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Beiträge zum Transnationalen Wirtschaftsrecht

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The Applicability
of the Energy Charter Treaty
in ICSID Arbitration
of EU Nationals vs. EU Member States

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**The Applicability of the Energy Charter Treaty
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of EU Nationals vs. EU Member States**

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A. Introduction

In recent times, the relationship between EC law and international investment law has gained increasing attention. This is due to ongoing proceedings before the European Court of Justice (ECJ) concerning the compatibility of bilateral investment treaties (BITs) of EU Member States with EC law,¹ several arbitral proceedings of investors versus EU Member States based on BITs between EU Member States and/or concerning substantive legal problems that are somehow related to EC law (*Eastern Sugar*² being the best known example in this regard), and finally, initial discussions on the implication of a new EC competence for foreign direct investment according to the Treaty of Lisbon.³ Less attention, however, has so far been paid to the relationship between EC law and the Energy Charter Treaty (ECT) with regard to the specific situation of a possible arbitral proceeding of an EU national versus an EU Member State. As the ECT is a plurilateral treaty that has been concluded as a so-called mixed agreement by the EC and all its Member States, the questions that arise are to a large extent different than in the *Eastern Sugar*/BIT situation.

This article discusses the applicability of the ECT in ICSID Arbitrations of EU nationals versus EU Member States. It will do so from a strictly legal perspective, just as an arbitral tribunal would do, thus not focusing on broader policy considerations.

B. The Applicable Law Concerning Admissibility and Merits of ICSID Proceedings

The outcome of any ICSID case, both with regard to jurisdiction and to the merits, is centrally determined by the applicable law of the respective legal proceeding. In this respect, it is important to differentiate between the law applicable to the jurisdiction of the arbitral tribunal on the one hand and the applicable law of assessing the merits of a claim on the other.⁴

With the exception of individual agreements by the participating parties, the applicable law concerning jurisdiction is exclusively determined by the law which substantiates the admissibility of the claimant's claim in accordance with Art. 25 para. 1 of the ICSID Convention.⁵ In this context, it is important to determine whether the claimant refers to a specific investment contract, concluded between him and the responding (host) state, the national investment legislation of the host state, or invest-

¹ See Opinion AG *Maduro*, Case C-205/06, *Commission v. Austria*, und Case C-249/06, *Commission v. Schweden*, of 10 July 2008.

² *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL ad hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007.

³ See, e.g., *Karl*, *Journal of World Investment & Trade* 2004, 413 *et seq.*; *Maydell*, in: Reinisch/Knahr (eds.), *International Investment Law in Context*, 73 *et seq.*

⁴ *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, para. 87 *et seq.*

⁵ *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, para. 88; *SAIPEM S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007, para. 68.

ment treaties under public international law, when providing evidence with regard to the presence of an arbitration agreement, i.e. ‘consent’ in the sense of Art. 25 para. 1 of the ICSID Convention.

The applicable law that determines the jurisdiction of ICSID is subject to determination by the legal character of the specific legal instrument that establishes ‘consent’ to arbitration as defined by the three aforementioned possibilities. This particular and imperative interdependence of applicable law and the distinctive legal character of arbitration agreements, that constitute the jurisdiction of ICSID in accordance with Art. 25 para. 1 of the ICSID Convention, has been widely recognised in arbitral decisions.⁶

With regard to the assessment of jurisdiction of ICSID in a case concerning the Energy Charter Treaty, it is important to note that ‘consent’ to arbitration in the sense of Art. 25 para. 1 of the ICSID Convention builds upon Art. 26 para. 2 *et seq.* ECT. Pursuant to this observation, it is clear that – in addition to the ICSID Convention – only the Energy Charter Treaty constitutes applicable law with regard to the jurisdiction of ICSID. This fact is subject to concretisation in Art. 26 para. 6 ECT. Art. 26 para. 6 ECT determines that the arbitral tribunal, that has been constituted on the grounds of Art. 26 para. 4 ECT, is required to rule in respective disputes ‘in accordance with this Treaty and applicable rules and principles of international law’.

As a result, it can be established that the Energy Charter Treaty as a public international law treaty as well as additional pertinent public international law constitute the applicable law with regard to the assessment of the admissibility of ECT/ICSID arbitration proceedings. Thus, in this regard, national legislation or EU legislation cannot be taken into consideration.⁷ This could only be the case if the claimant would be in a position to establish the jurisdiction of ICSID based on national or EC legislation.⁸ With regard to an ECT/ICSID proceeding, this is explicitly not the case.

A similar question arises concerning the applicable law to the merits of an ECT/ICSID proceeding. Even though in this respect priority should be conferred upon the individual agreement of the parties (Art. 42 para. 1 of the ICSID Convention), with regards to plurilateral investment protection treaties, it is common practice to include a respective choice of law clause in the relevant treaty. This principle similarly applies to the Energy Charter Treaty, which stipulates in the previously cited Art. 26 para. 6 the exclusive application of the ECT and respective rules and regulations of public international law. Thus, following the institution of an ICSID proceeding by an investor of the energy sector according to Art. 26 para. 2 *et seq.* ECT, the designa-

⁶ See in particular *Compania de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, para. 96: “[w]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract [...]”; also comprehensively in recent times *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, para. 148 *et seq.*

⁷ See *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999, para. 35: “The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention.”

⁸ Cf. *Dolzer/Schreuer*, Principles of International Investment Law, 253.

tion of Art 26 para. 4 ECT becomes a compulsive obligation to the arbitral tribunal in view of the applicable law.⁹

It can be concluded that with regard to the jurisdiction of an arbitral tribunal as well as the merits of a respective case, the arbitral tribunal is required to exclusively apply the ECT as a treaty of public international law and if applicable additional relevant sources of public international law. In this respect, there is no margin regarding the application of national or EC legislation.¹⁰

C. The Public International Status of the ECT towards the EC and its Member States

Since the ECT, as public international law, constitutes the primary source of applicable law in ECT/ICSID proceedings, the question arises as to what extent the EC and its Member States are bound by the ECT under public international law. This question concerns the general legal position of public international law with regard to so-called mixed agreements of the EC and its Member States and moreover the separate problem of the legal effect of a mixed agreement within the EC and thus also with regard to the *inter se* relationship of its Member States.

The EC and all of its Member States are contracting parties of the Energy Charter Treaty,¹¹ which was signed on 17 December 1994 by the European Community and its Member States. The EC¹² and the majority of its Member States submitted their ratification documents on 16 December 1997;¹³ and the Energy Charter Treaty came into force on 16 April 1998.¹⁴ The ratification of the ECT by the EC and its Member States constituted a necessity following a critical competence constellation, i.e. the EC exclusively possesses the competence regarding the trade in energy aspects of the ECT. However, with reference to other regulatory aspects of the ECT, e.g. investment treatment standards and arbitration proceedings, legal competence is allocated to the Member States¹⁵ of the EC. Hence, the ECT has been concluded as a so-called mixed agreement by the EC and its Member States.

⁹ Schreuer, The ICSID Convention, Art. 42 para. 56.

¹⁰ With the same conclusion Happ, International Arbitration Law Review 10 (2007), 74 (76 f.); national or EC law may only be taken into account with regard to factual aspects of a case, sometimes also referred to as 'preliminary' or 'incidental' questions. For details see Spiermann, in: Muchlinski/Ortino/Schreuer (eds.), Handbook of International Investment Law, 89 (110 *et seq.*).

¹¹ See OJ EC 1998, L 69/26 *et seq.*

¹² 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 EC 1998, L 69/01 *et seq.*

¹³ See <http://www.encharter.org/fileadmin/user_upload/document/Public_ratification_Treaty.pdf>.

¹⁴ OJ EC 1998, L 252/21.

¹⁵ For more details see *infra* C.II.2.

I. General Aspects Concerning the Legally-binding Effects of Mixed Agreements under Public International Law

The legal concept of so-called mixed agreements acquires significance primarily in EC law.¹⁶ Since the applicable law of ECT/ICSID proceedings is not EC law but public international law, the legal character of the ECT – representing a mixed agreement – under EC law is irrelevant in an ECT/ICSID proceeding. In fact, public international law standards constitute the decisive components.

From a public international law perspective, a mixed agreement, similar to any other public international law treaty, imposes a comprehensive legally-binding effect upon all contracting parties.¹⁷ This derives from the legal principle of *pacta sunt servanda* (Art. 26 Vienna Convention on the Law of Treaties [VCLT]).¹⁸ Next to the binding effect of a mixed agreement, the implementation of the legal obligations deriving from a respective treaty into national (or EC) law is subject to the domestic (constitutional) law of the contracting parties.¹⁹ Public international law, in this regard, in general only determines ‘that’ the respective obligations contained in a treaty have to be observed, but it does not impose specific obligations as to ‘how’ they should be implemented within the domestic legal system.²⁰ Moreover, and in accordance with this general compliance structure of international treaties, it is a generally-recognized legal principle that the obligations deriving from a public international law treaty take precedence over domestic law.²¹ This principle follows directly from Art. 27 VCLT, which states that a State is not legally entitled to refer to national legislation in order to justify contractual non-compliance to public international law treaties. Since the aforementioned principles are subject to customary public international law,²² they are similarly legally-binding upon the EC, which constitutes a subject of public international law (Art. 281 EC), regardless of the fact that the EC is not a contracting party to the VCLT.

In conclusion, the legal character of the ECT as a mixed agreement under EC law does not influence the comprehensive legally-binding effect of the treaty in view of the EC and its Member States from the perspective of public international law. Similarly,

¹⁶ For an overview on mixed agreements under EC law see, e.g., *Eeckhout*, External Relations, 190 *et seq.*; *Heliskoski*, Mixed Agreements; *MacLeod/Hendry/Hyett*, External Relations, 142 *et seq.*; *Rosas*, in: Dashwood/Hillion (eds.), External Relations, 200 *et seq.*

¹⁷ Prevailing view in the literature, see, e.g., *Stein*, Der gemischte Vertrag, 206; *Tomuschat*, in: von der Groeben/Schwarze (eds.), EUV/EGV, Vol. 4, Art. 300 para. 64; *Eeckhout*, External Relations, 222.

¹⁸ *Schmalenbach*, in: Calliess/Ruffert (eds.), EUV/EGV, Art. 300 EGV para. 55.

¹⁹ *Tietje*, in: Wouters/Nollkaemper/de Wet (eds.), The Europeanisation of International Law, 55 (57); *Epiney*, EuZW 1999, 5 (6); *Ritgen*, in: Bauschke et al. (eds.), Pluralität des Rechts, 117 (120).

²⁰ *Ritgen*, in: Bauschke et al. (eds.), Pluralität des Rechts, 117 (120).

²¹ *Peters*, Völkerrecht, 93.

²² See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 of 24 May 2006, p. 8; *Jennings/Watts*, Oppenheim’s International Law, Vol. I/1, 84 *et seq.*; *Greek and Bulgarian Communities Case*, PCIJ 1930, Ser. B, No. 17, 32: „[I]t is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.“

the ECT's legally-binding effect as public international law extends to the *inter se* relationship of the EU Member States.

II. Exemptions to the Comprehensive Binding Effects regarding Mixed Agreements

The comprehensive legally-binding effect of mixed agreements under public international law is not subject to modifications because of the allocation of competence between the EC and its Member States according to the EC Treaty. The competence allocation in external relations between the EC and its Member States²³ must be considered as *res inter alios acta* with regard to third States. Thus, the internal competence allocation between the EC and its Member States is – from the perspective of public international law – not legally relevant within the boundaries of Art. 46 of the VCLT, i.e. on the condition that there is no instance of an act being committed evidently *ultra vires*. If at all, an exception from this can only be granted if the EC and its Member States have notified the internal allocation of competencies while ratifying the respective treaty.²⁴

At the time of the ratification of the ECT, or at any later date, neither the EC nor its Member States issued a document of public international law regarding the precise allocation of their internal legal competencies, from which the absence of a legally-binding effect of the ECT – according to the principles of public international law – could have been concluded clearly and accurately. In fact only an EC notification in accordance to Art. 26 para. 3 lit. b) ii ECT is present.²⁵ This notification in essence refers to the fact that the EC will refuse its consent to arbitration or conciliation proceedings, if the investor in question previously approached the ECJ and/or the Court of First Instance (CFI) respectively. Notwithstanding the fact that the aforementioned notification has been exclusively issued by the EC and not by its Member States, and in addition refers to a rather specific and, with regard to the subject of this article, a non-pertinent legal protection problem, the notification emphasises once more, *e contrario*, that a modification under public international law of the legally-binding effects of the ECT towards the EC and its Member States cannot be assumed.

With regard to the Energy Charter Treaty, it can be concluded that the treaty comprehensively also constitutes legally-binding effects upon EU Member States *inter se*. This is consistent with the prevailing view of academic literature, which in reference to mixed agreements considers a silent exclusion of the legally-binding effects only regarding the EC's relationship towards its Member States.²⁶ However, this is not perceived to be existent in terms of the *inter se* relationship of the EU Member States. In fact, it has rightly been emphasised that, in the case of mixed agreements, the EU Member States among themselves proceed as subjects of public international law. Thus, it must be assumed that with regard to their *inter se* relationship the Member

²³ For details see *Eeckhout*, External Relations, 9 *et seq.*

²⁴ For more details see, e.g., *Hilmes*, Die Europäische Union als Partei völkerrechtlicher Verträge, 243 *et seq.*; *Epiney*, EuZW 1999, 5 (7); *Schmalenbach*, in: Calliess/Ruffert (eds.), EUV/EGV, Art. 300 EGV para. 31; *Eeckhout*, External Relations, 222 *et seq.*

²⁵ OJ EC L 69/115 of 9 March 1998.

²⁶ *Herrmann*, in: Bauschke et al. (eds.), Pluralität des Recht, 139 (159).

States enter into public international law relations.²⁷ By way of exception, this result could only be modified if (1) the exclusion of the *inter se* effect is the result of the respective public international law treaty or (2) the respective subject matter of the mixed agreement would not at all be part of any sovereign competence of the EC Member States.

1. *Limitations of the Legally-Binding Inter Se Relationship as a Result of Explicit and Implicit ECT Standards?*

The comprehensive public international law principle of the ECT's legally-binding effects with respect to the *inter se* relationship of the EC Member States themselves, could be subject to restriction as a result of explicit or implicit statutory provisions of public international law.

a) *Explicit Statutory Provisions of the ECT*

In consideration of the aforementioned insignificance of EC legislation and with regard to the comprehensive legally-binding effects of the EC and its Member States concerning mixed agreements and possible resulting judicial conflicts of EC law, the practice of including 'disconnection clauses' in treaties of public international law has been adopted. The first such treaty was the 'Convention on Mutual Administrative Assistance in Tax Matters' of the Council of Europe from 1988.²⁸ It contains the following provision in Art. 27 para. 2: 'Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community'. Since 1988 the EC and its Member States concluded more than 20 treaties under public international law, which contain similar 'disconnection clauses'.²⁹

By the use of a 'disconnection clause' it is exceptionally possible, under public international law, and in the context of the *inter se* relations of the EU Member States, to disregard the regulation of the respective public international law treaty, and in deviating from the previously mentioned principles, apply EC internal law. Such an explicit modification of the binding effects of a treaty concerning the *inter se* legal relationship of the respective contracting parties appears necessary, not only where future deviations from the treaty are concerned, i.e. subsequent to the treaty coming into force, but also with regard to the retrospective effect of the *inter se* relationship of individual contracting parties that would remain unaffected by the respective treaty.³⁰

²⁷ *Kuijper*, EJIL 6 (1995), 222 (228): „It is clear as a matter of international law that a mixed Community agreement, concluded simultaneously between the Community, its Member States and third States, is in principle capable of creating rights and obligations between all the parties and hence also between the Member States *inter se*“; see also *Oen*, Internationale Streitbeilegung im Kontext gemischter Verträge, 71; *Herrmann*, in: Bauschke et al. (eds.), Pluralität des Recht, 139 (159).

²⁸ Available at: <<http://conventions.coe.int/Treaty/ger/Treaties/Html/127.htm>>.

²⁹ For a comprehensive assessment see *Smrkolj*, The Use of the 'Disconnection Clause' in International Treaties.

³⁰ *Smrkolj*, The Use of the 'Disconnection Clause' in International Treaties, 8 *et seq.*

This is based on Art. 41 VCLT, which provides for the possibility of *inter se* modifications of multilateral treaties only in succession to the treaty becoming effective. Moreover, Art. 41 VCLT imposes specific requirements on *inter se* modifications.³¹

The Energy Charter Treaty does not contain a ‘disconnection clause’. From a public international law perspective, this again clearly indicates that the ECT establishes a comprehensive legally-binding effect, also with regard to the *inter se* relationship of the EU Member States. Furthermore, it is important to note that certain regulations of the ECT underline *e contrario*, the treaty’s *inter se* effect concerning the relationship of the EU Member States. First of all, this is reflected in a declaration that has been published with reference to Art. 25 of the ECT on the occasion of the treaty’s signing by the EC and its Member States.³² The declaration clarifies the relevance of the Freedom of Establishment of EC law (Art. 58 EEC old version; Art. 48 EC) with regard to Art. 25 ECT. Moreover, particular emphasis should be directed at the decision No. 1 of the European Energy Charter Conference,³³ which regulates the relationship between the ECT and the Svalbard Treaty from 1920, and which declares that, in the case of arising conflicts, the ECT will be overruled by the Svalbard Treaty. Since there exists no corresponding provision concerning the EC Treaty, it can be followed, *e contrario*, that from a public international law perspective the ECT is legally superior to the EC Treaty in the context of the legal relationships among the EU Member States.

While interpreting the ECT, Art. 16 would also appear to be of particular significance. The exact wording of this article is as follows:

‘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.’

It can be followed from the above considerations that the *inter se* modification of the ECT by means of EC law, with reference to the relationship among the EU Member States, is not perceived to be possible, as a result of the absence of the ECT’s respective ‘disconnection clause’. This is even more accurate in reference to *inter se* modifications, which effectively impose negative implications upon investors (Art. 16 ECT).

³¹ See also *infra* C.II.1.b.

³² Available at: <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf> (p. 32).

³³ Annex 2 to the Final Act of the European Energy Charter Conference, available at: <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf> (p. 135).

b) Implied Inter Se Modification?

As there is no evidence for any explicit modification of the binding effects of the ECT concerning the *inter se* relationship of the EU Member States, the question remains whether any implied *inter se* modification might be given. As such, it may be argued that the EC and its Member States, upon the ratification of the ECT or during a later juncture, implied that the Treaty is not applicable to their *inter se* relationship. Such a modification of the extent to which the ECT is legally-binding upon EU Member States in their mutual relations would, from a public international law perspective, only be possible if the requirements of Art. 41 VCLT were fulfilled.

Art. 41 (1) of the VCLT stipulate that any possible *inter se* modification of a multilateral treaty is first of all subject to the provisions of the treaty concerned. Accordingly, the relevant corresponding prerequisites for such an *inter se* modification of the ECT are found in its Art. 16. Based on the above stated Article, the stipulations of ECT Part III (Investment Promotion and Protection) and Part V (Dispute Settlement), can under no circumstances be replaced by other international treaties between individual parties to the ECT if this would cause negative effects on investors. Following from this explicit specifications of the ECT, the minimum standards of material and procedural investment protection set out in the ECT clearly remain unaffected, even in the case of an *inter se* modification occurring. Due to the above stated reasons, any possible *inter se* modification of the ECT through EC law cannot have a negative impact on the procedural and substantive rights of an investor under the ECT.

The prohibition of any *inter se* modification of the ECT with negative effects on an investor is also further confirmed by Art. 41(1)(b)(ii) of the VCLT. Herein, an *inter se* modification is precluded when it ‘does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.’ This being premised on the fact that such a modification is not in the concerned treaty itself prohibited. In this sense, the central aims and objectives of the ECT must be determined through interpretation. In this regard and in accordance with contemporary developments in public international law, it is particularly important to consider if the respective treaty establishes individual rights. Any *inter se* modification is precluded once the respective treaty has an individual rights dimension.³⁴

The interpretation of the ECT must take place in light of the high priority accorded to economic growth in the Preamble of the Energy Charter Treaty which pursues this, ‘through measures on the liberalisation of investment and trade in primary energy sources and stocks’. In this context, the substantive investment protection regulations of Part III of the ECT and the procedural guarantees of the Art. 26 ECT must be taken into consideration. These regulations clearly underscore the integral role that investment protection has as a guarantee of individual rights³⁵ under the ECT. This is particularly clearly stated in Art. 26 (3)(a) of the ECT. It states that ‘Every contracting party ... must give its unconditional consent to a dispute resolu-

³⁴ *Smrkolj*, The Use of the ‘Disconnection Clause’ in International Treaties, 10.

³⁵ For details on the individual rights dimension of international investment law see, e.g., *Spiermann*, *Arbitration International* 20 (2004), 179 (183 *et seq.*); *Böckstiegel*, *Arbitration International* 23 (2007), 93 *et seq.*

tion in accordance and subject to this article.’ The integral and central status of substantive investment protection and what its relevant ECT legal protection means for investors under the ECT has been summarised by the Tribunal in *Plama* as follows:³⁶

“For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. The ECT has been described, together with NAFTA, as ‘the major multilateral treaty pioneering the extensive use of legal methods characteristic of the fledgling regulation of the global economy’, of which ‘perhaps the most important aspect of the ECT’s investment regime is the provision for compulsory arbitration against governments at the option of foreign investors ...’; and these same distinguished commentators concluded: ‘With a paradigm shift away from mere protection by the home state of investors and traders to the legal architecture of a liberal global economy, goes a coordinated use of trade and investment law methods to achieve the same objective: a global level playing field for activities in competitive markets’³⁷. By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.”

As clearly stated by the Tribunal, Art. 26 ECT and its consequent substantive investment protection regulations of Part III ECT clearly indicate that investors gain the status of subjects of international law under the ECT. As such, the ECT is not an international treaty which gives rise to rights and obligations to only its contracting parties. Over and above its contracting parties, private investors, as subjects of law, are accorded direct rights in substantive and procedural investment protection under the ECT.³⁸ This individual rights dimension of the ECT is further evidence of the fact that any *inter se* modification of the treaty with a negative impact on investors is prohibited.³⁹

c) *Intermediate Conclusion*

Consequently, from a public international law perspective, an *inter se* modification of the ECT by EC law is not possible. This is particularly the case if such a modification would have a negative impact on the substantive and procedural legal rights of investors. As the EC Treaty accords no direct legal protection to investors *vis-à-vis* EU Member States as host states any limitation of legal rights accorded to investors under Part III in connection with Part V ECT would be precluded under public international law. If such *inter se* modifications were to be permitted, the individual rights guarantee of an investor would be injured without there being any possible avenue for

³⁶ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 141.

³⁷ The Tribunal quotes as follows: ‘Bamberger, Lineham and Wälde, The Energy Charter Treaty in 2000 (in *Energy Law in Europe*, ed Roggenkamp; 2000), pp. 11, 31 and 32’.

³⁸ See also *Happ*, *Schiedsverfahren zwischen Staaten und Investoren*, 138 *et seq.*; *Tietje*, *The Law Governing the Settlement of International Investment Disputes*, in: Tietje (ed.), *International Investment Protection and Arbitration*, 17 (32 *et seq.*); *Tietje/Szodruch*, *ZBB* 19 (2007), 498 (501 *et seq.*) with further references.

³⁹ Similar *Wälde/Ben-Hamida*, *Energy Charter Treaty and Corporate Acquisition*, 48.

municipal legal protection possibilities in the EU Member States to instate according compensation.

2. ECT Part III and V as Competencies of EU Member States

As already indicated, the preclusion of an *inter se* effect of the ECT in the relationship of EU Member States could possibly be based also on the argument that the EU Member States do not possess any sovereign rights under public international law with regard to the ECT. This could be the case if the EC possesses exclusive competences concerning the regulatory content of the ECT. If the EC were to accord such a competency to its Member States, then one could argue that there was and is no decision-making competency for an EU Member State in what regards the ECT. Additionally, following on from this, it could also be argued that the ECT gives rise to no legally-binding effect upon the conduct of EU Member States.⁴⁰ The question as to whether such a perspective would be compliant with public international law needs obviously only be discussed if the relevant provisions of Part III and V ECT in effect are not within the sovereign competence of EU Member States.

From the vantage point of the allocation of competencies between the EC and its Member States in investment protection issues, one must differentiate between third-state investors and investors from EU Member States. With respect to third-state investors, the EC only has competence concerning admission of investments. This competency stems from Art. 57(2) EC and is restricted, at least according to the ECJ, to foreign direct investment that leads to control powers.⁴¹ Furthermore, this (limited) competence of the EC on admission of investment as part of free movement of capital is not an exclusive competence of the EC.⁴²

Over and above this limited competence of the EC on admission of investment, the EC has no competence with regard to investment protection. The entirety of the field on substantive procedural investment protection and substantive treatment standards falls under the competency of Member States.⁴³ This legal position would only change with the ratification and coming into force of the Treaty of Lisbon. Therein, at Art. 207 (1) Treaty on the Functioning of the European Union, a comprehensive competence over foreign direct investment is specified. At this time, however, there is no foreseeable juncture at which the Treaty of Lisbon would enter into force.

⁴⁰ In this direction *Oen*, Internationale Streitbeilegung im Kontext gemischter Verträge, 72; *Herrmann*, in: Bauschke et al. (eds.), Pluralität des Recht, 139 (159): „Soweit die Kompetenzen auf die EG übertragen worden sind, kann ein gemischtes Abkommen zwischen den Mitgliedstaaten wohl keine Verpflichtung begründen. Was gilt aber für Bereiche, in denen die Mitgliedstaaten eigene Kompetenzen ausgeübt haben? Soweit die Gemeinschaftsverträge keine Regelungen treffen bleiben die Mitgliedstaaten völkerrechtlich souverän. Ihre Teilnahme an einem multilateralen Vertrag oder einer internationalen Organisation begründet daher auch völkerrechtliche Rechtsbeziehungen nicht nur gegenüber Drittstaaten, sondern auch untereinander.“

⁴¹ For details concerning the respective (highly problematic) jurisprudence of the ECJ see *Scharf*, Die Kapitalverkehrsfreiheit gegenüber Drittstaaten (2008).

⁴² Convincing in this regard Opinion of AG *Maduro*, Case C-205/06, *Commission v. Austria*, and Case C-249/06, *Commission v. Schweden*, of 10 July 2008, para. 27 *et seq.*

⁴³ For details on the (missing) competences of the EC in investment protection issues see *Karl*, Journal of World Investment & Trade 2004, 413 (416 *et seq.*); *Maydell*, in: Reinisch/Knahr (eds.), International Investment Law in Context, 73 (80 *et seq.*), each with further references.

Part III ECT contains wide-ranging legal guarantees for investors in the treatment of admitted investments in the energy sector.⁴⁴ In light of the extremely limited competence of the EC in the energy sector, as can be seen in Articles 154, 155, and 175 (2)(c) EC, as well as with regard to the continuing competence of EU Member States concerning the treatment of admitted investment, Part III of the ECT can give no rise to any competence of the EC. In relation to Part III ECT, it is apparent that during the ratification of the ECT and even today, EU Member States acted and continue to act in full sovereignty.

The above also applies concerning the treatment of investment in the EU Single Market. The accordingly relevant Freedom of Establishment (Art 43 EC) states no allocation of exclusive competence for the EC. This can be seen by looking at Art. 44 EC. Rather, Art. 43 EC as one of the fundamental freedoms of EC law recognizes the competences of Member States and only conditions the exercise of these competences – just as it is the case with all fundamental freedoms.⁴⁵ Furthermore, there is nothing in secondary EC legislation based on Art. 44 EC which would be comparable with the substantive legal rights to investment protection guarantees that are set-out in Part III and V ECT. This is particularly evident with regard to the dispute resolution provisions of Art. 26 ECT, for which there exists no equivalent in EC law and thus no competence of the EC. This conclusion also applies to the Free Movement of Capital under Art. 56 EC and its corresponding secondary EC law.

Consequently, it can be clearly ascertained that the fundamental freedoms of the EC along with the substantive and procedural investment protection guarantees of Part III and V ECT have fundamentally differing objectives,⁴⁶ and hence give rise to no competency therein for the EC. As such, the EU Member States conducted and continue to conduct themselves with complete state sovereignty with regard to the ratification of the ECT Part III and V. On these grounds alone, there can be no possibility for an exclusion of the applicability of Part III and V ECT in the *inter se* relationship of EU Member States. What remains to be noted is the fact that even if one were to assume the presence of EC competence with respect to Part III and V ECT, this would not mean that the ECT would not be applicable in the *inter se* relationship of EU Member States. This, again, is due to the fact that the ECT explicitly prohibits any *inter se* modification having a negative impact on investments and investors (Art. 16 ECT).

III. The Particular Problem of Conflicting Jurisdiction in the Sense of Art. 292 EC

What must also be briefly elaborated upon is the particular problem of whether Art. 292 EC can preclude jurisdiction of ICSID. In this regard it is of course important to highlight again that Art. 292 EC is part of the internal law of the EC and thus not applicable law for an ICSID tribunal. This is regardless of the fact that Art. 292

⁴⁴ For details on the treatment standards of part III ECT see, .e.g., *Happ*, Schiedsverfahren zwischen Staaten und Investoren, 120 *et seq.*

⁴⁵ For details concerning the general structure of the EC fundamental freedoms see *Ehlers*, General Principles, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 175 *et seq.*

⁴⁶ Comprehensively also *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL ad hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 159 *et seq.*

EC is not applicable to an ECT/ICSID procedure anyway. Although Art. 292 EC, in accordance with ECJ jurisprudence,⁴⁷ can also apply to regulatory issues not being within an exclusive competence of the EC, it is determinant that this provision according to its clear wording only applies to disputes between Member States. Furthermore, Art. 292 EC is only intended to apply to the resolution of disputes between Member States as envisaged in the EC Treaty. In an ECT/ICSID procedure, what is at issue is not a dispute between EU Member States, but rather the legal protection of a private investor against an EU Member State. The EC does not acknowledge any legal protection procedure in the conduct between an investor and a Member State. For individuals (natural and legal persons), a legal right to directly bring a claim before the ECJ/CFI is only envisaged in Art. 230(4) EC in the context of challenging the legality of a legal act of an EC organ. As such, there are no circumstances in which an ECT/ICSID procedure can bring into question the competence of the ECJ as established in Art. 292 EC. As a result of its current effect being limited to internal Community matters, Art. 292 EC cannot have any impact on the admissibility or the merits of an ECT/ICSID proceeding.⁴⁸

IV. Irrelevance of Art. 307 EC

The non-applicability of Art. 307 EC in an ECT/ICSID proceeding must also be noted. Art. 307 EC has, according to the jurisprudence of the ECJ, a broad scope of application. This in connection with Art. 10 ECT leads, according to the opinion of Advocate General *Maduro*, to the conclusion that with regard to bilateral investment treaties between EU Member States there can exist the duty for a Member State to reconcile, with appropriate measures, conflicting international treaty obligations with EC law in relation to negotiations with the respective other contracting party of a BIT.⁴⁹ However, such a possible obligation of EU Member States is, of course, only an obligation under EC law, as such leaving public international law undisturbed.⁵⁰

D. Non-Applicability of EC Law as *Lex Arbitri* or *Ordre Public* in an ECT/ICSID Proceeding

As a last point, it must be emphasised that the aforementioned non-applicability of EC law in an ECT/ICSID proceeding does not conflict with the perspectives of *lex*

⁴⁷ ECJ, Case C-459/03, *Commission v. Ireland*, ECR 2006, I-4635 para. 84 *et seq.*

⁴⁸ See also *Söderlund*, *Journal of International Arbitration* 24 (No. 5, 2007), 455 (459): „The investor-state dispute resolution mechanism contained in a BIT does not call into question the competence of the ECJ. The EC Treaty only imposes obligations on Member States in their dealings with each other, inter alia, by instituting an obligation to refer disputes within the exclusive remit of the EC Treaty to the ECJ for adjudication to the exclusion of any other procedural remedy. It does not commit any non-signatory – such as a private investor – to submit to ECJ jurisdiction. Hence, provisions of the EC Treaty cannot intrude on the BIT-based investor-state dispute resolution facility.”.

⁴⁹ Opinion AG *Maduro*, Case C-205/06, *Commission v. Austria*, und Case C-249/06, *Commission v. Schweden*, of 10 July 2008, para. 33 *et seq.*

⁵⁰ See in general, e.g., *Schmalenbach*, in: Calliess/Ruffert (eds.), *EUV/EGV*, Art. 307 para. 1 and 7.

arbitri or *ordre public* in recognition and enforcement proceedings. In the context of a (private) commercial arbitration proceeding, EC law can, in principle, apply. This is due to the superiority that it enjoys in municipal law. Thus, for a tribunal which has its situ within an EU Member State, EC law might be applicable through the concept of *lex loci arbitri*. This would also apply in the context of an assessment of an arbitral award arising out of a recognition and enforcement proceeding under the concept of *ordre public*, as long as a domestic court of a Member State is addressed.⁵¹ An ECT/ICSID proceeding, however, does not, in any case, know a *lex arbitri* of a state. Rather, an ICSID proceeding has an exclusive public international character and is comprehensively governed by the ICSID Convention and the applicable law as is described above.⁵² Furthermore, an ICSID award pursuant to Art. 53(1) ICSID Convention is binding and not subject to review beyond what is foreseen under the ICSID Convention itself. This also applies, pursuant to Art. 54 ICSID Convention, in particular with what regards the full enforceability of an ICSID Arbitral Award. This is, pursuant to Art. 54 ICSID Convention, directly enforceable. As such, the recognition and enforcement of an arbitral decision is not subject to the influence of national (or EC) law on the basis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.⁵³ Following from this, there also exists no possibility for an ICSID award to be assessed from the perspective of *ordre public* based on EC legal principles. In this regard, the applicability of EC law to the assessment of an ICSID award is also precluded.

E. Conclusion

In conclusion, it is clear that the Energy Charter Treaty is applicable in an ICSID proceeding of an EU national versus an EU Member State. EC law does not influence such a proceeding which is exclusively governed by public international law.

⁵¹ For a comprehensive study see *Ruzik*, Die Anwendung von Europarecht durch Schiedsgerichte.

⁵² See, e.g., *di Pietro*, Stockholm International Arbitration Review 2005 (2), 136 *et seq.*

⁵³ *Schreuer*, The ICSID Convention, Art. 54 para. 4.

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