITs).

The CCP, including FDI, is regulated in Part V ("The Union's External Action"), Title II ("Common Commercial Policy"), Articles 206 and 207, of the TFEU. According to Art. 206 TFEU, "*By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers*".

Pursuant to Art. 207(1) TFEU, "*The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*".

As it is easy to see, these Articles give no description of what FDI is meant to be. No wonder if this state of things raised many interpretative concerns as to the contents and scope of this new EU competence. To this regard, scholars have argued about whether the notion of FDI includes, in addition to foreign direct investment *stricto sensu* – i.e. investments aimed at carrying out an economic activity in a foreign Country so as to exercise control on the management of the activity concerned – also foreign *portfolio* investment – i.e. investment aimed at earning a return, regardless to any involvement in the control and management of the activity. What is more, scholars have discussed on whether the Union's competence on FDI covers, in addition to investment *liberalization*, also investment *protection*, including therefore investment dispute settlement and, more specifically, ISDS[45]. To this regard, it is worth noting that the CJEU had recently had the opportunity to shed light on the issues at hand. In Opinion 2/15 on the Free Trade Agreement between the EU and Singapore[46], in fact, the Court clarified that *portfolio* investment and, what is more, ISDS do not fall within the scope of the CCP[47].

Another debated issue is the future of the numerous BITs concluded by and between EU Member States. As is well known, said treaties deal with investment promotion and protection and usually provide for investment dispute settlement, including ISDS. With respect to intra-EU BITs, it has been debated whether they should be deemed as automatically terminated following the expansion of the Union's competence in the field of investment. As to extra-EU BITs, the debate has focussed

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The Scope of the EU's Investment Competence After Lisbon, in *Santa Clara Journal of International Law*, 2, 2016, pp. 419-440.

[45] See: M. KRAJEWSKI, *op. cit.*, pp. 292-311; F. ORTINO – P. EECKHOUT, *Towards an EU Policy on Foreign Direct Investment*, in A. BIONDI – P. EECKHOUT – S. RIPLEY, *op. cit.*, pp. 312-327; L. HANCHER – F. M. SALERNO, *op. cit.*, pp. 393-397.

[46] Opinion 2/15 of 16 May 2016, EU:C:2017:376.

[47] *Ibid.*, para. 305 and dispositif. On the Opinion, see M. CREMONA, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017 ECJ – 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore*, in *EuConst*, 14, 2018, pp. 231–259.

on the opportunity to maintain or to progressively replace them with EU-wide investment agreements[48].

To this respect, it is worth noting that, in the long-awaited *Achmea* judgment[49], the CJEU ruled on the incompatibility with EU law of ISDS clauses provided for in intra-EU BITs and, in doing so, seriously challenged the lawfulness of intra-EU BITs under EU law (on *Achmea* see, more in detail, *infra*, § 8.4).

In addition, it must be noticed that, following the Treaty of Lisbon, the European Commission has promoted a far-reaching EU investment policy, the basis of which were expressed in a Communication issued on 2010 and significantly entitled "Towards a comprehensive European international investment policy"[50]. In line with the objectives outlined in the Communication, a Regulation providing for transitional arrangements for extra-EU BITs was adopted on 2012[51]. The Regulation, assuming that extra-EU BITs came under the Union' exclusive competence following the entry into force of the Treaty of Lisbon, provided the conditions under which said treaties could be maintained pending their replacement by EU investment agreements. In addition, on 2014, a Regulation for managing the financial responsibility between the Union and its Member States in relation to ISDS mechanisms provided in international agreements concluded by the Union was adopted[52]. Furthermore, starting from 2015, the Commission has embarked on the challenging project of creating a permanent Multilateral Investment Court for the settlement of investment disputes[53].

In the light of the above, it is easy to imagine how the expansion of the Union's competence on investment may have a major impact on the future of the Energy

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[48] See: G. COOP, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, in *JENRL*, 3, 2009, pp. 408-415; H. WEHLAND, *Intra-EU Investment Agreements and Arbitration: is European Community Law an Obstacle?*, in *International and Comparative Law Quarterly*, 58, 2009, pp. 297-320; *Part II: BITs, the ECT and the EU: Is Conflict Inevitable?*, in G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit., pp. 97-184; S. HINDELANG, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The case of Intra-EU Investment Arbitration*, in *Legal Issues of Economic Integration*, 39, 2012, pp. 179-206; C. TIETJE, *Bilateral Investment Treaties Between EU Member States (Intra-EU-Bits) – Challenges in the Multilevel System of Law*, in *TDM*, 2, 2010; M. BURGSTALLER, *The Future of Bilateral Investment Treaties of EU Member States*, in M. BUNGENBERG – J. GRIEBEL – S. HINDELANG (eds.), *International Investment Law and EU Law*, cit., pp. 55-77; J. P. TERHECHTE, *Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties*, in M. BUNGENBERG – J. GRIEBEL – S. HINDELANG (eds.), *International Investment Law and EU Law*, cit., pp. 79-93.

[49] Judgment of 6 March 2018, *Slowakische Republic v Achmea*, C-284/16, EU:C:2018:158, hereinafter "*Achmea* judgement".

[50] See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Towards a comprehensive European international investment policy", COM(2010) 343 final of 7.7.2010.

[51] See Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, pp. 40-46.

[52] See Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, pp. 121-134.

[53] http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

Charter process. To this regard, one can ask whether the EU will gain a prevailing role in the enforcement of ECT investment commitments and, possibly, as respondent party to investor-State disputes filed under Art. 26 ECT. More in general, one can even wonder whether the EU will become the only Contracting Party to the Treaty in the long run: on the one hand, it is true that the ECT covers matters which do not fall entirely within the exclusive competences of the Union. On the other hand – and as we will see in detail in next chapter – Italy's withdrawal from the Treaty was justified, in part, on the ground that the Union supposedly gained a prevailing role in the field of international investment. To this end, the possible "snowballing" effect that the Italian withdrawal may have on other EU Member States parties to the Treaty must not be underestimated.

4. Mixity and the ECT ISDS mechanism

As said by way of introduction, the mixed accession of the EU and its Member States to the ECT is a source of many interpretative concerns. This is especially so as far as the investment regime and, more specifically, its dispute settlement system are concerned[54].

As seen before (see *supra*, Chapter I, § 3.5), the settlement of investment disputes is regulated in Articles 26 and 27 ECT. The earlier governs the settlement of investor-State disputes; the latter regulates the settlement of State-State disputes on the application and interpretation of the whole Treaty, including, therefore, investment provisions. Considering that Art. 27 ECT has practically found no application, we will focus on Art. 26 ECT[55].

As far as the ECT ISDS regime is concerned, among the most relevant issues raised by mixity there are:

a) the individuation of the proper respondent, among the EU and its Member States, to the disputes;
b) the applicability of Art. 26 ECT to EU internal relations or, alternatively, the admissibility of EU "internal" disputes to the ECT ISDS regime; to this respect, sensitive questions of nationality/citizenship recognition arise, especially as far as the EU citizenship and its overlap with EU Member States' nationalities is concerned;
c) the applicability and, more in general, the relevance of EU law for the purposes of dispute settlement;
d) the interplay between the ECT and EU law.

Before entering into the merits of the above issues, which will be the subject of our investigation, it is worth making some preliminary remarks. It must be noticed, in the

[54] See C. CROSS – V. KUBE, *Is the Arbitration Clause of the Energy Charter Treaty Compatible with EU Law in Its Application Between EU Member States?*, Analysis commissioned by The Munich Environmental Institute, February 2018, p. 1 (available online).

[55] As seen before (see *supra*, Chapter I, § 3.5.2), the only State-State dispute filed under Art. 27 ECT arose between Slovenia and Croatia on oil transit restrictions and was settled amicably through diplomatic channels.

first place, that how these questions are addressed and answered depends on the point of view from which they are examined: the conclusions one may reach from a genuine EU constitutional law viewpoint may differ from those drawn if a general international law perspective is assumed. Indeed, in the course of our investigation, we will see how the position of the European Commission on the issues at hand sensibly diverges from that of the parties involved in the disputes and, more importantly, from that of ECT arbitral tribunals. This is no surprise, considering that the Commission is expected to approach the issues at hand with the lenses of EU law, while arbitral tribunals are required to decide the issues in dispute according to the ECT and international law, as expressly provided by Art. 26(6) ECT[56].

In the present investigation, we will adopt a "procedural" approach, by which examining how said issues become, or may become, relevant in disputes incepted under Art. 26 ECT and are, or are likely to be, decided by arbitral tribunals. Accordingly, both the EU perspective and that of arbitral tribunals constituted under the ECT will be taken into account. Such an approach, in fact, will enable us to understand how mixity affects, *in practice*, the application of the ECT and, moreover, the procedural implications of the Italian withdrawal therefrom, as largely discussed in Chapter III.

Second, it must be noticed that the questions under discussion are not an absolute novelty in the realm of international arbitration since they have already arisen, to different extents, with respect to intra-EU BITs[57]. As it has been pointed out, in fact, as regards investment protection, the ECT can be seen as: an intra-EU Multilateral Investment Treaty (MIT) involving EU Member States; an extra-EU MIT involving EU Member States and third Countries; a MIT completely external to the EU and involving only third Countries[58]. As an intra-EU MIT, the ECT may be said to pose similar questions to intra-EU BITs. However, it must be borne in mind that contrary to BITs, the Treaty has been acceded by all EU Member States and, moreover, by the EU itself. This means that the Treaty, unlike BITs, binds the EU institutions and Member States and, furthermore, is part of EU law[59]. As we will see, these findings are of paramount importance for addressing the issues at stake and to understand the effects of the Italian withdrawal from the Treaty[60].

In the third place, it must be noticed that said issues are inextricably linked and arise – or are likely to arise – in EU "internal" disputes, i.e. disputes involving EU Member States or the EU and investors therefrom. To this regard, it is worth remembering that, according to Art. 26(1) ECT, the ISDS mechanism applies to

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[56] Art. 26(6) ECT: "*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*".

[57] See H. WEHLAND, *op. cit.*;

[58] See G. COOP, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, cit., p. 416.

[59] See Art. 216 TFEU: "*1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*".

[60] See: C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 1; C. CROSS – V. KUBE, *op. cit.*, p. 1.

"*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 concern an alleged breach of an obligation of the former under Part III*". Considering that Contracting Parties to the Treaty are, in addition to extra-EU States, also the EU (and the EURATOM) and its Member States, it is possible to outline the following eight scenarios:

a) dispute between an investor of a non-EU State against another non-EU State party to the Treaty;
b) dispute between an investor of a non-EU State against an EU Member State party to the Treaty;
c) dispute between an investor of a non-EU State against the EU;
d) dispute between an investor of an EU Member State against a non-EU State;
e) dispute between an investor of an EU Member State against another EU Member State ("intra-EU" dispute);
f) dispute between an investor of an EU Member State against the EU;
g) dispute involving an investor claiming the EU citizenship and a non-EU State;
h) dispute involving an investor claiming the EU citizenship and an EU Member State. In this case two further scenarios can be outlined:
    i. the EU investor sues an EU Member State which is his/its home State;
    ii. the EU investor sues an EU Member State which is not his/its home State.

To this respect, it can be said that mixity-related issues mainly arise with respect to scenarios "e" "f" and "h" (EU internal disputes). Some questions also arise as regards disputes involving EU against non-EU parties (scenarios "b", "d", "c" and "g"), while disputes where both the claimant and the respondent are non-EU parties do not pose particular problems (scenario "a"). To some extent, such scenarios are unlikely if not unable to materialize, especially as far as scenarios "f" "g" and "h" are concerned. Indeed, only scenarios "a", "b", "d" and "e" have materialized so far.

Finally, it is worth noting that the above issues have been examined, to greater or lesser extent, by arbitral tribunals established to settle the so-called "intra-EU" disputes filed under the ECT, i.e. disputes involving EU Member States and investors therefrom, and are likely to be dealt with more comprehensively in as much as the numerous intra-EU cases still pending are awarded or settled somehow. Particular attention, therefore, will be accorded to relevant intra-EU disputes so far awarded or partly decided under the ECT and publicly available[61]. In the specific, the disputes are:

1) *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22), hereinafter "*AES*"[62];
2) *Electrabel S.A. (Belgium) v. Republic of Hungary* (ICSID Case No. ARB/07/19), hereinafter "*Electrabel*"[63];

[61] Excepting for *REEFF* – regarding which a Decision on Jurisdiction has been rendered – and the *PV Investors* – regarding which a Preliminary Award on Jurisdiction has been issued – in the other disputes, arbitral tribunal have delivered final awards which are public knowledge. As regards the *PV Investors*, the Preliminary Award on Jurisdiction is not public knowledge. However, excerpts of the award can be derived from other decisions or awards, namely those in *Masdar* and *Antin*.
[62] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/01/4.
[63] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/19.

3) *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain* (SCC Case No. 062/2012), hereinafter "*Charanne*"[64];
4) *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), hereinafter "*RREEF*"[65];
5) *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain* (SCC Case No. 2013/153), hereinafter "*Isolux*"[66];
6) *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), hereinafter "*Blusun*"[67];
7) *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), hereinafter "*Eiser*"[68];
8) *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* (SCC Case No 2015/063), hereinafter "*Novenergia*"[69];
9) *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), hereinafter "*Masdar*"[70];
10) *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31), hereinafter "*Antin*"[71];
11) *The PV Investors v. The Kingdom of Spain* (PCA Case No. 2012-14), hereinafter "*PV Investors*"[72].

Since the first step in order to incept an investor-State dispute under the ECT is the choice of the respondent to the controversy, in accordance with the procedural approach adopted in the present investigation, we will start our analysis with the first issue referred to above, i.e. the individuation of the proper respondent, among the Union and its Member States, to investment disputes filed under Art. 26 ECT.

5. The proper respondent issue

5.1. Premise

According to Art. 26(1) ECT, the ISDS mechanism is limited to "*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 concern an alleged breach of an obligation of the former under Part III*" (underlining added). For an investor-State litigation to be incepted under the ECT, therefore, three fundamental conditions must be met at the same time:

[64] http://investmentpolicyhub.unctad.org/ISDS/Details/502.
[65] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/30.
[66] http://investmentpolicyhub.unctad.org/ISDS/Details/564.
[67] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/3.
[68] http://investmentpolicyhub.unctad.org/ISDS/Details/535.
[69] www.italaw.com/cases/6613.
[70] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/1.
[71] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/31.
[72] http://investmentpolicyhub.unctad.org/ISDS/Details/435.

1) condition *ratione personae*: the dispute must be transnational, i.e. the investor's home State/REIO and the respondent State/REIO must be different Contracting Parties to the Treaty[73];
2) condition *ratione loci*: the dispute must relate to an investment made in the area of the defendant;
3) condition *ratione materiae*: the dispute must concern an alleged breach of an obligation in force for the respondent under Part III ECT.

If one takes into account the mixed participation of the Union and its Member States to the ECT, the interplay of such conditions raises significant interpretative challenges. Starting with the condition *ratione personae* ("*Disputes between a Contracting Party and an Investor of another Contracting Party…*"), the main difficulty concerns the determination of the claimant's nationality, especially when the recognition of the EU citizenship and, what is more, its overlap with the nationality of the claimant's home State, come into play.

Regarding the condition *ratione loci* ("*…relating to an Investment of the latter in the Area of the former…*"), the territorial identity between the EU and its Member States, as provided in Art. 1(10)(b) ECT, poses the thorny question of determining which is the relevant "area" between that of the EU and that of its Member States for the purposes of dispute resolution.

Lastly, the condition *ratione materiae* ("*…which concern an alleged breach of an obligation of the former under Part III…*") touches the wider issue of the international responsibility of the EU and its Member States for the performance of mixed agreements and, more importantly, for breaches of the commitments provided therein.

As said, the first step in order to incept an investor-State dispute under the ECT is the choice of the respondent to the controversy. We already saw that the initiative is up to investors, while Contracting Parties have only passive legitimacy to stand in arbitral proceedings. In the case of an investment made in an EU Member State, such choice may be a source of concerns for the investor: providing that an investment made in the area of an EU Member State is at once an investment made in the area of the EU, and considering that both the Union and its Member States are capable of breaching ECT commitments and have passive legitimacy to stand in investment proceedings (see *infra*, § 5.3), when a breach of an ECT investment provision takes place and supposedly affects an investment made in the EU, the investor concerned, in order to enable Art. 26 ECT, will have to face the dilemma of which party is the proper respondent to the dispute. As it is easy to imagine, the issue at stake is not

[73] The principle of diversity of nationality finds an express exception in Art. 26(7) ECT, according to which "*An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State"*". Under Art. 26(7) ECT, therefore, a dispute involving a company which has the same nationality of the respondent party may be incepted under the ECT, as long as the local company is foreign controlled before the dispute arises. As we will extensively see when discussing *Eskosol S.p.A. in liquidazione v. the Italian Republic* (ICSID Case No. ARB/15/50), Art. 26(7) ECT, if read in connection with Art. 25(2)(b) ICSID Convention, poses many interpretative challenges, especially as far as the "foreign control" requirement is concerned (see *infra*, Chapter III, § 5).

purely theoretical: a dispute filed against the wrong party can run the risk of being declared inadmissible to dispute resolution. Indeed, in many of the intra-EU disputes referred to above, it was argued that the controversy had been directed against the wrong party or before the wrong forum (see *infra*, § 5.6).

The question at stake is a far-reaching one, since it may arise in all these cases where the claimant, being either an EU or an extra-EU investor, is resolved to protect an investment made in the EU (as in scenarios "b", "c", "e", "f" and "h"). Nonetheless, it has been discussed with specific regard to cases where the claimant is an extra-EU investor investing in the EU (as in scenarios "b" and "c"). In the following paragraphs, therefore, the analysis will be carried out with specific attention to the latter.

5.2. Addressing the question

In scenarios "b" and "c" the claimant is an extra-EU investor, while the respondent is, respectively, an EU Member State and the EU. Singularly taken, scenarios "b" and "c" do not raise particular concerns, since the Treaty does not prevent, in principle, an extra-EU investor, say a Turkish company, from bringing a claim against an EU Member State, say Germany, or even against the EU, when a breach of an ECT Part III provision allegedly undermines an investment made in the area of those Contracting Parties[74]. At the most, one can observe that an extra-EU investor resolved to sue the EU (scenario "c") rather than an EU Member State (scenario "b") will be prevented from resorting to ICSID arbitration. Pursuant to Art. 26(4)(a) ECT[75], in fact, an investor who chooses to submit a dispute for resolution to international arbitration or conciliation may rely, among others, to:

a) ICSID arbitration, as long as both his home State and the respondent are parties to the ICSID Convention;
b) arbitration under the ICSID Additional Facility Rules, providing that either his home State or the respondent is party to the ICSID Convention.

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[74] Similar conclusions can be drawn with respect to scenario "a" (dispute involving extra-EU parties) and scenario "d" (dispute between an investor from an EU Member State against an extra-EU State or REIO). The ECT, after all, was originally conceived as an instrument for protecting foreign energy investments from the main political risks to which they are exposed in host States, especially in those Countries that were moving from State-controlled to market-based economies by the time the Treaty was negotiated and adopted. As we will see, however, the ECT has demonstrated, more recently, to be a compelling mean for protecting investors also in well-developed market economies, notably in western European States (see *infra*, Chapter III, § 3.2).

[75] Art. 26(4) ECT: "*In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (a) (i) The International Centre for Settlement of Investment Disputes, 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 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "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*".

Since the EU is not party to the ICSID Convention and the Additional Facility rules are available only to disputes involving States (and not international organizations), ICSID arbitration will be therefore inaccessible for the investor concerned[76].

This state of things is well summarized in the last clause of the statement provided by the European Communities in accordance with Article 26(3)(b)(ii) ECT, pursuant to which "*As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them*".

Problems rather emerge if scenarios "b" and "c" are taken into account together. One can observe, in fact, that such scenarios move from the same premise: the choice an extra-EU investor makes as to which party between the Union and an EU Member State suing when a breach of an investment obligation included in Part III ECT takes place and supposedly undermines an investment made in the EU. To this respect, whether the investor chooses to sue an EU Member State or the EU, both the conditions *ratione personae* and *ratione loci* would be satisfied: the investor's home State and the respondent party would be different parties to the Treaty and the investment would result to be made in the areas of both the EU and the Member State concerned. The condition *ratione materiae*, however, requires the dispute to be about an alleged breach of an obligation *of* the respondent under Part III ECT. According to a literal reading of Art. 26(1) ECT, therefore, it would be sufficient that a breach of an investment provision in force for the respondent takes place, no matters if the violation is attributable somehow to the latter.

In order to pinpoint the respondent to the dispute, therefore, our investor would have to determine, in the first place, whether and, if so, to what extent, the potential respondent is internationally responsible for the enforcement of that obligation. To this regard, the far-reaching question of the international responsibility of the EU and its Member States for the performance of mixed agreements comes into play. As we will see below, there are founded reasons for considering both the EU and its Member States responsible for the fulfilment of the ECT as a whole, including the investment-related obligations provided therein. As a consequence, our investor would have still to deal with the right respondent dilemma: in addition to the conditions *ratione personae* and *ratione loci*, in fact, also the condition *ratione materiae* would be potentially met whether he sues the Member State (scenario "b") or the EU (scenario "c").

In order to determine the respondent to the dispute, therefore, the investor would have to ascertain which party is the responsible of the breach at hand. To this regard, a breach of an international commitment implies the exercise of, or the failure to exercise, some kind of power or authority. Considering that, after all, the EU is an international organization constituted by States and that it mainly acts through its Member States, including in areas where it exercises exclusive competence, it may be difficult to determine whether the responsible for a breach of the ECT is the EU or a

[76] See T. WÄLDE – W. BEN HAMIDA, *Questions and Observations: Interactive Session. Part I – The Energy Charter Treaty and Corporate acquisition*, in G. COOP – C. RIBEIRO (eds.), *Investment Protection and the Energy Charter Treaty*, cit., pp. 207-208.

Member State. Take the case of a Member State that, by complying with EU binding legislation, acts inconsistently with an ECT investment provision: it is true that the measure is implemented, in practice, by the Member State; but it is equally true that the measure originated from, and was actually required by, the EU[77]. To this end, the thorny question of the international responsibility of the EU and its Member States for breaches of mixed agreements arises.

As we will see in detail below, under international law and, more specifically, the ECT it is difficult to determine unambiguously whether it is the EU or its Member States to be held responsible for a breach of a commitment included in a mixed agreement, including the ECT.

A valuable tool to overcome the problem at hand may be the above-seen statement rendered by the EU in compliance with Art. 26(3)(b)(ii) ECT, according to which an investor can request the EU and its Member States to determine which party among them is the right respondent to a dispute. According to the third clause of the statement, in fact, "*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. In such cases, upon request of the investor, the Communities and the Member States concerned will make such determination within a period of 30 days*". However, as examined below (see *infra*, § 5.5), there are certain procedural limits that undermine the application of this mechanism which, therefore, do not ultimately solve the question at stake.

Indeed, some guidance has been provided by arbitral tribunals established under Art. 26 ECT, which had to deal with, among others, questions of international responsibility. To this respect, it is worth noting that, while many proceedings have been filed by extra-EU investors against EU Member States (as well as against non-EU States), there is no record of disputes brought against the EU under the ECT. This state of things may be explained with the preclusion of ICSID arbitration for disputes involving the EU: to this respect, it is worth recalling that ICSID is by far the most preferred forum of arbitration in the ECT context. Moreover, an award rendered by an ICSID tribunal will have fewer risks to remain unenforced or to be challenged before the courts at the seat of the arbitration than an award issued within the UNCITRAL or the AISCC[78]. More simply, it may also be the case that investors find more comfortable to sue EU Member States rather than the EU since, intuitively, the relevant area within which the investment is made is the territory of a State and the breach allegedly claimed attributable to its acts or omissions[79].

In next paragraphs, we will first investigate the international responsibility of the EU and its Member States for the performance of the ECT and, second, for breaches of the investment commitments provided therein. Then, after having examined the mechanism foreseen in the statement provided by the EU in accordance with Art. 26(3)(b)(ii) ECT, we will review relevant ECT case law on the issues at hand.

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[77] See T. ROE – M. HAPPOLD, *op. cit.*, pp. 176-177.

[78] See: T. ROE – M. HAPPOLD, *op. cit.*, pp. 155; E. DE BRABANDERE, *op. cit.*, pp. 139-142. See also P. RATZ, *International and European Law Problems of Investment Arbitration involving the EU*, Nomos, Baden-Baden, 2017, pp. 219-231.

[79] See C. SÖDERLUND, *op. cit.*, pp. 116-117.

5.3. The international responsibility of the EU and its Member States for the performance of ECT commitments

The question of the international responsibility of the EU and its Member States for the performance of the ECT, notably the investment commitments provided therein, has been particularly debated in academic literature[80]. The issue can be put in the following terms: are the EU and its Member States fully responsible for the performance of the ECT or are they responsible within the limits of their respective competences? On the one hand, in fact, the EU and its Member States are different Contracting Parties to the Treaty and, as seen above, are not expressly provided with a special treatment under the Treaty. On the other hand, however, international organizations are founded on the principle of conferral, i.e. they act within the boundaries of the competences attributed to them. As a consequence, one may wonder to what extent the EU and its Member States have consented to be bound by the ECT[81].

As a starting point of our analysis, we can focus on Art. 23(1) ECT, according to which "*Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area*" (underlining added). This provision can be seen as a specification of the *pacta sunt servanda* principle codified in the Vienna Convention on the Law of Treaties (hereinafter VCLT)[82] and, similarly, in the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (hereinafter VCLTIO)[83], both of which are generally seen as codifying principles and rules of customary international law.

According to Art. 26 VCLT and, similarly, Art. 26 VCLTIO, "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*". Since both the EU and its Member States are distinct Contracting Parties to the ECT, one may conclude that they have consented to be bound to the Treaty as a whole, regardless of how competence for the fulfilment of the commitments provided therein is apportioned between them under EU law.

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[80] See: C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., pp. 7-15; G. COOP, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, cit., pp. 415-419; T. ROE – M. HAPPOLD, *op. cit.*, pp. 163-185; A. DIMOPOULOS, *op. cit.*, pp. 250-259; M. BURGSTALLER, *The Energy Charter Treaty as a Mixed Agreement: a Model for future European Investment Treaties?*, in G. COOP (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, cit., pp. 141-153.

[81] See A. DIMOPOULOS, *op. cit.*, pp. 250-253.

[82] The VCLT was adopted on 22 May 1969 and opened for signature on 23 May 1969 and entered into force on 27 January 1980. As to 17 August 2018, it has been ratified by 116 States.

[83] The VCLTIO was opened for signature on 21 March 1986 but has not yet entered into force, since the thirty-five ratifications or accessions required for its entry into force have not been reached. International organizations may ratify it, but their ratification is not counted for entry into force purposes. As to 17 August 2018, the Convention has been ratified by thirty-two States and twelve international organizations.

Indeed, international law only requires treaty commitments – as well as other international obligations – to be honoured, without specifying how they should be performed in domestic legal orders[84]. To this end, Art. 27 VCLT[85] and, similarly, Art. 27 VCLTIO[86], specify that States and international organizations cannot invoke their domestic law in order to justify a failure to perform a treaty. As to the EU, this would mean that the Union could not justify a failure to perform the commitments undertaken under the ECT on the grounds that said commitments do not fall within its competences.

As expressly stated by Articles 27 of the VCLT and the VCLTIO, an exception to this principle is provided by Art. 46 VCLT[87] and, similarly, Art. 46 VCLTIO[88], pursuant to which States and international organizations may invoke the fact that their consent to be bound by a treaty has been expressed in violation of an internal rule regarding competence to conclude treaties as invalidating their consent in as much as the violation was manifest and concerned a rule of fundamental importance. As to the ECT, it is safe to conclude that no manifest violation of internal rules regarding competence to conclude treaties occurred by the time the Union and its Member States acceded the ECT and that, therefore, both of them are bound by the Treaty as a whole[89].

Such conclusion would be confirmed by the fact that the ECT provides for no special arrangement by which linking responsibility for the performance of the obligations provided therein with the EU internal distribution of competences. To this regard, despite acknowledging the fact that certain matters governed by it could have

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[84] See C. TIETJE, T*he Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 8.

[85] Art. 27 VCLT ("Internal law and observance of treaties") "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46*".

[86] Art. 27 VCLTIO ("Internal law of States, rules of international organizations and observance of treaties"): "*1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty. 2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty. 3. The rules contained in the preceding paragraphs are without prejudice to article 46*".

[87] Art. 46 VCLT ("Provisions of internal law regarding competence to conclude treaties"): "*1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith*".

[88] Art. 46 VCLTIO ("Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties"): "*1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2.An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith*".

[89] See C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., pp. 8-10.

been transferred to the Union by the Member States[90], the ECT does not foresee any of the instruments commonly used in mixed agreements to clarify how competences on the matters dealt with therein are distributed within the EU. More specifically, the Treaty does not include or require a so-called "declaration of competences".

As is known, by way of a declaration of competences, the division of powers between the Union and its Member States on the matters treated by a mixed agreement is clarified to the benefit of third parties and, more importantly, acquires international relevance[91]. Classical examples are Art. 5 of Annex IX of the United Nations Convention on the Law of the Sea (UNCLOS), Art. 2 of the Constitution of the Food and Agriculture Organization of the United Nations and Art. 48 of the Convention on International Interests in Mobile Equipment, all of which require mandatory declarations on the division of competences[92]. For some commentators, the decision not to include a declaration would prove the intention of the Union and its Member States to undertake full responsibility for all the provisions of the Treaty[93]. In any event, it is worth noting that even if a declaration of this sort were provided in the Treaty, it would not avoid the raise of interpretative problems: practice on mixed agreements, in fact, shows how such declarations are unable to clarify the exact scope and nature of EU competences and to appreciate their evolution by means of amendments to the EU founding treaties or the doctrine of implied powers[94].

Moreover, if the agreement concerned provides for a dispute settlement mechanism, as is the case with the ECT, said declarations may even undermine the

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[90] Art. 1(3) ECT: "*"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*".

[91] See: P. EECKHOUT, *op. cit.*, p. 256; A. DELGADO CASTELEIRO, *The International Responsibility of the European Union: From Competence to Normative Control*, CUP, Cambridge, 2016, pp. 110-129; P. RATZ, *op. cit.*, pp. 71-73.

[92] Art. 5 of Annex IX UNCLOS is perhaps the most relevant example to this end. It provides that: "*1. The instrument of formal confirmation or of accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention. 2. A member State of an international organization shall, at the time it ratifies or accedes to this Convention or at the time when the organization deposits its instrument of formal confirmation or of accession, whichever is later, make a declaration specifying the matters governed by this Convention in respect of which it has transferred competence to the organization. 3. States Parties which are member States of an international organization which is a Party to this Convention shall be presumed to have competence over all matters governed by this Convention in respect of which transfers of competence to the organization have not been specifically declared, notified or communicated by those States under this article. 4. The international organization and its member States which are States Parties shall promptly notify the depositary of this Convention of any changes to the distribution of competence, including new transfers of competence, specified in the declarations under paragraphs 1 and 2. 5. Any State Party may request an international organization and its member States which are States Parties to provide information as to which, as between the organization and its member States, has competence in respect of any specific question which has arisen. The organization and the member States concerned shall provide this information within a reasonable time. The international organization and the member States may also, on their own initiative, provide this information. 6. Declarations, notifications and communications of information under this article shall specify the nature and extent of the competence transferred*".

[93] See: R. HAPP – J. A. BISCHOFF, *op. cit.*, p. 169; C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 9.

[94] See: P. EECKHOUT, *op. cit.*, pp. 256-257; S. TALMON, *Responsibility of International Organizations: Does the European Community Require Special Treatment?*, in M. RAGAZZI (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Nijhoff, Leiden-Boston, 2005, p. 419.

autonomy of the EU legal order, since, in the case of uncertainty as to the apportionment of competences between the Union and its Member States, external tribunals – such as investor-State arbitral tribunals established under the ECT – may be called to clarify the distribution of competences within the EU, a task which is entrusted with the CJEU[95].

Actually, the only reference to the EU internal apportionment of competences is provided in the already mentioned statement rendered by the European Communities in accordance with Art. 26(3)(b)(ii) ECT. The second clause of the statement provides that "*The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competence*" (underlining added). A literal reading of the clause suggests that the EU and its Members are responsible for the fulfilment of the ECT within the limits of their respective competences. Such a conclusion, however, can be questioned on different grounds: as it has been highlighted[96], the statement does not appear sufficiently clear as to the intention of the European Communities to subordinate responsibility to competence, since, as we will see more extensively in next pages (see *infra*, § 5.5), it includes other clauses suggesting the opposite view. In any event, the statement has no international relevance: not only it was provided by the Communities alone but, what is more, it is not *stricto sensu* part of the Treaty[97].

Thus, in the light of the above considerations, it is safe to conclude that both the EU and its Member States are fully responsible for the performance of ECT commitments, including those harboured in Part III[98]. This conclusion, indeed, is in line with the prevailing view in academic literature, according to which there is joint and several responsibility with respect to mixed agreements that remain silent as to the apportionment of the responsibility for the performance of the obligations provided therein[99]. Furthermore, joint and several responsibility has been upheld also by the CJEU, which stated, notably in *Parliament v. Council*[100] and *Hermés*[101], that in the absence of any indication as to the division of competences, the latter remains an internal matter of EU law, being the EU and its Member States jointly liable for the performance of the obligations undertaken.

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[95] See A. STEINBACH, *EU Liability and International Economic Law*, Hart Publishing, Oxford-Portland (Oregon), 2017, p. 142.

[96] See R. HAPP – J. A. BISCHOFF, *op. cit.*, p. 170.

[97] See: C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 9; P. RATZ, *op. cit.*, pp. 73-75.

[98] See: M. BURGSTALLER, *The Energy Charter Treaty as a Mixed Agreement: a Model for future European Investment Treaties?*, cit., pp. 143-144; R. HAPP – J. A. BISCHOFF, *op. cit.*, pp. 169-170; T. ROE – M. HAPPOLD, *op. cit.*, p. 175.; C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 8.

[99] See: P. EECKHOUT, *op. cit.*, p. 262; P. RATZ, *op. cit.*, pp. 58-79. It is worth noting that, for a minority opinion, the very fact that the EU and its Member States jointly accede to an international agreement is *per se* sufficient to inform third parties that the agreement does not fall entirely within the competences of the EU, which, consequently, assumes responsibility only for the performance of the obligations falling within its competences. To this respect, see Opinion of AG Mischo of 27 November 2001, *Commission v Ireland*, C-13/00, EU:C:2001:643, paras. 29-30.

[100] Judgement of 2 March 1994, *Parliament v. Council*, C-316/91, EU:C:1994:76.

[101] Judgement of 16 June 1998, *Hermès v. FHT*, C-53/96, EU:C:1998:292.

Finally, such reading is also supported by the International Law Commission (ILC) of the United Nations: in the commentary to the Draft Articles on the Responsibility of International Organizations (DARIO) (see *infra*, § 5.4), the ILC confirmed, by referring precisely to *Parliament v. Council*, that in the absence of express indications as to the limitation of responsibility, the EU and its Member States are jointly liable for the fulfilment of every obligation arising from the commitments undertaken[102].

To sum up, in accordance with a literal interpretation of the Treaty, the prevailing view of scholars, the CJEU's jurisprudence and the ILC's opinion, when international treaties do not expressly acknowledge the EU domestic division of competences, as in the case of a mixed agreement concluded without any declaration of competences, both the EU and its Member States are deemed equally bound to the agreement as a whole. To this end, the ECT would make no exception.

5.4. The international responsibility of the EU and its Member States for breaches of ECT Part III commitments

5.4.1. Premise

After having examined the international responsibility of the EU and its Member States for the *performance* of ECT (investment) provisions, we can now turn on the thorny question of the international responsibility of the Union and the Member States for *breaches* of the Treaty, namely the investment promotion and protection provisions provided therein.

Reference rules and principles, here, are those provided in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the DARIO, together with their respective commentaries[103]. The suitability of such Articles to describe the internal dynamics of an international organization such as the EU can be questioned, given the specific characteristics that distinguish the latter from "classical" international organizations (e.g. its supranational nature)[104]. Nonetheless, they will be at the base of our analysis, since they can be seen as formulating, by way of codification and progressive development, the general rules and principles on the international responsibility of States and international organizations[105]. In addition, the ECT provides for its own rules on responsibility, namely Art. 22 ("State and Privileged Enterprises") and Art. 23 (Observance by Sub-National Authorities").

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[102] See the commentary to Art. 48 DARIO.

[103] See United Nations, *Yearbook of the International Law Commission*, 2001, vol. II (Part. Two) and *Yearbook of the International Law Commission*, 2011, vol. II (Part Two).

[104] See: R. HAPP – J. A. BISCHOFF, *op. cit.*, p. 171; A. STEINBACH, *op. cit.*, pp. 141-142; P. J. KUIJPER – E. PAASIVIRTA, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations*, in *International Organizations Law Review*, 1, 2004, pp. 113-116 and 136-137; S. TALMON, *op. cit.*, pp. 406-407 and 421. See also the general commentary to the DARIO, para. (70).

[105] See: general commentary to the ARSIWA, para. (1); general commentary to the DARIO, para. (5). See also A. DELGADO CASTELEIRO, *op. cit.*, pp. 54-60.

In the following paragraphs, therefore, the international responsibility of the EU and its Member States for breaches of the ECT, notably Part III provisions, will be examined in the light of the ARSIWA, the DARIO and Articles 22 and 23 ECT[106].

5.4.2. General principles of international responsibility

According to the ARSIWA and the DARIO, the general rule on international responsibility is that States and international organizations are responsible for their internationally wrongful acts (Art. 1 ARSIWA[107] and Art. 3 DARIO[108]). An act is deemed internationally wrongful when conduct consisting of an action or omission is attributable to a State or to an international organization under international law and constitutes a breach of an international obligation in force for that State or organization (Art. 2 ARSIWA[109] and Art. 4 DARIO[110]). For international responsibility to arise, therefore, two conditions must be met at the same time: (a) there must be a breach of an international obligation binding a State or an international organization and (b) such breach must be attributable to that State or organization[111].

To this regard, it must be emphasized that qualifying a conduct as a breach of an international commitment constitutes a task different from attributing such breach to a State or to an international organization. In other words, when dealing with international responsibility, the distinction between *primary rules* of obligation (i.e. the content of the international obligations) and *secondary rules* of responsibility (i.e. the general conditions under international law according to which a State or an international organization can be considered responsible for a wrongful conduct) must be always born in mind, despite their close interconnection[112].

Starting with primary rules, there is a breach of an international obligation by a State or an international organization when an act or omission – or a combination of both – of that State or organization is not in conformity with what is required of them

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106 On the international responsibility of the EU and its Member States, especially for breaches of mixed agreements, see: M. EVANS – P. KOUTRAKOS (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Hart Publishing, Oxford-Portland (Oregon), 2013; A. DIMOPOULOS, *op. cit.*, pp. 250-305; A. DELGADO CASTELEIRO, *op. cit.*; A. STEINBACH, *op. cit*, pp.129-150; P. RATZ, *op. cit.*, pp. 58- 151.

107 Art. l ARSIWA ("Responsibility of a State for its internationally wrongful acts"): "*Every internationally wrongful act of a State entails the international responsibility of that State*".

108 Art. 3 DARIO ("Responsibility of an international organization for its internationally wrongful acts"): "*Every internationally wrongful act of an international organization entails the international responsibility of that organization*".

109 Art. 2 ARSIWA ("Elements of an internationally wrongful act of a State"): "*There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State*".

110 Art. 4 DARIO ("Elements of an internationally wrongful act of an international organization"): "*There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization*".

111 See A. DELGADO CASTELEIRO, *op cit.*, pp. 61-62.

112 See the general commentary to the ARSIWA, paras. (1) and (2), and the general commentary to the DARIO, para. (3). See also R. HAPP – J. A. BISCHOFF, *op. cit.*, p. 164.

by that obligation, regardless of its origin or character (Art. 12 ARSIWA[113] and Art. 10 DARIO[114]). Thus, in order to determine whether a conduct consisting of an act or omission – or a combination of both – constitutes a breach of an international obligation, the primary commitments in force for the State or the organization concerned must be firstly analysed. In our case, it must be ascertained if the obligation disregarded is included in Part III ECT, since only breaches of investment provisions can trigger the ISDS mechanism laid down in Art. 26 ECT.

Once a breach has been found out, for the purposes of international responsibility, it remains to be determined whether and, if so, how, that breach is attributable to a State or an international organization, in our case an EU Member State or the EU respectively. To this end, the secondary rules of attribution, which are the core of the ILC's Articles, must be taken into account.

5.4.3. Responsibility of States and international organizations for their internationally wrongful acts

As a general rule, a conduct – that in our case amounts to a breach of a provision included in Part III ECT – is attributable to a State or an international organization when it is put into place by that State's or organization's own organs or by subjects which closely depend on them, even when they act *ultra vires*[115]. The matter is dealt with in Part One ("The internationally wrongful act of a State"), Chapter II ("Attribution of conduct to a State"), Articles 4-11 ARSIWA, and in Part Two ("The internationally wrongful act of an international organization"), Chapter II ("Attribution of conduct to an international organization"), Articles 6-9 DARIO, which provide for rules of attribution of conduct to States and international organizations.

A conduct is attributable to a State when it is put into place by that State's organs (Art. 4 ARSIWA)[116], by persons or entities exercising elements of governmental

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[113] Art. 12 ARSIWA ("Existence of a breach of an international obligation"): "*There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character*".

[114] Art. 10 DARIO ("Existence of a breach of an international obligation"): "*1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned. 2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization*".

[115] See: Art. 7 ARSIWA ("Excess of authority or contravention of instructions"): "*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions*"; Art. 8 DARIO ("Excess of authority or contravention of instructions"): "*The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions*".

[116] Art. 4 ARSIWA: "*1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State*".

authority (Art. 5 ARSIWA)[117], by organs placed at that State's disposal by another State (Art. 6 ARSIWA)[118], by a person or group of persons acting under the State's instructions or direction or control (Art. 8 ARSIWA)[119] or exercising elements of governmental authority in the absence or default of the official authorities (Art. 9 ARSIWA)[120], and, finally, by insurrectional or other movements (Art. 10 ARSIWA)[121].

A conduct is attributable to an international organization when it is carried out by its organs or agents (Art. 6 DARIO)[122] or by organs of a State or organs and agents of another international organization placed at its disposal (Art. 7 DARIO)[123].

In this respect, the fact that a breach of an ECT investment obligation committed by the Government of a State party to the Treaty or, similarly, by an EU institution, is attributable to, respectively, that State or the EU, is of little value for the purposes of our analysis: considering the *status* of the EU as a REIO party to the ECT, the EU membership of numerous Contracting Parties to the Treaty and the fact that the Union mainly acts through its Member States, including in areas of EU exclusive competence[124], it must be seen whether it is possible to attribute a breach of the ECT either to the Union or to its Member States. Put it into different terms, it must be seen whether and, if so, how, EU Member States may be held responsible for a breach of an ECT investment obligation committed by the EU and *vice versa*[125]. More specifically, it must be seen if EU Member States, due to their EU membership, may be held internationally responsible when a breach of an ECT investment obligation is

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117 Art. 5 ARSIWA: "*The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance*".

118 Art. 6 ARSIWA: "*The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed*".

119 Art. 8 ARSIWA: "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*".

120 Art. 9 ARSIWA: "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority*".

121 Art. 10 ARSIWA: "*1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9*".

122 Art. 6 DARIO: "*1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization apply in the determination of the functions of its organs and agents*".

123 Art. 7 DARIO: "*The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct*".

124 See: P. J. KUIJPER – E. PAASIVIRTA, *op. cit.*, p. 115; S. TALMON, *op. cit.*, p. 408.

125 See M. BURGSTALLER, *The Energy Charter Treaty as a Mixed Agreement: a Model for future European Investment Treaties?*, cit., p. 128.

committed by the EU and, similarly, if the EU may be held responsible for a similar breach when it is committed by its Member States.

To this end, we can firstly ascertain whether, under the above cited Articles 6 and 7 DARIO, EU Member States, or EU Member States' organs, may be considered as, respectively, "organs or agents" or "organs placed at the disposal" of the EU. The question is of paramount importance, considering the extent to which the EU may intervene in the field of foreign investment following the Treaty of Lisbon and the role played by EU Member States as implementing channels of the Union's activity[126]. To this respect, should a breach of an ECT investment provision committed by an organ of an EU Member State be considered as an act of the EU under Art. 6 or Art. 7 DARIO, a claim under Art. 26 ECT should be addressed to the EU rather than to its Member States. As it has been highlighted, in fact, the rules on attribution harboured in Chapter II DARIO, including Articles 6 and 7, attribute responsibility *either* to a State *or* to the organization concerned, unlike other rules of attribution that provide for an *additional* responsibility of States to that of international organizations and *vice versa*, as we will see in next paragraphs[127].

Art. 6 DARIO ("Conduct of organs or agents of an international organization") reads as follows: "*1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization apply in the determination of the functions of its organs and agents*".

On its part, Art. 7 DARIO ("Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization") states that "*The conduct of an organ of a State* […] *that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct*".

While from an EU law perspective Member States could be seen as executive organs of the Union, especially when they implement binding acts of the latter, from an international law perspective a similar view raises more concerns[128]. It may be questioned, in fact, that EU Member States can be understood as "organs" or "agents" of the EU under Art. 2 DARIO ("Use of terms"), according to which "*"organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization*" and "*"agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts*".

Furthermore, with specific regard to Art. 7 DARIO, it is difficult to establish if the EU exercises "effective control" over the conduct of its Member States[129]. To this respect, it is worth noting that the commentary to Art. 7 DARIO makes reference to

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126 See T. ROE – M. HAPPOLD, *op. cit.*, pp. 172-173.

127 See 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?*, in *EJIL*, 3, 2010, p. 727.

128 See S. TALMON, *op. cit.*, p. 413.

129 See: P. J. KUIJPER – E. PAASIVIRTA, *op. cit.*, pp. 126-127; A. DIMOPOULOS, *op. cit.*, pp. 260-262; A. STEINBACH, *op. cit.*, pp. 143-145; A. DELGADO CASTELEIRO, *op. cit.*, pp. 67-75; P. RATZ, *op. cit.*, pp. 83-86.

the international responsibility of the United Nations or regional organizations for military operations carried out through their respective member States' forces. In other words, the ILC does not expressly take into account the question of the attribution to an international organization such as the EU of the acts of the organs of its member States, especially when such acts are adopted by the latter to comply with obligations assumed by the former[130]. To this regard, it is noteworthy that the ILC rejected a proposal, advanced by the European Commission, to include in the text of the DARIO a rule on attribution according to which, when implementing a binding act of the EU (or similar organizations), the conduct of the organs of its Member States should be attributed to it, with the consequence that State organs would act as a "quasi-organs" of the Union (or the organization concerned)[131]. The existence of a rule of this kind, however, is not excluded from the scope of the ILC's Articles, since, as we will see later on, it may be encompassed within Art. 64 DARIO ("*Lex specialis*").

Another way by which EU Member States may be held internationally responsible for breaches committed by the EU (and *vice versa*) is provided by Articles 11 ARSIWA[132] and 9 DARIO[133].

Articles 4-10 ARSIWA and 6-8 DARIO assume, as a general rule, that a certain conduct is, or may be, attributable to a State or to an international organization by the time of its commission. Articles 11 ARSIWA and 9 DARIO, conversely, foresee the possibility that a conduct not attributable to a State or to an international organization at the time of its commission is subsequently acknowledged and adopted by the latter as their own[134]. To this regard, the statement provided by the European Communities in accordance with Art. 26(3)(b)(ii) ECT can be read in line with these Articles: the third clause of the statement, in fact, establishes 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. In such cases, upon request of the investor, the Communities and the Member States concerned will make such determination within a period of 30 days*"[135].

As it has been highlighted, Articles 11 ARSIWA and 9 DARIO may be seen as a viable solution as regards the attribution of conduct to a State for acts committed by an international organization and *vice versa*, but nonetheless do not provide for a satisfactory solution. In particular, it has been noticed that said rules may diminish the effectiveness of the other rules of attribution. In addition, many interpretative concerns arise when determining the meaning and the content of the

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130 See: A. DIMOPOULOS, *op. cit.*, p. 262; S. TALMON, *op. cit.*, p. 409.

131 See the Seventh report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 27 March 2009, UN Doc A/CN.4/610, para. 31.

132 Art. 11 ARSIWA ("Conduct acknowledged and adopted by a State as its own"): "*Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own*".

133 Art. 9 DARIO ("Conduct acknowledged and adopted by an international organization as its own"): "*Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own*".

134 See commentary to Art. 11 ARSIWA, para. (1), and commentary to Art. 9 DARIO, paras. (1) and (2).

135 See R. HAPP – A. BISCHOFF, *op. cit.*, p. 172.

"acknowledgement" criteria[136]. Similarly, as regards the mechanism provided in the statement, it presents some procedural limits and do not ultimately answer the issues of international responsibility at hand (see *infra*, § 5.5).

In the light of the above, we must turn on other rules provided by the ARSIWA and the DARIO by which States assume responsibility for internationally wrongful acts of international organizations and *vice versa*. Attributing a breach of an international obligation to a State or an international organization, in fact, is not the only way for international responsibility to arise: the ILC's Articles envisage cases where a State or an international organization should assume international responsibility for the internationally wrongful acts of other States or organizations, i.e. for breaches of international obligations attributable to the latter. In other words, a State or an international organization may be held internationally responsible also if a breach is not attributable to them under Articles 4-11 ARSIWA and 6-9 DARIO. These cases, however, are referred to as exceptions, since, as said, the basic principle of international responsibility is that one is responsible for the conduct assumed with respect to his own international commitments[137].

5.4.4. The international responsibility of EU Member States by virtue of their involvement in the conduct of, or by virtue of their membership to, the EU

Reference provisions, here, are those included in Part Five ("Responsibility of a State in connection with the conduct of an international organization"), Articles 58-63 DARIO[138]. Said Articles deal with cases where an international organization (in our case the EU) is the actor and the State (in our case an EU Member State) is deemed responsible by virtue of its involvement in the conduct of, or by virtue of its membership to, that organization. While in Articles 58, 59 and 60, the responsible State may not be a member of the organization, in Articles 61 and 62 the State is necessarily a member of the latter[139].

A State is internationally responsible if it aids or assists (Art. 58)[140], directs and controls (Art. 59)[141] or coerces (Art. 60)[142] an international organization in the

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[136] See: P. J. KUIJPER – E. PAASIVIRTA, *op. cit.*, pp. 127-128; A. DELGADO CASTELERIO, *op. cit.*, pp. 75-77; A. DIMOPOULOS, *op. cit.*, pp. 262-264.

[137] See commentary to Part One, Chapter IV, ARSIWA, paras. (1)-(9). See also F. HOFFMEISTER, *op. cit.*, pp. 725-726.

[138] According to Art. 57 ARSIWA ("Responsibility of an international organization"), any question involving the international responsibility of international organizations (which are regulated in the DARIO) and any question involving the international responsibility of States for the conduct of an international organization are excluded from the scope of the ARSIWA. Indeed, as specified in the commentary to Art. 57 ARSIWA, para. (4), and in the commentary to Part One DARIO, para. (7), questions involving the international responsibility of States for the conduct of international organizations could fall, at least by analogy, within the scope of the ARSIWA, since they concern questions of State responsibility akin to those dealt with in Part One, Chapter IV ("Responsibility of a State in connection with the act of another State"), Articles 16-19 ARSIWA. Since such issues are better dealt with in the DARIO, however, the latter will be at the base of our analysis.

[139] See commentary to Part Five DARIO, para. (4).

[140] Art. 58 DARIO: "*1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) the State does so with knowledge of*

commission of an internationally wrongful act by the latter, or if it circumvents its international obligations by taking advantage of the distinct legal personality of the organization (Art. 61)[143], notwithstanding that an act by a State member of an international organization done in accordance with the rules of the latter does not automatically engage the international responsibility of the earlier[144].

According to the commentaries to the DARIO, if the "aiding or assisting", "directing and controlling" or "coercing" State is member of the organization, the fact that the earlier participates to the decision-making process of the latter does not *per se* entails its international responsibility. It goes without saying that a State acting in accordance with the rules of the organization is not exempted from complying with its international obligations, since such obligations may encompass the State's conduct also when it acts within an international organization[145].

More interesting for present purposes is Art. 62 DARIO ("Responsibility of a State member of an international organization for an internationally wrongful act of that organization"), which reads as follows: "*1. A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility. 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary*". For our purposes, it is important to pinpoint what is not expressly stated in the Article. The ILC, in fact, specifies that "*article 62 positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. While it would be thus inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which responsibility is not considered to arise for a State in connection with the act of an international organization, such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act*" (underlining added)[146]. In other words, for the ILC, States members of an

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the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article".

141 Art. 59 DARIO: "*1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State*".

142 Art. 60 DARIO: "*A State which coerces an international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and (b) the coercing State does so with knowledge of the circumstances of the act*".

143 Art. 61 DARIO: "*1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization*".

144 Indeed, with respect to Art. 60, there is no reference to acts done in accordance with the rules of the organization. As specified in para. (3) of the commentary to Art. 60 DARIO, it is unlikely that an act of coercion could be taken in accordance with the internal rules of the organization; nonetheless, the coercion cannot be assumed as necessarily unlawful.

145 See paras (4)-(5) of the commentary to Art. 58 DARIO and para. (2) of the commentary to Art. 59 DARIO.

146 *Ibid.*, para. (2) of the commentary to Art. 62 DARIO.

international organization are not, as such, responsible, either concurrently or subsidiarily, for the obligations in force for that organization[147].

Articles 58-62 DARIO point out cases where States may be held responsible for the conduct of an organization to which they are members. To this regard, the assumption is that membership does not engage, as such, their international responsibility. As pointed out by the doctrine, the application of said Articles to the relations between the EU and its Member States may be difficult, especially in the case of mixed agreements[148].

In any event, it is worth noting that, as specified in Art. 63 DARIO, Articles 58-62 are "*without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization*". In other words, Articles 58-63 DARIO create an "additional" responsibility for the State that contributes to the commission of an internationally wrongful act by an organization under Articles 6-9 DARIO[149]. Accordingly, if an EU Member State is found internationally responsible for a breach of an ECT investment provision under Articles 58-63 DARIO, this does not rule out the international responsibility of the EU.

5.4.5. The international responsibility of the EU by virtue of its involvement in the conduct of its Member States

Similar provisions govern those cases where a State member of an international organization (in our case an EU Member State) is the actor and the organization (the EU) is deemed responsible by virtue of its involvement in the conduct of the former. Reference rules are those included in Part Two, Chapter IV ("Responsibility of an international organization in connection with the act of a State or another international organization), Articles 14-19 DARIO.

According to Articles 14-17 DARIO, an international organization is responsible if it aids or assists (Art. 14)[150], directs and controls (Art. 15)[151] or coerces (Art. 16)[152] a State in the commission of an internationally wrongful act by the latter, or if it

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147 *Ibid.*, paras. (5)-(6) of the commentary to Art. 62 DARIO.

148 See A. DELGADO CASTELEIRO, *op. cit.*, pp. 90-105.

149 See F. HOFFMEISTER, *op. cit.*, p. 727.

150 Art. 14 DARIO: "*An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization*".

151 Art. 15 DARIO: "*An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization*".

152 Art. 16 DARIO: "*An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and (b) the coercing international organization does so with knowledge of the circumstances of the act*".

circumvents its international obligations through decisions and authorizations addressed to its Member States (Art.17)[153].

With respect to Article 15 DARIO, the ILC notes that "*in the relations between an international organization and its member States* […] *the concept of "direction and control" could be conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members*" and, as long as "direction" is understood as "actual direction of an operative kind" rather than mere "incitement or suggestion", and "control" as "domination over the commission of wrongful conduct" rather than "oversight, influence or concern", "*the adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the addressee of the decision is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act*"[154].

With respect to Art. 16, the ILC specifies that "*In the relations between an international organization and its member States* […] *a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary on article 18 on the responsibility of States for internationally wrongful acts stresses that: "Coercion for the purpose of article 18 has the same essential character as* force majeure *under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State"*"[155].

Thus, it may be assumed that the EU may be held responsible for the conduct of its Member States in as much as it adopts decisions binding its Member States which do not provide the latter with discretion on how carrying out the conduct.

Nonetheless, many interpretative doubts arise as to the possibility to rely to Articles 14-17 DARIO for describing the relations between the EU and its Member States. In particular, it may be difficult to establish that the EU "aids or assists", "directs and controls" or "coerces" its Member States when they implement EU law[156].

In any event, also with respect to Articles 14-17 DARIO, the international responsibility of member States committing the act in question is not ruled out, as expressly stated in Art. 19 DARIO[157].

To sum up, if an EU Member State or, similarly, the EU, is found internationally responsible for a breach of an ECT investment provision under, respectively, Articles

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[153] Art. 17 DARIO: "*1. 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. 2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization. 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed*".

[154] See para. (4) of the commentary to Art. 15 DARIO.

[155] See para. (4) of the commentary to Art. 16 DARIO.

[156] See: S. TALMON, *op. cit.*, p. 410; A. DELGADO CASTELEIRO, *op. cit.*, pp. 82-90.

[157] Art. 19 DARIO: "*This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization*".

58-62 DARIO and Articles 14-17 DARIO, the responsibility of the EU and, similarly, of its Member States, is not compromised. For the purposes of our analysis, this means that an investor willing to protect an investment made in the EU would be free, in principle, to sue the EU or the Member State concerned.

5.4.6. Lex specialis

As said above, the DARIO does not provide for an express rule by which, when implementing binding acts of an international organization such as the EU, the conduct of the organ of a member State must to be attributed to the organization alone. Nonetheless, the DARIO does include a general provision, applying with respect to issues concerning the international responsibility of international organizations and State responsibility in connection with the conduct of international organizations, which has particular relevance for our analysis: Art. 64 ("Lex specialis")[158].

According to Article 64 DARIO, the DARIO "*do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members*" (underlining added)[159].

For the ILC, Art. 64 DARIO leaves open the question of the existence of a special rule according to which conduct of EU Member States implementing binding acts of the EU should be attributed to the Union[160], as suggested in academic literature[161]. To this respect, the ILC refers to some disputes, within the framework of the ECHR and the WTO, where relations between the EU and its Member States were particularly debated.

While in the WTO context the existence of a special rule on attribution was accepted, the European Commission of Human Rights and, later, the ECtHR, considered that conduct of an organ of a member State should be in any case attributed to the State. In other words, there would be no settled case law on the issue at hand.

To this respect, it is worth noting that in *Blusun*, the European Commission argued that questions of international responsibility of the EU and its Member States are to be assessed under Art. 64 DARIO and "relevant case law" (see *infra*, § 5.6).

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158 On *lex specialis* see: A. DELGADO CASTELEIRO, *op. cit.*, pp. 105-107; A. STEINBACH, *op. cit.*, pp. 146-147; A. DIMOPOULOS, *op. cit.*, pp. 265-266; P. RATZ, *op. cit.*, pp. 109-110.

159 A similar provision is included in the ARSIWA. According to Art. 55 ("Lex specialis"), the ARSIWA "*do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law*".

160 See para. (2) of the commentary to Art. 64.

161 To this end, the ILC refers to: P.J. KUIJPER – E. PAASIVIRTA, *op. cit.*, pp. 111-127; S. TALMON, *op. cit.*, pp. 405 and 412-414; F. HOFFMEISTER, *op. cit.*, p. 723.

5.4.7. Articles 22 and 23 ECT

As said by way of premise, the ECT provides for specific rules on international responsibility, namely Articles 22 ("State and Privileged Enterprises") and 23 ("Observance by Sub-National Authorities").

Art. 22 ECT states that: *"(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty. (2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty. (3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty. (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty. (5) For the purposes of this Article, "entity" includes any enterprise, agency or other organisation or individual*".

As it has been noticed, Art. 22 ECT consists exclusively of primary rules of obligation and not of secondary rules of attribution of conduct. To this respect, it is important to bear in mind that said Article is not included in Part III ECT and, therefore, a breach of the commitments provided therein cannot be enforced under Art. 26 ECT. In any event, Art. 22 would be redundant, since a Contracting Party that encourages or requires a State or a privileged enterprise to act inconsistently with the commitments undertaken under Part III ECT could be held responsible for the breach under customary international law rules and principles on international responsibility as codified by the ILC[162].

More relevant for our purposes is Art. 23 ECT, according to which: "*(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area. (2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party*".

With respect to paragraph (1), it has been noticed that it contains two distinct and independent provision, i.e. a secondary rule of attribution ("*Each Contracting Party is fully responsible under this Treaty for the observance of all the provisions of the Treaty*") and a primary rule of obligation ("*and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area*")[163]. As regards the primary rule of obligation, it must be noticed that a breach of said provision cannot be challenged under Art. 26 ECT, since, similarly to Art. 22 ECT, it is not included in Part III of the Treaty.

As regards paragraph (2), one may argue whether, under said provision, the EU can be held responsible for breaches of ECT Part III commitments perpetrated by its

[162] See T. ROE – M. HAPPOLD, *op. cit.*, p. 169.
[163] *Ibid.*, p. 166.

Member States due solely to their EU membership, i.e. irrespective of any rule of attribution of conduct as provided by the ILC's Articles. The EU, in fact, is a Contracting Party to the Treaty and its Member States may be considered, at least in principle, as "authorities within" its area. Accordingly, the ISDS mechanism laid down in Art. 26 ECT – which is included in Part V of the Treaty – may be invoked in respect of measures affecting the observance of the Treaty by the EU which have been taken by its Member States.

As seen before, under the ILC's Articles on international responsibility, the fact that a State is member of an international organization does not automatically engage the international responsibility of the latter for breaches of international commitments perpetrated by the earlier. To this respect, while it has been argued that Art. 23 ECT – as well as Art. 22 – would not ultimately change the international rules on international responsibility codified in the VCLT and VCLTIO[164], one may wonder whether Art. 23 ECT qualifies as a *lex specialis* under Art. 64 DARIO by which linking the international responsibility of the EU to mere territorial criteria, i.e. by the sole fact that EU Member States are part of the EU area.

Indeed, despite Art. 64 DARIO is generally taken into account for describing the relations between the EU and its Member States, it has a more general scope, which may encompass Art. 23 ECT. According to the ILC, in fact, "*Special rules relating to international responsibility may supplement more general rules or may replace them, in whole or in part. These special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations. They may also concern matters addressed in Part Five of the present articles*" (underlining added)[165].

5.4.8. Findings

It may be useful to summarize the findings of the analysis developed so far. The EU and its Member States are distinct Contracting Parties to the ECT. As such, they are responsible for the fulfilment of the commitments provided therein, including those enclosed in Part III, and may be held internationally responsible for breaches of such obligations. To this respect, it is worth noting that, following the entry into force of the Treaty of Lisbon, there are numerous ways by which the EU can affect investments and investors and, therefore, breach ECT Part III provisions.

Considering the *status* of the EU as a Contracting Party to the ECT, the EU membership of numerous Contracting Parties to the Treaty and the fact that the Union mainly acts through its Member States, one may ask whether it is the Union or its Member States that must be held internationally responsible when a breach of an ECT investment commitment occurs and undermines an investment made in the EU. To this regard, it must be seen whether EU Member States may be held responsible for a breach of an ECT investment obligation committed by the EU solely by virtue of their EU membership and, similarly, whether the EU may be held responsible for a

[164] See T. ROE – M. HAPPOLD, *op. cit.*, 165-171.
[165] See commentary to Art. 64 DARIO, para. (1).

breach of an ECT investment obligation attributable to its Member States by virtue of their EU membership.

To this respect, the ILC purports the view that member States of an international organization, including therefore States members of the EU, are not, due solely to their membership, responsible for breaches committed by that international organization. Similarly, it is difficult to consider an international organization, in our case the EU, responsible for breaches of international obligations, in our case Part III ECT commitments, committed by its member States, in our case EU Member States, solely by virtue of their membership to the organization. For instance, it is difficult to consider EU Member States or EU Member States' organs as, respectively, "organs or agents" or "organs placed at the disposal" of the EU under Articles 6 and 7 DARIO. Accordingly, it may be difficult to trigger under said Articles the exclusive international responsibility of the EU for acts or omissions put into place by its Member States.

To this respect, the ILC leaves open the possibility of the EU being held internationally responsible for breaches committed by its Member States when the latter implement binding acts of the Union, with the consequence that the breach would be attributed to the Union rather than to its Member States. This view, which has been advocated by the European Commission as well as in academic literature, can be held encompassed in Art. 64 DARIO.

In any event, under Articles 14-19 DARIO and 58-63 DARIO (and their respective commentaries), EU Member States may be held internationally responsible for breaches of the ECT perpetrated by the EU by virtue of their involvement in the commission of such breaches and, similarly, the EU may be held internationally responsible for breaches of the ECT perpetrated by its Member States by virtue of its involvement in the commission of the breaches. In such cases, however, the responsibility of the actor which actually commits the breach is not ruled out.

Notwithstanding the ILC's Articles – which, as said, codify customary international law rules and principles on international responsibility – the ECT provides for specific rules on international responsibility in Articles 22 and 23. As to Art. 23 ECT, it may be seen as a provision by which the EU can be held responsible for breaches of ECT commitments committed by its Member States, irrespective of whatever rule of attribution of conduct. To this regard, Art. 23 ECT may be even considered as a *lex specialis* under Art. 64 DARIO.

In the light of this, one may conclude that there is no clear-cut answer as to the right respondent dilemma discussed above. In particular, the ILC's Articles have not been fully-tested so far, with the consequence that no general answer can be drawn with respect to issues of international responsibility arising in the ECT context. As a consequence, each concrete dispute under the ECT must be analysed according to its own features and claims[166].

[166] See: T. ROE – M. HAPPOLD, *op. cit.*, pp. 184-185; A. DELGADO CASTELEIRO, *op. cit.*, pp. 107-109.

5.5. The Statement provided by the European Communities in accordance with Art. 26(3)(b)(ii) ECT

An useful instrument to overcome the right respondent issue is provided by the above-mentioned statement rendered by the European Communities (now the EU and the EURATOM) in accordance with Art. 26(3)(b)(ii) ECT. For the sake of completeness, it is worth quoting the statement in full:

"*The European Communities are a regional economic integration organization within the meaning of the Energy Charter Treaty. The Communities exercise the competence conferred on them by their Member States through autonomous decision-making and judicial institutions.*
The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competence.
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. In such cases, upon request of the investor, the Communities and the Member States concerned will make such determination within a period of 30 days. (This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States).
The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice.
Any case brought before the Court of Justice of the European Communities by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty. (Article 26(2)(a) is also applicable in cases where the Court of Justice of the European Communities may be called upon to examine the application or interpretation of the Energy Charter Treaty on the basis of a request for a preliminary ruling submitted by a court or tribunal of a Member State in accordance with article 177 of the EC Treaty). Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.
As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them. Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty".

For present purposes, the relevant clause is the third one, according to which the EU and its Member States, upon the request of an investor of another Contracting Party and within a period of 30 days, will determine who is the respondent to the arbitration proceeding.

The statement provides for a "proceduralization" of the international responsibility issue and can be read, from an EU law perspective, in line with the jurisprudence of the CJEU on mixed agreements, especially as regards the duty of Member States to

cooperate when negotiating, concluding and enforcing agreements of this kind[167]. More specifically, it can be read in the light of the duty of loyal cooperation expressed in Art. 4(3) TEU[168].

The procedure laid down in the statement is remarkable, since it relieves the investor from the difficult task of determining the proper respondent to a dispute and, therefore, investigating very complex issues of EU law. Nonetheless, it presents some procedural limits that may undermine its effectiveness: the statement, in fact, is not an integral part of the Treaty; furthermore, it is subject to an explicit request of the investor, who remains free to sue either the EU or its Member States, even in the event the Union and the Member States make a determination in accordance to this procedure. As specified in the very statement, in fact, the procedure "*is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States*"[169].

5.6. ECT case law

The right respondent issue and, more in general, questions of international responsibility, arose and were discussed in some of the intra-EU disputes so far filed under Art. 26 ECT.

As is known, the dispute in *Electrabel* arose from the termination, on December 2008, of a power purchase agreement (PPA) concluded by an Hungarian State-owned electricity supply company (Magyar Villamos Müvek Zrt) and the Hungarian subsidiary (Dunamenti Erőmű Rt) of a Belgian energy firm (Electrabel). The termination of the PPA was required by the European Commission's decision 2009/609/EC of 4 June 2008[170] and was part of Hungary's efforts to liberalize its electricity market and comply with EU law requirements on State aid. To this respect, the claimant lamented that, by terminating the PPA, Hungary violated its obligations under Part III ECT[171].

During the dispute, the European Commission, which intervened as non-disputing party, argued that the claimant (Electrabel) had named the wrong party to the dispute (Hungary), since responsibility for preventing unlawful State aid would have lied with

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167 See M. BURGSTALLER, *The Energy Charter Treaty as a Mixed Agreement: a Model for future European Investment Treaties?*, cit., pp. 126-127.

168 Art. 4(3) TEU: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

169 See T. ROE – M. HAPPOLD, *op. cit.*, pp. 174-175.

170 2009/609/EC: Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements, OJ L 225, 27.8.2009, pp. 53-103.

171 On *Electrabel* see: S. JAGUSCH – 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*, cit., pp. 87-88; J. KATONA, *The Role of EU Law in Intra EU ISDS under the ECT: Some Thoughts on the Electrabel v. Hungary Award*, in *ELTE Law Journal*, 1, 2015, pp. 57-64. See also the case report by E. MATHISON, *Electrabel S.A. v. Hungary (ICSID Case No. ARB/07/19) Award*, in *TDM*.

the EU and not with its Member States[172]. For the claimant, on the contrary, Hungary was the right respondent, since the claim related to measures attributable to Hungary and resulting only in part from the Commission's request to terminate the PPA[173]. Furthermore, the claimant highlighted that compliance with binding EU law (in this case the Commission's decision requiring the termination of the PPA) does not relieve EU Member States from performing the international commitments assumed under the ECT[174].

Similar arguments were raised in *Blusun*. As we will see extensively in next chapter, the dispute originated from some measures adopted by the Italian authorities in the renewable energy sector that supposedly undermined an investment made in a photovoltaic project by two nationals from, respectively, France (Jean-Pierre Lecorcier) and Germany (Nichael Stein) and a Belgian holding company created and owned by said investors (Blusun).

In its *amicus curiae* submission, the European Commission contended that any question concerning the international responsibility of the EU and its Member States must be assessed in accordance with Art. 64 DARIO and "relevant case law"[175]. To this respect, the Commission specified that, under EU law, international responsibility must be determined in accordance with the "liability follows competence" principle and that the provisions harboured in Part III ECT fall within the competences of the EU. As a consequence, it would be the Union and not its Member States to be internationally responsible for alleged breaches of ECT investment commitments[176].

For the claimant, on the contrary, EU membership would not excuse Member States from complying with obligations assumed under the ECT, as expressly required by public international law (namely Art. 27 VCLT)[177].

Regardless of any general discourse on the international responsibility of the EU and its Member States for breaches of mixed agreements, ECT arbitral tribunals limited their analysis to the fulfilment of the conditions required by Art. 26(1) ECT for the inception of an investor-State dispute.

To this regard, the tribunal in *Electrabel* established that the claim was brought against the right party[178]. In its view, the Union would have to be named as respondent party "[…] *only if and to the extent that the relevant dispute engages the legal responsibility of the European Union under the ECT for a decision of the European Commission*". In that case, however, "[…] *the European Union is not a named party to this arbitration; the Claimant here makes no complaint against the European Union or the European Commission; it does not impugn the legal validity of the Commission's Final Decision; and its claims are not made under EU law. The Claimant's claims under the ECT relate only to certain measures taken by the*

172 See *Electrabel*, Decision on Jurisdiction, Applicable law and Liability, paras. 4.169-4.171.
173 *Ibid.*, para. 4.35.
174 *Ibid.*, paras. 4.38-9.
175 See *Blusun*, Award, para. 225.
176 *Ibid.* para. 227.
177 *Ibid.* para. 257.
178 See *Electrabel*, Decision on Jurisdiction, Applicable law and Liability, para. 5.35.

Respondent, some resulting from the Final Decision under EU law and some with no link with the Commission or EU law" [179].

Of great interest are the arguments developed by the tribunal in *Charanne*, a dispute that arose out of a series of energy reforms undertaken by the Spanish Government in the renewable sector, which included the introduction of a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers[180]. For the *Charanne* tribunal, given the territorial identity between the EU and that of its Member States, to know if the territory relevant for the purposes of dispute resolution in a controversy concerning an investment made in the EU is that of the Union or of one of its Member States (in that case the territory of Spain) "[…] *depends on the content of the claim and the entity against which the claim is directed*". Accordingly, "*An investor may well sue the EU based on allegedly unlawful acts committed by it. In this case, it could be considered that for the purposes of Article 26 of the ECT, the dispute is related to an investment made in the territory of the EU. The Tribunal nonetheless does not have to decide whether in that case jurisdiction in such circumstances would exist under the ECT, as the present situation is completely different*". In that case, in fact, the claims were "*not based on EU actions, but on allegedly unlawful acts committed by the Kingdom of Spain in the exercise of its national sovereignty. Nor is the claim directed against the EU, or somehow implies that the EU should be held responsible, thus, there is no doubt for the Arbitral Tribunal that Spain has a passive legitimacy to act in this arbitration and therefore the territory to which Article 26(1) of the ECT refers, for jurisdictional purposes, is the territory of the Kingdom of Spain and not the territory of the EU*"[181].

From ECT case law, therefore, it emerges that any question of international responsibility that may arise in an investor-State dispute must be assessed depending on different factors, such as the parties involved in the dispute, the contents of the claim and the rules invoked by the parties to decide the controversy.

6. The admissibility of EU "internal" disputes to the ECT ISDS mechanism

6.1. Premise

In addition to the proper respondent issue, among the most relevant questions that mixity poses vis-à-vis the ECT ISDS regime there are: the applicability of Art. 26 ECT to EU internal relations, i.e. the admissibility of EU internal disputes to the ECT ISDS regime; the applicability and, more in general, the relevance of EU law in ECT arbitral proceedings; the interplay between EU law and the ECT. As it is easy to imagine, these issues are inextricably related and are likely to arise in disputes involving EU Member States or the EU and investors thereof, i.e. in EU internal disputes.

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[179] *Ibid.*, para. 4.171.

[180] On Charanne see: F. D. SIMÕES, *Charanne and Construction Investments v. Spain: Legitimate Expectations and Investments in Renewable Energy*, in *RECIEL*, Vol. 26, 2, 2017, pp. 174-180; B. ARP, *Charanne B.V. v. Spain*, in *The American Journal of International Law*, 2, 2016, pp. 327-333; T. RESTREPO, *Modification of Renewable Energy Support Schemes Under the Energy Charter Treaty: Eiser and Charanne in the Context of Climate Change*, in Goettingen Journal of International Law, 1, 2017, pp. 101-137. See also the case report by T. PILGRIM, *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain (SCC Case No. 062/2012) Award*, in *TDM*.

[181] *Charanne*, Final Award (Unofficial English translation by Mena Chambers), para. 431.

Before entering into the merits of a dispute, an arbitral tribunal established under Art. 26 ECT has to decide on two preliminary questions: first, whether it has jurisdiction to decide the case concerned; second, whether the latter is admissible for dispute resolution under Art. 26 ECT[182]. In order to determine its jurisdiction on and the admissibility of a dispute as well as the merits of the latter, the tribunal has to establish the applicable law.

To this respect, the relevant provision is Art. 26(6) ECT, according to which "*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*" (underlining added). As far as EU internal disputes are concerned, arbitral tribunals have to determine their jurisdiction on, and the admissibility of, disputes where both the claimants and the respondents are from the EU and, subsequently, the merits of the controversy. To this regard, arbitral tribunals have to determine whether and, if so, to what extent, EU law qualifies as "applicable rules and principles of international law" to settle the issues in dispute, whether of jurisdiction, admissibility or of the merits. Should tribunals decide in favour of the applicability of EU law to the disputes, then they will have to examine how the latter interplays with the ECT and impacts on how the issues in dispute are decided.

As said, these issues may arise with respect to EU internal disputes in general (scenarios "e", "f" and "h" above). Nonetheless, they have been particularly discussed, both in academic literature and in ECT arbitral proceedings, with specific regard to intra-EU disputes (scenario "e"). As seen before, in fact, while numerous intra-EU disputes have been incepted under Art. 26 ECT, no dispute has been filed so far by an investor of an EU Member State against the EU (scenario "f") or, *vice versa*, by an investor claiming the EU citizenship against an EU Member State (scenario "h").

The following analysis, therefore, will be carried out with specific regard to scenario "e", notwithstanding that many of the conclusion that will be drawn therefrom apply also to scenarios "f" and "g". That said, we will start with the first question referred to above, that is the admissibility of EU internal disputes, notably intra-EU disputes, to the ECT ISDS mechanism.

6.2. The admissibility of intra-EU disputes to the ECT ISDS mechanism: the doctrinal debate

The inception of an intra-EU dispute under Art. 26 ECT would originally seem a rather hypothetical event, given that the Treaty's main aim was to protect investment flows from the EU and its Member States towards eastern European Countries. Such a possibility, however, became a reality when the first intra-EU disputes were filed under the ECT, namely *AES* and *Electrabel*, both of which were registered by the ICSID Secretary General on 13 August 2007. Since then, the number of intra-EU disputes brought under the ECT has dramatically increased, especially during the last six years, and amounts, today, to around 60% of all disputes ever initiated under Art. 26 ECT. As we will largely see in next chapter, this sudden increase was due by the

[182] See T. ROE – M. HAPPOLD, *op. cit.*, pp. 39-41.

reforms introduced by many EU Member States, notably Spain Italy and the Czech Republic, in the renewable energy sector.

Prima facie, a dispute between an investor of an EU Member State and another EU Member State party to the Treaty would satisfy the three conditions required by Art. 26(1) ECT: an investor of a Contracting Party, say a Belgian national, makes an investment in the area of another Contracting Party, say France, and claims that the latter has undermined its investment by breaching Part III ECT.

However, if one considers the *status* of the EU as a Contracting Party to the ECT and the EU membership of both the claimant's home State and the respondent Country, many interpretative concerns emerge, especially as regards the conditions *ratione personae* and *ratione loci*. One may argue, in fact, that, since the EU – whose area encompasses the areas of its Member States (including Belgium and France) – is a Contracting Party, and since an investor of an EU Member State (in our case a Belgian national) is at the same time an investor of the EU, the diversity of parties required by Art. 26(1) would be unmet. In addition, one may assert that the investment concerned would not have been made in the area of "another" Contracting Party, since the investor's home State and the respondent party would be part of the same "area", namely the EU area as construed in accordance to Articles 40 and 1(10) ECT.

Indeed, EU Member States involved as respondents to intra-EU disputes have challenged the jurisdiction of ECT arbitral tribunals on similar arguments and, in doing so, have found the strong support of the European Commission, which in many cases intervened as a non-disputing party to the controversies[183]. While the opposition of EU Member States to the jurisdiction of arbitral tribunals can be explained with the attempt to avoid arbitral proceedings, the position of the European Commission is based on more complex grounds, especially on the view that the ECT investment dispute settlement regime would undermine the autonomy of the EU legal order in so far as questions of EU law are examined by external tribunals[184]. In the light of this, there is little surprise if the admissibility of intra-EU disputes to the ECT ISDS regime is one of the most contentious issues discussed both in academic literature and ECT arbitral proceedings.

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[183] The European Commission intervened as a non-disputing party to numerous arbitral proceedings filed under the ECT. As regards the disputes analysed in this chapter, it is worth noting that it intervened in *AES*, *Electrabel*, *Charanne*, *Isolux*, *Blusun*, *Novenergia* and *Masdar*. In *Antaris*, the Commission submitted an application for leave to intervene as a non-disputing party but was not allowed to do so by the tribunal since it did not undertake to pay in full the costs deriving from the submission. Similarly, in *Antin* and *Eiser*, the Commission submitted twice an application to intervene to the disputes but, since it was not able to provide for the relative costs, it did not file its submissions. Finally, in *RREEF*, the Commission filed two applications but, nonetheless, was not allowed by the tribunal to intervene as a non-disputing party. On the intervention of the European Commission as a non-disputing party to investor-State arbitrations see O. GERLICH, *More Than a Friend? The European Commission's Amicus Curiae Participation in Investor-State Arbitration*, in G. ADINOLFI – F. BAETENS – J. CAIADO – A. LUPONE – A. G. MICARA (eds.), *International Economic Law Contemporary Issues*, Springer International Publishing Switzerland – Giappichelli, 2017, pp. 253-269.

[184] See C. SÖDERLUND, *op. cit.*, pp. 102-103.

The doctrine has long debated on whether Art. 26 ECT applies to intra-EU relations[185]. To this respect, the prevailing view is that the ECT, including Part V on dispute settlement, applies to intra-EU relations. Such conclusion would derive, in the first place, from the general, legally-binding effects that the ECT has been said to have with respect to the EU and its Member States (see *supra*, § 5.3)[186]. Accordingly, the application of the ECT, notably Art. 26, would not be limited to relations between EU Member States and third Contracting Parties – and, similarly, between the latter and the EU – but would extend also to the *inter se* relations between EU Member States – and, similarly, between them and the EU[187].

To this respect and as mentioned before, it has been noticed that there is no express indication in the Treaty as to the intention to limit or exclude intra-EU relations from its application. In particular, the Treaty would not include a so-called "disconnection clause" or similar provisions.

As is well-known, disconnection clauses are an instrument of international law aimed at safeguarding the autonomy of EU law, since they provide that, as to relations between EU Member States parties to an agreement (and between them and the EU), relevant EU law, instead of the provisions of the agreement concerned, applies[188]. The formulation of this kind of clauses vary depending on the features of the agreement concerned. For present purposes, it is suffice to highlight that, despite this clauses were a well-established instrument of international law by the time the ECT was concluded, they were not included in the Treaty. Indeed, the preparatory works of the Treaty show that the introduction of a clause of this kind was proposed but nonetheless rejected during the negotiation process[189]. A state of things that would confirm, *e contrario*, the willingness of the EU and its Member States to extend the scope of the ECT also to their *inter se* relations[190].

As to the exclusion of intra-EU disputes – and, more in general, of EU internal controversies – from the scope of the ECT ISDS regime, it is worth noting that, at the occasion of the signing of the IEC on 20-21 May 2015, the European Commission made the following declaration on behalf of the EU: "*It is declared that, due to the nature of the EU internal legal order, the text in Title II, Heading 4, of the International Energy Charter on dispute settlement mechanisms cannot be construed so as to mean that any such mechanisms due to the nature of the EU internal legal order would become applicable in relations between the European*

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185 See: T. ROE – M. HAPPOLD, *op. cit.*, pp. 89-103; S. JAGUSCH – J. SULLIVAN, *op. cit.*, pp. 93-95; C. SÖDERLUND, *op. cit.*; G. COOP, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, cit., in particular pp. 415-419; C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit.; C. CROSS – V. KUBE, *op. cit.*; G. A BERMANN, *ECT and European Union Law*, in M. SCHERER (ed.), *International Arbitration in the Energy Sector*, cit., pp. 203-220.

186 See C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 9.

187 *Ibid.*, pp. 9-10.

188 See M. CREMONA, *Disconnection Clauses in EU Law and Practice*, in C. HILLION – P. KOUTRAKOS (eds.), *op. cit.*, p. 160.

189 See, for instance, the Draft Basic Agreement for the European Energy Charter of 12 August 1992, p. 84, para. 27.18, available at: www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/8_-_BA_15__12.08.92_.pdf..

190 See C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 11.

Union and its Member States, or between the said Member States, on the basis of that text" (underlining added)[191].

Title II ("Implementation"), Heading 4 ("Promotion and protection of investments"), of the IEC states, *inter alia*, that "[…] *The signatories affirm the importance of full access to adequate dispute settlement mechanisms, including national mechanisms and international arbitration in accordance with national laws and regulations, including investment and arbitration laws and rules, all the relevant bilateral and multilateral treaties and international agreements* […]".

Despite the lack of any legally-binding effect of the IEC, let alone of a declaration rendered by the European Commission – additionally without the endorsement of the Council of the EU[192] – it is remarkable that the Commission felt the need to clarify its position on the application of investment dispute resolution mechanisms to EU internal relations.

According to some scholars, the inclusion of intra-EU relations within the scope of the ECT would be further confirmed by some parts of the Treaty[193]. Annex 2 to the Final Act of the EEC Conference includes a decision dealing with conflicts between the ECT and the Svalbard Treaty[194]. According to the decision, "*In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply*". Since no similar decision was made with respect to EU treaties, the intention to extend the scope of the Treaty to intra-EU relations also in the case of conflicts between the ECT and the EU legal system would be thus confirmed.

A similar conclusion would derive from other declarations rendered with respect to the Treaty, in particular from that rendered by the European Communities and their Member States on the relevance of Art. 58 of the Treaty establishing the European Community (now Art. 54 TFEU) with respect to Art. 25 ECT[195] and, moreover, by the declarations made by the Communities and their Member States, on the one side, and Russia, Ukraine, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan, on the other, on the regulation of trade in nuclear materials[196].

In short, there would be no reason for considering intra-EU relations outside the scope of the Treaty and, more specifically, its investment dispute settlement regime. As we will see in next paragraph, this is the unanimous conclusion reached so far by ECT arbitral tribunals.

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191 www.energycharter.org/fileadmin/DocumentsMedia/Legal/EU_IEC_Declaration.pdf.

192 http://data.consilium.europa.eu/doc/document/ST-8872-2015-REV-2/en/pdf.

193 See C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 11; T. ROE – M. HAPPOLD, *op. cit.*, p. 91.

194 Decision 1 with respect to the Energy Charter Treaty.

195 Declaration 5 of the Final Act of the European Energy Charter Conference.

196 Declaration with respect to Annex [W(4)].

6.3. The admissibility of intra-EU disputes to the ECT ISDS mechanism: ECT case law

The question of the admissibility of intra-EU disputes to the ECT ISDS mechanism has been raised and contended in many intra-EU controversies filed under Art. 26 ECT. Respondent States to these disputes and the European Commission – where it intervened as a non-disputing party to the controversies – challenged the jurisdiction of arbitral tribunals on different grounds. In particular, they contended that intra-EU investment relations would be governed exclusively by EU law, which would cover all investment matters treated by the ECT. Accordingly, intra-EU investment disputes should be settled conforming to the EU judicial system and not by ECT arbitral tribunals, with the consequence that the latter would have no jurisdiction on disputes of this kind[197]. In their view, the ECT text, context, object and purpose would confirm such conclusion.

To this respect, when they came to verify their jurisdiction over the disputes, arbitral tribunals had to clarify, in particular, the following questions:

a) whether EU Member States accepted to apply the Treaty, notably Art. 26, to intra-EU relations at the time of its conclusion;
b) whether intra-EU disputes fulfil the condition *ratione personae* laid down in Art. 26(1) ECT;
c) whether Art. 26(6) ECT prevents the inception of intra-EU disputes under the ECT;
d) whether the ECT includes a disconnection clause or similar provisions by which excluding intra-EU investment relations from the scope of the ECT investment promotion and protection regime, notably Art. 26 ECT.

For ease of analysis, the above allegations are examined separately below.

A) *The application of the ECT to inter se relations between EU Member States at the date of its conclusion*

Among the many arguments developed to support the intra-EU jurisdictional objection, it has been argued that EU Member States did not accept to apply the Treaty, notably Art. 26, to intra-EU relations by the time of its conclusion. To this respect, it is important to bear in mind that while many EU Member States parties to the Treaty were already Members of the Union when they concluded the ECT, others were not. In other words, the ECT involves both EU Member States that acceded the Treaty *after* they founded or acceded the EU and, conversely, Member States that concluded the Treaty *before* their accession to the Union[198].

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[197] See, in particular: *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, paras. 5.10 and 5.20; *Charanne*, Final Award, paras. 207-212; *RREEF*, Decision on Jurisdiction, paras. 39-43; *Isolux*, Award, paras. 167-169; *Blusun*, Award, paras. 207, 208 and 220; *Eiser*, Award, paras. 163-165.

[198] The first group includes: Belgium, France, Germany, Italy, Luxembourg and The Netherlands (founding Members); Denmark, Ireland and UK (accession on 1973); Greece (1981); Portugal and Spain (1986); Austria, Finland and Sweden (1995). The second group includes eastern European States: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia (2004); Bulgaria and Romania (2007); Croatia (2013).

In *Charanne*, *RREEF*, *Isolux*, *Blusun*, *Eiser*, *Novenergia*, *Masdar* and *Antin*, both the claimants' home States and the respondents were already Members of the EU by the time they acceded the Treaty. Based on this assumption, respondent States and the European Commission contended that EU Member States that were already Members of the EU when they acceded the Treaty opted out from the application of the latter to intra-EU relations, notably as regards Art. 26 ECT. To this regard, they specified that the disputes to which they were parties departed significantly from the *Electrabel* case, where the arbitral tribunal rejected the intra-EU jurisdictional objection. In their view, in fact, since the respondent in *Electrabel* (Hungary) was not an EU Member State when it concluded the Treaty, it had full sovereignty to assume obligations with all ECT Contracting Parties on all matters covered by the Treaty[199]. Arbitral tribunals, therefore, had to determine whether States that were parties to the EU at the time of the conclusion of the ECT are allowed to submit disputes involving themselves and nationals from other EU Member States party to the Treaty to the ECT ISDS regime.

The issue at stake was particularly debated in *Blusun*. In this case, the question was raised by the European Commission, which questioned the jurisdiction of the arbitral tribunal by arguing that EU Member States, when acceding the ECT, would have created obligations on investment promotion and protection only with third Contracting Parties to the Treaty and not between themselves. To this respect, the tribunal established to settle the dispute had to clarify, in the first place, whether intra-EU disputes were admissible under the ECT ISDS mechanism by the time the Treaty was concluded, i.e. whether the Treaty – notably the investment dispute settlement regime – *originally* applied to intra-EU relations. In the second place, the tribunal had to clarify whether subsequent EU treaty amendments changed the alleged original applicability of the ECT to intra-EU relations, i.e. whether the Treaty of Amsterdam, the Treaty of Nice and, finally and above all, the Treaty of Lisbon, implicitly repealed the ECT's investment promotion and protection provisions by means of the *lex posterior* principle laid down in Art. 30 VCLT.

Starting with the first question, while both the European Commission and the respondent (Italy) contended that EU Member States had no competence to enter into *inter se* commitments on investment protection when they acceded the Treaty and that the ISDS mechanism was therefore inapplicable with respect to intra-EU relations[200], the respondent was of the opposite view[201].

Founding its analysis on Articles 31, 32 and 33 VCLT on the interpretation of treaties, the tribunal observed, in the first place, that "[…] *there is nothing in the text of ECT that carves out or excludes issues arising between EU Member States* […]"[202]. To this regard, the tribunal specified that neither the preamble – where the Treaty's inspiring principles and aims are summarized – nor Art. 1(2) ECT – that provides for a definition of "Contracting Party", which includes both States and REIOs – suggest a contrary reading. To this end, the tribunal observed that "[…] *it would take an express provision or very clear understanding between the parties to achieve any other result* […]"

[199] See, in particular: *Isolux*, Award, para. 179; *Eiser*, Award, para. 170; *Antin*, Award, paras. 177-178.
[200] See *Blusun*, Award, paras. 217, 230 and 243.
[201] *Ibid.*, para. 253.
[202] *Ibid.*, para. 280.

(underlying added)[203] and concluded that "*There is no express provision (or 'disconnection clause', to adopt recent parlance) in the ECT*"[204].

More specifically, the tribunal noticed that "[…] *The mere fact that the EU is party to the ECT does not mean that the EU Member States did not have competence to enter into* inter se *obligations in the Treaty. Instead the ECT seems to contemplate that there would be overlapping competences* […]", and further contended that no provision in the ECT "[…] *suggests that the EU Member States had transferred exclusive competence for all matters of investment and dispute resolution to the EU*"[205].

To this end – so continued the tribunal – "[…] *if the Member States thought they did not have competence over the* inter se *obligations in the ECT, this would have been made explicit by including a declaration of competence to set out the internal division of competence between the EC and its Member States, as has been done in many other treaties with mixed membership* […]"[206]. In addition, "[…] *Even if, as a matter of EC law, the EC has exclusive competence over matters of internal investment, the fact is that Member States to the EU signed the ECT without qualification or reservation* […]"[207]. For the tribunal, in short, "[…] *the more likely explanation, consistent with the text of the ECT, is that, at the time the ECT was signed, the competence was a shared one*"[208].

As to the second question, i.e. whether subsequent amendments to the EU founding treaties implicitly repealed the ECT's investment promotion and protection provisions by means of the *lex posterior* principle as codified in Art. 30 VCLT, which regulates the application of successive treaties relating to the same subject-matter, the tribunal concluded that EU law and the ECT do not relate to the same subject matter and are not inconsistent with each other. The relationship between the ECT and EU law is largely examined in § 8. Suffice, here, to notice that, for the tribunal, "[…] inter se *obligations in the ECT have not subsequently been modified or superseded by later European law*"[209].

The conclusions of the *Blusun* tribunal are in line with those reached by other ECT arbitral tribunals which had to deal with similar questions. To this respect, it is worth quoting part of the reasoning of the tribunal in *Eiser* regarding the alleged intention of EU Member States to exclude the application of the ECT to intra-EU relations[210].

In the tribunal's words, "*Reliance upon the negotiators' claimed intention brings to the fore the limited role of supplementary means of interpretation under Article 32(a) of the VCLT. Under Article 32(a), supplementary means "including the preparatory work of the treaty and the circumstances of its conclusion" may be considered where interpretation according to Article 31 "[l]eaves the meaning ambiguous or obscure." The Tribunal finds nothing ambiguous or obscure in the interpretation of Article 26, so recourse to supplementary means of interpretation is not required, or even permitted*"[211]. In addition, "*Of perhaps greater significance, there is no evidence showing*

[203] *Ibid.*, para. 280(2).
[204] *Ibid.*, para. 280(3).
[205] *Ibid.*, para. 281.
[206] *Ibid.*, para. 282.
[207] *Ibid.*, para 283.
[208] *Ivi.*
[209] *Ibid.*, para. 291.
[210] On the *Eiser* case see T. RESTREPO, *op. cit.*
[211] *Eiser*, Award, para. 205.

that any such objective was shared by all [European Economic Community] members, or was communicated to and accepted by the other parties to the treaty" (underlining added)[212].

In short, the intra-EU jurisdictional objection based on the alleged intention of EU Member States to exclude the intra-EU application of the ECT during the negotiations has been so far dismissed by ECT arbitral tribunals.

B) *Art. 26(1) ECT*

Another argument relied upon to challenge the jurisdiction of ECT arbitral tribunals on intra-EU disputes concerns Art. 26(1) ECT which, as seen before, limits the ISDS mechanism to "*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 concern an alleged breach of an obligation of the former under Part III* […]".

It has been argued that said provision, if read in connection with ECT provisions dealing with REIOs, notably Articles 1(2), 1(3), 1(10) and 36(7) ECT, would exclude that intra-EU disputes can be submitted to the ECT ISDS mechanism. The reasoning can be summarized as follows: since the EU, whose area encompasses, according to Art. 1(10) ECT, the areas of its Member States, is a REIO party to the Treaty under Articles 1(2) and (3) ECT, and since an investor of an EU Member State is at the same time an investor of the EU, as far as intra-EU disputes are concerned, the claimants cannot be considered as investors of "another Contracting Party", as expressly required by the condition *ratione personae* laid down in Art. 26(1) ECT[213].

Such allegation, too, has been so far dismissed by ECT arbitral tribunals. As pointed out by the tribunals in *Charanne*, *Isolux*, *Eiser* and *Novenergia*, the underlying question, here, is determining whether, as far as intra-EU disputes are concerned, claimants of EU Member States should be considered as investors of those States or of the EU. While in the earlier case the condition *ratione personae* would be met, it would not in the latter, since the dispute would concern an investment made by an investor of the EU in the territory of the EU[214].

As noticed by the tribunal in *Charanne*, "[…] *although the EU is a Contracting Party of the ECT, the States that compose it have not ceased to be Contracting Parties as well. Both the EU, as its Member States, may have legal standing as Respondent in an action based on the ECT*"[215]. In its view, in fact, "*Article 1(10) of the ECT, in order to define the concept of "area" refers to both the territory of the Contracting States (Article 1(10)(a)) and the EU territory (Article 1(10) second paragraph). Therefore, it appears reasonable to deduce that, in referring to investments made "in the territory" of a contracting party, Article 26(1) refers to both, in the case of a EU member State, to the territory of a national State as well as the territory of the EU. There is no rule in the ECT according to which a different interpretation can be inferred*"[216].

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[212] *Ibid.*, para. 206.

[213] See, in particular: *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, paras. 5.10 and 5.20; *Charanne*, Final Award, paras. 213-214; *RREEF*, Decision on Jurisdiction, paras. 37-38; *Isolux*, Award, para. 166; *Blusun*, Award, para. 227; *Eiser*, Award, paras. 160-162; *Novenergia*, Final Arbitral Award, paras. 404-405 and 426; *Masdar*, Award, paras. 296-300; *Antin*, Award, paras. 163-164.

[214] See: *Charanne*, Final Award, para. 428; *Isolux*, Award, para. 632; *Eiser*, Award, para. 195; *Novenergia*, Final Arbitral Award, para. 452.

[215] *Charanne*, Final Award (Unofficial English translation by Mena Chambers), para. 429.

[216] *Ibid.*, para. 430.

To this end, the tribunal further specified that "*To know if the term "territory" refers to one or the other depends on the content of the claim and the entity against which the claim is directed. An investor may well sue the EU based on allegedly unlawful acts committed by it. In this case, it could be considered that for the purposes of Article 26 of the ECT, the dispute is related to an investment made in the territory of the EU* […]"[217]. Since in that case the claim was based on allegedly unlawful acts committed by Spain as a sovereign State rather than EU actions, and since it was directed against Spain and not the EU, the tribunal concluded that "[…] *Spain has a passive legitimacy to act in this arbitration and therefore the territory to which Article 26(1) of the ECT refers, for jurisdictional purposes, is the territory of the Kingdom of Spain and not the territory of the EU*"[218].

The conclusions reached in *Charanne* were confirmed also by other arbitral tribunals[219]. To this regard, it is worth quoting a passage of the *Eiser* tribunal, since it discloses some of the issues which will be discussed below (see *infra*, § 6.4). In response to the respondent's allegation that an investor of an EU Member State would lose its home State' nationality and would become predominantly an investor of the EU, the tribunal noticed that "*A difficulty with this analysis is that it is not evident how there can be an "Investor of the EU" satisfying Article 1(7)(a)(ii) definition. There is no trans-national body of European law regulating the organization of business units, a matter that remains subject to member countries' domestic law. Thus, within the framework of the definition, there can be no "EU Investors." Investors exist only as "Investors" of a "Contracting Party* […]"[220].

C) *Art. 26(6) ECT*

As regards Art. 26(6) ECT, it has been argued that said provision, by providing that arbitral tribunals "[…] *shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*" (underlying added), would require EU law to be applied in order to settle intra-EU disputes. In particular, it would require the application of Art. 344 TFEU. To this respect – so it has been alleged – Art. 344 TFEU, which establishes that "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties as to any method of settlement other than those provided for therein*", would be inconsistent with the ISDS mechanism laid down in Art. 26 ECT and, what is more, would render the latter inapplicable in intra-EU disputes[221].

The applicability of EU law in intra-EU disputes – and in EU internal disputes in general – and the alleged incompatibility between the ECT, namely Art. 26, and EU law, namely Article 344 TFEU, will be largely discussed in, respectively, § 7 and § 8.4. Here, it is suffice to notice that such allegation, which is based on an alleged

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[217] *Ibid.*, para. 431.

[218] *Ivi.*

[219] See, in particular: *Isolux*, Award, paras. 630-636; *Blusun*, Award, para. 284; *Eiser*, Award, paras. 193-196; *Novenergia*, Final Arbitral Award, para. 453; *Masdar*, Award, paras. 315-324; *Antin*, Award, para. 222. As one can see from *Masdar*, Award, para. 319, the objection *ratione personae* based on Art. 26(1) ECT has been dismissed also by the tribunal in *PV Investors* in its Preliminary Award on Jurisdiction of 13 October 2014, paras. 178-180.

[220] *Eiser*, Award, para. 196.

[221] See, in particular: *Charanne*, Final Award, para. 217; *RREEF*, Decision on Jurisdiction, paras. 46-47; *Isolux*, Award, para. 170; *Eiser*, Award, paras. 166-167; *Novenergia*, Final Arbitral Award, paras. 408-418; *Masdar*, Award, paras. 297 and 305; *Antin*, Award, para. 171.

inconsistency between Art. 26 ECT and EU law and, what is more, on a presumed primacy of the latter over the earlier, has been dismissed by ECT arbitral tribunals.

As tellingly noticed by the tribunal in *Eiser*, the jurisdictional objection based on Art. 26(6) ECT "[…] *seeks to introduce a major, if unwritten, exception into the coverage of the ECT on the back of a somewhat intricate argument regarding choice of law. The Tribunal does not agree that the drafters of the ECT either intended or accomplished this result*"[222].

D) *Disconnection clause*

Finally, a core issue examined by ECT tribunals when verifying their jurisdiction on intra-EU disputes is the existence of a disconnection clause within the text of the ECT, by which excluding intra-EU relations from the application of the Treaty, in particular Art. 26. The issue has been particularly discussed in *Charanne*, *RREEF*, *Isolux*, *Blusun*, *Eiser*, *Novenergia* and *Masdar*, although on different grounds and extents. It is therefore worth examining each case separately, notwithstanding that arbitral tribunals reached similar conclusions on the issue at stake.

Charanne

In *Charanne*, both the respondent and the European Commission alleged that the Treaty would include an *implicit* disconnection clause applying to intra-EU relations[223]. Evidence of the application of said clause would be provided, in the first place, by Art. 27 ECT that, if read in accordance with Art. 267 TFEU[224], which regulates the preliminary ruling procedure before the CJEU, and in light of the *Mox Plant* decision of the CJEU[225], would not allow EU Member States to submit disputes between them to arbitral tribunals[226]. Additionally, the existence of a custom union in the EU would prove the existence of the implicit disconnection clause also in relation to Art. 7 ECT, since the notion of transit provided therein would apply only with respect to the EU as a whole and not between its Member States[227].

Such conclusions, unsurprisingly, were disputed by the claimants[228] and, more importantly, were dismissed by the tribunal established to settle the dispute. For the latter, " […] *Article 27 of the ECT in fact expressly subjects the resort to arbitration between Contracting Parties to the fact that they did not "*agree otherwise*". The applicable provision to the present dispute is, however, Article 26 of the ECT and not Article 27. However, no agreement to derogate from Article 26 exists in this case between the States parties to the ECT, nor is there any agreement of this nature between the Parties to this dispute. As for disputes between Member States,*

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222 *Eiser*, Award, para. 198.

223 See *Charanne*, Final Award, paras. 223 and 433.

224 Art. 267 TFEU: "*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay*".

225 Judgment of 30 May 2006, *Commission v Ireland*, C-459/03, EU:C:2006:345.

226 See *Charanne*, Final Award, para. 434.

227 *Ibid.*, para. 436.

228 *Ibid.*, para. 252.

the prohibition of submitting them to arbitration results from Article 267 TFEU, and there does not exist a similar provision that applies to a dispute between a private party and a Member State of the EU"[229]. Moreover, the fact that the notion of transit can only apply in the EU as a whole "[…] *solely demonstrates that Member States fulfil their obligations arising under Article 7 in the framework of the European customs union. The existence of the EU does not imply any contradiction or impediment to the full implementation by EU Member States of their obligations under Article 7 of the ECT, thus, there is no need for an implied disconnection clause*"[230].

To this end, the tribunal clarified some of the aspects discussed in academic literature with respect to disconnection clauses and briefly summarized above. After having concluded that, according to Art. 31 VCLT on the interpretation of treaties, the terms used in the Treaty are enough clear and do not justify additional interpretations that could lead to reading into the ECT an implicit disconnection clause[231], the tribunal specified that, also if a clause of this kind were provided, it would be of little use.

In the tribunal's opinion, in fact, "[…] *The role of a disconnection clause would be, in effect, to resolve a conflict between the ECT and the TFEU. However, there is no conflict between the two treaties.* […] *the competence of the Arbitral Tribunal to decide on a claim filed by an investor of an EU Member State against another EU Member State on the basis of the alleged illegal nature of the actions carried out in the exercise of its national sovereignty, is perfectly compatible with the participation of the EU as a REIO in the ECT.* […] *there is no rule of EU law which prevents EU other Member States through arbitration. Nor is there any EU law rule that prevents an arbitral tribunal to apply EU law to resolve such a dispute*"[232].

RREEF

In *RREEF*, the core argument discussed with respect to disconnection clauses was whether Art. 26 ECT would include an implied clause of this type. To this respect, the tribunal noticed – and in doing so expressly referred to the above quoted conclusions reached by the *Charanne* tribunal on the usefulness of the insertion of an explicit or implicit disconnection clause within the ECT[233] – that "*The purpose of a disconnection clause is to make clear that EU Member States will apply EU law in their relations* inter se *rather than the convention in which it is inserted. Absent such a clause in a multilateral treaty, it is intended to be integrally applied by the EU and its Member States. According to the* Respondent, *the inclusion of such a clause would be meaningless when "*the envisaged agreement covers areas in which there has been total harmonisation*". In the Tribunal's view, given that there is no disharmony or conflict between the ECT and EU* […] *there was simply no need for a disconnection clause, implicit or explicit*"[234].

For the tribunal, furthermore, "[…] *when the very essence of a treaty to which the EU is a party is at issue, such as it would be for the ECT if the interpretation proposed by the Respondent were correct, then precisely because the EU is a party to the treaty a formal warning that EU law would prevail over the treaty, such as that contained in a disconnection clause, would have been*

[229] *Charanne*, Final Award (Unofficial English translation by Mena Chambers), para. 435.
[230] *Ibid.*, para. 436.
[231] *Ibid.*, para. 437.
[232] *Ibid.*, para. 438.
[233] *RREEF*, Decision on Jurisdiction, para. 83.
[234] *Ibid.*, para. 82.

required under international law"[235]. In its view, in fact, "*This follows from the basic public international law principle of* pacta sunt servanda. *If one or more parties to a treaty wish to exclude the application of that treaty in certain respect or circumstances, they must either make a reservation (excluded in the present case by Article 46 of the ECT) or include an unequivocal disconnection clause in the treaty itself. The attempt to construe an implicit clause into Article 26 of the ECT is untenable, given that that article already contains express exceptions to the "*unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article*" that had been agreed amongst the States Party*"[236].

Finally, it added that "[…] *to recognize the existence of an implicit disconnection clause in Article 26 of the ECT would put into question the function of explicit disconnection clauses when they exist. Moreover, the absence of an explicit disconnection clause in the ECT would naturally lead to the inevitable conclusion that, when negotiating the ECT, the EU considered that there were and would be no inconsistencies between both* juris corpores *and therefore such a clause would have been otiose*"[237].

Isolux

In *Isolux*, the question of the existence of a disconnection clause centred around Art. 25 ECT[238] that, in the respondent's view, would recognize the primacy of EU law over the ECT to govern intra-EU relations. In the tribunal's opinion, said Article cannot be read as a disconnection clause of general scope, since it is only aimed at limiting the scope of application of the MFN treatment between Contracting Parties which are parties to an Economic Integration Agreement and those which are not.

In the tribunal's words, "*La Demandada parece apoyarse en el Artículo 25 TCE que indica en su apartado 1 que "*lo dispuesto en el presente Acuerdo no podrá interpretarse de manera que obligue a ninguna Parte Contratante que sea Parte en un Acuerdo de Integración Económica (en adelante denominado "AIE"), a que haga extensivas, mediante el trato de nación más favorecida, a otra Parte Contratante que no sea Parte en dicho AIE las ventajas decualquier tipo de trato preferente aplicable entre las Partes por ser Partes en dicho Acuerdo.*" Pero como lo observa justamente la Demandante, este Artículo "*se limita a circunscribir la extensión del efecto del trato de nación más favorecida entre Partes Contratantes que son partes de "Acuerdos de Integración Económica" ("Economic Integration Agreements") y aquellas que no lo son.*" No se puede interpretarlo comouna cláusula de desconexión de alcance general*"[239].

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[235] *Ibid.*, para. 84.

[236] *Ibid.*, para. 85

[237] *Ibid.*, para. 86.

[238] Art. 25 ECT: "*(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto. (2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalising, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame. (3) This Article shall not affect the application of the WTO Agreement according to Article 29*".

[239] *Isolux*, Award, para. 639.

Blusun

As seen before, the intra-EU objection raised in *Blusun* required the tribunal to establish, *inter alia*, whether intra-EU disputes were admissible under the ECT ISDS mechanism by the time the Treaty was concluded, i.e. whether the Treaty originally applied to intra-EU relations. To this respect, the tribunal found no indication in the text of the Treaty as to the intention to exclude issues arising between EU Member States. For present purposes, it is worth remembering that for the tribunal "[…] *it would take an express provision or very clear understanding between the parties* […]" (underlining added) [240] to reach such a conclusion and that "*There is no express provision (or 'disconnection clause', to adopt recent parlance) in the ECT*" (underlining added)[241].

It is interesting to notice that a question debated by the parties and the European Commission was whether the preparatory works and the circumstances of the conclusion of the Treaty should be taken into account for the purposes of treaty interpretation and, if so, whether they suggest that EU Member States intended to exclude the creation of *inter se* obligations when acceding the Treaty[242]. To this regard, the tribunal specified that the *travaux préparatoires* are irrelevant in order to read a clause of this sort in the text of the Treaty, since the terms of the latter are clear and, consequently, do not require supplementary means of interpretation. In any event, the *travaux préparatoires* seem to exclude the existence of a disconnection clause, considering that, as seen before, a proposal to insert one within the text of the Treaty was rejected during the negotiations[243].

Eiser

The question of the exclusion of the application of the ECT, notably the ISDS regime, to intra-EU relations emerged and was dealt with also by the tribunal in *Eiser*. As pointed out by the tribunal, "*Respondent argues* […] *that the ECT contains a significant, if implicit, exception. In Respondent's view, the plain language of Article 26 is subject to a significant unstated exception that bars any claims by Investors of EU Member States against an EU Member State that is party to the ECT. Respondent argues that the purpose of the ECT and other provisions of the Treaty – the context – compel this limiting interpretation excluding intra-EU claims*"[244].

For the tribunal, however. "[…] *Respondent's arguments do not justify disregarding the ECT's ordinary meaning in order to exclude a potentially significant body of claims. It is a fundamental rule of international law that treaties are to be interpreted in good faith. As a corollary, treaty makers should be understood to carry out their function in good faith, and not to lay traps for the unwary with hidden meanings and sweeping implied exclusions* […]"(underlining added)[245].

By referring to the conclusions reached by the *RREEF* tribunal, the *Eiser* tribunal concluded that "[…] *international law would require some form of express warning to make such a broad exclusion evident* […]"(underlining added)[246]. In its view, in fact, "*Treaty law and practice provide familiar mechanisms for treaty makers wishing to limit or exclude application of*

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[240] *Blusun*, Award, para. 280(2).
[241] *Ibid.*, para. 280(3).
[242] *Ibid.*, paras. 221, 239 and 256.
[243] *Ibid.* para. 256.
[244] *Eiser*, Award, para. 185.
[245] *Ibid.*, para. 186.
[246] *Ivi.*

particular provisions in particular situations. These were known and used in the ECT's texts, including by the predecessor to the European Union and its member countries. The treaty includes multiple limiting decisions and understandings, such as those providing that the treaty concerning Spitsbergen prevails over inconsistent provisions of the ECT in case of a conflict and limiting the scope of the treaty to "Economic Activities in the Energy Sector." In like vein, the European Communities and the Russian Federation agreed that trade in nuclear materials should be regulated by separate bilateral arrangements. Yet the EEC sought no similar clarifying provisions regarding what Respondent now contends is a major exclusion in the ECT's coverage. Respondent contends that no such express exclusion was included in the ECT because, for reasons analyzed below, it was obviously not required. The Tribunal is not persuaded"[247].

In its opinion, neither the ECT' purpose, nor other ECT provisions, namely Art. 1(3), 36(7) and 25 ECT "[…] *suggest the exclusion of a large category of potential claims by Investors in the circumstances presented here*" (underlining added)[248].

Novenergia

From the award rendered by the tribunal in *Novenergia*, it emerges that the respondent (Spain) originally argued that the ECT would provide for a disconnection clause allowing EU Member States to not apply the Treaty to *inter se* relations, a thesis that was questioned by the claimant[249].

In this case, too, the tribunal dismissed the disconnection clause's objection: "*The Tribunal further notes that the Respondent at least initially in this arbitration argued that the ECT should be interpreted so as to include a disconnection clause, which would bar EU Member States from applying the ECT* inter se. *To the Tribunal, this issue is a matter of interpretation of the ECT. Since it is plain from the text of the ECT that it does not contain an explicit disconnection clause, the Tribunal has understood the Respondent to argue that the intention of the Contracting Parties was to include an implicit disconnection clause in the ECT. The Tribunal here notes that, in accordance with the VCLT, the ECT should be interpreted in good faith according to the ordinary meaning of the terms of the treaty in their context and taking into account the object and purpose of the treaty. On this issue the Tribunal can be brief. The terms of the ECT are clear and the Tribunal finds no basis or evidence to suggest that the Contracting Parties had any intention to include an implicit disconnection clause in the ECT that should apply to intra-EU disputes. Consequently, the objection is dismissed*"[250].

Masdar and *Antin*

To sum up, the disconnection clause objection to the jurisdiction of ECT arbitral tribunals has been so far unanimously dismissed by arbitral tribunals established under Art. 26 ECT. As highlighted by the tribunal in *Masdar*, "*It is now common ground between the Parties that there is no "*disconnect*" clause, express or implicit, in Article 26 of the ECT. Respondent says that it "*does not hold to the existence of an express or implied disconnection clause*". It would seem to follow that such objection is now moot*"[251]. To this respect, it is worth noting that in the most recent intra-EU case awarded under the

[247] *Ibid*., para. 187.
[248] *Ibid*, para. 188.
[249] See *Novenergia*, Final Arbitral Award, para. 429.
[250] *Ibid*., para. 454.
[251] *Masdar*, Award, para. 312.

ECT, i.e. *Antin*, the respondent (Spain), did not raise a disconnection clause objection to the jurisdiction of the tribunal established to settle the dispute[252].

According to ECT case law, intra-EU disputes are admissible to the ECT ISDS mechanism. In the light of the analysis developed so far, one may even assume that the intra-EU jurisdictional objection will be raised less and less in the future. To this respect, it is worth noting that in *Novenergia* and *Masdar*, the respondent (Spain) argued that it would raise the intra-EU objection in order to comply with the principle of loyalty laid down in Art. 4 TFEU.

As reported by the tribunal in *Novenergia*, "[…] *it must be borne in mind that there are two pending cases before the Court of Justice of the EU regarding the compatibility between bilateral investment treaties ("**BIT**") and EU law. While the Court of Justice of the European Union ("**CJEU**") does not rule on these issues (and also on the compatibility between the arbitration of the ECT for intra-EU relations and EU law) the Respondent shall maintain this jurisdictional objection by virtue of the principle of institutional loyalty that derives from Article 4 of the EU Treaty, particularly taking into account the recent decision of the European Commission in the state aid dossier of the Czech Republic*"[253].

Similarly, the tribunal in *Masdar* stated that "[…] *it is bound to take note of the fact that at the Hearing of this arbitration, Respondent elected not to address the Tribunal on the intra-EU objection. It stated: "*Respondent is aware that all arbitral awards on this subject are now being disregarded, clearly. But by virtue of the principle of the institutional respect to the European Union to which we belong, as long as the European Court of Justice does not pronounce on the two issues that have been put before them, we will continue raising this subject, which we consider neither to be reckless nor frivolous*""[254].

6.4. The admissibility of other EU internal disputes to the ECT ISDS regime

As said by way of premise, the issue of the admissibility of EU internal disputes to the ECT ISDS mechanism may arise also with respect to disputes involving investors of EU Member States against the EU (scenario "f") and, *vice versa*, disputes filed by investors claiming the EU citizenship against EU Member States (scenario "h"). These scenarios raise more complex issues than those arising with respect to scenario "e". In particular, they pose sensitive questions of nationality recognition.

Said scenarios are analysed in turn below. Before doing so, however, it is worth making some preliminary considerations on the nationality/citizenship recognition under the ECT.

According to Art. 1(7) ECT, "investor" means "*(a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party*" (underlining added).

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[252] See *Antin*, Award, paras. 180 and 203.

[253] *Novenergia*, Final Arbitral Award, para. 407. The two pending cases referred to by the tribunal in *Novenergia* are: the already seen *Slowakische Republic v Achmea*, C-284/16; and *Micula and Others v Commission*, Case T-704/15.

[254] *Masdar*, Award, para. 307.

Under the ECT, therefore, the citizenship or nationality of an investor is established by reference to the relevant applicable law of his home State or REIO.

As far as the EU is concerned, the "applicable law" is Art. 20(1) TFEU, pursuant to which "*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*" (underlining added). According to EU law, therefore, the EU citizenship *derives* from EU Member States' nationality, being the earlier a *status* recognized *in addition* to the latter.

To this respect, recognizing an investor from an EU Member State as an investor of the EU alone under Art. 1(7) ECT may be thorny, since the starting nationality is always that of a Member State. This is so also if the EU citizenship is claimed by a natural person "*who is permanently residing*" in the EU (Art. 1(7)(a)(i) ECT) or by a company or other organization "*organised in accordance with the law applicable*" in the EU (Art. 1(7)(a)(ii) ECT): residing in the EU, in fact, implies residing in one of its Member States and, similarly, a company and organization is primarily organized under the national law of a Member State. Indeed, as it has been properly highlighted, "*the EU citizenship can hardly be considered equivalent to the concept of nationality under international law as the concept of nationality is inextricably linked with the concept of statehood*"[255].

Starting with scenario "f', we can imagine a dispute brought by a Dutch investor against the EU relating to an investment made by the former in the territory of the latter (say Spain) and concerning an alleged breach of an obligation in force for the EU under Part III ECT. Under the condition *ratione personae*, the dispute would be, in principle, admissible, since The Netherlands and the EU are different Contracting Parties to the Treaty. To this regard, it is worth quoting a passage of the tribunal in *Electrabel*, according to which "[…] *the European Union also accepted in signing the ECT to submit itself to international arbitration, thereby accepting the possibility of an arbitration between the European Union and private parties, whether nationals of EU or Non-EU Member States and whether held within or without the EU*" (underlining added)[256].

Nonetheless, since a Dutch investor is also an EU citizen, one may contend that the difference of nationalities required by Art. 26(1) ECT would be unmet. An arbitral tribunal, therefore, would have to determine whether the claimant is to be considered as an investor of The Netherlands exclusively or also of the EU. Put it differently, the tribunal would have to establish whether the Dutch nationality can be "disconnected" from the EU citizenship. To this respect, it must be borne in mind that, while the EU citizenship *derives* from and does not replace Member States' nationalities, the latter does not derive from that of the Union.

Further concerns arise with respect to the condition *ratione loci*. While the Dutch investor may claim that the investment made in Spain is an investment made in the area of the EU, it could be objected that the relevant area is that of Spain rather than that of the EU. To this respect, it is worth quoting again the tribunal in *Charanne*, when it considers that "*Article 1(10) of the ECT, in order to define the concept of "area" refers to both the territory of the Contracting States (Article 1(10)(a)) and the EU territory (Article 1(10)*

[255] R. HAPP – J. A. BISCHOFF, *op. cit.*, p. 180.
[256] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.163.

second paragraph). Therefore, it appears reasonable to deduce that, in referring to investments made "in the territory" of a contracting party, Article 26(1) refers to both, in the case of a EU member State, to the territory of a national State as well as the territory of the EU. There is no rule in the ECT according to which a different interpretation can be inferred"[257], and that "*To know if the term "territory" refers to one or the other depends on the content of the claim and the entity against which the claim is directed. An investor may well sue the EU based on allegedly unlawful acts committed by it. In this case, it could be considered that for the purposes of Article 26 of the ECT, the dispute is related to an investment made in the territory of the EU*" (underlining added)[258].

In any event, one may conclude that the difference of territories required by Art. 26(1) is not met: since The Netherlands forms part of the EU area, the investment would have been made in the same territory of the claimant[259].

As regards the condition *ratione materiae*, in light of the conclusions of the *Charanne* tribunal, it may be said that the Dutch investor can sue the EU if it demonstrates that the breach at hand is attributable to it, a task which may be difficult, considering the overlap existing between EU and EU Member States' action.

Focusing on scenario "h", the admissibility of a dispute between an investor claiming the EU citizenship against an EU Member State is even thornier. Starting with the condition *ratione personae*, it can be noticed that, since the EU citizenship is additional and does not replace EU Member States' nationality, it may be difficult for an investor of an EU Member State to claim the EU citizenship regardless of its own State nationality. To this end, if the investor sues an EU Member State which is not his home State, the dispute may be considered as an intra-EU dispute and, as such, admissible to dispute resolution under Art. 26 ECT. If the investor sues its own State, conversely, the dispute is likely to be held inadmissible, since the difference of parties required by the condition *ratione personae* would be unfulfilled.

In the second place, it must be noticed that, in any event, it may be difficult for the investor to demonstrate that he qualifies as an investor of the EU. As noticed before, the tribunal in *Eiser* remarked that "[…] *it is not evident how there can be an "Investor of the EU" satisfying Article 1(7)(a)(ii) definition. There is no trans-national body of European law regulating the organization of business units, a matter that remains subject to member countries' domestic law. Thus, within the framework of the definition, there can be no "EU Investors." Investors exist only as "Investors" of a "Contracting Party."* […]"[260].

A dispute of this kind would seem inadmissible also under the condition *ratione loci*, given the territorial identity between the EU area and the areas of its Member States. To this respect, we already saw how ECT arbitral tribunals, in determining whether claimants of EU Member States should be considered as investors of those States or of the EU, considered that in the latter case the dispute would not be admissible, since it would concern an investment made by an investor of the EU in the territory of the EU.

In *Charanne*, which opposed investors from The Netherlands and Luxembourg against Spain, the tribunal considered that "[…] *The issue that the Arbitral Tribunal has to*

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257 *Charanne*, Final Award (Unofficial English translation by Mena Chambers), para. 430.
258 *Ibid.*, para. 431.
259 See C. CROSS – V. KUBE, *op. cit.*, p. 9.
260 *Eiser*, Award, para. 196.

resolve is whether, in the context of this dispute, the Claimants can be considered as investors of the Netherlands and Luxembourg respectively or whether they should be considered as investors of the EU. In the latter case, since Spain is part of the EU, the dispute would cease to oppose a contracting party and an investor of another contracting party within the meaning of Article 26(1) of the ECT as it would be the case of an investment by an investor of the EU in the territory of the EU" (underlining added)[261]. Similarly, in *Isolux*, which opposed an alleged investor from The Netherlands always against Spain, the tribunal observed that it had to determine "[...] *si la pertenencia de los Países Bajos y de España a la UE tiene como consecuencia que ISOLUX puede considerarse como un inversor de la UE que realizó una supuesta inversión en la UE. Si así fuera, la condición de diversidad de territorio que resuelta del Artículo 26.1 no sería cumplida*" (underlining added)[262].

Finally, as regards the condition *ratione materiae*, the investor would have to determine that the EU is clearly the responsible of the breach at hand.

For the sake of completeness, it is worth taking into account also scenario "g", i.e. a dispute involving an investor claiming the EU citizenship and a non-EU Contracting Party. Despite it does not qualify as an EU internal dispute, scenario "g" raises interesting questions as to the fulfilment of the three conditions laid down in Art. 26(6) ECT.

Similarly to scenario "h", also in scenario "g" the plaintiff is – or better claims to be – an EU citizen. To this respect, it must be noticed, in the first place, that the investor would have lesser choice as to the arbitral *fora* he may rely on, since such investor would be prevented from resorting to ICSID arbitration. As already seen, in fact, ICSID arbitration is not available for disputes involving the EU. A part from this procedural limitation and notwithstanding the considerations made above on the recognition of the EU citizenship, scenario "g" does not raise particular problems, even if it remains a quiet theoretical case. To this respect, the main threshold to incept a case of this kind, however, remains the qualification of the investor as an investor of the EU. As pointed out by the tribunal in *Eiser* and as seen above, if the investor is a company rather than a national, it is difficult to see how there can be an investor of the EU under Art. 1(7)(a)(ii) ECT.

6.5. Conclusions

In the light of the above analysis, one can conclude that EU internal disputes are, in principle, admissible to the ECT ISDS mechanism. According to ECT case law, this is certainly true for intra-EU disputes (scenario "e"). More difficult is reaching a similar conclusion with respect to disputes involving investors of EU Member States against the EU and, what is more, disputes between investors claiming the EU citizenship and EU Member States (scenarios "f" and "h" respectively).

The latter, in fact, raise doubts as to the fulfilment of the conditions laid down in Art. 26(1) ECT. In addition, there is no relevant case law since no dispute under scenarios "f" and "h" has been incepted so far under the ECT. In any event, it is

[261] *Charanne*, Final Award (Unofficial English translation by Mena Chambers), para. 428.
[262] *Isolux*, Award, para. 234.

important to bear in mind that said scenarios may materialize following the Italian withdrawal from the Treaty, as we will see extensively in Chapter III.

7. The applicability of EU law in ECT arbitral proceedings

7.1. Premise

As said before, in order to decide the issues in dispute – whether they concern jurisdiction, admissibility or the merits – an arbitral tribunal established under Art. 26 ECT must determine, in the first place, the applicable law. To this end, Art. 26(6) ECT states that "*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*" (underlining added) [263]. The ECT and international law, therefore, constitute the rules of law agreed on by the parties to settle their dispute under Art. 26 ECT.

As far as EU internal litigations are concerned, ECT arbitral tribunals are likely to deal with the question of whether EU law forms part of the "applicable rules and principles of international law". To this respect, it is worth quoting the tribunal in *Electrabel*, when it considers that "[…] *The more difficult step is to identify the applicable rules and principles of international law and, more precisely, whether and, if so, to what extent, EU law forms part of such rules and principles* […]" (underlining added)[264].

It goes without saying that the decision on the applicability of EU law has far-reaching consequences on how the issues in dispute are settled. It is no surprise, therefore, if the question has been debated with particular emphasis in academic literature and, what is more, in intra-EU disputes filed under Art. 26 ECT. To this regard, it is worth recalling that a core issue in *AES* and *Electrabel* was whether compliance with EU law commitments can excuse EU Member States from being held internationally responsible for breaches of ECT investment provisions. In addition, it must be recalled that, for respondent States to ECT disputes and the European Commission, the applicability of EU law has so far represented a fundamental prerequisite for challenging the jurisdiction of ECT arbitral tribunals to settle intra-EU disputes (see *supra*, § 6.3).

As regards Art. 26(6) ECT, the following questions discussed in academic literature and in ECT investment disputes will be addressed:

1) whether and, if so, to what extent, EU law qualifies as international law;
2) assuming that EU law qualifies as international law, whether it is applicable to settle disputes incepted under Art. 26 ECT;
3) whether EU law, independently from its qualification as international law – and, possibly, as applicable law – may be some other way relevant for the purposes of dispute resolution.

These questions are examined in detail in the following pages.

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[263] A similar requirement is provided in Art. 27(g) ECT for State-State investment disputes, according to which the *ad hoc* tribunals constituted in accordance to Art. 27(3) "[…] *shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law*".

[264] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.114.

7.2. The nature of EU law

As it is easy to imagine, the answer to the above questions ultimately depends on the nature one attributes to EU law. Depending on the perspective adopted, in fact, the latter qualifies in different ways. From an international point of view, EU law is international law, since it derives from international treaties. From the vantage point of EU Member States, it qualifies as national law, because, once introduced in national legal orders, it becomes an integral part of the latter. Finally, from the vantage point of the EU, it can be seen as an autonomous legal order separated from both international and national law[265].

Accordingly, should EU law be considered as international law, it would be, in principle, applicable to the disputes. Conversely, should it be considered as national law or, similarly, as a legal order within the EU, it would be inapplicable under Art. 26(6) ECT. In this case, it would be relevant, at the most, as "fact" or "evidence": as is well-known, in fact, a fundamental principle in international arbitration is that domestic laws are to be considered only as facts[266].

To this respect, it has been argued that EU law constitutes a special legal order within the EU separated from international law and, as such, must be taken into account, for the purposes of dispute resolution, only as a fact[267]: in short, there would be "*no margin regarding the application of […] EC legislation*"[268].

In support of this conclusion, reference is generally made to the jurisprudence of the CJEU, according to which, starting with *van Gend & Loos*[269], EU law is an autonomous legal order separated from public international law[270]. For other commentators[271], on the contrary, EU law qualifies as international law and, as such, is applicable in EU internal disputes, including those filed under the ECT. According to this view, in fact, the self-qualification of EU law as an autonomous legal order is irrelevant from the international law perspective from which arbitral tribunals must address and decide the issues in dispute[272]. To this respect, it has been suggested that, even if EU law is qualified as international law, it would be still inapplicable, since the reference in Art. 26(6) ECT to rules and principles of international law would be to *customary* international law[273].

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[265] To this respect, see: S. HINDELANG, *op. cit.*, pp. 184-193; G. COOP, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, cit., p. 407.
[266] See J. HEPBURN, *Domestic Law in Investment Arbitration*, OUP, Oxford, 2017, p. 104.
[267] See: C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., pp. 5-7; R. HAPP – J. A. BISCHOFF, *op. cit.*, pp. 163.
[268] C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., p. 7.
[269] Judgment of 5 February 1963, *Van Gend & Loos*, C-26/62, EU:C:1963:1.
[270] See: R. HAPP – J. A. BISCHOFF, *op. cit.*, pp. 160-162; T. ROE – M. HAPPOLD, *op. cit.*, pp. 96-97.
[271] See: H. WEHLAND, *op. cit.*, pp. 302-303; S. HINDELANG, *op. cit.*, p. 186.
[272] See H. WEHLAND, *op. cit.*, p. 302.
[273] See T. ROE – M. HAPPOLD, *op. cit.*, p. 94.

Such difference of views is well reflected in *AES* and, to a greater extent, in *Electrabel*, where arbitral tribunals had to determine the nature of EU law and its relevance for the purposes of dispute resolution.

7.3. ECT case law

AES

In *AES*, the claimants, i.e. a British company (AES Summit) and a Hungarian company owned for the 99% by the latter (AES Tisza), and the respondent (Hungary), coincided on that the applicable law to settle the dispute was the ECT, as expressly required by Art. 26(6) ECT. As to European Community law (now EU law), they agreed on that it was to be taken into account only as a relevant fact, due to its nature of internal law[274].

The tribunal accepted only in part the conclusions reached by the parties. In its view, in fact, Community law, notably the Community competition law regime, which was at stake in that dispute, "[…] *has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration, national laws are to be considered as fact* […]"[275].

In this case, however, the tribunal decided to apply EU law only as a fact, since both parties so required[276].

Electrabel

When establishing the applicable law to decide the issues in dispute, the *Electrabel* tribunal started its analysis by including EU law among the possible laws applying to the controversy. To this end, it noticed that EU law can operate as international law, as a distinct legal order within the EU separated from both the national laws of EU Member States and international law and, finally, as part of the national laws of EU Member States (in that specific case Hungary's national law)[277].

To this regard, while both the claimant and the respondent agreed on that EU law, as part of EU Member States' laws, should be considered relevant as fact and evidence for the purposes of dispute resolution, they disagreed on whether it should be considered also as international law, and, as such, applicable to the dispute. For the claimant, the "origin" and "intended effect" of EU law would exclude it can be considered international law[278]. For the respondent, on the contrary, EU law is international law, since it derives from international treaties[279].

It is worth noting that such divergence of opinions was not limited to EU primary law but extended also to EU *secondary* law. As will be recalled, a core question in *Electrabel* was whether Hungary, by complying with the Commission Decision 2009/609/EC of 4 June 2008, which required the termination of a PPA concluded

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274 See *AES*, Award, para. 7.5.3.
275 *Ibid.*, para. 7.6.6.
276 *Ivi.*
277 See *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.20.
278 *Ibid.*, para. 4.29.
279 *Ibid.*, para. 4.57.

between Hungary and a subsidiary of Electrabel, breached its ETC obligations on expropriation and fair and equitable treatment. Therefore, determining whether the Commission's decision qualified as international law was of paramount importance in this case. While the claimant argued that, in the event EU law were held international law, only EU primary law should be taken into account[280], the respondent considered that also EU secondary law, namely the decisions of EU institutions implementing EU primary rules, should be included within international law[281].

In addition, it is worth noting that the claimant asserted that EU law, even if considered as international law, would be in any event inapplicable to the dispute: in its opinion, in fact, the reference made by Art. 26(6) ECT to "applicable rules and principles of international law" would be to rules and principles accepted by *all* the Contracting Parties to the ECT rather than to *some* of them: "*Because EU law is not common to all Contracting Parties to the ECT, it does not rise to the level of applicable international law for purposes of the ECT. … This would mean that an Investor from a Contracting Party within the EU would receive less favourable treatment (if Hungary could rely on EU law as overriding the ECT) than an Investor from a Contracting Party outside the EU*"[282].

The respondent contended such conclusion claiming that no requirement of that sort would be provided in Art. 26(6) ECT and, additionally, such an interpretation would render Art. 26 almost meaningless, considering that, by that time the dispute arose, there were few if any treaties dealing with trade and investment committing all the signatories to the Treaty[283].

Although on different grounds, the position of the respondent was purported by the European Commission in its *amicus curiae* submission. To this regard, the Commission expressly referred to the case law of the European Court of Human Rights (ECtHR), which recognised, namely in *Bosphorus v. Ireland*[284], that EU law falls within the rules and principles of international law[285].

As to the arguments developed by the parties and the Commission, the tribunal addressed, first, the multiple nature of EU law. To this end, it acknowledged that "*EU law is a sui generis legal order, presenting different facets depending on the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member States and EU institutions*"[286]. On this premise, and in line with the conclusions reached in *AES*, it contended that "[…] *EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders* […]"[287]. Accordingly, it accepted, as both the claimant and the respondent did, that EU law forms part of the EU Member States' legal orders (in that case the Hungarian legal order), while it considered that the claimant was wrong in limiting its nature: "[…] *In the international*

[280] *Ibid.*, para. 4.40.
[281] *Ibid.*, paras. 4.66-4.67.
[282] *Ibid.*, para. 4.37.
[283] *Ibid.*, para. 4. 65.
[284] ECtHR, Application 45036/98, *Bosphorus v. Ireland*, Judgment of 30 June 2005.
[285] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.102.
[286] *Ibid.*, para. 4.117.
[287] *Ibid.*, para. 4.118.

setting in which this Tribunal is situated and from which it necessarily derives its perspective, EU law has to be classified first as international law […]"[288] because "[…] *it is rooted in international treaties* […]" and "[… *flows from the Treaty of Rome, as amended many times, creating the European Union* […]"[289]. Consequently, "[…] *there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law*"[290].

Moreover, the tribunal specified that not only EU primary law, but the *entire body* of EU law, including EU secondary law, is international law: "[…] *the Tribunal considers that EU law as a whole is part of the international legal order; and it does not draw a material distinction, as proposed by the Claimant, between the EU Treaties (which the Claimant acknowledges as international law) and the* "droit dérivé" *(which the Claimant does not acknowledge as international law). In the Tribunal's view, all EU legal rules are part of a regional system of international law and therefore have an international legal character* […]"[291]. With specific regard to Art. 87 EC (now Art. 107 TFEU), the tribunal affirmed that "[…] *it would be artificial to categorize, an international legal rule, Article 87 EC* […]*, and refuse that same status to the necessary implementation of that international rule by the non-national organ created by the same EU treaty. A contrary analysis would result in a situation where the international rule would remain free-floating, as a mere theoretical aspiration* […]"[292].

Finally, the tribunal held that EU law, being also national law, is relevant in ECT litigation as fact when it is not applied as international law[293].

The conclusions reached by the tribunals in *AES* and, more extensively, in *Electrabel*, were confirmed also by other ECT tribunals, in particular those in *RREEF* and *Blusun*. In *RREEF*, both the parties to the dispute agreed on that EU primary law should be considered as international law and, as such, applicable to the dispute. The claimants, however, contended that a similar conclusion can be reached also regarding EU secondary law[294].

To this respect, the tribunal confirmed the conclusions reached by the *Electrabel* tribunal by stating that "*Nor does the Tribunal question that the EU law as a whole (primary and secondary rules together) must be considered as being part of international law outside the EU legal order*" (underlining added)[295].

As seen before, the tribunal in *Blusun* had to decide, among other issues, whether Art. 26 ECT applies to intra-EU disputes. To this regard, the tribunal noticed that "*The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy*" (underlining added)[296]. It goes without saying

[288] *Ibid.*, para. 4.119.
[289] *Ibid.*, para. 4.120.
[290] *Ibid.*, para. 4.126.
[291] *Ibid.*, para. 4.122.
[292] *Ibid.*, para. 4.123.
[293] *Ibid.*, paras. 4.124-4.129.
[294] See *RREEF*, Decision on Jurisdiction, paras. 44 and 63.
[295] *Ibid.*, para. 73.
[296] *Blusun*, Award, para. 278.

that the reasoning of the tribunal can be extended to any issue in dispute, including those concerning jurisdiction and the merits.

7.4. Conclusions

As regards the questions referred to above, from relevant ECT case law, one can conclude that, as far as intra-EU disputes – and, more in general, EU internal litigations – are concerned, EU law, whether primary or secondary, is relevant both as applicable law and as fact for the purposes of dispute resolution, due to its dual nature of both international and national law.

Since EU internal disputes are, in principle, admissible to the ECT ISDS mechanism and since EU law, both primary and secondary, is applicable to decide the issues in dispute – whether of jurisdiction, admissibility or the merits – it remains to be seen how EU law interplays with the ECT investment promotion and protection regime and, more specifically, how it impacts on the settlement of the disputes.

Next paragraphs are therefore devoted to the thorny question of the interplay between EU law and the ECT.

8. The relationship between EU law and the ECT

8.1. Premise

The EU legal order provides for a body of rules that applies, among others, in the fields of energy and investment promotion and protection. In order to ensure the coherence and uniformity of the application of EU law throughout the 28 EU Member States, including EU energy and investment law, it provides for a judicial system which entrusts the CJEU with the final word on the interpretation of EU law. As far as the promotion and protection of foreign energy investments is concerned, therefore, one may argue that both EU law and the ECT deal with energy investment promotion and protection. Indeed, this state of things has been expressly acknowledged by ECT arbitral tribunals, notably by the tribunal in *Electrabel*, in the words of which "[…] *the two legal orders share much in common: the protection of foreign investors is clearly addressed by both the ECT and EU law, although from different perspectives. There are a large number of rules in EU law which protect foreign investors, even if differently formulated from the rules in the ECT* […]"[297].

On this premise, therefore, one may wonder how, as far as EU internal relations are concerned, EU law interplays with the ECT investment regime, as regards both the *substantive* rights (MFN, FET, expropriation, etc.) and the *procedural* guarantees (investment dispute settlement, in particular ISDS) afforded to foreign energy investors. As it is easy to imagine, the question at hand is not at all purely theoretical but, conversely, has great practical consequences: since EU law is, in principle, applicable in EU internal disputes incepted under Art. 26 ECT, markedly intra-EU litigations, it may have a great impact on how the issues arising in these disputes are settled.

[297] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.177.

Indeed, ECT arbitral tribunals established to settle intra-EU disputes had to decide and clarify many issues concerning the relationship between EU law and the ECT. As we will see in detail in next pages, such issues include, in particular:

- whether EU law deals with the *same* subject matter of the ECT;
- if so, whether and to what extent EU law and the ECT are inconsistent with each other, especially as regards investment dispute settlement;
- finally, whether and how possible inconsistencies between the two law regimes should be solved.

It is easy to see that these issues move from the same far-reaching question: the relationship between the European integration process, which provided EU Member States with common rules on energy investment promotion and protection, and the Energy Charter process, aimed at creating a global law system for the promotion and protection of energy investments[298].

The general terms of the question at stake were well addressed by the tribunal in *Electrabel*, where the issues referred to above were largely discussed. In the words of the tribunal, "[…] *Two important and potentially competing values are here at stake: the substantive and procedural protections of the rights of a foreign investor and the economic integration of EU Member States into the European Union operating under the rule of law* […]"[299]. To this respect, the tribunal, on the one hand, acknowledged "[…] *the special status of EU law operating as a body of supranational law within the EU* […]"[300] and "[…] *the authority of the European Union (as an REIO) to take decisions binding under EU law on EU Member States which have signed the ECT* […]"[301]. On the other hand, however, it clarified that "*Under Article 26 ECT and Article 42 of the ICSID Convention, the Tribunal is required to apply the ECT and "applicable rules and principles of international law." In other words, this Tribunal is placed in a public international law context and not a national or regional context.* […] *This ICSID arbitration is a dispute resolution mechanism governed exclusively by international law* […]"[302].

In light of the reasoning of the *Electrabel* tribunal and in accordance with the procedural approach adopted in this investigation, the issues referred to above will be examined according to the international law perspective from which arbitral tribunals established under Art. 26 ECT are required to settle the disputes.

8.2. EU law and the ECT: overlapping or complementary subject matters?

One of the most debated questions in ECT intra-EU investment disputes is whether EU law deals with the same subject-matter of the ECT and, if so, whether the two law regimes are inconsistent with each other, especially as regards investment dispute settlement.

To this respect, it has been argued that EU law, despite providing for rules on investment promotion and protection, would not afford the same protections as those

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298 See C. CROSS – V. KUBE, *op. cit.*, p. 11.
299 *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.113.
300 *Ibid.*, para. 4.197.
301 *Ibid.*, para. 4.168.
302 *Ibid.*, para. 4.112.

offered by the BITs and the ECT and, consequently, would not cover the same subject matter of the latter. In particular, EU law would not provide foreign energy investors with procedural rights equivalent to the ISDS mechanisms offered by intra-EU BITs and the ECT[303].

With specific regard to the ECT, there is a stable case law on the issue at hand. In *Electrabel*, *Charanne*, *RREEFF*, *Isolux*, *Blusun*, *Eiser*, *Novenergia*, *Masdar* and *Antin*, in fact, the parties to the disputes and the European Commission – when it intervened as a non-disputing party – disagreed on whether EU law and the ECT deal with the same subject matter. The arbitral tribunals established to settle said disputes, therefore, were given the opportunity to clarify the issue at hand.

In the above disputes, the claimants argued that the EU and the ECT would be distinct and separate legal orders that would recognize differing rights and obligations to their respective subjects[304]. In their view, the substantive investment protections provided for in the ECT would be different from those offered by EU law, notably the TFEU, since the former would be broader, or simply absent, in the latter. The TFEU, in fact, would essentially regulate the economic and legal aspects of energy circulation within the EU, while the ECT would provide for a legal framework by which promoting long-term cooperation in the energy field, including energy investment[305]. This would be so, in particular, regarding the post-investment phase, notably with respect to the FET standard and, more importantly, the dispute settlement stage, since the ECT, contrary to EU law, would afford privates to protect their investments by allowing them to directly sue States before international arbitral tribunals[306].

For the respondents and the European Commission, on the contrary, the two law regimes would involve "overlapping" subject matters[307], namely energy[308], with EU law covering all aspects of investment promotion and protection dealt with by the ECT[309]. In their view, the EU is an economic integration area which provides for a comprehensive investment promotion and protection regime that would be broader than those offered by the ECT and BITs[310]. In any event, EU law would provide for both substantive and procedural rights at least equivalent to those ensured by the ECT. As regards the substantive profile, EU law would provide for FET, encouragement and creation of stable, equitable, favourable and transparent conditions, constant protection and security, no impairment by unreasonable or discriminatory measures, no treatment less favourable than that required by

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303 See: S. JAGUSCH – J. SULLIVAN, *op. cit.*, p. 94; C. SÖDERLUND, *op. cit.*, p. 104; T. ROE – M. HAPPOLD, *op. cit.*, pp. 95-98. See also Opinion of AG Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, EU:C:2017:699, paras. 179-228.

304 See *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.35.

305 See, in particular: *Charanne*, Final Award, paras. 245-246; *Blusun*, Award, para. 260; *Isolux*, Award, para. 260.

306 See, in particular: *RREEF*, Decision on Jurisdiction, para. 60; *Eiser*, Award, para. 177; *Novenergia*, Final Arbitral Award, para. 439; *Antin*, Award, paras. 190-191.

307 See *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.59.

308 See *Blusun*, Award, para. 229.

309 See *Charanne*, para. 208.

310 See: *RREEF*, Decision on Jurisdiction, para. 40; *Eiser*, Award, para. 163.

international law, national treatment and most favoured nation treatment and, finally, expropriation. As regards the procedural profile, EU law would offer a "comprehensive EU system of judicial review" that would be equivalent to the ECT ISDS regime[311].

The arbitral tribunals established to settle the disputes, in essence, agreed with the claimants: in their view, in fact, EU law and the ECT, despite dealing with the protection of foreign investors, do not share the same subject matter, especially as regards the procedural rights accorded to investors. In particular, only the ECT would deal with investor-State arbitration. This conclusion was well summarized by the *Electrabel* tribunal: while it recognized that "[…] *the protection of foreign investors is clearly addressed by both the ECT and EU law, although from different perspectives* […]"[312], it highlighted that, "*As regards the substantive protections in Part III of the ECT, the Tribunal does not consider that the ECT and EU law share the same subject-matter* […]"[313].

8.3. The alleged incompatibility between the ECT and EU law

8.3.1. Premise

As far as the relationship between the ECT and EU law is concerned, a core issue discussed in both academic literature and ECT investment disputes is the compatibility between the ECT ISDS mechanism and EU law[314].

In the previous paragraph we have ascertained that, under ECT case law, the two legal orders do not share the same subject matter. Irrespective of that, it remains still to be seen whether there are inconsistencies between them, in particular as far as ISDS is concerned. The issue at hand comes under the broader question of the compatibility with EU law of ISDS in general, a question which has been discussed, in particular, with respect to the investor-State dispute settlement clauses provided in intra-EU BITs[315].

As seen, from an EU constitutional law perspective, the EU constitutes a new and specific legal order, the autonomy of which is safeguarded by the EU judicial system. Under the latter, the judges of the Member States act as judges of the Union and, as such, can directly apply EU law. In order to ensure the uniformity and coherence of EU law, any conflict which may arise as to its application can be submitted to the CJEU that, as court of last resort, exercises the monopoly on its final interpretation.

Of particular importance, to this respect, are Articles 267 and 344 TFEU. The earlier regulates the preliminary reference procedure before the CJEU and, therefore,

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311 See: *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, paras. 4.104-4.105; *Isolux*, Award, para. 167.

312 *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.177.

313 *Ibid.*, para. 4.176. See also *Novenergia*, Award, para. 465.

314 On this point, see: C. SÖDERLUND, *op. cit.*; M. BURGSTALLER, *The Energy Charter Treaty as a Mixed Agreement: a Model for future European Investment Treaties?*, cit.; C. TIETJE, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, cit., pp. 15-16; C. CROSS – V. KUBE, *op. cit.*, pp. 11-25; G. A. BERMANN, *op. cit.*, pp. 203-220; P. RATZ, *op. cit.*, pp. 317-441; N. BASENER, *op. cit.*, pp. 151 ff.

315 See S. HINDELANG, *op. cit.*, pp. 193-206; C. TIETJE, *Bilateral Investment Treaties Between EU Member States (Intra-EU-Bits) – Challenges in the Multilevel System of Law*, cit.

is described as the "keystone" of the EU judicial system[316]. According to Art. 267 TFEU, where a question concerning the interpretation of the EU founding treaties or the validity and interpretation of acts adopted by the EU institutions is raised before a national judge, the latter may, or even is obliged to, refer the question to the CJEU, if it considers that a decision by the latter is necessary to enable his judgment[317].

Art. 344 TFEU, on its part, establishes that "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*". This provision is generally said to enshrine the monopoly of the CJEU on the interpretation of EU law and is seen as a specification of the principle of sincere cooperation laid down in Art. 4(3) TEU[318] which, among others, requires EU Member States to avoid any measure capable of undermining the achievement of the Union's objectives.

Finally, other relevant provisions are Articles 258 (ex Article 226 TEC) [319] and 260 (ex Art. 228 TEC)[320] TFEU, which govern the infringement procedures against EU Member States that fail to comply, respectively, with EU primary law obligations and judgments of the CJEU.

Having said that, the European Commission has consistently maintained the incompatibility of investor-State dispute settlement clauses provided in intra-EU BITs

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316 See Opinion of AG Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, EU:C:2017:699, paras. 84 and 235.

317 Art. 267 TFEU: "*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay*".

318 Art. 4(3) TEU: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

319 Art. 258 TFEU: "*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union*".

320 Art. 260 TFEU: "*1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 259. 3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment*".

with EU law. In its view, in fact, said clauses would undermine the autonomy, primacy and direct effect of EU law and the principle of mutual trust between EU Member States. In particular, since said clauses would benefit only the investors from those Member States parties to the BITs with the exclusion of the investors belonging to those Member States which are not parties to them, they would conflict with the principle of non-discrimination laid down, in its general terms, in Art. 18 TFEU[321]. Moreover, arbitral tribunals established under BITs would be called to interpret and apply EU law and would do so despite not being courts or tribunals of the EU. As such, they would be unable to rely on the preliminary reference procedure laid down in Art. 267 TFEU which, as seen, ensures the judicial dialogue between national courts and the CJEU. ISDS clauses included in BITs, therefore, would undermine the autonomy of EU law and, more specifically, would be in conflict with Articles 267 and 344 TFEU. Finally, under BITs, there would be the risk that awards rendered by arbitral tribunals may escape review by national courts within the EU, especially as far as ICSID arbitration is concerned (see *supra* § 5.2).

The position of the European Commission on BITs is well summarized in a Communication recently issued and meaningfully entitled "Protection of intra-EU investment"[322]. According to the Commission "*EU law, as progressively developed over decades, provides investors with a high level of protection* […]. *Cross-border investors in the EU may invoke directly applicable EU rights which have supremacy over national law. National judges have a special role and responsibility in protecting investment. Together with the Court of Justice of the EU ("CJEU" or "Court of Justice") through the preliminary reference procedure, national judges must ensure in complete independence the full application of EU law and judicial protection of the rights of individuals in all Member States. Moreover, cross-border investors' rights are protected in the EU also through a number of public mechanisms aiming at preventing infringements and solving difficulties that investors may experience with national authorities*"[323].

That said, the Commission notices that "*Some countries with which EU Member States had previously concluded BITs have since joined the EU. As a result of accession, the substantive rules of BITs, as applied between Member States ("intra-EU BITs"), became a parallel treaty system overlapping with single market rules, thereby preventing the full application of EU law. This is the case, for example, when intra-EU BITs are interpreted in such a way that they constitute the basis for the award of unlawful state aid in violation of the level playing field in the single market. Intra-EU BITs confer rights only in respect of investors from one of the two Member States concerned, in conflict with the principle of non-discrimination among EU investors within the single market under EU law. In addition, by setting up an alternative system of dispute resolution, intra-EU BITs take away from the national judiciary litigation concerning national measures and involving EU law. They entrust this litigation to private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice. For these reasons, the European*

[321] Art. 18 TFEU: "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination*".

[322] Communication from the Commission to the European Parliament and the Council "Protection of intra-EU investment", COM(2018) 547 final of 19.7.2018.

[323] *Ibid*, pp. 1-2.

Commission has consistently taken the view that intra-EU BITs are incompatible with Union law" (underlining added)[324].

However, the alleged incompatibility of intra-EU BITs and, more specifically, of the ISDS clauses included therein, with EU law, has been so far unanimously dismissed by the arbitral tribunals established to settle disputes arising under said BITs[325].

Speaking of which, it is worth noting that the CJEU had finally the opportunity to express its views on the matter at hand. In the long-awaited *Achmea* judgement[326], rendered on 6 March 2018, the Court ruled on the incompatibility with EU law of ISDS clauses such as the one provided in Art. 8 of the BIT concluded in 1991

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[324] *Ibid.*, p. 2.

[325] See, in particular: *Eastern Sugar B.V. v Czech Republic* (SCC Case No 088/2004), Partial Award of 27 March 2007; *Rupert Joseph Binder v Czech Republic*, Award on Jurisdiction of 6 June 2007; *Jan Oostergetel & Theodora Laurentius v Slovak Republic*, Decision on Jurisdiction of 30 April 2010; *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (PCA Case No 2008-13), Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 and Final Award of 7 December 2012; *European American Investment Bank AG v Slovak Republic* (PCA Case No 2010-17), Award on Jurisdiction of 22 October 2012; *WNC Factoring Ltd v Czech Republic* (PCA Case No 2014-34), Award of 22 February 2017; *Anglia Auto Accessories Limited v Czech Republic* (SCC Case V 2014/181), Final Award of 10 March 2017; *I.P. Busta and J.P. Busta v Czech Republic* (SCC Case V 2015/014), Final Award of 10 March 2017.

[326] The *Achmea* judgment originated from a dispute involving a Dutch insurance group, i.e. Achmea B.V. (previously known as Eureko B.V.) and the Republic of Slovakia. In 2006, Slovakia modified the favourable investment conditions previously granted to investors in the sickness insurance market. As a consequence, in October 2008, Achmea brought arbitration proceedings against Slovakia under Art. 8 of the BIT between the Netherlands and Slovakia. By arbitral award rendered on 7 December 2012, the *ad hoc* arbitral tribunal constituted under the UNCITRAL rules to settle the dispute and placed in Frankfurt established that Slovakia had breached its commitments under the BIT and, accordingly, ordered it to pay nearly € 22.1 million of damages to Achmea. Slovakia, in turn, started setting-aside proceedings before the German courts. In its view, the *ad hoc* tribunal lacked jurisdiction on the dispute at hand since, following the accession of Slovakia to the EU on May 2004, EU law would have taken precedence on conflicting rules deriving from intra-EU BITs, including the BIT between the Netherlands and Slovakia. To this respect, Slovakia argued on the incompatibility between Art. 8 of the BIT and Articles 18, 267 and 344 TFEU. While the Higher Regional Court of Frankfurt (*Oberlandesgericht Frankfurt am Main*) dismissed Slovakia's claims, the German Federal Court of Justice (*Bundesgerichtshof*), as court of appeal, referred the question to the CJEU for a preliminary ruling under Art. 267 TFEU in the following terms: "*(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date? If Question 1 is to be answered in the negative: (2) Does Article 267 TFEU preclude the application of such a provision? If Questions 1 and 2 are to be answered in the negative: (3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*". See Opinion of AG Wathelet, cit., paras. 6-23. On the *Achmea* Judgement see: HESS B., *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, in *MPILux Research Paper Series*, 3, 2018; A. PINNA, *The Incompatibility of Intra-EU BITs with European Union law, annotation following ECJ, 6 March 2018, Case 284/16, Slovak Republic v Achmea BV*, in *Paris Journal of International Arbitration*, *Cahiers de l'arbitrage*, 1, 2018, pp. 73-95; E. CIMIOTTA, *The First Ever Interpretative Preliminary Ruling Concerning the Validity of an International Agreement Between EU Member States: The Achmea Case*, in *European Papers*, 1, 2018, pp. 337-344; S. GÁSPÁR-SZILÁGYI, *It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, in *European Papers*, 1, 2018, pp. 357-373; J. LEE, *The Empire Strikes Back: Case Note on the CJEU Decision in Slovak Republic v. Achmea BV, March 6, 2018*, in *Contemporary Asia Arbitration Journal*,1, 2018, pp. 137-152.

between the Kingdom of the Netherlands and the then Czech and Slovak Federative Republic (presently in force between the Netherlands and the Slovak Republic)[327]. In the CJEU's words, "*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*"[328].

To this regard, the European Commission noticed that "*In the Achmea judgement, the Court of Justice ruled that the investor-to-State arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States. Recourse to such clauses undermines the preliminary ruling procedure provided for in Article 267 TFEU, and is not compatible with the principle of sincere cooperation. This implies that all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it*" (underlining added)[329].

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[327] According to Art. 8 of the BIT "*1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably. 2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement. 3. The arbitral tribunal referred to in paragraph 2 of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal. 4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments. 5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. 6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law. 7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute*".

[328] *Achmea* judgment, dispositif. It is worth noting that the conclusions reached by the CJEU significantly departed from those drawn by AG Wathelet, according to whom "*Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal*". See Opinion of AG Wathelet, cit., para. 273.

[329] See Communication from the Commission to the European Parliament and the Council "Protection of intra-EU investment", COM(2018) 547 final of 19.7.2018, p. 3.

As said before (see *supra*, § 3.2.) the *Achmea* judgment has seriously challenged the lawfulness of intra-EU BITs under EU law and has raised an intense debate on that regard. Such debate falls outside the scope of our investigation. For our purposes, it is important to highlight that similar objections to those raised against BITs have been put forward by the European Commission with respect to the ECT and, more specifically, to the ISDS mechanism laid down in Art. 26 ECT. As showed in next, pages, however, such objections, too, have been constantly rejected by arbitral tribunals established under the Treaty.

Following the *Achmea* judgement, such allegation has found new impetus. In the above-mentioned Communication, the Commission specified that "*The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States*" (underlining added)[330].

To this respect, it must be noticed that, independently of the Commission's position, the extent to which the conclusions of the CJEU in the *Achmea* judgement apply also to the ECT is, at the very least, contentious. As said before, in fact, the ECT, unlike BITs, is a MIT involving all EU Member States and the EU itself and, what is more, forms part of EU law. In any event, there is no doubt that *Achmea* judgment is likely to boost further discussion on the compatibility between the ECT ISDS system and EU law.

Indeed, in *Masdar*, the respondent (Spain) requested the tribunal to reopen the arbitral procedure in order to take into account, *inter alia*, the *Achmea* judgement[331]. In Spain's view, in fact, said judgment would confirm the incompatibility between the ECT ISDS mechanism with EU law and, therefore, would support its intra-EU objection to the jurisdiction of the arbitral tribunal[332]. This view, however, was rejected by the latter, in the opinion of which the judgement would be limited to ISDS mechanisms provided in BITs and not in a multilateral investment treaty such as the ECT[333].

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[330] *Ibid.*, pp. 3-4.

[331] The request was submitted in accordance with Art. 38 of the ICSID Rules of Procedure for Arbitration Proceedings ("Closure of the Proceeding"), pursuant to which: "*(1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed. (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points*".

[332] See *Masdar*, Award, paras. 674-676.

[333] *Ibid.*, paras. 678-683.

The *Achmea* judgment, furthermore, had relevant implications also with respect to *Novenergia*, a case decided under the AISCC rules. The award rendered by the tribunal, in which Spain was ordered to pay compensation of € 53,3 million for breaching the ECT FET standard, has been challenged before the Svea Court of Appeal: as is well-known, in fact, annulment proceedings against AISCC arbitral decisions must be brought before the domestic courts at the place of arbitration, in this case an EU Member State (Sweden). To this regard, it has been reported that the Svea Court of Appeal stayed any enforcement of the award at the request of Spain[334]. More important, it has been reported that Spain, following the *Achmea* judgement, asked the Svea Court to refer the case to the CJEU by means of Art. 267 TFEU[335]. This means that, if the Svea Court accepts Spain's request, the CJEU will have the opportunity to express its views on the compatibility between the ECT ISDS and EU law[336].

In light of the above, it is therefore clear why the issue at hand is of paramount importance for our purposes and extremely topical[337]. In next paragraph, the compatibility of the ECT ISDS regime with EU law will be examined in light of relevant ECT case law.

8.3.2. The compatibility between the ECT ISDS mechanism and EU law under ECT case law

As seen before, the compatibility of the ECT ISDS mechanism with EU law assumes particular importance when determining the jurisdiction of ECT arbitral tribunals on intra-EU investment disputes (see *supra*, § 6.3). Respondent States to said disputes and, more important, the European Commission, have constantly alleged that Art. 26 ECT would be inconsistent with the monopoly of the CJEU on the interpretation of EU law and, therefore, with the autonomy of the EU legal order. In their view, in fact, Art. 26 ECT would allow international investment tribunals to decide disputes involving EU Member States and relating to EU law, a task that is entrusted to the CJEU[338].

The issue at stake was well summarized by the tribunal in *Electrabel*, in the words of which "[…] *the main concern of the European Commission is to protect the ECJ's monopoly over the interpretation of EU law, operating as its ultimate guardian and also its gate-keeper. With this concern, so it is said, there must be a unique EU court entrusted with the final word on what EU*

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334 See: www.iareporter.com/articles/spain-secures-stay-of-enforcement-of-energy-charter-treaty-award-in-swedish-court/.

335 See: www.iareporter.com/articles/post-achmea-developments-spain-wants-court-to-ask-ecj-to-rule-on-compatibility-of-energy-charter-treaty-with-eu-law-achmea-ruling-also-touted-by-poland-as-reason-for-discontinued-bit-case/.

336 To this respect, C. CROSS – V. KUBE, *op. cit.*, p. 6, notice that "*Even if the CJEU were to find the intra-EU application of the ECT incompatible, there is no guarantee however that this would have any tangible impact on the exercise of jurisdiction by ISDS tribunals. This is one of the many complications in assessing the consequences of any incompatibility. Indeed, such a ruling might rather serve as a signal to investors to bring their claims in such a way as to ensure that the EU's courts are unable to frustrate any ensuing awards by choosing a seat of arbitration outside the EU and seeking enforcement in non-EU member states*".

337 *Ibid.*, p. 3.

338 See, for example, *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 5.20.

law means, whereas the existence of arbitral tribunals interpreting EU law could jeopardise its uniform application"[339].

The alleged incompatibility between the ECT ISDS mechanism and EU law, however, has been so far unanimously dismissed by arbitral tribunals established under the ECT.

To this respect, the tribunal in *Electrabel* noticed, in the first place, that the monopoly of the CJEU, enshrined in Art. 344 TFEU, does not prevent other courts and tribunals from interpreting and applying EU law, both *within* and *outside* the EU[340]. In its view, in fact, Art. 267 TFEU, which governs the preliminary ruling procedure before the CJEU and ensures a certain uniformity of interpretation of EU law, does not prevent the latter from being interpreted or applied differently within the EU: EU courts or tribunals, in fact, are provided with a certain degree of discretion as to the decision to refer to the CJEU[341]. In addition, a divergence of interpretations or applications may arise also outside the EU, since courts or tribunals of non-EU Member States may be invested with questions of EU law, being nonetheless prevented from seeking preliminary rulings from the CJEU[342].

In the second place, the *Electrabel* tribunal considered that, even if issues of EU law are decided by international arbitral tribunals, including those established under the ECT, the CJEU maintains its role as ultimate interpreter of EU law through the mechanisms provided in Articles 258 and 260 TFEU. To this regard, the tribunal acknowledged that, under the ECT, there is the risk that an award rendered by an arbitral tribunal can remain outside the control of EU Member States courts which, therefore, would be unable to rely on the preliminary ruling procedure governed by Art. 267 TFEU. This would be so, in particular, in the case of ICSID awards. However, by virtue of Articles 258 and 260 TFEU, if the award rendered by an arbitral tribunal is honoured voluntarily by the Member State concerned or judicially enforced against it, the CJEU maintains the possibility to exercise its role as the ultimate guardian of EU law, and this applies both for ICSID and non-ICSID awards[343].

With respect to international arbitration, the tribunal highlighted that Art. 267 TFEU prevents arbitration between EU Member States and not between Member States and investors of other Member States. In its words, "[…] *This was ostensibly decided in the* Mox Plant *case between the United Kingdom and the Republic of Ireland, where the ECJ held that EU Member States are prevented from submitting their disputes to "any other method of dispute settlement" than the method provided by EU law; and that, as a result, the ECJ has exclusive jurisdiction to resolve any dispute between two EU Member States that at least partially raises an issue of EU law.* […] *It is not however necessary to interpret any further the ECJ's decision in the* Mox Plant *case, given that the Parties' dispute does not here involve two EU Member States*"[344].

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[339] *Ibid.*, para. 4.146.
[340] *Ibid.*, para. 4.147.
[341] *Ibid.*, para. 4.148.
[342] *Ibid.*, para. 4.149.
[343] *Ibid.*, paras. 4.159-4.165.
[344] *Ibid.*, para. 4.150.

Such conclusion was confirmed, in particular, by the tribunals in *Charanne*[345] and *Blusun*[346]. According to the former, "*As for disputes between Member States, the prohibition of submitting them to arbitration results from Article 267 TFEU, and there does not exist a similar provision that applies to a dispute between a private party and a Member State of the EU*"[347]. For the latter, "*Even if Article 267 of the TFEU meant that no intra-EU dispute could be resolved by an* ad hoc *arbitral tribunal under Article 27 of the ECT, that did not preclude the jurisdiction of an investor-State tribunal under Article 26 of the ECT*"[348].

Focussing on Art. 344 TFEU, arbitral tribunals had to deal, in particular, with the following questions: 1) whether it concerns disputes between Member States and investors therefrom; 2) if so, whether intra-EU disputes concern the interpretation and application of EU treaties.

Starting with the first question, it has been argued that the prohibition laid down in Art. 344 TFEU would apply to investor-State disputes. This would be confirmed, firstly, by a textual reading of the Article, which would not expressly exclude disputes between a private and an EU Member State: instead of stating that "*Member States undertake not to submit disputes between Member States concerning…*", in fact, Art. 344 TFEU simply states that "*Member States undertake not to submit a dispute concerning…*"[349].

The applicability of Art. 344 TFEU to investor-State disputes would find support, in the second place, in the jurisprudence of the CJEU, notably in *Mox Plant*: in this case, in fact, the CJEU would have stated that, under Art. 344 TFEU, disputes involving EU Member States and relating to EU law would have to be settled under the procedures envisaged in the TFEU and not by arbitral tribunals[350]. In short, Art. 344 TFEU would be aimed at precluding an EU Member State from being party to a dispute involving State responsibility, since a dispute of this kind would affect the interpretation of European law[351].

As regards the second question, that is whether a dispute governed by Art. 26 ECT concerns the interpretation and application of EU treaties, it has been argued that a dispute of this kind would imply the interpretation and application of EU law and, therefore, would be inconsistent with Art. 344 TFEU. To this respect, it must be borne in mind that, by virtue of Art. 216 TFEU, the ECT forms part of EU law.

That said, the incompatibility between the ECT, namely Art. 26 ECT, and EU law, notably Art. 344 TFEU, has been so far unanimously dismissed by ECT arbitral tribunals, which have established that investor-State disputes filed under Art. 26 ECT do not fall under the scope of Art. 344 TFEU and, in addition, do not concern the interpretation or application of EU treaties.

Starting with the tribunal in *Electrabel*, it considered that "[…] *as regards an international or national arbitration tribunal in a dispute not involving two or more EU Member States as parties, there is no provision equivalent to Article 292 EC (now Article 344 TFEU)*

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345 *Charanne*, Final Award, paras. 434-435.
346 *Blusun*, Award, paras. 301-303.
347 *Charanne*, Final award (Unofficial English Translation by Mena Chambers), para. 435.
348 *Blusun*, Award, para. 301.
349 See *Charanne*, Final Award, para. 442.
350 See *Charanne*, Final Award, para. 217.
351 *Ibid.*, para. 442.

dealing with arbitration between two or more private parties, nationals of Member States, or with mixed disputes settlement mechanisms such as investor-state arbitration between individuals, nationals of EU Member States and an EU Member State under the ICSID Convention or other international instruments. Article 292 EC is not applicable to these arbitration tribunals"[352].

Such conclusion was confirmed and specified in *Charanne*, where the scope and purpose of Art. 344 TFEU was particularly debated. In its view, according to a literal reading, Art. 344 TFEU "[…] *applies to agreements relating to disputes between Member States, and not between a private party and a Member State*"[353]. Consequently, "[…] *there is no rule of EU law which prevents EU Member States to resolve through arbitration their disputes with investors from other Member States through arbitration. Nor is there any EU law rule that prevents an arbitral tribunal to apply EU law to resolve such a dispute*"[354]. Moreover, if Art. 344 TFEU were to prohibit international arbitration between privates and EU Member States, "[…] *no state tribunal could ever decide any issue that involved an interpretation of the European treaties whenever the responsibility of a Member State would be at stake. However, it is true that Member States are respondents in many proceedings before national courts in which the interpretation or application of the European treaties may come into play. Similarly, a Member State can agree to submit a dispute that may involve issues of EU law to an arbitration. Finally, it is today universally accepted that an arbitral tribunal not only has the power, but also the duty to apply EU law*"[355]. In conclusion, "*The scope of Article 344 TFEU cannot, therefore, be to prohibit Member States to submit any dispute that could involve an interpretation of European treaties to a dispute settlement proceedings other than those provided by EU framework. As rightfully noted by the tribunal in* Electrabel v. Hungary*, the scope of Article 344 TFEU is more limited. This is to guarantee that the Court of Justice of the European Union has the last word in interpretation of EU law to ensure its uniform interpretation*"[356]. Such a conclusion, furthermore, "[…] *is reinforced by the fact that the tribunal in* Electrabel v. Hungary *also considered relevant that the European Union signed the ECT, thus, accepting the possibility of arbitration between investors and Member States under Article 26. In this regard, it is relevant to note that the ECT does not allow reservations*"[357].

Moreover, for the *RREEF* tribunal, "*A simple reading of these provisions shows that they concern the settlement of two different kinds of disputes. Article 26 ECT is concerned only with the "*Settlement of Disputes between an Investor and a Contracting Party*". For its part, Article 344 TFEU deals with the submission of disputes concerning the interpretation of the EU founding treaties.* […] *In the view of this Tribunal, this difference of subject-matter of the two provisions is dispositive: there is no conflict between them*"[358]. Furthermore, "*The settled opinions of other tribunals endorse the view that it cannot be reasonably maintained that Article 344 TFEU sets up an "*interpretative monopoly*" in favour of the EUCJ. International tribunals have convincingly shown that there exists a number of contexts where other judicial or arbitral bodies can and are called upon to interpret and apply EU law. As the EUCJ itself noted: "Nor can the creation of the PC [European and Community Patents Court] be in conflict with Article 344*

[352] See *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.151.
[353] See *Charanne*, Final Award (Unofficial English Translation by Mena Chambers), para 441.
[354] *Ibid.*, para. 438.
[355] *Ibid.*, para. 443.
[356] *Ibid.*, para. 444.
[357] *Ibid.*, para. 445.
[358] *RREEF*, Decision on Jurisdiction, para. 79.

TFEU [formerly Article 292 EC]. Given that that article merely prohibits Member States from submitting a dispute concerning he interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties. The jurisdiction which the draft agreement intends to grant to the PC relates only to disputes between individuals in the field of patents"."[359].

For the tribunal in *Isolux*, "*Por una parte, no hay duda que, como lo subraya la Demandante, los Tratados referidos en el Artículo 344 TFUE son los Tratados de la UE con exclusión de los otros instrumentos internacionales como el TCE. Las demandas sometidas al Tribunal Arbitral son relativas a violaciones alegadas del TCE y no a violaciones de los Tratados de la UE*". "*Por otra parte, la lectura del Artículo propuesta por la Demandada implicaría que, por la interpretación o la aplicación de una norma de un Tratado europeo, solamente se podría acudir a un procedimiento previsto en el propio Tratado. Esta interpretación es incompatible con la realidad de la práctica jurisdiccional*"[360]. By referring to the conclusions reached by the tribunal in *Electrabel*, the *Isolux* tribunal argued that the exclusive jurisdiction of the CJEU, which is said to derive from Art. 344 TFEU, does not prevent numerous other courts and arbitral tribunals from applying EU law, both within and outside the EU[361]. To this respect, it argued that "[...] *se admite hoy, de modo general, que los tribunales arbitrales no solamente tienen el poder sino también el deber de aplicar el derecho europeo*"[362].

In line with the tribunals in the above cases, the *Blusun* tribunal upheld that "[…] *there is no such incompatibility. The dispute before this Tribunal is not an inter-State dispute. It is a dispute, in the words of Article 26, 'between a Contracting Party and an Investor of another Contracting Party'. It is not necessary for this Tribunal to decide whether Article 27, which concerns inter-State disputes, would be incompatible with Article 344 of the TFEU. Even if there were such an inconsistency, this would not also void Article 26, since the later Treaty will supersede the earlier one only to the extent of any incompatibility. To find otherwise would disadvantage investors, who have no ability under European law to protect their investment by suing the host State directly for breaches of the ECT. Neither does anything in European law expressly preclude investor-State arbitration under the ECT and the ICSID Convention*"[363].

The tribunal in *Eiser*, by referring to the conclusions reached in *Charanne*, stated that "[…] *Article 344 is not implicated here. This case does not involve any dispute between EU Member States, or address the allocation of competence between the EU and its members* […]"[364].

By referring to the conclusions reached in *Electrabel*, *Charanne* and *Isolux*[365], the tribunal in *Masdar* upheld that "[…] *EU law is not incompatible with the provision for investor-State arbitration contained in Part V of the ECT, including international arbitration under the ICSID Convention. The two legal orders can be applied together as regards the Parties' arbitration agreement and this arbitration, because only the ECT deals with investor-State arbitration; and nothing in EU law can be interpreted as precluding investor-State arbitration under the ECT and the ICSID Convention*"[366].

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[359] *Ibid.*, para. 80.
[360] *Isolux*, paras. 651-652.
[361] *Ibid.*, para. 653.
[362] *Ibid.*, para. 654.
[363] *Blusun*, Award, para. 289.
[364] *Eiser*, Award, para. 204.
[365] See *Masdar*, Award, paras. 333-339.
[366] *Ibid.*, para. 340

To sum up, in accordance with relevant ECT case law, EU law and the ECT are not inconsistent but rather complementary with each other. With specific regard to the procedural rights accorded to foreign energy investors, the ISDS mechanism provided for by Art. 26 ECT is perfectly consistent with EU law, notably Art. 344 TFEU, and does not challenge the role exercised by the CJEU as the ultimate interpreter of EU law.

8.4. Solution of possible inconsistencies between EU law and the ECT

8.4.1. Premise

In light of the conclusions reached so far, there would be no need to examine how possible inconsistencies between the two law regimes should be solved: as seen, ECT arbitral tribunals have found no conflict between the ECT and EU law. Nonetheless, it is worth spending some words on the issue at hand, since it has been particularly debated in all intra-EU disputes referred to above.

To this respect, a first question dealt with by arbitral tribunals is whether possible inconsistencies can be overcome through a "harmonious" interpretation of the two law regimes. Then, assuming that there would be conflicts not subject to harmonisation, a second question is whether, and according to what rules, it is possible to establish a hierarchy between the two law regimes in order to settle such conflicts.

These questions are discussed in detail in next paragraphs.

8.4.2. The harmonious interpretation of EU law and the ECT

As said by way of premise, since arbitral tribunals established under the ECT found no inconsistency between EU law and the ECT, there would be no need to harmonize the two regimes. As clearly stated by the tribunal in *Electrabel*, "[…] *there is no need to harmonise the ECT's provisions for the settlement of investor-state disputes by international arbitration with EU law because there is no inconsistency*"[367]. The question in issue, therefore, can be posed in the following terms: assuming the two regimes conflict with each other, shall they be harmonized in order to avoid conflict?

The question was discussed with particular emphasis in *Electrabel*. The parties to the dispute as well as the European Commission, despite agreeing on that there would be no contrasts between EU law and the ECT, accepted, in principle, that the two law regimes can be read in harmony[368]. However, they disagreed on whether there exists a principle or rule of international law permitting or requiring the harmonious interpretation of EU treaties and the ECT. While for the claimant there exists no legal principle of this sort[369], the respondent argued that there would be a general legal principle permitting the harmonious interpretation of different treaties concluded by the same parties and involving "overlapping" matters, as it would be the case with EU

[367] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.146.
[368] *Ibid.*, paras. 4.43, 4.59, 4.60-4.61, 4.68, 4.75, 4.78, 4.82 and 4.107.
[369] *Ibid.*, para. 4.43.

treaties and the ECT[370]. In the respondent's view, furthermore, the harmonious interpretation would be even required by Art. 32 VCLT, which provides for supplementary means of interpretation[371]. Similarly, the European Commission claimed that the tribunal would be required to interpret the ECT and EU law harmoniously[372].

As seen above, the tribunal, despite having established that there is no inconsistency between the two law regimes, accepted that the ECT and EU law should be interpreted in harmony. In doing so, however, it dismissed the respondent's allegation on the existence of a principle of international law so requiring: "*The Tribunal does not accept that there is a general principle of international law compelling the harmonious interpretation of different treaties. This may be a desirable outcome; but the end does not establish the means to that end. However, the situation here is somewhat special, with the European Union and its Member States so closely involved in and parties to the ECT. In the Tribunal's view, the ECT's historical genesis and its text are such that the ECT should be interpreted, if possible, in harmony with EU law*"[373].

To this regard, the tribunal acknowledged that, "*as a matter of legal, political and economic history, the European Union was the determining actor in the creation of the ECT*"[374] and asserted that EU law and the ECT should be reconciled where possible, for three legal reasons: "*The first derives from the ECT's genesis: it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law. The second derives from one of the ECT's objectives: it is an instrument clearly intended to combat anti-competitive conduct, which is the same objective as the European Union's objective in combating unlawful State aid. The third derives from the ECT's implicit recognition that decisions by the European Commission are legally binding on all EU Member States which are party to the ECT*"[375].

In supporting its reasoning[376], the tribunal quoted late Prof. Thomas Wälde, one of the most influential commentators on the ECT, in the words of which "*The ECT is largely a product of EU external political, economic and energy policy. It is meant to integrate the formerly Communist countries, provides an ante-chamber and preparation area for EU accession for many of them; it is intended to promote EU investment in these countries and energy flows from these countries to the EU. It is therefore linked more closely to EU integration, accession to the EU and EU external relations law than the 'run-of the mill' BIT*"[377].

To this regard, it is worth noting that the tribunal in *RREEF* distanced itself from the tribunal in *Electrabel*. In its words, in fact, "[…] *contrary to the position of the* Electrabel *tribunal, the present Tribunal is of the opinion that, to the extent possible, in case two treaties are, equally or unequally, applicable, they must be interpreted in such a way as not to contradict each*

[370] *Ibid.*, paras. 4.59-4.60.
[371] *Ibid.*, para. 4.82
[372] *Ibid.*, para. 4.107.
[373] *Ibid.*, para. 4.130.
[374] *Ibid.*, para. 4.131.
[375] *Ibid.*, para. 4.133.
[376] In paras. 4.134-4.142, the tribunal explained in detail the three legal reasons under which EU law and the ECT should be reconciled (ECT's genesis; ECT and EU objectives; ECT and EU objectives).
[377] See T. WÄLDE, *Arbitration in the Oil, Gas and Energy Field: Emerging Energy Charter Treaty Practice*, in *TDM*, 2, 2004, p. 4.

other. […] *Such a harmonious or harmonizing interpretation is all the more compelling in the present case when, as rightly noted by the Respondent, the EU played a predominant role in promoting and negotiating the ECT. As observed by the tribunal in* Electrabel*, "*it woud have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law*". That observation is consistent with Article 207(3) TFEU, which requires the Council and the Commission to ensure that "*the agreements negotiated are compatible with internal Union policies and rules*""* (underlining added)[378].

8.4.3. The hierarchy between EU law and the ECT

If one assumes that there are conflicts that cannot be solved even through harmonisation, it remains to be seen whether and how it is possible to establish a hierarchy between EU law and the ECT and, accordingly, determining which legal order should prevail over the other. The issue under discussion takes on particular importance if one bears in mind the jurisdictional objections raised against arbitral tribunals over intra-EU disputes. As seen before, the jurisdiction of arbitral tribunals has been challenged, *inter alia*, on an alleged primacy of EU law – and its judicial system – over the ECT – and its ISDS regime.

The issue at stake is a very complex one: as properly noticed by the tribunal in *Electrabel*, in fact, "*If different rules deal with the same subject matter in a way that seems contradictory, there is no general hierarchical system, but certain tools of interpretation regarding chronology (*lex posterior derogat priori*), specificity (*lex specialis generalibus derogat*) and identity of the Parties to the agreements (same or different Parties) can assist in solving the conflict. However, these rules do not always apply or can only be applied with difficulty. For this reason, international instruments often contain their own rules concerning the relationship with other agreements, as is the case here with Article 16 ECT and Article 307 EC (Article 351 TFEU)*"[379].

To this respect, the parties to intra-EU disputes incepted under the ECT tried to demonstrate the primacy of one system over the other by relying on the instruments referred to above by the *Electrabel* tribunal, notably Articles 16 ECT, 351 TFEU and Art. 30 VCLT.

According to Art. 16 ECT ("Relation to Other Agreements"), "*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 the subject matter of Part III or V of this Treaty, (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; and (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 favourable to the Investor or Investment*" (underlining added).

Under Art. 351 TFEU, "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more*

[378] *RREEF*, Decision on Jurisdiction, para.76.
[379] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.173.

Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States" (underlining added).

Finally, Art. 30 VCLT ("Application of successive treaties relating to the same subject-matter") states that "*1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty*" (underlining added).

As regards Art. 16 ECT, it has been argued that it would require the preferential application of the ECT over any conflicting rule of EU law. In *Electrabel*, for example, the claimant asserted that Art. 16 ECT would not be a conflict clause governing the relationship between successive treaties, since the reference to the "subject matter of Part III or V" would not be to the "*same* subject matter of Part III or V"[380]. Art. 16 ECT, therefore, would be applicable to intra-EU disputes and, what is more, would require the ECT to prevail over EU law. By relying to the last clause of Art. 16 ECT, in fact, the claimant affirmed that the ECT would provide investors with more favourable provisions than those offered by EU law[381].

For ECT arbitral tribunals, however, Art. 16 ECT does not apply in intra-EU disputes. In their view, in fact, said Article would be relevant only if the ECT conflicts with EU law and would be applicable only in the event that the ECT and EU treaties are considered to deal with the *same* subject matter. In other words, Art. 16 ECT is a clause governing the relationship between two conflict treaties dealing with the same subject matter: as seen before, however, ECT tribunals have found no inconsistency

[380] *Ibid.*, para. 4.47.
[381] *Ibid.*, para. 4.29.

between the two law regimes and have established that they do not share the same subject matter[382].

As regards the question of which set of rules among the ECT and EU law offers more favourable provision to investors, it is worth dwelling on some of the conclusions made by the tribunals in *Eiser* and *Masdar*. In response to the respondent's thesis that EU law would provide investors with better protections than the ECT, the tribunal in *Eiser* clarified that "*To the extent that provisions of European law may in some manner provide protections more favorable to Investors or Investments than those under the ECT, Article 16(2) makes clear that they do not detract from or supersede other ECT provisions, in particular the right to dispute settlement under ECT Part V. By its terms, Article 16 assures Investors or their Investments the greatest protection available under either the ECT or the other agreement. Thus, an agreement covered by Article 16(2) may improve upon particular protections available to Investors or their Investments, but it cannot lessen rights or protections under the ECT that are in other respects more favorable*"[383]. In this case, however, the tribunal said nothing on which regime would offer superior protection.

On the contrary, the tribunal in *Masdar* expressly contended that "*Article 16 of the ECT affords precedence to the more favourable investor-protection provisions of Article 26 of the ECT of which Claimant has availed itself over any conflicting provision of the EU treaties. They are more favourable, not least, because they obviate the need to bring the claim in the Spanish courts and Respondent cannot derogate from Article 26, pursuant to which it has given unconditional consent to arbitration*"[384].

As regards Art. 351 TFEU (ex Art. 307 TEC), it emerges from ECT case law that it too does not apply in intra-EU disputes. The *Electrabel* tribunal, by quoting Prof. Jan Klabbers, according to whom Art. 351 TFEU "*is the only article in the entire edifice of the EU relating to the status of treaties concluded by the EU's member states vis-à-vis EU law*"[385], noticed that "[…] *there is no other specific article in the EU Treaties dealing with the fate of treaties concluded between EU Member States. However, the effect of Article 307 EC is not straightforward under EU law*"[386]. In its view, "*From its wording, it is clear that Article 307 EC cannot apply to treaties made between EU Member States. Article 307 deals only with relations between EU Members and Non-EU Members that survive the entry of the EU Member into the European Union; and it does not address relations between EU Member States. The Tribunal concludes that Article 307 EC, as a "survival clause", does not apply to the relations between the two EU Member States in this case, Belgium as the home-state of the Claimant and the Respondent, as the host-state of the Claimant's alleged investment*"[387].

Such conclusion is in line with that previously reached by the tribunal in *AES*, in the words of which "[…] *Article 307 of the ECT is not applicable, as such, in this arbitration* […]"[388]. For the *AES* tribunal, in fact, "*Article 307 only applies to agreements between*

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[382] See in particular: *AES*, Award, para. 7.6.7; *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.176; *Charanne*, Final Award, para. 439;

[383] *Eiser*, Award, para. 201.

[384] *Masdar*, Award, para. 332.

[385] See J. KABBLERS, *Treaty Conflict and the European Union*, CUP, Cambridge, 2009, p. 10.

[386] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.179.

[387] *Ibid.*, para. 4.180.

[388] *AES*, Award, para. 7.6.10.

member states and non-member states, and Hungary and the United Kingdom are both member states. Moreover, the Claimants are not states, and even if sometimes individuals are granted rights under international law, Article 307 of the EC Treaty specifies that it only applies to states"[389].

That said, it is worth noting that arbitral tribunals had the occasion to investigate which legal order would prevail in case of inconsistencies. In *Electrabel*, while the claimant advocated the primacy of the ECT over EU law by relying, in particular, on Art. 16 ECT[390], the respondent and the European Commission, on the contrary, argued that EU law should prevail over the ECT by means of Art. 351 TFEU and Art. 30 VCLT[391].

To this respect, the tribunal confirmed the position of the respondent and the European Commission by affirming that , if EU treaties and the ECT were found to share the same subject matter, Art. 16 ECT would be superseded, under the *lex posterior* principle codified in Art. 30 VCLT, by the conflict clause provided in Art. 351 TFEU (former Art. 307 EC)[392].

By referring to the case law of the CJEU, namely *Commission v Slovakia*[393], the tribunal highlighted that said Article would be a specification of the general international rule codified in Art. 30(4)(b) VCLT, according to which, where two successive treaties relate to the same subject-matter but have not the same parties, the applicable treaty is the one to which both States are parties[394].

On the other hand, however, the tribunal noticed that, as to relations between EU Member States that are both parties to conflicting successive treaties dealing with the same subject matter, Art. 351 TFEU requires the later treaty to prevail over the former, in accordance to Art. 30(3) VCLT. For the tribunal, "*Article 307 EC has been interpreted to mean that relations between EU Members differ, by a logical implication, from relations between Non-EU Members, i.e. that inconsistent earlier treaties between Member States do not survive entry into the European Union. If Article 307 EC provides that treaty rights between Non-EU Members cannot be jeopardised by the subsequent entry of a Non-EU State into the European Union, it appears logical, taking into account the integration processes of the European Union, that the opposite consequence should be implied, i.e. the non-survival of rights under an earlier treaty incompatible with EU law as between EU Member States*"[395]. In short, "*the Tribunal concludes that Article 307 EC precludes inconsistent pre-existing treaty rights of EU Member States and their own nationals against other EU Member States; and it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State*"[396].

As to Art. 30 VCLT, the *Electrabel* tribunal noticed that "*it has the same consequences as the 'negative' interpretation of Article 307 EC decided by the ECJ and Advocate General in*

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[389] *Ibid.*, para. 7.6.11.
[390] See *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, paras. 4.29 and 4.47.
[391] *Ibid.*, paras. 4.72-4.78 and 4.109.
[392] *Ibid.*, para. 4.178.
[393] Judgement of 15 September 2011, *European Commission v Slovak Republic*, C-264/09, EU:C:2011:580.
[394] See *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, paras. 4.181-4.182.
[395] *Ibid.*, para. 4.183.
[396] *Ibid.*, para. 4.189.

Commission v Slovakia (where, as described above, Article 307 was treated as the expression under EU law of Article 30(4)(b) of the Vienna Convention). Accordingly, even in situations where Article 307 EC would not have applied, the same result would have followed under Article 30, on the hypothesis that the two treaties related to the same subject-matter"[397].

To sum up, as to the question of the relationship between EU law and the ECT in case of inconsistencies, the conclusion of the tribunal in *Electrabel* is that "*from whatever perspective the relationship between the ECT and EU law is examined, the Tribunal concludes that EU law would prevail over the ECT in case of any material inconsistency. That conclusion depends, however, upon the existence of a material inconsistency; and the Tribunal has concluded that none exists for the purpose of deciding the Parties' dispute in this arbitration*"[398].

Such conclusion was confirmed also by other tribunals, notably those in *Charanne*[399] and *Blusun*[400].

To this respect, it must be noticed that the conclusions reached by the above tribunals, namely that in *Electrabel*, have been called into question, more recently, by the tribunal in *RREEF*. For the latter, in fact, "[…] *this Tribunal has been established by a specific treaty, the ECT, which binds both the EU and its Member States on the one hand and non-EU States on the other hand. As of the latter, EU law is* res inter alios acta *and it cannot be upheld that, by ratifying the ECT, those non-EU States have accepted the EU law as prevailing over the ECT. The ECT is the "*constitution*" of the Tribunal* […][401]. "*Therefore, in case of any contradiction between the ECT and EU law, the Tribunal would have to ensure the full application of its "*constitutional*" instrument, upon which its jurisdiction is founded. This conclusion is all the more compelling given that Article 16 ECT expressly stipulates the relationship between the ECT and other agreements – from which there is no reason to distinguish EU law. It follows from this that, if there must be a "*hierarchy*" between norms to be applied by the Tribunal, it must be determined from the perspective of public international law. Not EU law. Therefore, the ECT prevails over any other norm* […]"[402]. In short, "[…] *should it ever be determined that there existed an inconsistency between the ECT and EU law* – quod non *in the present case – and absent any possibility to reconcile both rules through interpretation, the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former. This would be the case even were this to be the source of possible detriment to EU law. EU law does not and cannot "*trump*" public international law*"[403].

8.5. Conclusions

As regards the relationship between the ECT and EU law, according to ECT case law, the following findings can be outlined:

[397] *Ibid.*, para. 4.190.
[398] *Ibid.*, para. 4.191.
[399] See *Charanne*, Final Award, para. 439.
[400] See *Blusun*, Award, paras. 292-303.
[401] *RREEFF*, Decision on Jurisdiction, para. 74.
[402] *Ibid.*, para. 75.
[403] *Ibid.*, para. 87.

- both the ECT and EU law deal with investment promotion and protection; nonetheless, they do not share the same subject-matter, especially as far as ISDS is concerned;
- the two law regimes are consistent with each other and can apply side by side; in particular, there is no conflict between the ECT ISDS regime, namely Art. 26 ECT, and EU law, namely Articles 267 and 344 TFEU;
- eventual inconsistencies can be, in any event, overcome by interpreting the two regimes in harmony;
- as regards the hypothetical primacy of one system over the other, the question remains open; to this respect, the primacy of EU law over the ECT, which has been purported, in particular, by the tribunal in *Electrabel*, has been questioned, more recently, by other arbitral tribunals, namely the *RREEF* tribunal.

9. Conclusions

In this chapter, we have investigated the many issues that the mixed accession of the EU and its Member States to the ECT poses as regards the ISDS regime. To this regard, it is emphasized that the increasing number of intra-EU disputes filed under Art. 26 ECT, which today amounts to roughly the 60% of all disputes ever filed under the Treaty, is raising much attention by academic and specialized literature on the issues at hand.

A first number of issues concern the international responsibility of the EU and its Member States for breaches of ECT investment provisions. Under the procedural approach adopted in the present investigation, the key question is determining who is the proper respondent, among the EU and its Member States, to investment disputes filed under Art. 26 ECT. As seen in § 5, the current state and practice of international law does not provide for clear-cut answers to this respect. The only overall conclusion which one may reach is that issues of international responsibility are inextricably linked and, therefore, ultimately depend on, the specific features that characterize each case. Indeed, this state of things reflects the conflicting views existing as regards the nature and role of a REIO such as the EU in the realm of international law.

A second set of problems arises with respect to the admissibility of EU internal disputes, notably those intra-EU, to the ECT ISDS mechanism. As seen in § 6, one of the most contentious issues discussed with respect to the ECT ISDS regime is the applicability of Art. 26 – and, more in general, of the whole Treaty – to EU internal relations, notably those intra-EU. While the European Commission purports the view that Art. 26 ECT finds no application to relations between EU Member States, arbitral tribunals established under the ECT have so far argued for the opposite.

Indeed, such a difference of views ultimately unveils a competition of jurisdiction between two regimes – the ECT and the EU – and, more specifically, between two jurisdictional bodies – ECT arbitral tribunals and the CJEU – on disputes involving parties (Member States and investors therefrom) from the EU. To this respect, it is worth stressing that such jurisdictional competition is escalating, with the European Commission increasingly arguing in official documents for the "unlawful" application

of the ECT to intra-EU disputes and ECT arbitral tribunals alleging for the primacy of the ECT over EU law.

Another source of concerns is represented by the interplay between the ECT and EU law. As seen in § 7, according to ECT case law, it is well established that EU law applies to settle intra-EU – and, more in general, EU internal – disputes. As a consequence, the interplay between EU law and the ECT, especially as far as the procedural rights of investors are concerned, arises prominently.

To this respect, a first question is whether EU law and the ECT deal with the same subject matter. While it has been argued, especially by the European Commission, that the two legal orders can be considered as having the same object, ECT arbitral tribunals have so far taken the opposite view.

A second question concerns the alleged incompatibility between the ECT, notably its ISDS mechanism, and EU law. In this respect, it has been argued that Art. 26 ECT would be inconsistent with EU law, namely the principles of autonomy and primacy of EU law as enshrined in Articles 267 and 344 TFEU. ECT arbitral tribunals, however, have so far decided on the compatibility between EU law and the ECT and, more specifically, of the ISDS clause laid down in Art. 26 ECT with Art. 344 TFEU.

A third question concerns how possible conflicts between the ECT and EU law should be settled. This issue calls into question the interpretation and application of different rules governing the relationship between distinct successive treaties, namely *lex posterior* and *lex specialis*. To this regard, it is worth noting that while ECT arbitral tribunals have at first purported the view that in case of inconsistencies EU law would prevail over the ECT, more recently they are pushing towards the opposite view.

It goes without saying that, while under ECT case law some of the above questions may appear to be settled, the same cannot be said from the standpoint of EU law. Indeed, the discussion on the issues discussed in this chapter has just begun: following the CJEU's *Achmea* judgment and its developments, the debate is likely to keep academics and experts busy in the foreseeable future.

CHAPTER III
ITALY'S WITHDRAWAL FROM THE ECT AND ITS INVOLVEMENT IN INVESTMENT DISPUTES UNDER ART. 26 ECT

1. Introduction

On 31 December 2014, Italy notified the Portuguese Government, depository of the ECT pursuant to Art. 49 ECT[1], its decision to withdraw from the Treaty. The news was largely reported by the press only late in the day, although the intention to terminate the ECT was public knowledge at least since October 2014, when the 2015 Stability Law, which mandated the withdrawal, begun its parliamentary procedure[2]. Unsurprisingly, an early debate arose on the reasons of the withdrawal and, moreover, on its consequences for both Italy and the other participants to the Energy Charter constituency, a debate which has now gained momentum both in academic and business levels[3]. The withdrawal, in fact, will have important consequences in terms of promotion and protection of energy investments from and to Italy and, what is more, on the future of the ECT. To this respect, it is worth noting that the withdrawal took effect at a crucial point of the Energy Charter process: by then, in fact, the ISDS mechanism had just started to be fully tested by investors, especially within the EU context; furthermore, the adoption of the IEC marked the peak of the process of modernization and relaunching of the ECT since the "Warsaw Process" was launched in 2012 (see *supra*, Chapter I, § 4.2).

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[1] Art. 49 ECT ("Depositary"): "*The Government of the Portuguese Republic shall be the Depositary of this Treaty*".

[2] The 2015 Stability Law bill was presented by the Government to the Parliament on 23 October 2014 and was approved by the latter, with modifications, on 22 December 2014.

[3] See A. DE LUCA, *Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom*, in *TDM*, 3, 2015, p. 9.

This chapter focuses, in the first place, on the Italian withdrawal from the Treaty (§ 2). More specifically, it investigates its rationales (§ 2.1) and, more important, its consequences in terms of investment promotion and protection (§ 2.3). In the second place, the chapter examines the disputes filed against the Italian State under Art. 26 ECT (§ 3). To this respect, after having taken into account the current state and practice of the ECT ISDS regime (§3.2) and the reasons of the sudden raise of disputes against Italy (§§ 3.3 and 3.4), the chapter focuses on two cases, namely *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) (§ 4) and *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) (§ 5). Both cases are still pending. The earlier is the first case filed against Italy and awarded under Art. 26 ECT. As to the latter, a decision on an application under Rule 41(5) of the ICSID Rules of Procedures for Arbitration Proceedings has been rendered by the tribunal established to settle the controversy. The chapter is closed by some conclusive remarks on the questions discussed therein (§ 6).

2. Italy's withdrawal from the ECT

2.1. The reasons of the withdrawal

As is known, Italy is among the promoters of the Energy Charter process: on 17 December 1991, it signed the EEC; three years later, it signed the ECT and the PEEREA, both of which were ratified on 5 December 1997[4] and entered into force on 16 April 1998; on 13 July 2001, it ratified the 1998 Amendment to the Trade-related provisions of the ECT, which entered into force on 21 January 2010; finally, on 20 May 2015, it signed the IEC. It is no surprise, therefore, if the withdrawal of one of the founding Contracting Parties to the ECT was unexpectedly welcomed by the press and specialized commentators, which tried to find out the reasons of such a sharp decision[5].

At first, the withdrawal was seen as a reaction to the first investor-State dispute filed against Italy under Art. 26 ECT, i.e. *Blusun*, which was filed before the ICSID on 4 February 2014 and was registered by ICSID's Secretary-General on 21 February 2014[6]. By withdrawing from the Treaty – so it was submitted – Italy would have tried to avoid the "snowballing" effect that *Blusun*, a dispute concerning a photovoltaic

[4] The ECT and the PEEREA were jointly ratified through Law 10 November 1997, n. 415 "*Ratifica ed esecuzione del trattato sulla Carta europea dell'energia, con atto finale, protocollo e decisioni, fatto a Lisbona il 17 dicembre 1994*", Italian Official Journal, General Series n. 283 of 4.12.1997 – Ordinary Supplement n. 241.

[5] On Italy's withdrawal from the ECT, see: A. DE LUCA, *op. cit.*, pp. 10-13; B. LE BARS, *Recent Developments in International Energy Dispute Arbitration*, in *Journal of International Arbitration*, 5, 2015, pp. 543-545; C. PEINHARDT – R. L. WELLHAUSEN, *Withdrawing from Investment Treaties but Protecting Investment*, in *Global Policy*, 4, 2016; T. VOON – A. D. MITCHELL, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, in *ICSID Review*, 2, 2016, pp. 413-433; I. G. IACOB – R. E. CIRLIG, *The Energy Charter Treaty and settlement of disputes – current challenges*, in *Juridical Tribune*, 1, 2016, pp. 71-83; A. A. KONOPLYANIK, *The role of the ECT in EU–Russia energy relations*, in R. LEAL-ARCAS – J. WOUTERS (eds.), *op. cit.*, pp. 139-144; A. ROSS, *What lies behind Italy's ECT exit?*, in *Global Arbitration Review*, 3, 2015; N. GALLAGHER, *ECT and Renewable Energy Disputes*, in M. SCHERER (ed.), *op. cit.*, pp. 272-274.

[6] See *Blusun*, Award, paras. 6-7.

(PV) project, would have had on the inception of similar cases. Starting from 2011, in fact, Italy reduced the subsidies previously granted to the renewable energy sources (RES) sector, notably the PV. In other words, Italy would have tried to avoid the fate suffered by other EU Member States, notably Spain and the Czech Republic, which, after having introduced important reforms in the RES sector, were literally submerged by disputes under Art. 26 ECT[7]. As we will largely see in next pages, however, the withdrawal will have limited effects in this sense, since it will not affect the disputes incepted before 1 January 2016 and, what is more, will not prevent the inception of new litigations thereafter.

According to other comments, the decision to abandon the Treaty would have rather to do with other reasons, in particular: the reshaping of the role played by the ECT for the Italian State following Russia's decision not to ratify it and to terminate its provisional application; the non-participation of other energy-supplying Countries such as Algeria and Norway, which have not ratified the Treaty; the shift in the Italian (and EU) external energy relations over the last decade, especially as regards eastern European Countries[8]. To this respect, we already saw that, following the latest EU enlargements and the setting up of the Energy Community, the EU energy *acquis* has been *de facto* extended also to eastern European States.

According to other reports, the decision had more to do with the problematic set of issues arising from the mixed participation of the EU and its Member States to the ECT, notably as far as the promotion and protection of energy investments within the EU is concerned. As we extensively pointed out in the previous chapter, the application of the ECT to EU internal relations, notably those intra-EU, raises many issues as to its compatibility with fundamental principles of EU law, such as the autonomy of the EU legal order and the principle of sincere cooperation[9].

Despite these latter argumentations may well explain why Italy abandoned the Treaty, the withdrawal was officially justified by mere needs of spending review. Following the 2008 economic crisis, in fact, the Italian public sector underwent to a process of "rationalization". To this respect, Law 23 December 2014, n. 190 (2015 Stability Law)[10], in Art. 1, para. 318[11], delegated the Ministry of Foreign Affairs and International Cooperation to renegotiate the voluntary and compulsory contributions of Italy to international organizations, in order to reduce the public spending for a total amount of € 25.243.300 for 2015 and € 8.488.300 starting from 2016. According

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7 www.diritto24.ilsole24ore.com/art/avvocatoAffari/mercatiImpresa/2015-05-04/dal-2016-italia-fuori-carta-energia-conseguenze-gli-investitori-102105.php.

8 See A. DE LUCA, *op. cit.*, pp. 10-11.

9 *Ibid.*, p. 11.

10 Law 23 December 2014, n. 190 "*Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2015)*", Italian Official Journal, General Series n. 300 of 29.12.2014 – Ordinary Supplement n. 99.

11 Art. 1, para. 318, of Law 190/2014: "*Il Ministero degli affari esteri e della cooperazione internazionale provvede agli adempimenti eventualmente necessari, anche sul piano internazionale, per rinegoziare i termini degli accordi internazionali concernenti la determinazione dei contributi volontari e obbligatori alle organizzazioni internazionali di cui l'Italia è parte, per un importo complessivo pari a 25.243.300 euro per l'anno 2015 e a 8.488.300 euro a decorrere dall'anno 2016. Le relative autorizzazioni di spesa si intendono ridotte per gli importi indicati nell'allegato n. 8 annesso alla presente legge, per cui, a decorrere dall'anno 2015, non è ammesso il ricorso all'articolo 26 della legge 31 dicembre 2009, n. 196*".

to Annex 8 to Law 190/2014, which indicates the amount of the expenditure reduction for each international organization and the mean for its achievement – the Annex distinguishes between "*riduzione*" (reduction) or "*recesso*" (withdrawal) – the mean by which "reducing" the Italian contribution to the Energy Charter Secretariat consisted in the withdrawal ("*recesso*") from the European Energy Charter ("*Carta europea dell'energia*"), a measure expected to generate yearly savings in the amount of € 450.000 from 2016 onwards.

Unsurprisingly, the decision to leave the most relevant multilateral treaty existing in the energy field for mere budgetary reasons was largely criticized, both for formal and substantial reasons. Starting with Law 190/2014, it must be noticed that the above-mentioned Annex 8, instead of providing for the "renegotiation" – as stated in Art. 1, paragraph 318, of Law 190/2014 – of the Italian contribution to the ECT, sharply foresees the withdrawal from the EEC. To this end, it is worth noting that Annex 8, instead to the Energy Charter Treaty (in Italian: "*Trattato sulla Carta dell'energia*"), refers to the European Energy Charter ("*Carta europea dell'energia*"), which, as known, is not an international treaty but a political declaration deprived of legally binding commitments. Moreover, with respect to the financial concerns, it has been argued that before opting for such a drastic solution, Italy could have at least tried to renegotiate its contribution to the Secretariat's balance: among the many competences conferred to the Energy Charter Conference, in fact, Art. 34(3)(e) ECT foresees the power to "*consider and approve the annual accounts and budget of the Secretariat*". On the contrary, the decision was preceded by no dialogue with the other ECT Contracting Parties and Institutions and, what is more, with EU Institutions and Member States[12]. An aptitude which sensibly departs from the very purpose of the Treaty, i.e. "*promote long-term cooperation in the energy field, based on complementarities and mutual benefits*", and from the principle of fair collaboration which is at the base of the functioning of the EU system.

In light of these considerations, the decision to denunciate the Treaty for alleged budgetary reasons appears short-sighted. To this end, it is worth remembering that on May 2015, that is only few months after the notification of the withdrawal, Italy signed the IEC, therefore committing itself, although on a hortatory basis, in modernizing the Energy Charter process and relaunching the ECT as the reference system for global energy security. The position of the Italian State towards the ECT, therefore, appears at least ambiguous, especially considering that the IEC, among others, encourages its signatories to favour the promotion and protection of investments by proclaiming that "*The signatories affirm the importance of full access to adequate dispute settlement mechanisms, including national mechanisms and international arbitration in accordance with national laws and regulations, including investment and arbitration laws and rules, all the relevant bilateral and multilateral treaties and international agreements*"[13].

[12] See the Series of notes published by Mena Chambers on the Energy Charter Treaty, Note 12 of 5 May 2015 "*Italy's Withdrawal from the Energy Charter Treaty*" (available online).

[13] See Title II IEC ("Implementation), point 4 ("Promotion and protection of investments").

2.2. The effects of the withdrawal

The effects of the Italian withdrawal can be fully appreciated if one considers the *status* of Italy as both a former Contracting Party to the Treaty (a) and an EU Member State (b)[14].

Starting with point (a), it must be noticed, in the first place, that the ECT, in accordance with international law rules and principles governing the termination of treaties[15], regulates the withdrawal of a Contracting Party and its legal implications in Art. 47 ("Withdrawal")[16]. Under Art. 47(1) ECT, a Contracting Party is allowed to withdraw from the Treaty following the expiration of a period of five years from the date when the Treaty entered into force for that Contracting Party. As to Italy, we already saw that the Treaty was ratified on 5 December 1997 and entered into force on 16 April 1998: accordingly, the Italian State was allowed to withdraw from the Treaty starting from 16 April 2003.

Moreover, pursuant to Art. 47(2), the withdrawal takes effect one year after the receipt, by the Depository, of the written notification of the receding Party, unless the latter specifies a later term. To this regard, the Italian written notification provided for no delay and was received by the Portuguese Government on 31 December 2014: consequently, the withdrawal took effect on 1 January 2016[17].

Finally, since the withdrawal from the ECT implies also the cease of the effects of the Protocols eventually in force for the receding Party, starting from January 2016, the PEEREA ceased to be in force for the Italian State. Art. 47(4) ECT, in fact, states that "*All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty*", while Art. 20 PEEREA ("Withdrawal")[18] further specifies that "*Any Contracting Party which withdraws from the Energy Charter Treaty shall be considered as also having withdrawn from this Protocol*" and that the effective date of the withdrawal "*shall be the same as the effective date of withdrawal from the Energy Charter Treaty*".

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[14] Italy's withdrawal raises multiple legal issues, both from an international and EU law perspectives. According to the scope and purpose of our examination, we will focus on the most relevant questions which may have practical *procedural* effects as to the application of the ECT.

[15] See VCLT, notably Sections 3 ("Termination and Suspension of the Operation of Treaties") and 5 ("Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty").

[16] Art. 47 ECT: "*(1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Treaty. (2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of withdrawal. (3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date. (4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty*".

[17] www.energycharter.org/who-we-are/members-observers/countries/italy/.

[18] Art. 20 PEEREA: "*(1) At any time after this Protocol has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Protocol. (2) Any Contracting Party that withdraws from the Energy Charter Treaty shall be considered as also having withdrawn from this Protocol. (3) The effective date of withdrawal under paragraph (1) shall be ninety days after receipt of notification by the Depositary. The effective date of withdrawal under paragraph (2) shall be the same as the effective date of withdrawal from the Energy Charter Treaty*".

As regards the effects of the withdrawal on Italy's participation to the Energy Charter constituency, it is worth noting that Italy lost its *status* as "member" of the Energy Charter Conference and acquired that of "observer". According to Art. 34 ECT ("Energy Charter Conference"), paragraph (1), the *status* of member of the Charter Conference is granted to the Contracting Parties to the Treaty[19], while the *status* of observer is recognized to the signatories of the EEC as well as the signatories of the IEC. Since Italy is a signatory of both the EEC and the IEC, it is provided with the *status* of observer to the Charter Conference.

As regards the consequences of the withdrawal in terms of investment promotion and protection, the relevant provision for present purposes is the so-called "sunset clause" embodied in Art. 47(3) ECT. As seen before, pursuant to Art. 47(3) ECT, "*The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date*" (underlining added). Accordingly, investments made in Italy by investors from other Contracting Parties before 1 January 2016, as well as investments made by Italian investors in the areas of other Contracting Parties by the same period, will be covered by the ECT until the end of 2035. In other words, said investors will be able to rely on Art. 26 ECT for a long time to come. In light of this, it is clear enough how the above-referred hypothesis according to which the Italian withdrawal is to be interpreted as a countermeasure to avoid or limit the arbitral cases opened against Italy is little persuasive, at least from a practical point of view: if on the one hand the termination of the Treaty will deprive post-withdrawal investments from the protection of the ECT, on the other hand it will not interrupt pending disputes and, what is more, will not avoid the inception of new cases regarding pre-2016 investments until the end of 2035.

To this respect, it must be noticed that the application of Art. 47(3) ECT is not immune from practical interpretative questions. In Chapter I we pointed out how segmenting an investment into different phases may be a difficult task, especially if one tries to distinguish between a pre and a post-investment phase (see *supra*, Chapter I, § 3.4.3). Here, interpretative difficulties arise when determining whether an investment-related activity is to be considered as made before or, conversely, after the withdrawal, and therefore whether it is protected by the Treaty. Take the case of an economic contribution supplied after the withdrawal (in our case after 2015), but closely related to an investment already in place: is it to be considered as a "new" investment and, as such, outside the scope of Art. 47(3) ECT and, therefore, Art. 26 ECT? Or is it to be considered as a segment of an existing investment, thus falling within the scope of the sunset clause and Art. 26 ECT?

Focussing on point (b), i.e. the consequences of the withdrawal if one takes into account the Italian membership to the EU, the main question is whether, to what

[19] Art. 34(1) ECT: "*The Contracting Parties shall meet periodically in the Energy Charter Conference (referred to herein as the "Charter Conference") at which each Contracting Party shall be entitled to have one representative. Ordinary meetings shall be held at intervals determined by the Charter Conference*".

extent and how energy investments from and towards Italy will remain protected by the ECT via Italy's membership to the EU.

The EU, in fact, remains a Contracting Party to the Treaty and, as such, is fully responsible for the observance of the Treaty, as extensively pointed out in the previous chapter (see *supra*, Chapter II, § 5.3). Under Art. 23(2) ECT[20], the dispute settlement provisions laid down in Part V of the ECT can be invoked, in principle, in respect of measures affecting the observance of the Treaty by the Union which have been taken by regional or local governments or authorities within the EU area. Accordingly, as long as Italy keeps its EU membership – or, using the registry of Art. 1(10)(b)[21], remains part of the EU "area" – post-2015 investments from and towards Italy may be "indirectly" protected through the Union's participation to the Treaty. As explained below, however, such an "indirect" protection presents certain limits. To this end, it may be useful to bear in mind the scenarios outlined in the previous chapter (see *supra*, Chapter II, § 4) and, more specifically: scenario "c" (dispute between an investor of a non-EU State against the EU); scenario "f" (dispute between an investor of an EU Member State against the EU); scenario "g" (dispute involving an investor claiming the EU citizenship and a non-EU State); scenario "h" (dispute involving an investor claiming the EU citizenship and an EU Member State).

In order to protect an investment made in an extra-EU State party to the Treaty for alleged breaches of ECT investment provisions, an Italian investor may file a dispute under Art. 26 ECT via its EU citizenship (scenario "g"). To this respect, the three conditions laid down in Art. 26(1) ECT in order to incept a dispute under the ECT would be, in principle, met: the Contracting Party of the claimant (EU) and the respondent party (an extra-EU State) are different parties to the Treaty (condition *ratione personae*); the investment is made in the area of the respondent (condition *ratione loci*); the alleged breach concerns an obligation binding the respondent under Part III ECT. As regards the condition *ratione personae*, there should be no problem in recognizing the EU citizenship to an Italian investor, since the Treaty, as explained before, construes the concept of citizenship/nationality by reference to the applicable law of the Contracting Party concerned, in our case the EU (see *supra*, Chapter II, § 6.4). Under EU law, in fact, the EU citizenship derives from the EU Member States' nationalities, although it does not replace the latter. For an arbitral tribunal, therefore, it would be sufficient to verify whether the investor concerned holds the EU citizenship, irrespective of whether it derives from an EU Member State party to the Treaty or from a Member State which is not a party to the ECT, as is the case with Italy. To this respect, the main threshold to incept a case of this kind is the qualification of the investor as an investor of the EU. As pointed out by the tribunal in *Eiser*, in fact, if the investor is a company rather than a national "[…] *it is not evident how there can be an "Investor of the EU" satisfying Article 1(7)(a)(ii) definition. There is no trans-*

[20] Art. 23(2) ECT: "*The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party*".

[21] According to Art. 1(10)(b), second clause, of the ECT, "*With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation*".

national body of European law regulating the organization of business units, a matter that remains subject to member countries' domestic law. Thus, within the framework of the definition, there can be no "EU Investors." Investors exist only as "Investors" of a "Contracting Party." […]"[22].

As regards the opposite case, i.e. an extra-EU investor willing to protect an investment made in Italy by submitting the dispute against the EU (scenario "c"), the main problems are likely to arise with respect to the condition *ratione materiae*, i.e. when determining whether the Union can be held responsible for the breach at hand. To this respect, the already examined question of the apportionment of the international responsibility of the Union and its Member States for breaches of international commitments comes into play. The conditions *ratione personae* and *ratione loci*, conversely, would be satisfied, since the difference of parties and of territories would be met.

With respect to an Italian investor willing to protect an investment made in an EU Member State by means of its EU citizenship (scenario "h"), questions arise in particular as regards the conditions *ratione loci* and *ratione materiae*. In principle, the differentiation of parties required by the condition *ratione personae* would be met, since the EU and its Member States are distinct Contracting Parties to the Treaty. As regards the condition *ratione materiae*, the claimant would have to demonstrate that the responsible of the breach at hand is the EU, a task that, as seen in the previous chapter and recalled above, may be thorny. As regards the condition *ratione loci*, the respondent may claim that the investment is made in the same area of the claimant, since the respondent's area is part of the wider EU area. To this respect, it may be worth recalling again some of the conclusions reached by the tribunal in *Charanne* and confirmed by other ECT arbitral tribunals, according to which "*Article 1(10) of the ECT, in order to define the concept of "area" refers to both the territory of the Contracting States (Article 1(10)(a)) and the EU territory (Article 1(10) second paragraph). Therefore, it appears reasonable to deduce that, in referring to investments made "in the territory" of a contracting party, Article 26(1) refers to both, in the case of a EU member State, to the territory of a national State as well as the territory of the EU. There is no rule in the ECT according to which a different interpretation can be inferred*"[23]; "*To know if the term "territory" refers to one or the other depends on the content of the claim and the entity against which the claim is directed. An investor may well sue the EU based on allegedly unlawful acts committed by it. In this case, it could be considered that for the purposes of Article 26 of the ECT, the dispute is related to an investment made in the territory of the EU*" (underlining added)[24]. In any event, it must be noticed that ECT arbitral tribunals established to settle intra-EU disputes, when considering whether claimants of EU Member States should be considered as investors of those States or of the EU, stated that in the latter case the dispute would not be admissible, since it would concern an investment made by an investor of the EU in the territory of the EU. In *Charanne*, which opposed investors from The Netherlands and Luxembourg against Spain, the tribunal considered that "[…] *The issue that the Arbitral Tribunal has to resolve is whether, in the context of this dispute, the Claimants can be considered as investors of the Netherlands and Luxembourg respectively or whether they should be considered as investors of the*

[22] *Eiser*, Award, para. 196.
[23] *Charanne*, Final Award (Unofficial English translation by Mena Chambers), para. 430.
[24] *Ibid.*, para. 431.

EU. In the latter case, since Spain is part of the EU, the dispute would cease to oppose a contracting party and an investor of another contracting party within the meaning of Article 26(1) of the ECT as it would be the case of an investment by an investor of the EU in the territory of the EU" (underlining added)[25]. Similarly, in *Isolux*, which opposed an alleged investor from The Netherlands against Spain, the tribunal observed that it had to determine "[...] *si la pertenencia de los Países Bajos y de España a la UE tiene como consecuencia que ISOLUX puede considerarse como un inversor de la UE que realizó una supuesta inversión en la UE. Si así fuera, la condición de diversidad de territorio que resuelta del Artículo 26.1 no sería cumplida*" (underlining added)[26]. A dispute of this kind, therefore, would be inadmissible under the ECT, since it would fail the *ratione loci* test. In addition, similar to scenario "g" above, the same threshold of the qualification of a company as an "investor of the EU" arises in this case.

Finally, we can imagine the case of an investor of an EU Member State, say Spain, willing to protect an investment made in Italy by suing the EU for alleged breaches of ECT Part III obligations (scenario "f"). Under the condition *ratione personae*, the dispute would be, in principle, admissible, since Spain and the EU are different Contracting Parties to the Treaty. As pointed out by the tribunal in *Electrabel* "[…] *the European Union also accepted in signing the ECT to submit itself to international arbitration, thereby accepting the possibility of an arbitration between the European Union and private parties, whether nationals of EU or Non-EU Member States and whether held within or without the EU*" (underlining added)[27]. Nonetheless, since the Spanish investor is also an EU citizen, it can be contended that the difference of nationalities required by Art. 26(1) ECT would be unmet. An arbitral tribunal, therefore, would have to determine whether the claimant is to be considered as an investor of Spain exclusively or also of the EU. As seen, while the EU citizenship derives from and does not replace Member States' nationalities, the latter does not derive from that of the Union. Further concerns arise with respect to the condition *ratione loci*. While the Spanish investor may claim that the investment made in Italy is an investment made in the area of the EU, it could be objected that the relevant area is that of Italy rather than that of the EU and, what is more, that there would be no difference of territories, since Spain (as well as Italy) is part of the wider EU area. As regards the condition *ratione materiae*, the Spanish investor would have to prove that the breach at hand is attributable to the EU and not to the Italian State.

With respect to the scenarios depicted above, it is worth making two overall considerations. In the first place, it must be recalled that, as far as disputes involving the EU are concerned, ICSID arbitration – either under the ICSID Convention or the ICSID Additional Facility Rules – is inaccessible. As seen before, in fact, the EU is not party to the ICSID Convention and the ICSID Additional Facility rules are available only to disputes involving States and not international organizations (see *supra*, Chapter II, § 5.2). To this regard, the preclusion of ICSID Arbitration may represent a formidable deterrent for the inception of disputes under the ECT.

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[25] *Ibid.*, para. 428.
[26] *Isolux*, Award, para. 234.
[27] *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.163.

In any event, one has to bear in mind that Italy is presently party to numerous International Investment Treaties (IITs), both as an autonomous State and as an EU Member State, which may provide Italian investors and, similarly, foreign investors investing in Italy, with appropriate means by which protecting their investments, in particular those made after the 1th of January 2016[28]. To this regard, it is worth noting that, while Italy has been named as respondent in at least eleven disputes under the Treaty, the Energy Charter Secretariat is currently aware of three litigations involving Italian investors[29], i.e. *Alstom Power Italia SpA and Alstom SpA v. Republic of Mongolia* (ICSID Case No. ARB/04/10)[30], *Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania* (ICSID Case No. ARB/14/26)[31] and *Foresight Luxembourg Solar 1 S. Á.R1., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy Ii S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150)[32]. The first was filed before the ICSID on March 2004 and concerned an energy efficiency improvement project, more precisely a thermal energy station project related to boiler rehabilitation. There is little information on the dispute, since no details have been made publicly available. However, it appears that the claimants invoked breaches of the Italy-Mongolia BIT of 1993[33] and the ECT and that the dispute was eventually terminated on 13 March 2006, when the parties reached an agreement and discontinued the proceeding. The second, still pending, was registered by the ICSID on 7 November 2014 and concerns a waste management and renewable energy production project. The latter was filed on 2015 and, to our knowledge, arose from the reforms introduced by Spain in the RES sector, including taxes on power generators' revenues and reductions in subsidies for renewable energy producers (see *infra*, § 3.2).

As to the effects of Italy's withdrawal from the ECT, a final aspect is worth our attention. As seen in Chapter II, the European Commission has maintained the incompatibility with EU law of the ISDS clauses included in intra-EU BITs, on the grounds that said clauses would conflict, *inter alia*, with the principle of non-discrimination laid down in Art. 18 TFEU. In short, said clauses would be discriminatory, since the right to make use of international arbitration is recognized only to the investors of the Member States which are party to the BIT, with the exclusion of the investors of the Member States which, conversely, are not party to it. In Chapter II, we have also seen that under the EU law, the ECT qualifies as a mixed agreement, since both the EU and its Member States joined it. To this respect, it is

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[28] See: http://investmentpolicyhub.unctad.org/IIA/CountryBits/103#iiaInnerMenu.

[29] Indeed, there are other two cases which apparently involve Italian investors, namely *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) and *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14). As to the earlier, we will see that the claimant is an Italian company allegedly controlled by foreign investors (see *infra*, § 5). As to the latter, it can be noticed that Rockhopper Italia S.p.A is a subsidiary of Rockhopper Exploration plc, an international oil and gas exploration and production company incorporated and headquartered in the UK.

[30] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/04/10.

[31] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/26.

[32] http://investmentpolicyhub.unctad.org/ISDS/Details/837.

[33] The BIT was signed on 15 January 1993, entered into force on 1 September 1995 and is still in force.

difficult to see how the ISDS clause laid down in Art. 26 ECT can conflict with the principle of non-discrimination enunciated in Art. 18 TFEU, since all EU Member States are parties to the Treaty.

However, following Italy's withdrawal from the ECT, the latter can be better described as an "incomplete" mixed agreement, since not all the EU Member States are presently party to it[34]. As a consequence, notwithstanding the effects of the sunset clause laid down in Art. 47(3) ECT, the intra-EU application of the ECT may be seen now as inconsistent with the principle of non-discrimination provided for in EU law[35]. To this respect, however, it is worth noting that for AG Wathelet, a breach of the non-discrimination principle cannot be invoked as far as a voluntary decision to withdraw is concerned. With regard to BITs, Wathelet considered that: "*The Slovak Republic also concluded BITs with the Czech Republic and the Italian Republic, but the parties have terminated them. If there is thus a difference in treatment of Czech and Italian investors, that is because their Member States decided to withdraw from them the benefit which the BITs specifically conferred on them. Nonetheless, Estonian, Irish, Cypriot and Lithuanian investors do not benefit from a provision equivalent to Article 8 of that BIT vis-à-vis the Slovak Republic, except for investments in the field of energy, where the Energy Charter Treaty affords them such an opportunity. In my view, even in the case of those investors there is no discrimination prohibited by EU law*." (underlining added)[36].

3. The involvement of Italy in investor-State disputes under Art. 26 ECT

3.1. Overview of the disputes

As seen before, the Energy Charter Secretariat is currently aware of eleven disputes filed against the Italian State under Art 26 ECT:

1) *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3): registered by the ICSID on 21 February 2014, the dispute was filed by a group of Belgian (Blusun SA), French (Jean-Pierre Lecorcier) and German (Nichael Stein) investors on 4 February 2014. The dispute saw the *amicus curiae* intervention of the European Commission and was awarded on 27 December 2016. Currently, an annulment proceeding filed by the claimants in accordance with Art. 52 of the ICSID Convention is underway[37].
2) *Greentech Energy Systems and Novenergia v. Italy* (SCC Case No. 095/2015): registered by the AISCC on 7 July 2015, the dispute was filed by two investors from, respectively, Denmark (Greentech Energy Systems) and Luxembourg (Novenergia)[38].

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[34] The term "incomplete mixed agreements" generally refers to agreements to which not all EU Member States *acceded*. In our case we have a different situation, where all EU Member States acceded and one of them withdrew at a later time. In any event, the term can be as well used in the present case to remark the *status* of the ECT under EU law, with all its possible consequences.

[35] On this point, see C. CROSS – V. KUBE, *op. cit.*, pp. 24-25.

[36] Opinion of AG Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, EU:C:2017:699, paras. 63-65.

[37] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/3.

[38] http://investmentpolicyhub.unctad.org/ISDS/Details/634.

3) *Silver Ridge Power BV v. Italian Republic* (ICSID Case No. ARB/15/37): registered by the ICSID on 11 August 2015, the dispute was brought by a Dutch investor[39].
4) *Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40): case registered on 22 September 2015 by the ICSID on request of a Luxembourg investor[40].
5) *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50): case registered by the ICSID on 22 December 2015 on request of a Belgian investor. As we will see more in detail (see *infra*, §§ 4 and 5), this case is closely linked to *Blusun*, notably as regards the merits of the dispute[41].
6) *CEF Energia BV v. Italian Republic* (SCC Case No. 158/2015): case brought before the AISCC on 2015 by a Dutch investor[42].
7) *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic* (ICSID Case No. ARB/16/5): case filed on 8 March 2016 before the ICSID by a group of German (ESPF Beteiligungs GmbH and InfraClass Energie 5 GmbH) and Austrian (ESPF Nr. 2 Austria Beteiligungs GmbH) investors[43].
8) *VC Holding II S.a.r.l. and others v. Italian Republic* (ICSID Case No. ARB/16/39): registered by the ICSID on 6 December 2016, the dispute was brought by a group of investors from Germany (CIC Renewable Energies Italy GmbH; Enernovum Asset 1 GmbH; Enernovum GmbH; SolEs XX Projekt GmbH, SolEs XXI Projekt GmbH, SolEs XXII Projekt GmbH, SolEs XXIII Projekt GmbH, SolEs Zarasol GmbH), UK (Foresight European Solar 2 Ltd.) and Luxembourg (Foresight Luxembourg (VCT) 2 S.a.r.l.; Foresight Luxembourg Solar 4 S.a.r.l.; VC Holding II S.a.r.l.)[44].
9) *Sun Reserve Luxco Holdings SRL v. Italy* (SCC Case No. 132/2016): dispute brought by a Luxembourg investor before the AISCC on 2016[45].
10) *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14): dispute brought by Rockhopper Exploration Plc (British), Rockhopper Italia S.p.A. (Italian), Rockhopper Mediterranean Ltd (British) before the ICSID on 19 May 2017[46].
11) *Veolia Propreté SAS v. Italian Republic* (ICSID Case No. ARB/18/20): dispute filed by a French investor on 20 June 2018[47].

The disputes were filed between 2014 and 2018 (one in 2014, five in 2015, three in 2016, one in 2017 and one in 2018). Excepting for *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14), which concerns an oil mining concession, all disputed were triggered

[39] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/37.
[40] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/40.
[41] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/50.
[42] http://investmentpolicyhub.unctad.org/ISDS/Details/770.
[43] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/5.
[44] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/39.
[45] http://investmentpolicyhub.unctad.org/ISDS/Details/830.
[46] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/14.
[47] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/20.

due to the modifications introduced between 2010 and 2014 in the Italian renewable energy sector, notably the PV. All eleven disputes were filed by investors of other EU Member States parties to the Treaty (Austria, Belgium, Denmark, France, Germany, Luxembourg, The Netherlands, UK), i.e. they all qualify as intra-EU disputes. Among the various channels made available by Art. 26(4) ECT to investors who choose to submit disputes to international arbitration or conciliation (i.e. ICSID, UNCITRAL, AISCC), the most relied on is by far the ICSID, administering eight cases, while the AISCC has been chosen three times and no dispute has been submitted to UNCITRAL arbitration. Only one dispute has been awarded so far, namely *Blusun* (see *infra*, § 4), while a decision on the preliminary objections raised by Italy pursuant to ICSID Arbitration Rule 41(5) has been rendered on March 2017 by the tribunal constituted to settle *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) (see *infra*, § 5).

3.2. The disputes in the context of the ECT ISDS regime

The sudden raise of disputes against Italy can be fully understood as long as the most recent trends of the ECT ISDS regime are taken into account. As mentioned before (see *supra*, Chapter I, § 5), the number of disputes filed under Art. 26 ECT has literally boomed starting from 2013: sixteen new cases were filed in 2013, twelve in 2014, twenty-nine in 2015, thirteen in 2016, six in 2017 and, as to date, four in 2018, for a total amount of eighty new cases initiated between 2013 and 2018 (for an average of thirteen new cases per year), against the thirty-seven cases initiated between 2001 – i.e. when the first dispute was filed under Art. 26 ECT – and 2012 (for an average of approximately three new cases per year). Most of the disputes filed between 2013 and 2018 – which represent approximately the 70% of all cases so far filed under the ECT – concern renewable energy-related issues and have mostly arisen from the modifications introduced in State legislations on renewables, notably in the PV sector. The disputes are mainly intra-EU and have been mostly filed against Spain (currently involved in around forty disputes), Italy (eleven disputes) and the Czech Republic (six disputes). As to the arbitration *fora*, investors have mainly chosen the ICSID (governing fifty-three disputes), while the UNCITRAL (governing twelve disputes, six of which have been opened against the Czech Republic alone), and the AISCC (governing fifteen cases) have proven to be less attractive options. In short, during the 2013-2018 period, a swift raise of intra-EU investor-State disputes, especially against Spain, Italy and the Czech Republic, on renewable energy related issues, has been experienced in the ECT ISDS context. That said, what are the rationales behind such an exponential increase of litigations?

Classifying the disputes according to a specific denominator, e.g. the energy sector concerned, is not an easy – if not useless at all – task, since each litigation is shaped by specific features, such as the legal framework within which they arise, the parties involved, the violations complained, the damages allegedly suffered by the investors and so on. As it has been noticed, disputes arising in the same energy sector (e.g. renewable, nuclear, gas *etc.*) may concern quite different issues, while disputes arising

in different sectors may conversely involve similar questions[48]. In our case, however, it is possible to pinpoint some common features to these disputes and, therefore, appreciate the current state and evolution of the ECT ISDS regime.

As is known, generating energy from renewable sources (wind, solar, hydro, tidal, geothermal and biomass), especially for the purposes of electricity supply, is less profitable than resorting to conventional sources (oil, gas and carbon): setting up and running renewable energy conversion systems (windmills, solar panels *etc.*) require higher financial resources than fossil facilities and do not grant suitable returns on investments for those investors interested in acceding the electricity market. State support is therefore vital in order to overcome this failure of the market and to attract investors in such a strategic area of State economic activity.

During the last decade, in order to comply with their international obligations on the fight to climate change and global warming, to boost economic and employment growth in the green and high-tech economy and to reduce energy dependence, many States have largely subsidised the renewable sector. As a consequence, a massive growth of investments has been experienced in the field. It is no surprise, therefore, if the increasing regulation of the RES sector, coupled with the exponential increase of investments therein, has inevitably led to the raise of disputes between investors, determined in maintaining the favourable conditions originally accorded to their investments, and States, resolved in fully exercising their regulatory powers[49]. Moreover, since renewable energy investments strongly rely on governmental support, they are particularly exposed to any relevant change in State energy and investment laws and policies. To this regard, following the global economic and financial crisis started on 2008, renewable energy incentive schemes have been reshaped worldwide by States affected by public spending constraints: the high level of subsides accorded to the green sector, which in many cases led to electricity tariff deficits amounting to billions of euros, was in fact no longer sustainable. As a result, the number of litigations initiated on the basis of the ECT, as well as of other international instruments promoting and protecting energy investments (such as the BITs), increased dramatically[50].

To this regard, EU Member States made no exception. The EU's commitment in supporting the green energy sector is well known: in order to favour a sustainable transition towards a low-carbon economy and to foster its energy security, the Union pursues ambitious objectives on the share of renewable energy in its energy mix. Presently, the commitment consists in reaching an overall target of 20% of total

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[48] See K. TALUS, *Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases*, in *TDM*, 3, 2015, p. 3.

[49] *Ibid.*, pp. 4-6.

[50] See A. DE LUCA, *op. cit.*, p. 3. On renewable energy disputes in general and in the ECT context, see: S. MANNER – T. NIEDERMAIER, *Renewable Energy Disputes*, in M. SCHERER (ed.), *op. cit.*, pp. 86-106; N. GALLAGHER, *op. cit.*, pp. 250-275; F. MONTANARO, *"Ain't No Sunshine": Photovoltaic Energy Policy in Europe at the Crossroads Between EU Law and Energy Charter Treaty Obligations*, in G. ADINOLFI – F. BAETENS – J. CAIADO – A. LUPONE – A. G. MICARA (eds.), *op. cit.*, pp. 211-230.

energy consumption from renewable energy sources by the end of 2020[51], while for 2030 the target has been raised to 27%[52]. According to Directive 2009/28/EC[53], which is the reference legislation currently in force on the production and promotion of renewable energy in the EU, the 2020 goal is articulated in individual, mandatory, national targets, ranging from the 10% of Malta to the 49% of Sweden, to be achieved according to national renewable energy action plans: for Spain the target is 20%, for Italy 17% and for the Czech Republic 13%. To this end, the EU has encouraged and gave guidance to its Member States in defining renewable energy supporting schemes[54], in order to overcome the market failures undermining the sector and to prevent distortions in the energy market[55].

As part of the EU's commitment for a greener economy, EU Member States have promoted the renewable sector, in particular for the purposes of electric power generation, by providing for supporting measures which included, *inter alia*, feed-in-tariff (FIT) schemes, i.e. guaranteed tariffs paid at favourable prices for each unit of electricity produced by renewable energy conversion systems and fed into the grid. The level of the tariffs, which ensure appropriate returns on investments for investors acceding the green energy economy, were originally granted for long periods of time, from fifteen to twenty years or even for the entire lifetime of the renewable installations[56].

In Spain, incentive measures for the production of electricity from RES were provided since the 1990's, although it was only starting with Royal Decree 661/2007[57] that investors were provided with an attractive FIT regime. In essence, the Spanish FIT scheme granted, for an initial period of twenty-five years, a fixed, favourable price for each kilowatt per hour (kWh) of energy produced by renewable conversion

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[51] See Communication from the Commission to the Council and the European Parliament "Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future", COM(2006) 848 final of 10.01.2007.

[52] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A policy framework for climate and energy in the period from 2020 to 2030, COM (2014) 15 final of 22.01.2014. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Energy Roadmap 2050", COM(2011) 885 final of 15.12.2011.

[53] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, pp.16-62.

[54] See Commission Staff Working Document "European Commission guidance for the design of renewables support schemes" accompanying the document "Communication from the Commission Delivering the internal market in electricity and making the most of public intervention", SWD (2013) 439 final of 5.11.2013.

[55] See Communication from the Commission "Guidelines on State aid for environmental protection and energy 2014-2020" (2014/C 200/01) of 28.6.2014.

[56] See J. M. TIRADO, *Renewable Energy Claims under the Energy Charter Treaty: An Overview*, in *TDM*, 3, 2015, pp. 4-11.

[57] Royal Decree 661/2007 of 25 May "*por el que se regula la actividad de producción de energía eléctrica en régimen especial*", Spanish Official Journal n. 126 of 26.05.2007, pp. 22846-22886.

installations and fed into the grid, while from the twenty-sixth year until the expiration of the power plant's lifetime, the price was granted at a lower level[58].

In the Czech Republic, the relevant supporting scheme was introduced and perfected between 2005 and 2006. Basically, the scheme envisaged a FIT granted for fifteen years.

As we will see below (see *infra*, § 3.3), the Italian renewable energy supporting scheme envisaged "green certificates", i.e. tradable commodities attesting the "green" origin of certain amounts of electricity produced, and a FIT granted for twenty years[59].

Said measures encouraged massive investments in the renewable sector. However, starting from 2010, Spain, Italy and the Czech Republic, similarly to other EU Members (like Romania and the UK), reshaped their supporting schemes with respect to both future renewable energy projects and, more importantly, existing ones. The 2008 financial crisis, in fact, required large cuts in public spending, especially in the RES sector, where huge "tariff deficits" originated from the high rates originally granted to renewable energy producers[60]. Such modifications encompassed the reduction of the amount of the FIT paid to renewable energy producers, the limitation of the period for the application of the supporting schemes, the decrease of the number of kWh that renewable conversion facilities could transfer into the grid at subsided prices and, finally, the introduction of taxes which targeted the renewable sector, in particular the PV[61]. As a result, many disputes were initiated under the ECT by foreign investors claiming the violation of their rights under Part III ECT, especially against Spain, Italy and the Czech Republic.

From the investors' perspective, in fact, the measures referred to above were retroactive in nature, being therefore inconsistent with the fundamental principles of legal certainty and legitimate expectations. More specifically, said measures were allegedly inconsistent with the FET standard laid down in Art. 10 ECT and the provisions on indirect expropriation harboured in Art. 13 ECT[62]. In this sense, it can be asserted that the least common denominator at the base of the disputes is the recurrent tension between State right to regulate and investor's legitimate expectations[63]. To this regard, when the disputes will be settled and the outcomes rendered publicly available, the limits that States encounter when exercising their sovereign prerogatives with respect to the investor's rights are likely to be clarified[64]. In any event, it can be asserted that, in this specific stage of the ECT process, an "EUropeanization" of the ECT ISDS regime is being experienced. It remains to be seen how, following the adoption of the IEC as the cornerstone of the relaunching of

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[58] On the Spanish RES regime see P. A. PRIETO – C. A.S. HALL, *Spain's Photovoltaic Revolution. The Energy Return on Investment*, Springer, New York-Heidelberg-Dordrecht-London, 2013.

[59] On these case studies, see J. M. TIRADO, *op. cit.*, pp. 4-9.

[60] See A. DE LUCA, *op. cit.*, p. 4.

[61] See J. M. TIRADO, *op. cit.*, pp. 6-11.

[62] See A. DE LUCA, *op. cit.*, pp. 6-7.

[63] See K. TALUS, *Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases*, cit., pp. 15-16.

[64] See: J. M. TIRADO, *op. cit.*, p. 22. On States' right to regulate under the ECT, see G. COOP – I. SEIF, *ECT and States' Right to Regulate*, in M. SCHERER (ed.), *op. cit.*, pp. 221-249.

the ECT process, the process of expansion of the ECT constituency will change such a trend.

3.3. The evolution of the Italian RES supporting scheme

The Italian legal regime on renewables is rather complex, being the result of numerous legal and regulatory acts which came in quick succession in the course of time. The RES sector was comprehensively regulated starting from the 1990's, when Law 10/1990 on the implementation of the national energy plan on the national use of energy, energy efficiency and the development of renewable energy sources was adopted[65]. Starting from the 2000's, the RES sector became increasingly EU-driven: similarly to its EU partners, in fact, Italy had to comply with the EU legislation on RES, namely Directive 2001/77/EC, Directive 2003/30/EC and Directive 2009/28/EC. The latter provided for the 17% mandatory target on renewables for Italy, to be achieved through a supporting scheme regarding which a major role of guidance was assumed by the European Commission[66].

As mentioned before, the Italian RES supporting scheme has been based on two main instruments, i.e. the so-called "green certificates" and a FIT scheme known as "*Conto Energia*" ("Energy Account"), and has been managed by the *Gestore dei Servizi Energetici* (GSE), a State-owned operator whose main commitment is to promote and develop the renewable energy sector in Italy[67].

Green certificates are tradable instruments attesting the "green" origin of the energy produced by renewable energy conversion systems. They can be sold at market prices to those operators that, despite being legally obliged to produce a share of energy from renewable sources, are unable to do so on their own. Similarly to other States (e.g. USA, UK or northern-European Countries), green certificates were introduced in order to incentivise the production of electricity from renewable sources, notably wind, hydro, geothermal, biomass and tidal.

As to the FIT scheme, it was designed to promote electricity generation from PV installations and consisted, in essence, in a fix, per-kWh price paid for the energy produced and fed into the grid. The amount of the FIT varied according to specific factors, such as the capacity and the type of the PV system, and was originally guaranteed for a time period of twenty years[68].

The set-up of the FIT scheme dates back to the earlies 2000's, when Law 39/2002[69] and Legislative Decree 387/2003[70] enacted Directives 2001/77/EC and

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[65] Law 9 January 1991, n. 10 "*Norme per l'attuazione del Piano energetico nazionale in materia di uso nazionale dell'energia, di risparmio energetico e di sviluppo delle fonti rinnovabili di energia*", Italian Official Journal, General Series n. 13 of 16.01.1991 – Ordinary Supplement n. 6.

[66] See S. F MASSARI, *The Italian Photovoltaic Sector in Two Practical Cases: How to Create an Unfavourable Investment Climate in Renewables*, in *TDM*, 3, 2015, p. 1.

[67] For further information, see the GSE's website: www.gse.it/en.

[68] See J. M. TIRADO, *op. cit.*, p. 9.

[69] Law 1 March 2002, n. 39 "*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità Europee – Legge comunitaria 2001*", Italian Official Journal, General Series n. 72 of 26.03.2002 – Ordinary Supplement n. 54, in particular Art. 43 ("*Delega al Governo per il recepimento della direttiva 2001/77/CE sulla promozione dell'energia elettrica prodotta da fonti rinnovabili*").

2003/30/EC. Legislative Decree 387/2003 allowed the Minister of Productive Activities – later Minister of Economic Development[71] – to define and periodically revise the FIT scheme by means of ministerial decrees. The first FIT scheme (or "First Energy Account") was provided between 2005 and 2006[72], but it was only following the second one ("Second Energy Account"), introduced in 2007 and addressed to PV systems that would entered into operation until the end of 2010[73], that Italy experienced a boom in renewable energy investments, becoming one of the most important solar markets worldwide.

In 2010, the new Directive 2009/28/CE on renewables was enacted through Law 96/2010[74], according to which the FIT scheme was to be maintained in order to achieve the Italian 17% renewable target, although the level of the incentives was expected to be progressively reduced. Accordingly, a third FIT scheme ("Third Energy Account"), addressed to PV systems that would enter into operation between 2011 and 2013, was adopted in August 2010[75]. According to the scheme, the level of incentives granted to PV systems, which in comparison with the second scheme suffered a significant reduction, was determined according to multiple variables (PV system's type, size, nominal capacity, date of the connection to the grid *etc.*) and was granted until the overall target of 8000 MW of nominal PV capacity installed by the end of 2020 would be reached. In order to "soften" the progressive reduction of tariffs which would have taken place following the achievement of the 2020 target, accompanying measures were as well introduced, such us the preservation of the FIT for an additional period of time of fourteen months[76]. As said, the third FIT was designed for PV systems that would enter into operation between 2011 and 2013, but nonetheless was early terminated on March 2011 and soon replaced by a fourth scheme ("Fourth Energy Account"). The termination of the third scheme was due to the unsustainable economic bearing of the subsidies granted to the PV sector, particularly exacerbated by the speculation process which affected the field. Indeed, despite the third scheme (similarly to its predecessors) was to be applied with

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[70] Legislative Decree 29 December 2003, n. 387 "*Attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettricità*", Italian Official Journal, General Series n. 25 of 31.01.2004 – Ordinary Supplement n. 17.

[71] On 2006, following a process of reorganization, the Ministry of Productive Activities – previously Ministry of Industry, Trade and Craft Industries – was renamed Ministry of Economic Development.

[72] Decrees 28 July 2005 and 6 February 2006 "*Criteri per l'incentivazione della produzione di energia elettrica mediante conversione fotovoltaica della fonte solare*", Italian Official Journal, General Series n. 181 of 05.08.2005 and Italian Official Journal, General Series n. 38 of 15.02.2006.

[73] Decree 19 February 2007 "*Criteri e modalità per incentivare la produzione di energia elettrica mediante conversione fotovoltaica della fonte solare, in attuazione dell'articolo 7 del decreto legislativo 29 dicembre 2003, n. 387*", Italian Official Journal, General Series n. 45 of 23.02.2007.

[74] Law 4 June 2010, n. 96 "*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – Legge comunitaria 2009*", Italian Official Journal, General Series n. 146 of 26.06.2010 – Ordinary Supplement n. 138, in particular Art. 17 ("*Principi e criteri direttivi per l'attuazione delle direttive 2009/28/CE, 2009/72/CE, 2009/73/CE e 2009/119/CE. Misure per l'adeguamento dell'ordinamento nazionale alla normativa comunitaria in materia di energia, nonché in materia di recupero di rifiuti*").

[75] Decree 6 August 2010 "*Incentivazione della produzione di energia elettrica mediante conversione fotovoltaica della fonte solare*", Italian Official Journal, General Series n. 197 of 24.08.2010.

[76] See Z. BROCKA BALBI, *The Rise and Fall of the Italian Scheme of Support for Renewable Energy From Photovoltaic Plants*, in *TDM*, 3, 2015, pp. 7-8.

reference to the date of the connection to the grid, Law 129/2010, better known as "*Salva Alcoa*"[77], extended the application of the tariffs granted during the lapsed second FIT scheme to PV plants completed by the end of 2010 although entered into operation by June 2011. Such prorogation had the effect of exponentially increasing the investments and therefore the amount of incentives to be paid, with the consequence that the Italian sustainability of the FIT scheme, in the midst of the global and financial crisis, blew up.

The Italian authorities tried to handle the issue at hand within the framework of Legislative Decree 28/2011[78] (better known as "Romani Decree"), pursuant to which the tariffs accorded under the third scheme would apply to PV systems entered into operation by the end of May 2011[79]. Following Legislative Decree 28/2011, a fourth FIT scheme was introduced on May 2011 for PV plants entered into function after May 2011[80], and was soon followed by a fifth and last scheme introduced on July 2012[81] ("Fifth Energy Account"). Both energy accounts, in line with the attempt to downsize Italy's renewable energy supporting regime, foresaw remarkable tariff's reduction[82]. The fifth scheme ceased to apply on 6 July 2013, i.e. on the 30th day following the achievement of the yearly indicative cumulative cost of incentives of € 6,7 billion.

The modifications introduced by the Italian authorities starting from Law 96/2010 and culminated with Legislative Decree 28/2011 had the effect of progressively reshaping the scope of the FIT scheme. Nonetheless, such measures did not affect those PV plants which were already connected to the grid, i.e. from a strictly legal point of view they had no retroactive effects. In any case, they did had a detrimental impact on those operators that, despite having started the authorization or even the construction processes within a certain legal framework, found themselves obliged to operate in quite different investment conditions[83].

In 2014, a new legal reform invested the RES sector. Law Decree 91/2014[84] (better known as "*Spalmaincentivi*", literally "incentives-spreading"), as turned into law

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[77] Law 13 August 2010, n. 129 "*Conversione in legge, con modificazioni, del decreto-legge 8 luglio 2010, n. 105, recante misure urgenti in materia di energia. Proroga di termine per l'esercizio di delega legislativa in materia di riordino del sistema degli incentivi*", Italian Official Journal, General Series n. 192 of 18.08.2010.

[78] Legislative Decree 3 March 2011, n. 28 "*Attuazione della direttiva 2009/28/CE sulla promozione dell'uso dell'energia da fonti rinnovabili, recante modifica e successiva abrogazione delle direttive 2001/77/CE e 2003/30/CE*", Italian Official Journal, General Series n. 71 of 28.03.2011 – Ordinary Supplement n. 81.

[79] See Z. BROCKA BALBI, *op. cit.*, pp. 8-9.

[80] Decree 5 May 2011 "*Incentivazione della produzione di energia elettrica da impianti solari fotovoltaici*", Italian Official Journal, General Series n. 109 of 12.05.2011.

[81] Decree 5 July 2012 "*Attuazione dell'art. 25 del decreto legislativo 3 marzo 2011, n. 28, recante incentivazione della produzione di energia elettrica da impianti solari fotovoltaici (c.d. Quinto Conto Energia)*", Italian Offical Journal, General Series n. 159 of 10.07.2012 – Ordinary Supplement n. 143.

[82] See Z. BROCKA BALBI, *op. cit.*, p. 10.

[83] See J. M. TIRADO, *op. cit.*, p. 9.

[84] Law Decree 24 June 2014, n. 91 "*Disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea*", Italian Official Journal, General Series n. 144 of 24.06.2014, in particular Art. 26 ("*Interventi sulle tariffe incentivanti dell'elettricità prodotta da impianti fotovoltaici*).

by Law 116/2014[85], provided, *inter alia*, for a retroactive tariffs' cut with respect to already operating PV systems with a capacity of at least 200 kW, although with accompanying measures to be applied from 2015 onwards. More specifically, the affected operators were given the possibility to choose between three options:

1) reduction of the tariff's amount calculated on a sliding scale depending on the number of years remaining for benefitting the FIT and extension of the supporting period from twenty to twenty-four years;
2) articulation of the FIT scheme into two periods: the first characterized by a tariff reduction and the second by an equivalent raise of tariffs;
3) a 6, 7 or 8% tariffs reduction, depending on the nominal capacity of the PV system for the supporting remaining period (this option would automatically apply in the case operators would not communicate their choice within the reference deadline)[86].

To sum up, similarly to Spain and the Czech Republic, Italy provided for a FIT scheme by which promoting electricity generation from PV systems, within the framework of the EU RES policy. If on the one hand the FIT regime undoubtedly contributed to the fast and sudden development of the PV sector, especially following the adoption of the second FIT scheme, on the other hand it exacerbated the economic deficit of a Country severely affected by the 2008 global crisis. To this end, in order to reshape a no-longer sustainable system of incentives, Italy introduced a series of amendments which, starting from 2011, progressively reduced the entity and scope of renewable energy supporting measures. In the eyes of the investors operating in the sector, such measures were seen as inconsistent with the commitments assumed by Italy under Part III of the ECT, and therefore many disputes were incepted under Part V of the Treaty. To this end, it is worth recalling that the 2011-2013 reforms had no retroactive effects, contrary to the 2014 amendments that conversely did.

3.4. Some consideration on the disputes filed against Italy following the modifications introduced in the Italian RES sector

As regards the investment disputes filed against Italy under Art. 26 ECT, *Blusun* and *Eskosol* arose from the legal reforms introduced before 2014. It is worth noting, to this respect, that the pre-2014 measures were challenged by some PV operators before the Italian administrative courts, which nonetheless ruled on their legality on the grounds that they had no retroactive effects: for the administrative judge, in fact, investors acquire vested rights only starting from the date of the connection to the grid, being therefore all the preparatory activities (attainment of authorizations, construction activities *etc.*) outside the vested rights' scope[87].

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[85] Law 11 August 2014, n. 116 "*Conversione in legge, con modificazioni, del decreto-legge 24 giugno 2014, n. 91, recante disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea*", Italian Official Journal, General Series n. 192 of 20.08.2014 – Ordinary Supplement n. 72.

[86] See J. M. TIRADO, *op. cit.*, pp. 10-11.

[87] See Z. BROCKA BALBI, *op. cit.*, pp. 11-12.

As regards the 2014 amendments, it is worth noting that Law Decree 91/2014, as turned into law by Law 116/2014, was submitted to the judicial review of the Italian Constitutional Court, which was called to decide on the constitutionality of Art. 26, paragraphs 2 and 3, which provided for the retroactive tariff reduction referred to above. Taken together, said provisions were said to be unreasonable, discriminatory and inconsistent with the principle of legitimate expectations and, consequently, in breach of the following Articles of the Italian Constitution: Art. 3 (on equality)[88]; Art. 41 (on private economic enterprise)[89]; Articles 11[90] and 117(1)[91] (on the Italian participation to international organizations and systems such as the EU); Art. 77 (on law decrees)[92]. In short, the legislation involved would have been adopted without a proper balance between the interests at stake, namely State financial needs *versus* the investors' acquired rights, and with no reasonable link between the aim pursued by the legislator and the unilateral and authoritative character of the legislation adopted.

Such allegations, however, were rejected by the Constitutional Court which, with Judgement n. 16/2017[93], declared the groundlessness of the question of constitutionality raised with respect to said norms and ruled on the lawfulness of the cuts introduced in the PV sector. For the Constitutional Judge, in fact, the 2014 measures were adopted in the public interest and in accordance with a reasonable balance between the interests at stake, i.e. the support to the production of energy from renewable sources and the sustainability of the costs bearing on final electricity consumers. In the Court's view, the reshape of the Italian RES supporting scheme, instead of radically affecting the investments involved, was conversely formulated in a sustainable way. Furthermore, it was not unpredictable and, therefore, inconsistent with the investors' legitimate expectations, since a "cautious and watchful economic

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[88] Art. 3 of the Italian Constitution: "*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country*".

[89] Art. 41 of the Italian Constitution: "*Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes*".

[90] Art. 11 of the Italian Constitution: "*Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends*".

[91] Art. 117(1) of the Italian Constitution: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*".

[92] Art. 77 of the Italian Constitution: "*The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure*".

[93] See Italian Constitutional Court, Judgement n. 16 of 7.12.2016, Italian Official Journal, 1th Special Series – Constitutional Court n. 5 of 01.02.2017.

operator" would have been able to take into account possible normative evolutions, considering the temporary and changing nature of the RES supporting schemes[94].

As expected, the Court's decision raised unrest among RES operators and associations representing their interests. What is worth noting here is that the 2014 regulation passed the scrutiny of constitutionality, a finding which will have a certain weight on the settlement of the pending disputes brought against Italy before international investment tribunals.

4. Blusun S.A., Jean-Pierre Lecorcier and Nichael Stein v. the Italian Republic

4.1. Introduction

Blusun was the first dispute filed against the Italian State under Art. 26 ECT and the second "green energy" case settled under the Treaty (as known, the first was *Charanne*). The controversy concerned an investment made starting from the end of 2009 in a 120 MW solar energy project in the Italian Region of Puglia, by two nationals from, respectively, France (Jean-Pierre Lecorcier) and Germany (Nichael Stein) and a Belgian holding company created and owned by said investors (Blusun). The dispute was brought before the ICSID on 4 February 2014 by Lecorcier, Stein and Blusun and was awarded on 27 December 2016 by the arbitral tribunal constituted to settle the dispute[95].

The project consisted in joining 120 PV plants, with a capacity of up to 1 MW, to each other and to two substations for the connection to the national grid. The project, therefore, was expected to generate 120 MW. To this end, the investors planned to purchase twelve local companies (or special purpose vehicles – SPVs) that, between 2008 and 2009, had already acquired some of the rights and permits needed for the development of the plants, namely rights over the land where the plants were to be built, construction permits and permits for the connection of the plants to the local medium-voltage grid[96]. Furthermore, the project envisaged the construction of the two substations and of the medium-voltage grids for connecting the plants to each other and to the substations[97]. In order to realize the project, in December 2009, the investors set up a corporate structure consisting of Blusun and two Italian subsidiaries, i.e. *Società Interconnessioni Brindisi S.R.L.* (whose task was the construction and management of the two substations) and Eskosol (established as an holding company for the twelve SPVs and entrusted with the construction of the 120 PV plants and of the medium-voltage grids)[98]. With specific regard to Eskosol, it is worth noting that, on 9 December 2015, the company, which in November 2013 was placed under receivership and became Eskosol S.p.A. *in liquidazione*, filed a request for ICSID

[94] *Ibid*, para. 9.
[95] The tribunal was officially constituted on 12 June 2014 and was formed by Dr. Stanimir A. Alexandrov (appointed by the claimants), Prof. Pierre-Marie Dupuy (appointed by the respondent) and Judge James R. Crawford (appointed by the parties to the dispute as President of the tribunal).
[96] See *Blusun*, Award, paras. 53-54.
[97] *Ibid.*, para. 56.
[98] *Ibid.*, paras. 55-62.

arbitration for the same claims complained by Lecorcier, Stein and Blusun[99]. Furthermore, on 21 June 2016, Eskosol filed a request to intervene to the *Blusun* litigation as a non-disputing party, submitting that the tribunal lacked jurisdiction on the dispute and/or that the case was inadmissible since the only one to be entitled to seek damages was Eskosol rather than the claimants in *Blusun*. Considering that the request was submitted "extraordinarily" late and that both the claimants and the respondent agreed on that the application should have been rejected on the grounds that it would have disrupted the arbitral proceeding, the tribunal rejected the application[100].

Despite substantial resources were invested and part of the project realized (construction and connection to the national grid of the two substations, installation of 250 km of underground cables, acquisition of the local companies, lands and permits for the development of the plants), the latter was never completed. For the claimants, the project's failure was caused by a series of judicial decisions and regulatory measures adopted by the Italian authorities between 2010 and 2012, which supposedly created legal instability in the Italian PV sector, frustrated the investors' legitimate expectations as to the level of incentives granted to the PV industry and, additionally, were tantamount to expropriative measures, being thus in breach of Articles 10(1) and 13 ECT[101].

The measures complained of were: a) the Italian Constitutional Court's Judgement 119/2010, which declared the unconstitutionality of part of the legislation applicable to the claimants' project; b) the already seen Legislative Decree 28/2011 ("Romani Decree") and Decree 5 May 2011 of the Ministry of Economic Development that, as seen, set the stage for the reshaping of the Italian renewable energy supporting scheme and introduced the Fourth Energy Account; c) the publication by the GSE of a register of plants eligible for FET; d) finally, a stop-work order issued by the Municipality of Brindisi on 11 January 2012 with respect to the investors' project. The measures are examined in detail hereunder.

A. With Judgement 119/2010[102], the Italian Constitutional Court established that Art. 3, paragraphs (1) and (2), of Puglia Regional Law 31/2008[103], which required a simplified authorization procedure ("*Dichiarazione di Inizio Attività*" or "Declaration of Initiation of Activity", hereinafter DIA) for plants with a capacity between 20 KW and 1 MW, was contrary to Art. 12(5) of Legislative Decree 387/2003, that conversely demanded the DIA for plants with a capacity up to 20 KW, and consequently declared it unconstitutional. Despite Art. 117 of the Italian

[99] See *Eskosol*, Decision on Respondent's Application Under Rule 41(5), para. 5. As reported by the *Blusun* tribunal, Italy offered to Eskosol to consolidate the two cases. See *Blusun*, Award, para. 43.
[100] *Ibid.*, paras. 42-44. See also *Eskosol*, Decision on Respondent's Application Under Rule 41(5), para. 31.
[101] See *Blusun*, Award, para. 6.
[102] See Italian Constitutional Court, Judgement n. 119 of 22.03.2010, Italian Official Journal, 1th Special Series – Constitutional Court n. 13 of 31.03.2010.
[103] Puglia Regional Law 21 October 2008, n. 31 "*Norme in materia di produzione di energia da fonti rinnovabili e per la riduzione di immissioni inquinanti e in materia ambientale*", Official Bulletin of the Puglia Region n. 167 of 24.10.2008.

Constitution[104], which deals with the apportionment of legislative competences between the State and the Regions, encompasses the "*national production, transport and distribution of energy*" among the subject matters of concurring legislation[105], i.e. matters where "*legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation*"[106], the Court considered that the competence to identify the characteristics of the installation sites for which the DIA is required is entrusted to the State. To this respect, it must be noticed that, although part of the claimant's activities were covered by Puglia Regional Law 31/2008, they were unaffected by the decision, since under the Italian legal system, the Constitutional Court's decisions declaring the unconstitutionality of a law have no retroactive effects on the so called "*rapporti esauriti*" (or "consolidated

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104 Art. 117 of the Italian Constitution: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. The State has exclusive legislative powers in the following matters: a) foreign policy and international relations of the State; relations between the State and the European Union; right of asylum and legal status of nonEU citizens; b) immigration; c) relations between the Republic and religious denominations; d) defence and armed forces; State security; armaments, ammunition and explosives; e) the currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalisation of financial resources; f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament; g) legal and administrative organisation of the State and of national public agencies; h) public order and security, with the exception of local administrative police; i) citizenship, civil status and register offices; l) jurisdiction and procedural law; civil and criminal law; administrative judicial system; m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory; n) general provisions on education; o) social security; p) electoral legislation, governing bodies and fundamental functions of the Municipalities, Provinces and Metropolitan Cities; q) customs, protection of national borders and international prophylaxis; r) weights and measures; standard time; statistical and computerised coordination of data of state, regional and local administrations; works of the intellect; s) protection of the environment, the ecosystem and cultural heritage. Concurring legislation applies to the following subject matters: international and EU relations of the Regions; foreign trade; job protection and safety; education, subject to the autonomy of educational institutions and with the exception of vocational education and training; professions; scientific and technological research and innovation support for productive sectors; health protection; nutrition; sports; disaster relief; land-use planning; civil ports and airports; large transport and navigation networks; communications; national production, transport and distribution of energy; complementary and supplementary social security; harmonisation of public accounts and co-ordination of public finance and taxation system; enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities; savings banks, rural banks, regional credit institutions; regional land and agricultural credit institutions. In the subject matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation. The Regions have legislative powers in all subject matters that are not expressly covered by State legislation. The Regions and the autonomous provinces of Trent and Bolzano take part in preparatory decision-making process of EU legislative acts in the areas that fall within their responsibilities. They are also responsible for the implementation of international agreements and EU measures, subject to the rules set out in State law which regulate the exercise of subsidiary powers by the State in the case of non-performance by the Regions and autonomous provinces. Regulatory powers shall be vested in the State with respect to the subject matters of exclusive legislation, subject to any delegations of such powers to the Regions. Regulatory powers shall be vested in the Regions in all other subject matters. Municipalities, provinces and metropolitan cities have regulatory powers as to the organisation and implementation of the functions attributed to them. Regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women. Agreements between a Region and other Regions that aim at improving the performance of regional functions and that may also envisage the establishment of joint bodies shall be ratified by regional law. In the areas falling within their responsibilities, Regions may enter into agreements with foreign States and local authorities of other States in the cases and according to the forms laid down by State legislation*".

105 See Art. 117, third paragraph, of Italian Constitution.

106 *Ivi*, last sentence.

relationships"), i.e. relationships which are definitive and cannot be longer challenged before the judiciary[107]. Few months later, however, the entry into force of Law 129/2010 (the already seen "*Salva Alcoa*"), which provided for a 150-day time limit for DIA applications that were still in progress, created a state of uncertainty among RES operators, since said law was seen as implicitly abrogating the "consolidated" nature of other applications, including the investors' ones. As argued by the claimants, this state of uncertainty ended only on 15 December 2010, when the Ministry of Economic Development issued a Circular clarifying the scope of Law 129/2010[108].

B. As seen before, Legislative Decree 28/2011 ("Romani Decree") was aimed at implementing Directive 2009/28/EC on the promotion of the use of energy from renewable sources and, accordingly, reshaping the Italian renewable energy supporting scheme. In particular, the Romani Decree limited the application of the FIT scheme provided with the Third Energy Account (Decree 6 August 2010 of the Ministry of Economic Development) to plants entered into operation before 31 May 2011 and not before 31 December 2013, as originally established by the Third Energy Account. Furthermore, the Romani Decree modified the criteria for eligibility to the FITs only of plants erected in agricultural areas, limiting the concession of incentives to plants with a capacity of less than 1 MW and occupying less than 10% of the parcel where they were built. In compliance with the Romani Decree, the Fourth Energy Account was adopted and remarkable FIT reductions were introduced. Despite the Fourth Energy Account had no retroactive effects, it did had a detrimental impact on those operators that were already completing their investments, since it changed the legal framework within which they were operating.

C. The Fourth Energy Account, among other things, required the GSE to draw up and manage a register of plants eligible for FITs. On 15 July 2011, a list of plants was published and included 115 of the 120 plants of the claimant's project. Since the list was affected by errors, a new one was published on 29 July and included 113 plants of the claimant's project. Another list was published on 12 August and a final one was issued on 16 September. To this regard, the claimants alleged that the GSE's lists exacerbated the legal confusion existing in the Italian solar market.

D. Finally, on January 2012, the Municipality of Brindisi issued a stop-work order regarding some of the claimants' plants, questioning the legality of the DIA authorizations released with respect to the claimants' project. The order was issued following an inspection, made by the environmental protection unit of the local police to the construction sites, which raised doubts about the respect by the claimants of the zoning regulations. Despite the Regional Administrative Court of Puglia annulled the order on 7 March, the claimants alleged they did not have

[107] According to Art. 136(1) of the Italian Constitution, "*When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision*".
[108] Circular 15 December 2010 "*Realizzazione impianti alimentati da fonti rinnovabili*".

enough time to build the plants foreseen in the project within the deadline fixed by the Romani Decree (29 March 2012), a state of things that gave the final blow to their project.

While the claimants requested the tribunal to declare their rights under Part III ECT had been breached and, consequently, to condemn Italy to pay compensation amounting to € 187.8 million[109], Italy requested the tribunal to decline its *jurisdiction* to decide on, or alternatively the *admissibility* of, the case. In any event, the Italian State requested the tribunal to dismiss on the *merits* the charges advanced by the claimants' with regard to Part III ECT, on the base that there was no causal link between the measures adopted by the Italian authorities and the negative outcomes of the project[110].

With specific regard to the jurisdiction, it must be recalled the intervention of the European Commission as a non-disputing party to the litigation. As seen before, the Commission objected the jurisdiction of the tribunal to settle the case, which qualified as an intra-EU controversy, and the parties to the dispute expressed their own views on the arguments purported to this end. This matter has been already analysed before (see *supra*, Chapter II, § 6.3) and, therefore, will be omitted here.

As we will see, the case was won by Italy, despite the tribunal dismissed many of the arguments developed by the latter to purport its defence[111]. The following analysis will be carried out by taking into account: the position of the parties and the conclusions of the tribunal with respect to issues of jurisdiction and admissibility (excluding the arguments developed with respect to the intra-EU question); the position of the parties and the conclusions of the tribunal on the merits of the dispute; the most relevant findings arising from the case as to ECT provisions and definitions.

4.2. Position of the parties and conclusions of the tribunal on jurisdiction and admissibility

The arbitral tribunal had to deal, in the first place, with the issues of jurisdiction and admissibility raised and contended by the parties to the dispute. Such issues included: 1) the interpretation of the term "investment" under both the ICSID Convention and the ECT; 2) the qualification of the claimant's project as an investment under either treaty; 3) the relevance of the principle of good faith and of the theory of the "clean hands" for the purposes of dispute resolution.

Italy raised objections to the jurisdiction of the tribunal on the grounds that the claimants' project would have not qualified as an "investment" neither under the ICSID Convention, namely Art. 25 as construed by other arbitral tribunals in disputes settled under said Convention[112], nor under the ECT, namely Art. 1(6), being rather

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[109] See *Blusun*, Award., para. 48.

[110] *Ibid.*, para. 50.

[111] *Ibid.*, para. 423.

[112] Art. 25 ICSID Convention: "*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. (2)*

tantamount to pre-investment "expenditures" of "speculative character"[113]. From Italy's standpoint, in fact, the activities conducted by the claimants – which the latter alleged fell under the definition of "investment" provided by said treaties – were carried out with the purpose of selling to third parties the rights acquired for the development of the project, being therefore mere financial transactions made "in a sort of secondary market"[114]. This was supposedly inconsistent with Art. 25 of the ICSID Convention and, more specifically, with the *Salini* test, i.e. the most frequently invoked criteria for ascertaining the existence of an "investment" under the ICSID Convention[115]. In Italy's view, the *Salini* test would have required the claimants' activities to be in line with the objectives pursued by relevant national legislation, in this case with the objective of building PV plants benefiting from economic incentives[116].

Similarly, Italy claimed that the claimants' activities were not "associated with an economic activity in the energy sector", notably with the construction of PV plants by which contributing to the production of energy from renewable sources in Italy, lacking therefore an essential condition required by Art. 1(6) for an activity to be qualified as an investment under the ECT[117].

The tribunal's jurisdiction was objected also on the ground that the project would have not qualified, in any case, as an investment protected under the ECT, since it would have been consciously made in violation of the Italian applicable legislation, of the principle of good faith as provided both under national and international law and, finally, of ECT provisions on environmental protection, namely Art. 19[118]. The core argument, to this regard, was that the claimants' investment would have infringed the authorization and environmental requirements demanded by the Italian legislation for

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"National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required. (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)".

[113] See *Blusun*, Award, paras. 125 and 134.

[114] *Ibid.*, para. 130.

[115] According the so-called *Salini* test, there is an investment under Art. 25 ICSID Convention if the following criteria are met: contribution of the investor; duration of time; operational risk; contribution to the host State's development. These criteria were clearly stated in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001, para. 52. See: R. DOLZER – C. SCHREUER, *op. cit.*, pp. 67-68.

[116] See *Blusun*, Award., paras. 128-130.

[117] *Ibid.*, paras. 132-133.

[118] *Ibid.*, paras. 125, 135 and 140.

the development of renewable energy projects. According to the then applicable law, in fact, the construction of PV plants with a capacity greater than 1 MW required the so called "*Autorizzazione unica*" or "Single Authorization" (AU). The AU consisted in a simplified authorization procedure provided for by Legislative Decree 387/2003 for the construction of plants powered by renewable energy sources, which entailed, *inter alia*, the so called "*Valutazione d'Impatto Ambientale*" (VIA) or Environmental Impact Assessment (EIA), i.e. an assessment of the environmental impact of a project aimed at minimising environmental damage. For PV plants with a capacity below 20 KW, conversely, it was sufficient the already seen DIA, which consisted in the presentation of a declaration by the applicants notifying the competent authority on the inception of the project. Accordingly, the claimants would have circumvented the AU requirements, including the EIA, by splitting an originally unitary project by interposing twelve SPVs controlled by the same people and presenting one DIA for each plant of less than 1 MW instead of the AU[119].

Finally, Italy upheld that, should the tribunal have established its jurisdiction on the case, it should have considered the claimants' pleas inadmissible on the basis of "unclean hands", i.e. on the grounds that the claimants would have acted unlawfully when developing their project[120].

In response to these arguments, the claimants argued that the activities carried out from 2009 onwards, notably the construction of the two substations for the connection to the national grid, the installation of 250 km of underground cables, the acquisition of local companies and lands and the holding of authorizations, permits and contractual rights for the development of the project did constitute an investment protected under both the ICSID Convention and the ECT[121].

As to the good faith argument, the claimants alleged that their investment was developed in full respect of the applicable legislation[122]. To this regard, they argued that, instead of splitting a unitary project, they united 120 PV plants already initiated by the twelve local companies and that the DIA authorizations were obtained in compliance with the applicable law. On these grounds, there was no need to obtain the EIA, which actually could have been required for plants with a capacity greater than 1 MW. In this sense, and with respect to the arguments developed by the respondent as to Art. 19 ECT, the claimants noticed that not only the tribunal would have no jurisdiction on alleged breaches of Art. 19 ECT provisions, since the latter are not included in Part III ECT, but furthermore that the EIA would not be a requirement of general international law[123].

Finally, regarding the clean hands allegation, the claimants asserted that not only the ECT would contain no express requirement of that kind but, additionally, there would be no customary international law rule or general principle of law on clean

[119] *Ibid.*, para. 136.
[120] *Ibid.*, paras. 126 and 142.
[121] *Ibid.*, paras. 143 and 146-151.
[122] *Ibid.*, para. 144.
[123] *Ibid.*, paras. 152-155.

hands. In any event, they claimed that their hands were "clean", since there was no evidence of illegality in their behaviour[124].

As to the arguments raised and contended by the parties on jurisdiction and admissibility, the tribunal reached the following conclusions. First, with respect to the qualification of the claimants' project as an investment under the ECT, the tribunal noticed that "[…] *once an active process of construction of an energy project involving substantial resources is commenced, the merely preparatory phase is over and project qualifies as an investment* " and, accordingly, concluded that "*There is no doubt that, assuming the Claimants' Project was lawful and not merely speculative, it fell squarely within the terms of Article 1(5) and (6) ECT*"[125]. For the tribunal, in fact, Art. 1(6) ECT provides for a broad definition of "investment" which, as remembered over and over again, applies only to investments associated with activities developed in the energy sector. As noticed by the arbitrators, the definition of "economic activity in the energy sector", as provided in Art. 1(5) ECT and the attached understanding[126], includes the "construction and operation" of power generation facilities, including those powered by renewable energy sources, with "construction and operation" understood as alternative rather than cumulative requirements. According to this reading, therefore, the tribunal decided on the qualification of the claimants' project as an investment under the ECT. To this regard, it is worth noting that the tribunal reached such conclusion on the assumption that the project was "lawful" and "not merely speculative".

Secondly, as to the lawfulness of the claimants' project, the tribunal noticed, in line with previous decisions adopted by other arbitral tribunals, notably by the tribunal in *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), that "[…] *it is true that the ECT does not lay down an explicit requirement of legality, but the Tribunal concludes that it does not cover investments which are actually unlawful under the law of the host state at the time they were made because protection of such investments would be contrary to the international public order* […]"[127]. To this regard, the fact that the claimants relied on the DIA authorization process did not render the project unlawful from its inception. Moreover, the arbitrators considered that the claimants had never misrepresented their project and that there was no evidence in the arguments developed by the respondent of a fraudulent or deceptive conduct by the claimants[128]. After having

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[124] *Ibid.*, paras. 145 and 156.

[125] *Ibid.*, para. 263.

[126] Understanding 2 of the Final Act of the European Energy Charter Conference: "*(a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector. (b) The following activities are illustrative of Economic Activity in the Energy Sector: (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium; (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources; (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines; (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations; (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants; (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency*".

[127] See *Blusun*, Award, para. 264.

[128] *Ibid.*, para. 264.

examined relevant Italian legislation and decisions adopted by domestic tribunals, and considering that the respondent did not demonstrate the illegality of the claimants' project[129], the tribunal concluded that "[…] *it should be presumed that the investment was a genuine one, and was correspondingly treaty-protected, from the outset*"[130].

Third, as to the qualification of the project as an investment covered by the ICSID Convention, the tribunal concluded that, since the project fell under the investment definition of Art. 1(6) ECT, it was equally covered by the ICSID Convention[131].

Finally, as regards the "clean hands" and "good faith" arguments, the tribunal essentially supported the claimant's position and decided on the admissibility of the claim by dismissing the respondent's allegations. To this respect, and in light of the conclusions drawn as to the lawfulness of the project, the tribunal stated that "[…] *the 'clean hands' doctrine has nothing to operate on. It is therefore unnecessary for the Tribunal to decide whether there exists a generic 'clean hands' defence or ground of inadmissibility in international investment law*"[132]. Furthermore, as to the claimant's failure to conduct the EIA, which was supposedly inconsistent with the Italian legislation and, moreover, with Art. 19 ECT, the tribunal clarified that "[…] *it is at least arguable that a tribunal constituted under Part III could take into account conduct clearly in breach of other provisions of the ECT insofar as it is relevant to the admissibility of a claim* […]" – therefore standing back from the claimants' position on the tribunal's lack of jurisdiction on ECT provision not included within Part III – and concluded affirming that "*The key point, however, is that Article 19 operates not at the level of individual investors but at the interstate level, as is equally the case with the developing general international law of EIAs* […]"[133].

To sum up, the tribunal established its jurisdiction on, and the admissibility of, the case and, in doing so, dismissed most of the respondent's arguments and accepted, although with some reserves, the claimants' reasons.

4.3. Position of the parties and conclusions of the tribunal on the merits of the dispute

As said before, the merits of the dispute concerned the following questions: whether there was a causal link between the judicial decisions and regulatory measures adopted by the Italian authorities and referred to above and the project's failure and, consequently, whether Italy breached Articles 10(1) and 13(1) ECT. To this respect, the tribunal had to deal with three different claims:

1) the "legal instability claim", according to which Italy would have failed to create "*stable, equitable, favourable and transparent conditions*" for foreign investors, being therefore in breach of the first sentence of Art. 10(1) ECT;
2) the "FET standard claim", according to which Italy would have frustrated the claimants' legitimate expectations, being consequently in breach of the second sentence of Art. 10(1) ECT;

[129] *Ibid.*, paras. 265-268.
[130] *Ibid.*, para. 269.
[131] *Ibid.*, para. 271.
[132] *Ibid.*, para. 273.
[133] *Ibid.*, para. 275.

3) finally, the "expropriation claim", pursuant to which the measures adopted by Italy would have been tantamount to expropriation, being therefore in breach of Art. 13 ECT.

In examining these pleas, the tribunal had the occasion to dwell on the interpretation of Art. 10(1) ECT[134].

As to the first claim, the claimants argued that the first sentence of Art. 10(1), which provides that "*Each Contracting Party shall* […] *encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area*", would establish binding obligations, both of means and of result, and would apply to all stages of the investment, i.e. both to the pre-investment and the post-investment stages[135]. According to this reading, they alleged that, if taken together, the Constitutional Court's Judgement 119/2010, the Romani Decree, the Fourth Energy Account and, finally, the stop-work order adopted by the Municipality of Brindisi on January 2012, destabilized the Italian solar market and, therefore, undermined their project, in breach of the commitments assumed by Italy under the first sentence of Art. 10(1) ECT[136].

Italy rejected the claimant's allegations on the grounds that the first sentence of Art. 10(1) would be a "framework regulation" referable only to relations between Contracting Parties to the Treaty and, therefore, would not be directly enforceable by investors, especially if one considers the vagueness of its formulation. Additionally, in light of the definition of "make investments" or "making of investments" provided in Art. 1(8) ECT[137], Art. 10(1) would apply only to the pre-investment phase[138].

With respect to the FET claim, the claimants purported the view that the FET standard, of which stability and transparency would be essential elements, is primarily aimed at protecting the investors' "reasonable and legitimate expectations". According to this reading, the measures adopted by the Italian authorities, notably the Romani Decree, would have undermined the legitimate expectations they assumed when developing their project and would have prevented them from securing the investment needed for the project's fulfilment[139].

For the respondent, conversely, any analysis on the FET standard was superfluous, since there would have been no causal link between the State conduct and the failure of the claimants' project[140]. For Italy, the legitimate expectations argument, which in the claimants' view is the core of the FET standard, should have been analysed in the context of the legitimacy of State conduct. In other words, as far as a State exercises its regulatory powers, including the right to modify its legislation, in the pursuit of the public interest and in accordance with the principles of due process, proportionality and non-discrimination, it could not be considered as violating the investor's

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134 *Ibid.*, paras. 310-311.
135 *Ibid.*, paras. 159-161.
136 *Ibid.*, para. 162.
137 Art. 1(8) ECT: "*"Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity*".
138 See *Blusun*, Award, paras. 171-173.
139 *Ibid.*, paras. 163-168.
140 *Ibid.*, paras. 174-182.

legitimate expectations and, therefore, the FET standard provided for in Art. 10(1) ECT. For Italy, in fact, the measures adopted between 2010-2012 were general in nature and reasonable[141].

Finally, as to the expropriation claim, the claimants contended that their investment was effectively subjected to measures having effects equivalent to nationalization or expropriation without compensation[142], while Italy considered that there was no causal link between State conduct and the deprivation of the benefits of the investment, being therefore no sign of any indirect expropriation by it. In any event, the measures at stake would have qualified as non-compensable regulatory takings, since they were non-discriminatory and adopted in the public interest[143].

The tribunal's appreciation on the arguments developed by the parties on the merits of the dispute was articulated as follows: first, the tribunal gave an interpretation of Art. 10(1) ECT, in line with the case law rendered by other arbitral tribunals both outside the ECT context (*PSEG Global v. Turkey*)[144] and within it (*Charanne*)[145]; second, it dealt with the legal instability claim and, in doing so, it took into account the effects of the measures adopted by the Italian State and allegedly amounting to a breach of Art. 10(1), first sentence, of the ECT, both *singularly* and *cumulatively*; third, it approached the FET claim; fourth, the tribunal dwelled on the "causation issue" contended by the parties as to whether there was a direct link between the measures adopted by Italy and the failure of the claimant's project and drawn its overall conclusions on Art. 10(1) ECT; finally, it confronted the expropriation claim under Art. 13 ECT.

Starting with the first point, it is worth quoting the conclusions drawn by the tribunal with respect to Art. 10(1) ECT: "*The present Tribunal, on the basis of a balanced interpretation of the text of Article 10 read in the light of its object and purpose* [as required by Article 31(1) VCLT]*, and having due regard to the course of its interpretation so far* [notably in *Charanne*]*, would reach the following conclusions: (1) The five sentences of Article 10(1) embody commitments towards investments, in accordance with their terms. None is merely preambular or hortatory. (2) The requirement to 'encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area' is not limited to the initial making of the investment but includes subsequent extensions of the investment as well as changes of form. (3) But the core commitment is that in the second sentence, expressly included in the first, 'to accord at* all times *to Investments of Investors of other Contracting Parties fair and equitable treatment' (emphasis added). This incorporates the fair and equitable treatment standard under customary international law and as applied by tribunals. (4) That standard preserves the regulatory authority of the host state to make and change its laws and regulation to adapt to changing needs, including fiscal needs, subject to respect for specific commitments made. (5) In the absence of a specific commitment, the state has no obligation to grant subsides such as feed-in-tariffs, or to maintain them*

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141 *Ibid.*, paras. 183- 187.

142 *Ibid.*, paras. 169-170.

143 *Ibid.*, paras. 188-190.

144 *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007.

145 As the very tribunal affirmed, Charanne is worth of particular attention "*as the first of many pending "green energy" cases under the ECT to be decided on the merits*". See *Blusun*, Award, paras. 317-318.

unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime" (parenthesis added)[146].

With respect to the legal instability claim, the tribunal concluded that the measures concerned did not breach Art. 10(1) ECT[147], either individually or cumulatively[148].

As to the FET claim, the tribunal was of the opinion that: "[…] *the Respondent made no special commitment to the Claimants with respect to the extension and operation of the FITs, nor did it specifically undertake that relevant Italian laws would remain unchanged. For this reasons the Claimants have not established a breached of Article 10(1), second sentence, of the ECT*"[149]. In light of the findings of other ICSID tribunals, notably in *Charanne*, *El Paso*[150] and *Philip Morris*[151], the *Blusun* tribunal noticed, in fact, that "*In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in-tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, it should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime. These considerations apply even more strongly when the context is subsidies or the payment of special benefits for particular economic sectors*"[152]. Accordingly, "[…] *Circumstances change and in the absence of specific commitments, the risk of change is for entrepreneurs to assess and assume*"[153].

As to the causation issue, the decision of the tribunal is well summarized in the following passage: "*In the tribunal view, the Claimants have not discharged the onus of proof of establishing that the Italian state's measures were the operative cause of the Puglia Project's failure. Of a greater weight was the continued dependence on project financing, and the failure to obtain it was due both to the size of the Project and to justified concerns about the scope of DIA authorization, on which the legality of the Project depended. That being so, the claim under Article 10(1) for loss of the Project would fall in any event*"[154].

Finally, the majority of the tribunal, with the dissenting opinion of arbitrator Alexandrov, dismissed also the expropriation claim, on the grounds that the measures adopted by the Italian authorities did not amount to expropriation under Art. 13 ECT[155].

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146 *Ibid.*, para. 319.
147 *Ibid.*, paras 322-360.
148 *Ibid.*, paras 361-364.
149 *Ibid.*, para. 374.
150 *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15).
151 *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).
152 *Blusun*, Award, para. 372.
153 *Ibid.*, para. 373.
154 *Ibid.*, para. 394.
155 *Ibid.*, paras. 396-409.

To sum up, the arbitral tribunal, despite rejecting many of the arguments developed by Italy to support its defence, dismissed all the claims brought by Blusun, Jean-Pierre Lecorcier and Michael Stein[156].

4.4. The *Blusun*'s legacy

On 2 May 2017, the ICSID Secretary General registered an application for annulment of the *Blusun* award filed by the claimants pursuant to Art. 52 of the ICSID Convention[157]. The annulment procedure is still underway[158]. Pending the completion of the *Blusun* case and in the light of the analysis developed above, however, it is possible to outline its the main outcomes.

In the first place, *Blusun* gave a valuable contribution to clarify many provisions and terms of the ECT and the ICSID Convention. In particular, it shed light: on the definition of "investment" under the combining reading of Articles 1(6) and 1(5) ECT and the ICSID Convention and, furthermore, on the requirement of legality that investments must meet in order to be protected by the Treaty; on Art. 19 ECT and, more specifically, its inter-State nature; on Art. 10(1) ECT and, more specifically, the legally binding effects of the commitments provided for in its five sentences, the application of the requirement to "encourage and create stable, equitable, favourable and transparent conditions" to both the pre and the post investment phases and, finally, the FET standard laid down in the first two sentences of the Article; on Art. 13 on expropriation.

Furthermore, *Blusun* helped to clarify many controversial aspects as to the intra-EU issue which were previously dealt with by other ECT arbitral tribunals. To this respect, it reiterated the applicability of Art. 26 ECT to intra-EU relations and, therefore, the admissibility of intra-EU disputes to the ECT ISDS mechanism. In addition, it played

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156 *Ibid.*, para. 423: "*For these reasons, the Tribunal: (a) Holds that it has jurisdiction over the claims brought by the Claimants; (b) Dismisses those claims on the merits; (c) Orders the Respondent to pay USD29,410.69 to the Claimants as its share of the costs of the proceedings; (d) Rejects all other claims for costs*".

157 According to Art. 52 of the ICSID Convention *"(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based. (2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered. (3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1). (4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee. (5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request. (6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter*".

158 https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/3.

a relevant part in clarifying a very sensitive issue of international investment law, i.e. the limits of States' right to regulate under investment treaties, namely the ECT.

As we will see in next pages, these provisions and issues are likely to be further clarified in as much as pending cases against the Italian State (as well as similar cases involving other EU Member States such as Spain), are awarded or settled somehow.

5. Eskosol S.p.A. in liquidazione v. the Italian Republic

5.1. Introduction

As seen before, Eskosol was established on December 2009 as part of a corporate structure set up by Jean-Pierre Lecorcier and Nichael Stein in order to realize a 120 MW solar energy project in the Puglia Region. Eskosol was created by Blusun S.A., a Belgian company established and owned by Jean-Pierre Lecorcier and Nichael Stein, and four Italian nationals, as an holding company for the construction of the 120 PV plants and their connection to the national grid. As we already saw, the project was never completed. Due to the reforms introduced into the Italian RES sector, notably the Romani Decree and the Fourth Energy Account, the level of FIT's previously granted to green energy investors was reduced. This allegedly led to the failure of the project and to the bankruptcy of Eskosol which, in turn, was placed under receivership on November 2013 and changed its company name in Eskosol S.p.A. *in liquidazione*.

Eskosol S.p.A. in liquidazione v. the Italian Republic (ICSID Case No. ARB/15/50) was filed on 9 December 2015. As already said, this case is quiet similar to *Blusun*: both cases arose out from the measures adopted by the Italian authorities in the RES sector, in particular the Romani Decree and the Fourth Energy Account, which allegedly undermined the realization of the PV project in Puglia and resulted in the breach of Italy's commitments under Articles 10 and 13 of the ECT. While in *Blusun* the claims were filed by Lecorcier, Stein and Blusun, in *Eskosol* they were borught by Eskosol *S.p.A. in liquidazione*, formerly Eskosol.

The dispute is currently pending. However, on 18 November 2016, Italy filed an application for dismissal of all of Eskosol's claims on the grounds that they were "manifestly without legal merits" in accordance to Rule 41(5) of the ICSID Arbitration Rules. The tribunal issued its decision on the Italian application on 20 March 2017[159]. Since the decision provides much food for thought for the purposes of this investigation, it will be examined in detail in next paragraphs.

5.2. Italy's objections pursuant to Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings

As said, on 18 November 2016, Italy filed an application for dismissal of Eskosol's claims on the grounds that they were manifestly without legal merit under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings. According to Rule 41(5), "*Unless the parties have agreed to another expedited procedure for making preliminary*

[159] *Eskosol S.p.A. in liquidazione v. the Italian Republic* (ICSID Case No. ARB/15/50), Decision on Respondent's Application under Rule 41(5).

objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit".

In its application, Italy raised four different objections:

1) Eskosol would not qualify as a "national of another Contracting Party" under Art. 25(2)(b) of the ICSID Convention;
2) Eskosol would not qualify as an "investor" under both the ECT and the ICSID Convention;
3) Art. 26(3)(b)(i) and Annex ID of the ECT would have prevented Eskosol from bringing its claims against Italy;
4) The public international law principles of *lis pendens* and *res judicata* or collateral estoppel would have prevented Eskosol from bringing its claims.

The objections are analysed in detail in next paragraphs. Suffice to say, here, that the tribunal dismissed all the objections and denied Italy's application under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings.

Before entering into the details of each objection, it is worth making some preliminary considerations on the basic elements that, according to the tribunal, characterize a Rule 41(5) inquiry. First, as regards the scope of application of Rule 41(5), the tribunal stated that said provision relates exclusively to *legal* defects, including those concerning both jurisdiction and the merits, but not to *factual* defects. To this respect, while the tribunal specified that it would not enter into an analysis of the *disputed* facts, it clarified that the "factual premises" of the claim could be taken into consideration in order to address its Rule 41(5) inquiry[160].

Second, as regards the "manifestly without legal merit" standard, which is the core of Rule 41(5), the tribunal considered that a claim is deemed manifestly without legal merit when it is "plainly without merit as a matter of law", with the burden of proof lying with the Rule 41(5) applicant (in this specific case Italy). For the tribunal, in fact, "[…] *the "manifest" standard requires a very high degree of clarity* […] *that the claims as presented cannot succeed as a matter of law*"[161].

Third, as regards the *extent* of a Rule 41(5) analysis, the tribunal accepted that an inquiry of this kind may require some level of sophistication, but should not be used as a mechanism to address complex legal issues[162]. In its words, "[…] *Investment proceedings do involve a level of sophistication and the fact that the parties may consider it appropriate to brief legal objections at some length, in order to ensure an appropriate context for assessment, does not in and of itself render the objections too complex for resolution under the "manifest" standard. At*

[160] *Ibid.*, paras. 35-36.
[161] *Ibid.*, para. 37.
[162] *Ibid.*, paras 38-41.

the same time, the Rule 41(5) procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult or unsettled issues of law"[163].

With these premises in mind, it is possible now to examine in detail the objections filed by Italy under Rule 41(5).

5.3. The first objection: Eskosol's qualification as a "national of another Contracting Party" under Art. 25(2)(b) ICSID Convention

Italy's first objection is quiet complex, since it requires a delicate cross-referenced interpretation of Art. 25(2)(b) ICSID Convention and Art. 26(7) ECT.

According to Art. 25(1) ICSID Convention[164], ICSID jurisdiction is limited to disputes between Contracting States to the Convention and *nationals* of other Contracting States. In other words, ICSID jurisdiction is based on the principle of diversity of nationality, as expressly stated in Art. 25(2)(a) ICSID Convention[165]. The principle of diversity of nationality, however, finds a specific exception in Art. 25(2)(b) ICSID Convention, according to which a claim can be submitted to ICSID arbitration also by a juridical person having the nationality of the Contracting State against which it directs its claims, although under certain conditions. Art. 25(2)(b), in fact, provides that, for purposes of Art. 25(1) ICSID Convention, a "*national of another Contracting State*" means "*any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention*" (underlining added). Under Art. 25(2)(b) of the ICSID Convention, therefore, a company can bring a claim against its home State as long as two conditions are met: first, the company must have the nationality of its home State "*on the date on which the parties consented to submit the dispute to conciliation or arbitration*"; second, the parties must *agree* that the local company, *because of foreign control*, should be treated as a national of another Contracting State.

That said, in its first objection, Italy argued that Eskosol would not qualify as a national of another Contracting State under Art. 25(2)(b) ICSID Convention. To this respect, the most debated questions by the parties concerned the second condition referred to above and, in particular, the "foreign control" requirement. More specifically, the parties disagreed on the contents of the "foreign control" standard, on

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[163] *Ibid*., para. 41.

[164] Art. 25(1) ICSID Convention: "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally*".

[165] Art. 25(2)(a) ICSID Conventions states that, for purposes of Art. 25(1) ICSID Convention, a "*national of another Contracting State" means "any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute*" (underlining added).

whether Eskosol could be considered as "foreign controlled" for purposes of Art. 25(2)(b) ICSID Convention and, finally, on the date on which foreign control must be established.

As seen, the second condition referred to above requires, in the first place, an agreement between the parties to treat the local company as a national of another Contracting State. To this respect, both Italy and Eskosol coincided on that such agreement would be provided by Art. 26(7) ECT[166]. According to Art. 26(7) ECT, "*An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State"*".

As regards the foreign control standard, Italy contended that majority of shares or majority of capital is not a valid criterion for establishing foreign control. Since neither Art. 25(2)(b) of the ICSID Convention, nor Art. 26(7) ECT provide for a definition of foreign control, Italy relied on Understanding with respect to Article 1(6) ECT[167], which clarifies the meaning of "control" for purposes of the definition of "investment" under Art. 1(6) ECT. To this end, Italy contended that control must be control *in fact* and not control established by mere shareholder status. To this end, Italy highlighted that, following Eskosol's bankruptcy and its subsequent placement under receivership on November 2013, Eskosol could not be considered as foreign controlled[168].

As regards the date on which foreign control should be established, it must be noticed that Art. 25(2)(b) ECT does not expressly indicate a date: it simply requires that the investor concerned had the *nationality* of the Contracting State party to the dispute *on the date of consent* to arbitration. Art. 26(7) ECT, on its part, distinguishes between the date on which the *nationality* of the investor must be established, i.e. *the date of consent*, and the date on which foreign control must be verified, i.e. *before the dispute arises*. To this respect, however, Italy argued that the relevant date for establishing foreign control is the *date of consent*. Accordingly, ICSID tribunals would have no competence to decide claims filed by companies that, at the time of consent, were controlled by nationals of the States against which they directed their claims. This would be the case of Eskosol which, being put under receivership, was no longer under foreign control. To this respect, Italy argued that, according to Italy's

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166 See *Eskosol*, Decision on Respondent's Application under Rule 41(5), paras. 49-51 and 68-69.

167 Final Act of the European Energy Charter Conference, Understanding 3: "*For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists*".

168 See *Eskosol*, Decision on Respondent's Application under Rule 41(5), paras. 52-55.

bankruptcy law, the controlling shareholder lost its actual control over the company[169].

As to Italy's allegations, Eskosol argued that it was entitled to file its claims against the Italian State according to Art. 26(7) ECT. In its view, irrespective of whether the date for assessing foreign control is the date when the dispute arises or the time of consent, it would anyway meet the foreign control criteria due to Blusun's continuity majority shareholder status[170]. In any event, it contended that the relevant date for establishing foreign control is the date when the dispute arises and not that of consent[171].

As regards the issues raised and discussed by the parties, the tribunal made the following considerations. In the first place, it noticed that, for purposes of Art. 25(2)(b) ICSID Convention, Eskosol was undisputedly a national of Italy and was so on the date on which the parties consented to submit the dispute to arbitration, i.e. on 9 December 2015. Accordingly, "[…] *The question presented by Italy's first objection* […] *centers on the second clause of Article 25(2)(b),* i.e.*, whether Eskosol is eligible to avail itself of the exception created by that clause in order to proceed in this forum. At this stage of the proceedings, Italy must demonstrate that it is "manifest" that Eskosol may not do so, within the meaning of Arbitration Rule 41(5)*"[172].

That said, the tribunal assessed, in the first place, the nature and scope of the parties' agreement, i.e. whether the parties agreed to treat Eskosol as a national of another Contracting State and, if so, whether such agreement was because of foreign control. To this respect, the tribunal was of the opinion that "[…] *such subjective intent and agreement is met in this case. Article 26(7) of the ECT sets forth two requirements, separated by the conjunctive "and," for a host State company to be treated as a qualified foreign national for purposes of Article 25(2)(b) of the ICSID Convention. Each of these requirements contains an express temporal condition, and those requirements notably differ. First, such company must have the host State nationality "*on the date of [its] consent in writing*" to ICSID (emphasis added), which Eskosol – an Italian company – clearly did. Second and independently, the company must be "controlled by" investors of another Contracting Party "*before a dispute between it and that Contracting Party arises*" (emphasis added). There is no dispute that prior to and at the time of the two State measures challenged in this case (the Romani Decree and the Fourth Energy Account, in March and May 2011 respectively), Eskosol was controlled for all relevant purposes by its 80% shareholder Blusun, a Belgian company. Italy agrees that Eskosol was under foreign control until at least December 2012*"[173]. To this regard, the tribunal dismissed Italy's argument that Art. 26(7) ECT would require foreign control to exist before the raise of the dispute and to persist through the date of consent. In its words, in fact, "*Nothing in Article 26(7) suggests an additional requirement, namely that the foreign control existing immediately before the dispute arises also must persist through the date of consent* […]"[174].

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169 *Ibid.*, paras. 56-62.
170 *Ibid.*, paras. 70-75.
171 *Ibid.*, paras. 76-84.
172 *Ibid.*, para. 86.
173 *Ibid.*, para. 87.
174 *Ibid.*, para. 88.

In the second place, the tribunal ascertained whether the foreign control standard was met in the case at hand. In its view, in fact, "[…] *the test for Article 25(2)(b) of the ICSID Convention also has an* objective *component that is not necessarily satisfied merely because of the parties' subjective agreement.* […] *An ICSID Tribunal therefore must undertake its own review of the facts regarding foreign control*"[175]. According to the tribunal, "[…] *such an inquiry has two necessary components. The first is whether it would be inconsistent either with the text of Article 25(2)(b) or with the purposes of the ICSID Convention to accept jurisdiction based on foreign control connected* to the date a dispute arises *(the ECT test), rather than the date of consent to arbitration. The second is how the existence of foreign control should be evaluated for purposes of the ICSID Convention, and whether it would be inconsistent with the purposes of the ICSID Convention to accept jurisdiction over a claim filed by a local company* after its entry into bankruptcy proceedings *in the host State. For both of these inquiries, the Tribunal applies the standards of Rule 41(5), to determine whether Italy has met its burden of showing that Eskosol's invocation of jurisdiction is "manifestly without legal merit."*"[176].

As regards the first component, i.e. the date on which foreign control must be established, the tribunal acknowledged that the wording of Art. 25(2)(b) ICSID Convention is ambiguous and may led to differing interpretations. A literal reading of Art. 25(2)(b), in fact, would suggest that the drafters of the ICSID Convention, instead to indicate the date of consent as the relevant date for establishing foreign control, deliberately left the temporal question to discussion between the parties. This reading would be in line with Art. 31 VCLT, which requires a treaty to be interpreted in good faith in accordance with the ordinary meaning of its terms. However, since Art. 31 VCLT requires treaty provisions to be interpreted "in their context" and in the light of the treaty's objective and purpose, Art. 25(2)(b) ICSID Convention, if read in its context, namely Articles 25(1) and 26, and in accordance to the ICSID Convention's object and purpose, would suggest that the date of consent is the relevant date for establishing foreign control.

According to the tribunal, "[…] *either interpretation of Article 25(2)(b) could have significant implications for cases involving facts different from this one* […]"[177]. In its view, "[…] *the fact remains that all interpretations of arguably ambiguous treaty language have potential doctrinal consequences for future cases that should not be lightly ignored. This counsels for caution in interpreting arguably ambiguous treaty text, particularly where the issue presented appears (as it does here) to be one of first impression. At minimum, such exercises should not be attempted at the Rule 41(5) stage, where briefing necessarily has been expedited and the parties have not had a full opportunity to present the potential ramifications of all interpretations. If anything is clear from the parties' briefing of the temporal issue regarding foreign control under the ICSID Convention, it is that the outcome of this theoretical debate is not "manifest," but rather is both novel and complex, and therefore is unsuitable for resolution on a Rule 41(5) application*"[178]. Accordingly, "*In this case, it would be particularly inappropriate for the Tribunal to reach out to resolve the temporal issue at this*

[175] *Ibid.*, para. 90
[176] *Ibid.*, para. 91.
[177] *Ibid.*, para. 96.
[178] *Ibid.*, para. 98.

juncture, because the Tribunal has serious doubt whether Italy could demonstrate, in any event, a loss of foreign control in Eskosol even as of the date of consent"[179].

As to the second component, i.e. the evaluation of the existence of foreign control for purposes of the ICSID Convention, the tribunal expressed doubts as to Italy's allegation that Eskosol's bankruptcy filing would deprived it from its foreign controlled status. In the tribunal's view, the fact that the ICSID Convention provides for no definition of "foreign control" means that the Convention's drafters preferred to leave the question to discussion between the parties. To this end, the ECT does not define what control means in order to determine whether a company is controlled by investors of another Contracting Party under Art. 26(7) ECT, although the term "controlled" is present in Art. 1(6) ECT and its relative Understanding providing for the definition of "investment". On the base of these provisions, the tribunal developed an articulated analysis for assessing whether Eskosol met the foreign controlled standard[180] and reached the following conclusions: "[…] *the Tribunal is unconvinced by Italy's assertion regarding the second necessary component of its first Rule 41(5) objection, namely that Eskosol's bankruptcy filing manifestly deprived it of foreign control prior to filing its Request. This is so even if, for the sake of argument, such continuing foreign control were to be deemed objectively necessary to pursue ECT claims under the ICSID Convention. Italy's first Rule 41(5) objection is therefore denied* […]". To this respect, it is worth noting that for the tribunal "[…] *Italy of course retains the right to try to convince the Tribunal otherwise at a subsequent stage of this proceeding*" (underlining added)[181].

5.4. The second objection: Eskosol's qualification as an "investor" under both the ECT and the ICSID Convention

Italy's second objection was about whether Eskosol could be considered as an "investor" under both the ECT and the ICSID Convention. Italy, in fact, argued that Eskosol would not qualify as an "investor" neither under the ECT, namely Art. 26, nor the ICSID Convention, namely Art. 25, since it would lack the "material qualities" required to be so considered under either Treaty. In short, Eskosol would be a mere instrument created by Blusun to carry out its investment in Italy[182].

Eskosol, on the contrary, argued that it qualified as an "investor" under both treaties and that the "material qualities" referred to by Italy would be an additional, implicit requirement absent in both the ECT and the ICSID Convention. Moreover, it claimed that, in any event, it did make investments in Italy and that it had a distinct legal personality from its shareholder, being therefore more than a mere instrumentality of Blusun. In any case, Eskosol specified that Italy's first objection could not be addressed under a Rule 41(5) inquiry, since it would require an in-depth analysis of factual issues[183].

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[179] *Ibid.*, para. 99.
[180] *Ibid.*, paras. 100-107.
[181] *Ibid.*, para. 108.
[182] *Ibid.*, paras. 109-111.
[183] *Ibid.*, paras. 112-117.

The tribunal addressed Italy's second objection by considering that, as regards the definition of "investment", it is broadly accepted that it must be given some substantive content, although there is no consensus on the characteristics which should be included in such content. For the tribunal, when defining the notion of "investor", Italy draw a similarity from the notion of "investment", which would imply some material characteristics. In short, the question was whether, similarly to the definition of "investment", also the definition of "investor" under both the ECT and the ICSID Convention would require not only formalistic but also substantive criteria. To this respect, the tribunal considered that "[…] *Whether this is so is an interesting question, but it clearly is not one that can or should be resolved at the Rule 41(5) stage of a case*". Accordingly, it denied Italy's' second objection[184].

5.5. The third objection: Italy's consent under the ECT to multiple related proceedings

The third objection related to Art. 26(3)(b)(i) ECT, which in Italy's view, would have prevented Eskosol from bringing its claims. To this respect, the parties disagreed on the scope of said provision, on the existence of an identity of parties between *Eskosol* and *Blusun* and on whether the objection would meet the thresholds of a Rule 41(5) investigation.

According to Art. 26(3)(a) ECT, "*Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article*". Pursuant to Art. 26(3)(b)(i), "*The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)*". Subparagraph (2)(a) refers to proceedings brought before "*the courts or administrative tribunals of the Contracting Party party to the dispute*", while subparagraph (2)(b) refers to proceedings brought "*in accordance with any applicable, previously agreed dispute settlement procedure*". Since Italy is listed in Annex ID ECT, it is entitled to benefit from the limitation of consent provided in Art. 26(3)(b) ECT.

That said, in Italy's view, Art. 26(3)(b)(i) ECT would exclude consent to arbitration with respect to an investor who has already submitted a dispute to another internal or international dispute settlement channel, including prior resort to ICSID arbitration. To this respect, Italy contended that Eskosol and Blusun were to be considered the same investor.

For Eskosol, on the contrary, Art. 26(3)(b)(i) ECT would not apply to proceedings brought before the ICSID, since neither Art. 26(3)(a), nor Art. 26(3)(b) refer to arbitration under the ECT. In its view, in fact, the submission of a dispute to international arbitration is regulated in Art. 26(4) ECT. In any event, Eskosol argued that *Eskosol* and *Blusun* did not concern the same dispute, that it had not previously submitted the dispute to another tribunal and that it was a different investor from Blusun. Finally, Eskosol contended that Italy's Art. 26(3)(b)(i) ECT objection did not

[184] *Ibid.*, paras. 118-120.

meet the requirements of Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings.

As noticed by the tribunal, "*Italy's third objection would require the Tribunal to find, under the Rule 41(5) standard, that at least three conclusions are each "manifest."* First*, the Tribunal would have to find it manifest as a matter of law that the ECT's "fork in the road" clause can be used to bar repeated ECT claims by the same "Investor" regarding the same "dispute," and not merely resort to the ECT after resort to local proceedings or "previously agreed" procedures other than ECT arbitration.* Second*, the Tribunal would have to find it manifest as a matter of fact – in other words, not capable of reasonable dispute – that Eskosol and Blusun constitute the same "Investor" for purposes of Article 26(3)(b)(i).* Finally*, the Tribunal also would have to find it "manifest" that the "dispute" here submitted is substantively the same one that Blusun submitted in the prior ECT case*"[185].

As to the first point, the tribunal acknowledged that submitting multiple times a controversy for dispute resolution under the ECT would result in an abusive conduct. Nonetheless, it expressed scepticism on "*that a fork-in-the-road clause is the appropriate doctrine to bar such abusive re-litigation; the appropriate doctrine would appear to be* res judicata […]. *That conclusion is supported by the very notion of a "fork" in a road, which implies the choice between two different paths, rather than repeat travels down the identical path. In the case of the ECT, it is also supported by the structure of Article 26(2), which distinguishes between ECT arbitration – addressed in subsection (c), which cross-references "the following paragraphs of this Article" – and alternative mechanisms for dispute resolution, addressed in subsections (a) and (b)*"[186].

As to the second and third points, the tribunal considered that *Eskosol* and *Blusun* "[…] *cannot be deemed (much less "manifestly") to be the same "Investor," as both Article 26(3)(b)(i) and Annex 1D on their face require*"[187]. Accordingly, the tribunal denied also this objection.

5.6. The fourth objection: Eskosol's preclusion to bring its claim under the public international law principles of *lis pendens* and *res judicata* or collateral estoppel

Italy's last objection related to public international law principles prohibiting the prosecution of multiple claims dealing with the same prejudice and the inception of new proceedings on disputes already submitted to international arbitration (*lis pendens*) or already settled by arbitral tribunals (*res judicata* or collateral estoppel)[188]. In Italy's view, in fact, *Eskosol* and *Blusun* would concern the same prejudice[189].

In order to demonstrate that the two cases concerned the same dispute, Italy relied on the so-called "triple-identity test": under this test, there is identity between two or more cases as long as there is identity of parties, identity of object and identity of

[185] *Ibid.*, para. 133.
[186] *Ibid.*, para. 134.
[187] *Ibid.*, para. 135.
[188] To this respect, it must be noticed that, by the time Italy filed its Rule 41(5) application (18 November 2016), *Blusun* was still pending. As is known, the award was rendered on 27 December 2016.
[189] See *Eskosol*, Decision on Respondent's Application under Rule 41(5), paras. 136-137.

cause. In Italy's view, when applying the test, a flexible rather than a strict approach should be adopted, i.e. the identity of parties, object and cause should be assessed substantially and not formally[190].

As to the identity of parties, Italy argued that Eskosol and Blusun were so closely related that they could be considered as identical. To this regard, Italy specified that the identity of parties is verified also when a party is privy in the interests of another party, as Italy alleged was the case between Eskosol and Blusun[191]. As to the identity of object (i.e. the type of relief requested) and cause (legal grounds), Italy claimed that both cases had the same object and cause of action[192].

Finally, Italy considered that, similarly to the *res judicata* principle, Eskosol's claim should have been dismissed also under the collateral estoppel theory[193].

Arguably, Eskosol questioned all Italy's allegations: in particular, it argued that the triple identity test should be applied strictly, that the identity of parties does not apply to privies and that *Eskosol* and *Blusun* did not have the same object and cause of action. As regards collateral estoppel, it argued that the theory is not universal and that, in any event, did not apply to the case at hand.

As regards the arguments raised and contended by the parties, the tribunal reached the following conclusions. As regards the alleged identity of parties between the two cases, it stated that "[…] *A shareholder's claim for its reflective loss through an entity in which it holds shares cannot be equated automatically to that entity's claim for its direct losses*"[194]. For the tribunal, in fact, "[…] *there may be certain circumstances in which a foreign shareholder and the local company in which it holds shares have such identical interests that it would be abusive to permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute*". Regarding Eskosol and Blusun, however, " […] *the Tribunal would have difficulty concluding – and certainly cannot find it "manifest" – that Blusun and Eskosol effectively were the same party, so as to preclude the later from attempting any claim after the former already has done so*"[195]. To this regard, the tribunal specified that it was "[…] *not unsympathetic to Italy's circumstances, having to face claims now that are closely related to those it already successfully vanquished in a prior proceeding. But the fact remains that neither the ICSID system as presently designed, nor the ECT itself, incorporate clear avenues (much less a requirement) for joinder in a single proceeding of all stakeholders potentially affected by the outcome* […]"[196]. In short, "*the Tribunal rejects the Rule 41(5) objection premised on the identity of parties between the* Blusun *case and this one, whether presented under the* res judicata *doctrine or the similar doctrine of collateral estoppel. Because it is far from manifest that the parties were identical, the Tribunal need not proceed to the further steps in a preclusion analysis, involving identity of object and identity of cause*"[197]. To this regard, the tribunal clarified that "*Of course, Italy is free later in this case to argue, if it so*

[190] *Ibid.*, paras. 138-139.
[191] *Ibid.*, paras. 140-144.
[192] *Ibid.*, paras 145-147.
[193] *Ibid.*, paras 148-149.
[194] *Ibid.*, para. 166.
[195] *Ibid.*, para. 169.
[196] *Ibid.*, para. 170.
[197] *Ibid.*, para. 171.

wishes, that the conclusions of the Blusun *tribunal were persuasive and should be followed by this Tribunal, exercising its independent judgment*"[198].

5.7. Conclusions

To sum up, the tribunal dismissed all the objections raised by Italy and denied its application for dismissal of Eskosol's claims on the grounds that they were manifestly without legal merit under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings. To this respect, it is worth noting that many of Italy's arguments were dismissed since they did not pass the strict thresholds of the tribunal's Rule 41(5) inquiry. As a consequence – and as clarified by the very tribunal – Italy will be allowed to raise similar objections in a later stage of the arbitral proceeding and, possibly, to successfully put forward its arguments.

As seen, *Eskosol* is still pending. Despite the case appears quite similar to *Blusun*, which was decided in favour of Italy, its outcomes are still unpredictable. In any event, the case is of great importance for the purposes of present investigation, since it raises the question of an intra-EU dispute filed by an investor against its home State and offers an interesting example of an application filed under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings.

6. Conclusions

In this chapter, we have focused on Italy's participation to the ECT and process. To this respect, two broad aspects have been taken into consideration: the Italian withdrawal from the Treaty and its involvement in investor-State disputes under Art. 26 ECT.

As regards the first aspect, we have tried to outline the rationales behind Italy's decision to abandon the Treaty and, furthermore, the consequences resulting from such decision in terms of investment promotion and protection. With respect to the reasons of the withdrawal, abandoning the most relevant international instrument existing in the energy realm for mere budgetary reasons is worthy of criticism, considering the important role that the ECT plays in ensuring energy security worldwide. Longer acceptable are Italy's (alleged) concerns as to the relevance of the ECT for Italy's external energy relations, considering the prevailing role that the EU is assuming in the field of investment promotion and protection and the non-participation to the Treaty of major international energy players such as the Russian Federation. As regards the effective consequences deriving from the withdrawal for the promotion and protection of energy investments, it may be said that, in the short run, energy investment flowing to and from Italy will be protected by the Treaty, at least considering the application of the sunset clause included in Art. 47(3) ECT. In the long-run, however, Italy lost a major opportunity to play an active role in the most relevant international forum dealing with current challenges affecting energy security and to provide foreign investors investing in Italy as well as Italian investors investing

[198] *Ibid.*, para. 172.

in foreign countries with an appropriate framework for the promotion and protection of energy investments.

As regards the second aspect referred to above, i.e. the involvement of the Italian State in investor-State disputes under Art. 26 ECT, we saw how Italy, similarly to other EU Member States parties to the ECT, namely Spain and the Czech Republic, has been recently involved in multiple disputes following the modifications introduced in its RES sector. The Italian case, together with those of Spain and the Czech Republic, reveals an interesting trend which has characterized the ECT ISDS regime in recent years. From an east-west instrument to protect energy investments, the ECT ISDS mechanism has demonstrated to be an effective mean by which protecting energy investments also within the EU, where the number of disputes incepted under Art. 26 ECT due to the legal reforms in the RES sector has experienced a literal boom. To this respect, the cases involving Italy, namely *Blusun* and *Eskosol*, are contributing to the consolidation of an ECT *acquis*.

Regarding *Blusun*, in line with previous case law rendered by ECT arbitral tribunals, it shed light on numerous ECT provisions, in particular those concerning the definition of investment, Art. 19 on environmental protection, the FET standard laid down in Art. 10 ECT and the prohibition of expropriation provided in Art 13 ECT. Moreover, the *Blusun* case contributed to better clarify the application of the Treaty to EU internal relations, i.e. the so-called intra-EU question, and the limits of States' right to regulate under the ECT. As regards *Eskosol*, it is likely to test very sensitive principles of international investment law within the context of the ECT, such as the principles of *lis pendens*, *res judicata* and collateral estoppel. In addition, pending cases against Italy are likely to shed further light on the interpretation of ECT provisions and to States' right to regulate. As said, in fact, there are numerous cases which concern the *retroactive* measures which Italy adopted in the RES sector starting from 2014.

To conclude, it can be said that the Italian case had the merit to put into the academic debate important questions concerning the future of the ECT and process and to revive old and still unsettled issues such as the implementation of the ECT within the EU.

CONCLUSIONS

In this work, we have dealt with three broad subjects:

1. the ECT's attempt to provide for global rules on energy security and the limits that prevent its vocation to become the reference international framework in this field;
2. the multiple interpretative issues posed by the joint accession of the EU and its Member States to the ECT, especially as far as the ISDS regime laid down in Art. 26 ECT is concerned;
3. the implications of Italy's withdrawal from the Treaty in terms of investment promotion and protection and on the future of the ECT and process.

Said subjects have been discussed, in detail, in three separate chapters. In Chapter I, we have recalled the main steps of the Energy Charter process, with particular attention to its latest outcomes. To this respect, we have described, in the first place, the main contents of the EEC and its role as the founding document of the ECT and process. In the second place, we have described the main fields of energy cooperation dealt with by the ECT, namely trade, transit, investment promotion and protection and the other sectors covered by the Treaty. In the third place, we have examined the IEC and, more specifically, its attempt to modernize the EEC as the founding document of the ECT and process and to enhance international energy cooperation in order to deal with contemporary challenges in the energy realm.

Then, we have assessed the main achievements of the ECT and the shortcomings that still prevent its attempt to become the reference legal framework on global energy security. To this respect, we have pinpointed, in the first place, the promotion and protection of foreign energy investments as the most remarkable achievement of the Treaty, as confirmed by the nearly hundred and seventeen disputes so far filed under Art. 26 ECT. In that regard, we have highlighted how the awards and decisions rendered by ECT arbitral tribunals are progressively clarifying many controversial provisions and aspects of the Treaty and are providing for an ECT *acquis*. Despite it may be premature to speak about a well-established jurisprudence on the ECT, especially if one considers the different arbitration *fora* provided for by the Treaty and the lack of *stare decisis* effects of decisions rendered by ECT tribunals, it can be said that such *acquis* is contributing to the evolution and consolidation of international investment law and practice by clarifying very sensitive questions such as the balance between State right to regulate and the investors' legitimate expectations.

In the second place, we have examined the many factors that undermine the authority of the ECT in the realm of energy security. To this regard, the non-participation of major economies such as the USA, China and Russia to the ECT can be seen as the most relevant political failure of the Energy Charter process. More recently, such process has been seriously challenged by the Italian withdrawal from the Treaty, which, *inter alia*, has posed relevant concerns about the future of its application, especially within the EU context. With specific regard to the Russian decision not to ratify the Treaty and Italy's withdrawal therefrom, we have seen how both had to do with EU inner questions, i.e. the extent to which the Treaty, in

particular its transit and investment promotion and protection regimes, applies within the EU.

These latter aspects have been discussed, more in detail, in Chapter II, where the main issues posed by the mixed accession of the EU and its Member States to the Treaty, with specific regard to the ECT ISDS regime, have been discussed. In particular, we have remarked how said issues may affect, *in practice*, the application of the Treaty, in general, and the effectiveness of the its investment dispute settlement regime, in particular. As seen, said issues touch very sensitive questions of international, EU and national law and, despite having already been dealt with in the realm of intra-EU BITs, acquire particular complexity within the ECT context.

To this regard, we have dwelled on the many questions arising as to the international responsibility of the EU and its Member States for the performance and, more important, for breaches of ECT investment provisions. Said questions have been addressed under the ILC's Articles on the international responsibility of States and international organizations, i.e. the ARSIWA and the DARIO, and ECT provisions on international responsibility, namely Art. 22 and, more important, Art. 23. In the course of our analysis, we have ascertained how said Articles are unable to clarify all the interpretative issues which may arise with respect to questions of international responsibility under the ECT. Accordingly, we have reviewed relevant ECT case law, especially the decisions and awards rendered by arbitral tribunals established under Art. 26 ECT to settle intra-EU disputes. According to such case law, the only general conclusions one may reach is that any question of international responsibility arising under the ECT can be addressed depending on the specific features that distinguishes each case, such as the contents of the claims, the addressees of the disputes and the measures challenged by the claimants.

Moreover, we have examined further issues arising from mixity, such as the admissibility of EU internal disputes, notably those intra-EU, to the ECT ISDS mechanism, the relevance and applicability of EU law to said disputes and, finally, the interplay between the ECT and EU law. Starting with the admissibility of EU internal disputes to the ECT ISDS mechanism, we have seen how said issue, especially as far as intra-EU disputes are concerned, represents one of the most debated aspect in both academic literature and intra-EU disputes filed under the Treaty. While from an EU law perspective the applicability of Art. 26 ECT to EU internal relations is understandably a source of concerns, from the standpoint of ECT arbitral tribunals the question is groundless. ECT arbitral tribunals, in fact, have constantly advocated the applicability of Art. 26 ECT to intra-EU relations and, therefore, the admissibility of intra-EU disputes to the ECT ISDS mechanism. More problematic is to reach similar conclusions with respect to other EU internal disputes, namely disputes filed by investors claiming the EU citizenship or disputes filed against the EU rather than its Member States, since no dispute of these types has been so far filed under the Treaty.

As to the applicability and, more in general, relevance of EU law in ECT arbitrations, we have seen that, under ECT case law, it is well-established that EU law as a whole – i.e. both EU primary and secondary law – applies as both

"applicable law" and facts to intra-EU – and, more in general, EU internal – disputes, due to its dual nature of both international and domestic law.

With respect to the relationship between the ECT and EU law, it is the most relevant question presently discussed with respect to the ECT investment regime. As seen, the recent exponential raise of intra-EU disputes under the Treaty raised the old question of the compatibility of the ISDS clauses provided for in international investment agreements, notably intra-EU BITs, with EU law. Such question, indeed, has recently gained momentum following the *Achmea* judgement, where the CJEU ruled on the incompatibility between ISDS clauses as the one included in the BIT presently in force between the Netherlands and Slovakia with EU law, namely Articles 267 and 344 TFEU. To this respect, the European Commission has constantly claimed that Art. 26 ECT would be inapplicable to intra-EU relations, since it would be in conflict with the autonomy of the EU legal order and, more specifically, with Articles 267 and 344 TFEU.

To this regard, we have ascertained that, under relevant ECT case law, the ECT and EU law do not deal with the *same* subject matter and, furthermore, do not conflict with each other, especially as far as Art. 26 ECT and Articles 267 and 344 TFEU are concerned. As to the possible effects of the *Achmea* judgement on the ECT, we have seen how the arbitral tribunal in *Masdar* ruled on the irrelevance of the *Achema* judgement on the ECT. It is safe to assume that, in future ECT decisions and awards, the relevance of the *Achmea* judgement on the ECT will be further discussed.

As to the solution of possible conflicts between the two regimes, we have ascertained how said issue requires the application of international law rules and principles governing the relationship between successive treaties, namely *lex specialis* and *lex generalis*, a task which is particularly thorny in the ECT context. As seen, in fact, it is not easy to establish which treaty, between the EU Treaties and the ECT, qualifies as *lex posterior* or *lex generalis*, especially if one considers that the ECT includes, among its Contracting Parties, EU Member States that acceded the Treaty before they founded or acceded the EU as well as EU Member States that joined the Treaty after acceding the EU. Whatever the case, we have seen how ECT arbitral tribunals are increasingly advocating for the primacy of the ECT over EU law, a state of things that unveils a conflict of jurisdiction on intra-EU investment disputes between the ECT – and its ISDS mechanism – and EU law – and its judicial system.

In Chapter III, we have examined the Italian withdrawal from the ECT and Italy's involvement in investment disputes filed under Art. 26 ECT. As to the withdrawal, we have tried to find out, in the first place, the reasons behind such a drastic decision. In this respect, we have expressed criticism on the decision to abandon the most relevant multilateral international treaty for mere budgetary reasons, while we gave more credit to other justifications which are allegedly at the base of the decision, i.e. the reshaping of the strategic role played by the Treaty for Italy following Russia's decision not to ratify it and the prevailing role assumed by the EU in the field of FDI following the entry into force of the Lisbon Treaty.

In the second place, we have tried to point out the consequences of the withdrawal on the promotion and protection of energy investments towards and from Italy. To this regard, we have highlighted that, due to the sunset clause laid down in Art. 47(3)

ECT, the ECT investment regime will continue to protect investments made in and from Italy until 31 December 2035. Moreover, we have analysed how post-withdrawal investments may be indirectly protected by the ECT via Italy's membership to the EU, a protection that, indeed, presents many procedural thresholds. In general, we have noticed that by withdrawing from the Treaty, Italy lost a great opportunity to play an active role in the most relevant international forum dealing with the current challenges affecting energy security and to provide foreign investors investing in Italy as well as Italian investors investing in other Contracting Parties Countries with an appropriate framework for the promotion and protection of energy investments.

In addition, we have observed how Italy's withdrawal undermined the authority of the ECT as the reference legal framework on international energy security, while at the same time fostered discussion on the already complex debate on the mixed participation of the EU and its Member States to the Treaty.

As regards the involvement of Italy in investor-State disputes under Art. 26 ECT, we have seen how Italy, similarly to Spain and the Czech Republic, has been named as respondent to numerous disputes due to the modifications introduced in the RES sector. To this regard, we have pointed out an interesting trend experienced by the ECT ISDS regime in the recent few years: from an east-west instrument to protect energy investments, the ECT ISDS mechanism has proved to be a formidable mean for the protection of energy investments also within the EU, where the number of controversies filed under Art. 26 ECT due to the legal reforms in the RES sector has experienced a literal boom. As seen, inasmuch as said disputes are awarded or partly decided by ECT tribunals, the ECT *acquis* is likely to consolidate.

In the second part of Chapter III, we have focussed on two cases involving the Italian State, namely *Blusun* and *Eskosol*. While both cases are still pending, an award has been rendered on 27 December 2016 by the arbitral tribunal established to settle *Blusun*, while a decision on Italy's application under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings has been issued on 20 March 2017 by the tribunal constituted to settle *Eskosol*.

As to *Blusun*, in line with previous case law rendered by ECT arbitral tribunals, it shed light on numerous ECT provisions, in particular those in particular those concerning the definition of investment, Art. 19 on environmental protection, the FET standard laid down in Art. 10 ECT and the prohibition of expropriation provided in Art 13 ECT. In addition, *Blusun* contributed to better clarify the issue of the application of the Treaty to EU internal relations and, moreover, on the limits of States' right to regulate under the ECT.

As regards *Eskosol*, it is likely to test very sensitive principles of international investment law within the context of the ECT, such as the principles of *lis pendens*, *res judicata* and collateral estoppel. Furthermore, it presents an interesting case of an investor, allegedly foreign controlled, suing its home State.

It must be borne in mind that *Blusun* and *Eskosl* concerned the modifications introduced in the Italian RES sector before 2014, i.e. those measures which, despite reshaping the Italian supporting scheme on RES, had no retroactive

effects. To this regard, it is worth highlighting that pending cases against Italy are likely to shed further light on the interpretation of ECT provisions and to States' right to regulate, since, as said, they mostly concern the *retroactive* measures which Italy adopted in the RES sector starting from 2014.

In sum, in this work we have recapped the most relevant questions that mixity and Italy's withdrawal pose as to the ECT, in light of the most recent trends in the Energy Charter process and ECT arbitral practice. In doing so, we have tried to contribute to the general debate on the Treaty and its unsettled interpretative issues, a debate which is increasingly drawing the attention of academics and practitioners. Indeed, future decisions and awards rendered under the ECT, as well as potential judgements by the CJEU on the ECT, are likely to shed further light on the issues discussed in this thesis.

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