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Escalated interactions between EU energy law and the Energy Charter Treaty

Ernesto Bonafé* and Gökçe Mete**

ABSTRACT

The European Union (EU) has a recognized international legal personality and it has signed the Energy Charter Treaty (ECT) as a Regional Economic Integration Organization (REIO). As a result, the ECT, the EU and national legislation together establish different regulatory layers governing energy markets. Although those layers are in principle complementary, rules adopted in different periods and frameworks may cause inconsistencies in their implementation. The arbitral tribunal award on 21 January 2016 in the case *Charanne and Construction v Spain*, is only the latest illustration of the uneasy boundaries between the EU and ECT. This article will look into some of the dynamics and tensions between the EU internal energy market and policy and the ECT in the areas of transit, long-term contracts, renewable energy and external relations. The review of selected measures and case law will reveal the existence of tensions at regional and international levels and the way they are addressed to simultaneously accommodate regional and international legal orders. This article will help to understand what kind of interactions are happening today between the EU and the ECT legal systems and will offer a particular view to explain and approach those relations.

1. INTRODUCTION

On 21 January 2016, a final award on *Charanne and Construction v Spain*[1] has dealt with important issues regarding investment protection and the right to regulate national interests in the energy sector. This is one of the first cases filed under the Energy Charter Treaty (ECT)[2] regarding changes to Spain's renewable energy legislation. Similar cases are pending and are affecting other countries such as the Czech Republic and Italy. This kind of case, where an investor from a Member State of the European Union (EU) files a case under the ECT against another EU Member State, was unexpected only a few years ago, let alone when the ECT was negotiated in the early 1990s, with a view mainly to hydrocarbon issues in Eurasia. Today, the ECT, as a unique instrument to enhance the rule of law in the energy sector at international level, is to become a legal benchmark for investment protection in the global transition to a sustainable energy system.

The final award on 21 January 2016, which dismissed the merits and upheld the tribunal's jurisdiction, had to deal with the boundaries and the relations between the EU and the ECT. First, the tribunal held that Member States of the EU did not lose their status as contracting parties to the ECT when the EU ratified it as a Regional Economic Integration Organization (REIO) and consequently both the EU and its Member

* Ernesto Bonafé, PhD, Trade and Regulatory Expert at the Secretariat of the Energy Charter Treaty. The findings, interpretations and conclusions expressed in this artcile are those of the authors and do not reflect the positions of the institution.

** Gökçe Mete, PhD Candidate at Centre for Energy, Petroleum, Mineral Law and Policy of the University of Dundee and Visiting Scholar at The Energy and Natural Resources Law Institute of Queen Mary University of London. Email: gmete@dundee.ac.uk

1 *Charanne BV and Construction Investments SÀRL v Kingdom of Spain*, Stockholm Chamber of Commerce Arb No 062/2012.

2 The Energy Charter Treaty and Related Documents (1994) 2080 UNTS 100, 34 ILM 360 (ECT).

States individually can be respondents in ECT proceedings. Likewise, the tribunal pointed out that the ECT encompasses both the territory of a REIO and the territory of each of its Member States, being the national territory, the relevant one in this case. As a conclusion, the tribunal also upheld that dispute settlement under the ECT was compatible with EU law.

Some of the substantial and jurisdictional issues addressed in this award identify new challenges regarding the interactions between EU energy law and the ECT. Academic literature will flourish accordingly analysing the many issues at stake. This article tackles those interactions in a broader context than solely focusing on the renewable cases. It concludes that while there are tensions between the EU and ECT, they relate to the integration pace and specificity of each system.

2. THE EU ENERGY INTEGRATION PROCESS

The EU is a process of regional integration whereby its 28 Member States have ceded sovereignty by way of delegation of some decision-making powers in many policy areas to tailor-made institutions shared at the EU level. The EU we know today, is the result of an ongoing gradual integration process, starting with the 1951 the European Coal and Steel Community,[3] the Rome Treaties of 1957 establishing the European Economic Community and the European Atomic Energy Community, and with its most recent transformation under the Lisbon Treaty in 2009.[4] The initial focus of the EU in the energy sector was on achieving economic integration hence the creation of a single energy market. The Lisbon Treaty incorporated a separate article on energy issues[5] which explicitly involves the EU taking legislative measures on the functioning of the energy markets, energy security, energy efficiency and promotion of the interconnection of energy networks.

The primary law of the EU Treaties is implemented through a specific law-making process. Starting from the late 1990s, several sets of EU Directives and Regulations,[6] as well as Guidelines, were introduced covering electricity and gas markets and followed by the renewables sector in 2009, on the functioning and transparency of energy markets in 2011 and on Trans-European Energy Networks in 2013. The Energy Union relaunched an initiative on 25 February 2015, in the direction of more coordination and consistency to the different spread of actions in the energy sector. This is important because there is the risk that increased and spread EU secondary law is implemented in different or contradictory ways at national level.

The efforts to complete the internal energy market continue, post-Lisbon, with further focus on external dimension of the EU and stronger emphasis on energy security challenges. As more than half of the EU's energy comes from countries outside the EU, there is a particular need to establish an EU external energy policy, a platform and a regulatory space between the EU and potential third-country suppliers, as well as important energy corridors. With this in mind the Commission released its European Energy Strategy of May 2014[7] and later launched the Energy Union. One of the central measures emphasized in these policy instruments is speaking with one voice in global affairs, including notification of the Commission by Member States on their future agreements with third countries in the field of energy.

From an international perspective, it should be also noted that in a particular historical period, the aftermath of the fall of the Berlin Wall and dissolution of the former Soviet Union, a political declaration for international cooperation in energy between the west and the east was adopted in 1991, the European Energy

3 Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140 (hereinafter ECSC Treaty).

4 Lisbon Treaty replaced all previous EC Treaties and consolidated them under the Consolidated Version of the Treaty on the Functioning of the European Union (2008) OJ C115/47 (hereinafter TFEU) and Consolidated Version of the Treaty on European Union (2010) OJ C83/01 (hereinafter TEU).

5 TFEU, art 194.

6 Whereas a regulation must be implemented as national law in its entirety across the EU, a directive stipulates general rules for achieving a goal according to which each EU country must devise its national law and implement as they deem appropriate.

7 'Communication from the Commission to the European Parliament and the Council European Energy Security Strategy' COM (2014) 0330 final.

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Charter. This political momentum led to the materialization of the legally binding ECT in 1994.[8] The ECT is the first multilateral treaty in the energy sector covering investment protection, transit, trade and environmental aspects of energy. The ECT's constituency originally encompassed, *inter alia*, most of the energy-rich former Soviet Union and Central Eastern Europe.[9] The ECT was also signed by all EU Member States individually[10] and the EU as a whole, with its own internationally recognized legal personality.[11]

Similar to the ECT, but concerning two countries, bilateral investment treaties (BITs) provide an investor from the third country with protection against discriminatory acts of host governments who may adversely affect the investment, for example, through expropriation. More often than not, the BITs also contain an investor-state investment arbitration clause, which gives the foreign investor the right to initiate dispute settlement with the host state.[12] Moreover, some Member States signed intergovernmental agreements (IGAs) with producing third countries such as Russia for cross-border energy supplies and construction of energy infrastructure. For long time, those BITs and IGAs have been agreed by EU members among themselves and among them and third countries in parallel to the creation of an internal energy market.

3. AREAS OF TENSION BETWEEN THE EU AND ECT

In the light of the above, this article contemplates that the regional EU energy market is constructed and continues to evolve within a three-layered regulatory space encompassing, namely national legislation, EU law and international treaties—the IGAs and BITs concerning energy sector and most importantly the ECT. These rules were adopted in different periods and within different contexts. Even though the three legal layers pursue the common objective to improve the functioning of energy markets, in practice the interaction between different legal systems may result in tensions and inconsistences, as this article will identify and assess.

The first area of tension relates to the interaction between EU law and the ECT with regard to the concepts of transit and third-party access. The second area concerns disputes related to the long-term energy contracts from the perspectives of investment protection under the ECT/BIT and the EU internal market and competition rules. The third area of tension deals with two key sources of the energy mix, particularly renewable energy sources (produced domestically) and natural gas (the EU being mostly dependent on external suppliers). The role of national governments on ensuring these two different energy sources has been controversial. National changes in renewable energy support schemes have been challenged by investors under the ECT. On the other hand, intergovernmental natural gas agreements with third countries have been opposed by the EU, despite their international dimension.

There are many other potential conflicts between the three layers of legal frameworks. These problems are the result of pursuing the same objective of competitive, secure and sustainable energy markets at different level. Single solutions for each of the cases do not exist, but the problems need to be tackled. For instance, with an aim to clarify division of competences and international responsibility between the EU and Member States, the Commission adopted the Communication outlining the EU's future investment policy in

8 The ECT was opened for signature in Lisbon on 17 December 1994 and entered into force on 16 April 1998. It evolved through a non-legally binding political declaration of the European Energy Charter Conference. See Energy Charter's home page <http://www.encharter.org/> accessed 27 December 2015.

9 Today, the ECT has 54 contracting parties. For more information on signatories <http://www.encharter.org/index.php?id=6> accessed 10 January 2015.

10 Italy quitted in 2015.

11 This is done by inclusion of a Regional Economic Integration Organization Clause to the Treaty. A REIO clause entails some exceptions to the international treaty in question, to refrain third countries automatically enjoy from liberalization advantages of the regional integration formation and to reserve room for legislative manoeuvre for prospective measures to be taken within the REIO that might run contrary to national treatment principle embodied under the international framework.

12 The European Commission, 'EU Agrees Rules to Manage Investor-State Disputes' (Press Release, 28 August 2014) <http://europa.eu/rapid/press-release_IP-14-951_en.htm> accessed 10 January 2014.

2010,[13] followed by the Regulation establishing transitional arrangements relating to investment agreements between Member States and third countries[14] and another Regulation addressing the issue of allocating financial responsibility between the same in cases of investment arbitration, published in 2012 and 2014, respectively.[15]

This article acknowledges the existence of the problems by focusing on specific cases. It argues that putting the selected cases from the perspective of a conflict between different legal systems, this article will contribute to a better understanding and practical recommendations on how to resolve these problems.

Building a regional energy market does not only create tensions between the regional and international levels. For instance, in *Ålands Vindkraft AB v Energimyndigheten*,[16] Ålands Vindkraft, a wind-farm investor located in Finland, was not allowed to receive a green certificate in Sweden for the electricity exported there because the EU legislation has not harmonized green energy support schemes and there still exists market barriers for renewables. This case is certainly very interesting to understand the challenges to move from national energy markets into a single EU internal electricity market. However, the scope of this article does not cover focus on pure internal EU cases but areas of tension between the EU and international frameworks, namely the ECT and BITs.

4. NEGOTIATION DEADLOCKS BETWEEN REGIONAL AND INTERNATIONAL FRAMEWORKS: THE TRANSIT REGIME

Cross-border transport of energy materials and products forms an important aspect of Eurasian trade. Due to land-locked nature of Central Asia and long distances between producing and consuming centres, carriage of hydrocarbons often involves another actor, the transit state. The importance of transit increased particularly in the 1990s with the collapse of the Soviet Union—new sovereign states emerged, which meant the transport infrastructure had to cross several national borders. Definition of transit in international law suggests that there should be at least three states involved along the transport corridor.[17] Transit within the meaning of the ECT occurs where the 'transit state' and either the state of origin or the state of destination is a contracting party. The definition of transit also includes those situations where there is only two states involved (ie state of origin is also the state of destination).[18]

In the early 1990s, before the establishment of the common EU energy market, pipelines also crossed multiple borders within the EU and it became important to regulate it. Therefore, the transit regime of the EU and the ECT were developed in parallel. Although the definitions of the transit regimes were technically different in the context of the EU and the ECT,[19] in both contexts transit was a condition to start liberalizing cross-border trade of energy. The same need to regulate transit appeared within the borders of the EU and

13 '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.

14 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 (2012) OJ L351.

15 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 EU is Party (2014) OJ L257.

16 Case C-573/12, *Ålands Vindkraft AB v Energimyndigheten*, Judgment of the Court (1 July 2014) <http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&pArticle=1&mode=lst&docid=154403&occ=first&dir=&cid=67445> accessed 10 January 2015.

17 General Agreement on Tariffs and Trade (1947) 55 UNTS (GATT 1947) art V.

18 art 7(10) (a) (ii) ECT.

19 According to the EU's 'Transit Directives' of 1990s, transit is defined as transport of natural gas/electricity between high-pressure/high-voltage grids, origin or final destination of which is situated in the Community and covers a scenario where transport involves crossing of only one intra-Community border. ECT art 7 entitled 'transit' explicitly applies to carriage of 'Energy Materials and Products' (defined in ECT art 1(4) and further listed in Annex EM) through so-called 'Energy Transport Facilities' which are defined as 'high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling EMP'.

within the larger ECT constituency. However, other measures integrating the new market framework were substantially different in the EU and the ECT, which explains that later on during the liberalization process the concept of transit disappeared inside the EU, while at international level remained a core issue.

It could be said that there was a common need to regulate transit both under EU law and the ECT before the EU liberalization legislative packages of 2000s. These similarities, however, took in a very different context. Within the EU, the so-called 'First Energy Package'[20] introduced the first hints of (negotiated) third-party access, (accounting and functional) unbundling, and (partial) liberalization of national energy markets. None of these requirements existed under the ECT as it does not seek to determine national energy policies or prescribe a particular market model or impose privatization or third-party access to pipelines and grids.

The introduction and subsequent abandonment of the transit regime in the EU

The concept of transit in the EU was first established by the Transit Directives of 1990 and 1991, which stipulated measures to ensure homogeneous and non-discriminatory access regimes for intra-EU transit of gas and electricity.[21] Next, in late 1990s the so First Energy Package initiated a process of liberalization focused on stimulating increased competition in the EU electricity and gas markets.

The first harmonization electricity and gas directives encompassed rules concerning transmission, storage, distribution and consumption of electricity and gas and the organization of the market. They required EU Member States to allow negotiated or regulated third-party access to their transmission networks and storage facilities to foster free movements of energy between intra-EU borders. This regulatory package established that two contracting parties located in the territory of the EU have a right to trade even if the transport involves the crossing of at least one intra-EU frontier, at conditions non-discriminatory and fair for all parties concerned. On the other hand, the Maastricht Treaty introduced in 1993, the task to develop Trans-European Networks in the areas of transport, telecommunications and energy infrastructures. This provided a legal basis for the EU contribution to planning and financing of energy infrastructure projects. Whereas, an important step towards the establishment of a regional energy policy, this did not accord any exclusive competences to the EU in policies pursued at national level.

The first EU energy package did not prevent Member States from enjoying a significant freedom in shaping their national energy legislation. Much worse, it was implemented in a fragmented way and did not entail the targeted unrestricted energy flows between regional borders. This in mind, the EU adopted the so-called 'Second Energy Package'[22] in 2003 which abolished the previous directives and their transit regime. The Member States were now required to regulate for (instead of negotiate) the non-discriminatory third-party access of all system users to the electricity and gas network infrastructures in order to develop a competitive environment. The term transit was removed from the legal text, replaced by the concept of transmission to denote intra-EU domestic transport of electricity and gas flows. It was also believed that vertically integrated undertakings active in the energy industry had to provide 'functional and legal unbundling' for effective implementation of the rules.[23]

In 2005, the Commission carried out a comprehensive study of the functioning of the common energy market and came to the conclusion that the legislation proved short of providing unrestricted and continuous flow of electricity and gas with monopolization persisting and an inadequate process of market integration.

20 Council 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 [1998] OJ L204/1.

21 Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids; and Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids.

22 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 (second Gas Directive) and Directive 2003/54/EC of the European Parliment and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

23 Second Gas Directive, art 9.

This initiated preparations for the currently applicable so-called 'Third Energy Package', which came into force in June 2009.[24]

The Third Energy Package deepened changes to the organization of the EU internal energy market, including the reinforcement of national regulatory authorities, the creation of European Network of Transmission System Operators (ENTSO-E and ENTSO-G) and the establishment of the Agency for the Cooperation of Energy Regulators (hereinafter ACER).[25] New set of rules on unbundling were introduced, greater transparency and coordination, and equal access to gas storage and liquefied natural gas facilities. A major innovation of the Third Energy Package was the introduction of EU network codes, based on framework guidelines, and aiming to harmonize market, operation and development rules for electricity and gas cross-border trade.

The foregoing shows that a persistent effort towards further liberalization, integration and harmonization of energy and gas markets at the European level has led from the original transit regime to the concept of third-party access and, eventually, to the harmonization of network codes. As explained in the next section, at international level the concept of transit has remained unchanged.

The attempt to adopt a Transit Protocol to the ECT

In 1994, the ECT was signed between the EU Member States and most of the newly independent states of the former Soviet Republic, Japan and Turkey. The ECT's Article 7 deals with the issue of transit and aims at establishing a multilateral framework of rules governing transit flows of energy. Based on the principles of 'freedom of transit' and 'non-discrimination' enshrined in General Agreement on Tariffs and Trade (GATT) 1947,[26] Article 7 of the ECT has a number of provisions that deal with the security of transit flows. For instance, the interruption or reduction of existing transit flows in view of a dispute over transit is prohibited. The primary responsibility of the transit contracting party is to facilitate the energy transit. Other provisions deal with the upgrading of infrastructure or the creation of new one. Transit is understood as through-transit, meaning the carriage of energy materials and products across the area (territory) of a contracting party.

The ECT constituency felt that general principles of free movement of transit needed further elaboration. Therefore, the idea of a specific protocol to develop Article 7 appeared shortly after the negotiations of the 1994 ECT. There was a shared view that common rules on energy transit need to respect a balance of interest between gas producers, consumers and transit countries. The objective was to establish an effective regime for the secure flow of energy via existing and future cross-border transit infrastructures. By 2003, the drafting and negotiation process was effectively concluded and contracting parties agreed on almost all provisions of the Draft Transit Protocol.[27]

The signatories decided that provisions on third-party access to available network capacity should be based on negotiations. However, Russia which has now withdrawn from the ECT, insisted that the existing network user, whose contract has expired, to be given the first opportunity to accept the conditions offered (by the network operator) for any such new request for that available capacity (so-called right of first refusal).[28] This proposal was contested by the EU as it carried the risk to create market barriers detrimental to competition. Furthermore, the EU asserted that the Transit Protocol shall not apply to transit within the

24 Council 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 [2009] OJ L211/94 (hereinafter Gas Directive); 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.

25 Council Regulation No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1.

26 GATT (n 17).

27 Final Act of the Energy Charter Conference with Respect to the Energy Charter Protocol on Transit, 31 October 2003.

28 art 8(4) DTP; Andrey Konoplyanik 'Transit Provisions of the Energy Charter Treaty and Draft Transit Protocol' (Energy Charter Secretariat's conference 'Energy Transit in Eurasia: Challenges and Perspectives', Brussels, Belgium, 19–20 October 2004).

boundaries of the EU as the concept has disappeared for intra-EU energy flows and a REIO clause was to be inserted to the Draft Transit Protocol for this purpose.[29] The EU's stance was in turn protested by Russia, the EU's main energy supplier, because it would mean Russia would have to comply with internal EU energy legislation in transporting gas to the EU and face strict competition for access to the energy infrastructure.

There were also disagreements on the calculation of tariffs and procedures for booking long-term capacity. Due to the unresolved issues, negotiations were suspended until 2009 and, when resumed, a modified version of the Draft Transit Protocol appeared in 2010.[30] Shortly after however, and notwithstanding the Russian withdrawal in 2009, the mandate for negotiation of the Draft Transit Protocol was eventually cancelled.

The rapid evolvement of regional institutions inside the EU, created a stumbling block to negotiations for an international 'transit protocol' under the auspices of the ECT, a unique document for multilateral energy regulation. During the period between 2000 and 2010 (when the negotiations were suspended the second time) the concerns of the EU to protect the specific rules within their REIO conflicted with the expectations of the other negotiating parties of the Draft Transit Protocol. The EU has established its own internal rules and a major multilateral agreement on transit could not be agreed. Arguably, the more advanced regional level of market integration—in which energy goods can be freely traded without cross-border related tariffs—came at the cost of a failure to reach a consensus, a level playing field at multilateral level, with important players of international energy markets, particularly those on the supply side, in particular Russia.

Article 7 of the ECT not applying to intra-EU energy flows, it is still relevant for extra-EU cross-border transport of energy materials and products. This article also does not contradict the Third Gas and Electricity Directives[31] due to the latitude left by the ECT in terms of allowing a REIO to move from a transit regime to access to the transmission network across the EU. The ECT, a multilateral instrument negotiated in Eurasia over 3 years, resulted in a compromise text with generalized rules on international transit regime. Therefore, the failure of the first attempt to adopt a more detailed 'transit protocol' does not rule out a possible reset of negotiations on the multilateral transit protocol as a legal framework to facilitate energy trade across borders and cooperation among energy producing, consuming and transit countries/regions.

5. LEGAL CONTROVERSIES BETWEEN REGIONAL AND INTERNATIONAL FRAMEWORKS

The previous section has shown that in a fast-moving liberalization dynamics, the EU replaced the concept of transit by the third-party access. This swift has not occurred at international level. Similarly, long-term energy contracts were critical as a way to erode the monopolistic position of energy incumbents at the initial phase of national liberalization and let new market entrants. These long-term agreements were in line with international treaties. However, they became a concern for the Commission under EU law. In the next section, this article will use some case examples to illustrate the existence of the tensions the long-term contracts have caused between the EU internal energy market and the ECT and BITs.[32]

29 According to art 20 DTP, provisions of the Transit Protocol are not applicable for transit through a single Member State but the EU, a regional economic integration organization, as a whole. Whereas 'transit' within the meaning of art 7 ECT covers transit through each Member States, as well as the EU.

30 Final Act of the Energy Charter Conference with Respect to the Energy Charter Protocol on Transit, 22 January 2010.

31 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.

32 According to the published statistics on EU in ICSID investor state investments disputes, 69 cases out of 512 were registered cases, of which 74 per cent were commenced by an investor who was also from an EU Member State ('Intra-EU') and 31 per cent under the ECT. The other 69 per cent of the cases relied on consent found in bilateral investment treaties negotiated by the States <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%20EU%20(English)%206-4-15.pdf> accessed 21 February 2015.

Long-term contracts between EU countries

In the case of *AES v Hungary*,[33] an English company, AES, initiated arbitration proceedings against Hungary for alleged breaches of the ECT. Both the UK and Hungary are signatories and hence bound by the ECT provisions. These countries are also Member States of the EU and obliged to comply with the EU Treaties and the *acquis communautaire*.

The dispute arose when, in 2006 and 2007, Hungary imposed maximum price caps on electricity sold by electricity generators in Hungary. One of the electric generation owners, AES, was operating under the terms of a long-term power purchase agreements (PPAs) it signed with Hungary in 1996, before accession of Hungary to the EU (in 2004). The PPA guaranteed an administrative (fixed) pricing regime at which AES sold its electricity to two Hungarian state-owned entities. AES argued that the new price regime of 2006 and 2007 violated the terms of its long-term PPAs with the Hungarian state-owned entities, and, therefore, it had a detrimental impact on its investment, in breach of Hungary's obligations under the ECT. Against this, Hungary responded that the PPAs would violate the EU state aid regulations[34] and the investor could not legitimately expect the State to ignore EU demands to minimize or eliminate prohibited state aid.[35]

AES argued that Article 16 of the ECT provides that, if there is a conflict between the ECT and any other treaty which deals with the subject matter covered by Part III (investment promotion and protection) or Part V (dispute settlement) of the ECT, such as the TFEU, the provisions which are more favourable to the investor or the investment shall prevail. In this case, according to AES, the ECT provisions are more favourable to the investor since the PPA was in line with it.

Hungary claimed that 'it defies logic to suggest, as claimants do, that the ECT can be read as entirely divorced from EU competition law'.[36] Hungary further argued that when a state has obligations under two different treaties involving overlapping subject matter, those obligations should—to the extent possible—be read in harmony and be interpreted to minimize conflict.[37] Against this, AES purported that the 'ECT was not solely a European initiative, because Russia, Canada, USA, Japan, and other countries were each heavily involved in its inception',[38] and according to AES it was about two independent legal systems.

The International Centre for the Settlement of Investment Disputes (ICSID)[39] tribunal declared it had jurisdiction over all the ECT claims presented in this arbitration, between, at the time of the dispute, an EU Member State and an investor from another Member State. The ICSID tribunal found that Hungary did not breach the ECT investment protection provisions when it temporarily imposed maximum price caps on electricity sold by AES electric power plant. The tribunal noted that even if Hungary's regulatory acts aimed to address the Commission's state aid[40] concerns altered the terms of the PPAs, it would have constituted a rational public policy measure in line with the host state's right to regulate economic activities within its territory. [41] Therefore, it seems that the tribunal did not see the need to deal with a possible conflict between the ECT and EU law and it simply rejected the relevance of Article 16 of the ECT, on the basis that the dispute was rather about whether Hungary's measures were in conformity or not with the ECT and its right to regulate its national economic activities, in this case, in line with EU law.

33 ICSID Case No ARB/07/22, *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*.

34 Commission Decision 2009/609/EC of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (notified under document COM (2008) 2223).

35 ICSID Case No. ARB/07/22, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, 7.2.5.

36 ibid, 7.2.3.

37 ibid.

38 ibid, 7.3.6.

39 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 17 UST 1270, TIAS 6090, 575 UNTS 159.

40 See n 34.

41 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, 10.3.16.

This outcome is in line with the ECT as the contracting parties' right to determine considerable part of their economic activities in the energy sector and their national energy policies is also recognized under Article 18 of the ECT, including the sovereign right to regulate authorizations, concessions and licences in connection with access to energy resources.

Furthermore, Article 351 TFEU (ex Article 307 EC Treaty) states that international agreements signed by EU Member States with pre-accession EU Member States shall not be affected by the provisions of the TFEU in so far they comply with the EU *acquis*. Otherwise, the pre-accession Member State, once it becomes a Member State, shall take all appropriate steps to elim inate incompatibility between such pre-accession agreements and EU law. The tribunal also rejected the application of Article 351 TFEU noting that it applies only to agreements between Member States and non-Member States, whereas Hungary and the UK were both EU Member States.[42]

In *Hungary v Electrabel*,[43] a Belgian investor, Electrabel, entered into a PPA with a Hungarian state-owned electricity buyer before Hungary's accession to the EU. The PPA required the power station to preserve capacity to be available on demand, in return for payment of a fixed capacity fee. Post-accession, Hungary had to terminate the PPA following a legally binding order of the Commission[44] (the same as in *AES v Hungary*) in which it held that the state-owned electricity buyer's obligations under the PPAs were incompatible with EU law as it constituted state aid to the generators. The Commission considered the high prices paid to the power generators under the PPAs in Hungary as a disincentive to supply to liberalized markets within the country, hence distorting competition. Against this, in 2007 Electrabel initiated an arbitration proceeding claiming the termination of the PPA constituted breach of the ECT.

The tribunal, in its decision on jurisdiction, applicable law and liability in 2012, held that the ECT cannot exempt a state from enforcement of a legally binding decision of the Commission under EU law and, consequently, a foreign investor cannot rely on the ECT as a remedy in such circumstances.[45] The tribunal noted that:

> It is common ground that the European Union (including the European Commission) was and remains, of course, such a Regional Economic Integration Organization (*'REIO'*). As regards protection under the ECT, investors can have had no legitimate expectations in regard to the consequences of the implementation by an EU Member State of any such decision by the European Commission.[46]

The tribunal noted, however, that if the ECT and EU law were incompatible, EU law would prevail over the ECT's substantive protections. The tribunal came to the conclusion that EU law, and not the ECT, would apply for intra-EU matters, whereas the ECT would remain applicable in relations between EU Members and non-EU Members.

In both cases *AES v Hungary* and *Electrabel v Hungary*, the tribunals assessed the impact of measures taken by Hungary concerning long-term energy contracts on the present situation in the Hungarian electricity market. By doing so, tribunals assessed whether the market operated in such a way that a reasonable rate of return could be obtained in the realm of new regulatory prices—rightfully adopted by Hungary in a liberalized market.

In AES and Electrabel proceedings, the Commission intervened by filing '*amici curiae*' briefs. It was reported that the Commission took Hungary's side by stating that the PPAs between the investors and a

42 Regarding this, an expert opinion submitted by Professor Piet Eeckhout to the tribunal, noted that for Hungary, ". . .this does not mean that Hungary's accession to the EU in any way diminished its obligations under the ECT", *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* expert opinion of Professor Piet Eeckhout (30.10.2008), 6.

43 ICSID Case No ARB/07/19, *Electrabel SA v Republic of Hungary*.

44 See n 34.

45 ICSID Case No. ARB/07/19, *Electrabel S.A. v. Republic of Hungary*, 6.77.

46 ibid, 4.142.

Hungarian state-owned entity violated EU law as they could restrict competition. However, the Commission did not take into account the protection granted to the investors by the ECT at stake.

It appears that the tribunals did not appreciate material inconsistencies between the ECT and EU law because both regulatory frameworks had one identical objective, namely the fight against anti-competitive behaviour or state aid. In any event, if there were any material inconsistency between the ECT and EU law, both legal systems should, if possible, be read in harmony.

Long-term contracts between EU and third countries

Commission v Slovakia,[47] is another relevant case, albeit decided by the European Court of Justice (instead of arbitral tribunals). This case particularly concerned the cornerstone of the internal energy market—non-discriminatory third-party access to transmission networks. Prior to Slovakia's accession to the EU, Slovak state-owned network operator and a Swiss company signed a contract under which the latter pledged to cover half of the construction costs of a cross-border power line from Poland to Slovakia. In return, the Slovak operator granted long-term priority access rights to the Swiss company, covering a 16-years period. The Commission initiated infringement proceeding against Slovakia on the basis that such priority access violated the non-discrimination obligations. The Commission also claimed breach of mandatory third-party access to networks and cross-border capacity for electricity requirement imposed under the EU Electricity Market Directive.[48] Slovakia, on the other hand, argued that the long-term contract was protected under two international treaties, the Swiss–Slovakia BIT and the ECT and that full compliance with EU law would amount to violation of its pre-existing international commitments.

In his opinion, Advocate General Jääskinen noted that the detailed provisions contained in the Electricity Directive cannot be overridden by the more general provisions of the ECT. However, he conceded that 'EU law should be interpreted in conformity with the EU's obligations under the ECT and that the ECT can be considered as a kind of benchmark with which the Third Energy Package must comply, like all other EU legislation.'[49]

The Court did not base its decision on potential breaches of the ECT, but on the Swiss–Slovakia BIT, since it was directly related to the investment.[50] The Court ruled that, even if it were to be assumed that the preferential access granted would not comply with the Electricity Directive, that preferential access is protected under Article 351 of the TFEU (ex Article 307 the EC Treaty). In other words, the application of EU law did not affect the duty of Slovakia to respect a prior agreement with the non-EU member Switzerland (*pacta sunt servanda* principle).[51]

To conclude, although it may be asserted that there is no substantial contradiction between the regional EU energy legislation and the ECT multilateral or BIT regulatory frameworks, there is a general tendency at the EU level to favour EU energy regulation as the primary legal framework, particularly over intra-EU international investment treaties since the EU is a REIO under the ECT that has the power to adopt and implement more specific rules.

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

48 Such priority access to the line would, according to the Commission, violate the non-discrimination obligations imposed under secondary EU legislation on the internal market in electricity (Directive 2003/54/EC).

49 Case C-264/09, Opinion of Advocate General Jääskinen delivered on 15 March 2011.

50 *Commission v Slovakia*, para 30. This said, the ECT's Part III on investment also grants investment protections and rights often similar to that of most BITs.

51 ibid, para 41.

Reviewing the general relationship between the EU and international frameworks

In the foregoing sections, this article referred to cases brought to international arbitration tribunals and one that was judged by the European Court of Justice.[52] In the view of the Commission, the existence of this two-layered judicial system may lead to a situation where there are parallel jurisdictions between the matters covered by the European Court of Justice and arbitral tribunals.[53] It believes that there is no need for investment treaties within a single market between Member States.[54] In 2015, the Commission has, therefore, launched the first stage of infringement procedures against Austria, the Netherlands, Romania, Slovakia and Sweden and requested these five Member States to terminate the intra-EU BITs between them.[55] Previously in 2013, Italy terminated all the intra-EU BITs it has signed, as did Ireland in 2012. The arguments of the Commission is that intra-EU BITs offer investors from some Member States more favourable investment protection measures than others (based on nationality), hence perceived discriminatory. Also in a recent state aid case, the Commission ordered Romania to recover compensation to two Swedish investors as per an arbitral award of December 2013, which concluded that Romania breached a BIT between the two countries by revoking an investment incentive scheme in 2005, to align with EU state aid rules.[56] According to the Commission, Romania's payment of compensation to the Swedish investors amounts *de facto* reinstatement of the prohibited state aid. This is why the Commission argues that issues arising out of intra-EU BITs should exclusively be resolved under the European Court of Justice and not international investment treaty arbitration.[57]

For this reason, the Commission has recently acquired authority to review current and prospective BITs and to negotiate EU-wide investment treaties in the future.[58] However, often both the intra-EU and extra-EU BITs contain a clause (known as 'freezing clause'), which makes substantive and procedural provisions of those treaties applicable for a period after termination up to 15 years. Furthermore, hundreds of pre-existing extra-EU BITs are still in place. A relevant proposal to tackle some of the issues above was made by the Commission in May 2015.[59] Discussions of this issue is beyond this article, however suffice to mention that this proposal revealed the Commission's intend to establish a multilateral investment court as a standard feature in all EU trade and investment agreements with other negotiating partners, structured either as a self-standing international body or by embedding it into an existing multilateral organization.

6. A CONSENSUAL APPROACH TO TENSIONS BETWEEN NATIONAL, REGIONAL AND INTERNATIONAL FRAMEWORKS

This article contemplate that there are at least two more distinct areas of tensions and interactions of legal systems. The first one deals with renewable energy sources, which have been promoted according to the EU

52 We did not go into a public international law debate in this article but for those who are interested we recommend this article by Graham Coop: G Coop, 'Energy Charter Treaty and the European Union: Is Conflict Inevitable' (2009) 29 JENRL 404.

53 Commission Staff Working Document, Capital Movements and Investments in the EU, Commission Services' Paper on Market Monitoring, SWD(2012) 6 final, Brussels, 3.2.2012, 3.

54 SCC Case No 088/2004, *Eastern Sugar BV (Netherlands) v The Czech Republic*, Partial Award, para 126 <http://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf> accessed 10 January 2015.

55 Commission, 'Commission Asks Member States to Terminate their intra-EU Bilateral Investment Treaties' (Press Release, 18 June 2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm> accessed 21 February 2016. <http://europa.eu/rapid/press-release_IP-15-4725_en.htm>.

56 Commission, 'Commission Orders Romania to Recover Incompatible State Aid Granted in Compensation for Abolished Investment Aid Scheme' (Press Release, 30 March 2015) <http://europa.eu/rapid/press-release_IP-15-4725_en.htm> accessed 21 February 2016.

57 This does not mean that intra-EU arbitration cases can be prevented automatically—for this intra-EU BITs needs to be terminated, see the amicus brief submitted by the Commission at *Eastern Sugar v Czech Republic* arbitration case, Partial Award, 27 March 2007, para 26/72—for the ECT, we will explain possible solutions in Section 7 below.

58 EU issued Regulation (EU) No 1219/2012 (the Regulation) establishing transitional arrangements for BITs between Member States and third countries.

59 TTIP—Investment in TTIP and beyond—the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, Concept Paper, Cecilia Malmstrom, European Commission < http://trade.ec.europa.eu/doclib/html/153408.htm> accessed 21 February 2016.

legislation but associated changes at national level have been challenged by investors before international arbitration. The second area concerns bilateral agreements signed between some Member States and third countries for the supply of natural gas. The issue considered here is the now defunct South Stream pipeline project.

Beyond the numerous international disputes introduced by investors against national reforms on renewable energy regulation, the two areas of conflict presented here have in common the efforts to conduct them on the basis of a consensual and negotiated approach to the removal of contradictions between legal regimes, that is national, EU and international.

Renewable cases

The Commission published the State Aid Guidelines in 2014 with an aim to ensure renewable energy sources will become grid-competitive in the period between 2020 and 2030.[60] This implied that subsidies and exemptions from balancing responsibilities are expected to be gradually removed.[61] Accordingly, the Guidelines recommend the phasing out of feed-in tariffs and, calls on Member States to reform their public intervention in the renewables sector. Removal of renewable subsidises has been advocated already for some time in Europe. However, in recent years, the regulatory changes to previously granted government subsidises and feed-in tariffs in some Member States initiated a significant number of international and intra-EU investor claims[62] based on alleged breaches of international investment treaties, such as the ECT and various BITs.

In cases involving Spain, Italy and the Czech Republic, the investors including investment funds, banks and renewable energy companies, who had invested in renewables projects relying on subsidies and other forms of government support, alleged the retroactive restrictions on these schemes amounted to expropriation as their projects became economically unviable.[63]

In Czech Republic, the investors contested a 26 per cent tax to electricity generated from solar power plants and a 500 per cent hike in land use fees both of which occurred in 2010. The investors' complaint was that the tax applied to all existing installations and had a negative effect on their rate of return for investments already made.[64] In a similar context, a 7 per cent tax on the revenues of power generators and a reduction of subsidies for renewable energy producers resulted in legal action against Spain. Other cases in Spain concern the decision to reduce the amount of feed-in tariffs.[65] Italy also has been challenged by investors following the State's restriction on feed-in-tariffs granted earlier to the solar energy industry to provide long-term price stability as subsidies.[66]

Further cases have been initiated on similar grounds against the Netherlands, Germany, Cyprus, Luxembourg and the UK in 2013. At the time of writing, the majority of these cases are still pending together with an interesting arbitral proceeding based on breach of the ECT brought against Spain by 14 different groups of foreign investors for the State's retrospective removal of solar energy tariffs.

Subsidies were deemed necessary in most of EU countries to kick-start investment in renewable installation facilities due to the high cost of production. The Commission dealt with this issue by adopting the

60 Communication from the Commission — Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (2014) OJ C200.

61 State Aid Guidelines (2014), para 108.

62 There are now at least 16 treaty arbitrations pending against Spain and the Czech Republic and at least one arbitration pending against Italy.

63 'Trends in Investor Claims over Feed in Tariffs for Renewable Energy (19 June 2012)' <http://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy/> accessed 30 December 2015.

64 *Voltaic Network GmbH v Czech Republic*; *ICW Europe Investments Limited v Czech Republic*; *Photovoltaik Knopf Betriebs-GmbH v Czech Republic*; *WA Investments-Europa Nova Limited v Czech Republic*; *Natland Investment Group NV and others v Czech Republic*; *Antaris Solar GmbH and others v Czech Republic*; *Mr Jurgen Wirtgen and others v Czech Republic.*

65 ICSID Case No ARB/13/36, *Eiser Infrastructure v Spain*; ICSID Case No ARB/13/31, *Antin Infrastructure Services Luxembourg v Spain*; ICSID Case No ARB/13/30, *RREEF Infrastructure (GP) Limited v Spain*; *The PV Investors v Spain*; *Charanne (the Netherlands) and Construction Investments (Luxembourg) v Spain*; *Isolux Infrastructure Netherlands BV v Spain*; *CSP Equity Investment Sàrl v Spain.*

66 ICSID Case No ARB/14/3, *Blusun and others v Italian Republic.*

Guidelines[67] on environmental and energy aid with a supporting 'Best Practice Guidance' on renewable subsidies.[68] One of the concerns is that fixed tariffs would, first and foremost, distort competition. The individual implementations of these best practices in Member States are challenged in the international regulatory space of the ECT (and BITs) causing further on ongoing tensions and interactions between national, EU and international legal systems.

The South Stream

The South Stream case does not involve interaction with the ECT, or any alleged breaches of the ECT, however, it demonstrates that the EU REIO is constructed and continues to operate within international regulatory space. Indeed, it shows the complications of the EU integration process. The Commission challenged the provisions of bilateral IGAs signed to implement a natural gas pipeline project between Russia and Central and Southeast Europe (bypassing Ukraine). The IGAs were signed between Russia and six EU Member States separately,[69] as well as one with Serbia, an Energy Community Member that is also bound by EU energy *acquis*.[70]

Accordingly, the Commission made an investigation into the terms of the international pipeline agreements, and found that these bilateral deals did not comply with the Third Energy Package.[71] The Commission particularly opposed the ownership structure of the proposed pipeline project's designated transmission system operator (TSO), Gazprom, which was to both own the pipeline infrastructure and the gas to be exported. The third Gas Directive requires any TSO (including third country companies) operating in the EU, to be certified and structured under one of the three types of the unbundling models foreseen in the legislation.[72] In essence, unbundling obligations are deemed necessary to ensure the commodity owner could not distort or restrict free access to the transmission system, thereby creating market barriers within the internal market. In addition, Gazprom's right to set the transmission tariffs (instead of the regulator as foreseen in the Third Energy Package), and the fact that it is the only shipper, raised further tensions between the IGAs' terms and the regional legislation.

It is important to note here that since 2012, the Commission has the power to participate in the negotiation of Member States' energy related IGAs with third countries as an observer (upon request of the Member State or upon request of the Commission subject to Member State's written approval), and provide advice on how to circumvent any inconsistency between EU law and the IGAs.[73] This was exactly what was sought by the Commission in the South Stream case, initially calling for the renegotiation of the existing agreements[74] in order to bring them in line with the EU energy *acquis* and was subsequently accorded the mandate to renegotiate the bilateral contracts with Russia on behalf of the Member States concerned.

67 Information from EU institutions, bodies, offices and agencies European Commission Communication from the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01).

68 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 (COM (2013) 7243 final).

69 Individual IGAs signed with Bulgaria, Hungary, Greece, Slovenia, Croatia and Austria.

70 The Energy Community Membership entails expansion of the core EU energy *acquis* as adapted to the special circumstances in the Member State in question.

71 Directive 2009/73/EC; Directive 2009/72/EC; Regulation (EC) No 715/2009; Regulation (EC) No 714/2009; Regulation (EC) No 713/2009.

72 The ownership unbundling, the independent system operator or the independent transmission operator, arts 9 and 11 Gas Directive.

73 Decision No 994/2012/EU of The European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to IGAs between Member States and third countries in the field of energy.

74 The European Commission confirmed on 5 December 2013 that bilateral agreements conducted between six EU Member States and Russia for construction of the South Stream gas pipeline are in breach of EU law and must be renegotiated. As Gunther Oettinger, European commissioner for energy, explained: 'We have looked into the intergovernmental agreements (IGAs) from which South Stream would flow [. . .] and we have advised these Member States to renegotiate these IGAs' (Press Release 12 May 2013) <http://www.europeanvoice.com/Article/2013/december/south-stream-must-be-renegotiated-commission/78982.aspx> accessed 10 January 2015.

Against this, Russia argued that the IGAs are valid and enforceable under international law, and they take precedence over EU law.[75] The EU Member States along the pipeline corridor were hence caught up in a legal situation, where their withdrawal (or breach) of their respective agreement with Russia could result in an international arbitration dispute on the basis of bilateral agreements, or payment of penalties, whereas the continuance of the project, as per the IGAs, could result in the Commission initiating infringement procedures against them for alleged breaches of EU law. The paradox became irrelevant, as Russia revoked the pipeline project and proposed an alternative route to construct the pipeline through Turkey which would use the supply for domestic consumption and transit to Southern Europe. This so-called 'Turkish Stream' pipeline project, which is also suspended as of late 2015, was a way for Russia to sell its gas to Europe without being subject to the EU rules as Turkey is not an EU member.

Since then, the EU has promoted greater involvement of the Commission in bilateral energy agreements in the 'Energy Union Communication' document released on 25 February 2015[76] as means to minimize and eliminate market distortions. In this document, the Commission publicized its intention to take a step further and attain the right to 'actively participate' in negotiations of natural gas contracts concluded between Member States and third country suppliers. The Commission introduced a new legislation, the so-called 'winter package' as part of the action plans of the Energy Union on 16 February 2016.[77] The winter package includes, *inter alia*, two legislative proposals: the revision of the abovementioned 2012 decision on information exchange for energy related IGAs with third countries and revision of the 2010 gas security of supply regulation. According to the new proposed rules, the Commission will be able to see the IGAs before they are signed, as it is difficult to renegotiate them *ex post*. It remains open how any such mechanism will interact with sensitive issues such as national sovereignty and commercial confidentiality. The evolution criteria and further details such as whether this mechanism will cover only the IGAs but also private gas supply contracts shall be elaborated under legislation. It must be noted however, while Article 194 of the TFEU confer the EU the power to take legislative action in the energy field, its second paragraph allows opt outs—Member States can decide on their energy mix and they may block or water down the legislative action by the Commission.

In conclusion, the cases we refer to in this section demonstrate that the interaction between international law and regional law in the energy sector continues to cause tensions inside the EU and the issue is an ongoing problem which is handled differently in different areas of the energy market legal systems.

7. CONCLUSION

This article endeavoured to shed light on the construction of the EU internal energy market and policy within the ECT international framework. Escalated interactions between both regimes was at the heart of the arbitral award on *Charanne and Construction v Spain* of 21 January 2016, and the numerous related pending cases concerning national measures on renewable energy sources and the potential conflicts between investment protection and the right of governments to regulate the market in changing circumstances. National, regional and international issues do not always integrate smoothly, particularly when strategic energy issues are

75 Russian Prime Minister Dmitry Medvedev asserted that 'Legal acts of the EU are considered to be national laws for the countries of the EU [. . .] (while) intergovernmental agreements, signed by [countries] of the EU are acts of international law. On the whole, there is a rule of precedence of international law over national law. We only understand it this way" (News Release) <http://www.naturalgaseurope.com/south-stream-eu-laws> accessed 10 January 2015.

76 'Energy Union Package 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) 80 final, 7.

77 Proposal for a Regulation of the European Parliament and of The Council Concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 Brussels, 16 February 2016; Proposal for a Decision of The European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, Brussels, 16 February 2016.

concerned. This article illustrated some of those interactions in the areas of transit, long-term contracts, incentives to renewable energy sources and gas supply agreements with third countries.

Although the initial rationale for creation of the ECT and the EU energy *acquis* was similar, namely the establishment of open and competitive markets for trade and transport of energy materials and products, the envisaged timescale to achieve those objectives and the development of a legal framework has happened more quickly at regional level, thanks to the supranational system of governance of the EU. On the contrary, procedures are more lengthy and political on intergovernmental systems like the ECT—where divergences between different states exist due to their position in a cross-border energy value chain (such as producer, transit and consumer states) and decisions are often taken unanimously.

It may be asserted that the existence of a REIO clause within the ECT is necessary to allow the EU Member States to achieve a rapid and more profound market integration. EU regional specifities should be kept in mind when dealing with any tensions, divergences and conflicts between the EU and the ECT. The assessment of international transit, long-term contracts and state aid cases, as well as external relations should respect the EU's objective of completion of the internal energy market. At the same time, that assessment should strike a balance with the requirements of long-term transparent and predictable protection of energy investments under the ECT.

On the other hand, since market convergence happens at slower pace at international level, there is the risk of loosening the bridge between different regions across the world. In that sense, the new International Energy Charter of 2015, which has so far been adopted by more than 75 countries from all continents, provides an intergovernmental forum where countries and regions can discuss and coordinate energy policies on the basis of common principles.

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