

Role and Responsibility of the EC under the ECT

**Dr. Richard Happ
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1. Parameter of Analysis

- A tribunal has to apply the law chosen by the parties.
- Article 26 (8) instructs a Tribunal to apply the ECT and applicable rules and principles of international law.
- Municipal laws are a matter of fact and evidence. An ECT tribunal will not apply municipal law as such, but analyse whether in applying that law, a Contracting Party breaches its obligations under the ECT.
- A Tribunal's jurisdiction is limited to breaches of the ECT. It will not determine breaches of EC law as such.

2. The Role of the European Communities as a REIO

- The EC is **not** a State; but it is **more** than an International Organisation
- ECT uses the concept of „REIO“ = Regional Economic Integration Organisation

“an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters“

- REIOs can be Contracting Parties
- ECT contains a special rule on „Area“ for REIO's (1 X ECT) , but not on „Investors“ – are there EC Investors or only MS Investors?

3. The Role of EC Law

- Does the ECT refer to EC law?
- Article 26 (6) ECT: a tribunal has to apply the ECT and „applicable rules or principles of international law“ → to avoid a non-liquet.
 - One view: the EC treaty is international law.
 - But: is the provision in question **applicable** in an Art. 26 case?
 - What about secondary community law? It is not international law.
 - Other view: the EC treaty is more than international law.
 - „Constituting order“ of the European Communities (*van Gend en Loos, Les Verts v. European Parliament*).
 - Why should constituting order of EC be applicable, but not constituting order of other Contracting Parties? EC Law nevertheless relevant like any „domestic law“

4. The ECT as a Mixed Agreement

- Mixed Agreement = Member States and EU together had the competencies to sign it.
- EU and MS are Contracting Parties and bound by the ECT.
- „Mixed agreements“ is a concept of EU law and thus not *per se* relevant on the international law level (arg. Art. 27, 46 (1) VCLT).
- Evident allocation of competences (arg. 46 (2) VCLT)? No, cf. EU statement on ratification. Clear declaration of competence allocation on signing? No, quite to the contrary

*“The Communities and the Member States will, **if necessary**, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party.”*

5. Applicable Principles of „Responsibility“

- Articles on State Responsibility not pertinent
- Attribution of all acts of Member States? (no, not a state)
- Attribution of acts of organs of EU (+)
- Attribution of acts of MS organs in the execution of EU law ?
 - Direct enforcement (e.g. customs law): arguable
 - Indirect enforcement : level of control too weak, organs not under EU control. But what in case of binding decisions?
- Attribution of all acts which EU recognizes as its own (done in WTO cases)?

6. Where to invoke the Responsibility

- As a Contracting Party, the EC can be sued under Art. 26 ECT.
- The ECT specifically gives a choice between domestic courts and arbitration. ECJ is domestic court of EC (cf. statement of EU Comm. of 9.3.1998, OJ L 69, 115).
- Conflict with ECJ as regards interpretation and application of EC law?
 - Formally, rules of EC law are rules of domestic law and thus irrelevant.
 - Substantively, ECT tribunal does not apply EC law as law, does not decide about breach of EC law.
- Arbitration under Art. 26 ECT is possible.

7. Who can have standing / invoke the responsibility?

- Investors of non-EU Member States
 - Should be undisputed
- Investors of EU Member States?
 - ECT applicable in relationship between EU-Member State Investor <-> EU?
 - disconnection clause?
 - Investor of **another** Contracting Party? No special rules for REIO's
 - Nationals: EU Citizenship as problem?
 - Companies: is, e.g. a UK company organized in accordance with the law applicable in the EU?
 - Investment in the **Area** of another Contracting Party?

8. Whom to sue: EU or Member States or both?

- Responsibility of EU does not exonerate Member States
 - Cf. *Matthews* and *Bosphorus* cases (ECHR)
 - Art. 15 Draft Articles on Resp. of IO
- Joint and several responsibility possible (e.g. MS acts on binding instructions of EU)
- Suing MS may lead to problems in enforcing the award (EU law as part of *ordre public*), although compatible with EU's obligations?
- Enforcing an award against EU? See Statement of EU:

“Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty.”

9. A look into the future: ECT and Lisbon Treaty?

- Exclusive competence of EU for „direct investments“.
- Existing treaties remain valid under international law.
- Right of EU to demand cancellation of ECT membership?
- Need to keep EU Member States as Contracting Parties?
 - ECT covers also portfolio investments and indirect investments.
 - „Investor“ not defined for REIO's.
 - Attribution of MS organs acts in areas where EU has no competence?
- Forcing MS to terminate the ECT, if possible, would be a serious blow to the ECT itself and hardly in the interest of the EU.