EUROPEAN COMMISSION

Brussels, 2 May 2017
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TO THE PRESIDENT AND MEMBERS OF THE ARBITRAL TRIBUNAL

Johan Sidklev, President ofthe Tribunal

Prof. Antonio Crivellaro, Arbitrator

Prof. Juez Bernardo Sepúlveda-Amor, Arbitrator

***AMICUS CURIAE* BRIEF**

submitted by the **Europcan Commission,** represented by Steven NOE, Tim **MAXIAN** RUSCHE, and Petra NEMECKOVA, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e-mail via steven.noe@ec.europa.eu, tim.rusche@ec.europa.eu and petra.nemeckova@ec.europa.eu,

in **SCC 2015/63,**

Novenergia 11- Energy & Environment (SCA)

Claimant

v.

Kingdom ofSpain

Respondent

1. INTRODUCTION

1. The European Commission (the "Commission") would like to thank your Tribunal for accepting, by means of the Procedural Order dated 27 March 2017, its request to file an *amicus curiae* brief011 issues ofjurisdiction in the present proceedings.

2. The dispute befare yom Tribunal has the particularity that it is an intra-EU dispute between an investor from one Member State and another Member State of the Un ion; that it is based on an international treaty, which is part of Union law[1]; and that it covers a field that is regulated by Union law.

3. The Commissions expects, as this is an international investment arbitration, that the starting point of your analysis is one of international law2, although - given the fact that the seat of your Arbit'al Tribunal seems to be Stockholm, that is in an EU Member State - there are very strong arguments that the starting point should be one of EU law, in which case the supremacy ofthe EU legal order would be beyond doubt, in line with the classic case-Jaw of the European Court of Justice ("ECJ").

4. Should you take, as expected, the starting point of international law, this *amicus curiae* brief contains an analysis f'om the standpoint of international law, which, as requested by the Commission and granted by your Tribunal, limits itself to the question of competence of your Tribunal.

5. The Commission invites your Tribunal not to simply follow existing published awards[3] which found jurisdiction in their respective cases. As the Commission will set out below, these awards contain severa! flaws, *inter alia,* from the point of view of EU law. In that context, tite Commission notes that the Arbitral Tribunal in *WNC Factoring Ltd.* v *Czech Republic* has very recently confi'med that despite the existence of a number of awards dealing with the question of intra-EU ISDS, the matter is far f'om settled:[4]

> *"[..] Jhe Europea// Court ofJusiice[..] wi/1 no doubt define ils posilion more precise/y in due course. The Tribunal recognizes that a different view may eve11l11ally prevail. However, tMs Tribunal is obligated under the BIT to decide this case based 011 the consent of the States parlies as set out in the text oj the BIT. and on the argumell/s presellfed by the parties."*

6. There is also significant academic wnl111g that suggests that investor-State dispute settlement is not compatible with EU law.[5]

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1 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Chartcr Protocol on encrgy eft'iciency and related environmental aspects, OJ L 69, 9.3.1998, p. 1.

2 ICSID Case No. ARB/03/16 *ADC Affliate Ltd.* v *Republic o/ Hl111gmJ,* award of 2 October 2006, at paragraph 290; ICSID Case No. ARB/01/7, *MTD Eq11ity Sdn Bhd* v. *Rep11blic of Chile,* award of 25 May 2004, at paragraph 86; and ICSID Case No. ARB/01/12 *Azurix Corp.* v. *Arge11tine Republic,* award of 14 July 14 2006, at paragraph 67; see also for further references *Amonio Parra,* "Applicable Law in Investor-State Arbitration", in: *Michael Rovine* (ed.), Contemporary lssues in lnternational Arbitration and Mediation: The Fordham Papers, Martinus Nijhoff Publishers, 2008 p. 3 (attached as **Annex EC-1),** at pp. 7-8.

3 Most notably *Clwrmme* and *RREEF Jnfastruc/11re.*

4 *WNC* v *Czech Rep11blic,* PCA Case No. 2014-34, Award of 22 February 2017, paragraph 3 11.

5 *See,* in particular *Stejfen Hi11dela11g,* „Member State BJTs - There's still (sorne) life in the old dog yet", in: Yearbook on international invcstment law and policy 2010/11, pp. 217 to 242 (attached as **Annex EC-2);** *Bruno Po11/ai11,* "Quelques interrogations sur le statut des traités bilatéraux de promotion et de protection des investisserncnts au sein de l'Union européenne", in: 111 Revue générale de droit international public (2007), pp. 803 to 828 (attached as **Annex EC-3);** *Eric Teynier,* "L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne", in : 128 La Gazette du Palais (2008), pp. 690 to 697 (attached as **Annex EC-4);** *Marek Wierzbowski and Aleksander G11b1y110111icz,* "Conflict of norms stemming from intra-EU BITS and EU

7. This is particularly important against the backdrop ofthe pending dispute before the ECJ in *Achmea* v *Slovakic/',* which deals precisely with the question of compatibility of intra-EU ISDS with EU law. The ECJ will hold an oral hearing in Grand Chamber formation on 19 June 2017 in this case.

8. This brief is organised into four sections. After the present introduction **(Section 1.),** the Commission will show, fi'st, that the interpretation of Article 26 ECT leads to the conclusion that the offer for entering into arbitration made by Spai11 is limited to investors fi'om contracting parties other tha11 EU Membcr States and did not create any international obligations between EU Member States *i11ter se* (Section 2.). It will, then, second, set out that if Article 26 ECT were to be interpretcd in the opposite manner, i.e. as entailing an offer also to EU investors, that that would constitute a violation of the Treaty 011 Functioning of Europea11 Union[7] ("TFEU") and that there would be co11flict between two international treaties which both are part ofthe law applicable by your Tribunal, namely the ECT and the TFEU. Said conflict would have to be resolved, in any case, in favour of the TFEU, either vía intcrpretation 011 the basis of context *("harmonious i11terpretatio11"* or *"systemic integra/ion")* or vía the applicable mies of conflict of laws **(Scction 3.)** On the basis of these assessmcnts, the Commission will, finally, suggcst a course of actio11 to your Tribunal that involves thrce options for proceeding with the present dispute: fi'st, declare that your Tribunal lacks the competence to hear the case, second, suspend the proceeding pending the preliminary ruling of the ECJ in *Aclunea v Slovakia,* which is expected to decide on the compatibility of intra-EU I11vestor-State Dispute Settlement ("ISDS") with Union law, or, third and finally, should your Tribunal consider that it is competent to hear the case, which would make it necessary to analyse the compliance of Spain's measures with State aid mies, for example for assessing whether the claimants had legitimate cxpcctation.s[8], suspend the dispute until the Commission has taken a view on Spain's

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legal obligations: some remarks on possible solutions", in: Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, pp. 544 to **560** (attached as **Annex EC-**5); *Angelos Dimopoulos,* "The validity and applicability of international investment agreements between EU Member States under EU and inlernational law", in 48 Common Market Law Review (201 1), pp. 63 to 93 (attached as Annex EC-6); *Dominik Moskva11,* "The clash of intra-EU bilateral inveshnent treaties with EU law: A bitter pill to swallow", in: 22 Columbia Journal of European Law (2016), pp. 101 to 138 (attached as **Annex EC-7);** *Mark A. Clodfelter,* "The Future Directíon of Investment Agreements in the European Union", in: 12 Santa Clara Journal of International Law (2014), pp. 159 to 182 (attached as **Annex EC-8**); *Jacqueline Dutheil de la Rochere,* "Quel róle pour la Cour de Justice ?", in: Catherine Kessedijan (ed.), "Le droit européeen et l'arbitrage d'investissment", Editions Panthéon Assas 2011, pp. 37 ¡\ 45 (attached as Annex **EC-9).** See also *Juliane Kokofl and Christoph Sobolla,* "Investment Arbitration and EU Law", in: 18 Cambridge Yearbook ofEuropean Legal Studies (2016), pp. 3-19 (attached as **Anncx EC-10).**

6 Case C-284/16. The order for reference by the *Bundesgerichtshof* and an English courtesy translation ofthe order for reference are attached as **Annex EC-11.** The written procedure is closed; a hearing is scheduled for 19 June 2017, and ajudgment is expected the latest in 2018.

7 Consolidated version of the Treaty on the Functioning of the European Un ion, OJ C 326, 26.10.2012, p. 47.

8 According to the case-law of the ECJ, a recipient of State aid cannot, in principie, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission, see ECJ, Judgment in *Land Rheinland-Pfalz* v *Alean Deutschlancl.* C-24/95, EU:C: 1997: 163, paragraph 25: *"In view o/the mandato,y 1lat1lre o/the supervision o/State aid by the Commission under Article {108] o/the Treaty, undertakings to which aid has been granted may not, in principie, el1terlai11 a legitimate expectatio11 that the aid is lmvful unless it has bee11 granted in compliance with the procedure laid down /11 that article. A diligent bllsi11essl11al1 should normally be able to determine whether that procedure has been followed (ECJ, Judgment in Commission v Germany, cited above, C-5/89, EU:C: /990:320, paragraphs 13 and 14, and ECJ. Jlldgl11el1t in Spai11 v Commission, C-169195, EU:C:/997:/0, paragraph 51)."* The ECJ concluded in paragraphs 39 to 43 ofthat 111ling that EU law *"requires the competen/ authority to revoke a decision granting 1111/mvful aid, in accordance with afina/ decisio11 o/ the Commission declaring the aid incompatible with the [internalj market and ordering recovery, even if the competen/ authority is responsible for the illegality o/ the aid decision to suc/1 a degree that revocation appears to be a breach o/goodfaith towards the recipienl, where the lafler could not have hada legitimate expectation that the aid was law.ful because the procedure laid down in Article [108*

notification of Statc aid, which duly took place on the basis of Article 108(3) TFEU. **(Section 4.).**

2. TIIE OFFER FOR ARBITRATION MAOE BY SPAIN WHEN RATIFYING THE E C T WAS ONLY ADDRESSED TO INVESTORS FROM CONTRACTING PARTIES OTHER THAN E U MEMBER STATES

9. The Commission consider-s, first, that the ECT <loes not apply *at ali* in the *ínter se* relationship between EU Member States. Rather, the ECT created international obligations only between third countries and the competen! subject of international law of the area of Union law. That is to say, either the Union (for areas of Union competence) or the EU Member States (for areas of Member State competence). The analysis in that regard is exactly the same as for the Agreernenl on the World Trade Organisation ("WTO agrcement"), which is in an analogous situation to the ECT. **(Section 2.1).**

1Q. Second, the Commission takes the view that even if the ECT did create certain *ínter se* obligations between the EU Member States, *quod 1l0ll,* those obligations would not comprise the provisions of the ECT on investment protection (Chapter 1ll) and dispute settlcment (Article 26): EU Member States can only enter into international obligations *ínter se* to the extent that they have not transferred their extemal competence to the Union. Both the substantive competence for protection of investments by EU investors in other EU Member States, including in the field of energy, and the jurisdictional cornpetence for those disputes have been transferred to the Union **(Section 2.2).**

2.1. The ECT has not created *iuter se* obligations behveen EU Member States

11. Article 26 ECT is to be interpreted on the basis of Article 31 VCLT *"in good faith in accordance with the ordina,y meaning to be given to the terms of the lreaty in their context and in the light of its object and pwpose".* Where that method <loes not lead to a clear result, the *"preparato,y work of /he treaty alld the circumstances of its conc/usion"* may be used for tite purpose of interpretation, in fine witlt Article 32 VCLT.

2.1.1. Ordina,y meaning of Jhe text of lhe ECT and its il1stmmel11s, interpreted a/so in the light of the principie of ejfectiveness

2.1.1.1. The Commission's interpretation of tite ordinary meaning of the text of Article 26 ECT

12. The Claimant relies on Article 26 ECT in order to establish that Spain made an offer for arbitration. That article sets out the procedure for the settlement of disputes between an investor ancl a Contracting Parly to the ECT.

13. Article 1(2) ECT defines the term *"Cont'acting Pm·ly"* of the ECT as a *"State or Regional Economic Integra/ion Organization which has consented to be bollllld by the ECT and Jor which that treaty is in force".* Tltis article caters for the possibility that a Contracting Party is bound only for palls of the ECT, namely for the parts for which it ertjoys international cornpetence.

14. Article 1(3) ECT defines *"Regional Econol11ic J11tegratiol1 Organization"* ("REIO") to mean an *"orgal1izatiol1 constituted by states to which they have transferred competence over certain matters a lllllllberofwhich are governed by the ECT, il1c/1ldi1g the authority to take decisions bi1ldi1g on them in respect o(those matters"* (emphasis added by the Commission). Article 36(7) ECT reflects the division of competences and foresees that the

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TFEU} !,ad not been/ollowed." In that context, it should be noted that the ECJ, in its Order in *Elcogás SA,* C-275/13, EU:C:2014:2314, held that the special regime constitutes State aid in the sense of Article 107(1) TFEU. The case-law of the ECJ is accessible online via the Curia website: http://curia.europa.etú

Union votes on matters falling in ils competence, and the Mcmber Slates on matters falling in their cornpetence, and lhat the Un ion, when voting, shall have a number of votes egual to the number of its Member States.

15. The ECT lhus recognizes that the EU Member States have transferred competences over matters governed by the ECT to the Union, including the authority to lake decisions binding on them in respect of !hose matters. Hereby, the signatories to the ECT acknowledge that the competence for concluding the ECT is shared between the Union and the EU Member States. Furthermore, it recognizes that the Union corresponds to its parts (because it has a number of votes equal to its parts), and that each acts only in lhe matters falling under its competence. for the Union, Member States and the Union are therefore not bound for the entirety ofthe ECT, but each for its respective cornpetences.

16. Similarly, A1licle 1(10) ECT explains how lhe term "Area" is to be understood with respect to a REJO and its Member States: *"With respect to a Regional Economic /ntegration Organiza/ion which is a Contracting Party, Area means the Areas of the member states of such Organizatio11, under the provisions contained in the agreement establishing that Organiza/ion"* (emphasis added by the Cornmission).

17. For defining the terms *"Area"* and *"Contracting Party",* the ECT therefore contains an express reference to the provisions of the agreement eslablishing the REJO (here: the EU Trealies, *i.e.* lhe TEU, the TFEU and the Euratom Treaty). lt furthermore recognizes that the relationships between the Contracting Parties that are member ofthe REJO are governed by the provisions contained in the agreement establishing the REJO.

18. The *"Area"* of the EU comprises the entirety of the areas of the EU Member States.[9] Therefore, an investment by an EU investor in Spain is no! an investment in the area of another Contracting Party, but in the area ofthe same Contracting Party. The Union being a single investment area for its Member States, the offer for arbitration made by the Union (comprising, among others, Spain) is hence only made to invcstors from Contracting Parties that are not EU Member States.

19. Significantly, Article 1(3) and 1(10) ECT are not limited to certain chapters ofthe ECT (a technique used elsewhere when !he drafters wanted to exclude certain chapters or provisions of ECT from application to the entire treaty).[10] Rather, they apply throughout the ECT and have to be taken into account whenever the interpretation of rights and obligations of Contracting Palties under the ECT's substantive provisions is at issue.

20. A different interpretation of the term *"Area"* would lead to absurd results. For example, *"transit"* within the meaning of A1ticle 7(10)(a) ECT can only apply to the Union, as to the entity having the substantive competence for that issue under the TFEU and being a fully-fledgcd customs union as a whole[11], and not to transportation between the EU Member States.

2.1.1.2. The interpretation ofthe text of Article 26 ECT by the Tribunals in *Cha'anne* and *RREEF Jnf'aslrnc/ure* has severa(flaws

21. The opposite view taken by the tribunals in *Charanne* and *RREEF J,ifrastrncture* can be summarized as follows: The term *"Area"* has to be defined depending on who is the responden!. If an EU investor decides to bring a claim against an EU Member State, that claim is directed only against the telTitoly of that EU Member State. If the EU investor decides to bring a claim against the Union, that claim is directed against the territory of ali Member States.

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9 See Article 52 TEU and Article 355 TFEU.
10 See Article 26(1) ECT or Article 27 ECT.
11 See Article 28 *et seq* TFEU.

22. That view is not convincing, 0ll three accounts.

23. rirs(, it **deprives** the par! of **Article 1(10) ECT** that has been emphasized by the Commission in paragraph 20 above of any **effectiveness** or *effet uti/e*[11]. Indeed, the interpretation proposed by those Tribunals would only be faithful to the text of the ECT if Article 1(10) ECT did not contain the words *"lllder the prOl'isions contained in the agreemenl estahlishi11g that Orgal1izatio11"*. Those words indicate that in arder to assess whether the *"Area"* is the area of an EU Member State or the area of the Union, it is necessary to assess whether the EU Member State or the Union has the externa! competence for the matter in question. In other words: by viliue of the reference to the agreement establishing the REIO in Article 1(10) ECT, the ECT takes the view tltat the EU Treaties shall define tite term "Area" far that REIO and its Member States.

24. Second, the interpretation ofthe *Charal111e* and *RREEF /11fi-astructure* Tribunals **disregards** the **importance** that the ECT places in Article 1(3) 0ll tite **trnnsfer of competence** f'om the members ofthe REIO to the REJO (that is here from the EU Mernber States to the Union).

25. Third, the interpretation proposed by the Commission is also the only one that avoids *"respomlent sll0ppi11g"*. By defining the area with reference to the agreement establishing tite REIO, the ECT wants to make it clear that EU investors cmmot bring claims against the Un ion. That aim would, however, be put into jeopardy if one were to allow EU investors to bring a claim against an EU Mernber State: lndeed, EU law is usually implernented by actions of the Member States, as the Un ion lacks - with very narrow exceptions mainly in the area of competition law - enforcernent tools. EU investors, therefore, in rnost cases, will find national acts of execution of Union law, which they could challenge by bringing a claim against the EU Member State executing Union law, rather than against the Union itself.

26. That such *"re.lpol1del1t shopping"* is not allowed under the ECT is also confinned by the staternent submitted by the EU to thc Secretariat of ECT pursuant to Article 26(3)(ii) ECT. This statement is *"all instrument which was made by one or more porties in connection with the col1clusio11 of the treaty and accepted by the other porties as 011 il1st'llme1lt re/ated to the treaty"* in the sense of Article 31 (2)(b) VCLT, and therefore is part of the context of the ECT. lt provides the following: [13]

> *"The Col1lm1111ities* Ofl(f *the Member States will, if necessa1y, determine al1l0llgthel11 who is the respo11del1t party to arbitra/ion proceedings initiated by an Investor o/* flllOtller *Contracting Part;,. In sl1dl case, upo11 the request o/an I11vestor, the Com1111111ities and the Member States concemed will 1llake such a deter11li11atio11 within a period o/30 days."* (Emphasis added by Commission.)

27. The use of the word *"cmother"* clearly excludes disputes brought by EU investors against a Member State. That ilhrstrates that the Union and the EU Member States consider that only investors f'om Contracting Parties that are not EU Member States may bring a case against the Union or its Mernber States, and that, in such a situation, the Union and the Member States determine together who the responden! party will be.

28. Now, contrary to what the *Charanne* tribunal found at paragraph 431 of its decision on jurisdiction, the allegedly wrongful acts comnitted by Spain in that case have an origin in Union law. The same applies in thc present case: The allegedly wrongful acts by Spain

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12 See, on the importance of the *effet 11tile* or principie of effectiveness in treaty interpretation, *CEMEX* v *Venez11ela,* ICSID Case No. ARB/08/15, Decision on Jurisdiction (30 October 2010), paragraph 107, with multiple further references to the case-law of the lntemational Court of Justice ("ICJ") and to decisions of other investment tribunals.

13 The statement has been published by the secretaria! of the ECT, see http://www.energycharter.org/fileadmin/DocumentsMe<lia/Legal/fransparencv_Annex_ID.pdf at page 9. lt is also attached as **Annex EC-12.**

constitute but the implernentation of its obligations under Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources[14] ancl possibly of its obligations under Articles 107 to 109 Tf-EU (Statc aid law, see above footnote *5* and below **Scction 4.)**

2.1.2. lnterpretation based 011 context, object alldp111pose ofthe ECT

29. The interpretation proposed by Spain and the Commission is also supported by the context, object, and purpose ofthe ECT.

30. When both the Union and EU Member States become parties to a multilateral agreement, it is the Un ion legal order that informs the latter's behavior and actions. The Un ion legal order therefore constitutes a *"relevant rule of il1tematio11al law applicable in the relations between the parlies"* in the sense of Article 31 (3)(e) VCLT. This holds true in particular in a situation where the other Contracting Parties are fully aware ofthe Union legal order and its particularities. That that was indeed the case for the other Contracting Parties to the ECT is evidenced, first and foremost, by the specific references to the transfer of cornpetences to the REIO and the agreement establishing the REIO in Articles 1(3) and 1(10) ECT. lt is, furthennore, confi'med by the fact that the ECT has been initiated by the EU, and that the Charter of Paris and the European Energy Charter, which are incorporated through the preamble of the ECT into the ECT, refer to the special role and status of the Un ion (see in detail paragraphs 38 to 45 below).

31. A multilateral agreement to which both the Union and its Member States are party is part of Union law. The ECJ is competen! to determine whether that multilateral agreement has direct effect to the extent that the provisions concerned fati within the Union's competence, so that individuals can invoke it in national courts and tribunals as Union law. The ECJ is also, in general, competent to interpret its provisions. In parlicular, it may do so to determine whether a particular provision of the agreement falls under the extemal competence of the Union; and how a given provision is to be interpreted, where that provision falls under the externa! competence of the Union or can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law. It is only where a provision falls exclusively in the competence of the Member States that thc ECJ is not competent for its interpretation.15

32. The Commission, as guardian ofthe EU Treaties, can bring inf'ingement actions against EU Member States for failing to comply with their obligations under such agreements, even where thcre is no Union legislation covering those obligations. lt is sufficient that the area in question is largely covered by Union law, and that there is a Union interest in the Member States' compl iance.[16] That even includes situations where the obligation under the multilateral agreement is an obligation for thc Member State to adhere to another multilateral agreement.[17]

33. When negotiating and concluding such a multilateral agreement, the Union and its Member States are bound by the general principie of Union law of unity in the international

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14 OJ L 140, 5.6.2009, p. 16. See on the implementation of that Directive by Membcr States as implementation ofUnion law ECJ, Judgment in *Industrie du bois de Vie/sa/111 & Cie (!BV),* C-195/12, EU:C:2013:598, paragraph 49; ECJ, Judgment in *Alm1ds vindkraft,* C-573/12, EU:C:2014:2037, paragraph 125.

15 Standing case-law, lastly summarized and applied in ECJ, judgment in *lesoochra11árske zoskupenie,* C-240/09, EU:C:2011: 125, paragraphs 28 to 38, with extensive further references.

16 ECJ, judgment in *Commission* v *F'ance* ("Etang de Berre"), C-239/03, EU:C:2004:598, paragraphs 22 to 32; ECJ, judgment *Commission* v *lre/and* ("Berne Convention for the Protection of Literary and Artistic Works"), C-13/00, EU:C:2002: t84, paragraphs t3 to 20.

17 ECJ, judgment *Commission v lreland* ("Berne Convention for the Proteclion of Litcrary and Artistic \Vorks"), C-t3/00, EU:C:2002: 184, paragraphs 13 to 20.

representalion of lhe Union.[18] As a preeminent specialist put it recently:[19] *"[...] the Europem, group (EU and Member Sta/es) appears as a single contracting par/y".*

34. Even though, in theoly, EU Member States have the intemational capacit)' to enter into *inter se* obligations when negotiating a multilateral agreement for those areas of the agreement for which they retain competence, they, in practice, never do. *Pieter Jan Kuijper* has notably summarized this in his account of the negotiations and conclusion of the WTO agreement.[20]

35. The Commission considers that for those same reasons, the ECT does not apply *al ali* in the relationship between EU Member States.

36. Just as was the case for the WTO agreement, the Union and the EU Member States acted throughout the negotiations like one single block and with one voice (that of lhe Commission).[21] lf anything, the absence of any intention to create *inter se* obligations between EU Member States is even clearer in the case of the ECT than in the case of the WTO agreernenl, in view of the particular historical circumstanccs, where the ECT was proposed by the Commission and initially conceived as a European treaty:[22]

37. The ECT was f'om !he outset a European project, rather than an intergovernmental project.23

38. The origins of the ECT can be traced back to a memorandum which the Dutch prime minister *Ruud Lubbers* presented in June 1990 to !he European Council of Oublin.[24] The President of the Commission, *Jacques Delors,* further developed that idea in a speech on 21 November 1990 at the Conference for Security and Cooperation in Europe's ("CSCE") Summit in Paris. That surnmit, which closed with the adoption of the *"Charter of Pa,.is for a New Europe",* had the purpose of laying the foundation for *"a new era of democracy, peace and zmity"* (and led to the transformation of the CSCE into the Organisation for

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18 ECJ, judgment in *Commission* v *Sweden* ("Stockholm Convention on Persisten! Organic Pollutants "), EU:C:2010:203, paragraph 73, with extensive further references.

19 *Eleftheria Nefi',m1i,* "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU Externa! Relations" (2010) 47 *Co111111011 Marker Law Review,* lssue 2, pp. 323-359, attached as **Annex EC-13,** at page 335, footnote 45. *Nefi'ami,* professor of European Law at the University of Luxembourg, has written her PhD thesis on international agreements to which both the Union and Member States are Contracting Parties: *Les accords mixtes de la Com111111a11/é E11ropée1111e: aspects com111111ra11taires el illfernationaux,* Brussels: Bruylant, 2007.

20 *Pieter Jcm Kuijper,* "The Conclusion and lmplementation of the Uruguay Round Results by the European Community", (1995) 6 *European Journa/ of l111ernatio11al Lmv,* issue l, pp. 222-244, attached as **Annex EC-14,** at p. 228 and 229.

21 *Johann Baswdow, "The E11ropea11 Union's infernalional inves111e11/ policy Explaining inte11sifyi11g Member Sta/e coopera/ion in infemationaf i11vest111enl reg11/atio11,* (2014) PhD thesis, The London School of Economics and Political Science (LSE), pages 136, 156, 164 and 166, attached as **Annex** EC-15. A quote from page 156 is particularly instructive in this regard: *"What is more, 1101 the individual Member Sta/es bu/ the Commission co11d11cted EU-illlernal and international co11s11/tatio11s wilh the Soviet Union, drew up a draft text for a European Energy Charter and managed the logisfics of the 11pco111i1g 11egotiatio11s on the European Energy Charter muí ECT."*

22 See also ICSID Case No. ARB/07/19, *Electrabel* v *H11ngmJ.* Award of 30 November 2012, paragraphs 4.130 to 4.142.

23 *Johann Baswdow, "The E11ropea11 Union's internafional i11ves/me111 policy Explaining intensifi·i1g Member Sta/e coopera/ion in inlemational investmenl reg11/atio11.* (2014) PhD thesis, The London School ofEconomics and Political Science (LSE), page 156, attached as **Annex** EC-15.

24 At that time, shortly after the foil of the Berlin wall, the centrally-planned economies of the Un ion of Soviet Socialist Republics (and thcn Russia and tite Commonwealth of lndependent States) and the countries of Central and Eastem Europe started to reforms into market cconomies. They all were short of capital. Therefore, *Lttbbers'* memorandum suggested the creation of a European Energy Community to capitalize on the complementary relationship between the EU, tite USSR and the countries of Central and Eastem Europe. The idea was to secure investment flows from West to East, so that the energy flows from East to \Vest would be secure.

Security and Cooperation in Europe). The preamble of the ECT therefore refers to the Charter of Paris.

39. Shortly thereafter, the European Council of Rome endorsed in December 1990 the proposals made by *Lubbers* and the Commission.25 In February 1991, the Commission presented a draft for thal European Energy Charter, which would give life to lhe commitment of the Charter of Paris.[26] Then, in 1991, the EU convened an international conference to negotiate and agree on such a charter, funded that conference and provided its secretariat. The final text of the European Energy Chaiier, which contains the bread political objectives, was adopted in December 1991 in The Hague. The special role of the EU is also reflected in the recitals of lhe European Energy Charter itself. Those acknowledge furthennore the obligations of EU Member Stales under the EU Treaties (and other existing international agreements). The precise wording ofthose recitals is as follows:

> *"Assw·ed of supporl from the European Community, particular/y through completion of its intema/ e11ergy market:*
>
> *Aware of the ob/igatio11s under maior relevan/ multilateral agreeme11/s, of the wide range of intemational e11ergy co-operation. and of the exte11sive activities by exisling inlernatio11al organisations il1 the e11ergy field a11d willi11g to take ful/ advantage of !he e>.pertise of these orga11isatio11s in furthering the objectives of the Charter".* (Emphasis added by the Commission.)

40. The ECT has the objective of implementing the policy objectives set out in the European Energy Charter. Article 2 ECT expresses that as follows:

> *"This Treaty establishes a lega/framework in arder to promote /011g-ten11 cooperatio11 in the energy field. based 011 complementarities and mutual benefits. in accordance with the objectives and principies of the [European Energy] Charter."*

41. It follows f'om that historical process, which ultirnately led to the conclusion of the European Energy Charter (a policy document) and the ECT (the translation of that policy document into international law, as witnessed by the reference in the preamble and in Article 2 ECT to the European Energy Charter), that the objective of the ECT is to create an international framework for cooperation in the energy sector between the European Communities, on the one hand, and Russia, the CIS and the countries of Central and Eastern Europe, on the other hand.[27]

42. The ECT was perceived as palt of the European Communities' externa! energy policy.[28] It was never intended that the ECT should influence their internal energy policy. Johann Basedow explains this at length in this PhD thesis in the chapter on the historical origins of the ECT:

> *"From the beginning, the Com111issio11 1111derlined that the ECT was conceived as the i11tematio11a/ relations co111po11e11t of the emerging Single Market far e11ergy. The ECT should exte11d the Single Market for e11ege1y beyond the EV's borders. The 1111derlying reasoni11g was that the Single Market for energy would 011/y fimction efficiently and securely. j i the supp/y and transmission cozmtries a/so embraced a market-based approach to the regula/ion of their energy sectors. The Commission c/early formulated this view in its*

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25 See Conclusions ofthe Presidency on the European Council in Rome, attached as **Annex EC-16.**

26 See Communication from the Commission on European Energy Charter, COM(9 I) 36 final of 14 Febmary 1991, attached as **Annex EC-17.**

27 Additionally, on the first conference held in Bmssels on July 1991, the European Communities also invited the other members ofthe Organization for Economic Cooperation and Development ("OECD") that were not EU Member States to participate in the negotiations on the Energy Charter.

28 This point is also underlined in JCSID Case No. ARB/07/19, *Electrabel* v *H1111gary,* Award of 30 November 2012, at paragraph 4.132, quoting *Thomas Wtilde.*

collllllllllicatioll accompanying the drr;fi text for the Ellropeall Energy Charter of spring 1992.

'[Tire European Energy Charte,j ... flnds itselJful/y integrated within the ellergy po/icy which the Collllll isioll wishes to prom te . . . , ith a view !' co1!!!/etillg the interna/ ellergy market and provul11g an extema/ relallons po/tcy to back lt up. "'-[9]

43. lndeed, the creation of the European Communities' infernal energy market was well under way when the ECT was negotiated: In 1985, the European Council in Milan endorsed the Commission's proposal for creating a single market by 1992. In arder to implement that commitment in the field of energy, the Council adopted Directives 90/547/EEC on the transit of electricity lhrough transmission grids[30] and 91/296/EEC on the transit of natural gas through grids[31]. In 1991, the Commission proposed more comprehensive rules liberalising the entire electricity and gas sector.32 Parliament and Council adopted the legislation in 1996 (electricity)[33] and 1998 (gas)[34]. Those initiatives are explicitly mentioned and recognizecl in lhe European Energy Charter and hence were known to all Contracting Parties ofthe ECT.

44. While the EU hacl negotiated the European Energy Charter and the ECT, if was necessaiy for EU Member States to also become Contracting Parties, since it was considered at the time that they retained competence over certain malters covered by the ECT.[35] However, as Basedow recalls, the ECT provisions on investment protection fell into the Union's undisputed exclusive externa(competence under the Common Commercial Policy.36

45. In summary: it results from the context, object and purpose of the ECT, as established by reference to prior international agreements referenced in its preamble and the circumstances of its conclusion, that it was understood by all Contracting Parties that - although in theory a possibility - the EU Member States clid not intend to create *inter se* obligations between them,just as in tJle case ofthe WTO agreement.

2.1.3. On the question of a "discol11lection clause"

46. The awards in *Charanne* and *RREEF Jnfras/mct11re* draw further support for their position from the fact that ECT lacks an explicit disconnection clause. That view, which is also widely expressed in academic literature, relies exclusively on one academic article by *Christian Tietje*[31].

47. However, the view expressed by *Christian Tielje* in his often-referenced (and regrettably never questionecl) article is not suppo1ted by the academic sources he claims to rely 011. In arder to support the view that *inter se* obligations between Member States are the rule, ancl

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29 *Jolwnn Baswdow, "The Ellropeall Ulliolt's intemational investment policy Explail1il1g intensifying Member State coopera/ion in international investment regula/ion,* (2014) PhD thesis, The London School ofEconomics and Political Science (LSE), page 160, attached as Anucx EC-15.

30 OJ L 313, 13.11.1990, p. 30.

31 OJ L 147, 12.6.1991, p. 37.

32 OJ C 65, 14.3.1992, p.4 (for electricity) and p. 14 (for gas).

33 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the intemal market in electricity, OJ L 27, 30.1.1997, p. 20.

34 Directive 98/30/EC of the European Parlíament and of the Council of 22 June 1998 concerning common rules for the interna! market in natural gas, OJ L 204, 21.7.1998, p. 1.

35 Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998, p. 1.

36 *Johann Baswdow, "The Ellropeall Unian's intemational investment policy Explaining il1tel1sifying Member Sta/e coopera/ion in intemational investment regulation,* (2014) PhD thesis, The London School of Economics and Political Science (LSE), page 159, attached as Annex EC-15.

37 *Christian Tielje,* The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Membcr States. Halle: lnstitute of Economic Law, 2008, pp. 7-16, attached as Annex EC-18.

that an exception to that rule is only possible where the multilateral agreement contains a disconnection clause, he relies, tirst, on the article by *Pieter Jan Kuijper,* quoted above in footnote 20. By selectively quoting *Pieler Jan Kuijper, Tielje* distorts the view of *Kuijper,* which is, in fact, the opposite of that of *Tielje;* namely, that such *infer se* obligations are a theoretical possibility, but in practice never created.

48. The paper by *Maja S111rko!/* quoted as second authorily by *Tielje,* also <loes nol provide any support for his view. To the contraly: As *Smrko(j* points out, a disconnection clause is only needed where the application of Union law (and not of the international treaty) between the Member States *"qffecl[s] the enjoymenf by other porties oj their rights 1lllder the treaty or pelfor111ance of their obligations"* (emphasis added) or *"relafe[s] fo a provision, derogarion jrom which is incompatible with the ejfeclive exec11/io11 oj !he object and purpose oj !he treaty as a who/e."* In other words, a disconnection clause is only needed where the application of Union law between the Member States is not in fine with Article 41 (I)(b) VCLT. Where, on the contraly, as in the present case, the rights and obligations of third countries are not affected, *"the insertion oj the EU-specific 'disconnectio11 clause' seems to be entirely superfluous".*[19]

49. Also, the las! two sources on which *Tielje* relies are misquotes: *Raphael Oe1I*[In] and *Christoph Herrmam/'* take the view that, even in the absence of a disconnection clause, a multilateral agreement may create *inter se* obligations only for those areas where Member States retain their externa! competence (which is the view advanced by the Cornmission in the alternative under **Section 2.2).**

50. Fm1hermore, disconnection clauses have traditionally been used in international treaties where the Union could not become a Contracting Party itself due to the rules of the international organisation under whose auspices the intemational treaty was negotiated, in particular the Council of Europe. In such a setting, disconnection clauses may indeed be useful, as - despite those agreements being mixed agreements insofar as it concerns the question of competence - the Union <loes not appear in the text of the international treaty, and the disconnection clause serves as a "rerninder" of its existence.

51. The situation is completely different in intemational treaties where the Union is a party, and which explicitly recognize its role as REIO, as is the case for lhe ECT in Article 1(3) and 1(10) thereof. Here, ali Contracting Parties are fully aware of the speciftcities of the Union's legal arder.

2.1.4. Co1lc/11sio11: No ojferfor arbitration made by Spain to EU investors

52. Therefore, the Commission takes the view that the ECT has not created any *inter se* obligations between the Member States of the Union. As a consequence, Spain (and the

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38 *Maja Smrkolj,* "The Use of the 'Disconnection Clause' in lnternational Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public lnternational Law?", paper presented al the GARNET Conference, "The EU in lntemational Atfairs", Brussels, 24-26 April 2008, attached as **Annex EC-19.**

39 *Ibidem,* p. 9.

40 *Raphael Oen,* lntemationale Streitbeilegung im Kontext gemischter Vertrtlge der Europaischen Gemeinschaft und ihrer Mitgliedstaaten, Berlín: Duncker and Humblot, 2005, S. 73: *"Fesfgehalten wurde bisher nur, dass eine volkerrechtliche Bi1ldl111g der Milgliedstaaten zueinander jedenfa/1s in Bereichen ausschliej]licher Ge111ei11schajlszusla11digkeil ausscheide. Die Bindung komme mir flir so/che Besfim1111111gen in Betracht, die der (aussch/ieflichen oder konkurriere11de11) mitgliedstaatliclten Zustiindigkeit unterfie/en",* **Annex EC-20.**

41 *Christoph Herr111al111,* "Rechtsprobleme dcr parallelen Mitgliedschaft von Volkerrechtssubjekten in lnternationalen Organisationen - Eine Untersuchung am Beispiel der Mitgliedschaft der EG und ihrer Mitgliedstaaten in der WTO", in: *Gabrie/e Bauschke* et al., Pluralitat des Rechts - Regulierung im Spannungsfeld der Rechtsebenen, Boorberg: Stuttgart, 2003, pp. 139 and following, attached as **Annex EC-21,** at p. 159: *"Soweil die Kompetenzen auf die EG iibertragen worden sind, kann ein ge111ischtes Abko1111111el1 zwischen den Mitg/iedsstaaten wohl keine Verpjlicht1111gen begrt111de11".*

Union) has made an offer for arbitration only to investors from Contracting Partics that are not EU Member States.

2,2. Iu the alteruative: *ll1ter se* obligations betweeu Membe1· States would in any event be limited to arcas where Mcmber States retain externa! co111petence; tllat *is* not thc *QfSC* for investment protection *dHI* ISDS

53. In the alternative, the Commission presents the following argument: Even if, by concluding the ECT, EU Member States had entered into ce11ain *inter se* obligations, *quod non,* those obligations would only cover areas where EU Member States relain externa! competence. The Commission will fi'st set out the applicable principie of international law that applies to the detennination of the extent of lhe responsibility of EU Member States in case they have entered into *inter se* obligation. That principie could be stated as follows: *"liability follows competence"* **(2.2.1).** It will then apply that principie to the case ofthe ECT **(2.2.2).**

2.2.1. *Applicab/e principie of intemational /aw for !he delermining the extent of illlernalional obligations and intemational liabilily of Member Sta/es:* "liability follows competence"

54. In line with the view of intemational tribuna ls, tite 2011 Draft Articles on the Responsibility of Intemational Organizations ("DARIO"), with commentaries[42], foresee that special rules on attribution of responsibility may be applicable to the relations between an international organization and its member States.[43] Indeed, the commentaries to Article 64 DARIO make particular reference to the Union's rules on attribution, which operate *"to the effecl that, in the case of a El1ropeml Coml1111111ity act binding a member Sta/e, Sta/e authorilies would be considered as acting as organs of the Col1111111mity"* as well as to WTO and European Court of Human Rights case-law recognising these rules. As explained above in parag'aph 28, Spain has acted under its obligation pursuant to Directive 2009/28/EC, and possibly also under its obligations pursuant to Articles 107 to 109 TFEU.

55. The same view has been taken very recently by the Intemational Tribunal for the Law of the Sea ("LTLOS"). In case no 21, *Obligatíons of Flag States,* it discussed the liability of an intemational organization where fishing licences are issued within the framework of a fisheries access agreement between the member states of the Sub-Regional Fisheries Commission ("SRFC") and the SRFC itself, and where vessels flying the flag of one ofthe SRFC member states violate that fisheries access agreement. It held that liability followed competence, and - as the matter fell within the competence transferred by SRFC member states to the SRFC itself - it was only the SRFC, and not the SRFC member state the flag of which a vessel flew, that was internationally liable for such a violation.[44]

56. On the basis of Article 64 of the DARIO and the case-law discussed in the preceding paragraphs, the principie of international law applicablc for the determining the extent of international obligatíons and international liability of EU Member States can hence by summarized as follows: *"liabilityJollows compelence".*

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42 Adopted by the Intemational Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/IO). The first draft of the DARIO did not take account of this possibility and was hence heavily criticised *inter afia* by the European Communities as not being in line with íntemational law and the interpretation thereof by international tribunals. *See F'ank Hoffmeister,* Litigating against the European Union and lis Member States, 21 *El1ropeall Jo11mal of lnternational* law (2010), issue 3, attached as **Anncx EC-22,** pp. 724-747, al p. 728 (position expressed by the Commission) and 728 to 739 (presentation of case-law and critique of the positíon adopted by the Intemational Law Commission in its first draft).

43 Article 19 ofthe DARIO.

44 ITLOS, Advisory opinion of2 April 2015, case no 21, attached as Anncx EC-23, paragraphs 151 *to* 174.

2.2.2. Applicatio11 o/ the principie to the ECT: the Ulioll, and 1l0l the Mel1lber States, have compelence for pro11lolio11 and proleclion o/ invest11le11ts within the intemal 11,arket

2.2.2.1. The extemal competences of the Union and its Member States

57. The attribution ofcompetences within the Union is governed by the principie ofconferral.[45]

58. Thc Union has the exclusive externa! competence to conclude agreements with one or more third countries or international organisations for areas where the EU Treaties expressly stipulate such exclusive competence. An example, in this regard, is the Common Commercial Policy. [6] Exclusive competence in that area entails, *inter alía,* the exclusive right to conclude international agreements 011 foreign direct investment.[47]

59. The Union also possesses exclusive externa! competence where the conclusion of an international agreement is likely to affect common interna! EU rules or alter their scope.48 According to the ECJ, the affectation of common interna! EU rules or the altering of their scope <loes not presuppose that the areas covered by the international commitments and those covered by the Union rules coincide fully.49 Rather, it is sufficient that the international commitments are concerned within an area which is already covered to a large extent by such mles.[50]

60. In such a situation of exclusive externa(competence, EU Member States may not enter into those types of international commitments outside the f'amework ofthe Union, even ifthere is no possible contradiction between those commitments and the common Union rules.51

61. Crucially for the present case, it also follows f'om A1iicle 3(2) TFEU that EU Member States are prohibited f'om concluding an international agreement between themselves *(inter se)* which might affect common rules or alter their scope.[52]

2.2.2.2. Un ion law contains a complete set of investmcnt protection rules for intra-EU investments in freid of energy

62. In order to establish whether EU Member States have the externa(competence to conclude an *inter se* agreement on intra-EU investment protection in the freid of energy, it is hence necessary to establish whether the conclusion of such an agreement might affect common interna(EU rules or alter their scope.

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45 Article S(1) and (2) TEU.

46 That follows from the use ofthe word "also" in Article 3(2) TFEU.

47 See the wording of Article 206 TFEU.

48 Article 3(2) TFEU.

49 ECJ, Opinion 1/03 ("Lugano Convention on jttrisdiction and the recognition and enforcement of judgments in civil and commercial matters"), EU:C:2006:81, paragraph 126; ECJ, judgment in *Commission* v *Council* ("Broadcasters"), C-114/12, EU:C:2014:21 S1, paragraph 69; ECJ, Opinion 1/13 ("Convention 011 the civil aspects of international child abduction"), EU:C:2014:2303, paragraph 72; ECJ,judgment in *Green Network,* C-66/13, EU:C:2014:2399, paragraph 30. That lastjudgment is of particular relevan ce in the present case, as it concems the externa! competence of the Un ion in the field of renewable electricity.

50 ECJ, Opinion 2/91 ("Convention N° 170 ofthe Intemational Labour Organization conceming safety in the use of chemicals al work"), EU:C: 1993: 106, paragraphs 2S and 26; ECJ, Opinion 1/03 ("Lugano Convention on jurisdiction and the recognition and enforcement ofjudgments in civil and commercial matters"), EU:C:2006:81, paragraph 126.

51 ECJ, Opinion 2/91 ("Convention N° 170 ofthe Intemational Labour Organization concerning safety in the use of chemicals at work"), EU:C:1993:106, paragraphs 2S and 26; and ECJ, judgment in *Commission* v *Co1111cil* ("Broadcasters"), C-114/12, EU:C:2014:21 S1, paragraph 71.

52 ECJ,judgment in *Pringle,* C-370/12, EU:C:2012:756, paragraphs 101-102.

63. Energy and the intemal market are shared intemal competences.[53] Tite Union has extensively legislated, in particular in tite area of the interna! market for energy and in tite area of renewable energy (see, for instance, above paragraph 43[5]\

64. Furthennore, Union law rules on interna(market rules govern and protect ali steps of the life-cycle of an investment.

65. The provisions on freedom of establishment and free movement of capital and payments forbid directly discriminatory measures by the host Member State, *inter alia* in relation to investment. As regards the free movement of capital, as early as in 1988 (under the Treaty of Rome in its original version), the Community legislature clearly indicated that the Treaty freedom of capital movement applies to investrnent, and specifically to direct investment. Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty[55] contains a 11011-exhaustive classification of capital movements ("Nomenclature" within the meaninf ofthe current Article 63 TFEU). The first item ofsuch classification is direct investments.[5] The ECJ has clarified that thc Nomcnclature continues to have indicative value for the notion of capital movements in spite of the Directive no longer being in force.[57] In addition, since the entry into force of the relevant modifications introduced by the Treaty of Maastricht, in January 1994, the Treaty provision on free movement of capital (currently Article 63 TFEU) has been prohibiting any barrier to capital movements as between the EU Member States. 11 has, therefore, long been clear that EU Member States can no longer introduce international obligations regulating investment *ínter se,* although they can adopt derogations from the general principie of full liberalisation under certain conditions.

66. The provisions on freedom of establishment and free movement of capital and payments also prohibit any other restrictions, even those of a non-discriminatory nature. It is settled case-law that Union law *"precludes any national measure which, even though it is app/icable without discrimi1latio11 011 grounds of nationality, is fiable to hinder or render less attractive the exercise by Community nationa/s of tite freedom of establishment that is guaranteed by the Treaty.*[1158]

67. lndeed, as Professor Fabrice Picod summarises on the basis ofthe case-law ofthe ECJ,

"[l]es mesures nationafes qui sont susceptibles d'empécher 011 de limiter certaines opérations refatives ci des opérations d'investissement 011 de désinvestisse111e11t, mais égafement des mesures susceptibles de dissuader de procéder Ci de te/les opérations, son/ Ci

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53 Article 4(2)(i) TFEU

54 In that context, it is importan! to recall that the fact that the Commission has made a proposal for using an interna! competence, such as here the proposals for the interna! elcctricity and gas markets labled prior to the ratification of thc ECT, is sufficient for creating an exclusive externa! competence, see ECJ, Opinion 1/76 ("European Laying-up Fund for lnland Waterway Vessels"}, 1/76, EU:C: 1977:63, paragraph 4.

55 OJ, L 178, 8.7.1988, p. 5.

56 Other ilems are investments in real estate, operations in securities nonnally dealt in on the capital market, opcrations in units of collective investment undertakings, operations in securities and other instruments nonnally dcalt in on the money market, operations in curren! and deposit accounts with financia! institutions, credits rclatcd to commercial transactions orto the provision of services in which a residen! is participating, financia! loans and credits, sureties, other guarantees and righls of pledge, transfers in performance of insurance contracts, personal capital movements, and physical import and export offinancial assets.

57 See *e.g.* ECJ, judgment in *Commission* v *Spain,* C-207/07, EU:C:2008:428, paragraph 32, and E J, judgment in *Commission* v *Netherlands,* C-282/04 and C-283/04, EU:C:2006:608, paragraph 19, with further refercnces.

58 See, *ex multis,* ECJ, judgments in *Commission* v *Netherlands,* C-299/02, EU:C:2004:620, paragraph 15, and ECJ,judgmcnt in *Commission* v *Greece,* C-140/03, EU:C:2005:242, paragraph 27.

co11sidérer collllle des restrictions a la libre circulation des capitaux au sens de l'artic/e 63 TFUE."[59]

68. EU Member States are therefore prevented f'om discriminating between national investors and investors of other EU Member States and more generally f'om maintaining or introducing measures which may deter, limit the enjoyment of, of generally dissuade the continuation or establishment of investment f'om other EU Member States. This even applies to potential restrictions that may affect, in the future, access to the market.[60]

69. Thus, national legislation that requires authorisalion to be obtained in order to provide cel lain services constitutes a restriction of f'eedom of establishment within the meaning of A1licle 49 TFEU, in that it seeks to restrict the number of service providers, also if there is no discrimination on grounds of the nationality of the persons concerned.61 Similarly, national legislation which prohibits, without providing for a transitional period or compensation, economic activities that used to be lawful in that EU Member State, constitutes a restriction on the f'eedom to provide services.[62]

70. Lastly, the f'ee movement provisions also govern expropriation of nationals of other Member States.[63] More generally, Union law protects the f'eedom to choose an occupation, the f'eedom to conduct a business and the right to property. As to the latter, Article 17 of the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties[64], provides that *"[e]velyo11e has the right to owll, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the co11ditio11s provided for by law, subject to fair compensation being paid ill good time for their loss."*

71. Restrictions may be justified on the grounds listed in Articles 52 or 65 TFEU (public policy, public security, public health) or by overriding requirements in the general interest as recognised in the case-law of the ECJ (such as the protection of the environment). In either case, tite national provision must, in accordance with the principie of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective.[65]

72. Such justifications must be interpreted in the light oftlte general principies of Union law, in pai1icular the rights and freedoms guaranteed by the Charter of Fundamental Rights (ltereafter simply the "Cltarter"). Thus, national rules can only justify restrictions on the freedom to provide services or the f'eedom of establishment (and, by tite same logic, on f'ee movement of capital) if they are compatible with fundamental rights. Those include the principies of legal certainty and the protection of legitimate expectations, as well as the f'eedom to conduct a business the right to property enshrined in Articles 16 and 17 of the Charter.66 Under Article 52(1) of the Chai1er, for such a limitation to be admissible, it must be provided for by law and respect the essence of those rights and f'eedoms. Furthennore, subject to the principie of proportionality, limitations may be made only if they are neccssary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

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59 *Fabrice Picad,* "Investissements et libre circulation des capitaux au sein de l'Union européenne", R.A.E. -L.E.A. 2014/4, pp. 669-687, p. 673, attached as **Annex EC-24.**

60 *!bid.*

61 See ECJ, judgments in *Yellow Cab Verkehrsbetrieb,* C-338/09, EU:C:2010:814, paragraph 45, and *H a'tlauer,* C-169/07, EU:C:2009: 141, paragraphs 36 and 39.

62 ECJ, judgment in *Berlington H1111ga01J1 and Others,* C-98/14, EU:C:2015:386, paragraphs S1-52.

63 ECJ, judgment in *Fearon* v *Irish Land* Commission, C-182/83, ECLI:EU:C: 1984:335, paragraph 7.

64 See Article 6 TEU.

65 ECJ, judgment in *Esse111 Belgi11111,* Joined cases C-204/12 to C-208/12, EU:C:2014:2192.

66 ECJ, judgment in *Berlington H1111g01J1 and Others,* C-98/14, EU:C:2015:386, paragraphs 74ff.; ECJ, judgment in *Pfleger c111d Others,* C-390/12, EU:C:2014:281, paragraphs 57-60.

73. The protection hence afforded applies to the whole life cycle of thc investment. Thus, for example, the right of establishment concems both the taking up and the pursuil of an economic activity in another EU Member Stale, and both the setting up and the management of undertakings.[67] For its part, the fundamental principie of f'ee movement of capital protects direcl investment, with no further limitation or qualification[68]; it also protects the f'ee flow of financia! means, whether necessary for the operation of an investment or constituting the proceeds resulting therefrom.[69] f-'ree movement of capital further protects investors by limiting State interference in the management of companies (inter alía by means of "golden shares" or other special powers[70]) and f'ames the exercise of State powers to regulate the regime of property ownership[71].

74. Union law provides for a complete set of remedies that ensure its proper application. Of particular relevance for the present case is that national courts and tribunals, in their function as ordinal)' courts within the Un ion legal order[72], have jurisdiction to hear actions for damages brought against EU Member States that have violated Union law. That also includes cases where the competent national courts and tribunals failed to apply Union law, or incorrectly applied that law.n

75. The Union legal order is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is foundcd, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that irnplements them will be respected. That general principie of Union law of mutual trust requires considering all the other Member States to be complying with EU law.74 The general principie of Union law of mutual trust includes in particular the mutual trust accorded by the Member States to their respective legal systems and judicial institutions.[75]

76. Should your Tribunal harbour doubt in this regard, it should follow the established practice of other Arbitral Tribunals and apply a presumption in favour of the more complete and exhaustive regime, here, that of the European Union, and fill any lacunae by analogies within the systern or by recourse to general principies inherent in the Union legal order instead of falling back on general international or investment law.[76]

2.2.2.3. EU Member States lack the competence to conclude an investment protection treaty *inter se*

77. By concluding an investment protection treaty *inter se,* EU Member States would hence conclude a treaty that *"might affecl common rules or alter their scope",* namely the Union

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67 See also the General Programme for the abolition of restrictions on freedom of establishment, OJ English Special Edition (11) pp. 7-15, esp. Tille 111, which since 1962 has provided examples ofState measures falling within the scope ofthe freedom of establishment and impacting on both the taking up and the pursuit thereof (then set out in Article 52 of the Treaty establishing the European Economic Community).

68 See e.g. ECJ, judgment in *Commission* v *Portugal, C-212109,* EU:C:2011 :717, paragraphs 42-44.

69 For a vast, yet not exhaustive list of transactions covered by free movement of capital see the Nomenclature, cf. paragraph 65 above.

70 See e.g. ECJ,judgment in *Commission* v *Portugal,* C-212/09, EU:C:2011 :717, paragraphs 6-1 O,56-57; ECJ, judgment in *Commission* v *Germa1 1y,* C-112/05, EU:C:2007:623, paragraphs 4-7, 56, 68; ECJ, judgment in *Commission* v *Ita/y,* C-326/07, EU:C:2009:193.

71 See e.g. ECJ,judgment in *Essent,* C-105/12, C-106/12 and C-J 07/12, EU:C:2013:677.

72 ECJ, Opinion 1/09 ("European and Community Patents Court"), EU:C:2011: 123, paragraph 80.

73 ECJ, Judgment in *Kobler, C-224101,* EU:C:2003:513, paragraphs 30 to 59.

74 ECJ, Opinion 2/13 ("Accession of the European Union to the European Convention for thc Protection ofHuman Rights and Fundamental Freedoms"), EU:C:2014:2454, paragraphs 168 and 191.

75 ECJ, Judgment in *Gazprom,* C-536/13, EU:C:2015:316, paragraph 37.

76 *Bruno Simma* and *Dirk Pulkowski,* "Of Planets and the Universe: Self-contained Regimes in lntemational Law", *EJ/1* (2006), Vol. 17 No. 3, 483-529, al page 505, attached as **Annex EC-25.**

law rules 011 inveslment proteclion and the Union law rules 011 energy. Therefore, 011 the basis of Article 3(2) TFEU, as interpreted in the judgment in *Pri1lgle,* EU Member States lacked the externa! cornpetence to conclude such a treaty.

78. The Commission is aware of the fact that therc are six published awards of tribunals concerning intra-EU BIT[17] which take the opposite view. Those awards, as well as academic writing espousing the same view[78], have one fundamental flaw in this regard: They consider that EU Member States remain f'ee to conclude international agreements in areas covered by the four freedoms *il1ter se,* because the interna! competence for the interna\ market is qualified in Article 4(2)(a) TFEU as a *"shared competence".* On that basis, they consider that EU Member States are f'ee to go beyond the leve! of investment protection afforded by the EU Treaties in intra-EU BIT, and in particular to agree on more demanding substantive protection and to agree on the use of investor-State dispute settlement. Their position is based 011 A11icle 2(2) TFEU.79

79. However, they overlook the fact that Article 2(2) TFEU only regulates to what extent EU Mcmber States may legislate within their ten-itory. It does not, on the contrary, define to what extent EU Member States may enter into international agreements, including into international agreements with other EU Member States. As the ECJ has held in *Pringle,* sitting as the Full Court, *i.e.* in the most authoritative and solemn formation, the power of EU Member States to conclude international agreements, both with third countries and other EU Member States, is governed by A11icle 3(2) TFEU: [80]

> *"In that regard, it mus/ be recal/ed that, Imder Article 3(2) TFEU. the Ul1ion is to have 'exclusive competence for the co11c/11sion of all i11ternatio11al agreement When ils co11c/usio11 ... may a.ffect co11111110llrules or alter their scope'.*
>
> *Jtfol/ows a/so from that provision thal Member Sta/es are prohibited from concluding an agreeme11t between lhemselves whic/1 might a.ffect co11111110llrules or alter their scope."*

80. It is therefore beyond doubt that the decisive question for establishing whether EU Member States were competent to conclude *inler se* obligations is whether their existence *"might a.ffect commo11 rules [of EU lmv] or alter their scope",* not whether the interna! market and energy are sha'ed competences and the ECT merely goes beyond the level of protection

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77 *Eastem Sugar B. V. (Nether/ands)* v. *The Czech Republic,* SCC Case No. 088/2004, Award of 27 March 2007 on jurisdiction; *Ac/1111ea B. V.* v. *The S/ovak Republic,* PCA Case No. 2008-13 (fonnerly *Eureko B. V.* v. *The S/ovak Republic,* Award of 26 Octobcr 201 O on jurisdiction, arbitrability and suspension; *Binder* v *The Czech Republic,* Award of 6 June 2007 on jurisdiction; *Ostergete/ and Laurentius* v. *Slovakia,* Decision on Jurisdiction of 30 April 2010; *European American lnvestment Bank (EURAMJ* v *The Slovak Republic,* Award on Jurísdiction of22 October 2012; *WNC* v *Czech Republic,* PCA Case No. 2014-34, Award of22 February 2017.

78 See for example *Thomas Eilmansberger,* "Bilateral lnvestment Treaties and EU Law", in: (2009) 46 *Co1111111011 Market law Review,* pp. 383-429, attached as **Annex** EC-26, at page 401; similarly *Christian Tietje,* The Applicability of lhe Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States. Halle: lnstitute of Economic Law, 2008, pp. 14 and 15, attached as **Annex EC-**18. Since the entry into force of the Treaty of Lisbon, in addition to the competence of the Union in that field, which precluded since the entry into force of the Treaty of Rome in 1958 the conclusion of investment protcction agreemcnts between its Member States *inter se,* the Union also has the competence for concluding investment protection agreements with third countries (Articlt: 207 TFEU), and Membcr States manifestly lack the competence to conclude international agreements in that field. As the present case conccrns investment protcction with regard to another Member State, and not with regard to third countries, that change is - contrary to what *Tietje* seems to assume - without relevance for the present case.

79 Which reads as follows: *"When the Treaties con/er 011 the Union a competence shared with the Member States in a specific area, the Union and the Member States may legis/ate and adopt legal/y binding acts in that area. The Member States sha/1 exercise their competence to the extenl that the Union has not exercised its competence. The Member States sha/1 again exercise their competence to the extent that the Union has decided to cease exercising its competence."*

80 ECJ,judgment in *Pringle,* C-370/12, EU:C:2012:756, paragraphs 100 and 101.

offered by the EU Treaties. In that contcxt, it is also important to recall that the ECJ considers that international treaties breach Union law already when they present the risk of conflict with potential Union measures, without it being necessary to demonstrate actual conflict.81

81. For the sake of completeness, as sorne authors argue that a declaration of competence is a precondition for the applicability of the principie of *"liability fol/ows competence",* the Comrnission notes that the Contracting Pallies of the ECT concerned by the question of *inler se* obligations between Member States were only the EU Member States, for the following reason: it is only necessary to establish whether the ECT has created *inter se* obligations between those Mernber States.

82. The Commission takes the view that the EU Mcmber Statcs are, f'om thc point of view of international law, presumed to be aware of the rules governing the distribution of competences in a supranational organisation they have themselves created. Therefore, even if there were no declaration of competence in the ECT at ali, *quod non* (see following paragraph), the principie of *"liabilityfol/ows competence"* would still apply between the EU Member States.

83. In any event, the ECT contains detailed provisions by means of which Cont.racting Parties have been made aware of the special features of the legal order of the European Communities. Those are: Articles 1(2), (3) and (lO), 36(7) ECT, and the instrument submitted by the EU to the Secretaria! of the ECT on the basis of Article 26(3)(ii) (see above **Section 2.1.1.1).** Hence, tite si$_{gn}$atories to the ECT acknowledged the Union's role with respect to EU Member States and the distribution of competences between the Union and its Member States.

84. That means that it is necessary to consider in each case whether EU Member States have conferred competence over the matter at hand to the Union. If the competence overa mattcr lies with the Union, the Union is the relevan! Contracting Party and ltence bound by the ECT. If the competence overa matter lies with the EU Member States, they are tite relevan! Contracting Parties and hence bound by the ECT.

85. In order to improve the operability of the division of competences, the European Comrnunities subrnitted to the Secretaria! of ECT a statement pursuant to Article 26(3)(ii) ECT, which is an instrument in the sense of Alticle 31(2)(b) VCLT and provides the following:[82]

> *"The European Coml1111lities are a regional economic integra/ion orgmlisatio11 within the 1lleallilg of the Energy Charler Treaty. The Communities exercise the compelences conferred 0ll them by their Member Sta/es through a11/011omous decision-making and Judicial institulions.*
>
> *The European Communilies and their Member States have both concluded the Energy Charter Treaty and are thus international/y responsible for lhe /11/fi/ment of the obligalions contained therein, in accordance with their respective compelences."* (Emphasis added by the Commission.)

86. That statement repeats the division of the externa! competence, and affirms that the international responsibility of the Union and its Member States is govemed by the principie

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81 Judgments in Case C-205/06, *Commission* v *Austria,* EU:C:2009: 118, paragraphs 28 and 45; in Case C-249/06, *Commission* v *Slveden,* EU:C:2009: 119, paragraphs 29 and 38 to 45; and in Case C-118/07, *Commission* v *Finland,* EU:C:2009:715, paragraphs 22 and 29 to 35.

82 The statement has been published by the secretaria! of the ECT, see htl]l://www.energycharter.org/fileadmin/DocumentsMedia/Legal/Transparency_Annex_ID.pdf at page 9. Attached as **Anncx EC-12.**

of *"/iabilíty ,fol/ows competence".* It constitutes a declaration of competences, if such a declaration was necessary, *quod 11011.*

2.2.2.4. Conclusion: If, at all, the ECT has created *inter se* obligations between EU Member States, those do not concern Part III and Atticle 26 ECT

87. In conclusion, as all provisions in Patt 111 and Article 26 ECT fall wilhin the externa! competence of the Union, the Union - and not its Member States - are bound under international law by those provisions. EU Member States, when ratifying the ECT, did not have the competence to conclude *ínter se* obligations concerning inveslment protection in the field of energy.

88. That has two consequences: First, in case of a dispute between tite Union and an investor of another Contracting Party (i.e. a third country), the Union is internationally responsible for any breach of the provisions on investment promotion and protcction, irrespective of whether the treatment at issue is afforded by the Union itself or by R Member State.[83] Second, the provisions ofthe ECT on investment promotion and protection bind the Union, but not Member States *ínter se.* Article 26 ECT does not allow an EU investor to initiate arbitration proceedings against a Member State because the dispute would be one between the Union and an EU investor from the Union. A1ticle 26 ECT does not apply to such disputes, because they are not directed against another Contracting Party.

89. In the alternative, should your Tribunal consider that there is ambiguity in the terms of the ECT with regard to the question of *ínter se* obligations between EIJ Member States, the Commission considers that the Tribunal should favour an interpretation that does not conflict with Union law. That point has been reasoned in detail by the *Electrabel* Tribunal.[84] Therefore, in the present case brought by an EU investor against an EU Mcmber Statc, the principie of interpretation of lhe ECT in the light of Union law requires an interpretation pursuant to which Chapter III and A1licle 26 ECT do not apply (see on that point in detail **section 3.).**

90. Also for all those reasons, Atticle 26 ECT does not constitute an offer for arbitration from Spain to investors from other EU Member States.

3, AN INTERPRETATION OF ARTICLE 26 ECT TIIAT ALLOWS FOR INVESTOR-STATE ARBITRATION BROUGHT BY AN E U INVESTOR AGAINST AN E U MEMBER STATE WOULD CONSTITUTE A VIOLATION OF THE E U TREATIESj SUCH CONFLICT SHOULD EITHER BE AVOIDED BY INTERPRETATION BASED ON CONTEXT, OR HAS TO BE SOLVED IN FAVOUR OF THE E U TREATIES

91. An interpretation of Atticle 26 ECT that allows for investor-State arbitration brought by an EU investor against an EU Member State would constitute a violation of the EU treaties **(Section 3.1).** In the view ofthe Commission, such an interpretation should be avoided. The appropriate basis to reach that objective would be an interpretation of the ECT based 011 its context, which is formed by the EU treaties **(Section 3.2).** Otherwise, there would be an open conflict between the ECT and the EU Treaties. According to the applicable rules of international law for solving that conflict, the EU Treaties would in such a situation take precedence over the ECT **(Section 3.3).**

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83 The Union has adopted specific legislation on financia! responsibility in such cases; see Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financia! responsibility linked to investor-to-stale dispute settlement tribunals eslablished by international agreements to which lhe European Union is party, OJ L 257, 28.8.2014, p. 121.

84 ICSID Case No. ARB/07/19, Award of30 November 2012, paragraphs 4.130 to 4.142.

3.1. An offcr for arbih'ation by Spain to EU investors would violntc Uuion law

3.l.l. The intra-EU applicatio11 of the substantive il1vestmel1t protection provisions o/the ECT vio/ates Article 3(2) TFEU and Ulliol1 lml• pro11isions 0ll investment protection

92. As has been demonstraled in detail in **Section 2.2.2** above, Union law provides for a complete set of rules 011 investment protection, including and in particular in the field of energy. Therefore, if EU Member States had indeed agreed *inler se* obligations creating a second, different set of rules on investment protection to be applied betwe.en them, they would have violated the distribution of competences between the EU and the EU Mernber States, as laid down in Article 3(2) TFEU, because they lacked the cornpetence to do so.

93. At the same time, the substantive content of Part lll ECT is not necessarily identical to the substantive content of the Union law provisions concerning investment protection. As a result, there is also a risk of conflict on substance between the ECT and Union law provisions on investrnent protection.

3.1.2. The sl1bl1lissiol1 of intra-EU disputes to treaty-based investor-State arbitra/ion vio/ates Artic/es 267 and 344 TFEU as we/l as the general principies o/effectiveness and unity o/Un ion law

3.1.2.1. The legal analysis ofthe Commission

94. Unlike ordinary international treaties, the founding treaties of the Union established a new legal order, possessing its own institutions, for the benefit of which EU Member States have limited their sovereign rights, in ever wider fields. The subjects of that legal order include not only the EU Mernber States, but also their nationals. [85] Thc esscntial characteristics of the Un ion legal order are in particular its primacy over the laws of the Member States and the direct effect of a series of provisions which are applicable to their nationals and the EU Member States themselves. [86] lnherent in that system is that EU Member States are liable for loss and damage caused to individuals as a result of breaches of EU law for which the State can be hcld rcsponsible. [87]

95. The ECJ and the courts and tribunals of the Member States are the guardians of the Un ion legal order. They cooperate by way of the preliminary ruling mechanism established by Article 267 TFEU, which is essential for the preservation of the character of the legal order established by the Treaties. That rnechanism aims to ensure that, in all circumstances, that law has the sarne effect in ali Member States, and to avoid divergences in its interpretation. [88] Therefore, *"except where otherwise provided, the basic concept of the Treaty requires t/l0l the Member States sha/11101 take the law into their own hands."* [89]

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85 ECJ, judgrnent in *Van Gend en Laos v Adminisrratie der Be/asti11ge11,* C-26162, EU:C: 1963: l, at paragraph 3.

86 ECJ, Opinion 2/13 ("Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"), EU:C:2014:2454, in particular paragraphs 158, 163, 165; ECJ, Opinion 1/91 ("Draft agreement between the Community, on the one hand, and thc countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area"), EU:C: 1991 :490, paragraph 21.

87 ECJ, judgment in *Francovich and Bonifaci* v *Ita/y,* joined cases C-6/90 and C-9/90, EU:C: 1991 :428, at paragraph 35. *See a/so* ECJ, judgment in *Brasserie du pecheur v B1mdesrep11blik De11/schla11d and The Qllœll / Secretmy o/Starefor Transport, ex parte Factor/ame and Others,* C-46/93, EU:C: 1996:79, at paragraph 20 *et seq.*

88 ECJ, Opinion 2/13 ("Accession ofthe European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"), EU:C:2014:2454, in particular paragraphs 170 and 174.

89 ECJ, judgment in *Commission of the EEC v L11xembo11rg and Bdgi11111,* joined cases C-90/63 and 91/63, EU:C: 1964:80, at page 631.

96. Alticle 344 and Alticle 267 TFEU establish the following methods for the setllement of conflicts on the application and interpretation of the Treaties: Disputes involving two Member States, as well as disputes bctween a Member State and the Union's institutions have to be brought to the ECJ. Disputes between a private pmty and a Member State have to be brought to the competent national judge, as *juge de droit commun du droit communautaire*. The national judge may and sometimes must refer the questions concerning EU law to the ECJ.[90]

97. The slarting point of the analysis of intra-EU investor-Stale arbilration under the ECT against that system is that Article 26 ECT creates a new dispute settlement system, namely investor-State arbitration, for subjects otherwise covered by those dispute settlement procedures envisaged in Articles 344 and 267 TFEU. Pursuant to Article 26(6) ECT, the law to be applied by arbitral tribunals in intra-EU investor-State arbitration includes Union law as part of the *"applicable rules of international law"*, because it is in force between the host State and the home State of the investor. According to Allicle 26(8) ECT, any decision rendered by a Tribunal on the basis of Article 8 shall be *"final and binding"*.

98. However, when EU Member States create such a new dispute settlement system, *i.e.* one that is competent to apply Ullion law ata final and binding level, they violate Articles 267 and 344 TFEU, because that new dispute settlement system is outside the complete system created by those articles, and, in particular, does not have the possibility or the obligation to refer preliminary questions to the ECJ pursuant to Allicle 267 TFEU.

3.1.2.2. Arbitral Tribunals have not addressed in detail the problem of incompatibility with Alticle 267 TFEU; the (contestable) solution found in *EURAMv Slovokia* cannot be transposed to the present case

99. Thus far, only the Arbitral Tribunal in *EURAM* v *Slovakia* has discussed the problem of the illcompatibility of intra-EU ISDS with Allicle 267 TFEU. lt has recognized that it has to apply Union law[91]; at the sarne time, *it* rejected *the* claim that there was a violation of Article 267 TFEU, because il took the view that in the case of UNCITRAL arbitration with seat in Stockholm, its award was not final alld binding, but subject to the control of the competent Swedishjudge, who could request a preliminary ruling to the ECJ.

100. The Commissiol1 does not share that view, which transposes case-law from the field of commercial arbitration to thc field of investrnent arbitration (see on the impossibility of doing so below paragraphs IOS to 108) and <loes not address the underlying problem that nothing in the underlying intra-EU BIT (and here: in the ECT) obliges the Tribunal to choose its seat in the Ullioll.

101. However, it is not necessaly to expand on this, because in any evellt, this reasoning fails for ICSID-admillistered arbítration, such also foreseen as a possibility in A,ticle 26 ECT. The ICSID Convelltiol1 does not cater for allnulment proceedings in a national court of a Member State ofthe Union. In the case of ICSID arbitratíoll, the award (possibly following an ICSID-internal annulmellt proceeding) is final and binding. An ICSID is therefore obliged, Oll the Olle hand, to apply and interpret Ullion law, and, Oll the other hand, lacks the possibility, even indirect, through a judge of a Member State, to request a preliminary ruling. The possibility of a contlíct (even if, in thc present case, that colltict does not materialise, if the seat of your Arbitration Tribunal is Sweden), is sufficient for creating a violation of EU law.92

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90 See, in detail, ECJ, Opinion 1/09 ("European and Community Patents Court"), EU:C:2011:123, paragraphs 64 to 89.

91 *European American Investlllelll Bank (EURAM)* v *The Slovak Republic,* Award Oll Jurisdiction of 22 October 2012, paragraph 266.

92 ECJ, judgments in *Collllllission/Belgillllll* („Open Skies"), C-471/98, EU:C:2002:628, paragraphs 137 to 142; in *Collllllissiol1/Swedell* ("extra-EU BIT"), C-249/06, EU:C:2009: 119, paragraph 42; in

102. Therefore, if ICSID tribunals or Tribunal with a seat outside the EU were competen! to hear intra-EU cases 011 the basis of Article 26 ECT, that would constitute a violation of Article 267 TFEU.

3.1.2.3. Arbitral Tribunals have wrongly interpreted Article 344 TFEU

I03. The Arbitral Tribunals in *Electrabe/, Charal111e* and *RREEF* have taken the view that Article 344 TFEU only applies to disputes between two EU Member States, but not to disputes between an investor and an EU Member State. They have, in particular, observed that national coults and commercial arbitration tribunals are competen! to apply Un ion law as a matter of law, without that being a violation of Un ion law.

104. That position fundamentally, however, overlooks the fact that the national coult is the ordinary comt within the Union legal order[9J] (see also above paragraph 74 and 96). Therefore, !hose disputes are submitted to a method of settlement not provided for by the EU Treaties and so violate the legal order established by Articles 267 and 344 TFEU.

105. The Un ion legal order treats commercial arbitration differently in this respecl. The ECJ has indeed accepted that private parties enter into arbitration agreements, including 011 matters govemed by Union law, in *Nordsee*[9] and *Ecoswiss*[95]. However, that reasoning cannot be extended to investment treaty arbitration, for three reasons.

106. First, the legal nature of an investmcnt treaty is different from the legal nature of an arbitration clause in a commercial agreement. An investment treaty is an act of public intemational law, concluded between two States, and constitutes an *actu111 jure imperii.* When acting in its capacity as legislator (including through international law making), the State may not limit the scope of application of Article 267 TFEU[%]. An arbitration clause in a commercial contrae!, on the other hand, is an act of prívate law, and constitutes an *actum jure gestionis.* Herc, private parties only regulate the relationship between themselves, and enjoy in principie autonomy of contrae!, subject only to the *ordre public.*

107. Second, the subject-matter of investor-State arbitration is nota contractual relationship, but the behaviour of the contracting States in their capacity as public authority and the exercise ofpublic policy prerogatives.[97]

108. Third, the system of control with respect *to* the application and interpretation of EU law, which is part of the applicable law, foreseen in *Nordsee* and *Eco Swiss* is based on the assumption that the commercial arbitration tribunal fixes its seat in the Union.[98] However,

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Co11111ission/A11stria ("extra-EU BIT"), C-205/06, EU:C:2009: 118, paragraph 42; in *Commission/Finland* ("extra-EU BIT"), C-118/07, EU:C:2009:715, paragraph 33; Opinion 2/13, paragraphs 198 and 199 as wel I as 208.

93 ECJ, Opinion 1/09 ("European and Community Patents Court"), EU:C:2011: 123, paragraph 80.

94 ECJ, Judgment in *Nordsee,* 102/81, EU:C:1982:107.

95 ECJ, Judgment in *Ecv Swiss,* C-126/97, EU:C: 1999:269.

96 ECJ, Judgment in *Rhei1111ihle11,* 166/73, EU:C: 1974:3, paragraph 4; see also Opinio11 1/09 ("Europcan and Community Patents Court"), EU:C:2011: 123, paragraphs 80 to 85; Judgment in *Puligienica,* C-689/13, EU:C:2016: 199, paragraphs 31 to 36.

97 *Salini Costrullori S.p.A. ami Jtalstrade S.p.A.* v *Tl,e Hasl,emite Kingdom of Jordan,* ICSID Case No. ARB/02/13, Decision 011Jurisdiction of 9 November 2004, paragraph 151.

98 And so, potentially, where needed, avails itself of a *juge d'appl1i* in order to request a preliminary ruling from the Court of Justice. ECJ, Judgment in *Nordsee,* 102/81, EU:C:1982:107, paragraph 14. See 011 this poi11t for example also José Carlos Fernández Rozas, *l e róle des juridictions élatiques devant /'arbitrage commercial intemaliona/,* Académie de Droit I11ternational de la 1-laye / Hague Academy of Internatio11al Law Recueil des cours, Collected Courses, TomeNolume 290 (2001), p. 130, attached as An11ex EC-27 The *juge d'appui* is typically the judge designated for that function by the procedural law of the State where the tribunal has its seat. See order for refere11ce of the *Brmdesgerichtshof* in *Achmea* v *Slovakia,* attached as Annex EC-1 1, paragraph 51, co11firming that the

nothing in Article 26 ECT preve1i"ts the Tribunal f'om fixing its seat outside the Un ion. This facilitates circumvention o f the control on the application and interpretation o f EU law by judges o f a Member State.

109. Furthermore and more generally, nothing in the wording o f Article 344 TFEU suggests that it would only apply to disputes between EU Member States. That has also been confi'med by the ECJ: In *Opinion 2/13,* the ECJ opined that Article 344 TFEU extends to disputes between the Member States and the Union[99]. In *Opinion 1/09,* the Court clarified that Article 344 TFEU did not apply to a new cou11 structure that applies *"011/y to dúputes between individuals".*[100]

110. Both *Opinion 2113*[101] and *Opinion 1191*[102] stress that Article 344 TFEU is the expression o f a more general principie that an international agreement cannot affect the allocation o f powers fixed by the EU Treaties or, consequently, the autonomy o f the EU legal system, observance o f which is ensured by the Court. *Opinion 1191* even goes so far as to refer to *"[t]he threat posed by the court system set up by the agreement to the autonomy o / the Co1111111111ty legal order".*[103]

111. Therefore, the Commission takes the view that Article 344 TFEU also covers an international agreement by which two EU Member States agree to submit cases brought by an investor f'om the other EU Member State against them and involving the interpretation or application o f !he Treaties to a new dispute settlement structure outside the EU Treaties. On that basis, the interpretation o f Article 26 ECT favoured by the tribunals in *Electrabe/, Charanne* and RREEFviolates Ar1icle 344 TFEU.

3.1.2.4. Conclusion

112. The Uniop has recently affirmed its position that intra-EU ISDS is contrary to Union law, and in particular to Articles 267 and 344 TFEU in the context o f the ECT, when signing the International Energy Charter.[104] On that occasion, the Cornmission made the following statement on behalf o f the European Union:[105]

> *"It is dec/ared that, due to the nature (!/the E U inlemal leRal arder, the text in Title l l Headi11g 4, o /the Jntemational Energy Charter 011 dispute sett/ement mechanisms ca111lot be construed so as to mean that any s1lcJl mec/wnisms wou/d become applicable in relations befll'een the E11ropea11 Union and ils Member States, ar between the said Member States, 011 the basis o /that text."*

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relevan! provision o f German civil procedural law allows for such a reference from the ***juge*** *d'appui* i f thc seat o f the commcrcial arbitration tribunal is Germany. See Catherine Kessedjian, ***"l 'arbitrage*** *comme mode de reglement des différends est-il remis en ca11se par le droil e11ropée11?",* in: ibid. et Charles Leben (ed.), Le droit européen et l'investissement, Editions Panthéon-Assas, 2009, pp. 107 to 121, at 120, for references to the relevan! specific provisions in British and Danish law.

99 EU:C:2014:2454, paragraphs 202 to 204; see also Opinion 1/00, EU:C:2002:231, paragraph 17; Case T-465/08, *Czech Repub/ic v Co1111111issio11,* EU:T:2011: 186, paragraphs 1O1-102.

100 EU:C:2011:123, paragraph 63.

101 EU:C:2014:245.4, paragraph 202.

102 EU:C: 1991 :490, paragraph 35.

103 EU:C: 1991 :490, paragraph 47.

104 The Intemational Energy Charter is a declaration o f political intention aiming al strengthening energy coopcration betwccn thc signatory states which has been fonnally adopted and signed at the Ministerial Conference in The Hague in May 2015. It seeks to update the ECT and maps out common principies for international cooperation in the field o f energy.

105 Declaration attached as **Anncx** EC-17. The text o f declaration can be found on the website o f the Secretariat of the Energy Charter: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/EU_IEC_Declaration.pdf.

113. Accordingly, the Commission invites your Tribunal to rule that the interpretation of Article 26 ECT favoured by the tribunals in *Electrabel I, Charnl11le* and *RREEF* violates Articles 267 and 344 TFEU.

3.2. Conflict should be avoided through i11terpr·etatio11 of the ECT on the basis of its context *("liarmo11io11s i11terpretatio11"* or *"systemic i11tegratio11")*

114. The *Electrabel* tribunal has at lenglh discussed the relationship between the ECT and Union law in general.[106] Its findings can be summarized as follows:

(1) Union law is part of international law, and therefore has to be applied by a Tribunal established on the basis of Article 26 ECT as a matter of law, both with regard *to* the validity of the arbitration agreement and the merits. That follows from the fact thal Article 26 refers, with regard to the law applicablc to the dispute, *to* international law, and Union law constitutes international law that applies between the host State and the home State of the investor in case of an intra-EU dispute.[107]

(2) Given its historie genesis and its text, the ECT should be interpreted, if possible, in harmony with Union law.[108]

(3) Jf such harmonious interpretation proves to be impossible, Union law prevails on the basis of Article 351 TFEU, which is an expression of the customary rule of international law codified in Article 30 VCLT.[109]

115. The fi'st finding has not been disputed by subsequent tribunals. The Commission will therefore refrain from arguing that point in depth in this submission. Should your Tribunal have any doubt 011 it, the Commission is at its disposal to further expand on that question.

116. The *Cha'mme* tribunal has restated the finding of the *Electrabel* tribunal on the second and third point.[110] It finds no need to analyse those questions further, as it consider that Union law allows for intra-EU investor-State arbitration *(quod non,* see **Section 2.1.2** above). However, the award on jurisdiction rendered by the *RREEF* tribunal diverges and claims that in case of conflict, the ECT prevails over the EU Treaties even in case of an intra-EU dispute.

117. As the t'ibunal in *Electrabel* convincingly argued, refuting all arguments to the contrary and relying on the relevant case-law of the ECJ, *"Article 307 EC [110w Article 351 TFEU] prec/udes inconsistent pre-existing treaty rights of EU Member States alld their owll 11atio11als against other EU Member States; and itfollows, ifthe ECTand EU* fmv *remained incompatible 110/withstanding* a11i *ejforts at harmonisation, lhat EU /aw would prevail over the ECT's substantive protections and that the ECT could 1l0/ apply inconsistently with EU law to such a natio11al's claim againsl al1EU Member State."*[111]

118. In academic writing, *Tlromas Ei/mansberger* has argued that case equally convincingly: public international law (which governs the law applicable to this arbitration[112]) *"requires*

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106 *Ibídem,* paragraphs 4.111 to 4.199.
107 *fbidem,* paragraphs 4.119 to 4.126.
108 *Ibídem,* paragraphs 4.130 to 4.142.
109 *Ibídem,* paragraphs 4.178 to 4.191.
110 *Charanne v Spain,* Final Award of21 January 2016, paragraph 439.
111 ICSID Case No. ARB/07/19, *E/ectrabe/* v *fhmgary,* Award of30 November 2012, paragraphs 4.178 lo 4. 189, echoed in paragraph 439 *ofCharanne.*
112 ICSID Case No. ARB/03/16 *ADC Aj)iliate Ltd.* v *Republic o/Hl111gmy,* award of 2 October 2006, al paragraph 290; ICSID Case No. ARB/01/7, *MTD Equity Sdn Bhd* v. *Republic o/Chile,* award of 25 May 2004, al paragraph 86; and ICSID Case No. ARB/01/12 *Azurix Co1p.* v. *Arge11ti11e Republic,* award of 14 July 14 2006, at paragraph 67; see also for further references *Antonio Parra,* "Applicable Law in Investor-State Arbitration", in: *Michael Rovine* (ed.), Contemporary Issues in International

arbitral tribl11als to il1terpre/ intra-EU B!Ts in the light of other il1ternalio11al lml[1] obligatio11s applicab/e to the facts al hanr/, i.e. in the light qf releva11t EC /aw". m As he rightly underlines, that obligation follows in pat1icular from Ariicle 31 (3)(c) VCLT, which requires that in the interpretation of a treaty, *"cmy re/eva11t rnles of il1temationa/ law applicable in the relalio11s betwee11 the parties"* shall be taken into account as context. As Eilmansberger fu11her points out, *"the il1te11tions uf the parties m·e e;,.pressed in the most authoritative W«J' by conjlict mies included in the later treaty, [foot11ote omilled} and the EC Treaty (being the /afer Treaty in this case) does il1deed co11tai1l suc/1 a conflict rule, name/y the already mentioned Article 307 EC"* (see 011 Article 351 TFEU as a contlict rule in detail **Section 3.3** below).114

119. So, the fact Ihat EU law must be taken account of as an element extrinsic lo the BIT (or here, the ECT), *"means that these e/ements are par/ oj the circ11msta11ces a/so mentioned in Article 32 {VCLT], together with the preparato1J' works, but pul in Article 31 in arder to avoid relega/ion as a seco11da,y 11lea11s of il1terpre/atio11."*[115] The converse would mean that the ECT is to be understood to operate wholly independently from Union law so as to be capable of being successfully invoked even when it clearly contradicts the fom1er. In the opinion of the Commission, that cannot have been the understanding of the EU Member States when they signed the ECT, pa11icularly since nothing indicates that the ECT is intended to apply as a */ex specialis* to Union law.[116] To use the fíndings of the ICJ's case in *Tl11lisia v Libya* by way of analogy here: it cannot be lightly presumed that Spain would conclude a treaty, such as the ECT, that would impose obligations on it that would place Spain in breach of obli9ations owed to the Union and other Member States of the Union under the EU Treaties.11

120. Rather, in a situation between two EU Member States, Union law should be viewed under Article 31 (3)(e) VCLT as forming an integral part of the task of interpretation of the ECT by your Tribunal so as to avoid results that diverge from the fonner.118 The JCJ in *Oil Platfonns* evidenced that this could be done through a process of systemic coherence in interpretation of the treaty provisions at hand.[119] The Commission invites your Tribunal to follow that process of system ic coherence.

Arbitration and Mediation: The Fordham Papers, Martinus NijhofT Publishers, 2008 p. 3 (attached as **Anncx EC-1**), at pp. 7-8.

113 *Thomas Eilmansberger,* "Bilateral Investment Treaties and EU Law", in: (2009) 46 *Co1111111011 Market lmv Review,* pp. 383-429, attached as Anncx EC-26, at page 421.

114 *!bid,* at page 421 and 425.

115 *Hervé Ascencio,* "Article 31 of the Vienna Conventions on the Law of Treaties and Intemational Investment Law", in: (2016) 31 2 ICSID Review, pp. 366-387, at page 371, attached as Anncx EC-29.

116 *See,* in this regard, also the reasoning of the ICJ in *Oil Platforms (fran v USA),* Merits, Judgment, 6 November 2003, *ICJ Reports* (2003) 161, paragraph 41. *See a/so Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),* Judgment, 4 June 2008, */CJ Reports* (2008), paragraph 113-114.

117 ICJ in *Tunisia v. libyan Arab Jamahiriya (Case Conceming App/ication for Revision and lnterpre/ation of the Judgmenl of 24 February 1982 in the Case Co11cerni11g the Continental Shelj),* Merits, Judgment, 10 December 1985, *ICJ Reports* (1985) 15, 41, at paragraph 43.

118 That Un ion law satisfies the requirements for At1icle 31 (3)(c) VCLT should be without doubt: first, as rules contained in the TEU and TFEU or rules deriving from those treaties, Union law falls within the sources of international law set out in Article 38(1) of the Statute of the ICJ; second, Un ion law is directly applicable to the subject-matter of the case as an interpretation in conflict would lead to the situation whereby a Member State is in conflicting different sets of obligations at different levels of intemational law, and, third, they are binding to both pa1ties to the dispute before your Tribunal. *See afso* the analysis of the requirements of Article 31 (3)(e) VCLT of *Simma* and *Kiff; Bruno Simma, Theodore Ki/1,* "Harmonizing Investment Protection and Intemational Human Rights: First Steps Towards a Methodology", in *Intemationaf /11vestme111 lmvJor the 2t" Cenlwy: Essays in Ho11011r of Christoph Schreuer* (OUP, 2009), pp. 678-707, at pps. 695-702, attached as Annex EC-30.

119 ICJ in *Oil Platforms (lran v USA),* Merits, Judgment, 6 November 2003, *ICJ Reports* (2003) 161, paragraphs 41 and 78.

121. Accordingly, since, in light of the above, Union law cannot be relegated to a secondary means of interpretation when assessing the existence of conflict therewith, the Commission invites your Tribunal *to* interpret the ECT and EU law in such a way as to avoid any conflict between the two.

3.3. In case of conflict, the EU Treaties prevail over tite ECT

122. Should your Tribunal reject a harmonious interpretation of the ECT and EU law, it would have to solve the conflict between the ECT and the EU Trcaties in favour of the latter. lt could do so either 0ll the basis of Article 351 TFEU or 0ll the basis of Article 4l (l)(b) and Article 30(4)(a) VCLT.

3.3. J. Article 351 TFEU as conjlicl rule

123. Under Article 351 (l) TFEU (previously A11icle 307 of the Treaty establishing the European Community ("TEC"), the rights and duties 1111dr a public international law agrcement entered into by a Member State prior to accession to the EU with a non-Member State are not affected by EU law. However, Article 351(2) TFEU is clear in that the Member State concerned must apply all appropriate means in order to remove any incompatibility with EU law arising f'om this prior international agreement.

124. On the basis of a simple *a contrario* reasoning, the ECJ considers that the *pacta s1mt servanda* guarantee of A11icle 351 TFEU does not apply to treaties concluded between two EU Member States[120], or, indeed, to treaties to which both EU Member States and 11011-EU Member States are paiy.[121]

125. If Article 307 TEC/Article 351 TFEU are applied as conflict rule in the present case, the provisions of the ECT identified as being incompatible with Union law, i.e. Part III on investment protection and A11icle 26 on investor-State arbitration, would become inapplicable.

126. The Cornmission is aware that the *RREEF* tribunal[122] has taken different views. The main flaw in the reasoning of the *RREEF* tribunal is to disregard the fact that Union law is part of the intemational law applicable to the dispute, and that Article 4l (l)(b) and Article 30(4)(a) YCLT cater for the possibility of having effects of posterior treaties only between certain

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120 *See,* for instance, ECJ, Judgment in *Commission* 1' *Slovakia,* C-264/09, EU:C:2011 :580, paragraph 4l and ECJ, Judgment in *Commission v Austria,* C-147/03, EU:C:2005:427, paragraph 58. See, in addition, also ICSID Case No. ARB/07/19, *Electrabel v Hungmy,* Award of 30 November 2012, paragraph 4.183: *"Under this 'negative' interpreta/ion, Article 307 EC* [now: Article 351 TFEU] *means that between EU Member States, EU law prevails in case of inconsistency with another ear/ier lreaty. [...] lf Article 307 EC provides that treaty rights between Non-E U Members ca1111ot bejeopardised by the subsequent entry of a Non-EU State into the E11ropea11 Unio11, it appears logical, taking into acco1111t lhe integra/ion processes of the European Union, that the opposile conseq11ence sho11/d be implied, i e the no11-s11rvival of rights 1111dr 0ll earlier treaty incompatible with EU lmv as between EU Member Sta/es".*

121 For those treaties, in the relationship between EU Member States, the applicable rule of conflict is Article 307 EC/Artícle 351 TFEU. ECJ, Judgment in *RTE* v *Commission,* C-241/91 P and C-242/91 P, paragraph 84 (concerning the Berne convention); see already ECJ, Judgment in *Commission* v *ltaly,* 10/61, EU:C: 1962:2, at page 10 (concerning agreements concluded under the auspices ofthe GATI).

121 At paragraphs 74 and 75. The claim of the *RREEF* tribunal that it shares the view of the *Electrabel I* tribunal at paragraph 75 seems to rest on an erroneous reading of the *Electrabel I* tribunal's award. Paragraph 4.112 of the *Electrabel I* award only sets out that the applicable law is public international law. 11<1oes not say anything as to the question what is, under public international law, the applicable rule of conflict. The *Electrabel* / tribunal found, at paragraphs 4.173 to 4.189, that Artícle 307 TEC/Article 351 TFEU prevails *over* Article 16 ECT as rule to solve any conílict betwcen the ECT and the TECffFEU. Thus, the precedence of Article 307 TEC/Article 351 TFEU over Article 16 ECT, as presented in the present scction, is a question ofpublic international law, not ofUnion law.

contracting parties to the earlier agreement (see on this point in detail the following section).

3.3.2. Article 41(1)(b) and Article 30(4)(a) VCLT

127. Even if one were to consider that the rules applicable to a conflict between the ECT and Union law are the general rules of conflict contained in the VCLT, the Commission considers that the *inter se* obligations between EU Member States would have been superseded on the basis of Articles 41(1)(b) or 30(4)(a) VCLT.

128. Article 41(1)(b) VCLT concerns the amendment of a treaty by a later treaty only between certain parties thereto. It stipulates that such amendment is possible, provided that it does not affect the enjoyment by other parties of their rights under the treaty or performance of their obligations and does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole (see already above paragraph 48).

129. Those conditions are complied with in the present case: The suppression of *inter se* obligations between EU Member States only concerns those EU Member States. In the case of investor-State arbitration such as the one foreseen in Article 26 ECT, it also is not incompatible with the effective execution of the object and purpose of the treaty as a whole: the possibility of investor-State arbitration between investors from non-EU Member States and either the Union or EU Member States remains untouched.

130. In the Treaties of Amsterdam, Nice and Lisbon, the investment protection rules of Union law, as well as the principles concerning the competences and the system of judicial protection, laid out above in Sections 2.2.1 and 3.1.2, are re-affirmed. This could be interpreted as an amendment pursuant to Article 41(1)(b) VCLT.

131. Even if there were no such amendment, the applicable rule of conflict according to the VCLT between the earlier and the later treaty would be Article 30 VCLT Article 30(3) VCLT provides that when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 VCLT, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

132. Article 30(4) and (5) VCLT specify that when the parties to the later treaty do not include all the parties to the earlier one, as between States parties to both treaties the same rule applies, provided that the provisions of Article 41 VCLT are respected.

133. The ECT and the EU Treaties relate to the same subject matter. The ECT establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the European Energy Charter. The EU Treaties establish a European Union to achieve European unity, including an internal market that also covers energy (see detailed description above; the Treaty of Lisbon has introduced, for the first time, a dedicated competence for energy, see Article 194 TFEU; beforehand, secondary legislation on energy had been based on the internal market competence and the environmental competence).

134. If one assumed that the provisions on investment protection in Chapter III and Article 26 ECT have created *inter se* obligations between EU Member States, *quod non,* the EU Member States would be party to successive treaties that relate to the same subject matter. It therefore needs to be determined which is the earlier treaty.

135. The ECT has been concluded in 1994; the Union ratified it in 1997. After that date, the Member States have reaffirmed their commitment to Union law by various treaties, and in

particular the Treaty of Amsterdam, the Treaty of Nice, and the Treaty of Lisbon. [123] The ECT is therefore the earlier treaty compared to each of those treaties. In such a situation, under Ariicle 30(4)(a) VCLT, the ECT only applies to the extent that its provisions are compatible with those ofthe later treaties of Amsterdam, Nice, and Lisbon.

136. The provisions of the ECT on investment protection (Chapter 1ll) and dispute settlement (Article 26 ECT), when applied between two EU Member States, are not compatible with Union law as it results f'om those later treaties (see Section 3.1 above). Hence, they are, pursuant to A1iicle 30(4)(a) VCLT, not applicable.

4. SUGGESTED COURSE OF ACTION: DECLINE COMPETENCE TO HEAR THE CASE OR SUSPEND THE CASE UNTIL THE RULING OF THE ECJ IN ACHMEA

4.1. Decline competence to heal' tbe case

137. The logical consequencc of the view presented by the Commission is that the Commission invites your Arbitration Tribunal to decline its compelence to hear the case. lndeed, the Tribunal in *WNC Factoring* noted that a clarifying decision by tire ECJ could have acted as a potential qualifier lo its final decision on jurisdiction. [124]

138. However, the Commission understands that your Arbitral Tribunal may be reluctant to do so, in particular because other Arbitral Tribunals have taken a different view, and because there is, as of yet, no clear case-law from the ECJ on the question of the compatibility of intra-EU JSDS with Union law.

4.2. In the alternative: suspension of the proceedings pending the preHminary ruling il1Adl111ea

139. The Commission considers therefore that an altemative to the preferred course of action of the Commission is that your Tribunal suspends the proceedings before it and awaits the ruling ofthe ECJ in *Achmea* v *Sfovakia* [125], which deals precisely with that question, and for which an oral hearing will take place before the Grand Chamber of the ECJ on 19 June 2017.

140. Now, as the UNCLOS Tribunal in Mox *Plant* [126] and the tribunal in Jrol1 Rhil1e [121] have convincingly argued, the ECJ is the ultimate authority for the interpretation of Union law. Therefore, the principie of comity justifies suspension of the proceedings until that question of Union law is definitively decided by the competcnt forum. [128] The legal basis for such a suspension of proceedings can be found in the case-rnanagement authority of the

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123 Other treaties reaffirming Union law are the various acccssion treaties.

124 PCA Case No. 2014-34, Award, 22 February 2017, *WNC Facloring* lid. *v Czech Republic,* at paragraph 3 11.

125 Case C-284/16. The arder for reference by the *81111desgedchtshofand* an English courtcsy trnnslation of the order for reference are attached as **Annex EC-11.** The written procedure is closed; a hearing is scheduled for 19 June 2017, anda judgment is cxpected the lates! in 2018.

126 ITLOS Order No. 3, 24 June 2003, attached as **Annex EC-31,** at paragrnphs 27 and 28.

127 Award in the Arbitration regarding the lron Rhine ("ljzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, Chapter III, attached as **Annex EC-32,** in particular al paragraph 103: *"[T]he Tribunal arrived at lhe co11c/11sion lhal il could 1l0l decide the case brought befare il withoul engaging in lhe inlerprelalion o,frules of EC law which constilule neilher acles clairt nor acles éclairés, the Parlies'obligalions under Article 292 would be tdggered in Jhe sense 1Jdl Jhe relevan/ questions of EC law would need lo be submilled lo lhe European Courl of Justice".*

128 Sce *Brooks E Alfen* and *Tommaso Soave,* Jurisdictional Overlap in WTO Dispute Settlement and lnvestment Arbitration, in: *Arbitra/ion lnternational* 30, p. I, in particular pp. 44 to 47, attached as **Annex EC-33.**

Tribunal.129 Your Tribunal can find precedent for decisions to stai proceedings in comparable situations in particular in *Mox Plant*[130], in *SPP* v *Egypt*[1 1], and in *SGS* v *Philippines*[132]. The situation is also different from *Achmea (Jormerly Eureko)* v *Slovakia,* where a suspension to await the outcome of a possible infringement procedure under what is now Article 258 TFEU was declined, because it was not certain whether the Commission would eventually bring such an infringement case.133 Here, the relevant case is already pending in the Union Courts.

141. It is accordingly in light of the above and with a view to having this fundamental issue of jurisdiction resolved by the competent fornm that the Commission invites your Tribunal to suspend proceedings until the final judgment of the Court in *Achmea* v *Slovakia* is delivered.

142. The Commission is aware that in the last years, severa! academics have suggested that investment tribunals, contrary to commercial tribunals, are "national courts and tribunals" within the meaning of Article 267 TFEU, because of their different characteristics and their legal basis as an intemational agreement concluded by a Member State.[134] Advocate General *Wathelet* has recently endorsed that view at the very least for ICSID tribunals, because, particuJarly in the field of State aid, the possibility for arbitral tribunals to refer questions for a preliminarr ruling could help to ensure the correct and effective implementation of EU law.[13] . If your Arbitral Tribunal were to espouse that view, it could also consider referring itself questions to the ECJ (including possibly the question whether it constitutes a national court or tribunal in the sense of Article 267 TFEU, whether Article 26 ECT applies to disputes between an EU investor and another Member State[136] or whether intra-EU ISDS is compatible with Union law).

143. The Commission, agreeing as to the result with Arbitral Tribunals seized with the question[137] and the German *Bundesgerichtshof,* does not share that view. In particular,

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129 See in detail International Law Association, Final report on *lis pendens* and arbitration, available at http://arbitration.oxfordjoumals.org/contenVarbinV25/l/3.full.pdf, Recommendation 6.

130 11LOS Order No. 3, 24 June 2003, attached as **Annex EC-31,** at paragraph 1191.

131 ICSID case No. ARB/84/3 *Sowhem Pacific Properties (Middle East) Limited* v *Arab Republic of Egypt,* Decision on Preliminary Objections to Jurisdiction of November 27, 1985, paragraphs 84 to 87.

132 ICSID case No. ARB/02/6, Decision of the Tribunal on objections to jurisdiction, 29 January 2004, paragraphs 170 to 176.

133 *Achmea B. V.* v. *The S/ovak Rep1 1blic,* PCA Case No. 2008-13 (formerly *Ellreko B. V.* v. *The Slovak Republic,* Award of 26 October 20IO onjurisdiction, arbitrability and suspension, at point 292.

134 Jürgen Basedow, "EU Law in Intemational Arbitration: Referrals to the European Court of Justice" 32 Journal of International Arbitration (2015), *S.* 367-386, attached as **Annex** EC-34; Konstanze von Papp, "Clash of ,autonomous legal orders': Can EU Member States Courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ" 50 Common Market Law Review (2013), S. 1039-1082, attached as Annex EC-35; John P. Gaffney, "Should Investment Treaty Tribunals Be Permitted to Request Preliminary Rulings From tlle Court of Justice of tlle European Union?" 2 Transnational Dispute Management (2013), attached as **Annex EC-36;** Milos Olik and David Fyrbach, "The Competence of Investrnent Tribunals to Seek Preliminary Rulings from European Courts", Czech Yearbook of International Law 2011, p. 191-205, attached as **Annex EC-37;** Stephan Schill, "Arbitration Procedure: The Role of the European Union and lhe Member States in the Arbitration Procedure", in: Catherine Kessedjian, Le droit européen et l'arbilrage d'investissement, Editions Panthéon-Assas, 2011, pp. 129 to 147, at 144 and 145, atlached as **Annex EC-38,** *Paschalis Paschalidis,* "Arbitral tribunals and preliminary references to the EU Court of Justice", (2016) *Arbitratio11 lntematio11al,* pp. l-23, attached as Annex EC-39, and *Paschalis Paschalidis,* "Greentech: EU Jaw confronted with international arbitration", (2016) *European /11tematio11al Arbitra/ion Revietv,* pp. 59-66, attached as **Annex EC-40.**

135 Conclusions in *Ge11entech,* C-567/14, EU:C:2016: 177, footnote 34.

136 Because tlle ECT is also part of Union law, the ECJ is competent for the interpretation of Article 26 ECT.

137 They take, however, the view that this is not problematic, based on the rulings of the ECJ in *Nordsee* and *Eco Swiss,* discussed above in paragraphs 105 to 108. Por the reasons set out there, the Commission does not share that view. The investment tribunal in *Eastem Sugar* has endorsed that

Arbitral Tribunals do not seern to rneet the requirernent of *"permanence"* and of being State organs. Therefore, the findings of the ECJ in *Nordsee* for comrnercial tribunals are applicable by analogy to them. It would therefore not recommend that cow-se of action.

4.3. In the further alternative: suspension of the proceeding until the Commission has t.aken a view on Spain's notific.ation

144. The third and further altemative is suspension of the proceedings pending the Commission's decision on the disputed measures, *ie.* Spain's national RES support scheme, which was notified to the Commission on the basis of Article 108(3) TFEU, because it constitutes State aid pursuant to Article 107(1) TFEU in light of the order of the ECJ in *Elcogás.*[138]

145. The Commission has exclusive competence for authorising EU Member States to grant State aid. The Commission therefore is now obliged to take a decision on that notification.[139] That decision is currently in the preliminary investigation period.

146. As has been correctly pointed out by the *Electrabel* Tribunal, the framework of the **ECT** recognises that EU Member States will be legally bound by decisions of the Commission under EU law. ***As*** regards protection under the ECT, investors can have had no legitimate expectations with regard to the consequences of the implementation by an EU Member State of any such decision by the Commission.[140] In other words, the possible interference with a foreign investment through the implementation by an EU Member State of a legally-binding decision of the Commission was and remains inherent in the framework of the ECT itself.

147. The decision which the Commission will take on the notification of Spain therefore is relevant, as a matter of law, and at very least as a matter of fact, for the assessment of the merits of the present case. Since the assessment of the compatibility of State aid, and therefore the application of the guidelines thereon, is the exclusive competence of the Commission, national judges[141], and hence, by analogy, arbitral tribunals are not competent to carry out that assessment.[142] Indeed, a finding that the measures undertaken by Spain constituted illegal State aid contrary to the principies of the Treaties may hinder the enforcement of any award as a violation of the law of the European Union.[143]

148. It so arises that should your Tribunal take the view that it has jurisdiction, and that in order to decide the dispute before it, it becomes necessary to analyse the compliance of the national RES support scheme with State aid rules, the Commission invites the your Tribunal to suspend the dispute until the Commission has taken a view on Spain's notification.

TimMAXIAN CHE
Agents of the Commission

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theory also for investment tribunals, against the position taken by the Czech Republic (*Eastem S11gar B. V. (Netherlands) v. The Czech Republic,* SCC Case No. 088/2004, at paragraphs 130-139). See also *Achmea B. V. v. The Slovak Republic,* PCA Case No. 2008-13 (formerly *E11reko B. V. v. The Slovak Republic).* Award of 26 October 20IO onjurisdiction, arbitrability and suspension, at point 292.

138 Order in *Elcogás SA,* C-275/13, EU:C:2014:2314.

139 ECJ, Judgment in *Athinaiki,* Case C-362/09 P, EU:C:2010:783. The Claimant may make submissions to the Commission expressing its point of view already at Uiis stage, and can seek review of any such decision in front of the EU courts.

140 ICSID Case No. ARB/07/19, *Electrabel* v *H1111gary* 4.137 to 4.142.

141 ECJ, Judgment in *De11tscl1e L1ifth a11sa,* EU:C:2013:755, C-284/12, paragraph 28; ECJ, Judgment in *SFEI and Others,* C-39/94, EU:C:1996:285, paragraph 42.

142 ECJ, Judgment in *SFEI and Others,* C-39/94, EU:C: 1996:285, paragraph 36.

143 *See,* e.g. PCA Case No. AA 227, *Yukos v R11ssia,* paragraph 1352: *"An investor who has obtained an investmellt in the host State 011/y by acting in badfaith or* ill *violatio11 of the lmvs of the host State . . . should 11ot be allowed to benefit from the Treaty." See a/so* ICSID Case No. ARB/03/24, *Plama v Bulgaria,* paragraphs 138, 140, and 143.

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