

**JUDICIAL PROTECTION OF INVESTORS IN THE EUROPEAN UNION:
THE REMEDIES OFFERED BY INVESTMENT ARBITRATION, THE EUROPEAN CONVENTION
ON HUMAN RIGHTS AND EU LAW**

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Abstract

In addition to investment arbitration, investors, who object to State measures jeopardising their investments in the European Union [“EU”], can benefit from the protection offered by the European Convention on Human Rights and EU law. If, in practice, investors have favoured investment arbitration, these two additional remedies have assumed greater importance in the wake of the landmark Slovak Republic v. Achmea BV ruling of the Court of Justice of the European Union, which jeopardises intra-EU investment arbitration.

This article aims to present the main differences, similarities and interplay of the three regimes, each of which offers a contrast in terms of substantive rules and standards of protection, scope of application, procedures, remedies and enforcement mechanisms.

I. Introduction

In addition to investment arbitration, investors who object to State measures jeopardising their investments in the European Union [“EU”] can benefit from the protection offered by the European Convention on Human Rights [“ECHR”] and EU law. Yet, despite the theoretical possibility of relying on these regimes, investors and their counsel have mainly focused on investment arbitration while showing little interest for the interaction between the three fields, be it in practice¹ or in legal scholarship.²

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¹ For a few examples of well-known parallel proceedings before investment tribunals and the European Court of Human Rights, see the (i) Yukos (Hulley Enterprises Limited, Yukos Universal Limited and Veteran Petroleum Limited) v. The Russian Federation, Case Nos. 2005-03/AA 226, 2005-04/AA227 and 200505/AA228, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2009), Final Award (Perm. Ct. Arb. 2014) [*hereinafter* “Yukos”]; OAO Neftyanaya Kompaniya Yukos v. Russia, Eur. Ct. H.R., Award (2011), Admissibility (June 29, 2009), Merits (Sept 30 2011), Just Satisfaction (Dec. 22, 2014) [*hereinafter* “OAO Neftyanaya”], (ii) Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award (Mar. 26, 2008); [*hereinafter* “Amto”] and (iii) Nomura cases (Saluka Investments B.V. v. The Czech Republic (Neth. v. Czech), Partial Award, (Mar. 17, 2006), 15 ICSID Rep. 250 (Perm. Ct. Arb. 2006); Nomura and Saluka v. Czech Republic, App. No. 72066/01, Eur. Ct. H.R., Inadmissibility Decision (Sept. 4, 2001)).

The so-called Zimbabwe Farmers cases constitute another example of parallel human rights and BIT claims. Some of the farmers were Dutch nationals and brought proceedings before an International Centre for Settlement of Investment Disputes [“ICSID”] arbitral tribunal under the Dutch-Zimbabwean BIT (Bernardus Henricus Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), while others submitted their dispute to a tribunal constituted under the Southern African Development Community Treaty [*hereinafter* “SADCT”], a regional treaty protecting inter alia the right to a fair trial and the absence of discrimination on the basis of race (Mike Campbell (Pvt) Ltd. v. The Republic of Zimbabwe, Case No. SADCT: 02/2007, Judgment (Nov. 28, 2008) (S. Afr.)).

However, interaction between human rights law and investment arbitration has received broader attention in the wake of the landmark *Yukos* case, where expropriated shareholders successfully pursued parallel proceedings before the European Court of Human Rights [“**ECtHR**”]³ and the arbitral tribunals constituted under the Energy Charter Treaty [“**ECT**”] (Section V.A).⁴

The same applies to the relationship between investment arbitration and EU law, as a consequence of the recent landmark ruling of the CJEU in *Slovak Republic v. Achmea BV* [“**Achmea**”].⁵ The decision jeopardises roughly 200 BITs concluded amongst the EU Member States (Section II.A.ii.a), as well as the ambition of the European Commission to set up a Multilateral Investment Court for investment disputes involving third States (Section II.A.ii.b).

This article, divided into 6 parts, aims at presenting the main differences, similarities, and

² For a comparison from a procedural perspective of the CJEU and the Eur. Ct. H.R. with the dispute resolution mechanisms provided for in the recently negotiated EU free trade agreements with Canada, Singapore and Vietnam, see Directorate-General for External Policies (Policy Dept.), *In Pursuit of an Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, EUROPEAN PARLIAMENT (July 2017). For a succinct discussion of the overlap between the three regimes, see W. Ben Hamida, *L'arbitrage Etat-investisseur face à un désordre procédural: la concurrence des procédures et les conflits de juridictions*, 2005 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 564, 583-587.

For a discussion of the interactions between investment arbitration and EU law, see W. Sadowski, *Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?*, 55(4) COMMON MKT. L. REV. 1025 (2018); N. BRASENER, INVESTMENT PROTECTION IN THE EUROPEAN UNION - CONSIDERING EU LAW IN INVESTMENT ARBITRATIONS ARISING FROM INTRA-EU AND EXTRA-EU BILATERAL INVESTMENT AGREEMENTS (2017).

Interactions between investment arbitration and human rights law have attracted more attention. F. BALCERZAK, INVESTOR – STATE ARBITRATION AND HUMAN RIGHTS (2017); S. El Boudouhi, *L'investisseur devant les juridictions internationales des droits de l'Homme: la question des droits fondamentaux de l'investisseur*, in DROIT DES INVESTISSEMENTS INTERNATIONAUX 301 (S. Robert-Cuendet ed., 2017); E. De Brabandere, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals*, 30(2) ICSID REV. - FOREIGN INV. L. J. 345 (2015); T. G. Nelson, *Human rights law and BIT protection: areas of convergence*, 12(1) J. WORLD INV. & TRADE 27 (2011); Christian Tomuschat, *The European Court of Human Rights and Investment Protection*, in INVESTMENT LAW FOR THE 21ST CENTURY – ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 636 (Christina Binder et al. eds., 2009); F. Horchani, *Les droits de l'homme et le droit des investissements internationaux*, in DROIT ÉCONOMIQUE ET DROITS DE L'HOMME 139 (L. Boy et al. eds., 2009); U. Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 219 (Pierre-Marie Dupuy et al. eds., 2009); Christoph Schreuer & Ursula Kriebaum, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 743 (Stephan Breitenmoser et al. eds., 2007); M. Ruffert, *The Protection of Foreign Direct Investment by the European Convention on Human Rights*, 43 GER. Y.B. INT'L L. 116 (2000); H. Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for “Regulatory Compensation” of the Property of Foreign Investors*, 11(1) N.Y.U. ENVTL. L. J. 148 (2000).

³ OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R., Admissibility (Jan. 29, 2009), Merits (Sept. 30, 2011), Just Satisfaction (Dec. 22, 2014) [*hereinafter* “OAO Neftyanaya Admissibility”].

⁴ Yukos, *supra* note 1.

⁵ Case C-284/16, Slovak Republic v. Achmea BV, 2018 E.C.R. 158.

procedural interplay of these three regimes.⁶

Part II provides a brief overview of the remedies available to investors against unwarranted State intervention under investment treaties (Section II.A), the ECHR (Section II.B), and EU law (Section II.C), the authors single out the main substantive protections which investors facing excessive State intervention can rely on, as per the abovementioned instruments.

Part III discusses how the investors can take recourse to general standards under EU law, such as the fundamental freedoms of the internal market (Section III.B.ii) or under investment arbitration, such as fair and equitable treatment, and full protection and security treatment (Section III.B.i). The three regimes also specifically protect the investors' rights to property (Section III.C), to be free from discrimination (Section III.D), a fair trial and an effective remedy (Section III.E) as well as to benefit from legal certainty and ensure respect for their legitimate expectations (Section III.F). Depending on the nature of their investment, investors may also rely on sectorial protection, in particular in the energy and media sectors (Section III.G).

Part IV examines the procedural aspects. As a general rule, the ECHR and EU law can be directly invoked before domestic courts and, in theory, take precedence over national law. However, over the last few years, the rule of law and the independence of the judiciary have been increasingly questioned in some Member States, such as Poland and Hungary.⁷ This Part, therefore, focuses on the conditions under which investors can bring their disputes before European bodies, namely the ECtHR, the CJEU and the European Commission. Further, it will examine the salient procedural aspects of the proceedings before them and investment tribunals in the framework of investment disputes i.e. the legal standing of the investors (Section IV.B.i), the statutes of limitation and obligations to exhaust domestic remedies that they may face (Section IV.B.ii), whether parallel proceedings can be conducted under the three regimes (Section IV.B.iii), the conditions under which interim measures can be obtained (Section IV.C.iii), the transparency and confidentiality of the proceedings (Section IV.D), the costs (Section IV.E), the possibility to settle in their course (Section IV.F) and, finally, the remedies (Section IV.G) and enforcement mechanisms (Section IV.H) offered by the three regimes.

Many of these substantive and procedural aspects have been illustrated in two high profile cases examined in **Part V**, *Yukos* (Section V.A), and the actions launched before an intra-EU

⁶ This article does not cover other types of interactions between human rights and investment protection, such as the question of whether the European Convention on Human Rights should be applied to arbitral proceedings (see J. van Compernelle, *L'arbitrage et la Convention européenne des droits de l'homme : une décision en clair-obscur de la Cour européenne*, 113(1) REVUE TRIMESTRIELLE DES DROITS DE L'HOMME [REV. TRIM. DR. H.] 199 (2018), the emerging trend whereby human rights obligations owed by the host state to non-parties to the arbitration proceeding are invoked by the former to justify or defend certain measures that had negative impacts on foreign investments (see F. BALCERZAK, INVESTOR-STATE ARBITRATION AND HUMAN RIGHTS (2017)), whether investors can rely on the international instruments protecting human rights (see P. Jacob, *La place des normes externes dans le contentieux d'investissement*, in DROIT DES INVESTISSEMENTS INTERNATIONAUX 607 (S. Robert-Cuendet ed., 2017)), or the potential business and human rights obligations of investors (see E. Vidak-Gojkovic et al., *The Medium Is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration*, 35 J. INT'L. ARB. 379 (2018)).

⁷ The European Commission triggered Article 7 of the Treaty of the European Union against Poland in December 2017, amid judicial reforms which have put the country's justice system "under the political control of the ruling majority" (see W. Sadowski, *Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?*, (55) 4 COMMON MKT. L. REV. 1025, 1028-1031 (2018). In September 2018, the European Parliament voted for a similar resolution against Hungary.

investment tribunal and the ECtHR against the sale of the Czech bank IPB by one of its shareholders, the Nomura group (and its vehicle company, Saluka Investments B.V.), whilst the European Commission was investigating potential State aids (Section V.B).

Finally, the authors conclude in **Part VI** that the priority given by investors to investment arbitration law is justified by this regime's procedural hallmarks and the broad substantive protections it offers. However, under various circumstances and depending on their ultimate objectives, investors would also benefit from looking at the additional remedies offered by EU law and the ECHR. This is obviously the case where investment arbitration is not available or presents substantive enforcement risks (for purely EU disputes for instance), but the interest of these two regimes is not limited to this situation. They may also be effectively mobilised where a State measure affects substantially the integrity of the internal market or jeopardises core human rights, such as the rule of law or the freedom of press.

II. The Three Regimes

A. Investment Arbitration

i. Introduction

Bilateral and multilateral trade and investment treaties [**"BITS"**] usually grant a number of guarantees to investments made by an investor of one contracting State in the territory of another.⁸ More than 3,000 BITS have been concluded since the conclusion of the first such treaty by Pakistan and Western Germany in 1959.⁹ Multilateral treaties are usually concluded on a geographical basis, such as the North American Free Trade Agreement concluded between the US, Mexico and Canada [**"NAFTA"**],¹⁰ but they may also relate to a specific sector, such as the ECT.

⁸ In some jurisdictions, domestic specific statutes on the protection of foreign investments, such as the Protection of Investment Act 22 of 2015 (S. Afr.), (see TARCISIO GAZZINI, *Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection Investment Act*, SSRN (May 1, 2017), available at <http://www.ssrn.com/abstract=2960567> [hereinafter "Tarcisio Gazzini"]), have also been enacted in order to support or to replace BITS.

⁹ India concluded roughly 100 of them (for a presentation of India's BIT scheme, see Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29(3) ICSID REV. 419 (2014). In July 2016, the country announced that it had sent termination notices for the BITS concluded with 58 countries, including 22 EU Member States. Many of these BITS include "sunset" provisions such that existing investors will continue to receive investment protections for a further period of, for example, 10 or 15 years. The Indian Government has brought a new model BIT in 2016 (Ministry of Finance, Office Memorandum Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties, F. No. 26/07/2013-IC (Feb. 8, 2016), available at http://indianbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf) with the aim of using it as a basis of negotiation for the conclusion of new investment treaties with its commercial partners (for a critical analysis, see Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38(1) NW. J. INT'L. BUS. 1 (2017) [hereinafter "Ranjan & Anand"]; G. Hanessian & K. Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?*, 30 ICSID REV. 729 (2015). For the remaining BITS that have not completed their initial term, and so are not ripe for termination, India has circulated a proposed joint interpretative statement to the counterparties to these BITS seeking to align the on-going treaties with the Indian Model BIT.

¹⁰ On September 30, 2018, the US, Mexico and Canada reached an agreement to replace NAFTA by the United States-Mexico-Canada Agreement [**"USMCA"**] currently under ratification process by the three States. Once entered into force, USMCA will significantly alter the ISDS system among the parties. In a nutshell, USMCA "*essentially erases ISDS as between Canada and the US, curbs ISDS as between Mexico and the US, and leaves Canada and Mexico to the ISDS system in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*" (see Edward G. Baldwin et al., *The New NAFTA – the United States-Mexico-Canada Agreement (USMCA) Brings Future Changes*, BAKER MCKENZIE, GLOBAL ARB. NEWS (Oct. 4, 2018), available at <https://globalarbitrationnews.com/the-new-nafta-20181004/#page=1>).

Most of them offer Investor-State Dispute Settlement [“ISDS”] mechanisms, whereby investors alleging a violation of their rights under the treaty are given a choice between a range of different dispute resolution fora, including the courts of the host State and various arbitral institutions.¹¹ Amongst the latter, the International Centre for the Settlement of Investment Disputes [“ICSID”] has taken prominence and will be the focus of this article.¹²

The ICSID is part of the World Bank Group, headquartered in Washington D.C. It was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [“ICSID Convention”], drafted under the auspices of the International Bank for Reconstruction and Development. It has been ratified by 154 contracting States (but not some major jurisdictions such as India, Brazil and South Africa).¹³ The ICSID Convention has been said to provide for “*a comprehensive, self-sufficient system of truly international arbitration in the area of investment disputes*”.¹⁴ It does not provide substantive protection to foreign investments (which are usually contained in the BITs themselves), but merely a procedural dispute resolution mechanism, in accordance with the ICSID Arbitration Rules annexed to the ICSID Convention.¹⁵

Although substantially less frequent in practice,¹⁶ an ICSID arbitration clause may also be provided by a domestic investment law or by an investment contract concluded between the investor and the State.

In general, BITs ensure two types of substantive protections for investors: minimum standards of treatment on the one hand, such as “fair and equitable treatment” [“FET”], “full protection and security treatment” or “protection from expropriation” clauses (see Sections III.B.i and III.C.i below); and the guarantee of non-discrimination vis-à-vis nationals or investors from

¹¹ Some BITs provide for a so-called “fork-in-the-road” provision, pursuant to which, investors must choose, at the outset of the dispute, to bring their case to arbitration or before domestic courts (*see* Section IV.B.iii below).

¹² From a handful of cases a year between 1972 and 1996 (with a maximum of four a year over this period), the number of ICSID arbitrations launched has dramatically increased to an average of 50 a year since 2012. As of December 31, 2017, ICSID had registered 650 cases, 8% of them against a Western European State and 26% against a State of Eastern Europe and Central Asia (*see* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES SECRETARIAT, THE ICSID CASELOAD – STATISTICS (updated every 6 months), *available at* <http://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> and INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES SECRETARIAT, SPECIAL FOCUS – EUROPEAN UNION (updated yearly), *available at* <http://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>).

¹³ *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, DATABASE OF ICSID MEMBER STATES, *available at* <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

¹⁴ Albert Jan van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2(2) ICSID REV. 439, 441 (1987) [*hereinafter* “van den Berg”].

¹⁵ The ICSID Arbitration Rules were initially adopted in 1967 and amended three times since (1984, 2002 and 2006). A set of proposed amendments were published by ICSID on August 3, 2018 (for a presentation, *see* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, BACKGROUNDER ON PROPOSALS FOR AMENDMENT OF THE ICSID RULES (2018), *available at* https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf). A vote on these proposed amendments, which require the approval of two-thirds of the ICSID Member States, is expected in 2019 or 2020.

Since 1978, the ICSID Arbitration Rules are completed by the ICSID Additional Facility Rules, which apply to certain disputes that fall outside the scope of the ICSID Convention such as arbitration of investment disputes between a State and a foreign national, one of which is not an ICSID Member State or a national of an ICSID State.

¹⁶ Between 1976 and 2016, more than 70% of ICSID cases have been brought under investment treaties, 11% under investment laws and only 1% exclusively under investment contracts (J. BONNITCHA ET AL., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 61 (2017)).

other countries on the other, such as “national treatment” or “Most-Favoured Nation” [“**MFN**”] clauses (see Section III.D.i below). The former could be described as “self-standing”¹⁷ or “non-contingent”¹⁸ because these standards are not dependent upon the extent of protection offered to others, as opposed to national treatment or MFN treatment. BITs may also contain so-called “umbrella clauses” providing that the host state must honour the obligations it has specifically undertaken with the nationals of the other contracting States, in addition to the substantive protection contained in the treaty, and permitting investors to resort to arbitration if they consider that such obligations have been breached. Despite the fact that the protection offered by the BITs varies, and that tribunals are appointed on a case-by-case basis and have no obligation to rely on awards rendered in previous cases, a body of case law has started to emerge (though by no means fully coherent).¹⁹ This is helped by the more transparent nature of investment arbitration (as compared to commercial arbitration), which entails the (partial) publication of many awards (see Section IV.D.i below).

As is the case for commercial arbitration, investment arbitration proceedings are based on the principle of parties’ procedural autonomy, save for a few mandatory rules which are mostly concerned with the tribunal’s independence and impartiality and the respect of the right of defence of all the parties. Institutional rules (such as the ICSID or the UNCITRAL Arbitration Rules) provide a general procedural framework, leaving parties broad autonomy to agree upon particular timetables and procedural approaches (appointment of the arbitrators, number and content of the submissions, rules of evidence and discovery, organisation of the hearings, etc.). If the parties fail to agree on certain procedural questions and the applicable institutional rules do not provide for a default solution, the tribunal has broad discretion. In the majority of cases, the tribunal is made up of three arbitrators appointed on an *ad hoc* basis. Typically, each party, or group of parties with the same interests in the proceedings, appoints one co-arbitrator and the parties, or co-arbitrators, appoint the president, together. In the absence of such an agreement, the president is appointed by the institution. For ICSID arbitrations, the Chairman of the Administrative Council does so from a panel of arbitrators designated by himself or the contracting States.²⁰

Awards rendered by arbitral tribunals are binding upon the parties. Their enforcement depends on the applicable regime (see Section IV.H.i below).

ii. *Investment Arbitration and the EU*

The field of investment arbitration has seen dramatic new developments in the EU, both for investment treaties concluded by EU Member States amongst themselves [“**intra-EU**”], and for treaties concluded by the EU with third countries [“**extra-EU**”].

¹⁷ Bayindir Insaat Turizm Ticaret ve Sanayi A.S v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 164 (Aug. 27, 2009).

¹⁸ ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT: DIRECTORATE OF FINANCIAL AND ENTERPRISE AFFAIRS, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW, available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

¹⁹ CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION – SUBSTANTIVE PRINCIPLES 6 (2007) [*hereinafter* “Campbell McLachlan et al.”].

²⁰ *Fair and Equitable Treatment Standard in International Investment Law*, Org. for Econ. Co-operation and Dev., Working Paper No. 3 on International Investment (2004), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

a. *Intra-EU Investment Arbitration*

Many BITs have been concluded between Eastern European States, which were emerging from communism and willing to attract foreign investment, and Western European States. The majority have not been terminated following the Eastern enlargement of the EU in the 2000s and 2010s. Over the last few years, the European Commission has been more and more vocal in expressing concerns in this respect, considering that:

*“this sort of additional reassurance should no longer be necessary because all Member States are subject to the same EU rules in the single market, including those on cross-border investments. What's more, all investors benefit from the same protection thanks to EU rules, for example non-discrimination on the grounds of nationality. These treaties are incompatible with EU law and risk fragmenting the single market due to the fact that, by their very nature, they give rights to investors of certain EU countries and not others”.*²¹

As a result, the European Commission has brought infringement proceedings against several EU Member States for their membership in intra-EU BITs²² and has filed numerous *amicus curiae* briefs against the validity of these BITs in arbitrations.²³

The Commission's opposition to BITs recently received a sympathetic ear from the CJEU. In its ground-breaking *Achmea* case of March 5, 2018,²⁴ the Court held that the arbitration clause provided for by the 1991 Netherlands-Slovakia BIT was incompatible with the principle of autonomy of EU law (enshrined in Article 344 of the Treaty on the Functioning of the European Union [“TFEU”]). The Court reasoned that an arbitral tribunal “*such as that referred to in Article 8 of the [Netherlands-Slovakia BIT]*” may be called upon to interpret or apply EU law, particularly the provisions on freedom of establishment and free movement of capital. However, a tribunal constituted under Article 8 is not a ‘court or tribunal of a Member States’ and thus, cannot make preliminary references to the CJEU pursuant to Article 267 TFEU. Moreover, at the annulment and enforcement stages, it is not subject to sufficient review by a court of a Member State capable of ensuring compatibility with EU law.²⁵

The CJEU's reasoning, which departs from the prior opinion delivered by its Advocate General,²⁶ has been seen as highly political and has caused much ink to flow. Its exact implications for intra-EU investment arbitration are not clear and would deserve a separate

²¹ EUROPEAN COMMISSION, GET THE FACTS: INTRA-EU BILATERAL INVESTMENT TREATIES (2015), available at <http://ec.europa.eu>.

²² European Commission Press Release IP/15/5198, The Commission, Commission asks Member States to terminate their intra-EU bilateral investment treaties (June 18, 2015).

²³ E.g., Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, EU Commission's Brief for Amicus Curiae in Support of Romania (Feb. 4, 2016).

²⁴ Case C-284/16, Slovak Republic v. Achmea BV, 2018 E.C.R. 158.

²⁵ For a detailed analysis of the principle of autonomy of EU law in relation to investment arbitration, see S. Hindelang, *Repellent Forces: The CJEU and Investor-State Dispute Settlement*, 53(1) ARCHIV DES VÖLKERRECHTS 68 (2015).

²⁶ Case C-284/16, Slovak Republic v. Achmea B.V., 2017 E.C.R. 699.

contribution.²⁷ It also remains to be seen how investment treaty tribunals, which have usually upheld the validity of intra-EU BITs, will react to this judgment in pending and future intra-EU investment disputes. At least four arbitral tribunals were undeterred by the CJEU's ruling, rendering awards on the merits in intra-EU cases under the ECT.²⁸ The debate is likely to continue before domestic courts at the annulment and enforcement stages,²⁹ as the European Commission considers State payments under intra-EU BIT awards to be illegal State aid under Article 107(1) of the TFEU, as they would constitute an illegal advantage, payable from State resources and favouring a certain undertaking.³⁰

In the wake of the *Achmea* ruling, the European Commission stated in a communication of July 2018 that:

“all investor-State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs. The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations.

[...] EU investors cannot invoke intra-EU BITs, which are incompatible with Union law and no longer

²⁷ See E. Lanotte, *Arrêt “Achmea”: une décision de principe ?*, 2018 (7) JOURNAL DE DROIT EUROPÉEN [J.D.E.] 266-269 (2018); B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, SSRN (Apr. 2, 2018), available at <http://ssrn.com/abstract=3152972>; A. Lang, *Die Autonomie des Unionsrechts und die Zukunft der Investor-Staat-Streitbeilegung in Europa nach Achmea*, SSRN (June 12, 2018), available at <http://ssrn.com/abstract=3178088>; W. Sadowski, *Protection of the rule of law in the European Union through investment treaty arbitration: Is judicial monopolism the right response to illiberal tendencies in Europe?*, (55) 4 COMMON MKT. L. REV. 1025, 1047-1058 (2018); A. Pinna, *The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ*, 6 Mar. 2018, *Case 284/16, Slovak Republic v. Achmea BV* (Apr. 30, 2018), SSRN (May 14, 2018).

²⁸ One tribunal asserted that *Achmea* was limited to intra-EU BITs and had “no bearing” on the case due to the multilateral nature of the ECT and the EU being a party to that treaty (*Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018)). Another tribunal considered that its jurisdiction stemmed from the ECT and that nothing in this treaty limits its scope to extra-EU disputes (*Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue (Aug. 31, 2018)). A third tribunal dismissed a request to reopen the proceedings in light of *Achmea* but the final award does not further address the tribunal's reasoning (*Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018)). A fourth tribunal dismissed Croatia's intra-EU objection following *Achmea* for being late and refrained from an *ex officio* review of the issue (*Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent's Request of 4 April 2018 (Apr. 30, 2018)). Finally, it has been reported that a fifth tribunal has ruled that the *Achmea* judgment does not apply to ICSID arbitration, after denying the European Commission the chance to make submissions on its effects (see A. Rose, *Achmea does not apply to ICSID cases, tribunal rules*, GLOBAL ARB. REV. (Oct. 10, 2018), available at <https://globalarbitrationreview.com/article/1175480/achmea-does-not-apply-to-icsid-cases-tribunal-rules>).

²⁹ As a striking example, the Brussels Civil Court of First Instance has denied the enforcement of the *Micula* award in Belgium on grounds of illegality under EU law (see Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Brussels, Jan. 25, 2016, BELGIAN REVIEW OF ARBITRATION [b-arbitra] 2016, 15/7241/A and 15/15/7242/A, 239 [Belg.]).

³⁰ Commission Decision 2015/1470 of Mar. 30, 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania, 2015 O.J. (L 232/43).

The Commission's decision has been appealed before the CJEU and is currently under review (Case T-694/15). See H. Wehland, *The Enforcement of Intra-EU BIT Awards: Micula v Romania and Beyond*, 17(6) J. WORLD INV. & TRADE 942 (2016).

necessary in the single market. They cannot have recourse to arbitration tribunals established by such intra-EU BITs or, for intra-EU litigation, to arbitration tribunals established under the Energy Charter Treaty".³¹

According to the Commission, the fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion as the participation of the EU in that Treaty would only have created rights and obligations between the EU and third countries and would not have affected the relations between the EU Member States.³²

On January 15, 2019, all the EU Member States committed to terminate their intra-EU BITs on the basis that Union law takes precedence over bilateral treaties concluded between them. They also agreed to inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment in all pending intra-EU investment arbitration proceedings. 21 Member States also declared that *Achmea* applies to intra-EU investor-state arbitrations under the ECT, whilst 5 other EU States (Sweden, Finland, Slovenia, Malta and Luxembourg) declared that they considered the judgment to be silent on this point.³³ The impact of *Achmea* on the ECT is currently the subject of an appeal before a Swedish Court (seat of the investment arbitration at stake), in which Spain has sought a preliminary ruling from the CJEU.³⁴

b. Extra-EU Investment Arbitration

In 2009, by virtue of the Lisbon Treaty, external trade policy fell under the exclusive competence of the EU, which meant that Member States were precluded from entering into new BITs.³⁵ EU Member States had entered into roughly 1,400 BITs before this date. Under EU regulation 1219/2012, these BITs remain in force but the European Commission has the power to indicate appropriate measures to be taken by Member States if it considers that an existing BIT constitutes a serious obstacle to the negotiation or conclusion of investment treaties by the EU.³⁶

Most recently, the EU has concluded free trade agreements with Singapore, Vietnam, Canada and Japan and has launched negotiations for the conclusion of various others (including with China and Mexico).³⁷ The most well-known of these envisaged treaties, the Transatlantic Trade and Investment Partnership ["TTIP"] had been negotiated between the Obama administration and the EU from 2013 to 2016. Negotiations, which had already been jeopardised by numerous stumbling blocks between the two parties and growing concerns amongst the general public,

³¹ *Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment*, COM (2018) 547 final (July 19, 2018), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0547>.

³² *Id.*

³³ EUROPEAN COMMISSION, *Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection*, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

³⁴ L. Roddy, *Spain asks for ECJ to rule on ECT*, GLOBAL ARB. REV. (May 31, 2018), available at <https://globalarbitrationreview.com/article/1170107/spain-asks-for-ecj-to-rule-on-ect>.

³⁵ See generally Rumiana Yotova, *The New EU Competence in Foreign Direct Investment and Intra-EU Investment Treaties: Does the Emperor have New Clothes?*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 387 (Freya Baetens ed., 2013).

³⁶ Regulation 1219/2012, of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, arts. 3 and 6, 2012 O.J. (L 351).

³⁷ See generally European Commission, *Overview of FTA and Other Trade Negotiations* (Dec. 2018), available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

were stopped with the election of Donald Trump as the United States president at the end of 2016.

The use of ISDS mechanisms has been seen by certain sections of the civil society, and recently the EU itself,³⁸ as inappropriate for disputes involving States because of their alleged lack of transparency, legitimacy, consistency, as well as the absence of sufficient review of the arbitral tribunals' decisions. Since 2015, in order to address those criticisms, the EU's approach has been to attempt to institutionalise the resolution of investment disputes in trade and investment agreements it concludes, through the inclusion of an Investment Court System ["ICS"]. Such a mechanism is now provided for by the EU's free trade agreements ["FTAs"] with Canada (the Comprehensive Economic and Trade Agreement ["CETA"]),³⁹ Singapore (the EU-Singapore Free Trade Agreement ["EUSFTA"])⁴⁰ and Vietnam (the EU-Vietnam Free Trade Agreement ["EUVFTA"])⁴¹.⁴² In a nutshell, the ICS provides a break from the *ad hoc* arbitration system, to a permanent and institutionalised court, whose members (subject to strict independence and impartiality requirements) are appointed in advance by a joint committee of the States party to the treaty, instead of being appointed on a case-by-case basis by the investor and the State involved in the dispute.⁴³ In addition, the EU FTAs contain appellate mechanisms, as opposed to traditional investment arbitration mechanisms which only provide for one instance of hearing on

³⁸ The EU sums up the "*significant concerns*" it sees in the ICSID system as follows: "(i) the lack of consistency and predictability flowing from the ad-hoc nature of the system; (ii) significant concerns arising from the perception generated by the system; (iii) limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism; (iv) the nature of the appointment process impacting the outputs of the adjudicative process; (v) significant costs; and, (vi) a lack of transparency. These concerns are systemic in nature. That is they derive from the interplay of multiple elements of the current system, but above all the ad hoc nature of the tribunals and the lack of appellate review. As demonstrated above, the contemporary investment regime is strongly characterised by repeat disputes, relative indeterminacy and vertical relationships in a context of public international law and public law situations. A comparison shows that the international community and states individually have typically chosen to create or develop permanent standing bodies to adjudicate disputes in the context of such regimes" (Submission from the European Union to the Working Group III of UNCITRAL on the Investor-State Dispute Settlement Reform, U.N. Doc. A/CN.9/WG.III/WP.145 (Nov. 20, 2017), available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)

³⁹ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, ch. 29, Jan. 14, 2017, 2017 O.J. (L 11) [*hereinafter* "CETA"]. The EU and Canada signed CETA on October 30, 2016, following the EU Member States' approval expressed in the Council. On February 15, 2017, the European Parliament gave also its consent and, on May 16, 2017, the text was ratified by Canada, entailing a limited provisional entry into force of the treaty on September 21, 2017. Its most sensitive provisions, including the rules pertaining to the Investment Court System, will not be applicable before the final ratification of CETA by all EU Member States, according to their respective constitutional requirements.

⁴⁰ Free Trade Agreement between the European Union and the Republic of Singapore, ch. 3, Oct. 12, 2018 [*hereinafter* "EUSFTA"]; Investment Protection Agreement between the European Union and the Republic of Singapore, 2018/0093 (NLE) [*hereinafter* "IPA"]. Unless indicated otherwise, every reference to the EUSFTA in this contribution refers to this specific Chapter. The Commission proposed to the Council the signature of the EUSFTA and its Investment Protection Agreement on April 18, 2018 (the treaty is expected to be signed in the course of 2018 and to enter into force in 2019).

⁴¹ European Union-Vietnam Free Trade Agreement, ch. 8 (II)(3) (as of January 2016) [*hereinafter* "EUVFTA"] (the treaty is expected to be signed in the course of 2018 and to enter into force in 2019). Unless indicated otherwise, every reference to the EUVFTA in this contribution refers to this specific Chapter. The final version of the agreement should provide for a separate Investment Protection Agreement, similarly to the EUSFTA.

⁴² Investment protection is outside the scope of the trade agreement recently concluded between Japan and the EU (the Economic Partnership Agreement ["EPA"]), as the negotiating partners could not agree on the issue of investment dispute resolution.

⁴³ For a detailed analysis, see G.A. Van Harten, *The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA*, 1(1) U. BOLOGNA L. REV. 138 (2016).

the merits. Subject to the mandatory provisions of the FTAs, investors' claims may still be submitted according to the ICSID or UNICTRAL Arbitration Rules (or any other rules on agreement of the parties).⁴⁴ The ICSID Secretary General and Secretariat remain entrusted with administrative tasks.

The new guarantees under the ICS, however, have not overcome the general public's mistrust for investment arbitration. The ICS provided for by the CETA, in particular gave rise to heated debates in the framework of the conclusion of the treaty. This point was one of the core reasons put forward by the Walloon Region, one of Belgium's federated entities, along with three other Belgian federated entities, for refusing to agree to the signing of the treaty by the federal Government.⁴⁵ If the Region finally surrendered after intense political pressure, it was only due to an agreement between the federal State and Belgium's other federated entities that Belgium would refer the validity of the CETA's ICS to the CJEU.⁴⁶ As a result, on September 6, 2017, Belgium requested the CJEU to render an opinion on the compatibility of the CETA's ICS with EU law – in particular with (i) the exclusive competence of the CJEU to provide the definitive interpretation of EU law, (ii) the general principle of equality, (iii) the practical effect requirement of EU law,⁴⁷ and (iv) the right to an independent and impartial judiciary – while specifying that Belgium “*does not take any position itself regarding [those] questions*”.⁴⁸

The hearing before the CJEU took place on June 26, 2018. AG Bot rendered his opinion on January 29, 2019.⁴⁹ He considered that the CETA provides sufficient guarantees in order to preserve the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law and that its ICS mechanism would therefore be compatible with EU law.⁵⁰ Although the CJEU usually follows the opinion of its AGs, the divergence of views between the Court and AG Wathelet in *Achmea* was a striking example that this pattern admits exceptions.

In *Achmea*, the CJEU ruled that the EU has competence to conclude agreements establishing an

⁴⁴ CETA, *supra* note 39, art. 8.23(2); EUSFTA, *supra* note 40, art. 3.6, IPA; EUVFTA, *supra* note 41, art. 7.

⁴⁵ See Amy Wood & Hadrian Mertins-Kirkwood, *Investor court in CETA does not fix problems with investor-state dispute settlement*, BEHIND THE NUMBERS (Nov. 3, 2016), available at <http://behindthenumbers.ca/2016/11/03/investor-court-ceta-not-fix-problems-investor-state-dispute-settlement>.

⁴⁶ Kingdom of Belgium, *Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l'Etat fédéral et les Entités fédérées pour la signature du CETA*, EUROPEAN UNION (Oct. 27, 2016), available at <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/fr/pdf>.

⁴⁷ Pursuant to the principle of practical effect (or “*effet utile*”, in French), EU law has to be interpreted in the way which furthers the objectives of the EU treaties and safeguards the EU's ability to function. See, e.g., Case 41/74, *Yvonne van Duyn v. Home Office*, Judgment (Dec. 4, 1974), 1974 E.C.R. 1337.

⁴⁸ Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17), Oct. 30, 2017 O.J. (C 369); BELGIAN MINISTRY OF FOREIGN AFFAIRS, BELGIAN REQUEST FOR AN OPINION FROM THE EUROPEAN COURT OF JUSTICE (Sept. 6, 2017), available at https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf.

⁴⁹ Opinion of Advocate General Bot delivered on January 29 2019 in Opinion 1/17, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10811785>.

⁵⁰ For a first review of the AG's reasoning, see G. Croissant, *CJEU Opinion 1/17 – AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law*, KLUWER ARB. BLOG (Jan. 29, 2019), available at <http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/>.

international court, as long as the principle of the autonomy of the EU legal order is respected.⁵¹ Despite the opinion of its AG, the CJEU may consider that this principle would be breached if another dispute resolution body were to provide for a binding interpretation of EU law without a possibility of preliminary ruling. Arguably, a way out could be for the CJEU to allow investment courts (or the potential future Multilateral Investment Court envisaged by the Commission; see below) to request preliminary rulings before it. This could be directly provided by the FTAs (or an international convention on the Multilateral Investment Court), as long as it is deemed compatible with the CJEU's competences under the EU Treaties. Obviously, such a clause would not merely depend on the willingness of the EU but also on the consent of the other contracting States, which may request a similar arrangement for the definitive interpretation of their domestic law by their supreme/constitutional court. As pointed out by AG Bot in his opinion, "*this would run counter to the purpose of the dispute settlement mechanism, namely to be neutral and independent from the domestic courts and tribunals of the other Party*" (¶ 182).

The CJEU's opinion is likely to shape the future of extra-EU investment arbitration, as AG Bot highlighted that "*what is at issue here is the definition of a model which is consistent with the structural principles of the EU legal order and which, at the same time, may be applied in all commercial agreements between the European Union and third States*" (¶ 86).

Addressing the general public's and Member States' concerns is all the more important for the EU since, in its opinion on the draft EUSFTA, the CJEU had ruled that a regime governing dispute settlement between investors and States falls within a competence shared between the EU and its Member States. As a result, the EU must obtain the Member States and their respective federated entities' consent in order to include such a regime in a trade treaty.⁵²

Against this background, the European Commission introduced on September 13, 2017, a recommendation for a Council decision authorising the opening of negotiations for a convention establishing a multilateral court for the settlement of investment disputes⁵³ with the aim of "*having one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place*", rather than bilateral investment courts.⁵⁴ With this new regime, the European Commission hopes to address the criticisms raised against the ISDS and ICS by:

⁵¹ C-284/16, *Slovak Republic v. Achmea BV*, 2018 E.C.R. 158, ¶ 57 ("It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected").

⁵² Opinion 2/15 of the Full Court of Justice of European Union on the draft EU-Singapore trade agreement (May 16, 2017), *available* at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3014>.

⁵³ *Recommendation for a Council decision authorising the opening of negotiations for a convention establishing a multilateral court for the settlement of investment disputes*, COM (2017) 493 final (Sept. 13, 2017) [*hereinafter* "COM (2017) 493 final"].

⁵⁴ This possibility is already expressly provided for in CETA (Article 8.29; "The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements"), the EUSFTA (Art. 3.12) and the EUVFTA (Art. 15).

“*setting up a framework for the resolution of international investment disputes that is permanent, independent and legitimate; predictable in delivering consistent case-law; allowing for an appeal of decisions; cost-effective; transparent and efficient proceedings and allowing for third party interventions. The independence of the Court should be guaranteed through stringent requirements on ethics and impartiality, non-renewable appointments, full time employment of adjudicators and independent mechanisms for appointment*”.⁵⁵

This regime would only deal with the investment disputes’ procedural aspects. The applicable law and the standards of interpretation would be addressed in the underlying investment agreements to be applied by the Multilateral Investment Court. The intra-EU BITs, seen as contrary to EU law by the Commission (see Section II.A.ii.a above), are expressly excluded from this initiative. However, it can be applied to extra-EU BITs concluded individually by the Member States before 2009.

The Council adopted negotiating directives authorising the Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes on March 20, 2018.⁵⁶ These negotiations have been taking place in the framework of Working Group III [“**Investor-State Dispute Settlement Reform**”] of the United Nations Commission on International Trade Law [“**UNCITRAL**”], which had identified the setting up of an international investment court as an “option for reform” of ISDS at the occasion of its 50th session in July 2018.⁵⁷

At its 36th session of November 2018, Working Group III concluded that multilateral reforms of ICSID are desirable to address (i) the consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, (ii) the appointment, limitations in challenge mechanisms and lack of diversity of arbitrators and decision-makers, and (iii) the cost and duration of ISDS cases.⁵⁸ It remains to be seen whether the Commission’s views that a multilateral investment court is the appropriate solution to these challenges will achieve consensus.⁵⁹

iii. Potential consequences of Brexit

In this context, it remains to be seen what will be the exact consequences of the United Kingdom’s [“**UK**”] withdrawal from the EU [“**Brexit**”],⁶⁰ and whether an FTA containing a dispute resolution mechanism similar to the one provided in CETA, the EUVFTA and the

⁵⁵ COM (2017) 493 final, *supra* note 53.

⁵⁶ Council Directive 12981/17, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, ADD 1 DCL 1 (Mar. 20, 2018).

⁵⁷ See United Nations Comm’n On Int’l Trade L., Rep. on the Fiftieth Session, U.N. Doc. A/72/17 45 (July 21, 2017).

⁵⁸ See United Nations Comm’n On Int’l Trade L., Draft Rep. of Working Group II (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session, U.N. Doc. A/CN.9/965 (Nov. 6, 2018).

⁵⁹ The EU and its Member States submitted two papers to UNICTRAL Working Group III on January 18, 2019. The first paper (*available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf) sets out in more detail the EU’s proposal of establishing a permanent multilateral investment court whilst the second paper (*available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf) proposes a work plan for the process of Working Group III on ISDS reform.

⁶⁰ For a first analysis of the consequences of Brexit for international arbitration, see the special issue of the Journal of International Arbitration, 2016/7 (in particular, Markus Burgstaller & Agnieszka Zarowna, *Possible Ramifications of the UK’s EU Referendum on Intra- and Extra-EU BITs*, 33(7) J. INT’L. ARB. 568 (2016)); G. Croisant, *Brexit – Actualités en droit international privé et en arbitrage international*, 2018(16) J.T. 350 *et seq.* (2018); G. Croisant, *Fog in Chunnel – Continent Cut Off. Les conséquences du Brexit pour le droit international privé et l’arbitrage international*, 2017(2) JOURNAL DES TRIBUNAUX [J.T.] 24 (2017).

EUSFTA (i.e. an ICS which could be replaced by the MIC) will be concluded between the two parties.

Following the triggering of the “withdrawal clause” of Article 50 of the Treaty on European Union [“TEU”] on March 30, 2017, the UK should indeed cease to be a Member State on March 30, 2019 (00:00 CET) at the latest. According to the initial draft withdrawal agreement negotiated by the EU and the UK Government, most of the EU law *acquis* (including the CJEU’s jurisdiction) would remain applicable to the United Kingdom for almost a two year transition period, lasting until December 31, 2020.⁶¹

Arguably, the dozen of BITs concluded by the UK with other EU Member States⁶² and multilateral treaties such as the ECT could remain unaffected by *Achmea* after the British withdrawal. This may entail investors, willing to benefit from the protection of these treaties, to structure their investment through UK incorporated companies. The UK could also become a seat of predilection for post-*Achmea* intra-EU BIT arbitrations, since annulment proceedings can only be launched in the country of the seat of the arbitration and UK courts might not be bound by the CJEU’s case law anymore. However, even if UK courts were to dismiss annulment requests based on *Achmea*, the awards rendered by the investment tribunals are likely to face hurdles if recognition and enforcement is sought before the courts of an EU Member State.

In addition, investment treaties concluded by the EU on behalf of its Member States will cease to apply to the relationships between the UK and the EU’s counterparty. Given the long-lasting inclination of the UK towards international arbitration, one may expect the new FTAs to be concluded by the UK to contain dispute settlement provisions providing for investment arbitration in one way or another.

B. The European Convention on Human Rights

The ECHR (formally, “the Convention for the Protection of Human Rights and Fundamental Freedoms”) was drafted in 1950 under the auspices of the Council of Europe, and entered into force on September 3, 1953. The accession to the organisation goes together with becoming a party to the ECHR i.e. 47 contracting States.

The ECHR protects rights first spelt out in the United Nation Universal Declaration of Human Rights, 1948 [“UDHR”]. However, whilst the UDHR embodies both civil and political rights on the one hand, and economic, social and cultural rights on the other, the ECHR predominantly deals with the former. This is mainly because reaching an agreement on economic, social and

⁶¹ See European Commission and United Kingdom, Joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union TF50 (2018) 52 (June 19, 2018), available at https://ec.europa.eu/commission/publications/joint-statement-negotiators-european-union-and-united-kingdom-government-progress-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en.

⁶² The United Kingdom has concluded BITs with 12 other EU Member States, namely Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia (see United Kingdom, Bilateral Investment Treaties (BIT), INVESTMENT POLICY HUB, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu>).

cultural rights was deemed too problematic and was left for later negotiations,⁶³ in order to promptly adopt a non-controversial text that governments could accept.⁶⁴

As elaborated below, overlaps between the protection offered by the ECHR, investment treaties and EU law mainly concern the right to property (see below, Section III.C.ii), the provisions on protection from discrimination (Section III.D.ii), the right to a fair trial (Section III.E.ii) and the principle of legal certainty and respect of legitimate expectations (Section III.F.ii).⁶⁵ In some sensitive sectors, it is also conceivable that jeopardising an investment may constitute a structural obstacle to certain rights or freedoms guaranteed by the ECHR, in particular the freedom of expression (Section III.G.ii). In this context it is worth noting that historically, under public international law, before the emergence of international human rights instruments, States were merely required to offer basic protection to aliens (such as the protection from expropriation and the right to a fair trial) rather than to every individual.⁶⁶ This common origin partly explains the similarities existing between human rights law and investment arbitration protection.

The system of legitimate restrictions to the ECHR rights is complex.⁶⁷ As we will develop below, their conditions vary depending on the substantive right at stake. However, certain general restrictions are applicable to all the substantive rights enshrined in the ECHR and its Protocols. Most notably, “*in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation*”.⁶⁸ Arguably, the notion of “*threatening the life of the nation*” has recently been construed rather loosely by certain Member States.⁶⁹ The Convention also provides for derogations from the prohibition of discrimination, the freedom of expression and

⁶³ Economic and social rights are now protected by the European Social Charter (adopted in 1961, and revised in 1996), under the auspices of the Council of Europe. It has been ratified by 39 Council Member States. The ECtHR does not have jurisdiction to rule on alleged breaches of this convention.

⁶⁴ D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3 (2009) [*hereinafter* “D.J. Harris”].

⁶⁵ Although it is less relevant in the context of investment disputes, Convention rights may also be invoked by corporates facing investigations or prosecutions, e.g. the right to a fair trial against no or insufficient protection of due process in domestic legislation, or the right to privacy to protect business secrets and as a testing parameter for search and seizure warrants.

⁶⁶ See P.M. Dupuy, *Unification rather than fragmentation of international law ? the case of international investment law and human rights law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 43, 47 (Pierre-Marie Dupuy et al. eds., 2009).

⁶⁷ For a complete analysis, see Y. Arai, *The System of Restrictions*, in THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 307, 333-350 (Pierre van Dijk et al. eds., 4th ed., 2006). The author distinguishes four types of restrictions on the basis of the case law of the ECtHR: (i) the general type of restrictions applicable to all the substantive rights; (ii) the limitation clauses attached to Articles 8-11 of the Convention and certain Protocols (including Article 1 of the First Protocol); (iii) the possibility of restrictions allowed to demarcate or delimitate the scope of protections of certain rights and (iv) the theory of inherent or implied limitations (pursuant to which, for certain rights for which the Convention does not contain express limitations, some restrictions would not constitute an interference on the ground that they are “ingrained” in the scope of guarantee of these rights).

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 221 [*hereinafter* “ECHR”]. These derogations are proscribed with respect to the right of life, except in respect of deaths resulting from “lawful acts of war”, the prohibition of torture, the prohibition of slavery and the principle of no punishment without law; ECHR, art. 15(2).

⁶⁹ France notified the Secretary General of the Council of Europe pursuant to Art. 15(3) of the ECHR that the country would derogate to the ECHR as a result of state of emergency measures adopted in the wake of the 2015 terrorist attacks in Paris.

the freedom of assembly and association with respect to political activity of aliens.⁷⁰

In many contracting States, the ECHR is directly applicable before domestic courts and takes precedence over their national laws.⁷¹ Constitutional courts, in particular, usually construe the rights enshrined in their respective domestic constitution in light with the ECHR and the ECtHR's case law.⁷²

As opposed to other international human rights treaties, the ECHR has very strong enforcement mechanisms thanks to the existence of the ECtHR, a permanent court composed of 47 full-time judges, one per Convention State. The ECtHR, seated in Strasbourg, hears applications brought either by other Convention States or, considerably more important in practice, by “*any person [including corporate bodies], non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto*”.⁷³ It is not necessary for the claimant to be a national of the respondent State.

As will be elaborated below (Section IV.B.ii.b), the ECHR is based on the principle that national authorities, primarily the courts (in particular constitutional courts, entrusted with the protection of fundamental rights), should be granted the possibility to redress the alleged violations of the ECHR, before the case may be brought before the Court. As a result, an application lodged before the exhaustion of domestic remedies shall be inadmissible. Within six months of the exhaustion of such remedies, an investor can file an application with the ECtHR.⁷⁴ A judge rapporteur shall review the case and decide whether the application is to be considered by a single judge formation or by another judicial formation.

If the judge rapporteur considers the application clearly inadmissible, the application shall be considered by a single judge formation (or “filtering section”). Should the single judge reach the same conclusion, he or she shall declare the application inadmissible or strike it out of the Court's list of cases without further examination. Such decision of inadmissibility cannot be challenged. If, on the contrary, the single judge does not consider the case as clearly inadmissible, he or she shall forward the application to a committee (of three judges) or to a Chamber (of seven judges) for further examination.

If the judge rapporteur does not consider the application inadmissible, the case is allocated to a

⁷⁰ ECHR, *supra* note 68, art. 16.

⁷¹ Although, in some jurisdictions, the superiority accorded to the ECHR is limited by constitutional principles, which have been referred to as the “*intangible nucleus of constitutional sovereignty*” (see G. Martinico, *Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 23(2) EUR. J. INT'L L. 401, 423 (2012) [*hereinafter* “G. Martinico”]).

⁷² See generally G. Martinico, *supra* note 71; E. Bjorge, *The Courts and the ECHR: a Principled Approach to the Strasbourg Jurisprudence*, 72(2) CAMBRIDGE L. J. 289 (2012); Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Aug. 1, 2016, E.T.S. No. 214. Pursuant to Protocol No. 16 to the ECHR, which entered into force on August 1, 2018 for 10 Member States of the Council of Europe, the highest courts of a Member State may request the ECtHR to give advisory (non-binding) opinions on questions of principle relating to the interpretation or application of the ECHR and the Protocols thereto.

⁷³ ECHR, *supra* note 68, arts. 33 and 34.

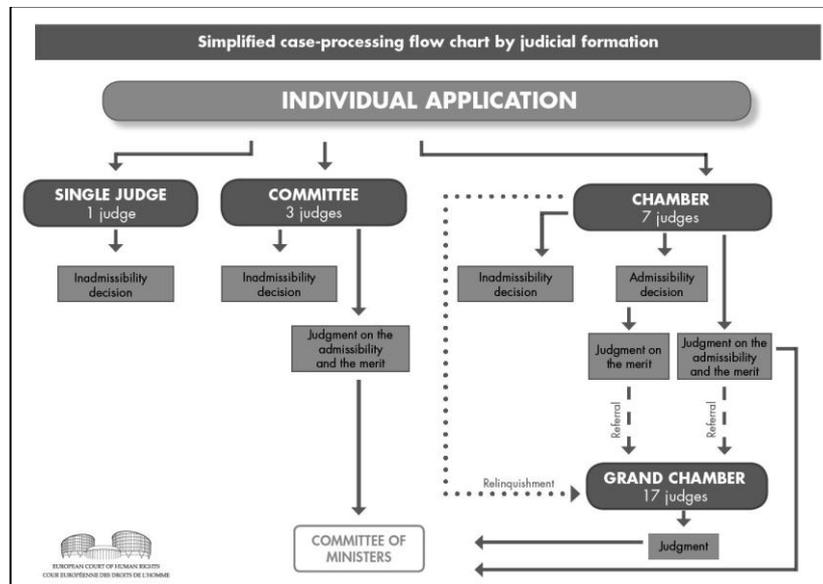
⁷⁴ The application will only be examined if it complies with the strict formal requirements of Rule 47 of the Rules of Court of the ECtHR. A mandatory application form is available on the website of the Court, *European Court of Human Rights, Application Form*, EUROPEAN COMMISSION OF HUMAN RIGHTS, available at <http://www.echr.coe.int/Pages/home.aspx?p=applicants/forms&c=>.

committee or a Chamber. The committee may, by a unanimous vote, either declare the application inadmissible or declare the application admissible and render at the same time a judgment on the merits if the application is considered to be a repetitive case (which is unlikely for investment disputes).

If the case is not allocated to a Chamber, or if the committee does not adopt a decision of inadmissibility or a decision considering the case repetitive, the application shall be examined by a Chamber. The Chamber is also entitled to consider the application inadmissible on its own motion. If the Chamber does not take such decision, a notice of the application shall be given to the responding State so that it may submit written observations. The applicant shall then receive these observations from the Court and be given the opportunity to submit observations in reply. The Chamber may decide, either at the request of a party or on its own motion, to hold a hearing on the merits if it considers that “*the discharge of its functions under the Convention so requires*”. It does so only in a limited number of cases.

Unless one of the parties object, a Chamber may relinquish jurisdiction in favour of the Grand Chamber (of 17 judges) when a case raises a serious question affecting the interpretation of the Convention or the Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court. Although the Court accepts such referral requests only in exceptional cases, a case may also be referred to the Grand Chamber for appeal at the request of any party within 3 months of the delivery of a Chamber judgment.

This procedural process can be summarised as follows:⁷⁵



The Court’s judgments are binding upon the Convention States (albeit they are essentially declaratory and cannot of themselves be directly enforced in the contracting States) and their enforcement is monitored by the policy-making and executive organ of the Council of Europe,

⁷⁵ *Simplified case-processing flow chart by judicial formation*, EUROPEAN COMMISSION OF HUMAN RIGHTS, available at http://www.echr.coe.int/Documents/Case_processing_Court_ENG.pdf.

the Committee of Ministers (see section IV.H.ii below). Before 1998, this body was entrusted with jurisdictional tasks, but since the entry into force of Protocol No. 11 to the Convention, it has lost this competence, and is now merely entrusted with the enforcement of the Court's judgments.

More than 200 conventions have been concluded under the Council of Europe's auspices, including the ECHR. The UK has indicated that consideration would be given to the country's "human rights legal framework" after Brexit.⁷⁶ The UK remaining a party to the ECHR is regarded by the EU as a key safeguard to be retained by the UK.

C. EU Law

i. Introduction

The EU is a political and economic union of 28 Member States,⁷⁷ tracing its origins to the European Coal and Steel Community ["**ECSC**"] and the European Economic Community ["**EEC**"], established by the 1951 Treaty of Paris and 1957 Treaty of Rome, respectively.⁷⁸ Today, the two fundamental EU treaties are the TEU, originally signed in Maastricht in 1992 and the TFEU, (successor of the 1957 Treaty of Rome).

The EU has a separate legal personality and can conclude international treaties.⁷⁹ The EU functions with a complex network of seven core institutions,⁸⁰ specialised bodies, offices and agencies (e.g. the European External Action Service, the European Ombudsman, the European Environment Agency, the European Chemicals Agency, etc.), some of them having a separate legal personality. As opposed to the EU Treaties' nomenclature, "EU institutions" will be construed in a broad sense in this article, encompassing not only the Union's seven core institutions, but also its bodies, offices and agencies.

The most relevant rules of EU law are directly applicable before domestic courts and have precedence over domestic law,⁸¹ similar to the ECHR.

ii. Investment Protection under EU Law

⁷⁶ Christopher Hope, *Britain to be bound by European human rights laws for at least another five years even if Tories win election*, THE TELEGRAPH (May 18, 2018), available at <https://www.telegraph.co.uk/news/2017/05/18/britain-bound-european-human-rights-laws-least-another-five/>.

⁷⁷ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden and, until March 30 2019, the United Kingdom.

⁷⁸ The third community was the European Atomic Energy Community ["Euratom"], an international organisation established by the Euratom Treaty of March 25 1957 with the original purpose of creating a specialist market for nuclear power in Europe. It is the only former community organisation that is still legally independent from the EU. It has the same membership and is governed by many of the EU institutions but remains outside the legislative power of the European Parliament.

⁷⁹ Treaty on European Union, art. 47, Feb. 7, 1992, U.N.T.S. 1755-1759 [*hereinafter* "TEU"].

⁸⁰ Namely, the European Parliament, the European Council (Member States' heads of State or Government), the Council of the European Union (representatives of the Member State's executive governments, part of the essentially bicameral EU legislature with the European Parliament), the European Commission (the EU's executive), the Court of Justice of the European Union, the European Central Bank and the Court of Auditors (TEU, *supra* note 79, art. 47).

⁸¹ Some EU rules, such as the ones contained in the EU treaties, the EU Charter and regulations, are directly applicable while others, such as directives, must in principle be transposed under national law before forming part of the Member States' legal order.

The EU, which was initially built as an economic area, grants strong protections to investors. In its communication of July 2018 on the protection of EU investments, the European Commission stated that:

“In the aftermath of the Achmea judgment, the unlawfulness of intra-EU investor-State arbitration may result in the perception that EU law does not provide for adequate substantive and procedural safeguards for intra-EU investors. However, the EU legal system protects cross-border investors in the single market, while ensuring that other legitimate interests are duly taken into account. When investors exercise one of the fundamental freedoms, they benefit from the protection granted by: i) the Treaty rules establishing those freedoms; ii) the Charter of Fundamental Rights of the European Union (“Charter”); iii) the general principles of Union law; and iv) extensive sector-specific legislation”.⁸²

The internal market of the EU is based on four fundamental freedoms, namely, the free movement of goods, persons, capital and services (which includes the freedom of establishment). Under certain circumstances, State measures jeopardising an investment may constitute an illegal hindrance to these freedoms, in particular the free movement of capital and services. Pursuant to the CJEU’s case law, national measures liable to hinder, or make less attractive, the exercise of fundamental freedoms guaranteed by the Treaty must be justified with imperative requirements in the general interest, be necessary and proportionate to these requirements, and be compatible with the general principles of EU law and fundamental rights, in particular, the Charter of Fundamental Rights of the European Union [“**EU Charter**”] and the ECHR (see Section III.B.ii below).

Since the entry into force of the Lisbon Treaty, the EU Charter has the same legal value as the EU Treaties and the general principles of EU law.⁸³ It can be directly opposed to the EU institutions and, where they apply EU law,⁸⁴ also to the Member States. The protection conferred by the EU Charter is very similar to the one offered by the ECHR, since the former provides that *“in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”*, without prejudice to the possibility for EU law to grant more extensive protection.⁸⁵ The ECtHR and the CJEU also frequently refer to each other’s case law with respect to fundamental rights. Further, similar to the limitations on some of

⁸² *Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment*, at 3, COM (2018) 547 final (July 19, 2018).

⁸³ See generally F. PICOD & S. VAN DROOGHENBROECK, CHARTE DES DROITS FONDAMENTAUX DE L’UNION EUROPEENNE: COMMENTAIRE ARTICLE PAR ARTICLE (2018); THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers et al. eds., 2014); THE EU CHARTER OF FUNDAMENTAL RIGHTS FROM DECLARATION TO BINDING INSTRUMENT (Giacomo Di Federico ed., 2011).

⁸⁴ See Charter of Fundamental Rights of the European Union, art. 51, Dec. 12, 2000, 2010 O.J. (C 364) [*hereinafter* “EU Charter”]. “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”. With respect to the general principles of legal certainty, see Case C-381/97, Belgocodex SA v. Belgian State, 1998 E.C.R. I-08153, ¶ 26.

⁸⁵ EU Charter, *supra* note 84, art. 52(3). See also TEU, *supra* note 79, art. 6(3), pursuant to which “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

the ECHR's freedoms, limitations on the freedoms provided under the EU Charter must be provided by law, respect the essence of the rights and freedoms, be proportional, necessary and meet objectives or general interest.⁸⁶

Moreover, given the supremacy of EU law over domestic law, investors may directly benefit from the harmonisation rules contained in EU sector-specific legislations, covering areas such as financial services, transport, media, energy, telecommunications, public procurement, professional qualifications, intellectual property or company law (see Section III.G below).

Finally, a selective advantage granted by a State or from State resources to certain companies, over other investors, may also be prohibited under EU State aid rules, if they distort or threaten to distort competition and affect trade between Member States (see Section III.D.iii.c below).

iii. *The Court of Justice of the European Union (CJEU)*

The CJEU was established in 1952⁸⁷ and is seated in Luxembourg. It is composed of two separate courts, the Court of Justice and the General Court. The Court of Justice, with which this article is mostly concerned, hears applications from national courts for preliminary rulings and certain actions for annulment and appeals. It consists of 28 judges, one judge from each EU Member State, as well as 11 Advocates General. The General Court hears applications for annulment brought by individuals, companies and, in some cases, Member States. In practice, this means that this court deals mainly with competition law, State aid, trade, agriculture, and trademarks. It is made up of 47 judges, which will be increased to 56 (two for each Member State) in 2019.⁸⁸

The Court of Justice sits in Chambers of 3 or 5 judges. Where it is requested by a Member State or an EU institution party to the proceedings, or where the Court considers that the case has important value as a precedent, it sits in a "Grand Chamber" of 15 judges. It may even sit as a "Full Court" for a few enumerated circumstances and where it considers that a case before it is of "exceptional importance". As per similar principles, the General Court sits in Chambers (of 3 or 5 judges), Grand Chamber (of 13 judges) or Full Court.

The jurisdiction of the CJEU spans over a wide range of subject matters, but we will focus our analysis on the three most relevant procedures, namely, the action for annulment of a measure allegedly contrary to EU law or failure to act, the preliminary ruling procedure and the infringement proceedings. The investors' standing for these actions is detailed below (Section IV.B.i.c).

a. *Action for Annulment or Failure to Act ("Direct Actions")*

⁸⁶ EU Charter, *supra* note 84, art. 52(1).

⁸⁷ The Court of Justice of the European Coal and Steel Community ["ECS"] was established by the Treaty of Paris (signed on April 18, 1951). The Court was formally inaugurated in Luxembourg on December 10, 1952. As a result of the conclusion on March 25, 1957 of the Treaties of Rome establishing the European Economic Community ["EEC"] and the European Atomic Energy Community ["EAEC"], the Court of Justice of the ECSC became the Court of Justice of the European Communities ["ECJ"], common to the three Communities. The whole court system of the European Union, including the ECJ, became the Court of Justice of the European Union ["CJEU"] under the Treaty of Lisbon (signed on December 13, 2007 and entered into force on December 1, 2009).

⁸⁸ See INSTITUTIONS AND BODIES: COURT OF JUSTICE OF THE EUROPEAN UNION, available at https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.

The action for annulment (Article 263 of the TFEU) and the action for failure to act (Article 265 of the TFEU) are the two EU procedures for which investors have direct standing before the CJEU. These actions are only available to investors challenging an act adopted by the EU institutions (or its absence thereof), to the exclusion of acts adopted by the Member States.

The CJEU is entrusted with the task of reviewing the legality of the acts adopted by the EU institutions (intended to produce legal effects vis-à-vis third parties),⁸⁹ as “*any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*”.⁹⁰ Actions for annulment are common in the area of EU Competition Law, against the acts of the European Commission.

In addition, should an EU institution fail to act in the event of infringement of the EU treaties, any natural or legal person may call upon this institution to act and, in the absence of an action within two months, bring the matter before the CJEU.⁹¹ The threshold for this remedy is high, as it must be proved by the applicant that a sufficiently clear and well-defined obligation to act exists and that it can also be enforced by a court.⁹²

Applicants can lodge an application directly with the CJEU’s Registrar. The defendant has two months following the application’s notification, for lodging a defence.⁹³ “*The application, initiating proceedings and the defence may be supplemented by a reply from the applicant and by a rejoinder from the defendant*” within the time-limits prescribed by the court.⁹⁴ The exchange of submissions is usually followed by an oral hearing, either because the court considers that it will have an added value, or because one of the parties submitted a reasoned request to that end. In practice, each party may only address the court for 15 minutes. The judges and the advocate general can ask questions to the parties. The advocate general usually reads out his or her opinion a few weeks after the hearing. The parties are not granted an opportunity to reply.

Successful actions for annulment and for failure to act lead to a decision declaring the contested act of an EU institution void⁹⁵ or that the EU institution failed to act.⁹⁶ The CJEU cannot render direct orders eliminating the consequences arising from the infringement of EU law. However, the relevant EU institution is under a duty to eliminate any such consequence, including financial ones.⁹⁷

Another point to be noted is that investors may also launch independent actions in order to

⁸⁹ On grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers (Consolidated Version of the Treaty on the Functioning of the European Union, arts. 263(2),(4), Oct. 26, 2012, 2012 O.J. (C 236) [*hereinafter* “TFEU”]).

⁹⁰ *Id.* art. 263(4).

⁹¹ *Id.* art. 265.

⁹² Case 13/83P, European Parliament v. Council of the European Communities (Common transp. pol’y - Obligations of the Council), 1985 E.C.R. 1513.

⁹³ Rules of Procedure of the Court of Justice, art. 124(1), 2012 O.J. (L 265) [*hereinafter* “CJEU Rules of Procedure”].

⁹⁴ *Id.* art. 126.

⁹⁵ TFEU, *supra* note 89, art. 264(1).

⁹⁶ TFEU, *supra* note 89, art. 265(1).

⁹⁷ TFEU, *supra* note 89, art. 266.

engage the EU's contractual⁹⁸ or non-contractual liability⁹⁹ before the CJEU, including as a result of the adoption of an unlawful act or its absence thereof.¹⁰⁰

b. Preliminary Ruling Reference

Under Article 267 of the TFEU, a domestic court faced with questions concerning the interpretation of EU law (including unwritten general principles) or the validity and interpretation of acts of EU institutions may (or must, if it is a court of last resort), if it considers that a decision on the question is necessary to enable it to give a judgment, request the CJEU to give a preliminary ruling thereon. As a general rule, arbitrators cannot be regarded as a “court or tribunal of a Member State” in the meaning of Article 267 of the TFEU and are therefore barred from referring a case for preliminary ruling to the CJEU,¹⁰¹ although such a reference can be made by the annulment or enforcement courts of the Member States. The ECtHR cannot refer a case to the CJEU either.¹⁰²

Preliminary ruling references can be made in the framework of any type of proceedings, regardless of the type of proceedings or substantive law at stake. The domestic court has the right to refer questions on its own motion, and parties to the main proceedings cannot compel it to make a reference.¹⁰³ It is also for the domestic court to determine the question(s) to be referred to the CJEU, even if the parties to the main proceedings make a proposal. The order for reference must contain sufficient factual and legal information to allow the CJEU to rule on the case.¹⁰⁴ The domestic court should therefore only request a preliminary ruling once it has sufficiently ascertained the facts and the domestic law aspects of the case.

In principle, the CJEU has no jurisdiction to rule on the compatibility of national rules with EU law.¹⁰⁵ However, in practice, the Court considers that “*it may nevertheless provide the national court with an interpretation of European Union law on all such points so as to enable that court to determine the issue of*

⁹⁸ Pursuant to Article 340(1) of the Treaty on the Functioning of the European Union [“TFEU”], the contractual liability of the EU is governed by the law applicable to the contract in question. Article 272 of the TFEU authorises the EU and its counterparties to confer jurisdiction over contractual disputes to the CJEU pursuant to an “arbitration clause” (this expression is misleading as the CJEU acts as a court and not an arbitrator). In the absence of such a clause, Article 274 of the TFEU gives jurisdiction to national courts.

⁹⁹ Under an action for damages, pursuant to Articles 268 and 340(2) of the TFEU.

¹⁰⁰ For a presentation of these actions, *see* KOEN LENAERTS ET AL., EU PROCEDURAL LAW, chs. 11 and 19 (2015 [bereinafter “Koen Lenaerts et al.”]).

¹⁰¹ Case C-102/81, Nordsee Deutsche Hochseefischerei Nordstern GmbH v. Reederei Mond Hochseefischerei Nordstern, 1982 E.C.R. 01095, ¶ 11; Case C-284/16, Slovak Republic v. Achmea BV, 2018 E.C.R. 158, ¶ 49 (with respect to a BIT arbitral tribunal). However, the CJEU has held admissible preliminary questions referred to it by an arbitral tribunal, where that tribunal had been established by law, whose decisions were binding on the parties and whose jurisdiction did not depend on their agreement (*e.g.*, Case C-109/88, Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening (Danfoss), 1989 E.C.R. 03199. *See also* Case C-555/13, Merck Canada Inc. v. Accord Healthcare Ltd and others, 2014 E.C.R. 92; Case C-377/13 Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v. Autoridade Tributária e Aduaneira, 2014 E.C.R. 1754).

¹⁰² KOEN LANAERTS ET AL., *supra* note 100, at 61.

¹⁰³ Case 93/78, Lothar Matthaus v. Doego Fruchtimport und Tiefkühlkost eG, 1978 E.C.R. 02203, ¶¶ 4-6.

¹⁰⁴ Besides this requirement, it is the domestic court, which is “*in the best position to appreciate at which stage of the proceedings it requires a preliminary ruling from the Court of Justice*” (Case 14/86, Pretore di Salò v. X, 1987 E.C.R. 275, ¶ 11).

¹⁰⁵ *See, e.g.*, Case C-206/13, Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo, 2014 E.C.R. 126.

compatibility for the purpose of the case before it".¹⁰⁶ It will therefore indicate to the referring court that EU law precludes domestic legislations "such as" that which is at issue in the main proceedings.¹⁰⁷

The domestic court is bound by the CJEU's decision and has to apply it to the specific circumstances of the case (including by disregarding a national measure, or one of its interpretations, which would be contrary to EU law).

c. Infringement Proceedings

In a situation in which a Member State has failed to fulfil its obligations under the Treaties, the European Commission may, under Article 258 of the TFEU, request this State to amend its legislation and should it refuse to do so, bring the matter before the CJEU. In theory, other Member States may also, under Article 259 of the TFEU, bring the matter before the CJEU but, for obvious political reasons, have barely ever done so.

This means that investors do not have the right to formally initiate a Treaty action on their own, but must file a complaint with the European Commission, and convince this authority to take on their case.¹⁰⁸ The Commission is under no obligation to act on the complaint,¹⁰⁹ and a decision rejecting the complaint cannot be challenge since this cannot be regarded as a binding legal act.¹¹⁰

If the Commission were to take on the case, it will issue one or more requests for information to the Member State against which the complaint was launched. If the Commission is not satisfied by its answers, it will send its finding of an infringement to the Member State, which will have an opportunity either to remedy or to submit formal observations. If the Commission's concerns are not addressed, it can issue a reasoned opinion, which crystallises the infringement. It should be stressed that "*the main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process*".¹¹¹ Only a fraction of all expected infringements makes it to the litigation phase. The majority of all cases are settled in the preliminary phase, where the Commission negotiates with the parties concerned.

If the Member State were to continue to object, the Commission may seize the CJEU. There are no fixed deadlines for all these steps, and at each step the Commission has discretionary powers as to proceed or not. The investor will not be afforded the possibility to intervene before the

¹⁰⁶ This is a standard formula frequently used by the Court, e.g. Cases C-78/08 to C-80/08, *Ministero dell'Economia e delle Finanze and Others. v. Paint Graphos Soc. coop. arl and Others*, Joined, 2011 E.C.R. 550, ¶ 34.

¹⁰⁷ E.g., Case C-553/16, *'TTL' EOOD v. Direktor na Direksia 'Obzhalvane i danachno-osiguritelna praktika'*- Sofia, 2018 E.C.R. 604.

¹⁰⁸ There are no specific legal provisions governing such a complaint but the Commission publishes a mandatory complaint form on its website (*available at* https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/).

¹⁰⁹ Case T-202/02, *Makedoniko Metro and Michaniki AE v. Comm'n*, 2004 E.C.R. 5, ¶¶ 42-47. An action for failure to act, or an action for damage, will not lie since the Commission has no duty to act (Case T-117-96, *Intertonic - F. Cornelis GmbH v. Comm'n*, 1997 E.C.R. 16, ¶ 32); Case C-72/90, *Asia Motor France v. Comm'n*, 1990 E.C.R. I-02181, ¶ 13). In theory, investors could take up the matter with the European Ombudsman if the Commission's inaction is accompanied by maladministration (such as the absence of any answer or the loss of the file).

¹¹⁰ Case C-87/89, *Société nationale interprofessionnelle de la tomate (Sonito) and others v. Comm'n*, 1990 E.C.R. I-01981, ¶¶ 5-9.

¹¹¹ F. Snyder, *Preconditions for the Effectiveness of EU Law: Reflections on Constitutionalism and EMU*, in COMPLIANCE AND ENFORCEMENT OF EUROPEAN COMMUNITY LAW 27 (J.A.E. Vervaele et al eds., 1999).

CJEU if the Commission were to launch infringement proceedings.¹¹² If the CJEU finds an infringement of EU law, the Member State will be under a duty to take remedial steps. The CJEU cannot award direct compensation to the investor. At the initiative of the Commission, the CJEU may impose fines and/or penalty payments on the Member State, if it fails to comply with the judgment.

Article 108 of the TFEU, as implemented by the Council Regulation 2015/1589 of July 13, 2015,¹¹³ provides for a specific procedure for violations of State aid law. Any interested party may submit a complaint to “*inform the Commission of any alleged unlawful aid or any alleged misuse of aid*”.¹¹⁴ The existence of this specific State aid procedure does not prevent the compatibility of an aid scheme in relation to EU principles, other than State aid rules being assessed under Art. 258 of the TFEU.¹¹⁵

III. Substantive Aspects – Overlap of the Three Regimes

A. Introduction

We identify below the main substantive protections offered by the ECHR, BITs and EU law, and how these regimes may overlap, while bearing in mind that, if it is tempting to import notions from one regime to the others, “*there can be no assumptions about the perfect correspondence between*

¹¹² Statute of the Court of Justice of the European Union, art. 40, 2012 O.J. (L 228) [*hereinafter* “CJEU Statute”] (“Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union”).

¹¹³ Council Regulation 2015/1589 of 13 July 2015, 2015 O.J. (L 248) (EU) laying down detailed rules for the application of TFEU, *supra* note 89, art. 108.

¹¹⁴ A specific State aid complaint form is also available on the Commission’s website, *State Aid Control: State Aid Complaint Form* (http://ec.europa.eu/competition/forms/intro_en.html). The complainant is granted specific information rights (Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), art. 24, 2015 O.J. (L 248) (EU); Code of Best Practice for the conduct of State aid control procedures 2009/C 136/04, art. 7, 2009 O.J. (C 136)). The Commission may, after *prima facie* examination of the complaint, decide that no State aid is involved and reject the complaint. If the complaint provides grounds revealing that the State measure can be an aid, the Commission will start an investigation and request information from the Member State. Unlike the national courts, the Commission cannot order State aid to be repaid solely on the mere ground that it has not been notified (Case C-301/87, *French Republic v. Comm’n*, 1990 E.C.R. I-00307) [*hereinafter* “Case C-301/87”]. The Commission must examine whether there is state aid and whether the aid may be declared compatible. If it concludes there are doubts as to the existence of aid it will initiate the formal proceedings and third parties will be able to submit comments. It will then issue a decision (within an indicative timing of 18 months) that (i) there was no State aid; (ii) the aid is compatible (possibly under conditions); and (iii) the aid is not compatible. In the latter case, the aid cannot be put in effect, and recovery of the unlawful aid already granted will be ordered. Should the Member State fail to comply with the decision, the Commission or another Member State may refer the matter to the CJEU.

¹¹⁵ Case C-35/88, *Comm’n. v. Hellenic Republic*, 1990 E.C.R. I-03125, ¶ 11.

instruments devised for quite different purposes".¹¹⁶

The purpose of this review is to highlight the circumstances under which investors can mobilise each of the remedies, and how they interact, rather than to conduct a thorough analysis of the substantive protections offered by each of them. Such an analysis would require entire textbooks, given the extensive case law which has been developed by investment arbitration tribunals,¹¹⁷ the ECtHR¹¹⁸ and the CJEU.¹¹⁹

It is more challenging to draw clear guidelines with respect to investment law since it rests on different treaties, which provide for subtle differences with respect to the substantive rights conferred to investors and the balance between these rights and the State's sovereignty. Although this may change in the future, if the European Commission were to be successful in the setting up of a multilateral investment court. The unity of investment arbitration case law is also undermined by the fact that investment tribunals are established on an *ad hoc* basis.

B. General Standards

i. Fair and Equitable Treatment and Full Protection and Security Standards under Investment Law

Most BITs require the host State to afford FET to investors. It is the most frequently, and successfully invoked standard in investment disputes.¹²⁰ In *Tecmed v. Mexico*,¹²¹ the Arbitral Tribunal noted that foreign investors expect host States to act in a "*consistent manner, free from ambiguity and totally transparent*". This is done so that the investors know the rules before they make the investment so that they can plan their investment and comply with regulations. Thus, the FET standard, based on the principle of good faith in international law, requires States to "*provide to international investments treatment that does not affect their basic expectations that were taken into*

¹¹⁶ J. Paulsson, *Indirect Expropriation: is the Right to Regulate at Risk?*, TRANSNAT'L DISP. MGMT. 2 (2006). E. De Brabandere also rightly points out that: "while the general objective of human rights law and investment law are in the end to protect non-State entities from certain sovereign acts of the State, the objective of the agreement granting rights to these entities are fundamentally distinct. Investment agreements are signed for economic objectives, namely to promote foreign investment, and, thus, the rights of foreign investors exist only because the protection of foreign investors is considered necessary to promote foreign investment" (E. De Brabandere, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals*, 30(2) ICSID REV. 345, 354 (2015)). These authors made this caveat as regards the relationship between investment arbitration and human rights law. The same applies to the relationship of these remedies with EU law.

¹¹⁷ See generally RUDOLF DOLZER & CHRISTOPHER SCHREUER, PRINCIPLE OF INTERNATIONAL INVESTMENT LAW (2012) [*hereinafter* "Dolzer & Schreuer"]; INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et al. eds., 2009); 1-2 E. GAILLARD, LA JURISPRUDENCE DU CIRDI (2004-2009); CAMPBELL MCLACHLAN ET AL., *supra* note 19; T. WEILER, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (2005).

¹¹⁸ See generally J. VELU & R. ERGEC, CONVENTION EUROPÉENNE DES DROITS DE L'HOMME (2014); D.J. HARRIS ET AL., *supra* note 64; THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Peter van Dijk et al eds., 4th ed., 2006).

¹¹⁹ See generally F. PICOD & S. VAN DROOGHENBROECK, CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE: COMMENTAIRE ARTICLE PAR ARTICLE (2018); C. BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS (2016) [*hereinafter* "Barnard"]; PAUL CRAIG & GRAINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS (2015); THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers et al. eds., 2014); THE EU CHARTER OF FUNDAMENTAL RIGHTS FROM DECLARATION TO BINDING INSTRUMENT (Giacomo di Federico et al. eds., 2011) [*hereinafter* "Craig & Burca"].

¹²⁰ DOLZER & SCHREUER, *supra* note 117, at 130.

¹²¹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003), 10 ICSID Rep. 130 (2003) [*hereinafter* "Técnicas Medioambientales Tecmed, S.A."].

account” when making that investment. The operation of FET clauses is akin to codes in civil law countries – by specifying rules and complementing them with “*a general clause of good faith as an overarching principle which fills gaps and informs the understanding of specific clauses*”.¹²²

We develop below the guarantees offered by the FET to investors with respect to their right to be free from discrimination (Section III.D.i), to an effective remedy and to a fair trial (Section III.E.i) and to have their legitimate expectations respected (Section III.F.i).

Its scope is sometimes defined in more detail in BITs, especially the recent ones. Under the CETA, for instance, a Party breaches the obligation of fair and equitable treatment if a measure or series of measures constitute(s):

- a. *denial of justice in criminal, civil or administrative proceedings;*
- b. *fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*
- c. *manifest arbitrariness;*
- d. *targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;*
- e. *abusive treatment of investors, such as coercion, duress and harassment; or*
- f. *a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties.*¹²³

The EUVFTA¹²⁴ and the EUSFTA¹²⁵ give a similar definition of the standard.

Many BITs also guarantee “full protection and security” to investors, often in combination with the FET standard.¹²⁶ It is usually understood as protecting the *physical* integrity of the investor and its investment (as an example, the EU FTAs define “full protection and security” as the “*Party’s obligations relating to the physical security of investors and covered investments*”).¹²⁷ However, some tribunals have concluded that it also requires host States to provide a secure legal environment that affords security to the investor.¹²⁸

The most recent BITs contain express provisions supporting the States’ powers to regulate in public interest, thus curtailing the power of investors to claim violation of the FET standard. This is a result of the rise in investment cases under the FET or full protection and security standards directed against regulatory acts which disturb the legal stability surrounding the investor’s business. For instance, the EU FTAs provide that:

“the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the

¹²² DOLZER & SCHREUER, *supra* note 117, at 132.

¹²³ CETA, *supra* note 39, art. 8.10(2).

¹²⁴ EUVFTA, *supra* note 41, art. 14(2) and (4).

¹²⁵ EUSFTA, *supra* note 40, art. 2.4, IPA.

¹²⁶ Some tribunals have equated the standards of full protection and security with fair and equitable treatment whilst others have found that the two standards were separate. *See* DOLZER & SCHREUER, *supra* note 117, at 161.

¹²⁷ CETA, *supra* note 39, art. 8.10(5).

¹²⁸ GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 431 (2012) [*hereinafter* “Gary Born”].

protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section".¹²⁹

ii. *The EU Internal Market's Fundamental Freedoms*

Under the four fundamental freedoms (free movement of goods, persons, capital and services),¹³⁰ investors have the right to oppose unjustified restrictions to trade between Member States, the free circulation of their workers, their right to provide and receive services and operate across the EU, their freedom of establishment, etc. As developed under the following Sections, State measures threatening an investment may often constitute a restriction on these fundamental freedoms. It must be noted that the restrictions must be compatible with the fundamental rights enshrined in the ECHR and the EU Charter.

The most obvious overlap concerns the principle of non-discrimination, since the law of the four freedoms is mostly concerned with avoiding direct or indirect discrimination on the basis of nationality amongst undertakings operating in the internal market.¹³¹

Both direct and indirect discriminations are prohibited i.e. explicit discriminations on grounds of nationality as well as measures which, by means of any other criterion, could lead eventually to the same effect.¹³²

Against this background, the CJEU has increasingly come to favour a "market-access" approach,¹³³ under which domestic rules "*liable to hinder or make less attractive, directly or indirectly, actually or potentially, the exercise of fundamental freedoms guaranteed by the Treaty*", are unlawful unless they: (i) are justified by imperative requirements in the general interest, (ii) are suitable for securing the attainment of the objective that they pursue, and (iii) do not go beyond what is necessary in order to attain it.¹³⁴ This extends to even those rules which affect nationals and non-

¹²⁹ CETA, *supra* note 39, art. 8.9; EUSFTA, *supra* note 40, art. 2.2, IPA; EUVFTA, *supra* note 41, art. 13.

¹³⁰ TFEU, *supra* note 89, arts. 28, 45, 56, and 63. The freedom to provide services includes the freedom of establishment (TFEU, *supra* note 89, art. 49).

¹³¹ BARNARD, *supra* note 119, at 18. ("The principle of non-discrimination on the ground of nationality is the cornerstone of the four freedoms. It adopts a comparative approach, requiring out-of-State goods, persons, services and capital to enjoy the same treatment as their in-State equivalent. This model presupposes that domestic and imported goods and national and migrant persons, services and capital are similarly situated and that they should be treated in the same way").

¹³² Case C-1/93, Halliburton Services BV v. Staatssecretaris van Financiën, 1994 E.C.R. I-01137, ¶ 15.

¹³³ This approach is based on the principle of mutual recognition, as first articulated by the CJEU in the seminal "Cassis de Dijon" case (Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 00649), pursuant to which goods lawfully produced and marketed in one Member State should have unrestricted access to the markets of the other Member States. In tax matters, in particular with respect to the freedom of establishment, the CJEU appears to keep discrimination as the core of its analysis (*see* BARNARD, *supra* note 119, at 403-405).

¹³⁴ Case C-148/91, Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media, 1993 E.C.R. I-00487, ¶ 9; Case C-19/92, Dieter Kraus v. Land Baden-Württemberg, 1993 E.C.R. I-01663, ¶ 32; Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37.

nationals in the same way.¹³⁵ In addition, justifications must also be made out on the facts¹³⁶ and, as already indicated, be compatible with the fundamental rights, in particular the ECHR¹³⁷ and the EU Charter.¹³⁸

With respect to the first condition, restrictions on the fundamental freedoms must, in principle, be justified by the reasons expressly provided by the TFEU for each freedom.¹³⁹ Moreover, in order to soften the inroads into States' regulatory powers caused by the "market-access" approach, the CJEU has ruled that restrictions, which are not directly discriminatory,¹⁴⁰ may be justified not only by the reasons provided for by the TFEU but also by public interest justifications (referred to by the CJEU under various denominations such as "*mandatory requirements*", "*overriding requirements of the general interest*" or "*objective justifications*").¹⁴¹ The justifications offered by this judicially developed public interest defence are open-ended and wide ranging. The CJEU's case law presents subtle distinctions with respect to the justifications available, and how the proportionality principle should be applied, under each of the four freedoms.¹⁴²

Both the justifications granted by the TFEU and the public interest defence exclude any interpretation based on purely economic considerations.¹⁴³ For instance, the CJEU has rejected "*the intention to promote the economy of the country*" as an overriding reason in the public interest.¹⁴⁴ It considers that:

"It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty.

¹³⁵ A discriminatory restriction will, without further question, fall within the scope of the treaty prohibition while a non-discriminatory measure must constitute a sufficiently certain and direct hindrance. See Joined cases C-267/91 and C-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097, ¶¶ 15-17; Case C-190/98, Volker Graf v. Filzmoser Maschinenbau GmbH, 2000 E.C.R. I-00493, ¶¶ 23-25 [*hereinafter* "Volker Graf"]; Case C-148/10, DHL International NV v. Belgisch Instituut voor Postdiensten en Telecommunicatie, 2011 E.C.R. I-09543, ¶¶ 61-63 (free movement of services) [*hereinafter* "DHL International NV"].

¹³⁶ It is not sufficient for States to invoke a justification without supporting evidence; Case C-389/05, Comm'n v. French Republic, 2008 E.C.R. I-05337, ¶ 103.

¹³⁷ Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, 1991 E.C.R. I-02925.

¹³⁸ Case C-483/12, Pelckmans Turnhout NV v. Walter Van Gastel, (May 8, 2014).

¹³⁹ Articles 36 (free movement of goods; "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property"), 45(3) (free movement of persons; "public policy, public security or public health"), 52 and 62 (right of establishment and free movement of services; "public policy, public security or public health"), and 65(1) (free movement of capital; "relevant provisions of tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested" and "all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security") of the TFEU.

¹⁴⁰ This was the CJEU's traditional approach but it increasingly admits, under limited and casuistic circumstances, that distinctly applicable measures could be saved both by the reasons provided by the TFEU and by its case-law driven mandatory requirements (see BARNARD, *supra* note 119, at 150).

¹⁴¹ E.g., Joined Cases C344/13 and C367/13, Cristiano Blanco and Pier Paolo Fabretti v. Agenzia delle Entrate, ¶¶ 37 and 38 (Oct. 22, 2014); Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-04581, ¶ 68 (free movement of capital).

¹⁴² For a complete analysis, see BARNARD, *supra* note 119.

¹⁴³ Case C-17/92, Federación de Distribuidores Cinematográficos v. Estado Español and Unión de Productores de Cine y Televisión, 1993 E.C.R. I-02239, ¶ 16.

¹⁴⁴ Case C-35/98, Staatssecretaris van Financiën v. B.G.M. Verkooijen, 2000 E.C.R. I-04071, ¶¶ 47 and 48.

That reasoning is equally applicable to the economic policy objectives reflected in [...] in the present proceedings, namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production. Such interests cannot constitute a valid justification for restrictions on the fundamental freedom concerned”.¹⁴⁵

A protectionist element seems to be the operative factor in drawing the line between the economic justifications (which are always prohibited) and the non-economic ones (which can potentially be accepted).¹⁴⁶

The law of the internal market is, first and foremost, concerned with avoiding (discriminatory) restrictions to the free movement of goods, capital, services, and labour *within the European Union*. Free movement of goods requires trade between Member States,¹⁴⁷ free movement of persons applies only to nationals of one of the Member States moving from one Member State to another one and free movement of services applies to nationals of one of the Member States providing or receiving services in another one. By exception, pursuant to Article 63 of the TFEU, “*all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited*”. As it is clear from its wording, free movement of capital and payment extends to situations involving third countries.¹⁴⁸

C. Right to Property

i. Under Investment Arbitration Law

Most BITs, including the EU FTAs,¹⁴⁹ contain specific provisions protecting investors from illicit expropriations.

Expropriations can be direct (when an investment is nationalised or where the host State takes physical or legal possession of the investment), indirect (where the host State takes measures diminishing the value or use of the investment significantly, such as the revocation of a license or unduly onerous regulations) or creeping (where it results from a “step-by-step series of measures rather than a single action”).¹⁵⁰ Recent decisions have sought to find a balance between the host State’s right to adopt general regulatory measures and protection of the investor’s rights reminiscent of the ECtHR’s case law.¹⁵¹ In the case of *LG&E v. Argentina*, for instance, the tribunal ruled that:

¹⁴⁵ Case C-367/98, *Comm v. Portugal*, 2002 E.C.R. I-4756, ¶ 52. *See also* AG Lenz’s observations in the “Du Pont de Nemours” case that “it is a well-established principle that a Member State may not rely on mandatory requirements in order to protect its domestic economy” (Case 21/88, *Du Pont de Nemours Italiana SpA v. Unità sanitaria locale N° 2 di Carrara*, 1990 E.C.R. I-00889).

¹⁴⁶ J. ISRAEL, *EUROPEAN CROSS-BORDER INSOLVENCY REGULATION: A STUDY OF REGULATION 1346/2000 ON INSOLVENCY PROCEEDINGS IN THE LIGHT OF A PARADIGM OF CO-OPERATION AND A COMITAS EUROPAEA* 169 (2005).

¹⁴⁷ It applies to both products originating in Member States and to products coming from third countries, which are in free circulation in Member States (i.e. which have paid the common customs tariff, if one is due).

¹⁴⁸ Though third country situations are subject to additional potential restrictions, which do not exist as regards intra-EU situations but are of limited practical use (except for the grandfathering of any restrictions on certain types of free movement of capital existing prior to December 31, 1993, pursuant to Article 64(1) of the TFEU); *see* BARNARD, *supra* note 119, at 524-525.

¹⁴⁹ CETA, *supra* note 39, art. 8.12. *See also* EUSFTA, *supra* note 40, art. 2.6, IPA and EUVFTA, *supra* note 41, art. 16.

¹⁵⁰ GARY BORN, *supra* note 128, at 432.

¹⁵¹ Its case law is, for instance, cited in *Técnicas Medioambientales Tecmed, S.A., supra* note 121, ¶¶ 121-122 and *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 311 (July 14, 2006).

“In order to establish whether State measures constitute expropriation [...], the Tribunal must balance two competing interests: the degree of the measure’s interference with the right of ownership and the power of the State to adopt its policies. [...] With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed”.¹⁵²

Where a State measure qualifies as expropriation, BITs typically subject its legality to four conditions, it must be: (i) for a public purpose, (ii) under due process of law, (iii) done in a non-discriminatory manner, and (iv) on payment of prompt, adequate and effective compensation.

Virtually all BITs contain specific provisions on the standard of compensation for expropriation, the vast majority of them requiring a “prompt, adequate and effective” compensation,¹⁵³ often further clarified by a reference to the “fair market value” of the expropriated assets, or similar standards.¹⁵⁴ The EU FTAs also refer to the fair market value of the expropriated investment.¹⁵⁵ In order to determine the amount of this compensation, arbitral tribunals use a variety of different economic methods, including the liquidation value, the replacement value, the book value, the use of comparable transactions, discounted cash flow principles, etc.¹⁵⁶ As opposed to human rights law, questions of proportionality and public interest are, in principle, not relevant for the determination of the compensation due to the expropriated investor.¹⁵⁷

Tribunals, especially in recent years, have usually interpreted the concept of indirect expropriation narrowly and have preferred to find a violation of the FET standard (see Section III.B.i above).¹⁵⁸

¹⁵² LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 189 and 195 (Oct. 3, 2006).

¹⁵³ This formula, first expressed by the back then US Secretary of State Cordell Hull to the Government of Mexico in a 1938 correspondence (“under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without providing for prompt, adequate and effective payment therefor”), was reaffirmed by the World Bank Guidelines on the Treatment of Foreign Direct Investment (Guideline IV, 2) and widely adopted by the relevant instruments. See CAMPBELL MCLACHLAN ET AL., *supra* note 19, at 316 *et seq.* (2007). It also finds its roots in a 1928 judgment of the Permanent Court of International Justice where the Court held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed” (Factory at Chorzów (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13)).

¹⁵⁴ As an example, Article 13(1)(d) of the ECT provides that an “Expropriation” must be “accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment”.

¹⁵⁵ CETA, *supra* note 39, art. 8.12(2); EUSFTA, *supra* note 40, art. 2.6(2), IPA and EUVFTA, *supra* note 41, art. 16(2).

¹⁵⁶ See further CAMPBELL MCLACHLAN ET AL. *supra* note 19, at 334 *et seq.*

¹⁵⁷ S. El Boudouhi, *L’investisseur devant les juridictions internationales des droits de l’Homme : la question des droits fondamentaux de l’investisseur*, in DROIT DES INVESTISSEMENTS INTERNATIONAUX 301, 326 (S. Robert-Cuendet ed., 2017).

¹⁵⁸ Timothy G. Nelson, *Human rights law and BIT protection: areas of convergence*, 12(1) J. WORLD INV. & TRADE 27, 39 (2011) [hereinafter “Timothy G. Nelson”]; DOLZER & SCHREUER, *supra* note 117, at 101, 132.

ii. *Under the ECHR*¹⁵⁹

The protection of property is enshrined in Article 1 of Protocol No. 1 to the ECHR, which states that, “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

It proved to be very difficult to reach an agreement on the scope and the formulation of the right to property, which explains why it is not provided directly in the Convention. The ECtHR has frequently referred to the drafting history of the Convention, most notably in order to confirm the broad latitude left to States when interfering with this right.¹⁶⁰ All the Member States of the Council of Europe have now ratified this Protocol, except for Monaco and Switzerland.

Article 1 of Protocol No. 1 applies to “possessions”.¹⁶¹ The ECtHR has adopted a very broad approach to this notion, which it considered as autonomous and independent of domestic laws.¹⁶² It encompasses moveable and immovable, as well as corporal and incorporeal, properties, rights and interests which have an economic value. Those include company shares, intellectual property rights, a sufficiently established and enforceable cause of action, contractual rights (including judgment and arbitration debts¹⁶³), etc.¹⁶⁴ As developed below, legitimate expectations of acquiring effective enjoyment of a property right can also be considered a “possession” (Section III.F.ii).

The ECtHR breaks down Article 1 of Protocol No. 1 into three distinct rules: the first rule enounces the principle of peaceful enjoyment, the second rule covers deprivation of possessions and subjects it to certain conditions, and the third rule recognises the right of States to control

¹⁵⁹ For a detailed analysis of the protection of the right to property in the Court’s case law, see Luzius Wildhaber & Isabelle Wildhaber, *Recent case law on the protection of property in the European Convention on Human Rights*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 657 (Christina Binder et al. eds., 2009); M. CARSS-FRISK, A GUIDE TO THE IMPLEMENTATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001).

For a comparison of the protection of investment under investment treaties and the right to property under Article 1 of Protocol No. 1 to the ECHR, see Markus Perkaps, *The Concept of Indirect Expropriation in Comparative Public Law: Searching for Light in the Dark*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 107 (Stephen W. Schill ed., 2010); J. Waincmeyer, *Balancing Property Rights and Human Rights in Expropriation*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 275 (Pierre-Marie Dupuy et al. eds., 2009); Christoph Schreuer & Ursula Kriebaum, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 743 (Bernhard Ehrenzeller et al. eds., 2007); M. Ruffert, *The protection of Foreign Direct Investment by the European Convention on Human Rights*, 43 GER. Y.B. INT’L L. 116 (2000).

¹⁶⁰ D.J. HARRIS ET AL., *supra* note 64, at 655.

¹⁶¹ “Biens” under the French version.

¹⁶² *Forrer-Niedenthal v. Germany*, App. No. 46316/99, Eur. Ct. H.R., Merits, ¶ 32 (Feb. 20, 2003) (unpublished).

¹⁶³ *Kin-Stib and Majkić v. Serbia*, App. No. 12312/05, Eur. Ct. H.R., Merits, (Apr. 20, 2010); Y. Kryvoi, *Can an Arbitration Award Be Expropriated? Introductory Note to European Court of Human Rights: Kin-Stib and Majkić v. Serbia*, 49(4) INT’L L. MATERIALS 1181 (2010).

¹⁶⁴ See the many examples and references provided by D.J. HARRIS ET AL., *supra* note 64, at 652-662; A. van Rijn, *Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No. 1)*, in THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 865, 865-872 (Pierre van Dijk et al. eds., 4th ed., 2006) [*hereinafter* “A van Rijn”].

the use of property in accordance with the general interest.

The Court frequently underlines that the second and third rules are concerned with particular interferences with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle set out under the first rule.¹⁶⁵ The notion of “peaceful enjoyment of property” is therefore key, especially as it operates as a “catch-all” provision for the interferences which are not direct or indirect expropriation, nor a control of the use of the applicant’s property, or for which the complexity of the legal or factual position prevents it from being classified. Again, this notion is construed very broadly by the ECtHR as embracing, amongst others, the rights to have, to use, to repair, to dispose of, to pledge, to lend, and to destroy one’s possession (and the possibility to exercise those rights).¹⁶⁶ For instance, the Court held that failure to enforce an arbitral award violates the right to peaceful enjoyment of possession if the award is final and enforceable, and that it is not practically possible to enforce it in another jurisdiction.¹⁶⁷

Despite subtle nuances in its application, especially in its older case law, the ECtHR has tried to strike a “fair balance” under each of the three rules:

*“the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1”.*¹⁶⁸

If the ECtHR recognises a broad margin of appreciation available to States for determining the “general interest of the community”, even where the benefits fall to the advantage of particular individuals,¹⁶⁹ it underlines that courts, when assessing interferences with the rights to property, must:

*“conduct an overall examination of the various interests at issue, having regard to the fact that the Convention is intended to guarantee rights that are ‘practical and effective’, not theoretical or illusory. It must go beneath appearances and look into the reality of the situation at issue, taking account of all the relevant circumstances, including the conduct of the parties to the proceedings, the means employed by the State and the implementation of those means. Where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner”.*¹⁷⁰

There are two main types of protection offered by the fair-balance test: State’s interferences must go with sufficient procedural guarantees for the applicant (often in combination with the right to

¹⁶⁵ *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 2007-I Eur. Ct. H.R. 39, Merits, ¶ 62 (Jan. 11, 2007).

¹⁶⁶ D.J. HARRIS ET AL., *supra* note 64, at 662.

¹⁶⁷ *Kin-Stib and Majkić v. Serbia*, App. No. 12312/05, Eur. Ct. H.R., Merits, ¶¶ 81-85 (Apr. 20, 2010).

¹⁶⁸ *Sporrong and Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A), ¶ 69 (Sept. 23, 1982) [*hereinafter* “Sporrong”].

¹⁶⁹ *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A), Merits, ¶¶ 39-45 (Feb. 21, 1986) [*hereinafter* “James”].

¹⁷⁰ *N.K.M. v. Hungary*, App. No. 66529/11, Eur. Ct. H.R., Merits, ¶ 62 (May 14, 2013). With respect to expropriations, see *Sporrong*, *supra* note 168, ¶ 63 (“In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are “practical and effective”, it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants”). The Inter-American Court of Human Rights has the same position (*Ivcher-Bronstein v. Peru*, Judgment (Merits, Reparation, Costs), Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 154 and references quoted at footnote No. 102 (Feb. 6, 2001) [*hereinafter* “Ivcher-Bronstein”]).

a fair trial, see Section III.E.ii below), and not put him under an excessive individual burden.¹⁷¹ Further, delay, unpredictability and inconsistency in the exercise of the State's power to interfere are all evidence of disproportionate interference.¹⁷²

The level of compensation granted to the applicant, or its absence thereof, is often relevant even if, as opposed to investment arbitration law, an adequate compensation is not a condition of lawfulness of the interference. The Court indeed considers that:

*“the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court’s power of review is limited to ascertaining whether the choice of compensation terms falls outside the State’s wide margin of appreciation in this domain”.*¹⁷³

Moreover, the standard of compensation may vary depending on the nature of the property and the circumstances of the taking. For example, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property such as the compulsory acquisition of land for public purposes.¹⁷⁴

Moreover, non-nationals are entitled to compensation for the deprivation of their possession (expropriation), since such deprivations must comply with the “*general principles of international law*” as per the second sentence of Article 1.¹⁷⁵ The same is however not applicable to nationals. In *Lithgow v. United Kingdom*¹⁷⁶ and *James & Ors. v. United Kingdom*,¹⁷⁷ UK nationals unsuccessfully argued against their home State that the compensation payable to them had to be “*adequate, prompt and effective*” as required by general principles of international law. The Court rejected their argument and noted that under the general principles of international law themselves, the requirement only applied to non-nationals and that it was clear from the preparatory works to

¹⁷¹ A. van Rijn, *supra* note 164, at 876.

¹⁷² D.J. HARRIS ET AL., *supra* note 64, at 676-677.

¹⁷³ James, *supra* note 169, ¶ 54.

¹⁷⁴ *Lithgow v. the United Kingdom*, 102 Eur. Ct. H.R. (ser. A), Merits, ¶ 121 (July 8, 1986) [*hereinafter* “Lithgow”]. In *Papamichalopoulos v. Greece*, the Court held that: “The act of the Greek Government which the Court held to be contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay fair compensation; it was a taking by the State of land belonging to private individuals, which has lasted twenty-eight years, the authorities ignoring the decisions of national courts and their own promises to the applicants to redress the injustice committed in 1967 by the dictatorial regime. The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession”; *Papamichalopoulos and Others v. Greece*, App. No. 1455/89, Eur. Ct. H.R., ¶ 36 (Oct. 31, 1995) [*hereinafter* “Papamichalopoulos”] (with reference to *Factory at Chorzów (Ger. v. Pol.)*, Merits, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) [*hereinafter* “Chorzow Factory Case”]). If the standard of compensation is lower for legal expropriations, there have still been many cases where the breach resided in the insufficiency of compensation (e.g. *Former King of Greece and Others v. Greece*, App. No. 25701/94, Eur. Ct. H.R., ¶ 75 (Nov. 28, 2002)).

¹⁷⁵ James, *supra* note 169, ¶¶ 58-168; BERNDADETTE RAINEY ET AL., THE EUROPEAN CONVENTION ON HUMAN RIGHTS 506 (2014) [*hereinafter* “Bernadette Rainey”].

¹⁷⁶ *Lithgow*, *supra* note 174, ¶¶ 111-119.

¹⁷⁷ James, *supra* note 169, ¶¶ 58-66.

Article 1 that the States intended the sentence to apply only to non-nationals.¹⁷⁸

Insolvency matters have been a good example of the casuistic and pragmatic approach of the ECtHR. The Court distinguishes creditor claims against public entities from claims against individuals or private companies. It considers that contracting States are liable for a public authority's failure to honour its obligations¹⁷⁹ whereas their obligations “*are limited to providing the necessary assistance to the creditor in the enforcement [of its claim]*” for debts of private actors.¹⁸⁰

Even in this latter case, an infringement of Article 1 may however arise from specific circumstances, such as the adoption of debt-adjustment legislation where an excessive burden is placed on one or several creditors,¹⁸¹ or from the insolvency liquidator's actions where the State's involvement in the insolvency procedure is sufficiently material. Even where the State cannot be held responsible for a liquidator's behaviour, the Court considers that it must “*at least set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and to have them enforced*”.¹⁸²

iii. Under EU Law

The right to property had been recognised by the CJEU as one of the fundamental principles of the EU's legal order as early as 1979.¹⁸³ It is embodied in Article 17 of the EU Charter, which provides:

“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest”.

Similar to the ECtHR, the CJEU has consistently held that the right to property is not an absolute right and “*must be viewed in relation to its function in the society*.” Such a right can be restricted provided that the restrictions “*correspond to objectives of public interest pursued by the Community*”, and do not constitute a “*disproportionate and intolerable interference, impairing the very substance of the right so guaranteed*”.¹⁸⁴

The CJEU has also attached great importance to the respect of procedural guarantees with

¹⁷⁸ Lithgow, *supra* note 174, ¶ 115; James *supra* note 169, ¶ 62.

¹⁷⁹ De Luca v. Italy, App. No. 43870/04, Eur. Ct. H.R., Merits, ¶ 54 (Sept. 24, 2013).

¹⁸⁰ Kotov v. Russia, App. No. 54522/00, Eur. Ct. H.R., Merits, ¶ 90 (Apr. 3, 2012) [*hereinafter* “Kotov”].

¹⁸¹ Bäck v. Finland, App. No. 37598/97, Eur. Ct. H.R., Merits, ¶¶ 63-69 (July 20, 2004).

¹⁸² Kotov, *supra* note 180, ¶ 117.

¹⁸³ Case C-44/79, Liselotte Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 03727, ¶ 17 (“the right to property is guaranteed in the community legal order in accordance with the ideas common to the constitutions of the member states, which are also reflected in the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms”).

¹⁸⁴ *E.g.*, Joined Cases C-402/05P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Comm'n, 2008 E.C.R. I-06351, ¶ 355 [*hereinafter* “Kadi”]. *See also* art. 52(1) of the EU Charter pursuant to which “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms”. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

respect to restrictions of property rights.¹⁸⁵

D. Non-discrimination and Equality Principles

i. Under Investment Arbitration Law

Discrimination is addressed in investment treaties by way of the absolute FET standard¹⁸⁶ (see Section III.B.i above) and two relative standards, namely national treatment and MFN treatment.

The national treatment standard is found in most BITs, including the EU FTAs.¹⁸⁷ It requires the host State to treat foreign investment no less favourably (positive differentiation is possible) than the investments of their own nationals. The review of the State measure under the national treatment standard rests on three main steps, very similar to the assessment under the ECHR and EU law. As summarised by Dolzer and Schreuer:

“First, it has to be determined whether the foreign investor and the domestic investor are placed in a comparable setting or, in US terminology, in ‘a like situation’ or in ‘like circumstances’.

Secondly, it has to be determined whether the treatment accorded to the foreign investor is at least as favourable as the treatment accorded to domestic investors.

Thirdly, in the case of treatment that is less favourable, it must be determined whether the differentiation was justified.

*Behind these seemingly simple parameters of the clause, lie complex issues that are not answered completely by existing case law. At all levels, the full factual and legal context of the relevant issues will have to be taken into account”.*¹⁸⁸ Some BITs, including the CETA¹⁸⁹ and the EUVFTA,¹⁹⁰ also contain MFN treatment provisions, pursuant to which the host State undertakes to treat investment of the home State’s nationals no less favourably than the investments of investors from third States.¹⁹¹ Investors have mainly invoked benefits granted in treaties concluded by the host State with third States, rather than the fact that nationals of third parties would be treated *de facto* in a more favourable manner.¹⁹² Tribunals remain divided on the question of whether MFN clauses only apply to substantive rights (such as guarantees of FET) or also extend to procedural ones (such as the waiver of the obligation for the investor to exhaust domestic remedies before referring the case to investment arbitration).¹⁹³ Against this background, some more recent BITs indicate in their

¹⁸⁵ Kadi, *supra* note 184, ¶ 369.

¹⁸⁶ See, DOLZER & SCHREUER, *supra* note 117, at 144.

¹⁸⁷ CETA, *supra* note 39, EUSFTA, *supra* note 40, art. 8.6; EUSFTA, *supra* note 40, art. 2.3, IPA; EUVFTA, *supra* note 41, art. 3.

¹⁸⁸ DOLZER & SCHREUER, *supra* note 117, at 199.

¹⁸⁹ CETA, *supra* note 39, art. 8.7.

¹⁹⁰ EUVFTA, *supra* note 41, art. 4.

¹⁹¹ Suzy H. Nikiema, *The Most-Favoured-Nation Clause in Investment Treaties*, INT’L INST. FOR SUSTAINABLE DEV. (2017), available at <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>.

¹⁹² DOLZER & SCHREUER, *supra* note 117, at 207.

¹⁹³ GARY BORN, *supra* note 128, at 432. See, e.g., the discussions in *Técnicas*, *supra* note 121; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (Aug. 3, 2006).

MFN clauses the areas to which the clause is meant to apply.¹⁹⁴

ii. Under the ECHR

Article 14 of the ECHR prohibits discrimination in relation to the rights and freedoms guaranteed by the Convention. This provision is not directed against discrimination in general but only against discrimination in relation to the rights and freedoms guaranteed by the Convention.

A more general prohibition of discrimination is enshrined in Article 1 of Protocol No. 12 to the ECHR,¹⁹⁵ which has been ratified by 19 Member States of the Council of Europe.¹⁹⁶ It guarantees, in particular, non-discrimination in relation to *any* right provided for by national law. Hence, this provision, which does not constitute a replacement for Article 14 of the ECHR,¹⁹⁷ does not have to be read in conjunction with the rights and freedoms guaranteed by the Convention and may constitute an additional and separate legal basis.

According to the Council of Europe, the additional scope of protection under Article 1 concerns cases where a person is discriminated against: (i) in the enjoyment of any right specifically granted to an individual under national law; (ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; (iii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies); or (iv) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).¹⁹⁸

For Article 14 or Article 1 of Protocol No. 12 to be breached, three conditions must be met. There must be (i) a difference in the treatment (ii) of persons in relevantly similar situations. Further, such a difference of treatment will be considered discriminatory if it has no objective and reasonable justification or, in other words, (iii) if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹⁹⁹

In addition, as regards Article 14 of the ECHR and given its ancillary nature, the alleged violation must fall “*within the ambit*” of a freedom guaranteed by the Convention. Moreover, a State which goes beyond its obligation under a Convention right must do so in a non-

¹⁹⁴ See, e.g., German Model (Bilateral Investment) Treaty, art. 3 (2008).

¹⁹⁵ This provision states that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.” On its general character, see, *Savez Crkava “Rijec Zivota” and others v. Croatia*, App. No. 7798/08, Eur. Ct. H.R., Merits, ¶ 103 (Dec. 9, 2010); *Sejdic and Finci v. Bosnia and Herzegovina*, App. Nos. 27996/06 and 34836/06, Eur. Ct. H.R., Merits, ¶ 53 (Dec. 22, 2009).

¹⁹⁶ Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Malta, Montenegro, the Netherlands, Portugal, Romania, San Marino, Serbia, Slovenia, Spain and Ukraine.

¹⁹⁷ BERNADETTE RAINEY *supra* note 175, at 592, with references to the Explanatory Report to Protocol No. 12.

¹⁹⁸ COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE PROTOCOL NO. 12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (2000), available at <http://rm.coe.int/16800cce48>.

¹⁹⁹ *Burden and Burden v. The United Kingdom*, App. No. 13378/05, Eur. Ct. H.R., Merits, ¶ 60 (Apr. 29, 2008).

discriminatory manner.²⁰⁰

The ECtHR has consistently held that States “*enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law*”.²⁰¹ However, with respect to discrimination based on national origin, the Court added (in a case where the applicant alleged the breach of Article 14 in conjunction with Article 1 of Protocol No. 1) that “*very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention*”.²⁰²

iii. Under EU Law

a. *General Principle of Equality and Non-Discrimination*

The principle of equality and non-discrimination had been recognised as general principles of EU law by the CJEU,²⁰³ and are now enshrined in Articles 20 (equality before the law) and 21 (non-discrimination) of the EU Charter. Various directives have also been adopted.²⁰⁴

Whilst *any* discrimination based on grounds, such as race, sex, religion or sexual orientation is prohibited, discrimination on grounds of nationality is merely prohibited “*within the scope of application of the Treaties*”.²⁰⁵ The principle of non-discrimination on grounds of nationality has therefore been seen as “*curiously truncated*” under EU law. Indeed, because of its paramount importance in the construction of the European project, it does not extend to non-EU nationals.²⁰⁶

b. *Restrictions on the Fundamental Freedoms*

The principle of non-discrimination on the grounds of nationality has mainly been applied in the context of the CJEU’s review of restrictions to the fundamental freedoms.

As indicated above (Section III.B.ii), where they constitute direct discrimination on the basis of nationality,²⁰⁷ restrictions can only be justified by the reasons expressly provided by the TFEU,²⁰⁸

²⁰⁰ D.J. HARRIS ET AL., *supra* note 64, at 580-81.

²⁰¹ *Stubbings and Others v. The United Kingdom*, App. Nos. 22083/93 and 22095/93, Eur. Ct. H.R., Merits, ¶ 72.

²⁰² *Gaygusuz and Turkey (intervening) v. Austria*, App. No. 17371/90, 23 Eur. H.R. Rep. 364, ¶ 42 (1996). [It should nevertheless be stressed that, pursuant to Article 16 of the ECHR, “nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens”].

²⁰³ *Joined Cases 117/76 and 16/77, Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen, Diamalt AG v. Hauptzollamt Itzehoe*, 1997 E.C.R. 01753.

²⁰⁴ Council directive 2000/43/EC of June 29, 2000, Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180); Council Directive 2000/78/EC of Nov. 27, 2000, Establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303); Directive 2006/54/EC, of the European Parliament and of the Council of 5 July 2006 on the Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 2006 O.J. (L 204); Council Directive 2004/113/EC of Dec. 13, 2004, Implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004 O.J. (L 373).

²⁰⁵ EU Charter, *supra* note 84, art. 21(2); TFEU, *supra* note 85, art. 18.

²⁰⁶ *Craig & Burca*, *supra* note 119, at 893.

²⁰⁷ This was the CJEU’s traditional approach but it increasingly admits, under limited and casuistic circumstances, that distinctly applicable measures could be saved both by the reasons provided by the TFEU and by its case-law driven mandatory requirements (*see*, BARNARD, *supra* note 119, at 150).

at the exclusion of the wider and open-ended range of “public interest justifications” established by the CJEU’s case law.

In addition, a discriminatory restriction will, without further question, fall within the scope of the treaty prohibition while a non-discriminatory measure must constitute a sufficiently certain and direct hindrance.²⁰⁹

c. Prohibition of State Aid

Under certain circumstances, investors discriminated against can also rely on the protection offered by State aid law. Pursuant to Article 107(1) of the TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*”

Certain exceptions may be granted by the Commission, which adopted specific guidelines on the type and amounts of aid that it regards as compatible with the internal market (including with regard to State measures designed to rescue businesses in financial distress²¹⁰ and taken in the framework of environmental protection and energy).²¹¹ Member States are under an obligation, stemming from Article 108(3) of the TFEU, to notify the Commission of all new State aid measures. Failure to do so renders State aid automatically illegal, even if the aid could have been considered compatible with the internal market by the Commission.²¹²

A measure of public support is classified as State aid if five cumulative conditions are satisfied, namely that the aid must (i) be granted by the State or through State resources, (ii) confer an advantage to the recipients, (iii) favour certain (selected) undertakings or economic activities, (iv) affect trade amongst Member States, and (v) distort competition in the internal market.²¹³

²⁰⁸ Articles 36 (free movement of goods; “public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”), 45(3) (free movement of persons; “public policy, public security or public health”), 52 and 62 (right of establishment and free movement of services; “public policy, public security or public health”), and 65(1) (free movement of capital; “relevant provisions of tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested” and “all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security”) of the TFEU.

²⁰⁹ See Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, 1993 E.C.R. I-06097 ¶¶ 15-17 (Free movement of goods); Case C-190/98, *Volker Graf*, *supra* note 135, ¶¶ 23-25 (Free movement of workers); Case C-148/10, *DHL International NV*, *supra* note 135, ¶¶ 61-63 (Free movement of services).

²¹⁰ *Communication No. 2014/C 149/01 of the European Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*, 2014 O.J. (C 249) (EC). For a study of the State aid amid financial crises, see, Phedon Nicolaides, *State Aid, in ANTI-TRUST LAW AMIDST FINANCIAL CRISES 349 et seq.* (Ioannis Kokkoris and Rodrigo Olivares-Caminal eds., 2010).

²¹¹ *Communication No. 2014/C 200/01 of the European Commission, Guidelines on State aid for environmental protection and energy 2014-2020*, 2014 O.J. (C 200) (EC).

²¹² Before national courts, the Commission may still declare the aid compatible under certain circumstances; see Case C-301/87, *supra* note 114.

²¹³ For a detailed review of these conditions, see KELYN BACON QC, *EUROPEAN UNION LAW OF STATE AID* (3d ed. 2017); *EUROPEAN STATE AID LAW: A COMMENTARY* (Frank Montag & Franz Jürgen Säcker eds., 2016).

The notion of “State aid” is very wide and includes a large variety of measures such as grants, subsidies, loans and guarantees actually given by the State, but also anything owed to the State which the latter fails to collect or receive (tax exemptions, social security payments, interests on loans, etc.) or anything the State buys/sells at excessively high/low prices. In *Mediaset v. Commission*, the CJEU acknowledged that “an advantage granted directly to certain natural or legal persons who are not necessarily undertakings [such as consumers] may constitute an indirect advantage, hence State aid, for other natural or legal persons who are undertakings.”²¹⁴ As indicated above (Section a.0), the Commission also considers State payments under intra-EU BIT awards to be illegal State aid.

Further, Article 108 of the TFEU, as implemented by the Council Regulation 2015/1589 of 13 July 2015,²¹⁵ provides for specific infringement proceedings under State aid law (see Section II.C.iii.c).

E. Right to Effective Remedy and Fair Trial

i. Under Investment Arbitration Law

Under the old concept of “denial of justice”, investment arbitral tribunals have held a variety of breaches of due process as constituting a form of unfair and inequitable treatment.²¹⁶ Some BITs, including the EU FTAs, expressly provide that the FET standard includes the obligation “not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process”.²¹⁷ Accordingly, States can be held liable for the conduct of their judicial organs as well as of acts of the executive and the legislature affecting the administration of justice.²¹⁸

It is generally underlined that denial of justice is an elusive concept and that it is impossible to list exhaustively the behaviours it would encompass, though it is usually said that a denial of justice may constitute an unfair and inequitable treatment where relevant courts “refuse to entertain a suit, subject it to undue delay, or administer justice in a seriously inadequate way”.²¹⁹ Denial of justice is therefore, first and foremost, procedural in nature. The main hypothesis where arbitral tribunals have concluded to denials of justice are fairly similar to the ones we will discuss under Article 6 of the ECHR,²²⁰ and it is not uncommon for tribunals to refer to the ECtHR’s case law, for

²¹⁴ Case T-177/07, *Mediaset SpA v. Comm’n*, 2010 E.C.R. II-02341, ¶ 75.

²¹⁵ Council Regulation 2015/1589 of July 13, 2015, laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, 2015 O.J. (L 248).

²¹⁶ See, e.g., Timothy G. Nelson, *supra* note 158, at 40 *et seq.*; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, 4 J. WORLD ENERGY L. & BUS. 90 (2011) [*hereinafter* “Santiago Montt”]; CAMPBELL MCLACHLAN ET AL. *supra* note 19, at 227 *et seq.*

²¹⁷ E.g., U.S. Model Bilateral Investment Treaty, art. 5(2)(a) (2012) [*hereinafter* “U.S. Model BIT”]. The EU FTAs provide that the FET standard is breached, *inter alia*, where a State measure constitutes “denial of justice in criminal, civil or administrative proceedings” or “a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings” (art. 8.10(2)(a) and (b) of CETA, *supra* note 39; EUSFTA, *supra* note 40, art. 2.4(2), IPA; EUVFTA, *supra* note 41, art. 14(2)(a) and (b)).

²¹⁸ Article 4 of the International Law Commission’s Draft Articles on State Responsibility makes clear that courts’ conduct can be attributed to States (“the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions”).

²¹⁹ Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶ 102 (Nov. 1, 1999).

²²⁰ For a detailed analysis and parallels with the ECtHR’s case law, see Carlo Focarelli, *Denial of Justice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 14-27 (2013) [*hereinafter* “Carlo Focarelli”].

example in the framework of unreasonable court delays.²²¹

In principle, under BITs' FET clauses, States are bound to treat foreign investors fairly not only procedurally but also substantively. However, the tribunals' standard of review has usually been deferential to domestic courts. Alleged judicial errors in the application of domestic law have only given rise to State's liability where the court's decision was "*egregiously wrong*", "*so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith*" or a "*clear and malicious misapplication of the law*".²²² Even in those cases, the underlying reasoning is often a procedural one, that such decisions could only be explained by due process breaches or discrimination towards the investor. In the words of Paulsson, "*gross or notorious injustice – whatever the words used – is not a denial of justice merely because the conclusion appears to be demonstrably wrong in substance; it must impel the adjudicator to conclude that it could not have been reached by an impartial judicial body worthy of that name*".²²³

Contrary to the ECHR, the majority of the BITs do not require investors to exhaust local remedies before resorting to arbitration (*see below*, Section IV.B.ii.a). However, with respect to denial of justice, investment arbitral tribunals usually consider that such a breach of the FET standard does not occur, and therefore cannot be invoked, before the exhaustion of effective local remedies.²²⁴

Where a fork in the road provision is contained in the relevant BIT, scholars underline that the investor who opted for domestic litigation before facing unfair trial would not be precluded to go to arbitration, be it because the procedural denial of justice itself was not brought before domestic courts²²⁵ or because the investor's choice was not validly made under such circumstances.²²⁶

ii. Under the ECHR

Article 6 of the ECHR provides for the right to a fair trial. Under this provision, everyone has the right to have any claim relating to his or her "*civil rights and obligations*" brought before a court or tribunal.²²⁷ These words "*civil rights and obligations*" have an autonomous meaning;²²⁸ the

²²¹ E.g., *Victor Pey Casado & President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, ¶ 664 (May 8, 2008), *citing* *Ruiz-Mateos v. Spain*, App. No. 12952/87, Eur. Ct. H.R., Merits (June 23, 1993).

²²² Examples quoted by Santiago Montt, *supra* note 216, at 334. *See also*, the examples quoted by Carlo Focarelli, *supra* note 220, ¶ 12 ("*palpable and malicious iniquity of a judgment*", "*clearly improper and discreditable*").

²²³ JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 65 (2005) [*hereinafter* "Jan Paulsson"].

²²⁴ Carlo Focarelli, *supra* note 220, at ¶ 30. In the "*Loewen*" case, for instance, the Tribunal highlighted that "*no instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system*" (*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award, ¶ 154 (June 26, 2003)).

²²⁵ JAN PAULSSON, *supra* note 223, at 129 (2005).

²²⁶ Christoph Liebscher, *Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 105 et seq.* (Christina Binder et al. eds., 2009).

²²⁷ *Golder v. the United Kingdom*, Eur. Ct. H.R., Application No. 4451/70, Merits, ¶ 36 (Feb. 21, 1975). For a detailed analysis of the ECtHR's case law on the civil limb of Article 6, *see Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)*, COUNCIL OF EUROPE (Dec. 31, 2017), *available at* http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [*hereinafter* "Guide on Article 6"]; PASCAL GILLIAUX, DROIT(S) EUROPÉEN(S) À UN PROCÈS ÉQUITABLE (2012) [*hereinafter* "PASCAL GILLIAUX"].

²²⁸ *König v. Germany*, App. No. 6232/73, Eur. Ct. H.R., Merits, ¶¶ 88-89 (June 28, 1978).

fact that a public authority is involved in the proceedings in a sovereign capacity,²²⁹ or that great public interests are also at stake,²³⁰ is irrelevant, as long as these proceedings relate to the determination of civil rights and obligations. Although less common for investment disputes, Article 6 is also applicable to the “*determination of any criminal charge*”.²³¹

In addition, Article 13 of the ECHR requires the provision of effective national remedies, in practice as well as in law, for the breach of a Convention right.²³² As developed above, if such remedies exist, Article 35 of the ECHR imposes to the applicant to exhaust them before bringing its claim to the ECtHR.

Access to court may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.²³³ In addition, a limitation will not be compatible with the ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.²³⁴

The “court or tribunal” must meet certain institutional requirements, namely its independence (in particular from the executive)²³⁵ and impartiality, establishment by law (which covers not only the legal basis for the very existence of the tribunal, but also compliance by the tribunal with the particular rules that govern it)²³⁶ and respect of procedural guarantees. As long as these guarantees are in place and the institution has full jurisdiction, the “court or tribunal” in the meaning of Article 6 does not need to be a court of law integrated within the judiciary of the State concerned.²³⁷ It is not necessary for each and every one of the procedural stages to be conducted in accordance with all these principles, as long as there is subsequent review by a judicial body with full jurisdiction in compliance with the requirements of Article 6.²³⁸

²²⁹ *Id.* ¶ 90.

²³⁰ Rasmussen v. Denmark, App. No. 8777/79, Eur. Ct. H.R., Merits, ¶ 32 (Nov. 28, 1984).

²³¹ Here again, this expression has an autonomous meaning, based on three criteria, namely classification in domestic law, nature of the offence and severity of the penalty that the person concerned risks incurring. For a detailed analysis of the ECtHR’s case law on the criminal limb of Article 6, see Guide on Article 6, *supra* note 227.

²³² For a complete analysis, see *id.*

²³³ *Philis v. Greece*, App. Nos. 12750/87, 13780/88, and 14003/88, Eur. Ct. H.R., Merits, ¶ 59 (Aug. 27, 1991).

²³⁴ *Lupeni Greek Catholic Parish and Others v. Romania*, App. No. 76943/11, Eur. Ct. H.R., Merits, ¶ 89 (Nov. 29, 2016) [*hereinafter* “Lupeni Greek Catholic Parish”].

²³⁵ In the words of the Court, “in order to establish whether a body can be considered “independent”, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence” (*Langborger v. Sweden*, App. No. 11179/84, Eur. Ct. H.R., Merits, ¶ 32 (June 22, 1989)). For a good example in the framework of investment disputes, see the ruling of the Inter-American Court of Human Rights in *Ivcher-Bronstein v. Peru* where an investor successfully complained that the judicial procedures he had launched in defence of his shareholding rights were not conducted in accordance with his right to a fair trial as Peru created public law chambers and courts and appointing judges to them after that the facts of the case had occurred (*Ivcher-Bronstein*, *supra* note 170, ¶¶ 111-116).

²³⁶ *Sokurenko and Strygun v. Ukraine*, App. Nos. 29458/04 and 29465/04, Eur. Ct. H.R., Merits, ¶ 24 (July 20, 2006).

²³⁷ *Rolf Gustafson v. Sweden*, App. No. 23196/94, Eur. Ct. H.R., Merits, ¶ 45 (July 1, 1997).

²³⁸ *Albert and Le Compte v. Belgium*, App. Nos. 7299/75 and 7496/76, Eur. Ct. H.R., Merits, ¶ 29 (Feb. 10, 1983). On the question whether authorities competent to impose administrative fines must comply with some guarantees of Article 6 of the ECHR such as the principle of impartiality, see Xavier Taton & Olivier van der Haegen, *Les procédures spécifiques en droit de l’énergie*, in *DROIT DE L’ENERGIE, DROIT DE L’ENVIRONNEMENT ET DROIT DE L’URBANISME* 38, 62-69 (2012) [*hereinafter* “Taton & Haegen”].

The ECtHR avoids giving an abstract enumeration of criteria for determining whether proceedings were conducted fairly; rather, it conducts a case-by-case assessment. It considers, amongst others, equality of arms between the parties, the right to adversarial proceedings, the right to a lawyer and the judicial decisions' reasoning.²³⁹

The hearing of the case must take place “*within a reasonable time*”, in order to ensure the effectiveness and credibility of the proceedings and to end as soon as possible the legal insecurity into which a person finds himself or herself as regards his or her civil or criminal law position. In civil matters, time normally begins to run from the moment the action is instituted before the competent court²⁴⁰ and ends once its judgment is executed.²⁴¹ While different delays may not in themselves give rise to any issue, they may, when viewed together and cumulatively, result in reasonable time being exceeded.²⁴² Long periods during which the proceedings ‘stagnate’ without any explanations are not acceptable either.²⁴³ Again, the ECtHR conducts an overall assessment, on a case-by-case basis, of the duration of the case. Three main criteria must be respected: (i) the complexity of the case, (ii) the conduct of the applicant and of the relevant authorities, (iii) and what was at stake for the applicant in the dispute.²⁴⁴

Article 6 also guarantees the public trial and pronouncement of the judgment and, in criminal proceedings, the presumption of innocence as well as various minimum rights of defence for the accused.

The right to execution of final, binding decisions is also an integral part of the “right to a court” in order to guarantee the useful effect of Article 6.²⁴⁵ The decision taken by a court cannot be deprived of its effect by a non-judicial authority to the disadvantage of the successful party.²⁴⁶

In principle, Article 6 is only applicable to the procedural aspects of legal proceedings. The substantive right relied upon by the applicant in the national courts must have a legal basis in the State concerned and Article 6 does not extend to substantive limitations existing under domestic law.²⁴⁷ Save in the event of evident arbitrariness, it is not for the Court to question the interpretation of the domestic law by national courts,²⁴⁸ although the respect due to legitimate expectations may be opposed to a national court's decision which clearly departs from settled case-law (*see below*, Section III.F.ii below).

iii. Under EU Law

The right to a fair trial is also enshrined in Articles 47 (right to an effective remedy and to a fair trial) and 48 (presumption of innocence and right of defence) of the EU Charter. The CJEU

²³⁹ Pierre van Dijk & M. Viering, *Right to a fair and public hearing (Article 6)*, in *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 578-596 (Pierre van Dijk et al. eds., 4th ed., 2006).

²⁴⁰ Leopold, Josef and Anna Poiss v. Austria, App. No. 9816/82, Eur. Ct. H.R., Merits, ¶ 50 (Apr. 23, 1987).

²⁴¹ Martins Moreira v. Portugal, App. No. 11371/85, 143 Eur. Ct. H.R. (ser. A), Merits, ¶ 44 (Oct. 26, 1988).

²⁴² Deumeland v. Germany, App. No. 9384/81, Eur. Ct. H.R., Merits, ¶ 90 (May 29, 1986).

²⁴³ Beaumartin v. France, App. No. 15287/89, Eur. Ct. H.R., Merits, ¶ 33 (Nov. 24, 1994).

²⁴⁴ Guide on Article 6, *supra* note 227, ¶¶ 358-377.

²⁴⁵ Burdov v. Russia (No. 2), App. No. 59498/00, Eur. Ct. H.R., Merits, ¶¶ 34, 37 (May 7, 2002).

²⁴⁶ Van de Hurk v. The Netherlands, App. No. 16034/90, Eur. Ct. H.R., Merits, ¶¶ 45-52 (Apr. 19, 1994).

²⁴⁷ Lupeni Greek Catholic Parish, *supra* note 234, ¶ 100; Károly Nagy v. Hungary, App. No. 56665/09, Eur. Ct. H.R., Merits, ¶¶ 60-61 (Sept. 14, 2017).

²⁴⁸ Nejdet Şahin and Perihan Şahin v. Turkey, App. No. 13279/05, Eur. Ct. H.R., Merits, ¶¶ 49, 50 (Oct. 20, 2011).

had already recognised this right as a general principle of Union law²⁴⁹ and has consistently ruled that effective judicial remedies must exist against a decision of a national authority jeopardising a right granted by EU law.²⁵⁰

Since the meaning and scope of the rights contained both in the ECHR and the EU Charter must be the same,²⁵¹ and as the fundamental rights as guaranteed by the ECHR constitute general principles of EU law,²⁵² the guarantees offered by the right to a fair trial are very similar under both regimes.²⁵³

However, although this is of little practical effect for investment disputes, the Charter does not confine the right to a fair trial to disputes relating to “civil rights and obligations” or to “any criminal charge” and does not refer to the “determination” of such. Moreover, additional requirements sometimes appear in the CJEU’s case law, as a result of the Court’s determination to ensure the full effectiveness of EU law and to avoid discrimination between EU nationals in cross-border situations. As a striking example, the CJEU has held that the right to a fair trial would be breached where, while awaiting a judgment on the merits of the case in the framework of preliminary reference proceedings, a claimant could not obtain interim relief against the national measure which is under review. In the seminal *Factortame* case, the Court ruled that:

“The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule”.²⁵⁴

The ECtHR had initially considered that Article 6 of the ECHR was not applicable to interim measures. However, it has justified a change of its position on the basis – *inter alia* – of the CJEU’s case law.²⁵⁵

Another example is of security for costs; the ECtHR has ruled that security for costs orders constitute a legitimate restriction on the right of access to court where its excessive amount does not jeopardise the exercise of such right.²⁵⁶ Conversely, the CJEU considers that cost orders constitute a forbidden discrimination on the basis of nationality if they are not imposed on the same conditions on nationals and nationals of other EU Member States.²⁵⁷

F. Principle of Legal Certainty and Legitimate Expectations

²⁴⁹ Case C-222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 01651, ¶ 18; Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-03813, ¶ 65.

²⁵⁰ With respect to the free movement of workers, see Case 222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. George Heylens and others, 1987 E.C.R. 04097, ¶ 14.

²⁵¹ EU Charter, *supra* note 84, art. 52(3).

²⁵² TEU, *supra* note 79, art. 6(3).

²⁵³ For a critical analysis with respect to the right to a fair trial, see PASCAL GILLIAUX, *supra* note 227, at 64-68.

²⁵⁴ Case C-213/89, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, 1990 E.C.R. I-02433, ¶ 21 [*hereinafter* “Factortame Ltd.”]. For an analysis, see Simon Denys and Ami Barav, *Le droit communautaire et la suspension provisoire des mesures nationales. Les enjeux de l’affaire Factortame*, 2 REV. MAR. COMM. 591 (1990).

²⁵⁵ *Micallef v. Malta*, App. No. 17056/06, Eur. Ct. H.R., Merits, ¶¶ 32, 78-82 (Oct. 15, 2009).

²⁵⁶ *Tolstoy Miloslavsky v. The United Kingdom*, App. No. 18139/91, Eur. Ct. H.R., Merits, ¶¶ 62-67 (July 13, 1995).

²⁵⁷ Case C-20/92, Anthony Hubbard (Testamentvollstrecker) v. Peter Hamburger, 1993 E.C.R. I-03777 ¶¶ 14, 15.

i. Under Investment Arbitration Law

If some recent BITs, including the EU FTAs, provide that “investment-backed expectations” constitute one of the factors to be assessed by the tribunal in order to determine whether an investor was victim of indirect expropriation,²⁵⁸ the majority of the investor treaties do not refer to the principle of legitimate expectations.²⁵⁹ However, as noted by the tribunal in *El Paso v. Argentina*, “legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope. There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith”.²⁶⁰

The contours and conditions of the principle have varied greatly with evolving case law. As summarised by Potestà, under the investment arbitration tribunals’ case law, legitimate expectations tend to come into play in three main situations, depending on the behaviour of the host State.²⁶¹

First, they can be breached where the host State has made *specific contractual commitments* to an investor. However, as pointed out by Schreuer, any breach of the investor’s expectation to have the contract performed cannot amount – by itself – to a frustration of the treaty FET since such reasoning would entail a general umbrella clause pursuant to which any contractual breach would also be, *ipso facto*, a treaty breach.²⁶² For a treaty violation to occur as a consequence of a contractual breach, an additional element would be required, such as a “breach involving sovereign power” (“*exercice de la puissance publique*”) or an “outright and unjustified repudiation of the transaction”.²⁶³

Second, they can be breached when the host State *breaches certain promises or representations, which had been relied upon by the investor at the time of its investment*.²⁶⁴

Finally, the most controversial potential application of this principle is where an investor considers, without benefitting from a commitment specifically addressed to it, that its *expectations to a stable regulatory framework were breached by a new legislation introduced by a State*. As indicated above (see above, Section III.B.i), tribunals have been quite divided on this issue. Some have ruled that

²⁵⁸ See, e.g., U.S. Model BIT, *supra* note 217, Annex B(4)(a)(ii); Canada Model Bilateral Investment Treaty, Annex B.13(1)(b)(ii) (2003). See also CETA, *supra* note 39, art. 8.10(4) (“When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated”); EUSFTA, *supra* note 40, art. 2.4(3), 2.4(6), IPA.

²⁵⁹ Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) ICSID REV. 88 (2013) [*hereinafter* “M. Potestà”].

²⁶⁰ *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, ¶ 348 (Oct. 31, 2011). [*hereinafter* “El Paso Energy International Company”]. See also the definition of the FET standard by the Tecmed tribunal cited above (see above, Section **Error! Reference source not found.**III.B.i).

²⁶¹ M. Potestà, *supra* note 259, at 88-122.

²⁶² Christoph Schreuer, *Fair and Equitable Treatment (FET): Interactions with other Standards, in INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY* 63, 89-90 (Graham Coop and Clarisse Ribeiro eds., 2008).

²⁶³ M. Potestà, *supra* note 259, at 102-103.

²⁶⁴ In the words of the tribunal in *Glamis Gold v. USA*, Award, (2009) 48 ILM 1039, ¶ 766 (June 8, 2009), “a State may be tied to the objective expectations that it creates in order to induce investment. Such an upset of expectations thus requires something greater than mere disappointment; it requires, as a threshold condition, the active inducement of a quasi-contractual expectation”.

“there is certainly an obligation not to alter the legal and business environment in which the investment has been made”²⁶⁵ whilst the most recent case law considers that “economic and legal life is by nature evolutionary” and, as a result, “a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest” (on the basis of all the circumstances of the case, including the investor’s conduct, the reasonableness of its expectations, or the host State’s specific characteristics in terms of investment environment).²⁶⁶

ii. Under the ECHR

The principle of legal certainty and legitimate expectations is not, as such, guaranteed by the ECHR. However, the ECtHR considers that these rights are derived from the principle of lawfulness i.e. the obligation for the restrictions to the fundamental rights to be prescribed by law, pursuant to the rule of law (which is “one of the fundamental principles of a democratic society, inherent in all the Articles of the Convention”).²⁶⁷ In *Sunday Times v. United Kingdom*, the ECtHR summarised two requirements that flow from the expression ‘prescribed by law’. First, that the law must be adequately accessible to the citizens. Second, a norm shall be regarded as a ‘law’ if it is formulated with sufficient precision to enable the citizen to regulate his conduct, such that he can foresee, to a reasonable degree, the consequences of an action. Additionally, law must not be too rigid, and must keep pace with changing circumstances.²⁶⁸

The principle of legal certainty is also often discussed in the framework of the right to property, where the ECtHR systematically underlines that the law which restricts such principle must be accessible, precise and foreseeable.²⁶⁹ However, rational agents are expected to make efforts in order to find and comprehend the rules applicable to them. The Court expects companies to seek specialist advice on the requirement of domestic law.²⁷⁰

With respect to the doctrine of legitimate expectation, seen by the ECtHR as having its roots in

²⁶⁵ Occidental Exploration and Production Company v. Republic of Ecuador, Final Award, London Court of International Arbitration Administered Case No. UN 3467, ¶ 191 (July 1, 2004).

²⁶⁶ El Paso Energy International Company, *supra* note 258, ¶¶ 352, 358. *See also*, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶¶ 331-333 (Sept. 11, 2007), (“It is each state’s undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power. In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.”).

²⁶⁷ *Iatridis v. Greece*, App. No. 31107/96, Eur. Ct. H.R., Merits, ¶ 58 (Mar. 25, 1999) (with respect to restrictions to the right to property). For a general review, *see* Patricia Popelier, *Legal Certainty and the European Courts: Accessibility and Legitimate Expectations as Standards of Reasonableness*, in *THE SHIFTING MEANING OF LEGAL CERTAINTY IN COMPARATIVE AND TRANSNATIONAL LAW* 29 (Mark Fenwick et al. eds., 2017) [*hereinafter* “Patricia Popelier”].

²⁶⁸ *The Sunday Times v. The United Kingdom*, App. No. 6538/74, Eur. Ct. H.R., Merits, ¶ 49 (Apr. 26, 1979), [*hereinafter* “The Sunday Times”].

²⁶⁹ *Carbonara & Ventura v. Italy*, App. No. 24638/94, Eur. Ct. H.R., Merits, ¶ 64 (May 30, 2000); *Beyeler v. Italy*, App. No. 33202/96, Eur. Ct. H.R., Merits, ¶ 109 (Jan. 5, 2000).

²⁷⁰ *Spacek, s.r.o. v. The Czech Republic*, App. No. 26449/95, Eur. Ct. H.R., Merits, ¶ 59 (Nov. 9, 1999).

the principles of legal certainty and good faith, the Court considers that “*those who act in good faith on the basis of law as it is or seems to be should not be frustrated in their expectations without specific and compelling reasons*”.²⁷¹ Such expectations may be caused by legislation, case law, or (even unlawful)²⁷² administrative practice.²⁷³ The principle of legitimate expectations often arises where a new legislation is introduced, especially if the new rules have retroactive effect or if they interfere with a behaviour which had been specifically encouraged by the State.²⁷⁴ The Court often balances the social benefits of legislative interference with the costs borne by the applicant or its ability to adjust behaviour to the new rule.²⁷⁵ It also takes into consideration whether a transitional period, enabling the applicant to adjust itself to the new legislation, was provided therein.²⁷⁶

Legitimate expectations may arise in the framework of Article 1 of the First Protocol. If mere expectations do not qualify as a ‘possession’ in the meaning of this provision, the right to property could be breached where a possession is treated by the responding State contrary to the applicant’s legitimate expectations.²⁷⁷ As summarised by the ECtHR in *Anheuser-Buse v. Portugal*,

“*in certain circumstances, a “legitimate expectation” of obtaining an “asset” may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a “legitimate expectation” if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence. However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts*”.²⁷⁸

iii. Under EU Law

The principle of legal certainty and of the protection of legitimate expectations has been recognised as one of the general principles of EU law by the CJEU.²⁷⁹ This principle requires that rules of law must be clear, precise and predictable in their effect, especially where they may have negative (financial)²⁸⁰ consequences on individuals and undertakings.²⁸¹

Those concerned must know *precisely* the extent of the obligations imposed on them, and must

²⁷¹ N.K.M. v. Hungary, App. No. 66529/11, Eur. Ct. H.R., Merits, ¶ 75 (May 14, 2013) [*hereinafter* “N.K.M.”].

²⁷² Öneriyıldız v. Turkey, App. No. 48939/99, Eur. Ct. H.R., Merits, ¶¶ 127-128 (Nov. 30, 2004).

²⁷³ Patricia Popelier, *supra* note 267, at 40.

²⁷⁴ See, Scoppola v. Italy (No. 2), App. No. 50550/06, Eur. Ct. H.R., ¶¶ 137-138 (Sept. 17, 2009).

²⁷⁵ Patricia Popelier, *supra* note 267, at 40-41.

²⁷⁶ N.K.M., *supra* note 271, ¶ 71.

²⁷⁷ Pine Valley Developments Ltd and Others v. Ireland, App. No. 12742/87, Eur. Ct. H.R., Merits, ¶ 51 (Nov. 29, 1991); Pressos Compania Naviera SA v. Belgium, App. No. 17849/91, Eur. Ct. H.R., Merits, ¶ 31 (Nov. 20, 1995); see D.J. HARRIS ET AL., *supra* note 64, at 657-668.

²⁷⁸ Anheuser-Busch Inc. v. Portugal, App. No. 73049/01, Eur. Ct. H.R., Merits, ¶ 65 (Jan. 11, 2007).

²⁷⁹ Case C-325/91, French Republic v. Comm’n of the Eur. Communities, 1993 E.C.R. I-03283, ¶ 30.

²⁸⁰ Case C-325/85, Ireland v. Comm’n of the Eur. Communities, 1987 E.C.R. 05041, ¶ 18.

²⁸¹ Case C-98/14, Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam, ¶¶ 76-88 (June 11, 2015) [*hereinafter* “Berlington”]; Case C-183/14, Radu Florin Salomie and Nicolae Vasile Oltean v. Direcția Generală a Finanțelor Publice Cluj, ¶¶ 30-32 (July 9, 2015) [*hereinafter* “Radu Florin Salomie”]. For a complete analysis, see Patricia Popelier, *supra* note 256, at 29-55; Jeremie Van Meerbeeck, *The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust*, 41(2) EUR. L. REV. 275 (2016); JUHA RAITIO, *THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW* (2003).

be able to ascertain *unequivocally* what their rights and obligations are.²⁸² The Court is especially strict in defining the duty of the Member States to be clear and precise when transposing EU law and derogating from EU law provisions.²⁸³ In this context, the Court has put special emphasis on the respect of the principle of legal certainty in respect of restrictions to the free movement of capital.²⁸⁴

With respect to the protection of legitimate expectations, often raised in the framework of tax matters, the right to rely on that principle extends to any economic agent in a situation in which an authority has caused that person to entertain expectations which are justified by precise assurances provided to him/her.²⁸⁵ It is necessary to determine whether the conduct of an authority has given rise to a reasonable expectation in the mind of a reasonably prudent and alert economic agent and, if it did, the legitimate nature of that expectation must then be established.²⁸⁶ The agent cannot rely on unlawful decisions of the public authority (as opposed to the ECtHR's case law, *see above*, Section III.F.ii).²⁸⁷ In the framework of preliminary ruling references, these questions are usually for the domestic court referring the case to the CJEU to answer.²⁸⁸

Moreover, the modification of existing legislation should be foreseeable and allow the subject of this legislation to adapt to the new rules under reasonable conditions, especially where the EU/Member State had encouraged it to adopt a specific behaviour.²⁸⁹ In this respect, the operations and typical calendar in the relevant sector must be taken into consideration and economic operators have a legitimate expectation to benefit from an appropriate transitional period if they cannot adapt quickly enough to the legislative change.²⁹⁰ However, they are expected to keep abreast of legislative and regulatory evolutions. The legitimacy of expectations depends, *inter alia*, on the predictability of the legal change, considering public debates, parliamentary discussions, and announcement in coalition agreements.²⁹¹

G. Sectorial Protection

Depending on the sector in which they operate and the nature of their investment, investors may also benefit from rights granted by EU sector-specific legislations covering areas such as financial services, transport, telecommunications, public procurement, professional qualifications, intellectual property, company law, energy or media. Sector-specific rights may also stem from the ECHR or investment treaties. This is particularly striking in the energy and media sectors.

i. The Energy Sector

²⁸² Case C-158/06, *Stichting ROM-projecten v. Staatssecretaris van Economische Zaken*, 2007 E.C.R. I-05103, ¶¶ 25-26.

²⁸³ Patricia Popelier, *supra* note 267, at 39, 54.

²⁸⁴ BARNARD, *supra* note 119, at 547.

²⁸⁵ Radu Florin Salomie, *supra* note 281, ¶ 44.

²⁸⁶ *Joined Cases C-181/04 to C-183/04, Elmeka NE v. Ypourgos Oikonomikon*, 2006 E.C.R. I-08167, ¶ 32 [*hereinafter* "Elmeka NE"].

²⁸⁷ Case C-585/13 P, *Europäisch-Iranische Handelsbank AG v. Council*, ¶ 97 (Mar. 5, 2015).

²⁸⁸ *Elmeka NE*, *supra* note 286, ¶¶ 35-36.

²⁸⁹ Case C-120/86, *J. Mulder v. Minister van Landbouw en Visserij*, 1988 E.C.R. 02321, ¶ 24.

²⁹⁰ *Joined cases C-182/03 and C-217/03, Belgium and Forum 187 ASBL v. Comm'n*, 2006 E.C.R. I-05479, ¶ 163; *see also* *Berlington*, *supra* note 281, ¶¶ 76-88.

²⁹¹ C-201/08, *Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt*, 2009 E.C.R. I-08343, ¶ 63.

a. *EU Energy Law*

Article 194 of the TFEU grants specific competences (shared with its Member States) in the field of energy law to the EU. Prior to its introduction by the Treaty of Lisbon, EU energy legislation was based on the competence of the EU with respect to the internal market and the environment. These two aspects are still the core foundations of the EU energy policy, as is clear from the text of Article 194.²⁹²

In the words of the EU institutions,

*“In order to harmonise and liberalise the EU’s internal energy market, measures have been adopted since 1996 to address market access, transparency and regulation, consumer protection, supporting interconnection, and adequate levels of supply. These measures aim to build a more competitive, customer-centred, flexible and non-discriminatory EU electricity market with market-based supply prices. In so doing, they strengthen and expand the rights of individual customers and energy communities, address energy poverty, clarify the roles and responsibilities of market participants and regulators and address the security of the supply of electricity, gas and oil, as well as the development of trans-European networks for transporting electricity and gas”.*²⁹³

The sectorial legislations adopted by the EU in order to harmonise and liberalise the EU internal energy market (mainly in the field of electricity and natural gas) therefore contain specific rules which are of direct interest to investors in their relationships with Member States and public authorities with respect to, amongst other, non-discriminatory third-party access to the energy networks,²⁹⁴ the unbundling of energy suppliers from network operators, specific competition law and State aid aspects, investments in cross-border networks (including the setting up of the Trans-European Networks for Energy (TEN-E)), energy trading, market supervision, etc.²⁹⁵

b. *Investment Protection under the Energy Charter Treaty*

The ECT is an international convention ratified by 46 States²⁹⁶ (including all the EU Member States) as well as EURATOM and the EU, signed in 1994 and entered into force in 1998. It aims at *“promot[ing] the development of efficient, stable and transparent energy markets”* by *“creat[ing] a climate favourable to the operation of enterprises and to the flow of investments and technologies.”*²⁹⁷ The ECT was

²⁹² “In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks” (TFEU, *supra* note 89, art. 194(1)).

²⁹³ See *Fact Sheets on the European Union: internal energy market*, EUROPEAN PARLIAMENT, available at <http://www.europarl.europa.eu/factsheets/en/sheet/45/internal-energy-market>.

²⁹⁴ For a review of the principle of non-discrimination in network industries, see Xavier Taton & Guillaume Croisant, *Le principe de non-discrimination dans l'accès aux réseaux: une application dépendant des objectifs poursuivis*, 9 REVUE DE DROIT COMMERCIAL BELGE 912 (2015).

²⁹⁵ For a complete review, see, Claeys & Casteels, 1-11 EU ENERGY LAW (2004); LEGAL ASPECTS OF EU ENERGY REGULATION: THE CONSOLIDATION OF ENERGY LAW ACROSS EUROPE (Peter Cameron and Raphael Heffron eds., 2d ed., 2016).

²⁹⁶ Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan. Belarus also applies it provisionally. Russia applied it provisionally until 2009.

²⁹⁷ The Energy Charter Treaty, title I, Dec. 17, 1994, 2080 U.N.T.S. 95 [*hereinafter* “ECT”].

initially adopted in order to facilitate investments and the West-East cooperation in the energy sector following the breakup of the Soviet Union,²⁹⁸ but it has now become a more global instrument.

To that end, the ECT provides for various wide-ranging substantive protections to investors from the contracting States, including fair and equitable treatment, protection and security, the prohibition of illegal expropriation, and non-discriminatory conditions for trade in energy materials, products and energy-related equipment.²⁹⁹ The ECT also contains a general umbrella clause with respect to contractual engagements of a contracting State towards an investor.³⁰⁰ A supplementary treaty, providing for national or MFN treatment (whichever would be the most favourable), was foreseen. However, it has not been adopted till date.³⁰¹

Investors from one of the contracting States alleging a breach of these substantive protections by another contracting State may refer their disputes to investment arbitration (conducted under the ICSID, UNCITRAL or the Stockholm Chamber of Commerce Arbitration Rules).³⁰² A specific procedure is also set out for disputes between contracting States but, similar to infringement proceedings under EU law, has virtually never been applied.³⁰³

The ECT does not impose the exhaustion of domestic remedies before the recourse to international arbitration but, as discussed below (*see above*, Section IV.B.iii), contains a so-called “fork in the road” provision (limited to the contracting parties, enumerated at the Annexe ID to the ECT,³⁰⁴ which have elected for its application).³⁰⁵

As indicated above (*see above*, Section II.A.ii.a), the European Commission considers that it results from the CJEU’s *Achmea* ruling that investors cannot have recourse to arbitration tribunals established under the ECT for intra-EU disputes. This position, already challenged by several arbitral tribunals, has significant practical consequences since more than half of the reported ECT cases are concerned with such disputes.

ii. The Media Sector

a. Freedom of Expression and Information under the EU Charter and the Audiovisual Media Services Directive

Article 11 of the Charter of Fundamental Rights, on the freedom of expression and information, expressly guarantees the freedom and pluralism of the media. It had already been

²⁹⁸ THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 7-13 (2011) [*hereinafter* “Roe & Happold”].

²⁹⁹ ECT, *supra* note 297, arts. 10, 13. For a complete review, *see* KAJ HOBER, THE ENERGY CHARTER TREATY: A COMMENTARY (2019); INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY (Graham Coop & Clarisse Ribeiro eds., 2008).

³⁰⁰ ECT, *supra* note 297, art. 10(1). Australia, Hungary and Norway do not allow investors to submit a dispute under this umbrella clause (*see* ECT, *supra* note 297, annex IA).

³⁰¹ ECT, *supra* note 297, art. 10(3)-(4).

³⁰² ECT, *supra* note 297, art. 26. *See* ROE & HAPPOLD, *supra* note 298; Taton & Haegen, *supra* note 238, at 38 *et seq.*

³⁰³ ECT, *supra* note 297, art. 27.

³⁰⁴ Australia Azerbaijan, Bulgaria, Croatia, Cyprus, The Czech Republic, the European Union and EURATOM, Finland, Greece, Hungary, Ireland, Japan, Kazakhstan, Poland, Portugal, Romania, Russia (when it provisionally applied the ECT), Slovenia, Spain and Sweden.

³⁰⁵ ECT, *supra* note 297, art. 26(3).

considered a fundamental right of EU law by the CJEU, in connection with the freedom of expression, before the adoption of the charter.³⁰⁶

The Audiovisual Media Services Directive [the “**AMSD**”] sets out coordinated rules which apply to the audiovisual sector and obligates Member States to ensure freedom of retransmissions in their territory of audiovisual media services from other EU Member States, given the importance of media services for democracy and growth of societies.³⁰⁷ The AMSD underlines that “*media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services*”.³⁰⁸ The directive also refers to protection of the fundamental freedoms of the internal market (*see above*, Section III.B.ii) and competition law concerns: “*it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole*”.³⁰⁹

b. Freedom of Expression under the ECHR

The freedom and pluralism of the media is not expressly enshrined in the ECHR. However, the ECtHR considers that it stems from Article 10 of the Convention, which guarantees the freedom of expression. Investors operating media operators, faced with excessive State intervention, can therefore rely on this provision. In *Meltex* for instance, the ECtHR held that a procedure which did not require a State body to justify its decisions to refuse a broadcasting licence did not provide adequate protection against arbitrary interference by a public authority with the applicant’s freedom to impart information and ideas.³¹⁰

Pursuant to the ECtHR’s case law, non-interference is necessary but not sufficient. States must also proactively ensure media freedom and pluralism. For instance, in *Centro Europa v. Italy*, the Court held that:

“To ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed [...]

The Court observes that in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative

³⁰⁶ Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, 1991 E.C.R. I-04007, ¶ 23 (in the framework of the Court’s review of a restriction to the freedom of providing services in the media sector).

³⁰⁷ Directive 2010/13/EU, of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (“Audiovisual Media Services Directive”), 2010 O.J. (L 95) [*hereinafter* “AMSD”].

³⁰⁸ *Id.* recital 5.

³⁰⁹ *Id.* recital 8.

³¹⁰ *Meltex Ltd and Mesrop Movsesyan v. Armenia*, App. No. 32283/04, Eur. Ct. H.R., Merits, ¶¶ 80-85 (June 17, 2008). *See also* *Ivcher-Bronstein*, *supra* note 170, ¶¶ 148, 149 and 163.

framework to guarantee effective pluralism".³¹¹

A Recommendation of the Committee of Ministers of the Council of Europe also underlines that:

*"In order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member States should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed".*³¹²

IV. Procedural Aspects

A. Introduction

Again, a complete presentation of the applicable procedures before investment arbitration tribunals,³¹³ the ECtHR³¹⁴ and EU Courts³¹⁵ would require entire text books. This section aims to provide an overview of some of the most salient aspects of these procedures, and how they interact together, in the framework of investment disputes.

B. Availability of the Remedy

i. Legal Standing of the Investor

a. Investment Arbitration

In order to refer their case to arbitration, investors will have to rely on either a BIT, an investment law or a specific provision in their contract with the State.

BITs usually limit the dispute resolution commitments to "nationals" of the other contracting State, determined by an individual's citizenship and a company's place of incorporation or principal place of business.³¹⁶ Some treaties contain detailed definitions of "nationals", such as

³¹¹ Centro Europa 7 S.R.L. and di Stefano v. Italy, App. No. 38433/09, Eur. Ct. H.R., Merits, ¶¶ 130, 134 (June 7, 2012).

³¹² Recommendation CM/Rec (2007)2 of the Committee of Ministers to member States on media pluralism and diversity of media content, (Jan. 31, 2007).

³¹³ See amongst many, JEREMY COMMISSION and RAHIM MOLOO, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION (2018); ERIC DE BRABANDERE, INVESTMENT ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS (2014); DOLZER & SCHREUER, *supra* note 117; LA PROCÉDURE ARBITRALE RELATIVE AUX INVESTISSEMENTS INTERNATIONAUX, SOUS LA DIRECTION DE CHARLES LEBEN (2010); CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009) [*hereinafter* "Schreuer Commentary"]; GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION (2004).

³¹⁴ See amongst many, CLAIRE DUBOIS & ELLEN PENNINGCKX, LA PROCÉDURE DEVANT LA COUR EUROPÉENNE DES DROITS DE L'HOMME ET LE COMITÉ DES MINISTRES (2016) [*hereinafter* "Dubois & Penninckx"]; JACQUES VELU and RUSEN ERGEC, CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 851-1185 (2014); D.J. HARRIS, *supra* note 64, at 757-885; L. Zwaak, *The procedure before the European Court of Human Rights*, in THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 95-291 (Pierre van Dijk et al. eds., 4th ed. 2006).

³¹⁵ See amongst many, RENE BARENTS, REMEDIES AND PROCEDURES BEFORE THE EU COURTS (Helen E. Breese ed., 2016) [*hereinafter* "Rene Barents"]; K.P.E. LASOK, LASOK'S EUROPEAN COURT PRACTICE AND PROCEDURE (3rd ed., 2017); KOEN LENAERTS ET AL., *supra* note 100; MORTEN BROBERG AND NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE (2d ed. 2014); COURT OF JUSTICE OF THE EUROPEAN UNION, COMMENTARY ON STATUTE AND RULES OF PROCEDURE (Bertrand Wägenbaur ed., 2013); LASOK & MILLET, JUDICIAL CONTROL IN THE EU: PROCEDURE AND PRINCIPLES (2004); HENRY. G. SCHERMERS AND DENIS. F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION (6th ed. 2001).

³¹⁶ See SCHREUER COMMENTARY, *supra* note 313, at 283-298.

the EU FTAs.³¹⁷ Indeed, although the criterion may, at first glance, appear quite straightforward, the practice shows that complex questions can arise in this respect (e.g. the nationality of a local subsidiary of a foreign company, dual-nationals, situations involving foreign-incorporated companies owned by investors who are nationals of the host State, etc.).³¹⁸

The existence of an investment, as defined by the treaty, is also a key requirement. The ICSID Convention does not expressly define “investment”. As pointed out by Born, “*ICSID tribunals have reached a variety of interpretations of what constitutes an “investment” under the Convention, developing different criteria to define the term. A number of ICSID awards have suggested that an investment involves the contribution of money or other assets for a duration of time in a manner that incurs some element of risk and assists the host State’s development; all of these elements, and particularly the last one, have been the source of debate*”.³¹⁹ BITs often refer to the ICSID Convention and this definition and debates are therefore broadly relevant under many BITs.³²⁰ Others contain more precise definitions, including the EU FTAs³²¹ and the ECT.³²²

b. *The ECtHR*

Article 1 of the ECHR obliges the Member States of the Council of Europe to secure the Convention’s rights and freedoms with respect to everyone within their jurisdiction, regardless of their nationality.

In many contracting States, the ECHR is directly applicable in the domestic legal orders of the Convention States and takes precedence over domestic law. Investors, legal or natural persons, may rely on the ECHR’s protection before the domestic courts of these States and, in the absence of satisfactory remedy at the domestic level (*see below*, Section IV.B.i.b), before the ECtHR. Pursuant to Article 34 of the ECHR, the ECtHR may hear applications from “*any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto*”. The requirement of “victim” implies that the applicant must have been personally affected by the State measure. The Court has also never doubted the capability of corporations to bring claims before it³²³ and does not view corporate claims with suspicion.³²⁴ The ECtHR evaluates per provision whether it can attribute a specific Convention right to corporations. Many of them have already been considered to extend their protection to corporations,³²⁵ including all the rights considered under Section III above.

The same applies to the rights protected by the additional protocols to the ECHR (*see above*, Section II.B), though only with respect to the States which have ratified the protocol invoked by

³¹⁷ See, e.g., CETA, *supra* note 39, art. 8.1, definition No. 18; EUSFTA, *supra* note 40, art. 1.2, IPA; EUVFTA, *supra* note 41, Chap. 8(I), art. 1(4).

³¹⁸ See GARY BORN, *supra* note 128, at 422-425.

³¹⁹ GARY BORN, *supra* note 128, at 421.

³²⁰ See ANNE GILLES, LA DEFINITION DE L’INVESTISSEMENT INTERNATIONAL 214-536 (2012).

³²¹ See, e.g., CETA, *supra* note 39, art. 8.1, definition No. 17; EUSFTA, *supra* note 40, art. 1.2(1), IPA; EUVFTA, *supra* note 41, Chapter 8(I), art. 1(4)(p).

³²² ECT, *supra* note 297, art. 1(6).

³²³ For the first claim launched by a corporate, see *The Sunday Times*, *supra* note 268.

³²⁴ Winfred H.A.M. van den Muijsenbergh and S. Rezai, *Corporations and the European Convention on Human Rights*, 25(1) GLOBAL BUS. & DEV. L. J. 45, 48 (2012).

³²⁵ For a review, *see id.* at 49-51.

the plaintiff. As we have seen, Protocol No. 12 (on the general prohibition of discrimination) is of particular importance for investment disputes. It has been ratified by 20 States.³²⁶

The European Commission on Human Rights had held that a shareholder with “majority or controlling interest” was entitled to claim to be the “victim” of measures directed against a company.³²⁷ However, since then the ECtHR has underlined in several cases that:

*“The piercing of the ‘corporate veil’ or the disregarding of a company’s legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators”.*³²⁸

Save for these exceptional circumstances, the ECtHR does not allow applications from shareholders on behalf of the company victim of an alleged breach of the ECHR or alleging consequential losses. They have to demonstrate that a State measure interfered directly with their holding.

c. The CJEU

As is the case for the ECHR, EU law prevails over national legislations and can be invoked by investors, regardless of their nationality, before domestic courts.³²⁹ However, by contrast with the procedure before the ECtHR, investors do not have direct standing to challenge a Member State’s measure before the CJEU. As elaborated above (*see above*, Section II.C.iii), they will need to convince the European Commission to take on their case (infringement proceedings), or a domestic court to refer the case to the CJEU (preliminary reference procedure).

Investors have merely direct legal standing before the CJEU for challenging the legality of the acts adopted by the EU institutions (or their lack thereof). Any natural or legal person, regardless of their nationality, may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern

³²⁶ Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Malta, Montenegro, the Netherlands, Portugal, Romania, San Marino, Serbia; Slovenia, Spain, Macedonia and Ukraine.

³²⁷ *X. v. Austria*, App. No. 8278/78, 18 Eur. Comm’n H.R. Dec. & Rep. 154 (Dec. 13, 1979); *Joseph Kaplan v. the United Kingdom*, App. No. 7598/76, Eur. Comm’n H.R., Admissibility, (July 17, 1980). *See also Yarrow P.L.C. v. the United Kingdom*, App. No. 9266/81, Eur. Comm’n H. R., Admissibility, 184-185 (1983).

³²⁸ *See, e.g., Agrotexim and Others v. Greece*, App. No. 14087/96, Eur. Ct. H.R., Merits, ¶ 66 (Oct. 24, 1995) (citing the landmark International Court of Justice’s decision in *Barcelona Traction*); *CDI Holding and Others v. Slovakia*, App. No. 37398/97, Eur. Ct. H.R., Admissibility (Oct.18 2001); *Marta Veselá and Tobiáš Loyka v. Slovakia*, App. No. 54811/00, Eur. Ct. H.R., Admissibility (Dec. 13, 2005). *See also*, the *Yukos* case below (*see below*, section V.A.), where the ECtHR ruled that “the various alleged breaches of Articles 6, 7, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 in the present case concern the tax assessment and enforcement proceedings in respect of the applicant company which eventually resulted in its bankruptcy and ceasing to exist as a legal person. Striking the application out of the list under such circumstances would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality” (*OAO Neftyanaya Admissibility, supra* note 3, ¶ 443).

³²⁹ As developed above, within their scope of application, the fundamental freedoms of the internal market and the EU sectorial legislations can be invoked against any measures taken by a Member State. By contrast, general principles of EU law and the EU Charter can only be invoked (i) when a Member State implements EU law or (ii) against a Member State’s restriction to the fundamental freedoms of the internal market.

to them and does not entail implementing measures.³³⁰ ‘Direct concern’ means that the contested measure is capable of directly producing effects on the applicant’s legal situation and leaves no discretion to addressees entrusted with its implementation whilst “individual concern” means that the contested measure is a measure of individual application, where the applicant shows that he or she was part of a “closed circle” of persons concerned by the act.³³¹ Actions for failure to act filed by legal or natural persons must relate to a failure to adopt an act that has direct influence on that person’s legal position. These restrictive conditions are a significant hurdle for actions of legal or natural persons against an act of an EU institution before the CJEU.

ii. Statutes of Limitation and Prior Exhaustion of Local Remedies
 a. Under Investment Arbitration Law

According to a 2012 survey conducted by the Organisation for Economic Cooperation and Development [“OECD”], hundreds of BITs (7% of the sample of treaties with ISDS sections) contain statutes of limitation that bar access to international arbitration if a claim has not been brought within a specified period of time.³³² Such clauses have only begun to increase significantly since 2004. The treaties that deal with this issue usually set limitation periods of 2 to 5 years.³³³ More unusual periods – 39 months for instance³³⁴ – can also be found. Multilateral agreements often set limitation periods of 3 years from the date on which the investor first acquired, or should have first acquired, knowledge of the breach and knowledge that the investor has incurred loss or damage.³³⁵

Under customary international law, in the framework of diplomatic protection in particular,³³⁶ remedies provided for by the national law of the host State must be exhausted before claiming that it would have failed to correct the breach. Unsurprisingly, the exhaustion of local remedies is therefore set forth in a number of BITs. As an example, Article 15 of the Indian Model BIT provides that foreign investors should first exhaust local remedies at least for a period of five

³³⁰ TFEU, *supra* note 89, art. 263(4).

³³¹ Case C-97/85, *Union Deutsche Lebensmittelwerke GmbH and others v. Comm’n*, 1987 E.C.R. 02265, ¶ 11.

³³² Joachim Pohl et al., *Dispute settlement provisions in international investment agreements: A large sample survey* (Org. for Econ. Cooperation and Dev., Working Papers on International Investment 2012/02), available at https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf [hereinafter “Joachim Pohl”]. The UK and, to a lesser extent, Germany, Hungary and Romania have included this mechanism in a significant share of their treaties.

³³³ CETA provides for 3 years (Art. 8.19(16)), the EUSFTA for 30 months as from the knowledge of the alleged breach or one year after the date on which the claimant ceases to pursue the local remedies (Art. 3.3.3 of the IPA), the EUVFTA for 30 months as from the knowledge of the alleged breach or one year after the date on which the claimant ceases to pursue the local remedies (Art. 4.2).

³³⁴ See Free Trade Agreement between Canada and the Republic of Colombia, Can.-Colom., Nov. 11, 2008; Free Trade Agreement between Canada and the Republic of Peru, Can.-Peru, May 29, 2008.

³³⁵ Dominican Republic-Central America Free Trade Agreement, art. 10.18, Costa Rica-Guat.-El Sal.-Hond.-Dom. Rep.-Nicar.-U.S., May 28, 2004, 43 ILM 514 (2004); North American Free Trade Agreement, arts. 1116(2), 1117(2), Can.-Mex.-U.S., Dec. 17, 1992, 32 ILM 289 (1993) [hereinafter “NAFTA”]; the Investment Agreement for the COMESA Common Investment Area, art. 28(2), May 23, 2007; the ASEAN Comprehensive Investment Agreement, art. 34(1)(a), Feb. 26, 2009. The ECT does not provide for such a time limit.

³³⁶ See Peter Muchlinski, *The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 341 (Christina Binder et al. eds., 2009).

years before commencing international arbitration.³³⁷ Under the so-called “futility exception”, arbitral tribunals generally consider, similarly to the ECtHR, that the local remedies do not have to be exhausted when there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.³³⁸ This exception is expressly provided for in the Indian Model BIT as well. Although this is more controversial, other tribunals have also reached the same conclusion in applying MFN clauses (*see above*, Section III.D.i).³³⁹

However, most BITs (including the EU FTAs) do not make reference to exhaustion of local remedies anymore – which is generally interpreted as the State’s waiver of such requirement – or even expressly reject this obligation.³⁴⁰ Pursuant to the OECD survey, merely 73 BITs require investors to first present their dispute to domestic courts before they may, under certain conditions, bring it to international arbitration.³⁴¹ Article 26 of the ICSID Convention is a good example of this shift, by providing that the host State must express a specific reservation if it wants to require the exhaustion of local administrative or judicial remedies. However, the exhaustion of domestic remedies may still be relevant in the context of denial of justice cases (*see above*, Section III.E.i).

Many BITs contain “cooling off” periods requiring investors to wait a couple of months after their notice of claim before launching the arbitration proceedings. Others prescribe prior “consultations”, “negotiations” and/or the prior use of ADR mechanisms. Arbitral tribunals have had varying approaches as to whether cooling off periods can oust their jurisdiction.³⁴²

b. Under the ECHR

The time-related admissibility criteria for recourse with the ECtHR are set forth in Article 35(1)

³³⁷ For a few other examples, *see* Agreement on economic cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore, Neth.-Sing., art. 11, May 16, 1972; Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments, Ger.-Arg., art. 10(3), Apr. 9, 1991.

³³⁸ Ranjan & Anand, *supra* note 9, n. 281. E.g. *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 597-611 (Feb. 8, 2013).

³³⁹ Suzy H. Nikiema, *The Most-Favoured-Nation Clause in Investment Treaties*, INT’L INST. FOR SUSTAINABLE DEV. (2017), available at <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>.

³⁴⁰ For an overview of the principle of exhaustion of local remedies in international investment law, *see* Christoph Schreuer, *Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4(1) L. & PRAC. INT’L CTS. & TRIBUNALS 1 (2005); Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 417-460 (Christina Binder et al. eds., 2009); Matthew C. Potterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?*, 41 YALE J. INT’L L. ONLINE 1 (2015).

³⁴¹ “This type of provision was a common feature of international investment agreements during the 1970s and the 1980s; since then, it is very much less used, and has not appeared in treaties concluded from 2004 onwards. The United Kingdom and, to a lesser extent, Germany, Hungary and Romania have used this mechanism in a significant share of their treaties”; Joachim Pohl, *supra* note 332, at 27-46.

³⁴² E.g., in *Murphy v. Ecuador* the tribunal held that it did not have jurisdiction as the cooling off period was not complied with (*Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (Sept. 15, 2010), whereas in *Biwater Gauff v. Tanzania*, the tribunals held the opposite (*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008).

of the ECHR.³⁴³ It provides that, *first*, the applicant must exhaust domestic remedies before bringing an action before the ECtHR. The rationale for this rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the ECHR. It is based on the assumption, reflected in Article 13 of the ECHR, that the domestic legal order will provide an effective remedy for violations of Convention rights.

The ECtHR has frequently underlined the need to apply the exhaustion rule, which is “*neither absolute nor capable of being applied automatically*”, with some degree of flexibility and without excessive formalism.³⁴⁴ Applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success.³⁴⁵

Second, the applicant must bring its application before the ECtHR within a period of six months from the date on which the final decision (in the process of exhaustion of domestic remedies) was taken. The purpose of the six-month rule is to promote legal certainty, by ensuring that cases raising issues under the ECHR are dealt with in a reasonable time and that past decisions are not continually open to challenge.³⁴⁶

In the absence of an effective domestic remedy available to challenge the measure allegedly in breach of the Convention, the ECtHR has adopted a flexible and factual approach.³⁴⁷ In the landmark decision of *Varnava & Ors. v. Turkey*, the Grand Chamber of the ECtHR considered that the six-month period runs from “*the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant*”.³⁴⁸ In an older decision relating to an administrative State measure, the European Commission of Human Rights ruled that “[*w*]here, in the present case, no domestic decision is required for the application of a general measure to the particular case, the relevant date is the time when the applicant was actually affected by the measure”.³⁴⁹ The date of effect or prejudice to the applicant is therefore the most probable starting point in cases of adverse legislations without effective domestic remedies.

The close relation between these two admissibility conditions places the applicant in a difficult position if it is not sure whether a particular remedy must be pursued before domestic courts.

³⁴³ “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken”.

³⁴⁴ See, e.g., *Kozacıoğlu v. Turkey*, App. No. 2334/03, Eur. Ct. H.R., Merits, ¶ 40 (Feb. 19, 2009).

³⁴⁵ *Sejdovic v. Italy*, App. No. 56581/00, Eur. Ct. H.R., Merits, ¶ 46 (Mar. 1, 2006).

³⁴⁶ *PM v. The United Kingdom*, App. No. 6638/03, Eur. Ct. H.R., Merits, (July 19, 2005).

³⁴⁷ *Sabri Günes v. Turkey*, App. No. 27396/06, Eur. Ct. H.R., Preliminary Objection, ¶ 41 (June 29, 2012), (“Article 35 §1 contains an autonomous rule which has to be interpreted and applied in such a manner as to ensure to any applicant claiming to be the victim of a violation by one of the Contracting Parties of one of the rights set forth in the Convention and its Protocols the effective exercise of the right of individual petition pursuant to Article 35 § 1 of the Convention”).

³⁴⁸ *Varnava and others v. Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90, Eur. Ct. H.R., Merits, ¶ 157 (Sept. 18, 2009); *Lizette Dennis and others v. The United Kingdom*, App. No. 76573/01, Eur. Ct. H.R., Admissibility (July 2, 2002); *Isabel Hilton v. the United Kingdom*, App. No. 12015/86, Eur. Comm’n H. R., Admissibility (July 6, 1988).

³⁴⁹ *Christian against Racism and Fascism v. The United Kingdom*, App. No. 8440/78, Eur. Comm’n H.R., Admissibility, at 138, 147 (July 16, 1980).

Indeed, where an applicant has tried a national remedy that the ECtHR considers inappropriate, the time taken to do so will not have stopped the six-month period from running, which may lead to the application being rejected as tardy.³⁵⁰ On the other hand, an application will be ruled inadmissible if the effective national remedies have not been exhausted and if the recourse with the ECtHR has been filed too early.

c. Under EU law

An action for annulment must be lodged before the General Court within two months of the publication of the contested act.³⁵¹

iii. Parallel Proceedings and Fork in the Road Provisions

This section reviews whether investors must choose between the reliefs provided by investment treaties, the ECHR and/or EU law or whether they can use several or all of these avenues in parallel.

a. The Arbitral Tribunal's Perspective

Some BITs, and the ECT,³⁵² provide for so-called “fork in the road” provisions that require investors to choose a single avenue of relief at the outset of a dispute and preclude them from switching forums after having filed a request for arbitration or having started a proceeding in court. Others refer to the ICSID Convention, pursuant to which “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy”.³⁵³

However, arbitral tribunals usually consider that such provisions do not impede investors from making use of the two remedies. For instance, in the *Yukos*³⁵⁴ and *Amto* cases,³⁵⁵ parallel applications based on similar facts were brought before the ECtHR and an arbitral tribunal. The latter held that a “triple identity” test should be applied in the context of “fork in the road” provisions: *namely*, identity of parties, cause of action and object of the dispute.³⁵⁶ Since the causes of action (under the ECHR and the ECT) and the parties to the proceedings were different in these cases, the tribunal rejected *lis pendens* objections invoked by the defendant States.³⁵⁷

Distinguishing the causes of action (the investment rights on the one hand, human rights and fundamental freedoms on the other) and/or the plaintiffs (usually the shareholder(s) of a company operating in the State that allegedly violated the investment rights on the one hand, the latter company on the other) of the two remedies therefore appears of paramount importance.

³⁵⁰ *Rezgui v. France*, App. No. 49859/99, Eur. Ct. H.R., Merits, (Nov. 7, 2000).

³⁵¹ TFEU, *supra* note 89, art. 263.

³⁵² See ECT, *supra* note 297, art. 26(3)(b)(i). This fork in the road clause is limited to the contracting parties, enumerated at the Annexe ID to the ECT, which have elected for its application. See *supra* note 304 above.

³⁵³ Convention for the settlement of investment disputes between States and nationals of other States, art. 26, Oct. 14, 1966, 575 U.N.T.S. 159 [*hereinafter* “ICSID Convention”]. Similarly, see NAFTA, *supra* note 335, art. 1121.

³⁵⁴ *Hulley Enterprises Limited v. The Russian Federation*, Case No. 2005-03/AA226 Interim Award on Jurisdiction and Admissibility, ¶¶ 586-593 (Perm. Ct. Arb. 2009) [*hereinafter* “Hulley Enterprises Limited Interim Award”].

³⁵⁵ *Amto*, *supra* note 1, ¶¶ 71-72.

³⁵⁶ For an example of application of the triple identity test in the context of contract-based and treaty-based claim, see *Sempre Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶¶ 120-128 (May 11, 2005).

³⁵⁷ *Amto*, *supra* note 1, ¶ 71.

The same solution *a fortiori* applies where no fork in the road provisions are provided for by the applicable BIT.

However, some arbitral tribunals are ready to adopt a “flexible interpretation” of the triple identity test in this respect. In *Charanne & Construction Investments, et al v. Spain* [“**Charanne**”] for instance, the tribunal held that separate legal entities applying to the ECtHR and an arbitral tribunal constituted under the ECT could be considered as a single party where the claimants in the arbitration “enjoy decision-making powers in [the applicants to the ECtHR] in such a way that these companies have been in reality intermediary companies” or where “the corporate structure of the group of the claiming parties has been designed or modified with a fraudulent purpose to allow the Claimants to avoid the fork in the road provision of the ECT”.³⁵⁸

Interestingly, the tribunal also underlined that the ECtHR could not be considered as a court of the contracting party within the meaning of the fork in the road provision of the ECT since:

“the Contracting Party to which Article 26(2)(a) refers is the respondent Contracting Party, in this case Spain. And there is no doubt that the ECHR is not a court of the Kingdom of Spain. Neither can it be considered that the procedure before the ECHR is “a process of dispute resolution previously agreed” within the meaning of Article 26(2)(b) of the ECT, since there is no agreement between the parties to submit their dispute to the ECHR”.³⁵⁹

A more flexible approach was also adopted by several tribunals as regards the identity of causes of action of claims brought before domestic courts and arbitral tribunals, where the latter applied a “fundamental basis of a claim” test, which aims to “assess whether the same dispute has been submitted to both national and international fora”.³⁶⁰

It remains to be seen what position will be adopted by the tribunals established by the EUFTAs. Investors turning to arbitration under these treaties must withdraw or discontinue any existing proceedings and, waive their right to initiate any future proceedings,³⁶¹ “before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim”.³⁶² This wording is very broad and expressly refers to international courts and the factual State’s measure rather than the legal cause of action. Investors are likely to try to differentiate the parties engaged in parallel proceedings,³⁶³ but *Charanne* is a good illustration of the fact that mere

³⁵⁸ *Charanne B.V. and Construction Investments S.a.r.l. v. Spain*, SCC Case No. 062/2012, ¶¶ 405-408 (Jan. 21, 2016).

³⁵⁹ *Id.* ¶ 409.

³⁶⁰ *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania (Greece v. Alb)*, ICSID Case No. ARB/07/21, Award, ¶ 61 (Jul. 30, 2009); *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 370 (May 6, 2014).

³⁶¹ Under CETA, this waiver ceases to apply if (i) the Tribunal rejects the claim for any procedural or jurisdictional grounds or (ii) because it finds the claim manifestly without legal merit or unfounded, or (iii) if the investor withdraws its claim within 12 months of the constitution of the Tribunal (CETA, *supra* note 39, art. 8.22(5)), EUSFTA, *supra* note 40, art. 3.7 of the IPA and EUVFTA, *supra* note 41, art. 8 contain similar, albeit slightly different, rules.

³⁶² CETA, *supra* note 39, art. 8.22(1)(f), (g) (EUSFTA, *supra* note 40, art. 3.7 of the IPA, EUVFTA, *supra* note 41, art. 8 contain similar, albeit slightly different, rules).

³⁶³ Which will be difficult under the EUSFTA and the EUVFTA, as they expressly provide that the obligations to discontinue existing proceedings and to waive the right to initiate any future proceedings also apply to all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor (Arts. 3.7(2) of the IPA and 8(2) respectively).

restructuring of a group's corporate structure could be insufficient in this respect.

In addition, where a claim is brought pursuant to CETA and another international agreement and there is a potential for overlapping compensation or the other international claim could have a significant impact on the resolution of the claim, the CETA tribunal must stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision.³⁶⁴

The Indian Model BIT does not contain a fork in the road provision as such but mandates the investors to exhaust domestic remedies before resorting to arbitration and precludes them from claiming that they have complied with the exhaustion requirement on the basis that the treaty claim is made by a different party or in respect of a different cause of action. This clarification has been seen as an attempt to water down the effect of the "triple test" adopted by arbitral tribunals.³⁶⁵

b. The European Court of Human Rights' Perspective

Pursuant to Article 35(2)(b) of the ECHR, "[t]he Court shall not deal with any application that is substantially the same as a matter that (...) has already been submitted to another procedure of international investigation or settlement". At the outset, it must be stressed that it is not the date of submission to a parallel set of proceedings that is decisive, but whether a decision on the merits has already been taken in those proceedings by the time the Court examines the case.³⁶⁶ The mere fact that an arbitration is ongoing will therefore not be a procedural ground for inadmissibility; it may only be so if an award were issued before the judgment of the Court.

Where a decision on the merits has been taken, the Court verifies whether the applications to the different international institutions concern substantially the same matter. In doing so, in the *Yukos* case,³⁶⁷ the Court strictly applied a triple identity test, in a way reminiscent of the arbitral tribunal cases highlighted above. The Court highlighted that "the assessment of similarity of the cases would usually involve the comparison of the parties in the respective proceedings, the relevant legal provisions relied on by them, the scope of their claims and the types of the redress sought" and concluded that the majority shareholders of the applicant (three companies) as well as several groups of its minority shareholders were parties different from the applicant. The Court also emphasised the applicant's own right under the ECHR, which is different from the investment complaints.

Besides this strict application of the triple identity test, it is also doubtful that an arbitral proceeding qualifies as a "procedure of international investigation or settlement" within the meaning of Article 35(2)(b) of the ECHR. In *Yukos*, the Court considered that, since the applications were not substantially the same, there was no need to examine whether the arbitral proceedings could be seen as another procedure of international investigation or settlement.³⁶⁸ This dictum can be read in conjunction with *Lukanov v. Bulgaria*, where the European

³⁶⁴ CETA, *supra* note 39, art. 8.24.

³⁶⁵ Ranjan & Anand, *supra* note 9.

³⁶⁶ *Peraldi v. France*, App. No. 2096/05, Eur. Ct. H.R., at 1 (Apr. 7, 2009).

³⁶⁷ *OAO Neftyanaya, Kompaniya Yukos v. Russia*, App. No. 14092/04, Eur. Ct. H.R., Merits, ¶¶ 519, 526 (Sept. 20, 2011) [*hereinafter* "OAO Neftyanaya Merits"].

³⁶⁸ *Id.* ¶ 523.

Commission on Human Rights held that the “*terms ‘international investigation or settlement’ refers to institutions and procedures set up by States, thus excluding non-governmental bodies*”.³⁶⁹ Thus, the procedure before the Human Rights Committee of the Inter-Parliamentary Union was not a procedure of international investigation or settlement since this Union was a non-governmental organisation.

It seems to us that, despite the State’s involvement as party to the BIT and to the arbitration proceedings, a BIT arbitration may generally not be considered as an institution or procedure set up by States. It may be different only in exceptional hypotheses, in so far as the arbitral panel itself (as opposed to merely the appointing authority) is composed of arbitrators appointed by the member States of the institution. One may think of the FTAs’ courts for instance, which would be composed of judges appointed by the contracting parties (or a common joint committee).

c. The EU’s Perspective

Since investors are not direct parties to the infringement proceedings provided for at the EU level (which are under the discretionary competence of the European Commission), there is no legal objection to the introduction of a complaint before the European Commission parallel to investment arbitration proceedings and/or an application before the ECtHR.

Since preliminary references are made in the framework of domestic proceedings and the ECHR requires the exhaustion of domestic remedies, it is difficult to conceive a situation of parallel proceedings before the CJEU and the ECtHR that would bar the application to the ECtHR.

On the other hand, there is nothing in the CJEU’s Statute or Rules of Procedure precluding the Court to answer a preliminary reference relating to a national measure which is also challenged before an investment tribunal.

The CJEU has exclusive jurisdiction for quashing a decision of EU institutions or declaring that they have failed to act.

C. Interim Measures

i. Investment Arbitration Tribunals

Except if excluded by the parties, ICSID tribunals may, on their own motion or at the request of one of the parties, “recommend” any interim measures that may be necessary to preserve the parties’ rights.³⁷⁰ Despite the use of the term “recommend” by the ICSID Convention, tribunals have developed a doctrine under which provisional measures have binding effect on the parties, on the basis of the parties’ obligation not to frustrate the object of the arbitral proceedings.³⁷¹ As opposed to awards on merits, provisional measures are not enforceable but tribunals ensure their respect by either awarding specific damages or taking into account any non-compliance with its “recommended” provisional measure in the award on the merits.³⁷²

Interim measures can be sought by a party at any time after the institution of the proceedings,

³⁶⁹ Lukanov v. Bulgaria, App. No. 21915/93, Eur. Comm’n H.R. Dec. & Rep., Admissibility, at 18 (Jan. 16, 1996).

³⁷⁰ ICSID Convention, *supra* note 353, art. 47.

³⁷¹ SCHREUER COMMENTARY, *supra* note 313, at 764-765.

³⁷² *Id.* at 768-769.

even before the constitution of the tribunal.³⁷³ The practice of ICSID tribunals shows that provisional measures are only granted where they are found to be (i) necessary, (ii) urgent and (iii) needed in order to avoid irreparable harm.³⁷⁴ They have included discovery and production of documents, financial guarantees, stays of national judicial proceedings, etc.³⁷⁵

Broad powers to award interim measures are also granted to tribunals by the UNCITRAL Arbitration Rules,³⁷⁶ CETA³⁷⁷ and the EUVFTA.³⁷⁸

ii. ECHR

Interim measures are provided for under Rule 39(1) of the ECtHR's Rules of Court. Although this had been discussed, it is now clear that such measures have binding legal effect.³⁷⁹ A breach thereof would constitute a breach of Article 34 of the ECHR, which establishes the right of individual application.³⁸⁰ In practice, a great majority of these measures are respected by the responding State.³⁸¹

The Court grants requests for an interim measure only on an exceptional basis, where the applicant would otherwise face a real risk of serious and irreversible harm. Its practice is to examine each request on an individual and priority basis through a written procedure. Refusals to apply Rule 39 cannot be appealed against. The length of an interim measure is generally set to cover the duration of the proceedings before the Court or for a shorter period. The measure may be discontinued at any time by the Court.³⁸²

In practice, most interim measures concern expulsion and extradition cases.³⁸³ However, in *Rustavi 2 Broadcasting Co. Ltd. & Ors. v. Georgia*, the ECtHR ordered interim measures in the framework of an ownership dispute. The Court suspended the decision of the Georgian Supreme Court to transfer the ownership of a TV company from its opposition-affiliated owners to a businessman perceived as being close to the Government, pending its own review of the case. The interim order was granted the very same day as the petition, lodged hours after the Supreme Court's decision, by a duty judge, before being confirmed four days later by a chamber which reviewed further legal and factual submissions filed by the parties.³⁸⁴

iii. CJEU

³⁷³ International Centre for Settlement of Investment Disputes Arbitration Rules, r. 39(1) (Jan. 1, 1968) [*hereinafter* "ICSID Arbitration Rules"].

³⁷⁴ Loretta Malintoppi, 11 *Provisional Measures in Recent ICSID Proceedings: What Parties Request and what Tribunals Order*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 157, 161-164 (Christina Binder et al. eds., 2009).

³⁷⁵ *Id.* at 172-179.

³⁷⁶ UN Commission on International Trade Law (UNCITRAL) Arbitration Rules, art. 26 (2013).

³⁷⁷ CETA, *supra* note 39, art. 8.34.

³⁷⁸ EUVFTA, *supra* note 41, art. 21.

³⁷⁹ See *Mamatkoulov and Askarov v. Turkey*, App. Nos. 46827/99 and 46591/99, Eur. Ct. H.R., Merits (Feb. 4, 2005).

³⁸⁰ Even if, in practice, the breach to the interim measure did not hinder the applicant's effective exercise of the right to lodge an application (*Olaechea Cahuas v. Spain*, App. No. 24668/03, Eur. Ct. H.R., Merits, ¶¶ 76-79 (Aug. 10, 2006).

³⁸¹ PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 35 (3d ed., 2011) [*hereinafter* "PHILIP LEACH"].

³⁸² *Fact sheet – Interim Measures*, EUROPEAN COURT OF HUMAN RIGHTS, at 1, (*available at* https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf).

³⁸³ *Id.*

³⁸⁴ See US Dep't of State, Georgia – 2017 Country Reports on Human Rights Practices, 17-18 (2018).

Actions brought before the CJEU do not have suspensory effect but the Court may order the suspension of the application of the contested act “*if it considers that circumstances so require*”.³⁸⁵ An application to suspend the operation of a measure is only admissible if the applicant challenges its validity in the main proceedings.³⁸⁶ In addition, the Court may prescribe “*any necessary interim measures*”³⁸⁷ in any case before it,³⁸⁸ in order to guarantee the full effectiveness of its definitive future decision and to avoid serious and irreparable damage to the party seeking the interim relief.³⁸⁹ In this hypothesis, an application for interim measure is only admissible if it is made by a party to a pending case, and relates to that case.³⁹⁰

Investors may therefore request the CJEU to grant interim measures in the course of an action for annulment. In theory, interim measures may also be requested in the context of an action for failure to act. However, this is very rare in practice since the object of such an action is to obtain the adoption of a measure and that relief other than the suspension of an act would usually make the action in the main proceedings without object.

The CJEU may also order interim measures, at the request of the Commission, in the context of infringement proceedings. The interim order most often sought is the suspension of the operation of a challenged national measure (thereby allowing the Commission to impose a direct injunction at the interlocutory stage although it does not have this power at the merits stage, which is merely declaratory; see Section IV.G.iii below).³⁹¹

Finally, the CJEU considers that it is not empowered to issue interim measures ancillary to preliminary ruling proceedings but, as indicated above (see Section III.E.iii), the domestic courts must be entitled to do so when this is necessary to ensure the “full effectiveness of EU law”, even if this is impaired by these courts’ domestic law.³⁹²

In the context of preliminary ruling proceedings and direct actions, the CJEU may also decide, at the request of the national court or of its own motion, to apply an expedited procedure to the merits of the case.³⁹³ An urgent decision is necessary to prevent the risks that would be incurred if the normal procedure were to be used.³⁹⁴ Economic loss³⁹⁵ or economic interests,³⁹⁶ by themselves, have been held as insufficient circumstances to justify the recourse to expedited procedure.

³⁸⁵ TFEU, *supra* note 89, art. 278.

³⁸⁶ CJEU Rules of Procedure, *supra* note 93, art. 160(1).

³⁸⁷ As long as the CJEU does not exercise a power vested in another institution, as this would jeopardise the balance between the institutions (KOEN LENAERTS ET AL., *supra* note 100, at 566).

³⁸⁸ TFEU, *supra* note 89, art. 279.

³⁸⁹ Case C-574/13, French Republic v Eur. Comm’n, Order of the Vice-President of the Court, ¶ 19 (Jan. 21, 2014).

³⁹⁰ CJEU Rules of Procedure, *supra* note 93, art. 160(2).

³⁹¹ KOEN LENAERTS ET AL., *supra* note 100, at 571.

³⁹² Factortame Ltd., *supra* note 254, ¶ 21.

³⁹³ CJEU Rules of Procedure, *supra* note 93, arts. 105(1), 133.

³⁹⁴ In the context of preliminary ruling proceedings, see Case C-385/05, Confédération générale du travail (CGT) and Others v Premier ministre and Ministre de l’Emploi, de la Cohésion sociale et du Logement, 2007 E.C.R. I-00611, ¶ 9.

³⁹⁵ Case C-6/12, P Oy, 2012 O.J. (C 58/6), ¶ 9.

³⁹⁶ See, e.g., Case C-310/09, Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA, 2011 E.C.R. I-08115, ¶ 10.

D. Transparency v. Confidentiality

i. Investment arbitration tribunals

a. Under ICSID

The ICSID Convention and Arbitration Rules do not contain a general presumption of confidentiality or transparency applicable to the parties. The BITs, contract or law containing the parties' consent to arbitration may include specific provisions on confidentiality and transparency applicable to the arbitration proceeding.³⁹⁷

In the absence of such provisions, in accordance with the contractual nature of arbitration, the parties may tailor the level of confidentiality or transparency to their proceedings (or refer the question to the Tribunal in the absence of an agreement). Further, they may make an express agreement on the information and documents they wish to keep confidential. They may also agree to allow public access to hearings through web or video broadcasting or in person.³⁹⁸

The ICSID Centre publishes information on the registration of requests for arbitration and maintains an online register (accessible to the public on the ICSID's website) of the procedural details of each case. The award is not published without the consent of the parties. However, in the absence of consent, the ICSID Centre publishes excerpts of the tribunals' legal reasoning.³⁹⁹

In practice, given the highly political nature of investment cases, it is not uncommon for submissions or the award to be leaked to the press, even if those documents were confidential.

b. Under the UNCITRAL Rules on Transparency

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [**“UNCITRAL Rules on Transparency”**], which came into effect on 1 April 2014, comprises of a set of procedural rules that provide for transparency and accessibility of treaty-based investor-State arbitration to the public.

In a nutshell, these rules make a significant number of listed documents publicly available by default (including the submission of a claim, pleadings and memorials, transcripts of hearings if available, and awards). Documents not listed can be made publicly available by discretion of the tribunal. By way of exception, specific information can be kept confidential in order to protect certain legitimate interests (e.g. business secrets).

The parties may agree to apply these rules to their arbitration, including arbitrations which are not conducted under the UNCITRAL Arbitration Rules, such as ICSID arbitrations. The application of the UNCITRAL Rules on Transparency may also be imposed by the relevant BIT. This is provided for in CETA⁴⁰⁰ and the EUVFTA,⁴⁰¹ subject to a few specific rules,⁴⁰² whilst the

³⁹⁷ ICSID, *Confidentiality and Transparency – ICSID Convention Arbitration*, available at <https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx>.

³⁹⁸ *Id.*; ICSID Arbitration Rules, *supra* note 373, r. 32(2).

³⁹⁹ ICSID Arbitration Rules, *supra* note 373, r. 48(4).

⁴⁰⁰ CETA, *supra* note 39, art. 8.36(1).

⁴⁰¹ EUVFTA, *supra* note 41, art. 20(1).

⁴⁰² *See, e.g.*, in principle, hearings are public pursuant to Article 8.36(5) of CETA.

EUSFTA contains self-standing rules which are very similar.⁴⁰³

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration [“**Mauritius Convention**”] aims at enabling States to apply the UNICTRAL Rules on Transparency to their investment treaties concluded prior to 1 April 2014.⁴⁰⁴

ii. ECtHR

The policy of the ECtHR is very liberal. All documents deposited with the Registrar are, in principle, accessible to the public unless, the president of the court decides otherwise at the request of the applicant or on its own motion.⁴⁰⁵ Moreover, hearings are public, unless the ECtHR decides otherwise “in exceptional circumstances”.⁴⁰⁶ The ECtHR’s judgements are read in open court and published on the HUDOC website.⁴⁰⁷ Applicants can request the Court to keep their identity confidential by submitting a statement of the reasons justifying such a departure from the normal rule of public access. The Court may also grant anonymity of its own motion.⁴⁰⁸ If the applicant’s anonymity is granted, all the documents of the matter will be treated as confidential.⁴⁰⁹

iii. At the EU Level

a. Complaint with the European Commission

In principle, the Commission guarantees the confidentiality of the complainants.⁴¹⁰ Since it is common for the Commission to provide the Member State targeted by the complaint with a copy thereof, a cautious approach may require the investor to provide the Commission with an anonymised version of its complaint. Pursuant to Article 339 of the TFEU, Commission officials are required, even after their duties have ceased, not to disclose information “*of the kind covered by the obligation of professional secrecy, in particular, information about undertakings, their business relations or their cost components.*”

In practice, it may well be the case that the investor can easily be related to the situation it has denounced. In such a case, the complainant’s identity will be known by the Member State swiftly since the Commission contacts it at a very early stage of its investigation (See Section II.C.iii.c above).

b. Proceedings before the CJEU

Submissions of the parties are not made publicly available by the CJEU. However, names of the

⁴⁰³ EUSFTA, *supra* note 40, annex 8, IPA.

⁴⁰⁴ The Convention, which was adopted on Dec. 10, 2014 and entered into force on Oct. 18, 2017, provides in its Article 2 that the UNCITRAL Rules on Transparency apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a party to the Convention (that has not made a relevant reservation) and the claimant is of a State that is a party to the Convention (again, that has not made a relevant reservation). It has been signed by 23 States (including Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Sweden and the UK) but only ratified by 4 of them (Cameroon, Canada, Mauritius and Switzerland).

⁴⁰⁵ ECHR, *supra* note 68, art. 40(2); Rules of Court of the European Court of Human Rights, r. 33, Sept. 18, 1959, CDH (59) 8, [*hereinafter* “ECtHR Rules of Court”].

⁴⁰⁶ ECHR, *supra* note 68, art. 40; ECtHR Rules of Court, *supra* note 405, r. 63.

⁴⁰⁷ ECtHR Rules of Court, *supra* note 405, rr. 77(2), 78.

⁴⁰⁸ ECtHR Rules of Court, *supra* note 405, r. 47(4).

⁴⁰⁹ DUBOIS & PENNINGCKX, *supra* note 314, at 89.

⁴¹⁰ See Section 6 of the model complaint form.

main parties, a summary of the relief sought and the main supporting arguments are published in the Official Journal of the European Union upon submission.⁴¹¹ Hearings are public, unless the CJEU decides otherwise for “serious reasons”.⁴¹² The date and operative part of a judgement or order are published in the Official Journal of the European Union.⁴¹³ Judgements are read in open court and published in full on the EUR-Lex website.⁴¹⁴

In the context of preliminary ruling proceedings, the CJEU respects the decision of the referring judge to grant anonymity.⁴¹⁵ It may also grant anonymity itself, on its own motion or at the request of a party to the main proceedings.⁴¹⁶

The CJEU is exempted from the EU rules on transparency.⁴¹⁷ Accordingly, no formal right of third party access to court files is granted. The parties to a dispute are, in principle, entitled to publish case-related submissions where they see fit, without the authorisation of the CJEU.⁴¹⁸

E. Costs

i. Investment Arbitration Tribunals⁴¹⁹

The non-refundable fee for lodging ICSID requests amounts to US\$ 25,000. Additional non-refundable fees of US\$ 10,000 are payable by a party requesting specific actions from ICSID or its Secretary General, such as the appointment or challenge of arbitrators.

Both parties must also bear a yearly administrative charge of US\$ 42,000 as well as the expenses and fees of the arbitrators (US\$ 3,000 per day of meetings or other work performed in connection with the proceedings). Additional services by other service providers (e.g. costs of interpretation, court reporting, catering, video-conferences and courier) are also charged. These costs are met from advance payments that the parties are periodically requested to make. The first advance payment is requested shortly after the constitution of the Tribunal and is usually in the order of US\$100,000 – US\$150,000 per party. Each party pays one half of the advances, although the tribunal may order a different apportionment at any stage of the proceeding.⁴²⁰

In addition, parties are responsible for the fees and expenses of legal representation and experts appearing in the proceedings. These are often substantial as investment disputes are usually legally and factually technical and complex.

⁴¹¹ CJEU Rules of Procedure, *supra* note 93, art. 21 (4).

⁴¹² CJEU Statute, *supra* note 112, art. 31; *id.* art. 79.

⁴¹³ CJEU Rules of Procedure, *supra* note 93, art. 92.

⁴¹⁴ CJEU Statute, *supra* note 112, art. 37.

⁴¹⁵ CJEU Rules of Procedure, *supra* note 93, art. 95(1).

⁴¹⁶ *Id.* art. 95(2).

⁴¹⁷ The right of access to EU documents is guaranteed by Article 15 of the TFEU and by Article 42 of the EU Charter. The main applicable rules and exceptions are set out in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145).

⁴¹⁸ Joined Cases C-174/98 and C-189/98, Kingdom of the Netherlands and Gerard van der Wal v. Comm’n, 2000 E.C.R. I-00001, ¶ 17.

⁴¹⁹ For ICSID proceedings, see Administrative and Financial Regulations 14 to 16 of the ICSID Arbitration Rules and the dedicated page of the ICSID website, available at <http://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx>. See generally David Smith, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51(3) VA. J. INT’L L. 749-779 (2011) [*hereinafter* “David Smith”].

⁴²⁰ ICSID Arbitration Rules, *supra* note 373, r. 28.

ICSID proceedings are therefore particularly expensive. For instance, based on its internal statistics, ICSID estimates that the total costs for a disputed amount of US\$ 150,000,000 (heard by a tribunal composed of 3 arbitrators, during 3.25 years) amounts to US\$ 2,350,000 approximately for each party.⁴²¹ This amount includes an estimation of the legal fees and of the expert, witness, management and other external costs.

Except where the parties otherwise agree, the tribunal will decide how and by whom the expenses are incurred by the parties, the fees and expenses of the members of the Tribunal, and the charges for the use of the ICSID facilities shall be paid.⁴²² By contrast, the UNCITRAL Arbitration Rules provides that the costs of the arbitration are, in principle, borne by the unsuccessful party or parties ('costs-follow-the-event' rule). However, the arbitral tribunal may apportion each of such costs between the parties if it determines that the apportionment is reasonable, taking into account the circumstances of the case.⁴²³ The EU FTAs also provides for an in-principle 'costs-follow-the-event' rule.⁴²⁴ In practice, tribunals' practice in apportioning costs under the ICSID or UNCITRAL Arbitration Rules has been neither clear nor uniform.⁴²⁵

ii. ECtHR⁴²⁶

Lodging a complaint with the ECtHR is free of any charges.

The applicant has to file a 'just satisfaction claim', pursuant to Article 41 of the ECHR (see Section IV.G.ii below), to be compensated by the responding State for its costs and expenses, which "*typically include the cost of legal assistance, court registration fees, travel and subsistence expenses and suchlike*" (incurred both in the framework of the proceedings at domestic level and before the ECtHR itself). A just satisfaction is not automatically granted, but awarded by the Court if it considers such compensation to be 'just' under all circumstances of the case. In its assessment, the Court will review whether the costs claimed by the applicant are (i) closely linked to the responding State's breach of the Convention, that they have been (ii) actually and (iii) necessarily incurred by the applicant, and (iv) that they are reasonable as to quantum. In order to assess whether these requirements are met, the Court requires the applicant to file sufficiently detailed evidence of its costs and expenses.

The Court also decides on a case-by-case basis whether the costs of appearances before it (witness, expert, etc.) requested by or on behalf of the applicant are to be borne by the Council

⁴²¹ See *Total ICSID cost calculator*, INTERNATIONAL ARBITRATION INFORMATION, available at <http://www.international-arbitration-attorney.com/icsid-arbitration-cost-calculator-2/>.

⁴²² ICSID Convention, *supra* note 353, art. 61(2).

⁴²³ United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2013, art. 42(1).

⁴²⁴ "The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. If only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims" (CETA, *supra* note 39, art. 8.39(5), EUSFTA, *supra* note 40, art. 3.21, IPA, EUVFTA, *supra* note 41, art. 27(4)).

⁴²⁵ David Smith, *supra* note 419, at 775.

⁴²⁶ See ECtHR Rules of Court, *supra* note 405, Practice Directions on Just satisfaction claims ¶¶ 16 -21.

of Europe or awarded against the applicant.⁴²⁷

iii. *At the EU level*

a. *Proceedings before the CJEU*

As is the case before the ECtHR, proceedings before the CJEU are free of any charges, unless a party has caused the CJEU to incur avoidable costs or if excessive translation or copying work is carried out at the request of a party.⁴²⁸

The Court allocates the costs of the proceedings in the judgement or in the order which closes the proceedings.⁴²⁹ As a general rule, it orders the unsuccessful party to reimburse the successful party of its recoverable costs i.e. expenses “*necessarily incurred by the parties for the purpose of the proceedings*” (in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers)⁴³⁰ and sums payable to witnesses and experts.⁴³¹ If there is more than one unsuccessful party, the Court will decide how to share the costs between them. Where parties succeed on some and fail on other heads, each party bears its own costs unless, because of the circumstances of the case, the Court orders one party to bear a portion of the costs of the other party (in addition to its own costs).⁴³² Cost allocation is still very casuistic and is influenced by the features of the case.⁴³³

It is up to the referring court to decide as to the costs of the preliminary ruling proceedings,⁴³⁴ pursuant to its domestic procedural rules (which cannot be “*less favourable than those governing similar domestic actions (principle of equivalence) and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)*”).⁴³⁵

b. *Complaint with the European Commission*

No charges apply for the filing of complaints with the European Commission. The legal expenses borne by the plaintiff will not be recovered, unless it reaches an amicable settlement with the Member State providing for such recovery.

F. Settlements in the course of the proceedings

i. *Investment arbitration tribunals*

Both Rule 43 of the ICSID Arbitration Rules and Article 36 of the UNCITRAL Arbitration Rules provide for discontinuation of proceedings if the parties agree on a negotiated settlement of the dispute. The Tribunal may record the settlement in the form of its award if the parties file the full and signed text of their settlement. Discontinuance in case of amicable settlement is also provided for by the EU FTAs.⁴³⁶

⁴²⁷ ECtHR Rules of Court, *supra* note 405, r. A.5(6).

⁴²⁸ CJEU Rules of Procedures, *supra* note 93, art. 143.

⁴²⁹ *Id.* art. 137.

⁴³⁰ In practice, it is frequent for the CJEU to order the reimbursement of only a fraction of the attorney’s fees actually incurred by the successful party.

⁴³¹ CJEU Rules of Procedures, *supra* note 93, art. 144.

⁴³² *Id.* art. 138.

⁴³³ RENE BARENTS, *supra* note 315, at 840.

⁴³⁴ CJEU Rules of Procedures, *supra* note 93, art. 102.

⁴³⁵ Case C-472/99, Clean Car Autoservice GmbH v. Stadt Wien and Republik Österreich, 2009 E.C.R. I-09687, ¶ 28.

⁴³⁶ CETA, *supra* note 39, art. 8.19(1); EUSFTA, *supra* note 40, art. 3.39, IPA; EUVFTA, *supra* note 41, art. 3.

ii. *ECtHR*⁴³⁷

Pursuant to Article 39(1) of the ECHR, “[a]t any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto”. The procedure, which is confidential and without prejudice to the parties’ arguments in the contentious proceedings,⁴³⁸ is further described in Rule 62 of the Rules of Court. The Court clearly favours such friendly settlements and promotes them proactively, through the intermediary of its Registrar. If the Court is informed by the Registrar that the parties have agreed to a friendly settlement, it will verify that “the settlement has been reached on the basis of respect for human rights as defined in the Convention and the Protocols thereto”, before striking the case out of the Court’s list. In the negative, the Court should resume its review of the case. The Court has virtually never done so.⁴³⁹

In practice, friendly settlements are often reached in case of bifurcation (where the Court has adjourned the question of just satisfaction after concluding a breach of the ECHR).⁴⁴⁰ In such a case, the ECtHR verifies the “equitable nature” of the agreement.⁴⁴¹

Settlements virtually always provide for a financial compensation.⁴⁴² Other measures, of individual or general nature, can also be negotiated (e.g. restitution of lands or assets, arrangements as to the exercise of the right to property, execution of a judicial decision, etc.).⁴⁴³

The Committee of Ministers supervises the execution of the terms of the friendly settlement as per Article 39(4) of the ECHR (see Section IV.H.ii below).

iii. *At the EU level*

a. *Complaint with the European Commission*

The European Commission exercises its supervisory task of ensuring that EU law is applied on its own motion, in the general interest of the EU. It assesses itself whether it is appropriate to conduct, or to terminate, investigations (and, potentially, infringement proceedings).⁴⁴⁴ The mere fact that an investor reaches an agreement with the Member State and/or withdraws its complaint does not oblige the Commission to do so.

b. *Proceedings before the CJEU*

It is not possible to settle annulment or failure to act actions.⁴⁴⁵ As regards preliminary ruling references, the CJEU remains seized of a request for a preliminary ruling for as long as it is not

⁴³⁷ For a complete review, see HELLEN KELLER, ET. AL., FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE (1st ed. 2010).

⁴³⁸ ECHR, *supra* note 68, art. 39(2); ECtHR Rules of Court, *supra* note 405 r. 62(2) (Where successful, however, the terms of the settlement are usually set out in the Court’s judgment).

⁴³⁹ See *Ukrainian Media Group v. Ukraine*, App. No. 72713/01, Eur. Ct. H.R., Merits (Mar. 29, 2005) (with respect to Article 10 of the Convention in the context of the freedom of expression of the press).

⁴⁴⁰ DUBOIS & PENNINGCKX, *supra* note 314, at 267.

⁴⁴¹ ECtHR Rules of Court, *supra* note 405, r. 75.

⁴⁴² Usually the compensation must be paid within three months and, in case of late payment, interest at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points is due on the unpaid amounts.

⁴⁴³ DUBOIS & PENNINGCKX, *supra* note 314, at 276-277.

⁴⁴⁴ KOEN LENAERTS ET AL., *supra* note 100, at 179.

⁴⁴⁵ CJEU Rules of Procedure, *supra* note 93, art. 147.

withdrawn by the domestic court.⁴⁴⁶ As a result, should the investor and the Member State reach a settlement and withdraw the case from at domestic level, this would also terminate the case before the CJEU.

In the framework of infringement proceedings, the Commission may withdraw its action if the Member State ceases the challenged behaviour. However, the Commission rarely does so as it has often an interest to establish that the Member State infringed EU law.

G. Remedies

i. *Investment Arbitration*

If the obligation to enforce an award under Article 54 of the ICSID Convention merely covers “pecuniary obligations”, it would be wrong to conclude from this provision that an ICSID tribunal may not order non-pecuniary relief such as an injunction or an order of specific performance.⁴⁴⁷ For instance, in *Enron v. Argentina*, the ICSID tribunal, pursuant to the US-Argentina BIT, ruled that “an examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available”. It therefore concluded that it had “the power to order measures involving performance or injunction of certain acts”.⁴⁴⁸

However, certain BITs, such as the EU FTAs, expressly limit the remedies available to tribunals by confining them to the order of monetary damages (and interest), restitution of property and costs and attorney’s fees.⁴⁴⁹ Even where there is no specific provision to that end, in practice arbitral tribunals have mostly confined themselves to the award of monetary compensation,⁴⁵⁰ which is seen as less intrusive to State sovereignty than an award of specific performance. Non-pecuniary relief is also much more challenging to enforce given the fact that they fall outside the specific ICSID enforcement framework (see Section IV.H.i.a below). In most cases, investors themselves seem to frame their claims in terms of monetary damages.⁴⁵¹

In practice, investment tribunals tend to award substantial amounts to successful investors.⁴⁵² As discussed above (Section III.C.i), most BITs provide for a compensation amounting to the fair market value of the expropriated investment. Tribunals have used the expropriation standard for breaches which, while not qualifying as formal expropriation, amounted nevertheless to a total

⁴⁴⁶ *Id.* art. 100.

⁴⁴⁷ Christoph Schreuer, *Non Pecuniary Remedies in ICSID Arbitration*, 20(4) *ARB. INT’L* 325 (2004) [*hereinafter* “Schreuer Non-Pecuniary Remedies”].

⁴⁴⁸ *Enron Corporation and Ponderosa Assets, L.P. v. Argentina Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶¶ 79, 81 (Jan. 14, 2004).

⁴⁴⁹ As a couple of examples, see CETA, *supra* note 39, arts. 8.39(1), 8.39(5), EUSFTA, *supra* note 40, arts. 3.18(1) and 3.21 of IPA; EUVFTA, *supra* note 41, arts. 27(1), 27(4), US Model BIT, *supra* note 217, art. 34(1). Similarly, Article 1135 NAFTA provides that a tribunal may award only monetary damages or the restitution of property, in which case the State concerned may elect to pay monetary damages in lieu of restitution. Under Article 26(8) of ECT, an award concerning a measure of a subnational government or authority shall provide that the state may pay monetary damages in lieu of any other remedy granted.

⁴⁵⁰ CAMPBELL MCLACHLAN ET AL., *supra* note 19, at 341.

⁴⁵¹ Schreuer Non-Pecuniary Remedies, *supra* note 447, at 329.

⁴⁵² For a detailed analysis, see IRMGARD MARBOE, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* (2d ed 2017) [*hereinafter* “IRMGARD MARBOE”].

loss or deprivation of investments.⁴⁵³ By contrast, BITs generally do not address issues of compensation due for breaches of other provisions. A distinction is usually made between the responsibility of States for breaches of its international obligations and its contractual obligations. In the first case, Article 31 of the International Law Commission's 2001 Draft Articles on State Responsibility provides that "*the responsible State is under an obligation to make full reparation for the injury [i.e. "any damage, whether material or moral"] caused by the internationally wrongful act*".⁴⁵⁴ With respect to contractual breach, the question will depend on the specificities of the contract, the factual circumstances and the substantive applicable law.⁴⁵⁵

ii. European Court of Human Rights

In principle, the means necessary to comply with the judgment are left to the State's discretion. However, more recently, the ECtHR has given directions or recommendations to States on the most appropriate individual and general measures needed to provide redress, including in cases pertaining to Article 1 of Protocol 1.⁴⁵⁶ For instance, in *Broniowski v. Poland* ["**Broniowski**"], the Court held that:

"although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant".⁴⁵⁷

Where appropriate, in particular in cases where the violation finds its roots in a systemic dysfunction of the domestic legal system, it is incumbent on the respondent State not only to take remedial measures in the individual case at hand but also to take general measures to prevent further violations of a similar nature.⁴⁵⁸ For repetitive cases, which derive from a common dysfunction at the national level, the Court has developed a so-called "pilot procedure" whereby it can select one or more cases for priority treatment and issues clear indications of the type of remedial measures it considers necessary.⁴⁵⁹ The first pilot judgment was rendered by the Court in *Broniowski*, on the subject of some 80,000 Polish citizens who had been repatriated and had had to abandon their property.⁴⁶⁰ Interestingly, the right to property is one of the main fields

⁴⁵³ See, e.g., *CMS Gas Transmission Co v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 410 (May 12, 2005); *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 88 (June 27, 1990).

⁴⁵⁴ See also *Chorzow Factory Case*, *supra* note 174, at 47 ("reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").

⁴⁵⁵ IRMGARD MARBOE, *supra* note 452, ¶ 3.174.

⁴⁵⁶ See D.J. HARRIS ET AL., *supra* note 64, at 862; CHRISTIAN TOMUSCHAT, HUMAN RIGHTS – BETWEEN IDEALISM AND REALISM 253-254 (2014) [*hereinafter* "Christian Tomuschat"].

⁴⁵⁷ *Broniowski v. Poland*, App. No. 31443/96, Eur. Ct. H.R., Merits, ¶ 193 (June 22, 2004) [*hereinafter* "Broniowski"].

⁴⁵⁸ Papamichalopoulos, *supra* note 174, ¶ 34.

⁴⁵⁹ See ECtHR Rules of Court, *supra* note 405, r. 61; *Fact sheet Pilot Judgments*, EUROPEAN COURT OF HUMAN RIGHTS, available at https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.

⁴⁶⁰ *Broniowski*, *supra* note 457, ¶ 192-193.

of application of this specific procedure.

Where the respondent State cannot remedy the consequences of its breach in a satisfactory way, the Court will consider whether the award of a just satisfaction is opportune.⁴⁶¹ Pursuant to Article 41 of the ECHR, “*if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party*”.

The award of just satisfaction, in the form of sum of money, is not an automatic consequence of a finding of violation by the ECtHR. The Court indeed considers, on the basis of Article 46 of the ECHR which provides that contracting States “*undertake to abide by the final judgment of the Court in any case where they are parties*”, that:

“*a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach [...]. If the nature of the breach allows for restitution in integrum, it is for the respondent State to effect it*”.⁴⁶²

The Court does not require applicants, who have already exhausted domestic remedies before lodging their application (see Section IV.B.ii.b above), to initiate further domestic proceedings. The Court may decide that the finding of violation constitutes in itself sufficient just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even decide not to make any award at all.⁴⁶³ However, as developed above (Section III.C.ii), pursuant to the Court’s case law and save for exceptional circumstances justified by the public interest, serious breaches to the right to property mandates the payment by the State of compensation to the victim.

It has been observed that the case law has not always been consistent with regard to the award of financial compensation to successful applicants, both for non-pecuniary and for pecuniary injury, and that it is often very difficult, if not impossible, to discern how the Court has arrived at the sum awarded.⁴⁶⁴ Problems of consistency have in particular crept in from the existence of five Sections and a Grand Chamber, all taking decisions on satisfaction.

⁴⁶¹ Pursuant to Rule 75 of the ECtHR Rules of Court, the Court may consider that the question of just satisfaction is not ready for decision and reserve it in whole or in part. It will then render a separate judgment, usually after further submissions from the parties. This is relatively frequent in cases under Article 1 of Protocol No. 1, where the calculation of the just satisfaction may entail elaborate calculations.

⁴⁶² *Accord Süzer and Eksen Holding A.Ş. v. Turkey*, App. No. 6334/05, Eur. Ct. H.R., Merits, ¶ 166 (Oct. 23, 2012); *Nițescu v. Romania*, App. No. 26004/03, Eur. Ct. H.R., Merits, ¶ 46 (Mar. 24, 2009); *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H.R., Merits, ¶ 103 (Dec. 11, 2008).

⁴⁶³ For a complete analysis of the Court’s practice with regard to just satisfaction, see OCTAVIAN ICHIM, JUST SATISFACTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2014) [*hereinafter* “Octavian Ichim”] (By contrast, the Inter-American Court of Human rights considers that “the reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists of re-establishing the previous situation and repairing the consequences of the violation, as well as payment of an indemnity as compensation for the damage caused”) (Ivcher-Bronstein, *supra* note 170, ¶ 178).

⁴⁶⁴ Christian Tomuschat, *Just satisfaction under Article 50 of the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE. STUDIES IN MEMORY OF ROLV RYSSDAL 1409, 1427-1428 (Paul Mahoney et al. eds., 2000); D.J. HARRIS ET AL., *supra* note 64, at 856-857.

That being said, cases relating to the guarantee of private property appear to be “*the only group of cases where the Court seems to be prepared to make a detailed assessment of the damage sustained by the applicant*” and where “*notwithstanding a certain reticence to follow the computing of damage by the applicants to its full extent, the Court has moved much closer [...] to the figures claimed*”.⁴⁶⁵ In *Yukos* for instance, the Court awarded the record amount of almost EUR 2 billion to the companies’ former shareholders (see Section V.A below).⁴⁶⁶

The Court also grants financial compensation for non-pecuniary damages in connection with proceedings for the defence of property affected by state interferences, particularly for the inconvenience and uncertainty caused to the applicants (including legal persons).⁴⁶⁷ Although less frequent in practice, the ECtHR has also awarded just satisfaction for the breach of procedural rights (in particular Article 6 of the ECHR) where the procedural breach created substantive losses to the applicant.⁴⁶⁸ From a practical angle, one may also consider the public pressure to redress the breach and its consequences could be stronger where a State is found in breach of a human right law instrument than of an investment treaty, especially given the current criticism of investment arbitration (See section IV.H.i. below).

iii. EU law

If the CJEU finds an infringement of EU law, it cannot itself award compensation to investors prejudiced by a Member State’s violation of EU law. However, if the CJEU establishes that a Member State has violated its Treaty obligations, such a ruling will constitute a precedent for a possible claim for damages against this Member State (and, under State aid law, against an aid beneficiary) before national courts.⁴⁶⁹

The remedies available to the prejudiced investor under EU law depend on the procedure launched.

⁴⁶⁵ PHILIP LEACH, *supra* note 381, at 398, 1428; For examples of *restitutio in integrum* and the current market value of the property at issue, see *Chengelyan and Others v. Bulgaria*, App. No. 47405/07, Eur. Ct. H.R., Just Satisfaction, (Nov. 23, 2017); *Kehaya and Others v. Bulgaria*, Apps. No. 47797/99 and 68698/01, Eur. Ct. H.R., Just Satisfaction (June 14, 2017); *Papamichalopoulos*, *supra* note 174.

⁴⁶⁶ *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R., Just Satisfaction (July 31, 2014) [*hereinafter* “*OAO Nestyanaya Just Satisfaction*”].

⁴⁶⁷ Christian Tomuschat, *The European Court of Human Rights and Investment Protection*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 636, 654 (Christina Binder et al. eds., 2009); The same applies to the Inter-American Court of Human Rights (see *Ivcher-Bronstein*, *supra* note 170, ¶ 183, references quoted at footnotes 111, 112).

⁴⁶⁸ *E.g.*, *Sabeh El Leil v. France*, App. No. 34869/05, Eur. Ct. H.R., Merits, ¶ 72 (June 29, 2011) (“The Court observes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicant as having incurred a loss of real opportunities. In addition, the applicant has sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy”); *Guincho v. Portugal*, App. No. 8990/80, Eur. Ct. H.R., Merits, ¶ 44 (July 10, 1984) (“The resultant lapse of time, which was additional to the normal length of the proceedings, delayed to a corresponding extent the completion of the litigation. Not only did it reduce the effectiveness of the action brought, but it also placed the applicant in a state of uncertainty which still persists and in such a position that even a final decision in his favour will not be able to provide compensation for the lost interest”). For a critical analysis see OCTAVIAN ICHIM, *supra* note 463, at 27-29.

⁴⁶⁹ See *Case C-39/72, Comm’n v. Italy*, 1973 E.C.R. 00101 ¶ 11 (“a judgment by the Court under articles 169 and 171 of the Treaty [now Arts. 258 and 259 of the EFEU] may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties”).

Regarding the preliminary reference procedure, a judgement on interpretation of EU law has binding effect on the court which referred the case (and, arguably, all national courts).⁴⁷⁰ The domestic court will have to apply the CJEU's interpretation to the case before it, including by disregarding a national measure, or one of its interpretations, which would be contrary to EU law.

In the framework of infringement proceedings, the CJEU's declaration that a Member State has breached EU law requires that State to take the necessary measures to comply with such decision, but the Court cannot award direct compensation to the prejudiced investor, nor impose specific measures (except under State aid law, where the CJEU can directly order the Member State to take specific steps to rectify its breach, such as obtaining the repayment of the aid).

Successful actions for annulment and for failure to act lead, respectively, to a decision declaring the contested act of an EU institution void⁴⁷¹ (*ex tunc* and *erga omnes*) or that the institution failed to act.⁴⁷² The CJEU cannot render direct orders aiming at eliminating the consequences arising from the infringement to EU law. However, the relevant EU institution is under a duty to eliminate any such consequences, including financial ones.⁴⁷³ The same applies where the CJEU declares an EU act invalid in the course of preliminary reference proceedings. In addition, a procedurally independent action for damages may be brought before the CJEU, since the EU is liable for damages caused by its institutions and servants in the performance of their duties.⁴⁷⁴

H. Enforcement mechanisms

i. Investment Arbitration Tribunal's Awards

a. Under the ICSID Convention

ICSID awards are subject to immediate recognition and enforcement in the contracting States, without any form of review by domestic courts (but subject to local rules on State immunity, as confirmed by Article 55 of the ICSID Convention).

Pursuant to Article 53 of the ICSID Convention, "*the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention*". This obligation exists only for the parties to the arbitration and applies equally to the investors and the State. A prevailing party is not required to initiate enforcement proceedings in order to trigger the defeated party's obligation to comply with the award. Should the respondent State fail to enforce the award, the investor's home State may theoretically resort to diplomatic protection under Article 27 or bring the case before the International Court of Justice as per Article 64.

The investor may also launch enforcement proceedings under Article 54, which provides that "*each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that*

⁴⁷⁰ KOEN LENAERTS ET AL., *supra* note 100, at 243-245.

⁴⁷¹ TFEU, *supra* note 89, art. 264(1).

⁴⁷² *Id.* art. 265(1).

⁴⁷³ *Id.* art. 266.

⁴⁷⁴ *Id.* arts. 268, 340.

State". The execution of the award is governed by the laws concerning the execution of judgments in force in the State where the enforcement is sought. This obligation is imposed on all contracting States and the enforcement proceedings it entails cannot be interpreted as weakening the obligation of the respondent State to abide by the award under Article 53.⁴⁷⁵

The annulment of the award may only be requested before an *ad hoc* Committee of three persons appointed by the ICSID Chairman from the Panel of Arbitrators.⁴⁷⁶ This Committee may "*if it considers that the circumstances so require*", stay enforcement of the award pending its decision.⁴⁷⁷

When the ICSID Convention was drafted, it was assumed that the contracting States would comply with their international law obligations and abide by the awards rendered against them.⁴⁷⁸ The practice of States has been in consonance with this assumption. In the overwhelming majority of cases, defeated States have paid the amounts due under the awards, and investors have not had to launch enforcement proceedings.⁴⁷⁹ This is generally explained by the conjunction of different factors such as the risk of political embarrassment, the pressure from international institutions (the World Bank in particular, given its key role in the setting up of the ICSID Convention) or other States, the threat of economic retaliation, the fear to discourage future potential investors, etc.

However, a few States – such as Argentina, Russia (the Soviet Union beforehand), Kazakhstan, Zimbabwe and Congo – have shown a tendency to refuse to abide by the award rendered against them. ISDS mechanisms are more and more criticised by States⁴⁸⁰ and the general public,⁴⁸¹ which denounce the use of investment arbitration as means to challenge a wide range of policies and regulations (especially in fields such as taxation, health, labour or environment).⁴⁸²

⁴⁷⁵ Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 322, 323-324 (Christina Binder et al. eds., 2009) [*hereinafter* "Stanimir A. Alexandrov"].

⁴⁷⁶ ICSID Convention, *supra* note 353, art. 52.

⁴⁷⁷ *Id.* art. 52(5).

⁴⁷⁸ SCHREUER COMMENTARY, *supra* note 313, at 1115-1286.

⁴⁷⁹ Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, available at https://www.arbitration-icca.org/media/4/39889320043113/media012144885278400enforcement_of_icsid_awards.pdf; Stanimir A. Alexandrov, *supra* note 475, at 329.

⁴⁸⁰ Bolivia, Ecuador and Venezuela have denounced the ICSID Convention in 2007, 2009 and 2012 and also terminated many of their respective BITs. South Africa has denounced many BITs and seeks to replace them by a unilateral domestic legislation, the South African Protection of Investment Act 2015 (*See*, Tarcisio Gazzini, *supra* note 8). The CETA negotiations have also shown the general public mistrust towards investment arbitration (*see* Section II.A.ii.b above). Other States have attempted to find a better balance between investment protection and host State's right to regulate and make ISDS mechanisms more transparent and legitimate through the adoption of new treaties (such as the Indian Model BIT).

Against this background, Mexico has become the 162nd country to sign the ICSID Convention on 11 January 2018. The Mexican Government issued a press release stating that its signature of the convention will strengthen its reputation as a "safe, reliable and attractive country for investments" and grant "greater legal certainty to domestic investors abroad and foreigners in our country." (*See* the Press Release, Ministry of Economy, México firma el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados Nacionales y de Otros Estados, (Jan. 11, 2018) (Mex.), available at <https://www.gob.mx/se/prensa/mexico-firma-el-convenio-sobre-arreglo-de-diferencias-relativas-a-inversiones-entre-estados-nacionales-y-de-otros-estados?idiom=es>).

⁴⁸¹ Louis T. Wells, *Backlash to Arbitration: Three Causes*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTION AND REALITY 341-352 (Michael Waibel et al. eds., 2010); Ranjan & Anand, *supra* note 9, at 1-53.

⁴⁸² For a few examples, *see* Ranjan & Anand, *supra* note 9.

b. Under the New York Convention

Where an arbitral award is not rendered by an ICSID tribunal, investors may still benefit from the enforcement regime provided for by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958 under the auspices of the United Nations [the “**New York Convention**”]. This convention requires the courts of the 157 contracting States to give effect to private agreements to arbitrate and to recognise and enforce the awards made in other contracting States. It has always been construed as encompassing disputes involving sovereign States, regardless of the absence of any references to them in the text of the convention.⁴⁸³

The New York Convention and the majority of domestic arbitration statutes (including the UNCITRAL Model Law on International Commercial Arbitration) presumptively require the recognition and enforcement of international arbitration awards, subject only to limited exceptions enumerated exhaustively.⁴⁸⁴ Where the defeated party refuses to abide voluntarily, the winning party needs to obtain an *exequatur* from the competent court of the State where the enforcement of the award is sought. The party resisting recognition and enforcement bears the burden of showing that one of the exceptions is applicable.⁴⁸⁵

Annulment of the award may be sought before the courts of the seat of the arbitration.⁴⁸⁶ The grounds for annulment are not mandated by the New York Convention but are left to the discretion of the domestic procedural laws. Pursuant to the New York Convention, recognition and enforcement of the award “*may*” be refused by the courts where the recognition and enforcement is sought if it has been annulled by the courts of the seat. In certain jurisdictions, most notably France,⁴⁸⁷ awards which have been annulled in the seat may still be recognised.⁴⁸⁸

c. Under the EU FTAs

The EU FTAs contain enforcement clauses pursuant to which, subject to potential appeals before the appellate tribunals and specific related delays before which enforcement cannot be sought, awards are binding between the disputing parties and are not subject to appeal or set aside proceedings. Moreover, their execution is governed by the laws concerning the execution

⁴⁸³ ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION*, 277-282 (1st ed. 1981).

⁴⁸⁴ Namely, (a) lack of a valid arbitration agreement or excess of jurisdiction; (b) procedural irregularities in the arbitration; (c) bias of the arbitral tribunal; (d) violation of public policy; (e) non-arbitrability of the dispute; (f) lack of “binding” status of the award; and (g) annulment of the award in the arbitral seat (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V).

⁴⁸⁵ GARY BORN, *supra* note 128, at 3419-3420.

⁴⁸⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), June 10, 1958, 330 U.N.T.S. 3.

⁴⁸⁷ See Philippe Pinsolle, *The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali*, 24(2) *ARB. INT'L* 277 (2008).

⁴⁸⁸ For a comparative review of the state of play in France, Germany, Austria, Spain, Switzerland, The Netherlands, England and Wales, Russia, the US, Brazil, Hong Kong and Singapore see Oliver Marsden and Ashley Jones, *Awards set aside at the seat of the arbitration: is enforcement still possible?*, THOMSON REUTERS PRACTICAL LAW (Oct. 4, 2017), available at [https://uk.practicallaw.thomsonreuters.com/65992365?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/65992365?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

of judgments or awards in force in the State where such execution is sought.⁴⁸⁹

In addition, the EU FTAs provide that arbitrations conducted under the ICSID rules should benefit from the ICSID Convention and that awards conducted under the rules are deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of the scope of application of the New York Convention.

d. State Immunity from Enforcement

State immunity has been described as the “*Achilles’ heel in the body of investor-State dispute settlement*”.⁴⁹⁰ Indeed, Article 55 of the ICSID Convention provides that “*nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution*”.

The New York Convention does not address immunity, and therefore at least permits the argument of an implied waiver of execution immunity by virtue of an agreement to arbitrate.⁴⁹¹ However, in practice, the courts of many contracting States have upheld State immunity, at least for the State assets which are not used for an economic or commercial activity, but for public service. Even in cases of economic or commercial activity, investors must still locate such assets and defeat all arguments about their status that a State may raise (or, in certain jurisdictions where investors bear the onus of proof, demonstrate the commercial or economic nature of the State’s assets).

Further, specific performance and punitive damages aimed at compelling the State to perform are widely considered as breaching public policy of the forum (by breaching the sovereignty of the responding State) and therefore unenforceable, if the responding State has not expressly waived its sovereign rights in this respect, pursuant to its ratification of a treaty or its signature of an investment contract.⁴⁹²

State immunity from enforcement has recently been strengthened in several European jurisdictions, such as France⁴⁹³ and Belgium.⁴⁹⁴ These are widely seen as a consequence of the diplomatic crisis caused by the launch of attachment and enforcement proceedings against the Russian Federation in the *Yukos* case (see Section V.A below).

⁴⁸⁹ CETA, *supra* note 39, art. 8.28(9), 8.41; EUSFTA, *supra* note 40, art. 3.22, IPA; EUVFTA, *supra* note 41, art. 31.

⁴⁹⁰ Andrea K. Bjorklund, *State immunity and the Enforcement of Investor-State Arbitral Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 302, 321 (Christina Binder et al. eds., 2009).

⁴⁹¹ Van den Berg, *supra* note 14, at 449-50.

⁴⁹² See Anthony C. Sinclair and Epaminontas E. Triantafyllou, *Specific Performance Under Commercial Contracts with Sovereign States*, 34(5) J. INT’L ARB. 747 (2017); Farshad Rahimi Dizgovin, *Foundations of Specific Performance in Investor-State Dispute Settlements: Is It Possible and Desirable?*, 28(1) FLA. J. INT’L L. 1 (2016); For a recent application in the US, see *Hardy Exploration & Prod. (India), Inc. v. Gov’t of India, Ministry of Petroleum & Natural Gas*, Civil Action No. 16-140 (RC) (D.C. Cir., 2018).

⁴⁹³ Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9, 2016 on transparency, combating corruption and modernising economic life], Journal officiel de la République française [J.O.] [Official Gazette of France], Dec. 9, 2016. (Fr.).

⁴⁹⁴ Loi insérant dans le Code judiciaire un article 1412quinquies régissant la saisie de biens appartenant à une puissance étrangère ou à une organisation supranationale ou internationale de droit public [Law incorporating into the Judicial Code an article 1412quinquies governing the seizure of property belonging to a foreign power or to a supranational or international organisation of public law], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Sept. 03, 2015 (Belg.).

ii. *European Court of Human Rights' Judgments*

As already indicated, pursuant to Article 46 of the ECHR, “*the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*”. The Committee of Ministers of the Council of Europe has regularly pointed out that the obligation to abide by the judgments of the Court is unconditional; a State cannot rely on the specificities of its domestic legal system to justify failure to comply with the obligations by which it is bound under the Convention.⁴⁹⁵

As opposed to arbitral awards, the judgements rendered by the Court are not directly enforceable.⁴⁹⁶ However, their execution is supervised by the Committee of Ministers, which must be informed by the respondent State of the individual and general measures taken to abide by the judgment and/or the steps taken to pay the amounts awarded by the Court in respect of just satisfaction.⁴⁹⁷ The Committee of Ministers keep cases on its agenda until the States concerned have taken satisfactory measures, and continue to require explanations or action until it has been done.⁴⁹⁸ If the Committee of Ministers considers that a contracting State refuses to abide by a final judgment, it may, after serving formal notice on that State and by decision adopted by a majority vote of two-thirds, refer to the Court the question whether that party has failed to fulfil its obligation. The Committee does so only in “exceptional circumstances”.⁴⁹⁹ If the Court finds that its final judgment was not complied with, it will refer the case to the Committee of Ministers for consideration of the measures to be taken.⁵⁰⁰

In practice, the Committee of Ministers rarely resorts to political or diplomatic pressure (such as suspension or termination of membership of the Council of Europe, which is theoretically possible under Article 8 of its statute). In its 2016 annual report on the supervision of the execution of the Court’s judgments, the Committee highlighted that “*the years since 2010 have seen a*

⁴⁹⁵ COUNCIL OF EUROPE, MONITORING OF THE PAYMENT OF SUMS AWARDED BY WAY OF JUST SATISFACTION: AN OVERVIEW OF THE COMMITTEE OF MINISTERS’ PRESENT PRACTICE, ¶ 4 (2009).

⁴⁹⁶ For a detailed analysis, see J. Frowein, *The Binding Force of ECHR Judgments and its Limits*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 261 (Bernhard Ehrenzeller et al. eds., 2007).

⁴⁹⁷ A similar system exists under Articles 29 and 30 of the Protocol to the 1981 African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, pursuant to which the contracting States undertake to comply with the Court’s judgments, and the Committee of Ministers of the African Charter is responsible for monitoring their execution. Pursuant to Articles 65 and 68 of the American Convention on Human Rights, the contracting States also undertake to comply with judgements of the Inter-American Court of Human Rights but it is the Court itself which is responsible to monitor the execution of its judgments and publish a yearly report, specifying the cases in which a State has not complied with its judgments and making any pertinent recommendations in this respect. Interestingly, the American Convention also provides that “part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state”.

⁴⁹⁸ See COUNCIL OF EUROPE, RULES OF THE COMMITTEE OF MINISTERS FOR THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND OF THE TERMS OF FRIENDLY SETTLEMENTS (2006).

⁴⁹⁹ *Id.* r. 2.

⁵⁰⁰ ECHR, *supra* note 68, art. 46(5),(6).

*considerable improvement of the effectiveness of domestic remedies*⁵⁰¹ but the “*refusal to adopt, notwithstanding strong insistence from the Committee of Ministers, the individual measures required or to pay just satisfaction – situations which frequently hide more fundamental disagreements with the Court’s conclusions or the requirements of execution*” constituted a major problem.⁵⁰² Major investment disputes are also likely to be part of these problematic situations.

iii. CJEU’s Judgments

If the Commission considers that a Member State has not taken the necessary measures to comply with a judgment of the CJEU, it may bring the case before the CJEU after giving that State the opportunity to submit its observations.⁵⁰³ If the CJEU finds that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it.⁵⁰⁴ These fines will be recovered by the EU, and not the prejudiced investor.

V. Illustrations

A. The Yukos Case

There is probably no better illustration of the implications of proceedings before the ECtHR and investment arbitration remedies than the legal crusade launched by the former shareholders of the oil and gas giant OJSC Yukos Oil Company [“**Yukos**”] against the Russian Federation, which resulted in, respectively, the highest award and just satisfaction ever awarded by an arbitral tribunal and the ECHR.

By way of background, Yukos was privatised by Russia in the mid-1990s, sold to the oligarch Mikhail Khodorkovsky and became one of the biggest oil and gas companies in the world, producing roughly 20% of Russia’s oil output in the 2000s. In August 2006, the company was broken up by the State for alleged unpaid taxes amounting to more than €20 billion, and its assets were seized and transferred for a fraction of their value to state-owned oil companies. Yukos was declared bankrupt shortly thereafter.

The former shareholders launched various legal proceedings – including three arbitrations under the ECT⁵⁰⁵ and an application to the ECtHR (lodged by the company itself)⁵⁰⁶ – contending that the tax claims were disguised means of nationalizing Yukos and acting politically against Mikhail Khodorkovsky, who was seen as a vociferous opponent to the Kremlin’s policies.

Yukos had exhausted most of the Russian domestic remedies, challenging the tax and the

⁵⁰¹ On March 27, 2015, the Council of Europe adopted the so-called Brussels Declaration, reemphasizing “the importance of the full, effective and prompt execution of judgments and of a strong political commitment by the States Parties in this respect, thus strengthening the credibility of the Court and the Convention system in general” and setting up a specific action plan to that end. As a result, the number of interventions of the Committee of Ministers to support the ongoing processes to implement the Court’s judgments has increased by almost 40% in 2016 (from 108 to 148) and a record number of cases were closed the same year (*see* COUNCIL OF EUROPE, SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS 2016 – 10TH ANNUAL REPORT OF THE COMMITTEE OF MINISTERS (2017)).

⁵⁰² *Id.*

⁵⁰³ TFEU, *supra* note 89, art. 260(2).

⁵⁰⁴ *Id.* art. 260(3).

⁵⁰⁵ By agreement of the parties, the cases were heard together before identical arbitral tribunals, under the auspices of the Permanent Court of Arbitration in The Hague (Yukos, *supra* note 1).

⁵⁰⁶ OAO Neftyanaya, *supra* note 1.

penalties up to the Russian Constitutional Court and the Supreme Commercial Court. Yukos omitted to conduct a few of them, but after reiterating that “*the rule of exhaustion is neither absolute nor capable of being applied automatically*”, the ECtHR ruled that “*it does not appear that the applicant company’s complaints in this connection had any additional prospects of success, had the company not omitted the above-mentioned judicial instances*”.⁵⁰⁷

The possibility to make use of both remedies in parallel proceedings was examined both by the arbitral tribunal and the Court. As indicated in Section IV.B.iii.b above, the plaintiffs successively contended that the triple identity test⁵⁰⁸ was not satisfied because the parties (investment companies before the arbitral tribunal and the company Yukos itself before the Court) and the causes of action (under the ECT and the ECHR) were different. Accordingly, both, the arbitral tribunals⁵⁰⁹ and the Court⁵¹⁰ dismissed Russia’s *lis pendens* objections. Russia’s defence as regards the possibility of double jeopardy was also dismissed by both, the ECtHR⁵¹¹ and the tribunals.⁵¹²

Before the ECtHR, Yukos claimed that Russia’s measures constituted breaches to Articles 1 (obligation to respect human rights), 6 (right to a fair trial), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 18 (limitation on use of restrictions on rights) of the ECHR as well as Article 1 of Protocol No. 1 (right to property) whilst, in the arbitral proceedings, the claimants contended that Russia violated Article 10(1) (obligation to treat investments in a fair and equitable manner and on a non-discriminatory basis) and Article 13(1) (prohibition of illegal expropriations/nationalisations) of the ECT.

In both proceedings, the core question was whether Yukos had been, *de facto* or indirectly, expropriated.⁵¹³ The ECtHR and the investment tribunals reached opposite findings in this respect: the Court found no violation “*on account of the alleged disguised expropriation of the company’s property and the alleged intentional destruction of the company itself*”,⁵¹⁴ while the tribunals held that “*the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets*”.⁵¹⁵ This underlines the broad margin of appreciation left by the ECtHR to States in regulating private property, and the inapplicability of principles of customary international law to nationals in this respect (see Section III.B.i above).

The Tribunals held that Russia’s measures constituted illegal expropriation/nationalisation and, as a result, that it did not need to assess such measures under the FET standard. The finding of an expropriation led to the award of a compensation of roughly US\$50 billion based on the

⁵⁰⁷ OAO Neftyanaya Merits, *supra* note 367, ¶¶ 638-641.

⁵⁰⁸ Identity of parties, cause of action and object of the dispute.

⁵⁰⁹ Hulley Enterprises Limited Interim Award, *supra* note 354, ¶¶ 586-593.

⁵¹⁰ OAO Neftyanaya Merits, *supra* note 367, ¶¶ 519-526.

⁵¹¹ OAO Neftyanaya Just Satisfaction, *supra* note 466, ¶¶ 43-44 (“the Court would note that the case file contains no information regarding the enforcement of these awards. In such circumstances, the Court does not find it necessary to take this information into account in the context of the present judgment and at this stage of the proceedings”).

⁵¹² Hulley Enterprises Limited v. The Russian Federation, Case No. AA226, Final Award, ¶¶ 1828-1829 (Perm. Ct. Arb. 2014) [*hereinafter* “Hulley Enterprises Limited Final Award”].

⁵¹³ For a detailed analysis, see Eric De Brabandere, *Yukos Universal Limited (Isle of Man) v The Russian Federation: Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals*, 30(2) ICSID REV. 345 (2015) [*hereinafter* “Eric De Brabandere”].

⁵¹⁴ OAO Neftyanaya Merits, *supra* note 367, ¶¶ 666.

⁵¹⁵ Hulley Enterprises Limited Final Award, *supra* note 512, ¶ 756.

entire market value of the expropriated company (taken into account the 70.5 percent share of the claimants in Yukos and a reduction for contributory negligence, because of the use of tax avoidance schemes).⁵¹⁶

Despite the finding that no expropriation occurred, the ECtHR concluded that Yukos' right to property and right to a fair trial had been breached by Russia as a result of the retroactive change, through a decision of the Russian Constitutional Court, in the rules on the applicable statutory time limit and the consequent doubling of the penalties because of a repeated offence due for one of the tax years (breach of the requirement of lawfulness). The Court also found a breach of Article 1 to Protocol No. 1 in the pace of the enforcement proceedings against Yukos, its obligation to pay the full 7% enforcement fee and the choice of Russia to focus on the seizure and auction of Yukos' principal production subsidiary i.e. "*the asset that was the company's only hope of survival*" (enforcement measures lawful but disproportionate).⁵¹⁷ Yukos claimed almost €38 billion before the Court, representing the company's value before Russia's measures, but was awarded €2 billion, representing the retroactive imposition of the penalties for the relevant tax years (including the 7% enforcement fee and without reduction for contributory negligence).⁵¹⁸

The arbitrations started in February 2005, and the awards on the merits were rendered on July 18, 2014. The total duration of the arbitral proceedings was therefore of 9 years and 5 months while the proceedings before the ECtHR spanned roughly 10 years and 8 months, from their launch in April 2004 to the Court's judgment on just satisfaction on 22 December 2014.

The investors started enforcement proceedings in several jurisdictions,⁵¹⁹ including France, Belgium, Germany, the UK, the US and India, while Russia opposed these actions⁵²⁰ and launched annulment proceedings in the Hague, the seat of arbitration. As indicated above, several of these jurisdictions strengthened their rules on State immunity from enforcement, in a move which is widely seen as a consequence of diplomatic pressures from Russia. On 20 April 2016, the Hague District Court quashed the *Yukos*' awards on jurisdictional grounds.⁵²¹ Shortly thereafter, the investors announced that they had put on hold the enforcement proceedings awaiting the result of the appeal before the Hague Court of Appeal.

With respect to the just satisfaction awarded by the ECtHR, Russia refused to engage with the Council of Europe, and ignored the Council of Europe's requests to implement the ruling. In 2015, the country adopted a legislation enabling the Constitutional Court to overrule the ECtHR's judgments which it considers contrary to the Russian constitution. Unsurprisingly, on 19 January 2017, the Russian Constitutional Court held so with regard to the ECtHR's just

⁵¹⁶ *Id.* ¶¶ 1826-1827.

⁵¹⁷ Eric De Brabandere, *supra* note 513, at 350-351.

⁵¹⁸ OAO Neftyanaya Just Satisfaction, *supra* note 466.

⁵¹⁹ See Hong-Lin Yu & Belen Olmos Giupponi, *Road to nowhere?: A comparative legal analysis on the enforcement of Yukos awards*, 18(4) INT'L ARB. L. REV. 80 (2015).

⁵²⁰ In courts but also diplomatically, by reaching out to the governments of the States where enforcement proceedings were launched. Legislations strengthening their rules on State immunity from execution, usually referred to as "Yukos Laws" have been adopted in France and Belgium as a result.

⁵²¹ The Dutch Court found that the arbitral tribunal had no jurisdiction under the ECT since Russia had signed but never ratified this treaty. On the basis of various legal expert reports, the Court concluded that Russia was only bound by the provisions reconcilable with Russian law – which excluded the treaty's investor-State arbitration clause.

satisfaction decision in the *Yukos* case.

These enforcement proceedings are a striking illustration of the substantial hurdles faced by investors where a State is determined to refuse to abide by the ECtHR's and investment tribunals' decisions.

B. Nomura Group v. Czech Republic

In the 1990s, the Czech banking sector was subject to serious economic difficulties and the Czech Republic took several support measures aiming at ensuring the rescue, restructuring and subsequent privatisation of the country's main banks. In this context, on March 8, 1998, the Czech Government sold its 36% shareholding in one of those banks, Investiční a Poštovní banka a.s. ["**IPB**"], to the Nomura group of companies (a major Japanese merchant banking and financial services group) ["**Nomura**"], which already held 10% of the bank's shares. These shares were transferred to Saluka Investments B.V., a Nomura subsidiary incorporated under the laws of the Netherlands.⁵²² Another of the main Czech banks, Československá obchodní banka a.s. ["**COB**"], received various forms of assistance from the Czech Government (guarantees, compensation for bad loans, etc.) before being privatised on May 31, 1999 by the sale of the roughly 66% State shareholding to KBC Bank of Belgium N.V.

IPB's financial situation was still a concern after these operations, and the bank was subject to investigation by the Czech National Bank, which concluded that serious financial deficiencies and irregularities were apparent. On 16 June 2000, the Czech National Bank put IPB into forced administration, considering the bank's financial situation threatened the stability of the Czech banking system. IPB was sold to COB by the forced administrator on June 19, 2000. COB obtained a State guarantee and a promise of indemnity from the Czech National Bank. The acquisition of IPB made COB the leading bank in the Czech Republic.

Saluka Investments B.V. launched *ad hoc* UNCITRAL arbitration proceedings under the 1991 Czech Republic-Netherlands BIT by a notice dated July 18, 2001, claiming that the Czech Republic had acted in a way which was discriminatory, unfair, inequitable and expropriatory. A partial award was rendered on March 17, 2006 by the tribunal, concluding that the Czech Republic breached the FET standard but reserving the question of the appropriate redress for that breach for a second phase of the arbitration.⁵²³ Later, the Swiss Federal Tribunal, as the competent court of the seat of the arbitration, dismissed annulment proceedings against this partial award,⁵²⁴ and the parties reached a settlement agreement on November 30, 2006, providing, *inter alia*, that the valuation of IBP should be submitted to expert determination to be conducted by the tribunal. The tribunal rendered its final decision on June 6, 2008.⁵²⁵

Nomura and Saluka Investments B.V. had also lodged a parallel complaint before the ECtHR,

⁵²² For a complete description of the facts of the case, see *Saluka Investment BV (The Netherlands) v. The Czech Republic*, Partial Award, (Mar. 17, 2006), 15 ICSID Rep. 250 (Perm. Ct. Arb. 2006).

⁵²³ *Id.*

⁵²⁴ *Saluka Investments B.V. v. The Czech Republic*, Bundesgericht [BGer] [Federal Supreme Court] (Sept. 7, 2006), 4P.114/2006 (Switz.).

⁵²⁵ *Saluka Investment BV v. The Czech Republic (Neth. v. Czech)*, Expert Valuation of IPB (Perm. Ct. Arb., Jun. 6, 2008).

primarily based on alleged breach of the right to property.⁵²⁶ This was ruled inadmissible on September 4, 2001⁵²⁷ because the applicants did not exhaust the Czech local remedies. This shows the limits of the ECtHR's flexible approach with respect to the admissibility criteria of Article 35 of the ECHR. By contrast, in the *Yukos* case, the applicant could rely on many unfavourable decisions of the Russian courts to evidence the absence of any prospects before domestic courts. A couple of months later, in August 2002, Saluka (in its capacity as a shareholder in IPB) brought an action in IPB's name against the Czech National Bank in the Czech courts. The action, which appears to have been dismissed, challenged the validity of the appointment of the forced administrator, and consequently of his acts, including the transfer of IPB's business to COB.⁵²⁸

In 2003 and 2004, the Czech Republic notified a series of cases concerning the rescue and restructuring of Czech banks, including IPB and COB, to the European Commission under the State aid interim mechanism procedure of Annex IV.3 of the Act of Accession of the Czech Republic to the EU. The Commission launched investigations with respect to other banks,⁵²⁹ but decided not to do so with respect to IPB and COB because the measures related to events that had already occurred by the date of accession (the Treaty of Accession was signed on April 16, 2003 and entered into force on May 1, 2004) and thus could not be questioned by the Commission pursuant to Annex IV.3.⁵³⁰ Nomura tried to obtain access to the file but its request was dismissed by the European Commission on April 13, 2005 (on the basis that such access “*would undermine the protection of the purpose of its investigation*”).⁵³¹ Nomura introduced annulment proceedings against the decision of the Commission before the General Court on June 23, 2005.⁵³² On December 5, 2007, Nomura informed the Court that they wished to discontinue proceedings. The Commission did not object, and this was granted by the Court on February 1, 2008.⁵³³

It is worth noting that, if the facts of the case had occurred after the accession of the Czech Republic to the EU rather than shortly before, the success of the arbitration proceedings could have been jeopardised by the EU institutions' position towards intra-EU BITs whilst the

⁵²⁶ M. Preskett, *Nomura's gloves are off*, CENT. EUR. REV. (Feb. 19, 2001), available at <http://www.ce-review.org/01/7/czechnews7.html>.

⁵²⁷ *Nomura and Saluka v. Czech Republic*, App. No. 72066/01, Eur. Ct. H.R., Inadmissibility Decision (Sept. 4, 2001).

⁵²⁸ These Czech proceedings are discussed in related court proceedings introduced in London by COB against the Nomura Group; see *Ceskoslovenská obchodní banka a.s. v. Nomura International plc* [2002] QB at ¶ 5(11) (Eng.).

⁵²⁹ See Commission Decision 2008/214/EC of July 18, 2007 on State aid C 27/2004 which the Czech Republic has implemented for GE Capital Bank a.s. and GE Capital International Holdings Corporation, USA notified under document number C(2007) 1965, 2008 O.J. (L 67/3) (holding at ¶ 124 that “the aid granted in the course of the sale of AGB1 forms part of the wide ranging measures systematically taken by the Czech Republic in order to avoid the collapse of its banking sector. In doing so, the Czech authorities, although not complying with all the terms of the 1994 Guidelines, fully respected the spirit and the underlying principles of these Guidelines. Taking account of the extreme circumstances confronting the Czech Republic at the relevant time and Article 46(2) of the Europe Agreement, the Commission has concluded that the aid can therefore be considered compatible with Article 87(3)(c) EC [now Article 107(3)(c) of the TFEU] as aid to facilitate the development of certain economic activities”).

⁵³⁰ Commission Decision declaring that the measure notified by the Czech Republic, under the interim mechanism pursuant to Annex IV.3 of the Act of Accession, is not applicable after accession, 2006 O.J. (C 242).

⁵³¹ Pursuant to Article 4(2), Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145).

⁵³² See Case T-233/05, *Nomura Principal Investment and Nomura International v. Comm'n*, 2005 O.J. (C 217/46).

⁵³³ *Id.*

Commission's investigations under State aid law would have been much more relevant.

VI. Conclusion

As a general rule, the preference given to investment arbitration by investors and their counsels, appears to be justified both from a substantive and procedural point of view. This should not come as a surprise, since investment arbitration has been designed as an *ad hoc* and tailor-made dispute resolution mechanism, aimed at attracting foreign investors by offering them strong protections.

Investment arbitration offers very broad and wide-ranging standards of protection (in particular the FET standard) which – albeit is mitigated by the arbitral tribunals' practice and specific clauses in the most recent BITs – also cover regulatory changes and measures, and can be justified by the broad margin of appreciation in defining the general interest left to States under the ECHR or EU law.⁵³⁴ State measures jeopardising an investment can often qualify as an interference with human rights and/or rights granted by EU law, in particular given the broad construction given by the ECtHR to the right to property and to a fair trial, and by the CJEU to what constitutes a restriction on the fundamental freedoms of the internal market. The ECtHR and the CJEU generally leave much more discretion to the States for the justification of these interferences and in conducting the proportionality test though, it should be noted that, under the EU law of the internal market, public interest defences exclude any interpretation based on purely economic considerations.

Investment arbitration also has obvious procedural advantages: it can be directly mobilised by investors who have legal standing in the procedures and are not usually required to exhaust domestic remedies before bringing their case to arbitration. By contrast, investors must exhaust domestic remedies before approaching the ECtHR and, in order to have their case brought before the CJEU, must convince either the European Commission to take on their case⁵³⁵ or a domestic court to request a preliminary ruling. As a result, proceedings before the CJEU are more focused on the legality of the State measure than on the breach to the investors' rights. These drawbacks are partly mitigated by the fact that EU law and, in a majority of the Member States of the Council of Europe, the ECHR can be invoked before domestic courts and takes precedence over domestic law.⁵³⁶ However, investors often have little trust in the independence of the local judiciary in the highly political context of investment disputes.

⁵³⁴ One ICSID tribunal goes as far as to consider that “The Tribunal does not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No.1. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above. Consequently Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT” (Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 312 (Dec. 7, 2011).

⁵³⁵ With the exception of direct actions, for which investors may have direct standing (*see* Section II.C.iii.a above). However, their object is to challenge the validity of the acts of the EU institutions, or their absence thereof, and not the validity of the measures taken by the Member States.

⁵³⁶ Subject to the fact that some EU rules, such as the ones contained in the EU treaties, the EU Charter and regulations, are directly applicable while others must in principle be transposed under national law before forming part of the Member States' legal order.

Despite the fact that the remedies provided by investment arbitration are mostly limited to pecuniary damages, the substantial compensations awarded by arbitral tribunals as a result of the application of objective standards such as “fair market value” or “full reparation”, are also key elements in favour of this mechanism. This is reinforced by the strong enforcement mechanisms offered by the ICSID Convention and the slightly less protective New York Convention (although domestic rules on State immunity from enforcement can constitute a significant hurdle under both regimes). Under the ECHR regime, it is first and foremost for the domestic courts of the responding State to take the necessary measure to redress the breach of the Convention, taking into consideration broader public interests than the sole remedy of the investors’ prejudice. The just satisfaction that can be awarded by the ECtHR is left to the Court’s discretion, both for its principle and its amount. While the enforcement of the judgements of the ECtHR is supervised by the Council of Ministers, they can hardly be enforced against the will of the responding State, without the assistance of domestic courts. Finally, the CJEU cannot award direct compensation to investors,⁵³⁷ although a Member State found in breach of EU law is under a duty to take the necessary steps to remedy its breach, and the prejudiced investors can claim compensation before domestic courts.

However, investment arbitration is not always the panacea. As opposed to proceedings before the ECtHR or European institutions, investment arbitration comes with substantial additional costs, while the combination of *ad hoc* tribunals and the often subtle differences of procedural and substantive rules amongst BITs affect investment law’s predictability and coherence. More fundamentally, investment law protections are only available to investors who are the beneficiaries of an investment treaty, an investment law or specific contractual clauses. The availability of investment arbitration for intra-EU disputes has been considerably jeopardised by the opposition of the European Commission and, more decisively, the judgment rendered by the CJEU in *Achmea*. Uncertainties also exist with respect to the validity of the ICS mechanisms provided by the recent EU FTAs. The opinion to be rendered shortly by the CJEU on the conformity with EU law of CETA’s dispute resolution mechanism is likely to be decisive in this respect, and to impact greatly the potential set up of a multilateral investment court.

Against this background, it would be wrong to conclude that EU law and the ECHR would merely be a “second option” available to investors where specific investment protection is not available. They may also be effectively mobilised, potentially in parallel to investment arbitration, in various circumstances, particularly where a State measure affects substantially the integrity of the internal market, by violating the fundamental freedoms of the internal market of the prohibition of State aid, or jeopardises core human rights such as the rule of law or the freedom of press. This is especially true where investors pursue other objectives than seeking a direct financial compensation from the State.

Investors who object to State measures jeopardising their investments in the EU should therefore conduct at the very outset of the potential dispute, a thorough assessment of the three

⁵³⁷ Except where the EU itself could be held liable for damages caused by its institutions and servants in the performance of their duties (*see* Section IV.G.iii above).

mechanisms' availability, procedural constraints, substantive standards, chances of success, remedies and enforcement mechanisms.