

**Effective judicial protection of bank  
depositors during the financial crisis and  
arbitration in an EU context**

**by**

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A thesis submitted in partial fulfilment for the requirements for the degree of Doctor of  
Philosophy at the University of Central Lancashire

March 2018

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## **ABSTRACT**

It is generally assumed that the EU law regime excludes arbitration from its scope, since issues of EU law must be resolved within the EU legal order, according to the wording of the Treaties and the case law of the CJEU. It is also assumed that courts offer adequate and effective protection to litigants, thus arbitration does not make any further contribution to parties. This thesis challenges these ontological assumptions, using the case of bank depositors, and aims to investigate whether courts within the EU protect bank depositors effectively or whether arbitration would offer further protection. For this purpose, the nature of bank deposits is considered, and the approach of courts and arbitrators towards depositors are comparatively analysed, based on effectiveness of protection, as the appropriate tool of assessment. The findings of this examination lead to the final research question regarding the role, if any, of arbitration within the EU legal order and the relationship between arbitration and litigation, in particular within the context of the global financial crisis. Thus, the central argument of this thesis is that, if it is accepted that arbitration does have a place in the EU legal order, and based on the argument that bank deposits qualify as investment, bank depositors can enjoy the protection offered by international investment arbitration, which can protect them more effectively than litigation

The originality of this work centers around three points. Firstly, this thesis aims to use the principle of effectiveness in a substantial sense rather than its procedural meaning, considering whether individuals do not only access the justice, but also being remedied effectively. Secondly, this thesis argues that bank deposits can be treated as investment, thus depositors could enjoy further protection offered by investment law. Finally, the thesis supports that the EU law regime does have some place available for arbitration,

albeit its traditional exclusion, especially during the particular period of the financial crisis.

## CONTENTS

.....	<b>Error! Bookmark not defined.</b>
ABSTRACT.....	1
ACKNOWLEDGEMENTS.....	13
ABBREVIATIONS.....	14
INTRODUCTION.....	16
I. ORIGINALITY – CONTRIBUTION.....	28
II. RESEARCH DESIGN AND TECHNIQUES.....	29
III. STRUCTURE.....	31
CHAPTER TWO.....	34
LITERATURE REVIEW.....	34
I. EU LAW.....	38
1. Access to justice.....	38
2. Proportionality.....	46
3. Right to property.....	55
II. PUBLIC INTERNATIONAL LAW – ECHR.....	60
1. Access to justice.....	60
2. Proportionality.....	65
3. Right to property.....	69
III. INTERNATIONAL INVESTMENT LAW.....	73
1. Access to justice.....	73
2. Proportionality.....	77

3. Right to property .....	81
IV. CONCLUDING REMARKS .....	86
CHAPTER THREE.....	89
THE SUBJECT MATTER: THE NATURE OF BANK DEPOSIT.....	89
I. BANK DEPOSITORS AND BANK SHAREHOLDERS.....	90
II. MONEY AS PROPERTY IN FINANCIAL TRANSACTIONS .....	92
III. THE NOTION OF ‘BANK DEPOSIT’ IN NATIONAL LEGAL ORDERS..	94
IV. THE NOTION OF ‘DEPOSIT’ AND ‘DEPOSITOR’ UNDER EU LAW ...	100
V. THE NOTION OF ‘BANK DEPOSIT’ UNDER PUBLIC INTERNATIONAL LAW .....	104
VI. BANK DEPOSITS UNDER INTERNATIONAL INVESTMENT LAW ....	108
1. Financial and Economic definition of ‘Investment’ .....	108
2. ‘Investment’ under International law .....	110
3. ‘Investment’ under EU law .....	119
4. Bank deposits as investments .....	122
VII. CONCLUDING REMARKS .....	128
CHAPTER FOUR.....	130
THE APPROACH OF COURTS TOWARDS THE PROTECTION OF BANK DEPOSITORS AND EFFECTIVENESS .....	130
1. National courts .....	131
2. CJEU .....	132
3. ECtHR .....	133

I.	EFFECTIVENESS OF PROTECTION.....	136
1.	Effectiveness of courts .....	136
2.	Effective judicial protection under EU law .....	137
II.	JUDICIAL PROTECTION THROUGH DIRECT ACTIONS AT NATIONAL COURTS .....	143
1.	Access to justice .....	144
2.	The principle of proportionality .....	151
III.	JUDICIAL PROTECTION THROUGH DIRECT ACTIONS AT THE EU COURTS UNDER ARTICLE 263 TFEU AND THROUGH PRELIMINARY REFERENCES TO THE CJEU UNDER ARTICLE 267 TFEU.....	166
1.	Access to justice .....	168
2.	The principle of proportionality .....	189
IV.	JUDICIAL PROTECTION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS .....	199
1.	<i>Koufaki and ADEDY v Greece</i> .....	199
2.	<i>Da Conceição Mateus v Portugal</i> .....	202
3.	<i>Dennis Grainger and others v UK</i> .....	204
4.	<i>Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the ‘former Yugoslav Republic of Macedonia’</i> .....	207
5.	<i>Capital Bank AD v Bulgaria</i> .....	208
V.	CONCLUDING REMARKS .....	210
	CHAPTER FIVE.....	215

THE APPROACH OF ARBITRATION TOWARDS THE PROTECTION OF BANK DEPOSITORS AND EFFECTIVENESS .....	215
I. THE LIMITATION OF CONFIDENTIALITY .....	218
II. <i>ABACLAT AND OTHERS V ARGENTINE REPUBLIC</i> .....	224
1. Factual framework of Argentina .....	224
2. <i>Abaclat v. Argentina: Decision on jurisdiction</i> .....	228
3. <i>Abaclat v. Argentina: Dissenting Opinion</i> .....	237
4. Implications of the Decision.....	241
III. ARBITRATION CASES IN THE EUROZONE REGARDING THE FINANCIAL CRISIS .....	247
1. <i>FBME v. Republic of Cyprus</i> .....	247
2. <i>Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus</i> .....	248
3. <i>Theodoros Adamakopoulos and others v. Republic of Cyprus</i> .....	250
4. <i>Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic</i> .....	250
5. <i>Bank of Cyprus Public Co. Ltd. v. Hellenic Republic</i> .....	251
6. <i>Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic</i> .....	251
7. Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium .....	255
IV. CONCLUDING REMARKS .....	258
CHAPTER SIX .....	260
THE FUTURE OF ARBITRATION IN THE EU LEGAL ORDER .....	260



I. EU LAW AND ARBITRATION.....	263
II. EU LAW AND INTERNATIONAL INVESTMENT LAW.....	275
1. Bilateral Investment Treaties and EU law.....	275
2. Investment Treaty Arbitration and EU law .....	279
III. RECENT TRENDS ON ARBITRATION IN THE EU.....	285
1. CETAC.....	288
2. TTIP.....	293
3. Summary of findings .....	298
IV. ARGUMENTS SUPPORTING THAT ARBITRATION DOES HAVE A ROLE IN THE EU LAW REGIME.....	302
1. Article 344 TFEU .....	303
2. Article 19(1) TEU .....	307
3. Different mandates .....	310
4. Preliminary references from investment tribunals to the CJEU.....	311
5. Summary of findings .....	318
V. CONCLUDING REMARKS .....	322
CHAPTER SEVEN.....	324
CONCLUSION.....	324
LIST OF REFERENCES .....	334
CASES .....	334
i. Supranational case law .....	334
1. Court of Justice of the European Union .....	334

2.	General Court .....	339
3.	Opinions .....	340
4.	Opinion of Advocate General.....	341
5.	European Court of Human Rights .....	342
6.	EFTA Court .....	346
7.	International Court of Justice .....	346
8.	USA-Iran Tribunal .....	346
ii.	National case law .....	347
1.	UK .....	347
2.	Germany .....	348
3.	Cyprus .....	348
4.	Spain.....	348
5.	Portugal .....	349
6.	Greece.....	349
7.	USA .....	349
iii.	Arbitral awards.....	350
	LEGISLATION.....	354
i.	EU law.....	354
1.	Treaties .....	354
2.	Regulations .....	355
3.	Directives.....	355
4.	European Commission documents .....	357

5. European Parliament documents .....	358
6. Other EU documents .....	359
ii. International Treaties .....	361
iii. Regional Treaties .....	362
iv. Bilateral Investment Treaties .....	363
v. National legislation .....	365
1. UK .....	365
2. Germany .....	365
3. Cyprus .....	366
4. Spain .....	366
5. Greece .....	367
6. Netherlands .....	367
7. France .....	367
8. Latvia .....	367
9. Estonia .....	367
10. Switzerland .....	367
11. Italy .....	368
12. Iceland .....	368
13. Austria .....	368
BOOKS .....	369
CHAPTERS IN BOOKS .....	372
i. International Yearbooks .....	374

ARTICLES.....	375
i. Published articles .....	375
ii. Electronic articles.....	383
iii. Forthcoming articles.....	384
iv. Working papers, Research papers .....	385
INTERNET SOURCES .....	388
OTHER SOURCES .....	390

## ACKNOWLEDGEMENTS

*‘Με τον καιρό να ‘ναι κόντρα, είναι όντως τιμή να πετάς...’ (O. Elitis)*

*(Having the weather against you is quite an honour to fly)*

First of all, I am indebted to my Director of Studies, Professor Stéphanie Laulhé Shaelou who avowed me with the possibility and opportunity of pursuing a PhD and I would like to thank her for that and for all of her help throughout the years. Without her patience, immense knowledge and support I would not be able to complete this thesis.

Besides my Director of Studies, I would like to thank the rest of my supervisory team: Dr Henrik Andersen and Dr Bogusia Puchalska for their insightful comments and encouragement. Their guidance helped me in all the time of research and writing of this thesis.

I am also grateful to all the staff of the School of Law of UCLan Cyprus for their precious support and assistance.

Most importantly, I want to thank my parents, Pampos and Elena, and my siblings, Andreas and Nikolas, for their unconditional love, for always believing in me and respecting what this means to me, and for always reminding me that I should never give up as long as we have each other.

Finally, I am grateful to all my friends, who are a lot, for their patience, encouragement and undying love, whose faithful support during the final stages of this PhD made it possible for me to complete what I had started.

## ABBREVIATIONS

BIT	Bilateral Investment Treaty
CETA	EU–Canada Comprehensive Economic Trade Agreement
CJEU	Court of Justice of the European Union
DGS	Deposit Guarantee Scheme
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreements
ISDS	Investor – State Dispute Settlement
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
TTIP	EU–US Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law

## INTRODUCTION

The recent global financial crisis has caused pivotal changes in the EMU's structure<sup>1</sup> and its constitutional foundations, leading to the completion of European integration being put at risk. Post-crisis austerity measures<sup>2</sup> implemented by those Member States that were heavily hit by the crisis, which were deemed necessary to fulfil the criteria in order to receive financial assistance by international lenders, have raised a lot of questions with respect to the level of protection of individuals' fundamental rights.<sup>3</sup> Although each Member State's programme for financial assistance varied, the common purpose of all programmes was 'to return Member States to sound macroeconomic or financial health and restore their capacity to meet their public-sector obligations',<sup>4</sup> and this purpose can reflect the public interest involved and which may counter-balance the effects on individuals' fundamental rights.

The aim of this thesis is to identify whether courts within the EU effectively protect bank depositors, as a category of individuals affected by the post-crisis austerity measures, and whether arbitration would offer additional protection, especially in the light of the ongoing global financial crisis. The selection of bank depositors as the subject matter was

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<sup>1</sup> Although the crisis started in the financial/banking sector, it pushed the EU economy into severe recession and affected simultaneously the two central policies of the Union, namely the EMU and the internal market, and underlined the need for public intervention in the financial/banking sector, in the form of state aid, state guarantee or liquidity measures and recapitalisation, and the need for permanent and integrated crisis systems. Remarkably, the European Banking Union has been developed after the crisis arose.

<sup>2</sup> Either affecting the banking sector of the State (for example, banks restructuring and bail-in) or the social and employment rights of the citizens (for example, increase in taxation, reductions in public sector workers' salaries and pay cuts in the pensions of retired citizens)

<sup>3</sup> See N. Alkiviadou, 'Sustainable Enjoyment of Economic and Social Rights in Times of Crisis: Obstacles to Overcome and Bridges to Cross' (JMMWP 1/2017, School of Law, UCLan Cyprus, August 2017), available at: [http://www.uclancyprus.ac.cy/files/5115/0407/8235/JMMWP\\_Dr.Natalie\\_Alkiviadou.pdf](http://www.uclancyprus.ac.cy/files/5115/0407/8235/JMMWP_Dr.Natalie_Alkiviadou.pdf) (accessed 5 September 2017)

<sup>4</sup> European Parliament, Committee on Budgetary Control, 'Working document on the European Court of Auditors' Special Report N°18/2015 (2015 Discharge): Financial assistance provided to Member States in difficulties' (2016) 2



made because, recently, during the financial crisis, their rights were heavily affected and they initiated proceedings in national, EU and international courts and arbitral tribunals. In other words, this thesis challenges the effectiveness of the protection offered by the courts to those depositors affected by the measures taken in response to the financial crisis. It is upon this assumption that this thesis will focus. Thus, the central argument is that arbitration could offer an alternative option for bank depositors that can protect them more effectively than litigation.

The aim of this thesis will be achieved by examining those measures that have been adopted at the EU level and those implemented by Member States, under EU influence. The restoration of Member States' capacity to meet their public-sector obligations and the survival of the Eurozone required numerous measures with broad effects on that country's financial system, its economy, the labour market and its institutions. It is noteworthy that, so far, most challenges against those measures found recourse before the national courts of Member States, albeit with mixed results.<sup>5</sup> In addition to the severe consequences of the crisis on the economic and social areas, there are also important legal aftermaths that have emanated from the actions taken by the EU institutions, international institutions and the Member States when countering the crisis. From the procedural scope of view, the financial assistance programmes and the resultant MoUs, which have been implemented in the Member States most heavily hit by the financial crisis, consist of a combination of EU and intergovernmental frameworks, a fact that prevented any social partners and other national or Union bodies<sup>6</sup> from being involved. From the substantial scope of view, those programmes provided for fundamental changes and interferences in

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<sup>5</sup> See C. Kilpatrick and B. De Witte, 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) *LAW Working Papers 2014/05*

<sup>6</sup> Such as the EU Parliament and the parliaments of the Member States

a wide range of subject areas that do not fall within the competences of the Union though they are in conflict with the EU Treaties and the Charter of Fundamental Rights.

This thesis is regularly using the term ‘austerity measures’. Repasi described austerity measures as ‘measures whose substance is determined by a different actor than the one that is competent to adopt them’, and their compliance at the Member States level constitutes ‘a precondition for the payment of financial assistance, so non-compliance embodies the risk of a sovereign default of the debtor country’.<sup>7</sup> Generally, this thesis recognises as austerity measures those that were implemented for the purpose of diminishing public deficit or, at least, restraining its increase. Such measures are contrasted to those that were implemented as a part of some other policy considerations that would exist even in the absence of a financial crisis. In other words, there is a distinction between the measures adopted for austerity purposes and the measures adopted as part of ‘a business as usual agenda’. In addition to their purpose, austerity measures may relate either to the public sector, by having the character of measures on public expenditure and structural or fiscal reforms, or to the private sector, nationalised or not, by having the character of measures affecting particular financial institutions that are considered at risk. Furthermore, austerity measures can be taken at the national level or at a supranational level; in other words, either by the national Parliaments, Central Banks and Departments of the Government or by supranational bodies, such as the IMF and the ESM Treaty. The involvement of Union institutions is evident, but it is rather indirect, in the sense that they do not adopt the measures themselves, but they are involved in the composition of supranational bodies, such as the international lenders, which consist of the IMF, the European Commission and the ECB. The most common austerity

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<sup>7</sup> R. Repasi, ‘Judicial protection against austerity measures in the euro area: *Ledra and Mallis*’ (2017) 54 *Common Market Law Review*, 1123, at 1124

measures include reductions in benefits and public pensions, increase in direct and indirect taxes, reductions in public expenditure and cuts in public sector employment and remuneration. Furthermore, ‘financial measures’ can be described as encompassing any measure or policy which relates to the banking system of a State or its sovereign debt and affects the citizens. Though austerity measures and financial measures can be arguably distinguished, this thesis treats them as one category of measures, since financial measures can fit in the definition given by Repasi and which is adopted in this thesis.

The principal research problem of this thesis is whether courts within the EU protect bank depositors effectively and/or whether arbitration would offer more effective protection, especially in the light of the recent global financial crisis. The research questions guiding the study can be derived from the central research problem. Initially, the rights of bank depositors and the restriction of those rights by the financial measures adopted by the EU in response to the crisis, such as the bail-in measures, the establishment and operation of DGSs and the agreements on exchange of national debt instruments held by the ECB and national central banks for new securities, shall be identified. Thus, the first research question evolves around the nature of bank deposits and the rights of depositors, identifying which of those rights have been affected by the financial measures adopted by the EU and/or the Member States and how.

The importance of clarifying the nature of bank deposits lies on the necessity to identify those areas of law that include provisions which protect bank depositors. In addition to banking law, which clearly considers depositors, areas such as consumer law, contract law and company law may also be of relevance. Furthermore, deposits constitute property of their owner, thus property law provides for depositors’ rights. Finally, if it can be established that bank deposits qualify as investment as well, international investment law

should also be examined. Moreover, at a higher level, EU law and Public International law provide rights for depositors, in the form of fundamental rights, and are protected as such under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

For the purpose of this research, the term ‘depositors’ will be used and will exclude States. Thus, ‘depositors’ will include any individuals or businesses, either local or foreign, which hold deposit in a bank (financial institution). Depositors have rights arising from their relationship with the bank and, consequently, from the relationship between the bank and the State, since States themselves and, recently, the EU are responsible for the regulation, supervision and sometimes capitalisation of banks. The financial measures at the EU level and those at the Member States’ level influenced by such EU measures affected some of the rights of depositors, since they interfered in the banking system of the States in need. Thus, the depositors’ rights that have been influenced, as well as the extent to which this influence has taken place, are assessed.

As it will be observed in the literature review, different legal orders treat the same rights in a different way. Thus, the comparative method will form the core of the analysis. Comparative law, as a research method, focuses on identifying mutual features among different legal orders. Though it mostly compares national legal orders, it is also useful for the analysis of aspects of EU and international law. Such comparisons contribute to the revision and unification of law across national frontiers. Comparative research can be pursued by macrocomparison, namely by comparing statutory interpretation, the role of precedent and the powers of judges in various legal systems, or by microcomparison, which compares the means through which the different legal orders resolve the same legal problems.

After analysing the rights of bank depositors affected by the EU financial measures, the approach of the courts shall be examined, in order to consider whether they have offered effective judicial protection to depositors. Arbitration, as a dispute resolution method, could also offer effective protection to depositors, and there are numerous cases pending before international arbitral tribunals challenging the measures adopted by Member States in order to deal with the financial crisis. In other words, the second research question evolves around the approach of the courts, which are dealing with the case of bank depositors, and the corresponding approach of arbitration, assessing in particular to what extent they offer effective protection to bank depositors.

It cannot be denied that, in spite of the financial and economic primary considerations behind the methods employed in response to the crisis, the legal values enshrined in the EU Treaties and the ECHR have also been affected. Such effect constitutes the basis of litigation at the national level and, further, it initiates judicial dialogue between domestic courts and supranational courts based on the legal principles provided by EU law and international conventions, mostly the ECHR.

Depositors have brought cases before national courts, but also before the CJEU, the EFTA Court and the ECtHR, seeking protection of their legal rights which have been affected by the EU financial policies. The approach of these courts must be examined so as to determine the extent of the effectiveness of the protection they offer and the extent to which judges follow a more neutral approach, away from political pressure and discourse. Measuring the effectiveness of the protection given to depositors could be drawn from an assessment established on the basis of the right of effective judicial protection, as it is preserved in the Charter, the ECHR and the EU Treaties and the relevant case law.

In particular, under EU law, effective judicial protection is preserved in Article 47 of the Charter which encompasses, *inter alia*, the right to an effective remedy of every individual in case of violation of EU law. The principle of effective judicial protection was initially treated as a ‘mere’ general principle of law evolving from the constitutional traditions of the Member States and Article 6 ECHR, until it was granted a Treaty basis of its own under the Lisbon Treaty and Article 19(1) TEU.<sup>8</sup> A main argument of this thesis is that EU law adopts only a procedural approach towards effective judicial protection, while this chapter will try to involve effectiveness on the substance of a case.

Litigation does not constitute the only available dispute resolution method for those affected by the austerity measures; in fact, arbitration has also been employed by numerous natural and legal persons. Arbitration and litigation have become the two sides of the coin, in cases parties are seeking a binding determination of their disputes. Remarkably, in history, arbitration predated litigation as a dispute resolution method. According to Professor Derek Roebuck: ‘Litigation is comparatively modern in the history of human society. It cannot predate the state, which must set up the courts which litigation by definition requires. Litigation and arbitration have been alternatives since at least the 18th century BC, when Assyrian merchants employed them in ancient Mesopotamia. But arbitration and mediation must be even older than that. Pre-state societies must have had some way other than violence to resolve their disputes.’<sup>9</sup>

Being described as the private version of litigation, arbitration is defined as ‘an adjudicative dispute resolution process based on an agreement between the parties to refer

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<sup>8</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/30 (‘TEU’) Article 19(1) TEU only creates the obligation of Member States to provide sufficient remedies to ensure effective judicial protection in areas protected by EU law.

<sup>9</sup> N. Kaplan, ‘The Role of the State in Protecting the System of Arbitration’ (2015) 81 *Arbitration* 452

a dispute or difference between them to impartial arbitrators for a decision.’<sup>10</sup> Similarly and in more details, Halsbury’s Laws of England describes arbitration as ‘[t]he process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.’<sup>11</sup> Though arbitration was traditionally characterized as an Alternative Dispute Resolution (ADR) method, its distinct characteristics rendered it an autonomous method. These characteristics are mainly the enforceability of awards at an international level and the fact that the arbitrator has the power to give a decision on the dispute that is binding on both parties. The fact that litigation process is public and, in most cases, it permanently harms the relationships between the parties due to its adversarial nature, rendered arbitration a more attractive option.

As mentioned above, arbitration has also been employed by numerous natural and legal persons. An indicative example of the way arbitrators approach disputes on financial instruments and measures in response to the financial crisis is offered by the ICSID decision in the case of *Abaclat v Argentina*<sup>12</sup> when the country defaulted on its sovereign debt and a class action emerged on an alleged violation of rights under a BIT after investors suffered a haircut of their investment. Although national citizens only had the option of litigation before domestic courts, foreign investors had also the alternative of international investment arbitration that was offered under the regime of BITs that Argentina had entered into during the 1980s and 1990s. As a result, the measures imposed by the government of Argentina, either legislative or regulatory, were challenged in numerous cases before ICSID arbitration brought by foreign investors.

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<sup>10</sup> S. Sime, ‘Res Judicata and ADR’ (2015) 34 *Civil Justice Quarterly* 35, at 42

<sup>11</sup> Halsbury & Halsbury, *Halsbury’s Law of England* (4<sup>th</sup> edn, Butterworths, 1991) 332

<sup>12</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5)

The process of choosing a particular legal issue and then comparing how various legal systems examine and resolve this issue develops functionalism. This process was mainly supported by Rabel and the initial aim of this theory was to achieve the unification of commercial law. According to Rabel, functionalism does not analyse differences in doctrinal construction but rather in the practical effects of the norms, such as the remedy provided for each issue.<sup>13</sup> Functionalism, as a comparative method, can contribute to the examination of the depositors' protection during the financial crisis. The avenues of national courts, EU courts, the ECtHR and arbitration, can be compared on the basis of the way they approach the legal consequences of the financial crisis on bank depositors and the effectiveness of each approach. The position of national courts is quite different when implementing EU law or ECHR law, since the former is supreme and directly effective, while the latter follows general international law norms on its primacy and effect in national legal orders. Furthermore, the elements of direct effect and supremacy do not bind arbitrators, even when they are asked to implement EU law or ECHR law. Therefore, the consistent application of EU law and ECHR law cannot be controlled or guaranteed, when a case is brought before an investment arbitration tribunal.

The protection of bank depositors in the light of the financial crisis should be examined on the basis of the transnational legal process, on which legal redress is sought in cases where public and private actors are involved, including international organisations, such as the IMF and the ESM. Transnational legal process could be considered as constituting an aspect of liberalism. Liberalism is an ideology, constituting the basis of a legal method, which focuses on the rights of individuals as they are given effect and are protected in societies with less government, also named as 'liberal States'. In an attempt to define

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<sup>13</sup> E. Rabel, *Das Recht des Warenkaufs: Eine rechtsvergleichende Darstellung (The Law of the Sale of Goods: a comparative survey)* (Berlin and Leipsig: Walter de Gruyter & Co, volume 1, 1964) 67



liberalism, Slaughter states that ‘liberal States are States with some form of representative democracy, a market economy based on private property rights, and constitutional protections of civil and political rights’.<sup>14</sup> In such liberal world, the institutions of liberal States engage in transnational transactions with institutions of other liberal States. In other words, liberalism offers the theoretical framework of ‘transnational law’, by rendering States as transparent bodies providing procedures and practices for the protection and representation of the interests of individuals and private groups. Transnational law has been described as encompassing ‘all law which regulates actions or events that transcend national frontiers’,<sup>15</sup> thus including national law, EU law, international human rights law, as enshrined in the ECHR and international investment law. It also provides that private parties can trigger international legal proceedings against the States. Arbitration, as a dispute resolution method, reflects transnational law, in the sense that it links private law to the enforcement guarantees of State law and the cases dealing with ‘interplay between State and non-State institutions’ beyond the boundaries of a single State.

The main characteristics of the transnational legal process are argued to fit perfectly in this area of research. Transnational legal process destroys the traditional dichotomies between domestic and international, public and private; which is reflected in the claims of private depositors against State measures both at the domestic level, before national courts, and at the international level, before international courts and arbitral tribunals. Furthermore, the process is normative, which means that new rules of law constantly appear and are enforced. The way banking depositors are treated by various legal orders and arbitration during this financial crisis, can establish new ways of protection of

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<sup>14</sup> A.-M. Slaughter Burley, ‘International Law in a World of Liberal States’ (1995) 6 *European Journal of International Law*, 509

<sup>15</sup> P. C. Jessup, ‘Transnational Law’ in C. Tietje et al. (eds), *Philip C. Jessup’s Transnational Law Revisited – On the Occasion of the 50th Anniversary of its Publication*, (Heft, 2006), 45

depositors' financial interests, which, in turn, will be challenged. Thus the focus is both on the way international interaction creates law and the way law creates international interactions.

The last research question proposes to look at the alternative dispute resolution method of arbitration, and, in particular, whether arbitration could constitute an available option for bank depositors, as well as the extent to which it could actually offer more protection to their rights. Therefore, the third research question evolves around the relationship between arbitration and litigation in the EU legal order and, generally, in the context of the global financial crisis. It is established that any disputes concerning matters of EU law should be resolved within the EU legal order,<sup>16</sup> while arbitration is excluded *prima facie* from EU law.<sup>17</sup> As a consequence, the use of arbitration pre-supposes the absence of any legal basis to claim under EU law. Nevertheless, particularly in the context of the financial crisis, the lines between arbitration and litigation have become even more blurred, thus the relationship between them should be redefined.

This thesis does not aim at limiting its analysis and its conclusions regarding the role of arbitration in the EU legal regime to the context of the financial crisis and the protection of bank depositors. Instead, the case of the financial crisis is used as an example and as a tool to prove that arbitration can indeed have a place in the EU legal order. In other words, it is tried to prove that bank depositors can enjoy effective protection through arbitration and this protection can be recognised within the Union, since arbitration and particularly investment arbitration, is argued not to be wholly incompatible with EU law.

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<sup>16</sup>Article 19(1) TEU; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 1 326/1 ('TFEU'), Article 344

<sup>17</sup> Article 267 TFEU; Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ 2 012/01, Article 2(1)(a)

Traditionally, EU law and international arbitration law constituted two separate worlds. Moreover, the common commercial policy of the EU did not cover investment law, therefore Bilateral Investment Treaties (BITs) belonged to the exclusive external competence of Member State. However, foreign direct investment (FDI) was inserted on the exclusive competences of the EU, when the Lisbon Treaty included it in the scope of the CCP.<sup>18</sup> Furthermore, there is the principle that any external judicial body with the authority to hear disputes by individuals within the Union cannot be compatible with EU law.<sup>19</sup> In contrast with the traditional approach of EU law towards arbitration, some recent trends indicate that investment arbitration can have some place within the EU legal order, those being CETA<sup>20</sup> and TTIP,<sup>21</sup> which provide for an investment court system (ICS) that reflects many of the features of arbitration.

The choice between dispute resolution methods indicates that there is a rationale to guide bank depositors. Generally, liberalism, and, particularly, transnational legal process, are based on the idea that the main actors in the international scene are rational individuals who promote and defend their interest. Rationalism is a theory founded on Aristotle's philosophy which supported that the human being has a rational principle. If it is assumed that people have always reasons and motives for making particular choices, then the

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<sup>18</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 1 326/1, Article 206

<sup>19</sup> Opinion of 26 April 1977, *re Inland Waterways*, Opinion 1/76, EU:C:1977:63; Opinion of 14 December 1991, *on the creation of the European Economic Area*, Opinion 1/91, EU:C:1991:490; Opinion of 28 March 1996, *Accession to the ECHR*, Opinion 2/94, EU:C:1996:140; Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123; Opinion of 18 December 2014, *Accession to the ECHR*, Opinion 2/13, EU:C:2014:2454

<sup>20</sup> EU–Canada Comprehensive Economic Trade Agreement, 29 February 2016, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

<sup>21</sup> EU–US Transatlantic Trade and Investment Partnership EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (accessed 22 July 2017)

decision to resort to litigation or arbitration is also based on some reasons and motives that should be identified.

The above research questions should be consolidated and eventually lead to more general findings being made with respect to the effective legal protection of bank depositors, either by litigation or arbitration.

## **I. ORIGINALITY – CONTRIBUTION**

The originality of this work lies in three key points. First, the current thesis focuses on the protection of bank depositors, based on the idea of effectiveness, which is already developed in EU law in its procedural sense, focusing on access to justice. However, this thesis aims to use the principle of effectiveness in a rather substantial sense, considering whether individuals do not only access the justice, but also being remedied effectively. The assessment of this kind of effectiveness will consider *inter alia* the principle of proportionality, in relation to the context of the global financial crisis. This assessment focuses on substantially effective protection has not been applied by any court or tribunal yet.

Second, this thesis supports that bank deposits can be treated as investment, thus depositors could enjoy further protection offered by investment law. This subject is relatively new and is evolving. As the use of arbitration is a rather novel question in disputes concerning stakeholders of banks and other financial institutions, there are limited primary sources such as case law and arbitration awards to discuss and use in this research. There is lack of extensive literature and case law covering the use of international arbitration regarding measures imposed by States in response to a financial crisis, nor is there a significant body of research that discusses the effectiveness of this resolution method in this area regarding the particular period of the financial crisis.

Finally, the EU law regime excludes arbitration from its scope, as issues of EU law must be resolved within the EU legal order. This assumption of the exclusion of arbitration could be challenged, especially regarding the particular period of the financial crisis, based on two lines of arguments. Firstly, since the notions of litigation and arbitration have become interrelated to some extent, what is actually excluded from the scope of EU law should be reconsidered. For example, the EU has negotiated with other countries on areas of trade and investment and, among others, the agreements they suggest provide for an ICS that resonates with many of the features of arbitration, without labelling it as such. Secondly, the relevant EU legislation and case law leave some room for arbitration, even in matters concerning EU law. The main legal arguments that are discussed in support of a future role of arbitration on the EU legal regime, relates to Article 344 TFEU, Article 19(1) TEU, the mandate of courts and arbitral tribunals and Article 267 TFEU.

## **II. RESEARCH DESIGN AND TECHNIQUES**

This thesis aims to be based on secondary research, by using information already published but with the purpose of re-examining it from a particular point of view, or, in the case of new case law and arbitral awards, examining them for the first time. This is achieved through the content analysis of primary sources of information from the EU, national legal systems, and international legal orders, including sources of primary and secondary legislation. Some key pieces of legislation that will be used are the EU Treaties;<sup>22</sup> the ECHR;<sup>23</sup> the EU Charter<sup>24</sup> and some EU directives and regulations.<sup>25</sup>

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<sup>22</sup> For example, Consolidated Version of the Treaty on European Union [2008] OJ 1 115/13

<sup>23</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

<sup>24</sup> Charter of Fundamental Rights of the European Union [2000] OJ 1 364/01

<sup>25</sup> For example the Directive 2014/59/EU for the recovery and resolution of credit institutions and investment firms [2014] OJ 2 173/190 and the Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2000] OJ 2 012

Furthermore, various Bilateral Investment Treaties will be reviewed, as well as the ESM Treaty<sup>26</sup> and the TSCG.<sup>27</sup> Data from secondary sources of information are also collected, indicative being those referred to in the literature review. The study is a qualitative one, through comparative and argumentation analysis, by focusing only on the courts' approach towards the financial measures adopted by the EU, and the way that arbitration could become available for bank depositors in order to seek effective protection of their rights.

Generally, the research's two foundations are EU and international law. The relationship between these two legal regimes should be clarified in an early stage of the research, so as to have the abovementioned relationship between the various courts and the pieces of legislation, to be clarified as well. The EU legal order could be argued to be 'monist' in its relation to public international law,<sup>28</sup> based on the ontological assumption that the EU institutions and the Member States are bound by the international agreements concluded by the Union.<sup>29</sup> It is reiterated that while EU law is an autonomous legal order, supreme and directly effective, these international agreements, and also ECHR law, follow general international law norms on their primacy, validity and effect in national systems.

Regarding case law, this thesis studies disputes which deal with the effects of EU financial measures on bank depositors, but also bondholders, shareholders and investors. Analysis is performed, of cases of courts at the national level of EU Member States, at the EU level, and at the Public International law level, only from the scope of the ECHR. Moreover, decisions and awards of arbitral tribunals, for example ICSID and the ICC, are

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<sup>26</sup>Treaty establishing the European Stability Mechanism [2012]

<sup>27</sup>Treaty of Stability, Coordination and Governance in the Economic and Monetary Union [2012]

<sup>28</sup>R. A. Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in E. Cannizzaro *et al.* (eds), *International Law as Law of the European Union* (MartinusNijhoff Publishers, Leiden/Boston 2011)

<sup>29</sup> Article 216(2) TFEU

examined, not only within Europe, but also regarding the Argentinian financial crisis. In addition to the judgments themselves, case reports and comments on different cases are referred to. It should be noted that the legal value of the cases studied in this thesis varies. In particular, while court decisions are binding and constitute legal precedent, particularly those of EU courts and the supreme national courts, arbitral awards lack the binding effect and only affect the parties involved on the dispute.

### **III. STRUCTURE**

This thesis comprises of seven chapters including the Introduction and the Conclusion. Following this Introduction, Chapter 2 constitutes the Literature Review and consists of three legal orders, these being EU law, Public International law and International Investment law, being reviewed from a comparative perspective, focusing only on three specific dimensions. Firstly, access to justice is considered, as a central idea of the thesis is the comparative effective protection of bank depositors by litigation and arbitration. Secondly, the protection of bank depositors in the light of the measures for the management of the current global financial crisis should be measured on the basis of the principle of proportionality since public and private interests are involved and, mostly, in conflict. Finally, since bank deposits constitute property of the depositor, the protection of property and the right to possession in each legal order is examined.

Having reviewed the existing literature on the area in Chapter 2, the third chapter of this thesis identifies the nature of bank deposits, so as to extract the rights of depositors. Chapter 3 also examines whether bank deposits can qualify as investments, either under international and EU law. The purpose of this examination is to prove that bank depositors

could be entitled to the protection offered by investment law, in case they are regarded investors.

Chapter 4 proceeds to examine the various approaches that the CJEU, selected national courts and the ECtHR have followed when asked to review the legality of the post-crisis measures adopted at the EU and national level. Thus, analysis is made of some of the most prominent litigation arising out of the measures adopted in Ireland, Iceland, Greece, Portugal, Spain, Slovenia and Cyprus. In addition, selective case law of the ECtHR dealing either with the financial crisis or the protection of depositors and shareholders of failing banks. All the cases selected are studied from the perspective of the protection of individuals, either as depositors, shareholders or investors in banks. This chapter critically analyses the position of the CJEU, national courts and the ECtHR so far, from the scope of effectiveness of protection offered to applicants when confronting with the challenging task of ruling during the crisis.

Having outlined, in Chapter 4, the approach of national, supranational and international courts, the fifth chapter of this thesis proceeds to examine the approach that international arbitration has followed when arbitrators were asked to review the conformity of the post-crisis measures adopted at the EU and national level with the standards afforded to the protection of foreign investors. This chapter critically analyses the position of international arbitration so far, from the scope of effectiveness of protection offered to applicants, similarly to the measure assessing effectiveness developed in Chapter 4.

Finally, Chapter 6 deals with the position of arbitration in the EU legal order and considers the traditional relationship between EU law and arbitration and between EU law and International Investment law and some recent trends on arbitration in the EU, namely the CETA and the TTIP. The focus on the position of arbitration in the EU legal



order at this stage is inevitable, since it would be insufficient just to demonstrate that arbitral tribunals can offer more effective protection to bank depositors, if the awards rendered cannot have a standing in the EU legal order. Moreover, four arguments are developed to support that arbitration can be used by bank depositors in disputes regarding the financial crisis without being in contrast with EU law, with the final one suggesting that investment tribunals could be allowed to make direct references to the CJEU for a preliminary ruling.

Chapter 7 forms the Conclusion of this thesis where the research questions of this thesis will be re-addressed collectively using the findings and relevant comparative analysis of Chapters 2- 6. This chapter also addresses further research and relevant recent developments.

## CHAPTER TWO

### LITERATURE REVIEW

As described in the Introduction, the principal consideration of the thesis could be summarised by asking whether courts within the EU protect bank depositors effectively and/or whether arbitration would offer more protection, especially in the light of the current global financial crisis. Such research question requires the examination of the bank depositors' rights both at EU level and international level. The three legal orders that will be analysed in this section are EU law, Public International law and International Investment law.

The relationship between EU law and Public International law could be the subject of an entire chapter, but, for the purposes of this thesis, the discussion will only be limited to the reason the two legal orders are examined separately. It is expected that some of the arguments might be common between the two legal regimes. However, they are distinguished in the literature review, since they constitute different options for bank depositors regarding litigation. In other words, EU courts and Public International courts, particularly the ECtHR, constitute different options for bank depositors who wish to bring proceedings in the context of the financial crisis according to different, or, at least, not identical, legal standards.

The choice of International Investment law is based on the assumption that bank deposits constitute investments in a foreign country and should enjoy the protection offered by International Investment law.<sup>30</sup> For the purposes of this thesis, it is treated as a separate

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<sup>30</sup> It should be underlined that International Investment law is not applicable in the case of depositors in the home country, but only in the host country.

legal order, in the sense that though it constitutes a public law discipline, it was granted a private method of dispute resolution. In essence, the nature of disputes resolved by investment arbitration tribunals mainly constitutes issues of public concern because they mostly deal with measures adopted by the host State that affect *inter alia* foreign investors, therefore the typical bilateral relationship of private disputes is rather surpassed. For this reason, International Investment law is examined as a separate, probably 'hybrid' legal order, which is settled between public and private legal orders.<sup>31</sup>

The three legal orders are reviewed from a comparative perspective, focusing only on three specific dimensions. It should be mentioned here, as a limitation, or rather as an indication, that each dimension have also been developed by national legal orders, and sometimes their national perspective is the one applicable.

Firstly, access to justice is considered, as a central idea of the thesis is the comparative effective protection of bank depositors by litigation and arbitration. 'Access to justice', as a term, is not found easily in legal instruments. For example, the European Convention of Human Rights<sup>32</sup> provides for the protection of access to justice without making any express reference to the term.<sup>33</sup> In the same line, the Universal Declaration on Human Rights<sup>34</sup> protects the right to access to justice through the declaration of the right to an effective remedy.<sup>35</sup> The term was specifically used by the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

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<sup>31</sup> See S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), J. A. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 *Virginia Journal of International Law*

<sup>32</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

<sup>33</sup> The ECHR protects access to justice under Article 6 ('right to fair trial') and Article 13 ('right to remedy')

<sup>34</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

<sup>35</sup> UN General Assembly, Universal declaration of human rights, Resolution 217 A(III), UN Document A/810 at 71 (1948), Article 8: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'

Environmental Matters, which describes access to justice as ‘access to a review procedure before a court of law or another independent or impartial body established by law’.<sup>36</sup>

Secondly, the protection of bank depositors in the light of the measures for the management of the current global financial crisis should be measured on the basis of the principle of proportionality since public and private interests are involved and, mostly, in conflict. The principle of proportionality is founded on the axiom that the freedom of human beings is not absolute, thus the fundamental rights guaranteed by international, transnational and national legal orders controvert with the protection of the public interests and the society’s rights. However, fundamental rights are usually restricted due to arbitrary measures adopted by public authorities. Therefore, a balance is crucial to be established between the rights of individuals and the objectives of the State.

Finally, since bank deposits constitute property of the depositor, the protection of property and the right to possession in each legal order are examined. Property law defines objects of property for the purpose of the law, whether tangible or conceptual, and confers exclusive rights in these objects or ‘things’ that are enforceable against the whole world. These property rights, are socially recognised and legally protected or created exclusive powers over these objects, asserted against the world at large. Thus property law creates ‘things’ as normative concepts and assigns these things to natural or legal persons by way of conferring interests in them. The type of property right determines the extent of the granted exclusive power or interest.

Generally, the purpose of this literature review is to critically assess the legal framework and the existing literature on these three dimensions of the three abovementioned legal

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<sup>36</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘Aarhus Convention’) 1998, 2161 UNTS 447, Article 9(1)

orders, in order to analyse the relationship of this thesis with the existing scholarly work and to demonstrate the research questions leading this thesis.

## I. EU LAW

### 1. Access to justice

Under EU law, an explicit reference to access of justice is found in Article 67(4) TFEU, which reads as follows: ‘the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters’.<sup>37</sup> Similarly, the Charter of Fundamental Rights in Article 47, on the ‘right to an effective remedy and to a fair trial’, contains the term ‘access to justice’ in its third paragraph.<sup>38</sup> ‘Access to justice’ encompasses the right to an effective remedy before an independent and impartial tribunal which is established by law, the right to a fair and public hearing without undue delay, the right to legal aid when it is considered necessary and the right to effective remedies.

It constitutes the foundation of a Union based on the rule of law, as it is clearly stated in Article 2 TEU,<sup>39</sup> and this is evident by the numerous provisions that set out a system of legal remedies and procedures that authorise the CJEU to review the legality of measures adopted by the EU institutions. According to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Roda Golf* case, ‘[a]ccess to justice is a fundamental pillar of western legal culture [...]. Therefore the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised [...]. Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seized of those proceedings.’<sup>40</sup>

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<sup>37</sup> Article 67(4) TFEU

<sup>38</sup> Charter of Fundamental Rights of the European Union [2012] OJ 1 326/02

<sup>39</sup> Article 2 TEU

<sup>40</sup> Opinion of Advocate General Ruiz-Jarabo Colomer of 5 March 2009, *Roda Golf*, C-14/08, ECLI:EU:C:2009:134, paragraph 29

Within the EU legal order, access to justice includes access to the EU courts and access to national courts and tribunals. These two aspects were clearly illustrated in the case of *Les Verts v Parliament*, where it was stated that: ‘Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.’<sup>41</sup>As the quote indicates, the EU envisages access to courts at two levels: firstly, at EU level to enable citizens to challenge Union institutions’ decisions (Article 263 TFEU) and, secondly, at domestic level to challenge the decisions of the national authorities that interfere with EU law rights or to challenge the decisions of the EU institutions indirectly (Article 267 TFEU).

With regards to direct action, the legality of a decision of an EU institution could be challenged either by ‘privileged applicants’<sup>42</sup> or by natural or legal persons that are ‘directly and individually concerned’ with the decision in question. This condition for *locus standi* is quite restrictive. The traditional approach of the CJEU towards these two requirements was rather rigorous.<sup>43</sup>

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<sup>41</sup>Judgment of 23 April 1986, *Les Verts*, Case 294/83, ECLI:EU:C:1986:166, paragraph 23

<sup>42</sup>Member States, the Council, the Commission and the EU Parliament, as the guardians of the public interest, which can challenge any measure they believe that infringes Union law

<sup>43</sup>Judgment of 15 July 1963, *Plaumann*, Case 25/62, ECLI:EU:C:1963:17

Advocate General Jacobs supported the necessity of altering the interpretation of ‘individual concern’ and adopting a more flexible approach.<sup>44</sup> While the CJEU supported that Article 267 TFEU provides private applicants with unimpeded access to justice via the procedure of preliminary reference by national courts, Advocate General Jacobs argued that this avenue does not offer effective judicial protection and sometimes individuals remain without a remedy. As he explained: ‘Access to the Court of Justice via [Article 267 TFEU] is however not a remedy available to individual applicants as a matter of right. National courts may refuse to refer questions, and although courts of last instance are obliged to refer under the third paragraph of [Article 267 TFEU], appeals within the national judicial systems are liable to entail long delays which may themselves be incompatible with the principle of effective judicial protection and with the need for legal certainty’.<sup>45</sup> What he proposed is to recognise that an applicant is individually concerned ‘where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.’<sup>46</sup> Two years later, the same conclusion was reached by the General Court in the case of *Jego-Quéré*.<sup>47</sup> However, this judgment was indirectly overruled by the CJEU in *UPA* case,<sup>48</sup> where it had to be considered whether a person not being individually concerned, could have standing to bring an action for annulment of a regulation, based only on the lack of any national legal remedy which contradicted to the principle of effective judicial protection. As it was established, the wording of Article 230(4) EC Treaty<sup>49</sup> should be followed and cannot be affected by the system of legal remedies of the Union.<sup>50</sup> At the same time, the CJEU also indicated that

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<sup>44</sup>Opinion of Advocate General Jacobs of 21 March 2002, *Unión de Pequeños Agricultores*, C-50/00 P, ECLI:EU:C:2002:197

<sup>45</sup>*Ibid.* paragraph 42

<sup>46</sup>*Ibid.* paragraph 60

<sup>47</sup> Judgment of 3 May 2002, *Jégo-Quéré*, T-177/01, ECLI:EU:T:2002:112, paragraphs 41-51

<sup>48</sup> Judgment of 25 July 2002, *Unión de Pequeños Agricultores*, C-50/00 P, ECLI:EU:C:2002:462

<sup>49</sup>Treaty establishing the European Community (Nice consolidated version) [2002] OJ 1 340/173, Article 230(4)

<sup>50</sup>*Ibid.* paragraph 37



‘the European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights’.<sup>51</sup> This statement could be argued to have let an application of Article 230(4) EC Treaty, even in the absence of individual concern, if no effective legal remedy existed under EU law.<sup>52</sup>

Before the Lisbon Treaty, private litigants had *locus standi* only if the EU measure in question directly affected their legal position and they were ‘sufficient in themselves and require no implementing provisions’.<sup>53</sup> Consequently, private applicants could challenge EU Regulations, even if not very easily, but not EU Directives.<sup>54</sup> Such an argument was partly addressed by the CJEU in the *Salamander* case, where it was demonstrated that directives could be challenged directly, but it was admitted that the requirement of direct concern was difficult to be met, because ‘a directive cannot of itself impose obligations on an individual and may therefore not be relied on as such against him’.<sup>55</sup> Thus, private litigants were used to be directed to their national courts to challenge the legality of directives when reviewing their transposition into their national legal systems.<sup>56</sup>

The Lisbon Treaty tried to promote effective judicial protection of private litigants who challenge the legality of EU acts, by ‘relaxing’ the conditions of *locus standi* under Article 263 TFEU.<sup>57</sup> Currently, natural or legal persons are allowed to challenge ‘regulatory

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<sup>51</sup>*Ibid.* paragraph 38

<sup>52</sup> E. Biernat, ‘The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community’ (JMMWP 12/03, New York University School of Law, 2003) 38

<sup>53</sup>Judgment of 23 April 1986, *Les Verts*, Case 294/83, ECLI:EU:C:1986:166

<sup>54</sup>By their very nature, EU Regulations require national implementing measures, while the implementation of EU Directives depends on the discretion of the Member States.

<sup>55</sup> Judgment of 27 June 2000, *Salamander*, J T-172/98 and T-175/98 to T-177/98, ECLI:EU:T:2000:168, paragraph 54

<sup>56</sup>S. Peers and M.Costa, ‘Judicial Review of EU Acts after the Treaty of Lisbon’ (2012)8 *European Constitutional Law Review*, 84

<sup>57</sup> Judgment of 27 February 2014, *Stichting Woonpunt*, C-132/12 P, ECLI:EU:C:2014:100, paragraph 43

acts'<sup>58</sup> that do not 'entail implementing measures'<sup>59</sup> without having to demonstrate 'individual concern'.<sup>60</sup> The CJEU clarified that a restrictive interpretation of the admissibility conditions of Article 263(4) TFEU, does not impede the right to an effective judicial remedy.<sup>61</sup> In addition, it was supported that the EU Treaties provide a complete system of remedies, by offering the option of preliminary reference, in cases where *locus standi* cannot be established for the purpose of Article 263 TFEU and, effective judicial protection for individuals is therefore guaranteed.<sup>62</sup> In other words, preliminary reference counterbalances individuals' limited access to direct actions, thus ensuring their effective protection against illegal acts adopted by the EU institutions. Despite this argument, the practice indicates that in some cases, for example in the case of the financial crisis, none of the two mechanisms offered effective access to justice to private litigants, since they could not meet the requirements of Article 263 TFEU and their respective national courts were reluctant to activate the preliminary reference mechanism under Article 267 TFEU. This will be further analysed in Chapter 4.

Consequently, on the assumption that access to the Court for individuals is still rather limited,<sup>63</sup> despite the Lisbon Treaty amendment to Article 263, it is challenged whether such a gap can be filled by recourse to the preliminary ruling procedure. Though generally it is more possible for an individual to challenge a Community act through Article 267, due to the absence of specific requirements for *locus standi*, there are also some limits on

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<sup>58</sup> Judgment of 3 October 2013, *Inuit Tapiriit Kanatami*, C-583/11 P, ECLI:EU:C:2013:625, paragraph 61: 'regulatory act' is a non-legislative act of general application adopted in accordance with a procedure different from the legislative one. This interpretation was argued to be consistent with the objective of enabling individuals 'to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts' (paragraph 60)

<sup>59</sup> Judgment of 29 November 2016, *T&L Sugars*, T-279/11, ECLI:EU:T:2016:683

<sup>60</sup> Article 263(4) TFEU

<sup>61</sup> As it is provided by Article 47 CFR, Judgment of 29 November 2016, *T&L Sugars*, T-279/11, ECLI:EU:T:2016:683, paragraphs 43-44

<sup>62</sup> *Ibid.*, paragraph 45

<sup>63</sup> This will be extensively discussed in Chapter 4

its application. Firstly, the decision to make a reference to the CJEU and the parameters of the question depend on the national court itself, thus it is out of the individuals' control. As the CJEU stated '[Article 267 TFEU] does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of [Article 267]'.<sup>64</sup> In essence, the preliminary ruling procedure is, in principle, not a judicial remedy for individuals, but rather a means of cooperation between national courts and the ECJ when an action is brought before national courts.<sup>65</sup> Moreover, Article 277 TFEU provides that preliminary reference can only be made for a Union act which is at issue in an actual legal dispute before a national court.

Though in practice both Articles may have the same final effect, namely the annulment of the act in question, a ruling of invalidity by the CJEU, under Article 267 TFEU, requires national courts and the EU institutions to take all the appropriate measures to give effect to that ruling. It is argued that preliminary rulings do not create enforceable obligations, since only very limited remedies are available to unsatisfied private parties.<sup>66</sup> In fact, a failure to comply with the obligation to make a preliminary reference can have the effect of an infringement procedure against the particular Member State, a measure that rests on the discretion of the EU Commission.<sup>67</sup> However, such effect could still leave

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<sup>64</sup> Judgment of 6 October 1982, *CILFIT* Case 283/81, ECLI:EU:C:1982:335, paragraph 7

<sup>65</sup>Joined Opinion of Advocate General Mengozzi of 26 October 2006, *Gestoras Pro Amnistía*, C-354 and 355/04 P, ECLI:EU:C:2006:667, paragraph 95

<sup>66</sup> R. Mastroianni and A. Pezza, 'Striking the right balance: limits on the right to bring an action under Article 263(4) of the Treaty on the Functioning of the European Union' (2015) 30 *American University International Law Review*, 774

<sup>67</sup>Article 258 TFEU and Judgment of 9 December 2003, *Commission v Italy*, C-129/00, ECLI:EU:C:2003:656, paragraph 29; Judgment of 14 February 1989, *Star Fruit*, Case 247/87, ECLI:EU:C:1989:58, paragraph 11

the applicants without an effective remedy, since the infringement procedure has no consequences on the national judicial decision that was taken without preliminary reference. Since the decision of the national court has reached its final stage, it cannot be challenged for a breach of the obligation to refer to the ECJ,<sup>68</sup> even if doing so would enable the Member State to remedy that breach.

Regarding remedies against national authorities before national courts, the ECJ has guaranteed Union rights by developing the principles of direct effect and supremacy of EU law. According to the principle established in the *Van Gend en Loos* case, EU law confers rights on individuals, which must be directly enforced and protected by national courts.<sup>69</sup> Furthermore, the CJEU in *Costa v ENEL* stated that the EU Treaties have created their ‘own legal system which [...] became an internal part of the legal systems of the Member States and which their courts are bound to apply’.<sup>70</sup> Thus, under EU law, individuals are entitled to access to EU courts and national courts in order to ensure the protection of their rights, through the effective enforcement of Union law. As the case law of the CJEU demonstrated, a Member State can be responsible for the harm caused to the effectiveness of EU law rules and the infringement of individuals’ rights if it cannot repair the breach of EU law it previously committed.<sup>71</sup>

In addition to Articles 263 and 267 TFEU and the relevant case law, there are other Treaty provisions and EU Directives dealing with access to justice. As already stated, Article 67(4) TFEU provides for access to justice in cross-border disputes, based on ‘the principle of mutual recognition of judicial and extra-judicial decisions in civil matters’, in an effort

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<sup>68</sup> Judgment of 16 March 2006, *Kapferer*, C-234/04, ECLI:EU:C:2006:178, paragraph 21

<sup>69</sup> Judgment of 5 February 1963, *Van Gend en Loos*, Case 26/62, ECLI:EU:C:1963:1, p. 3.

<sup>70</sup> Judgment of 15 July 1964, *Costa v ENEL*, Case 6/64, ECLI:EU:C:1964:66, p. 593

<sup>71</sup> Judgment of 19 November 1991, *Francovich*, C-6/90 and C-9/90, ECLI:EU:C:1991:428; Judgment of 5 March 1996, *Factortame*, C-46/93 and C-48/93, ECLI:EU:C:1996:79

to achieve ‘a Europe of justice’, through an Area of Freedom, Security and Justice (AFSJ). In its AFSJ Communication, the Commission underlined that priority should be given to mechanisms that expedite access to the courts for private applicants, so that they can enforce their rights throughout the Union.<sup>72</sup> Access to justice is also considered in various EU Directives. The Free Movement Directive provides for judicial redress procedures available to those EU citizens and their families that are refused to enter or reside in another Member State.<sup>73</sup> Similarly, the Racial Equality Directive provides that individuals who have been subject to discrimination on racial and ethnic grounds should be entitled to all the appropriate ‘judicial and/or administrative procedures’ so as to be adequately legally protected in any Member State.<sup>74</sup> Access to justice is facilitated by the Legal Aid Directive which demonstrates that ‘all persons involved in civil or commercial [cross-border] disputes are able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings’.<sup>75</sup> Finally, the Mediation Directive aims at facilitating and improving access to justice by promoting extrajudicial dispute resolution methods, such as mediation.<sup>76</sup>

The above discussion leads to the conclusion that access to justice is rather restricted in the EU law regime. Firstly, while Article 263 TFEU gives the right to private litigants to bring direct actions against Union institutions’ decisions, the conditions of admissibility are restrictively interpreted. Secondly, notwithstanding that citizens have the option of indirectly challenging the decisions of national or EU authorities that are against their EU

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<sup>72</sup>B7-0155/2009, European Parliament resolution on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme

<sup>73</sup>Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ 2 158/1

<sup>74</sup> Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ 2 180

<sup>75</sup> Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ 2 26

<sup>76</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters [2008] OJ 2 136

law rights through Article 267 TFEU, the whole process is exclusively depended on the discretion of the national court. Finally, as it is evident, though access to justice is enshrined for by EU Treaties, only instruments of secondary legislation facilitate access to justice for all EU citizens. Since EU Directives are characterised by indirect effect into Member States, this means that access to justice can be hindered or restricted, to some extent, based on the discretion of each Member State to implement the relevant Directives in a particular manner, thus the overall effectiveness of the operation of access to justice could be doubted. In the context of this thesis, all these findings signifies that bank depositors will face several hurdles when trying to bring cases against the measures affecting them, particularly in the sensitive framework of the financial crisis, where emergency conditions and political considerations are involved.

## **2. Proportionality**

Among the general principles of EU law is the principle of proportionality, which is enshrined in Article 5 TEU, but was mostly developed by the CJEU. It applies to legislative and administrative measures adopted by EU institutions and to national measures which fall within the EU law scope and it is considered as ‘the preferred procedure for managing disputes involving an alleged conflict two rights claims’,<sup>77</sup> those conflicts being of either constitutional<sup>78</sup> or administrative nature.<sup>79</sup>

It originates from different legal traditions of Member States with the most influencing being the German public law<sup>80</sup> and the French administrative law<sup>81</sup> and less directly

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<sup>77</sup> T. – I. Harbor, ‘The Function of Proportionality Principle in EU law’ (2010) 16 *European Law Journal*, 158

<sup>78</sup> Disputes of constitutional nature are those where a provision that protects a right is alleged to be against the public interest

<sup>79</sup> Disputes of constitutional nature are those where a private interest is alleged to be against the public interest

<sup>80</sup> The notion of *Verhältnismäßigkeit*

<sup>81</sup> *Théorie du bilan*

related, the English concept of reasonableness. The very notion of proportionality was supranationalised<sup>82</sup> by being recognised as a fundamental principle of the Union law.<sup>83</sup> ‘This legal technique is intended to allow the Court not to invoke national laws but rather to build up an autonomous EU legal order so that the EU legal norms suffice to answer the legal issues presented before the Court.’<sup>84</sup> Proportionality bears all the characteristics as a general principle of EU law. In particular, it is inherent in almost all the applications of the law,<sup>85</sup> and, as noted by Advocate General Jacobs, ‘as for the principle of proportionality, there are few areas of Community law, if any at all, where that is not relevant.’<sup>86</sup> Furthermore, it enjoys universal recognition, which means that it exists in various national and international legal orders. It is also differentiated by rules of law, in the sense that it forms the basis of the very institution of law and it represents an ideal of justice, while rules of law simply provide some rights or duties on parties.<sup>87</sup>

For the court to decide that a measure is infringing, it has to examine three questions: firstly, whether the particular measure is appropriate to achieve the objective pursued; secondly, whether the measure is necessary to achieve that objective; and, thirdly, whether the burden imposed by the measures is disproportionate to the benefits secured (proportionality *strict sensu*). The appropriateness (or suitability) test deals with the relationship between the means and the end, the necessity test looks at any less restrictive

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<sup>82</sup> A. Portuese, ‘Principle of Proportionality as Principle of Economic Efficiency’ (2013) 19 *European Law Journal*, 618

<sup>83</sup> Judgment of 17 December 1970, *Köster*, C-25/70, ECLI:EU:C:1970:115

<sup>84</sup> A. Portuese, ‘Principle of Proportionality as Principle of Economic Efficiency’ (2013) 19 *European Law Journal*, 618

<sup>85</sup> N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer, 1996), 115

<sup>86</sup> Opinion of Advocate General Jacobs of 6 April 1995, *Commission v Greece, affaire retiree*, C-120/94, ECLI:EU:C:1995:109, paragraph 70 (*case withdrawn*)

<sup>87</sup> T. – I. Harbor, ‘The Function of Proportionality Principle in EU law’ (2010) 16 *European Law Journal*, 159

measures that could pursue the same purpose and the *strict sensu* test focuses on the burden imposed on individuals.<sup>88</sup>

The principle of proportionality is applied by the CJEU when the legality of EU measures is challenged in direct proceedings and by national courts as well. Generally, as a ground of review of EU measures, proportionality focuses on the balance of private interests adversely affected by the measure against the public interests which the measure pursues to achieve. Additionally, as a ground of review of national measures, it focuses on the protection of fundamental freedoms, as they are enshrined in the EU Treaties, if a measure restricts them.<sup>89</sup>

Legal theorists, most notably Robert Alexy, have presented the principle of proportionality as the gold standard of constitutional adjudication, since both rights and principles are taken into account to achieve the correct balance. ‘Constitutional judgments are only correct if they correspond to the outcome of an appropriate balancing of principles’.<sup>90</sup> Such an approach implies that rights are not absolute and can be restricted for the protection or promotion of some public policies. As Alexy further supports: ‘[t]he Law of Balancing requires the increasing intensity of interference with liberty to be matched by an increasing weight of reasons justifying the interference’.<sup>91</sup> The legal theory on proportionality in the EU legal order is considered by Harbo, who challenges its applicability and states that ‘[t]he dissection of the principle reveals that the principle has no clear or fixed substantial meaning’<sup>92</sup> and ‘[a]t some stage one could even question

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<sup>88</sup> M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (1<sup>st</sup> edn, Oxford University Press, 2012)

<sup>89</sup> See T. Tridimas, ‘The Principle of Proportionality in Community Law: from the rule of law to market integration’ (1996) 31 *Irish Jurist N.S* 83

<sup>90</sup> R. Alexy and J. Rivers, *A Theory of Constitutional Rights*, (OUP, 2002) 210

<sup>91</sup> *Ibid.*, 231

<sup>92</sup> T. – I. Harbor, ‘The Function of Proportionality Principle in EU law’ (2010) 16 *European Law Journal*, 160



whether the court, although claiming to do so, is really applying the principle of proportionality in the first place'.<sup>93</sup> As Lenaerts and Gutiérrez-Fons argue, while evaluating the existence of balancing in the EU legal order, 'given that no principle encapsulating an individual right in the general interest is absolute, the courts must engage in balancing to evaluate whether a legal norm is consistent with a general principle'.<sup>94</sup> In other words, it is supported that a kind of balancing exercise exists, but not in the form which either Alexy or Harbo recommend.<sup>95</sup>

Proportionality is an essential requirement of the justification of national measures, adopted in reliance upon provisions in the EU legislation, which are challenged on the basis that they limit to some extent fundamental freedoms. It is also a requirement of the justification of other national measures concerning EU law, which restrict other EU law rights.<sup>96</sup> Moreover, Member States should also act proportionately when they are applying EU measures, such as Directives. Even in areas where EU law offers some discretion to the Member States to choose what measure to implement and to what extent to protect the relevant public interest, they still have to act proportionately within the limits of their choices. As Advocate General Van Gerven stated 'it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality. That principle has two aspects. First, in order for a national rule to be justified under Community law it must be objectively necessary in order to help achieve the aim sought

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<sup>93</sup>T. – I. Harbor, 'The Function of Proportionality Principle in EU law' (2010) 16 *European Law Journal*, 160, at 171

<sup>94</sup>K. Lenaerts and J. Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) *Common Market Law Review*, 1650

<sup>95</sup> W. Sauter, 'Proportionality in EU Law: A Balancing Act?' (January 25, 2013) *TILEC Discussion Paper No. 2013-003*, 4

<sup>96</sup>For example, the right to equal treatment or non-discrimination, and the right to family life

by the rule: that means that it must be useful (or relevant) and indispensable(...) Secondly, (...) the Member State must nevertheless drop the rule, or replace it by a less onerous one, if the restrictions caused to intra-Community trade by the rule are disproportionate, that is to say if the restrictions caused are out of proportion to the aim sought by or the result brought about by the national rule.’<sup>97</sup>

A discussion regarding the role of the principle of proportionality in cases where the scope of EU law is blurred, such as in the context of the financial crisis, can arise. As far as most mechanisms employed by the Eurozone Member States in order to deal with the crisis were declared to fall outside the remits of the EU legal order, it is questioned whether the principle of proportionality, in the way it is envisaged by EU law, should be applicable or whether Member States have been given the absolute freedom to act the way they wish beyond any control of the proportionality of their actions. At the same time, it should not be ignored that the principle of proportionality also exist at the national legal orders, so each Member State’s courts have already interpreted and applies the proportionality principle in domestic disputes. The relevant case law is discussed in Chapter 4.

It is argued that the interpretation of proportionality varies according to the areas in which is to be employed.<sup>98</sup> As Tridimas supports, this difference in interpretation is more evident if it is considered in the light of the distinction between the horizontal<sup>99</sup> and the vertical<sup>100</sup> dimensions of the application of the principle. On the one hand, Community measures are only quashed if they are held *manifestly inappropriate* to achieve the

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<sup>97</sup> Opinion of Attorney General Van Gerven of 11 June 1991, *Stephen Grogan*, C-159/90, ECLI:EU:C:1991:249, paragraphs 26 - 27

<sup>98</sup>P. Craig and G. de Búrca, *EU Law* (3<sup>rd</sup> edn, Oxford University Press, 2003), 371–380

<sup>99</sup> Assessing Community regulation

<sup>100</sup> Assessing national regulation

intended purpose, even if they interfere with the four fundamental freedoms. On the other hand, national measures are quashed if a *less restrictive alternative* exists but it has not been adopted.<sup>101</sup> Furthermore, De Búrca claims that ‘when action is brought against the Community in an area of discretionary policy-making power, a looser form of the proportionality inquiry is generally used’, because of the difference on the importance of the measure’s purpose and on the nature of the right affected.<sup>102</sup> Again, these arguments lead to some considerations regarding the measures adopted by the Eurozone Member States aiming to handle the financial crisis. Since they have been characterised as an exercise of one of the Member States’ competences, it is inferred that the principle of proportionality, if applicable, would be applied in a more flexible sense.

Thus, the objectiveness of proportionality could be challenged, based on the argument that it lacks neutrality in relation to value, and it is biased, for the achievement of EU integration. Sometimes, the court accepts interferences with fundamental freedoms, even if it is contrary to private interests, if such interferences contribute to the integration of the internal market of the Union. In such a case, the principle of proportionality operates as a conventional public law principle.<sup>103</sup>

The following brief analysis of the case law of the CJEU leads to the conclusion that the principle of proportionality differs in application when used in relation to economic rights<sup>104</sup> and fundamental freedoms, non-economic rights and Community measures.

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<sup>101</sup>T. Tridimas, *The general principles of EU law* (2<sup>nd</sup> edn, Oxford University Press, 2006)

<sup>102</sup>G. de Búrca, ‘The principle of proportionality and its application in EC law’ (1993) 13 *Yearbook of European Law*, 146

<sup>103</sup> P. Hungerford – Welch, ‘Case Comment: R. (on the application of Lumsdon) v Legal Services Board: Legal representation - Quality Assurance Scheme for Advocates – guidance Supreme Court: Lord Neuberger, Lady Hale, Lord Clarke, Lord Reed and Lord Toulson: June 24, 2015; [2015] UKSC 41; [2015] 3 W.L.R. 121’ (2015) 11 *Criminal Law Review* 894, at 896

<sup>104</sup>See C. Gorga, ‘Toward the Definition of Economic Rights’ (1999) 2 *Journal of Markets & Morality*, 89 ‘Economic rights are rights of access to resources—such as land, labor, physical, and financial capital—that are essential for the creation, legal appropriation, and market exchange of goods and services.’

Cases on economic rights and fundamental freedoms were the *Internationale Handelsgesellschaft*,<sup>105</sup> concerning Community measures on the common market for agricultural products, and *Hauer*,<sup>106</sup> where the CJEU had to consider whether some EU administrative measures infringed the right to property, since they prohibited the landowner from planting certain types of vines, and the Court finally decided that the measures in question were proportionate in both cases. The horizontal dimension of these cases could be compared to the vertical dimension of the *de Peijper* case,<sup>107</sup> which concerned national measures infringing fundamental freedoms. In that case, the regulatory measure was found disproportionate with public health protection, since, as it was held, only the least restrictive alternative would be accepted as proportionate. It should be noted that when applying the principle of proportionality, the CJEU treats both human rights and fundamental freedoms as fundamental rights. According to a CJEU's judgment, 'the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance'.<sup>108</sup>

It is assumed that in cases of non-economic rights, the CJEU applies the principle of proportionality equally, irrespective of horizontal or vertical dimension. In the *Hautala* case<sup>109</sup> the protection of the right to information from public authorities had to be balanced with the protection of EU's relations with third countries. The principle of proportionality required partial access to documents, up to the extent that it was appropriate and necessary without endangering the interests of the Union. The

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<sup>105</sup>Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, Case 11/70, ECLI:EU:C:1970:114

<sup>106</sup>Judgment of 13 December 1979, *Hauer*, Case 44/79, ECLI:EU:C:1979:290

<sup>107</sup>Judgment of 20 May 1976, *de Peijper*, Case 104/75, ECLI:EU:C:1976:67

<sup>108</sup> Judgment of 7 February 1985, *ADBHU*, Case 240/83, ECLI:EU:C:1985:59

<sup>109</sup> Judgment of 6 December 2001, *Hautala*, C-353/99 P, ECLI:EU:C:2001:661

*Schmidberger* case<sup>110</sup> examined whether the fundamental freedom of movement of goods was restricted, not by a national administrative or legislative measure, but by a human right, namely the right to freedom of expression. The CJEU underlined that such a restriction could be justified if it promoted the general interest and did not operate as a disproportionate interference, impairing the very substance of the right.<sup>111</sup> The freedom of expression was held to predominate of the free movement of goods. This human rights-friendly approach against fundamental freedoms was underlined by the CJEU in the *Laval* case.<sup>112</sup> The right to take collective action had to be balanced with the freedom to provide services, with the reasoning emphasising that the right to take collective action for the protection of the workers of the host State, constitutes an overriding reason of public interest which justifies a restriction on the freedom of services.<sup>113</sup>

Any Community administrative or legislative measures which do not infringe any individual right, can be quashed only if they are held manifestly inappropriate. In the *Fedesa* case,<sup>114</sup> concerning the agriculture policy of the Union, the CJEU based its decision solely on the manifestly inappropriate test. According to Advocate General Mischo, ‘[a]s regards proportionality in the narrow sense, that is to say the weighing of damage caused to individual rights against the benefits accruing to the general interest, it should be stated that the maintenance of public health must take precedence over any other consideration’.<sup>115</sup>

This manifestly inappropriate test applied equally in cases that do not deal with public health, but, instead, deal with areas where EU institutions enjoy wide discretion, such as

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<sup>110</sup> Judgment of 12 June 2003, *Schmidberger*, C-112/00, ECLI:EU:C:2003:333

<sup>111</sup> *Ibid*, paragraph 80

<sup>112</sup> Judgment of 18 December 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809

<sup>113</sup> *Ibid*, paragraph 103

<sup>114</sup> Judgment of 13 November 1990, *Fedesa and Others*, C-331/88, ECLI:EU:C:1990:391

<sup>115</sup> Opinion of Advocate General Mischo of 8 March 1990, *Fedesa and Others*, C-331/88, ECLI:EU:C:1990:109, paragraph 42

social policy. ‘The Council must be allowed a wide discretion in an area which involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited, to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.’<sup>116</sup>

Any administrative regulation, which by its nature does not infringe any human right, causes economic consequences for private parties, sometimes to such an extent that their economic rights are infringed. It is thus necessary, to make a distinction between infringement of economic interests and infringement of economic rights, though the CJEU has not distinguished them yet. While the principle of proportionality clearly applies in an alleged infringement of economic rights, it is unclear whether an infringement of economic interests should also be proportionate to the purpose to be achieved. In the *Skimmed milk* cases,<sup>117</sup> some Council measures of economic policy were challenged and the CJEU quashed them as they were held disproportionate, since the measures were not necessary to achieve the objective in question, though no less restrictive alternatives were proposed.

In the recent *Kadi* cases,<sup>118</sup> a measure of common foreign and security policy was challenged on the basis that it infringed the fundamental human right to property. Even if the measure was finally held to constitute restriction of the right to property, the CJEU commented that ‘(...) the right to property is one of the general principles of Community

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<sup>116</sup>Judgment of 12 November 1996, *United Kingdom v Council*, C-84/94, ECLI:EU:C:1996:431, paragraph 58

<sup>117</sup>*Skimmed milk* cases: Judgment of 5 July 1977, *Bela-Muhle*, Case 114/76, ECLI:EU:C:1977:116; Judgment of 13 February 1979, *Granaria*, Case 101/78, ECLI:EU:C:1979:38; Judgment of 5 July 1977, *Oelmuehle and Becher*, Joined Cases 119 and 120/76, ECLI:EU:C:1977:118

<sup>118</sup>Judgment of 3 September 2008, *Kadi and Al Barakaat*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461; Judgment of 30 September 2010, *Kadi v Commission*, T-85/09, ECLI:EU:T:2010:418

law. It is not, however, absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.’<sup>119</sup> As it could be reiterated, the principle of proportionality might be argued to lack objectiveness, since its value is not neutral in order to achieve EU integration and public policy purposes of each Member State separately. Therefore, it is expected that this lack of objectiveness will be apparent in the cases before national or EU courts challenging the measures adopted in response to the financial crisis, due to the high level of public policy, both of the Union as a whole and of each Member State apart, involved.

### **3. Right to property**

Property law has always led a dormant existence within the ever-increasing body of EU law. The existence of Article 345 TFEU, which provides that nothing in the Treaties shall prejudice the system of property ownership in the Member States, has often created the impression to Member States, academics and sometimes the EU institutions themselves, that the Union is precluded from becoming involved in the area of property law.<sup>120</sup> The wording of the Treaty Article could suggest that regulation of property law is under the exclusive competence of the Member States and, thus, EU institutions cannot legislate in this field of law. However, there are existing elements of EU property law in several Regulations and Directives,<sup>121</sup> and there are various CJEU judgments concerning issues

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<sup>119</sup>Judgment of 3 September 2008, *Kadi and Al Barakaat*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, paragraph 355

<sup>120</sup> E. Ramaekers, ‘Classification of objects by the European Court of Justice: movable immovables and tangible intangibles’ (2014) 39 *European Law Review*, 447

<sup>121</sup>Directive 2002/47/EC on financial collateral arrangements [2002] OJ 2 168, Green Paper on Mortgage Credit in the EU COM(2005) 237 final, White Paper on Mortgage Credit Markets COM(2007) 807 final, Green Paper on Wills and Succession COM(2005) 65 final

of property law.<sup>122</sup> As Ramaekers argues, though there is not any specific EU piece of legislation dealing exclusively with property law, ‘that does not mean that national property law is exempted from the influence of the internal market or from the scrutiny exercised by the CJEU’.<sup>123</sup> The same scholar supports that Article 345 TFEU limits but does not prevent the application of EU law to the regulation of the right of ownership by Member States.<sup>124</sup> Evidently, in the *Fearon* case, the CJEU established that Article 345 TFEU does not exclude the application of the Treaty to questions of state or private ownership; it instead, underlines that these powers could belong to the Member States, but not as far as the exercise of those powers is concerned.<sup>125</sup>

Property rights were recognised as fundamental rights by the CJEU in the *Nold* case, where it was demonstrated that the protection of property rights does not cover mere commercial interests or opportunities, such as shares of the market.<sup>126</sup> In the *Hauer* case the CJEU considered that the public interest can limit the right to property.<sup>127</sup> In this case, it was held that the owner was not deprived of his property, since he remained free to dispose of it or to use it otherwise.<sup>128</sup> Apart from the public interest, the CJEU demonstrated that the right to property does not encompass the maintenance of an advantage that existed only for a limited period. In *Biovilac*, the CJEU clarified that ‘an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it

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<sup>122</sup> Judgment of 4 June 2002, *Commission v Portugal*, C-367/98, ECLI:EU:C:2002:326, paragraph 48; Judgment of 4 June 2002, *Commission v France*, C-483/99, ECLI:EU:C:2002:327, paragraph 44; Judgment of 4 June 2002, *Commission v Belgium*, C-503/99, ECLI:EU:C:2002:328, paragraph 44

<sup>123</sup>E. Ramaekers, ‘Classification of objects by the European Court of Justice: movable immovables and tangible intangibles’ (2014) 39 *European Law Review*, 448

<sup>124</sup>B. Akkermans and E. Ramaekers, ‘Article 345 TFEU (ex. Article 295 EC), Its Meanings and Interpretations’ (2010) 16 *European Law Journal*, 292

<sup>125</sup> Judgment of 6 November 1984, *Fearon*, Case 182/83, ECLI:EU:C:1984:335, paragraphs 6-8

<sup>126</sup> Judgment of 14 May 1974, *Nold*, Case 4/73, ECLI:EU:C:1974:51, p.491

<sup>127</sup> Judgment of 13 December 1979, *Hauer*, Case 44/79, ECLI:EU:C:1979:290

<sup>128</sup>*Ibid.*, paragraph 19



enjoyed at a given time'.<sup>129</sup> Similarly, in *Bananas* case, the CJEU stated that 'no economic operator can claim a right to property in a market share which he held at a time before the establishment of a common organization of a market, since such market share constitutes only a momentary economic position exposed to the risks of changing circumstances'.<sup>130</sup>

It could be argued that the right to property is not difficult to be violated by EU legislation because of the powerful authority of the Union in the area of economic regulation. The case law of the CJEU shows that a measure which interferes with private property is held reasonable, and thus legitimate, if it pursues a public interest such as the establishment of the internal market,<sup>131</sup> the management of sector crises,<sup>132</sup> the enhancement of consumers' confidence<sup>133</sup> and the effectiveness of economic sanctions.<sup>134</sup> It is expected that the survival of the Eurozone and the completion of the European Banking Union will be soon included in this list after the case law on the recent financial crisis.

It is important to note that EU law does not contain a general principle of compensation, and the CJEU case law illustrates that a reduction of owner's benefit from the property does not constitute violation of the right to property and it is not compensable.<sup>135</sup>

Since Member States are entitled to regulate their property law independently, there are many differences between them. In Roman law countries, such as Germany, 'things' (res) are considered only physical objects, thus rights are excluded as they are not corporeal.<sup>136</sup>

On the other hand, under the law of Austria, the notion of 'thing' encompasses everything

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<sup>129</sup> Judgment of 6 December 1984, *Biovilac*, Case 59/83, ECLI:EU:C:1984:380, paragraph 23

<sup>130</sup> Judgment of 5 October 1994, *Germany v Council*, C-280/93, ECLI:EU:C:1994:367, paragraph 79

<sup>131</sup> Judgment of 29 January 1998, *Dubois et Fils*, T-113/96, ECLI:EU:T:1998:11, paragraph 75

<sup>132</sup> Judgment of 17 July 1997, *Schiffahrt and Stapf*, C-248 and C-249/95, ECLI:EU:C:1997:377

<sup>133</sup> Judgment of 11 September 2002, *Pfizer Animal Health*, T-13/99, ECLI:EU:T:2002:209

<sup>134</sup> Judgment of 30 July 1996, *Bosphorus*, C-84/95, ECLI:EU:C:1996:312

<sup>135</sup> Judgment of 15 April 1997, *The Irish Farmers Association*, C-22/94, ECLI:EU:C:1997:187

<sup>136</sup> BGB (Civil Code), Section 2 § 90 <http://dejure.org/gesetze/BGB/90.html>

distinct from the person and usable.<sup>137</sup> The distinction between tangibles and intangibles is used by English law, as well as by Cyprus law, which calls things as ‘choses’.<sup>138</sup> According to The Sale of Goods Law of 1994, only actionable claims and money are excluded from ‘goods’.<sup>139</sup> While German law strictly separates possession from ownership, with the former being a mere fact and the latter being an absolute right, English law does not clearly distinguish the two concepts (‘an owner of a chattel is the person with the best possessory interest in it’).<sup>140</sup> In Cyprus, both ownership and possession are recognised as proprietary rights.<sup>141</sup>

Moreover, ‘possession’ and ‘ownership’ are differently defined, though their definitions have some similarities amongst various Member States. It appears that the exercise of factual control and the intention to do so are the two common and essential characteristics of ‘possession’,<sup>142</sup> and it is also commonly accepted that if factual control belongs to a person but the intention belongs to someone else, the latter is considered as a possessor.<sup>143</sup> A common rebuttable presumption also exists in relation to ‘ownership’, namely that the possessor is also the owner.<sup>144</sup> The right of ownership is safeguarded by Article 23 of the Constitution of Cyprus,<sup>145</sup> and according to the reasoning of the Supreme Court in *Christou Orfanides v The Republic of Cyprus*, ‘conceptually the term ownership

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<sup>137</sup>§ 285 ABGB [http://www.jusline.at/285\\_ABGB.html](http://www.jusline.at/285_ABGB.html)

<sup>138</sup>Tangible things are known as ‘choses in possession’ and intangible things are known as ‘choses in action’. Choses in possession includes goods, chattels, objects, personal corporeal items whose physical possession can be transferred by one person to another by delivery, they can therefore be physically possessed and actually enjoyed

<sup>139</sup> Section 2(1) Law 10(1)/1994

<sup>140</sup> A. Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3 *Journal of Comparative Law*, 197

<sup>141</sup>S. Laulhé Shaelou *et al.*, ‘National Report on the Transfer of Movables in Cyprus’ in W. Faber and B. Lurger (eds), *National Reports on the Transfer of Movables in Europe, Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Sellier.european law publishers, 2009) 495

<sup>142</sup>A. Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3 *Journal of Comparative Law*, 197

<sup>143</sup> Indirect possession under German law and constructive possession under English law

<sup>144</sup>A. Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’ (2010) 3 *Journal of Comparative Law*, 197, § 1006 BGB <http://dejure.org/gesetze/BGB/1006.html>

<sup>145</sup>The Constitution of the Republic of Cyprus, 1960, Article 23

denotes proprietorship over an immovable or movable asset and indicates the possibility of that asset being transferred / sold / disposed of'.<sup>146</sup> Finally, ownership in German law is protected by a proprietary remedy, while in the case of possession damages are available only under the general rules of tort. In contrast, under English law ownership does not confer a title to sue itself; only possession counts as title. Remedies for the protection of property are provided by Cypriot Contract law, and take the form of damages for breach of contract.<sup>147</sup>

The particular countries were chosen to show the different approaches on the matter due to the different legal traditions, namely civil law and common law. The difference on this approach will be further examined in Chapter 3, where the nature of bank deposits under numerous national legal orders will show that civil law countries and common law countries treat bank deposits differently. Moreover, Chapter 4 will illustrate these differences between national legal orders by discussing their case law on the financial crisis.

The remarkable discretion of Member States to regulate their property law independently results in a great variety of provisions on similar matters within the Union and impedes the effective protection of the rights to ownership and possession. An area in which this variety of provisions can be illustrated is the litigation at the national level regarding the financial crisis and the allegations of violation of the right to property.

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<sup>146</sup>*Christou Orfanides v The Republic of Cyprus*, No 585/93

<sup>147</sup>Section 73(1) Cap 149

## II. PUBLIC INTERNATIONAL LAW – ECHR

### 1. Access to justice

The right of access to a court is embodied in Article 6 ECHR and aims to guarantee that litigants have an effective judicial remedy, which protects their civil rights.<sup>148</sup> The right of access to justice encompasses both the right to institute proceedings and the right to obtain a decision by a court.<sup>149</sup> As it was established in *Bellet v France*, the right of access to justice must be ‘practical and effective’,<sup>150</sup> in the sense that individuals should ‘have a clear, practical opportunity to challenge an act that is an interference with [their] rights’.<sup>151</sup> Access to justice does not constitute an absolute right,<sup>152</sup> though its limitations must not restrict access to such an extent that the very substance of the right is impaired.<sup>153</sup> Furthermore, a limitation is compatible with Article 6 only if it pursues a ‘legitimate aim’ and there is ‘reasonable relationship of proportionality between the means employed and the aim sought to be achieved’.<sup>154</sup> In a comparative perspective, access to justice is treated as the foundation of the EU, which is based on the rule of law. Thus, in theory, access to justice has a more prominent role in the EU law regime than under the ECHR regime.

Individuals can apply themselves to the ECtHR, under Article 34 ECHR. It was stated that Article 34 constitutes one of the ‘key components of the machinery’ of human rights’ protection<sup>155</sup> because it allows individuals to take legal action at international level to assert their rights. According to the wording of the Convention, ‘The High Contracting

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<sup>148</sup> See J. H. Gerards and L. R. Glas, ‘Access to justice in the European Convention on Human Rights system’ (2017) 35 *Netherlands Quarterly of Human Rights*, 11

<sup>149</sup> *Kutic v Croatia* App no 48778/99 (2002) paragraph 25

<sup>150</sup> *Bellet v France* (1995) Series A 333-B paragraph 38

<sup>151</sup> *Ibid.*, paragraph 36

<sup>152</sup> *Golder v the United Kingdom*, App no 4451/70, (1975) 1 EHRR 524, paragraph 38; *Stanev v Bulgaria* [GC] App no 36760/06 (2012) ECHR 46, paragraph 230

<sup>153</sup> *Philis v Greece* (1991) 13 EHRR 741 paragraph 59

<sup>154</sup> *Fayed v the United Kingdom*, App no 7101/90 (1994) 18 EHRR 393 paragraph 65

<sup>155</sup> *Loizidou v Turkey* (preliminary objections), App no 15318/89 (1995) paragraph 70

Parties undertake not to hinder in any way the effective exercise of this right’; a phrase that ensures the absolute nature of the right. Individuals must be ‘directly affected’ by the alleged measure, thus only direct victims are allowed to lodge proceedings.<sup>156</sup> Similarly, in the EU, private applicants should prove that are directly concerned by the measure at stake in order to meet the *locus standi* threshold.

An individual can only lodge proceedings before the ECtHR if he has already exhausted all the domestic remedies.<sup>157</sup> As the text of Article 35 itself demonstrates, this requirement is founded on the generally recognised rules of international law, since it forms part of customary international law<sup>158</sup> and it is contained in various international human-rights treaties.<sup>159</sup> The objective of this requirement is to ensure that the ECtHR operates as a subsidiary to the national systems protecting human rights; it thus allows firstly national courts to decide questions concerning the compatibility of domestic law with the ECHR, before instituting proceedings to the international court.<sup>160</sup> The purpose of this rule is to provide the national courts with the opportunity to prevent or correct the alleged violation, based on the assumption that domestic legal orders provide effective remedies in case a Convention right is violated.<sup>161</sup> This rule applies irrespective of whether the ECHR provisions have been incorporated into national legal order,<sup>162</sup> and it is an essential element of the operation of the protection system under the Convention.<sup>163</sup> It is important to underline that Article 35 considers the exhaustion of domestic remedies

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<sup>156</sup>*Burden v the United Kingdom* [GC] App no 13378/05 (2008) 18 paragraph 33

<sup>157</sup> Article 35 ECHR, paragraph 1

<sup>158</sup> For example, see the case of *Interhandel (Switzerland v the United States)*, [1959] ICJ Rep 6

<sup>159</sup> For example, the International Covenant on Civil and Political Rights (Article 41(1)(c)), available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> and the Optional Protocol (Articles 2 and 5(2)(b)), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>; and the American Convention on Human Rights (Article 46), available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

<sup>160</sup> *A, B and C v Ireland* [GC] App no 25579/05 (2010) paragraph 142

<sup>161</sup> Article 13 ECHR

<sup>162</sup> *Eberhard and M. v Slovenia* App nos 8673/05 and 9733/05 (2009)

<sup>163</sup> *Demopoulos and Others v Turkey* [GC] App nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 (2010) paragraphs 69 and 97

only, and not any other remedies provided for by international bodies. Though not explicitly provided, in practice, the exhaustion rule applies equally under EU law, since the exercise of the preliminary reference mechanism is compulsory only by the highest court of a Member State, which means that applicants have already exhausted the rest domestic remedies.

The exhaustion rule has been characterised ‘as one that is golden rather than cast in stone’.<sup>164</sup> The rule has been applied with some flexibility and without excessive formalism, since the ultimate purpose is to protect human rights.<sup>165</sup> The rule of exhaustion is not absolute and neither it applies automatically.<sup>166</sup> For example, it was decided that it was not necessary for applicants to make use of a remedy which was not obligatory even from the highest national court.<sup>167</sup> Applicants are only obliged to exhaust domestic remedies, which are both theoretically and practically available at the relevant time and which they can directly institute themselves. In other words, they must exhaust those domestic remedies which are accessible, capable of providing redress regarding their complaints and offering reasonable expectations of success. Consequently, applicants are not obliged to avail themselves to discretionary or extraordinary remedies. One should note here that, using the comparative analysis method, in the context of the financial crisis, the exhaustion rule is rather an impediment to effective judicial protection. In most cases, which will be discussed in Chapter 4, litigants brought proceedings before their national courts, and once their cases reached the EU courts, they were reverted to their national courts. Thus, they were asked to go through the same procedure twice, and only

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<sup>164</sup> European Court of Human Rights, ‘Practical Guide on Admissibility Criteria’ (Council of Europe/ European Court of Human Rights, 3<sup>rd</sup> edn, 2014) 23

<sup>165</sup> *Ringeisen v Austria* App no 2614/65 (1971) paragraph 89

<sup>166</sup> *Kozacıoğlu v Turkey* [GC] App no.2334/03 (2009) paragraph 40

<sup>167</sup> *D.H. and Others v the Czech Republic* [GC] App no.57325/00 (2006) paragraphs 116-18

then they are allowed to file an application to the ECtHR, a fact that causes a remarkable delay to their effective judicial protection.

Article 35(3)(b) provides that an individual application will be inadmissible if ‘the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground, which has not been duly considered by a domestic tribunal’. This criterion consists of three elements: there must be a significant disadvantage; or respect for human rights necessitates the hearing of the application; or no domestic court has properly heard the case. Though Protocol 15 suggested the removal of the third element, the Convention has not been amended yet.<sup>168</sup> It has been established that there is not any formal hierarchy between these three elements, though ‘significant disadvantage’ grounds Article 35(3)(b).<sup>169</sup> In practice, a hierarchical approach is followed, with judges examining each element in turn.

‘Significant disadvantage’ reflects the idea that a violation of a right, even if legally recognised, is worth the attention of an international court only if it contains a minimum level of severity.<sup>170</sup> Purely technical violations or without any significance, apart from their formal acknowledgement, do not merit European supervision.<sup>171</sup> What constitutes the minimum level is a question of fact, determined according to the circumstances of the

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<sup>168</sup> Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series - No. 213, 2013, Article 5

<sup>169</sup> *Shefer v Russia* App no.45175/04 (2012)

<sup>170</sup> J. H. Gerards and L. R. Glas, ‘Access to justice in the European Convention on Human Rights system’ (2017) 35 *Netherlands Quarterly of Human Rights*, 19

<sup>171</sup> *Ibid.*

particular case. Regarding the severity of the alleged violation, the applicant's subjective perception is assessed,<sup>172</sup> but only if it is objectively justified.<sup>173</sup>

The existence of harm of a pecuniary interest is not necessary, as long as questions of principle may also cause a significant disadvantage.<sup>174</sup> In *Giuran v. Romania*, a question of principle, which was the applicant's right to respect for his possessions, led the Court to hold that a significant disadvantage was suffered, even if the national court focused only on the compensation of the applicant as a recovery of the stolen goods.<sup>175</sup> The nature of the right allegedly violated, the seriousness and the consequences of the violation for the applicant, were introduced by the ECtHR as aspects to be considered in order to decide the 'minimum level' of severity.<sup>176</sup> Moreover, the issues at stake before the national court or the decision already taken are now assessed. Finally, if a pecuniary interest is affected by the alleged violation, the effect of the financial loss on the particular applicant is examined, considering also the specific conditions of the individual and the economic reality of the country.<sup>177</sup>

Thus, access to public international courts, in particular the ECtHR, is protected by Article 6 ECHR, though its protection is not absolute. The right of individuals to apply to the ECtHR presupposes the exhaustion of national remedies and the existence of 'significant disadvantage' suffered by the applicant. These requirements indicate that individuals cannot seek the protection afforded by the ECtHR effortlessly. However, in comparison with the threshold of Article 263 TFEU, 'significant disadvantage', which

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<sup>172</sup>*Korolev v Russia* App no.25551/05 (2010)

<sup>173</sup>*Ladygin v Russia* App no.35365/05 (2011)

<sup>174</sup>*Korolev v Russia* App no.25551/05 (2010)

<sup>175</sup>*Giuran v Romania* App no.24360/04 (2011) paragraphs 17-25

<sup>176</sup>*Giusti v Italy* App no.13175/03 (2011) paragraphs 22-36

<sup>177</sup>*Fernandez v France* App no.65421/10 (2012)



seeks the minimum level of severity, is easier to be proved than the requirement of ‘direct and individual concern’, which is restrictively interpreted by EU courts.

## 2. Proportionality

While having the status of a general principle of EU law, the principle of proportionality has had a pervading impact throughout the case law of the ECHR, and it has been characterised as ‘the alter ego of the principle of effective protection’.<sup>178</sup> The fact that State measures should be proportionate to the interference with ECHR rights has been expressed in several terms, including the phrases ‘relevant and sufficient’ grounds,<sup>179</sup> ‘convincing established’ necessity to interfere,<sup>180</sup> and ‘pressing social need’ must exist.<sup>181</sup> It has been supported that proportionality has a ‘thinly veiled form’ in the text of the ECHR.<sup>182</sup>

The proportionality principle in the context of the ECHR has not been developed likewise in EU law. The Strasbourg organs aim at achieving a balance between the individual’s rights and the general interests of the public and also between the measure adopted and the public objective to be pursued. Among the elements that constitute the principle of proportionality, there are four, generally accepted, essential elements.

Firstly, a fundamental right can be limited only if a legitimate aim is to be pursued. In other words, illegal interests and social prejudices are not acceptable as reasons for

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<sup>178</sup> S. Geer, ‘The margin of appreciation: interpretation and discretion under the European Convention on Human Rights’ (2000) *Council of Europe Publishing* 20

<sup>179</sup> *Observer/Guardian v the United Kingdom* App no.13585/88 (1991), dissenting opinion of Judge paragraph 72

<sup>180</sup> *Weber v Switzerland* App no.11034/84 (1990) paragraph 47

<sup>181</sup> *Observer/Guardian v the United Kingdom* App no.13585/88 (1991), dissenting opinion of Judge Martens, paragraph 71

<sup>182</sup> J. McBride, ‘Proportionality and the European Convention on Human Rights’ in E. Ellis (ed) *The principle of Proportionality in the Laws of Europe* (Hart Publishing 1999), 23

restricting individuals' rights, and this is clearly stated in Article 18 ECHR.<sup>183</sup> This element is described within the Convention as a purpose which is 'necessary in a democratic society',<sup>184</sup> and legitimate aims and public interests vary, according to the relevant human right.<sup>185</sup> Despite the various names given, all the concepts could be summarised to the protection of the rights of others and the public interests.

Secondly, the suitability of the mean in question is concerned, since the relationship between the mean and the aim should be reasonable. The requirement of suitability is contained in numerous provisions of the ECHR. For example, Article 5(3) provides for arrest or detention as suitable restriction of the right to liberty and security only within the reasonable terms of proceeding. Therefore, if the relationship between the purpose, namely the prevention of crime, and the mean, namely the interference with an individual's liberty, is unreasonable, then the requirement of suitability is not fulfilled. However, this requirement should not interfere with the independence and the discretion of the judiciary of the State. Notably, '[a]lthough it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the

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<sup>183</sup>ECHR, Article 18: 'the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'

<sup>184</sup>ECHR, Article 6 (1); Article 8 (2); Article 9 (2); Article 10 (2); Article 11 (2); Article 1 of Protocol No. 1; Article 2 (3) of Protocol No 4; Article 2 of Protocol No 7

<sup>185</sup>'National security': ECHR, Article 6 (2); Article 8 (2); Article 9 (2); Article 10 (2); Article 11 (3); Article 2 of Protocol No 4

'Public order': ECHR, Article 6 (1), Article 8 (2), Article 9 (2), Article 10 (2), Article 11 (2), Article 2 (3) of Protocol No 4

'Health': ECHR, Article 8 (2); Article 9 (2); Article 10 (2); Article 11(2); Article 2 (3)of Protocol No 4

'Morals': ECHR, Article 6 (1); Article 8 (2); Article 9 (2); Article 10 (2), Article 11 (2), Article 2 (3)of Protocol No 4

'Protection of the rights and freedoms of others': ECHR, Article 6 (1); Article 8 (2); Article 9 (2); Article 10 (2); Article 11 (2), Article 2 (3) of Protocol No 4

'Economic well-being of the country': ECHR, Article 8 (2)

'Territorial integrity': ECHR, Article 10 (2)

'Interests of justice': ECHR, Article 6 (1); Article 10 (2)

consequence that the Court can and should exercise a certain power of review. However, the logic of the system of safeguard established by the Convention sets limits on the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention ‘incorporates’ the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection’.<sup>186</sup>

Thirdly, a measure is held proportionate only if there is no any less restrictive alternative means of achieving the same purpose. In particular, ‘harm which is caused to the rights-holders should be less, than the advantage received from limitation of their possible abuse of convention rights’,<sup>187</sup> and the chosen measure should not be able to be replaced by any other less harmful measure.

While the above elements focused on the relationship between the means, namely the restriction of a right, and the aim, namely the public interest, the final element focuses on the relationship between the fundamental right itself and the public interest. Proportionality in that stage applies *stricto sensu* and goes into the substance of the conflict between the right and the interest, in order to achieve a balance. According to the words of a ECtHR’s judge, the search for balance of ‘the general interest of the community and the requirements of the protection of the individual’s fundamental rights ... is inherent in the whole of the Convention’.<sup>188</sup>

The principle of proportionality is characterised as the most demanding standard for deciding whether the limitation of a right was acceptable. A human right is not breached

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<sup>186</sup>*Bozano v France* App no.9990/82 (1986) paragraph 58

<sup>187</sup>A. V. Dolzhikov, ‘The European Court of Human Rights on the Principle of Proportionality in ‘Russian’ Cases’ (2012) 82 *Teise*, 222

<sup>188</sup>*Sporrong and Lonnroth v Sweden* App no.7152/75 (1982) paragraph 69

if the measure in question is held to be proportionate or ‘necessary in a democratic society’.<sup>189</sup> The examination of the operation of proportionality principle in the context of the ECHR, has led several scholars to link this principle with the margin of appreciation. In particular, proportionality has been described as ‘the other side of the margin of appreciation’<sup>190</sup> and as ‘corrective and restrictive of the margin of appreciation’.<sup>191</sup> Other scholars support that the margin of appreciation is not an adequate and comprehensive mechanism for striking a balance between the rights of individuals and the public interests. ‘If the Court gives as its reason for not interfering simply that the decision is within the margin of appreciation of national authorities, it is really providing no reason at all but is merely expressing its conclusion not to intervene, leaving observers to guess the real reasons which it failed to articulate’.<sup>192</sup> ‘The margin of appreciation is a conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable. As such it tends to preclude courts from articulating the justification for and limits of their role as guardians of human rights in a democracy’.<sup>193</sup>

Even if the term ‘proportionality’ is not included in the ECHR as such, the judges of the ECtHR apply the principle strictly, so as to ensure that fundamental rights are not unreasonably or heavily restricted. In comparison with the principle of proportionality under EU law, it could be noticed that EU law imposes a ‘softer’ obligation on EU Member States to ensure proportionality than the obligation imposed by the ECHR. Based

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<sup>189</sup> G. Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies*, 711

<sup>190</sup>Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) 14

<sup>191</sup>F. Matscher, ‘Methods of Interpretation of the Convention’ in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (1993) 79

<sup>192</sup>R. MacDonald, ‘The Margin of Appreciation’ in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (1993) 85

<sup>193</sup>R. Singh *et al.*, ‘Is there a role for the “Margin of Appreciation” in national law after the Human Rights Act?’ (1999) 1 *European Human Rights Law Review* 4

on this comparative result, it could be expected that the ECtHR is more likely to declare the measures adopted to deal with the Eurozone financial crisis as disproportional and thus in violation of human rights, than the EU courts.

### 3. Right to property

The right to the peaceful enjoyment of possession, i.e. the right to property, is protected by Article 1 of Protocol No.1 ECHR. The scope of Article 1 was first demonstrated in the *Marckx* judgment, which stated that ‘by recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property’.<sup>194</sup>

The notion of ‘possession’ encompasses both movables and immovables;<sup>195</sup> even the benefit of a restrictive covenant was accepted as property right.<sup>196</sup> Claims,<sup>197</sup> shares<sup>198</sup> and legitimate expectations were also recognised as possessions.

As the Court established in the *Sporrong and Lonnroth v Sweden*, Article 1 of Protocol No.1 consists of three rules. ‘The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.’<sup>199</sup> Thus, for proving that a violation of the right to property took place, the applicant should firstly illustrate that

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<sup>194</sup>*Marckx v Belgium*, App no.6833/74(1979) paragraph 63

<sup>195</sup>*Wiggins v the United Kingdom* App no. 7456/76(1978) p.40

<sup>196</sup>*S. v the United Kingdom*, App no. 10741/84, (1984) p. 226

<sup>197</sup>*De Napoles Pacheco v Belgium*, App no. 7775/77 (1978) p.143

<sup>198</sup>*X v the United Kingdom*, App no. 3039/67 (1967) p.66-71

<sup>199</sup>*Sporrong and Lonnroth v Sweden* App no.7152/75 (1982) paragraph 61

there is an existing property right, then that this possession has been interfered, and finally, that the particular interference was not one of those permitted. The three rules laid down in *Sporrong and Lonnroth* case are not independent from each other; in essence, the first rule constitutes the general principle and the latter two provide the instances where interferences are permissible.

The first rule, namely the peaceful enjoyment of possession, covers any interference with property rights that is not deprivation of property or control of its use. It is common practice for the ECtHR to examine the second and the third rules at first, and then revert to the first rule, since they deal with specific types of interference, and if those types are not recognised, then the broader category included in the first rule is assessed. *Sporrong and Lonnroth v Sweden*,<sup>200</sup> *Solodyuk v Russia*<sup>201</sup> and *Stran Greek Refineries and Stratis Andreadis v Greece*,<sup>202</sup> are among the few cases that fail to be examined under the first rule. Notably, in the latter case the general rule was assessed regarding a national legislation rendering an arbitration award void and unenforceable.

The second rule provides for the deprivation of property. Deprivation could be described as dispossession from the legal rights of the owner, in other words, transfer of property. While formal expropriation is clearly included in the second rule,<sup>203</sup> *de facto* expropriation was sometimes recognised by the ECtHR as deprivation as well, since the results are the same and what differs is that it is not based on legal procedures. ‘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

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<sup>200</sup>*Ibid.*

<sup>201</sup>*Solodyuk v Russia* App no. 67099/01 (2005)

<sup>202</sup>*Stran Greek Refineries and Stratis Andreadis v Greece*, App no.13427/87 (1994)

<sup>203</sup>For example *Andorfer Tonwerke v. Austria*, App no.7987/77 (1979) p.31

are ‘practical and effective’ [...], it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants.’<sup>204</sup> For example, in *Papamichalopoulos v Greece* judgment, it was found that ‘the applicants were unable either to make use of their property or to sell, bequeath, or make a gift of it; Mr Petros Papamichalopoulos [...] was even refused access to it’,<sup>205</sup> and that amounted to a *de facto* expropriation.

A national measure falls within the third rule if the purpose of the State is to control the use of property, while its ownership is not affected, for a public interest or in order to ‘secure the payment of taxes or other contributions or penalties’. For instance, in *Banèr v. Sweden*, interference to exclusiveness only affected the enjoyment of the possession and thus, it was held that it constituted a control of use.<sup>206</sup> Moreover, a temporary measure influencing the applicant’s property fell under the third rule, since it did not deprive the property.<sup>207</sup>

The wording of Article 1 of Protocol No.1 itself declares that the right to property is not absolute. Interference is allowed if it is lawful, it pursues a public interest and it is proportionate. All these three conditions should be fulfilled; otherwise the ECHR will be decided to have been violated. The right can also be legally restricted at time of war or other public emergency, according to Article 15 ECHR.

The requirement of lawfulness promotes legal certainty, which constitutes a fundamental principle of democratic societies and is inherent in the whole Convention. ‘Law’ is interpreted autonomously and encompasses sources that are formally legal and contain

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<sup>204</sup>*Sporrong and Lönnroth v Sweden*, App no.7152/75(1982) paragraph 63

<sup>205</sup>*Papamichalopoulos and others v Greece*, App no.14556/89(1993) paragraph 43

<sup>206</sup>*Banèr v Sweden*, App no. 11763/85 (1989), p.128

<sup>207</sup>*Handyside v the United Kingdom*, App no.5493/72( 1976)

some procedural safeguards, so as to exclude arbitrary acts. As it was noted by the ECtHR, 'it has consistently held that the terms 'law' or 'lawful' in the Convention [do] not merely refer back to the domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law'.<sup>208</sup> The second requirement is described both as 'public interest' regarding deprivation of property, and as 'general interest' regarding control of use of it. What constitutes a 'public interest' depends on the decision of national authorities in question, unless that decision is manifestly unreasonably founded. Finally, the measure must be proportionate, in the sense that it is 'necessary in a democratic society' in order to pursue a legitimate aim.

As it can be demonstrated, the ECHR provides a comprehensive legal framework for the protection of the right to property, which does not only entail the right to possession, but also the right to the peaceful enjoyment of that possession, with interference being allowed only in very specific circumstances. To put these findings in the context of this thesis, bank depositors may have more chances to prove that their rights have been infringed, based on the right to the peaceful enjoyment of possession, rather than the right to possession as such, because they still constitute the owners of the bank accounts but their value have been significantly limited and their use was restricted due to capital controls.

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<sup>208</sup>*James and others v the United Kingdom*, App no.8793/79 (1986)



### III. INTERNATIONAL INVESTMENT LAW

#### 1. Access to justice

The right to obtain legal protection and legal remedies has been considered controversial in the context of international investment law.<sup>209</sup> The well-known right of access to justice is entailed in the principle of ‘minimum standard of justice’ that aliens and their economic interests are entitled to under customary international law.<sup>210</sup> Traditionally, diplomatic protection was the only available avenue for foreign investors to protect their rights. A State exercising diplomatic protection espoused the claim of its national against another State and pursued it in its own name.<sup>211</sup> ‘By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.’<sup>212</sup> Even then, the prior exhaustion of local remedies as a prerequisite implied the international obligation of States, to ensure access to courts to foreigners and to ensure that justice is delivered according to the standards of fairness and due process. However, such prerequisite includes only access to remedial process within the host State and under the national law of that State; it does not therefore cover the right of access to justice before international tribunals or the courts of a third State.

The recognition and consolidation of the right of access to international justice and to the courts of third states by private investors, for the enforcement of international investment

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<sup>209</sup> F. Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 *The European Journal of International Law*, 729; J. Kurtz, ‘Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni’ (2010) 20 *The European Journal of International Law*, 1077

<sup>210</sup> North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993), Article 1105(1)

<sup>211</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn, Oxford University Press, 2012) 232

<sup>212</sup> *Mavrommatis Palestine Concessions Case*, PCIJ, Series A, No 2, 12

awards, have strengthened the right of access to justice for foreign investors.<sup>213</sup> The evolution of Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs), including NAFTA, which promote investment arbitration, has transformed, in the words of Francioni, ‘the inter-state claims to the private-to-state-arbitration’,<sup>214</sup> and relieved foreign investors from the burdensome diplomatic protection of their home State. That change had significant consequences, since it established that private investors are now able to protect themselves in law, without being necessary for their home states to intervene, and it introduced the human rights dimension in the sphere of international investment law, by recognising ‘the individual as the title holder of rights’<sup>215</sup> which constitutes the foundation of the international human rights law.

The right of access was central in the *Loewen Group v the United States* case,<sup>216</sup> which was based on rights provided by NAFTA, and related both to litigation and arbitration. While the arbitral tribunal recognised the court’s maladministration of justice, it denied considering the merits of the case since claimants did not exhaust all the local remedies in the USA. The ICJ in the *Diallo* case,<sup>217</sup> which concerned the diplomatic protection of foreign investors, commented on the exhaustion of local remedies: ‘It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted’.<sup>218</sup> In a comparative perspective, while under EU law and Public International law, the exhaustion of domestic remedies is treated as an

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<sup>213</sup> See Article 54 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, paragraph 1 which provides that ‘ [e]ach Contracting State shall recognise 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 State ’

<sup>214</sup> F. Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 *The European Journal of International Law*, 731

<sup>215</sup> *Ibid.*, 732

<sup>216</sup> *Loewen Group Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, 26 June 2003, 42 ILM

<sup>217</sup> International Court of Justice, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of Congo (Preliminary Objections)*, judgment of 24 May 2007

<sup>218</sup> *Ibid.*, paragraph 44

obligation of the applicant, in International Investment law it is considered as an obligation of the respondent. This remark reflects a general feature of International Investment law, namely that priority is given to the protection of investors.<sup>219</sup>

The issue of State immunity may restrict access to justice for foreign investors, and this could be particularly evident during a financial crisis, when the necessary restructuring of a State's public debt harms the foreign bondholders. In such a case, foreign investors need to resort to courts or arbitration to protect their private rights and their financial interests. However, effective remedies may not be available if the doctrine of State immunity applies, as in the cases of Nigeria,<sup>220</sup> Mexico<sup>221</sup> and Argentina.<sup>222</sup> Most recently, the doctrine was invoked in the case of Argentina's sovereign debt restructuring and the following bonds' default during the economic crisis of 2001-2002. Foreigners, who invested in the defaulted bonds and sought remedies, had the choices of either diplomatic protection or arbitration. Diplomatic protection was not without obstacles, since investors had to exhaust all the available domestic remedies in Argentina, as a condition of admissibility, under customary international law. Moreover, as Francioni explains, even if the claim was admissible, the home state of the investors would have to prove that the bond default was a wrongful act by Argentina under the international rules on the treatment of aliens.<sup>223</sup> In such a case, Argentina would probably invoke the doctrine of necessity as a defence for excluding wrongfulness, according to Article 25 of the 2001 ILC Articles on State Responsibility.<sup>224</sup> Instead of diplomatic protection, foreign

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<sup>219</sup> That are mostly the applicants in international investment disputes

<sup>220</sup> *Trendex v. Central Bank of Nigeria* [1977] 1 Lloyd's Rep. 581

<sup>221</sup> US Court of Appeals for the Fifth Circuit, *Callejo v. Bancomer*, 8 July 1985, 764 F2d (1985) 1101

<sup>222</sup> US Supreme Court, *Republic of Argentina v. Weltover*, 12 June 1992, 504 US 607

<sup>223</sup> F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *The European Journal of International Law*, 734

<sup>224</sup> United Nations, Responsibility of States for Internationally Wrongful Acts (2001)

investors commenced proceedings before the ICSID arbitral tribunals,<sup>225</sup> where necessity was not accepted as a defence,<sup>226</sup> or, even if accepted, it did not preclude the Argentina's responsibility to compensate foreign investors.<sup>227</sup>

It is supported that the development and expansion of investment arbitration has enhanced access to justice, in the sense that foreign investors can have their disputes heard and decided according to the law, as a principle that now coexists in investment law and human rights law. This development has also released private parties from the chains of the State, 'by allowing the former to bring claims directly against a state before an international dispute settlement mechanism'.<sup>228</sup> The interface between international investment law and human rights law has been challenged, on the basis that the latter provides for equal treatment when the former entitles only foreign investors to commence investor-state arbitration proceedings, which means that they enjoy further treatment than national investors, in the sense that an extra forum is available to resolve their disputes. Therefore, local investors as well as the host State itself do not enjoy the right to access to justice through arbitration.<sup>229</sup>

The possibility of international investment arbitration for foreign investors has received various critiques. In particular, Ginsburg has argued that BITs create a distinct protection

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<sup>225</sup> See for example *Giordano Alpi and others v. Argentine Republic* (ICSID Case No. ARB/08/9), 28 July 2008

<sup>226</sup> In *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005, the Tribunal did not accept the defence of necessity since the measure adopted by Argentina affecting the investment did not constitute the only available response to the economic crisis and, also, the Government had significantly contributed to the materialization of the financial crisis.

<sup>227</sup> In *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, 3 Oct. 2006, the Tribunal accepted the defence of necessity, but underlined that this defence does not exclude the obligation to compensate the affected investors, because of the temporary character of necessity, therefore the duty to compensate revives once necessity is concluded.

<sup>228</sup>F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *The European Journal of International Law*, 746

<sup>229</sup> J. Kurtz, 'Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni' (2010) 20 *The European Journal of International Law*, 1077

which is absolutely independent from domestic legal processes in the host State.<sup>230</sup> ‘By allowing foreign investors to exit the domestic institutional regime (through arbitration), bilateral investment treaties are said to act as substitutes rather than complements to the domestic legal system.’<sup>231</sup> As a consequence, the domestic legal system is sidelined and the motives of foreign investors to coordinate with domestic actors are decreased.<sup>232</sup> However, this does not necessarily mean that justice is not achieved or that foreign investors are not embedding in the host State.

Summarily, access to justice in International Investment law is mainly provided through international arbitration, without excluding the option of domestic courts. Such a regime has both advantages and disadvantages, with the main advantage being that foreign investors are not dependent on the espousal of their claim by their home State anymore, and the main disadvantage being that national and foreign investors are not equally treated.

## **2. Proportionality**

With the widespread application of IIAs and the resolution of investment disputes by arbitral tribunals, a crucial tension between two objectives in clash emerged. On the one hand, IIAs aim to protect foreign investors and their economic interests, and on the other hand, the host States aim to promote their legitimate public policies by taking all the necessary regulatory measures. Proportionality operates as an essential principle when such a tension arises.<sup>233</sup>

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<sup>230</sup> T. Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *International Review of Law and Economics*, 119

<sup>231</sup> J. Kurtz, ‘Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni’ (2010) 20 *The European Journal of International Law*, 1079

<sup>232</sup> *Ibid.*

<sup>233</sup> See J. Krommendijk and J. Morjin, ‘“Proportional” by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’ in P.

In the international investment law regime, the application of the principle of proportionality implies a method of legal interpretation that is particularly appropriate in cases of conflicts of foreign investors' interests and of public policy objectives.<sup>234</sup> Similarly, Stone Sweet supports that proportionality constitutes 'the most appropriate analytical procedure currently available for adjudicating disputes' that include conflicts of the aforementioned nature.<sup>235</sup>

The principle of proportionality was firstly invoked by an investment arbitration tribunal in the *Tecmed* case.<sup>236</sup> The tribunal considered the impact of the measure on the investment and whether that impact was proportionate to the aim pursued,<sup>237</sup> and reached the conclusion that the measure was disproportionate. The factors that were taken into account included the effects of the non-renewal of the licence, the legitimate expectations of the investor, the importance of the regulatory interest protected by the host state, the weight and the effect of the restriction.<sup>238</sup> After *Tecmed* introduced the principle of

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M. Dupuy *et al*, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009)

<sup>234</sup> B. Kingsbury and S. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Administrative Law' (2009) *New York University Public Law and Legal Theory Working Papers*, 29

<sup>235</sup> A. S. Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *Law and Ethics of Human Rights*, 49

<sup>236</sup> *Tecnicas Medioambientales Tecmed SA v The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, 43 ILM 133 (2004)

<sup>237</sup> *Ibid*, paragraph 22

<sup>238</sup> *Ibid*, paragraph 122: 'The Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the State and whether such deprivation was compensated or not.'

proportionality in the area of investment arbitration, other cases followed its approach, such as the *LG&E* case.<sup>239</sup>

The economic crisis of Argentina in 2001-2002 and the resulting arbitration proceedings of foreign investors against the State gave the chance to arbitrators to consider again the principle of proportionality in the context of investment protection.<sup>240</sup> In particular, Article XI of the Argentina-US BIT has been invoked several times, since it provides defence to the State for measures ‘necessary for the maintenance of public order’.<sup>241</sup> In other words, in the case of the Argentinean economic crisis, the measures implemented could be considered as not breaching the US investors’ rights, if they could meet the requirements of Article XI. Arbitration panels were rather inconsistent in the application of Article XI, since some of them accepted that the measures taken were legitimate and preserved public order and security of Argentina, while others reached the opposite conclusion. According to Stone Sweet, proportionality would be the best-practice standard for dealing with conflicts that arise by clauses like Article XI,<sup>242</sup> though most arbitral tribunals preferred to avoid applying it. Remarkably, the tribunal in *Continental Casualty* case employed the proportionality test when interpreting Article XI. As it was stated: ‘The necessity of a measure should be determined through ‘a process of weighing and balancing of factors’ which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged

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<sup>239</sup>*LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Award, 25 July 2007

<sup>240</sup>See *CMS Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005; *LG&E Energy Corp. v. Argentine Republic* (ICSID Case No. Arb/02/1), Decision on Liability, 3 October 2006; *Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. Arb/01/3), Award, 22 May 2007; *Sempra Energy International v. Argentine Republic* (ICSID Case No. Arb/02/16), Award, 28 September 2007; and *Continental Casualty Company v. Argentina* (ICSID Case No. ARB/03/9), Award, 5 September 2008

<sup>241</sup>Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (1994), available at:

[http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=243242](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=243242) (accessed 12 September 2017)

<sup>242</sup>A. S. Sweet, ‘Investor-State Arbitration: Proportionality’s New Frontier’ (2010) 4 *Law and Ethics of Human Rights*, 50

measures, the contribution of the measure to the realisation of the ends pursued by it and the restrictive impact of the measure on international commerce'.<sup>243</sup> Unsurprisingly, EU law and Public International law considerations when applying the principle of proportionality are not the same with the above. The effects of any measure on international commerce are not a priority either for EU law or for Public International law, without meaning that they are fully ignored. This difference is attributed to the different nature of interests protected by each legal order.

It will not be surprising if, in the context of the financial crisis, the defence of necessity will be regularly invoked, for the protection of the State's interests, and thus, proportionality might become a familiar tool for arbitrators. However, such development will definitely attract criticism, as it already does. For example, it has been argued that 'to adopt proportionality-style necessity analysis would place arbitrators in the position of the balancing judge as perhaps something quite different than arbitrators traditionally conceived'.<sup>244</sup> On the other hand, supporters of the use of the proportionality principle in international investment arbitration believe that proportionality analysis is more rational and profound than the 'I-know-it-when-I-see-it' type of reasoning that most arbitrators use.<sup>245</sup> As a result, arbitrators become more reliable and they do not ignore serious aspects of a dispute, like public interests that are not directly related to the investment but they are of high importance and can affect the decision.<sup>246</sup> Particularly in the context of the financial crisis, the public interest element is pivotal and, irrespective of the conflict of

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<sup>243</sup>*Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award, 5 September 2008, paragraph 194

<sup>244</sup>A. S. Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *Law and Ethics of Human Rights*, 75

<sup>245</sup>B. Kingsbury and S. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Administrative Law' (2009) *New York University Public Law and Legal Theory Working Papers*, 40

<sup>246</sup>A. S. Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *Law and Ethics of Human Rights*, 62



legal scholarship on this area, arbitrators may be found in a position that they cannot avoid the application of the principle of proportionality. However, it is assumed that the application of the proportionality principle will not lead exactly to the same results as in the case of EU law and Public International law, since, as have been mentioned above, different considerations are taken into account and more weight is expected to be put on the interests of private applicants under this legal order.

### 3. Right to property

International investment law provides for the protection of property without referring to the term; property is covered by the term ‘investment’ instead.<sup>247</sup> Though there is no precise definition of ‘investment’, the arbitral tribunals have established some features of the notion, including a commitment of economic value, a certain duration, the assumption of risk, the expectation of making profit and contribution to the development of the host State.<sup>248</sup> Contractual rights have always been considered ‘investment’ and, thus, they are protected against expropriation.<sup>249</sup> As it was stated in *SPP v Egypt*: ‘Nor can the Tribunal accept the argument that the term “expropriation” applies only to *jus in rem*. The Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants. ...Clearly, those rights and interests were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking

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<sup>247</sup> U. Kriebaum and C. Schreuer, ‘The Concept of Property in Human Rights Law and International Investment Law’ in S. Breitenmoserua (eds.), *Liber Amicorum Luzius Wildhaber - Human Rights Democracy and the Rule of Law* (Kehl, 2007) 743-762

<sup>248</sup> *Fedax N.V. v. Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction, 11 June 1997, paragraph 43; *Salini Costruttori SpA et Italstrade SpA v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001, paragraph 53; *Joy Mining Machinery Ltd. v. Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, paragraphs 53, 57, 62

<sup>249</sup> See for example *Rudloff Case*, Interlocutory Decision, 1903, 9 Reports of International Arbitral Awards 244, 250 (1959), *Eureka B. V. v. Poland*, Partial Award, 19 August 2005, paragraph 241

of such rights involves an obligation to make compensation therefor'.<sup>250</sup> Moreover, in *Bayindir v Pakistan* the tribunal demonstrated that 'With respect to expropriation, the Tribunal said in its decision on Jurisdiction: It is not disputed that expropriation is not limited to *in rem* rights and may extend to contractual rights'.<sup>251</sup> Claims from loans and other financial instruments were also considered as constituting investments.<sup>252</sup>

The most common interference with the investor's property, i.e. investment, in the host State occurs in the form of expropriation,<sup>253</sup> which is also known as 'dispossession' and 'deprivation'.<sup>254</sup> Expropriation could be either direct, through the formal transfer of the title of the investment and its nationalisation, or indirect, through the interference by the host State in the use of the investment or the enjoyment of the benefits of the investment, without interfering to the legal title of the property. Expropriation is allowed, provided that some conditions are fulfilled, namely that a public purpose is pursued, which is provided by law, with the deprivation of investment being non-discriminatory and compensable.<sup>255</sup> Numerous scholars have demonstrated that sometimes, the measures of a State may not constitute expropriation, even if they interfere with an investment. '[F]oreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.'<sup>256</sup> Dolzer and Stevens explained that: 'To the investor, the line of demarcation between measures

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<sup>250</sup>*SPP v. Arab Republic of Egypt*, (ICSID Case No. ARB/84/3), Award, 20 May 1992, p. 228-229

<sup>251</sup>*BayindirInsaat Turizm Ticaret Ve Sanayi A. S. v. Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, paragraph 255

<sup>252</sup>*Fedax N. V. v. The Republic of Venezuela* (ICSID Case No. ARB/96/3), Award, 9 March 1998; *CSOB v. Slovakia* (ICSID Case No. ARB/97/4), Decision on Jurisdiction, 24 May 1999

<sup>253</sup> See J. Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in P. M. Dupuy *et al*, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009)

<sup>254</sup> R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, International Centre for Settlement of Investment Disputes (1995), 98

<sup>255</sup>OECD, "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) *OECD Working Papers on International Investment*, 2004/04, 3

<sup>256</sup>I. Brownlie, *Public International Law* (6<sup>th</sup> edn, Oxford University Press, 2003)509

for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or from an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources'.<sup>257</sup>

Most BITs provide for indirect expropriation by referring to the effects of the State's action and at the same time, by avoiding distinguishing between compensable and non-compensable regulatory acts.<sup>258</sup> Furthermore, the OECD Draft Convention on the Protection of Foreign Property<sup>259</sup> laid down the four conditions to be fulfilled for allowing a State to take any expropriatory measure,<sup>260</sup> and it notes that: 'Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognised by international law – its political and social existence. The right is reconciled with the obligation of the State to respect and protect the property of aliens by the existing requirements for its exercise – before all, the requirement to pay the alien compensation if his property is taken.'

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<sup>257</sup>R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, (International Centre for Settlement of Investment Disputes, 1995), 99

<sup>258</sup>OECD, "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) *OECD Working Papers on International Investment*, 2004/04, 6

<sup>259</sup>OECD Draft Convention on Foreign Property (1967) 23-25

<sup>260</sup>Article 3: The measures in question must be taken: (i) in the public interest, (ii) under due process of law; (iii) not be discriminatory; and (iv) just and effective compensation must be paid

Regarding the degree of interference with the investment, what is important is the severity of the economic impact caused by the State's act. In essence, an investor is not entitled to compensation if the foreign State's action has not removed all or most of the investment's economic value. In other words, the interference is compensable if it deprives the investor of fundamental rights of ownership, and it affects the investment for a significant duration.<sup>261</sup>

It is noteworthy that in the *Sea-Land* case the arbitrators had to decide whether there was an expropriation of a bank account. Finally, they did not find any substantial deprivation of, or interference with the investor's rights to his account, and stated that the 'account remains in existence and available' in the investor's disposal.<sup>262</sup>

The question has arisen whether the economic impact of the investor could be the sole criterion for establishing the extent to which the regulatory act constituted indirect expropriation. As the Tribunal demonstrated in the *Tippetts* case, 'the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact'.<sup>263</sup>

Finally, the reasonable expectations of the investors are taken into consideration, since the affected investor proves that their investment was reasonably based on a state of affairs that could not predict the challenged regulatory act.<sup>264</sup>

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<sup>261</sup>OECD, "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) *OECD Working Papers on International Investment*, 2004/04, 10

<sup>262</sup>*Sea-Land Service Inc. v. Iran*, 6 Claims Tribunal Report 149 (1984)

<sup>263</sup>*Tippetts v. TAMS-AFFA Consulting Engineers of Iran*, 6 Claims Tribunal Report 219 (1984)

<sup>264</sup>OECD, "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law"' (2004) *OECD Working Papers on International Investment*, 2004/04, 19

It is expected that these elements will be examined by the arbitral tribunals which are called to decide on the compatibility of the measures adopted by countries during the financial crisis with the standards of the respective BITs. Undeniably, the economic impact of the investors will be proved harsh, while the consideration of reasonable expectations may be found more intricate.

#### **IV. CONCLUDING REMARKS**

As it can be concluded, all three legal orders tend to protect the same interests, but in a different way. While EU law and Public International law provide only for litigation, International Investment law provides arbitration as its main dispute resolution method. However, even within the sphere of litigation, EU law and Public International law ask parties to satisfy different requirements in order to have the necessary legal standing. The application of the principle of proportionality varies in each legal order, since it is perceived differently by the relevant actors and is pursuing a different purpose in each system. Finally, property is protected to a greater extent by Public International law and International Investment law, while EU law approaches the right to property by leaving it to the discretion of each Member State. Notwithstanding the separate examination of the three legal orders for the purposes of the literature review, it is not implied that they cannot be mixed. On the contrary, there are areas where the three legal orders operate in conjunction, and a remarkable example is the one of the financial crisis. In essence, the reason why the literature review was structured is such a way as to distinguish between the three legal orders is to firstly appreciate the similarities and differences between them, by using the comparative method, so as to continue with studying the way the three of them interact in the field of this thesis.

This examination of the literature review in the particular areas will now contribute to the identification of the rights of bank depositors in Chapter 3 and to the evaluation of how those rights have been affected by the financial measures adopted by the EU in Chapter 4. Moreover, it will facilitate the analysis of the relevant courts' approach and, in particular, of the effective judicial protection they might have offered to bank depositors, by taking into consideration the principle of proportionality in their decisions. Finally, the

role of arbitration, as the main instrument of access to justice provided by International Investment law, and the application of proportionality and the protection of property rights by arbitrators, found in Chapters 5 and 6, will be based on the literature review in that field.

Numerous assumptions can be made from the literature review in relation to the topic of this thesis. Regarding the access to justice, it is assumed that the exhaustion rule provided for in Article 35 ECHR may operate as an impediment to effective judicial protection, in the sense that significant delays may occur. As was explained above, and will be further discussed in Chapter 4, when the applicants' cases reached EU courts, they were reverted to their national courts. They are thus asked to go through the same procedure twice, and only then they are allowed to file an application to the ECtHR. Moreover, an impediment of effective, though not judicial, protection for foreign investors could be the principle of State immunity, which may be employed by the Respondent States, in order to avoid arbitration proceedings on the measures adopted.

Concerning the right to property and its alleged violations during the financial crisis, effective protection of bank depositors and other stakeholders within the EU may be affected by the variety of provisions on ownership and possession, since its regulation belongs to the discretion of Member States.

Finally, very important assumptions can be made in relation to the principle of proportionality. Firstly, since most mechanisms employed by the Eurozone Member States in order to deal with the crisis were declared to fall outside the remits of the EU legal order, it is questioned whether the proportionality principle is applicable or whether Member States have been given the absolute freedom to act the way they wish, beyond

any control of the proportionality of their actions.<sup>265</sup> Furthermore, as it was noticed, EU law imposes a ‘softer’ obligation on EU Member States to ensure proportionality than the obligation imposed by ECHR. Based on this comparative result, it is assumed that the ECtHR is more likely to declare the measures adopted to deal with the Eurozone financial crisis, as disproportional and thus in violation of human rights, than the EU courts. Lastly, proportionality might become a familiar tool for arbitrators, because the defence of necessity is expected to be regularly invoked, for the protection of the State’s interests. Particularly, in the context of the financial crisis, the public interest element is crucial, thus the application of the principle of proportionality by arbitrators may be unavoidable.

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<sup>265</sup> The relevant case law is discussed in Chapter 4.



## **CHAPTER THREE**

### **THE SUBJECT MATTER: THE NATURE OF BANK DEPOSIT**

Apart from banking law that undeniably deals with some of the rights and obligations of depositors, it is assumed that local depositors and investors are entitled to any rights provided for by the national investment law and consumer law. Foreign investors are also entitled to any rights provided for by Bilateral and Multilateral Investment Treaties between the country of their origin and the country of their investment. Moreover, EU law and Public International law provide rights for depositors, in the form of fundamental rights (Charter of Fundamental Rights of the European Union and European Convention of Human Rights).

For the purpose of this research, the term ‘depositors’ is used and excludes States. Thus, ‘depositors’ include any individuals or businesses, either local or foreign, which hold deposit in a bank (financial institution). Bank depositors and bank shareholders have a radically different position in a bank. Shareholders own shares of the bank, and the amount of these shares determines the extent of influence that they can exercise over a bank’s corporate decisions. In contrast, bank depositors only save their money in the bank without having the power to influence any decision affecting the operation of the bank.

The aim of this chapter is to identify the nature of bank deposit, so as to extract the rights of depositors. After distinguishing between bank depositors and bank shareholders (i), the chapter discusses the treatment of money as property in financial transactions (ii). What follows is an analysis of the notions of bank deposit and depositors under some national legal orders (iii), applying the comparative method, under EU law (iv), under Public International law (v), and, finally, under International Investment law (vi).

## I. BANK DEPOSITORS AND BANK SHAREHOLDERS

The rule established in *Foley v Hill*<sup>266</sup> entails the risk that money deposited might be lost if the bank, as any other corporation, is not managed in good faith in pursuing its interests, as a whole.<sup>267</sup> Someone could argue that the interests of a bank refers only to the shareholders' interests. However, there are States which tried to change the attitude that the purpose of a company is exclusively the maximization of shareholder value and introduce the protection and promotion of stakeholders' interests too. For example the English Companies Act 2006 provides that 'a director of a company must act in the way he considers in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.<sup>268</sup> Though it is well established that directors must act in the best interests of the shareholders, and that is demonstrated by the fact that they should disclose to shareholders all the options available before making any decision, their obligation to take into consideration the depositors' interests is controversial. For example, directors do not owe a duty to stakeholders if a corporation is solvent, though when facing the risk of insolvency, the stakeholders' interests are of central importance in their decision-making. As it was demonstrated in *Brady v Brady*, while a company is solvent, the shareholders' interests prevail and creditors' interests 'ought not to count for very much'. In contrast, during insolvency, 'the interests of the company are in reality the interests of existing creditors alone'.<sup>269</sup>

Since bank depositors have the right to be paid an amount equivalent to that they deposited, directors of banks should ensure, not only that the bank is solvent, but that it

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<sup>266</sup> *Foley v Hill* (1848) 2 H.L. Cas 28; 9 E.R. 1002; see below, section 3

<sup>267</sup> See for example: *Howard Smith Ltd v Ampol Petrol Ltd* [1974] A.C. 821 PC (Australia), 'in the interests of the company as whole is interpreted to mean in the interests of the company as a commercial entity', at paragraph 82

<sup>268</sup> Companies Act 2006, section 172

<sup>269</sup> *Brady v Brady* [1988] B.C.L.C. 20 at 40

has the necessary budget to be able to pay depositors on demand an amount equal to what has been deposited. Such obligation, in conjunction with the particular vulnerability of banks to bank run in general, impose a heavy burden on bank directors to ensure that any bank in difficulty is managed in a proper manner.<sup>270</sup>

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<sup>270</sup> See J. M. Sjovall, 'What duty do company directors owe to banks and other creditors?' (2004) 121 *Banking Law Journal* 4; R. Westlake, 'Guidance for the Directors of Banks' (2013) *IFC Global Corporate Governance Forum Focus* 11

## II. MONEY AS PROPERTY IN FINANCIAL TRANSACTIONS

Before examining the notion of bank deposit, it seems prudent to start the analysis with a brief examination of the treatment of money as property in financial transactions. Money is usually described as tangible property in the literature. Goode supports that money are fungible in the sense that any amount of money can be exchanged for any other equal amount of money.<sup>271</sup> This argument is based on the fact that one-Euro coin can stand for another one-Euro coin without having its value being affected, so that it does not matter which coin the holder has since all of them are the same. Though it constitutes a reasonable argument, it does not enlighten the discussion about the nature of money in relation to property law.

In order to establish proprietary rights over money, either held as cash or deposited in a bank account, there must be a segregation of the particular fund of money, which should be made capable of distinct identification, before any claim brought against it. Segregation of money in bank accounts was discussed in numerous cases, including *Re Goldcorp Exchange* case,<sup>272</sup> *Boscawen v Bajwa*<sup>273</sup> and *Re Lehman Brothers International (Europe)*.<sup>274</sup> It can be noticed that while money is indeed fungible from Goode's point of view, it is not fungible from the point of view of property law as these cases illustrated. Accordingly, the persistence of property law for certainty of the subject matter is reflected in the fact that for proprietary rights to arise, money should be separately identified from other money with which it has been mixed. As it was traditionally held in *Roscoe v. Winder*<sup>275</sup> and then illustrated in *Boscawen v.*

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<sup>271</sup>R. Goode, *Commercial Law* (2<sup>nd</sup> edn, Penguin, 1995), 491

<sup>272</sup>*Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC)

<sup>273</sup>*Boscawen v. Bajwa* [1996] 1 W.L.R. 328

<sup>274</sup>*Re Lehman Brothers International (Europe)* [2012] UKSC 6

<sup>275</sup>*Roscoe v. Winder* [1915] 1 Ch. 62

*Bajwa*<sup>276</sup>, where a bank account is overdrawn, the money that was held in that bank account has disappeared, since the specific property which was to be the subject of the proprietary claim has ceased to exist.

Such rulings are contrary to Goode's argument that money is fungible and they can be replaced by other money of equal value without having their proprietary rights affected. The fungible nature of money was supported by the Court of Appeal in *Hunter v. Moss*,<sup>277</sup> where it was argued that shares in a company were identical and indistinguishable, thus any part of shares could constitute the subject matter of the trust in question. While such approach satisfies the commonsense of parties, it entails the risk that claims to the property might be more than the property available to satisfy those claims. Such a problem did not arise in *Hunter v. Moss*,<sup>278</sup> since all parties were solvent, but in *Re Goldcorp Ltd* the claimants were more than the money available to satisfy their claims.<sup>279</sup> Thus, English authority still requires a segregation of the property in order for there to be proprietary rights imposed over it.

What can be assumed from this section is that, according to the above authorities, bank depositors whose money was bailed in, should also satisfy the requirement of segregation of the property, so as to claim the protection of their proprietary rights.

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<sup>276</sup>*Boscawen v. Bajwa* [1996] 1 W.L.R. 328

<sup>277</sup>*Hunter v. Moss* [1994] 1 W.L.R. 452

<sup>278</sup>*Ibid.*

<sup>279</sup>*Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC)

### III. THE NOTION OF 'BANK DEPOSIT' IN NATIONAL LEGAL ORDERS

Generally, money is considered a method of payment and a unit of account. As a method of payment, money allows saving. As a principle, money deposited in bank accounts should be repayable in money. As it was stated, '[a]s a rule, however, the economist's view that everything is money that functions as money is unacceptable to lawyers. Bank accounts, for instance, are debts, not money, and deposit accounts are not even debts payable on demand [...] In the absence of the creditor's consent, express or implied, debts cannot be discharged otherwise than by payment of what the law considers as money, namely legal tender [...] Nor does the fact that 'bank money' largely functions as money prove that in law it necessarily and invariably is money.'<sup>280</sup> The quote illustrates, *inter alia*, that, from the perspective of methodology, Law and Economics appraise bank deposits differently, with the legal interpretation being more complicated, including the factor of consent of the depositor.

There are two main types of transactions, through which banks collect capital; loans and deposits. The distinction between these two financial contracts can be understood based on the following considerations. On the one hand, when the bank pays an interest rate and uses the money from the customers' accounts without their permission, then the contract is a loan to the bank. On the other hand, when the customer who owns a deposit is entitled to withdraw his money without any significant costs, then the contract is a deposit to the bank.

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<sup>280</sup>F. A. Mann, *The Legal Aspect of Money* (5<sup>th</sup> edn, Oxford University Press, 1992), 5-6, cited in K. Laurinavičius, 'The Legal Nature of Bank Deposits' (2006) 31 *Review of Central and East European Law* 294

The fact that money deposited is then used by the depositary for its own purposes has been considered by all jurisdictions, in an attempt to define the nature of bank deposits.

Under Roman law, the contract of *depositum* operated for the delivery of the money to the depositary to keep it in safe custody, with the depositor being able to claim his object at any time.<sup>281</sup> Though usually individual objects were deposited, money was also accepted. If money was deposited either in a box or sealed, then the contract was one of *depositum*. If an amount of money was deposited without being individualized, then the same amount was restored, but not the same coin *in specie*. In such case, the depositary obtains the right to use the money, as it acquires their ownership, as well as the risk of money getting lost.

This kind of contract was described as *depositum irregulare*, since the depositary was only obliged to return equivalent things, instead of the same object *stricto sensu*.<sup>282</sup> It was also considered whether *depositum irregulare* could be treated as *mutuum*, i.e. loan, due to the fact that both contracts transfer the ownership of money from the initial owner to the depositary – borrower. The counter argument was that each type of contract pursues different economic objectives, with *mutuum* promoting the interests of the borrower and *depositum irregulare* promoting the interests of the depositor. Since the depositary acquires the ownership of the money deposited, he can lend it or mix it with his own assets, thus the depositor's restoration of money depends on the depositary's (bank) solvency and on any applicable deposit insurance.

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<sup>281</sup>K. Laurinavičius, 'The Legal Nature of Bank Deposits' (2006) 31 *Review of Central and East European Law* 297

<sup>282</sup>R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 215

The notion of *depositum irregulare* has influenced the relevant legislation of many continental countries. Under German law, bank deposits are treated as loans, according to section 700 of the German Civil Code.<sup>283</sup> French law is slightly different, with the ownership of the object deposited being transferred to the depositary, who can use and dispose it but is also obliged to restore the equivalent object, under the notion of '*le depot irrégulier*'.<sup>284</sup> Swiss law refers only to money deposited and not to loans, though it is argued that in such case the depositary acquires the ownership of money, as well as the right to use it, similarly to the case of a loan.<sup>285</sup> In Italy it is explicitly provided that by depositing a sum of money in a bank, the bank acquires ownership of it and is bound to repay in the same kind of money, though there is no any requirement to restore depositor's money immediately on his demand.<sup>286</sup> Dutch law does not contain the notion of *depositum irregulare*, but it only treats deposit as a contract under which the depositary is obliged to retain depositor's money.<sup>287</sup> Latvian Civil Code expressly recognises the conversion of deposit into a loan, for as long as the money deposited, as fungible property, are being used by the depositary, according to his discretion.<sup>288</sup> Depositaries in Estonia bear the obligation of returning the money deposited and the depositors assume the risk of any loss after the delivery of money. All the provisions on loans apply for bank deposits likewise.<sup>289</sup> Greek legislation does not provide an explicit definition of bank deposit, which is mainly regulated by principles of contract law. The main characteristic of bank deposits in

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<sup>283</sup>Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 paragraph 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719), Section 700

<sup>284</sup>French Civil Code Act No. 2013-404 of 17 May 2013, Articles 1930, 1932

<sup>285</sup>Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), Article 481

<sup>286</sup>Civil Code of the Italian Republic, approved by Royal Decree No. 262 of March 16, 1942), Article 1782 and 1834

<sup>287</sup>Civil Code of Netherlands, Article 7(600)

<sup>288</sup>Latvian Civil Code 1937, Article 1992

<sup>289</sup>Estonian Law of Obligations Act, section 896



Greek law is the reinforcement of bank's power through the depositing of depositor's money there, which is temporary and lasts until the depositor demands his money back.<sup>290</sup>

Under English law, the bank-customer relationship is similar to the debtor-creditor relationship. By the time money is deposited in the bank, the same amount should be repaid, either on depositor's demand, for current accounts, or on a date agreed, for term deposits or savings accounts. While being deposited in the bank, money can be disposed. As it was stated in *Foley v. Hill*, '[t]he money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit he can, which profit he retains to himself... The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation'.<sup>291</sup> Such argument demonstrated the debtor-creditor relationship, which was also supported by scholars. 'Whilst it would be misguided to attempt to define the relationship of banker and customer in terms of status rather than of contract, it is realistic to concede that it constitutes a *sui generis* contract incorporating elements of specific, well-defined contracts, such as that of debtor and creditor.'<sup>292</sup> In such a debtor-creditor relationship, the bank is not under an obligation to advise customers on how it disposes the money deposited and the risk to which those funds are exposed, in contrast with its obligation to advise customers who buy investment products. If bank directors were under a fiduciary duty to protect the

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<sup>290</sup>Ολ ΑΠ 35 / 97 ΔΕΕ 1997, 980

<sup>291</sup>*Foley v Hill* (1848) 2 H.L. Cas 28; 9 E.R. 1002 at 1005-1006

<sup>292</sup>P. Ellinger *et al.*, *Modern Banking Law* (3<sup>rd</sup> edn, Oxford University Press, 2002) 96

depositors' interests, then depositors would have been equalized with beneficiaries in investment business.<sup>293</sup> To place it in the context of this thesis, these considerations indicate that, in the light of the financial crisis, bankers cannot be found liable for the way they have used depositors' money and for the fact that they have not inform the for the risk to which their money are exposed, even if those risks resulted in the collapse of the bank and the loss of their savings.

In the US, a general deposit passes the title to money from the depositor to the bank, thus it creates a relationship of debtor-creditor. At that time, the money becomes part of the bank's property, and can be repaid after the depositor's demand.<sup>294</sup> In case of insolvency, the general depositors' repayment, as creditors, follows the repayment of privileged creditors. Under Cypriot law, bank deposits must be repayable either with or without simple or premium interest, either on demand or on an agreed date, and it is distinguished from the sale or supply of goods and assets, the provision of services and the issuing of debentures or shares.<sup>295</sup>

From this section it can be inferred that there are four main models of the bank-depositor relationship. Firstly, there is the model of the *depositum irregulare* that emerged from the Roman law tradition and provides that the ownership of money deposited is transferred to the depositary, i.e. the bank, which should promote the interests of the depositor. This model is adopted by some continental, civil law countries, such as France, Switzerland and Italy. Secondly, there is the model that treats deposits as loans and considers all the provisions on loans identically applicable for bank deposits. The second model is found in countries like Germany, Latvia and

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<sup>293</sup>D. Singh and J. R. La Brosse, 'Northern Rock, depositors and deposit insurance coverage: some critical Reflections' (2010) 2 *Journal of Banking Law* 60

<sup>294</sup>Uniform Commercial Code, Article 4: Bank Deposits and Collections (2002)

<sup>295</sup> N. 66(I)/97 , Ο περί Τραπεζικών Εργασιών Νόμος του 1997, Article 2

Estonia. Thirdly, the Netherlands and Greece apply the simple principles of contract law in disputes relating to bank depositors. Finally, common law countries consider the bank-customer relationship as a debtor-creditor relationship. Depending on the model that each country employs, the rights of depositors and the obligation of banks vary accordingly.

From the four models, the two former let the bank use the money deposited according to its discretion, either by fully acquiring its ownership and the risk to get lost, or by disposing them as money loaned. Thus, in the case of the financial crisis and the litigation in this area, it is rather difficult for bank depositors to prove bank's liability. In contrast, the two latter models seem more beneficial to depositors, as they can base their claims on grounds of breach of contract by the bank or on the responsibility of bank to repay the same amount to depositors in a debtor-creditor relationship. Based on the different treatment of bank deposits by different national legal orders, it is expected that the approach that States adopt during the financial crisis regarding their banks will vary too. This will be examined in Chapter 4, when discussing the approach of courts towards the protection of bank depositors.

Since the financial crisis is not a phenomenon limited to a particular country only and one of the basic methodologies of this thesis is transnational legal process, the analysis should now move to a higher level, the supranational one.

#### IV. THE NOTION OF ‘DEPOSIT’ AND ‘DEPOSITOR’ UNDER EU LAW

Under EU law, any person who holds a deposit is called depositor. Directive 94/19/EC<sup>296</sup> defines ‘deposit’ as any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution. The notion of ‘deposit’ does not cover bonds.

According to the abovementioned Directive, a deposit may be considered ‘unavailable’, when it is ‘due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either: (i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so; Or (ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances which has the effect of suspending depositors' ability to make claims against it, should that occur before the aforementioned determination has been made.’<sup>297</sup>

The Commission made some comments on the notions of deposit and credit balance in its draft: ‘The idea of deposit as it appears in para (1) has been envisaged from the depositor’s point of view. The depositor has a ‘credit balance’ or ‘claim’ whereas in the Directives relating to annual accounts, this naturally appears in the credit institution’s accounts in the form of ‘debt’ or ‘loan’... The idea of ‘credit balance’ is

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<sup>296</sup>Directive 94/19/EC on deposit-guarantee schemes [1994] OJ 2 135/05

<sup>297</sup>*Ibid.*, Article 1(3)

relatively clear: in particular it is used for current accounts but it is supplemented by the idea of ‘funds left in accounts’, which is intended to indicate savings books or accounts or any other instrument in which funds generally remain for longer than in current accounts.’<sup>298</sup>

The original Directive has been substantially amended in the light of the Eurozone financial crisis, so as to facilitate access to Deposit Guarantee Schemes for depositors, by extending the scope of their coverage, expediting repayment periods and enhancing the funding requirements.<sup>299</sup> The amendment of this Directive had the ultimate purpose of embellishing ‘consumer confidence in financial stability throughout the internal market’.<sup>300</sup> Under Directive 2014/49/EU, ‘deposit’ means a credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution is required to repay under the legal and contractual conditions applicable, including a fixed-term deposit and a savings deposit.<sup>301</sup> ‘Exclusions exist relating to credit balances whose existence can only be proven by a financial instrument as defined in Article 4(17) of Directive 2004/39/EC of the European Parliament and of the Council (1); their principal is not repayable at par; or their principal is only repayable at par under a particular guarantee or agreement provided by the credit institution or a third party’.<sup>302</sup>

The Directive characterises ‘eligible’ to repayment a deposit if it is not excluded from protection pursuant to Article 5. Any part of an ‘eligible deposit’ that does not exceed

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<sup>298</sup>Commission of the European Communities, ‘Proposal for a Council Directive on deposit-guarantee schemes’ 1992, COM (92) 188 final, Commentary on the Articles, Article 1, paragraph 1

<sup>299</sup> Directive 2014/49/EU on deposit guarantee schemes (recast) [2014] OJ 2 173/149, Preamble, Recital 7

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*, Article 2(3)

the coverage level laid down in Article 6 is classified as ‘covered deposit’. The definition of ‘unavailable deposits’ remained unchanged.

The only statutory definition of ‘depositor’ can be found in Article 2 of Directive 2014/49/EU,<sup>303</sup> in which ‘depositor’ is defined as the holder or, in the case of a joint account, each of the holders, of a deposit. If an account has been opened in the name of two or more persons, or if over that account two or more persons have rights that are exercised by means of the signature of one of more of those persons, then this account is considered as a joint one.

In other words, money deposited in a bank is a bank deposit. Bank deposit creates a contractual relationship between a banker and a depositor. The depositor or the account holder retains a right to get repayment on demand. The bank owes a liability to the depositor. In a bank’s financial statement, a deposit is shown as the asset of a bank.

In order to fully appreciate the notion of ‘depositor’ under EU law, one should also examine some more terms that are relevant to it and can put some limitations to the subject matter of the thesis. These terms are ‘creditor’, ‘consumer’ and ‘investor’, since it cannot be doubted that a depositor is also a creditor and a consumer of the bank.

Under EU law, the term ‘creditor’ is commonly used, but without any explicit definition available, apart from one given in the context of consumer protection. According to it, a ‘creditor’ is defined as any natural or legal person who grants credit

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<sup>303</sup>Directive 2014/49/EU on deposit guarantee schemes (recast) [2014] OJ 2 173/149

in the course of his trade, business or profession, or a group of such persons.<sup>304</sup> After being amended, Directive 2008/48/EC provides that ‘creditor’ means a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession.<sup>305</sup> Directives 2008/48/EC<sup>306</sup> and 2014/17/EU<sup>307</sup> interpret ‘consumer’ as a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession. Clearly, bank depositors fall within the definitions of ‘creditors’ and ‘consumer’ but their distinct characteristics ask for a particular treatment by law.

Finally, Directive 97/9/EC defines ‘investor’ as any person who has entrusted money or instruments to an investment firm in connection with investment business.<sup>308</sup> Though the definition of ‘investor’ and ‘bank depositor’ are not the same, it seems that a bank depositor can also fall below the category of ‘investor’.

As it can be extracted, the term ‘creditors’ includes depositors and investors, either individuals and businesses, and States. For the purposes of this thesis, States are excluded, and depositors and investors are examined in parallel, or from a comparative perspective, without employing the term of ‘creditors’.

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<sup>304</sup>Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1986] OJ 2 042/0048

<sup>305</sup> Article 1(2)(b), Directive 2008/48/EC on credit agreements for consumers [2008] OJ 2 133/66, Article 3

<sup>306</sup>Directive 2008/48/EC on credit agreements for consumers [2008] OJ 2 133/66, Article 3

<sup>307</sup>Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] OJ 2 60/34

<sup>308</sup>Directive 97/9/EC on investor-compensation schemes [1997] OJ 2 084/022

## V. THE NOTION OF ‘BANK DEPOSIT’ UNDER PUBLIC INTERNATIONAL LAW

The position of English law in section ii is presented as a starting point for discussion, but what is more useful for this thesis is the relevant approach of the international legal order and, in this case, the ECHR is examined.

Bank deposits have been included in the sphere of ‘possessions’ for the purposes of Article 1 of Protocol 1 ECHR. Since the ECtHR has decided cases concerning bank deposits on the basis of the right to property on several occasions, it could be understood that a bank deposit constitutes property, which should be protected by the relevant State, against any interference that prevents its peaceful enjoyment. However, this obligation on the States does not extend to the protection of the purchasing power of the money deposited. If the funds deposited have been interfered only on their value, this does not constitute an infringement of the depositor’s right to property. The case law of the ECtHR involves a number of examples that demonstrate this position.

In *Flores Cardoso v Portugal*<sup>309</sup> the Court held that the right to property of the applicants was not affected by the inflation and the decreased purchasing power of the Mozambiquen escudos, since Portugal could not be held liable for not protecting its citizens from the consequences of inflation. Similar judgments were delivered in the cases of *Appolonov v Russia*<sup>310</sup> and *Rudzinska v Poland*.<sup>311</sup> In the former case, the economic reforms in Russia affected the value of the applicant’s savings in a bank account but the State was not under the obligation to revalue the deposits. In the latter

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<sup>309</sup>*Flores Cardoso v Portugal*, App no 2489/09 (2012)

<sup>310</sup>*Appolonov v Russia*, App no 67578/01 (2002)

<sup>311</sup>*Rudzinska v Poland*, App no 45223/99 (1999)



case, it was declared that Article 1 of Protocol 1 of the Convention does not entail the obligation of maintaining the purchasing power of amounts deposited in banks. The argument of the applicant, that she could not buy the house she intended because Poland reduced the guarantees offered to holders of housing savings accounts, rendered the application inadmissible since the ambit of the right to property did not cover the right to become the owner of property.<sup>312</sup>

Since the restriction on a bank account's holder to access his money is considered interference with his right to property, the ECtHR has to examine whether that restriction fulfils the requirements of lawfulness and proportionality. Regarding proportionality, a temporary restriction could be accepted more easily than a permanent prohibition of disposing the money deposited.

The freezing of bank deposits and the payment in State bonds of the 'old' foreign-currency saving accounts in the Former Yugoslav Republic of Macedonia had to be examined by the Court in order to be demonstrated whether it constituted an unreasonable interference with the right to property of the affected depositors in the case of *Trajkovski v the Former Yugoslav Republic of Macedonia*.<sup>313</sup> It was demonstrated that the control of the use of property in this case was not a disproportionate measure. Taking into account the fact that the applicant was able to withdraw specific amounts in euros and the difficult economic conditions of the State at that time, the Court held that the measures were reasonable violation of Article 1 of Protocol No.1. The ECtHR followed a similar approach when considering the

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<sup>312</sup> See J. Sluysmans *et al.*, 'The Rule of Law: Protection of property' in M. Haentjens and B. Wessels, *Research handbook on crisis management in the banking sector* (Edward Elgar Publishing, 2015) 379-399; P. Artemou, 'Rights of European Union Depositors Under Article 17 of the Charter of Fundamental Rights After the Cyprus Bail-Out' (2016) 28 *Pace International Law Review* 205

<sup>313</sup> *Trajkovski v the Former Yugoslav Republic of Macedonia*, App no 53320/99 (2002)

conversion of money deposited in banks in ‘old’ foreign currency in Bosnia and Herzegovina to privatisation coupons and State bonds.<sup>314</sup>

Finally, in *Zolotas v Greece*<sup>315</sup> it was alleged that a statute of limitation on claims to bank deposits implemented by the Greek civil code was in breach of Article 1 of Protocol 1 ECHR. The applicant asked for the balance in his bank account 22 years after the opening of that account, and his inquiry was rejected, because the account remained inactive all those years. The ECtHR underlined the principle of proportionality, namely that any interference with the right to property could not be reasonable only if it imposes an excessive burden on the person affected. Furthermore, the Court reiterated that Article 1 of Protocol 1 ECHR renders States responsible to guarantee the effective enjoyment of the right to property and possession. Based on the principle that the relationship between a banker and a customer is a relationship of trust, the bank was considered to be obliged to have informed the applicant *a priori* of the statute of limitation that was about to impede his claims. Since Greece had failed to set up such an obligation, the Court held that there was a violation of the right to property.

This case law can lead to some initial conclusions regarding the case of bank depositors in the financial crisis. Firstly, since the interference of their deposits was not only on their value, but a restriction on their access to their money, thus the right to property is presumed to be violated. The ECtHR should only examine whether the measures at stake fulfil the requirements of lawfulness and proportionality. The former is clearly satisfied, because all measures were provided either by EU,

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<sup>314</sup>*Suljagić v. Bosnia and Herzegovina*, App no 27912/02 (2009)

<sup>315</sup>*Zolotas v Greece*, App no 66610/09 (2013)

international or national legislation. What is intricate is the satisfaction of the latter requirement, and this is analysed in Chapter 4.

## VI. BANK DEPOSITS UNDER INTERNATIONAL INVESTMENT LAW

‘Investment’ is a word very commonly used, thus it might be assumed that defining the term is straightforward. However, the notion of investment is broad enough and it receives various interpretations in everyday, financial, economic and legal usage.

The numerous interpretations of investment under EU law and international law stress the necessity for establishing a clear definition that will encompass all the different aspects that each legal order covers.

Initially, in this part a financial and economic definition is given (a). Moreover, an analysis of the interpretation of investment under international (b) and EU law (c) follows. The purpose of this analysis is to extract the essential features of ‘investment’ in order to examine whether bank deposits fulfill the criteria so as to be considered ‘investments’ (d). Bank depositors could be entitled to the protection offered by investment law, in case they are regarded investors, either under international or EU law.

### 1. Financial and Economic definition of ‘Investment’

The common sense considers ‘investment’ as money committed with the aim of achieving additional income. Economic science often assumes that an investment involves the transfer of funds for the establishment of a longer term project, having the purpose of regular income, with the person who transferred the funds, participating in the management of the project, assuming a business risk.<sup>316</sup>

The definition of investment in financial terms is that there is a commitment of the investor’s funds in order to obtain income in the future. That income could take various

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<sup>316</sup>R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn, Oxford University Press, 2012)

forms, including interest and dividend. Activities which can produce financial assets are regarded as investments for financial purposes.<sup>317</sup>

Turning to the economic definition of investment, this includes ‘the net additions to the economy’s capital stock which consists of goods and services that are used in the production of other goods and services’.<sup>318</sup> This explanation focuses on the creation of new and profitable capital.

The difference between the financial and the economic definitions lies in the fact that in the financial sense, an investment must produce financial assets; whereas in the economic sense, the investment must produce physical assets.<sup>319</sup> However, it can be noticed that both definitions have the same foundation, which is the commitment of money for the procurement of some assets, either financial or physical. Moreover, both definitions acknowledge that investments have some specific characteristics.

Definitely, an investment is made in the expectation of a return. In particular, the purpose of investing an amount of money is to derive return. The value of the return is determined by various factors, such as the nature and the management of the investment and the duration of it. The return of capital must be certain, in the sense that the investor must feel safe that his capital will be returned without losing his money or effort.

In addition, the assumption of risk is intrinsic to investments. This risk may relate to loss of capital, the alteration of returns, delay in repayment of capital, or non-payment of interest. The nature of the investment determines the risk to a great extent. For example, investments in ownership securities like equity shares carry higher risk compared to

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<sup>317</sup> Examples: purchasing of shares and debentures

<sup>318</sup>S. Kevin, *Security Analysis and Portfolio Management* (PHI Learning, 2008) 11

<sup>319</sup> Examples: new constructions, products, inventories etc

investments in debt instruments like debentures and bonds.<sup>320</sup> Moreover, the risk is analogous to the return. In other words, the higher is the risk, the higher is the return.

The afore-mentioned features of investment in the financial and economic sense of the notion, will be used below to examine whether bank deposits can qualify as investments. As it is demonstrated in the next section, both International and EU law interpretations of the term recognise most of these features, namely the commitment of money, the expectation of profit and the assumption of risk. It is not surprising that both legal orders provide for these common elements with the financial and economic sciences, since investment is an interdisciplinary concept, proving that concepts from one discipline can be transferred to another. Indicatively, it is supported below that bank deposits clearly share the two latter features, while the fulfillment of the commitment of money requirement is debatable.

## 2. 'Investment' under International law

'Investment' is not unanimously defined in international law, since customary international law and treaty instruments interpret the term differently. Each investment instrument serves different purposes and thus it defines the notion in various ways.<sup>321</sup> 'The multiplication of definitions of investment thus results from the proliferation of different sources.'<sup>322</sup>

Initially, investments were protected by the law on state responsibility, and particularly by the rights of property held by aliens.<sup>323</sup> The term 'investment' was not used; instead,

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<sup>320</sup> S. Kevin, *Security Analysis and Portfolio Management* (PHI Learning, 2008) 12

<sup>321</sup> C. Yannaca-Small, 'Definition of Investor and Investment in International Investment Agreements' (2008) *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD, 46  
<sup>322</sup> *Ibid.*

<sup>323</sup> A. Dimopoulos, *EU Foreign Investment Law* (Oxford Scholarship Online, 2012) 21

customary international law provided for ‘foreign property’.<sup>324</sup> A foreign capital entered into a host country and took the form of property, that property becoming a foreign investment. Through the years, the concept of property expanded so as to include, in addition to physical property, intangible assets, contractual rights and other economic transactions. Therefore, considering any cross-border economic activity as an investment would be misleading. ‘Such a broad concept of foreign investment would significantly curtail state sovereignty and domestic control over economic activities, and would also lead to inconsistent overlaps with trade and other forms of cross-boundary economic regulation.’<sup>325</sup>

The OECD Codes of Liberalisation of Capital Movements<sup>326</sup> shift the focus on the transfer of capital, by regarding investments as the most important activity of capital movement. According to the definition of direct investment in Annex A, the decisive features of an investment are the existence of a capital contribution, the creation of ‘lasting economic relations with an undertaking’<sup>327</sup> and the investor’s effective managerial control of the enterprise where it had invested.

A more specific definition of direct investment can be found in the OECD Benchmark Definition of Foreign Direct Investment, where it is stated that ‘direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise). The motivation of the direct investor is a strategic long-term relationship between the direct

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<sup>324</sup>UNCTAD, ‘Scope and Definition’(1999) *UNCTAD Series on issues in international investment agreements* available at: <http://unctad.org/en/Docs/psiteiitd11v2.en.pdf> (accessed 12 September 2017)

<sup>325</sup>A. Dimopoulos, *EU Foreign Investment Law* (Oxford Scholarship Online, 2012) 22

<sup>326</sup>OECD Code of Liberalisation of Capital Movements (2013) available at: [http://www.oecd.org/investment/investment-policy/CapitalMovements\\_WebEnglish.pdf](http://www.oecd.org/investment/investment-policy/CapitalMovements_WebEnglish.pdf) (accessed 12 September 2017)

<sup>327</sup>*Ibid.*, at 25

investment and the enterprise which allows a significant degree of influence by the direct investor in the management of the direct investment enterprise. The lasting interest ‘is evidenced where the director investor owns at least 10 per cent of the voting power of the direct investment enterprise’.<sup>328</sup> Again, the principal characteristics of an investment remain the same, namely the contribution by the investor, the establishment of durable relations between the investor and an enterprise and the actual influence in the management of the enterprise by the investor.

Most International Investment Agreements prefer a broad definition of investment, usually describing them as ‘every kind of assets’ without giving an exhaustive list of which are these covered assets. The reason of preferring such wide interpretations is that States, when negotiating this kind of agreements, aim at offering protection to as many economic activities as possible in order to attract more investors and contribute to the development of their national economies. Such wide definitions cover both direct and portfolio investment and they demonstrate the steadily progressive nature of the notion. An example of a multilateral instrument that interprets investment so broadly is the Energy Charter Treaty, in which Article 1(6) talks about ‘every kind of assets’ relating to economic activities in the energy industry.<sup>329</sup> NAFTA is slightly more specific, providing of foreign direct investment, portfolio investment, partnership, tangible and intangible property with a profit-making expectation.<sup>330</sup> Moreover, NAFTA excludes some categories of property from the area of investment.<sup>331</sup>

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<sup>328</sup>OECD Benchmark Definition of Foreign Direct Investment (Draft) (2007) *OECD Global Forum on International Investment*, 4th edition, 261

<sup>329</sup>Energy Charter Treaty, entered into force in April 1998, available at: [http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf) (accessed 12 September 2017)

<sup>330</sup>North America Free Trade Agreement (NAFTA), Article 1139, available at: <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> (accessed 12 September 2017)

<sup>331</sup>For example, money claims arising solely from commercial contracts for the sale of goods or services



Tribunals have tended to interpret ‘every kind of asset’ broadly in order to encompass various types of assets. The more recently drafted IIAs tend to define ‘investment’ more specifically, rejecting the general interpretation that was traditionally employed. The reason for that change lies in the deficiencies of the initial definition, the most significant being that it does not reflect the common understanding of investment since it does not refer to the expectation of profit or the risk assumption.

In the same line with multilateral treaties, Bilateral Investment Treaties construe ‘investment’ as ‘every kind of asset’ accompanied by a non-exhaustive list of types of foreign investments that are protected. It has been observed that most BITs define investments based on four specific foundations, i.e. ‘the form of the investment; the area of the investment’s economic activity; the time when the investment is made; and the investor’s connection with the other contracting state’.<sup>332</sup> The non-exhaustive lists usually include movable and immovable property, debt and equity investment, claims to money and claims under a contract with a financial value. The use of broad definitions allows the protection of both foreign direct investments and portfolio investments.<sup>333</sup>

A typical sample of the general definition of investment can be found in the German Model BIT,<sup>334</sup> which illustrates the traditional approach,<sup>335</sup> even if it was only drafted in 2005. According to it, not every asset could constitute an investment, but rather only the

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<sup>332</sup>C. Yannaca-Small, ‘Definition of Investor and Investment in International Investment Agreements’ (2008) *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD, 50

<sup>333</sup> There are BITs which expressly include in their list covered assets bonds, debentures and other debt instruments (Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (2007), available at: <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078> (accessed 12 September 2017), Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments (1998), available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/204> (accessed 12 September 2017) as well as futures, options and other derivatives (US Model BIT(2004), available at: <http://www.state.gov/documents/organization/117601.pdf> (accessed 12 September 2017)). On the other hand, other BITs do not include such a provision.

<sup>334</sup> German Model Treaty (2008), available at: <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> (accessed 12 September 2017)

<sup>335</sup> That approach was developed in the early 1960s

examples given. Among the examples of the list are the ‘movable and immovable property and any other property rights’.<sup>336</sup> It is not clarified whether property must relate to the undertaking or be used for a business purpose. Another example is any ‘shares of a company and other kinds of interest in companies’.<sup>337</sup> Various interests in companies can be included there, such as debentures and other debt-type instruments, as well as portfolio investments. Furthermore, ‘claim to money that has been used to create an economic value or to any performance having an economic value’<sup>338</sup> also qualifies as investment. Potentially, such a wording covers a wide range of commercial contracts and transactions. While the abovementioned Model BIT provided for an exhaustive list of activities that qualify as investments, the 2004 US Model BIT<sup>339</sup> constitutes another example of how States approach the notion of investment. Investment is interpreted as every asset which is either owned or controlled by the investor ‘which has the characteristics of an investment’ and includes, apart from the traditional examples of investment, debts instruments, ‘futures, options and other derivatives’.<sup>340</sup> The abovementioned ‘characteristics of an investment’ consist of ‘the commitment of capital, the expectation of gain or profit, or the assumption of risk’.<sup>341</sup> An even broader definition is given in the Belgium-Luxembourg Model BIT which explains investment as ‘any kind of asset and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity’.<sup>342</sup>

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<sup>336</sup>German Model Treaty (2008) Article 1(i), available at: <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> (accessed 12 September 2017)

<sup>337</sup>German Model Treaty (2008) Article 1(ii), available at: <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> (accessed 12 September 2017)

<sup>338</sup>German Model Treaty (2008) Article 1(iii), available at: <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> (accessed 12 September 2017)

<sup>339</sup>US Model BIT (2004) <http://www.state.gov/documents/organization/117601.pdf> (accessed 12 September 2017)

<sup>340</sup>*Ibid.*, Article 1

<sup>341</sup>*Ibid.*

<sup>342</sup>Belgium-Luxembourg Model BIT (2002) Article 1.2, available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/290> (accessed 12 September 2017)

Due to the broadness of the definitions given in most BITs, the arbitral tribunals are usually asked to rule on this matter. Thus, the definition of investment could also be extracted from the interpretation of tribunals, when they have been asked to decide whether a particular activity constituted investment.

In *Eureko B.V. v Poland*,<sup>343</sup> the *ad hoc* arbitration was called to determine whether the possession of shares and the deriving corporate governance rights could be entitled to protection under the 1992 Netherlands-Poland BIT. It was held that since shareholding was regarded as an investment, as well as any rights derived from shares, then Eureko's corporate governance rights had some economic value and they had to be protected, since they constituted investment.

Without doubts, the most significant illustration of the argument that investment is not only a broad term, but rather an autonomous legal concept, can be found in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Although the ICSID Convention does not contain a clear definition of the notion, it stresses the importance of delimiting its nature by providing in Article 25(1) that 'the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment'. The reason behind the absence of an explicit definition is expressed in the World Bank Executive Directors' Report, which stated that 'no attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can be made known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the centre'.<sup>344</sup> In other words, the parties' agreement that their

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<sup>343</sup>*Eureko B.V. v Poland*, Partial Award, 19 August 2005, IIC 98

<sup>344</sup>C. Yannaca-Small, 'Definition of Investor and Investment in International Investment Agreements' (2008) *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD, 59

dispute arises out of an ‘investment’ and their consequent consent to jurisdiction could be a major factor for recognising an activity as an investment.<sup>345</sup>

However, the parties’ consent, either in the case of two private investors or in the case of investor-State arbitration, could not constitute the only determinant criterion. Even if it is acknowledged that ICSID arbitral tribunals can interpret ‘investment’ according to the facts of each particular case, their freedom is restricted, as it was stated in the *Joy Mining v Egypt*: ‘The parties to a dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.’<sup>346</sup>

The first definition of investment was given by the arbitral tribunal in *Fedax NV. v Republic of Venezuela*.<sup>347</sup> Five criteria were presented as ‘the basic features of an investment’, and they consisted of certain duration, a certain regularity of profit and return, the risk assumption, a substantial commitment and a contribution to the development of the host State.<sup>348</sup> Among the five criteria in this approach, four were widely accepted, and only the relevance of the regularity of profits was doubted. The four characteristics (substantial commitment, certain duration, assumption of risk and significance for the host state’s development) were established in the *Salini Construttori*

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<sup>345</sup>A. Broches, Chairman’s Report on the Preliminary Draft of the Convention, 9 July 1964, doc. Z11, reprinted in ICSID, *Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Vol. II, (1968) at 557, 579-582, cited in C. Yannaca-Small, ‘Definition of Investor and Investment in International Investment Agreements’ (2008) *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD, 33

<sup>346</sup>*Joy Mining Machinery Ltd v Egypt* (ICSID Case No. ARB/03/11), Award on jurisdiction, 6 August 2004, paragraph 50

<sup>347</sup>*Fedax N.V. v. Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction, 11 June 1997

<sup>348</sup>*Ibid.*, para 43

*S.p.A. and Italstrade S.p.A v Morocco*,<sup>349</sup> and they are usually referred to as the ‘Salini criteria’.<sup>350</sup>

This four-criteria approach has not avoided criticism. In *Saba Fakes v The Republic of Turkey*,<sup>351</sup> the tribunal tried to define ‘investment’ based on the ordinary meaning of the word, thus it only focused on capital contribution, duration and risk assumption and it rejected the contribution to the economic development of the host state, as it was considered uncertain at the time of the investment.

Furthermore, in *Phoenix v Czech Republic*<sup>352</sup> two more criteria were added. According to the tribunal, an investment could be covered by ICSID Convention if the assets were invested in accordance with the laws of the host state and they were invested *bona fide*.<sup>353</sup> The importance of the contribution to the development of the state was doubted, because designating the contribution of an investment is ‘impossible to ascertain’.<sup>354</sup> The criterion of contribution to the economy – not to the development- of the host state was preferred, and that contribution could be demonstrated by the existence of the three first factors (capital contribution, duration and risk assumption).

The recognition of financial instruments as investments was considered in the *Fedax v Venezuela*<sup>355</sup> and *CSOB v Slovak Republic*,<sup>356</sup> which supported that loans and promissory notes could be qualified as investments. The tribunal in *Fedax v Venezuela* expressed the view that ‘Loans qualify as an investment within ICSID’s jurisdiction [...] Since

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<sup>349</sup>*Salini Costruttori SpA et Itals trade SpA v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001

<sup>350</sup> Although the concept of binding precedent does not apply in investment treaty arbitration

<sup>351</sup>*Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010

<sup>352</sup>*Phoenix Action Ltd v. Czech Republic* (ICSID Case No ARB/06/5), Award, 15 April 2009

<sup>353</sup>*Ibid.*, paragraph 144: ‘It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.’

<sup>354</sup>*Ibid.*, paragraph 85

<sup>355</sup>*Fedax N.V. v. Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction, 11 June 1997

<sup>356</sup>*CSOB v. Slovak Republic*, (ICSID Case No. ARB/97/4), Award, 29 December 2004

promissory notes are evidence of a loan and a rather typical financial and credit instrument there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this.’<sup>357</sup> In the same line, the loan in question in the *CSOB v Slovakia* was held to involve ‘a significant contribution by CSOB to the economic development of the Slovak Republic [...] this is evident from the fact that CSOB’s undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic’s banking infrastructure.’<sup>358</sup>

However, in *Joy Machinery Limited v The Arab Republic of Egypt*,<sup>359</sup> bank guarantees were not regarded as investments, after the application of the criteria presented beforehand. In particular, it was held that a bank guarantee only constitutes a contingent liability and ‘to conclude that a contingent liability is an asset... and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do’.<sup>360</sup>

Two conclusions can be drawn regarding these three arbitral awards. Firstly, generally, tribunals are not negative to recognise financial and credit instruments as investments *ab initio*, therefore it cannot be excluded that bank deposits can be found ‘investments’ in an arbitration dispute. Secondly, and as a limitation to the former inference, tribunals try to apply the *Salini* criteria in the facts of each particular case and, having in mind that arbitrators are not bound by the doctrine of precedent, it is difficult to establish a general principle on which financial instruments qualify as investments.

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<sup>357</sup>*Fedax N.V. v. Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction, 11 June 1997

<sup>358</sup>*CSOB v. Slovak Republic* (ICSID Case No. ARB/97/4), Award, 29 December 2004

<sup>359</sup>*Joy Mining Machinery Ltd v. Egypt* (ICSID Case No ARB/03/11), Award on jurisdiction, 6 August 2004

<sup>360</sup>*Ibid.*

### 3. 'Investment' under EU law

In antithesis to international law, there is no precise definition of 'investment' in EU law, probably due to the fact that the area of investments initially fell below the exclusive competences of the Member States. The first explicit citation of the term has appeared in the Lisbon Treaty,<sup>361</sup> under which the Common Commercial Policy covered foreign direct investment (FDI) thereafter. Primary EU law did not include the notion of foreign investment until the implementation of the Lisbon Treaty, since its protection was encompassed in the competence of the Member States and not the EC.<sup>362</sup>

Article 207 TFEU refers merely to foreign direct investment, disregarding portfolio investment and other forms of foreign investment, thus it does not provide a comprehensive definition of the term. A definition of foreign investment can be derived from a broad analysis of EU law.

Foreign investors are protected by EU law provisions on capital movement and establishment. The TFEU provides for absolute liberalization of capital movements, both between Member States and between Member States and third countries.<sup>363</sup> The Council Directive 88/361/EEC<sup>364</sup> defined investments as 'Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest

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<sup>361</sup>Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01: Before the entry into force of the Lisbon Treaty, the term had not existed in primary EU law, not even regarding investments within the Union. Moreover, the international agreements concluded by the Union do not refer to investment, despite the fact that their primary scope is the regulation of foreign investment.

<sup>362</sup>A. Dimopoulos, *EU Foreign Investment Law* (Oxford Scholarship Online, 2012) 17

<sup>363</sup> Articles 63 to 66 TFEU

<sup>364</sup>Directive 88/361/EEC for the implementation of Article 67 of the Treaty OJ 2 178/5 (1988)

sense.’ The characteristics that can be extracted from the above definition are the provision of capital in order to accomplish an economic activity, the creation of an enduring and direct link, and the managerial control of the enterprise by the person who supplies the capital.

Moreover, the CJEU case law provides that ‘movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service... The physical transfer of bank notes may not therefore be classified as a movement of capital where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of goods or services.’<sup>365</sup> By distinguishing between payment for the provision of goods or services and transfer of capital, the CJEU demonstrated two more features of investments, namely the profit expectation and the risk assumption. In other words, investments are characterised by their ultimate purpose to make profit, but with an element of unpredictability for the outcome of the undertaking.<sup>366</sup>

Capital movements are interpreted broadly enough in Directive 88/361/EEC, so as to include – in addition to direct investment – all operations in equity or debt securities, namely shares and bonds, which are dealt with on the capital or on the money market.<sup>367</sup> Therefore, it could be argued that portfolio investments are considered as capital and they should be regulated in the same manner as direct investments.<sup>368</sup> Since portfolio investments constitute capital movement, then they have also the aforementioned key features that are derived by EU law.

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<sup>365</sup> Judgment of 31 January 1984, *Luisi and Carbone*, Joined cases C-286/82 and 26/83, ECLI:EU:C:1984:35

<sup>366</sup> For example, in the case of sales of goods, even if there is a profit expectation, such profit is rather predictable, thus there is no any risk.

<sup>367</sup> A. Dimopoulos, *EU Foreign Investment Law* (Oxford Scholarship Online, 2012) 44

<sup>368</sup> *Ibid.*



Furthermore, capital movements for personal or commercial purpose are also covered by the provisions of free movement of capital. This means that physical transfer of money; credits and financial loans regarding commercial transactions are regulated by the EU law provisions on capital movements. Nevertheless, such capital movements do not meet the profit expectation and the risk assumption characteristics, which identify investments, thus they are not treated as investments under EU law. As it can be noticed, ‘capital’ and ‘investment’ cannot be equalized under EU law, since the term of capital is very broad and it includes *inter alia* investments.

Evidently, Articles 206 and 207 TFEU refer solely to FDI, leaving aside *inter alia* portfolio investments and money claims. ‘This does not mean that EU law does not consider them as foreign investment, as the other Treaty rules remain significant for their determination and regulation.’<sup>369</sup> It rather means that the Common Commercial Policy *principally* deals with FDI.<sup>370</sup>

The inclusion or not of portfolio investments on the FDI, and consequently on the Common Commercial Policy, has constituted the subject of a continuous debate between the Member States and the EU Commission. On the one hand, a narrow interpretation was asserted by the German Constitutional Court, which demonstrated that FDI exclusively comprises ‘investment which serves to obtain a controlling interest in an enterprise’.<sup>371</sup> On the other hand, the EU Commission supported that the exclusive competence of EU covers ‘both foreign direct investment and portfolio investment’.<sup>372</sup>

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<sup>369</sup>A. Dimopoulos, *EU Foreign Investment Law* (Oxford Scholarship Online, 2012) 44

<sup>370</sup>The EU competences in the field of investment are discussed in Chapter 6.

<sup>371</sup>BVerfG, Judgment of 30 June 2009 - 2 BvE 2/08 - Rn. (1-421) available at: [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html). (accessed 17 September 2015)

<sup>372</sup>Financial Responsibility Regulation proposal COM (2012) 335 final, 2012/0163 (COD)

The EU Council seems to promote a textual interpretation of the relevant TFEU provisions by describing portfolio investments as an area of mixed competence.<sup>373</sup>

Even if a clear definition of ‘investment’ is absent from EU law, a definition can be constructed based on a synthesis of characteristics recognised in many areas of primary and secondary EU law. Firstly, there must be a commitment of capital for the performance of an economic activity. Secondly, the investor must establish a long-lasting link with the enterprise. Thirdly, the investor must have the control of the undertaking. Fourthly, the capital commitment should have a profit-making orientation. Finally, the investor must assume the risks of such an activity. Apart from the third feature, namely the managerial control of the enterprise by the investor that international law does not provide for, both legal orders acknowledge the same key characteristics that an investment should have.

#### **4. Bank deposits as investments**

After examining how the notion of investment is interpreted by international and EU law, and also by the financial and economic sciences, the focus will now be shifted on whether bank deposits could be treated as investments or, instead as only claims of their depositors against the relevant bank. Bank depositors could be entitled to the protection offered by investment law, in case they are regarded investors, either under international or EU law. As a consequence, the avenue of international investment arbitration could be available for them, in addition to the option of litigation in national and international courts.

The variety and ambiguity of definitions of investment cannot always provide clear guidance as to which activities qualify. Both international law<sup>374</sup> and EU law recognise

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<sup>373</sup>Commission Press Release 16943/12 (29 November 2012) on negotiation for investment with Canada, India and Singapore

<sup>374</sup>See the ‘Salini criteria’

some key features in common, the existence of which is usually determinant to decide whether an activity, including bank deposits, constitutes an investment.

Firstly, an investment principally involves a commitment of economic value. In other words, an investment consists of assets. Through the years, the notion of investment has been expanded so as to recognise new forms of property and modern types of economic transactions. Secondly, the duration of the investment is always taken into consideration. Thirdly, investments are mainly characterised by profit expectation and risk assumption. Inevitably, expecting profit entails some risk, which the investor has incurred or shared the business risk associated with the set up of an investment. ‘The existence of risk and profit becomes crucial for differentiating investment from mere commercial transactions.’<sup>375</sup> Fourthly, an investment should contribute to the development of the host state. ‘Development’ has also been interpreted very broadly, thus each State has to determine for themselves what is regarded advantageous for their development. Finally, EU law adds that the investor must have the managerial control of the investment.

Some BITs expressly acknowledge bank deposits as investments. On the other hand, there are other more restrictive BITs which expressly exclude them. For example, it is stated in the Uruguay – United States BIT that ‘Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as a bank account that does not have a commercial purpose and is related neither to an investment in the territory in which the bank account is located nor to an attempt to make such an investment, are less likely to have such characteristics.’<sup>376</sup>

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<sup>375</sup>A .Dimopoulos, *EU Foreign Investment Law* (Oxford Scholarship Online, 2012) 29

<sup>376</sup>Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (2005), footnote on Article 1 [https://ustr.gov/sites/default/files/uploads/agreements/bit/asset\\_upload\\_file748\\_9005.pdf](https://ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf) (accessed 12 September 2017)

There are authorities which define investment as a simple ‘title to money’, a broad definition that can easily encompass bank deposits. The examination of the nature and characteristics of bank deposits in relation to the abovementioned general features of investments, might lead to some assumptions regarding whether bank deposits could qualify as investments and thus fall below the jurisdiction of international investment arbitration.

At first, an investment involves a commitment of economic value, the purchase of an asset or the transposition of capital into a lucrative economic activity. The action of depositing money in a bank does not convert cash (or either cash-equivalents) into other assets. Purchasing shares in a bank, or bank bonds or even certificates of deposit are all activities which could fulfill the commitment of economic value criterion, since they transform cash into other assets. However, opening a simple bank account cannot be considered as making a commitment of economic value, and thus it cannot indicate that a bank deposit qualify as investment. Furthermore, there is the argument that the operation of a bank deposit entails a commitment of economic value but from a reverse side.<sup>377</sup> In particular, the bank invests the client’s money when it on-lends it to third parties. In such argument, the client becomes the lender to the bank, instead of being an investor in it.

Moreover, the duration of an activity plays a key role in identifying the activity as an investment. Since there is no fixed time threshold, on the basis of which someone could assess whether a contribution may qualify as an investment, it is difficult to draw a general conclusion regarding bank deposits and their duration. It is clear that short-term bank deposits could not satisfy the duration requirement and long-term deposits might illustrate the establishment of long-lasting link with a country, while medium-term deposits are

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<sup>377</sup> P. Athanassiou, ‘On the Legal and Economic Treatment of Bank Deposits as Investments: Some Reflections’ (2014) 29 *Journal of International Banking Law and Regulation* 717

more controversial. Measuring time is a matter of common sense. For example, a 10-months bank deposit is clearly a short-term one, while a 10-years deposit is considered as long-lasting.

The third feature of investment relates to the profit expectation and the assumption of risk. Bank deposits are income-producing, since depositors have at least a minimum return, in the form of the interest returned to them. As every profitable activity, bank deposits involve some risk. 'That bank deposits are not risk-free placement is one of the bitter lessons of the recent financial crisis, which has seen depositors in several European banks come close to losing or actually losing some of their deposits'.<sup>378</sup> Since most Deposit Guarantee Schemes provide for the protection of a maximum amount of money deposited,<sup>379</sup> the rest of the deposit remains uninsured. Therefore, the deposits in excess of the deposit guarantee threshold constitute unsecured claims of the depositor on the bank, and they can be bailed-in, contrary to the initial supposition that money deposited are available to be returned to their owners on demand. In particular, by transferring the burden of rescuing a bank to the depositors, based on the Single Resolution Mechanism, implies that deposits have been changed from bank credits to taxpayers' money available in emergency conditions, thus 'nobody's money is safe from the tax collector'.<sup>380</sup>

Furthermore, an investment is generally considered to contribute to the development of the country. Strictly speaking, an individual bank deposit cannot be advantageous for the development of a country in a direct way. However, the long-term importance of bank deposits in a country's economy is priceless. The banking sector in an economy is likened

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<sup>378</sup>P. Athanassiou, 'On the Legal and Economic Treatment of Bank Deposits as Investments: Some Reflections' (2014) 29 *Journal of International Banking Law and Regulation* 716, see for example Northern Rock, the banks in Iceland and Cyprus's Laiki Bank

<sup>379</sup> In EU this amount is usually 100 000 euros

<sup>380</sup> G. C. Georgiou, 'Cyprus's Financial Crisis and the Threat to the Euro', (2013) 24 *Mediterranean Quarterly*, 67

to the heart in a body and the capital it provides is likened to blood that circulates in it. In other words, if banks do not provide finance, the economy of a country will suffer and finally fail. The ability of banks to provide finance depends on their ability to mobilise sufficient amount of deposits in the economy. Some clients deposit their money in a bank and some other clients borrow money from those resources, therefore the banking industry transform deposits into real productive capital, which contributes to the development of a country. Consequently, bank deposits are the foundations of an economy, since banks cannot function without deposits.<sup>381</sup>

What EU law describes as the managerial control of the investment, lacks direct application in the case of bank deposits. A bank depositor does not have voting rights and thus he cannot influence the management of the bank. While shareholders can affect the business strategy and the whole behaviour of a bank, depositors do not have such a power. The only means of influencing, in a very indirect way, the bank's management is by threatening to remove their deposits when they disagree or worry about the policy of the bank. 'However, a depositor's threat to move his deposits is hardly a substitute for the voting rights of shareholders in a bank not least because of the relatively weak competitive forces within the banking sector and its relatively high degree of concentration.'<sup>382</sup>

In addition to the assessment of the main characteristics of an investment, the intention behind opening a bank account should also be taken into consideration. Someone who has excess cash has the option of a bank deposit, as well as the option of purchasing other investment products. In other words, bank deposits are regarded as a part of the

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<sup>381</sup> Among the functions of banks in a country's economy are also the provision of clearing and settlement systems that expedite trade, and of various products to deal with risk and uncertainty

<sup>382</sup> P. Athanassiou, 'On the Legal and Economic Treatment of Bank Deposits as Investments: Some Reflections' (2014) 29 *Journal of International Banking Law and Regulation* 717

‘investment’ options. The holder of the cash will decide whether to deposit the money on a bank, instead of purchasing shares for example, based on the elements of profit expectation and wealth-allocation. Such elements are inherent in the nature of ‘investment’. ‘The volitional conduct element is all the more prominent where foreign depositors, with no permanent ties to a given jurisdiction, choose to bring in it and deposit, with one or several local banks, excess liquid funds: their decision to do so would appear to bear all the hallmarks of an investment decisions, dictated by business considerations.’<sup>383</sup> In other words, choosing in which bank the account will be opened requires the consideration of similar elements with choosing in which country or which industry to establish an enterprise, i.e. an investment.

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<sup>383</sup>P. Athanassiou, ‘On the Legal and Economic Treatment of Bank Deposits as Investments: Some Reflections’ (2014) 29 *Journal of International Banking Law and Regulation* 716

## VII. CONCLUDING REMARKS

It is clear and undeniable that bank depositors can avail themselves to the protection offered by the ECHR under Article 1 of Protocol 1. What is disputable is whether they can also enjoy the protection offered by international investment law and, consequently, by international investment arbitration.

Even if at first glance, investment can be easily defined; such an impression does not reflect the reality. Investment has been interpreted in various ways, through economic and financial sciences and in different legal orders.

There is no clear answer whether bank deposits can qualify as investments. Though some of the principal characteristics of investments are present in bank deposits, most importantly the assumption of risk, there are other characteristics whose presence is controversial, such as the long-term duration.

The fact that some BITs expressly cover bank deposits also strengthens the argument that bank deposits are investments for the purposes of investment arbitration. Moreover, deposits may well qualify as investments from an economic perspective, since the expectation of return and the assumption of risk requirements are met, as it was explained in the previous section.

One possible approach would be that bank deposits cannot be regarded as investments up to the amount protected by the deposit guarantee schemes, but they can be regarded as investments for the unsecured amount. For example, if there is a bank deposit of €250 000, it can be argued that the €100 000, which are secured under most EU deposit guarantee schemes, cannot constitute an investment, while the remaining €150



000 do constitute investment. Such an argument makes more sense in the case of larger amount of money being deposited.

Whether bank deposits qualify as investments is a matter of high importance, since it either allows or prevents the protection of depositors by the provisions of investment law. The rest of this thesis builds on the assumption that bank deposits can be treated as investments. Thus, international investment arbitration is examined in order to see whether it could be beneficial for bank depositors regarding their effective protection during the financial crisis.

## CHAPTER FOUR

### THE APPROACH OF COURTS TOWARDS THE PROTECTION OF BANK DEPOSITORS AND EFFECTIVENESS

The global financial crisis has brought essential changes in the EMU's architecture<sup>384</sup> and its constitutional foundations and the success and future of European integration have been intensely challenged. Post-crisis austerity measures<sup>385</sup> implemented by those Member States that were heavily hit by the crisis, to fulfil the criteria in order to receive financial assistance by international lenders, have given rise to numerous questions regarding the level of protection of individuals' fundamental rights. Further considerations relate to the transparency and efficiency of crisis management mechanisms at the EU, and -consequently, also national- level. The purpose of this chapter is to examine the various approaches that the CJEU, selected national courts and the ECtHR have followed when asked to review the legality of the post-crisis measures adopted at the EU and national level. Thus, analysis is made of some of the most prominent litigation arising out of the measures adopted in Ireland, Iceland, Greece, Portugal, Spain, Slovenia and Cyprus. Those countries have been chosen due to the rigorous, and in some cases unprecedented, measures that have arguably restricted the fundamental rights of citizens, and in some cases, depositors in particular. In addition, selective case law of the ECtHR dealing either with the financial crisis or the protection of depositors and shareholders of

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<sup>384</sup> Although the crisis started in the financial/banking sector, it pushed the EU economy into severe recession and affected simultaneously the two central policies of the Union, namely the EMU and the internal market, and underlined the need for public intervention in the financial/banking sector, in the form of state aid, state guarantee or liquidity measures and recapitalisation, and the need for permanent and integrated crisis systems. Remarkably, the European Banking Union has been developed after the crisis arose.

<sup>385</sup> Either affecting the banking sector of the State (for example, banks restructuring and bail-in) or the social and employment rights of the citizens (for example, increase in taxation, reductions in public sector workers' salaries and pay cuts in the pensions of retired citizens)

failing banks is analysed. The constitutional<sup>386</sup> and social<sup>387</sup> perspectives of those macroeconomic adjustment programmes have already been extensively studied by legal scholarship. Therefore, those aspects will be slightly touched upon on this chapter, with the focus being shifted to the protection of individuals, either as depositors, shareholders or investors in banks.

The protection offered will be assessed on its effectiveness. In the EU legal order, effective judicial protection is preserved in Article 47 of the Charter which encompasses the right to an effective remedy of every individual in case of violation of EU law, the right to a fair trial and the right of defence and legal aid. The Lisbon Treaty gave to the principle of effective judicial protection a Treaty basis of its own, with Article 19(1) TEU;<sup>388</sup> until then, it only constituted a ‘mere’ general principle deriving from the constitutional traditions of the Member States and Article 6 ECHR. As it will be explained below, arguably, EU law prefers only a procedural approach towards effective judicial protection, while this chapter will try to examine the application of effectiveness on the substance of a case.

## **1. National courts**

Applicants have often brought proceedings in national courts in order to challenge the post-crisis measures, based their arguments on the obligation of States to protect their fundamental rights and on their national constitution allowances to create or participate in supranational instruments, outside the sphere of EU law, such as the ESM. The overview in this chapter aims to be rather indicative than exhaustive. Litigation at the national level could be classified based on the subject-matter of cases. In particular, two

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<sup>386</sup> In other words, the legal competence of the relevant authorities on EU bail outs and bail ins

<sup>387</sup> In other words, the effects of the programmes on employment and labour social rights

<sup>388</sup> Article 19(1) TEU creates the obligation of Member States to provide sufficient remedies to ensure effective judicial protection only in areas protected by EU law.

classes of actions can be identified. Firstly, there are cases where the relevant national court had to rule on the compatibility of the national adjustment programme with guarantees regarding social rights and general principles of law<sup>389</sup> provided in their constitution. Examples of this class are the cases of Greece, Portugal and Spain. Secondly, there are cases where the national courts were asked to decide on the legality of general, supranational reforms of the EMU structure and their compatibility with national constitutions, as they allegedly intrude with national sovereignty and democratic legitimacy. Remarkable in this area is the example of Ireland. The case law on bank depositors and investors can be argued to belong either to the first class, as in Slovenia and Cyprus, or the second class, as in Iceland. Notable deference to the political process can be identified in both classes of cases, but the degree has been higher in the context of the second type, since courts had to evaluate the constitutionality of more general reforms.

## 2. CJEU

Generally, the CJEU has operated as a catalyst for the architecture of the EMU, in relation to its legal perspective, with the political process being deliberately ignored. Prior to the crisis, the jurisprudence of the CJEU concerned only the effectiveness and enforceability of the Stability Growth Pact and underlined the political and discretionary character of the excessive deficit process, which constitutes an underpinning of the EMU. Post crisis, it is argued that the Court remained deferential to the mechanisms employed at the EU level, though it had a lot of opportunities to criticize the amendments and developments of the EMU. The relevant case law can be classified into two categories, reflecting the double role of the CJEU during the crisis. Firstly, the legality and constitutionality of some general reforms of the EMU's architecture were examined, such as in the *Pringle*

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<sup>389</sup> The main general principle of law examined by the courts on those cases was the principle of equality.

case.<sup>390</sup> Secondly, the Court had to rule on the nature of MoUs and their interaction with EU law, since national courts, for example in Portugal, Slovenia etc, made preliminary references when they dealt with the adverse effects of the rescue packages and austerity measures.<sup>391</sup>

### 3. ECtHR

Though limited, due to the requirement of prior exhaustion of all domestic remedies, the recent jurisprudence of the ECtHR contains rulings on the legislative austerity measures because of the Eurozone crisis, against Greece, Portugal, the UK, Bulgaria, Hungary, Romania, and Lithuania. This chapter will only study the cases against the first four countries. It is not surprising that the Court has repeatedly held that, under those exceptional circumstances, the adoption of laws that aim to balance State expenditure normally have a political character that prevails over social matters. In other words, the Court used the concept of ‘margin of appreciation’ in a rather broad sense, so that any action made by the State can be found to fall within this latitude, unless it is considered disproportionate. Based on the principle of subsidiarity, the ECtHR clarified that economic policy falls outside of its scope of application, since the ECHR does not protect economic and social rights. However, some legal bases do exist for initiating proceedings against States before the ECtHR, these being the principle of fair trial,<sup>392</sup> the right to property and peaceful enjoyment of possessions<sup>393</sup> and the freedom of association and of collective bargaining.<sup>394</sup>

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<sup>390</sup> Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756

<sup>391</sup> For a thorough analysis on the approach of the CJEU towards the crisis, see A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015)

<sup>392</sup> ECHR, Article 6

<sup>393</sup> ECHR, Article 1 of Protocol 1

<sup>394</sup> ECHR, Article 11

Arguably, all the aforementioned courts have preferred a deferential approach towards the political aspects of the policies and measures adopted by the Union and/ or the Member States. While each case examined in this chapter has its particular features, it is submitted that what all have in common is the acknowledgment of emergency and of exceptional circumstances due to the fear of collapse not only of the national financial sector, but also of the whole Eurozone. For example, in the cases of Greece, Portugal and Spain the notion of emergency is demonstrated in the adoption of ‘legislation of emergency’, while in the cases of Ireland and Iceland emergency was used as an explanation for the legal organs and processes implemented at the EU / supranational level.

This chapter will critically analyse the position of the CJEU, national courts and the ECtHR so far, from the scope of effectiveness of protection offered to applicants. It is important to clarify that the chapter does not intend to provide a comprehensive analysis of all the case law regarding the Eurozone crisis throughout the Union. Instead, the chapter purports to evaluate the effectiveness of protection offered by national and EU courts and the ECtHR when confronting with the challenging task of ruling during the crisis. To this effect, the chapter first explains the concept of effectiveness of protection (i). It then outlines the litigation that concerned various Member States, both before national courts (ii) and before the General Court and the CJEU, either through Article 263 TFEU or through Article 267 TFEU (iii),<sup>395</sup> and a selection of rulings of the ECtHR concerning the protection of bank depositors and the compatibility of austerity measures with the ECHR (iv). The case law on this area can be categorised in accordance with the methodology used in the Literature Review. Thus, each legal order will be examined

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<sup>395</sup> In the case of Iceland, the decision of EFTA Court is analysed: Case E-16/11, *EFTA Surveillance Authority v. Iceland (Icesave)*[2013]

separately, and then, within each legal order, cases are firstly discussed based on the right to access to justice and then on the principle of proportionality. In other words, the approach chosen here is to discuss the admissibility or inadmissibility of cases at each legal order, so as to identify whether access to justice was hindered or not. Then, those cases that were held admissible are categorised according to whether the principle of proportionality, as analysed in the literature review, or any other similar measure of assessment have been employed by the relevant court. It concludes with an evaluation of the role of effectiveness on the approach of those courts (v).

## I. EFFECTIVENESS OF PROTECTION

### 1. Effectiveness of courts

The existing and, arguably, speedily growing empirical literature on judicial effectiveness faces the significant problem of lack of a coherent definition of ‘effectiveness’, as they mostly described judicial effectiveness as sharing the same meaning with judgment-compliance, usage rate and influence on the conduct of States.<sup>396</sup> At the moment, a comprehensive theory on the notion of judicial effectiveness has not been developed yet. According to the social science literature, ‘an action is effective if it accomplishes its specific objective aim’.<sup>397</sup> The satisfaction of such test requires the initial recognition of the action’s aims,<sup>398</sup> and the time-frame over which those aims are expected to be fulfilled.<sup>399</sup>

An approach that emerges from this definition and has been followed for the purpose of ‘measuring’ the effectiveness of international courts focused on the extent to which international courts have met the expectations of the states and international courts that created them, known as mandate providers. Such a goal-based approach supports that courts should both follow the legal mandate that demonstrates their objectives and also clarifies the limits of their powers and also pursue the normative expectations of their mandate providers. Factors that should be taken into account are the legal powers of the court, its resources, the extent of its independence and impartiality, its reputation, and, finally, its interplay with external political environment. The latter is the factor being more evident in the decisions given in relation to the financial crisis, on which political

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<sup>396</sup> E. A. Posner and J. C. Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review*, 28-29

<sup>397</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2004), 14

<sup>398</sup> See R. F. Zammuto, *Assessing Organizational Effectiveness* (State University of New York Press, 1982) 12

<sup>399</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2004), 14



considerations played a crucial role and the interplay between the politics and the judiciary was noticeable.

## 2. Effective judicial protection under EU law

The right to effective judicial protection is a universal fundamental right which can be found in most national constitutions and international legal instruments and has been characterized as ‘an essential element of democratic accountability’.<sup>400</sup> It is a general notion that comprises various specific rights such as access to justice,<sup>401</sup> the right to an effective remedy,<sup>402</sup> the right to a fair trial and due process.<sup>403</sup> All these rights could be characterized as rather procedural, in the sense that none of them relates to the effectiveness of the courts’ decisions on the merits of disputes.

Since individuals should be fundamentally entitled to obtain judicial protection of the rights they derive from EU law, such a right establishes a general principle of EU law. In the EU legal order, effective judicial protection is preserved in Article 47 of the Charter which provides for the right to an effective remedy of every individual in case of violation of EU law, the right to a fair trial and the right of defence and legal aid. By virtue of Article 6(1) TEU, Article 47 of the Charter constitutes a binding provision of primary EU law.<sup>404</sup> The issue of effective judicial protection has been considered by the CJEU years before 2004, when the Charter was adopted. Evidently, in 1985 the Court described effective judicial protection as a principle ‘which must be taken into consideration in

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<sup>400</sup> L. M. Lavo, ‘The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions’ (2012) *Sources of Law and Legal Protection* (Triestine Lecture; 1), EUT Edizioni Università di Trieste, 101, at 102

<sup>401</sup> Judgment of 15 October 1987, *Unectef v Heylens*, C-222/86, ECLI:EU:C:1987:442; Judgment of 3 December 1992, *Borelli*, C-97/91, ECLI:EU:C:1992:491; Judgment of 11 September 2003, *Salafero*, C-13/01, ECLI:EU:C:2003:447

<sup>402</sup> Judgment of 29 October 2009, *Pontin*, C-63/08, ECLI:EU:C:2009:666

<sup>403</sup> See F. Francioni (ed.), *Access to justice as a human right* (Oxford University Press, 2007)

<sup>404</sup> According to Article 6(1) TEU ‘the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties’

Community law’, since it ‘underlies the constitutional traditions common to the Member States and [...] is laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms’.<sup>405</sup> Consequently, the CJEU interpreted effective judicial protection over time based on the interpretations given by the national courts of Member States and on the relevant case law of the ECtHR.<sup>406</sup> The reference to the ECHR was introduced in Article 52(3) of the Charter, which states that the meaning and scope of fundamental rights laid down in the Charter, that correspond to rights provided by the ECHR, such as Article 47 of the Charter, are to be identical, including *inter alia* the approaches followed by the ECtHR. It is important to note that the abovementioned Article does not preclude a wider application of the right under EU law, and this is indicated by the fact that Article 47 of the Charter applies to administrative law matters, such as fiscal law, while the scope of Article 6 ECHR is limited to ‘civil rights and obligations’ and ‘criminal charges’.<sup>407</sup> In essence, Article 47 of the Charter can be found to be applicable in disputes challenging fiscal measures, while the same dispute would be beyond the scope of Article 6 ECHR.

The concrete application of the principle aims at reinforcing the judicial protection of individuals, by ensuring the accomplishment of an effective EU system of legal remedies, both at national level, when domestic courts consider the enforcement of rights and obligations derived from EU law; and at international level, regarding the relationship between EU and national remedies.<sup>408</sup>

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<sup>405</sup> Judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206, paragraphs 1 and 2

<sup>406</sup> See very explicitly Judgment of 22 December 2010, *DEB*, C-279/09, ECLI:EU:C:2010:811

<sup>407</sup> In fiscal matters Article 6 ECHR only applies to fiscal fines, because they qualify as a ‘criminal charge’ - See *Janosevic v. Sweden* App no. 34619/97 (2002)

<sup>408</sup> L. M. Lavo, ‘The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions’ (2012) *Sources of Law and Legal Protection* (Triestine Lecture; 1), EUT Edizioni Università di Trieste, 101

It could be argued that the obligation placed upon national courts to ensure effective judicial protection was inherent in the doctrine of direct effect, as this was established in the *Van Gend en Loos* case.<sup>409</sup> In that case the Court authorised national courts to ensure the application and enforcement of the rights conferred by EU law upon individuals in their legal systems, by exercising effective judicial control, based on the duty of sincere cooperation established in Article 4(3) TEU and the principles which govern the effectiveness of EU law in the national legal orders.

The emergence of the principle of effective judicial protection is dating in the mid-1970s and the case of *Rewe*, where the CJEU demonstrated the obligation of national courts to ensure the protection of citizens regarding the rights derived by EU law.<sup>410</sup> Ten years later, the Court in *Von Colson* ruled that Member States should choose sanctions that guarantee real and effective protection<sup>411</sup> and in *Johnston* it was explicitly recognised that ‘all persons have the right to obtain an effective remedy in a competent court’.<sup>412</sup> The initial recognition of effective judicial protection as a general principle of law in the area of equal treatment was shortly extended to the area of free movement of workers,<sup>413</sup> but also to areas where the principle could not be attached to a Treaty freedom.<sup>414</sup> Finally, its scope expanded to encompass not only the protection of individuals, but also the protection of Member States against European institutions or the protection of the latter in disputes *inter se*.<sup>415</sup>

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<sup>409</sup> Judgment of 7 March 1985, *Van Gend & Loos*, C-26/62, ECLI:EU:C:1985:104

<sup>410</sup> Judgment of 16 December 1976, *Rewe*, C-33/76, ECLI:EU:C:1976:188

<sup>411</sup> Judgment of 10 April 1984, *Von Colson*, Case 14/83, ECLI:EU:C:1984:153

<sup>412</sup> Judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206

<sup>413</sup> Judgment of 15 October 1987, *Unectef v Heylens*, C-222/86, ECLI:EU:C:1987:442, paragraph 14: ‘the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [ free access to employment] is essential in order to secure for the individual effective protection of his right.’

<sup>414</sup> For a discussion on the areas on which effective judicial protection was extended through the years, see A. Arnall, ‘The Principle of Effective Judicial Protection in EU law: An Unruly Horse?’ (2011) 36 *European Law Review*, 51

<sup>415</sup> S. Prechal and R. Widdershoven, ‘Redefining the Relationship between ‘Rewe-effectiveness’ and Effective Judicial Protection’ (2011) 4 *Review of European Administrative Law*, 35

Despite the absence of an express recognition of effective judicial protection in EU legislation, the principle gained a ‘constitutional’ status<sup>416</sup>: firstly, as a main source of interpretation of EU law and national provisions; secondly, as a ground for reviewing the legality of EU provisions of secondary law or national law implementing it; and, finally, as a principle binding on Member States and EU institutions when examining the remedies before European courts for the enforcement of rights relating to EU law.<sup>417</sup>

Due to the lack of general rules on remedies and procedures at EU level, it is a responsibility for national courts to achieve effectiveness of EU law and judicial protection of individuals in those areas covered by EU law according to their domestic legal procedures and remedies. However, such a system implies the risk of heterogeneity of the application of judicial protection within the Union. Thus, the CJEU started assessing the compatibility of national procedural and jurisdictional legal norms that could prejudice the uniformity between Member States on this field.<sup>418</sup> The procedure of preliminary reference also contributes to the elimination of heterogeneities between Member States. National courts, which constitute the ‘natural forum’<sup>419</sup> that offers judicial protection to the interests of individuals, ask for the interpretation of the CJEU when EU law rights are violated because of some failures committed by any private party, a Member State or the EU institutions.

However, it has been argued that the interpretation and application of the principle of effective judicial protection by the CJEU diversify according to the specific

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<sup>416</sup>T. Tridimas, *The general principles of EU law* (2<sup>nd</sup> edn, Oxford University Press, 2006) 4

<sup>417</sup> L. M. Lavo, ‘The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions’ (2012) *Sources of Law and Legal Protection* (Triestine Lecture; 1), EUT Edizioni Università di Trieste, 101

<sup>418</sup> *Ibid.*

<sup>419</sup> G. Tesaurò, ‘The effectiveness of judicial protection and the co-operation between the Court of Justice and National Courts’ (1993) 19 *Yearbook of European Law*, 1

circumstances of each case and the result that is pursued.<sup>420</sup> Case-law of the CJEU also illustrates that the effectiveness of judicial protection enhances EU procedural rights, but also subjective rights of individuals, ‘implying different consequences as to how this can affect the role of national courts and the application of domestic rules on remedies and procedure’.<sup>421</sup>

A progress of the traditional judicial position of the CJEU towards a more human rights-centred approach could be deduced from some recent rulings of the Court which suggested an interpretation and application of domestic rules on procedure and remedies that is rather based on some principal subjective rights of individuals. In other words, effective judicial protection has changed status; while it just constituted a general principle that Member States and the EU institutions had to comply with, it is now a distinct source of self-standing rights that both EU and national courts should protect in applying EU law.<sup>422</sup> On the one hand, such a development could result in the establishment of a new test aiming at achieving a better balance between the fundamental right of effective judicial protection and the competing EU or national interest. On the other hand, this development could lead to difficulties on the coordination, or rather a conflict, between the ECtHR and national jurisprudence.<sup>423</sup>

The Lisbon Treaty gave to the principle of effective judicial protection a Treaty basis of its own, while until then it only constituted a ‘mere’ general principle deriving from the constitutional traditions of the Member States and Article 6 ECHR. Now Article 19(1) TEU refers to effective judicial protection, but only in its horizontal dimension, since it

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<sup>420</sup> L. M. Lavo, ‘The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions’ (2012) *Sources of Law and Legal Protection* (Triestine Lecture; 1), EUT Edizioni Università di Trieste, 2012, 101

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

<sup>423</sup> Judgment of 28 July 2011, *Diouf*, C-69/10, ECLI:EU:C:2011:524

establishes an obligation only on the Member States to provide sufficient remedies to ensure effective legal protection in those fields covered by EU law. In this sense, the provision serves the principal task of enforcing rights and obligations deriving from EU law, rather than protecting fundamental rights.

Evidently, EU law prefers a procedural approach towards effective judicial protection, without involving this concept on the substance of a case. This chapter, and the next one, tries to examine the substantial effectiveness of the various courts' and arbitral tribunals' approach. Such test focuses on whether applicants were given the opportunity to have their cases considered on the merits, instead of just being limited to the question of jurisdiction and whether the relevant legal framework has been applied in their disputes, even if ultimately liability does not arise against the defendants.

## **II. JUDICIAL PROTECTION THROUGH DIRECT ACTIONS AT NATIONAL COURTS**

Generally, it is difficult to evaluate the operation of national courts and their effectiveness in a consistent manner, due to their diversity. Among the factors that do not allow for a coherent appraisal are the differences between the various legal traditions, the different attitudes of each country's judiciary regarding the preservation of the rule of law, general principles of law and constitutional values and the extent to which political considerations affect court decisions. Thus, a comparative analysis could illustrate how different national courts in the EU legal order approach the legality and constitutionality of measures adopted in response to the financial crisis and the question of whether these measures infringe the rights of individuals. The purpose of this analysis is, firstly, to examine whether national courts in general protected individuals effectively and, secondly, to identify the approach of which national courts have been more effective.

Individuals can judicially challenge austerity measures before their national courts, based on the provision of their national law that implements the respective MoU and can allegedly be in conflict with their constitutions. This path was chosen by several claimants in Greece, Portugal, Spain, Slovenia and Cyprus. As it is discussed in this section, some of the actions were successful, while in the rest of them, national courts avoided to shift their focus towards the effects of the measures under challenges on individuals, in the fear of sovereign default.

In particular, the Spanish Constitutional Court and the Supreme Court of Cyprus held that the cases before them were inadmissible due to lack of jurisdiction to rule on the particular matters.

## 1. Access to justice

Spain is generally characterised by a weak judicial enforcement of welfare rights, known as the *principios rectores* of social and economic policy.<sup>424</sup> This weakness has been evident during the Eurozone financial crisis, since there are only few examples of rulings given by the Spanish Constitutional Court on the protection of social rights affected by the financial measures adopted in the country, and even those rulings do not essentially derogate from the previous case law on social rights. The main reasons for this phenomenon is, firstly, the traditional deferential approach of the Court to the Parliament – most cases result on the inadmissibility or dismissal of constitutional challenge and only on some interpretations in conformity with the Constitution – and, secondly, the fact that in Spain ‘Regions are in charge of the main social policies’. What this means in practice is that most judgments relating to the protection of welfare rights, even during the financial crisis, only concern the matter of correct allocation of legislative powers between the State and the Regions. Therefore, all cases have been brought as preliminary references of constitutionality of the measures implemented in response to the financial crisis and have been declared inadmissible.

A preliminary reference<sup>425</sup> challenged the reduction of public salaries<sup>426</sup> as a breach of an existing collective agreement, and this, as an infringement of the right to collective bargaining<sup>427</sup> and the right to freely join a trade union,<sup>428</sup> was declared inadmissible and the Court did not even consider the protection of fundamental rights. Another consequence of the financial crisis was brought as a preliminary reference, dealing with

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<sup>424</sup> Ch. Fasone, ‘Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective.’ (2014) *EUI Working Paper MWP 2014/25*, 20; Z. Sente and K. Lachmayer, *The Principle of Effective Legal Protection in Administrative Law: A European Perspective* (Routledge, 2016) 285

<sup>425</sup> Auto 85/2011

<sup>426</sup> According to Decree-law no.8/2010

<sup>427</sup> Article 37 of the Spanish Constitution

<sup>428</sup> Article 28.1 of the Spanish Constitution



the protection in mortgage eviction.<sup>429</sup> In Spain, the mortgage enforcement proceedings are absolutely independent from any proceedings against an illegal or unfair mortgage contract. As a consequence, the ownership of a house may change, in case the mortgage remains unpaid, disregarding the legality of the mortgage contract. The Constitutional Court was asked to examine whether such legal framework is in breach of the prohibition of arbitrary action by public authorities,<sup>430</sup> the right to effective judicial protection<sup>431</sup> and the right to enjoy decent and adequate housing.<sup>432</sup> In declaring the reference inadmissible, the Court held that the matter in question was rather political than legal, as it asked for the Court to implement a new legislation, an action that belongs to the competence of the Parliament, and thus it went beyond its remit. The Spanish legal regime regarding mortgage was examined by the CJEU regarding its compliance with an EU Directive on unfair terms in consumer contract.<sup>433</sup> According to the CJEU, the national mortgage legislation violated debtors' right to effective judicial protection.<sup>434</sup> Such a ruling indicates that the Union has offered a superior level of protection to Spanish debtors having unfair mortgage contracts during the financial crisis than the State.

Generally, the domestic case law demonstrates the self-restraint approach that the Constitutional Court prefers to follow when adjudicating the effects of the financial crisis on social rights.

This self-restraint approach was also followed by the Supreme Court of Cyprus when it was asked to consider the legality of the financial measures implemented in the country. When Cyprus fell into a deep financial crisis in 2011, the rescue package that was

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<sup>429</sup> Auto 113/2011

<sup>430</sup> Article 9.3 of the Spanish Constitution

<sup>431</sup> Article 24.1 of the Spanish Constitution

<sup>432</sup> Article 47 of the Spanish Constitution

<sup>433</sup> Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ 2 95/29

<sup>434</sup> Case C-415/11 *Mohamed Aziz v Caix d'Estalvis de Catalunya, Tarragona i Manresa* (Catalunyacaixa) ECLI:EU:C:2013:164

proposed and applied by the international lenders in 2013 was considered ‘unique’, as it was the first time that the bail-in tool was used in the EU. On the 16th of March 2013, Cyprus dominated the news worldwide, as the Eurogroup and the President of the Republic of Cyprus reached an agreement on the implementation of a rescue package, which provided for the bail-in of all insured and uninsured depositors in all banks of the island.<sup>435</sup> The initial proposal of international lenders required ‘all bank deposits to bear the brunt of the haircut’.<sup>436</sup> While debt haircut was the measure adopted in other countries, a deposit haircut was given to Cyprus, with such an unprecedented proposal being presented as necessary because of the small number of bondholders in local banks, who were unable to assume all the losses on their own.<sup>437</sup> According to the relevant Eurogroup statement, the measures proposed included ‘the introduction of an upfront one-off stability levy applicable to resident and non-resident depositors... the increase of the withholding tax on capital income, a restructuring and recapitalisation of banks, an increase of the statutory corporate income tax rate and a bail-in of junior bondholders’.<sup>438</sup>

Though the first proposal was rejected by the Cypriot House of Representatives, the take-it-or-leave-it approach of the Eurogroup obliged the government to accept the terms of a revised bailout on the 25th of March 2013.<sup>439</sup> The difference between the new and the

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<sup>435</sup>Eurogroup Statement on Cyprus, 16 March 2013, available at:

[https://www.google.com.cy/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CB4QFjABahUKEwi0h\\_3H8\\_jIAhVGuhQKHeHOAO4&url=http%3A%2F%2Fwww.consilium.europa.eu%2Fpress%2Fpress-releases%2F2013%2F03%2Fpdf%2FEurogroup-Statement-on-Cyprus\(1\)%2F&usg=AFQjCNEJfftVqLs60VMQ9GND-mHVX\\_4D8Q](https://www.google.com.cy/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CB4QFjABahUKEwi0h_3H8_jIAhVGuhQKHeHOAO4&url=http%3A%2F%2Fwww.consilium.europa.eu%2Fpress%2Fpress-releases%2F2013%2F03%2Fpdf%2FEurogroup-Statement-on-Cyprus(1)%2F&usg=AFQjCNEJfftVqLs60VMQ9GND-mHVX_4D8Q) (accessed 5 December 2016)

<sup>436</sup>G. C. Georgiou, ‘Cyprus’s Financial Crisis and the Threat to the Euro’, (2013) 24 *Mediterranean Quarterly*, 63

<sup>437</sup>*Ibid.*

<sup>438</sup>Eurogroup Statement on Cyprus, 16 March 2013, available at:

[https://www.google.com.cy/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CB4QFjABahUKEwi0h\\_3H8\\_jIAhVGuhQKHeHOAO4&url=http%3A%2F%2Fwww.consilium.europa.eu%2Fpress%2Fpress-releases%2F2013%2F03%2Fpdf%2FEurogroup-Statement-on-Cyprus\(1\)%2F&usg=AFQjCNEJfftVqLs60VMQ9GND-mHVX\\_4D8Q](https://www.google.com.cy/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CB4QFjABahUKEwi0h_3H8_jIAhVGuhQKHeHOAO4&url=http%3A%2F%2Fwww.consilium.europa.eu%2Fpress%2Fpress-releases%2F2013%2F03%2Fpdf%2FEurogroup-Statement-on-Cyprus(1)%2F&usg=AFQjCNEJfftVqLs60VMQ9GND-mHVX_4D8Q) (accessed 5 December 2016)

<sup>439</sup> See for example D. Roland and R. Cooper, ‘Cyprus bail-out: as it happened – March 25, 2013’, *The Telegraph*, available at: <http://www.telegraph.co.uk/finance/debt-crisis-live/9951727/Cyprus-bailout-live.html> (accessed 29 August 2017); G. Wearden and B. Quinn, ‘Cyprus bailout: last-ditch deal agreed-as it happened’, *The Guardian*, available at:

prior proposal was the fact that in the new proposal only depositors of Laiki Bank and the Bank of Cyprus would be affected; and deposits of less than 100.000 Euros deposited would be guaranteed.<sup>440</sup> Laiki Bank was forced to close, and a ‘good bank’ and a ‘bad bank’ were created instead. In particular, the bad bank would absorb all toxic assets, i.e. deposits of more than 100.000 Euros, and non-performing loans, and the good bank would consist of all the guaranteed deposits and would constitute a part of the Bank of Cyprus, which operated under restructuring and downsizing, and also terminated the operation of all its branches in Greece.<sup>441</sup>

Though the bail-in had not been imposed on any other Member State yet, all the necessary steps for authorizing such a measure were taken. Arguably, the bail-in tool used in Cyprus expedited the finalisation of the Deposit Guarantee Scheme, with the relevant Directive being implemented one year later,<sup>442</sup> and, subsequently, the bail-in tool was introduced as a concept in EU legislation.<sup>443</sup> Without doubt, the case of Cyprus constitutes a precedent of capital controls within a common monetary area, such as the eurozone, which was followed two years later in Greece.<sup>444</sup>

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<https://www.theguardian.com/business/2013/mar/24/eurozone-crisis-cyprus-bailout-eurogroup-meeting> (accessed 29 August 2017)

<sup>440</sup>Eurogroup Statement on Cyprus, 25 March 2015, available at:

[https://www.google.com.cy/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBoQFjAAahUKEwj3pY3yrP7IAhVJwHIKHZkjBbE&url=http%3A%2F%2Fec.europa.eu%2Fspain%2Fpdf%2Facuendo-eurogrupo-chipre.pdf&usq=AFQjCNHo\\_ur28MGvNIUs9aUeaoWE777GSA](https://www.google.com.cy/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBoQFjAAahUKEwj3pY3yrP7IAhVJwHIKHZkjBbE&url=http%3A%2F%2Fec.europa.eu%2Fspain%2Fpdf%2Facuendo-eurogrupo-chipre.pdf&usq=AFQjCNHo_ur28MGvNIUs9aUeaoWE777GSA) (accessed 5 December 2016)

<sup>441</sup> The 2013 Decree on the sale of certain operations of Laiki, Regulatory Administrative Act No 104, EE, Annex III(I), No 4645, 781–88, 29 March 2013 2013 (sale of operations under sections 7(1)(b) and 9 of the Law) and The 2013 Decree on the bailing in of Bank of Cyprus, Regulatory Administrative Act No 103, EE, Annex III (I), No 4645, 769–80, 29 March 2013 (bail-in under sections 7(1)(e) and 12 of the Law)

<sup>442</sup>Directive 2014/49/EU on deposit guarantee schemes [2014] OJ 2 173/149 was implemented on 16 April 2014.

<sup>443</sup>Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ 2 173/190 was implemented on 15 May 2014

<sup>444</sup>European Commission, Statement on behalf of the European Commission by Jonathan Hill on the capital controls imposed by the Greek authorities, Brussels, 29 June 2015, available at:

[http://europa.eu/rapid/press-release STATEMENT-15-5271\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-5271_en.htm) (accessed 5 December 2016)

There is no case law of Cyprus national courts on the constitutionality of the ESM Treaty or of the measures adopted by Member States acting under the ESM to deal with the crisis. However, the Supreme Court of Cyprus was asked to examine the legality of the measures affecting Laiki Bank and the Bank of Cyprus, as those were taken by the CBC and approved by the Ministry of Finance. A vast number of recourses were filed against the so called ‘bail in’ Decrees in actions brought by depositors and investors against the CBC, its Governor and the Republic of Cyprus through the Attorney General and the Ministry of Finance.<sup>445</sup> The Decrees that were challenged were the Sale of certain Operations of Cyprus Popular Bank Public Co Ltd Decree 104 of 2013<sup>446</sup> and Bailing-in of Bank of Cyprus Public Company Limited Decree 103 of 2013.<sup>447</sup> In details, Decree 104 provided for the resolution of Laiki Bank, the transfer of all deposits below 100,000 Euros to the Bank of Cyprus and the writing off all deposits above 100,000 Euros, while Decree 103 provided for the recapitalisation of Bank of Cyprus. Both Decrees derived from the Law 17(1)/2013 passed on 22nd of March 2013 within the frame of the agreement reached by the Government with the Eurogroup. The Supreme Court, by a majority of seven to two, and in full chamber, issued on June 2013 its judgment and dismissed the Decrees on the ground of non-admissibility.<sup>448</sup>

In an examination of the *locus standi* of applicants to challenge the Decrees, the Court concluded that the whole legal dispute belonged to the sphere of private law and considered the relationship between the bank and its depositors and investors, the relationship between the two banks, regarding the transfer of assets from the one to the

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<sup>445</sup> The actions were brought under Article 146 of the Constitution for judicial review of administrative acts.

<sup>446</sup> The 2013 Decree on the sale of certain operations of Laiki, Regulatory Administrative Act No 104, EE, Annex III(I), No 4645, 781–88, 29 March 2013 (sale of operations under sections 7(1)(b) and 9 of the Law)

<sup>447</sup> The 2013 Decree on the bailing in of Bank of Cyprus, Regulatory Administrative Act No 103, EE, Annex III (I), No 4645, 769–80, 29 March 2013 (bail-in under sections 7(1)(e) and 12 of the Law)

<sup>448</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (majority decision)

other, and the relationship between the bank and the buyer of its assets. All those relationships give rise to disputes under contract law and tort law, and they are not of administrative law nature. In particular, the two Decrees at stake do not regulate relations of the State with its citizens, but relations pertaining to the operations of Laiki Bank and the Bank of Cyprus only, thus they only concern the two banks and not the applicants themselves. Applicants' interests are not directly affected by the Decrees, but any effect of those depositors comes through the actions of Laiki Bank and the Bank of Cyprus and their failure to meet their contractual obligations towards them. By virtue of these findings, the Court decided that the legality of the measures taken on the basis of the two Decrees should be challenged through lawsuits before the District Courts which could extend also to any civil liability resulting from previous actions of the Republic of Cyprus, being the authority that caused the infringement of banks' obligations towards their depositors/ investors by issuing the Decrees. Such lawsuits could also be addressed against the Central Bank of Cyprus, as the resolution authority.<sup>449</sup>

The Supreme Court clearly stated that the Republic could not raise the defence of 'Act of Government' before the lower courts, by stressing as follows: 'The material rights of depositors of Laiki and BOC are not in the least affected by the view that they do not have *locus standi* to challenge the administrative actions and that their complaints fall within the realm of private rather than public law. To the contrary, while an administrative review of the legality [of an administrative action] has a restricted scope, the civil procedures are particularly suitable for the examination of every aspect that may be

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<sup>449</sup> For commentaries on the case see J Giotaki, 'The Cypriot "Bail-in" Litigation', (2015) *Butterworths Journal of International Banking and Financial Law*, 485; A. Karatzia, 'An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States' (2016) *Hungarian Yearbook of International Law and European Law 2016*, 573; and S. Lahlé Shaelou and P. Athanassiou, 'Cyprus Report' in G. Bándi *et al.*, *European Banking Union* (Congress Proceedings, Vol. 1, Wolters Kluwer, 2016) 269-297

relevant to the substantial matter. The question of jurisdiction should not, obviously be confused with the substance of the rights.’<sup>450</sup> It should be explained here that in Cyprus a newly-established Administrative Court operates as a first instance court in disputes concerning administrative law. However, the function of this Court has the peculiarity of reviewing only the legality of an act or omission made by the administration, distinguished from the assessment of the substance of the dispute, which still falls within the jurisdiction of the Supreme Court. Consequently, the Supreme Court remains the responsible organ for the determination of whether the legality of an administrative act can fall under judicial challenge.

Regarding the contractual relationship between the bank and depositors, it was stressed that: ‘Where the debt/obligations of the bank towards its depositors are affected, the depositor should primarily turn towards the bank in any civil action, for its contractual default in repaying the deposit, with a possible claim against the Republic as having caused the breach of the contractual obligation by means of the Decree.’<sup>451</sup> Furthermore, the Court made a distinction between the holders of bank deposits and the depositors in safe deposits and shareholders and excluded the application of the concept of expropriation to simple bank deposits.<sup>452</sup>

The same findings apply both for Decree 104 of 2013 relating to the resolution of Laiki Bank and Decree 103 of 2013 relating to the Bank of Cyprus. The relationship between depositors and the bank is a contractual one and the effects on depositors result from the breach of the contractual obligations of the banks in the context of their resolution.

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<sup>450</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (majority decision), paragraph 23

<sup>451</sup> *Ibid.*, paragraph 24

<sup>452</sup> Otherwise, mere bank depositors would be immediately granted the necessary *locus standi* to challenge an individual administrative act relating to their property (direct and individual concern would be satisfied, but it is not available to all types of creditors).

## 2. The principle of proportionality

Contrary to the aforementioned cases, the courts in Greece, Portugal and Slovenia accepted that they had jurisdiction on the applications before them in relation to the austerity measures imposed in each country. Thus, the focus is now shifted on whether, and how, they applied the principle of proportionality. Both Greek and Portuguese courts applied the principle in all the cases before them, with mix results.

Undeniably, Greece has heavily suffered because of the financial crisis within the Eurozone, probably more than any other Member State. In 2010, the huge public debt compelled the Government to ask for external financial assistance by the international lenders,<sup>453</sup> which resulted in the adoption of two MoUs and the implementation of numerous austerity measures, including reductions in salaries, benefits and pensions of public servants. Those reforms were challenged as infringing freedoms and fundamental rights that are otherwise protected in the Greek legal order, either at national, EU or international level. Thus, the constitutionality of the austerity measures was examined several times by the Plenary Assembly of the Council of State. At the EU level, it was established that the responsibility of any loss suffered by private holders of Greek debt instruments did not lie to the ECB but to the economic risks intrinsic in the activities of the country's financial sector, since the ECB's actions were only pursuant to the safeguard of the stability of the price market.

In its decision 668/2012,<sup>454</sup> the Plenary Assembly of the Council of State was asked to cancel the austerity measures of MoU I as they were contested as incompatible with the Constitution and international conventions. It was held that the measures of MoU I,<sup>455</sup>

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<sup>453</sup> The IMF, the European Commission and the ECB

<sup>454</sup> Council of State (Plenary Assembly) 668/2012

<sup>455</sup> Law 3845/2010

though restrictive in nature, did not violate the Constitution or Article 1 of Protocol 1 ECHR, since they were implemented for the purpose of rescuing the national economy. The notion of public interest is protected by Article 106 of the Greek Constitution and operates as ‘the restriction of the restrictions’, which should take into account all the conflicting interests. The argument that the measures were contrary to the general principle of equality<sup>456</sup> and the equality before tax was countered by the transitional and exception character of the measures and the alleged violation of the right to property and, therefore, the right to the wage, were found inapplicable as the wage cuts did not lead wages to a level below the threshold of poverty.<sup>457</sup>

In a following case, the cut in pensions and holidays allowances as were introduced by the Law 3845/2010<sup>458</sup> were challenged by the national Union of Pensioners of the Public Power Corporation, which sought the cancellation of the Joint Ministerial Decision which derived from MoU I. In its decision 1285/2012,<sup>459</sup> the Plenary Assembly of the Council of State held that the adoption of the MoU by the Greek Government and the related policies for the implementation of the austerity measures were legitimate as they pursued a superior public interest purpose and constituted the last option to prevent the State’s bankruptcy.

Finally, in the decision 2307/2014,<sup>460</sup> the Plenary Assembly of the Council of State considered the conformity of the austerity measures derived from the MoU II regarding

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<sup>456</sup> Article 4 paragraph 5 of the Constitution

<sup>457</sup> D. M. Tsakiri, ‘The protection of the fundamental social rights in the Greek legal system’ (2015) *A.N.E.S.C. papers*, available at: <https://anescracse.wordpress.com/2015/08/24/anesc-papers-d-m-tsakiri-the-protection-of-fundamental-social-rights-in-the-greek-legal-system/> (accessed 29 August 2017)

<sup>458</sup> Law 3845/2010 allowed for ‘Measures for the application of the support mechanism for the Greek economy by euro area Member States and the International Monetary Fund’, thus more austerity measures were introduced imposing further reduction of salaries of the public sector employees, reduction of pensions provided by the social security organizations and increase of the value added tax and excise taxes.

<sup>459</sup> Council of State (Plenary Assembly) 1285/2012

<sup>460</sup> Council of State (Plenary Assembly) 2307/2014



employees in the private sector with the national and international rules, including the TFEU,<sup>461</sup> the ECHR,<sup>462</sup> the European Social Charter and the ILO Conventions Nos. 87, 98 and 154. It was held that all measures were in compliance with those international instruments, apart from the measures amending recourse to labour arbitration, which were held contrary to the constitutionally protected principle of collective autonomy.<sup>463</sup> This decision was reached after the application of ‘the theory of exceptional circumstances’ and the identification of ‘reasons of higher social interest’,<sup>464</sup> to decide whether the implemented austerity measures were not infringing neither the Greek Constitution, nor international labour agreements and the ECHR. Applying that test, it was found that the restrictive measures were proportionate and exceptional in nature.

The Portuguese case law is very similar to the Greek cases. Portugal has been severely affected by the Eurozone sovereign debt crisis, with Stability and Growth Programmes being implemented in an attempt to diminish the budget deficit. In particular, the first Portuguese Stability and Growth Programme provided for numerous austerity measures, mainly increase in taxation, reductions in public sector workers’ salaries and pay cuts in the pensions of retired citizens. The Economic and Financial Adjustment Programme and the rescue package received from international lenders<sup>465</sup> have functioned as a catalyst of national legislation drafted in order to import the commitments to the national legal order. This budgetary legislation introduced several austerity measures, the constitutionality of which have been challenged before the national Constitutional Court. It is worthy to note that the constitutional review in Portugal was triggered by Members of the Parliament,

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<sup>461</sup> Articles 125 and 136 TFEU

<sup>462</sup> ECHR, Article 11 and Article 1 of Protocol 1

<sup>463</sup> Article 22, paragraph 2 of the Greek Constitution

<sup>464</sup> The concept of general social interest is equivalent to the concept of public interest, thus it justifies restrictions to the right of collective autonomy only under strict conditions.

<sup>465</sup> i.e. the EFSM, the EFSF, and the IMF

the Ombudsman and the President of the country, instead of affected individuals. Individuals and associations brought proceedings before the domestic Labour Courts, with some preliminary references being made to the CJEU.

The most analysed line of cases considers the constitutional challenges to provisions of the Portuguese Budget Acts. In its judgment 396/2011,<sup>466</sup> the Portuguese Constitutional Court examined whether the reduction of the salaries of public servants<sup>467</sup> infringed the principle of equality. It was stated that some distinction between those receiving public funds and those working in the private sector was permissible, thus the alleged measures could not be classified as unjustifiably discriminatory. The Court held that the cuts in wages for public servants salaries did not exceed ‘the limits of sacrifice’ for those working in the public sector, because of the temporary character of the reductions and the width of its applicability.<sup>468</sup>

Though the public interest prevailed over the rights affected in all the above cases, the principle of proportionality illustrated that the national courts of both countries were also willing to scrutinise the austerity measures at stake if they found that the severity of the measures was not in balance with the purpose to be pursued.

Contrary to its previous decisions, the Council of State, in the decision 3354/2013,<sup>469</sup> found that the austerity measure of abolishing the permanent positions because of the automatic dismissal and the position in the preretirement suspension status of the employees of the public sector, were infringing the Constitution of the country. It was recognised that the Public Administration can be reorganized based on financial reasons,

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<sup>466</sup> Portuguese Constitutional Court Decision no 396/2011, judgment of 21 September 2011

<sup>467</sup> The 2011 budget provided that salaries of public employees that exceeded 1500 euros, would be reduced from 3.5% to 10%, according to their amount.

<sup>468</sup> Namely, they pointed that the reductions did not apply to lower scale salaries, and did not exceed 10%.

<sup>469</sup> Council of State (Plenary Assembly) 3354/2013

but without affecting its rational, effective and sustainable operation and without violating the relevant constitutional guarantees. The conclusion reached was that the legislation at stake was in contrast with the constitutional principle of equality and the aims pursued, particularly the reduction of public expenditure, did not contribute to the reform of the organization necessities of the Public Administration in a rational manner.

Similarly, the approach of the Portuguese Constitutional Court changed over time. In 2012 and 2013, the Court gave two rulings declaring that the austerity measures under challenge were disproportionate and they exceeded the limits of sacrifice. The suspension of the 14<sup>th</sup> monthly salary and the temporary pension and wage cuts of public employees imposed by the 2012 Budget Act<sup>470</sup> were held excessive and unconstitutional.<sup>471</sup> ‘The increase by a new reduction of 14.3% of annual income, which would more than triple, on average, the amount of the initial reductions, attains a percentage value of such high degree that it now becomes evident that these limits have been exceeded.’<sup>472</sup> Although declaring the measures disproportionate, the Court suspended the effects of its decision, appreciating the exceptional public interest of the country to receive the external financial aid. As Ribeiro commented, ‘the Government would thereby have to pay both subsidies in 2012, an expenditure not foreseen in the last year’s budget. Since there was no time to design policy alternatives that could compensate the imbalance, the decision would imply a serious aggravation of the budget deficit’.<sup>473</sup>

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<sup>470</sup> Public sector employees and pensioners, whose salaries or pensions exceeded 1100 euros had their Christmas and holiday pays suspended, while public sector employees or pensioners whose salaries were between 600 and 1100 euros would receive reduced holiday and Christmas payments.

<sup>471</sup> Portuguese Constitutional Court Decision no 353/2012, judgment of 5 July 2012

<sup>472</sup> Section 5 of the decision: ‘o acréscimo de nova redução, agora de 14,3% do rendimento anual, mais do que triplicando, em média, o valor das reduções iniciais, atinge um valor percentual de tal modo elevado que o juízo sobre a ultrapassagem daquele limite se revela agora evidente’

<sup>473</sup> G. de A. Ribeiro, ‘Judicial Activism Against Austerity in Portugal’ (2013) Blog of the International Journal of Constitutional Law and ConstitutionMaking.org, available at: <http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/> (accessed 5 December 2016)

Judgment 187/2013 consolidates this position of the Portuguese Constitutional Court.<sup>474</sup>

The 2013 Budget Act implemented pay cuts for public workers, the suspension of holiday pay and contribution to unemployment or sickness benefits. The reduction of public deficit was not recognised as a justification and the measures were held disproportionate and in violation of the principles of equality, legal certainty and the protection of legitimate expectations.<sup>475</sup> In particular, the Court demonstrated that the alleged measures set the demand of an extra effort from public sector workers, as opposed to workers in the private sector. That judgment was not suspended by the Court, which means that the Government had to reconsider the measures it implemented. However, it cannot be disregarded that the constitutional framework on which the Court was based made its modification more difficult than it would have been had the judgment being relied on individual constitutional rights.

In conclusion, the Greek domestic courts seem to mostly rule in favour of the compatibility of the austerity measures at stake and the basic grounds of their findings are the notion of public interest and, particularly, the prevention of the country's bankruptcy and the exceptional circumstances under which those measures were adopted. However, the existence of a case that declared that the measures at stake violated the Greek Constitution, after applying the principle of proportionality indicates the absence of a clear-cut position of the national courts of Greece.

Furthermore, in a nutshell, constitutional review in Portugal focused on the question of proportional infringements in socio-economic rights, in particular the right to wage. It is evident that the approach of the Portuguese Constitutional Court has become more severe

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<sup>474</sup> Portuguese Constitutional Court Decision no 187/2013, judgment of 5 April 2013

<sup>475</sup> It should be emphasised that the Court did not examine the effects of the alleged measures on the right to work or other social rights

from 2011 to 2013. The Court's original deference, though with warnings, in 2011, has been changed into a comprehensive reasoning explaining why further reductions in salaries solely for public servants could not be acceptable. As expected, such approach has been the subject of criticism by academics, who supported that the Portuguese Court partly ignored the wider context of the crisis that affects the whole Eurozone, as far as the decisions of the Portuguese Government, that the Court reviewed, were influenced by, and in respect of, the positions of other Member States and its commitments towards its international lenders. In addition, the Court had to take into consideration all the political negotiations that led to the adoption of the alleged austerity measures. Irrespective of that criticism, it can be argued that from the scope of view of this thesis, the Portuguese courts' approach can be characterised as more individuals-friendly rather than more supportive of the public interest. Indeed, the example of Portuguese Constitutional Court Decision no 353/2012, judgment of 5 July 2012 can be supported to reflect the principle of effectiveness in its substantial perspective, in the sense that the measures at stake were held disproportionate but, at the same time, the effects of the decision were suspended due to the exception circumstances involved. In other words, both individuals' rights were recognised and protected and the country's public interest was also respected.

Instead of the principle of proportionality, the 'no creditor worse off' principle was employed by the Slovenian Constitutional Court, which does not directly examine whether the measures under challenge are proportional or not, but, impliedly, it provides for a means of balance between the consequences of the measure adopted regarding a bank and the consequences of an ordinary insolvency of the same bank.

In the light of the crisis of the Eurozone, five banks in Slovenia had noticed serious deficits on their capital to such an extent that their assets were insufficient in relation to

their creditors and the value of their deposits. Thus, the Bank of Slovenia (the Bank Slovenije) decided the implementation of exceptional measures including the recapitalisation, the rescue and the winding up of those banks,<sup>476</sup> and asked for State aid which was authorised by the European Commission. National legislation was adopted in order to establish the legal framework for burden-sharing of the falling banks,<sup>477</sup> according to the requirements provided by the relevant Banking Communication.<sup>478</sup> The purpose of this Communication was to provide States with the necessary guidelines regarding the criteria on the compatibility of State aid granted to a financial sector during a crisis, with the internal market. The constitutionality of that national law was challenged before the Constitutional law of the country (the Ustavno sodišče) by the National Council (the Državni svet), the Ombudsman (the Varuh človekovih pravic) and some individuals.

According to the decision of the Slovenian Constitutional Court, Article 350.a of the Slovenian Banking Act was unconstitutional, as it did not afford effective judicial protection to stakeholders affected by Banka Slovenije's extraordinary measures. Thus, Banka Slovenije was held liable to compensate all shareholders and creditors affected by its extraordinary measures, provided that the 'no creditor worse off principle' is satisfied.<sup>479</sup> The compensation should be paid either by Banka Slovenije or the State, in case Bank Slovenije is not found liable. For the assessment of the bank's and the State's liability, a special committee of experts should be appointed in order to act as an advisory body to the court for complex questions requiring specialist knowledge. The role of this

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<sup>476</sup> Specifically, Nova Ljubljanska banka, Nova Kreditna banka Maribor were recapitalized, Abanka Vipa was rescued and Probanka and Factor banka were wound up.

<sup>477</sup> The measures at issue included writing off equity capital and subordinated debt.

<sup>478</sup> Commission Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') COM (2013) 216/01

<sup>479</sup> They should prove that the extraordinary measures resulted in a less favourable treatment of their qualified liabilities compared to insolvency or regular liquidation proceedings initiated on the day the extraordinary measures were imposed

committee will be limited to cooperate with the court by explaining facts that go beyond the court's knowledge. The appointment of such committee may be considered as promoting effective protection of all affected stakeholders of the bank, since it ensures that technical matters are examined correctly by experts on the fields.

In addition to the decision of the Slovenian Constitutional Court, and despite being declared inadmissible, the Cyprus Supreme Court's decision regarding the bail in, includes an interesting discussion on the 'no creditor worse off principle'. The Supreme Court underlined that, in applying the relevant private law principles, the District Courts should apply the 'no creditor worse off principle', as provided in section 3(2)(d) of Law 17(1)/2013, for the assessment of the measures' at stake legality in order to demonstrate, if any, non-contractual liability arising out of the actions of the two banks or the actions of the CBC and the Ministry of Finance.<sup>480</sup> This principle is established at the EU level in the SRM Regulation, and grants creditors, including depositors, and shareholders the right to be compensated if it can be demonstrated that they have suffered 'greater losses than would have been incurred if [the credit institution subjected to resolution] had been wound up under normal insolvency proceedings'.<sup>481</sup> Initially, depositors should demonstrate that they were individually and adversely affected by the measures in question. According to the wording of the Supreme Court, '[w]here the debt/obligations of the bank towards its depositors are affected, the depositor should primarily turn towards the bank in any civil action for its contractual default in repaying the deposit, with a possible claim against the Republic as having caused the breach of the contractual

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<sup>480</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (majority decision)

<sup>481</sup> Regulation (EU) No 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ 2 225/1, Article 15(1)(g)

obligation by means of the Decree'.<sup>482</sup> After establishing jurisdiction, depositors should prove that the loss they suffered was the consequence of the Decrees and the parallel agreements that each bank entered into for the transfer and selling of its assets and it was in excess of the loss they would have suffered had the banks gone into liquidation.<sup>483</sup> In other words, the object of the civil cases should be whether depositors are worse off, as a result of the restructuring measures, in comparison with the financial position they would have been if the decrees were not issued and the banks were either allowed to operate normally, in the case of the Bank of Cyprus, or gone through normal liquidation, in the case of Laiki Bank. Particularly for the depositors of the Bank of Cyprus, some specific factors to be taken into consideration by the District Courts were declared to be the compulsory conversion of the deposits into shares, the sufficiency of that exchange, the exceptions applied and the evaluation of the bank's property. The same test was held to apply equally to the case of shareholders of the Bank of Cyprus.<sup>484</sup>

It can be argued that the above-mentioned test established by the Supreme Court sets a remarkably high standard of proof.<sup>485</sup> In essence, its difficulty lies in the fact that depositors are asked to estimate the extent of losses that would have caused in the fictitious case of insolvency, without having any asset valuation assumption established in advance. This kind of test may attract significant legal challenges, which put the depositors' right to effective judicial protection in risk.<sup>486</sup>

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<sup>482</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (majority decision)

<sup>483</sup> See also C. Kombos and S. Laulhé Shaelou, 'The Cypriot Constitution under the Impact of EU law: An Asymmetrical Formation' in A. Albi and S. Bardutzky (eds), *National constitutions in European and global governance: democracy, rights and the rule of law* (TMC Asser Press, 2017)

<sup>484</sup> Cases 1034-6272/2013, *Vias Demetriou et al* [2014] not reported yet

<sup>485</sup> It should be underlined that this high threshold was not 'created' by the Supreme Court, but it actually resonates the test established by the SRM Regulation (Regulation (EU) No 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ 2 225/1, Article 15(1)(g))

<sup>486</sup> S. Laulhé Shaelou and A. Karatzia, 'Some preliminary thoughts on the Cyprus bail-in litigation: A commentary on *Mallis and Ledra*' (2018) *European Law Review* (forthcoming)



Contrary to the approach of the majority ruling, Judge Erotokritou gave a dissenting judgment<sup>487</sup> on which he discussed the distinction between private law and public law actions before domestic courts and he concluded that it is only the Supreme Court of the country, under its mandate to exercise judicial administrative control of the measures under challenge, that can apply a test of proportionality and reasonableness, based on principle of EU law, and particularly the Charter and the legal regime on free movement of capital. In other words, he supported that the Supreme Court has jurisdiction to decide the case and exercise administrative control of the relevant measures applying a test of proportionality and reasonableness and principles of EU law.<sup>488</sup> In particular, the commencement of judicial dialogue between national courts and the CJEU was recognised as available, when national courts will need to apply a ‘compatibility test’ which is based on rules and general principles of EU law.

Generally, all Cyprus domestic courts, even the lower District courts, are allowed to initiate judicial dialogue with the CJEU.<sup>489</sup> However, the classification of the Decrees and the relevant measures as ‘Acts of Government’ does not imply that they cannot be reviewed by the Supreme Court, thus Judge Erotokritou expressed his disagreement with the dismissal of the applications on the ground of non-admissibility. Such compatibility test should examine whether there is a balance between the public interest and the infringement of the rights of individuals, an expression of the principle of proportionality. Since this test should be applied within the framework of the Constitution and of the EU Treaties, it can only belong to the exclusive administrative revisional jurisdiction of the Supreme Court, such jurisdiction being in force even in times of crisis. Moreover, the

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<sup>487</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (dissenting judgment)

<sup>488</sup> Specifically, reference was made to the free movement of capital and the EU Charter

<sup>489</sup> See C. Lycourgos ‘Building Intra-Judicial Dialogue: The Relationship between the ECJ and Cypriot National Courts’ (2016) 5 *European Law Review* 623

dissenting judgment rejected the argument that the measures at stake constituted ‘political decisions’ resulting from extreme pressure at national and the EU level, and therefore should escape the compatibility test and could be in violation of the rule of law. Remarkably, this judgment, albeit dissenting, mentioned the EU Charter and the protection of the fundamental rights of the depositors, despite the fact that it was already established that the restructuring and bail-in measures do not fall within the ambit of EU law.<sup>490</sup> Specifically, the right to property<sup>491</sup> and the principles of equality before the law<sup>492</sup> and non-discrimination<sup>493</sup> were recognised as relevant to this case, with all of them including a test of proportionality to identify their potential infringement.

Even without a preliminary reference request or in the failure to establish direct effect of Union law, the Cyprus national courts are still emboldened to take into consideration EU law, including its general principles and relevant secondary legislation, when interpreting domestic law, reflecting the concept of indirect effect. At least for the time being, there is a case reported in a Cypriot District court, where the judge referred to the BRRD, though before being implemented into national law, when examining the bail-in measures.<sup>494</sup>

Based on the lack of clear guidelines to the lower courts regarding the application of the ‘creditor worse-off’ principle and of the compatibility concerning the bail-in pending cases, it can be assumed that individual rights will still be adversely affected and not enjoy effective judicial protection through a case-by-case approach. At this particular point, this thesis suggests the adoption of the Slovenian example and the establishment of a special

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<sup>490</sup> See Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756

<sup>491</sup> Charter of Fundamental Rights of the European Union [2012] OJ L 326/02, Article 17(1)

<sup>492</sup> *Ibid.*, Article 20

<sup>493</sup> *Ibid.*, Article 21(1)

<sup>494</sup> See District Court, Case no. 4602/14, *Institute of Archbishop Makarios III and others v CBC, Bank of Cyprus Plc, Resolution Authority, Attorney General of the Republic, Antri Antoniadou (in her capacity as special administrator of Laiki) and Cyprus Popular Bank Public Co. Ltd*, 26 August 2014

committee of experts which will function as an advisory body to the court, focusing only on specific questions which require specialisation and expertise on technical areas. The creation of such a committee can enhance effective judicial protection of bank depositors and ensure that they will receive the appropriate remedies, including fair compensation, at the national level.

Finally, the Spanish Supreme Court did not consider the principle of proportionality or any other balancing test at all, but gave a ruling based on the individuals' rights to effective judicial protection. In addition to the domestic case law on the violation of citizens' social rights, due to the austerity measures implemented, the judiciary in Spain had also to consider a case brought by bank investors against Bankia for the loss of their shares after being bailed out. After Bankia's bail out in 2012, investors sued the bank for over €800 million alleging that they were misled during its initial public offering one year before.

The seven savings banks that formed Bankia were merged and a public offering was made, in which the bank raised a considerable amount of money.<sup>495</sup> After Bankia disclosed that it needed about €22 billion to avoid collapse, the Spanish government seized its control and negotiated a European banking bailout of the bank.<sup>496</sup> In 2015 two judgments were given on this matter declaring the subscription and acquisition of shares in Bankia by the applicants null and void and asking Bankia to compensate the investors

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<sup>495</sup> Bankia raised over €3 billion in its initial public offering. The seven saving banks (cajas) that comprised Bankia were merged, under the leadership of Mr Rato, a former finance minister and managing director of the IMF. That merger was included in a broader consolidation of the national banking sector, after the first signals of the financial crisis in the country, aiming at the creation of stronger banks, able to absorb the mortgage losses of the weaker banks. The stock offering of Bankia took place after its merger.

<sup>496</sup> Bankia needed financial support equivalent to almost half of the 41 billion euros of European rescue funding. After suffering a loss of 19.2 billion euros in 2012, Bankia returned to profit in 2013, under new management.

for the amount they paid out plus interests.<sup>497</sup> In its appeal, the bank based its arguments on the relevant extraordinary appeals for procedural default and cassation and the existence of criminal prejudice regarding the pending criminal proceedings against two of its former ministers for alleged fraud in the public stock offering of BANKIA.<sup>498</sup> The Civil Courtroom of the Supreme Court dismissed the appeal.<sup>499</sup> It held that ‘the serious inaccuracies’ in the prospectus made by the bank for the public offering of stock led the small investors to error, which constituted misrepresentation regarding its solvency and the profitability of their shares. In reaching this conclusion, the Court compared the situation of small investors with large investors which may have access to more information. In its words, ‘small investors (...), contrary to other more qualified investors, lack other means (other than the prospectus) to obtain information on the economic data affecting the company whose stock are to be traded and which are important to take the investing decision.’

In response to the argument of Bankia that the proceedings should be postponed to avoid criminal prejudgment, the Supreme Court stressed that the outcome of one case should not affect the other since different tests and criteria are applied by the Criminal and the Civil Courts. The fact that the Criminal Court acquitted the defendant could not change the approach of the Civil Courtroom which had to consider the accounting and the stock exchange rules in order to decide liability in Bankia’s stock purchase. In any case, an adjournment of the civil proceedings waiting for the decision of the Criminal Court, which could be long-lasting due to the complexity of the issues at stake, would cause undue delays that would infringe the investors’ right to effective judicial protection.

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<sup>497</sup> Judgments of 7th January 2015, of the Ninth Section of the Provincial Appeal Court of Valencia, and of 11th May 2015, of the Fifth Section of the Province Appeal Court of Oviedo

<sup>498</sup> Mr. Rodrigo Rato and Mr. Ángel Acebes

<sup>499</sup> Judgments nos 23/2016 and 24/2016, of 3rd February

Summarily, it is illustrated that Spanish courts have treated the principle of effective protection in an inconsistent manner. On the one hand, they did not ensure effective protection of applicants by refusing to proceed with a preliminary reference to the CJEU and declaring the matter rather political than legal. On the other hand, effective judicial protection was protected in the case of the investors against Bankia, since the court decided to continue the civil proceedings in order to give a ruling to the applicants promptly.

### **III. JUDICIAL PROTECTION THROUGH DIRECT ACTIONS AT THE EU COURTS UNDER ARTICLE 263 TFEU AND THROUGH PRELIMINARY REFERENCES TO THE CJEU UNDER ARTICLE 267 TFEU**

As the discussion in the previous section showed, most national courts preferred to keep a distance from scrutinising the legality of austerity measures and MoUs and their compatibility with their national constitutions and the general principles of law. Therefore, those individuals who considered the judicial protection of their national courts ineffective, turned to the CJEU, by exercising their right to challenge Union institutions' decisions under Article 263 TFEU. It should be repeated here that, under Article 263 TFEU, natural or legal persons are allowed to challenge 'regulatory acts' that do not 'entail implementing measures' that have direct, but not necessarily 'individual concern' on them.

The CJEU has the legal mandate to closely examine the legality of measures taken and implemented at the EU level, both in the form of legislative acts and administrative actions, and to ensure the uniform interpretation of EU law throughout the Union.

The criticism against the judicial effectiveness of the CJEU is based on its interaction with Member States and their political interests. Firstly, in an empirical research that took place in 2008, the effect of the positions of various Member States on the judicial effectiveness of the CJEU was examined,<sup>500</sup> from the point of view of the limits on the independence of the Court imposed by the political pressures by Member States. The research reached the conclusion that the independence of the CJEU is rather restricted,

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<sup>500</sup> C. Carruba *et al.*, 'Judicial Behaviour under Political Constrains: Evidence from the European Court of Justice' (2008) 102 *American Political Science Review* 435

since ‘threats of exercise of political constraints by Member States had a systematic and significant effect on judicial rulings by the CJEU’.<sup>501</sup> Furthermore, the impact of Member States on the effectiveness of the CJEU can be seen in the practice of Member States to remove some issues from the scope of EU harmonization and the adoption of exceptions in particular harmonized areas.<sup>502</sup> To achieve these ‘selective exits’ from the Courts’ jurisdiction, Member States used to either delay the completion of their market and political integration or even overturn the process of Union harmonization any time they consider that the CJEU acts in excessive judicial activism.<sup>503</sup>

In the context of economic integration, the CJEU has been used to create new legal norms, establish new rights and interests and promote new policies. The whole process in this area has a normative character, since the changes introduced by the Court regarding economic governance and the role of various, national and supranational, actors involved, give rise to further litigation which results in deeper integration.<sup>504</sup> This can be evident in the context of the financial crisis, and it is expected that the case law discussed in this thesis will generate further litigation on the role of EU institutions on the financial and economic governance of the Eurozone and the role of the principle of the EU Treaties and the Charter.

The absence of any involvement of EU law to the austerity measures adopted and to the supranational treaties and mechanisms established in order to handle the Eurozone, and, also the global, financial crisis has constituted the primary reason for numerous cases to be declared inadmissible by the CJEU, which have been either brought as direct actions,

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<sup>501</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2004), 294

<sup>502</sup> G. Gaja, ‘The Growing Variety of Procedures Concerning Preliminary Rulings’ in D. O’Keeffe (ed), *Liber Amicorum Gordon Slynn of Hadley* (Kluwer Law International, The Hague 2000)

<sup>503</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2004), 266

<sup>504</sup> A. Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ (2010) 2 *Living Reviews in European Governance*, available at: <http://www.europeangovernance-livingreviews.org/Articles/lreg-2010-2/download/lreg-2010-2BW.pdf> (accessed 28 November 2016)

according to Article 263 TFEU, or through the preliminary reference procedure, according to Article 268 TFEU.

### 1. Access to justice

The legal aspects of DGSs have not been extensively examined at the international level, with the exception of some cases before the ECtHR which dealt with the State guarantee of deposits in the Former Yugoslavia.<sup>505</sup> In the *Icesave* case the European Free Trade Association Court (EFTA Court) issued the first judgment regarding the protection of deposits in the shed of the financial crisis,<sup>506</sup> in an action brought by the EFTA Surveillance Authority which challenged Iceland's responsibility under Directive 94/19/EC.<sup>507</sup> The EFTA Court dismissed the application and concluded that Directive 94/19/EC imposed the obligations on EEA States to introduce and officially recognise DGSs and supervise them in order to ensure their proper operation. However, this obligation does not extend to ensuring compensation if a DGS is unable to compensate deposits due to a system crisis.

Iceland implemented the Deposit Protection Directive 94/19/EC by Act No 98/1999<sup>508</sup> and established the Depositors' and Investors' Guarantee Fund (TIF). Landsbanki, an Icelandic bank, operated branches offering online saving accounts in the UK and in the Netherlands, known as Icesave. According to Article 4(3) of Directive 94/19/EC, the British and Dutch branches were made responsible to TIF, instead of the local creditors' deposit insurance. As a result of the financial crisis, online access to the deposits in the British and Dutch branches became unavailable, and one day later, Landsbanki collapsed,

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<sup>505</sup> *Alisic and others v Bosnia and Herzegovina and others*, App. no.60642/08 (2012); *Molnar Gabor v. Serbia*, App. no. 22762/05 (2009); *Suljagic v Bosnia and Herzegovina*, App. no. 27912/02 (2009); *Trajkovski v 'the former Yugoslav Republic of Macedonia'*, App. no. 53320/99 (2002)

<sup>506</sup> Case E-16/11, *EFTA Surveillance Authority v. Iceland (Icesave)*[2013]

<sup>507</sup> Directive 94/19/EC on deposit-guarantee schemes [1994] OJ 2 135/05

<sup>508</sup> Act No. 98/1999 on Deposit Guarantee and Investor Compensation Scheme (Act)



on 7 October 2008. As a result, New Landsbanki was set up by the Icelandic Government under the Emergency Act for the restructuring of the country's credit institutions,<sup>509</sup> and domestic deposits of the bank were transferred to that new bank. That transfer of deposits made them remain available to their holders, for the purpose of providing reimbursement under Directive 94/19/EC. Iceland received emergency payments from the EU, with the approval of the IMF, providing that the country should have applied strict capital controls that would restrict almost all transnational foreign currency movements. Although such a condition aimed at avoiding a further devaluation of the national currency,<sup>510</sup> it resulted in the depositors of Landsbanki in the two foreign branches being uncompensated from the TIF. The UK and Dutch governments decided to temporarily substitute the TIF and compensated depositors in their respective countries, and then requested Iceland return them the money paid. The citizens of Iceland voted negatively in two referendums held in 2010 and 2011 and rejected the proposal that their country should repay the UK and Dutch governments for the billions of euros paid to foreign savers of Icesave.<sup>511</sup> The application of ESA against Iceland consisted of three pleas. Firstly, the ESA sought a declaration that Iceland failed to comply with the obligations of the Directive 94/19/EC,<sup>512</sup> by failing to ensure compensation of Icesave depositors in the two foreign branches. Secondly, it claimed that indirect discrimination took place against those foreign savers, also in contrast with the provisions of the Directive.<sup>513</sup> Thirdly, the final

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<sup>509</sup> Act No. 125/2008 of 8 Oct. 2008 on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances

<sup>510</sup> Icelandic króna

<sup>511</sup> In two referendums held in March 2010 and April 2011, the people of Iceland rejected the proposal that Iceland repay the 3.9 billion euros paid out to 340,000 British and Dutch savers affected by Icesave's bankruptcy. See K. A. Curtis et al., 'I Save for Icesave: Self-Interest and Sovereign Debt Resettlement' (2012) Working Paper, Institute of Behavioral Science, University of Colorado at Boulder; C. Deloy, 'Referendum on the Icesave Agreement Law (2011) *Fondation Robert Schuman*

<sup>512</sup> Articles 3, 7 and 10 of the Directive

<sup>513</sup> Articles 4(1) and 7(1) of the Directive

plea was based on the argument that Iceland breached Article 4 of the Directive because of its discriminatory treatment.

Regarding the first plea, the EFTA Court interpreted the obligation imposed by Article 7(6) of Directive 94/19/EC<sup>514</sup> as an obligation to implement a deposit guarantee fund and excluded the performance obligation on States. In other words, the EFTA Court held that EEA States were only obliged to provide for an effective procedural framework for DGS, and did not extend to ensuring that the DGS was in a position to pay the minimum amount guaranteed in case a system crisis arose.<sup>515</sup> Thus, Iceland was found not to have failed to comply with Directive. In the Court's construction, Article 3<sup>516</sup> and Article 7<sup>517</sup> of the abovementioned Directive created an obligation of form to establish a DGS in general, but not an obligation of result to establish a DGS which would be capable of compensating depositors up to the amount provided. The Court reached this conclusion based on three arguments. Firstly, the DGSs should be financed entirely by the credit institutions that are members to them; an aspect that is not covered by the Directive, as Article 10 provides only for the obligation to compensate.<sup>518</sup> Secondly, since the compensation of depositors would constitute public sector funding, the State aid rules were triggered and an obligation to provide State aid is not found in the Directive.<sup>519</sup> Thirdly, according to Recital 24 of the Directive, EEA States are excluded from liability as long as they set up and recognise the DGS.<sup>520</sup>

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<sup>514</sup> 'Member States shall ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit-guarantee scheme'

<sup>515</sup> Paragraphs 133-135, 144 and 152 of the judgment

<sup>516</sup> 'Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised'

<sup>517</sup> 'Deposit-guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to ECU 20 000 in the event of deposits being unavailable.'

<sup>518</sup> *Icesave*, paragraph 159

<sup>519</sup> *Ibid.*, paragraph 165

<sup>520</sup> *Ibid.*, paragraph 179

In order to address the second plea, the EFTA Court examined a specific anti-discrimination rule, as it derived from Article 4 of the Directive.<sup>521</sup> In particular, the Court stated that, based on the principle of home State deposit protection, all the foreign branches of a credit institution should belong to the DGS of the home EEA State,<sup>522</sup> thus both domestic and foreign depositors should be equally compensated under the Directive. Since the depositors of Icesave already belonged to the domestic DGS, the EFTA Court held it was not Iceland that discriminated against foreign depositors on the basis of nationality, but the DGS itself with the way it used its funds. Domestic deposits remained available in the sense of Article 1(3) of the Directive, as their transfer to the New Landsbanki took place before the Iceland Financial Supervisory Authority triggered the application of Directive 94/19/EC. The TIF was not involved in that transfer, therefore the transfer could not be considered as a difference in the treatment of depositors or a difference in the payment of the funds by the TIF

Concerning the third plea, originating from the violation of Article 4 of the EEA Agreement the EFTA Court identified a self-limitation of the ESA, as it did not challenge Iceland for an infringement of the principle of non-discrimination on the ground that it did not transfer all the foreign deposits to the New Landsbanki, as happened in the case of domestic deposits. Such an approach by the ESA, left unchallenged whether the continuance of the UK and the Dutch Icesave deposits with the old, failing Landbanki constituted a breach of the non-discrimination principle of the EEA. The EFTA Court held that Iceland was not liable for discrimination, as it was not bound to assume such obligation of result.<sup>523</sup> In particular, it held that Article 4 EEA was not applicable, as it asked for comparable situations being treated similarly, but the compensation Icesave

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<sup>521</sup>*Icesave*, paragraphs 203-216

<sup>522</sup> *Ibid.*, paragraph 208

<sup>523</sup> *Ibid.*, paragraphs 218-223

depositors lacked any comparable situation.<sup>524</sup> *Obiter*, based on the *Sigmarsson* case,<sup>525</sup> the EFTA Court supported that, even if the third plea had been constructed differently by ESA, the margin of discretion of EEA States in matters of economic policy during a system crisis should have been taken into serious consideration and could have justified a potential discrimination.

Interestingly, the EFTA Court set aside the rationale of *Paul and Others v Germany*,<sup>526</sup> arguing that this case considered only the liability of German authorities which acted negligently in conducting banking supervision.<sup>527</sup> While in *Paul v Germany*, the State failed to implement Directive 94/19/EC and was held liable, in *Icesave* the DGS was established and the State was not found in any breach of EU law. This distinction implies that the liability of an EEA State is limited to the establishment of the DGS, and once this happens, the Directive cannot give rise to any further claim against the State.

In *Paul v Germany*,<sup>528</sup> the CJEU established that Directive 94/19/EC conferred on depositors the right to be compensated in case of insolvency of the bank, but not the right to require that the supervisory authorities implement supervisory measures in their interest. The Court supported its decision by referring to Recital 24 of the Directive, which clearly declares that the Member States, or the national supervisory authorities, cannot be held liable towards depositors, once they ensure that one or more DGSs have been officially set up in their countries. This point of the decision is in full compliance with the EFTA Court's decision in *Icesave*.

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<sup>524</sup> *Icesave*, paragraph 226

<sup>525</sup> EFTA Court Case E-3/11, *Pálmi Sigmarsson v. The Central Bank of Iceland*, [2011] EFTA Court Report, 430

<sup>526</sup> Judgment of 12 October 2004, *Paul and others*, C-222/02, ECLI:EU:C:2004:606

<sup>527</sup> *Icesave*, paragraph 179

<sup>528</sup> Judgment of 12 October 2004, *Paul and others*, C-222/02, ECLI:EU:C:2004:606

Furthermore, the Court set some delineations on the use of Directive 94/19/EC as a basis for applications against a State. The *Icesave* ruling excluded the liability of the State to individuals from the scope of its proceedings, by arguing that national courts are the appropriate fora for actions brought by individual depositors challenging the statutory or contractual obligation to compensate for the insured deposits.<sup>529</sup> The Court also demonstrated that the Directive applied only to the failure of individual banks, thus the State liability in the case of systemic crisis was excluded.<sup>530</sup> Finally, the Court distinguished the liability of the State from the liability of the DGS. Though the ESA argued that the TIF was an emanation of the State and its actions were attributable to Iceland,<sup>531</sup> the EFTA Court responded that any failure of the DGS could not affect the liability of the State, irrespective of the close links between them, since the Directive did not have any primary liability rules in the first place.<sup>532</sup>

A final comment concerns the legal framework applicable at the date of the dispute. While the *Icesave* decision was based on the Directive of 1994, it is questioned whether the EFTA Court would reach a different result if the Directive of 2009<sup>533</sup> or the Directive of 2014<sup>534</sup> constituted its legal basis. The Court commented on this, but only *in obiter*, by expressing the view that the Deposit Directive of 2009 imposes the liability of the DGS's operation on the State,<sup>535</sup> due to the change in the wording of Article 7(1),<sup>536</sup> which is now more robust and remains the same in the Directive of 2014.<sup>537</sup> Such wording shifts

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<sup>529</sup> *Icesave*, paragraph 123

<sup>530</sup> The Court supported this opinion by mentioning a number of provisions of the Directive of 1994 which refer to the failure of 'a' credit institution: paragraphs 150-159

<sup>531</sup> *Icesave*, paragraph 82

<sup>532</sup> *Ibid.*, paragraphs 181-184

<sup>533</sup> Directive 2009/14/EU on deposit guarantee schemes [2009] OJ 2 68/3

<sup>534</sup> Directive 2014/49/EU on deposit guarantee schemes [2014] OJ 2 173/149

<sup>535</sup> *Icesave*, paragraph 138

<sup>536</sup> 'Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be at least EUR 50000 in the event of deposits being unavailable.'

<sup>537</sup> H. Kupelyants, 'Protection of Private Creditors and Deposit Insurance' (2014) *Legal Studies Research Paper Series, Paper No. 51/2014*, 22

the responsibility to underwrite the obligations of the DGS in default to the Member States. Consequently, the obligation to protect depositors was also shifted from the DGS itself to the Member States. Remarkably, the EFTA Court, still *in obiter*, queried ‘[w]hether this obligation is limited to a banking crisis of a certain size would require further assessment.’<sup>538</sup> In future litigation on the current Directive of 2014, it is assumed that the Court would limit its scope to failures of individual banks only, as it did in the *Icesave* case under the Directive of 1994.

It can be concluded that this decision indicated that the protection of depositors in the single market is rather limited because the responsibility of State is confined to the establishment and not the operation of DGSs, and could not ensure the availability of deposit guarantee schemes in the event of another systemic banking crisis. The Court seems to have put the ball back into the legislator’s court, keeping depositors away from their right of effective judicial protection. In other words, the EFTA Court implies that the question of whether to provide deposit insurance guaranteed a state in the context of the single market, should be answered by the relevant parliament and not the national or the EU courts. This decision has implications for depositors, the CJEU and the Union as such. According to the *Icesave* ruling, depositors only have the option of recourse to their national authorities, which does not necessarily mean their national courts. In essence, they can only proceed with petitions to their national parliaments, provided that there is such an option available in their country. Moreover, this decision seems to exclude the CJEU from assuming jurisdiction on such kind of disputes, by declaring that the whole matter belongs to the competence of the relevant parliament and not the national or the EU courts. Finally, the EU and the Union institutions are excluded from any liability on

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<sup>538</sup> *Icesave*, paragraph 139

any disputes concerning DGSs, since their only task was to draft the Directive that impose an obligation to Member States to establish DGSs.

Two more cases that were held inadmissible by the EU courts relate to the bail-in measures adopted in Cyprus. After the decision of the Supreme Court of Cyprus, some depositors and investors brought proceedings to the General Court, asking for the annulment of the Eurogroup statement of March 2013 stating the bail-in in Cyprus and the ‘haircut’ on uninsured bank deposits, which were declared inadmissible. The statement under challenge announced the agreement between the Eurogroup<sup>539</sup> and the Cypriot authorities including the Memorandum of Understanding between the country and the international lenders,<sup>540</sup> which provided *inter alia* for the resolution of Laiki Bank, the restructuring of the Bank of Cyprus and the subsequent ‘haircut’ of the uninsured national and foreign bank deposits. In the case of *Mallis and Malli*,<sup>541</sup> the applicants claimed that Decrees 103 and 104 constituted the implementation of the Eurogroup decisions, as those were announced in its statement of March 2013, and thus they challenged the validity and legality of this statement. The General Court considered the features of Eurogroup and its relationship with the European Commission and the ECB and concluded that the Eurogroup is only an informal forum for discussion,<sup>542</sup> independent from the structure of the two Union bodies, hence their participation in Eurogroup meetings does not imply that its decisions are or instructed, or even just guided, by them.<sup>543</sup> Furthermore, the Court assessed whether the Eurogroup statement produced legal effects and, thus, capable of being the subject of judicial review under

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<sup>539</sup> An informal group consisting of the finance Ministers of the Eurozone Member States

<sup>540</sup> European Commission, European Central Bank and International Monetary Fund, also with the support of the Eurozone Member States

<sup>541</sup> Order of 16 October 2014, *Mallis and Malli*, T-327/13, ECLI:EU:T:2014:909

<sup>542</sup> With a set organisational structure and an elected president

<sup>543</sup> According to Protocol 14 to the Consolidated Version of the Treaty on European Union [2008] OJ C115/30 on the Eurogroup, the Commission ‘shall take part in the meetings’ and ‘the ECB shall be invited to take part in such meetings’.

Article 263 TFEU. The answer to this lied in the nature of Eurogroup; as long as it is not a decision-making body, its statements cannot produce legal effects on third parties. The conclusion of the General Court was that the Eurogroup is not an EU institution and its decisions cannot be submitted to judicial review under Article 263 TFEU, hence the first claim was declared inadmissible. Furthermore, the applicants brought proceedings against the European Commission and the ECB claiming that those authorities, de facto, wrote of the Eurogroup statement and the two Decrees in Cyprus implemented the decisions of those two Union institutions. Thus, the applicants asked for the declaration that the Eurogroup statement was a joint decision of the European Commission and the ECB. The second claim was also declared inadmissible, because the Court does not have the power to issue declaratory judgments, without providing for any legal remedies.<sup>544</sup>

By holding the claims inadmissible, the doors were closed to depositors from Cyprus who wished to challenge the decisions and agreements that led to the adoption of Decrees 103 and 104. However, this ruling enlightened the application of the law at the District Courts of Cyprus. Since it was decided that the Eurogroup, the European Commission and the ECB were not responsible for the adoption of Decrees 103 and 104, then the entire responsibility lied on the Cypriot authorities, thus it is the Republic of Cyprus that should be sued for damages.

Another case brought to the General Court, *Ledra Advertising Ltd*,<sup>545</sup> based on very similar grounds with *Mallis and Malli*, against the European Commission and the ECB, claiming that the responsibility for the measures adopted in Cyprus should be attributed to those two authorities. Once again, the Court held that the MoU between Cyprus and the ESM, from which the measures derived, did not originate from the two Union

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<sup>544</sup> Article 263 TFEU and established case law

<sup>545</sup> Order of 10 November 2014, *Ledra Advertising*, T-289/13, ECLI:EU:T:2014:981



institutions. The applicants in this case further asked for damages from the European Commission and the ECB on the ground that they infringed their right to property. They relied on Article 1 of Protocol 1 ECHR and Article 17 of the Charter and they argued that the European Commission, operating as the guardian of the Treaties,<sup>546</sup> failed to protect their rights by failing to guarantee the consistency of the MoU with EU law. The Court did not find a causal link between the damages suffered and the alleged failure of the Commission, as the damages were found to be caused by the two Decrees, which were implemented before the adoption of the MoU. Consequently, the application in *Ledra Advertising* was declared inadmissible.

After the dismissal of all these actions as inadmissible by the General Court, the applicants appealed to the CJEU seeking to have the orders of the General Court set aside. The appellants claimed that the ruling of the General Court lacked any assessment of the relationship between the Eurogroup and the two EU institutions and, thus, the conclusion that the bail-in was not caused by the decisions of the European Commission and the ECB was wrong. In other words they argued that, due to an alleged misrepresentation of law and the facts of the cases, the cases were wrongly declared inadmissible, and the General Court ‘failed to attribute any conduct or act or decision whatsoever either to the Eurogroup or to the defendants or to the defendants within the Eurogroup’.<sup>547</sup>

According to the Opinions of Advocates General, the General Court correctly dismissed the applications and the CJEU should uphold its orders. Advocate General Wathelet considered the actions for annulment of the Eurogroup statement of March 2013 and

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<sup>546</sup> TEU Article 17(1)

<sup>547</sup> Application of 8 May 2015, *Mallis and Malli*, C-105/15 P, OJ C178/02, appeal brought on 4 March 2015

Advocate General Wahl examined the action for damages against the European Commission and the ECB.

Advocate General Wathelet supported that the two EU institutions operate only as agents of the ESM in the stage of negotiations and signing during the financial assistance procedure, and they are not acting in their own name in the adoption of the MoU. Moreover, the two Union bodies have not delegated any powers to the Eurogroup and they cannot review or make any recommendations or give any instructions regarding the Eurogroup statements. Finally, the alleged statement cannot produce binding legal effects on third parties, so it cannot constitute the subject of judicial review under Article 263 TFEU. All these findings of Advocate General Wathelet led to the conclusion that the General Court have not erred in law or in fact in any point.<sup>548</sup>

Advocate General Wahl argued that the ESM is not an institution of the Union<sup>549</sup> and the MoU is not originating from the European Commission or the ECB.<sup>550</sup> As a consequence, in support of the General Court order, the loss suffered by the appellants cannot be attributed to the Union institutions. What the Advocate General suggested is that depositors can bring actions before national courts against the Eurozone Member States which consist the ESM, since it is the ESM that conceived the MoU and should bear the responsibility for it.<sup>551</sup>

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<sup>548</sup> Opinion of Advocate General Wathelet of 21 April 2016, *Mallis and Malli*, Joined Cases C-105/15 P to C-109/15 P, ECLI:EU:C:2016:294

<sup>549</sup> He supported his Opinion with previous case law of the CJEU, such as the *Pringle* case

<sup>550</sup> The duties conferred on the Commission and the ECB within the ESM Treaty entail no power to make decisions of their own and commit the ESM alone

<sup>551</sup> Opinion of Advocate General Wahl of 21 April 2016, *Ledra Advertising*, Joined Cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:290

Following the Opinions of the two Advocate Generals, the CJEU upheld the orders of General Court regarding the actions for annulment of the Eurogroup statement.<sup>552</sup> In particular, the CJEU reaffirmed that the alleged statement does not constitute a joint decision of the European Commission and the ECB, as the ESM Treaty does not confer them the power to make decisions on their own. The participation of the two EU institutions in the Eurogroup meetings does not affect the nature of the latter's statements, so the alleged statement concerning Cyprus does not express the decision-making power of those two institutions. Finally, the Court observes that the adoption, by the Cypriot authorities, of the legal framework necessary for the restructuring of the banks cannot be regarded as having been imposed by an alleged joint decision of the Commission and the ECB that was given concrete expression in the Eurogroup statement of March 2013. Consequently, the CJEU upheld the General Court's orders and dismissed the appeals.

The two aforementioned cases were the result of direct actions at the EU courts under Article 263 TFEU. Going back to the litigation on national courts, it has been illustrated that effective judicial protection against austerity measures does not only involve national measures and their compatibility with national constitutions, but also the supranational *raison d'être* of these measures.<sup>553</sup> If the austerity measures were the result of the implementation of EU directives, the preliminary reference mechanism would be willingly activated by national courts. In particular, national courts would justify the actions of the State based on Article 288(3) TFEU<sup>554</sup> so as to refuse legal review at the national level and bring preliminary questions to the CJEU regarding the validity of the

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<sup>552</sup> Judgment of 20 September 2016, *Mallis and Malli*, Joined Cases C-105/15 P to C-109/15 P, ECLI:EU:C:2016:702

<sup>553</sup> R. Repasi, 'Judicial protection against austerity measures in the euro area: *Ledra and Mallis*' (2017) 54 *Common Market Law Review*, 1123

<sup>554</sup> Article 288(3) TFEU reads as follows: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

relevant Directive. However, the austerity measures are the result of either supranational treaties, such as the ESM Treaty,<sup>555</sup> or MoUs, and neither of them can easily meet the requirement set by Article 267(1)(b) TFEU, namely that it should be an act ‘of the institutions, bodies, offices or agencies of the Union’. According to Repasi, a preliminary reference can be admissible, albeit MoUs do not produce legal effects themselves, as far as they contribute to the consequences of another Union act that produces legal effects.<sup>556</sup> However, there have been instances where the CJEU detached itself from any authority to rule on the austerity measures and the supranational mechanisms created during the financial crisis, by underlining the absence of any link of those mechanisms and measures with EU law.

Ireland became important regarding the case law of the CJEU on the financial crisis with the *Pringle* case,<sup>557</sup> since it was the first time the Court considered the legal consequences of the sovereign debt crisis and shed some light on the legal aspects of the crisis management instruments created within the Eurozone since 2010. The importance of this case is shown by the fact that eleven governments and the European Parliament intervened in the proceedings. Most importantly, the European Council made an intervention in the proceedings of a case before the CJEU for the first time ever.<sup>558</sup> The principal legal question submitted to the Court was whether the Member States which concluded the ESM Treaty<sup>559</sup> were in breach of EU law. An affirmative answer by the CJEU would cause a serious deterioration in the Eurozone mechanisms for the

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<sup>555</sup> Treaty establishing the European Stability Mechanism [2012]

<sup>556</sup> R. Repasi, ‘Judicial protection against austerity measures in the euro area: *Ledra and Mallis*’ (2017) 54 *Common Market Law Review*, 1123

<sup>557</sup> Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756

<sup>558</sup> The reason for the latter’s intervention was that the particular reference challenged, *inter alia*, about the validity of the European Council Decision that had led the way for the ESM Treaty. This Decision had added to the TFEU a new provision (Article 136(3) TFEU) which allows for the establishment of a financial rescue mechanism by the Eurozone countries.

<sup>559</sup> Treaty establishing the European Stability Mechanism [2012]

management of the crisis, since all the edifice created to deal with the financial crisis should have been destroyed and new mechanisms should have been established.

In February 2012, a Treaty was signed by the Eurozone countries establishing the ESM, an international financial institution, aiming at mobilising funding and providing ‘stability support under strict conditionality... to the benefit of the ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the Euro area as a whole and of its Member States’.<sup>560</sup> During the process of ratification of the Treaty by Ireland, Mr Thomas Pringle, as a member of the Irish Parliament, opposed the participation of the country, since its ratification would transfer many sovereign monetary powers to a new international institution and it would violate EU law. His case reached the Irish Supreme Court, which made a preliminary reference to the CJEU consisting of three questions. Firstly, it asked to verify the validity of the European Council Decision 2011/199, which amended Article 136 TFEU by inserting Article 136(3) regarding the establishment of a stability mechanism. Secondly, it referred to the interpretation of Articles 2, 3, 4(3) and 13 TEU, Articles 2(3), 3(1)(c) and (2), 119-123 and 125-127 TFEU, and of the general principles of effective judicial protection and legal certainty. In essence, the Irish Supreme Court asked whether a Eurozone Member State was entitled to conclude and ratify an agreement in the form of the ESM Treaty according to the abovementioned articles and principles. Thirdly, it asked whether Member States were allowed to conclude and ratify the ESM Treaty before the formal modification of the TFEU by Decision 2011/199.

Regarding the first question, concerning the validity of an act by the European Council, the Court had to examine whether Decision 2011/199 interfered with the exclusive

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<sup>560</sup> ESM Treaty, Article 3

competence of the Union in the area of monetary policy or in the competence of the Union in the area of co-ordination of economic policies of the Member States of the Eurozone. It was held that the monetary policy of the EU, as enshrined in Article 3(1)(c) TFEU, aims at maintaining price stability, while ESM had the aim of ensuring the stability of the euro.<sup>561</sup> Moreover, as long as the instruments used by the ESM do not fall within monetary policy, the ESM belongs to the area of economic policy.<sup>562</sup> However, since the Union is not entitled to establish a stability mechanism in the form of the ESM,<sup>563</sup> its competence in the area of co-ordination of economic policies of the Member States remains unaffected.<sup>564</sup>

Considering the second question, the Court had to analyse the relationship between the ESM Treaty with various provisions and principles of EU law. Articles 3(1)(c) and 127 TFEU are not violated, since the ESM falls within economic and not monetary policy.<sup>565</sup> Article 122(2) TFEU was also not violated; since it does not indicate ‘that the Union has exclusive competence to grant financial assistance to a Member state’<sup>566</sup> and the ESM does not prohibit EU from granting *ad hoc* financial assistance to a Member State.<sup>567</sup> Furthermore, Article 123 TFEU was held to apply only to the ECB and the national central banks, thus it does not impede the establishment of an international financial institution or a mechanism under which the assistance is provided by the Member States themselves.

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<sup>561</sup> *Pringle*, paragraph 56

<sup>562</sup> *Ibid.*, paragraph 60

<sup>563</sup> Based on Article 122(2) TFEU

<sup>564</sup> A. Van Malleghem, ‘Pringle: A Paradigm Shift in the European Union’s Monetary Constitution’ (2013) 14 *German Law Journal*, 141, at 150

<sup>565</sup> *Pringle*, paragraphs 94-97

<sup>566</sup> *Ibid.*, paragraph 120

<sup>567</sup> *Ibid.*, paragraphs 104-109

The CJEU gave particular focus on the interpretation of Article 125 TFEU<sup>568</sup> and argued that it ‘is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.’<sup>569</sup> Thus, the budgetary policy of a Member State is compatible with Article 125 TFEU if three requirements are satisfied; firstly, the Member State should remain responsible for its commitments; secondly, financial assistance can be granted only when essential for the maintenance of financial stability of the Eurozone; and, thirdly, financial assistance should be subject to strict conditions.<sup>570</sup> All the three requirements are fulfilled in the case of the ESM Treaty, thus it is not in breach of Article 125 TFEU. Furthermore, the ESM Treaty does not violate Article 4(3) TEU, as it contains provisions which ensure that its operation will be in compliance with EU law. The Court also examined whether each EU institution acted within its powers, according to the Treaties, as provided in Article 13(2) TEU. It held that, since its activities fall outside the exclusive competence of the EU, as a mechanism of economic policy, Member States can entrust tasks to the ECB and the Commission and the duties the ESM confers on them ‘do not entail any power to make decisions of their own’.<sup>571</sup>

As regards the third question, the CJEU held that the ratification of the ESM was not subject to the entry into force of Decision 2011/199, because Member States had already the competence to establish such a mechanism.<sup>572</sup>

The question of the relationship between the ESM Treaty and the principle of effective judicial protection is left to be examined. The Irish Supreme Court sought to ascertain

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<sup>568</sup> G. Beck, ‘The Court of Justice, legal reasoning, and the Pringle case-law as the continuation of politics by other means’ (2014) 39 *European Law Review*, 234, at 242

<sup>569</sup> *Pringle*, paragraph 130

<sup>570</sup> *Ibid.*, paragraphs 136-137

<sup>571</sup> *Ibid.*, paragraph 161

<sup>572</sup> *Ibid.*, paragraph 185

whether the establishment of the ESM violated the right to effective judicial protection, as enshrined in the Charter. As the Irish judges thought, the fact that the ESM operated outside the EU legal order could mean that the mechanism was placed beyond the duties that the Charter creates. The Court's decision was that the ESM constituted an *international* financial mechanism, so the ESM Member States were not implementing EU law and were acting outside the scope of the Charter, thus the principle of effective judicial protection could not prevent a Member State from ratifying the ESM Treaty.<sup>573</sup> The Court recalled that, according to Article 50(1) of the Charter, the latter applies only when Member States implement EU law. Specifically, 'under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties'.<sup>574</sup> It further stated that 'the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism'.<sup>575</sup>

After examining the Court's decision, an important issue is raised that is worth commenting in the context of this thesis; the sidelining of EU law by an international agreement, in other words, the exclusion of the Charter from the scope of the ESM Treaty. Among others, by excluding the application of the Charter, the right to effective judicial protection seems to be excluded too. It is worthy to note here that it was after 4 years, in the case of *Ledra Advertising v Commission and the ECB*,<sup>576</sup> that the CJEU recognised

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<sup>573</sup> *Ibid.*, paragraph 181

<sup>574</sup> *Ibid.*, paragraph 179

<sup>575</sup> *Ibid.*, paragraph 180

<sup>576</sup> Judgment of 20 September 2016, *Ledra Advertising*, Joined Cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701



that the EU institutions are subject to the Charter, even when they are acting within the framework of the ESM Treaty, thus outside the EU legal order.

The adoption of the ESM Treaty challenges the relationship between the EU legal framework and international agreements concluded beyond the sphere of it. As the CJEU acknowledged, on the one hand, there is the lack of any power of the Union to establish the ESM and, on the other hand, there is the competence of Member States to conclude the ESM Treaty, though they remain under the ‘duty to comply with European Union law when exercising their competences in that area’.<sup>577</sup> However, it remained unclear whether the provisions of EU law offering individuals protection are safeguarded. In other words, the position of the ESM Treaty and the decisions of ESM, such as the MoUs, with regard to EU law is left uncertain. Thus, the *Pringle* decision is argued to create a paradox; though Member States are required to comply with EU law when establishing a mechanism like the ESM, individuals might not be able to invoke EU law against measures designed by EU institutions and implemented by Member States as ESM Members. This assumption is based on the argument that MoUs are negotiated by the ESM, which does not constitute an institution of the Union, thus it is not bound by EU law.<sup>578</sup>

The decision of the CJEU regarding the status of the Charter in relation with the ESM could be challenged based on two grounds. Firstly, according to Recital 4 of the Preamble of the ESM Treaty, its signatory States should observe EU law and particularly ‘the economic governance rules of the European Union’ as provided by the TFEU.<sup>579</sup>

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<sup>577</sup> *Pringle*, paragraph 69

<sup>578</sup> Arguably, such reasoning is rather questionable, due to the predominant involvement of the Commission and the ECB in the drafting of the MoUs. In particular, by approving a MoU which provided for specific measures, the Commission and the ECB, impliedly, approved the measures themselves.

<sup>579</sup> ESM Treaty, Preamble

Secondly, the fact that the Charter enjoys the same legal status as the Treaties<sup>580</sup> renders the Court's ruling inconsistent with the provisions of the ESM Treaty. In simple terms, the ESM Treaty provides that its member states should observe EU law and the Charter and the Court, in interpreting the ESM Treaty, held that the Charter does not apply to it.

Such a decision not only contradicts the text of the Treaty itself, but also the previous case law of the Court. As it has been established in previous cases, the duty of Member States to observe EU law extends to the case they enter into bilateral or multilateral agreements, to which the Union is not a signatory party. Specifically, Article 4(3) TEU establishes the so-called duty of sincere co-operation, under which Member States should refrain from any action or from enacting any Act that would be in conflict with EU law or would threaten the achievement of the Union's objectives.<sup>581</sup> This Article was repeatedly interpreted as binding upon Member States when they negotiate, conclude, ratify or implement international agreements, even if the Union is absent from such actions.<sup>582</sup> That duty covers also the respect for fundamental rights, as they are provided by the Charter or recognised by EU law. Disregarding its previous decisions, the CJEU in *Pringle* demonstrated that the Member States are not obliged to consider the Charter when acting as parties of the ESM Treaty, since it is an international agreement on which the Union is not a signatory party. Such a radical conclusion created the argument that there was an essentially political motivation behind the *Pringle* decision.<sup>583</sup>

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<sup>580</sup> TEU Article 6. See also Judgment of 26 February 2013, *Akerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 45-48 where the Court applied its jurisprudence on primacy to the provisions of the Charter

<sup>581</sup> TEU, Article 4(3)

<sup>582</sup> See Judgment of 12 February 2009, *Commission v Greece*, C-45/07, ECLI:EU:C:2009:81; Opinion of 19 March 1993, *Re ILO Convention 170 on Chemicals at Work*, Opinion 2/91, ECI:EU:C:1993:106; Judgment of 2 June 2005, *Commission v Luxembourg*, C-266/03 ECLI:EU:C:2005:341

<sup>583</sup> G. Beck, 'The Court of Justice, legal reasoning, and the *Pringle* case-law as the continuation of politics by other means' (2014) 39 *European Law Review*, 234, at 247

Attorney General Kokott in the Opinion she gave on this case, underlined that ‘[t]he Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights’,<sup>584</sup> despite she found that EU law was not violated in that case. Regarding the right to effective judicial protection, AG Kokott firstly recognises that according to Article 37(2) of the ESM Treaty, the ESM is subject to a limited power of review by the CJEU, though the proceedings can only be brought by the Eurozone Member States. In other words, the CJEU’s power of review of the ESM does not include proceedings brought by individual litigants.<sup>585</sup> However, as long as the preliminary reference mechanisms, provided by Article 267 TFEU, is still an available tool, AG Kokott concluded that effective judicial protection is not infringed by the ESM Treaty.<sup>586</sup>

A final aspect of this ruling relates to the social aspects of the financial crisis.<sup>587</sup> Though EU citizens are heavily affected by the measures implemented for the rescue of the eurozone, the ESM Treaty seems ignorant of the social consequences of its provisions and of the crisis in general. Following the same oblivious approach, the CJEU in *Pringle* focused only on the economic and monetary aspects of EU law rather than the social policy of the Union. It would not be surprising, if the Court denies enforcing social rights against measures implementing the ESM Treaty provisions, claiming that they fall outside the scope of EU law.<sup>588</sup> Arguably, this constitutes a further intimation of the immense economic pressure which has, though, gone too far. It is a paradox that the ultimate

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<sup>584</sup> Opinion of AG Kokott of 26 October 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:675, paragraph 176

<sup>585</sup> *Ibid.*, paragraph 192

<sup>586</sup> *Ibid.*, paragraph 194

<sup>587</sup> See N. Alkiviadou, ‘Sustainable Enjoyment of Economic and Social Rights in Times of Crisis: Obstacles to Overcome and Bridges to Cross’ (JMMWP 1/2017, School of Law, UCLan Cyprus, August 2017), available at:

[http://www.uclanycyprus.ac.cy/files/5115/0407/8235/JMMWP\\_Dr.Natalie\\_Alkiviadou.pdf](http://www.uclanycyprus.ac.cy/files/5115/0407/8235/JMMWP_Dr.Natalie_Alkiviadou.pdf) (accessed 5 September 2017)

<sup>588</sup> P. A. Van Malleghem, ‘Pringle: A Paradigm Shift in the European Union’s Monetary Constitution’ (2013) 14 *German Law Journal*, 141, at 166

objective of the stability mechanism was to assist the EU citizens, and it is that stability mechanism which was decided to have no relation to the fundamental rights of EU citizens.<sup>589</sup>

The following cases does not consider the compatibility of a supranational mechanism with EU law, but the legality of austerity measures imposed. Apart from the rulings of the national Constitutional Court developed in the previous section, the Portuguese Labour Courts made three preliminary references to the CJEU regarding the compatibility of cuts on the wages in the public sector with the Charter.<sup>590</sup> These preliminary references are a clear indication of the difficult position of the national courts to classify the relationship between the MoUs and the principles of EU law. The CJEU found a failure of the applicants to illustrate a link between the national austerity measures and EU law, and, thus, it lacked jurisdiction to decide the case. As was stated, Article 51(1) of the Charter provides that Member State are bound by the Charter only to the extent that they apply EU law. In that case, the Portuguese State Budget Act under challenge was not implementing EU law. Legal scholars criticised the approach of the CJEU as being rather pathetic and asked for a more active role by the Court in recognizing a link between national measures according to the conditions of MoUs and EU law, arising from the Council Decisions adopting the macroeconomic adjustment programmes, even if the applications would be dismissed later on their merits.<sup>591</sup> Other scholars suggested a more

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<sup>589</sup> A similar approach with *Pringle* was adopted by the CJEU in *Gauweiler* case (Judgment of 16 June 2015, *Gauweiler*, C-62/14, EU C:2015:400), which concerned the European Central Bank's Outright Monetary Transactions Programme and held that it was legal, after distinguishing between monetary and economic policy and the respective role of the ECB in both. As argued, this case 'builds on *Pringle* providing normative legitimization to the austerity model whilst granting the ECB a distinct role in monetary policy but also in shaping the general economic policy of the Union.' (T. Tridimas and N. Xanthoulis, 'A legal analysis of the *Gauweiler* case between monetary policy and constitutional conflict.' (2016) 23 *Maastricht Journal of European and Comparative Law*, 17)

<sup>590</sup> Order of 7 March 2013, *Sindicato dos Bancários*, C-128/12, ECLI:EU:C:2013:149; Order of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros*, C-264/12, ECLI:EU:C:2014:2036; Order of 21 October 2014, *Sindicato Nacional dos Profissionais de Seguros*, C-665/13, ECLI:EU:C:2014:2327

<sup>591</sup> A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP, Oxford 2015)

active approach by the CJEU, in the sense that it could review, both in procedural and substantive grounds, the financial assistance conditions.<sup>592</sup> The rulings given by the CJEU remain consistent with its previous decisions on the same matter, such as in *Pringle* case. The Court confirmed its reluctance to intervene in areas of financial policy, in the context of the Eurozone financial crisis, by excluding the applicability of EU law on them. That position deprives EU citizens from their right to effective judicial protection by EU courts, by declaring lack of jurisdiction to decide their cases.

Moving to the cases that were admitted by the CJEU, it is remarkable that the principle of proportionality was applicable in none of them. Instead, the Court applied the *Bergaderm* test<sup>593</sup> and the ‘no creditor worse off’ principle in two respective cases.

## **2. The principle of proportionality**

Commencing with the *Bergaderm* test, the CJEU in the case of *Ledra Advertising* concerning the Cyprus bail-in, set aside the orders regarding the actions for compensation,<sup>594</sup> but gave a judgment itself, on the merits, and dismissed the actions.

The CJEU held that, despite the fact that the role of the European Commission and the ECB as provided by the ESM Treaty does not entail the power to make decisions of their own, the institutions can still be found liable for unlawful conduct regarding the adoption of the MoU and damages can be claimed against them. However, the Court made it clear that the powers conferred on the Commission by the EU and FEU Treaties are not limited or affected by the tasks the ESM Treaty conferred on it. Thus, the Commission, still operating as the guardian of the Treaties,<sup>595</sup> it has to abstain from signing a MoU which

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<sup>592</sup> A. Poulou, ‘Austerity and European Social Rights: How can Courts Protect Europe’s Lost Generation?’ (2014) 15 *German Law Journal*, 1145

<sup>593</sup> Judgment of 4 July 2000, *Bergaderm*, C-352/98 P, ECLI:EU:C:2000:361, paragraphs 41 and 42

<sup>594</sup> Judgment of 20 September 2016, *Ledra Advertising*, Joined Cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701

<sup>595</sup> Article 17(1) TEU

might not be consistent with EU law. Therefore, it was concluded that the General Court erred in law by deciding that it lacked jurisdiction to consider the actions for compensation. The orders were set aside and a new judgment was given on the merits.

The principle on non-contractual liability of the Union or its institutions was restated. As established by the CJEU in *Bergaderm* case,<sup>596</sup> in order for the Union to incur liability, a set of conditions should coincide. Firstly, the defendant institution should have breached a rule of law which is intended to confer rights on individuals; secondly, the breach must be sufficiently serious; and, thirdly, there must be a direct causal link between the breach of the obligation resting on the defendant institution and the damage suffered by the injured parties. Examining the first condition, the CJEU pointed that the rule of law which could be alleged to be violated is the right to property, protected by Article 17(1) of the Charter.

Though in the previous case law of the CJEU it was held that the Member States do not implement EU law when acting within the framework of the ESM Treaty,<sup>597</sup> thus the Charter is not addressed to them,<sup>598</sup> in this judgment, the Court noted that the EU institutions are subject to the Charter, even when they are acting outside the EU legal order. Consequently, the Commission was obliged to ensure that the MoU it signed was in consistency with the Charter. However, the two Union institutions were found to escape non-contractual liability, because the purpose of adopting the MoU corresponded to the general interest of ensuring the stability of the banking system and the Eurozone in general. In other words, the Court impliedly applied the proportionality test, tried to

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<sup>596</sup> Judgment of 4 July 2000, *Bergaderm*, C-352/98 P, ECLI:EU:C:2000:361, paragraphs 41 and 42

<sup>597</sup> Judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756

<sup>598</sup> Charter of Fundamental Rights of the European Union [2012] OJ 1 326/02, Article 51(1) provides that the Charter applies to the Member States only when they are implementing EU law, and the ESM Treaty does not constitute a legal instrument of EU law

balance the nature of the measures at stake with the impending risk of financial losses that depositors would have suffered had the two banks were let to fail. Since the restrictions were held justified, the first condition of the non-contractual liability test of the EU was not met and the actions for compensation were dismissed.

Since, at the end, the CJEU did not effectively protect the applicants, this resounds the suggestion made by the Dissenting judgment of Judge Erotokritou.<sup>599</sup> In essence, his Dissenting judgment constitutes a motivation for the lower national courts to activate the preliminary reference mechanism, according to Article 267 TFEU, regarding the application of the Charter to the bail-in measures.

Regarding the ‘no creditor worse off’ principle, a preliminary reference was made regarding the validity and interpretation of some provisions of the Banking Communication. Among the questions raised before the CJEU, there was the compatibility of points 40 to 46 of the Banking Communication with the principle of legitimate expectations and the right to property which are both protected by EU law, as developed in the Literature Review in Chapter 2. Points 40 to 46 set out the condition that State aid can be granted only if bank shareholders have already contributed to the absorption of the losses suffered by that bank to the same extent as in the absence of State aid.

According to the Opinion of AG Wahl, which is worth to be discussed due to its comprehensive analysis of the matter, neither the principle of the protection of legitimate expectations nor the right to property has been violated by the provisions of the Banking Commission and the relevant national legislation. In particular, he underlined that a legitimate expectation exists only when ‘authorised and reliable sources’ assure the

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<sup>599</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (dissenting judgment)

affected individual precisely, unconditionally and consistently.<sup>600</sup> In that case, investors have not received any assurance that their investments would remain unaffected by any public measure regarding the banking sector, and Article 107(3)(b) TFEU, which provides for the conditions of granting State aid and which does not include burden-sharing measures, could not be considered as ‘precise, unconditional and consistent assurance’. As it was stressed, the Commission should adjust its approach towards Article 107 TFEU to the changing circumstances in the markets that need State aid. Regarding the right to property, Attorney General Wahl supported that implementing measures affecting the property of the investors is not a prerequisite according to the Banking Commission and that ‘such measures can also be adopted voluntarily by, or with the consent of, the bank or its investors’.<sup>601</sup> However, he clarified that any measures adopted by national authorities and which fall within the scope of EU law, do not escape the obligation to be compatible with fundamental rights. Since the right to property is a qualified one, it was argued that the aim of ensuring financial stability without excessive public spending and consequences in competition can justify its restriction. Furthermore, AG supported that national courts are more appropriate to assess the compatibility of the national legislation in question with the rights at issue. As he explained, ‘it is the Member States’ authorities that are legally responsible for deciding to grant aid in a situation and ensuring that envisaged aid measures comply with any other applicable EU, national or international law’.<sup>602</sup> The role of the Commission is limited only to the assessment of the compatibility of the proposed measure with the internal market. Finally, some guidance was given on the interpretation of the ‘no creditor worse off’ principle by national judges. As point 46 of the Banking Communication states the affected parties ‘should not receive

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<sup>600</sup> Opinion of Advocate General Wahl of 18 February 2016, *Kotnik*, C-526/14, ECLI:EU:C:2016:102, , paragraph 68

<sup>601</sup> *Ibid.*, paragraph 71

<sup>602</sup> *Ibid.*, paragraph 84



less, in economic terms, than what their instrument would have been worth if no State aid were to be granted'.<sup>603</sup> The necessity of the measure, the risks for the relevant financial system without any such measure, the need to avoid excessive public spending, and the reasonableness and reliability of the economic evaluations made by the public authorities are some of the matters to be taken into account when applying the aforementioned principle.<sup>604</sup>

The Court, examining whether the principle of legitimate expectations was breached, observed that no guarantee was given by the Commission that the measures adopted in order to grant State aid would leave shareholders, subordinated creditors and investors unaffected.<sup>605</sup> It was also underlined that economic operators could not claim legitimate expectations in relation to an existing situation which is subject to the discretion of the EU institutions, 'particularly in a field such as State aid in the banking sector, whose subject matter involves constant adjustment to reflect changes in the economic situation'.<sup>606</sup> Moreover, the Court applied the 'no creditor worse off' principle and concluded that the shareholders' right to property was not violated, since the losses they suffered due to the burden-sharing measure are the same with the losses they would have suffered had the bank being insolvent. This decision can be compared to the case of Cyprus, where the 'no creditor worse off' principle was also applicable. Their main difference, that can justify a difference in the findings, is the fact that in the Slovenian case the applicants were shareholders, while in the case of Cyprus the applicants were depositors. In case of the collapse of a bank, depositors, considered as creditors of the company, are entitled to the lion's share of the remaining assets, while shareholders are

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<sup>603</sup> 'Banking Communication' (2013), paragraph 46

<sup>604</sup> AG Opinion, paragraph 91

<sup>605</sup> *Kotnik*, paragraph 64

<sup>606</sup> *Ibid.*, paragraph 66

the last who are compensated, provided that there are sufficient assets to cover their compensation. Consequently, while the ‘no creditor worse off’ principle may lead to the conclusion that the shareholders’ right to property was not violated, the opposite result may be concluded in the case of bank depositors.

Finally, in the two cases concerning Greek austerity measures, the CJEU’s rulings did not balance the public interest with the measures at stake at all, due to the different legal basis of them.

In addition to the constitutionality of the austerity measures imposed in Greece, foreign investors challenged some other financial measures implemented in the country before the EU courts. The objectives and basic tasks of the European System of Central Banks (ESCB) are provided in Article 127 TFEU and, according to the Protocol on the Statute of the ESCB those objectives and tasks include, *inter alia*, the protection of price stability and the sound management of the monetary policy. Due to the financial crisis in Greece which made the risk of collapse evident, the ECB and the Eurosystem<sup>607</sup> and Greece entered into an agreement providing for the exchange of the Greek debt instruments held by the ECB and national central banks for new securities with the same nominal value, interest rate and interest payment and repayment dates but with different serial numbers and dates. In addition, the securities held by private creditors were exchanged and were haircut at a rate of 53.5 per cent. By introducing a new legislation,<sup>608</sup> Greece implemented the exchange of all those securities by applying a collective action clause, even if some creditors denied the voluntary exchange offer. Additionally, according to the ECB Decision 2012/153, the use of Greek debt instruments that do not satisfy the minimum requirements of the Eurosystem for credit quality thresholds conditional upon the

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<sup>607</sup> It consists of the national central banks of the Eurozone Member States

<sup>608</sup> Law of February 23, 2012

provision by Greece to national central banks of a collateral enhancement in the form of a buy-back scheme.<sup>609</sup>

Numerous foreign private holders of Greek securities initiated proceedings before the General Court, in *Accorinti v ECB*,<sup>610</sup> claiming the damages suffered because of the exchange agreement of February 2012, which were estimated to €12 million. They accused the ECB of infringing their legitimate expectations, and the principles of legal certainty and equal treatment. The application was based on the argument that the ECB committed several unlawful acts capable of giving rise to liability on the part of the EU. In particular, the press releases and public statements of previous presidents of the ECB,<sup>611</sup> indicated its opposition to the restructuring of the country's public debt and its selective failure. Moreover, the exchange agreement enabled the ECB and national central banks to avoid the private sector arrangement, including the haircut enforced according to the collective action clause.

The Court in its ruling underlined that the assumption of risk is inherent in the nature of monetary policy, since the continuous changes in economic circumstances require instant adjustments. Therefore, applicants could not base their allegations on the principle of protection of legitimate expectations or the principle of legal certainty, as they are not applicable in such an area. Private investors were expected to be aware of the extremely unsteady economic circumstances that led to the fluctuation in the value of the Greek securities, which could not exclude the risk of the restructuring of the public debt,

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<sup>609</sup> Decision 2012/153/EU of 5 March 2012 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer (OJ 2012 2 77, p. 19)

<sup>610</sup> Judgment of 7 October 2015, *Accorinti*, T-79/13, ECLI:EU:T:2015:756

<sup>611</sup> Mr Trichet and Mr Draghi

considering the various views within the Eurosystem and in the other relevant Union institutions.<sup>612</sup>

The Court then clarified that the press releases and the public statements of succeeding presidents of the ECB were of a general nature, as they did not contain any specific assurance from authorised sources, and came from an institution which did not have the power to decide on a possible restructuring of the public debt of a Member State. For these reasons, the statements could not be found to create legitimate expectations to the private investors.

Examining the principle of equal treatment, the General Court held that it could not apply in that case, as long as private investors and the ECB were not in a comparable status. Their main difference lies in the nature of their objectives. On the one hand, the ECB was acting in order to pursue the public interest, namely to safeguard price stability and to achieve sound management of the Union monetary policy. On the other hand, private investors were guided by private interests, mainly to make a maximum profit from their investments.

Thus, it was stated that the loss suffered by the applicants was nothing else but the ordinary economic risks existing in such commercial activities relating to the financial sector, particularly in countries that present a downgraded rating such as Greece. The Court dismissed the application and excluded the ECB from being held liable. It could be expected that a similar approach would have been adopted in case the applicants were depositors rather than investors, since the loss they suffered could also be considered as an ordinary economic risk relating to the financial sector. As far as the Deposit Guarantee

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<sup>612</sup> i.e. the European Commission, the ECB and the IMF

Directive was already in force, it could be argued that depositors should have been aware of the risk of losing their savings, had their bank been heavily hit by the financial crisis.

In the recent case of *Nausicaa Anadyomene v ECB*,<sup>613</sup> the General Court remained consistent with its decision in *Accorinti v ECB*, which involved natural persons, and extended the absence of any liability on the part of the ECB to companies and banks. In this case, a French company and a French bank, both holding Greek debt instruments claimed the damages suffered due to the ECB's Decision 2012/153, which were estimated to €11 million. In particular, they alleged the ECB for infringing their legitimate expectations and also the principles of legal certainty and equal treatment of private creditors.

The General Court ruled that commercial banks cannot base their operation on the principles of legitimate expectation and legal certainty in the area of monetary policy, since the constant changes in economic circumstances ask for urgent adjustments. The Court continued by clarifying that none of the ECB's acts or statements can be considered as an encouragement for investors to obtain or keep possession of Greek debt instruments. The ECB simply restored the nature of collateral security of Greek debt instruments so as to defend the Eurozone's stability and proper operation in the light of the exceptional circumstances that the financial market faced during the crisis. Thus, the General Court concluded that the ECB neither had provided any specific and unconditional assurances on that a Greek default would never take place, nor it invited any private creditor to obtain or hold Greek debt instruments. Furthermore, commercial banks are expected to be aware of the extremely unsteady economic conditions that define the fluctuation in value of the Greek debt instruments, as well as the highly significant risk of Greek default, thus they

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<sup>613</sup> Judgment of 24 January 2017, *Anadyomène*, T-749/15, ECLI:EU:C:2017:21

are not excepted to base their actions on the ECB provisionally safeguarding the eligibility of those instruments. Therefore, commercial banks are nothing more than investors that undertake high risk.

In examining the alleged violation of the general principle of equal treatment, the Court declared that commercial banks and the ECB cannot be equated or compared. On the one hand, the ECB and the national central banks purchased Greek debt instruments in order to maintain price stability and the sound operation of the monetary policy of the Union, since these objectives fall within their duties. On the other hand, commercial banks' and other companies' motivation behind purchasing Greek debt instruments is the expectation of profit, in other words the acquirement of maximum return on their investment.

This decision of the CJEU left foreign investors unsatisfied, thus the option of international investment arbitration seemed an attractive option for them at that stage.

#### IV. JUDICIAL PROTECTION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Supervising ‘the most effective human rights regime in the world’,<sup>614</sup> the ECtHR has a heavy influence on the States that are members of the Council of Europe and it enjoys remarkable and long-lasting legitimacy.<sup>615</sup> Usually, remedies were given in the form of ‘declaratory’ violations made by States, and monetary damages were rather avoided. Such a fact could be argued to constrain the effectiveness of the ECtHR. However, through the years, States have been more and more ordered to take ‘individual measures’ to ensure *restitutio in integrum*<sup>616</sup> or ‘general measures’ to resolve extensive and serious matters.<sup>617</sup> This section follows a slightly different structure, in the sense that all the case law being discussed were admissible and the proportionality principle was applicable. Only specific cases are examined, which have been selected because they are dealing either with the financial crisis or the protection of depositors and shareholders of failing banks. In any case, it is not argued that these are the only cases concerning this area. In essence, all austerity measures in the context of the financial crisis were found proportional, and only in the two cases that concerned bank restructurings but not in the context of the recent Eurozone crisis, the measures were declared disproportional.

##### 1. *Koufaki and ADEDY v Greece*<sup>618</sup>

The austerity measures adopted by Greece and their relationship with the ECHR were examined in the case of *Koufaki and ADEDY v Greece*.<sup>619</sup> The first applicant challenged

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<sup>614</sup> H. Keller and A. Stone Sweet, ‘Introduction: The Reception of the ECHR in National Legal Orders’ (2008) *Faculty Scholarship Series* 89, 3, available at: [http://digitalcommons.law.yale.edu/fss\\_papers/89/](http://digitalcommons.law.yale.edu/fss_papers/89/) (accessed 28 November 2016)

<sup>615</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2004), 254

<sup>616</sup> See *Papamichalopoulos and others v Greece* App no 14556/89 (1995)

<sup>617</sup> See *Broniowski v Poland* App no 31443/96 (2004)

<sup>618</sup> *Koufaki and ADEDY v Greece*, App nos 57665/12 and 57657/12 (2013)

<sup>619</sup> *Ibid.*

the cuts in wages and pensions, an austerity measure for the purpose of limiting public spending in response to the financial crisis, resulting from Greek Laws nos. 3833/2010, 3845/2010 and 3847/2010, as amounting to a deprivation of possessions. The second applicant, the Public Service Trade Union Confederation, alleged violations of Article 6(1), 8, 13, 14 and 17 of the ECHR based on the detrimental effect of the measures on the financial situation of its members.<sup>620</sup> The ECtHR decided to hear both cases together, since they were similar both in terms of facts and in the substantive issues raised.<sup>621</sup>

Initially, the Court, after recognizing that a salary belongs to the sphere of ‘possessions’ under Article 1(1), Protocol 1,<sup>622</sup> clarified that the deductions in Koufaki’s salary does not constitute a ‘deprivation of possessions’ but, instead, an interference with the right to the peaceful enjoyment of possessions.<sup>623</sup> It then applied the three-stage test to decide whether the particular interference violated the ECHR; it assessed whether the measure was legal, necessary and proportionate. The first stage was not difficult to be satisfied, since the pay cuts were provided in Laws nos. 3833/2010 and 345/2010.<sup>624</sup> Regarding the second stage, the Court had to examine the public interest of the measure in order to decide whether it is justified. ‘Particular weight’ was given to the report accompanied Law no. 3833/2010<sup>625</sup> and to the reasoning of the Greek Supreme Administrative Court.<sup>626</sup> The report presented the measures adopted by the Greek Government as ‘a national duty to achieve fiscal consolidation’<sup>627</sup> with reductions in salaries being part of

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<sup>620</sup> *Koufaki*, paragraph 20

<sup>621</sup> *Ibid.*, paragraph 29

<sup>622</sup> In this regard, the Court cited the previous decision of *Stummer v. Austria*, App no. 37452/02, (2011) paragraph 32

<sup>623</sup> *Koufaki*, paragraph 34

<sup>624</sup> *Ibid.*, paragraph 45

<sup>625</sup> That report describes the ‘exceptional circumstances without precedent in recent Greek history’: ‘this was the worst crisis in the public finances for decades’ which ‘undermined the country’s credibility, thwarted efforts to meet the country’s lending needs and pose[d] a serious threat to the national economy’.

<sup>626</sup> *Koufaki*, paragraph 36

<sup>627</sup> *Ibid.*, paragraph 37



the general effort to restore stability in the country's economy. These considerations resulted in the ECtHR deciding that the austerity measures were implemented by the Greek Government and Parliament in pursuing the public interest.<sup>628</sup> The Court also took into account the amount the applicant lost because of the pay cuts and decided the reduction she suffered was not of such an extent so as to render her unable to provide for herself, thus it could not be regarded as an excessive burden on the applicant.

It was not surprising that the uncertainty of the country's financial position played a key role on the reasoning of the ECtHR. The decisive factor on finding a balance between the rights of the applicant and the austerity measures in Greece was the risk of macroeconomic instability in the Eurozone as a whole. Since it was demonstrated that the applicant was not at risk of destitution, the Court preferred to defer to the agreement between Greece and its creditors, and to the decision of the Greek Supreme Administrative Court. Interestingly, the ECtHR explicitly mentioned the MoU concluded between the Greek government and its international creditors,<sup>629</sup> with the crisis being described as the greatest challenge for the country in its 'recent' history. *Koufaki*'s ruling was cited in cases concerning the austerity measures in Portugal<sup>630</sup> and Lithuania.<sup>631</sup> The former is discussed below, while the latter considered the reduction of Lithuanian judges' salaries as part of a series of austerity measures regarding the whole public sector. The Court concluded that the austerity measure at stake was justified due to the difficult economic conditions in Lithuania and the need to pursue the public interest, including financing education, healthcare and social welfare. Finally, it was held that the temporary

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<sup>628</sup> *Koufaki*, paragraph 41

<sup>629</sup> *Ibid.*, paragraph 47

<sup>630</sup> *Da Conceição Mateus and Others v Portugal*, App nos 62235/12 and 57725/12 (2013)

<sup>631</sup> *Savickas and Others v Lithuania*, App nos 66365/09, 12845/10, 29809/10, 29813/10, 30623/10, 28367/11 (2013)

reduction of the applicants' salaries did not impose an excessive burden on them or affected their ability to perform their professional duties.

## **2. *Da Conceição Mateus v Portugal***<sup>632</sup>

In *Mateus v Portugal*,<sup>633</sup> which is similar to the previous one, the applicants were pensioners, receiving a state pension from the Portuguese government, which included holiday and Christmas bonuses. The country negotiated an Economic Adjustment Programme with the EU, the Eurozone Member States and the IMF, resulting to a MoU. According to the State Budget Act 2012, which came into force to implement some of the provisions of the IMF, public sector pensions were reduced, by decreasing the amount provided in holiday and Christmas holidays from 2012 to 2014. The Portuguese Constitutional Court found that the cuts in pension were unconstitutional, as there was not an equivalent reduction to private sector pensions, thus they violated the principle of 'proportional equality',<sup>634</sup> and this difference in treatment was unjustifiable, irrespective of the objective of the measure,<sup>635</sup> in the existence of alternative measures to achieve it.<sup>636</sup> However, the Constitutional Court suspended the effects of its decision, as the State Budget Act 2012 was at an advance stage of implementation and it would not be easy for the government to design and implement any alternative measures at that time. Applicants challenged the relationship of the austerity measure with the Convention, since their payments were reduced, without invoking any specific provision under the ECHR. Thus, the ECtHR considered interference to the peaceful enjoyment of possessions under Article 1 of Protocol No.1 as the appropriate basis for this application.

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<sup>632</sup> *Da Conceição Mateus and Others v Portugal*, App nos 62235/12 and 57725/12 (2013)

<sup>633</sup> *Ibid.*

<sup>634</sup> Portuguese Constitutional Court Decision no 353/2012, judgment of 5 July 2012, 3846

<sup>635</sup> Namely, to reduce the public deficit to the level specified in the MoU

<sup>636</sup> *Mateus*, paragraph 10

Under Article 1 of Protocol 1, a country can reduce the amount of payment of a pension only for a public interest purpose, provided that a fair balance has been achieved between the general interest of the society and the protection of the individual rights affected. In order to examine this balance, the ECtHR took into account the fact that only the holiday and Christmas payments of the applicants were deduced, with the rate of their basic monthly pension remaining unaffected. As the Court held, a human right is violated only if the ‘essence of the rights’ has been infringed.<sup>637</sup> In that case, the holidays and Christmas pensions were regarded as advantageous benefits that were provided only to specific groups of pensioners twice a year and did not constitute the normal monthly income of the applicants.<sup>638</sup> Moreover, the reduction would only last for three years, thus it constituted a temporary measure. In terms of quantity and time, the interference with applicants’ peaceful enjoyment of possessions was held not to have violated Article 1 of Protocol 1 and Portugal was held to have remained within its room for margin of appreciation to implement austerity measures to face with the severe economic conditions of the country. The ECtHR decided that a fair balance between the public interest and the individuals’ interest had been struck and the applications declared inadmissible, as being manifestly ill-founded.

The Court gave particular weight on the financial and economic crisis and its consequences in Portugal. ‘The very fact that a programme of such magnitude had to be put in place shows that the economic crisis which was asphyxiating the Portuguese economy at the material time and its effect on the State budget balance were exceptional in nature, as the Constitutional Court indeed recognised in its decision of 5 July 2012.’<sup>639</sup> It is interesting that in this case the Court underlined the temporary nature of the austerity

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<sup>637</sup> *Mateus*, paragraph 24

<sup>638</sup> *Ibid.*

<sup>639</sup> *Ibid.*, paragraph 25

measures, in assessing whether they constitute an infringement of the right to property, while in the *Koufaki* case the fact that the Greek measure was permanent had not prevented it from holding it as proportionate.<sup>640</sup>

### 3. *Dennis Grainger and others v UK*<sup>641</sup>

The ECtHR examined the cases in which shareholders are entitled to compensation in the case of *Grainger v UK* after the collapse and nationalisation of Northern Rock Bank. Facing the financial crisis of 2008, the UK Government, under the Banking (Special Provisions) Act 2008,<sup>642</sup> allowed for the nationalisation and compulsory acquisition of shares of Northern Rock Bank. The affected shareholders claimed that their right to property was infringed, because of an unfair valuation of their shares, and that their treatment was less favourable than other banks.<sup>643</sup> For the nationalization of the bank, a specific Compensation Scheme Order was introduced, under which compensation to Northern Rock shareholders would be assessed by an independent evaluator, who would examine what the bank would be worth if all financial assistance had been withdrawn and the bank placed in administration. Shareholders supported that the evaluator underestimated the value of their shares.<sup>644</sup>

The High Court found that the nationalisation of Northern Rock was not in breach of shareholders' right to property under Article 1 of Protocol 1 and dismissed their application for judicial review.<sup>645</sup> It held that the procedure followed did not impose any

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<sup>640</sup> See paragraph 26: 'Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory.'

<sup>641</sup> *Dennis Grainger and Others v UK*, App no 46720/99, 72203/01, 72552/01 (2012)

<sup>642</sup> Banking (Special Provisions) Act 2008, section 5(4)

<sup>643</sup> For example, Royal Bank of Scotland had received large capital injections from the government without outright nationalization

<sup>644</sup> The valuer decided in March 2010 that the value of the shares was zero, whereas the shareholders argued that £ 2-4 was their fair market value.

<sup>645</sup> *R (on the applications of (1) SRM Global Master Fund LP (2) RAB Special Situations (Master) Fund Limited (3) Dennis Grainger and others) v The Commissioners of Her Majesty's Treasury* [2009] EWHC 227 (Admin)

‘individual and excessive burdens’ on the applicants and that the government’s actions regarding other banks did not render the Northern Rock Compensation Scheme unfair or discriminatory. It also underlined that the Parliament acted within its margin of appreciation when decided to establish the particular compensation scheme. After exhausting all domestic remedies,<sup>646</sup> shareholders reached the ECtHR. The legality of nationalisation was not challenged. What the applicants contested was the evaluation of the valuer which, they argued, resulted in the Compensation Scheme not striking a fair balance.

In dismissing the application, the Court restated several rules on the protection of property and clarified that full compensation is not entitled to any circumstances, particularly in the light of a financial or economic crisis. ‘Legitimate objectives in the “public interest”, such as those 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.’<sup>647</sup> It also highlighted that its role was rather limited, since the public interest of a country could be better perceived by the national authorities instead of international judges, due to the direct relationship the former have with the society and its needs.<sup>648</sup> Thus, the role of the ECtHR was limited to the assessment of whether the parameters for compensation were within the UK’s margin of appreciation.

In assessing this margin of appreciation, the Court considered the efforts of the UK Government to maintain financial stability in times of ‘exceptional circumstances prevailing in the financial sector, both domestically and internationally’.<sup>649</sup> ‘The Court of

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<sup>646</sup> *SRM Global Master Fund LP and others v Treasury Commissioners* [2009] EWCA Civ 788 and *R (on the application of SRM Global Master Fund LP) and others (RAB Special Situations (Master) Fund Limited) v The Commissioners of Her Majesty's Treasury* UKSC 2009/0179

<sup>647</sup> *Grainger*, paragraph 37

<sup>648</sup> *Ibid.*, paragraph 36

<sup>649</sup> *Ibid.*, paragraph 39

Appeal took the view that the Government should be afforded a wide margin of appreciation in this case, since the impugned action arose in the context of macro-economic policy.... The Court considers that the Compensation Scheme must be seen as integrally linked to the series of support measures which ended with nationalisation. Throughout the entire process, the Government's focus was on protecting a key sector of the national economy.'<sup>650</sup>

Furthermore, the Court made some powerful statements, while examining whether the measures adopted regarding Northern Rock were in the public interest and for the avoidance of 'moral hazard'. '...the Court accepts that the Government's objective throughout its dealings with Northern Rock during this period was to protect the United Kingdom's financial sector. As part of this policy, they aimed to maintain depositor confidence in the safety of placing money with banks. On the other hand, however, they also sought to avoid encouraging the management boards of other financial institutions from making bad business decisions on the assumption that the State would provide a safety net.... In the Court's view, it was entirely legitimate for the State authorities to decide that, had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only through the provision of State support, this would encourage the managers and shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom economy.'<sup>651</sup> Finally, the ECtHR took into account the lack of any viable alternative measure at that time and concluded that opting to grant no compensation to Northern Rock shareholders did not violate their right to property under Article 1 of Protocol 1. Among others, the ruling in *Grainger v*

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<sup>650</sup> *Grainger*, paragraph 39

<sup>651</sup> *Ibid.*, paragraph 42

UK demonstrates that States enjoy a wide margin of appreciation in adopting macro-economic policy, including the resolution of banking and financial crises.

**4. *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the 'former Yugoslav Republic of Macedonia'***<sup>652</sup>

The application of the principle of proportionality led to the opposite results in the case of *Ališić*. This case also considered the repayment of shareholders after the failure of a bank and the status of frozen bank accounts. However, it should be distinguished from *Grainger v the UK*, in the sense that the collapse of the bank was not the result of a financial crisis, but of a State succession. The applicants claimed that their inability to recover 'old' foreign-currency savings, which were deposited with two bank in Bosnia and Herzegovina, after the dissolution of the former SFRY,<sup>653</sup> constituted an infringement of their right to property under Article 1 of Protocol 1. The Court found that the two old banks<sup>654</sup> were liable for the 'old' foreign-currency savings in all their branches until the dissolution of the SFRY and, since then, they were liable for these deposits in their branches in the new countries Bosnia and Herzegovina.

Such a decision does not imply that any foreign branches of domestic banks would always be covered by the domestic DGS.<sup>655</sup> Instead, the Court reached this conclusion in the light of the exceptional situation before it, as the branches in question were not foreign branches when the applicants deposited their money, but they became foreign branches after the dissolution of the SFRY. Moreover, the Court could not consider any rule regarding the rehabilitation of a collapsing private banks, since the status of the banks in

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<sup>652</sup> *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the 'Former Yugoslav Republic of Macedonia'*, App no. 60642/08 (2012)

<sup>653</sup> Socialist Federal Republic of Yugoslavia

<sup>654</sup> Ljubljanska Banka Ljubljana and Investbanka

<sup>655</sup> *Ališić*, paragraph 118

question had always been State-owned or socially-owned.<sup>656</sup> Nevertheless, and even after taking those special features of this case into consideration, the Court found that a fair balance had not been struck between the general interest of the society and the applicants' right to property, and thus a violation of Article 1 of Protocol 1 was committed.

Although the circumstances of this case does not concern a financial crisis, it can be argued that the Court did not only shift the focus on the public interest involved, but also considered the importance of individuals' rights and underlined that a fair balance should always be achieved, by applying the principle of proportionality.

### **5. *Capital Bank AD v Bulgaria***<sup>657</sup>

Finally, the case of *Capital Bank AD v Bulgaria* gave the ECtHR the chance to examine the effects of the IMF on human rights, and the obligations of States under agreements with such an institution and under the ECHR. It decided that the withdrawal of a banking licence and the following compulsory liquidation constituted a violation of Article 6(1) and Article 1 of Protocol 1. Regarding the effective judicial protection of citizens in Bulgaria, the Court stated that 'Government's reliance on the alleged demands by the IMF to limit the courts' involvement in the closing of ailing banks was misplaced, because Bulgaria could not avoid its obligations under the Convention under the guise of complying with the recommendations of an international organisation'.<sup>658</sup> The stability of a country's banking system was acknowledged as a 'sensitive economic area',<sup>659</sup> thus a wide margin of appreciation was reasonable and appropriate. Nevertheless, the Court established that Bulgaria was not exempted from its obligations under the ECHR because of the term on the agreement between Bulgaria and the IMF which provided that judicial

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<sup>656</sup> *Ibid.*

<sup>657</sup> *Capital Bank AD v Bulgaria*, App no 4942/99 (2005)

<sup>658</sup> *Ibid.*, paragraph 90

<sup>659</sup> *Ibid.*



review should be prohibited. The temporal factor and the emergency situation in the country were decisive in Court's ruling. As it stated, 'there may be a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole'.<sup>660</sup> However, in that case 'it does not appear that it was a matter of such urgency that any delay occasioned by some sort of formal procedure would have been unduly prejudicial',<sup>661</sup> even if the bank's licence was revoked during a banking crisis. Probably, this is the most remarkable case on how the Court can depart from its wide interpretation of the margin of appreciation and the broad tolerance it showed in the rest of the cases of the measures the implement in the sake of rescuing their economies.

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<sup>660</sup> *Capital Bank*, paragraph 136

<sup>661</sup> *Ibid.*

## V. CONCLUDING REMARKS

This chapter has sought to provide an overview of some landmark cases on the austerity measures adopted by Eurozone Member States in receipt of financial assistance or on the new legal concepts and procedures in the context of the EMU. As we have seen from the *tour d' horizon* of the national and EU litigation concerning Ireland, Iceland, Greece, Portugal, Spain, Slovenia and Cyprus, and also of ECHR litigation, judicial control has taken place to a varying extent.

It should be stressed here that any conclusion in that stage<sup>662</sup> should be drawn with caution, since account must be taken into the on-going developments of the European Banking Union, the differences between the macroeconomic adjustment programmes provided for each Member State, the traditions of each court in exercising judicial control, and the on-going litigation at national level and before the CJEU and the ECtHR. Moreover, any conclusion should not ignore the different kinds of objectives and mandates of these courts regarding the examination of the legality of the implemented post-crisis measures, as was explained in the Introduction of this chapter.

National courts have acted ‘as defenders of their national constitutional settlement’,<sup>663</sup> by showing notable deference to the political process, due to the nature of the matter and the emergency circumstances. In the fear of possible adverse consequences of a negative decision, national courts were highly deferential when they had to rule on reforms of the EMU, while they tried to be slightly critical, or less deferential, when they considered national measures in the same area.

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<sup>662</sup> At least for the time being

<sup>663</sup> A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) 153

Clearly, the CJEU preferred to show a restraint when dealing with the legality of the ESM Treaty and declared inadmissible all applications made to review the compliance of national measures and the MoUs with the general principle of law and the Charter. It also refused to recognise any involvement of the EU institutions in the conclusion of the MoUs and the financial assistance programmes, under their competences as organs of EU law. Similarly, the EFTA Court declined to impose responsibility on the State to compensate affected depositors, and prefer to shift all the burden on the DGS. The principal hurdle to judicial review is the nature of the area, since controlling of economic policies requires particular expertise and democratic legitimacy, and the emergent character of those measures. However, individuals are in need of such judicial review during the crisis more than ever before. In addition, the denial of any link of EU law with the MoUs leaves citizens vulnerable, since no legal organ within the EU legal order has jurisdiction to consider the protection of their fundamental, economic and social rights.

Despite, in its initial reaction in *Pringle*, the CJEU preferred to avoid to examine the actions of the Union institutions, in *Ledra Advertising* there was a slight change of this attitude,<sup>664</sup> which can operate as a catalyst for the recognition that the Union institutions are still under the obligation to apply principles of EU law, even outside the EU framework. In other words, while, at first, the CJEU just ‘washed its hands’ of any responsibility regarding the involvement of the Union institutions on the austerity measures, it now recognised that these institutions are obliged to function within the EU legal order, notwithstanding that the austerity measures are imposed by virtue of legal instruments that function outside that order. It is prudent to acknowledge that this development constitutes a positive step towards enhancing the effectiveness of judicial protection offered to citizens in the context of the financial crisis.

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<sup>664</sup> Irrespective of the outcome of this case

However, the threshold for natural or legal persons to challenge the austerity measures through direct actions at the EU courts by initiating proceedings under Article 263 TFEU remains high. According to Fitzpatrick, it is ‘nigh on impossible’ for individuals that were affected by the austerity measures, such as bank depositors, to meet the procedural requirements of Article 263 TFEU and acquire the necessary *locus standi*.<sup>665</sup> In essence, the doors to the action for annulment in the context of the measures relating to the financial crisis have become closed for affected individuals. However, the outcome of *Ledra Advertising* demonstrated that individuals’ only option for effective judicial protection by EU courts is through actions for damages under Article 340 TFEU and the concept of non-contractual liability of the Union and its institutions. Individuals should only satisfy the test established by the Court in the *Bergaderm* case and seek compensation for damages, rather than proving direct and individual concern of acts and ask for them to be nullified.<sup>666</sup>

The ECtHR’s response to the Eurozone crisis cases demonstrates that the economic crisis at stake constitutes a major threat for the Eurozone, but also for the Union as a whole, so most measures adopted are proportionate and States enjoy a wide margin of appreciation. Such an approach towards national authorities, could be found to undermine the role of an international court with the status of the ECtHR, which is to operate as an external dominion during a crisis, instead of granting States with a wide margin of appreciation.

Regarding the rulings on *Koufaki v Greece* and *Mateus v Portugal*, it has been observed that the effects of States’ obligations, arising from international agreements, concern primarily the principle of proportionality, instead of the protection of human rights itself.

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<sup>665</sup> C. Kilpatrick, ‘Are the bailouts immune to EU social challenge because they are not EU law?’ (2014) 10 *European Constitutional Law Review*, 394

<sup>666</sup> K. Gutman, ‘The evolution of the action for damages against the European Union and its place in the system of judicial protection’ (2011) 48 *Common Market Law Review*, 695, at 710 et seq

‘Conflicting international obligations may not claim primacy over human rights obligations, but they might have an impact on the application of the proportionality principle, since they define the goals of the measures that need to be justified as proportional.’<sup>667</sup> In essence, the reasoning of the ECtHR suggests that, in light of the severe economic conditions in those countries, any austerity measures implemented would be easily held proportionate, even if the right to property is clearly affected. Such an indication may prove the proportionality test inappropriate, or not the most suitable, for the protection of human rights in times of crisis.<sup>668</sup> In contrast with the above, the human rights prevailed over the obligations of States to maintain financial stability and regulate their financial markets in the cases of *Ališić v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* and *Capital Bank AD v Bulgaria*. In all the above-mentioned case law, applicants focused on the socio-economic consequences of a crisis, thus the Court did not have the opportunity to decide on a case where the derogation from the ECHR was the result of emergency economic circumstances, a scenario that would also invoke Article 15 ECHR.

If the extent of effectiveness provided in the afore-analysed case law is examined from its procedural scope, it can be supported that all courts have offered sufficiently effective judicial protections, since applicants enjoyed access to justice and a fair trial. However, most of the rulings given have not focused on the protection of individuals’ rights, giving priority on economic and political considerations and the survival of the Eurozone. There is also the tendency that some of the most important actions taken in response to the crisis, with the European Commission and the ECB playing a crucial role in their adoption, are

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<sup>667</sup> M. Goldmann, ‘Human Rights and Sovereign Debt Workouts’ in J. P. Bohoslavsky and J. L. Černič (eds), *Making Sovereign Financing and Human Rights Work* (Hart 2014), 91

<sup>668</sup> S. Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2008) 09/08 *Jean Monnet Working Paper Series, NYU School of Law*

held to fall outside the scope of EU law and the jurisdiction of the European courts. Thus, individuals should limit their judicial protection on their national courts, which seem reluctant to shift their focus towards the effects of the measures under challenges on the citizens. It is not argued that the public interest should not be taken into consideration. What is argued is that the courts, while applying the principle of proportionality, have not given sufficient weight to the interests of individuals, though the mandate of courts includes the protection of citizens and not only the protection of States. Such a misapplication of the proportionality principle has resulted in an insufficient effectiveness of substantial judicial protection.

## **CHAPTER FIVE**

### **THE APPROACH OF ARBITRATION TOWARDS THE PROTECTION OF BANK DEPOSITORS AND EFFECTIVENESS**

After examining the approach of litigation towards the subject matter of this thesis, this chapter comparatively examine the approach of arbitration. Traditionally, diplomatic protection was the only available avenue for foreign investors to protect their rights. A State exercising diplomatic protection espoused the claim of its national against another State and pursued it in its own name. The recognition and consolidation of the right of access to international justice and to the courts of third states by private investors, for the enforcement of international investment awards, have strengthened the right of access to justice for foreign investors.

The purpose of this chapter is to examine the approach that international arbitration has followed when arbitrators were asked to review the conformity of the post-crisis measures adopted at the EU and national level with the standards afforded to the protection of foreign investors. This approach will be correlated with the approach adopted by national, supranational and international courts that was the subject matter of the previous chapter, by employing the comparative method.

A legal precedent on how arbitrators approach disputes on financial instruments and measures in response to the financial crisis is offered by the award given by the ICSID tribunal when dealing with the situation in Argentina, which defaulted on its sovereign debt, prompting a class action on an alleged violation of rights under a BIT after investors suffered a haircut of their investments. Argentina suffered a dramatic financial crisis at the turn of the century. Its sovereign default has been characterised as the greatest and the

most complex in history. In particular, Argentina defaulted on USD 120 billion in private debt and on more than USD 30 billion of public debt.<sup>669</sup> In order to handle the crisis, which has been likened to the Great Depression of the 1930s in the United States, Argentina adopted a series of measures aiming at achieving financial stability and reinforcing political confidence. However, the bitter price for that restructuring was paid by those engaging with the country's economy, among them being foreign investors. While the options for national citizens seeking legal recourse were limited, foreign investors opted for protection through international investment arbitration, which was offered under the regime of BITs that Argentina had entered into during the 1980s and 1990s. As a consequence, the measures imposed by the State of Argentina, either legislative or regulatory, became the subject of various cases in ICSID arbitration brought by foreign investors who claimed that their investments were heavily affected. In particular, they claimed that Argentina breached its contractual obligation to protect their investment, and, on its part, Argentina rejected those allegations and defended its position on the ground of dealing with a 'state of necessity' and emergency.

The protection offered by international arbitration, both regarding the situation in Argentina and within the Eurozone, will be assessed on its effectiveness, as in Chapter 4. It should be repeated here that the analysis of Chapter 4 led to the conclusion that the CJEU and the EFTA Court remained restrained on dealing with the legality of the measures adopted at national and the EU level in response to the financial crisis, with their basic reasoning being the nature of the area and the emergent character of those measures. Similarly, national courts preferred to adopt a highly deferential position in order to keep a distance from the political processes that resulted in the measures at stake.

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<sup>669</sup>J. Ostřanský, 'Sovereign Default Disputes in Investment Treaty Arbitration: Jurisdictional Considerations and Policy Implications' (2015) 3 *Groningen Journal of International Law*, 27, at 34



Finally, the ECtHR found most measures adopted proportionate and under the wide margin of appreciation of States. Consequently, citizens remained without any available option regarding litigation, in the sense that no legal organ within the EU legal order accepted that it has jurisdiction to consider the protection of their fundamental, economic and social rights. Thus, it is time to examine the alternative option of arbitration.

This chapter will critically analyse the position of international arbitration so far, from the scope of effectiveness of protection offered to applicants. It is important to clarify that the chapter does not intend to provide a comprehensive analysis of all the cases regarding the Eurozone crisis throughout the Union. To this effect, the chapter first explains a significant limitation of this analysis, namely the duty of confidentiality (i). It then outlines the financial crisis of Argentina, the Decision and the Dissenting Opinion in the leading case of *Abaclat v Argentina*<sup>670</sup> and its implications (ii), and a selection of arbitration cases in the Eurozone concerning the protection of foreign investors according to the standards of protection in BITs (iii). It should be stressed that most cases in section iii are still pending, thus only their factual framework is described at the moment. It concludes with an evaluation of the role of effectiveness on the approach of those arbitral tribunals (iv).

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<sup>670</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5)

## I. THE LIMITATION OF CONFIDENTIALITY

A key feature of international arbitration is the fact that it constitutes a confidential, or at least private, dispute resolution mechanism, while the majority of national litigation are not confidential. As it has been stated, ‘the custom is not to say who arbitrated what’.<sup>671</sup> Traditionally, arbitration proceedings and awards have been fully confidential. It was only after the revision of the UNCITRAL Arbitration Rules in 2010 that the need of strengthening transparency was acknowledged, particularly in investor-State arbitration cases.<sup>672</sup>

It should be clarified that privacy and confidentiality are two distinct concepts. In particular, the former precludes any stranger from attending arbitration proceedings, while the latter reflects the obligation not to disclose information relating to the content of the case.

In litigation, hearings and court dockets are open to the public, competitors, press and regulators, and disclosure of evidence and submissions can be made publicly, all of them leading to the development of ‘trial by press release’.<sup>673</sup> On the other hand, arbitral hearings are almost always closed to the press and the public, and the parties' submissions and tribunals' awards remain confidential. In some jurisdictions, the obligation of confidentiality is implied in international arbitration agreements as a matter of law, while it can be expressly imposed in some arbitration agreements or institutional arbitration rules.

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<sup>671</sup> S. Azzali, ‘Introduction: Balancing Confidentiality and Transparency’ in A. Malatesta and R. Sali (eds.), *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards* (2013, Juris) xix-xxxii

<sup>672</sup> Official records of the General Assembly, 63rd Session, Supplement No. 17 (A/63/17)

<sup>673</sup> G. B. Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 14

It is interesting how the approach of national laws on the matter of confidentiality varies from country to country.<sup>674</sup> One of the most contentious matters is whether the proceedings should remain confidential, thus parties should be prohibited from revealing relevant facts or documents. For example, in the United States, confidentiality is not treated as a rule of law, but it is a well-recognised arbitral practice to comply with confidentiality. In England, the confidentiality has been established as a legal requirement through case law. In *Hassneh Insurance Co. of Israel v Mew*,<sup>675</sup> an English court established the implied right of confidentiality in every arbitration. Based on such an implied right, the court held that all the materials should be confidential. According to the court's decision, 'The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only them. It is implicit in this that strangers shall be excluded from the hearings and conduct of the arbitration....'<sup>676</sup>

The issues of confidentiality, transparency and public information in investment treaty arbitration have been extensively discussed in the *Abaclat* case, when considering whether to grant their Procedural Order No. 3 (Confidentiality Order).<sup>677</sup> At an early stage of the proceedings, Parties disagreed on the matter of confidentiality. Although their opinion on the publicity of the final award concurred,<sup>678</sup> they adopted different approaches on other, intermediate, issues regarding confidentiality. Due to the difficulty to reach an agreement on the matter, the Claimants sought for a Confidentiality Order that would be applicable for the whole record of the proceedings. The Order was considered

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<sup>674</sup> See K. Noussia, *Confidentiality in International Commercial Arbitration. A Comparative Analysis of the Position under English, US, German and French Law* (Springer, Heidelberg, 2010)

<sup>675</sup> *Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep. 243

<sup>676</sup> *Ibid.*, paragraph 379

<sup>677</sup> *Giovanna a Beccara and other v The Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No.3 (Confidentiality Order), 27 January 2010

<sup>678</sup> *Ibid.*, paragraph 75

to fall below the scope of Rule 19 of the ICSID Arbitration Rules that provides for the Tribunal's power to determinate the conduct of proceedings.

At first, the Tribunal shared the position followed by the arbitral Tribunal in *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*,<sup>679</sup> namely that 'In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.'<sup>680</sup>

Once the Tribunal examined a number of relevant authorities, it set out the general approach, which focuses on the duty of arbitral tribunals to achieve a balance between transparency and the integrity of arbitration proceedings, as it is explained below:

'72. [...] whilst the Tribunal shares the view that transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well-grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration, it also believes that transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings [...]'<sup>681</sup>

Further, after admitting the absence of any specific provision on the matter of confidentiality either in the ICSID Convention or in the ICSID Arbitration Rules, it was stated that 'the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve

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<sup>679</sup> *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No.3, 29 September 2006

<sup>680</sup> *Ibid.*, paragraph 121

<sup>681</sup> *Giovanna a Beccara and other v The Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No.3 (Confidentiality Order), 27 January 2010, paragraph 72

a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.<sup>682</sup> It can thus be understood that, although confidentiality is a principle that applies in investment arbitration in general, there are no clear, binding rules on the confines of this concept.

In the *Abaclat* case, on the one hand, the Claimants sought that the only information that could be disclosed was ‘general updates on the status of the case’,<sup>683</sup> since a general duty of confidentiality should have bound all the arbitral proceedings. On the other hand, the Respondent State argued that ICSID arbitration does not provide for a general obligation of confidentiality. And, indeed, the Tribunal recognised that the Respondent’s submission of expert opinions and transcripts from other arbitral proceedings indicated that Argentina ‘does not consider any such documents to be subject to any restriction, unless they relate to sealed proceedings’.<sup>684</sup> However, the Tribunal rejected both positions, as it both refused the existence of a general duty of confidentiality in ICSID arbitration but also underlined that parties do not have a ‘carte blanche’ to disclose documents used in the proceedings.<sup>685</sup> Instead, a new approach was conceived:

‘80. Depending on the information and documents at stake, different considerations of confidentiality, transparency, public information, equality of the Parties’ rights, orderly conduct of the proceedings and other procedural rights and principles may apply, requiring a differentiated treatment.’

Applying this approach, the Tribunal ordered that:

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<sup>682</sup> *Giovanna a Beccara*, paragraph 73

<sup>683</sup> *Ibid.*, paragraph 77

<sup>684</sup> *Ibid.*, paragraph 78

<sup>685</sup> *Ibid.*, paragraph 79

‘[...] the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult [...] No confidentiality restriction shall apply to the publication of the award and its content [...] and of orders or directions of the Tribunal’<sup>686</sup>

Among the matters that were discussed on the Confidentiality Order were the power and obligation of the Tribunal to order the continuity of confidentiality restrictions once the proceedings are completed,<sup>687</sup> the application of national laws on privacy,<sup>688</sup> and the distribution of materials used in previous arbitrations.<sup>689</sup> Remarkably, the Tribunal’s reasoning for restricting disclosure of pleadings, written memorials and other written submissions of the Parties as well as of witness and expert statements<sup>690</sup> reads as follows:

‘101. Pleadings and written memorials are likely to contain references to and details of documents produced pursuant to a disclosure exercise, and their uneven publication or distribution carry the risk of giving a misleading impression about these proceedings.

102. Indeed, based on their function and aim, pleadings and memorials of a Party often present a one-sided story of the dispute [...]’

It is interesting how the Tribunal suggests a differentiated treatment depending on the different interests involved regarding each material, in paragraph 80. However, it could be commented that preventing sovereign states from disclosing their legal pleadings in an arbitration governed by public international law, by using as a justification some

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<sup>686</sup> *Giovanna a Beccara*, paragraph 153

<sup>687</sup> *Ibid.*, paragraph 120

<sup>688</sup> *Ibid.*, paragraphs 121-133

<sup>689</sup> *Ibid.*, paragraphs 136-152

<sup>690</sup> *Ibid.*, paragraph 104

unproven risks may adversely affect public confidence in the investment treaty arbitration. For sake of discussion, although the Respondent State argued that ICSID arbitration is not bound by any general duty of confidentiality, it did not make its pleadings publicly available.

Undoubtedly, the confidentiality in international arbitration proceedings constitutes a serious limitation for this chapter. In particular, the fact that most cases are pending means that only limited information are available for the arbitral proceedings until the awards are given.

## II. *ABACLAT AND OTHERS V ARGENTINE REPUBLIC* <sup>691</sup>

### 1. Factual framework of Argentina

In the early 1990s, the Republic of Argentina proceeded to a radical restructuring of its economy, in order to promote growth by encouraging foreign trade and investment in the country. A broad programme of bilateral investment treaties was developed, with no less than 58 countries, which, in conjunction with the approval of a 35-years Standard Gas Transportation License, aimed at the privatization of state-owned companies on the sectors of gas and transportation.<sup>692</sup> Moreover, the restructuring measures included the adoption of the Currency Convertibility law which fixed the Argentine peso at par with the U.S. dollar and prohibited any future price freeze to the tariff system unless compensation was paid to investors.<sup>693</sup>

Among the BITs that Argentina negotiated, was the one with Italy, which came into force in October 1993. Furthermore, Argentina tried to boost its economic development by issuing sovereign bonds. In particular, it placed over a total of USD 186.7 billion in sovereign bonds across its domestic and international markets, mainly targeting Italy, as the two countries were historically and culturally connected. Italians responded positively to that call, by purchasing these bonds en masse. Thus, by 2001, 600,000 Italians owned USD 13.5 billion worth of Argentina bonds which were governed by laws of different jurisdictions.

By the end of 2001, Argentina faced a financial collapse that has been characterised as ‘the most complex in history’.<sup>694</sup> In one day alone, the Argentine peso lost 40% of its

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<sup>691</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5)

<sup>692</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, paragraphs 41–44

<sup>693</sup> *Ibid.*

<sup>694</sup> M. Waibel, *Sovereign Defaults Before International Courts and Tribunals* (Cambridge University Press, 2011) 15



value, having as a consequence the losses on banks. What followed was an economic catastrophe, during which, the living standard of over half of the population of the country fell below the poverty line, ‘income per person in dollar terms...shrunk from around \$7,000 to just \$3,500’ and ‘unemployment [rose] to perhaps 25%’.<sup>695</sup>

The crisis was attributed partly to internal conditions, namely the national economic policies, and partly to external events, including the financial crises in Brazil and South East Asia.<sup>696</sup>

Though, initially, expense cuts were adopted, the currency board that had fixed the peso to the USD was cancelled and all bank accounts were frozen in order to tackle the crisis.<sup>697</sup> Argentina ‘had allegedly come to a point where it was unable to avoid deferring interest and principal payments on all of its external bond debt owed to both foreign and Argentine creditors’<sup>698</sup> and thus ‘defaulted by publicly announcing the deferral of over USD 100 billion of external bond debt owed to both non-Argentine and Argentine creditors’.<sup>699</sup> Those severe economic conditions resulted in a grievous devaluation of the peso and in a public debt equivalent to the 130% of the country’s Gross Domestic Product in 2002.<sup>700</sup>

In the meantime, bondholders, in their majority Italian citizens, set up the Task Force Argentina (TFA) in Rome,<sup>701</sup> in an effort to secure that they will obtain their interests and

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<sup>695</sup> ‘Argentina’s Collapse: A Decline Without Parallel’, *The Economist*, (March 2, 2002) 26, available at: <http://www.economist.com/node/1010911> (accessed 12 June 2017)

<sup>696</sup> J. Ostránský, ‘Sovereign Default Disputes in Investment Treaty Arbitration: Jurisdictional Considerations and Policy Implications’ (2015) 3 *Groningen Journal of International Law*, 27, at 34

<sup>697</sup> That series of measures was known collectively as the *Corralito*

<sup>698</sup> I. Glivanos, ‘Investors vs. Greece: The Greek “Haircut” and Investor Arbitration Under BITs’ (2012) Draft version 15.5.12, at 6

<sup>699</sup> *Ibid.*

<sup>700</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5) Decision on jurisdiction and admissibility, 4 August 2011 (hereinafter *Abaclat* Decision on jurisdiction), paragraph 63

<sup>701</sup> The *Associazione per la Tutela degli Investitori in Titoli Argentini* or Task Force Argentina or TFA was established in Rome on 18 September 2002

capital. The idea was that interested bondholders could sign a ‘Mandate for the Protection of the Interests Connected with the Bonds involved in the “Argentinean Crisis”’<sup>702</sup> at their bank and be represented by TFA. After the participation of 450,000 Italian bondholders, TFA entered into negotiations with the government of Argentina trying to achieve a settlement.

In an effort to restructure its debt, the government offered an exchange of the defaulted bonds for new instruments with modified terms. In particular, on 14 January 2005, Argentina launched the Exchange Offer 2005, offering bondholders to exchange their bonds for new debt that Argentina would issue. Subsequently, Law 26,017, known as the ‘Emergency Law’, was enacted.<sup>703</sup> The Emergency Law provided that any bonds that would not be exchanged under the Exchange Offer could not be admitted to any new exchange offer later. In practice, the acceptance of that exchange offer meant that foreign bondholders would suffer a haircut of about 75% of the initially agreed payments in principal and interest. The 76% of bondholders accepted the offer. Meanwhile, national legislation was implemented that forbade the government from reaching any judicial, quasi-judicial, or private transaction with regard to those bonds.<sup>704</sup>

Those creditors who refused to tender with the government of Argentina initiated litigation in New York,<sup>705</sup> Germany, and Italy, aimed at obtaining the payment of capital and interest.<sup>706</sup> Though most judgments were in their favour, claimants faced serious

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<sup>702</sup> G. Bianco, ‘The Bitter End of Sovereign Debt Restructurings: The *Abaclat v. Argentina* Arbitration and the Eurozone Crisis’ (2013) 40 *Legal Issues of Economic Integration* 4, 315, at 317

<sup>703</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, paragraph 72

<sup>704</sup> Article 3 of the Law: ‘Prohíbese al Estado nacional efectuar cualquier tipo de transacción judicial, extrajudicial o privada, respecto de los bonos a que refiere el artículo 1º de la presente ley’. (Unofficial translation provided by Argentina to the Tribunal: ‘The national Government is precluded from entering into any type of judicial, extra-judicial or private settlement with respect to the bonds to which Article 1 of the present law refers’)

<sup>705</sup> *NML Capital Ltd v Republic of Argentina* 699 F 3d 246, 258–259 (2nd Cir 2012)

<sup>706</sup> *Abaclat* Decision on jurisdiction, paragraph 82

difficulties to enforce them. The reason was that the Republic of Argentina refused to pay and it was hard to find attachable Argentine assets to be levied against; as it was commented, litigation had ‘yet to yield a penny’.<sup>707</sup>

In 2006, and being dissatisfied with the Exchange Offer with the Argentinian government, TFA prepared a ‘Mandate Package’ that was accepted by over 180,000 Italian bondholders. On 14 September 2006, a Request for Arbitration with ICSID was filed based on the Argentine-Italy BIT, arguing that the 2001 default on the bond obligations of Argentina constituted an expropriation that remained without compensation and breached their obligation to fair and equitable treatment.<sup>708</sup>

In 2010, a new offer was made by Argentina in order to accomplish its unresolved debt restructuring. That new offer intended to ‘restructure and cancel defaulted debt obligations of Argentina represented by Pre-2005 Eligible Securities, to release Argentina from any related claims, including any administrative, litigation or arbitral claims and to terminate legal proceedings against Argentina in respect of the tendered Eligible Securities in consideration for the issuance of New Securities and, in certain cases, a cash payment’.<sup>709</sup> The 2005 Emergency Law was suspended for the time of the offer. 66% of the hold-out creditors agreed to the offer, and some bondholders who were part of TFA also decided to participate in the new Exchange Offer and withdrew from the ICSID proceedings.

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<sup>707</sup> A. Gelpern, ‘What Bond Markets Can Learn From Argentina’, (2005) 24 *International Financial Law Review*, 19

<sup>708</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5)

<sup>709</sup> Exchange Offer Prospectus, p. S-5, available at:

[http://www.mecon.gov.ar/finanzas/sfinan/documentos/us\\_prospectus\\_%28version\\_ingles%29\\_30042010.pdf](http://www.mecon.gov.ar/finanzas/sfinan/documentos/us_prospectus_%28version_ingles%29_30042010.pdf)

(accessed 12 June 2017)

## 2. *Abaclat v. Argentina*: Decision on jurisdiction

The Argentina-Italy BIT that came into force in 1993, constituted the basis for the arbitration claim brought by the Italian bondholders against the Republic of Argentina in the famous case of *Abaclat*.<sup>710</sup> The claimants sought a declaration by the Tribunal that Argentina was in breach of its obligations under the aforementioned BIT and the award of compensatory damages. Particularly, the claimants argued that their bonds qualified as investments, and that Argentina had defaulted on their payment and refused to negotiate with them, by making a unilateral exchange offer instead and dramatically diminishing the value of their investments through national legislation. The Tribunal gave a Decision on Jurisdiction and Admissibility on 4 August 2011;<sup>711</sup> a Dissenting Opinion of Professor Georges Abi-Saab, on 28 October 2011,<sup>712</sup> and numerous procedural orders. It underlined the lack of a precise legal regime governing a defaulting sovereign and the existence of a mere informal framework on this area that included some commonly used principles.

Both Parties accepted that there was a legal dispute within the framework of Article 25 of ICSID Convention.

### *A dispute arising out of the BIT or a mere contractual dispute?*

One of the main disagreements between the Parties was whether their dispute could be considered as one arising out of the BIT or whether it was a mere contractual dispute arising out of the bond-related documents. Thus, the Tribunal was asked to identify whether the claims fell within the scope of protection of the BIT, so they were treaty

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<sup>710</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5)

<sup>711</sup> *Abaclat* Decision on jurisdiction

<sup>712</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5) Decision on jurisdiction and admissibility, Dissenting Opinion, 28 October 2011 (hereinafter *Abaclat* Dissenting)

claims, or whether they constituted pure contract claims, that fell outside their jurisdiction.

The Tribunal's jurisdiction was dependent on this determination, since BITs could not correct contractual remedies and do not provide for dispute resolution, either for judicial or arbitral proceedings, of contract claims. The only case that an ICSID tribunal can have jurisdiction over a contractual dispute is when the host State was also in breach of its BIT obligations, in addition to the alleged breach of contract. Apart from this scenario, any other contract claim can only be resolved before the competent body, either judicial or arbitral, which is granted its jurisdiction from the contract itself.

Unequivocally, Argentina failed to perform its obligations as the debtor of the bonds, thus it was in violation of its contractual obligations towards the Italian bondholders and all other owners of security entitlements. Argentina justified its breaches by recalling the exceptional circumstances and the severe economic conditions the country faced by the end of 2001. In particular, the adoption of the Emergency Law, which modified the State's payment obligations, was presented as a drastic reaction to the dramatic public deficit. Argentina only based its actions on the risk of insolvency, and it did not argue that it invoke any contractual provision excusing its non-performance of its contractual obligations towards the bondholders.

The Tribunal acknowledged that an insolvent debtor may employ some special regimes such as bankruptcy or other mechanisms of financial redress, which can affect the performance of their contracts and release them from all or some of their contractual obligations. Although these kinds of mechanisms are in principle subject to conditions, those are not applicable in the *Abaclat* case, since the debtor was a sovereign State and

any measure taken, including the Emergency Law, constituted an exercise of its sovereign power and did not derive from any contractual mechanism.

To summarize the majority's reasoning on this issue, it was found that Argentina, in order to face the country's financial insolvency, took sovereign decisions, independent from any contractual framework, for the implementation of measures. Those measures reflected the power of the State and not the rights and obligations that arose out of a contract. In essence, the particular dispute did not 'derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the claimants in the case in question'.<sup>713</sup>

#### *Can securities qualify as investments?*

The first major issue to be dealt with by the Tribunal was whether the securities held by the Italian bondholders qualified as investments, thus they could have jurisdiction to hear the case.

Argentina brought three basic arguments. Firstly, they argued that those securities did not meet the *Salini* criteria<sup>714</sup> thus they did not constitute investments under Article 25(1) of the ICSIC Convention. It could be reminded in this stage that the *Salini* criteria include a substantial commitment by the investor, certain duration, the assumption of risk and significance for the host state's development. Secondly, the Respondent argued that the alleged investment was neither physically nor legally made in the territory of Argentina,

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<sup>713</sup> *Abaclat* Decision on jurisdiction, paragraph 324

<sup>714</sup> *Salini Costruttori SpA et Itals trade SpA v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001

as required by Article 1 of the Argentina – Italy BIT. As it was submitted, the securities ‘(i) [...] did not cause any transfer of money into the territory of Argentina, [and] (ii) they [were] located outside of Argentina and [were] beyond the latter’s scope of territorial jurisdiction based on the foreign law and forum selection clauses contained in the relevant bond documents, and (iii) the indirect holding systems of these entitlements implicates a cut-off point beyond which claims are not permissible because they have only a remote connection with the investment’.<sup>715</sup> The final argument focused again on Article 1 of the Argentina – Italy BIT, which provides that investments should be ‘in compliance with the laws and regulations of the host State’. In particular, the Respondent argued that securities should have complied with Argentine law, Italian and European law, the selling restrictions provided in the relevant bond documents, and general principles. In the case of the Italian bondholders, Argentina contested that numerous EU law regulations and the principle of good faith were violated by the conduct of the Italian banks, thus the Argentina-Italy BIT could not apply to those securities.

The Tribunal started its analysis by demonstrating that bonds, as financial instruments, fall below the scope of Article 1(1) lit. (c) of the Argentina- Italy BIT, and, thus, securities can also qualify as investments ‘since they constitute an instrument representing a financial value held by the holder of the security entitlement in the bond issued by Argentina’.<sup>716</sup> Also, by underlining that bonds and securities are closely related, as ‘they are part of one and the same economic operation and they make only sense together’,<sup>717</sup> the Tribunal established that the dispute was directly arising out of an investment.

Article 25(1) of the ICSID Convention and the Salini criteria

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<sup>715</sup> *Abaclat* Decision on jurisdiction, paragraph 341(ii)

<sup>716</sup> *Ibid.*, paragraph 357

<sup>717</sup> *Ibid.*, paragraph 359

Starting with the first argument made by the Respondent, the Tribunal focused on whether the investment was ‘generated by a contribution that is in line with the spirit and aim’ of Article 25(1) of the ICSID Convention and disproved the *Salini* criteria.<sup>718</sup> Its reasoning was that the application of the *Salini* test would keep investors outside the scope of the ICSID protection, and such a result would be contrary to the general aim of the ICSID Convention, which is to broaden the scope of protection it offers to private investors. Instead, the Tribunal only required a connection between the investors’ action and the value the parties to the BIT wished to protect. As the Decision states ‘there is no doubt that Claimants made a contribution: They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements. The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued’.<sup>719</sup> Though this explanation was not actually based on Article 25(1) of the ICSID Convention,<sup>720</sup> it led to the conclusion that the securities held by the Italian bondholders met the criterion of the contribution.

‘Made in the territory of the host State’

Regarding the second argument, namely whether the investment was ‘made in the territory of the host State’,<sup>721</sup> the Tribunal followed a two-stage approach. Firstly, the place where the investment was considered to be made was examined, and, secondly, whether the existence of forum selection clauses in contractual documents concerning the investment could influence their decision. It was noticed that the place of the investment

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<sup>718</sup> *Salini Costruttori SpA et Itals trade SpA v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001

<sup>719</sup> *Abaclat* Decision on jurisdiction, paragraph 366

<sup>720</sup> In essence, the Tribunal’s reasoning made the BIT prevail over the ICSID Convention.

<sup>721</sup> Article 1(1) of the Argentina – Italy BIT



depends on the nature of the investment and for financial instruments, the place of the investment depends on the legal person which benefited from it, in our case the State where the payment was made to.

A quote from the decision of *Fedax v Venezuela*<sup>722</sup> was employed by the Tribunal, that being that “[i]t is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere’, in order to support their reasoning.<sup>723</sup>

Furthermore, the Tribunal examined the ultimate usage of the funds in order to support that the investment was made in Argentina. The Government of Argentina alleged that the payment was made by the bondholders to the Italian banks, which had previously purchased the bonds, thus no money was transferred from the investors to the State. However, the Tribunal decided that the banks advanced the payment made by the investors and the money ‘was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina’s economic development and thus to have been made in Argentina’.<sup>724</sup>

The Respondent brought the argument that forum selection clauses were included in the bond contracts in favour of the courts of New York and Switzerland which indicated that the bonds were located outside of Argentina. The Tribunal disagreed with this argument, supporting that, even if it was accepted that the forum selection clause reflects the place of contract performance, such a finding could not affect the place where the investment

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<sup>722</sup> *Fedax N.V. v. Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction, 11 June 1997

<sup>723</sup> It should not be ignored that the decision in *Fedax* has received remarkable criticism on the point that the preferred ‘reading [wa]s at odds with the plain language of the BIT’ and on the absence of a clear explanation for the employment of such a novel ‘beneficiary’ criterion. This means that the basic ground for the *Abaclat* majority’s decision is highly controversial. (See M. Waibel, ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’, (2007) 101 *American Journal of International Law*, 711, at 731)

<sup>724</sup> *Abaclat* Decision on jurisdiction, paragraph 378

was made, as the rights and obligations that arise out of the BIT and the ICSID Convention have an ‘independent basis’ from contractual rights and obligations.<sup>725</sup>

*Compliance with Argentinian, Italian and European law*

After concluding that the investments were made in Argentina, the third argument brought by the Respondent was considered. The allegation made was that the investments were not in conformity with Italian law, local regulations and the general principle of good faith and the Tribunal explained that their Decision should only be limited to the definition of ‘investment’, and all the remaining questions had to be answered in a later award on the merits of the dispute. It therefore held that the investments should have been made in compliance with the laws and regulations of Argentina, as required by Article 1(1) of the Argentina – Italy BIT, and that was not challenged by the Respondent. Thus, the third objection was easily refuted.

*State’s consent to arbitration*

The second major subject to be dealt with by the Tribunal was the State consent to arbitration over sovereign debt restructuring. Argentina alleged that it never consented on an ICSID dispute that deal with its sovereign debt restructuring, which was also a mass claim.

As regards the admission of a mass claim, the reasoning given by the Tribunal had policy and teleological character, centered on the scope of the BIT and ICSID Convention in general. At first, the decision focused on the *raison d’être* of collective claims, despite the lack of a consistent position of national legal orders over this matter. In particular, some national legal systems do not accept collective claims, either only in arbitration or

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<sup>725</sup> *Abaclat* Decision on jurisdiction, paragraph 379

in litigation as well. According to the Tribunal, '[c]ollective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings were seen as necessary, where the absence of such mechanism would de facto have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism.'<sup>726</sup> Turning to the scope of the ICSID Convention, the Tribunal supported that the particular claim was collective due to the type of the specific investment, namely the bonds issued by a State, and that the ICSID Convention's scope was to promote and protect foreign investments, the notion of which is partially dependent on the discretion of States when drafting their BITs. Since the BIT's protection encompasses bonds and, in that case, the protection of that investment cover a huge number of investors, it seemed unnecessary and contrary to the scope and nature of the ICSID Convention to require a supplementary consent to refer to arbitration a collective claim, additionally to the general consent to ICSID arbitration. If the lack of any specific provision on the admissibility of collective claims in ICSID arbitration under the Convention would be treated as a negation, the purpose of BITs and the ICSID Convention would be adversely affected. The decision suggested that the most appropriate interpretation of this fact was the one of a simple lacuna that should be filled by the Tribunal through its regulating power on all procedural aspects that are not explicitly governed by the Convention or Arbitration Rules.<sup>727</sup>

As the Tribunal stated, 'however, it is understood that adaptations made to the standard procedure must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party.'<sup>728</sup> In the majority's

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<sup>726</sup> *Abaclat* Decision on jurisdiction, paragraph 484

<sup>727</sup> Article 44 ICSID Convention and Article 19 ICSID Arbitration Rules

<sup>728</sup> *Abaclat* Decision on jurisdiction, paragraph 519

view, declaring the particular claims inadmissible would constitute a clear denial of justice, since the kind of their investment is covered by the relevant BIT and their claims are either identical or, at least, adequately homogeneous.

As regards the absence of consent, the Respondent argued, firstly, that if sovereign debt restructuring disputes would have been decided by ICSID tribunals the whole efforts made by the country would be undermined, and, secondly, that the forum selection clauses included in the bond contracts demonstrated that the State had never consented to ICSID arbitration. At the beginning, the Tribunal clarified that, according to Article 25(4) of the ICSID Convention, States are allowed to apprise the Centre of categories of disputes which it would not accept to submit to its jurisdiction. It also underlined that the State of Argentina had not taken advantage of that option. The Decision then reiterated that the investment was protected under the Argentina-Italy BIT and found ‘no reason to exempt foreign debt restructuring situations from the scope of application of the BIT’.<sup>729</sup>

Considering the inclusion of the forum selection clauses in the bond contracts, the Tribunal based its analysis on the distinction between contract claims and treaty claims. While for the former they constituted a vital element, they had no effect on the latter. Provided the Tribunal was dealing exclusively with treaty claims, and its jurisdiction relied only on them, the existence of forum selection clauses could not obstruct the undertaking of its jurisdiction. Therefore, they reached the conclusion that they were ‘irrelevant for the assessment of the existence and/or validity of Argentina’s consent to ICSID arbitration’.<sup>730</sup> Consequently, the majority affirmed that the ICSID Tribunal had the necessary jurisdiction over the claims brought by the Italian bondholders, members of TFA, under the Argentina-Italy BIT and the ICSID Convention.

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<sup>729</sup> *Abaclat* Decision on jurisdiction, paragraph 479

<sup>730</sup> *Ibid.*, paragraph 499

### 3. *Abaclat v. Argentina: Dissenting Opinion*

Arbitrator Georges Abi-Saab, appointed by the Respondent, disagreed with the majority and explained the reasons that made him depart from the majority in his Dissenting Opinion. His reasoning contained grounds such as the requirement of previous consultations, the need to litigate to national courts for eighteen months before resorting to arbitration, and the lack of consent from Argentina to ICSID Arbitration for collective mass claims. However, the most remarkable issue was the one of the Centre's jurisdiction over a sovereign debt restructuring case. The arguments in the Dissenting Opinion were in sharp contrast with the reasoning deployed by the majority.

#### *Economic and political effects of the result*

At first, Professor Abi-Saab declared that it was the first time that an ICSID Arbitral Tribunal was called to hear a dispute involving a sovereign debt, instead of concerning a project or an economic operation or enterprise in the host State, thus he expressed his worries about the economic and political effects of that case's result. He also expanded on the distinction between the notion of investment in the financial and in the ICSID context. The financial meaning of 'investment' encompasses the 'acquisition of any kind of assets such as deposit accounts, debt and equity securities, credit default swaps and derivatives'.<sup>731</sup> On the other hand, the ICSID Convention covers a rather restricted area, pursuant to what the Contracting Parties contemplate, thus this 'term has a hard-core that cannot be waived even by agreement of States parties to a BIT'.<sup>732</sup> He also referred to the background of the ICSID Convention, and particular to the framework of the International Bank for Reconstruction and Development. The type of investment Contracting Parties

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<sup>731</sup> *Abaclat* Dissenting, paragraph 41

<sup>732</sup> *Ibid.*, paragraph 46

envisaged to protect through international arbitration was the one which contributed to the economic development of the host State, ‘i.e., to the expansion of its productive capacity, a contribution that presupposes a commitment to this task not only of economic resources, but also in terms of duration in time and the taking of risk, with the expectation of reaping profits and/or revenue in return’.<sup>733</sup> He also made a distinction between foreign direct investments, for which he also described the ‘ideal type’ to be protected by ICSID, and portfolio investments, which should be considered on a case-by-case basis.<sup>734</sup>

### Legal remoteness

The Dissenting Opinion agreed with the majority in recognizing that security entitlements were included on the definition of financial instruments found in Article 1(1) of the Argentina – Italy BIT. However, Professor Abi-Saab insisted on the existence of legal remoteness between Argentina and the bonds it issued and securities and their Italian holders. He disagreed that securities and bonds ‘are part of one and the same economic operation’,<sup>735</sup> and he focused on the distinction between primary and secondary markets. On primary markets, the State and the banks which pay for the bonds, on behalf of the purchasers, should be in direct contact. On secondary markets, banks sell securities to retail investors, and money is not transferred to the host government, which remains outside of the whole transaction. As a result, those securities could not constitute investments protected in Argentina, on the ground of legal remoteness. Moreover, it was supported that both the Argentina-Italy BIT and Article 25 of the ICSID Convention required a legal and material connection between the investment and the host State. Such connection was absent in the case of the securities in question. From the legal point of

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<sup>733</sup> *Abaclat* Dissenting, paragraph 50

<sup>734</sup> *Ibid.*, paragraph 55

<sup>735</sup> *Abaclat* Decision on jurisdiction, paragraph 359

view, it was argued that all bond-related documents indicated that the place of the securities was outside of Argentina, including the forum selection clauses, the choice of a foreign applicable law, the place and the currency of payment and the residence of the intermediaries. He also replied to the distinction made between contract claims and treaty claims by the majority, by arguing that treaty claims are founded on a right which have arisen out of a contract. In those cases, it is the contract which ‘governs [the right’s] legal existence and the modalities of this existence, including [its] location’.<sup>736</sup>

*Material connection between the investment and the host State*

From the material point of view, Professor Abi-Saab developed a strong line of reasoning on which he rebutted the assertions made by the majority. Initially, ‘it stated that whilst the vehicles utilized by investors corresponded to those listed by Article 1(1) lit. (c) of the Argentina-Italy BIT, the ‘negotium’ registered by such an act still had to comply with the requirements of Article 25 of the ICSID Convention, which it failed to do’.<sup>737</sup> Furthermore, the introductory text of Article 1(1) of the BIT established the condition that the investment be made by the subject ‘of one Contracting Party in the territory of the other [Party]’. Such a condition was claimed to be met only when the investment deals with a specific project, operation or enterprise in the territory of the host State, and it could not be overdrawn by the majority’s reasoning. Investments should be treated as a single unit for the purposes of the ICSID Convention, and no distinctions between them based on their financial or other nature, should be allowed. Professor Abi-Saab went further and distinguished *Fedax* from *Abaclat* and criticised *Fedax* on its own merits.<sup>738</sup> Finally, the availability of the funds to State of Argentina did not render the funds a

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<sup>736</sup> *Abaclat* Dissenting, paragraph 84

<sup>737</sup> G. Bianco, ‘The Bitter End of Sovereign Debt Restructurings: The *Abaclat v. Argentina* Arbitration and the Eurozone Crisis’ (2013) 40 *Legal Issues of Economic Integration* 4, 315, at 330

<sup>738</sup> *Ibid.*, paragraph 105

contribution to the development of the country, neither imply that they have been located in Argentina.

The Dissenting Opinion concluded that the Tribunal did not have jurisdiction Tribunal, since both the ICSID Convention and the Argentina-Italy BIT entailed the investment to be made in the territory of the host State. As far as such a territorial connection was argued to be absent, the result was that no any protected investment existed on which jurisdiction could be grounded. Finally, Professor Abi-Saab made a powerful statement on the general matter of giving jurisdiction to ICSID tribunals to deal with disputes concerning sovereign debt restructurings:

‘in view of the actual profound structural crisis of the international financial system; the absence of agreed international procedures regulating State bankruptcy; and the intense international discussions and efforts to improve the sovereign debt restructuring process, the present case raises, an international public policy issue about the workability of future sovereign debt restructuring, should ICSID tribunals intervene in sovereign debt disputes. It suffices to ponder the potential disrupting effect of different ad hoc tribunals following separate ways or deciding at cross purposes with the desperate international efforts to reconstruct a semblance of a coherent international financial architecture. Such decisions can also potentially unravel patiently negotiated settlements (through the effect of the most favoured creditor clause inserted in most settlements) [...].’<sup>739</sup>

Despite the Dissenting Opinion given by Professor Abi-Saab,<sup>740</sup> the majority of the Tribunal asserted its jurisdiction over the mass claims brought by the Italian bondholder that were members of TFA.

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<sup>739</sup> *Abaclat* Dissenting, paragraph 271

<sup>740</sup> He resigned from the Tribunal shortly after, on 1 November 2011, to be substituted by Dr Santiago Torres Bernárdez



#### 4. Implications of the Decision

As an initial implication, the decision in *Abaclat* is considered landmark as it signals the availability of ICSID arbitration to holders of security entitlements that have been negatively affected by a sovereign debt restructuring. Such a possibility could be characterised both as salutary for foreign investors and as a menace to States in financial difficulties, such as the Eurozone countries.<sup>741</sup> The immense significance of *Abaclat* does not depend on whether compensation was finally payable or not, but on the fact that it recognised that financial investment should enjoy the protection afforded by BITs. Indeed, since, probably, most BITs define ‘investment’ as ‘any kind of asset’, they give the opportunity to tribunals to encompass on the notion of financial investments. The jurisdiction of arbitral Tribunals over a claim against sovereign debt restructuring relies upon various matters, such as whether an investment is found to be made, whether consent is given by the relevant State to arbitration and whether an investment agreement provides for arbitration in such a dispute. Regarding jurisdiction, the consent of the State is governed by the investment agreement in the relevant BIT, whose provisions on ‘definitions’ are crucial. Had the agreement expressly included bonds and other debt instruments as covered investments, then the sovereign party would have consented to jurisdiction for those claims. Similarly, any limitation within the BIT to those claims constitutes a limitation on consent.

The introduction of international arbitration as a new forum for disputes arising out of sovereign debt restructurings demonstrates ‘a neglected field in the European Union countries’ reaction to the sovereign debt crisis’.<sup>742</sup> The reason for this is that, within the

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<sup>741</sup> G. Bianco, ‘The Bitter End of Sovereign Debt Restructurings: The *Abaclat v. Argentina* Arbitration and the Eurozone Crisis’ (2013) 40 *Legal Issues of Economic Integration*, 315, at 331

<sup>742</sup> *Ibid.*

Eurozone, various legal and political measures were taken in order to achieve and secure financial stability, but the matter of the resolution of disputes arising out of those measures was never touched upon. If ‘the crisis showed that it was possible to have a sovereign debt crisis in a European Member State’,<sup>743</sup> the *Abaclat* case revealed the availability of an international fora. It is noteworthy that shortly after the publication of the *Abaclat* Award, many law firms were already advising bondholders in Greece and other Eurozone countries on how to get advantage of the relevant BITs and ICSID.<sup>744</sup>

As a matter of fact, those Eurozone countries that were heavily affected by the financial crisis, namely Ireland, Greece, Portugal, Spain and Italy, have signed a significant number of BITs, both intra-EU and extra-EU. All these BITs can constitute the basis that grants jurisdiction to arbitral tribunals to hear disputes arising out of the financial crisis and the measures adopted as a response to it, as they all provide for arbitration as the resolution method for disputes between investors and the host State. It could be noticed here that none of the intra-EU BITs of the abovementioned Eurozone countries explicitly exclude sovereign debt restructuring disputes or financial investments from their coverage, as they just use the general definition of ‘every kind of asset invested by an investor’ and a non-exhaustive list of examples.<sup>745</sup> On the other hand, it has been argued that sovereign bonds and other financial instruments only constitute ordinary commercial transactions, thus they cannot enjoy the protection offered by investment arbitration.<sup>746</sup> However, such an argument ignores the political and legal aspects of the particular situation.

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<sup>743</sup> D. Zandstra ‘The European Sovereign Debt Crisis and Its Evolving Resolution’ (2011), 6 *Capital Markets Law Journal*, 285, at 287

<sup>744</sup> G. Bianco, ‘The Bitter End of Sovereign Debt Restructurings: The *Abaclat v. Argentina* Arbitration and the Eurozone Crisis’ (2013) 40 *Legal Issues of Economic Integration*, 315, at 332

<sup>745</sup> D. Strik, ‘Investment Protection of Sovereign Debt and Its Implications on the Future of Investment Law in the EU’ (2012) 29 *Journal of International Arbitration*, 183, at 185-187

<sup>746</sup> M. Waibel, ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’ (2007) 101 *The American Journal of International Law*, 711, at 722

The regime of international arbitration lacks the feature of precedent, which means that arbitrators are not bound to follow previous awards, even in cases with very similar facts, and this is the reason why court decisions and arbitral awards do not have the same legal value though they are both enforceable and binding on the parties involved. Thus, it is only expected that the ongoing arbitration cases on the financial cases will use the reasoning of *Abaclat*, but no one can ensure that this will happen. In any case, even if the approach of *Abaclat* Decision is not followed by other ICSID tribunals, and they find similar claims inadmissible due to the lack of an investment within the meaning of Article 25 of the ICSID Convention, this does not exclude the availability of other international arbitral tribunals. For example, most BITs signed by the aforementioned EU countries provide for the option to resort to other forms of arbitration, for instance ad hoc tribunals governed by UNCITRAL Arbitration Rules.<sup>747</sup> Such provisions that allow for other forms of arbitration avoid the obstacle of interpreting the notion of investment based on the ICSID Convention and would no longer constitute a threshold for holders of financial instruments ‘seeking redress under these BITs’.<sup>748</sup> A serious negative further implication of *Abaclat* should also be stressed. The availability of international arbitration for foreign investors entails the risk of *de facto* discrimination between holders of financial instruments in a country. In simple terms, dissatisfied creditors in a State which has signed a BIT with a country in financial crisis are able to commence arbitral proceedings and potentially recover their money. However, those who are in similar conditions but who are nationals of a country which does not have a BIT in force with a country in crisis cannot take the advantage of this opportunity. As a consequence, the equality of treatment

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<sup>747</sup> G. Bianco, ‘The Bitter End of Sovereign Debt Restructurings: The *Abaclat v. Argentina* Arbitration and the Eurozone Crisis’ (2013) 40 *Legal Issues of Economic Integration*, 315, at 333

<sup>748</sup> D. Strik, ‘Proposed Greek Collective Action Clauses Law May Trigger Its International Law Obligations’ (2012) *Kluwer Arbitration Blog*, available at: <http://justinvestment.org/2012/02/proposed-greek-collective-action-clauses-law-may-trigger-its-international-law-obligations/> (accessed 12 June 2017)

between investors cannot apply, because of the ground of nationality. Instead of treating all of them on the same footing and equitably dividing the capital available, a tribunal called upon to protect BIT rights would ‘allow any creditor to bring an action against the debtor state, regardless of other creditors and of the insolvency of the state, provided that creditor is able to locate goods to be realised’.<sup>749</sup> The notion of discrimination is examined as a general concept of law here. At the EU level, as it will be analysed at a later stage, the European Commission has already asked for the denunciation of their intra-EU BITs, but they are still in force, at least officially, thus the principle of equality between EU citizens is still under threat.

Furthermore, moving to the matter of the admissibility of collective claims, the Decision’s teleological approach has been criticised as deficient, on the ground that it suggests a simple reading of the agreements.<sup>750</sup> While the Tribunal interpreted as the purpose of the ICSID Convention the protection and promotion of investments, the Preamble to the Convention contravenes this position. According to the Preamble, the ICSID Convention aims at setting up a neutral arbitral forum for investment disputes’ settlement between contracting States and private nationals of other contracting States, ‘considering the need for international cooperation for economic development, and the role of private international investment’.<sup>751</sup> The scope of the BIT, as demonstrated in Article 1 of the Additional Protocol, cannot prevail over the scope of the ICSID Convention, through the teleological approach according to which the BIT’s objective is only the protection of foreign investments. Instead, the BIT should be interpreted employing the literal method,

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<sup>749</sup> M. Barra, ‘Remedies to Default on International Lending: Any Improvement From Bilateral Investment

Treaties?’ (2005) 2 *Transnational Dispute Management*, 5

<sup>750</sup> A. De Luca, ‘Collective Actions in ICSID Arbitration: The Argentine Bonds case’ (2011) *The Italian Yearbook of International Law XXI*, 211, at 229

<sup>751</sup> Preamble, first line

in good faith and based on the ordinary meaning of the terms.<sup>752</sup> In other words, it is beyond the powers of an arbitral tribunal to allow its own policy considerations to prevail over the nature of interests, based on the Contracting Parties' agreement on the BIT, despite the need of 'ensuring effective protection to a broad category of small and medium investors, who would otherwise be deprived of that protection'.<sup>753</sup> Against the reasoning on the *Abaclat* Decision, the adjustments that were made so as to hear the collective claims within the framework of the Argentina – Italy BIT do not only affect the execution of the ICSID arbitral procedure, but they also restrict the Tribunal's authority to verify groups regarding the eligibility of investors to treaty-based ICSID arbitration.<sup>754</sup> Such a limitation on Tribunal's control contravenes Article 25 of the ICSID Convention, regarding the examination of jurisdictional requirements. It also contravenes Article 1 of the Additional Protocol of the Argentina – Italy BIT, which again provides for the jurisdictional requirements. Thus, it is strongly argued that the admission of collective claims and the adjustments of the ICSID proceedings caused problems over the verification of the jurisdictional requirements and should have resulted to the opposite decision. In other words, the Tribunal should have declared the collective claims inadmissible on the ground that Article 25 of the ICSID Convention and the BIT cannot be applied appropriately, therefore respecting the nature of interests agreed by the Parties when concluding the respective BIT.

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<sup>752</sup> Article 31(1), The Vienna Convention on the Law of Treaties was done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331: the interpretation of treaties should also take into consideration the general context and purpose of the Treaty and any other relevant agreement between the same parties. The 'Draft Articles on the Law of Treaties with commentaries' (1966) 2 *Yearbook of the International Law Commission* 187, at 217-222, explain and develop the reasoning behind the wording of this Article

<sup>753</sup> A. De Luca, 'Collective Actions in ICSID Arbitration: The Argentine Bonds case' (2011) *The Italian Yearbook of International Law* XXI, 211, at 229

<sup>754</sup> *Ibid.*, 230

The fact that a dissenting opinion was given in *Abaclat*, which included numerous strong arguments against the admissibility of the case, illustrates that there is significant uncertainty in the system of international investment arbitration regarding this area and a lack of a consistent line. Particularly, Professor's Abi-Saab worries about the political and economic consequences of the result of the case, and his opinion that ICSID tribunals are not appropriate to intervene in sovereign debt disputes due to the high element of international public policy involved. The absence of a clear-cut position of arbitrators was perfectly expressed in the Dissenting Opinion and is to be repeated here: 'the potential disrupting effect of different ad hoc tribunals following separate ways or deciding at cross purposes with the desperate international efforts to reconstruct a semblance of a coherent international financial architecture'.<sup>755</sup>

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<sup>755</sup> *Abaclat* Dissenting, paragraph 271

### III. ARBITRATION CASES IN THE EUROZONE REGARDING THE FINANCIAL CRISIS<sup>756</sup>

#### 1. *FBME v. Republic of Cyprus*

In the case of *FBME v Republic of Cyprus*,<sup>757</sup> an application was brought to the International Chamber of Commerce (ICC) on the basis of the BIT between Lebanon and Cyprus.<sup>758</sup>

FBME Bank was established in Cyprus as a subsidiary of the Federal Bank of Lebanon in 1982. Thereafter, its parent company was reincorporated in Tanzania, and FBME Bank's operations in Cyprus became a branch of the Tanzanian entity, a foreign credit institution, subject to a different special liquidation regime. An in-depth investigation by the US Financial Crimes Enforcement Network, a division of the Department of Treasury, resulted in findings of money laundering, fraud, financing of Hezbollah, the Lebanese militant group linked to terrorism, and transnational organized crime against the FBME Bank. In response to those findings, the CBC acted under the powers conferred to it by the Resolution of Credit and Other Institutions Laws 2013-2014 and placed the Cypriot branch under resolution, by taking over the management of its operations as the Resolution Authority and appointing a Special Administrator in July 2014. Consequently, all the commercial activities of the bank in Cyprus were suspended, most of its business units closed, and all payments were authorized by the appointed administrators. Inevitably, FBME's income was drastically reduced and its withdrawals were drastically increased, with the bank remaining under resolution since then.

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<sup>756</sup> It should be underlined that most of the cases discussed in this section are ongoing, apart from the last two.

<sup>757</sup> *FBME v Republic of Cyprus*, ICC

<sup>758</sup> Treaty between the Lebanese Republic and the Republic of Cyprus on the Reciprocal Promotion and Protection of Investments (2003), available at:

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/925> (accessed 12 September 2017)

The bank's shareholders argue that such a decision to put the bank into resolution was in breach of the BIT and sought protection of their investment against expropriation. Their claim was found to fall within the scope of the BIT, since, according to Article 2, the notion of investment includes 'every kind of asset and in particular, although not exclusively, the following: [...] (b) a company or business enterprise or shares in and stocks and debentures of a company or any other form of participation in a company or business enterprise'.<sup>759</sup> Article 6 of the Cyprus - Lebanon BIT prohibits any nationalisation or expropriation of the assets of the citizens of either country.<sup>760</sup> They claim that the measures taken by the Central Bank of Cyprus were designed for insolvent banks or banks which are facing serious liquidity problems. Healthy financial institutions such as FBME Bank cannot come under the realm of such measures. As a matter of fact, the shareholders' demand reaches the €500 million compensation on the grounds that Cyprus failed to protect their investment and the proceedings are pending.

## ***2. Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus***

After the decision of the CBC and the government regarding the resolution of Laiki Bank, Marfin Investment Group and 18 more Greek shareholders brought proceedings in international arbitration against the Republic of Cyprus, in *Marfin v Republic of Cyprus*,<sup>761</sup> on the basis of the Bilateral Investment Treaty between Greece and Cyprus,<sup>762</sup>

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<sup>759</sup> Article 2 of the Lebanon – Cyprus BIT

<sup>760</sup> Article 6(1): 'Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated or subjected to measures having equivalent effect to nationalization or expropriation (hereinafter referred to as "expropriation") except for public interest as established by law, in accordance with due process of law, on a non-discriminatory basis and against the payment of prompt, adequate and effective compensation.'

<sup>761</sup> *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus* (ICSID Case No. ARB/13/27) - pending

<sup>762</sup> Treaty between the Greek Government and the Republic of Cyprus concerning the Reciprocal Promotion and Protection of Investment (1992), available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3011> (accessed 12 September 2017)



with the prime claim being for expropriation of their investments as shareholders of Laiki Bank.

Initially, the claimants attempted to approach the Republic of Cyprus in order to achieve an amicable settlement of the dispute, as the BIT provides for. On September 2013, after the deadline expired without any remarkable result, the arbitration proceedings were commenced and they are still pending. The damages they claim for the loss of their investments amount to approximately €1.1 billion, of which €824 million relates to the value of MIG's investment. In particular, the applicants argue that the Republic of Cyprus violated three of the essential standards of investment protections, those being the standard of Fair and Equitable Treatment,<sup>763</sup> the standard of Most-Favoured Nation Treatment<sup>764</sup> and the provision of compensation in case of expropriation.<sup>765</sup>

The outcome of the particular case will be of high importance regarding the way arbitrators will approach the matter of the financial crisis, since it is assumed that the tribunal will easily accept that it has jurisdiction because the applicants are only shareholders and shares are included in the definition of 'investment' in the particular BIT. Therefore, it is expected that the Tribunal will easily proceed to the merits of the dispute and examine whether the standards of protection provided by the BIT between Greece and Cyprus have been violated or not.

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<sup>763</sup> Article 2 of the Greece-Cyprus BIT implies that MIG's investment in Cyprus 'shall always enjoy fair treatment and full protection and security' and that 'in no way shall be hindered by measures of an arbitrary or discretionary nature'

<sup>764</sup> Article 3 of the Greece-Cyprus BIT implies that MIG's investment in Cyprus shall not be treated 'less favourably than that which Cyprus accords to the investment of its own investors'

<sup>765</sup> Article 4 of the Greece-Cyprus BIT implies that MIG's investment 'is not subject to expropriation, nationalization or any other measures tantamount to expropriation or nationalization'.

### **3. *Theodoros Adamakopoulos and others v. Republic of Cyprus***

The case of *Adamakopoulos v Republic of Cyprus*<sup>766</sup> deals with the bailout of the two biggest Cypriot banks which arose in 2013 in Cyprus and affects the claimants, who are Greek citizens. The claimants, who are either depositors or bondholders, suffered significant losses either in Laiki Bank or in the Bank of Cyprus. It must be noted that the number of the claimants are 954, thus the case raises, once again, the issue of the admissibility of collective claims. In addition, according to the law firms of the claimants, the compensation of the complainants is estimated to be over €120 million in order to recover their losses. The claim is based on the non-discrimination provision of the Cyprus – Greece BIT, since the claimants argued that they were discriminated when the bailout arose because many public institutions of Cyprus were excluded. The case is still pending. The interesting point of this case is the fact that some of the claimants are depositors in the two banks, thus once the award is given it will be seen whether bank deposits will be treated as investments.

### **4. *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic***

Laiki Bank filed a claim against the Hellenic Republic,<sup>767</sup> based on the Cyprus – Greece BIT. Laiki Bank's claim focused on the standard of Fair and Equitable Treatment and the non-expropriation. It was argued that, while the Greek authorities rejected the two Laiki's subsidiaries, namely Marfin Egnatia and Investment Bank of Greece, from the provision of emergency liquidity assistance (ELA), the assistance was permitted to other local banks. It was further argued that they invested in Greek bonds, which were then haircut, thus the Bank suffered severe damages as a consequence of expropriation. The

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<sup>766</sup> *Theodoros Adamakopoulos and others v. Republic of Cyprus* (ICSID Case No. ARB/15/49) - pending

<sup>767</sup> *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic* (ICSID Case No. ARB/14/16) - pending

Respondent made an objection for the jurisdiction of the tribunal but without success. The case is still pending.

#### **5. *Bank of Cyprus Public Co. Ltd. v. Hellenic Republic***

Greece was hit with its fourth ever ICSID claim in February 2017 by the Bank of Cyprus following a dispute over debt instruments and banking services.<sup>768</sup> The exact nature of the dispute in this case is unclear. The only information provided by ICSID is the fact that the claim has been brought under the Cyprus – Greece BIT. It is noteworthy that the Bank of Cyprus does not operate any branches in Greece, since it had closed up its banking operations in the country in 2013 and was in the effort to dispose of its remaining real estate assets there.

#### **6. *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic***

One Slovakian bank, Poštová banka, and one of its shareholders, Istrokapital SE, initiated ICSID arbitration proceedings against Greece for the Private Sector Involvement Program (PSI), claiming that Greek measures deprived the value of their investments in Greek bonds back in 2012.<sup>769</sup> During the financial crisis that heavily hit the country, Greece was asked to issue five series of Greek Government Bonds (GGBs) and Poštová purchased a respectful amount of those GGBs, amounting to €504 million. As part of its sovereign debt restructuring, the IMF ordered the Greek government to replace its GGBs with new securities by implementing the Greek Bondholder Act. The facts of this dispute are similar to those of *Abaclat*, therefore the two cases will be examined comparatively. Accordingly, Poštová and Istrokapital sought compensation for Greece's alleged violation of the Greece – Slovakia BITs' provisions and Greece brought numerous

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<sup>768</sup> *Bank of Cyprus Public Co. Ltd. v. Hellenic Republic* (ICSID Case No. ARB/17/4) - pending

<sup>769</sup> *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8)

jurisdictional objections. The two key issues were, firstly, whether the shares of Istrokapital could constitute investments and, secondly, whether the purchase of bonds by Poštová fell within the scope of the Greece – Slovakia BIT.

Istrokapital claimed it had made an indirect investment in Greece, through Poštová's acquisition of the GGBs, and such investment was included in Article 1(c) of the Greece – Cyprus BIT by constituting 'monetary claims or any other claim arising out of a contract and having economic value'. The Tribunal held that Istrokapital's shares were not eligible to be considered as investment, based on previous case law on the matter<sup>770</sup> and on the general principle of commercial law which provides that a company is an independent and separate legal entity, distinguished from its shareholders, having its own assets, rights and obligations. Istrokapital would only have had a right to bring a claim based on measures taken against Poštová's assets, provided that those measures had diminished the Istrokapital's shares' value. However, Istrokapital did not rely on its shareholding to found its claim. In other words, Istrokapital lacked the necessary standing to pursue claims directly over Poštová's assets, as Poštová bank was the single owner of the Greek bonds. Consequently, Istrocapital's claim was rejected a priori for lack of jurisdiction. It is important to underline that the Tribunal was not absolute on its ruling, in the sense that it suggested that Istrokapital would satisfy the requirement of jurisdiction if it based its claim on its shareholding on Poštová bank.

Poštová supported that its interests in the GGBs was included on the general definition of 'investment' which was described in Article 1 of the BIT as 'every kind of asset and in

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<sup>770</sup> *HICEE B.V. v. Slovak Republic* (UNCITRAL, PCA Case No. 2009-11), *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL, PCA Case No. 2011-06), *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), *Sergei Paushok & Ors. v. Government of Mongolia* (UNCITRAL, Award on Jurisdiction and Liability of April 28, 2011)

particular, though not exclusively, includes...'<sup>771</sup> The Tribunal preferred a more general approach which took into account the wording of the BIT's provisions, the rules on interpretation of the Vienna Convention on the Law of Treaties, similar wordings in other BITs and previous case law. The Tribunal believed that 'the list of examples provided by the Slovakia – Greece BIT must...be considered in the context of the treaty and be given some meaning together. Otherwise, if the interpretation stops by simply indicating that any asset is an investment, the examples will be unnecessary, redundant or useless...'<sup>772</sup> They further noticed that the GGBs constitute both securities and sovereign debt.<sup>773</sup> However, securities are subject to specific regulations and sovereign debt has some special features, and neither sovereign debt nor public securities or other public obligations are mentioned in Article 1(1) of the Slovakia – Greece BIT.<sup>774</sup>

Then, the Tribunal examined whether the bank's interests in GGBs could fall within either Article 1(b) or Article 1(c) of the BIT. The former refers to 'shares in and stock and debentures of a company and any other form of participation in a company', while the latter covers 'loans, claims to money or to any performance under contract having a financial value'. The Arbitrators held that the wording of Article 1(b) clearly establishes that the bonds covered are only those bonds issued by a company and neither sovereign debt in general, nor bonds issued by either State party to the treaty, in particular.<sup>775</sup> A comparison between loans and bonds followed, which underlined that bonds are held generally by anonymous groups of creditors, are subject to several alterations of their value and, in the particular case, are directly linked with sovereign debt.<sup>776</sup> However,

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<sup>771</sup> Article 1 of the Slovakia – Greece BIT

<sup>772</sup> *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), paragraph 294

<sup>773</sup> *Ibid.*, paragraph 317

<sup>774</sup> *Ibid.*, paragraphs 318 - 323

<sup>775</sup> *Ibid.*, paragraphs 333 - 335

<sup>776</sup> *Ibid.*, paragraph 337

sovereign debt fell outside the scope of the BIT, an omission that led to the conclusion that bank's BBGs could not enjoy the protection offered by the BIT.

Finally, the Tribunal considered Article 25 of the ICSID Convention that grants jurisdiction to ICSID arbitral tribunals for 'any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State...' In the absence of a specific definition of investment in the Convention, arbitral tribunals established some key features that should be fulfilled in each case, including contribution of money, certain duration and the assumption of risk. Even when applying those criteria, it was found that Poštová's possession of interests in GGBs could still not be held to constitute investments, thus the Tribunal could not assume jurisdiction.<sup>777</sup>

There being no protected investment under the Slovakia-Greece BIT, the Tribunal declared that it lacks competence to decide the dispute. Remarkably, the Tribunal's conclusion in this case comes in contrast with the Decision of *Abaclat*, probably because of the difference in the wording of the two BITs, namely the Slovakia – Greece BIT and the Argentina – Italy BIT. In particular, the Tribunal in *Poštová* and *Istrokapital* held that the language in Slovakia – Greece BIT was not as broad as the Tribunal in *Abaclat* considered as language that would comprise bonds, i.e., 'any right of economic nature conferred under law or contract'. The comparison between the two cases strengthen the argument that there is significant uncertainty in the system of international investment arbitration regarding this area and a lack of a consistent line.

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<sup>777</sup> *Poštová*, paragraphs 351 - 359

## **7. Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium**

In the first ever ICSID claim brought by investors from mainland China,<sup>778</sup> two Chinese insurance giants initiated arbitration proceedings against Belgium, based on the Belgium–Luxembourg Economic Union (BLEU) and China BIT, which was firstly signed in 1986 and replaced in 2009.

In 2007, the two claimants held the majority of shares in an international banking and insurance group, the Fortis group, which was regulated by Belgian, Dutch and Luxembourg authorities. As a consequence of the global financial crisis, Fortis suffered serious problems with its liquidity and, as a response, the Belgian government adopted a series of measures that resulted in the nationalisation of the subsidiary of the group in Belgium. Those restructuring measures dramatically decreased the value of interest that the shareholders of Fortis had at that time. The failure of the measures to rescue Fortis group led to the sale of the Belgian subsidiary to BNP Paribas one year later. The sale of Fortis meant that the claimants suffered a significant loss of their investment.

According to the original BIT between BLEU and China, signed in 1986, international arbitration could be an option for foreign investors only for the determination of the amount of compensation in case their investment has been expropriated. Other than that, ‘all disputes’ fell into the exclusive jurisdiction of national courts. In contrast, the new version of the BIT, signed in 2009, includes much broader dispute settlement terms, which gives the investors the option to initiate ICSID arbitration proceedings against the host State for any type of dispute that may arise. Two months before the entry into force

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<sup>778</sup> *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29)*

of the updated BIT, the claimants sent a notice of dispute to the Belgian government based on the original BIT. In 2012, the claimants filed an application with ICSID citing the 2009 BIT provision on dispute settlement and also communicated with the Belgian government to affirm that the notice of dispute they sent before was under the new BIT. However, the substance of the claim was fully based on the obligations under the 1986 BIT regarding expropriation and nationalisation and general principles of international law.

Belgium raised five objections on the matter of jurisdiction, and the tribunal found in favour of Belgium based only on its first objection, namely *ratione temporis*, thus it never addressed the remaining four. Belgium argued that the dispute arose before the entry into force of the 2009 BIT, which did not have retrospective effect, and did not contain the obligations under the 1986 BIT and general principles of international law that the claimants revoke on their claims.

After discussing previous awards of international tribunals dealing with the principle of non-retroactivity in international law, the Decision underlined that the matter of non-retroactivity was irrelevant in that case since ‘the temporal application of jurisdictional provisions is a question separate from the retroactivity of substantive provisions’;<sup>779</sup> and ‘the application of a new dispute settlement mechanism to acts which may have been unlawful when they were committed is not in itself the retroactive application of law’.<sup>780</sup> The Tribunal continued to interpret the arbitration clause of the 2009 BIT in order to examine whether it encompasses disputes previously notified but not submitted to a formal judicial or arbitral process before it entered into force. Their outcome that such disputes were not included to the 2009 BIT was reasoned by six arguments. The literal

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<sup>779</sup> *Ping An Life*, paragraph 186

<sup>780</sup> *Ibid.*, paragraph 218



interpretation of the arbitration clause showed that it only referred to future disputes and not those that had already arisen, because of the choice of words used. In particular, the clause states that ‘[w]hen a legal dispute arises [...] either party to the disputes shall notify [...]’ rather than ‘has arisen’ or ‘shall have notified’.<sup>781</sup> The Preamble of the BIT had nothing that could indicate the retro-activity of the arbitration provision and the Tribunal refused to fill this lacuna by the method of ‘creative interpretation’. Moreover, it was clarified that while prior investments were covered by the new BIT, the same did not apply for prior disputes. The claimants supported that since the 2009 BIT only stated that it does not apply to disputes already under judicial or arbitral process before it came into force impliedly meant that disputes already notified but not yet under judicial or arbitral process could be covered. Such an argument was rejected by the Tribunal and it was further explained that the new BIT could not be applicable to those ‘notified by not matured’ disputes just because it substituted the original BIT. Finally, the tribunal considered the potential consequences had the claim be allowed to proceed, and expressed its worries that claimants would be granted access to a significantly broader dispute settlement mechanism merely by the entering into force of the 2009 BIT, without having any express consent by the contracting parties. Despite the admission of the risk that some disputes, including the one before them, ‘might fall into some ‘black hole’ or ‘arbitration gap’ between the two BITs’,<sup>782</sup> the Tribunal concluded that they could not justify the extension of the 2009 BIT scope to settle the particular dispute on any ground. Nevertheless, they did not exclude the possibility that the claimants could still use other remedies, such as commencing a new claim (either investor–state or state–state) under the 1986 BIT, or bringing a proceeding in the national courts of Belgium.

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<sup>781</sup> *Ping An Life*, paragraph 224

<sup>782</sup> *Ibid.*, paragraph 207

#### IV. CONCLUDING REMARKS

This chapter has sought to provide an overview of the position that international arbitration has adopted when arbitrators were asked to review the conformity of the post-crisis measures adopted at the EU and national level with the standards afforded to the protection of foreign investors. The example of the Argentinian crisis and the way international arbitration handled it could constitute a benchmark and an indication of how other arbitral tribunals in the pending cases could approach the matters of financial instruments as investments and the financial crisis.

It should be stressed here that any conclusion drawn at this stage<sup>783</sup> is premature, since there are plenty of arbitral cases regarding the Eurozone that are still pending. A further limitation should be mentioned here. Most of the cases concerned in this chapter are under the ICSID regime, with the case of *FBME v Cyprus*<sup>784</sup> being the only exception. However, the fact that it is not ICSID, but a different arbitral institution that manages this case does not seem to change the conclusions that have been drawn in this thesis, since arbitrators share similar philosophy and approach the issue similarly, irrespective of the institution they belong to. In other words, arbitrators take into account similar considerations when deciding cases on alleged expropriation and measures being defenced on the ground of necessity. For example, as seen in the Literature Review, when applying the principle of proportionality, most arbitrators take into account the effects of the measure on international commerce and the economic impact on the investment.

Undeniably, from a procedural point of view, all arbitral tribunals have offered sufficiently effective protection, in the sense that the applicants' rights of access to justice

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<sup>783</sup> At least for the time being

<sup>784</sup> *FBME v Republic of Cyprus*, ICC

and a fair trial have been respected. Thus, procedurally, both litigation and arbitration satisfy the principle of effective (judicial) protection. However, one of the differences between litigation and arbitration lies on the ground of jurisdiction. While courts refused jurisdiction to hear the cases that concern the financial crisis, by declaring that they fall outside the scope of EU law, arbitral tribunals are more likely to assume jurisdiction and proceed to the merits of the disputes, as happened in the case of *Abaclat* and as it is expected to happen in cases that were brought by shareholders that clearly fall under the scope of the relevant BIT. From this point of view, it can be argued that arbitration offers more effective protection than litigation, since parties are given the opportunity to present their arguments in the substance of their cases instead of rejecting them by denying that they have jurisdiction. While no legal organ within the EU legal order is available for them, individuals should limit their judicial protection to their national courts, and particularly to the district courts of their countries, which prefer to remain distant from any political consideration and whose rulings are given with notable delay. This is the reason why arbitration can operate as a worthy available forum where individuals<sup>785</sup> can have their disputes being heard.

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<sup>785</sup> At least those who are covered by BITs or other agreements that provide for arbitration

## **CHAPTER SIX**

### **THE FUTURE OF ARBITRATION IN THE EU LEGAL ORDER**

In the two previous chapters, the approach of courts and arbitrators towards the protection of bank depositors has been measured based on the principle of effectiveness, not only in its procedural sense, but also in its substantial one. The method used was the comparative research, and particularly the microcomparison, since the means through which the different legal regimes, i.e. litigation and arbitration, resolve the same legal problem was compared. But, demonstrating that arbitral tribunals can offer more effective protection to bank depositors and other affected individuals is insufficient, if the awards rendered by such actions do not have a standing in the EU legal order. Now, in the last chapter before the Conclusion, the final research question of this thesis is answered and the traditional exclusion of arbitration is contrasted with the recent trends so as to develop arguments to support that arbitration constitutes an available avenue within the EU law regime.

It should be underlined here that the discussion on this chapter does not concern exclusively the matter of bank depositors. Instead, the case of the financial crisis works as an example in order to prove that arbitration can have a general role to play in the EU legal order.

Traditionally, there was a lack of interaction between EU law and international arbitration law. Furthermore the common commercial policy of the EU did not include investment law, thus EU law lacked any competence over Bilateral Investment Treaties (BITs), which belonged to the exclusive external competences of Member States. However, the Lisbon Treaty incorporated foreign direct investment (FDI) into the exclusive

competences of the EU, by including it in the scope of the CCP,<sup>786</sup> which means that the Union has now the authority to take external action regarding the admission and establishment of foreign investment and the conclusion of international investment agreements.

Despite the traditional distance between EU law and arbitration, there are some recent trends that suggest that the EU legal order has some place available for investment arbitration. The two most remarkable examples are CETA<sup>787</sup> and TTIP,<sup>788</sup> which provide for an ICS that resonates with many of the features of arbitration. In particular, the dispute resolution mechanism negotiated in TTIP reflects the European Commission's attempts to establish a 'court' but, at the same time, preserve the enforcement of the decisions as 'awards' rendered by a 'tribunal'.<sup>789</sup> It should be underlined here that the discussion on TTIP only aims at examining the EU's attitude towards arbitration and will not consider any recent development guided by the post-Trump US' policy on the area.

Furthermore, it is a well-established principle that any external judicial system with the authority to hear disputes by individuals within the Union is incompatible with EU law.<sup>790</sup>

Compatibility with EU law was only found when those bodies' jurisdiction does not

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<sup>786</sup> Article 206 TFEU

<sup>787</sup> EU–Canada Comprehensive Economic Trade Agreement, 29 February 2016, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

<sup>788</sup> EU–US Transatlantic Trade and Investment Partnership EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (accessed 22 July 2017)

<sup>789</sup> European Commission, 'Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', Commission Staff Working Document, 13 January 2015, available at:

[http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (accessed 22 July 2017); St. Schill, 'Editorial: The German Debate on International Investment Law' (2015) 16 *The Journal of World Investment & Trade*, 1

<sup>790</sup> Opinion of 26 April 1977, *re Inland Waterways*, **Opinion 1/76**, EU:C:1977:63; Opinion of 14 December 1991, *on the creation of the European Economic Area*, Opinion 1/91, EU:C:1991:490; Opinion of 28 March 1996, *Accession to the ECHR*, Opinion 2/94, EU:C:1996:140; Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123; Opinion of 18 December 2014, *Accession to the ECHR*, Opinion 2/13, EU:C:2014:2454

involve individuals, or when the claims are brought by individuals but do not relate to the Union or any Member State. This conventional approach is criticised in this chapter, by referring to the landmark case of *Eureko v Slovak Republic*.<sup>791</sup> Four arguments are then developed to support that arbitration can be used by bank depositors in disputes regarding the financial crisis without being in contrast with EU law, with the final one suggesting that investment tribunals could be allowed to make references to the CJEU for a preliminary ruling.

To this effect, the chapter firstly explains the traditional relationship between EU law and arbitration (i) and between EU law and International Investment law (ii). It then outlines the recent trends on arbitration in the EU (iii), namely the CETA and the TTIP, and proceeds with the development of some arguments supporting that arbitration does have a role in the EU law regime (iv). It concludes with a general overview of the matters discussed (v), so as to lead to the final conclusion of the thesis in which all considerations are to be synthesised.

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<sup>791</sup> *Eureko B.V. v The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (Oct.26, 2010)

## I. EU LAW AND ARBITRATION

‘EU law and the law of international arbitration have traditionally occupied largely separate worlds, as if arbitral tribunals would rarely be the fora for the resolution of EU law claims and as if EU law, in turn, had little concern with arbitration.’<sup>792</sup> The absence of any interaction between EU law and international arbitration law is rather due to traditional assumptions made by EU law than *vice versa*.<sup>793</sup>

In 1958 two treaties came into force, each of them pursuing its own separate policy aims. The Treaty Establishing the European Economic Community<sup>794</sup> and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>795</sup> set the foundations of the EU legal regime and the international arbitration regime respectively.<sup>796</sup>

‘In theory, arbitration merely offers another forum for giving effect to EU law in private legal relations, and to that extent serves EU law's purposes.’<sup>797</sup> However, EU law maintains some distance from arbitration, which has been reflected in various ways. Firstly, for many years, EU law did not intersect with private international law, and thus with arbitration.<sup>798</sup> Secondly, arbitral tribunals have not been allowed to make preliminary references to the ECJ, when applying aspects of EU law.<sup>799</sup> Finally, Brussels I Regulation, the leading legal instrument of EU law that governs the jurisdiction of courts

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<sup>792</sup> G. A. Bermann, ‘Reconciling European Union Law Demands with the Demands of International Arbitration’ (2011) 34 *Fordham International Law Journal* 1193

<sup>793</sup> G. A. Bermann, ‘Navigating EU law and the law of International Arbitration’ (2012) 28 *Arbitration International* 397

<sup>794</sup> Treaty Establishing the European Economic Community, Rome Treaty, 1957

<sup>795</sup> New York Convention on The Recognition And Enforcement Of Foreign Arbitral Awards of 10 June 1958, 330 U.N.T.S. 38

<sup>796</sup> In fact, the first legal document on international arbitration was the Convention (I) for the Pacific Settlement of International Disputes (Hague I); 29 July 1899

<sup>797</sup> G. A. Bermann, ‘Navigating EU law and the law of International Arbitration’ (2012) 28 *Arbitration International* 397

<sup>798</sup> *Ibid.*

<sup>799</sup> Judgment of 23 March 1982, *Nordsee Deutsche*, Case-102/81, ECLI:EU:C:1982:107

and the recognition and enforcement of judgments in civil and commercial matters, excludes arbitration from its scope.<sup>800</sup> Even its Recast Regulation of 2012 maintains the exclusion of arbitration.<sup>801</sup>

Although EU law has historically regulated a wide range of areas, private international law did not belong to them. Constitutional and administrative law, as well as transport law, common commercial policy, competition law and the creation of the internal market, constitute the principal interests of the EU architects. Recently, environmental law<sup>802</sup> and consumer protection<sup>803</sup> have been added to the broad list of areas which are governed by EU law. Private international law did not belong to the sphere of EU regulation, probably because of the initial refusal of the Union to intervene in private legal relations.<sup>804</sup> Indicatively, the EEC Treaty stated that any harmonization in the field of private international law would proceed outside the framework of EU law, through a wholly separate convention to be entered into by the Member States.<sup>805</sup> The consequence of that statement was the entry of the Member States into the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters.<sup>806</sup> Private International law finally fell within the scope of EU law with the Treaty of Maastricht,<sup>807</sup> which relegated the field to the Union's 'third pillar' on justice and home

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<sup>800</sup> Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ 2 012/01, Article 2(1)(a)

<sup>801</sup> Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ 2 351/1

<sup>802</sup> Articles 132-133 TFEU

<sup>803</sup> Articles 169 TFEU

<sup>804</sup> For a discussion on the evolving role of Private International law in EU law see: A. Mills, 'The identities of Private International Law: Lessons from the US and EU revolutions' (2013) 23 *Duke Journal of Comparative & International Law*, 445; E. C. Ritaine, 'Harmonising European Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information*, 419; J. Basedow, 'The communitarization of the conflict of laws under the Treaty of Amsterdam' (2000) 37 *Common Market Law Review*, 687; P. Stone, *EU Private International Law* (3<sup>rd</sup> edn, Elgar European Law, 2016)

<sup>805</sup> EEC Treaty, Article 220(4)

<sup>806</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1998] OJ 1 27/1

<sup>807</sup> Consolidated version of the Treaty on European Union, Treaty of Maastricht [1992] OJ 1 325/5



affairs. ‘Third pillar’ matters are conducted at the inter-governmental level, while ‘first pillar’ matters require qualified majority voting among the Member States in the Council, executive authority in the European Commission, and judicial review by the CJEU. It was only after the Treaty of Amsterdam,<sup>808</sup> that private international law was recognised as a ‘first pillar’ area for the Union, resulting in the adoption of Brussels Convention of 1968 and the following Brussels I Regulation that is directly applicable to all Member States.

A well-established mechanism of EU law which ensures its correct application is the preliminary reference. Under this mechanism, which is provided for in Article 267 TFEU, the highest court of each Member State can refer questions to the ECJ on the meaning and validity of EU law for the effective disposal of cases before them. According to Article 267, preliminary references are allowed to be made by any ‘court or tribunal of a Member State’. As the ECJ held in the *Nordsee* case,<sup>809</sup> arbitral tribunals did not constitute tribunals of a Member States, even when they have their seat in the territory of a Member State and the *lex arbitri* is the state’s law of arbitration. In other words, arbitral tribunals cannot request preliminary rulings on the interpretation or validity of EU law. Such a textual interpretation of the Treaty leaves arbitral tribunals unguided when they have to deal with a case governed by EU law. Arbitrators ‘cannot seek the kind of guidance on the meaning or validity of the relevant EU law norms that would ordinarily be available to a national court hearing the identical dispute’.<sup>810</sup> It could be argued that this exclusion of arbitral tribunals from preliminary references affects the effectiveness of EU law, since the relevant provisions of EU law might be misunderstood and applied wrongfully by the arbitrators. Notwithstanding the constant revisions of European

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<sup>808</sup> Consolidated version of the Treaty on European Union, Treaty of Amsterdam [1997] OJ 1 340/1

<sup>809</sup> Judgment of 23 March 1982, *Nordsee Deutsche*, Case-102/81, ECLI:EU:C:1982:107

<sup>810</sup> G. A. Bermann, ‘Navigating EU law and the law of International Arbitration’ (2012) 28 *Arbitration International* 397

legislation, arbitral tribunals remained excluded from bringing preliminary references to the CJEU. ‘Whether driven by an assumption that EU law issues will seldom arise in arbitration, by a desire not to overburden the Court, by a textual interpretation of the treaty language ‘courts or tribunals of member states,’ or by some other purpose,’ this exclusion keeps EU law distant from international arbitration.<sup>811</sup>

The 1968 Brussels Convention constituted a legal instrument outside the EU legal regime and expressly excluded arbitration from its scope. According to it, national courts did not have jurisdiction to hear arbitration cases and give judgments on them.<sup>812</sup> Moreover, matters of judicial jurisdiction and the judicial recognition and enforcement of prior judgments were excluded, when the claim or judgment in question related to arbitration, either because of the existence of an arbitration agreement or of an arbitral award on the same dispute. According to the Jenard Report, the Brussels Convention did not cover claims for the enforcement of arbitration agreements or the annulment of awards, applications for interim relief in support of arbitration, and claims to enforce foreign arbitral awards.<sup>813</sup> The Schlosser Report gave some further specific examples of court proceedings which were not covered by the Convention, including the appointment or dismissal of arbitrators, the determination of the place of arbitration and the extension of the time limit for giving the award.<sup>814</sup> The reason for that exclusion lies in the belief that since the New York Convention had already addressed all the arbitration proceedings, there was no need to intervene on that well-established regime.

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<sup>811</sup> G. A. Bermann, ‘Navigating EU law and the law of International Arbitration’ (2012) 28 *Arbitration International* 397

<sup>812</sup> Brussels Convention, Article 1(4)

<sup>813</sup> The Jenard Report OJ 1979, C 59, 1

<sup>814</sup> The Schlosser Report, OJ 1979, C 59, 71

In 2000 the Convention became a secondary legal instrument of EU law in the form of the Brussels I Regulation and, from 2012, the Recast Brussels I applies. Both versions of the Regulation exclude arbitration. The statement ‘This Regulation shall not apply to arbitration’ leaves unclear what is exactly excluded by the Regulation. It is doubted whether only arbitral proceedings are excluded or whether court proceedings relating to arbitration are also covered by that exclusion.<sup>815</sup>

In addition to the abovementioned Reports which tried to delineate the extent of the exclusion, the case law of the Brussels Convention could be examined.

The first case in which the ECJ had to decide on a matter relating to the interface between arbitration and litigation was the case of *Marc Rich & Co. AG v Società Impianti PA*,<sup>816</sup> which concerned a contract for the sale of crude oil, in which the buyer was a Swiss company (Marc Rich) and the seller an Italian company (Impianti). When the defendant denied the validity of the arbitration clause and commenced proceedings before an Italian court, the claimant made an application for the English High Court to appoint an arbitrator on Impianti’s behalf. The English Court of Appeal made a preliminary reference to the ECJ, which held that the proceedings before the English courts did not fall within the scope of the Brussels Convention, because they were ancillary to arbitration proceedings. The fact that the validity of the arbitration agreement was contested did not alter the Court’s decision. The ECJ found that the contracting parties to the Brussels Convention ‘intended to exclude arbitration in its entirety, including proceedings brought before national courts’.<sup>817</sup> As it was stated: ‘In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the

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<sup>815</sup> T. C. Hartley, ‘The Brussels I Regulation and arbitration’ (2014) 63 *International and Comparative Law Quarterly*, 843

<sup>816</sup> Judgment of 25 July 1991, *Marc Rich*, Case-190/89, ECLI:EU:C:1991:319

<sup>817</sup> *Ibid.*, paragraph 18

dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.’<sup>818</sup> That ruling of the ECJ demonstrated the interpretations of the Jenard and Schlosser Reports and confirmed that the Brussels Convention excluded from its scope any court proceedings ancillary to arbitration proceedings.

In the *Van Uden* case<sup>819</sup> the ECJ was asked to rule on the question of applicability of the Brussels Convention to the provisional measures applied for by a party to arbitration. Asset-freezing orders, even if granted in support of arbitration proceedings, differ from the other court proceedings ancillary to arbitration, such as the appointment of arbitrators. While the latter are inherent part of the arbitration process, the former could be equally used to support court proceedings. Therefore, preliminary measures are independent from the law of arbitration. In this case the reference to the ECJ concerned an interim-payment order, granted as a provisional measure in aid of arbitration. At first, the ECJ demonstrated that no any courts of any Member State should have jurisdiction as to the substance of the case, since a valid arbitration agreement exists. It then held that ‘provisional measures are not in principle ancillary to arbitration proceedings as they are ordered in parallel as measures of support’.<sup>820</sup> If the subject matter of the substantive claim, in that case performance of the contract as such, is covered by the Brussels Convention, then the Convention applies to provisional measures granted in aid of it, irrespective of whether the claim is subject to arbitration.

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<sup>818</sup> *Marc Rich*, paragraph 26

<sup>819</sup> Judgment of 17 November 1998, *Van Uden*, Case-391/95, ECLI:EU:C:1998:543

<sup>820</sup> *Ibid.*, paragraph 33

The prohibition of anti-suit injunctions under the Brussels Convention creates the question whether anti-suit injunctions are also prohibited regarding arbitration, as far as arbitration is also explicitly excluded from the scope of the Convention. Generally, a court of a Member State, even if it has jurisdiction, cannot forbid parties from bringing a claim based on the same facts to a court of another Member State. The ECJ first considered the place, if any, of anti-suit injunctions on the EU legal order in the *Turner v Grovit*,<sup>821</sup> a case which did not involve arbitration. The Court clearly prohibited parties from enforcing by anti-suit injunction a contractual clause which provided that parties would submit their disputes only to the courts of a particular Member State. According to the judgment, ‘a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court’s jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.’<sup>822</sup>

Anti-suit injunctions have been found incompatible with Brussels I Regulation, even if they relate to arbitration, which is excluded from the scope of the Regulation. The ECJ was faced with the relationship between arbitration and anti-suit injunctions in the *Allianz SpA v West Tankers Inc.*<sup>823</sup> The case concerned a claim in Italy, despite the existence of an arbitration agreement in London, and a second claim in London seeking the enforcement of the arbitration agreement and the suspension of the court proceedings in Italy. The House of Lords, in a preliminary reference to the ECJ, raised the question whether anti-suit injunctions are prohibited even when they are granted because the foreign proceedings were in conflict with an arbitration agreement. In other words, the

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<sup>821</sup>Judgment of 27 April 2004, *Turner v Grovit*, Case-159/02, ECLI:EU:C:2004:228

<sup>822</sup> *Ibid.*, paragraph 27

<sup>823</sup>Judgment of 10 February 2009, *Allianz SpA v West Tankers Inc.*, Case-185/07, ECLI:EU:C:2009:69

House of Lords asked whether the exclusion of arbitration from the scope of Brussels I also meant the isolation of anti-suit injunctions from the rule laid down in *Turner v Grovit*, since such an injunction would be granted in proceedings which were not regulated by the Regulation. Initially, the ECJ demonstrated that any court actions regarding the enforcement of arbitration agreements and arbitral awards are excluded from Brussels I scope of application. However, it held that if the subject matter of the dispute, in that case a claim for contract damages, fall within the scope of the Regulation, then any matter relating to the arbitration agreement is also covered by it.

In the Court's words, 'if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. .. It follows ... that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.'<sup>824</sup>

The rule derived from that judgment is that the decisive factor for the prohibition of anti-suit injunctions in every case is not whether the given proceedings fall within the scope of Brussels I, but whether the proceedings '*against which the injunction is directed* fall within its scope'.<sup>825</sup> Therefore, the *Marc Rich* principle on the subject-matter of the proceedings is confirmed and applied in each case. The rationale behind this decision is

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<sup>824</sup> *West Tankers*, paragraphs 26-29

<sup>825</sup> T. C. Hartley, 'The Brussels I Regulation and arbitration' (2014) 63 *International and Comparative Law Quarterly*, 843, at 853

to ensure the application of Brussels I to all the aspect of court proceedings in civil and commercial matters. Court proceedings ancillary to arbitration are excluded from its scope since they are more closely connected with arbitration than with the subject-matter of the Regulation. On the other hand, an anti-suit injunction, even if it prevents interferences with arbitration, affects court proceedings significantly, as they can stop them, before reaching a final decision. Consequently, prohibiting anti-suit injunctions whenever court proceedings are governed by Brussels I, could be reasonable.<sup>826</sup>

The Recast Brussels I Regulation, in force from January 2015,<sup>827</sup> operated as an opportunity for negotiations regarding the role of arbitration in the EU legal order. Various proposals were made, including the abolition of the arbitration exclusion and the total exclusion of arbitration. Abrogating the exclusion of arbitration would include arbitration within the sphere of governance of the Regulation and, as a consequence, within the competences of EU law.<sup>828</sup> In contrast, completely excluding arbitration would exclude a great number of cases in which arbitration might have been incidentally involved, from the Regulation scope and it would send them back to national law of the Member States, as if no any Convention would have bound them. Both proposals were unacceptable by many Member States.<sup>829</sup>

In an effort to find ‘the golden section’, the Commission supported the maintenance of the exclusion of arbitration, but also proposed that once proceedings had started in an arbitral tribunal or in a court in a Member State, which was the seat of the arbitration, ‘the

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<sup>826</sup> N. A. Dowers, ‘The anti-suit injunction and the EU: legal tradition and Europeanisation in international private law’ (2013) 2 *Cambridge Journal of International and Comparative Law*, 960

<sup>827</sup> Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ 2 351/1

<sup>828</sup> Commission, Green Paper on the review of Council Regulation (EC) No 44/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil an Commercial Matters, COM (2009) 175 final, 9-11

<sup>829</sup> Draft Report of MEP Zwifka of 28 June 2011, 2010/0383 (COD)

courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings'.<sup>830</sup>

In other words, a court in a Member State whose jurisdiction is contested on the basis of an arbitration agreement should stay the proceedings before it, once the arbitral tribunal or the courts of the Member State where the seat of the arbitration is located have been seized and the challenge is based on the arbitration agreement. If the court/ tribunal first seized confirmed the validity of the arbitration agreement, the court whose jurisdiction was contested had to decline jurisdiction. In case the arbitration agreement was declared invalid by the court/ tribunal first seized, the court could continue with the case.

It could be argued that such a proposal seems like the *lis pendens* rule and the anti-suit injunctions. As the Commission clarified, 'this modification will enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics'.<sup>831</sup>

That proposal received criticism based on the arguments that the Brussels I Regulation should not refer to the seat of arbitration in order to avoid further complexity, and that the New York Convention works autonomously and effectively for years.<sup>832</sup> As a result, the Recast Brussels I maintains the exclusion of arbitration and includes Article 73(2) and Recital 12 which refer to arbitration.

Article 73(2) states that the Regulation does not affect the application of the New York Convention. Although Article 71(1) of the Brussels I refer to 'conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction

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<sup>830</sup> Commission, Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 14 Dec. 2010, COM (2010) 748 final/2, Article 29(4)

<sup>831</sup> *Ibid.*, Article 9

<sup>832</sup> P. A. Nielsen, 'The New Brussels I Regulation' (2013) 50 *Common Market Law Review*, 503



or the recognition or enforcement of judgments’, it is the first time now that there is a specific reference to the New York Convention and this can be interpreted as a recognition of the particular importance of the subject of the relationship of EU law with arbitration.

Recital 12 consists of four paragraphs which concern the exclusion of arbitration regarding court jurisdiction, arbitration proceedings and the recognition and enforcement of arbitral awards.

The first paragraph repeats that arbitration is outside the scope of the Recast Regulation. As it is further stated: ‘Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.’<sup>833</sup> In other words, each Member State can maintain its national law governing the validity and enforcement of arbitration agreements.

The following paragraph provides that decisions of a national court regarding the validity of the arbitration agreement are not governed by the rules of the Recast Brussels I on the recognition and enforcement of foreign judgments. That means that a decision made in the court of one Member State which upholds or annuls an arbitration agreement, is not necessary to be recognised and enforced by the courts of any other Member State. It could

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<sup>833</sup> Recital 12(1)

also be argued that ‘although this provision does not expressly apply to rulings on the applicability of an arbitration agreement, there is little doubt that this too is covered’.<sup>834</sup>

Paragraph three explains that in cases a national court, which has jurisdiction under the Regulation, has set aside an arbitration agreement, this does not preclude the recognition and enforcement of the judgment on the substance, as it is provided in the Regulation. Therefore, it is clear that judgments on the substance are covered by the Regulation rules on recognition and enforcement, even if the court has set aside an arbitration agreement in order to determine its jurisdiction. Such a provision does not affect the recognition and enforcement of an arbitral award according to the rules of the New York Convention, and thus it does not affect the dilemma whether a court judgment or an arbitral award should take precedence. ‘This question is left to national law, so Member States are free to give priority to the award or the judgment, as they deem appropriate.’<sup>835</sup>

Finally, Recital 12 clarifies that the Regulation does not apply ‘to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure.... nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award’.<sup>836</sup> This paragraph confirms the Jenard and Schlosser Reports, as well as the rulings of *March Rich* and *Van Uden* cases.

In sum, both the case law of the CJEU and the Union legislation exclude arbitration from the scope of EU law and declare the lack of competence of national courts of the Member States and the EU courts to decide matters that concern arbitration proceedings.

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<sup>834</sup> T. C. Hartley, ‘The Brussels I Regulation and arbitration’ (2014) 63 *International and Comparative Law Quarterly*, 843, at 858

<sup>835</sup> P. A. Nielsen, ‘The New Brussels I Regulation’ (2013) 50 *Common Market Law Review*, 503, at 511

<sup>836</sup> Recital 12(3)

## II. EU LAW AND INTERNATIONAL INVESTMENT LAW

Traditionally, the common commercial policy of the EU did not include investment law, thus the Union could not legislate or enter into international agreements within this field.<sup>837</sup> Consequently, EU law lacked any competence over Bilateral Investment Treaties (BITs), for which, each Member State had exclusive external competence. The initial little interest for the relationship between the two regimes can be attributed to the traditional absence of any substantial connection between BITs and EU law. Mostly, BITs were signed between Member States, exercising their external competence, and third countries, thus the internal law of the Union was not apparently affected.<sup>838</sup>

### 1. Bilateral Investment Treaties and EU law

The initial provisions of the EU legislation did not expressly refer to investment matters when enumerating the express competences of the Commission, though it has always been doubted whether investment and trade are separate and not interrelated concepts. While Article 133 TEU provided for ‘uniformity in measures of liberalisation’ but only referred to ‘tariff and trade agreements’,<sup>839</sup> the CJEU interpreted those terms broadly and held that the CCP competences are non-exhaustive, underlining that the ultimate purpose should be the effective protection of the EC commercial interests.<sup>840</sup> That approach by the CJEU meant that some of the aspects of foreign investment could be covered by the

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<sup>837</sup> Article 51 TFEU that establish the common commercial policy as an exclusive competence of the Union; G. A. Berman *et al.*, *Cases and Materials on European Union Law* (3<sup>rd</sup> edn, American Casebook Series, 2010) at 1091-1094 and 1181-1182

<sup>838</sup> T. Eilmansberger, ‘Bilateral Investment Treaties and EU Law’ (2009) 46 *Common Market Law Review*, 383, at 387

<sup>839</sup> Treaty of Nice amending the Treaty on European Union [2001] OJ 1 80/1, Article 133(1)

<sup>840</sup> Opinion of 11 November 1975, *pursuant to Article 228 (1) of the EEC Treaty*, Opinion 1/75, ECLI:EU:C:1975:145 and Opinion of 4 October 1979, *International Agreement on Natural Rubber*, Opinion 1/78, ECLI:EU:C:1979:224

CCP, particularly those aspects in the trade of services which are analogous to trade in goods.<sup>841</sup>

Some years later, Opinion 2/92 and the Treaty of Amsterdam reassured this position. The former demonstrated that the decision whether or not to assign foreign investors national treatment does not fall within the scope of the CCP,<sup>842</sup> while the latter reinforced Opinion 1/94, but at the same time did not rule out a future addition of intellectual property rights into the CCP.<sup>843</sup>

On 1 December 2009, the Lisbon Treaty inserted the foreign direct investment (FDI) on the exclusive competences of the EU, by including it in the scope of the CCP.<sup>844</sup> Remarkably, the Commission described FDI as ‘a new frontier for the common commercial policy’.<sup>845</sup>

In that way, the Union has now the power to take external action in most aspects of foreign investment regulation; though, this power is not absolute. The admission and establishment of foreign investment forms part of the Union’s competence, since they are directly related with the principles of uniformity and liberalisation, which are promoted by the CCP. Moreover, the Union is empowered to substitute Member States in the conclusion of international investment agreements. The implementation of the Lisbon Treaty was followed by a debate between the EU Commission and the Member States on

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<sup>841</sup> Opinion of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, ECLI:EU:C:1994:384, para 41-47

<sup>842</sup> Opinion of 24 March 1995, *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment*, Opinion 2/92, ECLI:EU:C:1995:83

<sup>843</sup> P. Craig and G. De Búrca, *EU law: text, cases, and materials* (5<sup>th</sup> edn, Oxford University Press, 2011) 321

<sup>844</sup> Article 206 TFEU

<sup>845</sup> Commission Communication ‘Towards a comprehensive European international investment policy’ of July 7, 2010, COM (2010) 343 final, p. 7

the proper separation of their respective powers in the field of investment.<sup>846</sup> Both sides made remarkable efforts to negotiate on their treaty-making powers regarding International Investment Agreements with third countries that may hinder them from focusing on the design of the new investment policy of the EU.

The addition of FDI within the scope of the CCP illustrated the beginning of the collective effort, at a Union level, to reconsider the borderline of competences between the Union and Member States, ‘by simplifying the complex system of rules, solidifying Union competence with regard to certain aspects of foreign investment regulation and offering a framework for establishing a common foreign investment policy’.<sup>847</sup>

Likewise most powers of the Union in this area, the ambit of the new Union competence on FDI is undefined. However, the exclusive nature of this competence is undisputable. In 2012, a new EU Regulation was adopted, known as ‘grandfathering regulation’, considering BITs between Member States and third countries.<sup>848</sup> The exclusive competence of the Union over investment matters resulted in the loss of some powers of Member States, thus existing BITs of Member States were rendered ‘unconstitutional’ under EU law. Though their validity under international law remained unaffected, under EU law, only the Union can enter into such treaties with third countries and be a contracting party. This Regulation allows Member States to enter into new BITs with third states only after the authorization of the European Commission.<sup>849</sup> However, informally, the Commission had already warned Member States that it would give its

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<sup>846</sup> A. Reinisch, ‘The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements’ (2014) 12 *Santa Clara Journal of International Law*, 111, at 119

<sup>847</sup> A. Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing parallelism between internal and external economic relations?’ (2008), 4 *Croatian Yearbook of European Law and Policy*, 101, at 113

<sup>848</sup> Regulation No. 1219/2012 establishing transitional arrangements for bilateral investment treaties between Member States and third countries (2012) OJ 2 351/40

<sup>849</sup> *Ibid.*, Articles 7-10

consent to their pending negotiation and implementation of BITs with third countries, even before the adoption of the ‘grandfathering regulation’.<sup>850</sup>

The CJEU examined the compatibility of BITs between Member States and third countries with EU law and proved that Article 351(2) TFEU can be ‘a rather sharp tool’<sup>851</sup> by holding that Austria’s,<sup>852</sup> Sweden’s<sup>853</sup> and Finland’s<sup>854</sup> BITs with third states were inconsistent with Council measures restricting the free movement of capital and payments as protected by the TFEU, by providing clauses that guarantee investors the free transfer of payments with an investment. Though the Commission could not demonstrate its argument on real facts, since the Council had never taken such measures, the mere potential risk of conflict between the BITs’ and EU law rules’ obligations was ruled to be capable of impeding the practical effectiveness of EU law. ‘By basing itself on the mere existence of such provisions, the CJEU embraced a broad understanding of incompatibility.’<sup>855</sup> The effects of these decisions did not only concern the three Member States involved, but all the Member States that were bound by such agreements with third countries. Austria, Sweden and Finland have to amend their BITs so as to comply with the EU law provisions, bearing the risk that their agreements should be terminated, had the third states refuse the amendments. The broader implications of these rulings are that all Member States should examine the compatibility of their BITs with EU law to avoid

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<sup>850</sup> A. Reinisch, ‘The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements’ (2014) 12 *Santa Clara Journal of International Law*, 111, at 120

<sup>851</sup> J. P. Terhechte, ‘Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member State’s Bilateral Investment Treaties’, in M. Bungenberg *et al.* (eds) *International Investment Law and EU Law* (2011, European Yearbook of International Economic Law), 79, at 86

<sup>852</sup> Judgment of 3 March 2009, *Commission v Austria*, C-205/06, ECLI:EU:C:2009:118, paragraph 37

<sup>853</sup> Judgment of 3 March 2009, *Commission v Sweden*, C-249/06, ECLI:EU:C:2009:119, paragraph 38

<sup>854</sup> Judgment of 19 November 2009, *Commission v Finland*, C-118/07, ECLI:EU:C:2009:715, paragraph 49

<sup>855</sup> L. Schicho, ‘Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?’ (2012) *Research papers in Law, European Legal studies*, 11

future infringement proceedings, since the incompatibilities identified by the CJEU are ‘not limited to the Member State which is the defendant in the present case’.<sup>856</sup>

## 2. Investment Treaty Arbitration and EU law

Investment treaty arbitration is more and more affiliated with EU law, to such an extent that it was commented that ‘courts and arbitration tribunals throughout the EU interpret and apply EU law daily’.<sup>857</sup> However, it remains unclarified whether and how EU law can be employed in investment treaty arbitration. Generally, the basis in investment treaty arbitration is the relevant BIT, supported by principles of public international law and the applicable domestic law, which is regulated by the applicable arbitration rules that ensure the respect of party autonomy.<sup>858</sup> Moreover, in those proceedings involved are the law of the host State and the *lex arbitri*, i.e. the law of the seat of arbitration. Thus, EU law could be involved either as part of public international law or the applicable domestic law; or, in some cases, simply as a matter of fact.

The involvement of EU law on investment treaty arbitration raises the important question regarding its interpretation, since it falls below the exclusive powers of the CJEU. Notwithstanding the fact that arbitral tribunals’ mandate is to apply the provisions of BITs, in some cases it is unavoidable that they will also apply EU law. Vice versa, sometimes the CJEU applies provisions of BITs, such as in the case of *European Commission v Slovak Republic*, where the Court examined whether there was an ‘investment’ and decided that indirect expropriation took place, based on the provisions of the relevant BIT.<sup>859</sup> In principle, when a court or tribunal applies a certain legal regime,

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<sup>856</sup> Judgment of 3 March 2009, *Commission v Austria*, C-205/06, ECLI:EU:C:2009:118, paragraph 43; Judgment of 3 March 2009, *Commission v Sweden*, C-249/06, ECLI:EU:C:2009:119, paragraph 43

<sup>857</sup> *Eureko B.V. v The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (Oct.26, 2010) paragraph 282

<sup>858</sup> Article 42(1) of the ICSID Convention, Article 35(1) of the UNCITRAL Rules

<sup>859</sup> Judgment of 15 September 2011, *European Commission v Slovak Republic*, C-264/09, paragraphs 33-37 and 50

it has jurisdiction over the application of the context of that regime. This means that when an investment tribunal applies some EU law provisions, its jurisdiction covers EU law. At the same time, when the CJEU applies some BIT provisions, its jurisdiction extends to investment treaty law. This jurisdictional overlap affects the autonomy of both EU law (as established in traditional cases such as *Van Gend en Loos*<sup>860</sup> and *Costa v ENEL*<sup>861</sup>) and international investment arbitration.

The role of national courts in an investment arbitration can be either auxiliary or supervisory,<sup>862</sup> and it is mostly governed by the *lex arbitri*. In the former, the courts of the seat of arbitration may rule on the establishment of the arbitral tribunal, at the beginning of the process, or on issuing any interim measures, during the proceedings. In the latter, the courts of the seat can hear any challenges of the award and examine whether to set it aside. The award can also be challenged in the courts of other countries, at the recognition and enforcement stage, and based on the principles of New York Convention.<sup>863</sup> The matter of jurisdiction cannot be characterised strictly either as auxiliary or supervisory. If a party doubts about the validity of the arbitration agreement he can either pursue litigation once the dispute arises, or he can proceed with the arbitral proceedings and challenge the award before the court of the seat or the court of enforcement at the end of the process.<sup>864</sup>

Another option for a party who disagrees with the arbitral tribunal's jurisdiction is to challenge it before the tribunal itself, as the Respondent did in *Eureko v Slovak*

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<sup>860</sup> Judgment of 5 February 1963, *Van Gend en Loos*, Case 26/62, ECLI:EU:C:1963:1

<sup>861</sup> Judgment of 15 July 1964, *Costa v ENEL*, Case 6/64, ECLI:EU:C:1964:66

<sup>862</sup> Judgment of 23 March 1982, *Nordsee*, Case 102/81, ECLI:EU:C:1982:107, paragraph 14

<sup>863</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, 330 UNTS 38, Articles 2 and 5

<sup>864</sup> See for example Judgment of 10 February 2009, *West Tankers*, C-185/07, ECLI:EU:C:2009:69



*Republic*,<sup>865</sup> a landmark case regarding the aforementioned jurisdictional overlap between EU law and international investment arbitration. The dispute concerned an alleged violation of the Netherlands and Czech and Slovak Federal Republic BIT, as a result of a systematic reversal of the liberalization of the health care insurance market that affected Eureko's investment in the country. The Respondent State, namely the Slovak Republic, denied liability and objected to the jurisdiction of the arbitral tribunal due to its conflict with EU law.

Its objection was based on two arguments. Firstly, it was argued that from an international law perspective, the EC Treaty had rendered the BIT inapplicable under Articles 59 and/or 30 of the Vienna Convention of the Law of Treaties. Secondly, it was argued that from an EU law perspective, the Member State submitting to an investment tribunal was in breach of EU law, and particularly the provisions of TFEU that establish the exclusive authority of the CJEU to interpret EU law. A partial award was given which dismissed the jurisdictional objection.<sup>866</sup> The Slovak Republic challenged the partial award before the OLG Frankfurt, as the seat of arbitration, and the court upheld the decision of the tribunal.<sup>867</sup>

The Tribunal in its partial award rejected both arguments. Regarding the argument on international law, the tribunal underlined that it is not a question to be answered on the stage of jurisdiction. Specifically, it stated that any conflict between the BIT and EU law 'would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction'.<sup>868</sup> It also recalled the CJEU's decisions in *Eco*

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<sup>865</sup> *Eureko B.V. v The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (Oct.26, 2010)

<sup>866</sup> *Ibid.*

<sup>867</sup> OLG Frankfurt-am-Main, Decision of 10 May 2012 in Case 26 SchH 11/10, (BeckRS 2012, 10291)

<sup>868</sup> Partial Award paragraph 274

*Swiss*<sup>869</sup> and *Mox Plant*,<sup>870</sup> regarding the latter, they commented that it was only a dispute between Member States and not investor-State arbitration.<sup>871</sup> Moving on to the argument regarding EU law, the tribunal supported again that it is rather a matter for the merits. Explicitly, EU law ‘may have a bearing upon the scope of rights and obligations under the BIT in the present case, by virtue of its role as part of the applicable law under BIT Article 8(6)43 and German law .... But this is a question for the merits stage, not a question that goes to jurisdiction’.<sup>872</sup> The tribunal supported that the only obstacle in jurisdiction in relation to EU law, would be if the parties had not consented on the tribunal to apply EU law to the facts of the case. However, parties had not included any such provision in their investment treaty arbitration agreement. Thus, EU law was applicable ‘to the extent that it is part of the applicable law(s), whether under BIT Article 8, German law or otherwise’.<sup>873</sup> A final, and very significant, point made in the award was that the CJEU had no ‘interpretative monopoly’ over EU law, but only ‘a monopoly on the final and authoritative interpretation of EU law’.<sup>874</sup>

As already mentioned, the OLG Frankfurt upheld the tribunal’s findings, and its decision was mostly focused on the EU law related arguments expressed in the Partial Award. The ruling gave extensive reasoning in order to demonstrate that Article 344 TFEU<sup>875</sup> was not applicable in investor-State arbitration.<sup>876</sup> The position that Article 344 TFEU was relevant only to disputes between Member States themselves and not to investor-State

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<sup>869</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269: the CJEU discussed the issue of how questions of EU law should be handled, and from that discussion it could not be concluded that all arbitrations that involve EU law questions were conducted in violation of EU law

<sup>870</sup> Judgment of 20 May 2006, *Mox Plant*, C-459/03, ECLI:EU:C:2006:345

<sup>871</sup> Partial Award paragraph 276

<sup>872</sup> *Ibid.*, paragraph 279

<sup>873</sup> *Ibid.*, paragraph 281

<sup>874</sup> *Ibid.*, paragraph 282

<sup>875</sup> Article 344 TFEU: ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’

<sup>876</sup> Decision of 10 May 2012 (26 sCHh11/10), BeckRS 2012, 10291 (at II.B.2)

disputes found support by the German legal literature. In order to defend its findings, the Court also employed the silence of the relevant submissions of the European Commission. Although the Commission was not in favour of investor-State arbitration within the Union, it never stated that Article 344 TFEU applied. Though the Commission stressed out that arbitral tribunals could not use the preliminary reference mechanism, the risk that arbitral awards may not be in conformity with EU law could be dealt with by the domestic courts, which examine their validity or recognition and enforcement, and which are allowed to make preliminary references to the CJEU.

Furthermore, the statement made by the arbitral tribunal on the interpretative monopoly of the CJEU and all the reasoning given was fully supported by the national court. The decision reaffirmed that the CJEU had the exclusive authority to interpret EU law, but this exclusivity did not imply that domestic courts and arbitral tribunals were prevented from applying EU law. Even in preliminary references, the CJEU's role is only to interpret the EU law provisions in question, while their application lies within the responsibilities of the Member State court.

Finally, the OLG Frankfurt considered whether it was necessary to make a preliminary reference itself on that case. It was recognised that, generally, a Member State's Supreme Court was bound by the general obligation to make a reference for a preliminary ruling. The two exceptions to this obligation were the cases that settled case law on the relevant issue already existed, and the *acte clair* doctrine, namely when the correct interpretation of the EU law in question was adequately clear. The Decision concluded that the particular case fell below those exceptions, since Article 344 TFEU had already sufficiently clearly interpreted and no question was left for the CJEU.

The Partial Award in *Eureko* and the succeeding ruling of OLG Frankfurt can constitute a significant starting point for the development of arguments that support that arbitration does have a role in the EU law regime that follows in section v.

### III. RECENT TRENDS ON ARBITRATION IN THE EU

Despite the traditional distance between EU law and arbitration, there are some recent trends that suggest that the EU legal order has some place available for investment arbitration. Remarkable elements of an ICS, which reflects many of the features of arbitration, are evident in the two, probably largest, free trade agreements on which the EU had recently being involved, these being CETA<sup>877</sup> and TTIP.<sup>878</sup> The legal value of both agreements should be clarified here. CETA was approved by the European Parliament on 15 February 2017,<sup>879</sup> it was entered into force provisionally on 21 September 2017,<sup>880</sup> and what is pending is its ratification by all Member States' Parliaments.<sup>881</sup> TTIP is still under negotiations between the EU and the US.<sup>882</sup> Although the initial mandate to the European Commission, given by the Union's Council of Trade Ministers, was to negotiate for CETA and other free trade agreements on the basis of the classic investment-State arbitration,<sup>883</sup> the increased public reaction, known as the

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<sup>877</sup> EU–Canada Comprehensive Economic Trade Agreement, 29 February 2016, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

<sup>878</sup> EU–US Transatlantic Trade and Investment Partnership EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (accessed 22 July 2017)

<sup>879</sup> European Parliament legislative resolution of 15 February 2017 on the draft Council decision on the conclusion of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (10975/2016 – C8-0438/2016 – 2016/0205(NLE)) (Consent)

<sup>880</sup> European Commission Press release, 'EU-Canada trade agreement enters into force', Brussels 20 September 2017, available at: [http://europa.eu/rapid/press-release\\_IP-17-3121\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3121_en.htm) (accessed 21 September 2017)

<sup>881</sup> Until now, the Latvian parliament ratified CETA on 23 February 2017 (see <http://www.saeima.lv/en/news/saeima-news/25635-saeima-ratifies-eu-canada-free-trade-agreement> accessed 8 September 2017) and the Danish parliament ratified it on 1 June 2017 (see <https://www.lexology.com/library/detail.aspx?g=14bdccf6-b773-46e1-8fdb-40aa223a464a> accessed 8 September 2017)

<sup>882</sup> The outcome of these negotiations is expected to be affected by the election of Donald Trump in November 2016

<sup>883</sup> See, the leaked Council Negotiating Directives (Canada, India, and Singapore), 12 September 2011, available at: <http://www.bilaterals.org/?eu-negotiating-mandates-on&lang%20%BCen> (accessed 22 July 2017) and particular the following provision: 'Enforcement: the agreement shall aim to provide for an effective investor-to-state-dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BITs).'

‘backlash’ against investment arbitration, resulted in the proposal of establishing a permanent court rather than *ad hoc* arbitration.<sup>884</sup> It was firstly suggested by the Socialists and Democrats in the EU Parliament, led by their German branch, and then the European Parliament adopted a resolution suggesting the set-up of a permanent investment court with an appellate system.<sup>885</sup> This proposal attracted political momentum and was considered as an opportunity to be relieved by the alleged weaknesses of international investment arbitration.

In addition to the objections of the public against the inclusion of investment arbitration, since it is considered as a privilege given to foreign investors to challenge measures of public policy of States by circumventing national and EU courts, there are also concerns on behalf of the legal scholars on this matter.<sup>886</sup> Their principal considerations relate to the discrepancy of the ICS with the autonomy of EU law,<sup>887</sup> and with the exclusive competence of the CJEU both in the interpretation and application of EU law, and in the determination of claims on non-contractual liability of the EU and its institutions.<sup>888</sup>

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<sup>884</sup> A. Reinisch, ‘The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court’ (2016) *Centre for International Governance Innovation (CIGI), Investor-State Arbitration Series, Paper No. 2*

<sup>885</sup> European Parliament, Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the TTIP (demanding a ‘new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives’).

<sup>886</sup> See the letter ‘220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)’ (September 2016), available at: [www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf](http://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf) (accessed 22 July 2017)

<sup>887</sup> See the European Association of Judges, ‘Statement on the proposal from the European Commission on a new investment court system’ (2015) *International Association of Judges*, available at: [www.iaj-ium.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf](http://www.iaj-ium.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf) (accessed 22 July 2017) and 120 European academics, ‘Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)’ *Kent Law School*, available at: [www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](http://www.kent.ac.uk/law/isds_treaty_consultation.html) (accessed 22 July 2017)

<sup>888</sup> See M. Krajewski and R. T. Hoffmann, ‘The European Commission’s Proposal for Investment Protection in TTIP’ (2016), *Friedrich Ebert Stiftung*, J. Kokott and C. Sobotta, ‘Investment Arbitration and the EU law’ (2016) 18 *Cambridge Yearbook of European Legal Studies*, 3, and I. Govaere, ‘TTIP and dispute Settlement: potential consequences for the autonomous EU legal order’ (2016), *College of Europe, European Legal Studies Research Paper in Law 01/2016*

Notably, Jean-Claude Juncker commented that ‘Nor will I accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes. The rule of law and the principle of equality before the law must also apply in this context.’<sup>889</sup> Though on the surface this statement seems like an opposition of the ISDS, a more careful reading of it indicates that he does not exclude the possibility or investors to proceed with litigation before national courts.

A closer examination on the dispute resolution mechanisms negotiated in TTIP shows the significant efforts of the European Commission to find the golden section between establishing a ‘court’ and preserving the enforcement of the decisions as ‘awards’ rendered by a ‘tribunal’.<sup>890</sup>

The position of the US could also be mentioned here. The US have objected to the creation of a permanent international dispute settlement institution and expressed their preference for *ad hoc* investment arbitration.<sup>891</sup> This can be illustrated by comparing two free trade agreements, one concluded by the US and one concluded by the EU. On the one hand, TPP provides for the traditional mechanism of investor-state arbitration with parties being able to nominate the arbitrators.<sup>892</sup> On the other hand, CETA provides for a permanent tribunal, consisted of 15 members, who have the competence to decide investor-state disputes.<sup>893</sup> This comparison shows the huge gap between the two approaches and raises

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<sup>889</sup> J.-C. Juncker, ‘A new start for Europe: My Agenda for Jobs, Growth Fairness and Democratic Change. Political guidelines for the next European Commission’, 15 July 2014, available at: [https://groenlinks.nl/sites/default/files/downloads/newsarticle/PG\\_EN.pdf](https://groenlinks.nl/sites/default/files/downloads/newsarticle/PG_EN.pdf) (accessed 22 July 2017)

<sup>890</sup> European Commission, ‘Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’, Commission Staff Working Document, 13 January 2015, available at: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (accessed 22 July 2017); St. Schill, ‘Editorial: The German Debate on International Investment Law’ (2015) 16 *The Journal of World Investment & Trade*, 1

<sup>891</sup> S. Schacherer, ‘TPP, CETA and TTIP between Innovation and Consolidation – Resolving Investor-State Disputes under Mega-regionals’ (2016) 7 *Journal of International Dispute Settlement*, 628

<sup>892</sup> *Ibid.*, at 630

<sup>893</sup> *Ibid.*

the question of which of the two will finally prevail in the ongoing TTIP negotiations. As was commented, ‘these fundamentally contrasting visions about the future of ISDS are a ‘historic juncture’ for the future of international investment governance’.<sup>894</sup>

## 1. CETAC

The EU and Canada initiated the negotiations between them for CETA in May 2009, with the original directives of the Council being silent on ISDS. Two years later, the Trade Sustainability Impact Assessment, sought by the European Commission, pointed out that ‘the conflicting costs and benefits of [an ISDS] mechanism make it doubtful that its inclusion in CETA would create a net/overall (economic, social and environmental) sustainability benefit for the EU and/or Canada’.<sup>895</sup> Based on this, the Council amended the negotiation directives that had the purpose of agreeing to an ‘effective and state-of-the-art investor-to-state dispute settlement mechanism’.<sup>896</sup> Despite the numerous objections, CETA was made public in 2014 including the traditional ISDS. The principal reason given for this inclusion was that ISDS could enhance legal certainty and, thus, could increase trade and investment flows, an aim ‘of significant economic value and importance’.<sup>897</sup> Besides the economic considerations, the provision of ISDS procedure in CETA was also underlined, as investment protection without ISDS ‘would be of little value’ due to the need of ensuring effective implementation of the commitments from both sides. Moreover, CETA constituted the first EU agreement addressing investment

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<sup>894</sup> S. W. Schill, ‘Editorial: US versus EU Leadership in Global Investment Governance’ (2016) 17 *The Journal of World Investment & Trade* 1

<sup>895</sup> Development Solutions, ‘A Trade SIA relating to the negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada’, Final Report (2011) 19, 20, available at: [trade.ec.europa.eu/doclib/docs/2011/september/tradoc\\_148201.pdf](http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf) (accessed 22 July 2017)

<sup>896</sup> European Council, Council of the European Union, ‘EU-Canada trade negotiating mandate made public’, available at: [www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/](http://www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/) (accessed 22 July 2017)

<sup>897</sup> Parliamentary Questions, Answer given by Mr De Gucht on behalf of the Commission, 5 February 2013, OJ C 321 E, 7 November 2013, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-011275&language=EN> (accessed 22 July 2017)



protection and ISDS, thus it is 'politically important for the Union to exercise this competence, and in the future to pursue this policy with other key partners ... as .... the first agreements will be important in setting the path for this policy.'<sup>898</sup> Finally, on 29 February 2016, the final version of CETA was agreed, replacing the ISDS by an ICS.<sup>899</sup> CETA provides for the establishment of a Tribunal of first instance and an Appellate Tribunal. The former has 15 permanent members, nominated by the CETA Joint Committee.<sup>900</sup> The latter has as many members as decided by the Joint Committee. Cases are decided in divisions of three members, chaired by a third country national. Disputes are assigned to divisions in a 'random and unpredictable' manner.<sup>901</sup> The EU and Canada pay equally into an account managed by the ICSID Secretariat, who also acts as secretariat for the Tribunal, which means that no permanent secretariat is established.<sup>902</sup> The Tribunal can draw up its own working procedures.<sup>903</sup> The Appellate Tribunal's jurisdiction cover only those awards issued by the Tribunal and its mandate is to uphold, modify or reverse these awards on the ground of error in the application or interpretation of applicable law, on manifest error in the appreciation of the facts, including the appreciation of relevant domestic law, and finally on grounds set out in Article 52 of the ICSID Convention.<sup>904</sup> The Appellate Tribunal can also 'refer back issues to the tribunal for the adjustment of the award'.<sup>905</sup> These key characteristics of CETA ICS are to be analysed now, in an effort to examine whether the previous criticism against such system,

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<sup>898</sup> W. Douma, 'Investor-state arbitration in the light of EU policy and law after the Lisbon Treaty', available at: <https://www.eustudies.org/conference/papers/download/401> (accessed 22 July 2017)

<sup>899</sup> EU–Canada Comprehensive Economic Trade Agreement, 29 February 2016, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

<sup>900</sup> Five of these Members should be nationals of an EU Member State, five should be nationals of Canada and five should be nationals of third countries.

<sup>901</sup> Article 26.1 revised text of CETA, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

<sup>902</sup> *Ibid.*, Article 8.27(6)

<sup>903</sup> *Ibid.*, Article 8.27(10)

<sup>904</sup> *Ibid.*, Article 8.28(2)

<sup>905</sup> *Ibid.*, Article 28.7(b)

regarding the alleged privilege given to foreign investors to challenge measures of public policy and the contradiction of the ICS with the autonomy of EU law and with the exclusive competence of the CJEU, has become unfounded.

The first main concern was the matter of independence and impartiality of arbitrators. By establishing a permanent tribunal, where the members are pre-elected, CETA excluded investors from choosing the people that will hear their claim. Instead, members are elected by the Joint Committee, on the basis of mutual consent of the EU and Canada. The requirement of their consent gave rise to the argument that probably the Tribunal Members would be more sympathetic to the States' position, that in most cases are the respondent, than to the investors' positions, who are mainly the claimants in investor-state disputes.<sup>906</sup>

Furthermore, the assignment of cases to members on a rotation basis means that the division is random and unpredictable and ensures the objectiveness of the whole process. It also ensures that members are independent from the parties and the issues at stake, and thus, it is assumed that they are also impartial. In essence, this method limits the possibilities of bias to a greater extent than by applying a case-by-case appointment of adjudicators by the two conflicting parties. It is worthy to note that CETA insists on the traditional number of three adjudicators deciding as a panel, which constitutes the typical number in investment arbitration.

Another characteristic of CETA ICS that comes in support of the concerns regarding impartiality and independence is the nationality of the three adjudicators in each division;

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<sup>906</sup> A. Koorosh *et al.*, "Task Force Paper Regarding the Proposed International Court System (ICS)" (2016) *EFILA Paper*, 15, available at: [http://efila.org/wp-content/uploads/2016/02/EFILA\\_TASK\\_FORCE\\_on\\_ICS\\_proposal\\_1-2-2016.pdf](http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf) (accessed 22 July 2017)

namely, there is one EU national, one Canadian national and one from a third country. Such composition implies that the adjudicator that shares the same nationality with the respondent State or with the investor might not show the necessary impartiality. Therefore, the proceedings may be held by a ‘pro-state’ adjudicator and a ‘pro-investor’ adjudicator.<sup>907</sup> It means that the only person that seems fully neutral in each case is the chairperson whose nationality is from a third country.

Using, once again, the comparative method, it can be observed that the risk of lack of impartiality and independence in investment disputes under CETA is much higher than in other dispute resolution bodies. For example, the Dispute Settlement Understanding of the WTO prohibits a member of the panel from being a national of the respondent State.<sup>908</sup> Another example is the composition of the ICJ. Despite the allowance of nationals of the conflicting parties to be judges in the case, their influence is lessened due to the higher number of judges sitting on the Bench, those being 15-17, instead of only three.<sup>909</sup>

Finally, CETA sets some qualifications and ethical requirements for the members of the Tribunal, one of them being that they are expert in public international law.<sup>910</sup> This requirement illustrates that investment treaties are inter-state agreements and the disputes emanating from them are to be governed by some general principles of public international law. Tribunal Members should also prove their independence by demonstrating absence of affiliation with any government or organization. As a footnote in CETA agreement provides, receiving remuneration from a government is not a

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<sup>907</sup> S. Schacherer, ‘TPP, CETA and TTIP between Innovation and Consolidation – Resolving Investor-State Disputes under Mega-regionals’ (2016) 7 *Journal of International Dispute Settlement* 628, 637

<sup>908</sup> Article 8(3), Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO), available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (accessed 22 July 2017)

<sup>909</sup> Article 31(2) and (3), Statute of the International Court of Justice, available at: <http://www.icj-cij.org/en/statute> (accessed 22 July 2017)

<sup>910</sup> Article 8.27(4), revised text of CETA, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

sufficient element itself to render a person ineligible to be a member of the Tribunal.<sup>911</sup> Also, CETA shows a preference for the International Bar Association (IBA) Guidelines on conflict of interests in international arbitration and does not include a specific code of conduct of the Tribunal.<sup>912</sup>

The second main concern was the matter of inconsistency of arbitral awards in investment arbitration, even in cases with identical or similar treaty language and similar facts.<sup>913</sup> Inconsistency of awards results in lack of legal certainty and predictability, the authority of national courts to examine the awards given is limited and the ICSID annulment process is only focused on procedural grounds.<sup>914</sup> In order to strengthen predictability, coherence and legitimacy in investor-State disputes, the EU suggested the establishment of an appeal mechanism, in particular of an Appellate Tribunal that was mainly inspired by the operation of the WTO Appellate Body.<sup>915</sup> In contrast with the WTO Appellate Body that allows only for appeals on questions of law, CETA provides only for reviewing questions of fact. The reference to 'manifest' errors on the appreciation of the facts, indicates that appeals should be made with some deference to the factual assessment of the Tribunal of first instance. Finally, CETA remains silent on the matter of binding precedent. In particular, there is no specific provision on whether the CETA Appellate Tribunal's decisions should bind the Tribunal of first instance. Judges of other permanent international courts and tribunals respect more or less the doctrine of precedent for the

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<sup>911</sup> Article 8.30(1), revised text of CETA, available at: [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (accessed 22 July 2017)

<sup>912</sup> *Ibid.*, Article 8.44(2), last paragraph CETA

<sup>913</sup> C. Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015) 2-3

<sup>914</sup> S. Schacherer, 'TPP, CETA and TTIP between Innovation and Consolidation – Resolving Investor-State Disputes under Mega-regionals' (2016) 7 *Journal of International Dispute Settlement* 628, 640

<sup>915</sup> European Commission, Concept Paper 'Investment in TTIP and beyond - the Path for Reform; Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court' (2015), 9, available at: [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (accessed 22 July 2017)

purpose of legal certainty. For example, neither the ICJ nor the WTO Appellate Body explicitly provide for *stare decisis*, but both repeatedly referred to their precedent in their respective case law.<sup>916</sup> In contrast, the doctrine of precedent is a key concept for the operation of courts at the EU, both at national and the EU level.

## 2. TTIP

In June 2013, the European Commission was given the mandate to negotiate with the US and conclude a TTIP that would remove all tariffs, improve access to markets and enhance investment protection through ISDS, which is the arbitration clause of the Agreement.<sup>917</sup>

As it was stated, the inclusion of investment protection and ISDS ‘will depend on whether a satisfactory solution, meeting the EU interests (...) is achieved’, notably regarding the right to adopt and enforce ‘measures necessary to pursue legitimate public policy objectives such as social, environmental, (...) public health and safety in a non-discriminatory manner.’<sup>918</sup> In 2015, a public consultation was given regarding the inclusion of the ISDS on the TTIP.<sup>919</sup> Despite the numerous oppositions to the ISDS, the Commission repeated its command to discuss ISDS as part of TTIP, with the only condition that the agreement reflects and protects the Union’s interests.<sup>920</sup> According to the recommendations of the European Parliament for the TTIP, the ISDS could be replaced by a new public legal structure, where cases are decided by publicly appointed,

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<sup>916</sup> Article 59, Statute of the International Court of Justice, available at: <http://www.icj-cij.org/en/statute> (accessed 22 July 2017) and Article 3(2) Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO), available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (accessed 22 July 2017)

<sup>917</sup> Council of the EU, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013 available at: [data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf](http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf) (accessed 22 July 2017)

<sup>918</sup> *Ibid.*, 8

<sup>919</sup> European Commission, ‘Report on the Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ (Staff Working Document] SWD (2015)3 final, available at: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (accessed 22 July 2017)

<sup>920</sup> *Ibid.*, 26

professional judges, in public hearings, with the option of appeal, and with deference to the jurisdiction of national and EU courts. In September 2015, a draft TTIP Investment chapter was presented,<sup>921</sup> providing for ICS composed of a first instance Tribunal and an Appeal Tribunal. The proposal was criticised as amounting ‘to little more than putting lipstick on a particularly unpopular pig’<sup>922</sup> and that ICS does not prevent investors from circumventing national law systems.

The structure of the TTIP ICS is identical with the CETA ICS: it provides for a First Instance Tribunal and an Appellate Tribunal. Each case is decided by a division of three adjudicators and the chairperson’s nationality should be from a third country. Similarly to CETA, the members of the Tribunal are to be allocated based on a ‘random and unpredictable’ rotation system. The UNCITRAL Rules on Transparency are also incorporated, according to which the repository is obliged to rapidly make ‘available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made’ once the proceedings begin.<sup>923</sup>

Furthermore, the proposals provide for third-party and *amicus curiae* participation, which means that a non-dispute party, most probably the host state of the investor, is allowed to participate and also ‘any natural or legal person which can establish a direct and present

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<sup>921</sup> Commission draft text TTIP – investment, available at: [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf) (accessed 22 July 2017)

<sup>922</sup> W. Louch, ‘EU Commission TTIP proposal attacked by MEPs and campaigners’, (2015) *The Parliament Magazine*, available at: <https://www.theparliamentmagazine.eu/articles/news/eu-commission-ttip-proposal-attacked-meps-and-campaigners> (accessed 22 July 2017)

<sup>923</sup> Article 2, UNCITRAL, Rules on Transparency in Treaty-based Investor–State Arbitration (2013), available at: <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (accessed 22 July 2017)

interest in the result of the dispute (the intervener) to intervene as a third party', including non-governmental organisations.<sup>924</sup>

Appeals are allowed on the grounds provided by Article 52 of the ICSID Convention, but also on the grounds of errors of law and manifest errors in the appreciation of facts. The Appellate Tribunal can either uphold, modify, or reverse the award rendered by the First Instance Tribunal.<sup>925</sup> If the appeal is unsuccessful, the award becomes final, while if it is upheld, the Appeal Tribunal can fully or partly modify or reverse the legal findings and conclusions in the initial award.

Though most aspects of the proposed ICS have been drafted, three of the issues that remain unresolved, are discussed here. Firstly, the relationship between public international law rights and private rights; secondly, the determination of the respondent in case of dispute; and, thirdly, the relationship between the ICS and national courts.

Due to the wide scope of the TTIP, both the EU and the US should ensure a consistent interpretation, implementation and application of the measures agreed regarding trade. A possible means to achieve this, is to treat TTIP exclusively as a public international law legal agreement.<sup>926</sup> However, the strong negotiating position of the US *vis-à-vis* the EU would not result to the direct accessibility of ISDS or the enforceability of investment awards to be reconciled with an exclusion of private rights *in toto*.<sup>927</sup>

Regarding the determination of the respondent, the question is whether the European Commission will take this role in any case an investor from the US wants to initiate

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<sup>924</sup> Article 23(5), section 3, EU–US Transatlantic Trade and Investment Partnership EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (accessed 22 July 2017)

<sup>925</sup> *Ibid.*, Article 29(2), section 3

<sup>926</sup> H. Lenk, 'Investor-state Arbitration under TTIP: Resolving Investment Disputes in an (Autonomous) EU Legal Order' (2015) *Swedish Institute for European Policy Studies* 2015:2, 78

<sup>927</sup> *Ibid.*

proceedings against the Union, since, generally, investment tribunals do not have the power to identify and allocate international responsibility.<sup>928</sup> One way to deal with this internal EU legal matter, is to give the authority to the European Commission to decide the respondent in any such dispute, subject to judicial review by the CJEU. Alternatively, the provisions of CETA on this could be altered in the case of TTIP. CETA ICS provides that if the Commission does not determine the respondent within a period of 50 days, the investor's position on the allocation of Union competences is adopted by the Tribunal. The CETA approach can be improved by recognizing the EU as the *prima facie* respondent unless the Commission determines otherwise during the 50-day period.<sup>929</sup> Another solution could be the acceptance by the CJEU that the requirement for cooperation that originates from the duty of sincere cooperation, preserves the maintenance of EU objectives in investment arbitration against individual Member States to an adequate extent.<sup>930</sup>

Finally, the relationship between ICS and domestic courts should be clarified. It seems that foreign investors are privileged over national investors as they have extra options: firstly, the option to proceed in the ICS if they lost in domestic courts; secondly, the option to pursue parallel proceedings before the two legal mechanisms; and, thirdly, to wholly circumvent domestic courts, since exhausting local remedies is often not a prerequisite for access to ISDS. Evidently, ISDS is contrary to the idea of democratic equality.<sup>931</sup> At the same time, it should not be ignored that the weaknesses of domestic courts are the main reason why ISDS was conceived in the first place. Notably, the European

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<sup>928</sup> H. Lenk, 'Investor-state Arbitration under TTIP: Resolving Investment Disputes in an (Autonomous) EU Legal Order' (2015) *Swedish Institute for European Policy Studies* 2015:2, 79

<sup>929</sup> *Ibid.*

<sup>930</sup> *Ibid.*

<sup>931</sup> S. W. Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (2016) 20 *ASIL Insights* No.9



Commission sought to strike a balance between democratic equality and effective dispute resolution.<sup>932</sup> Thus, in its Proposal on ICS, direct access to the Tribunal is permitted, without resorting to local remedies first.<sup>933</sup> Further, in order to avoid parallel adjudication and prevent foreign investors from using the Tribunal as a second option if they fail in domestic courts and imposing pressure on States, the Tribunal is prohibited from hearing a dispute if proceedings in domestic courts are pending or if domestic remedies have been exhausted on the same case.<sup>934</sup> However, the Proposal might be difficult to operate in practice, due to the restricted remedies that the TTIP Tribunal can offer. In particular, the Tribunal can only order the respondent to compensate the claimant by examining the host State's actions based on principles of international law. Thus, in case the investor wants to examine the alleged conduct of the host State based on national law and ask for further remedies, for example restitution of the *status quo ante*, the only appropriate forum is the domestic courts. In other words, a dilemma burdens the investors as they are sought to choose between domestic law and international law protection. 'The requirement to make such choices weakens the authority of domestic law and domestic courts, as well as that of international law and the TTIP Tribunal, and hinders the mutual integration of both legal orders and dispute settlement mechanisms.'<sup>935</sup> In essence, the deficiencies of some States' court system mean *de facto* prevalence of the TTIP Tribunal and, in the long run, it can result in the devaluation of domestic courts' authority, and it does not give the

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<sup>932</sup> S. W. Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (2016) 20 *ASIL Insights* No.9

<sup>933</sup> Article 14, EU-US Transatlantic Trade and Investment Partnership EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at: [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (accessed 22 July 2017)

<sup>934</sup> *Ibid.*

<sup>935</sup> S. W. Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (2016) 20 *ASIL Insights* No.9

opportunity to States to correct any measures adopted that adversely affect foreign investors in order to avoid liability and the payment of compensation.

### 3. Summary of findings

The above analysis illustrates that ISDS creates numerous controversial effects on the autonomy of EU legal order,<sup>936</sup> which could only be dealt with through innovative negotiations and radical changes on the structure of both legal orders, namely EU law regime and International investment law. The CETA text shows some innovations on the area, but does not completely address the clash between the EU legal order and the ISDS, and it is expected to constitute a blueprint for the negotiations regarding TTIP.<sup>937</sup> It remains to see how, if at all, the TTIP will find a means to extinguish the most serious risk that investor-state tribunals impose to the fundamental principle of EU law autonomy. CETA grants to investment tribunals the authority to determine the allotment of competences between the Union and its Member States. Clearly, this provision operates as a ‘procedural safeguard for the US’,<sup>938</sup> since it ensures that issues that are only internal to EU law cannot postpone or block a dispute brought by US investors against the EU or a Member State. However, it constitutes a real risk to the autonomy of the EU legal regime, and it is assumed that if the CJEU were asked to give an opinion on the matter, the conclusions would be unfavourable to the ISDS, due to the potential threat for the autonomy of EU law.

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<sup>936</sup> In brief, these controversial effects include the threat of undermining the principle of democratic equality by allowing foreign investors to challenge measures of public policy by circumventing national and EU courts; the loss of the exclusive competence of the CJEU in the interpretation and application of EU law and the determination of non-contractual liability of the Union and its institutions; and the conflict with the concept of binding precedence which contradicts the EU law concept of consistency of decisions.

<sup>937</sup> H. Lenk, ‘Investor-state Arbitration under TTIP: Resolving Investment Disputes in an (Autonomous) EU Legal Order’ (2015) *Swedish Institute for European Policy Studies* 2015:2, 79

<sup>938</sup> *Ibid.*

It is also questioned whether the ICS can qualify either as a court or as an arbitral tribunal. Strictly speaking, the ICS mechanism shares most of the basic characteristics with courts. Firstly, judges are appointed for a specific period of time and their mandate is to decide as many cases as they are asked to, during their employment. On the other hand, arbitrators are appointed by the two parties and they should only resolve the particular disputes. Secondly, the system of appeals is inherent in litigation, while, traditionally, arbitration lacks any appeal mechanism. Finally, courts have jurisdiction over all types of disputes, in contrast with arbitration where jurisdiction is only given through the consent of the parties, as a reflection of the principle of party autonomy. However, the latter feature might be limited to national courts, since some international courts also require a consent by the parties, such as the ICJ that requires a distinct acceptance of its jurisdiction by the disputing parties.

In addition to the typical forms of litigation and arbitration, some hybrid mechanisms emerge which have qualified as arbitral tribunals, irrespective of the fact that the adjudicators are not appointed by the parties and for the particular dispute only. The best example for this could be the Iran-US Claims Tribunal, where adjudicators are appointed by the two states in order to decide an undefined number of cases, with mixed claims commissions responsible for numerous similar cases.<sup>939</sup>

It should be mentioned that the New York Convention does not limit its scope regarding the notion of arbitration to *ad hoc* arbitration, but also covers permanent arbitration bodies that can render enforceable arbitral awards. According to Article I(2), '[t]he term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but

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<sup>939</sup> Established by the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the USA and the Government of the Islamic Republic of Iran of 19 January 1981, 1 Iran-US CTR 9

also those made by permanent arbitral bodies to which the parties have submitted. [...].<sup>940</sup> Despite the lack of an explanation of ‘permanent arbitral bodies’ in the New York Convention, judicial practice indicates that an institution like the Iran–US Claims Tribunal can be included in the notion of such bodies.<sup>941</sup> Moreover, the *travaux préparatoires* of the Convention illustrate that the most important criterion to recognise an institution as arbitration was the ‘voluntary nature of arbitration, based on “will” or “agreement” of the parties, as opposed to any type of adjudication based on “compulsory”, or “mandatory” jurisdiction, imposed on the parties “regardless of their will”.’<sup>942</sup> In essence, what is crucial is that the parties freely consent to the particular institution, even if they do not appoint their adjudicators themselves. This is the case for the suggested ICS, because investors can be considered as freely accepting the Contracting Parties’ offer of consent included in the agreements.

From all the above, it can be concluded that even a semi-permanent dispute settlement institution with members that have been regularly appointed by States instead of the parties to a specific dispute themselves can qualify as arbitration, and this is the case of the ICS. The EU shows that it becomes more positive towards incorporating arbitration (even impliedly) in its legal order, since it incorporates such a system in their agreements with other countries. Beyond this, arguably, positive attitude of the EU, there are further

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<sup>940</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, 330 UNTS 38, Article I(2)

<sup>941</sup> See *Gould Inc., Gould Marketing v Hoffman Export Corporation, Gould International, Inc. v Ministry of Defense of the Islamic Republic of Iran*, U.S. Court of Appeals (9th Cir.), 23 October 1989, 887 F.2d 1357, 1362, which stated that ‘[t]he Convention defines “arbitral awards” to include those “made by permanent arbitral bodies”. Article I(2).’

<sup>942</sup> G. Kaufmann-Kohler and M. Potesta, ‘Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? – Analysis and roadmap’ (2016) *CIDS – Geneva Center for International Dispute Settlement*, 56, available at: [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf) (accessed 22 July 2017)

arguments within EU law in favour of the inclusion, or, at least, co-existence, of arbitration in the EU legal regime.

#### IV. ARGUMENTS SUPPORTING THAT ARBITRATION DOES HAVE A ROLE IN THE EU LAW REGIME

Never before in the history of the EU, was the jurisdiction of an external judicial system to decide disputes by individuals within the Union recognised as compatible with EU law, since this belongs to the competences of the EU courts.<sup>943</sup> Agreements that provide for such external judicial bodies were held compatible with EU law only when those bodies can hear cases concerning the EU and the respective third State, in other words when individuals are not involved, or when the claims are brought by individuals but do not relate with the Union or any Member State. For example, in Opinion 1/92, the EFTA Court created under the European Economic Area Agreement, was held compatible with EU law, since it was described as a judicial mechanism whose function takes place outside the EU legal regime and outside the Union.<sup>944</sup> A similar ruling was given regarding the European Common Aviation Area Agreement.<sup>945</sup> Evidently, what plays a crucial role is the broader effects that the external judicial body causes on the EU legal order if individuals seek judicial relief against the Union or its institutions beyond the reach of the EU courts. In cases the judicial body does leave individuals contingent on EU courts and institutions for the inclusion of international obligation on the EU legal regime, it is much less likely to find incompatibility with EU law. As an example, the Union's participation to the WTO and its special dispute resolution mechanism was not found to infringe EU law, since the CJEU still has the exclusive competence to decide the way and the extent to which EU citizens can challenge EU law measures based on the WTO and

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<sup>943</sup> Opinion of 26 April 1977, *re Inland Waterways*, Opinion 1/76, EU:C:1977:63; Opinion of 14 December 1991, *on the creation of the European Economic Area*, Opinion 1/91, EU:C:1991:490; Opinion of 28 March 1996, *Accession to the ECHR*, Opinion 2/94, EU:C:1996:140; Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123; Opinion of 18 December 2014, *Accession to the ECHR*, Opinion 2/13, EU:C:2014:2454

<sup>944</sup> Opinion of 10 April 1992, *on the creation of the European Economic Area*, Opinion 1/92, EU:C:1992:189

<sup>945</sup> Opinion of 18 April 2002, *ECAA Agreement*, Opinion 1/00, EU:C:2002:231

the decisions of the WTO dispute settlement system.<sup>946</sup> Contrariwise, the autonomy of EU law and the EU courts seems to be threatened if a judicial body constitutes a directly available avenue for individuals.<sup>947</sup> This position resonates regarding agreements that provide for ISDS. The main concern is that had the EU concluded trade agreements providing for an ISDS system with its most basic trading partners, an important portion of individuals would wholly evade the EU judicial system and prefer seeking judicial relief against the EU or its institutions via arbitration tribunals.

### **1. Article 344 TFEU**

As was explained in a previous section, the *Eureko* case is a clear example between the jurisdictional conflict that exists between the two legal orders.<sup>948</sup> On the one hand, there is EU law and, in particular, Article 344 TFEU, and on the other hand, there is public international law, and the provisions of the respective BIT.<sup>949</sup> It could be reasonably expected that the tribunal would have fully addressed the question whether the jurisdictional conflict would deprive it from its jurisdiction. Nevertheless, the arbitral tribunal in that case, merely prefer to leave such discussion for the merits stage, by rendering a partial award which confirmed its jurisdiction. In contrast, the OLG Frankfurt decided to address the jurisdictional conflict itself, without making a preliminary reference to the CJEU for the interpretation of Article 344 TFEU.<sup>950</sup>

Article 344 TFEU states that: ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’. The wording of this Article leaves unclear whether

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<sup>946</sup> Judgment of 1 March 2005, *Léon Van Parys*, C-377/02, EU:C:2005:121

<sup>947</sup> Judgment of 5 February 1963, *Van Gen en Loos*, Case 26/62, EU:C:1963:1

<sup>948</sup> *Eureko B.V. v The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (Oct.26, 2010)

<sup>949</sup> Article 8 of the relevant BIT in the case of *Eureko*

<sup>950</sup> OLG Frankfurt-am-Main, Decision of 10 May 2012 in Case 26 SchH 11/10, (BeckRS 2012, 10291)

in principle it applies to investor-State arbitration, thus it sets a prohibition to the Member States from allowing this kind of cases to be submitted to an arbitral tribunal in the first place.

Both Article 344 TFEU and the case law of the CJEU relied on by the OLG Frankfurt court remain silent on the case that the dispute arises between a Member State on one side and a private individual on the other, as happens in investor-State arbitration. In addition to the legal instruments of the EU, the literature has also considered whether Article's 344 TFEU application is limited to disputes between Member States or whether it also extends to disputes concerning individuals.<sup>951</sup> In the majority, it is supported that Article 344 TFEU applies only to disputes between Member States, with this argument implying the compatibility of investor-State arbitration with EU law.<sup>952</sup> In essence, what is supported is a narrow interpretation of Article 344 TFEU, since the only alternative way to interpret it broadly and at the same time promoting arbitration within the EU legal order, is to recognise that investment tribunals qualify as 'courts or tribunals of a Member State'.

In *Mox Plant*,<sup>953</sup> Ireland had alleged that by establishing and operating the Mox Plant on the coast of the Irish Sea, the UK was in breach of numerous EU directives. The CJEU demonstrated that '[I]t thus appears that Ireland submitted instruments of Community law to the Arbitral Tribunal for purposes of their interpretation and application in the context of proceedings seeking a declaration that the United Kingdom had breached the

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<sup>951</sup> See A. Bermann, 'Navigating EU law and the law of international arbitration' (2012) 28 *Arbitration International*, 397, 432; S. Hindelang, 'Circumventing primacy of EU law and the CJEU's judicial monopoly by resorting to dispute resolution mechanisms provided for in inter-se Treaties?' (2012) 39 *Legal Issues of Economic Integration*, 179, at 199

<sup>952</sup> K. V. Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ' (2013) 50 *Common Market Law Review* 1039, at 1052

<sup>953</sup> Judgment of 20 May 2006, *Mox Plant*, C-459/03, EU:C:2006:345



provisions of those instruments’.<sup>954</sup> It concluded: ‘[T]hat is at variance with the obligation imposed on Member States by [Article 344 TFEU]... to respect the exclusive nature of the Court’s jurisdiction... in particular by having recourse to the procedures set out in [Article 259 TFEU]... for the purpose of obtaining a declaration that another Member State has breached those provisions’.<sup>955</sup> Consequently, the Court found that Article 344 TFEU was in breach, on the ground that Ireland submitted a dispute to an arbitral tribunal while its subject matter was relevant to as EU law provision that the UK was alleged to have violated.

This case illustrates that Article 344 TFEU prohibits Member States from submitting to an arbitral tribunal disputes with each other that considers whether one of them was in breach of its EU law commitments. This position was confirmed later in the *European Patent Court Opinion*<sup>956</sup> where the CJEU further explained: ‘[t]hat article [Article 344 TFEU] merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties’.<sup>957</sup> In other words, any question regarding the interpretation and application of EU Treaties triggers the obligation of Member States to abstain from referring the dispute to any court or tribunal except from the CJEU. However, in the particular case, the general rule was found inapplicable, as ‘[by contrast,] the jurisdiction which the draft agreement intends to grant to the PC relates only to disputes between individuals in the field of patents’.<sup>958</sup>

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<sup>954</sup> *Ibid.*, para 151

<sup>955</sup> *Ibid.*, para 152

<sup>956</sup> Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123

<sup>957</sup> *Ibid.*, paragraph 63

<sup>958</sup> Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123, paragraph 63

Both the aforementioned cases establish that Article 344 TFEU prohibits a Member State from submitting to an arbitral tribunal ‘any dispute with another Member State involving questions relating to the interpretation or application of the Treaties’.<sup>959</sup> However, the situation where a dispute relates to a Member State and a private individual, as in an investor-State arbitration, remains unclear. The only that was clarified in the *European Patent Court* Opinion is that Article 344 TFEU does not bind Member States regarding disputes between individuals.<sup>960</sup>

The OLG Frankfurt referred to the judgments of *Eco Swiss*<sup>961</sup> and *Commission v Slovak Republic*<sup>962</sup> and found that the CJEU recognised its limits on its interpretative monopoly. At the beginning, the CJEU in *Commission v Slovak Republic* stated it was ‘not for the Court [the ECJ] to interpret the Investment Protection Agreement’.<sup>963</sup> However, it continued by underlining that ‘it is none the less appropriate to examine the factors which make it possible to determine whether that agreement imposes an obligation ... [on the Respondent] which cannot be affected by the provisions of the EC Treaty, within the terms of the first paragraph of Article 307 EC’.<sup>964</sup> The Court did not restrict itself on deciding whether an investment existed based on the definition given on the Investment Protection Agreement, but continued its analysis based on the lack of a denunciation clause and concluded that ‘in so far as a termination of the contract at issue would have the consequence of depriving ATEL of the remuneration provided for by that contract in return for its financial contribution ... such a measure would impact adversely on ATEL’s rights and would thus have the same effect as expropriation within the meaning of Article

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<sup>959</sup> K. V. Papp, ‘Clash of “Autonomous Legal Orders”: Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ’ (2013) 50 *Common Market Law Review* 1039, at 1054

<sup>960</sup> Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123

<sup>961</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269

<sup>962</sup> Judgment of 15 September 2011, *Commission v Slovak Republic*, C-264/09, EU:C:2011:580

<sup>963</sup> *Ibid.*, paragraph 40

<sup>964</sup> *Ibid.*

6 of the Investment Protection Agreement'.<sup>965</sup> Furthermore, the CJEU ruled that '[t]he only way for the Slovak Republic to comply with its obligations in the present case would be tantamount to an indirect expropriation'.<sup>966</sup> The two main findings, namely that there was an investment protected by the scope of the Investment Protection Agreement and that the measures at stake resulted in indirect expropriation of the investment, were actually based on the interpretation and application of main principles of international investment law. In essence, while the Court argued that it did not interpret the Investment Protection Agreement, in practice this is what it was doing.

To sum up, the first argument says that while Article 344 TFEU imposes an obligation that disputes *between Member States* should be resolved only by the EU courts, investor-State arbitration does not deal with disputes between two Member States thus it is not in conflict with it.

## 2. Article 19(1) TEU

Another argument in support of the view that investor-state arbitration does not automatically lead to an infringement of the autonomy of EU law relates to the subject matter of the disputes concerned. It can be questioned whether, besides Article 344 TFEU, the EU judicial system provided for in Article 19(1) TEU is in conflict with investor-State arbitration within the EU. According to what the case law of the CJEU underlines, exclusive jurisdiction was conferred on the Court by Article 220(1) EC, the predecessor of Article 19(1) TEU. Article 19(1) TEU renders the CJEU the exclusive judicial body that should interpret and apply EU law, thus it ensures the autonomy of Union law.<sup>967</sup> In

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<sup>965</sup> *Commission v Slovak Republic*, paragraph 48

<sup>966</sup> *Ibid.*, paragraph 50

<sup>967</sup> Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123, paragraph 35; Opinion of 18 April 2002, *ECAA Agreement*, Opinion 1/00, EU:C:2002:231, paragraphs 11 and 12

other words, any interpretation of EU law legislation made by a court outside the scope of Article 19(1) TEU and without the possibility of review by the CJEU violates its exclusive jurisdiction.

In order to examine whether arbitral tribunals deal with matters that fall within the sphere of EU law, the scope of application of EU law should be defined. Generally, the scope of EU law may be found to encompass any international agreement that provides for any area that is covered ‘in large measure’ by EU legislation.<sup>968</sup> The existence of *specific* Union legislation on the specific subject matter covered by the international, either bilateral or multilateral, agreement is not required, as EU law should only cover in general the area that is regulated by the agreement. To that extent, Member States are in breach of their obligation to safeguard the primacy and autonomy of EU law as far as they apply in their relations *inter se* the provisions of BITs that are covered ‘in large measure’ by EU law, in the form of either private or secondary legislation.<sup>969</sup>

A remarkable example is the *European Patent Court* Opinion.<sup>970</sup> Initially, the Court held that Article 344 TFEU could not operate as an obstacle for the compatibility of the European Patent Court with EU law, since it found that disputes between individuals do not fall within the scope of the Article. However, incompatibility was found based on Article 19(1) TEU, since the European Patent Court would essentially have hindered the national courts from their jurisdiction to apply relevant rules of EU law, those being the rules on internal market, patents and competition law. Moreover, it would also have impliedly prevented the same courts from using the preliminary reference mechanism.<sup>971</sup>

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<sup>968</sup> Judgment of 7 October 2004, *Commission v France*, C-239/03, EU:C:2004:598, paragraphs 29 and 30

<sup>969</sup> A. Dimopolous, ‘The Validity and Applicability of International Investment Agreements between EU Member States under EU and International law’ (2011) 48 *Common Market Law Review* 63, at 88

<sup>970</sup> Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123

<sup>971</sup> *European and Community Patents Court*, paragraphs 71 et seq. and 78 and 79

According to the words of the CJEU, the European Patent Court would have: ‘deprived those [Member State] courts of their task, as ordinary courts within the European Union legal order, to implement European Union law, and, thereby, of the power... or... obligation to refer questions for a preliminary ruling.’<sup>972</sup> The reason leading to this conclusion was that the proposed Patent Court would have the authority to examine the validity of acts of the Union. Thus, it can be understood that Article 344 TFEU is not the only obstacle for arbitration to find a place within the EU legal order. Even if it is satisfied that Article 344 TFEU is inapplicable due to the fact that the dispute is between a Member State and an individual, Article 19(1) TEU might constitute a barrier.

Clearly, most of the provisions of BITs are included in the scope of EU law. In particular, the substantive provisions of these agreements that aim at promoting and establishing investment and ensure the fair treatment of foreign investors can be found in EU law and the four free movements. However, as was already analysed in Chapter 2, Member States are entitled to regulate their property law independently and EU law does not contain a general principle of compensation. What is provided, is only some ‘procedural’ safeguards of the right to property that do not offer any substantial protection. There is a lack of EU law rules regarding the protection of the right to property of investors against infringements on property rights resulting from ‘pure’ national measures. Consequently, the commencement of investor-state arbitration seeking protection against expropriation or compensation for losses resulting from national measures does not affect the primacy and autonomy of EU Law, because the EU principles on this area do not cover it ‘in large measure.’ In other words, it can be argued that the provisions on the protection of the property rights of foreign investors in the host state against political risk and expropriation

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<sup>972</sup> *Ibid.*, paragraph 78

do not fall within the scope of EU law, thus they are not in conflict with Article 19(1) TEU.

### 3. Different mandates

The suggestion that arbitration does have an active role in the EU legal order can also be supported by an argument that is not based on an EU law provision but on the mandate the relevant courts and tribunals have. Arbitral tribunals have only the authority to protect the rights of the particular applicant in each case without affecting the relevant legal framework in general. In particular, the main remedy given by arbitral tribunals is the payment of monetary damages. According to the principles of international law on State responsibility, remedies for a wrongful act can be in the form of restitution, compensation, or satisfaction.<sup>973</sup> In investment arbitration, the most commonly used remedy is the one of monetary compensation. Satisfaction plays a subordinate role,<sup>974</sup> and restitution in kind or specific performance is not ordered very frequently.<sup>975</sup> Any award rendered binds only the parties involved in the particular dispute and does not have the power to affect third parties.

On the contrary, the CJEU's role have numerous aspects. Firstly, through the preliminary reference mechanism, the CJEU is responsible for the consistent interpretation of EU law, since national courts of different Member States may interpret the same provisions differently. Secondly, the CJEU has the responsibility to enforce the law in the case of infringement proceedings, if a national government fails to comply with EU law and the European Commission initiates proceedings against it. Thirdly, if a Union act is regarded

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<sup>973</sup> Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001 Article 34. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> ed, Oxford University Press, 2012) 293

<sup>974</sup> *Bewater Gauff v Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, paragraphs 465-467; *Europe Cement v Turkey* (ICSID Case No. ARB(AF)/07/2), Award, 13 August 2009, paragraphs 146-148, 176 and 181

<sup>975</sup> C. Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20 *Arbitration International* 325

as in breach of the EU Treaties or the fundamental rights, it will be annulled by the CJEU. Fourthly, the Court should ensure that the Union and its institutions, those being the European Parliament, the European Council and the EU Commission, act according to their mandates and they do not fail to act. Finally, under Article 340 TFEU, the CJEU decides on non-contractual liability of the Union and its institutions and can rule for the payment of damages to any natural or legal person harmed by the conduct of them.

By comparing the mandate of arbitral tribunals with the mandate of the CJEU, it can be argued that the only conflicting point between the two would be the monetary compensation by arbitral tribunals with the damages for non-contractual liability of Union institutions by the CJEU. Other than that, the CJEU's exclusive competence on the consistent interpretation and application of EU law throughout the Union cannot be affected by the operation of arbitral tribunals. In any case, an award can never affect the measures adopted at the EU level or the validity and legality of actions of the Union institutions. Its effects only reach the particular parties on the dispute and can result in remedying an affected individual or company that their rights have been infringed by an action of the host State. Thus, the inclusion of arbitration in the EU legal order does not contradict the primary role of the CJEU.

#### **4. Preliminary references from investment tribunals to the CJEU**

A far-reaching argument, or, more preferably, suggestion, relates to the opportunity for arbitral tribunals to use the preliminary reference mechanism according to Article 267 TFEU. If such an option was given, two benefits would be gained. Firstly, arbitration would have a place in the EU legal order; and, secondly, the correct and consistent application of EU law would be ensured. Article 267 TFEU only allows a 'court or tribunal of a Member State' to make a preliminary reference to the CJEU and, at a first

glance, it clearly excludes arbitration. Indeed, arbitral tribunals lack the right to ask the CJEU for a preliminary ruling, and that was well-established in the *Nordsee* case.<sup>976</sup> The rule that arbitral tribunals are excluded from the scope of application of Article 267 TFEU was confirmed in the case of the Arbitration Panel of the Belgian Travel Dispute Committee.<sup>977</sup> In contrast, the CJEU in the *Danfoss* case found that the Danish Industrial Arbitration Board belonged to the notion of ‘court or tribunal of a Member State’, since its jurisdiction was provided by the national legislation and it was mandatory, and the awards were final and only subject to appeal by another arbitration board.<sup>978</sup>

Due to its differences in nature with commercial arbitration, as it was the case in *Nordsee*,<sup>979</sup> it can be argued that investment arbitration is rather closer to the case of *Danfoss*,<sup>980</sup> and, therefore, it should be given the right to make preliminary references to the CJEU.<sup>981</sup> According to the case law of the CJEU, a body qualifies as a ‘court or tribunal of a Member State’ once some criteria are met. While some of these criteria are undeniably met, such as that it is independent and it uses adjudicatory procedures, there are others that need a close examination, those being that it is established by law, it is permanent, it has compulsory jurisdiction, and it is ‘of a Member State’.<sup>982</sup> The list of these requirements is not absolute and should not be absolutely and equally satisfied.

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<sup>976</sup> Judgment of 23 March 1982, *Nordsee Deutsche*, Case-102/81, ECLI:EU:C:1982:107

<sup>977</sup> Judgment of 27 January 2005, *Denuit and Cordenier*, C-125/04, EU:C:2005:69, paragraphs 13 et seq

<sup>978</sup> Judgment of 17 October 1989, *Danfoss*, Case 109/88, EU:C:1989:383

<sup>979</sup> Judgment of 23 March 1982, *Nordsee Deutsche*, Case-102/81, ECLI:EU:C:1982:107

<sup>980</sup> Judgment of 17 October 1989, *Danfoss*, Case 109/88, EU:C:1989:383

<sup>981</sup> Commentators are divided on this issue – See K. V. Papp, ‘Clash of “Autonomous Legal Orders”’: Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ’ (2013) 50 *Common Market Law Review* 1039

<sup>982</sup> T. Tridimas, ‘Knocking on heaven’s door: Fragmentation, efficiency and defiance in the preliminary reference procedure’ (2003) 40 *Common Market Law Review* (2003), 9, at 27, K. V. Papp, ‘Clash of “Autonomous Legal Orders”’: Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ’ (2013) 50 *Common Market Law Review* 1039, at 1067



*It is established by law*

The first criterion, that the judicial body should be ‘established by law’, implies the existence of a statutory legal basis for the body to act and give decisions on disputes.<sup>983</sup>

While, clearly, commercial arbitration that has its foundation on the arbitration agreement between the two parties cannot meet this criterion, investment arbitration does not have the same standing, as far as it is established by bilateral or multilateral treaties that are under the scope of public international law. In any case, investment arbitration has a particular regulatory framework providing for ‘a power to review decisions of review bodies even if this power is technically idle’.<sup>984</sup> The Court in the *Danfoss* case examined whether the Industrial Arbitration Board was independent from the agreement between the parties and the nomination of Board members was not dependent on the discretion of the disputing parties. In other words, the judicial body should have mandatory jurisdiction over the parties and this applies in the case of investment arbitration, as the commencement of proceedings does not depend on specific agreement between the host State and the particular investor, but depends on the relevant investment treaty.<sup>985</sup> Regarding the discretion of the parties over the formation of the tribunal means that the two private parties can nominate their arbitrators without the involvement, or at least the influence, of the State. For example, in the case of *Broeckmeulen*,<sup>986</sup> the fact that the State had to choose three out of the nine judges of the Medical Appeals Committee was adequate to demonstrate that the government had a ‘significant degree of involvement’ in the composition of the tribunal, thus the requirement was met. The intricate part in the

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<sup>983</sup> Judgment of 21 March 2000, *Gabalfrija et al*, C-110/98 to C-147/98, EU:C:2000:145, paragraph 34

<sup>984</sup> Judgment of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraph 24

<sup>985</sup> K. V. Papp, ‘Clash of “Autonomous Legal Orders”: Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ’ (2013) 50 *Common Market Law Review* 1039, at 1068

<sup>986</sup> Judgment of 6 October 1981, *Broekmeulen*, Case 246/80, EU:C:1981:218

case of investment arbitration is that the State is also a party to the proceedings. This means that the composition of the tribunal is decided by the parties, but at the same time the State is involved. In any case, the State is involved on the stage of drafting and concluding the respective investment treaty that provides for arbitration and this can be considered as much essential as in its absence, no arbitration agreement would exist at all.<sup>987</sup>

### *It is permanent*

Generally, investment tribunals are established *ad hoc* and, notwithstanding that there is no any legal authority on the CJEU case law establishing that an *ad hoc* judicial body cannot qualify as a ‘court or tribunal’ under the auspices of Article 267 TFEU, this obviously conflicts with the criterion of permanence. Interestingly, in the case of *Danfoss*, the Court approached the requirement of permanence as being satisfied once the judicial body has general jurisdiction to decide a particular type of legal dispute.<sup>988</sup> Legal scholars support that where there are both general jurisdiction of the arbitral tribunal and specific procedural provisions regulating the composition of the tribunal, it can be recognised that these factors establish permanence in a broad sense, notwithstanding the fact that the particular tribunal seized is of an *ad hoc* character.<sup>989</sup> The same approach can apply for investment arbitration, and particularly for ICSID arbitration, which is absolutely institutionalised. Moreover, the need for a direct relationship between investment tribunals and the CJEU is most evident in the case of ICSID arbitration where the

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<sup>987</sup> K. V. Papp, ‘Clash of “Autonomous Legal Orders”: Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ’ (2013) 50 *Common Market Law Review* 1039, at 1069

<sup>988</sup> See Opinion of Attorney General Lenz of 31 May 1989, *Danfoss*, Case 109/88, EU:C:1989:383, paragraph 21

<sup>989</sup> S. Hindelang, ‘Circumventing primacy of EU law and the CJEU’s judicial monopoly by resorting to dispute resolution mechanisms provided for in inter-se Treaties?’ (2012) 39 *Legal Issues of Economic Integration*, 179, at 201

possibility for involvement of domestic courts that could bridge the EU law gap is limited.<sup>990</sup> Since ICSID has a complete system of appeal and institutional control, domestic courts are not involved, by exercising either auxiliary or supervisory role, in ICSID arbitration at all. Thus, the only way for questions of EU law to be resolved by the EU judges is by allowing ICSID arbitral tribunals to use the preliminary reference procedure.

*It has compulsory jurisdiction*

The case law of the CJEU lacks consistency regarding this requirement. The criterion of compulsory jurisdiction has been interpreted as encompassing the requirements that the parties are obliged to resolve their dispute before the judicial body in question and that the decision given is binding on them.<sup>991</sup> Though sometimes the latter is treated as a distinct element, in any case it is easy to be proved for the case of investment arbitration since the awards are always final and binding unless one of the exhaustive grounds for annulment or non-enforcement applies.

The difficulty arises on proving the former requirement. In *Nordsee* case and the rest of the cases that followed the same line of reasoning, it was established that the judicial body should not give to the parties the freedom of choice of their jurisdictional forum.<sup>992</sup> What it means is that the jurisdiction of the judicial body should be mandatory in the sense that the parties do not have other choice but to submit their dispute to that judicial body as opposed to any other. At a first glance, this requirement is contrary to investment arbitration, to the extent that investors are given the option to bring a claim to the national

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<sup>990</sup> K. V. Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ' (2013) 50 *Common Market Law Review* 1039, at 1072

<sup>991</sup> M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (1<sup>st</sup> edn, Oxford University Press, 2010), 65

<sup>992</sup> In *Nordsee*, the parties were free to leave their disputes to be resolved by the ordinary courts.

courts of the host State. Nevertheless, a more in-depth examination of this requirement might shed some light on this matter. What is essential is that parties are under the mandatory jurisdiction of the judicial body once they opt for it, irrespective of whether another judicial body, including the national courts, are also available. For example, in the *Broeckmeulen* case, the Appeals Committee for General Medicine sought to make a preliminary reference to the CJEU which was accepted, despite the fact that its jurisdiction might not have been compulsory.<sup>993</sup> In fact, the individuals under the particular scheme had the option to bring proceedings either before the Appeals Committee or before the national courts of Netherlands. The Court held that where a professional body is authorised by the relevant Member State to implement some aspects of EU law and also provides for an appeal mechanism that relates to rights of individuals arising from EU law, it should be allowed to directly refer questions of EU law to the CJEU based on Article 267 TFEU.<sup>994</sup>

The same approach could be adopted to the case of investment arbitration to the extent that EU law becomes relevant and applicable. In particular, in spite of the fact that investors are able to bring proceedings in the national courts of the host State, it is important and sufficient that BITs signed by Member States provide for investment arbitration, the finality of awards and the grounds for challenges before national courts. In other words, though investors can sue the host State on the Member States courts, this does not render the jurisdiction of an investment tribunal not compulsory.

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<sup>993</sup> Judgment of 6 October 1981, *Broekmeulen*, Case 246/80, EU:C:1981:218

<sup>994</sup> See also Judgment of 30 March 2006, *Emanuel*, C-259/04, EU:C:2006:215. In this case, the fact that the applicant had a choice between the Person Appointed by the Lord Chancellor under the UK Trade Marks Act 1994 and either the High Court in England or the Court of Session in Scotland, did not render its jurisdiction non-mandatory.

Even from a more ‘practical’ or realistic point of view, the jurisdiction of investment arbitration can be proved *de facto* compulsory. In essence, if an investor wants a neutral forum with the appropriate expertise for challenging the legality of acts by the host State, his sole option is to use the investment arbitration avenue, as opposed to the domestic courts of the host State. To sum up, according to the rulings of *Nordsee*<sup>995</sup> and *Broeckmeulen*,<sup>996</sup> the jurisdiction of investment tribunal can be considered compulsory, both as a matter of law and as a matter of fact.

*It is ‘of a Member State’*

Finally, Article 267 TFEU can cover investment tribunals only if they are ‘of a Member State’, and this requirement is in conflict with the international nature of investment law disputes. Though from a strict point of view, an investment tribunal does not belong to a specific Member State, the requirement set out in Article 267 TFEU has been interpreted by the CJEU broadly. A remarkable example is the case of *Dior* which established that the Benelux Court of Justice, which is a court not of ‘a Member State’ but of several Member States, was found compatible with the wording of Article 267 TFEU, based on the argument that this Court’s mandate was to ensure the uniformity of application of those laws that were shared by the three Benelux States.<sup>997</sup> On the other hand, the Complaints Board was not held to qualify as ‘of a Member State’ in the *European Schools* case, due to the absence of any relation with the judicial system of any Member State.<sup>998</sup> In the wording of the CJEU, the Complaints Board constituted ‘a body of an international organization which... remains formally distinct from it and from the Member States’.<sup>999</sup>

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<sup>995</sup> Judgment of 23 March 1982, *Nordsee Deutsche*, Case-102/81, ECLI:EU:C:1982:107

<sup>996</sup> Judgment of 6 October 1981, *Broekmeulen*, Case 246/80, EU:C:1981:218

<sup>997</sup> Judgment of 4 November 1997, *Dior*, C-337/95, EU:C:1997:517, paragraphs 21 et seq

<sup>998</sup> Judgment of 14 June 2011, *European Schools*, C-196/09, EU:C:2011:388, paragraph 41

<sup>999</sup> *Ibid.*, paragraph 42

Thus, some analogies should be drawn between investment tribunals and the Benelux Court in *Dior* case, as opposed to the Complaints Board in the *European Schools* case, based on any potential links between investment tribunals and the judicial systems of Member States. Firstly and most importantly, national courts serve an auxiliary and a supervisory role in arbitration proceedings, as it was explained in a previous section, by providing assistance and support to arbitral tribunals and also be responsible for the annulment, recognition and enforcement of the arbitral awards and are bound by them. Furthermore, in contradiction with the *European Schools* case, investment tribunals are not accountable to any international organization that is independent from Member States. Even in the case of ICSID investment arbitration, where one cannot deny the involvement of an international organization, the awards are binding on the relevant Member States, which should ensure their enforcement, and not on any organization.

## **5. Summary of findings**

If investment tribunals were allowed to trigger Article 267 TFEU and use the preliminary reference mechanism, this would bring numerous advantages not only for the parties themselves, but also for EU law, public international law and arbitration in general.

Firstly, parties would be more confident regarding the finality of the award. An award can be challenged on the ground of public policy of the seat of arbitration and of the country of enforcement, and, after the *Eco Swiss* case,<sup>1000</sup> it can also be challenged on the ground of EU public policy too. In practice, this means that the parties to an investment treaty arbitration which relates to rules of EU law cannot be sure for the actual enforcement of their award until a Member State court rules on the compatibility of the award with EU public policy. In other words, the fact that investment treaty arbitration

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<sup>1000</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269

is sometimes called to consider question of EU law creates a notable legal uncertainty regarding the enforceability of the award given.<sup>1001</sup> One way to deal with this issue, is to stay the proceedings in arbitration until the relevant questions of EU law are clarified. Instead of resolving the problem, this option actually creates a new problem, namely how the relevant questions of EU law can be clarified. Giving this role to the European Commission and asking it to commence infringement proceedings against the Member State involved in any case an arbitral tribunal is sought to decide matters regarding EU law, does not solve the problem. It might aim at ensuring the uniform application of EU law throughout the Union and by all judicial and extra-judicial bodies, but it adversely affects the independence of international investment arbitration, since it would somehow be accountable to the European Commission.<sup>1002</sup> In contrast, proceeding with the option of enabling investment tribunals to make preliminary references to the CJEU themselves, allows arbitral tribunals to preserve their independence and also ensures the uniform and correct interpretation and application of EU law. Even if some extra delays might be caused by using the preliminary reference proceedings, this delay is clearly outweighed by the risk of having similar delay at a much later stage of the proceedings,<sup>1003</sup> namely in case the national court asks for a preliminary ruling at the stage of enforcement of the award.

Secondly, EU law could also benefit from this suggestion, mainly because the interpretation and application of EU law will be exclusively dependent on the CJEU. In

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<sup>1001</sup> K. V. Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ' (2013) 50 *Common Market Law Review* 1039, at 1074

<sup>1002</sup> See S. Hindelang, 'Circumventing primacy of EU law and the CJEU's judicial monopoly by resorting to dispute resolution mechanisms provided for in inter-se Treaties?' (2012) 39 *Legal Issues of Economic Integration*, 179, at 198 and T. Eilmansberger, 'Bilateral investment treaties and EU law' (2009) 46 *Common Market Law Review*, 383, at 405 et seq.

<sup>1003</sup> K. V. Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ' (2013) 50 *Common Market Law Review* 1039, at 1075

other words, any relevant question of EU law, and not only matters of EU public policy, will be reviewed by the CJEU.

Thirdly, from the public international law perspective, direct referrals to the CJEU by investment arbitral tribunals would augment their position in the international legal order and would strengthen their role in the development of law in general, as investment tribunals would be appropriate to construe any relevant matters of EU law. Furthermore, 'it would remove the "Damocles sword" hanging over the "finality" of arbitral awards that may face non-enforceability within the EU due to non-compliance with EU public policy'.<sup>1004</sup> Due to the absence of specific definition of EU public policy, the risk of having the losing party, mainly the respondent State, to seek for an exceedingly broad application of the concept of EU public policy is very high. It thus constitutes a real threat for the whole system of international investment arbitration and its effective operation, which is mainly based on the finality of the arbitral awards and the limited grounds for their annulment and non-enforcement.

Irrespective of the important advantages analysed above, one should not ignore a worth-mentioning conflict between EU law and International investment arbitration that can operate as a disadvantage for investment arbitration regime. As discussed in Chapter 5, a pivotal characteristic of international arbitration is the fact that it constitutes a confidential dispute resolution mechanism, while the majority of national litigation lack confidentiality. In essence, litigation hearings and court dockets are open to the public, competitors, press and regulators, and disclosure of evidence and submissions are made publicly.<sup>1005</sup> In contrast, arbitral hearings are almost always closed to public and the press,

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<sup>1004</sup> K. V. Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ' (2013) 50 *Common Market Law Review* 1039, at 1076

<sup>1005</sup> G. B. Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 14



and the submissions of the parties and tribunals' awards remain confidential. Regarding courts at the EU level, Article 15 TFEU establishes the public right of access to documents of all the Union institutions, bodies, offices and agencies. Specifically for the CJEU, the ordinary access to documents provisions apply only when it exercises its administrative tasks.<sup>1006</sup> Therefore, by allowing arbitral tribunals to use the preliminary reference mechanism under Article 267 TFEU and ask the CJEU to give rulings on the interpretation of EU law provisions, the confidentiality of arbitral proceedings would *de facto* be abolished. This thesis does not aim to proceed into an in-depth discussion of this matter, but it only mentions it as a possible limitation on the inclusion of arbitral tribunals on the scope of application of Article 267 TFEU.

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<sup>1006</sup>Article 15 TFEU

## V. CONCLUDING REMARKS

After studying the traditional approach of EU law towards arbitration and its relationship with International Investment law, the above analysis illustrates, *inter alia*, that ISDS creates various controversial effects on the autonomy of EU legal order, whose response could only be innovative negotiations and radical changes on the structure of both legal orders, that is EU law regime and International investment law. Notwithstanding that CETA became somehow innovative on the matter, the conflict between EU legal order and ISDS still exists, and it remains to see whether the negotiations on TTIP could offer a radical solution on the threat that investor-state tribunals poses over the autonomy of EU law. In any case, it is argued that if the CJEU were asked to give an opinion on the issue, the conclusions would be unfavourable to the ISDS.

It has also be examined whether the ICS can be recognised either as a court or as an arbitral tribunal. Section iii of this chapter indicates that even a semi-permanent dispute settlement institution with members that have been regularly appointed by States instead of the disputing parties can qualify as arbitration. Consequently, the EU makes some affirmative steps towards incorporating arbitration (even impliedly) in its legal order.

Finally, four legal arguments have been discussed in support of a future role of arbitration on the EU legal regime, focusing on Article 344 TFEU, Article 19(1) TEU, the mandate of courts and arbitral tribunals and Article 267 TFEU. Admittedly, if investment tribunals could use the preliminary reference mechanism, this would bring numerous advantages not only for the parties themselves, but also for EU law, public international law and arbitration in general. Notwithstanding that both Article 344 TFEU and Article 19(1) TEU can constitute a basis for proving that arbitration does have a place in the EU judicial

system, direct references to the CJEU would constitute the most effective and drastic solution to ensure that investment arbitral tribunals are embraced in the EU law regime.

As a point of last minute, Advocate General Wathelet gave an Opinion which comes in full support to most arguments developed in this section.<sup>1007</sup> In particular, in a case concerning the compatibility of the arbitration clause in the Netherlands-Slovakia BIT with EU law the Advocate General expressed the view that arbitral tribunals should be allowed to use the preliminary reference mechanism, since they are created in the basis of binding legal provisions, those being the relevant BITs, belong to a permanent arbitration system established by the two Member States concerned, their jurisdiction is compulsory, and they operate in complete independence and impartiality, according to the rule of law. Thus, it is supported that arbitration is compatible with Article 267 TFEU. Moreover, the Advocate General discussed the relationship of arbitration with Article 344 TFEU and argued that the Article concerns only disputes between Member States or between Member States and the EU, and not investor-State disputes. Finally, the argument brought by the European Commission that EU law sufficiently protects investors, particularly through the Charter, was rejected, since BITs offer broader protection than the EU Treaties, but remain compatible with EU law.

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<sup>1007</sup> Opinion of Advocate General Wathelet of 19 September 2017, *Achmea*, C-284/16, ECLI:EU:C:2017:699

## CHAPTER SEVEN

### CONCLUSION

The aim of this thesis was to identify whether courts within the EU effectively protect bank depositors and whether arbitration would offer additional protection, especially in the light of the current global financial crisis. This was achieved by examining selective case law of national, EU and supranational courts and awards given by international tribunals in this area. In order to consider and compare the approach of courts and arbitral tribunals towards the protection of bank depositors during the financial crisis, this thesis's measure of assessment is based on the right of effective judicial protection, as it is preserved in the Charter, the ECHR and the EU Treaties and the relevant case law.

Accordingly this thesis posed the following research questions:

- 1) What is the nature of bank deposits and what are the rights of depositors? Which of those rights have been affected by the financial measures adopted by the EU and/or the Member States and how?
- 2) Which approach have the courts, which are dealing with the case of bank depositors, taken? Which has been the corresponding approach of arbitration? Have they offered effective protection to bank depositors?
- 3) What role, if any, could arbitration play in order to protect depositors effectively? What is the relationship between arbitration and litigation in the EU legal order and, generally, in the context of the global financial crisis?

Initiating with the Literature Review, various assumptions were made. Firstly, concerning access to justice, the legal regime of EU law and the ECHR may cause significant delays that can operate as an obstacle to effective judicial protection. In essence, when the

applicants' cases reached EU courts, they were reverted to their national courts. They are thus asked to go through the same procedure twice, by submitting new applications before their national courts and wait until they reach the highest courts, and only then they are allowed to file an application to the ECtHR, due to the exhaustion rule provided in Article 35 ECHR. Moreover, an impediment of effective, though not judicial, protection for foreign investors could be the principle of State immunity, which may be invoked by the Respondent States, in order to avoid arbitration proceedings on the measures adopted. Secondly, regarding the right to property and its alleged violations during the financial crisis, effective protection of bank depositors within the EU may be affected by the variety of provisions on ownership and possession, since its regulation belongs to the discretion of Member States. Thirdly, in relation to the principle of proportionality, it is challenged whether it is applicable in the context of the crisis. Due to the fact that most mechanisms employed by the Eurozone Member States in order to counter the financial crisis were determined to fall outside the scope of the EU legal order, it can be argued that probably Member States have been given the absolute freedom to act the way they wish, beyond any control of the proportionality of their actions at the EU level. However, in any case, the principle of proportionality constitutes a constitutional right, which means that all national courts are obliged to consider when deciding all their cases. Moreover, by comparing the principle of proportionality under EU law and under the ECHR, it was concluded that the obligation imposed by the Union on Member States to ensure proportionality is 'softer' than the one imposed by ECHR. Based on this comparative result, this thesis assumes that the ECtHR is more likely to declare the measures adopted to deal with the Eurozone financial crisis disproportionate and thus in violation of human rights in future litigation rather than the EU courts. Finally, while the principle of proportionality does not officially exist in International Investment law, it is expected to

be applied by arbitrators in the context of this thesis, because the defence of necessity can constitute a basic argument for the protection of the State's interests. In particular, the public interest element is crucial, thus the application of the principle of proportionality by arbitrators may be unavoidable.

Based on the aforementioned assumptions, this thesis firstly comparatively examined the nature of bank deposits under some national legal orders, under EU law, under Public International law, and, finally, under International Investment law. The case law of the ECHR clearly establishes that bank deposits fall within the scope of protection of Article 1 of Protocol 1 ECHR. After analysing the key features of 'investment' under economic and financial sciences and under International and EU law, this thesis argues that though some of the principal characteristics of investments are present in bank deposits, most importantly the assumption of risk, there are other characteristics whose presence is controversial, such as the long-term duration. Moreover, the fact that some BITs expressly cover bank deposits also strengthens the argument that bank deposits are investments for the purposes of investment arbitration. In summary, Chapter 3 supported and explained that although bank deposits cannot be regarded as investments up to the amount protected by the deposit guarantee schemes, they can be regarded as investments for the unsecured amount, i.e. the amount that is not secured under the relevant DGS. The importance of deciding whether bank deposits qualify as investments lies in the further allowance or prevention of the protection of depositors by the provisions of investment law and the availability of international investment arbitration for the resolution of their disputes and their effective protection during the financial crisis.

This thesis then proceeded to examine some landmark cases on the austerity measures adopted by Eurozone Member States in receipt of financial assistance or on the new legal

concepts and procedures in the context of the EMU. It was found that the differences between the macroeconomic adjustment programmes provided for each Member State, the traditions of each court in exercising judicial control, and the on-going litigation at national level and before the CJEU and the ECtHR justify some differences among the rulings given at different levels.

This examination showed that at the national level, courts remained highly deferential when dealing with reforms of the EMU and slightly less deferential when dealing with national measures in the same area. This extent of deference can be explained based in the concerns of domestic judges of possible adverse consequences of a negative decision and of intervening in areas of political process and sensitive emergency circumstances. Similarly, the CJEU preferred to detach itself from scrutinising the legality of the ESM Treaty and declared inadmissible all applications made to review the compliance of national measures and the MoUs with the general principle of law and the Charter. Furthermore, it declared that the EU institutions were not involved in the conclusion of the MoUs and the financial assistance programmes, since they were not acting as organs of EU law at that time. Importantly, the EFTA Court refused to impose any responsibility on the State to compensate affected depositors, and prefer to shift all the burden on the DGS itself. Finally, the ECtHR's case law on the Eurozone crisis is mainly based on the argument that the economic crisis at stake constituted a major threat for the Eurozone, but also for the Union as a whole, so most measures adopted were declared proportionate and States were given a wide margin of appreciation.

The first conclusion reached is that the nature of the subject matter of the disputes, which requires particular expertise and democratic legitimacy, and the emergent character of the measures at stake, constitute the basic obstacle to judicial review, though such review

seems more necessary for individuals than ever before. Besides, by refusing any link of EU law and the EU institutions with the MoUs means that, *de facto*, no legal organ within the EU legal order remains eligible to examine the protection of citizens' fundamental, economic and social rights considering this field.

This thesis then concluded that from a procedural scope of view all courts have offered sufficiently effective judicial protection, since applicants enjoyed access to justice and a fair trial. However, most of the rulings given only gave priority on economic and political considerations and the survival of the Eurozone, thus they have not focused on the protection of individuals' rights. The tendency identified that holds some of the most important actions taken in response to the crisis, with the European Commission and the ECB playing a crucial role in their adoption, to fall outside the scope of EU law and the jurisdiction of the European courts, limits the judicial protection of individuals on their national courts. National courts, from their side, seem reluctant to shift their focus towards the effects of the measures under challenges on the citizens. At this point it should be clarified that in no case the author supports that public interest should not be taken into consideration. In essence, what the author supports is that the courts, in their effort to apply the principle of proportionality in the context of the financial crisis, have not weighed the interests of individuals correctly, since they primarily focused on the public interest dimension to such an extent that balance was not achieved between the two. Having in mind that courts' responsibility is to protect both States and citizens, it can be concluded that the aforementioned misapplication of the proportionality principle has resulted in an insufficient effectiveness of substantial judicial protection.

After examining the approach of national, supranational and international courts towards the protection of bank depositors during the financial crisis, this thesis proceeded to the



position that international arbitration has adopted when arbitrators were asked to review the conformity of the post-crisis measures adopted at the EU and national level with the standards afforded to the protection of foreign investors. For this purpose, the *Abaclat v Argentina* case<sup>1008</sup> has operated as a benchmark and an indication of how other arbitral tribunals in the pending cases could approach the matters of financial instruments as investments, and the financial crisis. The fact that most arbitral cases regarding the Eurozone are still pending renders any conclusion drawn, at least for the time being, somehow premature. As a matter of procedure, at this point the thesis reiterates the conclusion made in the previous chapter, namely that all arbitral tribunals have offered sufficiently effective protection, in the sense that the applicants' rights of access to justice and a fair trial have been respected. Consequently, comparatively, both litigation and arbitration satisfy the principle of effective (judicial) protection.

By comparing the approach of courts and arbitral tribunals towards the protection of bank depositors, this thesis reaches the conclusion that one basic difference between them lies on the ground of jurisdiction. In particular, while courts denied jurisdiction to hear the cases that concern the financial crisis, by declaring that they are not involved in the scope of EU law, arbitral tribunals are more likely to assume jurisdiction and proceed to the merits of the disputes, as happened in the case of *Abaclat* and as it is expected to happen in cases that were brought by shareholders that clearly fall under the scope of the relevant BIT. Based on this, it is suggested that arbitration offer more effective protection than litigation, in the sense that applicants are given the possibility to present their arguments on the merits of their cases instead of being rejected at the initial stage of jurisdiction. It should be repeated here that the limited information on the arbitration cases, due to the confidentiality principle and the fact that most cases are still pending, constitutes a

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<sup>1008</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5)

reservation of the thesis. While, as Chapter 4 demonstrated, no legal organ within the EU legal order remained available for them, the only available forum for individuals; judicial protection is their national courts, and particularly on their national district courts, which prefer to remain detached from any political consideration and whose rulings are given with considerable delay. This is the reason why arbitration can operate as the only available forum where individuals can have their disputes being heard, at least those individuals who fall within the scope of a BIT or any other agreement that provides for arbitration.

Finally, this thesis discussed the role of arbitration in the EU legal order. The traditional approach of EU law towards arbitration in general and, in particular, investment arbitration, proves that ISDS creates various controversial effects on the autonomy of EU legal order, whose response could only be innovative negotiations and radical changes on the structure of both the EU law regime and International investment law.

It was submitted that never before in the history of the Union was the jurisdiction of an external judicial system to decide disputes by individuals recognised as compatible with EU law, due to the fact that this task constitutes a competence of the EU courts. Accordingly, any agreement that provide for this kind of external judicial body were held compatible with EU law only when the competence of such body does not cover disputes that involve individuals or when the disputes involve individuals but do not relate with the Union or any Member State.

This thesis identified that although the CETA became somehow innovative on the matter, the conflict between EU legal order and ISDS has not been abolished, and it remains to see whether the negotiations on TTIP could offer a thorough solution on the threat that investor-state tribunals poses over the autonomy of EU law. Moreover, after discussing

whether the ICS can be recognised either as a court or as an arbitral tribunal, this thesis supports that even a semi-permanent dispute settlement institution with members that have been regularly appointed by States instead of the disputing parties can qualify as arbitration. This thesis submits four legal arguments in support of a future role of arbitration on the EU legal regime, focusing on Article 344 TFEU, Article 19(1) TEU, the different mandates of the two systems and Article 267 TFEU.

The wording of Article 344 TFEU implies that its scope of application concerns only disputes between Member States, this argument being supported by case law and legal scholars. Since Article 344 TFEU prohibits a Member State from submitting to an arbitral tribunal ‘any dispute with another Member State involving questions relating to the interpretation or application of the Treaties’,<sup>1009</sup> this thesis supports that disputes between a Member State and a private individual, as in the case of investor-State arbitration, can be resolved through arbitration and remain compatible with EU law.

Furthermore, in order to ensure the autonomy of EU law,<sup>1010</sup> Article 19(1) TEU renders the CJEU the exclusive judicial body that should interpret and apply EU law. In other words, any interpretation of provisions of EU law made by a court or other body that is not encompassed in the scope of Article 19(1) TEU and without the possibility of review by the CJEU is in contrast with its exclusive jurisdiction. While most of the substantive provisions of BITs are included in the scope of EU law, the Literature Review demonstrated that Member States are entitled to regulate their property law independently and EU law does not contain a general principle of compensation. As it was noticed, there

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<sup>1009</sup> K. V. Papp, ‘Clash of “Autonomous Legal Orders”: Can EU Member State courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A plea for direct referral from Investment tribunals to the ECJ’ (2013) 50 *Common Market Law Review* 1039, at 1054

<sup>1010</sup> Opinion of 8 March 2011, *European and Community Patents Court*, Opinion 1/09, EU:C:2011:123, paragraph 35; Opinion of 18 April 2002, *ECAA Agreement*, Opinion 1/00, EU:C:2002:231, paragraphs 11 and 12

is a lack of EU law rules regarding the protection of the right to property of investors against infringements on property rights resulting from ‘pure’ national measures. Therefore, investor-State arbitration that asks for protection against expropriation or compensation for losses resulting from national measures does not affect the primacy and autonomy of EU law, since the EU principles on this area do not cover it ‘in large measure.’ Thus, the thesis argues that the provisions on the protection of the property rights of foreign investors in the host State against political risk and expropriation does not fall within the scope of EU law, so it does not violate Article 19(1) TEU.

Moreover, a comparison between the mandates of arbitral tribunals with the mandates of the CJEU showed that the only conflicting point between the two is the monetary compensation by arbitral tribunals with the damages for non-contractual liability of Union institutions by the CJEU. Apart from this, the CJEU’s exclusive competence on the consistent interpretation and application of EU law throughout the Union cannot be affected by the function of arbitral tribunals. In essence, arbitral awards cannot affect the validity measures adopted at the EU level or at the national level. An award’s effects concern only the particular parties on the dispute and can result in remedying an affected individual or company that their rights have been infringed by an action of the host State. Thus, the inclusion of arbitration in the EU legal order does not contradict the primary role of the CJEU.

Finally, the thesis developed the argument that investment tribunals could use the preliminary reference mechanism under Article 267 TFEU. The author argues that once this approach is taken, this would bring numerous advantages not only for the parties themselves, but also for EU law, public international law and arbitration in general. Despite the fact that both Article 344 TFEU and Article 19(1) TEU are argued to

constitute a sufficient legal basis supporting that arbitration does have an active role in the EU judicial system, direct references to the CJEU can be the most effective and drastic solution to ensure that investment arbitral tribunals are embraced in the EU law regime.

It is anticipated that the proposals asserted and argued in Chapter 7 will enhance discussion on the contribution and value of methods of protection for bank depositors against the measures imposed countering the financial crisis that heavily affected them. If it is accepted that arbitration does have a place in the EU legal order, and based on the argument that bank deposits qualify as investment, then bank depositors can enjoy the protection offered by international investment arbitration. The case law discussed at Chapter 4 illustrated that courts' protection, at least at the national and EU level, has lacked sufficient effectiveness, in the sense that the political and financial considerations have, in a sense, undervalued the rights of bank depositors. In contrast, the very nature of international arbitration, which focuses only on protecting the rights of the particular applicant in each case without affecting the relevant legal framework in general, can offer more effective protection to bank depositors.

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