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INVESTMENT PROTECTION AND EU LAW: THE INTRA- AND EXTRA-EU DIMENSION OF THE ENERGY CHARTER TREATY

*Jan Kleinheisterkamp**

ABSTRACT

The interaction of investment treaty law with European Union (EU) law is a growing concern not only for policy makers but also for investors and arbitral tribunals, especially in the energy sector. This article sketches the existing and potential legal problems between the regimes with the aim of drawing conclusions on the impact of those tensions on the future of the Energy Charter Treaty (ECT). In the first part, the article discusses the problem of the compatibility of investment treaty law with EU law in general that may require EU member states to renegotiate their existing agreements. The second part is dedicated to the more controversial issues of the continuing applicability of intra-EU investment treaties, discussing their far-reaching overlap with the protection afforded by EU law and the resulting complications. Most of these problems also arise under the ECT, in addition to the specific complications that are analysed in the third part. The article also outlines the consequences of the entry into force of the Lisbon Treaty and finishes with a summary and outlook of the general importance of these European developments for the future of the ECT.

I. INTRODUCTION

The entry into force of the Lisbon Treaty in 2009 has shaken the European landscape of investment treaty law. By redefining the European Union (EU) common commercial policy as also including foreign direct investments (Article 207 TFEU), investment treaty law is now, to a large extent, formally within the exclusive competence of the EU (cf Articles 3.1(e) and 2.1 TFEU). This transfer of powers from the member states to the EU has dramatic consequences. It is rather uncontroversial by now[1]—and in any

* Senior Lecturer of Law, Law Department of the London School of Economics, Houghton Street, London WC2A 2AE, UK. E-mail: j.kleinheisterkamp@lse.ac.uk. An earlier version of this paper was presented as a report for the ICSID/ECT/SCC Conference on '10 Years of Energy Charter Treaty Arbitration' (Stockholm 9–10 June 2011).

[1] For the discussions about the interpretation of 'foreign direct investments' in the context of Articles 206 and 207, as to whether they cover only the pre-establishment market access

case accepted by the EU member states[2]—that the member states can no longer conclude new bilateral investment treaties (BITs) without the previous authorization by the Union and that future agreements on investments will be negotiated by or under the lead of the Union so as to substitute the existing BITs of the member states. The controversial part is the fate of the existing BITs with third countries in the transitional period until their effective substitution by EU agreements. The problems resulting from the new allocation of competences comes in addition to the complications relating to the continuing validity under EU law of BITs concluded with the Central and Eastern European countries which, with their accession to the EU in 2004, have become 'intra-EU' BITs.

These problems all affect the Energy Charter Treaty (ECT) in a particular way. The ECT is, indeed, a grandchild of the EU.[3] The idea for the ECT originated in a proposal of the Dutch government to the Council of the European Communities in June 1991 to create—in addition to the European Coal and Steel Community (ECSC) and Euratom—a European Energy Community. The aim was, in reaction to the end of the Cold War, to secure a market economy approach for the reconstruction and restructuring in the energy sector in the former communist countries. Leaving aside the gloss of another European Community, the European Commission elaborated the concept of the European Energy Charter, and the European Communities (European Economic Community (EEC), ECSC, and Euratom) presented the proposal to the other countries of Central and Eastern Europe, of the USSR, and the non-EEC members of the Organisation for Economic Co-operation and Development (OECD), which first led to the signing of the European Energy Charter in December 1991 and eventually to the ECT, signed in December 1994 in Lisbon. All old and (back then) future EU member states as well as the European Communities—now the EU—are parties to the ECT.[4]

aspects of foreign direct investments, see Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 Common Market Law Review 383 (2009), 389–96; also Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' 11 European Journal of International Law 1049 (2010), 1057–65.

2 Cf Council of the European Union, 'Conclusions on a Comprehensive European International Investment Policy' (3041st Foreign Affairs Council meeting Luxembourg, 25 October 2010), <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> (visited 7 January 2012).

3 For the following historic account, see the Final Act of the Energy Charter Conference, signed on 27 December 1994 in Lisbon, <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf> (visited 7 January 2012).

4 See also Council and Commission Decision 98/181/EC, ECSC, EURATOM 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 1998L 69/1.

The current problems arising from the tension between EU law and the existing BITs of the member states, both intra-EU and extra-EU, therefore also all concern the ECT—although with the special twist that the EU itself is a party to it alongside the member states. The present article sketches the problems of compatibility of the BITs and the ECT with EU law and offers an outlook into the resolution of these tensions in the future.

II. THE PROBLEMS OF COMPATIBILITY OF INVESTMENT TREATIES WITH EU LAW IN GENERAL

A. The enlargement of the EU and the *prise de conscience*

The problems of compatibility of investment treaties with EU law have first become apparent with the preparations of the accession of the Central and Eastern European countries to the European Community. In order to attract investments, most of the accession countries had previously concluded BITs both with the old EU member states as well as the other leading economies, such as especially the USA. In the context of the accession negotiations, the European Commission realized the potential limitations that those BITs could impose on the margin of manoeuvre of the accession states in their process of integrating the European *acquis communautaire*. The Commission approached the US government in 2003 in order to seek clarifications that US investors could not rely on these BITs for seeking remedies for the consequences that the EU reforms in the accession countries would have. In September 2003, the Commission and the eight acceding countries signed a memorandum of understanding (MoU) with the US government that aimed at ensuring that the new member states could effectively apply the EU legislation as of their accession in the most sensitive sectors.[5] Although it is clear that this MoU is not binding in terms of international law,[6] the Commission concluded that '[t]his would exclude from the scope of the [US] BITs agriculture and audiovisual, but also transport, financial services, fisheries, energy, etc.'[7]

[5] Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the U.S., the European Commission, and acceding and candidate countries for accession to the European Union (22 September 2003) <http://www.state.gov/s/l/2003/44366.htm> (visited 7 January 2012) [hereafter: MoU]. On the MoU, see Anka Radu, 'Foreign Investors in the EU – Which "Best Treatment"? Interaction between Bilateral Investment Treaties and EU Law', 14 European Law Journal 237 (2008).

[6] MoU, ibid, Concluding Provisions: '1. This Understanding constitutes a political arrangement [...] and is not an agreement binding under international law [...] 3. The Participants will act to complete the steps outlined in this Understanding to amend or interpret Acceding Countries' BITs with the United States as soon as possible [...]' The Annexes of the MoU spelled out the draft amendments or interpretation to be implemented on a bilateral basis.

[7] Press release by the Delegation of the European Union to the USA, EU/NR 59/03 (23 September 2003).

The assessment of compatibility of BITs with EU law in the context of the US BITs also led the Commission shortly afterwards to take on the previous batch of accession countries (1995) on one of the main issues addressed (but not fully resolved) in the MoU—the restrictions on capital transfers (which are addressed below). Austria, Denmark, Finland, and Sweden refused the Commission's request to renegotiate their BITs in order to bring them in line with the EC Treaty on this point.[8] This eventually led to the well-known infringement procedures before the European Court of Justice (ECJ) in 2006 and resulted in the Austria, Sweden, and Finland being condemned in 2009 for breach of their obligation to cooperate because they refused to renegotiate their BITs.[9] As of then, at the latest, it is clear that there is a serious issue of compatibility of the member states' obligations under EU law with those resulting from their BITs. And there can no longer be any doubt that—even prior to the transfer of exclusive competence for foreign direct investments to the EU—the member states have the obligation to bring their BITs in line with EU law.

B. The member states' obligation to renegotiate their BITs

In the above-mentioned cases, the obligation to bring BITs in line with EU law followed from (what is now) Article 351 of the Treaty on the Functioning of the European Union (TFEU), which addresses obligations of member states under international law entered into prior to their accession. Although these international obligations remain in force, the member states have the obligation to take the necessary steps to eliminate incompatibilities with the EU Treaties. This is actually merely a specification of the more general duty of loyal cooperation that is now enshrined in the Treaty of the European Union (TEU). Article 4(3) TEU establishes the same obligation for all member states regarding all their treaties, irrespective of whether they were concluded prior or after the accession:

> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

[8] In addition to the 2005 accession countries, Denmark was also requested to renegotiate and it accepted the request; see also European Commission Press Release 'Free Movement of Capital: Infringement Procedures against Denmark, Austria, Finland and Sweden Concerning Bilateral Investment Treaties with Non-EU Countries' of 10 May 2004 (IP/04/618), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/618> (visited 7 January 2012).

[9] ECJ, Cases C-205/06 *Commission* v *Austria* (2009) ECR I-1301; C-249/06 *Commission* v *Sweden* (2009) ECR I-1335; C-118/07 *Commission* v *Finland* (2009) ECR I-10889. On these decision in detail see Nikos Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law', 9 The Law & Practice of International Courts & Tribunals 409 (2010), 417–23.

> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Moreover, the ECJ has been quite clear in stating that, 'if a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot be excluded'.[10]

C. Examples of conflict between EU law and BIT provisions

The following is a short overview of some of the problematic issues of compatibility.

1. Capital transfer restrictions

As confirmed by the ECJ,[11] the unqualified capital transfer guarantees found in most BITs collide with the powers of the Council, partially in co-decision with the European Parliament, to impose restrictions on the free transfer of capital to and from third countries in exceptional circumstances, notably: to ensure reciprocity of treatment of financial operators in third countries as defined in a number of directives (Article 64(2) TFEU); in case of serious difficulties for the operation of the Economic and Monetary Union (Article 66 TFEU); and to allow freezing funds, financial assets, or economic gains relating to terrorist or similar activities (Article 75 TFEU).[12] Also the public policy exception to the capital transfer guarantee in Articles 14 and 24(3) of

[10] ECJ, Case C-62/98 *Commission* v *Portugal* (2000) ECR I-5171, para 49, noting at para 46 that

> 'the contested agreement [with Angola] contains a clause . . . which expressly enables the contracting parties to denounce it, so that denunciation by the Portuguese Republic would not encroach on the rights which the Republic of Angola derives from that agreement'; also Case C-264/09 *Commission* v *Slovak Republic* (2011) ECR I-0000, para 44 (obiter).

[11] See above n 9.

[12] It is interesting to note that in its MoU with the Commission the US government accepted the restrictions relating to reciprocity of treatment of financial operators and, unsurprisingly, to terrorist activities, but not those relating to serious difficulties for the operation of the European Economic and Monetary Union, presumably because of the losses suffered by US investors as a consequence of the economic and monetary turbulences in Argentina leading to its default in early 2002 (and triggering the biggest wave in history of BIT claims against one country); contrast with the 2004 Canadian Model Foreign Investment Protection and Promotion Agreement (FIPA), Article 10(2), <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (visited 7 January 2012): '2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons such as: (a) the protection of investors, depositors, financial market participants, policyholders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution; (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and (c) ensuring the integrity and stability of a Party's financial system.'

the ECT covers, at best, merely the last ground for restrictions but not the first two.[13]

2. Performance requirements

EU quotas such as for certain agricultural products or the 'European content' in television broadcasting[14] conflict with the prohibition of performance requirements found in numerous BITs. The same problem arises from EU procurement rules that require supplies and materials to be purchased with EU special funds to originate from the EU[15] as well as EU rules requiring a carrier that seeks permission for inland waterway transport to use only vessels owned and controlled by nationals of an EU member state.[16] In the 2003 MoU, the Commission and the US government, for the sake of retaining some 'policy space in strategic issues'[17] excluded certain sensitive areas—including hydrocarbons—from the obligation to grant national treatment or most-favoured-nation (MFN) treatment to foreign investors.[18]

3. Public policy exceptions

As also pointed out in the MoU,[19] investors should be aware that companies established in the EU but owned or controlled by third-country nationals (investment vehicles, typically Dutch) could, like any other European company, be subject to a different treatment than local companies for reasons of public policy, public security, or public health, and thus limited in their

[13] Annex 2 to the Final Act of the European Energy Charter Conference merely clarifies that each country can, under certain circumstances, apply restrictions to capital transfers to its own investors.

[14] Cf Council Directive 89/552/EEC of 3 October 1989, OJ 1989L 298/23, Article 4.

[15] Regulation (EC) 2110/2005 of the European Parliament and the Council of 14 December 2005, OJ 2005L 433/1, Article 5. In their MoU, the participants noted that an EU measure requiring the use of EU goods or services may be satisfied by the use of goods and services of any country of the EU.

[16] Council Regulation (EEC) 3921/91 of 16 December 1991, OJ 1991L 373/91, Article 2(1).

[17] Cf Radu, above n 5, at 252.

[18] Hydrocarbons, agriculture, and audio-visuals were excluded from both national and MFN treatment; the sectors excluded only from national treatment were securities, investment, or other financial services, fisheries, subsidies and transport (air carriers, inland waterways, and maritime). For a more detailed discussion of EU legislation denying of national treatment to investors from third countries, see Ramón Torrent, 'The Contradictory Overlapping of National, EU, Bilateral and Multilateral Rules on Foreign Direct Investments: Who is Responsible for the Mess?' 34 Fordham International Law Journal 1377 (2010–11), 1378–83.

[19] MoU, above n 5, Annex G; see Torrent, ibid, at 1396. See also European Commission Press Release, above n 8: 'Denmark's attention is also drawn to the fact that its agreement with Indonesia grants non-discriminatory treatment to investments, while it does not provide for a Regional Economic Integration Organisations ("REIO") clause which would allow preferential treatment to be accorded to its immediate EU partners only, without extension to the non-EU country involved. Thus, Denmark could be obliged to grant rights, which in specific sectors may be reserved to Community enterprises, to an investment from a non-EU country. This could result in further incompatibility with specific requirements of Community law in a number of sectors.'

freedom of establishment and to provide services.[20] Actually all fundamental freedoms of the internal market (i.e. also the free movement of goods, workers, and capital) are subject to such public policy exceptions in the Treaty, by which the member states reserved the right to suspend those freedoms to take regulatory measures for the sake of safeguarding national interests in exceptional circumstances even at the expense of discriminating against nationals of other EU member states.[21] Accordingly, not only the application of the EU directives coordinating the legal framework for such special treatment of (EU) foreigners, but also the national regulatory measures taken by the member states in the absence of harmonization (who then act as trustees of the Union's interests) clash with the national or most-favoured-nation treatment guaranteed by the BITs, which are usually unqualified.[22]

The ECT merely recognizes in Article 25(3) the possibility of taking measures considered necessary for the protection of essential security interests, for the respect of non-proliferation policies and 'for the maintenance of public order' and it excludes this exception for the rights to full security and protection (Article 12) and expropriation (Article 13). Moreover, it explicitly excludes the possibility of taking measures necessary to protect human, animal or plant life or health explicitly in the context of investment protection.[23]

4. State aid prohibitions and liberalization

There is an inherent tension between the Central and Eastern European states' obligation under their BITs to honour their 'deal-sweeteners' made to investors prior to their accession to the EU and their supervening obligation under EU law not to distort competition in the Internal Market through state aids (Article 107 TFEU). The problem is well illustrated by the claims (together exceeding €800 million) brought by Micula against Romania[24] and—more interesting in the present context because based on the ECT—by Electrabel, AES, and EDF against Hungary.[25] The latter concern the

[20] TFEU, Article 52. See also Torrent, above n 18, at 1381–6.

[21] For a short summary, see European Commission, Communication on Certain Legal Aspects Concerning Intra-EU Investments (97/C 220/06), OJ 1997 220/15, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y0719(03):EN:NOT> (visited 7 January 2012).

[22] For an analysis of the use of exceptions that allow for more flexibility in regulation, see Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis', 12(2) Journal of International Economic Law 507 (2009), 523–7.

[23] ECT, Article 25(2)(b).

[24] *Micula* v *Romania*, ICSID Case No. ARB/05/20 (claimant requests reinstatement of the legal framework prior to the revocation of certain financial incentives to invest in disfavoured regions or alternative €450 million in damages).

[25] *Electrabel SA* v *Hungary*, ICSID Case No. ARB/07/19; *AES Summit Generation Ltd and AES-Tisza Erömü Kft* v *Hungary (No 2)*, ICSID Case No. ARB/07/22; *EDF International SA* v *Hungary* (*ad hoc* arbitration under UNCITRAL Rules).

termination of long-term power purchase agreements for electricity, the terms of which Hungary claimed to violate EU state aid rules—as also confirmed by the European Commission decision ordering Hungary to recover that aid.[26] The *AES* claim was dismissed on different ground; and the tribunal's majority—against Professor Stern's dissent on this point—did not find that the EU state aid proceedings were relevant in this context.[27] But if one of the other two tribunals were to follow the same line of reasoning *and* awarded damages, this would put the existing investment protection system to a very serious test (provided that the ECJ were to uphold the Commission's decision). Any payment on such an award would then itself constitute a violation by Hungary of EU state aid rules since the damages would *de facto* re-allocate to the enterprise the forbidden economic benefit and thus perpetuate the illegal distortion of the market.[28] Compliance with the award could—and should—prompt the Commission to initiate infringement procedures before the ECJ.[29] The *AES* v *Hungary* tribunal may or may not have been right in stating that it was not under an obligation to interpret the ECT in the light of the EU state aid rules.[30] For any court of an EU member state, however, the hierarchy of norms is different and it would be under the obligation to refuse recognition and enforcement of such an award to the degree that it contradicts European competition law.[31] Faced with the dilemma of having to choose between respecting his or her country's obligations under international law[32] or preserving the integrity of the legal order

[26] Commission Decision C (2008) 2223 final of 4 June 2008 on the State Aid Award by Hungary through Power Purchase Agreements in Case C-41/2005, <http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_C41_2005> (visited 7 January 2012).

[27] *AES* v *Hungary (No 2)*, above n 25, Award of 23 September 2010, paras 10.3.15–19, <http://italaw.com/documents/AESvHungaryAward.pdf> (visited 7 January 2012).

[28] Cf ECJ, Case C-24/95 *Alcan* (1997) ECR I-1591, para 25 (categorically refusing that there could be legitimate expectations on the part of the undertaking); for the explicit exclusion of the circumvention of the state aid rules through damages claims against the state see, e.g. in Germany BVerwG [German Federal Administrative Court], 23 April 1998 (3C 15/97), NJW 1998, 3728.

[29] See also Eilmansberger, above n 1, at 406.

[30] *AES* v *Hungary (No 2)*, above n 27, para 7.6.9; see also below n 60. For the (questionable) argument that EU law is not even 'international law' for the purposes of Article 26(6) of the ECT and thus not applicable law, see Thomas Roe et al., *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge: CUP, 2011) 95–7.

[31] Cf ECJ, Case C-126/97 *EcoSwiss China* v *Benetto International NV* (1999) ECR I-3055, para 41.

[32] In the case of an ICSID arbitration: Articles 53 and 54 of the ICSID Convention, which obliges every contracting state to recognize and enforce ICSID awards without allowing any objections; otherwise the public policy exception of Article V(2)(b) of the New York Convention would be of avail.

of the EU Treaties, a judge of an EU member state is, as a matter of principle, obliged to privilege the latter.[33]

The situation may, however be different if the colliding international obligation is covered by (what is now) Article 351 TFEU, as the following case on the liberalization of the electricity market illustrates. In 2009, the European Commission brought a case against Slovakia because of the latter's refusal to terminate contractual priority electricity transmission rights granted to a Swiss investor prior to the EU's official decision to negotiate Slovakia's accession.[34] These were granted for 16 years by the Slovak state-owned network operator in exchange for the Swiss paying over half of the construction costs of an electricity transmission line between Poland and Slovakia. 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.[35] The ECJ held that, to the degree that the investor's rights were protected under the Swiss–Slovak BIT against interference by the Slovak state, Article 351 TFEU recognizes the effectiveness of Slovakia's international obligations[36]—despite the fact that, as Advocate General (AG) Jääskinen had observed, that this result 'seems to sit at odds, at first glance, with the idea of market liberalization that Directive 2003/54 aims to promote'.[37] The ECJ decision is little surprising in the light of the specific provision of Article 351(1) TFEU.[38] However, the AG's reference to the substantive incompatibility of the BIT rights and EU law indirectly points back to the above discussed obligation of member states under Article 351(2) TFEU to

[33] ECJ, Opinion 1/91 *EEA I* (1991) ECR I-6079, paras 35, 71, Case C-459/03 *Mox Plant* (2006) ECR I-4635, para 123; Joined Cases C-402/05 P and C-415/05 P *Kadi* (2008) ECR I-6351, paras 282, 286.

[34] ECJ, Case C-264/09 *Commission* v *Slovakia* (2011) ECR I-0000.

[35] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003L 176/37, Articles 9 and 20.

[36] *Commission* v *Slovakia*, above n 34, paras 32, 41 and 50–2. The ECJ abstained from discussing the ECT in the case, since it considered that the Swiss–Slovak BIT would constitute the relevant *lex specialis* 'since the latter agreement directly relates to investment protection' (paras 29–30)—as if the ECT did not . . . The ECJ's solution is nevertheless justified in view of ECT Article 16, which allows the application of whatever provision is more favourable to the investor. See also below n 37.

[37] ECJ, Case C-264/09 *Commission* v *Slovakia*, Opinion of AG Jääskinen of 15 March 2011, (2011) ECR I-000, para 109. See also paras 61, 63 *obiter* on the ECT: [T]he detailed provisions contained in Directive 2003/54 and interpreted in detail in *VEMW* [ECJ, Case C-17/03 *VEMW*, (2005) ECR I-4983] cannot be overridden by the more general provisions contained in the Energy Charter Treaty [. . .] EU energy law as it stands [. . .] cannot be considered as failing to achieve the standards required by the Energy Charter Treaty [. . .] Moreover, with respect to the enjoyment and protection of investments, the general level of the protection of fundamental rights provided by EU law affords protection to investors, which fulfils the obligations resulting from Articles 10(1) and 13(1) of the Energy Charter Treaty.

[38] For the different case law on intra-EU agreements see below n 84.

bring its international obligations in line with EU law. Having lost its battle to force Slovakia to terminate the contractual priority transmission rights, the Commission may well consider requesting Slovakia—as well as any other member state—to renegotiate its BITs so as to ensure that rights granted to investor rights do not prevail if contrary to EU law.[39]

5. Overlap with EU trade agreements with third countries

The EU had already negotiated, together with the member states, mixed agreements with third countries which also cover matters of foreign direct investments, such as the Association Agreement with Chile (2002),[40] and the Free Trade Agreements (FTAs) with the Cariforum (2008)[41] and South Korea (2010). Furthermore, the Commission now has a mandate for negotiating FTAs with Canada, Singapore, and India.[42] These EU agreements, which with their ratification technically become part of EU law, primarily concern the liberalization of investments in services and industrial sectors, but may also address post-establishment rights of investors, including the possible restrictions that the parties to the FTA may impose. An example for this—mirroring the problems of incompatibility with 'domestic' EU law—can be found in capital transfer provisions in the Association Agreement with Chile. They allow the contracting parties in case of 'serious balance of payments and external financial difficulties' to adopt 'restrictive measures with regard to trade in goods and in services and with regard to payment and capital movement, including those related to direct investments'.[43] The BITs concluded by member states with Chile, however, contain unqualified guarantees of free transfer of capital. If an investor could challenge restrictions allowed by the FTA by invoking BIT provisions, this would undermine and upset the overall balance struck for this comprehensive regime for all economic activities covered by the FTA. Moreover, parallel regimes would also defeat the purpose of the Union's agreements to establish a level playing field for outbound investment by the economic actors from all EU member states so as not to cause distortions on the EU market by repercussion. For example, investors from Ireland or Slovakia

[39] For the ensuing problem of the 'survival clauses' in the BITs that guarantee continuing protection to existing investments for another 10–20 years, see Andrea Carska-Sheppard, 'Issues Relevant to the Termination of Bilateral Investment Treaties' 26(6) Journal of International Arbitration (2009) 755–71, and Luke Peterson, 'Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protection For Existing Investments' *IAReporter* (1 February 2011), <http://www.iareporter.com/articles/20110201_13/> (visited 7 January 2012).

[40] OJ 2002L 352/3.

[41] OJ 2008L 289/1.

[42] See Text of the Mandates, 12 September 2011, Seattle to Brussels Network, <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html> (visited 7 January 2012).

[43] EU-Chile Association Agreement, Article 195.

could not escape the restrictions in the Association Agreement with Chile since their home countries have not concluded any BITs with Chile.

As a matter of international law, in particular the Vienna Convention on the Law of Treaties 1969 (VCLT), the Member State BITs remain in force since they do not cover exactly the same subject matter as the EU agreements.[44] The only limitation is that their provisions are not applicable anymore to the degree that they are incompatible with the later EU agreement with the same third country, to which all member states are also a party.[45] Only a clarification—either in the EU agreements or in general terms—that the EU agreements override the BITs insofar as they overlap would resolve this problem.[46]

III. THE PARTICULAR PROBLEM OF INTRA-EU BIT'S

The potential for conflict sketched above is not dependent on whether BITs are in force with third countries (extra-EU BITs) or with other member states (intra-EU BITs). This is illustrated by the use of investment vehicles such as in the notorious cases of *CME/Lauder* v *Czech Republic* that lead to parallel arbitrations in London (under the US–Czech BIT) and in Stockholm (under the Dutch–Czech BIT) and a squarely contradicting outcome.[47] The intra-EU situation, however, adds yet another layer of complexity and aggravates the potential for incompatibilities.

According to the European Commission, intra-EU BITs amount to an 'anomaly within the EU internal market'.[48] In line with the general absence of North–North BITs at the global level, no two EU member states have ever concluded a BIT amongst each other. All of the approximately 190 existing intra-EU BITs received this label through accession, such as first those concluded by Germany with Spain and Greece before their respective accessions in 1981 and 1986. The overwhelming bulk of the intra-EU BITs were concluded with the Central and Eastern European countries after the fall of the communist regimes to secure stable market conditions for West European investors—just like the multilateral ECT. This also points at the essential problem with intra-EU BITs: they were originally all 'pre-EU' BITs

[44] VCLT, Article 59.

[45] VCLT, Article 30(3).

[46] For the claim that BITs also overlap conflictingly with the General Agreement on Trade in Services, see Rudolf Adlung and Martín Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?', 11(2) Journal of International Economic Law 365 (2008), 403.

[47] *Lauder (Ronald S)* v *Czech Republic* (3 September 2001), 14(3) World Trade & Arbitration Materials 35 (2003); *CME Republic BV* v *Czech Republic* (13 September 2001), 14(3) World Trade & Arbitration Materials 109. See for more detail, Justin D'Agostino and Oliver Jones, 'Energy Charter Treaty – A Step Towards Consistency in International Investment Arbitration?' 25(3) Journal of Energy & Natural Resources Law 225 (2007), 226–30.

[48] Cf *Eureko* v *Czech Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para 177, <http://italaw.com/documents/EurekovSlovakRepublicAwardon Jurisdiction.pdf> (visited 7 January 2011>.

paving the way for outbound investments to the new neighbouring markets. This raises, as with the already-mentioned overlap with other EU trade agreements, the question of which instrument is to prevail. The framing of this question itself raises the next question: prior to any termination of these BITs, which instrument is to prevail in terms of applicability and, moreover, applicable for whom?

A. General inapplicability of intra-EU BITs?

Both defendant member states and the European Commission as *amicus curiae* have forwarded the argument that all intra-EU BITs have ceased to be valid with accession and because of the primacy of EU law. This position has been rejected by arbitral tribunals, such in *Eastern Sugar BV* v *Czech Republic*,[49] *RJ Binder v Czech Republic*,[50] and more recently in *Eureco* v *Slovak Republic*,[51] at least with respect to the tribunal's jurisdiction. Indeed, the supremacy of EU law is an 'inner-EU' problem. It does not, as such, concern arbitral tribunals that derive their jurisdiction from the BIT, i.e. a treaty governed by public international law.[52] As discussed in detail in *Eureco*,[53] the intra-EU BIT would cease to be applicable for an arbitral tribunal under Article 59 VCLT only if—in the absence of a clear intention to supersede the previously concluded BIT—the posterior European treaties covered the same subject matter to a degree that 'the two treaties are not capable of being applied at the same time'. Even the European Commission has accepted that there is no such total incompatibility.[54]

B. Inapplicability of specific BIT provisions

Individual provisions of the intra-EU BIT, however, could become inapplicable if they are incompatible with the subsequently concluded Treaty of Accession and thus the European Treaties according to Article 30(3) VCLT. In its award on jurisdiction, the *Eureko* tribunal rejected the Slovak Republic's and the Commission's contention that the

[49] *Eastern Sugar BV* v *Czech Republic*, Partial Award of 27 March 2007, <http://italaw.com/documents/EasternSugar.pdf> (visited 7 January 2012). On this decision see in detail Markus Burgstaller, 'European Law and Investment Treaties', 26(2) Journal of International Arbitration 181 (2009), 184–93 and Graham Coop, 'Energy Charter Treaty and the European Union: Is Conflict Inevitable?' 27 Journal of Energy & Natural Resources Law 404 (2009), 408–11.

[50] Award on Jurisdiction of 6 June 2007 (not public); cf Luke Peterson, 'Details Surface of Jurisdictional Holding in *Binder* v *Czech Republic*: UNCITRAL Tribunal Saw No Conflict Between BITs and EU Law', IAReporter 28 February 2009, <http://www.iareporter.com.gate2.library.lse.ac.uk/articles/20090924_8> (visited 7 January 2012).

[51] See above n 48.

[52] Roe et al., above n 30, at 94.

[53] *Eureko*, above n 48, para 231–67.

[54] Ibid, para 192. See also Eilmansberger, above n 1, at 399–401. This has apparently also been the conclusion of the *Binder* tribunal, see Peterson, 'Details Surface', above n 50.

investor-state-arbitration provisions in the BIT would be incompatible with the EU regime; the tribunal pointed *inter alia* at the general use of commercial arbitration, in the context of which arbitrators can also apply mandatory EU law—albeit under the control of state courts.[55] With some luck, the ECJ will get a chance to give its opinion on the correctness of the finding of the *Eureko* tribunal: the OLG Frankfurt, seized by a request to set aside the award on jurisdiction, might requested the ECJ for a preliminary ruling in this matter.[56]

What remains is then an analysis of the compatibility of the individual substantive provisions of the intra-EU BITs—a task that would exceed the scope of this article. It suffices to point out that, as sketched below, there is a considerable overlap of investor rights under intra-EU BITs and the ECT, on one hand, and investor rights under EU law, on the other hand,[57] and that the potential of incompatibility is significant, for the same reasons as in the extra-EU context: EU investor rights come with much more, albeit qualified and strictly framed, 'policy space' than the BITs or the ECT.[58] And it is difficult to conceive how the unqualified investment treaty standards can be applied at the same time as the qualified EU standards.

It was probably correct for the tribunal to state that the incompatibility of such wider protection with EU law 'is not a reason for cancelling Claimant's rights under the BIT' in the *Eureko* case,[59] since it is, indeed, 'not for an arbitral tribunal to cancel rights created by a valid treaty in order to safeguard a State party against the possibility that it might one day decide to apply the treaty in a way that could violate its obligations under one or more other later treaties'.[60] But it may be for the member states, either voluntarily or forced by the Commission and the ECJ, to terminate the intra-EU BITs because of the important overlap and potential conflict with EU law,[61] as shown in the following overview.

[55] *Eureko*, above n 48, para 274, referring to ECJ, C-126/97, *Eco Swiss China Ltd* v *Benetton Int'l BV* (1999) ECR I-3055.

[56] Luke Peterson, 'German Courts Asked to Overturn Finding of Jurisdiction by Arbitral Tribunal in Intra-EU Investment Dispute' *IAReporter* (13 January 2011), <http://www.iareporter.com/articles/20110114_7> (visited 7 January 2012).

[57] See also Hanno Wehland, 'Intra-EU Agreements and Arbitration: Is European Law an Obstacle?' 58 International and Comparative Law Quarterly 297 (2010), 304–5.

[58] See also *Eureko*, above n 48, para 226.

[59] Ibid.

[60] Ibid, para 267; see also *AES* v *Hungary (No 2)*, above n 27, para 7.6.9: '[The behaviour of Hungary] must be analysed in light of the ECT, to determine whether the measures, or the manner in which they were introduced violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by the Tribunal when determining the "rationality", "reasonableness", "arbitrariness" and "transparency".'

[61] Cf ECJ, Case C-62/98 *Commission* v *Portugal* (2000) ECR I-5171, para 49.

C. The general overlap between intra-EU BITs and EU law

And that leads back to the nature of the intra-EU BITs as 'pre-EU' BITs: they were designed to afford the protection of EU investors in the former communist European countries in the absence of the protection afforded by the European treaties. The core of the regulation of the European internal market is the guarantee of national treatment (Article 18 TFEU) so as to allow every national of a member state to participate on the internal market without any discrimination on the basis of nationality.[62] This general principle of non-discrimination finds its expression in the basic freedoms guaranteed to market participants and especially investors. The internal market comprises 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties' (Article 26 TFEU). Accordingly, investors may physically move and reside freely within the territory of the member states (Article 21 TFEU); they can move their capital freely within the internal market (Articles 63, 65 TFEU); they have the freedom to establish the companies they wish to use for their investments in any member state (Articles 49, 52 TFEU); their companies can provide their services across borders (Articles 56, 62, 52 TFEU); and their national employees can equally move freely (Article 45 TFEU).

All of these market freedoms are, of course, not unqualified. Member states are partially allowed to restrict these freedoms for the purposes of imperative requirements of public interest. Where these exceptions lead to disturbances on the level playing field of the internal market, the Union may use its competences to harmonize national legislation imposing restrictions on market freedoms. In any case, any regulatory legislation or administrative action based on these regulatory powers, be it by a member state or by the Union, is restricted by the test of proportionality,[63] which ensures fair treatment by the adequate balancing private and public interest.

Moreover, any investor in the EU enjoys the protection of fundamental rights, which were previously elaborated in the case law of the ECJ in the light of the European Convention of Human Rights, and which are now laid down in the Charter of Fundamental Rights (CFR) as directly applicable law.[64] This includes the guarantee of personal liberty and security (Article 6 CFR); the freedom to pursue a freely chosen occupation (Article 15 CFR) and to conduct business (Article 16 CFR); the right to property, including the right to fair compensation in good time (Article 17 CFR); access to services of general economic interest (Article 36 CFR); and the right to

[62] For an analysis of the comparability of the EU prohibition of discrimination and BIT standards see Wehland, above n 57, at 310–15.

[63] See generally Gráine de Búrca, 'The Principle of Proportionality and its Application in EC Law' 13 Yearbook of European Law 105 (1993).

[64] TEU, Article 6(1).

good administration (Article 41 CFR) as well as access to effective justice and due process (Article 47 CFR).

Finally, this broad system of protection against state interference is supplemented by the ECJ's case law based on the *Francovich* decision,[65] which establishes the liability of member states or Union institutions for damages resulting from the violation of these individual freedoms and rights.

D. Consequences arising from the overlap

This very rough overview of the existing system of protection of investments within the European internal market hints the degree to which the investor rights under EU law overlap to a very large degree with those arising under the intra-EU BITs or the ECT. It can hardly be argued—as did the Claimants in *Eureko*—that the termination of the intra-EU BITs would leave an 'enormous gap' in the protection of investors.[66] What is more important is that the overview also gives a flavour of the degree of potential conflict, given the higher degree of qualification and reservation of 'policy space' under EU law, adapted to the needs of regulating the Internal Market, and how the maintenance in force of the 'pre-EU' BITs after the accession is causing an 'anomaly within the Internal Market'. It would be most interesting to see what the ECJ, if requested, hands down in a preliminary ruling to the OLG Frankfurt in the *Eureko* case.[67] In any case, it is the Commission's declared intention to press for the termination of intra-EU BITs and has requested member states to act accordingly.[68] So far, it is known that the Czech Republic has negotiated the termination of is BITs with Denmark, Italy, Malta, and Slovenia.[69] Most member states, however, have taken the position that they prefer to keep their intra-EU BITs in force.[70] In the light of the foregoing, it should not come as a surprise if the European

[65] ECJ, Joined Cases C-6/90 and C-9/90 *Francovich* (1991) ECR I-5357; Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur* and *Factortame III* (1996) ECR I-1029; Case C-453/99 *Courage* (2001) ECR I-6297. See generally Paul Craig, '*Francovich*, Remedies and the Scope of Damages Liability' 109 Law Quarterly Review 595 (1993).

[66] *Eureko*, above n 48, para 84.

[67] See above n 56.

[68] Cf *Eureko*, above n 48, para 182; Luke Peterson, 'EC Asks Member-States to Signal by Year's End Whether They Will Terminate Their Intra-EU Investment Treaties; Spectre of Legal Actions Loom', *IAReporter* (23 October 2010), <http://www.iareporter.com/articles/20101023_10/> (visited 7 January 2012); see also Christophe von Krause, 'The European Commission's Opposition to Intra-EU BITs and its Impact on Investment Arbitration' *KluwerArbitationBlog* (28 September 2010), <http://kluwerarbitrationblog.com/blog/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/> (visited 7 January 2012). For the Commission's earlier plans in the same direction already in 2006, see *Eastern Sugar*, above n 49, para 126.

[69] *Eureko*, above n 48, para 82 n 64 and para 124 n 110; Peterson, 'Czech Republic', above n 39.

[70] Cf Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, ECFIN/CEFCPE(2008)REP/55806 (21 November 2008), <http://register.consilium.europa.eu/pdf/en/08/st17/st17363.en08.pdf> (visited 7 January 2012) para 17.

Commission were to bring procedures before the ECJ for infringement of the duty of loyal cooperation against those member states refusing to terminate their intra-EU BITs.

E. Some arguments regarding the obligation to terminate BITs

It would also not come as a surprise if the ECJ were to follow the Commission in this respect. Some broader arguments can be derived from the statement of the *Eureko* tribunal on the respective scope of the regimes: 'The protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law (or, indeed, under the laws of any EU Member State).'[71]

1. The substantive difference between BIT rights and EU law rights

The main reason why BIT protection is 'at least potentially' broader is that they are framed in extremely broad and unqualified terms. It is not all that clear why and how arbitral tribunals should on that basis engage in a balancing of private and public interests that is equivalent to the mechanisms of judicial review of administrative acts under national laws and, by extension, under EU law.[72] The situation is more complex than captured by the *Eastern Sugar* tribunal when concluding laconically that 'the fact that these rights are unequal does not make them incompatible'.[73] The clear framing of the balancing between the private and public interests as enshrined in EU law suggests the contrary: EU law provides *also* for investor protection but only within the much broader context of establishing the Internal Market as the regulated level playing field that is the backbone of the European integration project. Allowing EU investors investing within the EU to opt out of the complex balance of the sophisticated EU regime by accepting much less qualified guarantees of the BITs (or the ECT), and thus restricting the 'policy space' of EU member states as defined by EU law and, indirectly, that of the EU itself, is incompatible with EU.

The argument that 'the extra benefits enjoyed by investors that fall under an intra-EU BIT should be extended to all European investors by taking appropriate legislative measures at the European level, rather than eliminating existing right'[74] misses the point. It is not about 'everyone should have

[71] *Eureko*, above n 48, para 245.

[72] For this discussion see, e.g. Stephan Schill (ed.), 'An Introduction' in *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 3–37.

[73] *Eastern Sugar*, above n 49, para 170.

[74] Lavranos, above n 9, at 433:

> 'In other words, instead of lowering the protection standards for all European investors, the EU should expand the highest protection standards to all. After all, the EU has not obtained exclusive FDI competence from the member states for the purpose of lowering the standards of protection of investors.'

a full glass of water'.[75] There is a good reason why the investor's glass is only half-full under EU law protecting investments. Not only investors are the 'clients' of the policy makers but primarily the public in general, especially the tax payers, who have a legitimate interest in seeing public resources and public regulation applied for the benefit of general welfare—and thus in excluding the exposure of public budgets to claims which would be dismissed as unfounded on the basis of the general regime of EU law.

2. Intra-EU investment arbitration v the EU judicial system

The *Eureko* tribunal's statements on the broadness of BIT rights points at the very heart of the problem: why should investors from certain member states enjoy a greater degree of protection than that afforded by the European Treaties? Why should arbitral tribunals, in a purely intra-EU context, not be bound to the same restrictions on judicial review as courts of the Union and the member states?[76] Moreover, in the light of the fact that the European Treaties have put into place the well-tested procedural mechanisms that ensure that the EU laws, establishing supra-national standards of protection of investments within the internal market, are they applied and interpreted autonomously, untainted by national parochial conceptions, and uniformly? And going beyond the substantive standards of protection: why should European investors in the Internal Market be allowed to crosscut the existing supranational judicial system of the ECJ by using an alternative system of international arbitration?[77]

The policy arguments brought forward against these questions are usually that the EU judicial system still depends primarily on the judges of the member states who are at the same time Union judges when deciding disputes touching upon matters covered by EU legislation. Investors operating in countries with persistent governance and corruption issues such as Romania and Bulgaria—so the argument goes—should not have to start litigation first in potentially unreliable local courts before getting access to a preliminary ruling of the ECJ. This argument seems to be all the more

[75] This was the image used by Sabine Konrad in reply to the author's presentation of an earlier version of this article in Stockholm on 10 June 2011.

[76] The argument that there is the possibility of control of the compatibility of the award with EU law at the enforcement stage (Wehland, above n 57, at 319; Eilmansberger, above n 1, at 406; also Claimants in *Eureko*, above n 48, para 122) fails where the ICSID Convention is applicable, since it does not allow for any public policy exception at the stage of enforcement; see above n 32 and below n 83). Furthermore, the argument fails where enforcement can be obtained against assets of the condemned country in non-EU jurisdictions, as pointed out by Respondents in *Eureko*, above n 48, para 116.

[77] For the practical answer see Roe et al., above n 30, at 102:

> '[Bringing judicial proceedings before European courts] might, however, from the perspective of the Investor be seen as a less attractive alternative, not least because the view of such a court on the relationship between EU law and the ECT may not coincide with that of an arbitral tribunal.'

powerful when bearing in mind that if a host country's court of last instance refuses to submit a litigious question of interpretation of EU law to the ECJ (for example by invoking the *acte clair* doctrine[78]), the investor is left to the mercy of its home country or the Commission accepting the troubles of bringing infringement procedures. But, after all, that is a general problem that every merchant, service provider, or worker faces.

These systemic deficiencies of the local administrative and court structures arise equally under the Brussels I regime for civil and commercial disputes. It is not too far-fetched to compare the essence of the debate evolving around the intra-EU BITs to that of the *West Tankers* discussion,[79] since both are based on the reluctance to accept the premise of mutual trust among and in the courts of all EU member states postulated by the ECJ.[80] Seen from this perspective, the intra-EU 'mutual trust' problem is being addressed by the large EU programmes for training judges and public servants in those countries to allow them to perform their role as part of the EU administrative and judicial systems, to guarantee the EU standards in their country as any other EU member state.[81] Keeping a parallel system of investment arbitration in place arguably undermines these efforts of institutional capacity building and could be considered as incompatible with the principle of mutual trust in the administration of justice in the EU,[82] at least in the present form

[78] ECJ, Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* (1982) ECR I-3415, also referred to by the *Eureko* Tribunal, above n 48, para 282.

[79] In the *West Tankers* case, the English practice of enforcing arbitration agreements designating England as the seat of arbitration by issuing anti-suit injunctions against parties that initiate 'torpedo' proceedings in foreign courts known for being notoriously slow so as to delay proceedings was condemned as being incompatible with Regulation No 44/2011 (Brussels I) because they deprived the court of a member state to decide on its own jurisdiction and therefore run 'counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based'; ECJ, Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA* v *West Tankers Inc* (2009) ECR I-663, paras 24 and 30.

[80] See also Case C-159/02 *Turner* (2004) ECR I-3565, para 24, and Case C-116/02 *Gasser* (2003) ECR I-14693, para 72:

> 'It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.'

[81] Cf Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C (2006) 6569 final; Reports from the Commission to the European Parliament and the Council on Progress in Bulgaria and Romania under the Cooperation and Verification Mechanism, COM (2011) 459 final and 460 final, <http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm> (visited 7 January 2012).

[82] On this point see also the *amicus curiae* submission of the European Commission in *Eureko*, above n 48, para 185; but see Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' 24(5) Journal of International Arbitration 455 (2007), 465 (considering the principle of mutual trust merely to be a soft law principle).

provided for in the BITs, allowing for International Centre for Settlement of Investment Disputes (ICSID) arbitration and the resulting exclusion of review of awards for their respect for EU law.[83]

In summary, there seem to be good reasons for the Commission to push for ensuring that EU law is the only regime governing investment flows within the European market and that the ECJ is the only ultimate instance for interpreting and applying these rules. And, indeed, it does not seem too far-fetched to expect the ECJ to follow the Commission on this point.[84] The only alternative to the elimination of the intra-EU BITs would, indeed, be the establishment of specialized European investment court, which would be required to follow the ECJ's case law and which would be entitled to request preliminary rulings from the ECJ.[85] The prospects of actually achieving such an ambitious project, however, are rather questionable.

IV. THE SPECIFIC COMPLICATIONS OF THE ECT IN THE EU CONTEXT

A. The extra and intra-EU problems applying to the ECT

As already mentioned in the overview of the ECT's history, all EU member states are parties to it. Accordingly, all the general problems of compatibility of BITs with EU law arise also under the ECT, such as its insufficiently qualified capital transfer guarantees,[86] which all the more complex considering that the EU is itself a party to the ECT, as discussed below.[87]

Moreover, the problems of applicability or maintenance in force of intra-EU BITs equally arise, albeit in a somewhat more complex manner. The ECT, from the outset, was concluded as an instrument that would not only bind the 'old' EU member states vis-à-vis the later accession states, but

[83] See above nn 32 and 76; see also Roe et al., above n 30, at 103 (recommending claimants to privilege proceedings under ICSID for this reason). But see Wehland, above n 57, at 308 and 319, arguing that the reference to the national laws concerning the execution of judgments would allow courts of EU member states to scrutinize an ICSID award for compatibility with EU law; more correct would be that EU courts may, in certain situations, be obliged to refuse recognition and enforcement on the basis of incompatibility with EU law but only based on the supremacy of EU law and in breach of the ICSID Convention; see above text accompanying nn 28–33.

[84] For ECJ's affirmation of the prevalence of EU law in case of conflict with bilateral agreements between Member States see Case C-10/61 *Commission* v *Italy* (1962) ECR 1; Case C-235/87 *Matteucci* (1988) ECR 5589, para 22; Case C-3/91 *Exportur SA* v *Lor SA and Confiserie du Tech SA* (1992) ECR I-5529, para 8; for the exclusivity of the EU mechanism for settling disputes between Member States in matters covered by EU law se *Mox Plant*, above n 33, paras 123 and 154:

> 'the institution and pursuit of proceedings before the Arbitral Tribunal, in the circumstances [involving the application of EU law], involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected.'

[85] Lavranos, above n 9, at 433.

[86] See text accompanying n 13.

[87] See text accompanying nn 97–99.

also amongst each other. Put differently, the ECT was only partially a 'pre-EU' treaty; it was partially also, from the very beginning, an 'original intra-EU' agreement even prior to the two accession waves. The ECT does not contain any limitations regarding its applicability among the 'old' EU member states. This 'original intra-EU' element has not yet come into play.[88] But this could soon change as a group of investors in photovoltaic electricity from, inter alia, Germany, UK, and the Netherlands, has initiated arbitration proceedings against Spain under the ECT because of a revocation of beneficial tariff in the context of the austerity measures prompted by the financial crisis.[89] In any case, it seems that the Commission considers an interpretation of the ECT as allowing an arbitral tribunal to assume jurisdiction over an intra-EU claim or even not to take EU law into consideration as applicable law would be contrary to EU law.[90]

A complex question is whether and how the member states can 'disconnect' themselves from the ECT for the purposes of claims brought by EU investors so as to limit investor rights to the applicable EU law.[91] The ultimately problematic point is how the EU is to handle the dilemma of having created the ECT and now having to ensure its compatibility with EU law in relation to third countries and to deal with its continuing validity and applicability under international law also for intra-EU relations. A declaration of incompatibility by the ECJ in a preliminary ruling in the *Eureko* procedure would facilitate things for the Commission as the pressure would be on the member states also to address the intra-EU element of the ECT. Otherwise, the Commission would have to recur to infringement procedures against member states that do not wish to touch the ECT.[92] In any case, the

[88] The €1.4 billion claim under the ECT by the Swedish energy company Vattenfall against Germany over problems with concessions for a power plant was settled, but, in any case, Sweden only acceded to the EU in 1995, i.e. after the conclusion of the ECT.

[89] For the announcement of the request for arbitration, see press release by White Owl Capital on 8 March 2011: 'International PV Investors Demand Compensation or Repeal for Retroactive Spanish PV Tariff Changes Under International Investment Treaty', <http://www.presseportal.de/print.htx?nr=2004299> (visited 7 September 2011); for the apparent filing of the claim see Christopher Cundy, 'Spanish solar investors press ahead with legal challenge', Environmental Finance, 18 November 2011, <http://www.environmental-finance.com/news/view/2125> (visited 7 January 2011).

[90] See the arguments presented by Esa Paasivirta of the Legal Service of the European Commission at the ECT Conference 'Energy Dispute Resolution Conference: Investment Protection, Transit and the Energy Charter Treaty' in Brussels, 23 October 2009, <http://www.encharter.org/index.php?id=472> (visited 7 January 2012), discussed critically by Roe et al., above n 30, at 92–4.

[91] Burgstaller, above n 49, at 208–11; see also Christian Tietje, 'The Applicability of the Energy Charter treaty in ICSID Arbitration of EU Nationals vs. EU Member States' 78 Beiträge zum Transnationalen Wirtschaftsrecht 1 (2008), 10–11.

[92] The general—and not fully conclusive—recent remarks of the Advocate General on the ECT in relation to the European energy legislation could be taken as suggesting that, also for the ECT, the ECJ could be inclined to uphold the priority of EU law over the ECT; see above n 37.

elimination of parallel investment protection structures within the Internal Market in energy would require some form of general carve-out for intra-EU situations under the ECT. Such carve-out is ultimately necessary, even if the ECJ were to declare intra-EU BITs or the ECT as incompatible with the European Treaties, since such a ruling would not be binding on arbitration tribunals established under the ECT—at least not if within the realm of the ICSID Convention that shields the award against any scrutiny by EU jurisdictions.[93] In order to create such a binding carve-out, the easier but apparently less certain way would be through *inter se* agreements of the member states, the effectiveness of which does not seem to be quite clear under the ECT;[94] the more certain but also much more burdensome (and practically maybe too costly) way would be through a renegotiation of the ECT with the non-EU partners.

B. The EU as a party to the ECT

Another layer of complexity is added by the fact that the ECT is a mixed treaty to which also the Union (as the successor of the European Community) itself is a contracting party.[95] An uncontroversial point is that, while the EU could well be a defendant in an ECT claim, a EU national or a company organized according to the laws of a EU member state could not bring a claim against the Union, since they would not be an 'Investors of another Contracting Party' as required by Article 26(1) ECT.[96]

An issue raised in relation to the EU having itself entered into the ECT concerns the repercussion that this is to have on the general incompatibilities of the treaty's guarantees with EU law. It has been argued that by entering into the ECT, the EU would have limited its own competence to restrict capital movements specifically for the energy sector.[97] In the same vein, it has been argued that by accepting investor-state arbitration under Article 26 ECT, this dispute settlement mechanism cannot be deemed incompatible with the TFEU provisions on the role of the ECJ in interpreting and applying EU law.[98] This line of argument may well be acceptable before an arbitral tribunal under international law, but certainly not from an internal EU law point of view. The EU institutions have no powers to

[93] See above nn 32 and 83.

[94] Burgstaller, above n 49, at 210, pointing at ECT, Article 26, which could be interpreted as prohibiting such a special inter se regime of exclusive application of EU law and exclusive jurisdiction of the ECJ because that regime would be less favourable than the ECT, let alone because of the limited direct access by individuals to the ECJ.

[95] See also Council and Commission Decision 98/181/EC, ECSC, EURATOM 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 1998L 69/1.

[96] Burgstaller, above n 49, at 206–7.

[97] Eilmansberger, above n 1, at 411–12; Roe et al., above n 30, at 90.

[98] Söderlund, above n 82, at 459; Wehland, above n 57, at 319.

modify the provisions of the EU Treaties by way of the conclusion of an international treaty; such changes could only be brought about by way of amendment of the EU Treaties by the member states in accordance with Article 48 TEU.[99] This (internal) supremacy of primary EU law also defeats the possible broader argument that the fact that the EU has entered into the ECT as an intra-EU agreement would render obsolete the entire discussion about the compatibility of intra-EU BIT with EU law. It is not because the EU institutions commit the EU to certain obligations under international law that primary EU law is effectively changed or undermined.

Clear is that, whatever the difficulties, it could hardly be acceptable for the Commission in terms of consistency to leave the ECT untouched while obliging member states to bring their extra-EU BITs in line with EU law (or, in the alternative, to terminate them) and to terminate their intra-EU BITs. It remains to be seen in what direction the European Commission will push specifically for the ECT; but it seems probable that also the ECT's scope will eventually be affected by the EU context.

V. THE CONSEQUENCES OF THE ENTRY INTO FORCE OF THE LISBON TREATY

The entry into force of the Lisbon Treaty and the transfer of the power to regulate 'foreign direct investments' as a new part of the Common Commercial Policy to the EU as an exclusive competence does not really concern the intra-EU element of the ECT. Intra-EU investments are, by definition, not *foreign* direct investments. As regards the extra-EU element, the new exclusive competence will also not affect the ECT as such since the Union is already a contracting party. Accordingly, the Commission's draft regulation on transitional arrangements for investment agreements between member states and third countries[100] is limited to 'bilateral' agreements, thus excluding from its scope the only multilateral agreement on investment: the ECT.

What does change is that the EU member states lose their autonomy to renegotiate the ECT. The member states will thus probably not only have to accept the Commission's directions on the future (elimination) of the intra-EU element of the ECT, it seems, at first sight, that they would also have to accept the Commission's dictate regarding the ECT's extra-EU element, at least regarding the ECT provisions relating to foreign *direct* investments and, in application of the *AETR* case law,[101] those falling

[99] Cf ECJ, Opinion 2/94 *ECHR* (1996) ECR I-1759, paras 30–5.

[100] COM (2010) 344 final, 7 July 2010, <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf> (visited 7 January 2012); for background see Jan Kleinheisterkamp, 'The Future of the BITs of European Member States After Lisbon' 29 ASA Bulletin (2011) 212–23.

[101] ECJ, Case C-22/70 *Commission* v *Council* (1971) ECR 263.

under the Union's exclusive competence for external relations in matters for which the Treaties conferred exclusive competence for the internal market. Such calls for changes can be expected to arise at least in the medium term when the Commission seeks to implement a new comprehensive EU investment policy as outlined in its communication of July 2010.[102] Contrasting the ECT with these standards for new EU investment agreements could mean that the ECT would also have to be overhauled as its provisions do not sit comfortably with possible future standards projected in the communication, such as greater detail of definition of the very broad substantive standards and, regarding procedural standards, more transparency (including open hearings, *amicus curiae* briefs, and publication of awards), and potentially even quasi-permanent arbitrators and/or appellate mechanisms.[103]

The ECT being a mixed agreement, the Union will still require the member states' consent for negotiating any such changes with the non-EU contracting parties to the ECT. This time, the problem of consent and potentially reluctant member states plays out at the EU institutional level. In order to be able to negotiate any changes to the ECT, the Commission needs a mandate from the Council, which means that the Commission's proposal must get the endorsement of the qualified majority of member states votes.[104] This means that reluctant states could try to prevent the Commission from negotiating changes to the ECT by brokering a blocking minority in the Council. Insofar as the proposed modifications aim to eliminate some conflict between the ECT and EU law, the Commission could then bring infringement procedures before the ECJ against the recalcitrant member states so as to force them to agree to the mandate for bringing the ECT in line with EU law.[105] Changes that aim to implement a new policy of the Union, in contrast, would be more difficult to bring about in the absence of general consent.

It clearly follows from Article 4(3) TEU that the member states have the obligation to cooperate in bringing their legislation and treaties into line not only with EU law but also EU policies.[106] However, new policies of the Union relating to foreign investments from or to third countries can, in principle, only be established by a decision of the EU institutions; the Commission's communication alone or its request for mandate to implement new features in investment treaty law do not yet constitute policy of the

[102] COM (2010) 343 final, <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (visited 7 January 2012).
[103] Ibid, 9–10.
[104] TFEU, Articles 207(3), 207(4), 218(2).
[105] For the member states' duty of cooperation potentially involving also an obligation of result, see Christophe Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the "Duty of Cooperation"' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Oxford: Hart, 2011) 87–115.
[106] See text accompanying n 10.

Union. The failure to obtain the qualified majority vote in the Council would thus thwart the Commission's efforts to establish such a new policy. The situation could be different if the Commission first managed to obtain a series of mandates for including the sought features into bilateral EU agreements with third countries so as to eventually show a 'concerted strategy' for the inclusion of such features that could suffice for then forcing recalcitrant member states to fulfil their duty of cooperation as to abstain from blocking a renegotiation.[107] In practice, however, this situation is quite unlikely to arise and, once the Commission has consolidated its outline for a new EU investment policy, including certain concessions to the member states, it can be expected that the member states will accept moving towards new standards of investment protections—also in the ECT.

VI. CONCLUSION AND OUTLOOK

As regards its intra-EU dimension, it is unlikely that the ECJ would come to the conclusion that the ECT is not applicable between member states, let alone because the ECT is the only investment treaty which from the beginning bound states that were originally members of the European Community (now Union) and because it was actually proposed and designed by the European Commission itself. In any case, its applicability by international arbitral tribunals would not necessarily be affected by such findings on incompatibility at the EU level, although issues of recognition and enforcement of resulting awards in EU member states could be arising, especially in constellations such as in *AES* v *Hungary*. Given the Commission's strong determination to eliminate the parallelism of standards and recourses for investments inside the Internal Market, it can be expected that also the intra-EU dimension of the ECT will be eventually targeted by the Commission and may disappear if member states cooperate or are forced to cooperate by the ECJ.

As regards the extra-EU dimension, the Commission's ongoing review of existing BITs of the member states regarding their compatibility with EU law will eventually also prompt the need for remediating certain potential conflicts, such as regarding the unqualified capital transfer guarantees in the ECT, but potentially also others, as highlighted above. Again, it can be doubted that arbitral tribunals will feel compelled to interpret the ECT differently under the influence of EU law, but, depending on their procedural rules, they may want to bear in mind the possibility of having their award set aside or refused enforcement by courts of EU member states for violating

[107] For the notion of a 'concerted strategy' as sufficing for showing a policy of the Union, see ECJ, Case C-246/07 *Commission* v *Sweden (PFOS)* (2010) ECR I-3317, paras 76–94.

certain fundamental EU mandatory laws.[108] Conflicts with EU law can be expected to lead to an initiative by the European Commission to try to renegotiate the critical ECT provisions or to agree on an authoritative interpretation that can eliminate the potential for conflict.

Changes to the ECT that would incorporate innovative features resulting from a new EU investment policy remain dependent on the consensus of the member states despite the fact that the EU now has the exclusive competence for foreign direct investments. Following the Commission's communication 'Towards a Comprehensive European International Investment Policy' and the European Parliament's report thereon,[109] the Commission is now exploring the contours of the new standards for such new EU investment policies. Such features are likely to include: a higher degree of definition of substantive treaty standards; the limitation of choice of forum to ICSID only (despite the current obstacle of the EU's accession to the ICSID Convention) for the purposes of institutional transparency and legitimacy; greater transparency at the levels of initiation of proceedings, access to documents, open hearings, *amicus curiae* briefs, and the publication of awards; greater consistency of outcomes through clearer rules of interpretation; and an appeal mechanism. It remains to be seen how much of this can eventually be implemented in the context of the ECT.

[108] See also Burgstaller, above n 49, at 196 (considering that even the payment by a member state on an award that misapplies EU law could lead to infringement procedures against that member state).

[109] European Parliament, Report on the Future European International Investment Policy (2010/2203(INI)), adopted on 22 March 2011, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0070&language=EN> (visited 7 January 2012).