

ARTICLE

Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tensions

Gloria M. Alvarez¹

ABSTRACT

Investment arbitration in the European Union is currently experiencing one of its most crucial challenges. At EU level, there are different voices claiming that the applicability of jurisdictional and substantive investment protections in international agreements to resolve intra-EU disputes is no longer valid. This includes the intra-EU application of one of the most important sectorial international agreements: the Energy Charter Treaty. The main argument flagged by these voices is the existence of a conflict between the normative content of these international agreements and EU Law. Parallel to these criticisms, in the EU, there has been an unprecedented increase of intra-EU disputes in the energy sector, most of these brought under the ECT and yet to be decided under international arbitration. However, despite a general perception of an *asymbiotic* relationship between investment arbitration and the EU legal order, there has been limited evidence of a real normative conflict. In response, taking as example the intra-EU ECT cases, this article undertakes a cross-treaty study of the most frequently invoked treaty provisions and principles in the intra-EU ECT practice. The article aims to provide for a clearer evidence about the type of relationship that characterises the ECT and the TFEU. Contrary to the general perception, the article finds no evidence of a normative conflict between the ECT and the TFEU. The article concludes by redefining the relationship between the ECT and the TFEU as a relationship of policy tension.

I. INTRODUCTION

There are always two sides to every debate. However, criticisms of international investment law are so divergent that we have been forced to live in a multidimensional context. Observers of the international investment law system often have different appreciations of investment arbitration. Luckily enough, among the international investment community, there is a common agreement that the relationship between EU Law and intra-EU investment arbitration is a constant challenge. The challenge between investment arbitration and the EU legal order pertains policy and normative spheres. From a policy perspective, one of the most recent documents published by the European Commission re-confirms the EU's concerns about the incompatibility of international investment arbitration within the European Union, in particular the status of intra-EU international investment agreements as incompatible with EU Law.²

From a normative perspective, the current status of the relationship between the EU legal order and international investment arbitration has its origins in the proliferation of bilateral and multilateral agreements within Europe. In particular, in the EU, parallel to the proliferation of investment agreements, the EU's regulatory scope has expanded into new commercial areas, originally exclusively covered by international agreements.³

In this respect, EU commentators have claimed that the investment protections available in treaties signed by intra-EU parties are not exceptional, as the EU also offers similar protections. Hence, normative conflicts between EU Law and investment protection are possible and exist.⁴

To fully appreciate the normative relationship between investment treaty protections and the EU legal order, it is important to observe the history that precedes the intra-EU debate. First, it is necessary to look into the amendments brought by the Lisbon Treaty; Lisbon was created to amend the TFEU and the TEU, both of these treaties remain separate after these amendments. In particular, the TFEU brought some clarity to the expansive regulatory scope of the EU by explicitly including foreign direct investment (FDI) as part of the EU's common commercial policies. The inclusion of FDI into the TFEU means that all issues related to foreign investment between MS (including old and new MS) became exclusively the competence of the EU. As a consequence, it seemed that the protections given to intra-EU foreign investors in international agreements were no longer necessary or incompatible.⁵

In fact, since 2009 the European Commission has initiated a series of legal actions to manifest their position. First, the European Commission started proceedings against specific MS requesting them to terminate some of their intra-EU BITs given their incompatibility with EU Law. More recently, the European Commission has prohibited the enforcement of an intra-EU BIT award, under the argument that the payment of an awarded sum of money amounts to a violation of EU State-aid rules.⁶ However, unlike intra-EU BITs, the European Commission has refrained from initiating proceedings requesting to terminate the Energy Charter Treaty (ECT). Nonetheless, there is early evidence that the policy and regulatory phenomena that questioned the normative validity of intra-EU BITs has also affected the status of the ECT in the EU.⁷

At this point, it is also important to explain that the ECT has different characteristics from an intra-EU BIT. Firstly, the ECT is more than an investment treaty; it is a multilateral framework for energy cooperation which focuses in four areas: foreign investments, trade, transit and environmental protections.⁸ Secondly, unlike intra-EU BITs, the ECT was collectively signed by the ECSC, EURATOM and the European Communities, surviving today as ECT signatories the European Commission and EURATOM.⁹ Thirdly, the ECT is an international treaty which includes as its signatories not only all the Member States of the EU, but also includes the participation of other third states as signatories.¹⁰

¹ Dr Gloria M Alvarez can be contacted at gloria.alvarez@abdn.ac.uk or alvarez.gloriamaria@gmail.com

²European Commission, DG for Financial Stability, Financial Services and Capital Markets Union, 'Consultation Document: Prevention and amicable resolution of disputes between investors and public authorities within the single market' <https://ec.europa.eu/info/sites/info/files/2017-investment-protection-mediation-consultation-document_en_0.pdf> accessed 31 August 2017.

³In the words of Professor George Bermann: '*...EU Law and international arbitration law have long had their respective 'first principles' each developing its own in largely splendid isolation...*' George Bermann, 'Navigating EU Law and the Law of International Arbitration', (2012) 28 *Arbitration International* 3, 443.

⁴Juliane Kokkot and Christoph Sobotta, 'Investment Arbitration and EU Law', (2016) *Cambridge Yearbook of European Legal Studies*, 3-9.

⁵Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Law an Obstacle?', (2009) 58 *International and Comparative Law Quarterly* 2, 297.

⁶Case T-704/15 and T-694/15 *Micula and Others v The Commission*.

⁷*Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) paras 4.89-4.191.

⁸ ECT also covers portfolio investments, which are not foreign direct investments.

⁹ At the time of the signature of the ECT, the European Communities, ECSC, EEC and EURATOM had legal personality and capacity enter to international agreements with third states and other institutions. With the signature of the Treaty on European Union, European Community Law was subsequently referred as EU Law.

¹⁰ On December 2014, Italy notified of its withdraw from the Energy Charter Treaty, taking effect on the 1 January 2016, pursuant to ECT Article 47(3). See Energy Charter Secretariat, 'Italy at the Intentional Energy Charter', <<http://www.energycharter.org/who-we-are/members-observers/countries/italy/>> accessed 7 May 2016. For the purposes of this paper, the United Kingdom is one of the MS of the EU.

Technically, the ‘intra-EU’ aspect of the ECT has always existed, this is because the ECT was concluded by the then MS. This intra-EU aspect continued to exist with the accession of Central and Eastern European countries to the EU, countries which were already ECT members. Further, in the ECT there is no disconnection clause between its EU signatories.¹¹ As consequence, the ECT is binding between MS and the EU itself and therefore all signatories have agreed to assume obligations *inter-se*.¹²

More recently, the intra-EU aspect of the ECT has gained attention at the CJEU. An Opinion of Advocate General Wathelet briefly alluded to the lack of incompatibility of the ECT within the EU legal order; but failed at providing conclusive evidence.¹³ In this opinion, AG Wathelet highlights that -unlike intra-EU BITs¹⁴- in the ECT, all intra-EU parties have an equal footing and are bound by provisions of investment protection and the ISDS mechanism that operates in the ECT. Tantalizingly, Wathelet’s opinion attributes the ECT’s compatibility to the fact that so far, none of the ECT’s intra-EU Contracting Parties had sought the opinion of the CJEU. Thus, Wathelet seems to suggest that lack of suspicion on the ECT’s incompatibility is due to the fact that Contracting Parties have assumed that the ECT is compatible with the EU legal order.¹⁵

In numbers, the ECT Secretariat has registered a significant increase of intra-EU disputes, at about 60 cases out of 108 are currently registered.¹⁶ This is the background which incentivises the present discussion and aims to move from suspicions to a more objective analysis on the ECT status in the EU. This is, of course, a task with many dimensions which has at its onset already benefited from previous commentators.¹⁷ However, there is a need for further explanations and

¹¹ Maja Smrkolj, ‘The Use of the ‘Disconnection Clause’ in International Treaties: What Does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?’ <<http://ssrn.com/abstract=1133002>>, accessed on 14 November 2015, 1-15; Marise Cremona, ‘Defending Community interest: The duties of cooperation and compliance’ in Marise Cremona and Bruno De Witte (eds.), *EU Foreign Relations: Law Constitutional Fundamentals* (Hart 2008), 125-170 and Jan Klabbers, ‘Safeguarding the organizational *acquis*: The EU’s external practice’, (2007) 4 *International Organizations Law Review*, 57.

¹² Andres Delgado Casteleiro, ‘EU disconnection clauses and Energy Charter Treaty’, presentation given in Queen Mary, University of London Conference: The EU and investment arbitration under the Energy Charter Treaty, 11 – 12 February 2016 (London). The lack of disconnection clause in the ECT was confirmed recently in *Infrastructure (G.P.) Limited and RREEF v Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (6 June 2016) para 81 and *Charanne and Construction Investments v Kingdom of Spain*, SCC Case No. V 062/2012, Award (21 January 2016), 438.

¹³ Opinion of Advocate General Wathelet 19 September 2017, ECLI:EU:C:2017:699.

¹⁴ Previously, arbitration tribunals have also attempted to implement compatibility analysis between intra-EU BITs and EU Law substantive protections in investment treaties, for example: *Československa obchodni banka A.S.(CSOB) v Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) this is case under the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16, Arbitration Award (27 September 2006), this a case under the Agreement between the Government of the Hungarian People’s Republic and the Government of the Republic of Cyprus on Mutual Promotion and Protection of Investment and *CME Czech Republic BV v Czech Republic*, Ad hoc—UNCITRAL Arbitration Rules, Arbitration Award (13 of September 2001).

¹⁵ Thank you to the ICSID reviewers for this suggestion.

¹⁶ For a comprehensive list of all the pending cases under the ECT see International Energy Charter, ‘List of all Investment Dispute Settlement Cases’ <<http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/>> accessed 20 January 2018.

¹⁷ Jan Kleinheisterkamp, ‘European Policy Space in International Investment Law’, (2012) 27 *ICSID Review* 2, 416-431, Jan Kleinheisterkamp, ‘Investment protection and EU Law: The intra-and extra- EU dimension of the Energy Charter Treaty’, (2012) 14 *Journal of International Economic Law* 1, 85-109 and Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011) 89–103, Christer Söderlund, ‘The Future of the Energy Charter Treaty in the context of the Lisbon Treaty’, Graham Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (Juris 2011), 99-125

clarifications. Therefore, the analysis below centres the discussion on a comparative analysis of the most frequently invoked treaty provisions in the intra-EU ECT practice. The aim of this paper is to clarify and define the type of relationship that characterises the ECT within the EU legal order.

Firstly, the article summarises the different policy and regulatory approaches to the energy sector under EU Energy Law and the ECT, respectively. Secondly, the paper discusses the notion of normative conflict in public international law. Thirdly, there is a jurisdictional and substantive comparative analysis between the most frequently invoked treaty provisions in the TFEU- ECT relationship. The last section of the article reflects on the intra-EU applicability of the ECT and claims that the type of relationship that characterises the ECT and the TFEU is not a relationship of conflict, but rather a relationship of tension.

II. THE POLICY SPHERE

For more than twenty years, the ECT has been the only multilateral investment agreement covering energy investments between an investor from a EU Member State (MS) in another MS. However, parallel to the existence of the ECT, European countries were handcrafting an unprecedented regional union with ambitious goals. More than twenty years have passed after the creation of the ECT, and the EU has achieved to create a sophisticated and complex legal union binding on twenty-eight European Countries. Coincidentally, all of them are also signatories of the ECT.¹⁸

Historically, the ECT and the EU have shared the same policy (concerns) and objectives of achieving peace and prosperity by economic agreements where steel and coal were key natural resources to be controlled. As a matter of fact, the EU was founded upon two energy related treaties.¹⁹ The EU has not only expanded geographically, but it has also expanded its regulatory scope. The EU's regulatory expansion has also created a regulatory 'spill' on the regulatory space of its MS. For example, the CJEU case law has worked on ensuring that EU market participants enjoy fundamental market freedoms; where MS national laws cannot contravene the principles of free movement of goods, services, capital and workers.²⁰ The CJEU has also established a formula whereby EU traders could challenge national –more restrictive– laws, which are capable of hindering, directly or indirectly, actually or potentially, intra (EU) trade.²¹ Nonetheless, through the evolution of CJEU case law, there is a more balanced approach between trade freedoms and MS' regulatory powers; this is because the EU has also introduced mechanisms to test the application of public policy restrictions.²²

Regarding investment treaties, the CJEU has protected EU regulatory interests in light of its international obligations. For example, at the request of the Commission, the CJEU has

¹⁸ See n 10.

¹⁹ Kim Talus and Raphael Heffron, 'Energy Law in the 21st Century: A Paradigm Shift', (2016) 9 *Journal of World Energy Law and Business* 3, 3.

²⁰ Jan Kleinheisterkamp, 'European Policy Space in International Investment Law', See (n 17) 416–431 and Case 26/62 NV, *Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I, 12.

²¹ Case C- 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR-82, para 5.

²² The counter-balance between EU freedoms and regulatory powers from MS is in principle based on mandatory requirements related to the particular effectiveness of fiscal supervision, protection of public health, fairness of commercial transactions and the defence of the consumer. Joined Cases C–267/91 and C–268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1991] ECR I–6097, para. 16 and Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, para. 8 and Akaterina Titi, *The Right to Regulate in International Investment Law, Studies in International Investment Law* (Nomos 2014) 57.

reviewed the compatibility of some BITs in accordance to Article 307 EC Treaty.²³ The CJEU concluded that these three MS infringed their obligations in relation to free transfers of capital (ex Articles 57(2), 59 and 60(1) TEC).²⁴ This transfer clause guarantees that any transfer of capital (i.e. profits, liquidation sums, loan reimbursement, expense payments, etc.) connected to the investment should be made without undue delay.

In this case, the Commission submitted that this free transfer of capital provided in the BITs is comparable with TEC Article 56, which regulates free movement of capital. The difference is that in order to preserve Article 56, the EU legal order also imposes some restrictions to regulate economic and monetary difficulties.²⁵ Additionally, the CJEU can also impose free movement of capital restrictions in order to freeze funds in the fight against terrorism.²⁶ Moreover, in the *Pringle* Case the CJEU discussed that the primacy of EU Law requires that a MS cannot evade its EU Law obligations in light of its international obligations.²⁷ In the same way the EU respects the competences allocated to their MS, which means that international law obligations may not:

*“...adversely [...] affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, which must be assured by the Court of Justice...”*²⁸

In this respect, some commentators could suggest that CJEU case law could provide for the much-needed guidance on how EU Law may interact with other international agreements such as the ECT.²⁹ Under CJEU, landmark cases like *Kadi* have concluded that EU is an autonomous legal order which is different from national and international law. Most importantly, it has been also concluded that the EU Treaties, including the TFEU, are more than international law.³⁰ Also, the fact that the CJEU has the ultimate competence on the interpretative authority on EU law, leads to a couple of practical reflections. Firstly, the CJEU gives priority to EU Law when there

²³ Case C-205/06 *Commission of the European Communities v Republic of Austria* [2009] ECR I-1301, paras 16-23, Case C-249/06 *Commission of the European Communities v Kingdom of Sweden* [2009] ECR I-1335, paras 16-23 and Case C-118/07 *Commission of the European Communities v Republic of Finland* ECR [2009] I-10889, paras 16-23. Article 307 EC Treaty (now Article 351 TFEU) provides that Member States shall take all appropriate measure and steps to eliminate incompatibilities between EU Law and other International Treaties signed by Member States.

²⁴ European Commission, Court of Justice of the European Union on the Free Movement of Capital <http://ec.europa.eu/internal_market/capital/framework/court/index_en.htm> accessed 4 October 2017.

²⁵ Article 56 EC Treaty prohibits any restrictions of capital movement or payments between Member States themselves or with third countries.

²⁶ Nikos Lavranos, ‘Commission v Austria and Sweden’, (2009) 103 *The American Journal of International Law*, 718; Case T-306/01 *Ahmed Ali Yusuf and Al Brakaat International Foundation v Council and Commission*, para. 146 and Steffen Hindelang, *Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, (2012) 39 *Legal Issues of Economic Integration* 2, 201.

²⁷ Case C-370/12 *Thomas Pringle v Government of Ireland and The Attorney General* [2002] ECR I-756

²⁸ Opinion 1/91 Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area (‘EEA I’) (1991) ECR I-6079, paras 35 and 21 and Opinion 1/09 Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties [2011] ECR I-0000, 67.

²⁹ It is outside the scope of this article to study the hierarchical nature of EU Law according to the CJEU practice. However, it is important to mention for the EU courts it is undisputable that EU Law should be distinguished from public international law, but rather should be seen as a type of national and/or municipal nature which fundamentally has a constitutional nature. For more see C. Timmermans, ‘The EU and Public International Law’, (1991), 4 *European Foreign Affairs Review*, 180-181.

³⁰ Katja Ziegler, ‘International Law and EU law: Between Asymmetric Constitutionalisation and Fragmentation’ in Alexander Orakhelashvili, *Research Handbook on the Theory and History of International Law*, (Elgar 2011), 268 and Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds.), *International Law as Law of the European Union* (Martinus Nijhoff 2011), 1-6.

is a conflict of supreme authority between international law, which raises potential issues about the hierarchy of MS' international obligations under EU Law.³¹

This potential scope for conflict – to some extent – has diminished the international role of its MS as sovereign entities with international legal capacity.³² In the case of the ECT, MS and all other signatories expressed their regulatory interests which were proportionally calibrated to attract foreign investment and protect their investors abroad. In doing so, MS have confined and compromised their policy space. Therefore, what it used to be the MS' power to make-or-break international investments has now been debilitated by the expansion of the EU's regulatory scope.

As with the ECT and BITs, the EU legal order creates rules and laws for the treatment of trade and investment; a task which has contributed to the regional development of trade in the EU, but also created a misunderstanding on the existence how the TFEU has displaced the intra-EU aspect of the ECT.³³

III. THE ECT AND EU ENERGY LAW

The amendments brought by the TFEU also included the explicit inclusion of energy as a shared competence. Unlike FDI and the interpretation of EU Law, where the EU has exclusive competence, energy is a shared competence between the EU and its MS.³⁴ In this respect, from a policy perspective, EU Energy Law has evolved at regulating energy consumption through the promotion of trade, interconnection between MS, clean energy sources and energy efficiency techniques aiming to secure independently its own energy demand. In contrast, the ECT places foreign investors and states in an international law playing field, which provides for a non-discriminatory cross border co-operation. Therefore, there are different agendas and objectives in EU Energy Law and the ECT, which confirms that the energy sector is of a multidimensional nature, and therefore it is difficult to regulate the entire energy sector into one single legal framework. The many commercial, legal and geopolitical aspects orbiting around energy transactions cannot be tightened up within one single normative body of law. Any attempt to do so will inevitably present normative deficiencies.

In fact, EU Energy Law commentators have defined the ECT as a cross-European initiative, which ensures a level playing field based on non-traditional EU principles that generate and promote legal uniformity and consensus on energy security policies.³⁵ In particular, the ECT has been recognised as the only major multilateral agreement, which builds a legal framework for global energy security based on the principles of transparency, open and -most importantly- non-discriminatory markets.³⁶ Moreover, as discussed below, the ECT is the only energy cross-border instrument that sets compensation as the key condition for the legality of an expropriation. In

³¹ Albert Posch, 'The Kadi case: Rethinking the Relationship between EU Law and International Law?', (2009) 15 The Columbia Journal of European Law Online, 1-9.

³² Karen Alter, 'Who are the Masters of the Treaty? European Governments and the European Court of Justice', (1998) 52 International Organization 1, 121-147.

³³ European Commission, 'EU-Canada Comprehensive Economic and Trade Agreement (CETA) Draft Agreement' <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>>, accessed 29 April 2016 and European Commission, 'Transatlantic Trade and Investment Partnership (TTIP)' <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1467>> accessed 29 April 2017.

³⁴ "... under Article 4(1)(i) TFEU energy in its wide sense, is expressly referred to as a matter of shared competence..." in Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing energy security through an EU Constitutional perspective', (2013) 36 Fordham International Law Journal 5, 1245.

³⁵ Angus Johnston and Guy Block, *EU Energy Law* (Oxford University Press 2012), 283 and Martha Roggenkamp, Catherine Redgwell, Annita Rønne and Iñigo del Guayo, *Energy Law in Europe: National, EU and International Regulation* (Oxford University Press 2016), 141.

³⁶ Johnston and Block (n 35) 84.

addition, energy treaties have also recognised the uniqueness of the ECT as an international agreement which offers an alternative dispute mechanism (i.e. international arbitration and/or conciliation), which builds confidence at ensuring legality by reducing the risks involved in foreign energy investments.³⁷

In contrast to the policy reasons that motivated the creation of the ECT, the EU has a diverse set of reasons that motivated the regulation of the energy sector. For example, while some MS needed to prioritise their public interest goals such as environmental protections, others were more concerned about liberalising the energy market and securing energy supply in a cost-effective manner.³⁸ Therefore, EU Energy Law presents an important legal uniformity challenge, as there are twenty-eight MS with diversity in the legal and policy energy frameworks.³⁹ For example, each MS gives a different treatment to energy investors (i.e. France, Greece and Cyprus still have a large degree of state involvement, as well as a largely vertically integrated market), which presents a non-equal treatment in each MS.

This diverse nature of electricity market producers in the EU has fuelled national energy regulators to make policy choices.⁴⁰ These policy choices seem to oscillate from the private/state owned challenges of the internal energy market to the achievement of environmental targets and goals. In this respect, EU environmental goals and regulation do not draw any distinctions about the ownership of the utilities. Consequently, this has forced the EU to reduce its policy priorities on the security supply and the promotion and generation of electricity from renewable sources to fight climate change.⁴¹ For example, the most important regulatory success of the EU is the Emissions Trading System (EU ETS), which is the key tool to reduce CO₂ emissions by means of a ‘cap and trade’ system, which operates in the MS.⁴² In addition to EU ETS, the energy regulatory actions of the EU are also found in the 2020 climate and energy package which aims to reduce 20% of the EU’s greenhouse emissions, raising consumption from renewable sources to 20% and therefore improving efficiency by 20%.⁴³ However, despite the 2020 Energy package ambitions, this does not cover entirely all the inherent elements of the energy sector, or the whole of the EU energy market regulation.⁴⁴

³⁷ Ibid, 291.

³⁸ Angus Johnston, ‘The Future Shape of EU Energy Law and Policy’ in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleonor Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Allan Dashwood*, (Hart 2011), 398. Without a successful outcome, the EU aimed to fully integrate the electricity and gas markets of the twenty-eight Member State by 2014 in ‘Energy Roadmap 2050’ <<http://www.roadmap2050.eu>>, accessed 20 September 2017.

³⁹ Francis McGowan, ‘Can the European Union’s Market Liberalism Ensure Energy Security in a Toe of “Economic Nationalism”?’ (2008) 4 *Journal of Contemporary European Research* 2, 90-106.

⁴⁰ “... *The UK provides a case point, having moved during its EU membership from vertically integrated and publicly ... while France maintained both a strong degree of vertical integration and state involvement in the energy sphere...*” in Angus Johnston, See (n 38) 399. See also Dominique Finon, ‘French Electricity Policy: The Effectiveness and Limitations of Colbertism’ in Francis McGowan (ed.), *European Energy Policies in A Changing Environment*, (Springer 1996), 21-56.

⁴¹ European Commission, ‘Towards A European Strategy for the Security of Energy Supply’ <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52000DC0769>> accessed 23 April 2017, 769.

⁴² European Commission, The EU Emissions Trading System is binding for all MS in the form of a Directive and is the cornerstone of the European Union’s policy to combat climate change in: European Commission, ‘The EU Emissions Trading System (EU ETS)’, <http://ec.europa.eu/clima/policies/ets/index_en.htm> accessed 17 January 2017.

⁴³ European Commission, ‘The 2020 Climate and Energy Package’ <http://ec.europa.eu/clima/policies/package/index_en.htm> accessed 17 January 2017.

⁴⁴ “... *Energy is a multidimensional matter that needs regulation coverage in production, transport, distribution, sale and consumption of energy...*” in Leal-Arcas and Filis (n 34) 1235.

EU energy policy choices have not been exclusively driven by common commercial policies, but also by the fact that certain energy competences are retained by MS. The immediate consequence of the EU not having exclusive competence on the energy sector is that MS can legislate where the EU cannot. This can potentially segregate certain aspects of the EU energy policy internally and externally. Therefore, one could argue that at least for the investment dimension of each MS, the ECT reaches those corners where EU Energy Law cannot. Particularly, at the post-investment stage where under the ECT, MS have agreed to grant specific treatment to investors' nationals from another MS. Moreover, the ECT is able to supplement the energy relationships between its intra-EU signatories where the energy policy space of the EU has not exercised its shared competence.⁴⁵ To the date, most of the debate on the applicability of the ECT to resolve cross border intra-EU energy disputes has predominately taken place in practice. The legal transformation of the EU Energy Law can be seen on the type of disputes which have arisen between MS and energy investors. As explained earlier, the effects of decentralisation and new clean energy policies have shaped the type of intra-EU ECT disputes.

For example, *AES Summit* and *Electrabel* were only the beginning of a significant increase of intra-EU ECT disputes.⁴⁶ The increase of intra-EU ECT disputes could be attributed particularly to two events. First, MS using preferential tax schemes to accelerate the decentralisation of their own electricity markets had to discontinue this special treatment in order to comply with the new EU laws on State-aid. Secondly, MS national decarbonisation targets aiming to promote clean energy sources heavily relied in offering to foreign investors special schemes of national feed-in tariffs (FITs). FITs as clean energy strategies were ambitious and did not foresee the financial and technological challenges the renewable industry represents. As consequence, national schemes went beyond the financial capabilities of some MS and FITs had to be withdrawn from foreign investors.⁴⁷ The publicly available cases of *Charanne v Spain*, *RREEF v Spain* and *Eiser v Kingdom of Spain* illustrate these regulatory changes on FITs.⁴⁸

⁴⁵ "...The TFEU Art 2(2) also states that in cases where the EU shares competence in a specific area with Member States, the latter shall be able to exercise their competence to the extent that the Union has not exercised competence in a specific area..." in Sujitha Subramanian, 'EU Obligation to the TRIPS Agreement: EU Microsoft Decision', (2010) 21 *European Journal of International Law* 4, 997-1023.

⁴⁶Case C-205/06 *Commission v Austria* [2009] ECR I-1301, Case C-249/06 *Commission v Sweden* [2009] ECR I-1335, Case C-118/07 *Commission v Finland* [2009] ECR I-10889 and Panos Koutrakos, Case C-205/06, *Commission v Austria*, Judgement of 3 March 2009; Case C-249/06, *Commission v Sweden*, Judgement of the Court of 3 March 2009, (2009) 46 *Common Market Law Review* 6, 2060. Decision C (2014) 3192 final of 26 May 2014 issued in Case State-aid SA.38517 (2014/NN) - ordering Romania to suspend any action which may lead to the execution or implementation of the award of 11 December 2013 in the case *Ioan Micula, Viorel Micula and others v Romania* (ICSID Case No. ARB/05/20) and Action brought on 2 September 2014 — *Micula a.o. v Commission* (Case T-646/14) (2014/C 439/40) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014TN0646>> accessed 5 May 2017.

⁴⁷ United Nations Environment Programme (UNEP), *The Global Financial Crisis and its Impact on Renewable Energy Finance*, <http://www.unep.org/pdf/dtie/Study_Financial_Crisis_impact_on_RE.pdf> accessed 17 October 2017 and Julien Chaisse, 'Renewables re-energized? The Internationalization of Green Energy Investment Rules and Disputes', (2016) 9 *Journal of World Energy Law and Business*, 269-281

⁴⁸ *Charanne v Spain*, *RREEF v Kingdom of Spain* See n 12 and *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award (4 May 2017).

IV. THE NORMATIVE SPHERE

DEFINING THE NOTION OF CONFLICT IN PUBLIC INTERNATIONAL LAW AND IN THE INTRA-EU ECT CONTEXT

From Jenks to Pauwelyn, scholarship has often devised rules aiming to resolve tensions and conflicts between international treaties.⁴⁹ Under public international law, a normative conflict has been generally understood as the impossibility of simultaneous performance of two norms which share the same subject-matter.⁵⁰

Although the scope of this article is not to analyse the existent practice and rules used to deal with the particular interactions of treaty conflicts, but rather to determine the type of relationship between the ECT and the EU legal order; it is noteworthy to mention certain interpretation approaches used in the intra-EU treaty practice. Intra-EU arbitral tribunals have looked into principles of public international law in an attempt to approach the intra-EU ‘issue’.

For example, according to VCLT Article 31(3)(c), EU Law could be included as “*relevant rule of international law applicable in relations between the parties*”.⁵¹ This approach could allow for a better understanding of the role of EU law in the context of intra-EU ECT investment disputes. Nonetheless, this approach is yet to be further discussed in practice and so far, there are some initial indications to incorporate a more systemic integration of EU Law in the intra-EU discussion. In *Eureka* the tribunal upheld that not only is the tribunal not precluded from considering EU Law but it can apply and take into account EU Law as part of the applicable law to the parties, either under German Law, the BIT or otherwise.⁵² In the particular context of ECT disputes, there is an explicit incorporation of Article 31(3)(c) into the text of the ECT, and it is precisely ECT Article 26(6) which recognises the principle of systemic integration. According to the *Electrabel* Tribunal, ECT Tribunals have the capacity to decide on the dispute in accordance with the ECT, applicable rules and principles of international law, which includes EU Law.⁵³

In this context, it should be also mentioned that some commentators believe that VCLT Article 59 deserves to be discussed. It is noteworthy to remember, that VCLT Article 59 is a provision which deals with the effect of subsequent treaties on *the same subject-matter* (emphasis

⁴⁹ Wilfred Jenks, ‘The Conflict of Law-Making Treaties’, (1953) 30 *British Yearbook of International Law*, 403-404. In this article Jenks describes conflicts between international treaties as an ‘imperfection’ of the international legal order, which is consequence of a lack of an unified legislative process in international law. On this issue see these general studies: Mirja Ciesiolka, ‘A Contribution to Norm Conflict Resolution in a Fragmented International Legal Order’, *Schweizer Studien zum Internationalen Recht – Etudes Suisses de Droit International* (2015), 1-11; Mads Andenas and Eirik Bjorge, *A Farewell to Fragmentation* (Cambridge University Press 2015) 1-36; Robert House, ‘Multi-Sourced Equivalent Norms: Concluding Thoughts’, in Tomer Broude and Yuval Shany *Multi-Sourced Equivalent Norms in International Law* (Hart 2011); M. Forteau, *La Fragmentation du Droit Applicable aux Relations Internationales – Regards Croisés d’internationalistes Privatistes et Publicistes*, 27 *Cahiers Internationaux* (Pedone 2011), 143- 163; Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge Studies in International and Comparative Law 2003) 5-24; Ahmad Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, (Kluwer Law International 2015), 150. Susan Franck, ‘Integrating Investment Treaty Conflict and Dispute Systems Design’, (2007–2008) 92 *Minnesota Law Review*, 161-230; Anne van Aaken, ‘Fragmentation of International Law: The Case of International Investment Protection’, (2008) 17 *Finnish Yearbook of International Law*, 91-130; and Eirik Bjorge, ‘The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?’ in Mads Andenas and Eirik Bjorge, *A Farewell to Fragmentation*, (Cambridge University Press 2015), pp. 498-535.

⁵⁰ Pauwelyn (n 49) 165.

⁵¹ VCLT Article 31(3)(c).

⁵² Phillip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart 2014) 246.

⁵³ *Electrabel v Hungary* (n 7) para. 4.110

added). However, there are technical and substantive reasons to explain why VCLT Article 59 is not necessary a provision that should be analysed in detail in the intra-EU ECT context. The technical reason is that, for this provision to operate, VCLT Article 59 requires the parties' manifest intention to terminate the treaty. Currently, the EU sees in the ECT an important tool that promotes a stable energy framework for energy and transit, and there is no current official consideration that demonstrates that the EU wishes to terminate the ECT. Secondly, is that the effect of VCLT Article 59 is subject to the condition of satisfying the same subject matter requirement in both treaties, as discussed in detail below, the TFEU and the ECT do not cover the same subject matter.⁵⁴

Therefore, for proposes of this article, in order to construct the notion of conflict in the intra-EU ECT context, Pawelyn's suggestion is used as guidance. More concretely, for a normative conflict to exist between the ECT and the TFEU, this would require that these two frameworks cover the same subject-matter and compliance with the ECT or the TFEU treaty will automatically impede the performance of the other. In contrast, if the ECT and the TFEU do not cover the same subject matter and they can be performed at the same time, it could be argued that there is no real normative conflict between the ECT and the TFEU. Instead, it would perhaps worthwhile to study if the relationship between the ECT and the TFEU is a relationship of tension that arises from the regulatory expansion of EU Energy Law into new areas which originally were exclusively covered by the ECT.

ANALYSIS BETWEEN THE TFEU AND THE ECT

A. Jurisdictional Analysis

In the context intra-EU ECT arbitration, it has been previously argued that the jurisdiction of intra-EU ECT tribunals clashes with the jurisdiction of EU courts. This apparent clash gives the perception that public resources and public regulations are applied into a system that excludes the interference of the EU judicial system when intra-EU parties are on a dispute.⁵⁵

First, it is important to understand how jurisdiction is differently established under the ECT and in the EU legal order. Under the ECT, Article 26 is designed to cover disputes arising from an alleged breach of ECT's substantive protections (Part III) of the Treaty, between an investor from a Contracting Party against a host State from another Contracting Party, concerning an investment of the former in the area of the latter. Under the TFEU, an investor has no legal standing to directly sue a MS in the CJEU. There is, however, under TFEU Article 344, the exclusive jurisdiction of the CJEU to decide on disputes amongst its MS in relation to the application an interpretation of EU Law.⁵⁶

⁵⁴ This Chapter article does not attempt to assess the substantive conclusions produced by arbitral tribunals on treaty conflict but aims to assess the type of relationship between the ECT and the TFEU. The scope of this article is exclusively limited to question if there is a conflict between the ECT and the TFEU. Tasks to alleviate tension or to resolve conflicts between international treaties are not always delegated to the discretion of international tribunals. As a matter of fact, most of the modern treaties have created internal rules in case of tension or conflict with another international treaty, which is the case of the ECT and the TFEU, in the ECT is Article 16 and in the TFEU is Article 351.

⁵⁵ Jan Kleinheisterkamp (n 17) 101.

⁵⁶ In the MOX Plant the CJEU's interpretation on TFEU Article 344 has made clear that it only applies to disputes between MS. Daniel Bondansky and Cesare Romano, 'European Communities v Ireland. Case C-459/03. Judgment' (2007) 101 *American Journal of International Law* 1, 171-178 and Angelos Dimopoulos, 'The validity and applicability of international investment agreements between EU Member States under EU and international law' (2011) 48 *Common Market Law Review* 1, 86.

It is also relevant to note, that the exclusion of the EU judicial forum from ECT arbitration is supported by the absence of an ECT provision requesting disputing parties to exhaust local remedies.⁵⁷ This means that ECT jurisdiction carries the possibility of arbitration tribunals applying provisions of EU Law and thus intruding into the exclusive jurisdiction of the CJEU.⁵⁸

In response to the claim that ECT arbitration conflicts with the EU judicial system, there are three main arguments. First, there is no treaty provision in the entire EU legal order that explicitly prohibits arbitration between their investors from one MS against another MS. Secondly, the available TFEU provisions addresses disputes between a MS-MS relationship but not the investor-MS relationship.⁵⁹ Thirdly, the applicability of EU Law plays a limited role at the intra-EU ECT jurisdictional stage, which means that in order to establish jurisdiction on an intra-EU ECT dispute it would be sufficient for the arbitral tribunal to look into the requirements of the legal instruments bestowing consent, which is rather limited on issues of the applicable law. In other words, the jurisdictional scope of intra-EU ECT jurisdiction does not need to cover an assessment on the potential limitations EU Law could represent.

Also, there are some additional, but relevant, arguments to the perception that EU Law runs the potential risk of being interpreted without the input of the CJEU. This is predominantly because under TFEU Article 19 only national courts in the EU have the competence to request preliminary rulings to the CJEU. Accordingly, intra-EU arbitration tribunals –not being national courts in the EU– are not competent to refer to the CJEU questions on the interpretation of the *acquis*. This limitation has raised the critique that investment arbitration prevents relevant questions of EU Law from being submitted to the CJEU.⁶⁰

For example, in the intra-EU BIT case *Eastern Sugar BV v. Czech Republic*, the Respondent requested to the arbitration tribunal to refer questions about the interpretation of EU Law to the CJEU under Article 267 TFEU.⁶¹ The Czech Republic submitted that it was necessary to know the CJEU’s opinion on the validity of the Netherlands-Czech Republic BIT. In response, the *Eastern Sugar* tribunal found that referral to the CJEU was not a route for the arbitration tribunal even if it has a seat in an MS. In more detail, an argument which claims that intra-EU ECT tribunals cannot benefit from the input of the CJEU presupposes that investment tribunals inevitably would have to interpret EU Law. However, as explained below, EU Law might not necessarily play a relevant role in the considerations taken by an intra-EU ECT tribunal when establishing its own jurisdiction.

⁵⁷ Under ECT Article 26(2)(a) there is a fork in the road provision. Nonetheless, there is no requirement for the exhaustion of local remedies according to the ECT dispute settlement clause, see in Malduva Sattorova, ‘Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement and Change in Investment Treaty Law’ (2012) 39 *Legal Issues of Economic Integration* 2, 223-248. Also, under the ECT Annex ID, the European Commission (European Communities) has not given its unconditional consent to the submission of international arbitration. This means that any case brought by a foreign investor against the EU falls under ECT Article 26(2)(a) and there is no consent to submit the dispute to international arbitration. See Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, Official Journal of the European Communities, 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects.

⁵⁸ Nikos Lavranos, ‘Member States BITs: Lost in transition?’ <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935625> accessed 20 May 2017 and Roberto Baratta, ‘National Courts as “Guardians” and “Ordinary Courts” of EU Law: Opinion 1/09 of the ECJ’, (2011) 38 *Legal Issues of Economic Integration* 4, 297-320.

⁵⁹ TFEU Article 344.

First, in order to establish jurisdiction, international investment tribunals look into the legal instrument of the parties' consent. In the case of intra-EU ECT disputes this instrument is the ECT, where EU Law bears limited relevance.⁶² More precisely, the ECT being the instrument of consent of between the disputing parties gives the basis to make any jurisdictional assessment in accordance with the applicable law stipulated in the ECT. In intra-EU ECT disputes, the ECT as the treaty conferring jurisdiction is also directing the arbitration tribunal to apply a specific body of law. This is according to ECT Article 26, which requires that the arbitration tribunal should rule "...in ***accordance with this Treaty (emphasis added)*** and the applicable rules and principles of international law...".

The practical consequence of ECT Article 26 is that an arbitration tribunal should apply the interpretation of the treaty (i.e. ECT) as well as the principles of international law.⁶³ Therefore, intra-EU ECT tribunals are not directly bound to interpret EU Law when rendering a jurisdictional decision, simply because jurisdiction is established on the basis of the treaty giving consent. Moreover, even if the role of EU Law would have any relevance at the jurisdictional stage of the arbitration process there are certain control mechanisms that could operate. For example, an ECT (non-ICSID) award could be subject to challenge at a national court under the grounds that the award presents violations against the EU legal order.⁶⁴ While in ICSID proceedings, parties could seek the annulment of an intra-EU ECT award if there is a breach of EU Law, under the basis that the tribunal exceeded its powers.⁶⁵ Secondly, and most importantly -ECT arbitration tribunals do not circumvent the application of EU Law- 'circumvent' implies that there is an obligation of arbitration tribunals to apply EU Law, which from a reading of ECT Article 26 there is no such obligation.⁶⁶

Second, although there is a compelling argument about the lack of direct access to CJEU preliminary rulings, intra-EU ECT tribunals have some procedural options worthwhile of exploring. In this respect, it has also been argued that the lack of access to preliminary rulings

⁶⁰ In the Commission of the European Communities v Republic of Ireland (EC v Ireland) C-459/03, in this case the dispute started during the construction of the plant that raised Ireland's concerns about the radioactive contamination this plant could have caused. In particular, the Claimant (Ireland) alleged that the UK violated basic UNCLOS obligations including the one of carry out an environmental impact assessment. EC v Ireland is a parallel procedure from the arbitration case, where the European Commission brought a claim against Ireland to the Court of Justice of the European Union (CJEU). The Commission alleged breach of Article 292 of the EC Treaty and Article 193 of the EURATOM Treaty because at the moment the dispute was submitted to arbitration; Ireland failed to comply with the exclusive jurisdiction of the CJEU on the application of EC Law. See for example Hindelang (n 21), 201.

⁶¹ On the 10 May 2016 the Supreme Court of Germany requested to the Court of Justice to the European Union to clarify the status of intra-EU BITS in the case of *Eureko (Achmea) v. the Slovak Republic* <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Seite=0&nr=74606&pos=1&anz=82>> accessed 3 October 2017.

⁶² Christian Tietje, 'The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States, Essays on Transnational Economic Law' <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft78.pdf>> accessed 22 May 2017.

⁶³ Some authors have reached the same conclusion: Richard Happ, 'The Legal Status of the Investor vis-vis the European Communities: Some Salient Thoughts', (2007) 74 International Arbitration Law Review, 74-81; Ole Spiermann, Applicable Law, in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), 89-118 and Laurence Shore, The jurisdiction problem in the Energy Charter Treaty claims, (2007) International Arbitration Law Review <<http://www.gibsondunn.com/publications/Documents/Shore-TheJurisdictionProblemInEnergyCharterTreatyClaims.pdf>> accessed 3 October 2017.

⁶⁴ *Micula & Ors v Romania & Anor* [2017] EWHC 31 (Comm)

⁶⁵ ICSID Convention Article 52(1)(b) and *Ioan Micula, Viorel Micula and Others v Romania*, ICSID Case No. ARB/05/20, Decision on Annulment (26 February 2016).

⁶⁶ In the intra-EU ECT practice, arbitral tribunals have interpreted EU Law in three different ways: as national law (*Eureko v Slovak Republic*), as international law (*Electrabel v Republic of Hungary*) and as a matter of fact (*AES Summit v Republic of Hungary*).

carve out relevant issues that can affect EU Law matters from the supervision and influence of the EU judicial control which has left out the participation of the EU internal judicial mechanism.⁶⁷ However, access to preliminary rulings is not limited to a simple dichotomy. This is because reference to preliminary rulings to the CJEU is still discretionary, reference is not mandatory for MS national courts every time there is an issue about the interpretation of EU Law.⁶⁸

Under national law of the MS, there are some other options to be explored which might allow intra-EU tribunals to refer questions of EU Law to the CJEU.⁶⁹ There is, for example, Section 45 of the English Arbitration Act, where at the request of one of the disputing parties, an English court may determine any question of EU Law arising during the proceedings. This route could be potentially used to refer preliminary questions to the CJEU via English Courts, when the seat of arbitration takes place in England.⁷⁰

⁶⁷ Jan Kleinheisterkamp, See (n 17) 85-109, Dimopoulos (n 44), 63,87 and 91 and Phillip Strik, 'From Washington with Love- Investor-State Arbitration and the Jurisdictional Monopoly of the Court of Justice of the European Union', 12 Cambridge Yearbook of European Legal Studies, 426. The contrary position would be the one taken in *Eureko B.V. (Achmea) v The Slovak Republic*, UNCITRAL - PCA Case No. 2008-13, Award on Jurisdiction (26 October 2010) para 274, Markus Burgstaller, *European Law and Investment Treaties*, (2009) 26 Journal of International Arbitration 2, 181-191 and Hindelang (n 21) 198.

⁶⁸ "... Legal theory of *acte de claire* proves that there is no automatic reference to refer any question of EU Law ..." in *Electrabel v Hungary*, See n 7, para. 4.148 and *Eureko (Achmea) B.V. v The Slovak Republic*, PCA Case No.2008-13, Award on Jurisdiction (26 October 2010), para 282.

⁶⁹ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* (1999) ECR I-3055. Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*. (1982) ECR 1095, paras 10-13, Konstanze Von Papp, 'Clash of 'Autonomous Legal Orders': Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? - A Plea for Direct Referral from Investment Tribunals to the ECJ', (2013) 50 *Common Market Law Review* 4, 1039-1081, where the author suggested and explored some possibilities of an Arbitration Tribunal to refer preliminary rulings to the CJEU, John Gaffney, 'Should Investment Treaty Tribunals Be Permitted to Request Preliminary Rulings from the Court of Justice of the European Union?', (2013) 10 *Transnational Dispute Management* 2, 1-14 and Miloš Olík and David Fyrbach, 'The Competence of Investment Arbitration to Seek Preliminary Rulings from European Courts', (2011) *Czech Yearbook of International Law*, 191. See for example the CJEU Opinion 2/13, 18th December 2014. CJEU's Opinion 2/13 is about the draft agreement on the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which highlighted its concern about the fact that accession to the ECHR: "...could affect the autonomy and effectiveness of the preliminary ruling procedure ...", <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf>> accessed 22 May 2017. This same problem was put forward by the CJEU when it was discussed the establishment of a specialised Patent Court, Opinion 1/09, 8th March 2009, <http://ec.europa.eu/dgs/legal_service/arrets/09a001_en.pdf> accessed on 22 May 2017. The Court of Justice opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms identified what according to the are problems with regard to ECHR compatibility with EU law, available at <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf>> accessed 4 February 2016 and Koen Lenaerts, 'Effective judicial protection in the EU' <<http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf>>, accessed 4 February 2017. THIS ARGUMENT WAS PREVIOUSLY PUT FORWARD BY THE CJEU IN ITS OPINION 1/09 WHERE IT DESCRIBED THAT A PATENT COURT IS A FOREIGN COURT, WHICH WILL BE RESOLVING CONFLICTS THAT ARE EXCLUSIVE COMPETENCE OF EU NATIONAL COURTS INDISPENSABLE FOR THE PRESERVATION OF EU LAW EXCLUSIVELY BY THE TASK CONFERRED TO MEMBER STATES COURTS, R. Baratta, 'National Courts as "Guardians" and "Ordinary Courts of EU Law: Opinion 1/09 of the ECJ', (2011) 38 *Legal Issues of Economic Integration*, 297 - 320. So far, the only case where an arbitration tribunal have referred a question of EU Law has been an arbitration tribunal constituted in accordance with the Danish Labour Law, this is the *Dafos* case, the CJEU consider an Arbitration Board qualified as "court or tribunal of a Member State" and it was able to request preliminary rulings in *Case 109/88 Handels- og Kontorfunktionærernes Forbund Danmark v Dansk Arbejdsgiverforening*, acting on behalf of Danfoss (1989) ECR 3209.

⁷⁰ Case C-174/84- *Buik Oil v Sun International*, ECLI:EU:C:1986:60, paras 6-7.

The second option is according to new CJEU case law.⁷¹ According to *Merck Canada* and *Ascendi* cases it is now considered that an arbitration process emanating from a standing offer to arbitrate, where the only choice is limited to selecting the type of arbitration proceedings (*ad hoc* or institutional); this arbitration tribunal could refer questions of preliminary rulings to the CJEU.⁷² In practice, this possibility is yet to be tested.

In investment arbitration practice, a very clear example illustrating the lack of a jurisdictional normative conflict is the ‘procedural simultaneity’ of the *Electrabel* and *Dunamenti* cases. *Dunamenti* was subject to the European Commission’s investigation and final decision of the PPA as an ‘unlawful State-aid’. This allowed *Dunamenti*, as a Hungarian company, to start proceedings at the European General Courts in Luxembourg. *Dunamenti* requested an annulment proceeding against the EC’s decision and the operative provisions. In this legal process the European Commission (not Hungary) participated as the Respondent as it was the authority who initiated the State-aid investigation.⁷³

Conversely, *Electrabel*, who owned 75% of *Dunamenti*, is not part of these EU proceedings because it has no *locus standi* to challenge the validity of the European Commission’s decisions.⁷⁴ The only legal forum *Electrabel* had as a foreign electricity investor in Hungary was the ECT. Therefore, *Dunamenti* and *Electrabel* were legally entitled to start different proceedings under different normative bodies; one European, the other international. The argument presuming that the ECT and TFEU cannot be performed at the same time has less value when analysing the different jurisdictional rights of *Dunamenti* and *Electrabel* that arise out from the same investment energy activity as there were entitle to different legal frameworks of rights and obligations

To sum up, the jurisdictional analysis on the jurisdictional compatibility test applied between investment treaty law and TFEU primarily shows that there is no jurisdictional conflict between the TFEU and the ECT. The TFEU and the ECT excludes each other’s jurisdiction and therefore the jurisdictional effects of the ECT and TFEU are of self-exclusion. This is because they are subject to different types of applicable laws and principles, which internally each legal framework self-determines and establish its own jurisdictional scope. For example, in the context of the ECT, it is the treaty itself that creates its own jurisdiction (ECT Article 26).

⁷¹ Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, Acórdão do Tribunal de Justicia (Segunda Secção), paras 21-29 and Case C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd and Others*, paras 15-25.

⁷² Case C-567/14 *Genentech Inc. v Hoechst GmbH*, formerly *Hoechst AG*, *Sanofi-Aventis Deutschland GmbH*, 17 March 2016, Opinion of AG Wathelet, fn. 34 and Paschalis Paschalidis, ‘Arbitral Tribunals and Preliminary References to the EU Court of Justice, Arbitration International’, (2016) *Arbitration International*, 1-23 <<http://arbitration.oxfordjournals.org/content/arbint/early/2016/07/31/arbint.aiw026.full.pdf>>, accessed 19 October 2017.

⁷³ Case T-179/09 *Dunamenti Erömü Zrt. v European Commission*, ECLI:EU:T:2014:236.30 – 31.

⁷⁴ *Electrabel v Hungary* (n 7) para 5.37.

In contrast, it is EU treaty law that dictates the scope of the CJEU and its MS, where for example TFEU Article 344 refers to disputes between MS, but it leaves without protection disputes that could possibly arise between an MS investor against another MS. Most importantly, a right conferred to individual parties (i.e. investors) under a specific legal framework cannot be withdrawn because of obligations between states in other legal orders, which means that EU Law obligations between MS and the EU do not exempt MS from fulfilling their treaty obligations under the ECT. Therefore, for the reasons here explained the very nature of the EU judicial system is self-exclusive, leaving no possibility for foreign tribunals to refer preliminary rulings to the CJEU, yet.

This jurisdictional analysis has also revealed semantic abuse by some literature that accuses the ECT jurisdiction of infringing, circumventing and violating EU Law. The circumventing argument would imply that there is a (in) direct obligation of intra-EU ECT investment tribunals to observe EU Law while deciding their jurisdictional competence. Notwithstanding the fact that jurisdiction of ECT tribunals is only bound by the instrument bestowing consent, which as mentioned, is the ECT and where there is nothing in the ECT -and in the EU legal order- which prohibits the MS and its individuals from participating in arbitration proceedings.

B. Substantive Analysis between the TFEU and the ECT

The applicability of the ECT to resolve intra-EU energy disputes has predominantly been questioned at the jurisdictional stage and limited attention has been paid to a potential substantive normative conflict between the ECT and the TFEU. The general premise should be that the EU and its MS being ECT signatories presumes that EU Law is not in conflict with the ECT. Nonetheless, it is also fair to say that during the ECT negotiations; the potential effects of the fast expansion of EU policies into new energy areas might have brought some normative chaos about the applicability of the ECT to resolve intra-EU ECT disputes.

Looking into the substantive content of each framework, EU Law is very specific regarding the promotion of fair market competition and state aid prohibitions. In contrast, the ECT creates an adequate environment for foreign investors to be treated in the same manner as a national investor, giving the effect of elevating nationals of a MS and other MS investors to the same level of economic competitiveness. For example, while the national treatment standard envisaged in the ECT is broader and without restrictions, EU freedoms are subject to different control mechanisms not only by each MS, but also by the CJEU, whereas national treatment under the ECT is only subject to interpretation by arbitration tribunals without any restrictive effect on subsequent disputes. Moreover, a general appreciation of the EU trade provisions against ECT investment treaty protections reveals that while the EU offers qualified rights, the ECT offer broader protections to foreign investors.

Under intra-EU ECT arbitration, there are two frequently invoked substantive protections used as defence of the regulatory actions taken by the respondents. The analysis below pays particular attention to the standard of protection of Fair and Equitable Treatment (FET) and compensation in case of expropriation. FET is perhaps the only international investment protection where its non-incompatibility with EU Law has been generally agreed, simply because there is no equivalent in the EU Treaties.⁷⁵ In contrast, the ECT explicitly creates conditions to include commitments to treat investors and their investments of other contracting parties in a fair and equitable manner. A fair and equitable treatment operates specific circumstances ranging from protection of investors' legitimate expectations, good faith, transparency, non-arbitrary treatment, stable political framework and due process.⁷⁶

Nonetheless, under EU Law, there are some manifestations of what could be an EU fair and equitable treatment. First, under the investment treaty practice is common knowledge that the application and interpretation of the fair and equitable treatment is dependent on the circumstances and context where fairness and equity was meant to be considered. It is also well accepted that among the diverse set of the FET manifestations are: equal treatment, transparency, due process, legitimate expectations, etc. Under the EU legal order, there is no notion which has replicated the flexible and dynamic outreach of FET. However, it is noteworthy to mention that under EU Law there are already some notions similar to the FET 'guarantees' in investment treaty practice. In particular in the context of, equal treatment (non-discrimination) and legitimate expectations.

In the case of equal treatment, under EU Law, there is a broad enunciation of the principle of non-discrimination. Broadly speaking the principle of non-discrimination guarantees to confer an equal treatment to all EU nationals, including EU companies.⁷⁷ In this respect the substantive protection granted in FET under the ECT, as far as an equal and non-discriminatory treatment concerns is already available under the EU legal order.

Similarly, as one of the fundamental principles of EU Law, there is the principle of protecting legitimate expectations. At the CJEU, according to the case *Van den Bergh en Jurgens* any trader who has justified hopes may rely on the principle of the protection of legitimate expectation unless he could have foreseen the adoption of a measure likely to affect his interests.⁷⁸ However, under EU Law, legitimate expectations are strictly conditioned to three requirements: (i) precise and consistent assurances by the EU administration, (ii) those assurances must give rise to legitimate expectations and (iii) assurances must be consistent with the applicable rules.⁷⁹ This indicates that it is possible that in the foreseeable future CJEU case law could construct a principle equivalent to FET under the ECT. However, this is currently a notion under development, and so far under EU Law there is no existent principle that holistically encapsulates all the manifestations given to the FET standard.

⁷⁵ Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011), 315.

⁷⁶ *Ibid*, 65.

⁷⁷ Case C-307/97 *Saint-Gobain v Finanzamt Aachen-Innstadt* [1999] ECR I-6161, para 59. See also: "...The Court accordingly ruled that the national treatment principle requires the Member State that is party to such a treaty to grant to permanent establishments of companies resident in another Member State the advantages provided for by the agreement on the same conditions as those which apply to companies resident in the Member State that is party to the treaty." in Case C-55/00 *Gottardo v INPS* [2002] ECR I-413, para 32.

⁷⁸ Case 265/85 *Van den Bergh en Jurgens and Van Dijk Foods Products (Lopik) v EEC* [1987] ECR 1155, para 44.

⁷⁹ T-427/04 and T-17/05 *France and France Telecom v Commission* [2009] ECR II-4315.

Unlike FET, previous literature advocating for EU and investment treaties as two systems of normative conflict have vaguely discussed the standard of investment protection of compensation in case of expropriation. In the ECT context, the reason for this might be the fact that while in the ECT there is a thorough coverage of expropriation, there are no explicit provisions within TFEU directly regulating the principle of fair compensation in case of expropriation. In other words, EU Law does not impose on their MS laws related to national systems of property ownership.⁸⁰ Therefore, it has been argued that this protection, in principle does not exist at EU level.⁸¹ Nonetheless, in the case of property rights and compensation, there are ‘similar’ European principles that can be compared with the ECT right of fair compensation.⁸² For example, the Charter of Fundamental Rights of the European Union strengthens property rights.⁸³ This Charter determines the conditions under which deprivation and limitation measures against property rights are tolerated.⁸⁴ In addition, the CJEU has recognised that the absence of specific EU rules on expropriation is due to the fact that, as a national measure, they fall into the competence of each MS.⁸⁵ However, at the same time MS must respect the Charter of Fundamental Rights, which recognises and establishes the right to property in Article 17.

So far, according to the CJEU, the EU legal order protects property rights aiming to establishing conditions under which these rights could be altered or modified.⁸⁶ For the CJEU, the right to property is not an unfettered right, and it is possible to deny or restrict as long as those restrictions or prohibitions are consistent with general objectives pursued by the EU. The caveat is that these protections and conditions would only operate, if the modification on the property right results from an act derived from the implementation of EU Law. Therefore, under CJEU case law, there is no remedy for expropriation from an act derived from a national measure of a MS.

However, in *Åklagaren v Hans Åkerberg Fransson* it was concluded that the CJEU’s scope of application does not govern or precludes national courts to apply provisions that are contrary to the Charter of Fundamental Rights, unless that infringement was clear from the text of the Charter, the case law or in cooperation with the CJEU.⁸⁷ In terms of substance, according to the CJEU, there are two principal ways to analyse and conceptualise the notion of the right to property. First, under EU Law the right of property is an economic right.⁸⁸ However, there is no explicit provision under the TFEU, which gives direct recognition to this type of economic individual’s rights. Second, there is an alternative option, which is the effect of the *Hauer* principle.⁸⁹ This principle states that through TEU Article 6(3) there is recognition of the rights embodied in the Charter of Fundamental Rights of the EU.

Having identified the right to property within the *acquis*, there are two difficulties that remain unresolved. First, under EU Law, there is no clarity on the consequences of the breach of the right to property. Secondly, MS’ authorities are bound to comply with the Charter of Fundamental Rights when implementing EU Law, and therefore access to the protections

⁸⁰ Article 345 TFEU.

⁸¹ “...all BITs offer foreign investors fair and equitable treatment (FET) and protection against expropriation; rights which do not exist as such in EU Law ...” Angelos Dimopoulos (n 75) 315.

⁸² Jan Kleinheisterkamp (n 17) 98.

⁸³ For many years the Charter was not seen as a document considered part of the legal instruments of the European Union, but rather it was considered an authoritative statement. After the Lisbon Treaty, the document has become legally binding on the European Union in Damian Chalmers, Gareth Davis and Giorgio Monti, *European Union Law* (Cambridge University Press (2010), 238. See also Christophe McCrudden, ‘The Future of the EU Charter of Fundamental Rights’, Jean Monnet Working Paper 13/10 <<http://jeanmonnetprogram.org/archive/papers/01/013001.html>> accessed 17 February 2016.

⁸⁴ Article 17 of the European Charter of Fundamental Rights and Dimopoulos (n 63) 113.

⁸⁵ C-309/96 *Annibaldi v Sindaco del Commini di Guidoma* [1997] ECR I-7493.

⁸⁶ Case C-84/95 *Bosphorus* [1996] ECR I-3953 and Case C-4/73 *Nold* [1974] ECR I-491.

⁸⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2012:340.

presumes that one shall exhaust local remedies. Corollary, this exhaustion of local remedies means that an energy investor making the claim will be subject to national standards of compensation.

Most importantly, under the CJEU case law, interference of property rights should not be disproportionate or intolerable.⁹⁰ In this sense, there is nothing in the law of the *acquis* referring to the law of expropriation, its definition, requirements and consequences. Moreover, the analysis of the law of expropriation is limited and only very general concepts can be drawn from case law. For example, in *The Queen v Secretary of State for the Environment* the Advocate General Léger gave an opinion in which he mentions that any act of denying or limiting an owner of her right to property, which results in being prevented from disposing of her rights amounts to expropriation.⁹¹ For AG Léger, proportionality was a key principle, which is understood as a measure which should be in accordance with public policy interests, such as public health which in this case was the fact that polluted water can affect agricultural practices and therefore the imposition of this Directive on the farmers' land in order to reduce water pollution caused by nitrates is not unjustified as such to affect the principle of proportionality. This means, in the EU specific context, that proportionality between the measure and the policy objectives is the core standard when assessing the interference of an individual's property right. This has created ambiguity and uncertainty for the property right owner, as the level of compensation might vary in accordance with this 'proportionality test' but also there is no clear approach for the calculation of compensation. Moreover, under the EU legal order, interference of property rights is one, which does not necessarily include a general right of full compensation.⁹² This approach is supported by the priority given to the proportionality test and the measure implemented aiming to preserve a legitimate public interest, which may call for a lesser reimbursement of the full market value.⁹³

Previous commentators have also observed that, while the analysis by the CJEU gives a secondary role to compensation; the primary task is to assess the proportionality of the measure taken.⁹⁴ Conversely, international public law has addressed the assessment of compensation as a primary issue. In particular, the ECT requires compensation according to the fair market value at the time of expropriation, which is basically the *Hull* formula.⁹⁵ In addition, in the context of ECT

⁸⁸ Anna De Lucca, 'Indirect Expropriation and Regulatory Takings: what Role for the "Legitimate Expectations" of Foreign Investors?' in Giorgio Sacerdoti, Pia Acconci, Mara Valenti and Anna De Lucca (eds.), *General Interests of Host States in International Investment Law* (Cambridge University Press 2014) 58-75.

⁸⁹ Case C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 15. Moreover, the CJEU in this case confirms direct links between the standard of protection under Article 17 of the Charter of Fundamental Rights of the EU and standards of protection under ECHR and case law developed by the ECtHR. This link is also expressly acknowledged in Articles 52 and 53 of the Fundamental Charter (express references to ECHR) and Case C-501/11 *Schindler Holding and others v Commission* [2013] OJ.

⁹⁰ Case C-265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, para 15.

⁹¹ Case C-293/97 *The Queen v Secretary of State for the Environment*, Opinion of AG Léger, paras 61-61 and Case C-280/93 *Germany v Council* [1994] ECR I-4973, para 78.

⁹² Case C-347/03 *ERSA* [2005] ECR I-3785.

⁹³ *Strik* (n 52).

⁹⁴ *Strik* (n 52). *Eureko v Slovak Republic* (n 54) 261 "... the protection in Article 5 of the BIT against expropriation is by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects "assets" and "investments" rather than the arguably narrower concepts of "possessions" and "property" protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law...".

⁹⁵ Patrick Norton, 'Back to the Future: expropriation in the Energy Charter Treaty' in Thomas Wälde, *European Energy Charter Treaty: An East-West Gateway for Investment and Trade?* (Kluwer 1996), 365-385.

investment treaty protection, fair compensation is one of the core principles when expropriating investor's property rights. Therefore, there is a fundamental difference between EU Law and the ECT, as the ECT provides for clarity when defining expropriation and the methods by which they are entitled to fair payment.

The ECT provides for compensation of foreign investors in a prompt, adequate and effective manner if their investments are nationalised, expropriated or subject to a measure having an equivalent effect.⁹⁶ In addition, the ECT draws distinctions between acts by the government or authorities and loss caused by non-governmental agents. Unlike EU Law, the ECT guarantees compensation from acts made by governmental authorities that amount to destruction of an investment (ECT Article 12(2)). For example, in *Plama v Bulgaria* the tribunal recognised that a State's conduct provoking negative effects on the monetary value of the investment (even with no physical control or loss of title over the asset at stake), could result in expropriation as consequence of the adverse effects on the economic value of the investment.⁹⁷

In the ECT, the coverage of expropriation is as exhaustive as possible; nationalisation, expropriation and any other measures having equivalent effects are forbidden, unless the measure was for public interest and accompanied by compensation.⁹⁸ In contrast to the EU analysis of public interest, the ECT observes public propose not as a core element to modify property rights, but public propose as a requirement of the expropriation's legality.⁹⁹ Thus, investment protections under the ECT give investors more certainty and greater likelihood of receiving a fair monetary compensation. Therefore, it is possible to conclude that there is not incompatibility between the EU right to property and the ECT substantive protection of compensation in case of expropriation. This is because the *rationale* used in each system addresses different elements of property rights, and in the case of the ECT the protection is broader, ensuring that the investor will be entitled to full monetary compensation in accordance with the fair market value.

V. CONCLUSION

In Europe, the need of contouring the law and policy of the energy sector has played a unique and crucial role at intersecting two major legal orders; the Energy Charter Treaty is the point of convergence between international investment treaty arbitration and the legal order of the EU. This point of convergence has caused tension about the status of investment arbitration in the EU. Previously legal treatises, despite providing for limited evidence, have claimed that the negotiation and creation of the ECT, as a treaty binding for intra-EU cross-border energy investments was an 'historical mistake'.¹⁰⁰ This historical mistake, the argument was, should be alleviated by the presumption of an implicit disconnection clause between all the intra-EU parties (i.e. MS, the EU, and investors from a MS).

⁹⁶ Andrews-Speed and Thomas Wälde, 'Will the Energy Charter Treaty help international investors?' <<http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=28399>> accessed on 10 January 2017 and Christoph Schreuer, Rapport: The Concept of Expropriation under the ECT and other Investment Protection Treaties in Clarisse Ribeiro, *Investment Arbitration and the Energy Charter Treaty* (Juris 2006), 110.

⁹⁷ Other arbitration tribunals have not considered the existence of expropriation if the investor has not been deprived physically from its property, see for example *Petrobart Ltd (Gilbraltar) v Kyrgyzstan*, SCC Case No126/2003, Award (13 February 2003), 77 and *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No.ARB/01/8, Award (12 May 2005), para 254.

⁹⁸ ECT Article 13 (1).

⁹⁹ Sergei Lebedev, 'Introduction: The Concept of Expropriation under the ECT and other investment protection, in Clarisse Ribeiro, *Investment Arbitration and the Energy Charter Treaty*, (Juris 2006), 144 and Energy Charter Secretariat, 'Expropriation Regime under the Energy Charter Treaty' <http://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Expropriation_2012_en.pdf> accessed 2 May 2017.

¹⁰⁰ *Kleinheisterkamp* (n 17).

The analysis above reveals that the policy expansion of the EU has created a ‘regulatory spill’ in the energy sector which previously was previously regulated by other legal frameworks. In recent years, the EU has now moved into a more solid and comprehensive legal order with rules and policy goals on a common commercial energy market and is currently designed to secure energy supply by means of fair market competition while integrating measures to address different aspects of energy transactions within the EU. In contrast, the ECT ensures a level playing field based on non-traditional EU principles that generate and promote legal uniformity and consensus on energy security policies and builds a legal framework for global energy security based on the principles of transparency, open and -most importantly- non-discriminatory markets.

However, despite the differences between the policy and legal objectives of the ECT and EU (Energy) Law, there has been a general perception of a possible normative conflict between the ECT and the TFEU. The jurisdictional and substantive analysis above, presented a cross-analysis of the most relevant and frequently invoked normative issues and principles that characterise the intra-EU relationship between the TFEU and ECT. The analysis provided for a more structured evidence that clarifies the status of the relationship between the ECT and the TFEU.

As a general conclusion, this study has revealed that the normative relationship that characterises the TFEU-ECT is not in conflict. The establishment of jurisdiction in intra-EU-ECT disputes does not infringe EU Law, as the ECT investor is bringing an ECT claim in an ECT tribunal. First there is an absence of any norm or principle which explicitly prohibits arbitration between an investor from one MS against another MS. Moreover, the available TFEU provisions in regard to ‘jurisdictional restrictions’ addresses only the relationship between MS and not the relationship between MS nationals and other MS. To contrary, the jurisdictional scopes of the ECT and the TFEU have a self- exclusion effect which has clearly delimitations of its ambit of application and users. Even if one would assume that EU Law is at stake due the establishment of jurisdiction of an intra-EU ECT dispute there are post award mechanisms that can ensure that an arbitration tribunal did not exceed its powers and respected EU Law.

The substantive analysis revealed that ECT and the TFEU do not cover the same subject matter. ECT substantive protections are broad and aim primarily to protect foreign investors under certain principles of international public law. In this respect, FET offers a clear example to illustrate the absence of a conflict between the ECT and the TFEU as the FET protection simply does not fully guarantee a fair and equitable treatment for MS energy investors making investments in another MS. In the case of expropriation, the CJEU has also taken a line of reasoning more concerned about the proportionality of the measure to protect a public interest rather than giving heavier weight to adequate and fair monetary compensation. In contrast, the ECT offers a clear definition and standards on the notion of expropriation as well as fair and adequate compensation for the protection of property rights under the ECT.

To conclude, having identified the lack of a real jurisdictional and substantive normative conflict between the TFEU and the ECT, it could be argued that when an intra-EU ECT dispute arises, there is an opportunity to choose different avenues which offer different types of standards of protection. This opportunity means that there is no fundamental normative conflict between the TFEU and the ECT, but rather there is a relationship of regulatory tension arising from the policy expansion of the EU legal order.