Role and Responsibility of the EC under the ECT

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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.
    - 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.


- 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.”

- 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.