

City, University of London

Jean Monnet Chair in EU Law

**Protection Against Expropriation in Investment
Treaties, the European Convention on Human
Rights, and the EU Charter**

Dominik Moskvan

Jean Monnet Working Papers

Paper: 07/2017

© The Author(s)

**City University London
Northampton Square
Clerkenwell
London
EC1V 0HB**



**THE CITY
LAW SCHOOL**
CITY, UNIVERSITY OF LONDON
— EST 1894 —

Protection Against Expropriation in Investment Treaties, the European Convention on Human Rights, and the EU Charter

Dominik Moskvan

Researcher at the University of Antwerp, Faculty of Law – Business & Law Research Group

Stadscampus – Building V, Venusstraat 23, 2000 Antwerp

E-mail: dominik.moskvan@uantwerpen.be

Abstract

Expropriation is one of the greatest fears of all foreign investors since such an action by the host state constitutes the most serious infringement of investor rights. Whereas public takings and expropriatory measures have been fundamental to investment treaty arbitration, investment treaties may not be part of the future intra-EU investment protection due to their potential incompatibility with EU law. Therefore, this paper aims to analyse the applicability and scope of protection against expropriation of rights to property under the frameworks of the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the Charter) in comparison to investment treaties.

Investment treaties provide investors with rights to prompt, adequate, and effective compensation if affected by the host state's expropriatory measures. The two European fundamental rights frameworks instruments, on the other hand, accentuate public interest more prominently than investment treaties and may not even require investors be compensated for public taking. Furthermore, taking into account the separated legal systems of the ECHR and the Charter, investors would have to cope with distinctive, yet overlapping applicability of the two frameworks depending on the nature of the host state's measure in question.

List of Abbreviations

BIT	Bilateral Investment Treaty
the Charter	the Charter of Fundamental Rights of the European Union
CJEU	the Court of Justice of the European Union
EC(t)HR	the European Convention / Court of Human Rights
FET	Fair and Equitable Treatment
TFEU	the Treaty on the Functioning of the European Union

Keywords

Foreign direct investment; right to property; public taking; expropriation; expropriatory measure; European Convention on Human Rights; Charter of Fundamental Rights of the European Union; intra-EU bilateral investment treaties; EU investment policy.

Introduction

Although foreign investments can be described as a *bargain* between the investor and the host state,¹ governments possess unequal political and economic power over the investment since all investments placed in a foreign country are legally subjected to the jurisdiction of the host government and therefore any acts, that any state body chooses to undertake, may affect the rights to an investment. Expropriation is one of the greatest fears of all foreign investors since such an action by the host state constitutes the most serious infringement of investor rights. As a result, the legal framework for expropriation occupies the most prominent position in international investment law.² Under altered political, social, and economic circumstances, maybe weeks or years after the execution of a given foreign investment, governments may be susceptible to adopting measures which expropriate investors in order to address their own internal deficiency as witnessed in many the remarkable cases of expropriation across Latin America, the Soviet Union, the Middle East, and Central and Eastern Europe.³

Investor claims concerning expropriation have been fundamental to investment treaty arbitration.⁴ In the European area property rights may also be shielded by the European Convention on Human Rights (ECHR),⁵ and the Charter of Fundamental Rights of the European Union (the Charter).⁶ Although Titi suggests that the comparison of investment protection between investment treaties and human rights entails circumspection,⁷ the fact that the ECHR serves the purpose of protection of human rights and not investment rights cannot preclude the possibility that the protection of human rights may protect investor interest against expropriation. Naturally, the ECHR does not provide for the protection of substantive investment rights, other than property taking, or even the comprehensive promotion of investments. Nonetheless, the portrayal of investor rights as contradictory to human rights ignores the overlap in their aims.⁸ Considering the possibility that investment treaties may not be part of the future intra-EU investment protection,⁹ this paper aims to analyse the applicability and scope of protection against expropriation of rights to property under the frameworks of the Convention and the Charter in comparison to investment treaties.

¹ Salacuse, Jeswald W., *The Law of Investment Treaties* (OUP 2010), 285.

² Schefer, Krista Nadakavukaren, *International Investment Law* (EE 2013), 167.

³ Salacuse, Jeswald W., *The Law of Investment Treaties* (OUP 2010), 286.

⁴ Ripinsky, Sergey and Williams, Kevin, *Damages in International Investment Law* (BIICL 2008), 64.

⁵ The Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

⁶ The Charter of Fundamental Rights of the European Union (2000).

⁷ Titi, Aikaterini, *The Right To Regulate in International Investment Law* (Nomos 2013), 153-4.

⁸ Brower, Charles N. and Blanchard, Sadie, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 *Columbia Journal of Transnational Law* 689, 758.

⁹ See for instance Dominik Moskván, 'Reforming Intra-EU Investment Protection: Amid a Running Battle of Interests' (2015) 22 (5) *Maastricht journal of European and Comparative Law*, 732-750.

I. Expropriation in Investment Treaties

Investment treaties guarantee protection for investors against expropriation. Most bilateral investment treaties (BITs) contain an expropriation clause worded similarly to this:

*Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.*¹⁰

However, this guarantee does not comprise a ban on expropriation. Moreover, BITs even recognise the customary right of the host country to take the property of investor.¹¹ Nevertheless, if a state decides to expropriate, it would typically have to comply with certain stated conditions in the BIT for the seizure of property not to be illegal.¹² These requirements are also part of customary international law¹³ and must be fulfilled cumulatively. The measure through which the host state expropriates the investment:

- i. must serve public purpose;*
- ii. must not be arbitrary or discriminatory;*
- iii. must be outweighed by prompt, adequate and effective compensation;*¹⁴
- iv. Sometimes another condition is required: the taking must be effected by due process of law.*¹⁵

¹⁰ Art. 5 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1991). See also more detailed clause in Art. 4 of the Agreement between the Government of the Republic of Slovenia and the Government of the Kingdom of Sweden on the Promotion and Mutual Protection of Investments (1999): ‘1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subject to any other measure having effect equivalent to expropriation or nationalization (hereinafter referred to as "expropriation") except for a public purpose, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation. 2. Such compensation shall amount to the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment (hereinafter referred to as the "valuation date"). 3. Such fair market value shall at the request of the investor be expressed in a freely convertible currency on the basis of the market rate of exchange existing for that currency on the valuation date. Compensation shall also include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment. 4. The investor whose investments are expropriated, shall have the right under the law of the expropriating Contracting Party to the prompt review by a judicial or other competent authority of that Contracting Party of its case and of the valuation of its investments in accordance with the principles set out in this Article.’

¹¹ Schefer, Krista Nadakavukaren, *International Investment Law* (EE 2013), 168.

¹² *Ibid*, 167.

¹³ Dolzer, Rudolf and Schreuer, Christoph, *Principles of International Investment Law* (OUP 2008), 91.

¹⁴ So-called ‘Hull Formula’ of key elements for compensation.

¹⁵ The condition of due process is, however, contained in the minimum customary standard and FET, and it is therefore doubtful whether explicit reference to due process as a condition for expropriation in the Treaty adds an additional independent requirement; Dolzer, Rudolf and Schreuer, Christoph, *Principles of International Investment Law* (OUP 2008), 100.

If the host state cannot prove to have adhered to the conditions in the BIT, the state's expropriatory conduct is illegal which will impact the damages paid to the investor for the wrongful act and consequently the compensation for illegal taking of property thus shifts from the BIT provisions concerning legal expropriation to the customary standards of general international law for the wrongful acts of host states:¹⁶ namely the standard of the 1928 *Chorzow Factory* case.¹⁷ The state, however, remains bound by the obligation to compensate investor in cases of both lawful and unlawful expropriation. The lawfulness of the expropriation may impact the amount of compensation awarded by the tribunal.¹⁸

The formal transfer of an investor's title to its property would be considered *direct* expropriation.¹⁹ Over the course of time governments have altered the form of their policies with regard to the taking of property, adopting significantly more subtle measures²⁰ in order to achieve the same benefits of expropriation and circumvent the righteous claim for compensation from investors. As can be expected, current cases of investment arbitration do not feature as many claims of direct expropriation as before,²¹ and the *indirect* taking of property has become the rule instead.²² On this note the tribunal in *Telenor v. Hungary* noted that '*nowadays direct expropriation is the exception rather than the rule, as States prefer to avoid opprobrium and the loss of confidence of prospective investors by more oblique means.*'²³

The delineation of *indirect* expropriation is not unreservedly precise.²⁴ A measure tantamount to *indirect/creeping/regulatory/de facto*²⁵ expropriation leaves the investor's property title formally untouched but

¹⁶ Schefer, Krista Nadakavukaren, *International Investment Law* (EE 2013), 195-6; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2006), para. 483: '*Since the BIT does not contain any lex specialis rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.*'

¹⁷ *Factory at Chorzow*, Permanent Court of International Justice; see also *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, paras. 509-10; Ripinsky, Sergey and Williams, Kevin, *Damages in International Investment Law* (BIICL 2008), 85.

¹⁸ Investment tribunals have been divided on the distinction between lawful and unlawful expropriation; Ripinsky, Sergey and Williams, Kevin, *Damages in International Investment Law* (BIICL 2008), 66-7.

¹⁹ Bonnitcha, Jonathan, *Substantive Protection under Investment Treaties* (CUP 2014), 229.

²⁰ '*Over the past five to 10 years, there has been an increase of expropriatory actions by governments against foreign investors, although some of this is explained by a significant increase in direct investment generally. While the nature of the expropriatory actions has changed, so that there are now more indirect expropriations—regulatory takings, creeping expropriations—than direct expropriations, even the latter have increased. Thus, MNE concerns over governmental actions that negatively affect their investment are well grounded in reality:* Multilateral Investment Guarantee Agency (World Bank Group), 'World Investment and Political Risk 2011' (2011), 7.

²¹ Schefer, Krista Nadakavukaren, *International Investment Law* (EE 2013), 203.

²² Reinisch, August, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (OUP 2008) 407, 409.

²³ *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No ARB/04/15, para. 69.

²⁴ Dolzer, Rudolf, and Schreuer, Christoph, *Principles of International Investment Law* (OUP 2012), 101.

²⁵ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (2003), para. 114: '*Generally, it is understood that the term "...equivalent to expropriation..." or "tantamount to expropriation" included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called "indirect expropriation" or "creeping expropriation", as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. This type of expropriation does not necessarily take place gradually or stealthily — the term "creeping" refers only to a type of indirect expropriation—and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and de facto expropriation, although they are usually included within the broader concept of "indirect expropriation" and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place.*'

the possibility to make use of the investment is considerably impaired.²⁶ The host country in principle denies the existence of the alleged interference into the investment rights and does not compensate the investment, rendering such a measure illegal.²⁷ In *CME v. the Czech Republic* the tribunal referred to indirect expropriation in cases where measures ‘do not involve an overt taking but...effectively neutralize the benefit of the property of the foreign owner’,²⁸ and in *Metalclad* the indirect expropriation was understood as encompassing ‘incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’.²⁹

The variants of measures tantamount to indirect expropriation include: *the forced sales of property; forced sales of shares in an investment through a corporate vehicle; indigenisation measures; taking over management control of the investment; inducing others to take over the property physically; failure to provide protection when there is interference with the property of the foreign investor; administrative decisions which cancel licenses and permits necessary for the foreign business to function within the state; exorbitant taxation; expulsion of the foreign investor contrary to international law; and acts of harassment such as the freezing of bank accounts, lockouts and labour shortages.*³⁰

In comparison to direct expropriation, regulatory expropriation may be less damaging to the host state’s reputation.³¹ Yet, most cases of indirect expropriation also involve an acquisition by the state and the acquisition of rights without compensation may be compared to the legal concept of unjust enrichment, i.e. the constitution of new rights of a host state at the expense of the private entity.³² Schefer puts forward four criteria which indicate that the regulatory measure taken by the host state may be recognised as a measure tantamount to (indirect) expropriation: i. interference with the enjoyment of the investment; ii. substantial effect of loss of value, management, use, or control; iii. permanent or long-lasting character of the loss; iv. measure was enacted for the general welfare of the public.³³ Indirect expropriations may happen in a creeping manner and therefore tribunals often look at the totality of the host state’s action in the sense of their cumulative effect.³⁴

As indirect expropriation cannot be proven by determining if the formal transfer of the title of their property has occurred, investors may instead be required to prove a sufficient degree of interference with

²⁶ ‘The terminology is not fully uniform and one can encounter references to *de facto*, *creeping*, *constructive*, *disguised*, *consequential*, *regulatory* or *virtual* expropriation. All of these are equivalents or subcategories of indirect expropriation. The subcategory worth highlighting is the so-called *creeping* expropriation that results in a deprivation of property or a loss of control but which occurs gradually or in stages. Creeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment. A series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment’: UNCTAD, ‘Expropriation’ (2012) 11 <http://unctad.org/en/Docs/unctaddia2011d7_en.pdf> (online on 14 May 2015).

²⁷ Dolzer, Rudolf and Schreuer, Christoph, *Principles of International Investment Law* (OUP 2012), 101.

²⁸ *CME v. Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (2001), para. 604.

²⁹ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, para. 103.

³⁰ Sornarajah, Muthucumaraswamy, *The International Law on Foreign Investment* (CUP 2010), 375.

³¹ Schefer, Krista Nadakavukaren, *International Investment Law* (EE 2013), 203.

³² Newcombe, Andrew, ‘The Boundaries of Regulatory Expropriation in International Law’ (2005) 20 ICSID Review 1, 6.

³³ Schefer, Krista Nadakavukaren, *International Investment Law* (EE 2013), 205.

³⁴ *Vigotop Limited v. Hungary*, ICSID Case No ARB/11/22, Award (2014), paras. 292-3.

their property rights. In *Electrabel v. Hungary* the investor claimed indirect expropriation for the termination of the Power Purchase Agreement as a result of which the investment became less profitable. The tribunal firstly concluded that Hungary did not deprive the investor of its rights to use the Dunamenti power plant or its equipment, and that the termination of the Power Purchase Agreement did not make the economic transaction worthless.³⁵ Consequently the tribunal requested the investor to prove a radical deprivation of the investment noting that investors cannot choose to partition their investments in order to meet the test of a significant degree of deprivation.³⁶

State action does not amount to an expropriation of a claimant's investment unless the claimant can prove that he had been deprived of the use and benefit of the investment.³⁷ The recognition of both direct and indirect forms of expropriation, apparent from the explicit inclusion of indirect expropriation into BITs,³⁸ protects the obvious interest of investors – i.e. the utilisation of the full range of rights vis-à-vis their property.

If the inclusion of expropriation clauses into BITs protects the enjoyment of investor's property rights, a FET clause may be equally helpful in according investors a safeguard should the state engage in changes that interfere with the investment. Therefore, like the claimant in *Vigotop v. Hungary*,³⁹ investors may petition for damages due to expropriation as well as to the state's failure to treat their investment fairly and equitably.⁴⁰ This is especially valid if the FET threshold places lower,⁴¹ yet sufficient burden on the

³⁵ *Electrabel S.A. v. Hungary*, ICSID Case No ARB/07/19, para. 6.53.

³⁶ *Electrabel S.A. v. Hungary*, ICSID Case No ARB/07/19, para. 6.57: 'If it were possible so easily to parse an investment into several constituent parts each forming a separate investment (as *Electrabel* here contends), it would render meaningless that tribunal's approach to indirect expropriation based on 'radical deprivation' and 'deprivation of any real substance' as being similar in effect to a direct expropriation or nationalisation. It would also mean, absurdly, that an investor could always meet the test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test. The Tribunal also notes that the wording in the *Metalclad* award as to "significant part" qualifies the required gravity of deprivation and not the investment; and it interprets that phrase as describing in different terms the same approach later described by the *Tecmed* tribunal.'

³⁷ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (2013), para. 418.

³⁸ Art.5 of Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, (29 October 1990): 'Neither Contracting Party shall take any measures depriving, directly or indirectly investors of the other Contracting Party of their investment...'

³⁹ 'Claimant asserts that Respondent does not challenge Claimant's submission that many of the elements relevant to the finding of a breach of the FET standard can materially inform the inquiry into whether there was an indirect expropriation. For example, Respondent does not contest the relevance of investors' legitimate expectations to both the expropriation and the FET standard. Claimant acknowledges that each of the Treaty standards protects against a different kind of interference by a State. Nevertheless, Claimant is of the view that even the authorities relied upon by Respondent do not undermine the argument that the same conduct will often be capable of giving rise to breaches of different standards of protection.'

Vigotop Limited v. Hungary, ICSID Case No ARB/11/22, Award (2014), paras. 287-8.

⁴⁰ *Spyridon Roussalis*: 'Claimant asserts that his investments were subject to a series of malicious and unjustifiable acts taken by various agencies of the Romanian government. He alleges, inter alia, that the State agents' actions taken collectively or individually amount to an indirect expropriation, or at least substantial impairment, of his investments, in violation of the Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, which entered into force on May 23, 1997 (the "Treaty" or the "BIT"); that they also constitute violations of the fair and equitable treatment...'; *Occidental*: 'The Tribunal agrees with the Claimants. Having found in the previous Section of the present Award that the *Caducidad* Decree was issued in breach of Ecuadorian law, in breach of customary international law and in violation of the Respondent's Article II.3(a) obligation to accord fair and equitable treatment to the Claimants' investment, the Tribunal now has no hesitation in finding that, in the particular circumstances of this case which it has traversed earlier, the taking by the Respondent of the Claimants' investment by means of this administrative sanction was a measure 'tantamount to expropriation'. See also taking of the value added tax refunds previously accorded to subsidiaries in *EnCana*, or doubling of the claim under FET and expropriation in *Charles v. Moldova*; *Spyridon Roussalis v. Romania*, ICSID Case No ARB/06/1, Award (2011) para. 10; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (2012) para. 455; *Encana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL para. 107; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (2013) paras.187-204.

side of the claimant.⁴² Another connecting factor between the clauses can be found in the requirement of non-discrimination,⁴³ which not only is the condition for legality of expropriation, but also an established criterion to be considered when interpreting FET, national treatment, and most-favoured nation clauses.

The broad discretion of investment tribunals to inquire into all the relevant circumstances of property restrictions applies with regard to expropriation as well. For instance in *Bewater Gauff v. Tanzania*, the tribunal ruled as follows: *We therefore conclude that, on a cumulative basis, the public announcement of the termination of the contract by Minister Lowassa on 13 May 2005; the subsequent political rally of 17 May; the withdrawal of the VAT certificate by the TRA on 24 May; and finally, the seizing of the assets of City Water, the immediate installation of DAWASCO, and the deportation of City Water's management on 1 June, amount to an expropriation of BGT's investment on the basis of Article 5 of the BIT.*⁴⁴ The comprehensiveness of the tribunal's assessment is a double-edged sword, however. For instance, in *Vannessa Ventures v. Venezuela* the investor was expected to prove more than contractual breaches in order for breaches of contractual rights to amount to expropriation under the BIT.⁴⁵

The substantive protection of investor rights has as its common goal to defend the position of investors and investments that are inherently subject to the sovereign proclivity to regulate.⁴⁶ The tribunal in *Feldman* held that *'drawing the line between expropriation and regulation has proved difficult... The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like.'*⁴⁷ In this light, the notion of regulatory action is not in conflict with the right to adopt new policies as the states keep their rights to regulate, even though exercising the right may be

⁴¹ FET is perceived as being more flexible and in practice most indirect expropriation claims accompany the claim. Differences of thresholds of FET and expropriation clauses depend on the standard adopted and the Treaty applicable. For instance, according to UNCTAD statistics, in NAFTA cases the success rate of FET is much lower (22%) than in BIT cases (62% of cases where FET is invoked); Yannaca-Small, Katia, *Arbitration under International Investment Agreements* (OUP 2010), 455; UNCTAD, 'Fair and Equitable Treatment' Series on Issues in International Investment Agreements II (2012), 61.

⁴² *'The Claimants' claim that the Respondent has violated Article 2(3) of the BIT by failing to ensure fair and equitable treatment of the Claimants' investments is upheld by majority. In view of this decision, the Tribunal does not need to determine whether the Respondent has breached the BIT by impairing the Claimants' investments through unreasonable or discriminatory measures (Article 2(3) of the BIT, second part) or by expropriating the Claimants' investments without the payment of prompt, adequate, and effective compensation (Article 4(1) of the BIT)'; Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Final Award (2013), para. 1329.*

⁴³ Such as discriminatory treatment invoked by the investor in *Encana* with regard to other exporters in extractive industries. See *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, para. 23.

⁴⁴ *Bewater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 519.

⁴⁵ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/04/6, Award (2013).

⁴⁶ For general observations see Aikaterini Titi, *The Right To Regulate in International Investment Law* (Nomos 2013), 33.

⁴⁷ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF)/99/1, Award (2002), paras. 103-4.

subject to damages due to the limitations sovereign states have voluntarily imposed on themselves in BITs.⁴⁸

II. Expropriation in EU Law

With regard to the protection of property rights, investors pondering investments in the EU MS may notably utilise the threefold protection provided by those standards embodied in the national legal systems, the European Convention on Human Rights (ECHR),⁴⁹ and the Charter of Fundamental Rights of the European Union (the Charter).⁵⁰

However, due to the EU's lack of competence to legislate on property rights, EU law does not in itself provide for the conditions of legality and compensation regarding the seizing of property.⁵¹ Article 345 of the TFEU stipulates that EU law shall in no way prejudice the national rules of property ownership,⁵² and the principle that expropriation and property ownership '*concerns an area which falls within the purview of the Member States*' was further asserted by the Court in *Annibaldi*.⁵³

Whereas the ambit of the article might seem to suggest that EU law may in no way influence the rules of property rights, the limitation of the article is not insurmountable, as illustrated by the cases of *Golden Shares*, where the Court dismissed the argument of compatibility of these special prerogatives with the fundamental freedoms, making the hypothetical compatibility of the national organisation of ownership of undertakings under Article 345 TFEU dependent on the respect of the fundamental freedoms.⁵⁴ Thus,

⁴⁸ 'The OECD paper starts with the notion that there exists a conflict between the compensation for indirect expropriation in specific cases and the "right of governments to regulate". This notion is not appropriate because it is addressed to the wrong level of policy decision making: Any government that uses actively the international investment law by agreeing to investor protection exerts its "right to regulate" every time when it signs an international agreement. All compensation cases that might arise later are a consistent part of this policy. Therefore, compensation mechanisms in cases of indirect expropriation do not conflict with the "right to regulate" but are a classic instrument of international investment law to solve negative side effects from other policy areas, thus contributing to overall policy consistency. This has to be the starting point for analysing indirect expropriation and compensation mechanisms.' With regard to the restriction on the right to regulate and human rights see also the commentary of Brower and Blanchard: 'The increasing use of "sovereignty constraining" rhetoric should concern international lawyers generally, because it is in fact a challenge to foundational principles of international law that is the handmaiden of popular suspicions of international cooperation, "globalization," and multilateralism. On closer examination it becomes apparent that many "sovereignty-constraining" objections are actually objections not to the fact of binding international obligations, but to the content of those obligations. Thus, when environmental NGOs criticize BITs and investor-State arbitration as "reduc[ing] . . . domestic sovereignty," their actual objection is that they believe those policy tools threaten environmental values. This is clear from the fact that the same NGOs support treaties that bind states to particular environmental obligations—thereby constraining their sovereignty. Looking past the red herring that ILAs and investor-State arbitration are "sovereignty-constraining," the next Section considers whether they compromise the values that are actually at stake'. The Business and Industry Advisory Committee to the OECD, 'Aspects of Investment Protection: Indirect Expropriation and Fair and Equitable Treatment' (2004) 2; Brower, Charles N. and Blanchard, Sadie, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 Columbia Journal of Transnational Law 689, 722.

⁴⁹ The Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

⁵⁰ The Charter of Fundamental Rights of the European Union (2000).

⁵¹ Dimopoulos, Angelos, *EU Foreign Investment Law* (OUP 2011), 114.

⁵² Art. 345 TFEU: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.'

⁵³ Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR-I 7493, para. 23.

⁵⁴ Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, para. 28: Although the Court found Art. 345 TFEU irrelevant to the specific case, the Court argued: 'The provisions in issue do not meet any of those criteria and the conditions governing those exceptions are not fulfilled. Furthermore, Article 222 of the Treaty is irrelevant in the present case. That article merely signifies that each Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.' In *Essent* the Dutch restrictions on ownership – prohibition of privatisation and other restrictions in electricity and gas transmission system operators were declared justifiable on the grounds of public interest. Joined Cases C-105/12, C-106/12 and C-107/12 *Staat der Nederlanden v. Essent NV, Essent Nederland BV, Eneco Holding NV, and Delta NV* [2013], paras. 52-54: 'However, the Court has accepted that national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit

national property laws may be restricted by the principles fundamental to the Union, including the principle of non-discrimination as highlighted in *Fearon* concerning the exceptions to the schemes of compulsory acquisition of property in Ireland.⁵⁵ Or put differently in the context of the notion of nationalisation: *The existence versus exercise dichotomy, although originating in cases dealing with intellectual property rights, applies in general: the Treaty is neutral to the existence, i.e. the question of nationalisation itself, but does interfere in the way in which the nationalisation takes place.*⁵⁶

Whereas the TFEU mandates the system of EU law to recognise the openness of the system to external sources of law, including the framework of the Council of Europe with the obligation of the EU to accede to the ECHR in 6 (3) TEU,⁵⁷ the system of EU law appears to be going in the direction of closing itself off from the external influence of instruments of human rights law as seen in *Kadi*.⁵⁸ As a result, such trend intensifies the urgency behind the EU's proposed accession to the ECHR.⁵⁹ In *Kadi*, the CJEU examined the breach of property due to the contested regulation imposed on the individual and recognised the right to property as one of the general principles of EU law.⁶⁰ Nevertheless, since EU law does not regulate the restrictions on property, the assessment of the freezing measures imposed on Mr. Kadi since 2001 had to be evaluated in the context of the fundamental right to respect property within the meaning of Article 1 of Protocol No. 1 to the ECHR.⁶¹ Even though respect for human rights is a condition of the lawfulness of EU acts and any measure incompatible with the respect for human rights is

of an objective in the public interest (see, to that effect, Case C-141/07 Commission v Germany [2008] ECR I-6935, paragraph 60 and the case-law cited). Accordingly, as regards the prohibition of privatisation, which falls within the scope of Article 345 TFEU, it has indeed been held that that provision cannot justify a restriction on the rules relating to the free movement of capital (see Case C-171/08 Commission v Portugal, paragraph 64 and the case-law cited, and Commission v Poland, paragraph 44). That does not however mean that the interest underlying the choice of the legislature in relation to the rules on the public or private ownership of the electricity or gas distribution system operator may not be taken into consideration as an overriding reason in the public interest. In that regard, it must be observed that the situations in, on the one hand, the cases in the main proceedings and, on the other, the cases which gave rise to those judgments are not comparable. What is at issue in the cases in the main proceedings is an absolute prohibition of privatisation, whereas the case which gave rise to the judgment in Case C-171/08 Commission v Portugal concerned restrictions created by privileges which the Member States attached to their position as a shareholder in a privatised undertaking, and the case which gave rise to the judgment in Commission v Poland concerned restrictions on investments abroad by open pension funds which, however, in no way affected the rules relating to ownership of those funds. See also Opinion of AG Ruiz-Jarabo Colomer in Cases C-367/98, C-483/99 and C-503/99 Commission v Portuguese Republic, French Republic and Kingdom of Belgium, where AG suggested that EU MS Golden Shares be exempt at least in part by the virtue of Art. 345 TFEU.

⁵⁵ *'...Although Article 222 of the Treaty does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment.'* Case 182/83, *Robert Fearon & Company Limited v Irish Land Commission* [1984] ECR 3677.

⁵⁶ Akkermans, Bram and Ramaekers, Eveline, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations' (2010) 16(3) *European Law Journal* 292, 314.

⁵⁷ Art. 6 (3) TEU: *'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'*

⁵⁸ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351.

⁵⁹ Barnard, Catherine, 'The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflict of Interests' in De Vries, Sybe, Bernitz, Ulf and Weatherill, Stephen, *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 37, 43-4.

⁶⁰ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, paras. 344-5.

⁶¹ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, para. 356.

unacceptable in EU law,⁶² the human rights restrictions and guarantees are derived from the level of EU MS,⁶³ namely the ECHR.⁶⁴

A. Charter of the Fundamental Rights of the EU

The Union has also formulated its own standards that would be applicable at the level of EU law, and with the entry into force of the Treaty of Lisbon the Charter has become a binding core element of EU law.⁶⁵ As a result EU policies and legal acts have to also comply with the guarantees and limitations stipulated in the Charter. Apart from EU institutions and policies, pursuant to Article 51 (1) of the Charter the applicability of the Charter concerns also actions of the MS when implementing EU law.⁶⁶ Put differently, the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.⁶⁷ Apart from the incorporation of the Charter into the EU legal order, the Treaty of Lisbon also brought another significant change with regard to the protection of fundamental rights, i.e. the constitutional power of the Union to accede to the ECHR.⁶⁸

Article 17 of the Charter is the article of direct relevance to the conditions and legality of expropriation:

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

2. Intellectual property shall be protected.'

Whether a natural person or legal entity, the investor is entitled to the peaceful enjoyment of property of his possessions. Unlike the Convention, the Charter expressly requires fair compensation to be paid for the loss incurred. The right to property is one of the general principles of EU law and it can be restricted by the Union in its general interest under the condition that this aim does not involve a disproportionate

⁶² Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, para. 284.

⁶³ Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para. 15: '...International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'.

⁶⁴ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 71: 'According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect.'

⁶⁵ Pech, Laurent and Groussot, Xavier, 'Fundamental Rights Protection in the EU Post Lisbon Treaty' Policy Paper (2010) 1 <<http://ssrn.com/abstract=1628552>> (online on 1 November 2015).

⁶⁶ See also Case C-617/10 *Åkergaren v Åkerberg Fransson* [2013], para. 17.

⁶⁷ Case C-617/10 *Åkergaren v Åkerberg Fransson* [2013], para. 21.

⁶⁸ Pech, Laurent and Groussot, Xavier, 'Fundamental Rights Protection in the EU Post Lisbon Treaty' Policy Paper (2010) 1 <<http://ssrn.com/abstract=1628552>> (online on 1 November 2015).

and intolerable interference that impairs the essence of the right.⁶⁹ The CJEU has consistently held that, ‘while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function.’⁷⁰ The imposition of such restrictions and their review according to the principle of proportionality, is also enshrined in Article 52 of the Charter which provides interpretative guidance for property rights in the Charter that corresponds to those in the Convention.⁷¹ *In order to determine the scope of the fundamental right to property, a general principle of Community law, account must be taken inter alia of Article 1 of Protocol No 1 to the ECHR establishing that right.*⁷² EU law must also take into consideration the principles that the ECHR is founded upon,⁷³ that the Convention is a source of inspiration for the CJEU,⁷⁴ and that fundamental human rights were recognised to be a general principle of EU law in *Stauder*.⁷⁵ Via the link to the ECHR the Charter also recognises de facto expropriation as a deprivation of property rights.⁷⁶

B. European Convention on Human Rights

The ECHR is a human rights document adopted under the umbrella of the Council of Europe and its case law on the right to property is the most extensive of human rights frameworks.⁷⁷

Coming into force in 1953, the Convention did not initially provide for the right of property. A right to the peaceful enjoyment of one’s possessions was inserted into additional Protocol No. 1. Both the Convention and Protocol No. 1 have been ratified by all 28 EU MS. Any national of a signatory state is able to bring a complaint of infringement of the rights guaranteed by the Convention.

Article 1 of the Protocol 1 (P1-1) stipulates that:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

⁶⁹ C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERS A* [2005] ECR I-3785, para. 119.

⁷⁰ Case C-491/01 *R v Secretary of State for Health, ex parte British American Tobacco* [2002] ECR I-11453, para. 149.

⁷¹ Art. 52 of the Charter: ‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

⁷² C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERS A* [2005] ECR I-3785, paras. 119-20.

⁷³ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 18.

⁷⁴ Case C-94/00 *Roquette Frères v Director General of Competition* [2002] ECR I-9011, para. 29.

⁷⁵ Case 29/69, *Stauder v. City of Ulm* [1969] E.C.R. 419, para. 7.

⁷⁶ Wollenchlagler, Ferdinand, ‘Article 17 – Right to Property’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (CH Beck/Hart/Nomos 2014) 465, 478.

⁷⁷ Paparinskis, Martin, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013), 228.

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

In other words, restrictions to property rights must be adopted in order to attain a goal of public interest, they must be lawful, and they must be compliant with the principles of international law. In *Handyside v. UK* the Court established that the necessity of the imposition of interference with property rights is of a self-judging character.⁷⁸ Although Paporinskis claims that with *Sporrong and Lonroth v. Sweden* the ECtHR rejected the self-judging character of necessity,⁷⁹ the Court in *Sporrong and Lonroth* did not abandon the self-judging clause for interference but rather completed it with the additional Court's competence to control not only the lawfulness and the purpose of the enforcement measure concerned but also their relationship to the aim of the law.⁸⁰

The proportionality standard adopted by the ECtHR sets the test as a form of post-hoc judging,⁸¹ giving host states considerable deference when arguing their intentions of interference.⁸² *In respect of interferences which fall under the second paragraph of Article 1 of Protocol No. 1, with its specific reference to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...", there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect, States enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining*

⁷⁸ *Handyside v the United Kingdom* (1976) para. 62: 'On the other hand the seizure did relate to "the use of property" and thus falls within the ambit of the second paragraph. Unlike Article 10 para. 2 (art. 10-2) of the Convention, this paragraph sets the Contracting States up as sole judges of the "necessity" for an interference. Consequently, the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question. It finds that the contested measure was ordered pursuant to section 3 of the 1959/1964 Acts and following proceedings which it was not contested were in accordance with the law. Again, the aim of the seizure was "the protection of morals" as understood by the competent British authorities in the exercise of their power of appreciation (paragraph 52 above). And the concept of "protection of morals" used in Article 10 para. 2 (art. 10-2) of the Convention, is encompassed in the much wider notion of the "general interest" within the meaning of the second paragraph of Article 1 of the Protocol (P1-1).

⁷⁹ Paporinskis, Martin, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013), 233.

⁸⁰ *Sporrong and Lonroth v Sweden* App no 7151/75; 7152/75 Commission Decision, para. 105: '...Considering the terms of the second paragraph of Art. 1 of the Protocol as well as the interpretation given by the Court, the Commission agrees that the said provisions confer on the States the right, in principle, to assess the necessity of the adoption of a law for the purposes set out therein. The Commission considers it important to point out in this context, however, that the right of the States alone to assess the necessity of such legislation is conditional in that they are also under an obligation to respect other provisions of the Convention such as Arts . 17 and 18 thereof. Consequently, the Convention organs are also competent, if necessary, to supervise the law concerned in the light of these articles. From the foregoing considerations it follows that the Commission's main task under the second paragraph of Art . 1 of the Protocol is limited to supervising the measures of enforcing laws intended to control the use of property in accordance with the general interest. This competence comprises a control not only of the lawfulness and purpose of the enforcement measures but also of their relationship to the aim of the law concerned.' *Sporrong and Lonroth v Sweden* App no 7151/75; 7152/75, Court, para. 69: 'For the purposes of the latter provision, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1). ...under the Expropriation Act, an expropriation permit must not be issued if the public purpose in question can be achieved in a different way; when this is being assessed, full weight must be given both to the interests of the individual and to the public interest. The Court has not overlooked this concern on the part of the legislature. Moreover, it finds it natural that, in an area as complex and difficult as that of the development of large cities, the Contracting States should enjoy a wide margin of appreciation in order to implement their town-planning policy...'

⁸¹ 'However, self-judging treaty provisions are "infrequent in international economic law" and typically not provided for in bilateral investment treaties. There is good reason for this, since self-judging treaties present two issues, (i) difficulty in ensuring that a state exercises objective judgment in determining the existence of a crisis situation where there is the benefit of an excuse from liability and (ii) the problem of "almost inevitable post-hoc judging" of a purported crisis situation': Martinez, Elizabeth A., 'Understanding the Debate Over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases' (2012) 23 *Duke Journal of Comparative and International Law* 149, 184.

⁸² Titu, Aikaterini, *The Right To Regulate in International Investment Law* (Nomos 2013), 154.

whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question'.⁸³

Moreover, the Court does not review the compliance with domestic law unless there is a serious doubt cast upon the local authorities such as in a manifestly erroneous application or conduct which would allow the authorities of the host state to reach arbitrary conclusions.⁸⁴ In fact, the reluctance of the Court to review national identifications of public interest nearly leads to a presumption that a measure enacted by the host state is enacted in the public interest.⁸⁵ As the Court explained in *James*: *'The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.*'⁸⁶

The measure tantamount to expropriation must be adopted in the public interest and the state's justification of the interference is crucial for the particular case of deprivation of enjoyment of property to withstand the review of the Court. In *Burdov*, the Court concluded that not providing enforcement to an enforceable claim without any justification advanced for the interference would qualify as a violation of P1-1.⁸⁷ As a guardian of the public order the host state also has a moral obligation to lead by example and should provide a rationale for any genuine public interest that justifies committed violations of P1-1.⁸⁸

Also, any restriction to property must be proportionate. In *Capital Bank v. Bulgaria*, the Court noted that taking away the licence of a bank on public interest grounds can also be done in a confidential procedure closed to public⁸⁹ without causing a bank run, especially when protecting the stability of the banking system and creditors is the cause for the revocation of the bank licence.⁹⁰ *'However, the legislative framework opted for the most drastic solution – dispensing with any sort of proceedings in all cases – and there is no indication that other possibilities were considered.*'⁹¹ The principle of proportionality has also been applied in investment arbitration, including *Azurix* or *Tecmed* both of which summarise the principle from ECtHR's

⁸³ *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v United Kingdom*, Judgment, App no 44302/02 (2007), para. 55.

⁸⁴ *Beyeler v. Italy* App no 33202/96 (5 January 2000), para. 108: *'The Court has limited power, however, to review compliance with domestic law (see the Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171-A, p. 16, § 47), especially as there is nothing in the instant case from which it can conclude that the Italian authorities applied the legal provisions in question manifestly erroneously or so as to reach arbitrary conclusions.'*

⁸⁵ Escarcena, Sebastian Lopez, 'Interferences with Property under European Human Rights Law' LCGGS Working Paper No. 63 (2011), 16.

⁸⁶ *James and Others v. United Kingdom* App no 8793/79 (21 February 1986), para. 46.

⁸⁷ *Burdov v Russia* App no 59498/00 (7 May 2002), paras. 40-1.

⁸⁸ *Zwierzynski v Poland* App no 34049/96 (2001) para.72-3: *'The Court can find no justification for the situation in which the public authorities have placed the applicant. It cannot discern in the present case any genuine "public interest" that would justify a deprivation of possessions. The Court points out that where an issue in the general interest is at stake it is incumbent on the public authorities to act in an appropriate manner and with the utmost consistency. Moreover, as the guardian of public order, the State has a moral obligation to lead by example and a duty to ensure that the bodies it has charged with the protection of public order follow that example.'*

⁸⁹ *Capital Bank AD v Bulgaria* App no 49429/99 (24 November 2005), para. 137.

⁹⁰ *Capital Bank AD v Bulgaria* App no 49429/99 (24 November 2005), para. 138.

⁹¹ *Capital Bank AD v Bulgaria* App no 49429/99 (24 November 2005), para. 138.

James and others as follows: ‘The Court held that “a measure depriving a person of his property [must] pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’”, and bear “a reasonable relationship of proportionality between the means employed and the aim sought to be realized”. This proportionality will not be found if the person concerned bears “an individual and excessive burden”. The Court considered that such “a measure must be both appropriate for achieving its aim and not disproportionate thereto.”⁹²

Apart from traditional civil/private law-based rights, the court also recognizes possessions of a mixed/administrative rights-character as protected under P1-1, including licences and concessions.⁹³ Moreover, P1-1 covers what would be characterised as indirect expropriation under investment treaties. Ruling on the revocation of a permit for gravel exploitation in *Fredin v. Sweden* the Court acknowledged that the concept of deprivation includes both direct ‘formal’ and indirect ‘de facto’⁹⁴ expropriation.

In *Papamichalopoulos* the claimant invoked deprivation of property caused by a transfer of the applicant’s land rights. The land was acquired by a Navy fund in Greece enacted by the military government in 1967, on which the Navy constructed a base and a holiday resort. Despite obtaining judicial recognition of the claimant’s rights, the attempts to enforce them failed. As it is common in cases of indirect expropriation, no formal transfer of property title occurred;⁹⁵ yet the Court ruled that the loss of the ability to dispose of the land in issue constituted de facto expropriation.⁹⁶

*Presso Compania Naviera v. Belgium*⁹⁷ is another case of indirect expropriation where a group of applicants (including ship owners, mutual shipping associations etc.) were deprived of their enjoyment of their property due to a retroactive Belgian regulation adopted to manage the liability of ships. The Belgian law exempted the state and other organisers of pilot services from their liability, and as a result interfered with the exercise of claims for damages for infringement of property rights that could have been asserted until that point.⁹⁸

Similar to investment tribunals, the Court looks at the nature of the investment in question including its indirect forms, such as licences and concessions. For instance, in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*⁹⁹ the applicant company was granted a television licence in a public tendering procedure. The company, however, never acquired the necessary frequencies to become operational. Despite the fact that

⁹² *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (2006), para. 311.

⁹³ Wildhaber, Luzius and Wildhaber, Isabelle, ‘Recent Case Law on the Protection of Property in the European Convention on Human Rights’ in in Binder, Christina and others (eds), *International Investment Law for the 21st Century* (OUP 2009) 657, 664.

⁹⁴ *Fredin v. Sweden* App no 12033/86 (18 February 1991), para. 42.

⁹⁵ *Papamichalopoulos and Others v. Greece* App no 14556/89 (24 June 1993), para. 41: ‘The occupation of the land in issue by the Navy Fund represented a clear interference with the applicants’ exercise of their right to the peaceful enjoyment of their possessions. The interference was not for the purpose of controlling the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (P1-1). Moreover, the applicants were never formally expropriated: Law no. 109/1967 did not transfer ownership of the land in question to the Navy Fund.’

⁹⁶ *Papamichalopoulos and Others v. Greece* App no 14556/89 (24 June 1993), para. 45: ‘The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.’

⁹⁷ *Pressos Compania Naviera S.A. and Others v. Belgium* App no 17849/91 (20 November 1995).

⁹⁸ *Pressos Compania Naviera S.A. and Others v. Belgium* App no 17849/91 (20 November 1995), para. 34.

⁹⁹ *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433/09 (7 June 2012).

the company's licence had never been expropriated, the lack of allocation of broadcasting frequencies for more than ten years due to several transitional measures¹⁰⁰ deprived the applicant of the very substance of the licence¹⁰¹ as well as the protection against arbitrariness required by the rule of law.¹⁰² In another case regarding the violation of rights functionally equivalent to regulatory expropriation the ECtHR considered that the revocation of a bank licence, on which the bank depended in order to carry out its business and without which it was put into compulsory liquidation, constituted an interference with property rights under P1-1.¹⁰³

C. Multiplicity of Guarantees against Expropriation in the EU and EU MS

In conclusion, three distinct legal layers may effectively be identified in the EU MS: the Convention, the Charter, and each Member States' own national human rights framework which may provide further human right guarantees.¹⁰⁴ All three frameworks follow the common goal of protecting individual rights in constitutional democracies and the internal market.¹⁰⁵ In its review, the CJEU builds on the case law of the ECHR. For instance the CJEU recalled in *Kadi* that the ECtHR applies the assessment of proportionality in its review as well as the considerable margin of appreciation the ECtHR grants to the host states.¹⁰⁶ The decisions of European Court of Human Rights do not, however, bind the European Union. The overlapping character of the layers of law results in a unique form of interaction.

Although the provisions of the ECHR for the time being do not as such apply to the EU's actions, the EU Members have an obligation to respect the Convention, which they are signatories of, when applying or implementing measures of EU law. EU MS have to respect the primacy and autonomy of EU law at the same time, even though compliance with this requirement has been facilitated by the unilateral adherence of the EU to the standards of the Convention to such an extent that the lawfulness of EU acts is dependent on the respect for the human rights guarantees in the Convention.¹⁰⁷ In its judgments the CJEU has been drawing inspiration from the constitutional traditions of the EU MS,¹⁰⁸ international

¹⁰⁰ Ibid, para. 182.

¹⁰¹ Ibid, para. 177: '*Although the licence was not in fact withdrawn in the instant case, the Court considers that, without the allocation of broadcasting frequencies, it was deprived of its substance.*'

¹⁰² Ibid, para. 156.

¹⁰³ *Capital Bank AD v Bulgaria* App no 49429/99 (24 November 2005), para. 130.

¹⁰⁴ Waagstein, Patricia, 'Human Rights Protection in Europe' (2010) 2 <http://spice.fsi.stanford.edu/sites/default/files/humanrights_ineurope_Layout_1.pdf> (online on 28 May 2015).

¹⁰⁵ Petersmann, Ernst-Ulrich, 'Constitutional Theories of International Economic Adjudication and Investor-State Arbitration' in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, *Human Rights in International Investment Law and Arbitration* (OUP 2009), 159.

¹⁰⁶ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, paras. 359-60: *The question therefore arises whether that restriction of the exercise of Mr Kadi's right to property can be justified. In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question.*

¹⁰⁷ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, para. 284; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 71.

¹⁰⁸ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4.

human right treaties,¹⁰⁹ and the Court has expressly committed itself to the recognition of principles on which the ECHR was based upon in 1986.¹¹⁰ At the same time the CJEU asserted in *Demirel* that the examination of the compatibility of national legislation with the ECHR lies outside the scope of EU law.¹¹¹ In *Bosphorus* the ECtHR unilaterally accepted that the states' decision to become part of the Union is in compliance with the Convention as long as the substantive guarantees provided for by the Union are at least equivalent to the Convention.¹¹²

Should an investor challenge a national measure of expropriation, the conditions of EU MS national legal orders apply, and EU MS national laws have to comply with the standards of the ECHR. Conversely, invoking the taking of property as a result of a measure adopted by the EU is to be made within the conditions guaranteed in the Charter. With regard to the jurisdictions of the CJEU and the ECtHR, the same rule applies. In other words, depending on what measure the investor would appeal, a different jurisdiction would be applicable: EU measure (the CJEU) or a national measure (the ECtHR). As far as the overlap of ECtHR and CJEU jurisdictions is concerned, in *Kremzov* the CJEU considered the compliance of human rights with EU law in a case of a sentenced Austrian murderer who invoked imprisonment as a deprivation of his EU rights to freedom of movement. The CJEU ruled that even though the Court observes the rules laid down in the ECHR, the CJEU does not have jurisdiction with regard to national legislation falling outside the scope of EU law.¹¹³ Put differently, national rules governing the sentences for murder and illegal firearms possessions that *Kremzov* was imprisoned for, cannot be used to establish the jurisdiction of EU law since such situations fall outside the field of application of EU law.¹¹⁴

The boundaries between national and EU law measures are not necessarily always very visible since EU MS are obliged to implement EU law into their national systems: for instance with directives. The Charter shall apply only in cases when countries or EU institutions act in the name of the Union and only to those acts that are directly linked to the EU, i.e. where the national measure falls within the scope of EU law.¹¹⁵

¹⁰⁹ Case 4/73 *Nold v Commission* [1974] ECR 491, para. 13.

¹¹⁰ Case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 18.

¹¹¹ C-12/86 *Demirel* [1987] ECR 3719, para. 28.

¹¹² *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* App no 45036/98 (30 June 2005) paras. 155 and 165: 'In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent"... to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community.'

¹¹³ Case C-299/95 *Kremzov v Republik Österreich* [1997] ECR I-2629, paras.15-16.

¹¹⁴ Case C-299/95 *Kremzov v Republik Österreich* [1997] ECR I-2629, paras. 17-8.

¹¹⁵ Case C-617/10 *Aklagaren v Åkerberg Fransson* [2013], para. 21: *Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*

This interpretation originates in Article 51 of the Charter that scales the application scope up by including the implementation of EU law and by specifically considering the role of the principle of subsidiarity.¹¹⁶

The CJEU determined that the situation described in Article 51 of the Charter when EU MS are acting as agents implementing EU law ‘requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.’¹¹⁷ The CJEU further held that in order to determine whether national legislation should be considered to be an implementation of EU law, *it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.*¹¹⁸ It is for the national court to consider in light of the circumstances of each dispute whether the situation in question is covered by EU law and therefore apply the Charter; and if the situation is not covered by EU law then the situation should be examined in light of the Convention instead.¹¹⁹

Whilst EU MS may decide with regard to the design of their national implementing measures, and the Charter cannot restrict national human rights frameworks including the ECHR,¹²⁰ the principles of non-discrimination, the protection of legitimate expectations, proportionality,¹²¹ primacy, unity, and effectiveness are to be upheld in any case.¹²² Moreover, EU MS are bound by the general principles of EU law, in particular EU fundamental rights with regard to national measures implementing¹²³ or applying EU law, as well as national measures derogating¹²⁴ from EU law. It follows that if the adopted national legislation obstructs one or more fundamental freedoms guaranteed by the Treaty, the use of the exceptions for justification of the obstruction of the fundamental freedoms provided for by the Treaty

¹¹⁶ Art. 51 of the Charter: ‘1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.’

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.’

¹¹⁷ Case C-617/10 *Aklagaren v Åkerberg Fransson* [2013], para. 24.

¹¹⁸ Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012], para. 79.

¹¹⁹ Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011], para. 72.

¹²⁰ See Art. 53 of the Charter.

¹²¹ Usher, John, *General Principles of EC Law* (Longman 1998), 129.

¹²² Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], para. 60: ‘It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.’

¹²³ Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para. 19: ‘...it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.’

¹²⁴ Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimiotiki Etairia Pliroforissis and Sotirios Kourelas* [1991] ECR I-2925, para. 43: ‘...where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.’

See also Groussot, Xavier, Pech, Laurent, and Petursson, Gunnar Thor, ‘The Reach of Fundamental Rights on Member State Action after Lisbon’ in De Vries, Sybe, Bernitz, Ulf, and Weatherill, Stephen (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 97, 98.

shall be regarded as implementation of Union law pursuant to the meaning of Article 51 (1) of the Charter.¹²⁵

Similar to the ECtHR, investors would have to challenge the measure of a MS in front of the domestic court first before any ruling from the CJEU is possibly released. Although the CJEU facilitated the finding of a common understanding regarding the limitation of property in order to bridge national laws,¹²⁶ most notably with the *Hauer* judgment extracting the nature of right to property from Protocol 1 of the ECHR,¹²⁷ the case law under the Charter needs to be further developed.

As regards the relation between EU law and national measures, the Court's rulings in *Iida*, *Melloni*, and *Fransson* should be recalled.

In *Iida*, the Court held that in order *'to determine whether [the national measure] falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it'*.¹²⁸ If the national measure does not fall within the scope of implementation of EU law in Article 51 of the Charter, the conformity of the national measure with fundamental rights cannot be examined by reference to the rights established by the Charter.¹²⁹

In *Melloni*¹³⁰ the protection of national provisions was more advanced than in the EU, which prompted the questions of their compatibility, whereas in *Fransson*, the Court stressed that as long as a situation falls within the scope EU law, the Charter has to apply.¹³¹ In *Fransson* the CJEU distinguished between the relation of EU MS national laws and the Convention as opposed to EU MS and the Union, stating that EU law does not determine the conclusions to be drawn in the event of conflict between the rights guaranteed by the Convention and by national law.¹³² Nonetheless, the Court recalled the ruling in *Melloni* by asserting that *'where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts*

¹²⁵ Case C-390/12 *Pfleger and others* [2014], para. 37.

¹²⁶ Van Erp, Sjef, 'European and National Property Law: Osmosis or Growing Antagonism?' (ELP 2006), 18: *'If European property law is founded upon the aforementioned common features (leading principles and ground rules), thus creating awareness of the various underlying common thought patterns, the result will be that European property law is not perceived as a corpus alienum, but as law that can be received and accepted as a further development of the existing national property law. The result will then be a growing osmosis between national and European property law.'*

¹²⁷ Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para. 17: *'The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the First Protocol to the European Convention for the Protection of Human Rights.'*

¹²⁸ Case C-40/11 *Iida* [2012], para. 79.

¹²⁹ Case C-40/11 *Iida* [2012], para. 81.

¹³⁰ Case C-399/11 *Melloni*.

¹³¹ Bernitz, Ulf, 'The Scope of the Charter and its Impact on the Application of the ECHR' in De Vries, Sybe, Bernitz, Ulf, and Weatherill, Stephen (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 155, 159-60.

¹³² Case C-617/10 *Åkellagaren v Åkerberg Fransson* [2013], para. 49.

remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.¹³³

In *Melloni* the CJEU considered the possibility that national standards of fundamental rights protection could provide for a higher scope or protection pursuant to Article 53 of the Charter which in general authorises MS to apply higher protection where necessary.¹³⁴ The Court set an upper limit¹³⁵ to the national provisions by ruling that *'where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*'.¹³⁶

Concluding Remarks

In light of the argument of incompatibility of intra-EU BITs with EU law,¹³⁷ it might be the case that the only protection that investors can rely upon is the European Convention on Human Rights and its First Protocol, and the Charter of Fundamental Rights of the European Union (Article 17 of the Charter).

Taking into account the diverse legal environment of EU MS, investors would have to cope with distinctive, yet overlapping frameworks of the European Convention on Human Rights and the Charter of Rights of the European Union. The jurisdiction of the CJEU or the ECtHR would apply (without prejudice to the involvement of national courts proceedings) depending on what measure the investor would appeal: the EU measure (CJEU) or the national measure (ECtHR). Whereas the protection against expropriation may gain another layer of protection with the EU's accession to the Convention and its Protocols as it has been envisioned, the CJEU struck down the intended accession of the EU to the Convention in *Opinion 2/13* because the autonomy of EU law would be compromised if the EU acceded under the proposed terms.¹³⁸ As far as property regimes that involve different layers of law are concerned, Lehari and Licht assert that internationalised property law as opposed to national property law features a less clear hierarchy, including the hierarchy of normative rules, decisionmaking processes, and institutional mechanisms.¹³⁹ The overlapping nature of investor rights protection in Europe (investment treaties; EU

¹³³ Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013], para. 49.

¹³⁴ Art. 53 of the Charter: *'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'*

¹³⁵ Bernitz, Ulf, 'The Scope of the Charter and its Impact on the Application of the ECHR' in De Vries, Sybe, Bernitz, Ulf, and Weatherill, Stephen (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 155, 159-60.

¹³⁶ Case C-399/11 *Melloni*, para. 60.

¹³⁷ See for instance, Moskván, Dominik, 'The Clash of Intra-EU Bilateral Investment Treaties with EU Law: A BITter Pill to Swallow' (2015) 22 (1) *Columbia Journal of European Law*, 101-138.

¹³⁸ *Opinion 2/13 of the Court (Full Court)*, paras. 198-199.

¹³⁹ Lehari, Amnon and Licht, Amir, 'BITs and Pieces of Property' (2011) 36 *Yale Journal of International Law* 116, 138.

measures; the ECHR, and national measures) complicates sustaining cross-field effects of property regimes since the interpretative tastes differ and one element in one system may not fit in the other ignoring the compact spectrum of property rights in the system in which it is incorporated into.¹⁴⁰

¹⁴⁰ Ibid, 138: ‘...a property regime, with its in rem traits and cross-field effects, may be difficult to sustain when a specific BIT or a tribunal applying it takes out one piece of the puzzle to resolve an isolated investor-state dispute. We thus argue that properly meet their goals, cross-border investment mechanisms must come to terms with the entire array of jurisprudential dilemmas that characterize property systems.’