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Guest Editorial on the ISDS Papers

ELTE Law School and the Representation of the European Commission have hosted a conference on the 'The Reform of ISDS and the Newly Forming EU Investment Policy: Other Claims Against States Based on Violations of Property Rights' on September 26, 2014, in the Aula Magna of the Law School. Miklós Király, the dean of the law school, spoke about the history of investment protection, while other speakers, who included academic professors (August Reinisch, Ursula Kriebaum, Peter-Tobias Stoll and Tamás Kende) and French, American and Hungarian attorneys (Anna Joubin-Bret, Jean Kalicki, Dmitri Evseev and Alex de Gramont, János Katona and György Molnár-Bíró) spoke about different current issues of ISDS. Jonathan Faust, Anthony Paccione, Petra Jeney, Renáta Uitz and Pál Sonnevend spoke about various other claims against the states. Leopoldo Rubinacci, a senior official of the European Commission, spoke about the views of the European Union.

Investment protection and investor-state dispute settlement mechanisms have evolved over the past five decades from a niche subject for devoted research assistants into prime time news items with multi-billion dollar awards, and have revolutionised international law by generating nearly ten times as many arbitral awards in five decades as judgements by the International Court of Justice in seven decades. Investment arbitration practice and decisions by arbitral tribunals has become prevalent outside of the narrow scope of investment protection for the larger international legal community on matters of fair and equitable treatment, non-discrimination, legal certainty and legitimate expectations.

Investment protection mechanisms have steadily changed over the years. As best summarised by Jean Kalicki, one of the key speakers at the conference, the traditional European BITs were fairly short, and generally employed basic principles without detailed definitions or instructions on how the European BITs should be applied. Several earlier BITs were only a few pages in length, and the substantive obligations simply stated core principals, but with relatively minimal guidance for interpretation of those principles by tribunals. By contrast, the United States' approach to the North America Free Trade Agreement (NAFTA) has been to define substantive obligations with far greater precision and clarity, which exceeded too many number of pages with footnotes and definitional annexes. Despite this approach, there was ample room for tribunal discretion than the NAFTA States anticipated, and the early NAFTA decisions (along with the decisions of tribunals interpreting OECD model treaties) carved out certain interpretative standards, which led to a dramatic re-examination exercise by State negotiators in recent years.

The latest round of treaties and models are the outcome of that reactive exercise. Another speaker, Anna Joubin-Bret, spoke about newer texts that are being adopted in both the United States and the European Union, and elsewhere around the world. Additionally, these new texts

may be perceived as expressly rejecting some tribunal-developed doctrines that were viewed as limiting regulatory discretion (e.g., in the FET/FPS/procedural MFN area) too broadly, while expressly adopting some tribunal-developed doctrines that were seen as useful (e.g., characteristics of investment, in addition to an open-ended asset-type list). Jean Kalicki has emphasised the outcome of such reactive exercises resulting in the Canada-EU Free Trade Agreement (CETA), the US Model BIT (released in 2012), and the draft investment chapter of the Transpacific Partnership (TPP), which were negotiated between the three NAFTA countries along with nine Asian and South American countries.

In both the CETA and TPP texts, we see an explicit adoption of definitions that first arose in the jurisprudence in the *Salini* case,[1] when arbitrators struggled to define what type of characteristics did and did not exemplify an 'investment.' The US Model BIT and the TPP accomplish the same basic objective as the CETA (focusing on the protection of entities with substantial activities in the home State), but with a slightly different structural solution. Whereas the CETA imposes this requirement in the definition of an investor – to regulate the question of who is qualified for treaty protection in the first place – the US Model BIT and TPPs address this issue in the denial of benefits context. Specifically, this requirement in CETA provides a respondent state with an option to deny benefits that would otherwise presumably apply. The CETA, having dealt with the 'substantial business activity' requirement at the outset, reserves denial of benefits for a much more limited context, essentially to avoid circumvention of sanction regimes. In the discrimination area, all three of the recent models incorporate a concept that is drawn from the NAFTA jurisprudence – the requirement that discrimination be judged only against entities that are in 'like circumstances' with the claimants. In the NAFTA jurisprudence, this concept is frequently defined in terms of economic competitors but jurisprudence also ingresses on the notion that differential treatment are only barred based on rational basis (other than nationality) can be seen as the second 'like circumstances' test meaning that if there are justifiable reasons for treating the discrimination differently, then they must not be 'like circumstances.' With respect to the use of most favoured nation clauses as a potential tool to weight dispute settlement mechanisms from other investment treaties, to expand the scope of jurisdiction – as discussed by Jean Kalicki and also by August Reinisch in the context of the TTIP draft texts – we see a clear reaction against the so-called *Maffezini Doctrine*[2] in the modern generation of treaty texts. By contrast, the treaties are generally silent on whether MFN (most favoured nations) clauses may be used to import or borrow substantive provisions from investment treaties signed between the host State and third States. Some tribunals have allowed this in cases such as *EDF v. Argentina*[3] and *MTD v. Chile*[4].

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[1] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (ICSID Arbitral Tribunal Case No. ARB/00/4 – See more at: <http://www.italaw.com/cases/958#sthash.9foHHtjX.dpuf>).

[2] *Emilio Agustín Maffezini v The Kingdom of Spain* (ICSID Arbitral Tribunal Case No. ARB/97/7).

[3] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Arbitral Tribunal Case No. ARB/03/23).

[4] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile* (ICSID Arbitral Tribunal Case No. ARB/01/7).

Nevertheless, investment protection needs to change as a result of the numerous factors. It appears that investment protection became too vast (in the number of investors to state lawsuits, in the number of issues affected, in the amounts involved, in the interests hurt) and investors, in many cases, became too successful. Furthermore, States feel that investment litigation and the rights of investors clearly have a constitutional dimension, as explained by Peter-Tobias Stoll. As news articles may suggest, politicians feel that they are held prisoner by greedy investors who seek to influence and limit domestic policies pursued by elected government officials. Therefore, there is a political momentum to limit the scope of investment protections based on these arguments.

As Leopoldo Rubinacci explained on behalf of the European Commission, the new Transatlantic Trade and Investment Partnership negotiations coupling the flow of goods, services and investment is new concept in itself. The fact that the European Commission is trying to move towards a more rule-based, permanent and institutionalised system is a sign that, based on its new Lisbon competencies, the Commission evidently wishes to manage investment protection alongside other competencies that the Commission has been exercising for decades. Additionally, Rubinacci explained the firm view of the European Commission, which was further discussed in detail by Ulrike Kriebaum, that intra-EU BITs have become inapplicable for a number of reasons and should be annulled and/or replaced by European-wide investment protection mechanisms. Peter-Tobias Stoll, August Reinisch and Tamás Kende have all discussed the fate of intra-EU BITs in the scope of their presentations.

Professor Reinisch has presented in detail on his views of European investment policy after the implementation of the Lisbon Treaty, the latest drafts of the TTIP investment chapter and discussed how such a draft, if it became a treaty text, would affect investment arbitration.

János Katona discussed the effects of the *Electrabel* case[5] on the jurisprudence and the conceptual issue of whether EU law is a form of international or domestic law and whether it – or at least part of it - may be considered as lex posterior in the sense of the Vienna Convention on the Law of Treaties.

Tamás Kende presented the hot topic of the clash between international law and EU law prior to arbitral awards and such awards being qualified as state aid, as in the *Micula* case[6] of 2013, in order to block the enforcement of arbitral awards. Anthony Paccione also talked about the enforcement and problems of enforcement of ISDS decisions in the United States. Alex de Gramont spoke about the single largest investment award so far distributed in the recent *Yukos* case,[7] and whether the decision was or could ever become enforceable and be enforced against Russia. Pal Sonnevend also discussed the *Yukos* case,[8] as the European Court of Human Rights has also recently furnished a substantial award against Russia in that case. In Professor Sonnevend's view, the ECHR is not a real alternative to investment protection fora. Dmitri Evseev discussed investment treaty arbitration cases against Hungary in detail and how they – especially

[5] *Electrabel S.A. v Republic of Hungary* (ICSID Arbitral Tribunal Case No. ARB/07/19).
[6] *Ioan Micula, Viorel Micula and others v Romania* (ICSID Arbitral Tribunal Case No. ARB/14/29).
[7] *Yukos Universal Limited (Isle of Man) v The* Russian *Federation* (UNCITRAL, PCA Case No. AA 227).
[8] *Case of OAO Neftyanaya Kompaniya Yukos v Russia* (Application no. 14902/04).

the *Electrabel* case – contributed to international treaty arbitration law and to European policies on investment protection. Jonathan Faust spoke about recent Holocaust-related property claims in the US and the way US federal courts dealt with such claims. György Molnár-Bíró talked about discriminatory taxation rules as a violation of property rights and discussed how affected investors could sue in both the EU and in front of the ECHR. Professor Renata Uitz also talked about how, according to recent experience, rights to property and entitlements of various churches could be enforced in front of the ECHR.

This volume of ELTE Law Journal – besides other valuable contributions – is dedicated to the lectures made at the conference having taken a full day. We hope the readers of this volume will also be able to appreciate the diversity of views on many salient issues of international investment law and understand that, because of clashes between international investment law and European law (as well as clashes between state interests and important impending changes to the structures of world commerce), ISDS has been at an important turning point. Leopoldo Rubinacci was able to demonstrate this to the participants by referring in his presentation to a new draft chapter in the TTIP dealing with a new model of ISDS with a permanent tribunal instead of ad hoc arbitrations. Quite a seismic shift in investor-state arbitrations.

Budapest, 15 November 2015.

Tamás Kende
Guest editor

Symposium

August Reinisch, Lukas Stifter*

European Investment Policy and ISDS

I Introduction

Currently, the topic of investor-state dispute settlement (ISDS) and in particular the position of the European Union towards it is one of the most controversial issues with regard to the EU's external trade policy.

In late September 2014, the text of the EU–Canada Comprehensive Trade Agreement (CETA),[1] which includes an ISDS chapter, was finalised. However, it is very controversial and unclear whether ISDS will form part of an agreement with the United States. The negotiations on a possible investment chapter in EU-US Transatlantic Trade and Investment Partnership (TTIP) were officially suspended because of massive public and political opposition, in particular against ISDS. It is all the more important to look at the agreement with Canada and to see to what extent points of criticism that have been raised in the past are addressed in a sufficiently clear and satisfactory way.

In particular, the questions of efficiency of the procedure, predictability and consistency as well as state control over the process will be discussed.

With regard to efficiency, not only cost efficiency and speedy adjudication of claims is important but also innovative issues such as alternative dispute settlement resolution, whether in the form of mediation or conciliation, will be important. The question of predictability is closely linked to the problem of transparency and the issue of consistency will be addressed when speaking about the possibility of an appellate mechanism. Finally, the state control *problematique* is evident when looking at the very detailed language, not only of the substantive protection standards in the CETA, but also of the dispute settlement chapter. In this context, it is remarkable to see that the parties have provided for interpretation possibilities and certain limits on the level of enforcement.

The following overview will, in a very selective way, analyse a few of the provisions contained in Section 6: Investor-State Dispute Settlement of the 26 September 2014 draft of the CETA.[2] There is no claim to an exhaustive treatment.

* August Reinisch, Professor of International and European Law at the University of Vienna; Lukas Stifter, Researcher and Lecturer for Public International Law at the University of Vienna.

[1] Consolidated CETA Text, published on 26 September 2014, available at <trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>.

[2] Consolidated CETA Text (n 1).

II The Scope of ISDS

1 Treaty Claims Exclusively

One important issue concerning the potentially over-reaching breadth of investor-state arbitration relates to the scope of claims that may be submitted to arbitration. Often, concern is raised that investors may use ISDS to circumvent the domestic judiciary for purely contractual claims against host states. Various International Investment Agreements (IIAs)[3] contain so-called umbrella or observance of observation clauses which require states to respect the obligations they entered into with regard to a specific investment.[4] In other words, umbrella clauses potentially bring contractual and other individual obligations within the ambit of an IIA and thus make them enforceable under its ISDS mechanism.

It is clear though that, depending on the wording of the respective treaty, a state's offer to arbitrate may also be limited. In this regard Article X.17 of the draft is fairly unambiguous.[5] It permits only so-called treaty claims. Hence, this provision excludes investment disputes concerning contractual issues from being litigated under the ISDS chapter of the treaty. This is evident when comparing the current formulation with broader dispute settlement clauses in other IIAs.[6]

In this context, it is important to note that Canada has traditionally resisted umbrella clauses and that while the 'Draft CETA Investment Text of 21 November 2013' contained an EU suggestion on an umbrella clause,[7] the current final draft agreement does not contain such

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[3] See e.g. Article 10(1) last sentence of the Energy Charter Treaty (ECT) ('Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.').

[4] See R. Dolzer, C. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012, Oxford) 166 et seq. With regard to the question whether an umbrella clause transforms the applicable law to the underlying obligation, there has been a controversial discussion; on this issue see M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (Kluwer Law 2010) 180 et seq.

[5] Article X.17 Consolidated CETA Text (n 1) ['Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under: Section 3 (Non-Discriminatory Treatment) of this Chapter, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or Section 4 (Investment Protection) of this Chapter; and where the investor claims to have suffered loss or damage as a result of the alleged breach.'].

[6] E.g. Article 139 of the 2009 China-Peru Free Trade Agreement (FTA) which empowers the arbitral tribunal to decide on '[a]ny dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party.' Some treaties opt for an median approach between the by providing for an exhaustive list of causes of actions covered by the ISDS mechanism and by defining the breaches listed therein, see e.g. Article 15.15 of the 2003 Singapore-United States FTA ['(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: (i) that the respondent has breached (A) an obligation under Section B, (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.'].

[7] In November 2013, the Trade Justice Network leaked draft texts on the CETA; see <http://eu-secretdeals.info/upload/2014/02/CETA-Investment-and-ISDS-Chapter-Dec-2013.pdf>. The 'Draft CETA

a clause.[8] This implies that contractual disagreements and disputes can also not be brought under the protection of the CETA.

2 Lawful Investments

A further interesting provision dealing with limiting the scope of potential arbitration claims can be found in the same Article X.17, which provides as follows:

> For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[9]

What this novel provision aims at is the exclusion of claims such as those made by investors in cases like *Inceysa v. El Salvador*[10] and *Phoenix* v. *Czech Republic,* where it has been argued that the investments had been made in an unlawful way.[11] In those cases, the claims have been held inadmissible because they were considered to be contrary to an 'in accordance with host state law' clause. However, a closer analysis of, in particular, the *Inceysa* case demonstrates that such reasoning was somewhat complicated and not wholly convincing.[12] Moreover, the *Phoenix* award, with its enlargement of the *Salini* criteria[13] by an 'in accordance with host state law' and a bona fide requirement[14] has remained controversial. In this context, one should also take into

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Investment Chapter' contained the following suggestion on page 13 ('[EU: Article X Each Party shall observe any specific written obligation it has entered into with regard to an investor of the other Party or an investment of such an investor.]'). This would have been in accordance with the EU Commission's initial position on this issue, see European Commission, Directorate General for External Policies, Communication, 'Towards a Comprehensive European International Investment Policy' COM(2010)343 (7 July 2010) at 8.

8 See C. Lévesque, A. Newcombe, 'Canada' in C. Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013, Oxford) 53, at 60 f. Also, NAFTA's chapter 11 on investments does not contain such a clause.

9 Article X.17 Consolidated CETA Text (n 1).

10 *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador,* ICSID Arbitral Tribunal, Case No. ARB/03/26, Award, 2 August 2006.

11 *Phoenix Action, Ltd.* v. *Czech Republic,* ICSID Arbitral Tribunal, Case No. ARB/06/5, Award, 15 April 2009.

12 In its scrutiny whether the investment had been made in accordance with the law of the host State, the tribunal did not restrict itself to a consideration of the law of El Salvador. Instead, it reasoned that – because treaties formed part of the law of El Salvador – the BIT with its reference to generally recognized rules and principles of international law allowed it to look at these sources in order to establish the legality or illegality of the investment. Relying on a number of general principles of law, such as *Nemo Auditur Propriam Turpitudinem Allegans,* the tribunal found, inter alia, 'that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud". *Inceysa* (n 10) para. 242.

13 *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco,* ICSID Arbitral Tribunal, Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.

14 *Phoenix* v. *Czech Republic* (n 11) para. 114 ('1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested bona fide.').

account Article X.3, which inter alia requires the investment, more generally, to be 'made in accordance with the applicable law at that time' in order to constitute a 'covered investment' for the purpose of the investment chapter.

The suggested clauses will therefore, make it easier for future investment tribunals to clearly dismiss cases where there is evidence that the investment was obtained fraudulently or in any other unlawful way.[15]

3 The Dismissal of ill-Founded Claims

Litigation in general and investment arbitration in particular can turn into time- and cost-intensive undertakings. In addition, concern has been voiced over an increasing number of unmeritorious and frivolous claims that still require full defence strategies on the part of respondent states. For these reasons, mechanisms to avoid the submission of unfounded claims have been introduced.[16]

Similarly, the draft CETA text contains Articles X.29(1)[17] and X.30[18]. These provisions entitle the respondent to file preliminary objections to a claim put forth by the claimant with a view to obtaining an early dismissal in an expedited procedure. While the former provision concerns claims 'manifestly without legal merit', the latter covers claims that are 'not […] claim[s] for which an award in favour of the claimant may be made'.[19] Put in other words, these provisions enable the respondent to raise objections already at a very early stage. Neither Article X.29 nor Article X.30 is totally new.

The former provision will, most likely, only be important if a claim is submitted under arbitration rules other than the ICSID Convention, since ICSID Arbitration Rule 41(5) already contains a similar provision.[20] In the course of its application, the wording of Article X.29 CETA

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[15] See e.g. the facts of *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines*, ICSID Arbitral Tribunal, Case No. ARB/03/25, Award, 16 August 2007.

[16] See e.g. Article 35(3)a of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entry into force 3 September 1953, which allows for the dismissal of individual applications that are 'manifestly ill-founded' or amount to an abuse of 'the right of individual application.' In the context of investment arbitration, see e.g. Article 28(4) of the US-Model BIT 2012, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

[17] Article X.29(1) Consolidated CETA Text (n 1) ('The respondent may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. […]').

[18] Article X.30(1) Consolidated CETA Text (n 1) ['Without prejudice to a tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article X.22 (Submission of a Claim to Arbitration) is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.'].

[19] Article X.29(1) Consolidated CETA Text (n 1), requires the respondent to file an objection 'no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal,'

[20] ICSID Arbitration Rule 41(5) ('Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.').

text might arguably cause problems due to the absence of a definition of 'manifestly' and 'without legal merit'. It is therefore appropriate to look at the jurisprudence on ICSID Arbitration Rule 41(5), since it also addresses claims that are 'manifestly without legal merit' while at the same time not providing guidance for its interpretation.[21] Arbitral tribunals[22] have so far construed the meaning of this notion on a case-by-case basis.[23] In *Trans-Global Petroleum v Jordan,* the tribunal stated that a claim is 'without legal merit' when it concerns 'infringements of non-existent legal rights of the Claimant or non-existent legal obligations of the Respondent'.[24] With regard to the 'manifestly-requirement', the same tribunal concluded that '[t]he word requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high.[25]

It is not apparent to what extent the second provision, Article X.30, differs from Article X.29, nor how the two provisions interrelate exactly.

In fact, the wording of Article X.30 CETA is also not wholly new and provisions in other IIAs may help to interpret it.[26] For instance, Article 28(4) of the 2012 US Model-BIT entitles a tribunal, in a similar manner, to dismiss a claim based on the assertion that as a matter of law, an award in favour of the claimant may not be made.[27] It has been remarked that this provision 'borrows from Rule 12(b)(6) of the US Federal Rules of Civil Procedure, which permits dismissal for failure to state a claim upon which relief can be granted.'[28]

Taking this into consideration and looking at the wording of Article X.30 CETA, one can argue that this provision concerns claims based on factual arguments that per se are not capable of giving rise to legal claims under the treaty, e.g. the allegation that a contractual obligation

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For a more detailed analysis, see A. Diop, 'Objection under Rule 41(5) of the ICSID Arbitration Rules' (2010) 25 (2) ICSID Review 312–336; C. Brown, S. Puig, 'The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules' Sydney Law School Research Paper No. 11/33 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859446>.

21 See above (n 17).

22 So far, there have been several cases decided under ICSID Arbitration Rule 41(5): *Trans-Global Petroleum, Inc v Jordan,* ICSID Arbitral Tribunal, Case No ARB/7/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules of 12 May 2008; *Brandes Investment Partners LP v Venezuela,* ICSID Arbitral Tribunal, Case No ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules of 2 February 2009; *Global Trading Resource Corporation and Globex International, Inc v Ukraine,* ICSID Arbitral Tribunal, Case No ARB/09/11, Award, 1 December 2010 and *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Arbitral Tribunal, Case No ARB/10/6, Award, 10 December 2010.

23 See Diop (n 20) 328.

24 See *Trans-Global Petroleum v Jordan* (n 22*)* para. 95.

25 Ibid, para. 88.

26 See e.g. Article 10.19 of the 2003 USA-Chile FTA ('[…] a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made […].').

27 Article 28(4) 2012 US-Model-BIT (n 16) ('Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.').

28 See J. Sharpe, L. Caplan, 'United States' in Brown (n 8) 835.

had been infringed.[29] The phrase 'even if the facts alleged were assumed to be true' supports this view and arguably leads to the conclusion that Article X.30 focuses on claims that concern facts genuinely not capable of falling within the ambit of the treaty's investment chapter.

By contrast, the wording of Article X.29, in particular the term 'legal merit', suggests that is concerns the (manifestly wrong) application of the law to a certain factual situation that falls, from an objective and abstract point of view, under the ambit of the treaty and thus violates it. This view is further supported by Article X.29(3) which directs the tribunal to 'assume the alleged facts to be true' when deciding an objection under this provision. As for the relationship between these two distinct proceedings, Article X.29(2) prescribes that '[a]n objection may not be submitted under paragraph 1 [of this article] if the respondent has filed an objection pursuant to Article X.30 (Claims Unfounded as a Matter of Law).' This shows that proceedings under Art X.29 are subsidiary to objections Article X.30.

With regard to ICSID Arbitration Rule 41(5), there has been a discussion whether and to what extent this rule empowers a tribunal to review the factual faults of a claim and jurisdictional objections.[30] It remains doubtful whether the CETA approach will provide clarification of this issue.

4 Alternative Dispute Resolution

The investment chapter of the CETA also contains provisions aiming at alternative dispute resolution. The overarching goal seems to be the prevention of arbitral proceedings by way of amicable settlement of disputes. In this connection, the CETA contains elaborate provisions in Article X.18 entitled 'Consultations'[31] as well as Article X.19 entitled 'Mediation'.

The requirement to resort to consultations prior to the initiation of arbitral proceedings has become a fairly common feature in IIAs.[32] In this connection, it is important to note that it often constitutes a pre-condition for a host state's consent to arbitration.[33]

However, within arbitral practice there have been divided opinions as to whether non-compliance with an amicable settlement requirement affects a tribunal's jurisdiction or whether this is a mere procedural formality that may be cured by actual lapse of time.[34] In this regard, Article X.22(1) provides:

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[29] As described in the text above, (n 6) infringements of contractual obligation are not capable of amounting to a violation of one of the protection standards.

[30] See Diop (n 20) 321 et seq. See also *Trans-Global Petroleum v Jordan* (n 22*)* paras. 97 et seq.

[31] Article X.18 Consolidated CETA Text (n 1) ('Any dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 3. […].').

[32] E.g. NAFTA Articles 1118–1120 or Article 26(2) of the ECT. See C. Tams, 'Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?' (2014) 15 Journal of World Investment and Trade 603.

[33] See Dolzer, Schreuer (n 4) 268 et seq.

[34] In *Murphy Exploration and Production Company International v. Republic of Ecuador,* ICSID Arbitral Tribunal, Case No. ARB/08/4, at para. 194, the tribunal established that this requirement 'constitutes a fundamental

> *If a dispute has not been resolved through consultations,* a claim may be submitted to arbitration under this Section by […].[35]

Moreover, the time-frame for consultations as provided for in the CETA must be followed. Article X.21(1) sub-paragraph 2 prescribes that a claim may be submitted to arbitration only if the investor

> […] allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;[36]

Article X.19 CETA includes a more innovative provision on alternative dispute settlement by providing for the permanent option of mediation.

In investment disputes, meditation has not been used extensively in the past.[37] Mediation is a means of alternative dispute resolution which, by contrast to arbitration, puts less emphasis on the strict application of the law. Its main aim is to find tailor-made solutions that are acceptable to both disputing parties. From a procedural point of view, this mechanism provides for more flexibility and informality: an impartial and independent third party neutral (the mediator) assists the parties to establish a dialogue and might also propose a feasible solution to a dispute. However, mediators are not entitled to impose binding decisions or awards upon the disputing parties.[38]

Currently, there is an important debate on the use of mediation in investment disputes and the International Bar Association rules on mediation of investor-state disputes are clear evidence of this trend.[39] With regard to investment disputes, which very often contain a long-term perspective, mediation may be a tool to enable the continuation of an investment and therefore be in the end a cost-saving and more efficient way of settling disputes than contentious arbitration. Given the fact that investment arbitration regularly concerns measures involving aspects of public interest, mediation might be a method that finds more acceptance among civil

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requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.' Other investment tribunals, however, treated 'consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.' *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan,* ICSID Arbitral Tribunal, Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, para. 184. See also A. Reinisch, 'From Rediscovered Waiting Periods to Ever More Activist Annulment Committees – ICSID Arbitration in 2010' [2011-II] 11 Global Community YILJ 933.

35 Article X.22(1) Consolidated CETA Text (n 1) (emphasis added).

36 Article X.21(1) sub-paragraph 2 Consolidated CETA Text (n 1).

37 See UNCTAD (2014). *Series on International Investment Agreements II: Investor-state dispute settlement: A sequel* at 61, available at <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf>.

38 See M. Dimsey, *The Resolution of International Investment Disputes* (Eleven International Publishing 2008) at 144 et seq.; S. Franck, 'Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide' (2014) 29 (1) ICSID Review 66–89 at 80.

39 See W. von Kumberg, J. Lack, M. Leathes, 'Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come' (2014) 29 (1) ICSID Review 133–141. The IBA rules are available at <http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx>.

society due to its emphasis on the consent of both disputing parties. A negative aspect of mediation is a certain lack of transparency with regard to the way a state resolves its disputes.[40] After all, the lack of transparency has been one of the major points of criticism among opponents of the current ISDS system.

Article X.19 CETA appears to be clearly inspired by the WTO mediation possibility, which is available during the entire process of dispute settlement in trade disputes.[41] If one looks at the precise wording of Article X.19 paragraph 4 CETA, which prescribes that disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator, one may wonder whether this short time-frame is realistic for the resolution of highly technical complex investment disputes.

While the contemplated time period of 60 days may in some cases indeed be too short for the prevention of arbitral proceedings, some specific elements of a dispute could be resolved by way of mediation whereas remaining issues can still be subject to arbitral proceedings. In this connection, it is also important to note that, in the context of ICSID, the partial settlement achieved under mediation can be included into a (legally binding) award pursuant to ICSID Arbitration Rule 43(2).[42] It remains to be seen whether investors will make use of the possibility for mediation.

5 Procedural and Other Requirements

Another interesting aspect of the dispute settlement chapter relating to the scope of arbitration is Article X.21 CETA which contains procedural and other requirements for the submission of a claim to arbitration. It lists, in a somewhat 'paternalistic' way, specific requirements a potential claimant has to fulfil before it will be allowed to raise an investment claim.

While it seems obvious that this is intended to make sure that only serious claims will be ultimately subject to arbitration, the rather (over-)specific determination contains a number of potential problems.

For instance, Article X.21(1) sub-paragraph 4, which provides that the investor does not identify measures in its claim to arbitration that were not identified in its request for consultations, may lead to protracted jurisdictional disputes on whether and to what extent the actual claim complies with this formal prerequisite.

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[40] See Article 6(1) of Annex III Consolidated CETA Text (n 1) ('Unless the Parties agree otherwise, and without prejudice to Article 4(6), all steps of the procedure, including any advice or proposed solution, are confidential. However, any Party may disclose to the public that mediation is taking place. The obligation of confidentiality does not extend to factual information already existing in the public domain.').

[41] See Article 5(3) WTO DSU ('Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.').

[42] Article 43(2) ICSID Arbitration Rules ('If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.').

III State Control over the System

One of the main points of criticisms of the opponents of the inclusion of an investment chapter to the CETA has been the allegation that investment protection may be a genuine threat to state measures serving public interest.[43] Against this backdrop, one of the most important trends in recent investment arbitration negotiations has been the attempt by treaty negotiators to make sure that the states parties to such treaties remain in control of the procedure. This impetus may have been fuelled by concern over activist investment tribunals that are perceived to re-interpret the original intentions of the treaty parties.

States regain control, on the one hand, by shaping the substantive protection rules in more detailed ways than before and, on the other hand, by limiting the breadth of awards.

1 Substantive Limitations

With regard to the above mentioned fine-tuning of protection standards, the CETA's Article X.9 on the fair and equitable (FET) standard is particularly worth mentioning.[44] First of all, paragraph 2 contains a list of measures that infringe the FET standard.[45] This list is 'quasi-exhaustive' in the sense that it may be reviewed (and extended) by the Trade Committee only.[46]

Article X.27 CETA on 'applicable law and interpretation' is a further striking example of this trend.[47] More generally, its paragraph 2 provides that the Committee on Services and Investment may recommend to the Trade Committee the adoption of interpretations of the agreement and

[43] See e.g. a report of the 'Seattle to Brussels Network' entitled 'Reclaiming Public Interest in Europe's International Investment Policy – EU Investment Agreements In the Lisbon Treaty Era: A Reader available at <http://somo.nl/publications-en/Publication_3558/at_download/fullfile>.

[44] Another example would be Annex X.11 Consolidated CETA Text (n 1) on expropriation which clearly defines the ambit of Article X.11 on expropriation with regard to measures potentially amounting to an indirect expropriation ('measures having an effect equivalent to nationalization or expropriation') in a similar manner as the US-Model BIT and its Annex B (n 16).

[45] Measures may violate the FET standard if they amount to a denial of justice in criminal, civil or administrative proceedings, a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings, if they constitute manifest arbitrariness, a targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief, or if they amount to an abusive treatment of investors, such as coercion, duress and harassment. Interestingly, this list does not contain the element of legal stability which has been a common feature of the FET standard under the notion of 'legitimate expectations' as interpreted by arbitral tribunals. On this issue see e.g. R. Kläger, *Fair and Equitable Treatment' in International Investment Law* (OUP 2011) 164 et seq. After all, this might be a concession to the critics of ISDS with regard to their concern that investment protection prevents States from adopting measures serving the public interest.

[46] Article X.9(3) Consolidated CETA Text (n 1) ('The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.'). See also Article X.27 Consolidated CETA Text (n 1) at (n 45).

[47] Generally see e.g. UNCTAD, IIA Issues Note, No. 3 (December 2011), *Interpretation of IIAS: What States Can Do,* available at < http://unctad.org/en/docs/webdiaeia2011d10_en.pdf>.

that, of course, refers to the entire agreement, including the substantive protections. Such an interpretation, Article X.27 continues to say, shall be binding on a tribunal established under this chapter. [48]

From a general treaty law perspective, this builds on Article 31 Vienna Convention on the Law of Treaties (VCLT).[49] In the investment context, such a possibility has already been provided for in chapter eleven of the NAFTA and there indeed we have some examples of interpretations of core-substantive investment protection standards.[50] The most important one relates to the definition of fair and equitable treatment. In 2001, the NAFTA Free Trade Commission 'interpreted' that the fair and equitable treatment standard should be considered to be nothing more than the customary international law minimum standard.[51]

The NAFTA example has also demonstrated that such an 'authoritative' interpretation may be problematic when made in the course of pending proceedings.[52] While this may be helpful in order to clarify the intended standard of investment protection for investment tribunals, it is problematic from a due process/fair trial perspective, since it allows a host country in concert with the home country of the investor to influence the decision making of an independent investment tribunal.

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[48] Article X.27 Consolidated CETA Text (n 1) ['A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.'].

[49] In particular, Article 31(3) Vienna Convention on the Law of Treaties, 1155 UNTS 331 ["There shall be taken into account, together with the context:(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.'].

[50] Generally, see e.g. A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179–225.

[51] NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decisions of 31 July 2001, available at <http://www.worldtradelaw.net/nafta/chap11interp.pdf> ['1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'].

[52] See *Pope & Talbot v Canada,* UNCITRAL Arbitration Award in Respect of Damages of 31 May 2002, 41 ILM 1347 (2002). See for a non-NAFTA case *CME Czech Republic B.V. v. The Czech Republic, Partial Award,* UNCITRAL Arbitration Award of 13 September 2001, World Trade and Arbitration Materials 109 (2002), para 156 ('The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment.').

2 The Breadth of Awards

Another question linked to the issue of state control and sovereignty in the context of investment protection is the question of what obligations an arbitral tribunal may impose upon the parties in an award. In particular, the public discussion on ISDS has focused on the extent to which investment tribunals can force a state to change its policies and actually to change its laws and regulations. Often, the danger of ISDS is portrayed as forcing individual states to change or actually to abstain from regulating in the public interest. Such a danger may actually materialise where tribunals order specific performance or in another way instruct states to act in a particular way. In fact, under the ICSID Convention as well as under other investment arbitration regimes, tribunals are not generally limited to awarding monetary compensation only.[53]

It is thus remarkable to see that in Article X.36 of the draft CETA text it is clearly laid down that a tribunal may in a final award only specify monetary damages and any applicable interest as a general principle.[54]

With regard to expropriation claims, it is generally accepted that a tribunal may, if it finds that an expropriation was unlawful, order restitution of property. However, in the CETA, it is also made explicit that, even in such a situation, the respondent state should have the right to choose between actually returning the property or paying fair market value compensation for it.[55] This is interesting because fair market value compensation has been usually treated as a requirement for the lawfulness of an expropriation under general international law.[56] A lawful expropriation requires the payment of compensation usually based on the fair market value anyway, whereas an unlawful (non-compensated) expropriation triggers the obligation to pay damages. In the latter case, the *Chorzów*-principle would apply: An expropriating but non-compensating state would have to eliminate all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed.[57] Pursuant to Article X.36, a lawful expropriation and an unlawful expropriation will arguably have the same consequence: Eventually, both conducts require the payment of the fair market value if restitution in kind is not chosen.

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[53] The fact that Article 54(1) ICSID Convention expressly speaks of an obligation to enforce the 'pecuniary obligations' imposed by an ICSID award does not exclude the possibility of other obligations under an award such as restitution or different forms of specific performance or injunctions. See also C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (2nd edn, 2009, Cambridge) 1136.

[54] Article X.36(1) Consolidated CETA Text (n 1) ('Where a Tribunal makes a final award against the respondent the Tribunal may award, separately or in combination, only: monetary damages and any applicable interest; […]').

[55] Article X.36(2) Consolidated CETA Text (n 1) […restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier and any applicable interest in lieu of restitution, determined in a manner consistent with Article X.11 (Expropriation).'].

[56] See A. Reinisch, 'Legality of Expropriations' in A. Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008, Oxford) 171–204.

[57] *Chorzow Factory Case (Germany v. Poland),* 1928 PCIJ (Ser. A) No. 17 (Judgment of Sept. 13, 1928).

This is clearly reminiscent of one of the old problems, discussed in various of the *Libyan oil concession* arbitrations, whether restitution of property or compensation are the appropriated remedies in cases of expropriation.[58] However, since restitution has been found to be the primary remedy, as already has also laid down in the ILC Articles on State Responsibility,[59] it is important that the CETA makes a clear statement in this regard.

Another aspect of limiting the potential breadth of what investment arbitral tribunals may award can be found in paragraph four of the same article. It provides that a tribunal may not award punitive damages.[60] Given that there has been some discussion as to what extent investment tribunals should be entitled to award moral damages,[61] it is regrettable that the dispute settlement provision of Article X.36 CETA does not clarify this issue.

A further example of the continued host state control and limitation of enforceability of investment awards can be found in Article X.39 CETA, in which it is provided that the enforcement or execution immunity provisions of states where the execution of an award is sought will be maintained. This is a provision that corresponds to Article 55 of the ICSID Convention[62] and according to the CETA rules will now also apply with regard to UNCITRAL or other arbitrations.

This, of course, also triggers another interesting aspect, i.e. that the current formulation of the CETA investor state dispute settlement chapter makes standard and frequent reference to the ICSID Convention. This is surprising, since it is relatively clear that the ICSID Convention without an amendment will not be available to the EU as a non-state actor on the international stage.[63] Given the specific background of the CETA with the EU and its Members States concluding a mixed-agreement applicable to and eventually performed mainly by its 28 Member States, the ICSID Convention could nevertheless be applicable if the respondent in a specific dispute is not the EU itself but a Member State.[64] Pursuant to Article X.20(4) CETA, this would be the case if 'the measures identified in the notice [delivered to the EU requesting a determination of the respondent pursuant to paragraph 1] are exclusively measures of a Member State of the European Union […].' As for the personal scope, the ICSID Convention, Article 25 merely requires that the parties to a dispute (and not to the underlying IIA) are a Contracting State and a national of another Contracting State. From a Canadian perspective, this requirement

[58] See A. Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 502.

[59] Articles on Responsibility of States for internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

[60] Article X.36(4) Consolidated CETA Text (n 1).

[61] See *Desert Line Projects LLC* v. *Yemen,* ICSID Arbitral Tribunal, Case No. ARB/05/17, Award, 6 February 2008; *Joseph Charles Lemire* v. *Ukraine,* ICSID Arbitral Tribunal, Case No. ARB/06/18, Award, (March 28, 2011). See also P. Dumberry, 'Compensation for Moral Damages in Investor-State Arbitration Disputes' (2010) 27 (3) Journal of International Arbitration 247–276.

[62] Article 55 ICSID Convention ('Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.')

[63] Pursuant to Article 67 of the ICSID Convention, the convention is only accessible to member states of the IBRD or to any other state which is a party to the ICJ Statute. See already M. Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (2014) 15 Journal of World Investment and Trade 557.

[64] Article X.20 Consolidated CETA Text (n 1), concerns the determination of the proper respondent.

would obviously be met.[65] If the proceedings under CETA Article X.20 result in a Member State being the respondent in a dispute under this agreement and if this Member State is an ICSID Contracting State,[66] arbitral proceedings could arguably be conducted under the ICSID rules, even though the EU is not a party.

IV Transparency and other Procedural Issues

One of the issues that has been frequently discussed in the investment arbitration community but also within civil society is the question of sufficient transparency.[67] It seems that the negotiators of the draft CETA have shared the concerns raised in the course of this discussion. Article X.33 provides for the transparency of proceedings by incorporating the recently adopted UNCITRAL Transparency Rules.[68] Notably, this provision does not only make a reference to them but in parts extends the degree of transparency provided for by this set of rules. Paragraph two of Article X.33, for example, adds a list of further documents to be made public to the list contained in Article 3(1) of the UNCITRAL Transparency Rules. It is also worth mentioning that Article X.33(5) CETA prescribes that

> [h]earings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings.

The CETA approach with regard to transparency is, at least from an EU perspective, quite revolutionary, since a vast majority of past IIAs concluded by its 28 Member States do not contain a provision requiring mandatory transparency in investor-state arbitration.[69] Against this background, the position of the Commission (which has taken a strong stance in support of the UNCITRAL Transparency Rules, in particular upon its adoption in 2013)[70] has been different to the position of many EU Member States.[71]

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65 The ICSID Convention has been into force for Canada since 1 December 2013.

66 For a list of ICSID Contracting Parties and other Signatories of the ICSID Convention see <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

67 See on transparency in general V.V. Veeder, 'The Transparency of International Arbitration: Process and Substance' in L. Mistelis, J. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 89–102; H. Mann, 'Transparency and Consistency in International Investment Law: Can the Problem be fixed by Tinkering?' in K. Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 213; J. Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in A. Bianchi and A. Peters (eds), *Transparency in International Law* (OUP 2013). See also N. Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy' (2014) 15 Journal of World Investment and Trade 645.

68 Article X.33(1) Consolidated CETA Text (n 1) ('The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter.')

69 For background and more detail, see Calamita (n 67) 672.

70 European Commission, Press Release, EU backs new transparency standards for investor-state dispute settlement, 11 February 2013, available at < http://trade.ec.europa.eu/doclib/press/index.cfm?id=868>.

71 See Calamita (n 67) 673.

In Article X.38 CETA on the fees and expenses of the arbitrators, an attempt has been made to ensure that dispute settlement be efficient and cost sensitive. It provides that the fees and expenses of arbitrators should correspond to those under the ICSID Arbitration Rules, which are comparably low vis-à-vis those used in UNCITRAL and ad hoc arbitrations. That is relevant because it will also apply to UNCITRAL arbitrations and may therefore lead to a reduction in arbitrators' fees. Given that the costs of the tribunal are usually less than a quarter of the entire costs of international arbitration, which are mainly attributable to legal representation, it is open whether the cost saving of this particular provision will be dramatic. In this connection, it should also be noted that Articles X.22 and X.25 CETA provide for the possibility that a sole arbitrator should hear a claim. Whether this may constitute a relevant factor for the reduction of costs may also be called into question.[72]

With regard to cost reduction, Article X.36(5) CETA will have a more important economic impact. It stipulates that a tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. It thereby provides that there is a clear mandate to follow the loser pays principle, which is not generally adopted in investment arbitration.

Finally, the investment chapter of the CETA makes some provision for an appellate mechanism in Article X.42.[73] While not yet providing for such a mechanism in the agreement itself, it provides that the Committee on Services and Investment should discuss whether and, if so, under what conditions an appellate mechanism could be created under the CETA. Apart from its particular design, it should be noted that the inclusion of an appellate structure would not be compatible with the ICSID Convention, whose Article 53 unambiguously stipulates that awards 'shall not be subject to any appeal'. Thus introducing an appellate mechanism into the ICSID system would require a revision of the Convention. Against this backdrop, the creation of an appellate system merely remains an option.[74]

[72] Bischof, e.g., argues that this would only be beneficial if the sole arbitrator would categorically hear certain small claims; see J. Bischoff, 'Initial Hiccups or More? About the Efforts of the EU to find its Future Role in International Investment Law' (2014) 14 (1) Transnational Dispute Management 26–27. Similarly, Tams (n 32) at 602.

[73] On the discussion on the introduction of an appeals mechanisms, see e.g. D. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2006) 39 Vanderbilt J. of Transnat'l L. 51; A. Qureshi, 'An Appellate System in International Investment Arbitration?' in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1154; C. Tams, 'An Appealing Option? The Debate about an ICSID Appellate Mechanism' in G. Kraft, R. Sethe (eds), *Beiträge zum Transnationalen Wirtschaftsrecht* (Halle, 2006) and C. Tams, 'Is There A Need for an ICSID Appellate Structure?' in Hofmann, C. Tams (eds), *The International Convention for the Settlement of Investment Disputes: Taking Stock After 40 Years* (Nomos, 2007); B. Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Sauvant (n 67) 231.

[74] See Tams (n 32) 597–598.

V Conclusion

Looking at the specific agreements of the CETA, one can clearly discern the attempt of the treaty negotiators to limit the broad discretion given to investment arbitration tribunals in the past; states are regaining control of the process and claims should be admissible only in extreme and egregious cases.

It does appear that many of the concerns about the far or even too far-reaching powers of investment arbitrations have been adequately addressed here.

One may wonder therefore why the EU Commission, as the negotiating body responsible for the European side, was not in a position to convey this message publicly in an effective way. Instead, it remained fully silent and a opened a public consultation forum when a number of criticisms were raised against the system. Whether that is now too late or not remains to be seen.

Ursula Kriebaum*

The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective

I Introduction

It is estimated that almost 3,000 BITs are currently in existence worldwide. Of these, about 190 have been concluded between Member States of the European Union (intra-EU BITs). Most of these are between old Members of the EU and new Members in Central and Eastern Europe. While there are almost no BITs between the old Members in Western Europe,[1] there is a dense network of BITs between the old and new Members.

Most of the new Members concerned acceded to the Union in 2004,[2] Romania and Bulgaria in 2007.[3] Only some of the Member States have terminated intra-EU BITs. Denmark has allegedly terminated its BIT with the Czech Republic and Italy has terminated its BITs with a number of Eastern European States.[4] About 170 of the previous 190-intra EU BITs remain in force.

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1 There are BITs between Germany on one side and Portugal and Greece on the other. However, these BITs do not provide for investor-State arbitration, UNCTAD International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/78?type=c#iiaInnerMenu>; Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, dBGBl. Teil II, Nr. 9 vom 10.4.1963; Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, dBGBl., Teil II, Nr. 3 vom 21.01.1982.

2 Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ L236 23.09.2003.

3 Treaty of Accession of the Republic of Bulgaria and Romania, OJ L157, 21.06.2005.

4 See UNCTAD, International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/57?type=c#iiaInnerMenu> (Denmark-Czech Republic); Italy has terminated its BITs with all new Member States which acceded to the EU in 2004 and 2007 except for Malta, see UNCTAD, International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/103?type=c#iiaInnerMenu.

1 The Perspective of the Commission

The European Commission has voiced misgivings about the continued existence of intra-EU BITs and has called for their termination. The Commission has not taken the position that these BITs have become automatically abrogated through the accession to the EU of the States parties to them. However, it sees intra-EU BITs as incompatible with the overall structure of European Union law and takes the position that Member States are under an obligation to take steps to terminate these treaties.[5]

2 Reasons

The reasons given by the Commission for its position on intra-EU BITs are essentially threefold:

1. The Commission is of the view that the current situation involving BITs between some EU Members but not between others creates a situation that is *discriminatory.*
2. The Commission is of the view that there is a potential or actual *conflict* between EU law and *the substantive standards* contained in BITs.
3. The Commission is of the view that investment arbitration constitutes a *parallel system of adjudication* that is removed from the European Court's supervision and control.[6]

Let me address point two, the perceived conflict between BIT standards and European Union law and its consequences for jurisdiction, applicable law, merits and enforcement from a public international law perspective.

II Jurisdiction

Some new Member States have, in their role as respondent in investment arbitrations, asserted that there is an incompatibility between intra-EU BITs and EU law, which would lead to the automatic termination upon accession to the EU of the intra-EU BIT and would deprive investment tribunals of their jurisdiction.[7] They based this argument on Article 59 of the Vienna Convention on the Law of Treaties (VCLT).[8]

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[5] See letter of the European Commission, Internal Market and Services of 13 January 2006 quoted in *Eastern Sugar B.V.* v. *Czech Republic,* Partial Award, 27 March 2007 at pp. 24–26; European Commission Observations, 7 July 2010, paras 30, 38, cited in the case *Eureko BV (The Netherlands) v. The Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 180, 182.

[6] *Eastern Sugar B.V.(Netherlands) v. The Czech Republic,* UNCITRAL, SCC Case No. 088/2004, Partial Award, 27 March 2007, p. 25, para 126.

[7] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania,* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, paras 310–311; *Eastern Sugar v. Czech Republic*, Partial Award, paras 100–102, 105–107; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITRAL, Decision on Jurisdiction, 30 April 2010, paras 41, 65–66; *Eureko BV (The Netherlands) v. Slovak Republic,* UNCITRAL, PCA Case No. 2008–13 Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 58, 59.

[8] Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

As, for example, the *Eureko* Tribunal has stressed, Article 59 is subject to the provisions of Article 65 VCLT,[9] which regulates the procedure to be followed with respect to invalidity, termination or withdrawal of a treaty. It does not provide for the automatic termination of treaties and the procedure has not been followed in any of the intra-EU BIT cases so far decided.

However, tribunals did not stop here, but plunged deeply into arguments based on Article 59 VCLT. Article 59 VCLT provides, under limited conditions, for an implied termination of a treaty in the event of conclusion of a later treaty.

The application of Article 59 VCLT rests on two conditions. First, the earlier and the later treaty must relate to the 'same subject matter'. If this is the case, the parties to the treaty must either have intended this matter to be governed by the latter treaty or the treaties must be so incompatible that they are not capable of being applied at the same time.

Practice on Article 59 VCLT is scarce. The Official Records to Article 59 state that the Expert Consultant declared that 'those words should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty…'[10]

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

On Article 59 VCLT see e.g.: Capotorti, 'L'extinction et la suspension des traités' (1974) III (134) RCADI, 417 et seq.; Plender, 'The Role of Consent in the Termination of Treaties' [1986] BYBIL, 133 et seq.; Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' [1988] BYBIL, 75–111; Villiger, 'Article 59' in *Commentary on the 1969 Vienna Convention on the Law of Treaties,* 720 et seq. Dubuisson, 'Article 59' in Corten, Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary, vol. II.* (Oxford University Press 2011, Oxford) 1325 et seq.

[9] 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

On Article 65 VCLT see Briggs, 'Procedures for Establishing the Invalidity or Termination of Treaties under the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 61 AJIL, 976 et seq.; Briggs, 'Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice' (1974) 68 AJIL, 51 et seq.; Prost, 'Article 65' in Corten, Klein (n 8); Reisman, 'Procedures for Controlling Unilateral Treaty Terminations' (1969) 63 AJIL, 544 et seq.; Rosenne, 'The Settlement of Treaty Disputes under the Vienna Convention of 1969' (1971) 31 ZaöRV, 1 et seq.; Villiger (n 8) 799 et seq.

[10] Official Records, 2nd session, 91st meeting, p. 253, para 41.

Doctrine tends to a strict interpretation and requests an identical overall object as well as a comparable degree of generality and comparability of the two treaties to be seen as covering the same subject matter.[11]

Respondents in many of the intra-EU BIT cases argued that EU law and intra-EU BITs covered the same subject matter. They argued that the substantive provisions in BITs would correspond to the guarantees contained in the so-called four freedoms (prohibition on restriction on capital and movement and the prohibition on discrimination and the freedom of establishment) as well as to the protection of property in the Charter of Fundamental Rights.[12]

This opinion was not shared by investment tribunals, such as *Eastern Sugar, Jan Oostergetel* and *Eureko.* The tribunals unanimously considered that the substantive guarantees in BITs are broader and more specific than those available under EU law.[13] Furthermore, the focus of the so-called four freedoms in EU law is more on the establishment phase of an investment whereas a typical intra-EU BIT contains, in essence, guarantees in the post establishment phase of an investment.[14] The dispute settlement procedure, whereby a state can directly be sued by an investor, is furthermore also absent from EU law.[15] As such, the tribunals have already rejected the claim that the two treaties cover the same subject matter.[16]

Furthermore, the tribunals also held that neither of the other two conditions for the application of Article 59 VCLT was fulfilled. Neither the intra-EU BITs nor the accession treaties to the EU indicate any intention of the parties that the matters covered by any of the intra-EU BITs should, after the accession of the new Member State, be governed by EU law only.[17]

Furthermore, the tribunals did not consider the two treaties to be 'so far incompatible' that they are not capable of being applied at the same time. They stated that the fact that BITs provide for broader protection and offer a higher level of post-investment protection than EU law did not make them incompatible as such with EU law but would instead complement it.[18]

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[11] Dubuisson (n 8) para 25; Dubuisson in Corten, Klein (eds) *Les Conventions de Vienne sur le droit des Traités, Vol III.* (Bruylant 2006, Bruxelles) 2107; Aust, *Modern Treaty Law and Practice,* (2 nd edn, 2007, Cambridge) 229.

[12] *Eureko BV (The Netherlands) v. The Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension paras 69, 70; *Jan Oostergetel v. The Slovak Republic,* Decision on Jurisdiction, para 66; *Eastern Sugar v. Czech Republic*, Partial Award, para 101.

[13] *Jan Oostergetel v. Slovakia,* Decision on Jurisdiction, paras 75–79; *Eastern Sugar v. The Czech Republic,* Partial Award, paras 159–165; *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, paras 245, 249–262.

[14] Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations' (2012) 39 (2) Legal Issues of Economic Integration, 167.

[15] *Eastern Sugar v. Czech Republic*, Partial Award, para 180; *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 264; *Oostergetel v. Slovakia*, Decision on Jurisdiction, para 77.

[16] *Eastern Sugar v. Czech Republic*, Partial Award, para 159; *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 74.

[17] *Eastern Sugar v Czech Republic,* Partial Award, para 167; *Eureko v Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, paras 244–245, 262; *Oostergetel v. Slovakia*, Decision on Jurisdiction, para 80.

[18] *Eastern Sugar v Czech Republic,* Partial Award, para 170; *Oostergetel v. Slovakia*, Decision on Jurisdiction, paras 86–87.

The Tribunal in *Eureko* held, in this context:

> Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.[19]

The Tribunals unanimously found that they were not deprived of jurisdiction by the operation of Article 59 VCLT.[20]

A further line of the Respondent's and the Commission's argument is that the Tribunal lacks jurisdiction because of the operation of the rules set out in Article 30 VCLT.[21] Article 30 regulates situations of incompatibility between particular provisions in successive treaties relating to the same subject matter. The relevant clause in paragraph 3 provides that in such a situation the earlier treaty only applies to the extent that its provisions are compatible with those of the later treaty.

Confronted with this argument, the Tribunals in cases such as *Eastern Sugar* and *Eureko* and *Jan Oostergegetel* found, first, that the treaties did not relate to the same subject matter and that therefore Article 30 VCLT is not applicable.[22] Second, they held that there was no incompatibility. Rather, there was a situation of complementarity of the substantive norms.[23] The Tribunals stated that even if there was such an incompatibility this would be a question of the applicable law and not one of jurisdiction.[24]

With regard to the alleged incompatibility between investor-State arbitration and EU law, the tribunals found no prohibition of investor-State arbitration in the treaties and therefore no incompatibility.

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[19] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 263.

[20] *Eastern Sugar v. Czech Republic,* Partial Award, para 181; *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 293; *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 190.

[21] Application of successive treaties relating to the same subject-matter
(3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
On Article 30 VCLT see e.g.: Orakhelashvili, 'Article 30' in Corten, Klein (n 8) 764 et seq.; Borgen, 'Resolving Treaty Conflicts' (2005) 37 George Washington International Law Review 573 et seq.; Roucounas, 'Engagements parallelès et contradictoires' (1987) 206 (VI) RCADI 13 et seq.; Dahl, 'The Application of Treaties Dealing with the Same Subject-Matter' (1974) 17 India YBIA 279 et seq.; Karl, 'Conflicts between Treaties' (2000) 4 EPIL 935 et seq.; Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59 BYBIL 75 et seq.

[22] *Eastern Sugar v. Czech Republic,* Partial Award, para 180; *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 104.

[23] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, paras 263, 271, 272, 274, 277.

[24] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 272.

III Applicable Law

The approach of tribunals concerning EU law as part of the applicable law was fact-driven. The Respondent in *Eureko* argued that the BIT provisions were inapplicable because of the operation of EU law. The Tribunal summarised the Respondent's arguments as follows:

> if the same subject is regulated by both EU law and national law (the BIT), EU law prevails. Therefore, the Tribunal would be actually deciding on a breach of EU law by the Slovak Republic.[25]

The Tribunal rejected this analysis and stated that neither party relied on any specific provision of EU law in a manner that would influence the decision or reasoning of the Tribunal. It held that nothing in those Treaty standards is in conflict with any provision of EU law. Nothing in this Award amounts to, or implies, a decision that Respondent or Claimant has acted in conformity with EU law or contrary to EU law in any respect. This Award has no bearing upon any question of EU law. This Award relates only to the compliance by Respondent with the terms of the obligations it has assumed under the agreement that it made in the Treaty [i.e. the BIT].[26]

It concluded that it may therefore apply the treaty without being required to touch upon questions of EU law.[27]

In *Jan Oostergetel,* the Tribunal held that the applicable law includes domestic law, which in turn includes EU law following Slovakia's accession to the EU.[28] It said:

> 'Therefore, if EU law must be applied, this Tribunal will seek to interpret both the BIT and applicable EU law in a manner that minimizes conflict and enhances consistency.'[29]

On the facts, there was no need to apply EU law and the Tribunal dismissed all the claims on the basis of investment law.

In *Micula* the Tribunal had to decide on a case brought by Swedish investors who had taken advantage of various incentives offered by Romania in the late 1990s. The investors had expanded their operations in a disadvantaged area of Romania, significantly relying on the incentives offered by Romania for a 10 year period (1999–2009). Romania revoked all but one incentive prematurely, with a view to aligning its incentives with EU law in the accession process.

The Tribunal stated that there was no conflict of treaty norms.[30] It held that the primary source of law applicable to the case at hand was the BIT.[31] Furthermore, the Europe Agreement was a relevant rule of international law applicable in the period relevant for the dispute.[32] EU law was not directly applicable, since the accession treaty entered into force only on January

[25] *Eureko v. Slovakia,* Final Award, para 274.
[26] *Eureko v. Slovakia*, Final Award, para 276.
[27] *Eureko v. Slovakia*, Final Award, para 275.
[28] *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 100.
[29] Ibid.
[30] *Micula v. Romania,* Final Award, para 319.
[31] Ibid, paras 318–319.
[32] Ibid, para 319.

1st 2007, which was after the interferences with the investment had occurred.[33] The Tribunal stated that it was taking the general context of EU accession into account when interpreting the BIT.[34] It noted that the Parties appear to agree that EU law forms part of the 'factual matrix' of the case.[35]

As such, it considered the question of EU law to be of importance for the decision on fair and equitable treatment and on the issue of legitimate expectations of the investor.[36] The facts of the case all occurred before the entry into force of Romania's accession agreement. EU law was therefore only part of the applicable law to the extent it was incorporated into the Europe Agreement. The Tribunal took the EU law regime on state aid and the interaction with the Europe Agreement into account when it decided on the existence of legitimate expectations and the reasonableness of the Romanian measures, repealing all but one of the incentives.[37]

The Tribunal found a violation of the Claimant's legitimate expectations.[38] Furthermore, it found it unreasonable that Romania had abolished the investment incentives while the Claimants had corresponding obligations to remain invested in the disfavoured region.[39] The rest of Romania's measures were considered reasonable in the light of the EU accession.[40]

As these cases show, in arbitrations based on BITs, the basis of the claim is typically an alleged violation of the BITs' substantive standards and is not concerned with the interpretation of the EC Treaties or the validity of decisions made by EU institutions. Invocation of European Law usually takes place defensively, to justify the host States' conduct. In situations of this kind it is conceivable that EU rules on competition, State aid and procurement are relied upon by host States to ward off claims based on BIT standards, such as fair and equitable treatment, protection against uncompensated expropriation and umbrella clauses. The cases show that the potential for a genuine conflict between BITs and European Law is limited.[41]

In the cases so far decided, the interferences occurred before the accession of the Respondents to the EU. Even in this set of circumstances, tribunals were prepared to take the context of the accession into account in their assessment of the substantive protection standards. Both the *Micula* and the *Jan Oostergetel*[42] Tribunals stated that they were not interpreting the BIT in splendid isolation but, on the contrary, were striving for a harmonious interpretation of the different treaties.

The *Micula* Tribunal stated that the Tribunal will interpret each of the various applicable treaties having due regard to the other applicable treaties, assuming that the parties entered into each of those treaties in full awareness of their legal obligations under all of them.[43]

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[33] Ibid, para 319.
[34] Ibid, para 327.
[35] Ibid, para 328.
[36] Ibid, para 328.
[37] Ibid, paras 131–132, 692, 695–697.
[38] Ibid, para 677.
[39] Ibid, para 826.
[40] Ibid, para 825.
[41] Reinisch (n 14) 157 et seq.
[42] *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 100.
[43] *Micula v. Romania,* Final Award, para 326.

For investments made after accession to the EU, EU law will invariably be part of the applicable law, either as part of international law or as part of host State law. Hence, there will not be any legitimate expectations that a legal situation that is in conflict with EU law will prevail.

IV Enforcement of Awards

With regard to enforcement, two types of situations have to be distinguished, UNCITRAL arbitrations with a seat in the EU, and ICSID arbitrations.[44] With regard to an UNCITRAL arbitration, three situations are feasible should the EU state party be obliged to pay compensation: 1. compliance by the Member State, 2. enforcement in a third State or 3. enforcement in an EU Member State. In situations 2 and 3, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will apply.[45] If enforcement is attempted in an EU Member State, the courts of the State of enforcement could request a preliminary ruling from the European Court of Justice if a question of EU law should arise.[46] In *Eureko,* the Slovak Republic asked the *Oberlandesgericht Frankfurt am Main* to refer three questions to the ECJ. The Court declined to refer the questions, since it considered the questions it was asked to refer to the ECJ as not capable of being put before the ECJ.[47] On 19 September 2013 the *Bundesgerichtshof* declined to refer the case to the ECJ, since in the meantime the final award had been issued. The Bundesgerichtshof therefore stated that there was no need for legal relief concerning the interim award.[48]

With regard to an ICSID award, the award has to be complied with by the Respondent or enforced by third states without any possibility of consultation of the ECJ. Therefore, the recent intervention of the Commission in *Micula v. Romania*[49] would, if followed by Romania, lead to a violation of Article 53 of the ICSID Convention.[50] The other state parties of the ICSID Convention will have to enforce the award without any possibility of an *ordre public* test, since, unlike in Article V of the New York Convention, no such test is provided for in Article 54 of the ICSID Convention.[51]

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[44] On the issue of enforcement of awards and state aid law see: Christian Tietje, Clemens Wackernagel, 'Outlawing Compliance?' – The Enforcement of intra-EU Investment Awards and EU State Aid Law, (2014) 41 Policy papers on Transnational Economic Law.

[45] See van den Berg, *The New York Convention of 1958,* (1981); Di Pietro, Platte, *Enforcement of International Arbitration Awards The New York Convention of 1958,* (2001); Bertheau, *Das New Yorker Abkommen vom 10.6.1958,* (1965); Brotóns, 'La reconnaissance et l'exécution des sentences arbitrales étrangères' (1984-I) 169 RdC, 184.

[46] *Micula v. Romania,* Final Award, para 336.

[47] Oberlandesgericht Frankfurt am Main, 26 SchH 11/10, Beschluss vom 10.05.2012, 4–6, 26–27.

[48] Bundesgerichtshof, III ZB 37/12, Beschluss vom 19. September 2013, para 11.

[49] *Micula v. Romania,* Final Award, paras 334–336.

[50] On Article 53 of the ICSID Convention see: Schreuer, *The ICSID Convention. A Commentary,* (2nd edn, 2009) 1096 et seq.

[51] On Article 54 of the ICSID Convention see: Schreuer (n 50) 1120–1121, paras 13–14.

V Conclusions

Intra-EU BITs do not just fade away by accession to the EU. They would have to be terminated and some already have been terminated.

The termination of intra-EU BITs would leave a substantial gap and is likely to have a number of negative consequences. It would remove the valuable protection to investments afforded by BITs without offering a replacement. As mentioned, EU law does not cover the full range of standards contained in BITs.

In addition, cutting off access to investment arbitration would seriously weaken the ability of investors to vindicate their rights. Resort to the host States' domestic courts is likely to be unsatisfactory. Apart from lengthy procedures and problems of independence and impartiality, domestic courts are of little if any use if adverse measures against foreign investors are taken by way of the national legislation which domestic courts must apply. Resort to the European Court by way of preliminary rulings is promising only to the extent that European law offers effective protection to investors, which, often enough, is not the case.

The termination of intra-EU BITs is likely to have also other negative effects. In the absence of effective judicial means to settle investment disputes, there is likely to be a revival of inter-State disputes involving investments. The re-emergence of diplomatic protection in investment disputes within the European Union would be a retrograde step that could put a serious strain on relations between Members.

Also, the removal of intra-EU BITs will introduce a curious new form of discrimination. EU investors will operate on a level playing field, since they are all without protection. However, they will be disadvantaged vis-à-vis investors from non EU countries that continue to have BITs with EU Member States.

Astute EU investors who plan their investments carefully will start arranging their investments in such a way as to enjoy the protection of BITs between EU Members and third States. EU investors who find themselves without the protection of BITs in other EU Members will start incorporating in non-EU countries that do have BITs with the EU Member State in which they plan to invest. For instance, an Austrian investor who wishes to invest in Romania but finds that the BIT between Austria and Romania no longer exists may incorporate in Norway, Switzerland, China or Singapore, in order to avail itself of the BITs between these countries and Romania and channel its investment through its subsidiary in one of these countries. The net result is likely to be a migration of investors away from EU Members.

In addition, BITs are just one source of consent to arbitration. Investors may still prevail upon host States to agree to arbitration through contracts. The extinction of the BIT system within the EU may therefore well lead to a revival of the old system of arbitration clauses in contracts.

Finally, there is a rather odd paradox about the plans to do away with BIT arbitration in the EU. The Energy Charter Treaty (ECT) provides for protections very similar to those of BITs. These include the offer of consent to investment arbitration. Not only would the ECT survive the extermination of BITs in Europe, in fact, the EU itself is a Party to the ECT and continues to be bound by its substantive and procedural safeguards.

Tamás Kende*

Arbitral Awards Classified as State Aid under European Union Law**

Decisions obtained in international arbitrations against member states of the European Union (EU) may contradict decisions obtained at the final instances of European law and such decisions may declare that measures by member states of the EU were taken in contravention of international law. Many of these measures may have been taken on the initiative of or under pressure from European institutions. While European authorities may shelter member states from implementing such arbitral awards in the EU, enforcement may continue outside the EU.

I Introduction

Bilateral Investment Treaties (BITs) have proliferated since the 1960s.[1] BITs generally provide several investment protection clauses, such as: the fair and equitable treatment of investors, the most favoured nation principle, the national treatment principle, direct or indirect compensation in the event of expropriation, etc.[2] However, the most significant provision included in BITs were those that included investor-state dispute settlement (ISDS), which allowed investors to sue host states at international arbitrations, bypassing domestic courts and domestic legal regimes.[3]

In the 1990s, most European Union (EU) Member States from Western Europe (WE) countries signed BITs with the Central and Eastern European nations (CEE), such as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Romania and Bulgaria, who became the new Member States of the EU (MS) in 2004 and 2007.[4]

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1 Zachary Elkins, Andrew T. Guzman, Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' [2008] U.Ill L. Rev. 265.

2 Cecilia Olivet: *A Test for European Solidarity: The Case of Intra-EU Bilateral Investment Treaties* (published in Transnational Institute) 3.

3 *Id.*

4 *Id.* at 8.

The accession of these twelve CEE nations into the European Union transformed these BITs into BITs between EU Member States, or intra-EU BITs.[5] The issue with these BITs was that, after the collapse of the Soviet bloc, in successive waves of privatisations, these nations concluded privatisation agreements with investors, which contained significant advantages for the investors in order for the countries to draw investments into this impoverished region. In many cases, these agreements contained state subsidies of significant proportions. Once these nations joined the EU, these agreements needed to comply with EU law and in many cases were not in-line with EU state aid policy. In many instances, these new Member States, in their accession processes into the EU, had to change their policies and review their prior commitments in order to adjust to the rules of the European single market. This adjustment meant a withdrawal of benefits conferred on investors before EU accession. Arguably, these withdrawals constituted takings within the meaning of BITs.

Since their accession into the European Union in 2004 and 2007, CEE states were inundated with numerous lawsuits by foreign and, in many cases, European investors in front of international tribunals.[6] Around 77 cases were brought against CEE states until mid-2014, which included 18 cases against the Czech Republic, 15 cases against Poland and 10 cases each against Hungary and Slovakia.[7] By comparison, only seven lawsuits were initiated against Western European states such as Germany, Spain, Belgium, Portugal, United Kingdom, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Denmark, Sweden and Austria.[8] Sixty-five percent (50 cases) of all disputes against the CEE states were initiated by European investors based on intra-EU BITs.[9] In short, a majority of international investment arbitrations were initiated against capital importing CEE states by investors from (or investors established in) capital exporting Western European states.

These substantial numbers of lawsuits were politically inconvenient and extremely expensive for CEE states. Many of these cases originated from their adjustment to the EU single market prior to EU accession. However, in some cases, the basis of the complaint by investors in these international arbitrations were not measures adopted during the accession process, but, rather, were based on EU norms or decisions issued subsequent to CEE states' accessions.[10] These EU decisions forced CEE states to take certain measures, often by curtailing contractual rights awarded by CEE states to international or Western European investors. Since these investors realised that CEE states' measures were mostly implementing European norms and decisions of the European Commission (following lobbying in vain against implementation), they tried to invalidate the European Commissions' decisions in front of the EU Court of First

[5] Olivet (n 2).
[6] *Id.*
[7] *Id. Investor to State Dispute Settlement (ISDS) – Some facts and figures page 5 and 6 European Commission DG Trade* <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf> and Recent Trends in IIAs and ISDS in <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> 7.
[8] *Id.*
[9] Olivet (n 2).
[10] *Id.* at 4.

Instance/General Court and subsequently in the Court of Justice. When these initiatives failed, the facts of these cases were subsequently presented again by many of these investors in international fora, such as the International Centre for Settlement Investment Disputes (ICSID), or arbitrations organised under the UNCITRAL rules, among others.

It is here where a host of issues manifested. For one, there is a question as to whether European norms and decisions are part of the domestic law of the states or are part of their international obligations as international law. Special cases exist – such as the European Energy Charter Treaty, which itself gave rise to a large number of investment treaty arbitrations – where the EU itself is a party to the treaty and the treaty itself sets out the relationship between itself and EU law. Another relevant question is if and how arbitral decisions of investment tribunals can be implemented when one takes into account the preceding decisions of the European Commission, judgments by the European Court of First Instance/General Court and the European Court of Justice, especially if the effect of the arbitral decisions is contrary to EU norms and decisions. In some cases, if the Member State adhered to the arbitral award, it would run afoul of EU law, as the award itself is aimed at reinstating a state aid measure that would be declared unlawful under EU law. Analysing this latter problem will form the foundation of this paper.

II State Aid Under European Union Law

State aid is currently (as it has always been) a hot topic in the European Union. The issue with State aid is that certain government entities support industries or private companies by spending public funds and, therefore, it gives an unfair advantage over industries in the similar sector of industry in other EU Member States.[11] As the Member States of the European Union are brought under control, the European Commission has been forced to take responsibility to ensure compliance with State aid rules.[12]

1 What is State Aid?

Under Article 107 of the Treaty of the Functioning of the European Union (TFEU), state aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings.[13] In order for an award to be considered 'State aid,' there are four conditions that must be met: (1) the measure must confer a selective economic advantage upon an undertaking; (2) the measure must be imputable to the State and financed through State resources; (3) the measure distorts or threatens to distort competition; and (4) the measure must have the potential to affect trade between

[11] <http://ec.europa.eu/competition/consumers/government_aid_en.html>.
[12] <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.
[13] EC: Communication from the Commission: Draft Commission Notice on the notion of State Aid pursuant to Article 107(1) of TFEU.

Member States.[14] Based on these factors, the TFEU allows for the interpretation of when State aid is or may be declared compatible.[15] The European Commission has been given great leniency to make normative declarations that certain types or categories of aid are compatible.[16]

2 What Constitutes Illegal State Aid?

Member States are generally required to notify the Commission in advance (ex ante) of any plans to grant state aid, except in cases covered by the conditions set out in block exemption regulations.[17] If the notification ex ante does not take place or if the aid does not conform with the conditions set out in the block exemption regulation then such aid is incompatible. If a notification has taken place but the notified aid has been cleared with conditions and such conditions were not met, that aid is also considered incompatible and, therefore, is illegal.

3 When is a State Aid Measure Imputable to the State?

From the above four formative criteria of state aid, imputability is the most relevant criterion for the purposes of the arbitral disputes and is also the most controversial. In the jurisprudence of the European Commission and the European Court, the provisions of the Treaties on state aid refer

> '…to the decisions of Member States by which, in pursuit of their own economic and social objectives, they give, by unilateral and autonomous decisions, resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought.'[18] To illustrate this concept, the CJEU in the *Deutsche Bahn* case stated that '…for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, inter alia, be imputable to the State…'[19]

In most cases, the issue of imputability concerned whether certain grants of money by seemingly independent entities (funds, foundations, partially state owned enterprises) were in fact channelling state resources to the economy or not.[20] This type of act was considered imputable

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[14] <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.

[15] *Id.*

[16] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance OJ L187, 26.6.2014, 1–78 in <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2014:187:FULL&from=EN>.

[17] There are also types of aid which are declared compatible by Article 107(2) or may be compatible under Article 107 (3) TFEU.

[18] See *Deutsche Bahn AG v. Commission* (Case T-351/02, ECR II-1047) paragraph 101 and Case 61/79 *Amministrazione delle finanze del- lo Stato v Denkavit italiana* [1980] ECR 1205, paragraph 31.

[19] *Id.*

[20] C-78/76 (ECR 1977., p. 595. o.) 21.; C-206/06. *Essent Netwerk Noord* (ECR 2008., I-5497.) 70; C-83/98 P. *France v. Ladbroke Racing European Commission* (ECR 2000., I-3271.) C-379/98. *Preussen Elektra* (ECR 2001., I-2099.) para 59–62. and C-482/99. *France v. European Commission (Stardust)* (ECR 2002., I-4397.) paras 37–38.

to the state when the persons undertaking the decisions were *either nominated by or were acting under the control of the state.*[21] This seems to be in line with Article 8 of the Draft Articles of State Responsibility for Internationally Wrongful Acts.[22]

4 May a Court Judgement or an Arbitral Award Constitute Illegal State Aid?

It is arguable whether judges in ordinary courts meet the above criterion of control: they have been nominated by the state but nominations come in all EU Member States under some kind of professional ethics clause and under an explicit clause of judicial independence. On the other hand, it would be difficult to argue that arbitrators in international disputes are under the control of the state, since about a third of an arbitral panel would have been nominated by the state party to any ISDS[23] arbitration and the arbitrators must not receive instructions. Hence, from the European law perspective, it is contentious that the decisions of judges and arbitrators are not imputable to the state in the context of State aid law.

If the above were true, 'imputability' in the EU terminology would have a very different meaning from 'attributability', as generally accepted under public international law. In the meaning of Article 2 of the Draft articles on Responsibility of States for Internationally Wrongful Acts[24] of the International Law Commission, 'attributability' seems much broader than imputability in the EU state aid sense, as court decisions are clearly attributable to a state under international law within Article 4 of the Draft Articles (even if the government actively fought those decisions).[25]

Tietje and Wackernagel argue[26] based on the practice of the EU Court of Justice and the European Commission, that 'a contribution by a Member State is involuntary, and accordingly

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[21] C-482/99. *France v. European Commission (Stardust)* (ECR 2002., I-4397.) para 48 'The Commission points out that the State held the majority of the capital and the voting rights of Crédit Lyonnais and appointed its chairman and most of the members of its administrative board. In those circumstances, it contends that it is impossible to deny either the control exercised by the State over Crédit Lyonnais and, through the latter, over Altus, or, because of that control, the imputability to the State of the investments made by Altus, notwithstanding the malfunctioning of the control exercised by Crédit Lyonnais over the activities of its subsidiary.'

[22] Article 8 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

[23] Investor-state dispute settlement.

[24] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session A/56/10. in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

[25] 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

[26] Christian Tietje, Clemens Wackernagel, 'Outlawing Compliance? – The Enforcement of intra-EU Investment Awards and EU State Aid Law' Policy paper on Transnational Economic Law no. 41. 3.

does not constitute state aid when the state repays charges that have been improperly levied, when the state is obliged to pay damages, and when the state pays compensation for expropriation.' Tietje and Wackernagel cite *Denkavit,* referencing improperly levied charges, in which the Court stated 'it is therefore necessary to reply to the questions on the interpretation of Article 92 of the Treaty that the duty of the authorities of a Member State to repay to taxpayers who apply for such repayment, in accordance with national law, charges or dues which were not payable because they were incompatible with Community law does not constitute an aid within the meaning of Article 92 of the EEC Treaty.'[27]

On the payment of damages, they cite *Asteris*[28] in which the CJEU held that, '…damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles 92 and 93 of the EEC Treaty.'[29] The *ThyssenKrupp*[30] judgment stated, 'compensation granted by the State for an expropriation of assets does not normally qualify as State aid.' The European Commission, – in its letter to Romania following the adverse *Micula* award – also dealt with the judgment in *Asteris,* stating that the *Micula* case (explored in more detail later) is fundamentally different from the *Asteris* case.[31] It states 'in the present case…the damages are awarded on the basis of an intra-EU BIT which the Commission considers incompatible with the Treaty and in order to re-instate the State aid which Romania had abolished. …The principle underlying the Asteris judgment is, therefore, not applicable in the particular circumstances here present.'[32]

The Commission, in its letter to Romania – to counter any arguments based on *Asteris* – cited the opinion of Advocate General Colomer[33] and stated that the award of damages equal to the sum of the amounts of aid that were envisaged to be granted would constitute an indirect grant of the aid found to be illegal and incompatible with the common market. The *Atzori* case[34] showed that the General Court considered that indemnification clauses for the recovery of State aid constituted State aid.

Tietje and Wackernagel also cite *Deutsche Bahn* in a context where an EU Member State implemented EU law and refer to the CJEU judgment, stating, 'Member States are only imple-

[27] Case 61/79, ECR 1980, 1205.

[28] Joint Cases 106 to 120/87, ECR 1988.

[29] 5539 et seq.

[30] Commission Decision of 20 November 2007 on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of *ThyssenKrupp, Cementir and Nuova Térni Industrie Chimiche,* OJ EC No. L144/37, para. 70.

[31] Judgment of the Court of 26 April 1988. Asteris AE and others and Hellenic Republic v Commission of the European Communities. Production aid for tomato concentrate – Rules applicable to the Hellenic Republic – Consequences of a finding of illegality by the Court. Joined cases 97, 193, 99 and 215/86. European Court Reports 1988–02181 ECLI identifier: ECLI:EU:C:1988:199.

[32] Bruxelles, 01.10.2014 C(2014) 6848 final Subject: State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v Romania* of 11 December 2013.

[33] Opinion of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzori* ECLI:EU:C:2005:256, paragraph 198. stating '…if an entitlement to compensation is recognised, the damage cannot be regarded as being equal to the sum of the amounts to be repaid, since this would constitute an indirect grant of the aid found to be illegal and incompatible with the common market.'

[34] Case T-384/08 *Elliniki Nafpigokataskevastiki AE Chartofylakeiou* v *Commission* ECLI:EU:T:2011:650.

menting Community provisions in accordance with their obligations stemming from the Treaty. Therefore, the provision at issue is not imputable to the German State…'[35]

Tietje and Wackernagel claim that '…the legal situation in case of an investment award is comparable to the legal situation in the instances cited above. The sole difference is that the obligation to pay compensation does not stem from domestic law but from international law. This fact, however, does not justify treating the situations differently. …there is no reason to apply different principles on obligations to compensate based in international law.'[36]

In my view, it would be easy to attribute or impute the decisions of an arbitration tribunal to the state, even if it was not naming more than a mere one third of the arbitrators to the tribunal. Arguably, by simply accepting the rules of selections of the arbitrators, the state has agreed to a composition of the arbitral tribunal, even if it has not agreed to specific individuals to be nominated as arbitrators. In sum, there are grounds to argue that, under EU law (save for the exceptions discussed below), an investment award itself, and subsequently, the enforcement of an investment award, does not generally constitute illegal State aid under Article 107 TFEU because the payment of compensation is involuntary. In my view, this argument is seemingly well-supported by authorities under EU law, but also weak because the EU member states themselves had agreed to the ISDS procedures and, therefore, the decisions of the tribunals are as attributable (imputable) to the member states as are the decisions of their ordinary courts.

Even Tietje and Wackernagel concede that when an international arbitral procedure is aimed at restoring state aid that an EU Commission decision confirmed by an EU Court judgment declared illegal, the award in such an international arbitral procedure may be considered as one reinstating illegal State aid, '…enforcement of an intra-EU investment award does not, as a general rule, constitute illegal state aid under Article 107 of the …TFEU… However… enforcement can constitute illegal state aid if the measure found to violate the investment agreement consisted of repealing a legal regime that itself constituted illegal state aid…'[37] They agree to this exception to the rule under EU law.

The European Commission has almost completely evaded the question of whether an arbitral award may be attributable (imputable) to the state as illegal State aid or not. The European Commission introduced related but slightly different arguments in its notice to Romania in the *Micula* case.[38] It is important to note that the Commission has not taken the position that foreign (non-EU) arbitral awards are not enforceable in general in the EU if they are contrary to EU law. Nevertheless, the Commission has taken the position that enforcement of an arbitral award aiming to reinstate the status quo ante with regard to an EU decision declaring aid illegal and ordering such aid to be recovered is illegal, based on the fact that (1) the initial state aid followed by (2) the enforcement of the grant of state aid through arbitration; and (3) an enforcement of the award are single action (process). The European Commission argues the

[35] *Deutsche Bahn AG v. Commission* (Case T-351/02, ECR II-1047) para 102.
[36] See (n 26) 5.
[37] See (n 26) 3.
[38] Bruxelles, 01.10.2014 C(2014) 6848 final State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v Romania* 11 December 2013 <http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf>.

following: (1) the initial state aid decision was illegal under EU law; (2) the intra-EU BIT is illegal and is no longer valid; and therefore, (3) the effects of the illegal state aid enforced through an illegal mechanism contravening the EU State aid regime are contrary to EU law.

In support of the first point, the European Commission usually refers to its own decision and the decision of the European Court.[39] The second point refers to the response of Commissioner De Gucht to a Parliamentary oral Question in 2013, when he stated, 'the Commission agrees that bilateral and investment treaties (BITS) between EU Member States do not comply with EU law.'[40] This argument is not new. The European Commission and some Member States have already argued this point successfully in arbitrations. In another companion case, *Eastern Sugar*,[41] the Czech Republic – supported by the European Commission as *amicus curiae* - took the position that, following its accession to the EU, this BIT was automatically terminated, and Dutch investments in its territory have since been governed exclusively under EU law. The arbitral tribunals in the *Eastern Sugar* case answered this question by rejecting the argument that the opinion of the European Commission is neither biding nor persuasive or clear for the tribunal.[42] Moreover, the arbitral tribunal added that neither the European Agreement nor the Accession Treaty, nor the BIT itself provided expressly that the BIT would be terminated.[43] Finally, the arbitral tribunal held that it was not bound by the opinion of the European Commission. This matter was debated in greater depth in the *Eureko v Slovakia* case[44] and was decided in favour of the investors. Based on these awards, Canet and Doremus[45] take the view that 'the general inapplicability question….[is]…answered' and 'remains the question of the inapplicability of specific provisions of Intra-EU bilateral Investment.' Based on the aforementioned, the reference by the Commission to an answer by the former Commissioner to a Parliamentary question does not seem to be a particularly strong argument.

In the final point, the Commission, in *Micula,* had switched to a variant of the effects principle and referenced the *Lucchini* case, where the Court held that a national court was prevented from applying national law if the application of that law would in effect 'frustrate the application of Community law in so far as it would make it impossible to recover State aid that

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[39] In the *Micula* case, as a condition of its accession to the EU, Romania repealed the tax incentives granted to the *Micula* brothers in 2004 because the EU considered such incentives impermissible state aid. In the Hungarian electricity cases *(Electrabel, AES, EDFI)* there was an EU Commission decision declaring the long term power purchase agreements as illegal under the EU rules.

[40] Question O-000043/2013/rev.1 in debate of the plenary of 22 May 2013.

[41] *Eastern Sugar B.V.(Netherlands) v. The Czech Republic,* SCC Case No. 088/2004.

[42] See the EEC's letter to the tribunal in para 115 of *Eastern Sugar B.V.(Netherlands) v. The Czech Republic,* SCC Case No. 088/2004 see in particular para 125.

[43] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* SCC Case No. 088/2004 paras 121 and 122.

[44] PCA Case No. 2008-13 in the matter of an arbitration before a tribunal constituted in accordance with the agreement on encouragement and reciprocal protection of investments between the Kingdom of The Netherlands and The Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992 between EUREKO B.V. ("Claimant") –and the Slovak Republic award on jurisdiction, arbitrability and suspension 26 October 2010.

[45] Antoine Canet, Téo Doremus: *Problems and challenges of intra-EU investment treaties* <https://www.academia.edu/8735310/Problems_and_challenges_of_Intra-EU_investment_treaties_Intra-EU_BITS_>.

was granted in breach of Community law.'[46] In this context, the European Commission seems to argue that an intra-EU BIT is similar to a domestic law norm and, therefore, it is considered that the principle to apply is that 'where giving effect to an intra-EU BIT by a Member State would frustrate the application of Union law, that Member State must uphold Union law.' In other words, Member States must uphold Union law over an international agreement.

Hence, based on various points made by the Commission, it is indicative that the Commission took the view that a State aid related arbitral award that is based on an intra-EU BIT is not applicable (enforceable) in the EU, as it is itself state aid (it is attributable to the EU member state) and its effects would frustrate the application of EU law.

III ISDS Awards Incompatible with EU Decisions

Whenever aggrieved European investors seek to relitigate decisions by the European Commission or Court of Justice in international fora, the potential for incompatible and conflicting decisions will arise. One of the international forums that investors turned to was that of ICSID and the other is arbitration under UNCITRAL.

The EU Commission seems to have taken various routes to prevent such conflicts between an arbitral award based on international law and EU law in at least three ways: (1) attempts to force EU Member State to terminate intra-EU BITs; (2) intervening in international arbitrations as amicus curiae; and (3) efforts to preclude enforcement of adverse arbitral decisions based on intra-EU BITs.

1 Attempts to Force EU Member States to Terminate intra EU BITs

The Commission has long argued that intra-EU BITs are outdated and no longer necessary because the same protection is now afforded to investors, pursuant to various EU rules of the single market, including those on cross-border investments (the freedom of establishment and the free movement of capital). The Commission has been arguing that intra-EU BITs are incompatible with EU law. Perhaps the clearest example of the Commission's "dislike" for intra-EU BITs was when it issued the suspension injunction against Romania in *Ioan Micula, Viorel Micula and others v. Romania,* in which the Commission directed Romania not to satisfy the award nor allow to recover any sums already paid.[47] The claimants in *Micula* brought an action against the Commission later in 2014 and the decision is still pending.[48]

[46] Judgment of 18.7.2007 — Case C-119/05 Judgment of The Court (Grand Chamber) 18 July 2007, 23.

[47] By letter of 26 May 2014, the Commission informed Romania of its decision to issue a suspension injunction pursuant to Article 11(1) of Regulation (CE) No 659/1999 of 22 March 1996, thereby obliging Romania to suspend any action which may lead to the execution or implementation of the part of the Award that had not yet been paid, as such execution would constitute unlawful State aid.

[48] *Micula and Others v Commission* Case T-646/14 (currently pending).

As early as 2004, the tribunal in *Eastern Sugar* stated that one of the indications that intra-EU-BITs were not illegal was the fact that the Commission 'did not start infringement proceedings against the Netherlands and the Czech Republic and other Member States for failure to terminate their BITs.'[49] As already mentioned above, in 2013 Commissioner De Gucht questioned the legality of investment treaties between EU Member States in the European Parliament.[50] On June 18 2015, the European Commission issued letters of formal notice to five European Union Member States for intra-EU bilateral investment treaties' (BITs) incompatibility with Article 351 of the Treaty on the Functioning of the European Union (TFEU). The letters further pressure Austria, the Netherlands, Romania, Slovakia and Sweden to terminate their intra-EU BITs. The letters stated that 'all EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law.' [51]

2 Intervening in International Arbitrations as Amicus Curiae

The EU's position and the arguments the Commission has made relating to unenforceability of international awards contrary to EU law are both readily apparent through a number of ICSID cases where the Commission has intervened as amicus curiae. Here, we will discuss these companion cases such as *Electrabel, AES, EDF International* and *Micula*[52] where the Commission intervened as *amicus curiae*[53] and argued that EU law should prevail if it conflicts with the decisions of international tribunals.

In *Electrabel,* the claimant was a Belgian energy generation and supply company who brought a claim against the Republic of Hungary in 2007.[54] The claim was based on Electrabel's Power Purchase Agreement (PPA) in 1995 with Dunamenti and MVM, a Hungarian generator company which operated and owned a power plant. The PPA provided a supply of capacity in exchange for compensation of a capacity fee. The agreement between Electrabel and Dunamenti and MVM led to Electrabel acquiring nearly 75% of Dunamenti's share. At the time of this arrangement, Hungary (Respondent) owned 99% of MVM.[55] By 2004, the European Commis-

[49] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* SCC Case No. 088/2004 – <http://www.italaw.com/cases/documents/369#sthash.jwC9Hg9a.dpuf>.

[50] Question O-000043/2013/rev.1 in debate of the plenary of 22 May 2013.

[51] <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>.

[52] *Electrabel S.A. v. Hungary* (ICSID Case ARB 07/19), *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary* (ICSID Case ARB 07/22), *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20) *EDF International v. Hungary* (PCA Case 2009-13).

[53] See about this: Carlos González-Bueno and Laura Lozano: *More Than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration*, <http://kluwerarbitrationblog.com/blog/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/>.

[54] See *Electrabel S.A. v. The Republic of Hungary,* ICSID Case No. ARB/07/19, page 34–37.

[55] See *Electrabel S.A. v. The Republic of Hungary,* ICSID ARB/07/19, page 35.

sion had launched an investigation into the PPA because the EC was concerned that there was State aid in conflict with EU law.[56]As a result, Hungary introduced a regulated pricing scheme that required a 40% reduction of Dunamenti's prices.[57] Electrabel claimed that Hungary had terminated the PPA and the compensation scheme was an unlawful expropriation of Electrabel's investments.[58] Although the Arbitral Tribunal rejected Electrabel's claims, this case shows that investment tribunals are not likely to refuse jurisdictional disputes over claims between EU Member States.[59] The decision in *Electrabel* is indicative of the nature of arbitral awards that can pose an issue in terms of compensation.

The *AES* and the *EDFI* cases were largely similar in their context and case history, although the *EDFI* case also concerned district heating and certain particular issues relating to energy production. While in *AES* the tribunal decided in favour of the Respondent, the tribunal in *EDFI* decided in favour of the investor in an essentially similar set of circumstances.

In *Micula*, two Swedish brothers and three Romanian food production businesses initiated a claim after Romania cut incentives that Romania claimed were in conflict with EU state aid law.[60] The brothers set up a business with the belief that the tax incentives would be effective for a decade.[61] Those incentives were later revoked because Romania claimed that this was in conformity with EU law.[62] The tribunal ordered Romania to pay damages for failing to ensure a fair and equitable treatment of claimants' investments, and thereby, violating the Romania–Sweden BIT.[63]

Table 1. Facts of the four cases

Case	Investor	State respondent	Claim	Amicus curiae/state
Electrabel	Belgian	Hungary	Termination of PPA is expropriation	YES/EU decision
AES	UK	Hungary	Termination of PPA, regulatory caps constitute expropriation	YES/EU decision
EDFI	French	Hungary	?	?
Micula	Swedish	Romania	Withdrawal of investment aid violates FET	YES/ EU accession terms required

[56] *Id.*
[57] *Id.*
[58] *See Electrabel S.A. v. The Republic of Hungary,* ICSID ARB/07/19, VI-06 and see Mel Marquis, Roberto Cisotta, *Litigation and Arbitration in EU Competition Law* (Edward Elgar Publishing 2015, Cheltenham) 305.
[59] *Id.*
[60] See Global Investment Protection AG, *Interference of the European Commission in the enforcement of arbitration awards: The Micula Case,* 1.
[61] *Id.*
[62] *Id.*
[63] *See:* EC: Implementation of Arbitral Award *Micula v. Romania* (2013).

The three Hungarian cases were not based on intra-EU BITs but were based on the Energy Charter Treaty (ECT). Two of these cases were dealt with under ICSID and one by the Permanent Court of Arbitration. In three out of the four cases, the intervention by the European Commission did not resonate well with the tribunals. In the above cases, the Commission argued its position based on the three arguments:

1) Under the Supremacy argument, EU law obligation supersedes the obligation arising out of the intra-EU BIT;
2) Under lex posterior argument, EU-law obligation is lex posterior to the obligation arising out of the intra-EU BIT or to the intra-EU BIT itself; and
3) In the circularity argument, the arbitral award as requested by the claimant would be futile as it would not take effect.

a) The supremacy argument

In *Electrabel* and *AES*, the Commission partially rested its position on the argument that EU law takes supremacy over other international obligations of the Member States. According to the Commission's submission in these cases, if there is any material contradiction between the ECT and EU law, EU law shall reign supreme.[64] This specific argument is also rooted, according to the Commission, on the fact that the '[EU] was the driving force behind the adoption of the Energy Charter of 17 December 1991, and 'played a key role in negotiating the subsequent [ECT].'[65]

b) The lex posterior argument

In *Electrabel, AES,* and *Micula,* the European Commission also utilised the lex posterior argument primarily revolving around the application of Article 16 of the ECT, which states that 'where two or more Contracting Parties have entered into a prior international agreement… nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement.'[66] In response to this, the Commission argued that the Article in question 'applies only to the extent that the ECT is compatible with the Acts of Accession (and thus with EU law).'[67] Moreover, all Member States had already agreed in 2004 'not to apply the conflict rule contained in Article 16 ECT, but the general supremacy rule of EC law.'[68] In essence, because the individual Member States have assented to the primacy of EU rules over prior contractual commitments then so too should the investors from those states.

A recurrent question in the above cases relating to the lex posterior argument is whether the classification of EU law should be considered an international body of law or domestic law. The Commission, along with the Respondents in the above cases, advocated for acknowledging EU law as international law by applying the Vienna Convention on the Law of the Treaties. In *Elec-*

[64] *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability Part IV–34, section 4.109 (November 30, 2012).
[65] *Id.* at Part IV-31, section 4.99.
[66] Energy Charter Treaty, December 17, 1994, 2080 UNTS 95.
[67] *Electrabel* at Part IV-34, section 4.109.
[68] *Id.*

trabel, for instance, the Commission sought a harmonious interpretation between the ECT and EU law, in line with Article 31 of the Vienna Convention.[69] This section states that, for the purposes of interpretation, a treaty should take into account 'any relevant rules of international law applicable in the relations between the parties.'[70] Such an interpretation, harmonising conflicting treaty obligations, echoes the logic of the Commission's lex posterior argument detailed above. As such, if the classification of EU law is considered international law then the ECT's obligations should be read in the light of the Respondent's obligations under EU law, which it acceded to when the Member State joined the Community. More accurately for the Commission, EU law is not merely international law, but it is *also* domestic law.[71] The Commission's arguments were reflected in the Respondent Hungary's pleadings about EU law overriding the earlier ECT. Hungary set forth that the 'application of EC law is not defeated by Article 16 of the ECT, which is irrelevant both because it only pertains to treaties concerning the same 'subject matter,' and because the conflict of law provisions of a later treaty (the EC Treaty, as applicable to Hungary upon accession) override those of an earlier treaty, even when the earlier treaty (here the ECT) purports to opt out of lex posterior principles.'[72]

Such a line of reasoning stands in stark contrast to the approach advocated by the Claimant in scenarios like that presented in *Electrabel.* There, Electrabel S.A. encouraged analysing EU law not in an international light, but as a type of 'internal or municipal law,' thus being relevant against international treaties like the ECT only as a question of fact.[73] If the court were to adopt such an argument then the ECT, and any other truly international treaty, would reign supreme against the 'internal' laws of the EU.

The arbitration tribunals in *Electrabel* and *AES* both circumvented the question by stating that the cases were not about the conflict between international law and EU law. However, the tribunal in *Electrabel* took a more academic approach by accepting the harmonious interpretation argument when stating that 'there is no material inconsistency between the ECT and EU law' [in the case at hand]. 'The Tribunal has also concluded that if there were any material inconsistency between the ECT and EU law, the ECT and EU law should, if possible, be read in harmony.'[74]

In *AES,* which was very similar in its factual and legal basis, another tribunal concluded that 'properly understood, the dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or Community competition law and the ECT.'[75] This latter tribunal was rather reluctant to take a position in the debate and ultimately determined that 'the Respondent's acts/measures are to be assessed under the ECT as the applicable law but that the EC law is to be considered and taken into account as a relevant fact.'[76]

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[69] *Electrabel* at Part IV-45, section 4.144.
[70] Vienna Convention on the Law Of Treaties art. 31, May. 23, 1969, 1155 U.N.T.S. 331.
[71] *Electrabel* at Part IV-17, section 4.58.
[72] *Electrabel* at Part IV-17, section 4.78.
[73] *Id.* at Part IV-7, section 4.26.
[74] *Electrabel* at Part IV-17, section 4.167.
[75] *AES* at section 7.6.8.
[76] *AES* at section 7.6.12.

On the other hand, *Micula* presents a more interesting example, since the court entirely evaded the Commission's lex posterior argument and rejected the circularity theory. It is also worth noting that here the lex posterior argument was raised by the Claimants because the legal basis of the case was that the BIT between Romania and Sweden was adopted nearly a decade after Romania signed the Europe Agreement in 1993.[77] The Claimants pleaded that 'the BIT prevails as lex posterior pursuant to Article 30(3) of the Vienna Convention on the Law of Treaties of 1969.'[78] In turn, both the Respondent and the European Commission as *amicus curiae* argued that the EU law supersedes the BIT. The Respondent Romania claimed that 'where conflicts arise between competing rules of international law which cannot be resolved by systemic interpretation, the intention of the relevant States determines which of the competing rules takes precedence. According to the Respondent, in the present case the common intention of Romania and Sweden is clear: they intended the BIT to be subordinated to EU law. As EU law contains more specific rules on state aid, EU law should prevail by application of the principle lex specialis derogat generali.'[79] The Commission referred to Article 30(3) of the Vienna Convention[80] that Claimants cited to prove that this provision of international law 'directs the Tribunal to apply the EU's state aid law rather than provisions of the BIT that would prove incompatible with the EC Treaty.'[81]

c) The circularity argument

A final argument the Commission utilised in all four cases as an amicus curiae to convince the arbitral tribunal not to rule in favour of the investors was the circularity argument. This argument states that foreign arbitral awards are to be treated in some cases as decisions granting state aid under domestic law. Thus, the circularity argument thwarts application of foreign arbitral awards – and, inter alia, Article 54 (1) of the ICSID Convention – by stating that, if a foreign award granting damages would reinstate state aid if it was implemented by a Member State as a judgement by its domestic courts, the foreign arbitral award itself would constitute state aid and would not be enforceable since it would be have been made in contradiction to EU law.[82]

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[77] EUROPE AGREEMENT establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part 1993 <http://wits.worldbank.org/GPTAD/PDF/archive/EC-Romania.pdf>.

[78] *Micula* at section 294. *b).*

[79] *Id* at section 310.

[80] Article 30(3) of the Vienna Convention provides that '[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.'

[81] *Micula* at section 317.

[82] *Id.* at Part V-6, section 5.19.

Table 2. Further facts of the four cases

Case	BIT OR ECT, ICSID OR ELSE	Decision	Reaction to state argument	Reaction to amicus
Electrabel	ECT, ICSID	Partially rejected, one issue to be decided in 2016	Dealt with Hungary defence	Dealt with EU amicus
AES	ECT, ICSID	Claim rejected	Did not deal with Hungary defence	Did not deal with amicus
EDFI	ECT, UNCITRAL	Claim accepted	Rejected EU measure defence	Rejected the arguments in the amicus
Micula	BIT, ICSID	Claim accepted, annulment pending	Rejected EU measure defence, established FET violation	Rejected the arguments in the amicus

The impact of these three forms of Commission arguments was mixed. In *Electrabel,* ruling in favour of the Respondent, the ICSID court hypothetically accepted the supremacy and lex posterior arguments, stating that 'the acts of the Respondent implementing… a binding decision under EU law have to be taken into account in the evaluation of its conduct under the ECT' and that 'the ECT does not protect the Claimant, as against the Respondent, from the enforcement by the Respondent of a binding decision of the European Commission under EU law.'[83]

On the other hand, in *AES*, the court bypassed all these arguments and did not consider the Commission's amicus curiae while rejecting the Claimant's claim.[84]

In *Micula,* the Commission put forth that 'any award requiring Romania to reestablish investment schemes which have been found incompatible with the internal market during accession negotiations, is subject to EU State aid rules' and '[t]he execution of such award thus cannot take place if it would contradict the rules of EU State aid policy.'[85] The tribunal however, as already noted above, rejected the circularity argument raised by the Commission on the basis that 'it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award.'[86] As a result, the court accepted Micula's claim.

[83] *Id.* at Part IV-54, section 4.169.
[84] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary,* ICSID Case No. ARB/07/22, Section 16 (September 23, 2010).
[85] *Micula* at section 335.
[86] *Micula* at section 342.

3 Efforts to Preclude Enforcement of Adverse Arbitral Decisions Based on intra EU BITs

In *Electrabel* and *AES*, the respondent Member State supported by the European Commission came out victorious (for the moment), while in *Micula* and *EDFI,* the investors' arguments have convinced the arbitral tribunals.

In that sense, *Micula* and *EDFI* present excellent case studies of how the EU goes about preventing the enforcement of a tribunal decision after it fails to achieve success in its original intervention by an amicus curiae.

After the ICSID decision granting compensation to the *Micula* brothers for Romania's breach of a BIT, Romania took steps to annul and also partially implement the award.

On April 9, 2014, Romania – with the full backing of the EU Commission – filed an application with ICSID to annul the Award, and requested a stay of enforcement of the Award, based in part on the argument it repeats here – that Romania's payment of the Award would violate European law. On April 18 2014, the Secretary-General of ICSID put in place a provisional stay. On August 7, 2014, an ICSID ad hoc committee conditioned the continuation of the stay on Romania's ability to file a letter with the ICSID Secretary-General within 30 days, 'commit[ing] itself subject to no conditions whatsoever (including those related to E[uropean] law or decisions) to effect the full payment of its pecuniary obligation imposed by the Award…'[87] Romania failed to file the assurance, and in a letter dated September 15, 2014, ICSID confirmed that the stay on enforcement of the Award was "automatically revoked" as of September 7, 2014.[88]

As far as partial implementation is concerned, Romania has cancelled outstanding tax debts of European Food SA against payables by Romania.[89] As a reaction to this step, the EU Commission issued a suspension injunction against Romania which prevented the Member State from complying with the ICSID award until further determinations by the Commission were made.[90] After forming the belief that the award constituted unlawful state aid, the Commission then ordered Romania to recover any and all amounts paid to the Micula brothers in accordance with the ICSID award.[91]

Specifically, the Commission cited Article 14 of Council Regulation No. 659/1999 which 'provides that all unlawful aid may be recovered from the recipient.'[92] For Romania's partial im-

[87] Ioan Micula, Et Al., Petitioners, – Against – The Government Of Romania, Respondent. 15 Misc. 107 (Part I) Opinion & Order Usdc Sdny Document Electronically Filed Doc #: Date Filed: 8/5/201 5 *Micula Et Al V. The Government Of Romania* Doc. 66 Dockets.Justia.Com United States District Court Southern District Of New York Lorna G. Schofield, District Judge: Page 3.

[88] *Id.*

[89] *Romania Implementation of Arbitral award Micula v Romania of 11 December 2013,* European Commission Communication, paragraph 71, October 1 2014.

[90] *Id.* at paragraph 5,6.

[91] *Id.*

[92] *Id.* at paragraph 74.

plementation of an award constituting state aid to be lawful, the aid must have 'been granted in compliance with the procedure laid down in Article 108(3) of the TFEU.'[93]

The Micula brothers reacted by taking an action to annul the above decision.[94] According to the Micula brothers, 'the Commission's decision fails to acknowledge that Romania is obligated by international law to execute the ICSID award without delay and that Romania's international law obligations take primacy over EU law' and also that the decision 'infringes Article 351(1) TFEU and Article 4(3) TEU, which recognise and protect Romania's obligations under the ICSID Convention and under the [BIT].'[95] The issue is that the alleged infringement of Article 351 of the TFEU is not quite as clear-cut as the brothers seem to suggest and the Commission has stated that this particular provision does not apply, since the BIT in question concerns two Member States and not a Member State and a third country.[96]

Unfortunately for the Commission, the Micula brothers are not going to simply wait to collect their ICSID judgment and seek to take advantage of the delocalized nature of ICSID judgment enforcement. Since ICSID judgments are afforded the same 'full faith and credit' as a U.S. state court judgment, the brothers have now filed a petition in the U.S. District of Columbia district court seeing an ex parte confirmation of the ICSID award[97] and also in Bucharest, Romania.[98] Such a procedure is not unprecedented and has been successfully utilised in similar situations in the Southern District of New York.[99] Although the Commission has intervened in both cases, the outcome of the domestic litigations remains to be seen.[100]

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[93] The 'Final Decision' of the Commission declaring any payment under the Award a violation of European state aid laws, and ordered Petitioners to return any portion of the award Romania had already paid them. Petitioners have appealed the Suspension Injunction to the General Court of the European Union was issued on March 30, 2015.

[94] Case T-646/14: Action brought on 2 September 2014 – *Micula a.o. v Commission* OJ C439, 8.12.2014, 29–30.

[95] *Action brought on 2 September 2014 – Micula a.o. v Commission,* Case T-646/14, OJ C439/30.

[96] *EC Communication,* at paragraph 51.

[97] Docket, *Micula v. Government of Romania,* District of Columbia District Court; see also 22 U.S.C. § 1605a.

[98] On 24 March 2014, the Bucharest Tribunal allowed the execution of the Award considering that on the basis of Article 54 of ICSID the Award is a directly enforceable act and must be treated as a final domestic judgment excluding thus the procedure to recognize the award on the basis of the Romanian Procedural Civil Code (Art 1123–1132). Thereafter, on 30 March 2014 an executor started the enforcement procedure of the Award by setting the Romanian Ministry of Finance a deadline of 6 months to pay to the four claimants 80% of the award plus the interests and other costs.

[99] *See Mobil Cerro Negro, Ltd., et al v. Bolivarian Republic of Venezuela,* where a New York federal district court rejected Venezuela's sovereign immunity challenge and upheld use of an ex parte procedure available under New York law to convert an ICSID award into a U.S. court judgment.

[100] Romania challenged the execution before the Bucharest Tribunal and asked for interim measures, i.e. a temporary suspension of the execution until the case has been decided on the merits. On 14 May 2014, the Bucharest Court suspended temporarily the execution of the Award until a decision on the merits of Romania's challenge and request to suspend the execution had been taken. On 23 September 2014, the Bucharest Tribunal rejected the suspension claim regarding the execution of the award. The Commission has intervened into those proceedings pursuant to Article 23a(2) of Regulation (CE) No 659/1999 of 22 March 1999.

Additionally, in the ICSID forum, this matter remains in constant flux. The secretary for ICSID has granted a provisional stay of the award's enforcement.[101] Moreover, Romania, in yet another attempt to preclude award enforcement, has also filed for annulment of the award at the behest of the Commission.

Besides these various actions taken by the Commission to prevent enforcement of the ICSID award in *Micula,* the European Commission could, in theory, also issue a regulation to block enforcement of certain international arbitral awards – such as those based on intra-EU BITs – on EU soil. While regulations have not been used within the context of international arbitration awards, their use by the EU is not unprecedented. Blocking statutes were largely used by the EU in response to the U.S.'s Helms-Burton Act. The U.S. passed this legislation in 1996 for two primary reasons, to give U.S. citizens who suffered damage as a result of the Cuban government's appropriation of their property an avenue to sue foreign individuals or corporations and to bar U.S. entry to individuals who used this confiscated property.[102] The Helms-Burton Act had the consequence of creating extra-territorial jurisdiction for U.S. courts, which was fundamentally opposed by the European Commission. As a result, the Commission passed EC Regulation No. 2271/96, which aimed to protect 'against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.'[103] The essential components of this Regulation were Articles 4 and 5. Article 4 prohibits the recognition and enforcement of any judgment from the U.S. courts that aims to recover from companies or natural persons of the EC due to the Helms-Burton Act.[104] Article 5 mandates non-compliance with any requirement or prohibition, including requests from foreign courts, based on the Helms-Burton Act.[105]

All of this illustrates that EU implementation of blocking statutes to combat the extraterritorial application of 'foreign' norms or decisions is not unprecedented. However, whether the Commission would do so to counter the effects of international tribunals remains to be seen. It should also be noted that the one glaring limitation of blocking statutes, such as EC Regulation No. 2271/96, is that it would only be enforceable within the EU, *not* outside its jurisdictional boundaries.

IV International Tribunal Decisions Enforced Outside the EU

In current events, another issue has become more prevalent concerning awards granted by international tribunals. In the scenario where Member States refuse to honour awards granted by international tribunals for various reasons, including their classification as unlawful state aid,

[101] 2014-1918 Mealey's Daily News Update 11, ICSID Stays Enforcement Of $ 185 Million Award Pending Application To Annul, April 22, 2014.
[102] Anthony M. Solis, 'The Long Arm of U.S. Law: The Helms-Burton Act 19 Loy' (1997) 709 L.A. Int'l & Comp. L. Rev.
[103] Commission Regulation No. 2271/96 of November 22 1996, OJ L309.
[104] Jürgen Hubner, 'The Helms-Burton Blocking Statute of the E.U.' (1996) 20 Fordham L.J. 699, 704.
[105] *Id.* at 704–705.

often other aggrieved investors will seize that Member State's assets in third countries to honour the award determination.

If awards granted by international tribunals are enforced outside the EU, the EU Commission's decisions (or even a regulation) blocking enforcement are not relevant. The EU could however, in theory, conclude international agreements or could issue a domestic regulation to block the international enforceability of intra-EU BITs in such a way as the United States of America has done relating to the application of the decisions of the International Criminal Court to its military service personnel. In 2002, the U.S. Congress passed the American Service-Members' Protection Act, which contained prohibitions on the United States providing military aid to countries which had ratified the treaty establishing the International Criminal Court (ICC). However, there were a number of exceptions to this, including countries which entered into an agreement with the United States not to hand over U.S. nationals to the Court. The so-called 'Nethercutt Amendment' to the Foreign Operations, Export Financing, and Related Programs Appropriations Act suspended Economic Support Fund assistance to ICC States Parties who refused bilateral immunity agreements (BIAs) with the US or were not provided a Presidential waiver. The latter differed from the American Service-Members' Protection Act by imposing economic aid cuts instead of military aid cuts.

The EU could hypothetically use its economic clout and aid policy to make certain non-EU countries accept and pass legislation that decisions based on intra-EU BITs are not enforceable. The policy impact of such a policy move is likely to be detrimental for the EU internationally.

Developments in the *Micula* case clearly show that the applicants proceeded to the enforcement of the ICSID award in the state of New York. As already mentioned above, Romania and the European Commission have forcefully proceeded to stop enforcement of the claim in the US tribunal. Based on Article 54(1) of the ICSID Convention, 'if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts.' In that sense, a domestic tribunal[106] may only be convinced not to start enforcement of the decision by an ICSID tribunal if it is convinced that the ICSID decision remained, is suspended or is on course to being vacated.[107] Aside from the previous cases mentioned above, various arguments relating to sovereign immunity may be validly made.[108] For example, in the US district court proceedings in

[106] In the US the second sentence of Article 54(1) will also apply: 'A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.'

[107] Stanimir A. Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder, Christoph H. Schreuer et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009); Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, 'Article 54 – Enforcement' in *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1115.

[108] Article 55 provides: 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.' see more in detail: Inna Uchkunova, Oleg Temnikov, 'Enforcement of Awards under the ICSID Convention: What Solutions to the Problem of State Immunity?' (2014) 1 (29) ICSID Review—Foreign Investment Law Journal, 187–211; Schreuer, Malintoppi, Reinisch, Sinclair (n 107) 1151; Aron Broches, 'Awards Rendered Pursuant to the

Micula, the EU Commission argued for a non-enforcement of the ICSID award based on the EU's sovereign interests.[109] The Commission, speaking for the EU as a sovereignty, argued three doctrines: international comity, the act of state doctrine, and the foreign compulsion doctrine. In the latter, the Commission argues that Romania must comply with its obligations as an EU Member State, including the prohibition from paying Petitioners under the Award.[110]

There is some similarity with the events unfolding concerning the Yukos Oil Company shareholders' claims against Russia. These claims, presented in the international forums of both the European Court of Human Rights[111] and the Permanent Arbitration Court,[112] have awarded the oil company damages of $2.5 billion and $50 billion, respectively, after the Russian government's unlawful crackdown and systematic dismantling of the colossal oil company. The main issues arose when it came down to enforcing and collecting the awards from the Russian state.

Predictably, Russia has refused to pay the awards and seeks to contest the validity of both judgments. As a direct result of this refusal and armed with the authority of the New York Convention, Belgium and France have begun seizing certain Russian state owned bank accounts and real estate assets within their borders.[113] Seizing the assets is just a first step in ensuring that these assets will be available for enforcement; this steps shows that there is some promise for the Yukos shareholders. The Yukos case clearly shows that third countries – such as Belgium and France did in relation to a dispute between a Cyprus entity and the Russian state - may also seize Russian assets if Russia chooses not to follow ICSID award determinations. With respect to the *Micula* case, Romanian assets (or similar cases relating to other intra-EU BITs, other EU Member State assets) may be seized by third countries such as the United States or even Russia if the investors choose to enforce their claims in those countries. The value of an EU Commission injunction or decision relating to State aid may be quite limited in those states which are third parties to the Treaty on the Functioning of the European Union.

ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 (2) ICSID Review–Foreign Investment Law Journal, 287.

109 The Second Circuit endorsed the view that the European Community, 'which has been incorporated into the European Union,' derives its sovereignty from its member states. See *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 143 n.15, 147 (2d Cir. 2014) (holding that statutory phrase 'organ of a foreign state' applies to the European Community, 'which serves numerous foreign states').

110 See Michael A. Warner, Jr., Comment, 'Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law' (1990) 11 Nw. J. Int'l L. & Bus. 371, 373–374.

111 Case Of *Oao Neftyanaya Kompaniya Yukos v. Russia* (Application no. 14902/04) http://hudoc.echr.coe.int/eng?i=001-145730#{"itemid":["001-145730"]}.

112 PCA Case No. AA 227 In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules – Between – Yukos Universal Limited (Isle Of Man) – and – The Russian Federation Final Award 18 July 2014 <http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>.

113 BBC News, *Russian fury at Belgium asset seizure in Yukos oil case,* <http://www.bbc.com/news/world-europe-33197782> June 19, 2015.

János Katona*

The Role of EU Law in 'intra EU' ISDS under the ECT

Some Thoughts on the Electrabel v. Hungary Award

As of today, there are several investor state arbitration procedures pending between an investor from an EU member State and another EU member State. These procedures are called sometimes 'intra-EU' disputes. In some of these disputes, EU investors relied on Bilateral Investment Treaties between their home State and another EU member State while in approximately 10 pending procedures,[1] the legal basis of the investor's claim is the Energy Charter Treaty[2] (ECT). Both BIT and ECT-based intra-EU disputes raise some intriguing questions in connection with the role of EU law in such procedures. The *Electrabel S.A v. Hungary*[3] case is an example of such an intra-EU dispute under the ECT where the Tribunal has already taken a position on some of these questions.

In this brief paper, I shall review three findings of the award that seem relevant in the context of so-called intra-EU arbitration, namely:

– EU law is a part of the applicable public international law in an ECT arbitration;
– EU law takes precedence over the ECT in the event of a conflict;
– EU law does not bar the jurisdiction of the tribunal in an intra-EU ECT arbitration.

I shall briefly present the factual and legal background of the case, then continue with the presentation of the arguments in support of the above three findings and finish with a few observations relating to these findings.

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[1] An estimate based on the information found on the web-site of the ECT <http://www.encharter.org/index.php?id=213&L=0L%C2%A1%C2%AFid%C3%86%C3%AEe> and the ICSID <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>, last accessed on September 20, 2014.

[2] <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf>.

[3] *Electrabel S.A. v. Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability (November 30, 2012).

I Setting the Scene

1 Factual Background

Electrabel S.A.,[4] a Belgian company, invested in a power generator company in Hungary in 1995. Hungarian power generators at that time had concluded so-called long-term power purchase agreements (PPAs) with the state-owned electricity company in order to sell the generated electricity. These contracts created a stable flow of revenues to the generators, protecting them from the emerging free market in the sector.

After the accession of Hungary to the EU, the European Commission established that these PPAs constitute unlawful State Aid under EU rules and ordered their early termination. Hungary then terminated the PPAs by law.[5]

2 Procedural and (Substantive) Legal Background

Electrabel brought several claims before an ICSID tribunal against Hungary for violation of the ECT. One of Electrabel´s claims was that Hungary unlawfully terminated the PPAs – this was a so-called PPA Termination Claim. The PPA Termination Claim gives the most evident example of the interaction between ECT and the EU law.

The legal grounds of the claim in the Electrabel case was the ECT. The ECT, like most if not all BITs, provides for a more or less typical set of standards on how the host State needs to treat the protected investments[6]. It also contains an investor-state dispute resolution clause, offering the consent of the contracting States to submit to arbitration disputes with investors of other contracting States arising out of the violation of the ECT.[7]

The *Electrabel* arbitration is an ICSID (International Center for Settlement of Investment Disputes) arbitration. That means, in the present context, that the 'background rules' of the arbitration, *the lex loci arbitri,* are the ICSID Convention[8] and the rules of public international law and not, as with 'commercial' international arbitration, a municipal law of a State. One of the further differences is that, as an award of an ICSID tribunal, the award of the *Electrabel* tribunal shall be enforceable under the relevant provisions of the ICSID Convention without the possibility of being set aside under the rules of any municipal law[9] or a need for special recognition or enforcement under the New York Convention.

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[4] For the sake of completeness, the initial investor was *Electrabel´s* predecessor, *Tractabel.*

[5] Commission Decision On The State Aid Awarded By Hungary through Power Purchase Agreements. C (2008) 2223 final. http://ec.europa.eu/competition/state_aid/cases/201965/201965_827719_388_1.pdf, last visited September 25, 2014.

[6] See Chapter III of the ECT.

[7] See Article [Article 26. 3. *c)*] of the ECT.

[8] See for example Rudolf Dolzer, Christoph Schreuer, *Principles of international investment law* (2nd edn, Oxford University Press 2012, Oxford) 278.

[9] ICSID Convention, Article 53.1 and 54.

II Analysis of some of the Findings of the Tribunal

For the purposes of this article, it seems convenient to assume the perspective of an arbitral tribunal in the course of the analysis. From this perspective, the Tribunal's tasks start (i) with determining the law or laws applicable to its jurisdiction, (ii) then establishing its jurisdiction relating to the claims presented, (iii) then determining the applicable law or laws to the merits to these claims (iv) after which it is in a position to decide on the merits of the case.

As the Tribunal highlighted, it was an arbitral tribunal constituted under the rules of ECT and the ICSID. Its jurisdiction is based on the consent/the agreement of the parties – as in 'ordinary' or commercial arbitration - which is confirmed by the constant practice of investment tribunals.[10] The offer of the consent of the host State – i.e. Hungary – to arbitration is included in the investor-state dispute resolution clause of the ECT.[11] This consent is given therefore in a public international law instrument and, consequently, public international law shall be applicable to such consent.

Article 26.6 provides that if an investor submits a claim under the ECT, the Tribunal shall apply the ECT itself and the rules and principles of international law. Under the constant arbitral practice, such a treaty provision qualifies as a choice of law provision under the relevant arbitration rules[12]. As a result, a tribunal constituted under the ECT should apply the ECT itself and public international law to the merits of the dispute.

To have a complete picture of the legal context of such dispute, it worth noting that municipal laws also come into play in investment treaty arbitration, in particular *a)* to certain issues defined by international law[13] *b)* as fact in the dispute[14].

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[10] Just some example of the large number of scholarly works: Dolzer, Schreuer (n 8) 259. Hege E Kjos, *Applicable law in investor-state arbitration: The interplay between national and international law (Oxford monographs in international law* (1st edn, Oxford University Press 2013, Oxford) 20, and early arbitral decisions: *AAPL v. Sri Lanka* ICSID Arb no. 87/03 Award June 27, 1990 para 2., <http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf>; *Salini Construttori Spa v.Morocco* para 27. <http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>.

[11] See (n 6).

[12] In case of an ICSID procedure, Article 42.1 of the ICSID Convention is applicable providing that the agreement of the parties shall determine the law applicable to the merits of the dispute It is not necessary here to discuss in details that, when deciding applicable law in this context, the Tribunal defines applicable law with reference to the choice of law provision providing for the application of the law choosen by the Parties and/or by applying the 'law of the claim' the *lex causae.*

[13] For example, 'The law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state.' Zachary Douglas, *The international law of investment claims* (Cambridge University Press 2009) 52.

[14] See the frequently cited authority in *Certain German Interests in Polish Upper Silesia* No. 11 Interpretation of judgments nos. 7 and 8 (the Chorzow Factory). Publications of the Permanent Court of International Justice. Series a.-No. 13 December 16th, 1927 <http://www.icj-cij.org/pcij/serie_A/A_13/43_Interpretation_des_Arrets_No_7_et_8_Usine_de_Chorzow_Arret.pdf>.

1 Is EU Law a Part of Public International Law?

The first question the Tribunal needed to determine is the role of the EU law in the above context and in particular, whether EU law is to be considered as a part of public international law, as claimed by Hungary, or it needs to be taken account as a part of the municipal law of Hungary as argued by the Claimant.[15]

It was not disputed that the accession of Hungary to the EU was implemented by the entry into force of a treaty under public international law and that both Hungary and the home state of Electrabel, Belgium, were parties to this instrument.[16] The arbitrators were to decide whether EU law was part of the legal norms that are applicable as public international law and whether only the whole body of the EU is to be considered as international law or only a part of it, namely the founding treaties.

The Tribunal held that EU law has a multiple nature. Depending upon the perspective from which it is regarded, it can be considered

a) as international law, as it is created by international instruments,
b) part of the legal order of Hungary, one of its member states,
c) from the perspective of EU institutions, a distinct legal order.[17]

In the view of the tribunal – which was a tribunal constituted under public international law – it should regard EU law as part of international law. And not only the founding treaties[18] but EU law as a whole has the character of public international law. In support of this last finding, the Tribunal argued that 'all EU legal rules are part of a regional system of international law and therefore have an international legal character.'[19]

2 How to Resolve Conflicts between ECT and EU Law?

If EU law is a part of public international law and there is a conflict between the applicable norms, this conflict should be resolved in accordance with the rules of public international law. Such a conflict may emerge in two respects, in connection with the jurisdiction of the tribunal and with the merits of the case.

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[15] The Claimant, at some point in the arbitration, conceded that the founding treaties of the EU may be considered as public international law.

[16] TREATY concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed on April 16 2003 <http://www.europarl.europa.eu/enlargement_new/treaty/default_en.htm>.

[17] *Electrabel* para 4.118.

[18] I use the term founding treaties because the case was plead partly prior to the entry into force of the Lisbon Treaty, which change the names of the relevant treaties and the numbering of their articles. However, in order to be 'up to date' I shall refer to the articles as numbered by the Treaty on the Functioning of the European Union.

[19] *Electrabel* para 4.122 citing the famous *Van Gend & Loos* (Case 26/62) decision of the ECJ. 'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights.'

The *Electrabel* tribunal found that no conflict or inconsistency exists between EU law and the ECT. The Tribunal has also concluded that if there were any material inconsistency between the ECT and EU law, the ECT and EU law should, if possible, be read in harmony.[20] Though *Electrabel* tribunal discusses the two issues in Chapter IV titled 'Applicable law', issues relating to jurisdiction of the Tribunal shall be discussed under next point.

The findings on *'no inconsistency'* and need for 'harmonious interpretation' were founded, inter alia, on the historical role that the EC played in the ECT, i.e. that the ECT was the 'brainchild' of the EU. On the other hand, it found that ECT and EU law share some common policy objectives, in particular in both condemning anti-competitive behaviour.[21]

The Tribunal, however, went further and addressed the issue of how to resolve a potential conflict between the two set of norms of public international law. In the course of this obiter dicta analysis, it examined, as part of the rules on conflicts of public international law, the 'rule of conflict' provisions of the ECT and the Founding Treaties of the EU. The conclusion was that, if there is a conflict, EU law takes precedence over the rules of ECT.[22] The 'conflict provision' in the ECT, Article 16, provides that if there is a conflict between preceding or subsequent treaties and the ECT which have the same subject matter then the provision that is more favourable to investment or investors shall apply.

According to the Tribunal, the EC Treaty and the ECT do not relate to the same subject matter. And even if it were applicable, Article 16 has been replaced by the 'rules of conflict' of the EU Founding Treaties, i.e. what is now Article 351.1 of the TFEU[23].

Article 351.1 provides that earlier international agreements between Member States and third states shall not be effected by the EU Treaty.[24] As no rights or obligations vis á vis third states are at issue here, only those of EU Member States, this provision does not seem to be applicable. Moreover, the practice of the ECJ held that, in multilateral treaties, Article 351 shall not protect the *inter se* reciprocal obligations between Member States.

Finally, the Tribunal rejected the idea that Article 351 may be extended to the rights of investors under the anterior treaties. It held that one cannot disconnect the rights of individuals from the rights of their home states.

3 Jurisdiction and EU Law

In the *Electrabel* case, the jurisdictional objection was not raised by one of the Parties but the EU, which suggested in its *amicus brief* that the Tribunal lacks jurisdiction to hear the PPA Termination Claim.[25]

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[20] *Electrabel* para 4. 166.
[21] *Electrabel* para 4. 130–142.
[22] *Electrabel* para 4.173–4.191.
[23] This the former Article 307 of the Treaty on the European Communities (TEC).
[24] Article 351.1 of the TFEU provides 'that rights and obligations of the Member States – arising from agreements with one or more third states – concluded before [their accession to the EC/EU] shall not be affected by the Treaty.'
[25] Most of the issues addressed here were discussed by the Tribunal in chapter IV. of the award dealing with applicable law; however, for practical reasons I shall discuss it here under the section 'Jurisdiction'

If – as the Tribunal established – EU law is part of public international law and supersedes the ECT, it may alter the scope of the consent of Hungary included in the ECT or render the arbitration agreement between the parties invalid or inapplicable. This would be the case, for example, if EU law had barred investor-state arbitration between EU nationals and Member States. According to the tribunal, this is not the case.

The summary of the reasoning is the following:

There is no provision in EU law barring investor-state arbitration. In the TFEU, the only provisions concerning external dispute resolution explicitly are in Section 344, that excludes any dispute resolution mechanism *between Member States* in connection with the interpretation and application of EU law other than under the one provided for in the TFEU. This is applicable only in state-to-state relations and not to investor-state dispute resolution. No similar general interdiction exists in EU law in the latter field.[26]

Investor-state arbitration does not violate the ECJ´s role in the EU legal system. First, the Tribunal noted that, with regard to the PPA Termination Claim, the Tribunal does not need to review the validity of any act of an EU institution which can be a competence reserved to the ECJ. Moreover, the possibility of investor-state arbitration does not jeopardise the role of the ECJ as a court authorised to give final interpretation of EU law in the framework of a preliminary ruling procedure. The tribunal argued that foreign courts and arbitration tribunals that apply or may apply EU law do not have recourse to the ECJ and a tribunal in an investment treaty arbitration applying EU law shall not be in a different position. Also, the enforcement of decisions of an arbitral tribunal by the courts of the member states is reviewed by the ECJ because these courts refer to the ECJ any question of interpretation of EU law if it occurs in the enforcement procedure–see the *Eco Swiss* case as an example.[27]

The tribunal recognised that reference for preliminary ruling is not applicable with regard to an ICSID award. It found however that there remains a possibility to ensure the uniform application of EU law by the ECJ, even for an ICSID award, mainly in the framework of an infringement procedure.

The dispute on the PPA Termination is not an intra-EU dispute. The Commission argued that the PPA Termination Claim is, in substance, related to the lawfulness of an EU measure (the Commission's State Aid decision). It is thus an intra-EU dispute that is not covered by the ECT dispute resolution provision because it is an investor from the EU, an EU national, that contests the validity of an act of its 'home state'[28]. The Tribunal rejected this argument, noting that the Claim is directed against Hungary. The EU also argued that the tribunal should treat the relationship between ECT and EU law in such a way that, to the extent that a measure is in compliance with EU law, it should be presumed that it complies with the ECT.

In sum, the Tribunal has jurisdiction to hear the claims of Electrabel SA, including the PPA Termination Claim. It was even highlighted that the EU itself accepted, by signing the ECT, the

[26] *Electrabel* para 4.147.
[27] *Electrabel* para 4.148–4.152.
[28] *Electrabel* 5.20 and ss.

possibility of investment arbitration with private parties, including EU nationals (See under point III. below.).

Briefly, on the law applicable to the merits, it results from the above theories, as established by the Tribunal, that EU law is applicable to the merits of the case.

III Observations

The *Electrabel* tribunal was not reluctant to take a firm position concerning the role of EU law in an intra-EU investor state arbitration procedure.

On one hand, the award clearly confirmed that EU law is a part of the applicable law, as public international law in an ECT arbitration. This position was not accepted without critiques. Some argued that EU law cannot be seen as international law and even added that EU law excluded itself from international law.[29] EU law can thus only play a role as a part of the municipal law of the host state when and where the latter is applicable. It is noticeable that both the *Electrabel* tribunal and its critics refer – among others – to the *Van Gend en Loos* decision[30] of the ECJ when trying to determine the nature of EU law.

This criticism can definitely be sound if someone approaches the ECT or international investment law as if it were a stand-alone or self-contained system or if someone simply argues that complex phenomena, such as the regulation of the globalised world economy (including foreign investment), is provided for in various different set of legal norms that cannot be reconciled in one single dispute resolution procedure.

On the other hand, the Tribunal recognised that one aspect of the *Electrabel* case was to ascertain the correct balance between the competing values behind, on one hand, the ECT – i.e. the substantive and procedural rights granted to foreign investors – and EU law – i.e. the economic integration of EU member states.[31] As a procedural aspect of this balancing exercise, the Tribunal firmly confirmed, like other tribunals dealing with 'intra-EU' disputes, the availability of an investor-state dispute resolution mechanism for EU investors against EU member states under the ECT. That means the rejection of the broad policy argument according to which the EU Member States were willing to substitute the procedural and substantive standards granted by the investment treaties with the more complex institutional, substantive and procedural rules of EU law.

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[29] See Christian Tietje, *Bilateral Investment Treaties Between EU Member States (Intra-EU-BITs) – Challenges In The Multilevel System Of Law TDM March 2013.* The author argued in this article that EU law cannot be regarded as a part of public international law because, amongst others, that it posits the founding treaties as superior to other rules of public international law.

[30] See (n 18) and Tietje (n 29) 7, referring to the same citation in *Van Gend & Loos.* Even Professor Klabbers whose work the 'Treaty conflict and European Law' was cited approvingly several times in Chapter III of the award remarks with some irony in connection with *Van Gend & Loos* that EU law 'perhaps even so unique as to no longer qualify as a part of international law'. See Jan Klabbers, *Treaty conflict and the European Union* (Cambridge University Press 2009, Cambridge, UK, New York) 196.

[31] *Electrabel* 4.113.

A further highlight made by the Tribunal was that the EU itself agreed to international arbitration in the ECT, not only with non-EU nationals but with EU nationals.[32] This statement is, the least to say, not undisputed in the light of the Commission's arguments in its *amicus* brief, claiming that a dispute between a national of an EU member state (that is a national of the EU) and the EU relating to an EU measure is the same as a dispute between an investor and its home state[33] and therefore not covered by the investor-state dispute resolution clause of the ECT.

Finally, to what extent can the relevant findings of the Tribunal be 'extended' to intra-EU BIT arbitrations? The jurisdictional findings of the Tribunal can definitely serve as a reference outside ECT-based investor-state treaty arbitration. As to the findings in connection with substantive issues (including that of the applicable law and the hierarchy between ECT and EU law), the findings of the *Electrabel* tribunal cannot be disregarded either, though the special historical and legal connections between EU law and institutions and the ECT may serve as a 'vehicle' to facilitate the adoption of a contradictory position by another investment arbitration tribunal.

[32] *Electrabel* 4.163.
[33] *Electrabel* 5.20 citing point 60 of the *amicus* submission of the EU Commission.

Jonathan J. Faust*

Holocaust Litigation in U.S. Courts Involving Sovereign Entities

General Overview & Hungary's Experience

The Holocaust – one of the darkest chapters in human history – ended in May 1945. Fifty years later there was a proliferation of lawsuits in U.S. courts seeking restitution for Holocaust-era wrongs. These suits began with claims against private banks and industry, but soon implicated sovereign States and their agencies. This presentation provides an overview of civil litigation involving Holocaust-era claims, including Hungary's recent experience (e.g., claims for monetary reparations for expropriated property, slave labor, looted art work and personal injury). Criminal and deportation proceedings, and non-judicial reparations regimes are not addressed herein.

Holocaust litigation is very complex, with too many cases presenting too many nuanced claims, issues and holdings to give a detailed analysis of each.[1] The following provides a representative survey of the case law without qualitative judgments. Nothing presented is intended to diminish the rightful condemnation of the atrocities committed during World War II.

I The Swiss Bank Litigation: The Inaugural Holocaust Litigation

Holocaust restitution claims came to the fore in American courts in the late-1990s,[2] when political and press interest triggered litigation against Swiss banks.[3] By 1997, several separate U.S.

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1 See Appendix for a sampling of relevant decisions for the period 1999–2002, alone.

2 'A total of ten cases involving Holocaust-era claims were filed in the United States between the end of World War II and October 1996, the start of the new era of Holocaust-claim litigation.' *Alperin v. Vatican Bank,* 410 F.3d 532, 546 (9th Cir. 2005). While some such cases raised interesting issues, they are not covered herein. E.g. *Dreyfus v. Von Finck,* 534 F.2d 24 (2d Cir. 1976) (dismissing claims based on Act of State doctrine; 'violations of international law do not occur when the aggrieved parties are nationals of the acting state'), cert. den., 429 U.S. 835 (1976).

3 Many individuals opened Swiss bank accounts in the late 1930s and early 1940s to hide and preserve their assets as the Nazis rose to power. After the war, Swiss banks refused to assist heirs of account holders locate family assets, citing strict bank secrecy laws. Swiss banks had no incentive to help as the lack of any Swiss law requiring banks to turn over unclaimed accounts to the state, combined with regulations allowing account records to be destroyed after 10 years, enabled banks to keep dormant account proceeds as their own. *In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d 139, 151, 154–155 (E.D.N.Y. 2000) (destruction of records); 2

class actions[4] had been filed against Swiss banks. These actions were consolidated in the U.S. District Court for the Eastern District of New York.[5]

The U.S. District Court described the plaintiffs' claims as follows:

> Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities… collaborated with and aided the [German] Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law [and local laws of the forum]; engaged in fraud and conspiracy; and concealed relevant facts from the [plaintiffs] in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief.[6]

While the lawsuit involved claims against commercial (i.e. non-sovereign) banks, the Swiss government worked with U.S. officials to reach a resolution. In August 1998, while the bank defendants' motion to dismiss[7] was pending, a settlement in principle was reached to end the bank litigation and provide a broad release to the Swiss government and other Swiss business interests in exchange for a payment of $1.25 billion, plus a transparent audit of dormant accounts held by Swiss banks.[8]

Stan. J. Complex Litig. 139, 146 (2014) (no escheat). The Swiss government had little interest in encouraging account disclosure as the government had secretly used dormant account proceeds to: (i) make payments to the Nazi Reichsbank; and (ii) compensate Swiss citizens who lost property to foreign expropriation during and after World War II. E.g., Swiss Banks and Nazi Gold: Hearings before the House Comm. on Banking and Financial Servs., 105th Cong. (June 25, 1997) (Gerhard L. Weinberg: Swiss victims of Polish property nationalization compensated with proceeds from dormant accounts of Polish citizens); Amended Memorandum and Order, *In re Holocaust Victim Assets Litigation,* 319 F. Supp. 2d 301 (E.D.N.Y. 2004) (noting Swiss payments to Reichsbank). In 1996, the World Jewish Congress ('WJC') pushed for a full accounting of dormant Swiss bank accounts. U.S. Senator Alphonse D'Amato (NY), chairman of the Senate Banking Committee, was receptive to the WJC efforts and convened hearings on the issue. Then-President Clinton took note and appointed Under Secretary of State Stuart Eizenstat as Special Representative of the President and the Secretary of State on Holocaust Issues to oversee the resolution of such matters. See Burt Neuborne, 'Preliminary Reflections of Aspects of Holocaust-Era Litigation' (2002) 80 Wash U.L.Q. 795, 817 n. 75.

[4] A class action permits one or more plaintiffs to bring suit on behalf, and as representatives, of a larger group. A class action is allowed where there is a definable class; joining all members of the class is impractical due to numerosity; common issues of fact or law predominate; the proposed class representatives have claims or defenses that are typical of the class and can adequately represent the interests of the class. (Fed. R. Civ. Pr. 23) Aggregating the interests of a plaintiff group enables individuals to pursue relatively small claims that would not be viable to pursue on their own.

[5] *In re Holocaust Victim Assets Lit.,* 424 F.3d 132, 136 (2d Cir. 2002).

[6] *In re Holocaust Victim Assets Lit.,* 105 F.Supp.2d at 141–42.

[7] A motion to dismiss enables a defendant to argue, at the outset of litigation, that claims should be dismissed due to fatal legal or technical deficiencies; the motion generally cannot challenge factual issues raised in the complaint. See gen. Fed. R. Civ. P. 12; *Ashcroft v. Iqbal,* 556 U.S. 662, 678–79 (2009).

[8] *In re Holocaust Victim Assets Lit.,* 105 F.Supp.2d at 142–43; 80 Wash U.L.Q. at 808 n. 34, 811 n. 50.

In March 1999, the District Court provisionally approved a class action settlement agreement (the 'Swiss Settlement Agreement') covering 5 distinct classes of claims: (i) Deposited Assets Class, covering Swiss bank account proceeds that were not returned; (ii) Looted Assets Class, covering property looted by Nazis; (iii) Slave Labor Class I, for those forced to work for German companies; (iv) Slave Labor Class II, for those forced to work for Swiss companies; and (v) Refugee Class, for those denied entry into, expelled from or mistreated in Switzerland.[9]

This settlement was made possible by the active encouragement (and involvement) of Swiss and U.S. government officials. Indeed, the Claims Resolution Tribunal (the entity to administer the settlement claims process) relied on a cooperative alliance between the U.S. court, the Swiss Bankers Association and Swiss government, including its Federal Banking Commission.[10] U.S. officials and the court expressed hope that the Swiss Settlement Agreement would serve as a template for other foreign governments and foreign industry to work together to reach a 'voluntary resolution of disputes over Holocaust-era claims'.[11]

II A Broader Wave of Litigation

The broad issues raised and resolved by the Swiss Bank litigation led to other Holocaust-era litigation implicating both private industry and sovereign States.

1 Bank Lawsuits Implicating State Actors – FSIA, U.S. Policy, Diplomacy & Comity

Various national banks and their commercial counterparts were sued for their alleged role in directly or indirectly: (i) expropriating funds from Holocaust victims; (ii) helping to finance the Nazi genocide; or (iii) otherwise profiting from Nazi persecution of others.

For example, in *Freund v. Republic of France,*[12] plaintiffs sued the Republic of France, a French national depository *(Caisse des Dépôts et Consignations or 'CDC')* and the French national railway *(Société Nationale des Chemins de Fer Français or 'SNCF').* Plaintiffs claimed that the CDC 'was the depository for most of the funds spoliated from the Jews and other detainees in the holding camps', and 'was also the recipient of funds… arising from the sales and auctions of Jewish Property.'[13] In short, plaintiffs claimed that France and its agencies took and kept property belonging to Holocaust victims.

The District Court granted all defendants' motions to dismiss all claims based on the defendants' immunity under the U.S. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, et seq.

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[9] *In re Holocaust Victim Assets Lit.,* 105 F.Supp.2d at 143–44; *In re Holocaust Victim Assets Lit.,* 413 F.3d 183, 185 (2d Cir. 2001).

[10] *In re Holocaust Victim Assets Lit.,* 105 F.Supp.2d at 154–59; 80 Wash. U.L.Q. 795.

[11] *In re Holocaust Victim Assets Lit.,* 105 F.Supp.2d at 148.

[12] *Freund,* 592 F.Supp.2d 540 (S.D.N.Y. 2008) dism. aff., 391 F. Appx. 939 (2d Cir. 2010).

[13] *Id.*, 391 F. Appx at 941 (quoting complaint 20).

('FSIA').[14] The FSIA provides that U.S. courts lack subject matter jurisdiction over claims against foreign sovereigns and their instrumentalities (i.e., sovereign entities cannot be sued in U.S. courts) unless a specific statutory exception to immunity applies.[15] *Freund* held that plaintiffs failed to establish an exception to FSIA immunity because they did not show that the defendants: (i) still held any expropriated assets, or assets exchanged therefore; or (ii) engaged in commercial activity in the U.S.[16]

The District Court further held that, even if FSIA immunity did not apply, the suit would be dismissed as non-justiciable under the 'political question' doctrine[17] and 'principles of international comity'.[18] The court noted that: (i) in 1995 France publicly committed to address and resolve Holocaust-era claims; (ii) established the Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti–Semitic Laws in Force During the Occupation (the 'CIVS') and a separate, smaller fund (the 'Fund') to provide reparations; and (iii) established the Foundation for Memory of the Shoah ('Foundation').[19] The French government also undertook to ensure appropriate funding and legal oversight.[20]

The CVIS, the Fund and the Foundation were formed through bi-lateral diplomatic efforts, with French and U.S. officials recognizing that 'it is in the interests of both the [United States and France] to have a resolution of these issues that is non-adversarial and non-confrontational, and outside of litigation,' and that 'both parties desire all-embracing and enduring legal peace with respect to all claims asserted against the Banks arising out of World War II…'[21] Given France's creation of reparation funds, the U.S. agreed to inform courts 'through a Statement of Interest… that it would be in the foreign policy interests of the United States for the [CIVS], the Foundation, and the Fund to be the exclusive remedies and fora for resolving… claims asserted against [French] Banks and that dismissal of such cases would be in its foreign policy interest.'[22]

In holding that the Freund plaintiffs' claims presented non-justiciable political questions, the court explicitly deferred to the U.S. Executive's exclusive foreign policy prerogatives and the Executive's expressly stated preference for non-judicial resolutions to Holocaust-era expropri-

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[14] *Id.*, 391 F. Appx at 940–41.

[15] *Abelesz v. Magyar Nemzeti Bank,* 692 F.3d 661, 669 (7th Cir. 2012). There are several statutory exceptions to FSIA immunity, each with its own specific elements.

[16] *Freund,* 592 F.Supp.2d at 551, 555–58.

[17] The political question doctrine provides that certain disputes cannot be resolved by litigation because the issues: (i) are beyond the courts' capacity due to the lack of judicially manageable standards; (ii) implicate matter that is committed by the U.S. Constitution to the political branches of government, such as U.S. foreign policy; and/or (iii) intrude on the functions of the political branches, including respect for prior policy determinations or the government's practice of encouraging non-judicial resolution for certain categories of claims. See, *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 420–21 (2003); *Crosby v. Nat'l For. Trade Council,* 530 U.S. 363, 386 (2000); *Baker v. Carr,* 369 U.S. 186, 210–12 (1962).

[18] *Id.* at 551–52. '[C]omity of courts' is a set of principles 'whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.' *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 817 (1993).

[19] *Freund,* 592 F.Supp.2d at 547–50.

[20] *Freund,* 592 F.Supp.2d at 550.

[21] *Freund,* 592 F.Supp.2d at 549.

[22] *Freund,* 592 F.Supp.2d at 549–50.

ation claims. The court's holding as to comity expressly respected the CVIS and Fund mechanisms France set up to address Holocaust-era claims. Plaintiffs did not appeal the dismissal of the Republic of France or the CDC.[23] The appeal respecting the SNCF is discussed below.

2 Bank Lawsuits Implicating State Actors – Limits of Court's Capacity

Alperin v. Vatican Bank, in the United States District Court for the Northern District of California, is notable for the broader claims asserted. The *Alperin* plaintiffs claimed that defendants – including the Vatican Bank, the financial arm of the sovereign Vatican State – not only profited by receiving and retaining looted assets, but that the defendants' actions aided and abetted the genocidal acts of the Nazi-supported Croatian Ustasha regime (the 'Ustasha'). Plaintiffs claimed conversion, unjust enrichment, restitution, the right to an accounting, and violations of human rights and international law.[24]

The appearing defendants (one defendant defaulted) moved to dismiss, asserting a range of legal arguments. By agreement of the parties, the court focused its dismissal analysis on the argument that plaintiffs' claims were non-justiciable political questions.[25] The court then held that claims for the return of, or compensation for, specific stolen property are justiciable because they arise under well-settled law providing a concrete base for determination, with routine evidentiary considerations and could be resolved without implicating U.S. foreign policy or prior government actions.[26] To the contrary, the court held that more esoteric claims that defendants violated international law or human rights by aiding the war objectives of the Ustasha could not be civilly litigated.[27] The court noted that it is 'not a war crimes tribunal' and that 'to act as such would require [the court] to intrude unduly on certain policy choices and value judgments' and priorities of the Allies' political branches in resolving World War II.[28] *Alperin*'s analysis focused on the technical capacity of the courts as well as respect for the Executive branch of government.[29]

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[23] *Freund,* 391 F. Appx at 940–41.

[24] *Alperin,* 410 F.3d at 538–39.

[25] *Id.* at 538, 541 n. 4.

[26] *Id.* at 547–548, 552–553. This holding simply concluded that the court was capable of adjudicating the claim. The court expressly noted that it was not otherwise assessing the factual or legal merits of the claims or the various other legal hurdles the claims faced. *Id.* at 539.

[27] *Alperin,* 410 F.3d at 548, 559–560.

[28] *Id.* at 548 (U.S. civil court is not proper vehicle to render 'retroactive political judgments as to the conduct of war').

[29] There was, of course, other bank litigation – including suits against Austrian and German banks. In February 19, 1999, all such cases were consolidated with the consolidated complaint alleging that the defendant banks cooperated and conspired with the Nazi regime to steal plaintiffs' deposited assets and to exploit and profit from slave/forced labor. *D'Amato v. Deutsche Bank,* 236 F.3d 78, 81–82 (2d Cir. 2001). In March 1999, the Austrian Banks and the plaintiff class reached a $40 million settlement. *Id.* The German banks were later included in a sweeping settlement discussed as part of the slave/forced labor cases below. See *Duveen v. U.S. Dist. Ct.,* 250 F.3d 156 (2d Cir. 2001).

3 Slave/Forced Labor – Government Intervention to Settle Disputes

Prior to the late 1990s, there were very few slave/forced labor[30] suits because claims against the German government and German companies were barred by various international agreements and treaties intended to facilitate the rebuilding of the German economy.[31] However, in 1997, a German court ruled that Germany's immunity from suit had ended.[32] The combination of Germany's expired immunity and the discussion of slave labor claims in the Swiss Settlement Agreement, invited a new round of U.S. lawsuits against German interests.

a) Germany & Austria

In March 1998, Elsa Iwanowa, brought a class action against Ford Motor Co. and its German subsidiary, Ford Werke A.G., in the U.S. District Court for the District of New Jersey claiming that she had been forced to work as 'unpaid, forced labor' for Ford Werke A.G. from 1942 through 1945. Iwanowa asserted claims for unjust enrichment, breach of contract and violations of customary international law.[33] Eventually, more than fifty slave/forced labor lawsuits were filed against German and Austrian companies.[34]

The *Iwanowa* and *Burger-Fischer* defendants successfully moved to dismiss the complaints, with the courts emphasizing the non-justiciable political questions presented.[35] The plaintiffs filed appeals, but the parties – prompted by U.S. and German government officials eager to avoid the diplomatic and economic strain of such cases – agreed to pursue a global settlement before the appeals were heard.[36]

Settlement negotiations included representatives from a consortium of seventeen German corporations (called the German Economy Foundation Initiative), plaintiffs' attorneys, and government officials from various countries.[37] A sweeping, global settlement agreement was signed in July 2000, under which the German government created and administered a 10 billion Deutsche Marks foundation (with funding provided equally from government and industry sources) to compensate all victims of German oppression and to create a fund to promote tol-

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[30] Slave laborers worked under horrific conditions in concentration camp-like environments. Forced labors worked under despicable, but less horrific, conditions. 80 Wash. U.L.Q. at 799.

[31] *Garamendi,* 539 U.S. at 403–404 (citing the 1953 London Debt Agreement, 4 U.S.T. 443, 449, T.I.A.S. No. 2792); *Gross v. German Foundation Indus. Initiative,* 456 F.3d 363, 366 (3d Cir. 2006); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 114–115 (2d Cir. 2010) (Allies concerned that litigating reparations claim would cripple the new Federal Republic of Germany).

[32] *Krakauer v. Fed. Rep. Germany,* Bonn, 1* 134/92 (1997), rev'd other grounds, OLG, Cologne, 7U 222/97 (1998); see *Gross,* 456 F.3d at 366; 80 Wash U.L.Q. at 813.

[33] *Iwanowa v. Ford Motor Co.,* 67 F. Supp.2d 424 (D.N.J. 1999).

[34] *Gross,* 456 F.3d at 367, 370; see E.g., *Burger-Fischer v. DeGussa AG,* 65 F.Supp. 2d 248 (D.N.J. 1999); *In re Nazi Era Cases,* 129 F. Supp.2d 370 (D.N.J. 1999).

[35] *Iwanowa,* 67 F. Supp.2d at 483, 486 ('the Executive branch [of the U.S. government] has always taken the position that claims arising out of World War II must be resolved through government-to-government negotiations,' and not litigation); *Burger-Fischer*, 65 F.Supp. 2d at 272–285 (noting history of diplomacy to resolve Holocaust era claims).

[36] *Garamendi,* 539 U.S. at 405–406; *Gross,* 456 F.3d at 367.

[37] *Gross,* 456 F.3d at 367–368.

erance generally.[38] The settlement covered most claims against all German business interests and industry.[39] In exchange for Germany creating this well-funded and broadly responsive reparations mechanism, the U.S. entered into an Executive Agreement, which obligated the U.S. to file a Statement of Interest requesting the dismissal of any future Holocaust-era litigation against Germany and German business.[40]

While the German state was not directly sued in the typical slave/forced labor cases, it played a central role in reaching a massive global resolution to all claims against German government and business interests – setting up, helping to fund and administering the settlement. Indeed, direct communications between U.S. President Clinton and German Chancellor Gerhardt Schroeder were instrumental in finalizing the terms of settlement, including the size of the settlement fund and the type of legal protections to be provided to Germany interests.[41] The success of this settlement arrangement led to similar agreements with Austria and France.[42]

b) California state statute slave labor claims

In 1999, in response to the dismissal of slave labor cases brought in federal court, California passed a statute expressly creating a state cause of action for World War II slave labor claims.[43] By early 2000, several dozen state-level class actions were commenced in California against German and Japanese corporations (and their successors or affiliates) pursuant to this statute by plaintiffs seeking lost wages and damages for the other injuries and mistreatment they suffered. These suits, which were later consolidated in federal court, typically were dismissed as non-justiciable political questions and the California statute was deemed an unconstitutional state intrusion on the foreign affairs powers of the U.S. President.[44]

In addition, slave labor claims by U.S. nationals against Japanese companies for violations of California Code of Civil Procedure § 354.6 and other state law were dismissed by reference to the Treaty of Peace with Japan, which ended the war between the Allied Powers and Japan.[45] Courts held that Article 14(b) of that treaty waived (and therefor barred) claims of each country's nationals against the other.[46] Claims brought by non-U.S. nationals (e.g., Chinese and

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[38] *Garamendi*, 539 U.S. at 405; *Gross,* 456 F.3d at 368–370; see 'Agreement Concerning the Foundation of Remembrance, Responsibility and the Future' (2000) 39 Int'l Legal Materials 1298.

[39] The Foundation was intended to cover, among other things, claims for slave/forced labor reparations, expropriated accounts, and unpaid insurance benefits. 80 Wash. U.L.Q.at 800–802.

[40] *Garamendi,* 539 U.S. at 405–406; *Gross,* 456 F.3d at 368–370; *In re Nazi Era Cases*, 198 F.R.D. 429 (D.N.J. 2000); *In re Nazi Era Cases,* 129 F. Supp.2d 370 (D.N.J. 2001).

[41] *Garamendi*, 539 U.S. at 405–406; *Gross,* 456 F.3d at 368–69; 80 Wash U.L.Q. at 823–824.

[42] *Agreement Between the Governments of the United States of America and France Concerning Payments for Certain Losses Suffered During WW II,* Jan. 18, 2001, 2001 WL 416465; *Agreement between the Austrian Federal Government and the U.S.,* 40 Int'l Legal Materials 523, 2001 WL 685580 (May 2001); *Garamendi,* 539 U.S. at 408 n.3.

[43] California Code of Civil Procedure § 354.6.

[44] *Deutsch v. Turner Corp.,* 324 F.3d 692 (9th Cir. 2003).

[45] Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490.

[46] E.g., *In re WW II Era Japanese Forced Labor Litig.,* 114 F.Supp.2d 939, 944–49 (N.D.Cal. 2000); *In re WW II Era Japanese Forced Labor Litig.,* No. MDL–1347 (N.D.Cal. Feb. 8, 2001).

Koreans) were not resolved by the Treaty of Peace with Japan but were dismissed on the grounds that, inter alia, the claims presented non-justiciable political questions.[47]

3 Insurance Lawsuits – Government Cooperation

A separate line of lawsuits was commenced against insurance companies by policy beneficiaries who claimed that the issuing insurers either: (i) failed to pay out benefits due under life and property policies during the Holocaust; or (ii) paid out the benefits to Nazi officials (not the named beneficiaries). Plaintiffs asserted claims for breach of the insurance contracts, and tort claims regarding the insurers alleged cooperation with the Nazi regime to keep Jewish families impoverished and unable to flee.[48]

In 1998, given the proliferation of such suits, several countries worked with U.S. officials, Holocaust survivor associations and the U.S. National Association of Insurance Commissioners to create the International Commission on Holocaust Era Insurance Claims ('ICHEIC') to serve as a forum to negotiate a resolution to Holocaust-era insurance policy claims.[49] Working with the ICHEIC, host countries' own Holocaust reparations funds and national insurance regulators, more than $300 million dollars has been offered or awarded to more than 48,000 claimants as a result of the ICHEIC process.[50]

After the formation of the ICHEIC, subsequent Holocaust-era insurance policy suits against European insurers (often brought under favorable state laws) were dismissed under the political question doctrine.[51]

Once again, state actors, while not defendants in litigation, nevertheless interceded to develop a successful, non-judicial framework for addressing Holocaust era claims –helping form and fund the ICHEIC, and linking the ICHEIC process to existing national reparations funds.[52]

4 Looted Art – Government Assets and Policies

The Nazi's rampage through Europe included a calculated effort to loot art. Some looting was outright thievery. Other looting involved pretextual transfers of title under extreme duress.[53] Some looted art was transferred to official Nazi collections, some was kept by Nazi officials in

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47 *In re WW II Era Japanese Forced Labor Litig.,* 164 F.Supp. 2d 1160, 1164–78 (N.D.Cal. 2001).

48 *Garamendi,* 539 U.S. at 402–403.

49 *Garamendi,* 539 U.S. at 401–407; *Assicurazioni Generali, S.P.A.,* 592 F.3d at 114–15.

50 *Id.*

51 *Garamendi,* 539 U.S. at 401, 420–421 (California state statute requiring disclosure of information about Holocaust-era insurance policies impermissibly interfered with the President's conduct of foreign affairs including disposition of war-era assets and U.S. policy favoring resolution of claims through voluntary settlement funds such as the ICHEIC); *Assicurazioni Generali, S.P.A.,* 592 F.3d at 114–15.

52 E.g. *Garamendi,* 539 U.S. at 408 n.3 (noting Austrian national reparations program addresses insurance claims); 80 Wash. U.L.Q. at 802 (German Foundation covered insurance claims).

53 *Von Saher v. Norton Simon Museum of Art at Pasadena,* 754 F.3d 712, 714–15 (9th Cir. 2014) (Nazi's looted and 'forcibly purchased' art); *Cassirer v. Thyssen-Bornemisza Collection Foundation,* 737 F.3d 613, 615–16 (9th Cir. 2013); *Restituting Nazi-Looted Art,* 15 Vand. J. Ent., & Tech. L. 673, 678–79 (2013).

personal collections and some was hoarded in undifferentiated stockpiles (large caches of Nazi-looted art hidden in castles, banks, salt mines and caves).[54] Other looted artwork remains hidden to this day.[55]

In the late 1990s, government and museum archives became digitized and governments declassified documents after the Cold War, making it easier to search for stolen artwork being offered for sale or displayed in galleries and museums.[56] In addition, members of the art trade and insurance industry created the Art Loss Register ('ALR') to track stolen art.[57]

Often the current holder of the art work – whether a national museum or private collector – is the last in a string of owners who acquired the piece without knowledge that it had been looted during the Holocaust.[58] However, unlike most European law, in the United States 'a thief cannot pass good title' so, 'absent other considerations, an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods.'[59] To take advantage of more favorable U.S. law, Holocaust-era victims often wait until art located abroad is temporarily loaned or displayed in the U.S. before bringing suit.[60]

Looted art litigation does not readily lend itself to class actions as the particular factual circumstances by which the art was taken determine the precise legal issues presented and whether an existing voluntary settlement fund or treaty might potentially pre-empt any claim. Relevant factual considerations include, for example, where the art was stolen from, the nationality of the owner from whom the art was taken, the type of taking (physical theft or coerced sale), the nationality and official position (if any) of the original wrongdoer, and the current location and owner of the art.[61] Thus, each looted art claim is pursued and decided on its own, unique facts.[62] Nevertheless, there are primarily two types of legal claims: (i) 'replevin' claims, seeking the physical return of the stolen art; and (ii) conversion and related claims, seeking monetary damages as reparations.[63]

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[54] *Von Saher,* 754 F.3d at 716.

[55] In late 2013, a massive cache of over 1,400 pieces of Nazi-era looted artwork was found in the Munich, Germany home of Cornelius Gurlitt, whose late father helped the Nazis to loot art. 'Mr. Gurlitt and the Lost Masterpieces' Wall Street Journal, Nov. 8, 2013.

[56] Erin L. Thompson, 'World War II Looted Art *Repatriation*' (2011) 33 Hastings Comm. & Ent. L.J. 407, 409–410; 15 Vand. J. Ent., & Tech. L. at 676.

[57] See www.artloss.com.

[58] E.g., *Cassirer,* 737 F.3d 616 (describing how certain looted artwork was sold and re-sold in post-war years); 15 Vand. J. Ent., & Tech. L. at 677–679.

[59] E.g., *Bakalar v. Vavra,* 619 F.3d 136, 140–141 (2d Cir. 2010) (contrasting New York law with Swiss presumption that valid title passes after 5 years).

[60] See *In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d at 159.

[61] For example, the Swiss Settlement Agreement bars claims for money damages against Swiss business and government agencies for looted art, but does not bar claims seeking the return of a specific piece of looted art – as long as the claim is brought in the country where the looted art is located or from which it was looted. *In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d at 159.

[62] 15 Vand. J. Ent., & Tech. L. at 684–85.

[63] 15 Vand. J. Ent., & Tech. L. at 682–83.

State actors often play a significant role in looted art litigation. First, claims are often brought against national and other public galleries holding looted works. Second, states voluntarily have carved out a role to provide resolutions. For example, the U.S. Congress passed The Holocaust Victims Redress Act ('HRA'), setting forth the 'sense of Congress' that all governments should undertake good faith efforts to facilitate the return of looted property.[64] Likewise, at the 1998 Washington Conference on Holocaust-Era Assets ('Conference') more than forty countries established the 'Washington Principles' under which the attendees agreed to restore looted property, ensure that clear and effective restitution and litigation policies are adopted within their respective borders and accelerate the restitution process.[65]

Public and municipal institutions have had different responses to claims for the return of looted art in their possession. Some institutions see a higher virtue in returning looted art. Others see a higher virtue in resisting such claims, maintaining institutional assets and working to keep once private art treasures available for public viewing.[66] Looted art plaintiffs have had a mixed litigation track record, with both FSIA immunity, political question, treaty defenses and even statutes of limitations (given often long term prior display of the piece) serving to defeat claims.

5 Railroads – A Focus on Governments' Roles in the Mechanics of the Holocaust

Another type of litigation focuses on one very particular aspect of the Holocaust – suing railroads for transporting Holocaust victims to ghettos and concentration camps. Such plaintiffs assert claims against (generally state-owned) railroads and related rail entities alleging that the defendants are liable for both: (i) actively participating in the Nazi's genocidal relocation and extermination plans; and (ii) expropriating property confiscated from victims during the deportation process.

Among the first of these cases was the *Freund v. Republic of France* case previously mentioned. As noted, the *Freund* plaintiffs sued defendants including the French railroad (the SNCF) and the agency that maintained the French railway detention facilities from which Jews were deported. Plaintiffs claimed that the railroad entities – which were agencies of the French state – were liable for participating in genocide and for keeping expropriated assets. Plaintiffs' claims were dismissed on FSIA, political question and comity grounds. On appeal, the Second Circuit affirmed the FSIA dismissal, noting that the plaintiffs could not establish that the SNCF still held any expropriated assets or property exchanged therefor (which is an essential element to the pleaded FSIA exception). The Second Circuit reasoned that the complaint's allegations that the CDC (a separate defendant) received and retained all expropriated funds belied any

[64] Pub. L. 105–158, Sec. 202, 112 Stat. 15 (1998).
[65] See *Von Saher,* 754 F.3d 720–21; 30 Touro L. Rev. 675, 681.
[66] See 15 Vand. J. Ent., & Tech. L. at 698–702.

continued possession of the same assets by the SCNF.[67] The Second Circuit elected not to evaluate the District Court's political question or comity analysis.[68]

III Hungary's Holocaust Litigation Experience

Hungary was not drawn into the Holocaust litigation of the 1990s and early 2000s. However, in 2010 Hungarian interests, including government interests, were sued across almost the entire spectrum of Holocaust claims.

1 Hungarian Bank Litigation

In 2010, an ostensible class action was commenced in the U.S. District Court for the Northern District of Illinois against Magyar Nemzeti Bank ('MNB'; the Central Bank of Hungary) and several commercial banks operating in Hungary. Plaintiffs claimed to be the heirs of Hungarian Jews whose Hungarian banking assets were confiscated during the Holocaust by the defendants (or their predecessors) pursuant to Hungarian laws requiring the banks to turn over Jewish assets to the then Nazi-dominated Hungarian government.[69]

Plaintiffs sought damages in excess of US$75 billion based on six causes of action: genocide, aiding and abetting genocide, bailment, conversion, constructive trust, and accounting. Plaintiffs' genocide claims alleged that the banks helped the Nazis through a wealth expropriation scheme intended to impoverish Jews – making it harder for them to escape genocide and harder for survivors to later reconstitute their communities. Plaintiffs also sought restitution for their deposited assets. As a Central Bank, MNB did not maintain deposit accounts and, thus, could not have seized any accounts. Nevertheless, Plaintiffs (incorrectly alleging a link between MNB and the Hungarian Postal Bank) claimed that MNB directly or indirectly received, and still benefits from, expropriated assets.[70]

All of the bank defendant moved to dismiss the complaint citing various of the defenses mentioned above. MNB made a comprehensive motion to dismiss asserting: (i) FSIA immunity; (ii) political question; (iii) treaty limitations on lawsuits;[71] (iv) the 'Act of State' doctrine, which

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67 *Freund,* 391 F. Appx. at 940–41.

68 *Id.*

69 *Abelesz v. Magyar Nemzeti Bank,* 692 F.3d 661, 669 (7th Cir. 2012); *Albert, et al. v. Magyar Nemzeti Bank, et al.* Seventh Circuit Index No. 14–1319, June 23, 2015.

70 *Id.*

71 For example, in 1947, Hungary and the U.S. signed a treaty (the '1947 Treaty,' 1947 WL 26320, 61 Stat. 2109) which settled all Holocaust-era property expropriation claims against Hungary – including discriminatory property expropriation claims – as part of the U.S. foreign policy to end World War II-era hostilities. Articles 26 and 27 of the 1947 Treaty allocated resolution of such property expropriation claims to Hungary exclusively. Moreover, Article 40 of the 1947 Treaty created a U.S. Executive branch (diplomatic, not judicial) mechanism as the exclusive manner to resolve any disputes regarding Hungary's performance of its treaty obligations – including those respecting expropriated property claims. The 1947 Treaty does not create any private right of action.

provides that a foreign national may not sue a foreign sovereign in the U.S. for the sovereign's acts within that sovereign's own borders[72]; (v) statues of limitations; and (vii) failure to state a claim and other defects in plaintiff's allegations. The District Court denied the motions without providing a fulsome analysis of MNB's asserted defenses.

MNB appealed to the Seventh Circuit, focusing on its FSIA immunity and treaty limitations on claims.[73] Restrictions on appellate court jurisdiction over interlocutory appeals, prevented MNB from immediately raising all of its motion dismissal arguments on appeal.[74]

The Seventh Circuit vacated the denial of MNB's motion to dismiss, holding that plaintiffs failed to establish an international law violation (which is an essential element to establishing an exception to FSIA immunity) because plaintiffs failed to demonstrate that they exhausted remedies that are or were available in Hungary or provide a legally compelling reason for their failure to do so.[75] Requiring exhaustion of remedies in the country in which the claims arose in order to overcome FSIA immunity is 'a well-established rule of customary international law' that 'is based on the power of U.S. courts to hear a claim and the comity between sovereign nations that lies close to the heart of most international law.'[76] More simply, 'the state where the alleged violation occurred should have an opportunity to redress [an expropriation claim] by its own means, within the framework of its own legal system.'[77]

The Seventh Circuit recognized that Hungary is a well-established European state (a member of both the European Union and NATO), with a well-functioning legal system that operates under established and cognizable rules of law. Thus, Hungary had the apparent ability to provide an adequate remedy for plaintiffs' claim that Hungarian property was expropriated from Hungarians in Hungary by Hungarian actors.[78] So, Hungary should have the first opportunity to address the plaintiffs' claims, by Hungary's own means and under Hungary's own legal system, before a U.S. court can step in.[79]

The Seventh Circuit also noted that the U.S. risked reciprocal, if not retaliatory, foreign judgments if U.S. courts adjudicated such massive, stale and extra-territorial claims against foreign sovereigns.[80] In other words, if U.S. courts could determine plaintiffs' claims for $75 billion against Hungarian State defendants – a sum representing 40% percent of Hungary's annual gross domestic product – based on allegations that Hungarian actors injured Hungarian citizens and property in Hungary 70 years ago, the U.S. could not complain if foreign courts entertained massive reparations claims against the U.S. for historic claims (e.g., slavery).

Procedurally, the Seventh Circuit vacated the denial of the motion to dismiss and remanded the case against MNB back to the District Court to consider the single issue of exhaustion – i.e.,

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[72] See, *Samantar v. Yousuf,* 130 S.Ct. at 2278, 2290–91 (2010).
[73] *Abelesz,* 692 F.3d at 666; *Albert,* Seventh Circuit Index No. 14-1319, June 23, 2015 at pp. 3–7.
[74] 28 U.S.C. §1291.
[75] *Abelesz,* 692 F.3d at 666, 671, 679–85, 697; *Albert,* Seventh Circuit Index No. 14–1319, June 23, 2015 at pp. 3–7.
[76] *Abelesz,* 692 F.3d at 678–85, 697.
[77] *Id.* at 680.
[78] *Id.* at 679, 682, 683.
[79] *Id.* at 684.
[80] *Albert,* Seventh Circuit Index No. 14–1319, June 23, 2015 at pp. 2–14.

did Plaintiffs exhaust Hungarian remedies or provide a compelling reason for their failure to so do. On remand, MNB demonstrated, among other things, that Plaintiffs never sought judicial redress in Hungary even though, since 1989 (when Hungary became a Western democracy), Hungary possessed an independent, modern and well-functioning judicial system that is bound by European regulations and treaties that safeguard due process. MNB even identified various Hungarian legal theories potentially applicable to Plaintiffs' claims.[81] Based on this showing, the District Court dismissed MNB from the case. The Seventh Circuit Court of Appeals again denied Plaintiffs' appeal and affirmed the District Court's dismissal of Plaintiffs' claims.[82] The United States Supreme Court denied Plaintiffs' petition for certiorari on June 8, 2015.

2 Hungarian Railway Litigation

Two separate lawsuits were commenced by different plaintiffs in different forums seeking damages against Hungary's National Railroad Magyar Államvasutak Zrt. ('MÁV') and related entities for Holocaust-era claims.[83] Both cases involve similar central facts and claims, by which plaintiffs seek recompense for alleged atrocities committed against, and property allegedly stolen from family members forcibly deported to concentration camps during the Holocaust. Plaintiff's argue that Hungary's Holocaust experience was unique in its speed and ferocity – with half a million people deported within a few months, towards the end of the war when it was clear the Nazis had lost – suggesting the knowing complicity of MÁV and the other railway entities. Plaintiffs' also allege that the possessions of Jews were taken from them as they boarded the trains, and subsequently looted by the railroad and railroad employees.[84]

a) Illinois railways litigation

The plaintiffs group that commenced the aforementioned Hungarian Bank litigation in Illinois also brought suit against MÁV in the U.S. District Court for the Northern District of Illinois. Plaintiffs claim that MÁV's alleged role in transporting Jews and expropriating Jewish assets

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[81] The commercial bank defendants had also appealed the denial of their motions to dismiss. Two of the private commercials banks – MKB Bank Zrt. and OTP Bank – were dismissed from the case for lack of personal jurisdiction (i.e., the banks had insufficient contacts with the U.S.). *Abelesz v. OTP,* 692 F.3d 638 (7th Cir. 2012). Given the dismissal of MNB, MKB and OTP, the final commercial bank defendant (Erste Bank) was later dismissed on the grounds of *forum non conveniens* or inconvenient forum. Since the other bank defendants could not be sued in the U.S., it would be more convenient to litigate any dispute with Erste Bank in Hungary, where MNB, MKB and OTP could all be sued as well.

[82] *Albert,* Seventh Circuit Index No. 14-1319, June 23, 2015 at pp. 2–4.

[83] *Fischer v. Magyar Államvasutak Zrt.,* No. C 868, 2013 WL 4525408 (N.D. Ill., Aug. 20, 2013) ('Illinois Railways Litigation') and *Simon v. Republic of Hungary,* – F.Supp.2d –, 2014 WL 1873411 (D.D.C., May 9, 2014) ('Washington D.C. Railways Litigation').

[84] In 2011, an effort to consolidate the two Hungarian railroad cases was denied because: (i) while MÁV wanted to consolidate the litigation in Washington DC, the Illinois Railroad Litigation plaintiffs insisted on litigating in Illinois, where the Hungarian Bank Litigation was pending; (ii) representations made to the Court suggested that allowing the cases to proceed in parallel would remain manageable. *In re Hungarian Holocaust Litigation,* 763 F.Supp.2d 1370 (U.S.Jud.Pan.Mult.Lit. 2011).

violated international takings law, aided and abetted genocide, made MÁV complicit in genocide, violated customary international law, and constituted unlawful conversion, unjust enrichment, and fraudulent misrepresentations.[85]

While the factual issues in the Illinois Bank Litigation and the Illinois Railways Litigation differ, they were decided on the same legal grounds, by the same judges (at both the District Court and Seventh Circuit level). Following similar District Court, Seventh Circuit and remand proceedings, the claims against MÁV were dismissed because plaintiffs failed to exhaust remedies that are or were available in Hungary.[86] As with the Illinois Bank Litigation, the U.S. Supreme Court refused to hear plaintiffs' appeal from the Seventh Circuit decision affirming the dismissal of claims against MÁV.

b) Washington D.C. railways litigation

Fourteen named plaintiffs in this proposed class action, sued MÁV, the Republic of Hungary and Rail Cargo Hungaria Zrt. ('RCH'), which is a freight rail company that is the successor-in-interest to MÁV Cargo Árufuvarozási Zrt., f/k/a MÁV Cargo Zrt., a former division of MÁV. The District Court, acting after the Seventh Circuit dismissed the class action complaint for lack of subject matter jurisdiction under the FSIA and for lack of personal jurisdiction.[87] The case remains pending.

3 Hungarian Art Case

Heirs of a Jewish Hungarian art collector brought action against Republic of Hungary, the Hungarian National Gallery, Hungary's Museum of Fine Arts, the Museum of Applied Arts, and Budapest University of Technology and Economics alleging that the defendants breached bailment agreements entered into after World War II, when they refused to return pieces of an art collection upon demand. Defendants moved to dismiss on numerous grounds. The U.S. District Court for the District of Columbia, initially granted the motion in part and denied it in part. Plaintiffs and Defendants both appealed.[88] The Court of Appeals, held that the defendants did not enjoy immunity because the plaintiffs' claims fell within FSIA's commercial activity exception. The Court further held that the 1947 Treaty and 1973 Treaty were inapplicable. Otherwise, the claims presented issues of fact that could not be resolved by a motion to dismiss.[89] The case remains pending.

[85] *Abelesz,* 692 F.3d at 666, 671, 679–85.
[86] *Abelesz,* 692 F.3d at 666, 671, 679–85, 697; *Fischer v. Magyar Államvasutak Zrt.,* Seventh Circuit Index No. 13–3073.
[87] *Simon,* 2014 WL 1873411.
[88] *De Csepel v. Republic of Hungary,* 714 F.3d 591 (D.C. Cir. 2013).
[89] *Id.*

4 Gold Train

One additional case involves Hungary, but not any Hungarian defendant. In the waning months of World War II, a train loaded with valuables expropriated from Hungarian Jews was sent west – away from the advancing Russia army. This train became known as 'the Gold Train'.[90] The U.S. military intercepted and seized the train in Salzburg, Austria.[91] Instead of returning the valuables, the items were dissipated over the ensuing years while in U.S. custody.[92]

In 2001, plaintiffs claiming rights to valuables on the train brought a class action lawsuit against the U.S. in the Southern District of Florida seeking compensation for the property that was never returned to them. That lawsuit led to a settlement agreement under which the U.S. government paid $25.5 million. The vast bulk of the proceeds went to provide social services and humanitarian relief to specified victims of Nazi persecution.[93] An additional $500,000 was to be used to set up an archive to identify and catalogue Gold Train artifacts and the document the treatment of the Hungarian Jewish community during World War II. *See* Settlement Agreement at 15.[94]

IV Trends & Conclusions

The recent Hungarian Holocaust litigation may well be among the last of its kind.

Despite the massive breadth and width of Holocaust-era litigation, Holocaust-era claims 'have, for the most part, not fared well' in court.[95] Few if any such cases were resolved on the substantive or factual merits. Most cases were dismissed on the grounds that the claims could not properly be adjudicated. Other cases were resolved by negotiated settlements, without taking a position on the merits.

The inauspicious litigation track record is due, in part, to the fact that strong moral claims do not necessarily translate into successful legal causes of action. '[T]he law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim.'[96] Practical considerations further diminish the likelihood of successful claims. The Holocaust ended 70 years ago. Most reparations issues have already been explored – either by litigation, treaty, non-judicial programs or otherwise. Recent litigation has been pursued by the children and grandchildren of Holocaust survivors; one should expect that future and more attenuated generations will be less likely to pursue claims.

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[90] *Rosner v. U.S.,* 231 F.Supp.2d 1202, 1204, 1217–18 (S.D. Fla. 2002).
[91] *Id.*
[92] *Id.* at 1205.
[93] *Id.* at 1203–1204.; See Final Order and Judgment at 4, *Rosner et al. v. United States,* No. 01-1859 (S.D.Fl. Sept. 30, 2005).
[94] *Rosner et al. v. United States,* No. 01-1859 (S.D.Fl. Apr. 29, 2005).
[95] *Alperin,* 410 F.3d 541 n. 4.
[96] *In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d at 148–49; *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d 164, 177 (S.D.N.Y. 2000).

Moreover, legal challenges to claims continue to multiply. In addition to the legal defenses discussed above, Holocaust claims also have to overcome procedural hurdles such as statutes of limitations – i.e., the time period allowed to file claims.[97] Future lawsuits regarding events from the 1940s also face the evidentiary difficulties attendant to claimants/witnesses who are deceased or, if surviving, are old, infirm and dispersed globally. Likewise, any such claims would rely on old records which – if they still exist given the destruction of World War II and the passage of time – are in foreign languages maintained on foreign soil. These problems will only increase with time.

Furthermore, U.S. courts have begun to restrict their subject matter jurisdiction over extra-territorial claims – becoming less amenable to lawsuits (like Holocaust cases) in which it is claimed that foreign defendants injured foreign plaintiffs on foreign soil. Most Holocaust cases involving non-sovereign defendants invoked the jurisdiction of U.S. federal courts under the Alien Tort Statute ('ATS'), 28 U.S.C. §1350, which provides that federal courts may hear civil claims by foreigners for torts committed in violation of the law of nations or a treaty of the United States. However, two recent U.S. Supreme Court decisions greatly narrow ATS jurisdiction – holding that international law considerations, international comity and practical considerations require U.S. courts to refrain from exercising jurisdiction over foreign defendants who are alleged to have committed acts against foreign nationals on foreign soil.[98]

Kiobel and *Daimler* seem to shut the door to most extra-territorial Holocaust litigation. However, the law is a living thing that is always evolving. Creative lawyering and novel theories may yet breathe new life into efforts to pursue old claims.

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[97] Future plaintiffs will have a difficult time credibly explaining why they did not bring sooner bring suit.

[98] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). Kiobel recognized the potential 'international discord' and 'retaliative action' attendant to U.S. courts making determinations respecting 'conduct occurring within the territorial jurisdiction of another sovereign,' with 'foreign policy consequences not clearly intended by the political branches.' *Id.* at 1664, 1667 (rejecting extraterritorial application of the ATS). Letting U.S. courts determine matters that took place abroad also creates the risk 'that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.' *Id.* at 1669. Kiobel further held that the U.S. cannot and does not present itself as 'a uniquely hospitable forum for the enforcement of international norms. […] "No nation has ever yet pretended to be the *custos morum* of the whole world" […] '. *Id.* at 1668.

Appendix

To demonstrate the breadth of cases, the following lists various reported decisions in Holocaust-era litigation between 1999–2002:

Swiss Bank Litigation

In re Holocaust Victim Assets Litig., 1998 U.S. Dist. LEXIS 18014 (E.D.N.Y. Oct.7, 1998) [stipulation describing settlement in principle); *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (E.D.N.Y. 2000) (upholding fairness of settlement under Rule 23(e)]; *In re Holocaust Victim Assets Litig.,* 225 F.3d 191 (2d Cir. 2000) (upholding definition of plaintiff class); *In re Holocaust Victim Assets Litig.,* 2000 U.S. App. LEXIS 29529 (2d Cir. Nov. 20, 2000) (dismissing appeal); *In re Holocaust Victim Assets Litig.,* 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000) (accepting Special Master's allocation plan); *In re Holocaust Victim Assets Litig.*, 2001 WL 419967 (E.D.N.Y. Apr. 4, 2001) (defining Slave Labor II class); *In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir. 2001) (upholding plan of allocation); *In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2d Cir. 2002) (vacating definition of Slave Labor II class; remand for determination of parties' intentions); *In re Holocaust Victim Assets Litig.*, 2002 U.S. Dist. LEXIS 20195 (E.D.N.Y. Oct. 23, 2002) (denying risk multiplier).

German Slave Labor Cases

Iwanowa v. Ford Motor Co., 67 F. Supp.2d 424 (D.N.J. 1999) (dismissing slave labor claims on various grounds); *Burger-Fischer v. Degussa AG,* 65 F. Supp.2d 248 (D.N.J. 1999) (dismissing slave labor claims as non-justiciable); *In re Nazi Era Cases Against German Defendants Litig.,* 198 F.R.D. 429 (D.N.J. 2000) (upholding voluntary dismissal of slave labor claims in connection with the establishment of the German Foundation); *In re Nazi Era Cases Against German Defendants Litig.* (Frumkin), 129 F. Supp.2d 370 (D.N.J. 2001) (dismissing slave labor case in accordance with the Statement of Interest filed by the United States); *In re Nazi Era Cases Against German Defendants Litig.,* 213 F. Supp.2d 439 (D.N.J. 2002) (denying motion to enforce interest payments allegedly owed to German Foundation by German industry). See also *Deutsch v. Turner Corp.,* CV-4405 (C.D. Cal. 2000).

German and Austrian Banks

In re Austrian & German Bank Holocaust Litig., 80 F. Supp.2d 164 (S.D.N.Y. 2000) (upholding Austrian bank settlement under Rule 23(e)); *D'Amato v. Deutsche Bank,* 236 F.3d 78 (2d Cir. 2001) (affirming fairness of Austrian bank settlement under Rule 23(e)); *In re Austrian & German Bank Holocaust Litig.*, 2001 U.S. Dist. LEXIS 2311 (S.D.N.Y. Mar. 7, 2001) (denying motion to dismiss German litigation voluntarily); *Duveen v. United States District Court (In re Austrian & German Holocaust Litig.),* 250 F.3d 156 (2d Cir. 2001) (granting writ of mandamus compelling voluntary dismissal of German bank litigation); *In re Austrian & German Bank Holocaust Litigation,* 2001 U.S. Dist. LEXIS 15573 (S.D.N.Y. Sept. 27, 2001) (denying motion to forfeit fees on the ground of conflict of interest) (appeal pending); *In re Austrian & German Bank Holocaust Litig.,* 2002 U.S. Dist. LEXIS 21433 (S.D.N.Y. Oct. 29, 2002) (denying motion to compel

interest payments). *See also Ungaro-Benages v. Dresdner Bank AG,* No. 1:01 CV 2547 (S.D. Fla. June 18, 2001) (seeking damages from German banks for property seizures).

Other Bank Cases

Alperin v. Vatican Bank, 410 F.3d 532, 546 (9th Cir. 2005)

Insurance Cases

Cornell v. Assicurazioni Generali S.p.A., 2000 U.S. Dist. LEXIS 2922 (S.D.N.Y. Mar. 15, 2000); *Cornell v. Assicurazioni Generali S.p.A.,* 2000 U.S. Dist. LEXIS 11004 (S.D.N.Y. Aug. 2, 2000); *Cornell v. Assicurazioni Generali S.p.A.,* 2000 U.S. Dist. LEXIS 11991 (S.D.N.Y. Aug. 10, 2000); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.,* Judicial Panel on MultiDistrict Litig., 2000 U.S.Dist.LEXIS 17853 (Dec. 4, 2000); *Winters v. Assicurazioni Generali S.p.A.,* 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y. Dec. 18, 2000); *Gerling Global Reinsurance Corp. of Am. v. Gallagher,* 267 F.3d 1228 (11th Cir. 2001); *Haberfeld v. Assicurazioni Generali S.p.A.,* 2002 U.S. Dist. LEXIS 4391 (S.D.N.Y. Mar. 14, 2002); *Schenker v. Assicurazioni Generali S.p.A.,* Consol., 2002 U.S. Dist. LEXIS 12845 (S.D.N.Y. July 11, 2002) (granting Basler and Winterthur motions to dismiss for lack of in personam jurisdiction); *Gerling Global Reinsurance Corp. Am v. Low,* 296 F.3d 832 (9th Cir. 2002); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.,* 2002 U.S. Dist. LEXIS 18119 (S.D.N.Y. Sept. 25, 2002) (denying motion for order to suggest that multidistrict litigation panel remand cases to California courts); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 2002 U.S. Dist. LEXIS 18127 (S.D.N.Y. Sept. 25, 2002) (denying motion to dismiss Generali).

French Bank cases

Bodner v. Paribas, 114 F. Supp.2d 117 (E.D.N.Y. 2000) (denying motion to dismiss); *Freund v. Republic of France,* 592 F.Supp.2d 540 (S.D.N.Y. 2008) *dism. aff.,* 391 F. Appx. 939 (2d Cir. 2010).

French Railroad cases

Abrams v. Societe Nationale Des Chemins De Fer Francais, 175 F. Supp.2d 423 (E.D.N.Y. 2001); *Freund v. Republic of France,* 592 F.Supp.2d 540 (S.D.N.Y. 2008) *dism. aff.,* 391 F. Appx. 939 (2d Cir. 2010).

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Judicial Enforcement of WTO Rules before the Court of Justice of the European Union

I Introduction

The judicial enforceability of the 1947 General Agreement on Tariffs and Trade (GATT) and its successor World Trade Organization (WTO) rules has never been an easy issue under EU law. While the formal status of international treaties entered into by the EU (forming an integral part of the EU legal order) was pronounced early on,[1] the direct legal enforceability of such agreements, and in particular the GATT/WTO rules, has attracted a great number of disputes before the Court of Justice of the European Union (CJEU).

The present paper seeks to provide an overview of the various turns that the case law of the CJEU has taken in adjudicating what effect provisions of the GATT/WTO rules have in the EU legal order. In this vein, the paper will examine whether such provisions have direct effect and, if so, whether the annulment of EU acts conflicting with GATT/WTO provisions can be sought. It will be shown how the Court initially refused the direct enforceability of GATT rules, then conditionally allowed the review of EU measures in the light of GATT/WTO rules and finally turned back to its point of departure and ruled out a review of the legality of EU measures under GATT/WTO rules.

II Initial Rejection

Not long after the doctrine of direct effect of EU law was laid down by the CJEU, the issue of whether provisions of the GATT may produce such effects surfaced. In the *International Fruit Company case,*[2] a Dutch court asked the CJEU whether the validity of EU law also refers to its validity under international law, and if so, whether the particular EU Regulations – which laid down, by way of protective measures, restrictions on the importation of apples from third countries — were invalid as being contrary to Article XI of the General Agreement on Tariffs and

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[1] C-181/73 *Hageman* [1974] ECR 449.

[2] C-21–24/72 *International Fruit Company* [1972] ECR 1219.

Trade (GATT). In essence, the national court sought to invoke GATT provisions to challenge the validity of EU legislation.

In its ruling, the Court pronounced that in order to find any EU measure incompatible with a provision of international law, the EU must be bound by that provision. As the EU has assumed the powers previously exercised by the Member States in relation to the GATT, the latter's provisions are binding on the EU. The Court then proceeded to examine whether provisions of the GATT were capable of conferring rights on individuals, which they can invoke before national courts, i.e. whether GATT provisions have direct effect. With regard to this proposition, the Court examined the general scheme and terms of the GATT and concluded that GATT provisions are 'not capable of conferring on citizens of the Community rights which they can invoke before the courts.'[3] The Court's principal reason for arriving at this conclusion was that the agreement is in principle characterised by great flexibility, where negotiations were undertaken on the basis of 'reciprocal and mutually advantageous arrangement'. This is particularly reflected in the possibility of derogation, in the measures to be taken when confronted with exceptional difficulties, in the settlement of disputes and ultimately in the power of withdrawal.

In the Court's view, the flexible nature of the agreement did not meet the criteria of being sufficiently precise and unconditional in nature, as required for a provision to produce direct effect under EU law.

As has been pointed out, the Court was reluctant to allow GATT provisions to produce direct effect as this would have entailed a challenge to the legality of EU legislation.[4] This lies in stark contrast to other cases where the direct enforceability of international agreements concluded by the EU resulted in the extension of the scope of EU rules. In these instances, and most notably in the ever cited *Kupferberg case,* the Court was much more willing to grant direct effect to the provision of the given international agreement.[5]

One important aspect of the *International Fruit Company* ruling needs to be pointed out, however. In its reasoning, the Court did not make a clear distinction between the capability of GATT provisions to produce direct effect and the validity of EU legislation which were violating such provisions. The Court thus did not separate the issue of whether individuals may invoke rights contained in GATT provisions before national authorities from the other question of whether individuals may seek the review of EU law based on GATT provisions. Moreover, from the structure of reasoning employed in *International Fruit Company* it appears that the Court, at that stage, saw direct effect as a precondition of the review of legality. That is to say that, unless the provisions of the international agreement at stake had direct effect, the Court would not enter into the substantive review of the challenged EU act based on that international agreement. As will be shown below, in subsequent cases the Court has moved away from this stance.

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[3] Ibid para 27.

[4] Bebr, 'International Agreements Concluded by the Community and their Possible Direct Effect: From International; Fruit to Kupferberg' (1983) 20 CMLRev 35.

[5] To this effect see the rulings in case 104/81 *Kupferberg* [1982] ECR 3641 in relation to the EU-Portugal free trade agreement, and C-469/93 *Chiquita Italia SpA* [1995] ECR I–4533 concerning the Lomé Convention.

III Conditional Allowance

In the *Nakajima case,*[6] the applicants claimed that the Basic Regulation on anti-dumping[7] adopted by the EU at the time was unlawful for being in breach of the Anti-Dumping Code adopted under GATT. In their submissions, they sought a declaration of illegality, without relying on the direct effect of the relevant provision of the Code. It was on this occasion that the Court clarified its stance and drew a distinction between the two issues, of whether a provision of an international trade agreement has direct effect and how this related to the possibility of relying on such an agreement to challenge the allegedly incompatible EU legislation. The Court thus proceeded to review the compatibility of the Basic Regulation with the Anti-Dumping Code and found no conflict in the particular case. The more general outcome of the *Nakajima case*, however, was that direct effect was no longer considered as a precondition for reviewing EU legislation in the light of an international trade agreement, in this occasion an agreement adopted in the framework of the GATT, to which the EU was itself a party.

This is the approach that was followed in the *Germany v Council case,*[8] where Germany sought the annulment of the Banana Regulation,[9] among other claims, for its alleged incompatibility with GATT provisions. In its judgement, the Court expressly denied that the provisions of the GATT could have direct effect and cited its holding of the *International Fruit Company case.* Yet despite the absence of this, it followed the path set in the *Nakajima case* and went on to examine the compatibility of EU legislation with that of the GATT, thereby established the criteria within which it is willing to exercise such review. According to this, the Court would only review the lawfulness of EU legislation under the GATT provisions if the reviewed EU act had intended to implement a particular GATT obligation or if the EU act expressly referred to such specific provisions of the GATT. In the *Germany v Council case* the Court found that the Banana Regulation in question neither intended to implement a particular obligation arising under the GATT nor expressly referred to any specific provision of GATT. The Court therefore dismissed the annulment action. The criteria set out in *Germany v Council,* namely, that EU anti-dumping legislation can be reviewed under GATT rules, was followed in the *Petrotub case*[10] where the Court did annul EU legislation for its incompatibility with the GATT Anti-Dumping Code.

In the subsequent case law, however, it is quite easy to see the erosion of the stance taken by the Court in its *Nakajima/Germany v Council* rulings. In the *Ikea Wholesale* case[11] the Court

[6] C-69/89 *Nakajima v Council* [1991] ECR 2069.
[7] Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1988] OJ L209/1.
[8] C-280/90 *Germany v Commission* [1994] ECR I–4873.
[9] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [1993] OJ L47/1.
[10] C-76/00 *Petrotub* [2003] ECR I–79.
[11] C-351/04 *Ikea Wholesale* [2007] ECR I–7723.

refused to review EU anti-dumping legislation in the light of the WTO Anti-dumping Agreement. The argumentation was that although previous EU legislation did reflect the intent to comply with the Anti-Dumping Agreement, the subsequent EU legislation – contested in the present case – lacked any such intention while at the same time overwriting any previous intention to this effect. Through this step, the Court essentially opened the door for the EU to exempt itself from the WTO Anti-dumping Agreement with subsequent legislation, even if previous EU legislation intended to comply with WTO rules. This conclusion was unexpected for two main reasons. First, as the references show, the judgment was rendered at a time when the WTO regime was replacing the old GATT scheme and was being celebrated for offering a more effective means of enforcement and dispute settlement. Given this very significant shift which the new regime was intending to introduce, a more permissive judicial stance towards WTO rules was expected. Second, it was under this new regime that a recommendation was made by the Dispute Settlement Body (DSB) of the WTO finding the disputed EU legislation cited in the *Ikea Wholesale case* to be in conflict with the Anti-dumping Agreement. It was thus against both the Anti-dumping Agreement and the concrete finding of the DSB that the Court excluded the reviewability of EU legislation, simply claiming that the said legislative act did not intend to give effect to any of the specific obligations of the WTO rule. This approach was confirmed in the *FIAMM case,*[12] where the Court did not review the contested EU act, stating that it was not intended to implement any particular obligation under the WTO rules.

While refusing to review the compliance of EU legislation under GATT/WTO rules in the absence of express intent to implementi specific obligations thereof, even if previous EU legislation did express such an intent or where non-compliance was already established by the WTO DSB, the Court did not overrule its initial holding in the *Nakajima* and *Germany v Council cases.* In other words, in principle EU legislation was still open to review under GATT/WTO rules and such a legality review was not conditional on the issue of whether GATT/WTO provisions had direct effect.

Furthermore, in a number of parallel cases the Court did emphasise that secondary EU law must, to the extent possible, be interpreted consistently with international agreements concluded by the EU, especially where the specific EU legislation is to give effect to such an agreement. The obligation of harmonious interpretation was repeatedly cited by the Court in cases where the international agreement adopted under the auspices of the GATT/WTO and EU measures implementing those were at stake.[13] It must be said that the requirement to interpret implementing EU law consistently with concluded international agreements is not a vigorous means of giving force to such agreements and is certainly not on par with the direct enforceability by individuals. At a minimum, what it provides is a standpoint on where treaty conform solutions are preferred.

[12] C-120-121/06 *FIAMM* [2008] ECR I–6513.

[13] In relation to the International Dairy Agreement see C-61/94 *Germany v Council* [1996] ECR I–4006, with regard to TRIPS 53/96 *Hermes International* [1998] ECR I–3603, C-392/98 *Dior* [2000] ECR I–11307.

IV Stark Reluctance

It was in the *Portugal v Council case*[14] where the Court restated its approach and addressed head-on the issue of the direct enforceability of GATT/WTO rules within EU law. In the case, Portugal sought the annulment of a 1996 Council decision[15] on the conclusion of an agreement between the EU and Pakistan and the EU and India on market access for textile products. Among other arguments, Portugal claimed that the Agreement was in breach of the fundamental principles of the WTO and the rules of the Agreement on Textiles and Clothing and the Agreement on Import Licensing. In its submission Portugal duly cited the *Germany* v *Council* case, arguing that the compatibility of EU measures with GATT/WTO rules is to be distinguished from the issue of direct effect. It went on by pointing out that the Court itself had ruled that where the adoption of the measures implementing obligations assumed within the context of the GATT is at stake, or where an EU measure refers expressly to specific provisions of the GATT/WTO, the legality of EU measures must be reviewed in the light of those GATT/WTO rules.[16]

In its ruling, the Court arrived at the conclusion that, due to the structure and nature of WTO rules, including the cited Agreements, these rules cannot, in principle, be the basis upon which the legality of measures adopted by the EU can be reviewed. Thus, with one bold yet unambiguous move, the Court ruled out even the possibility that EU legislation could even eventually be reviewed in the light of WTO rules. To justify its holding, the Court provided a particularly detailed view of the WTO rules.

The point of departure for the Court was obviously to reiterate that EU institutions are free to enter into international agreement under public international law. The EU, in concluding international agreements, is also free to decide what effect the provisions of a specific agreement are to have on its internal legal order, with the Court only ruling on this matter if the issue was not settled by the agreement itself. In this way, the Court reaffirmed its *Kupferberg* ruling, and upheld the possibility of international agreements being directly enforceable in the EU legal order.

Turning to the WTO Agreements, the Court admitted that the 1994 WTO regime did indeed significantly differ from that of the 1947 GATT, especially as regards the system of safeguards and the mechanism for resolving disputes. It maintained, however, that the system resulting from the WTO Agreements nevertheless accords considerable importance to negotiation between the parties. The Court first examined the enforcement mechanism set forth by the new regime, where the withdrawal of measures incompatible with the WTO are prescribed for the contracting parties, but there lies the possibility to provide temporary compensation

[14] C-149/96 *Portugal v Council* [1999] ECR I–8395.

[15] Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products [1996] OJ L153/47.

[16] C-149/96 *Portugal v Council* [1999] ECR I–8395 para 27.

should withdrawal of such measures be impracticable. The Court also took into account the leeway left to parties failing to implement the recommendations of the dispute settlement body, and to enter into negotiations with a view to finding mutually acceptable compensation. In the Court's assessment, the WTO rules themselves did not determine the appropriate legal means of enforcement and left ample room to manoeuvre for the contracting parties in this regard. According to the Court it was exactly this margin, in terms of negotiating and finding mutually acceptable compensation, that would be lost had EU law itself prescribed the direct enforceability of WTO rules over conflicting EU measures. In the Court's view, the WTO was still founded on 'mutually advantageous negotiations' and lacked precise legal obligations, as was the case with the 1947 GATT. The Court went on to compare the WTO regime to the international trade agreements entered into by the EU with third countries. In the Court's view, the latter may be asymmetric regarding the respective obligations of the parties; however, there is a legal guarantee as to the enforcement of such obligations.[17] The Court left no doubt in its view that it is not the lack of reciprocity in obligations but the lack of reciprocity in their enforcement that puts the WTO regime in a different light. Ultimately, it is for this reason that the Court does not afford the direct enforceability of WTO rules within the EU legal order, otherwise a situation would arise whereby the parties to the WTO would continue to enjoy a large degree of flexibility in enforcing its obligations arising while the EU would not benefit from the same flexibility.[18]

This understanding of the otherwise celebrated 1994 WTO regime and the denial of direct enforceability of WTO rules, including the recommendations of its Dispute Settlement Body, has received much criticism from legal practitioners and from academia.[19] Even today, fifteen years after the judgment, the Court's stark reluctance to give direct effect to WTO rules within the EU legal order is considered to be an unsettled issue.[20] In the quest to understand the Court's rationale in *Portugal v Council,* many agree that this is to be found in the realm of the political rather than in the legal. While sentiments may differ in evaluating the underlying judicial policy, there is agreement that, by avoiding full enforcement of GATT/WTO rules within the EU legal order, the Court provided ample room to manoeuvre for the EU vis-à-vis the implementation of its own economic policies and measures in a manner this is not legally constrained by GATT/WTO rules.

[17] Para 42.
[18] Para 45.
[19] Summarized e.g. by Mendez, M 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 EJIL 83–104, p. 95.
[20] Eckout P., 'The International Legal Order: Black holes, fifty shades of grey, or extending *Van Gend en Loos*?' in 50th anniversary of the judgment in Van Gend en Loos Court of Justice of the European Union Conference Proceedings, Luxembourg, 13 May 2013, at 175.

V Aftermath of Portugal v Council

In parallel with the voices being heard in academic writing, legal practitioners are also tireless in seeking to overturn, or at least refine, the scope of the Court's *Portugal v Council* holding. To date, they have met with no success. The Court has adamantly stuck to its stance of not allowing rules of the WTO or other international agreements adopted within its framework to be directly enforceable.[21] Arguments trying to reinvigorate the *Nakajima/Germany v Council* ruling,[22] or seeking to exempt GATT/WTO rules as treaties concluded prior to the EU treaties,[23] or opting for damages actions instead of annulment actions,[24] or citing references to the principle of pacta sunt servanda[25] have all failed.

This notable disparity between WTO rules being clearly denied direct enforceability in the EU legal order, in contrast to other international agreements entered into by the EU, did not last long, however. In the *Intertanko case,*[26] where EU legislation was reviewed under the UN Convention of the Law of the Sea and the related Marine Pollution Convention, the Court made the bold and rather unexpected move to extrapolate its restrictive GATT/WTO approach and deny the direct effect of those instruments within EU law. The Court reached the same conclusion in the *Ioannis Katsivardas case,*[27] in which the provisions of the Cooperation Agreement between the EU and the countries party to the Cartagena Agreement were found to have no direct effect. It thus seems that, rather than opting for a more lax stance regarding the direct enforceability of GATT/WTO rules, the Court has moved to interpret other international agreements in the same restrictive manner.

VI Conclusion

The saga of the enforceability of GATT/WTO rules under EU law remains to be continued.[28] The more widespread and more effective WTO dispute-resolution becomes, the more awkward it will be for GATT/WTO rules not to enjoy direct enforceability in the EU legal order, for individuals not to be able to rely on GATT/WTO rules, and EU legislation by and large remaining intact from challenge. The sole, and much repeated, principle to which the Court seems to stick to is the obligation to interpret EU secondary law in a harmonious manner with GATT/WTO rules, which is obviously a less painful undertaking, while at least assuring a treaty conform interpretation of EU law.

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[21] C-307/99 *OGT* [2001] ECR I–3159., re TRIPS see C-392/98 *Dior* [2000] ECR I–11307., re the Technical Barriers To Trade see C-27 and 122/00 ex parte *Omega Air Ltd* [2002] ECR I–2569.
[22] T-18/99 *Cordis* [2001] ECR II–913.
[23] T-2/99 *T.Port* [2001] ECR II–2093.
[24] T-30/99 *Bocchi Food Trade International* [2001] ECR II–00943.
[25] T-383/00 *Beamglow Ltd* [2005] ECR II–5459.
[26] C-308/06 *Intertanko* [2008] ECR I–4057.
[27] C-160/09 *Ioannis Katsivardas v Ipourgos Ikonomikon* [2010] ECR I–4591.
[28] C-135/10 *Società Consortile Fonografici v Marco Del Corso* ECLI:EU:C:2012:140.

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Recognition and Enforcement of ICSID Awards in the United States

I Introduction

There is little doubt that arbitration awards generally, as well as those specifically arising from arbitrations under the International Convention on the Settlement of Investment Disputes ('ICSID'), can reach gargantuan proportions. One need look no further than the recent, historic $50 billion award issued by a tribunal seated in The Hague under the auspices of the Permanent Court of Arbitration (PCA) in favor of the Yukos Oil Company shareholders. The attorneys' fees and costs added to the Yukos award alone exceeded $60 million leaving the Russian Federation exposed to a $50.6 billion award for its breach of its international obligations under the Energy Charter Treaty (ECT).

Large arbitration awards could lead to recognition and enforcement proceedings in the United States. Indeed, the United States may be a likely forum for enforcement proceedings not only because of its commercial centrality but also because of recent legal developments which removed certain obstacles so as to give judgment-creditors the ability to use US discovery procedures to locate the existence of a sovereign's assets for eventual execution.[1] This article presents an overview of the legal issues relevant to the recognition and execution of arbitration awards obtained against sovereign states or their instrumentalities in the United States. The discussion will focus upon – but not exclusively – ICSID awards.

II ICSID Recognition, Enforcement and Execution

Arbitration awards under the ICSID differ from other arbitration awards since they are not, by the terms of the ICSID Convention, subject to any judicial review or challenge Challenge of an ICSID award is generally limited to a request for annulment by an annulment committee convened under the ICSID System.[2]

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[1] *Republic of Argentina v. NML Capital,* Ltd., 134 S. Ct. 2250, 189 L. Ed. 2d 234, 2104 WL 2675854 (U.S. 2014).

[2] See Art. 52.

Recognition of the Award is also streamlined by the ICSID Convention such that national courts of Contracting States are instructed to 'recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.' Thus, the obligation of recognition applies to the entire award but the obligation to enforce arises only with respect to pecuniary obligations.[3] In the United States recent cases have allowed recognition proceedings to go forward as a summary ex parte proceeding.[4]

Article 54 of the Convention requires all member States to recognize and enforce an ICSID award. Article 54 provides in full:

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

In the United States, the Federal Courts have exclusive jurisdiction over actions to recognize and enforce ICSID awards.[5]

'Enforcement' or 'execution'[6] of an ICSID award – terms used loosely here to refer to the procedures and remedies available to the award-creditor when the award-debtor refuses to pay the recognized award voluntarily – are governed by the laws of the country where enforcement is sought.[7] Those procedures could include post-award discovery of assets, issuance of restraining notices, issuance of writs of execution, and enlisting a marshal or sheriff to seize assets.[8] However, in circumstances where an award-debtor is a sovereign state or one of its agencies or instrumentalities, it may avail itself of the protection afforded sovereigns under that domestic

[3] See I. Uchkunova, O. Temnulcou, (2014) Vol. 29 ICSID Review, 187, 189 (hereinafter the 'ICSID Review').
[4] See, e.g., *Micula v. Gov't of Romania,* F. Supp. 3d, 2015 U.S. Dist. Lexis 102907 (S.D.N.Y. Aug. 5, 2015) (summary ex parte proceedings suffice for recognition of ICSID arbitral awards), citing *Mobil Cerro Negro Ltd. v. Bolivarian Rep. of Venezuela,* F. Supp. 3d, 2015 U.S. Dist. Lexis 17919 (S.D.N.Y. Feb. 13, 2015).
[5] 22 U.S.C. § 1650a(b).
[6] Recognition is, in essence, the process to authenticate and verify the ICSID award in order to give it res judicata effect. Recognition precedes enforcement. *Id.* at 192.
[7] Art. 54 (3).
[8] See Section 4, infra.

law. In the United States, a foreign sovereign subject to execution of an award is entitled to avail itself of the protections provided under the United States Foreign Sovereign Immunities Act ('FSIA').

III U.S. Foreign Sovereign Immunities Act

One of the founders of the ICSID Convention has said that the drafters of the convention sought to create 'a complete, exclusive and closed jurisdictional system, insulated from national law' with respect to the arbitration proceedings, awards, and review of award.'[9] Yet this insulation has not fully protected ICSID awards from the impact of national law which governs the procedures and substantive issues concerning the enforcement (collection) of an ICSID award. As recently noted, the application of local law and execution of ICSID judgments is

> […] implicit in the equalization of ICSID awards to local final judgments[10] and this is aimed to respect the variety of legal techniques followed in individual States.[11] This means that actual enforcement will require intimate knowledge of the peculiarities of local laws, and consequently, the results obtained may also vary from one jurisdiction to the other. Summoning the respondent State may be necessary at the stage of enforcement.[12]

In the United States, the most relevant national law that needs to be considered when dealing with governmental entities as award-debtors is the FSIA. That federal statute controls the questions of whether a sovereign state or its instrumentalities are immune from execution and whether certain property is subject to seizure. These issues will be addressed in turn.

1 Subject Matter Jurisdiction

Generally, the FSIA creates the presumption that sovereign states, political subdivisions, and governmental agencies and instrumentalities are immune from civil claims, including proceedings to enforce judgments.[13] A plaintiff can only overcome this presumption by demonstrating that an exception to the immunity or a treaty obligation applies.[14] The FSIA is the 'sole basis'[15] by which U.S. courts can entertain proceedings against sovereign states, political subdivisions, and governmental agencies and instrumentalities.

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[9] Christina Binder et al., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) at 323.
[10] Schreuer et al. (n 6) 1148.
[11] Ibid 1149.
[12] ICSID Review(n 3) at 194. (citations omitted).
[13] See 28 U.S.C. § 1603.
[14] See, e.g., 28 U.S.C. § 1605 (identifying exceptions), 28 U.S.C. § 1604 (identifying international agreements).
[15] *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439, 109 S.Ct. 683 (1989).

With regard to ICSID awards, the U.S. legislature specifically implemented the ICSID Convention by enacting 22 U.S.C. § 1650a which provides in pertinent part:

> An award of an arbitral tribunal [under the ICSID Convention] […] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed […] shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.[16]

However, U.S. courts have held that this provision does *not* address whether there is subject matter jurisdiction over the dispute (i.e. whether a sovereign is immune to US court intervention) but rather only makes clear that issues of whether there is such jurisdiction is a question exclusive to the U.S. federal courts as opposed to the state court system established under state law.[17] The subject matter jurisdiction over an ICSID enforcement proceedings is governed by the FSIA.[18] Several U.S. courts have found that enforcement proceedings of ICSID awards fall within the immunity exception[19] set forth at 28 U.S.C. § 1605(a)(6)(b) which provides that a:

> […] foreign state shall not be immune from the jurisdiction of courts of the United States […] in any case […] in which the action is brought […] to confirm an award made pursuant to such an agreement to arbitrate, if […]. the agreement or award is […] governed by a treaty […] calling for the recognition and enforcement of arbitral awards.

Another FSIA immunity exception applicable to ICSID awards has been found in the FSIA's implied waiver provision set forth at 28 U.S.C. § 1605(a).[20] For example, the United States Court

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16 22 U.S.C. § 1650a(a).

17 See, e.g., *Continental Casualty Co. v. The Argentine Republic,* 893 F. Supp.2d 747, 750 (E.D. Va. 2012) ('§ 1650a(b) simply makes clear that jurisdiction of matters arising under the statute is exclusive in the federal courts.').

18 *Id.*

19 See, e.g., *Blue Ridge Investments v. Republic of Argentina,* 735 F.3d 72, 85 (2d Cir. 2013); *Continental Casualty, infra,* 893 F.Supp.2d 750; *Funnekotter v. Republic of Zimbabwe,* No. 09 Civ. 8168(CM), 2011 WL 666227 at *2 (S.D.N.Y. 2011) ('the immunity exception in Section 1605(a)(6)(B) applies because the Netherlands, Zimbabwe, and the United States are signatories to the Convention on the Settlement of Investment Disputes and Petitioners' arbitration award was obtained pursuant to that treaty.'); see also, *Siag v. Arab Republic of Egypt,* No. M–82, 2009 WL 1834562 at *6 (S.D.N.Y. 2009) (entering a judgment recognizing an ICSID Convention award against Egypt); *See also Liberian E. Timber Corp. v. Government of Republic of Liberia,* 650 F.Supp. 73, 76 (S.D.N.Y. 1986) (prior to enactment of § 1605(a)(6)(B) court found that 'Liberia, as a signatory to the Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention'); see also *Maritime Int'l Nominees Est. v. Republic of Guinea,* 693 F.2d 1094, 1103 n.14 (D.C.Cir.1982) (discussing, without deciding, whether a foreign state's entering into the ICSID Convention 'waive[d] its immunity from proceedings enforcing ICSID awards').

20 The implied waiver exception provides that:
[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case… in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver […].
28 U.S.C. § 1605(a)(1).

of Appeals for the Second Circuit concluded that Argentina waived its sovereign immunity by becoming a party to the ICSID Convention.[21]

2 Property Subject to Execution

Under the FSIA, the extent to which property retains immunity from execution depends on whether the award-debtor is a sovereign state (or its political subdivision) or whether it is an agency or instrumentality thereof.

a) Property belonging to a sovereign (or political subdivision)

If property belonging to a foreign state or political subdivision is used 'for a commercial activity in the United States,' then that property can be subject to attachment or seizure if one of the following additional conditions are met:

(i) the sovereign waived or impliedly waived its immunity from attachment or seizure.
(ii) the subject property was used for the commercial activity upon which the claim is based.
(iii) the judgment establishes rights in the property which has been taken in violation of international law or exchanged for such property.
(iv) the judgment gives rise to a judgment establish rights in property acquired by succession or gift or which is immovable (but not used for purposes of establishing a diplomatic mission on the residence of the head of same).
(v) property or auto insurance proceeds or similar contractual indemnity obligations.
(vi) in the instance of an arbitration award, the attachment or execution conforms to the corresponding arbitration agreement.
(vii) the judgment is imposed against the foreign state for non-immune state-sponsored terrorism.

Again note that these conditions do not apply unless the subject property itself is used for commercial activity in the United States.[22]

Courts have grappled with the meaning and application of whether a sovereign's property was used for a 'commercial purpose' in the United States. One leading case has stated that the analysis requires a court to look at the use of the property in a 'holistic' fashion taking into account 'the circumstances surrounding the property' and its 'past and present commercial use.'[23] This is hardly a bright line test.

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[21] See *Blue Ridge,* 735 F.2d at 84. See, also, *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 578 (2d Cir.1993) quoting Article III of the CFREAA.* (by becoming a party to the Convention on the Recognition and Enforcement of Arbitral Awards ('CFREAA'), a foreign sovereign implicitly waived its immunity because the terms of the CFREAA provided, inter alia, that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…')

[22] See *Liberian Eastern Timber Corp. v. Republic of Libera,* 650 F. Supp. 73 (S.D.N.Y. 1986) (tonnage fees being collected by Liberian agents were deemed tax revenues and not for commercial activity.

[23] *AF Cap, Inc. v. Republic of Congo,* 383 F.3d 361, 369–70 (5th Cir. 2004).

Examples of decisions in this area provide better guidance on the meaning of what constructive property used 'for a commercial purpose.'

No – private pension funds for government employees transferred to government to terminate private options for social security benefits[24]

Yes – funds used to repay commercial debts[25]

Yes – funds used to facilitate sale of securities even though proceeds were to be used for government project

No – government tax revenues even though collected by private persons[26]

No – foreign antiques and artifacts held by a US university or museum[27]

Additional guidance can be found in a number of other cases which consider the term 'commercial activity' albeit in other sections of the FSIA.[28]

b) Agency or instrumentality

The FSIA provides less protection to property belonging to a sovereign agency or instrumentality as compared to sovereign state (or political subdivision). As to the latter, the property can only be seized if it is in the U.S. and used for 'commercial purpose in the United States.'[29] As to the former, any property in the United States belonging to the agency or instrumentality is subject to execution if the agency or instrumentality is engaged in commercial activity in the United States. The other additional conditions that need be satisfied in order to execute against an agency or instrumentality that is conducting commercial activity in the United States is where:

(i) the agency or instrumentality has expressly or impliedly waived its immunity.
(ii) the execution or attachment relates to a claim that falls under the commercial activity, expropriation, noncommercial tort and other exceptions not relevant here. (Again the property need not relate to the act underlying the claim.)

As noted earlier, as to instrumentalities and agencies, their property can be subject to attachment even if the property itself is not being used for the commercial activity at issue in the lawsuit. Rather, the test to be applied to agencies and instrumentalities is whether that entity itself is engaged in any 'commercial activity' in the United States. Such activity can be obvious – leasing of property, performing contracts, engaging in trade, borrowing money, issuing investing in securities, selling goods or services etc. Sometimes less so, especially if the activities are a blend of commercial and sovereign activity.

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[24] *Aurelius Capital Partners, LP v. Republic of Arg.,* 584 F.3d 120, 131 (2d Cir. 2009).
[25] *EM Ltd. v. Republic of Arg.,* 865 F. Supp. 2d 415, 424 (S.D.N.Y. 2012).
[26] *Conn. Bank of Commerce v. Republic of Congo,* 309 F.3d 240, 251 (5th Cir. Tex. 2002).
[27] *Rubin v. Islamic Republic of Iran,* 2007 WL 2219105 (N.D. Ill. July 26, 2007).
[28] See 28 U.S.C. § 1603(d); see generally, Sanchez, *The Foreign Sovereign Immunities Act Deskbook, Chapter 10* (ABA 2013).
[29] See, e.g., *Connecticut Bank of Commerce v. Republic of Congo,* 309 F.3d 240, 252 (5th Cir. 2002).

The relevant statute states:

> A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[30]

Again, not a particularly helpful definition. Guidance can be found in court decisions, although a recitation and analysis of the numerous decisions in this area is beyond the scope of this article. In essence, they will consider an activity as commercial 'when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it.'[31] Further, U.S. Courts will look to the type of action and not the motive behind it. Thus, while a motive for a transaction may be to generate income for the sovereign's use, if the transaction is of a commercial type then the activity will be deemed commercial in nature.[32]

c) Certain property exempt from execution

There are certain types of property that are immunized from execution by the terms of the FSIA or international law. Those include funds belonging to foreign central banks re monetary authorities whose immunity is not waived, funds disbursed from international organizations to foreign states, and funds used for military purposes.[33] Diplomatic property is additionally protected by the 1961 Vienna Convention on Diplomatic Relations and Customary International Law.[34]

IV Discovery Against Sovereigns in the US

In 2001, following a period of economic, social, and political turmoil, Argentina defaulted on more than $80 billion of external debt, including bonds issued under the Fiscal Agency Agreement (the 'FAA bonds'). Then in 2005, and again in 2010, Argentina offered the holders of the FAA bonds a 'take it or leave it' opportunity to exchange such bonds for a new series of bonds at 25-29 cents/dollar rate. As part of the exchange, FAA bond holders agreed to forgo various rights and remedies previously available under the terms of the Fiscal Agency Agreement. The prospectus of the exchange offer also clearly stated that Argentina had no intention of resuming payment on any of the FAA bonds and would oppose any efforts to collect on the defaulted FAA bonds. Although most bond holders agreed to voluntary restructurings, a group of distressed investors (part of the 7% of FAA bond holders who refused the exchange offer), commenced action to collect full value of the FAA bonds.

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30 28 U.S.C. § 1603(d).
31 *Republic of Argentina v. Weltover,* 504 U.S. 607, 614 (1992).
32 *Id.*
33 28 U.S.C. § 1611(a), (b).
34 Vienna Convention on Diplomatic Relations (entered into force April 24, 1961) 500 UNTS 95.

The battle over the bonds continued in the United States District Court in New York and a number of the hold-out bondholders, including NML, obtained sizable judgments against the Republic of Argentina. In connection with those judgments, NML served subpoenas on two nonparty financial institutions (Bank of America and Banco de la Nacion Argentina), seeking documents relating to 'all accounts maintained by or on behalf of Argentina *without territorial limitation*'). NML admittedly sought to get an understanding of Argentina's 'financial circulatory system.' Argentina objected contending that the subpoenas effectively violate the FSIA.

The District court granted NML's motion to compel the banks' compliance with the subpoenas, holding that the extraterritorial discovery did not infringe on Argentina's foreign sovereign immunity.[35] The United States Circuit Court of Appeals for the Second Circuit affirmed that decision and the U.S. Supreme Court granted review. The Supreme Court held that the FSIA does not bar post-judgment discovery into the overseas assets of a foreign state.[36] Thus, the two non-party financial institutions were required to disclose documents relating to all accounts maintained by or on behalf of Argentina – including assets and transactions in foreign states. In doing so the Court held that the FSIA does not limit post-judgment discovery to only those assets that U.S. courts can attach under FSIA (e.g. assets held and used for commercial purposes in the U.S.). The Court stated that because there is no provision in the FSIA 'forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets,' the Act does 'not shield from discovery a foreign sovereign's extraterritorial assets.'[37] The court therefore concluded that FSIA does not place any bar on NML's discovery into Argentina's foreign assets.

Note: the Supreme Court's determination was limited to the immunity defense under the FSIA. It expressly declined to address whether the Federal Rules of Civil Procedure or state laws impose other limits on post-judgment and extraterritorial discovery into the assets of a judgment debtor. The Supreme Court also added that concerns about the international relations consequences of its decision, which had been raised by Argentina and echoed in an amicus brief filed by the solicitor general of the U.S., should be directed to congress, and not for the courts to decide.

V What Kind of Post-Award Discovery is Available in Such Cases?

Judgment creditors are entitled to liberal post-judgment discovery in aid of the judgment or execution under federal or applicable state procedure. Federal Rule of Civil Procedure 69(a)(2) provides: 'In aid of judgment or execution, the judgment creditor or successor in interest whose interest appears of record may obtain discovery from any person – including the judgment debtor – as provided in these rules or by the procedure of the state where the court is located.'

[35] *NML Capital, Ltd. v. Republic of Arg.,* 2011 U.S. Dist. Lexis 99502, *24 (S.D.N.Y. 2011).
[36] *Republic of Argentina v. NML Capital,* 134 S.Ct. at 2256.
[37] *Id.* at 2257.

Thus, judgment creditors are free to employ every means available to them under federal or state discovery rules, and to utilize the full panoply of discovery measures, to obtain execution of a judgment, including:

– requests for production of documents,
– interrogatories,
– depositions and
– subpoenas.[38]

Rule 69 may be employed in aid of any money judgment, including judgments confirming arbitration awards.[39]

The purpose of discovery under Fed. R. Civ. P. 69(a)(2) is to enable the judgment creditor to locate assets of the judgment debtor, wherever located, for satisfaction of the judgment. As a result, discovery under Rule 69 is 'quite permissive,'[40] and judgment creditors are given the freedom to make broad inquiry to discover hidden or concealed assets.[41] Under Rule 69, the presumption is in favor of full discovery of any matters arguably related to the creditor's efforts to trace the debtor's assets and otherwise to enforce its judgment.[42] Because the scope of Rule 69 discovery includes any information reasonably calculated to lead to discovery of the judgment debtor's assets, it may necessarily be aimed at nonparties who have information, including financial records, related to those assets.[43] However, discovery pertaining to the assets of non-judgment debtors is permissible only when there is a reasonable belief that they have received assets from the judgment debtor.[44] To obtain nonparty discovery, a threshold showing connecting the non-party with discoverable information is required.[45] Under federal common law, the judgment creditor must show either (1) 'the necessity or relevance of the discovery sought' or (2) that 'the relationship between the judgment debtor and the nonparty is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets.'[46]

VI Enforcing Awards Against the United States and its Instrumentalities

Another scenario to be addressed is how one can enforce an arbitration award against the United States Government or its instrumentalities if they are the award-debtor. The question is not that complicated. Absent statutory consent, the US and its instrumentalities are immune

[38] *See ClearOne Commc'ns, Inc. v. Chiang,* 276 F.R.D. 402, 404 (D. Mass. 2011); *MagnaLeasing, Inc. v. Staten Island Mall,* 76 F.R.D. 559, 561 (S.D.N.Y. 1977).
[39] *See Universitas Educ., LLC v. Nova Group, Inc.,* 2013 WL 3328746, at **3–4 (S.D.N.Y. July 2, 2013).
[40] *Rep. of Argentina v. NML Capital, Ltd.,* 134 S.Ct. 2250, 2254 (2014),
[41] *See Universitas Educ.,* 2013 WL 3328746, at *12.
[42] *ClearOne Commc'ns,* 276 F.R.D. at 404.
[43] *Universitas Educ.,* 2013 WL 3328746, at *12.
[44] *Integrated Control Sys. Inc. v. Ellcon-National, Inc.,* 2003 WL 23514561, at *4 (D. Conn. January 21, 2003).
[45] *NML Capital v. Rep. of Argentina*, 2014 WL 3898021, at *13 (D. Nev. Aug. 11, 2014).
[46] *Id.* at *14 (citations omitted).

from suit for money damages.[47] However, general statutory consent has been given by legislation known as the Tucker Act, which gives the Court of Federal Claims jurisdiction to render judgment upon any claim against the US (and its instrumentalities) founded either upon the Constitution, any Act of Congress or any regulation of an executive department, or upon express or implied contract with the US, or for damages in cases not sounding in tort.[48] The Tucker Act creates a remedy but not substantive rights (such rights come from the Constitution, Acts of Congress, executive regulations, and contracts) and should be looked at as the procedural means for obtaining money damages for rights created by other federal laws.[49]

Procedures for enforcing arbitration awards against the United States while untested, seems relatively straightforward since the ISCID Awards have been authorized by the 22 U.S.C. § 1650a which provides in pertinent part that '[a]n award of an arbitral tribunal [under the ICSID Convention] …shall create a right arising under a treaty of the United States.' Moreover, it can be argued that international arbitration awards would be enforceable in accordance with the 1958 New York Convention. The 1958 New York Convention, and the legislation implementing it,[50] could also operate as a consent to suit by the US as it has been argued that if the U.S. declined to pay an arbitral award, the claimant could seek to enforce such award in a Tucker Act lawsuit seeking money judgments.

VII Conclusion

Despite considerable efforts, ICSID awards will have to overcome the implication of local state law insofar as the enforcement of such awards are concerned. If such awards are pursued in the United States, careful consideration of the FSIA's application must be undertaken. The ability to attach and seize an award-debtor's assets will largely depend on the nature of the award-debtor (state vs. instrumentality) and the nature of the property present in the United States for seizure. If nothing else, the United States post-award discovery procedures make the FSIA analysis a worthwhile undertaking.

[47] See e.g. *F.D.I.C. v. Meyer,* 510 US 471, 475 (1994).
[48] 28 U.S.C. 1491.
[49] Claimant would follow the same Tucker Act procedures in prosecuting a claim against an instrumentality of the US as he/she would against the US itself.
[50] 9 USCS §§ 201 et seq.

Articles

Fruzsina Gárdos-Orosz*

The Regulation of Offensive Speech in the New Hungarian Civil Code**

I Introduction

After a number of fruitless attempts at regulating hate speech (offensive speech)[1] had been blocked by the Constitutional Court in recent years in Hungary, the Parliament added a new anti-hate speech rule to the new Civil Code, which took effect on 15 March 2014. Section 2:54(5) of the new Civil Code allows private individuals to enforce a claim against offenders in cases of hate speech:

> In the event of a violation of rights committed before the wider public and seriously offensive to the Hungarian nation or to some national, ethnic, racial or religious community or unreasonably insulting for these groups in its manner of expression, any member of these groups is entitled to enforce his or her personality right in relation to him or her belonging to such groups, being an essential trait of his or her personality. The right to make a claim will be precluded after a period of thirty days from the injury. With the exception of surrendering the material advantage achieved through the violation, any member of the community may enforce any sanction available with regard to violations of personality rights.[2]

In order to eliminate any concerns related to the constitutionality of the new rule, the governing parties, relying on their two-thirds majority in Parliament, adopted the Fourth Amendment

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[1] The term 'hate speech' (offensive speech) is typically used for expressions threatening the foundations of a democratic political system and is reminiscent primarily of totalitarian ideologies. More specifically, hate speech propagates racial, ethnic or national supremacy and incites hatred for this purpose. Sajó András, *A szólásszabadság kézikönyve [A handbook of the freedom of speech]* (KJK 2005, Budapest) 133. In this paper, with regard to the above, I use the term 'hate speech' as a synonym for collective defamation, a conduct offensive to individuals through the attack towards entire communities. This meaning is reflected in the examined piece of legislation as well.

[2] 'Personality right' is a continental – especially German – concept. Under common law jurisdiction, this concept does not exist; instead, there is tort for libel etc. However, for the sake of the description of the Hungarian concept I use the expression 'personality right' with the limitations of this translation.

to the Fundamental Law shortly after passing the new Civil Code; the amended Fundamental Law now includes a provision[3] that makes it possible to sanction hate speech.

This paper will review the essential content of past attempts in Hungary in civil law to regulate the issue of hate speech, and will discuss why these attempts were problematic from the aspect of Hungarian civil and constitutional law. The paper will also analyse the relevant rule in the new Civil Code and its constitutional interpretation environment as defined by the Fundamental Law. Specific constitutionality and legal application aspects that can be identified at this stage of application will also be discussed.

Before examining the constitutionality and application of the Civil Code's hate speech rule (primarily focusing on the subjects of the regulation, the subject-matter of protection and the role of the prosecutor), I will try to answer the question whether it is a legitimate objective of legislation to regulate hate speech also as a violation of personality rights. The relevant Hungarian literature weighs the same arguments as some prominent foreign scholars[4], such as Robert Post,[5] Ronald Dworkin,[6] Edwin Baker[7] and Jeremy Waldron[8].

In my opinion, on the basis of Jeremy Waldron's arguments, it can be a legitimate objective of legislation to condemn those forms of conduct collectively known as hate speech by imposing legal sanctions on such conduct.[9] Regulation holding offenders responsible for conduct that vilifies a common trait of the members of a group, if membership of that group is a key trait of the person's character (e.g. religious conviction or national or ethnic background), may be an effective tool for progress towards social equality in a formal/procedural sense. Such a law would therefore punish a speaker who expresses, generally due to prejudice (which may have some rational or emotional basis), an opinion of racial, ethnic or religious groups or groups of vari-

[3] Article IX. (5) of the Fundamental Law states that 'The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act.'

[4] The thoughts of German philosophers Habermas and Gadamer are also applied to hate speech in Wright R. George, 'Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem' 76 (2000–2001) Chi.-Kent L. Rev. 991.

[5] Robert Post, 'A progressive perspective on freedom of speech' in Jack M. Balkin, Reva B. Siegel (eds), *The Constitution in 2020* (Oxford University Press 2009, Oxford) 179. Robert Post, 'Hate Speech' in Ivan Hare, James Weinstein (eds), *Extreme Speech and democracy* (Oxford University Press 2010, Oxford) 123.

[6] Ronald Dworkin, 'Reply to Jeremy Waldron' in Michael Herz, Péter Molnár (eds.), *The Content and Context of Hate Speech. Rethinking Regulation and Responses* (Cambridge University Press 2012, Cambridge) 341–345.

[7] His position was also published in Hungarian in Fundamentum. Edwin Baker, 'Gyűlöletbeszéd [Hate speech]' (2008) 2 Fundamentum 5–18.

[8] Jeremy Waldron, *The harm in hate speech* (Harvard University Press, 2012) 204–235, also in Herz, Molnár (n 5) 329–340.

[9] In Hungary, hate speech has been sanctioned by the Criminal Code for longer (Section 332 of Act C of 2012). 'Any person who before the public at large incites hatred against the Hungarian nation; any national, ethnic, racial or religious group; or certain social groups, in particular on the grounds of disability, gender identity or sexual orientation, is guilty of a felony punishable by imprisonment not exceeding three years.'

ous sexual identities and, indirectly, of the members of such groups, that offends the members of the group and may incite hatred against this group in other groups of society.[10]

In this paper, I will accept that in general there is a legitimate legislative objective of regulating the issue in civil law and that the restriction of freedom of speech may be necessary and proportionate in principle in order to achieve the above mentioned goals, because nowadays 'street justice' do not seem to be suitable for condemning hateful conduct in accordance with the principles and objectives of liberal democracies.[11] As I see it, the objective of 'regulation' by civil means, which have little effect today, should be the same as the objective of legal regulation: to express a value judgement, according to which hateful conduct is negative, rather than to suppress or silence these forms of conduct. From the aspect of maintaining a democracy built on the plurality of opinions, this is a key distinction. The legitimate objective of legislation, which the courts will have to take into account when establishing the facts of the case and the amount of the *solatium doloris* (compensation for emotional damage), is not the objective of silencing these hateful voices but to ensure that those whose personality rights have been violated feel that the state and, ideally, civil society in general both find such conduct unacceptable and condemn this conduct.

In this paper, I will focus on three fundamental questions in addition to a number of minor problems. The first is whether the personality rights regulations in civil law are able to incorporate the new rules according to the logical/theoretical foundations of the law. My conclusion is that the issue can be handled within the framework of personality rights protection but only if we adopt a restrictive approach concerning legal interpretation and application. The most important restriction is that it has to be proved that the individual's personality rights have been violated. This becomes possible if we apply Article IX (5) of the Fundamental Law, enabling the 'radiation effect' of the violation.

The second basic problem I will analyse in this paper is also a constitutionality concern in connection with the adopted provision. The phrasing of the civil law rule applicable to hate speech is general, i.e. that it does not specify those historical and underprivileged groups that need to be protected by legal means in the interest of progress towards substantive equality. Not only is this generality misleading but it also contradicts the basic rules of the Fundamental Law on equality and on the possibility of restricting fundamental rights. Despite the results of the grammatical interpretation of the text of the Fundamental law, the systematic and historical interpretation suggests that it is unconstitutional if, e.g., based on the new rule, some Romani people living in an average Hungarian village were sanctioned under civil law for berating Hungarians.

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[10] Halmai Gábor, Tóth Gábor Attila (eds), *Emberi jogok [Human rights]* (Osiris 2003, Budapest) 462. See also Halmai Gábor, *Kommunikációs jogok [Communication rights]* (Új Mandátum 2002, Budapest) 114.

[11] In the area of personality rights, the scope of regulation expands continuously, partly because in a state under the rule of law social relations are no longer regulated by morality or religion but by law, and members of society primarily expect the law to respond to social issues. Sólyom László, *A személyiségi jogok elmélete [The theory of personality rights]* (KJK 1983, Budapest) 317.

Finally, I will examine whether the new Civil Code's Section 2:54 (4) violates the Fundamental Law. This rule allows the prosecutor to lay a claim if the violation of the personality right is against the public interest. The prosecutor, as an exception to the general rule, will be allowed to take action without the authorisation of the person otherwise entitled to do so.

II Requirements of International Law, Delimitation of Civil and Criminal Law Regulations, Examples in Civil Law from Foreign Countries

The following brief and illustrative[12] review will show that although international law attempts to define the principles, expectations and directions concerning the regulation of hate speech, it does not help in answering the question of how the legislator should regulate the issue and whether a solution incorporated into civil law can be effective.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD), a United Nations convention, expects all states parties to take action against the dissemination of racial hatred. The convention uses the term 'positive measures' to allow states to decide what methods the legislator will choose to sanction such forms of conduct.[13]

The CERD[14] stresses the importance of penalising the dissemination of ideas of racial superiority and hatred. The CERD draws attention to article 20 of the International Covenant on Civil and Political Rights, and points out that advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. In these arguments, the need for criminal law regulations is combined with general principles, according to which laws need to be adopted to sanction forms of conduct that do not constitute specific racist actions. However, it is unknown what laws the legislator should pass and concerning what forms of conduct a civil law sanction is acceptable.

At a regional level, the Framework Convention for the Protection of National Minorities[15] prescribes some relevant obligations. 'The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.'[16] In this rule, the phrase 'appropriate measures' provide even fewer guidelines for the legislator on how to regulate threats of violence against communities and on what constitutes such a threat.

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[12] For more details about regulation in international law, see Gárdos-Orosz Fruzsina, 'Nemzetközi jogi standardok és magyar kísérletek a gyűlöletbeszéd büntetőjogon túli szabályozására [Standards of international law and Hungarian attempts at regulating hate speech beyond criminal law]' (2009) 1 Földrész 135–146.

[13] Article 4 of the ICERD states that 'States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination […]' In Hungary, the ICERD was implemented by Law-Decree 8 of 1969.

[14] The Committee on the Elimination of Racial Discrimination discusses the issue in Section 3 of its General Recommendation 15 concerning the interpretation of Article 4 of the ICERD.

[15] In Hungary, this convention was implemented by Act XXXIV of 1999.

[16] Article 6(2).

A commission formed within the framework of the Council of Europe[17] points out in its recommendations that states cannot remain passive concerning hate speech, racist materials distributed over the Internet and discrimination based on racist considerations in the private sphere, and that states must take action and adopt legislative reforms if need be. However, it can be established, concerning the possibility of regulating hate speech beyond criminal law, that not even the most effective regional human rights court is able to provide more reliable guidelines for legislation or the application of the law. As such, it seems that there is no European consensus regarding this matter.[18]

The framework defined for criminal law, however, cannot be applied from a number of aspects to assess the possibilities of civil law, because the subject-matter of protection is different for the two fields of law, which means that different factors are compared when the assessment is made. [19] The subject-matter protected by criminal law is public peace, first and foremost. However, in addition to the need of establishing that the public peace has been breached, the statutory definitions of crimes, to various degrees, require that absolute/subjective rights need to be directly or indirectly violated or threatened. The statutory definition of incitement against a community, however, does not require that a criminal act must be the result.

In civil law regulations, the protected legal interest is different from that of criminal law: the part of civil law that includes personality rights only protects absolute/subjective rights. Due to the history of personality rights, as presented below, the objective of regulation is, naturally, the provision of some form of protection defined by public policy for public peace; this is true for the introduction of all personality rights. However, this does not mean that the legal interest safeguarded by regulation is public peace: the civil law regulations are intended to protect the subjective/absolute rights of individuals.

Therefore, when examining civil law regulations, what international law or the constitutional criminal law of the state party expects in connection with public peace or, as part of its content, in connection with the threats against or the violation of subjective/absolute rights may not be used as a starting point, beyond some general principles. It should be noted here, to support some statements of this paper discussed below, that international law documents are in every case designed to protect disadvantaged minority groups.

International regulation may also reflect that no European hate speech regulatory regime has attempted to use civil law specifically and recently to sanction hate speech in general. Examples from foreign countries show instead that in most countries hate speech is only sanctioned by criminal law. In some states, relevant statutory provisions also appear in anti-discrimination law, media law or a separate anti-hate speech law and, in English-speaking countries, so-called

[17] European Commission against Racism and Intolerance – ECRI.

[18] Polgári Eszter, *Az összehasonlító jog az Emberi Jogok Európai Bíróságának gyakorlatában, különös tekintettel az európai konszenzus vizsgálatára [Comparative law in the practice of the European Court of Human Rights, particularly with regard to the examination of the European consensus]* (Doctoral thesis, Budapest, 2011) 45.

[19] See Constitutional Court Decision (ABH) 1992, 167, 172, see also: Halmai, Tóth (n 10) 436.

'public order acts' penalise certain forms of conduct.[20] There are, however, some unique (but not representative) exceptions that have historical roots.

For instance, the French Press Law of 1881 regulates hate speech but uses methods of criminal law (i.e. it gave the definitions of various crimes, including a definition of hate speech). However, Section 48–6 allows members of a community to make a claim (e.g. for damages) in a hate speech criminal procedure as if its members' rights had been violated directly.[21] This rule may be regarded as a step towards civil law (damages), but it is not an ideal answer to the original question of how hate speech may be regulated within the framework of personality rights.

According to Michel Rosenfeld, in Germany it is very easy to reach the level of a criminal law violation, which is why what kind of regulation the state will develop using civil law methods is not a pressing issue.[22]

In English law, the 'hatred, contempt or ridicule' and the 'to cause to be shunned or avoided' formulas have been part of case-law since 1724 and 1679, respectively, in connection with defamation tort.[23] Today, torts are considered neither private law nor public law concepts, as they contain private law, administrative law and criminal law elements.[24] It is very difficult under English tort law but by no means impossible to claim that offending a community resulted in a tort. If a group is relatively small and easily definable and thus the individual is able to prove that the offensive conduct affected each member of the group in person, or if the individual can give evidence that the statement concerning the group actually extended to the individual, a tort can be established under English judicial practice. In the *Knuppfer v. London Express Newspapers Ltd.* case, the court explained that, if a community is offended, it is up to the court to decide if the violation of rights should be applied to a member of the group.[25] Today, however, hate speech in the UK is primarily penalised by public order acts, which are of an administrative character.

Of course, the facts that there is no accurate standard in international law for the detailed regulation of hate speech and that there are no convenient models of regulation in European legal systems do not mean that the standards and methods based on applying the proportionality tests generally accepted for examining the admissibility of limiting freedom of speech would not be applicable when the Hungarian regulations are evaluated. In a nutshell, these standards suggest that freedom of speech may only be limited if it is necessary in a democratic society and if it is proportionate to the objective to be achieved.[26]

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[20] Paul B. Coleman, *Censored: how European 'hate speech' laws are threatening freedom of speech* (Kairos 2012, Vienna) 98–134.

[21] Loi du 29 Juillet 1881 sur la liberté de la presse (Law on the Freedom of the Press of 29 July 1881) The relevant rule was modified in 1996.

[22] Michel Rosenfeld, 'Hate Speech and constitutional jurisprudence, a comparative analysis' in Herz, Molnár (n 5) 268.

[23] Sólyom (n 11) 186.

[24] Sólyom (n 11) 193.

[25] Paula Giliker, Silas Beckwith, *Tort* (Sweet and Maxwell 2000, London) 293–294.

[26] Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11 (2) Int J Constitutional Law 466–490.

III Hate Speech and Personality Rights in Hungary

Around the turn of the millennium, it became clear that the legal disputes related to hate speech were not resolved succesfully by voluntary means, and courts were reluctant to extend, through a simple act of legal interpretation, the existing protection of personality rights to cases when the violation of the individual's rights could have been assessed with regard to conduct offending the community. As a result, such conflicts of interest or disputes were settled neither voluntarily and amicably, nor through the state's coercive measures. In 2007, Parliament specifically wanted to codify a rule in civil law allowing a member of a community suffering a serious public grievance due to his or her member status to take legal action. The rule would have authorised civil law courts to award damages to be paid by the person expressing hatred. The provision of law amending the personality rights chapter of the Civil Code was annulled by the Constitutional Court.[27]

A common criticism of anti-hate speech regulations in civil law is that they change the civil law system of personality rights, due to primarily public law considerations. However, due to the regulatory nature of personality rights, I believe that the new regulation in Section 2:54 should rather be seen as a result of organic development and not as a forced restriction on private autonomy. This is because creating a personality right is simply allowing the law to define what conduct breaches the freedom of others and what does not breach it in the relevant field of regulation. A personality right therefore is a restriction but it is also a guarantee that autonomy will continue to exist within the new framework.[28] Below I will present how the civil law regulations based on this approach define the framework and limitations for legislative objectives in connection with the regulation of hate speech. This interpretation should be taken into account when discovering the possible interpretation and application of the new rules of the Civil Code.

1 The Unique Characteristics of Personality Rights

According to an approach rooted in Roman law, pecuniary damage is handled more individually than *iniuria* (illegal behaviour towards another person, a personal insult); with regard to the latter, even the question of whether the grievance had arisen at all depended on public perception.[29] As *iniuria* grew separate from physical assaults, it started to rely not on an abstract idea of personality and not on the status of a Roman citizen but on the current social customs.[30] The pattern of conduct was defined by public morals, and the illegal conduct, in addition to insulting the targeted person, also qualified as a violation of public order. It was the *praetor* who interpreted the content of morals, and he had to assess even if the situation was clear whether

[27] I will discuss below the reasons behind this decision.
[28] Sólyom (n 11) 274.
[29] Sólyom (n 11) 148.
[30] Sólyom (n 11) 149.

the conduct had violated morality.[31] It was very uncertain whether a claim purely based on private interest would be upheld, as publicity and public order particularly substantiated a claim.[32] However, the *iniuria* as a private delict, originally concurrent with criminal law charges, was never used to protect public morals in general, as the *iniuria* was always targeted against a specific person.

In liberalism, the state wanted to provide economic guarantees to the personality to counterbalance the dominant position of the market. With the state regulating the economy and developing social functions, the protection of personality gained direct political interpretation.[33] In the 20th century, according to Szladits, 'the socialisation of the private law order,'[34] i.e. giving strong consideration to the community's interests, was the most dominant in the Nazi approach to private law. Advocates of the new approach believed that community considerations are the foundation of all civil law rules. Such a combination of private law and elements of public law was definitely a product of the crisis at the time, that is, a natural consequence of social and economic transformation, and an increased level of government intervention was an inherent part of these developments.[35]

Private law, however, has always been an individualistic system of laws (except for in crisis periods) because its objective is to strike a fair balance between conflicting private interests. The ideal of a *bourgeois* society, in which the weak must be protected from the stronger groups, had a noticeable impact in each field of law in the course of historical development. With the emergence of modern constitutions, it was a typical 19th century phenomenon that administrative and criminal law elements were removed from private law with the reasoning that such elements belong in the constitution.[36] The rules governing equal liberty, later equal human dignity, the prohibition of discrimination and then the requirement of equal treatment went through duplication at the levels of private law and constitutional law. However, the distribution of personality protection rules between branches of the law does not mean that the objectives and principles of these rules would be different.

The general opinion is that personality rights have three 'statutory roots': internationally recognised human rights conventions, the Hungarian Constitution and the basic principles of the Civil Code. According to Szladits, the basic difference between the rights in the Constitution and the personality rights in the Civil Code is that while the human rights specified in the Constitution must influence the entire state organisation and the conduct of individuals, the personality rights in the Civil Code are only granted to persons/entities of civil law and bodies applying civil law.[37] It is a result of the triple statutory basis of the interpretation of personality

[31] Sólyom (n 11) 151.
[32] Sólyom (n 11) 149.
[33] Sólyom (n 11) 314.
[34] Staud Lajos, 'A magánjog ethizálása – vagy pedig a természet jog felé?' [Making private law ethical – or progress towards natural law?] (1926) 1–2 Jogállam 38–42, cited by Szladits Károly, *A magyar magánjog. Általános rész. Személyi jog. Első rész. [The Hungarian Civil Law]* (Grill 1941, Budapest) 36.
[35] Szladits (n 34) 37.
[36] Szladits (n 34) 40–44.
[37] Gábor Jobbágyi, *Személyi jog [The law of persons]* (Novotni 1996, Miskolc) 51.

rights that the Civil Code's provisions analysed in this paper must be applied and interpreted in accordance with the foundations. In this section, I wanted to point out that these foundations can be identified not just in public law but also in the historical development of private law. For these reasons, it is not unacceptable for civil law to incorporate anti-hate speech rules.

2 The Dignity of Communities

After concluding that hate speech might be regulated as a personality right issue, I will examine, in connection with Section 2:54 of the Civil Code, what civil law and constitutional law limitations may be identified in the course of interpretation. One such factor, which I believe also appears at the constitutional level, is that communities have no right to human dignity.

It is a valid argument in connection with the regulation of hate speech in the effective text of the Fundamental Law that the Fundamental Law itself creates a right to human dignity, even if this is inconsistent with the past practice of the Constitutional Court.[38] I will argue against this interpretation below.

Although Article IX of the Fundamental Law declares that the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community (it therefore uses the concept of communities' dignity), in the very next sentence the text claims that freedom of speech may be restricted not in the interest of the dignity of communities but in order to guarantee the right to human dignity of individuals belonging to the community. The dignity of communities therefore does not appear in the Fundamental Law as a right but instead it is used as a constitutional value or a state objective.[39]

Consequently, a distinction must be made between the dignity of communities as a constitutional value worthy of preservation and the right of communities to human dignity. The latter is a concept that is difficult to interpret, even within the framework of the Fundamental Law. Only specific individuals, belonging to or not belonging to communities, may have a right to human dignity. This right is granted to each of them, regardless of their membership of communities and is equally granted to all of them.

It cannot be concluded on the basis of Article IX of the Fundamental Law that a law restricting the freedom of expression with the legitimate objective of preserving the dignity of communities would not be justifiable with regard to the first sentence of Article IX (5) of the Fundamental Law, which states that the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or

[38] In Decision 96/2008. (VII. 16.) AB, the Constitutional Court specifically stated that communities are not granted the right to human dignity.

[39] For more information about the concepts of rights, values and state objectives etc. in the constitution, see Gárdos-Orosz Fruzsina, '8. § [Az alapjogok korlátozhatósága] [Article 8. The possibility of restricting basic rights]' in Jakab András (ed), *Az Alkotmány kommentárja [A commentary of the Constitution]* (2nd edn, Századvég 2009, Budapest) 398–400.

religious community. However, in the course of applying the so-called test of necessity and proportionality, it must be taken into account whether the basic right is restricted for the purpose of promoting another basic right or only for promoting a constitutional value or objective. If a law was passed on the basis of the first sentence of Article IX (5) with the valid legislative objective of protecting the dignity of communities, the possible degree of restricting the freedom of expression under this rule would be significantly lower than the level of restriction introduced by Section 2:54 of the Civil Code.[40]

This is so because, with regard to the provision analysed in this paper, the legitimate legislative objective for which the freedom of expression is restricted is the human dignity of an individual acting in his or her capacity as a member of a community. This is confirmed by the text of Article IX (5) of the Fundamental Law: 'Members of such communities shall be entitled to enforce their claims, as provided for by an Act of Parliament, in court against the expression of an opinion which violates the community, invoking the violation of their human dignity.' Consequently, the first sentence of Article IX (5) of the Fundamental Law is more like a declaration and a specification of a state objective, and the freedom of expression is restricted in this case, even according to the Fundamental Law, on the basis of the protection of the right to human dignity. This approach is also consistent with the general logic of civil law.

3 The Content Neutrality Principle: the Interpretation of 'Seriously Offensive' and 'Unreasonably Insulting' Conduct

As opposed to the anti-hate speech regulations common in foreign legal systems that sanction specific content regardless of the consequences,[41] the rule of the Hungarian Civil Code is content-neutral to some extent, because it requires the conduct to be of such gravity that is capable of achieving a seriously offensive or unreasonably insulting result. The violation of the personality right, therefore, does not simply consist of the expression and perception of the hateful content: the speech must have a seriously offensive and unreasonably insulting effect.

When Section 2:54 of the Civil Code is applied by the courts, it will be a key test when a 'violation of rights'[42] will qualify as a violation of rights committed before the wider public and is seriously offensive or unreasonably insulting for these groups in its manner of expression, whether this criterion will apply to the community or individuals belonging to the community, and to what extent this test will be objective or whether it will be individualised based on the person seeking legal remedy. When this is assessed by the courts, they will surely take the evaluation criteria developed for defamation cases in judicial practice into account and, in addition

[40] Ibid 423–426. The notion that the possibility of restricting the freedom of expression is different when the goal is to protect the dignity of communities is confirmed by the following decisions of the Federal Constitutional Court of Germany: 68 BVerfGE 93, 266 (1994) 269; BVerfGE 90, 241 (1994).

[41] For instance, the statutory definitions of Holocaust denial in many European countries.

[42] Beyond the fact that the term 'violation of rights' in the context does not make much sense grammatically, it is also an unsuitable term here because, as discussed below, neither constitutional law nor civil law grants rights to communities.

to identifying general guidelines of interpretation, the constitutional interpretation (as necessary also with regard to the general principles of the Civil Code) in specific cases will have to be found in such a manner that the court does not restrict the freedom of expression unnecessarily and disproportionately.[43]

According to Section 2:54 of the new Civil Code, a member of the relevant community may make a personality right claim in the event of a violation of their rights committed before the wider public and seriously offensive to or unreasonably insulting for the community in its manner of expression. It follows from the content in the previous sections that, in a personality rights context, an insult to the community rather means that the hateful conduct shown towards the community actually insults or hurts an individual belonging to the given community. A violation of rights may therefore only qualify as a violation of rights under civil law if it is indeed a violation of the rights of an individual belonging to the community in question.

On the basis of the grammatical interpretation of the phrase 'a violation of rights committed before the wider public and seriously offensive or unreasonably insulting for the community in its manner of expression', we may conclude that a less vulnerable community (such as the Hungarian nation) is less sensitive to the same insult as a vulnerable and disadvantaged minority.

The part of the rule in Section 2:54 of the Civil Code analysed in this section therefore moves back closer to the content neutrality principle, thus allowing the courts to impose sanctions for hate speech in particularly serious cases, taking the standard of necessity and proportionality into account.

4 The 'Radiation Effect'

The next question to be discussed in connection with the civil law regulation is whether it is possible at all to establish the violation of the individual's rights, an indispensable component of a personality rights violation, in the event of a violation affecting the community. The 'radiation effect' principle of German law[44] may help in resolving this dilemma. Earlier attempts at regulating the issue under civil law in Hungary adopted this German legal principle, and the significance of this principle was pointed out by the Constitutional Court and also by the President of the Republic, who raised constitutionality concerns. Although, in connection with Section 2:54 (5) of the Civil Code, neither the text of the law nor the statement of reasons mentions the 'radiation effect' theory, my argument is that the relevant rule of the Fundamental Law actually allows the 'radiation effect' to be used. However, I will argue below that the 'radiation effect' may only be applied in very limited circumstances to the individual as a violation of personality rights caused by conduct offensive to or insulting for a community.

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[43] Gárdos-Orosz Fruzsina, *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban [Constitutional civil law? The application of fundamental rights in disputes under private law]* (Dialóg Campus 2011, Budapest) 118–146.

[44] *Ausstrahlung,* see Ralf Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law' (2011) 6 European Human Rights Law Review 421, 424.

The Constitutional Court of Germany found in the *Soldaten sind Mörder* decision that in principle a statement concerning a collective of individuals may in principle affect the honour of individuals. As the German Constitutional Court puts it, the radiation effect '[c]an primarily occur regarding statements made about ethnic or racial origin, or about physical or mental attributes if the inferiority of the entire affected group and each and every member of this group may be derived from the statement.'[45] According to the logical/theoretical foundations of German constitutional law, the insult must be intentional, with the primary goal of humiliating the victim. It must be taken into consideration whether the statement has been made as part of a debate or whether there has been a situation (such as a political campaign) that impacted the significance of the statement.[46] The theoretical concept of the 'radiation effect' first appeared in Hungarian law in 2007, when the civil law sanctioning of hate speech was introduced and the personality rights chapter of the Civil Code (Act IV of 1959) was amended.[47] However, the amendment was annulled by the Constitutional Court [Decision 96/2008. (VII. 3.) AB] following[48] the President of the Republic's petition for a preliminary review of constitutionality.[49]

The decision of the Constitutional Court states that the right to human dignity is only granted to natural persons as a basic right; communities do not have this right. The Constitutional Court, however, recognised that an injury suffered by the community as a result of a message communicated within the scope of the freedom of expression may qualify as a violation of the rights of an individual, who may in turn take legal action. The violation of the fundamental right to human dignity and the related protection may in this case limit the freedom of expression.

However, the large number of communities referred to in the amendment, the statutory presumption of belonging to the community, the unrestricted right of persons claiming to be members of the community to file a claim, and the possibility of non-governmental organisations and foundations taking action did not confine the restriction of the freedom of expression to the necessary minimum. Quite the contrary: these factors lifted all boundaries to the restriction.

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45 *Soldaten sind Mörder* BVerfGE 93, 266, 304. (1994) Rn. 142.

46 For a summary of the German Constitutional Court's practice, see Horst Dreier, *Grundgesetz Kommentar [Commentary to the Basic Law]* (Mohr-Siebel, 1996) Art. 5. I, II. 422–424. Rn 216–221.

47 Section 76/A A public and seriously insulting conduct targeted at race, national or ethnic minority status, religious or ideological conviction, sexual orientation or sexual identity and applying to a group of persons constituting a minority in society but sharing this characteristic shall constitute a violation of personality rights. […] The person violating the right may not use the defence that the conduct has not been directly and recognisably directed against the particular person or persons making a claim on the basis of the violation defined in paragraph (1). The claims made under Section 84(1) may also be brought by public benefit non-governmental organisations or foundations, the objective of which is the protection of civil and human rights. A claim made under Section 84(1)(e) may only be brought by the aforementioned organisations in the interest of the insulted community and to the benefit of a public benefit foundation established for this purpose. Regarding the claims stated in paragraphs (1) to (3), the statement of claim may be filed within 90 days from the violation of the right. The right to make a claim will be precluded after the expiry of this deadline. <http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=38&p_izon=3719> accessed 1 November 2015.

48 Constitutional Court Decision (ABH) 2008, 921, 923.

49 For a detailed analysis of this regulation and the constitutional law environment, see Gárdos-Orosz Fruzsina: 'Kísérlet a gyűlöletbeszéd elleni fellépés magánjogi szabályozására [An attempt at regulating anti-hate speech efforts in private law]' (2007) 3 Állam- és Jogtudomány 441–465.

The reform of the private law regulations of hate speech therefore failed, partly because the legislator had not made the criteria of the 'radiation effect' strict enough. As a result, in 2008, new legislation was adopted, but instead of amending the Civil Code, a separate Act of Parliament was passed regarding the issue. However, the President of the Republic did not promulgate the legislation passed by Parliament[50] but sent it to the Constitutional Court due to constitutionality concerns.[51] The President's request pointed out that the 'radiation' of the injury of the community to the members of the community is very difficult to establish in practice. This method of regulation is particularly problematic due to the logical/theoretical foundations of law and constitutionality and so it is very rarely used in foreign legal systems, and even then it is subject to quite a few restrictions. The possibility of establishing 'radiation' depends primarily on the relationship between the group and its members: the relationship must be very strong to accept that an insult to the group violates the absolute/subjective rights of a member. The nature of this relationship depends also on the size of the group and how distinguishable it is. The smaller the group, the more distinguishable it is from non-members, which makes 'radiation' to group members more likely. The larger the group, the smaller is the impact of the insult on each member. According to the President of the Republic's position (developed on the basis of the relevant Constitutional Court decisions of 2008), if the legislator allows 'radiation', its application will only meet the criteria arising from the regulation of the right to human dignity if the individual continues to have personal autonomy in all phases of the procedure and may request the court to issue a judgement in his or her particular case.[52]

According to Constitutional Court decision no. 96/2008. (V. 17.) AB, the subjective/absolute right of the individual will only be violated if the person's relationship with the given community is such an integral part of the person's identity and integrity that the injury of the community 'radiates' to the member of the community. Radiation will only take place if the conduct is directed against an essential trait of the individual's personality. Only in such cases is it possible to apply a method under civil law that restricts the freedom of expression.

In earlier decisions, the Constitutional Court found that religious conviction and the status of belonging to a minority qualify as essential traits of a person's character.[53] A ruling of the

[50] 'A person shall violate the personality rights of members of the group if he/she shows a conduct before the wider public that insults a group defined by nationality or ethnic status, religious conviction or sexual orientation if the aim of the conduct is to trigger fear or humiliation, or it causes fear or humiliation. No sanctions may be imposed if the person is able to prove that, based on all the circumstances of the case, his/her conduct insulting the group has not been so serious that would result in a violation of the members' personality rights.' Act no. T/6219, Section 1.

[51] <http://public.mkab.hu/dev/dontesek.nsf/0/29B1F1B8D128815DC1257ADA00525508?OpenDocument> Last accessed at 14 November 2015.

[52] The President's petition is still pending before the Constitutional Court (in 2013). As the new President of the Republic failed to supplement the petition in connection with the bill's unconstitutionality under the Fundamental Law, the procedure will likely be closed without the Constitutional Court assessing the merits of the case.

[53] Religious conviction and minority status were qualified as essential and new character traits in Decision 4/1993. (II. 12.) AB and Decision 22/1997. (IV. 25.) AB, respectively.

Supreme Court also considered sexual orientation as an essential trait.[54] It can be concluded on the basis of international legal literature and Hungarian legal practice that the majority of human attributes may not be used to define such groups in which the attribute would establish a strong connection between the community and the individual.

I referred to it above that, in very limited cases, courts would be able to use the 'radiation' theory even under the currently effective text of the Civil Code to recognise the individual's right to make claims against conduct insulting the community. For this purpose, it would be sufficient to deduce that the general provision of personality rights in the Civil Code has such a constitutional content. From the aspect of the logical/theoretical foundations of the law, no separate rule is required for this, neither in Hungary nor abroad.

However, the courts have not shown any willingness to recognise the right of individuals to bring claims. In the interpretation process, courts should establish whether the particular filter between the community and a member of the community (as the personality of a person in its entirety is influenced to various degrees by him/her belonging to different communities and by the particular situation) can let through the injury suffered by the community in the circumstances on which the legal dispute is based and apply it to the individual and thus whether the violation of rights suffered by the community can be translated into a violation of the individual's rights. Section 2:54 of the Civil Code specifies the protected communities and may also guarantee the protection of the freedom of expression if only such conduct is penalised that is seriously offensive or unjustifiably insulting to vulnerable groups. The principle of radiation acts as a strong filter in this case.

When establishing the facts of the case, the court would be able to take into account that, in accordance with the above, the Hungarian nation may not be considered as a vulnerable group allowing any attack against the group to radiate to the individual, not even if the Hungarian nation is specified as a protected group by legislation.

5 Right of Self-Determination in the Lawsuit

In addition to the constitutional and civil law issues discussed above, there is another clear constitutionality concern in connection with Section 2:54 of the Civil Code.

Section 2:54(5) of the new Civil Code allows private individuals to enforce a claim against offenders in cases of hate speech: The new Civil Code's Section 2:54 (4) allows the prosecutor to bring a claim but in a way that, as an exception to the general rule, the prosecutor will be allowed to take action without the authorisation of the person otherwise entitled to take action.

[54] Ruling no. Pfv. IV.20687/2005/5. Cited in Kárpáti József, 'Az utolsó próbatétel: Ítélet a Háttér Társaság kontra Károli Egyetem ügyben. [The last trial: Judgement in the Háttér Társaság vs. Károli University case]' (2005) 3 Fundamentum 108.

> If the personality right violation is against public interest, the prosecutor may file a statement of claim with the approval of the person otherwise authorised to file a statement of claim, and may request the court to impose any sanction of the violation for which no fault need to be proven. The financial advantage gained as a result of the violation must be used for a cause of public interest on the basis of the prosecutor's statement of claim. In the event of a violation referred to in paragraph (5), this rule must be applied with the difference that the prosecutor may file a statement of claim within the statute of limitations period without the approval of a person otherwise authorised to file a statement of claim.

The Constitutional Court has examined, in a number of cases, the constitutionality of the prosecutor's participation in civil cases.[55] In connection with the litigants' right of disposal in the procedure, the Constitutional Court pointed out that it means that the litigants will be entitled to exercise the right of disposal freely concerning the litigant's substantive and procedural rights. The right of free disposal includes the right to make a claim and the right to waive it. Therefore, in an actio popularis case, the litigant's right of disposal is taken away, which puts the litigant's right of self-determination at risk because, save for a constitutionally justifiable exceptions, no one is allowed to enforce another person's right before court independently from that person's will.

Decision 96/2008. (VII. 16.) AB, which assessed the constitutionality of the hate speech regulations adopted in 2007, established that claims under personality rights may only be made in person due to the nature of such rights. For this reason, non-governmental organisations may not be authorised to decide on enforcing a claim in a personality right matter independently from the person whose right has been violated. It is part of the individual's right of self-determination to decide whether and to what extent he/she wishes to remedy the violation personally by taking legal action against the person responsible for the violation.

With regard to the limits defined by constitutional law, the new Civil Code only allows the prosecutor to take action in very limited circumstances. Section 2:54 (4) of the Civil Code only authorises the prosecutor to file a statement of claim if the personality right violation is against the public interest and, if this is the case, the approval of the person otherwise authorised to file a statement of claim is required.

However, the rules applicable to hate speech are different. The third sentence of Section 2:54 (4) of the Civil Code states that the prosecutor may file a statement of claim within the statute of limitations period without the approval of a person otherwise authorised to file a statement of claim. The statement of reasons in the amendment to the bill submitted before the bill was voted states the following:

> In the interest of the individual's right of self-determination, it must be guaranteed that the individual's consent is required for the prosecutor to initiate public interest litigation on the basis of the violation of rights suffered by the individual. With regard to the new deadline for enforcing the right as specified in Section 2:53 (5), the prosecutor's right to file a statement of claim needs to be regulated in the procedures under paragraph (5). However, with regard to this deadline, it must be regulated that the prosecutor is allowed to file a statement of claim without the affected person's approval beyond the thirty-day

[55] Decisions 9/1992. (I. 30.) AB, 1/1994. (I. 7.) AB and 20/1997. (III. 19.) AB.

deadline but within the statute of limitations period. Through this, the proposed amendment achieves the public interest objective that a collective violation of personality rights will not escape sanctions if no member of the community decides to enforce their rights within the thirty-day deadline. Collective personality right protection is only justifiable with regard to certain fundamental rights, otherwise the freedom of expression would be impaired.

There is one key difference between the prosecutor's claim and the individual's claim: the prosecutor may only request the court to impose sanctions for which no fault need to be proven,[56] which means that the prosecutor may not demand *solatium doloris* from the person responsible for the violation. It is a rational restriction: as the prosecutor does not enforce the claim of individuals, there is no violation for which the prosecutor would be entitled to compensation.

The regulation is self-contradictory and it may be impossible to resolve this. This is because the new Civil Code authorises the prosecutor to file a statement of claim with regard to hate speech not in the individual's place, 'representing' the individual, but in the name of the injured community. This is clearly expressed by the following sentence in the statement of reasons: '[t]he proposed amendment achieves the public interest objective that a collective violation of personality rights also violating public interest will not escape sanctions if no member of the community decides to enforce their rights within the thirty-day deadline.' This regulation is based on the principle that the violation of the right must be penalised, even if those affected by the violation choose not to take their case to court. It is a similar reasoning according to which the state must protect, in addition to individuals, the interests of society and the smaller communities within society through legislation, because hateful content is harmful for democratic processes and peaceful coexistence. If the prosecutor has an independent right to file a statement of claim, the prosecutor will be able to represent the interests of the community.[57]

However, as explained above, communities are not subjects/entities of private law, so it is impossible to handle injuries to communities (or, as the statement of reasons of the proposed amendment puts it, 'a collective violation of personality rights also violating public interest') under private law. The right to enforce a claim granted in this way is alien to private law from all conceivable aspects. The prosecutor enforces a claim in the name of another person; also, the person on whose behalf the prosecutor acts is not a recognised subject/entity of private law, and

[56] A person whose personality right has been violated, with regard to fact of the violation, within the statute of limitations period and depending on the circumstances of the case, may request the court to establish the fact of the violation, demand the violation to be discontinued and the person responsible for it to be prohibited from future violation, demand that the person responsible for the violation make amends and, if necessary, that the person responsible, at his/her own expense, make amends publicly; demand the termination of the unlawful situation and the restoration of the preceding situation by and at the expense of the person responsible, demand to have any property item created as a result of the violation destroyed or deprived of their violating nature, and demand the person responsible for the violation or his/her legal successor to transfer to the injured person the financial advantage gained as a result of the violation subject to the rules of unjust enrichment.

[57] According to András Sajó, '[a]lthough the state acts on behalf of another person to ensure the proper operation of the communication space, the Hungarian (and, for instance, the German) approach does not oppose this at all.' Sajó (n 1) 152.

therefore has no personality that may be violated. The objective to be reached is clear, but the selected method is erroneous from the aspect of the logical/theoretical foundations of the law. The correct approach would have been if the regulations on public interest litigation had been included in public law legislation instead of the Civil Code with regard to the public law nature of regulation.[58] This would also allow public law sanctions (reflecting the original objective of the action), such as a public interest fine, to be imposed on those expressing hate.[59]

IV The New Constitutional Framework of Section 2:54 (4) and (5) of the Civil Code

The Fourth Amendment to the Fundamental Law supplemented Article IX on the freedom of expression in an attempt to lay the constitutional foundations of a number of items in Section 2:54 of the Civil Code.[60] The Amendment, however, did not affect Article II on the right to human dignity, which declares that the subjects of this right are human beings, or Article I on the possibility of restricting fundamental rights, which states that rights (including the right to human dignity and the freedom of expression) may be restricted if the requirements of proportionality and necessity are met.[61]

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[58] Administrative law, for instance, would be more suitable for regulating this issue. Some legal scholars believe that, for instance, the Act on Equal Treatment would be suitable for incorporating anti-hate speech regulations. See Legény Krisztián, 'Szólásszabadság és tolerancia [Freedom of speech and tolerance]' (2004) 6 Belügyi Szemle 193; Kántás Péter, Fórika László, 'A közméltóság védelmében [Protecting public dignity]' http://jesz.ajk.elte.hu/kantas14.html.

[59] Pap András László, 'A polgári törvénykönyv esete a gyűlöletbeszéddel [The Civil Code's affair with hate speech]' (2007) 9 Beszélő 43.

[60] Following the Fourth Amendment, the following provisions comprise the constitutional environment of Section 2:54 of the Civil Code: 'Human dignity is inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.' (Article II of the Fundamental Law) 'The inviolable and inalienable fundamental rights of MAN shall be respected. It is the primary obligation of the State to protect these rights. Hungary recognises the fundamental individual and collective rights of man. The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the application of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right. Fundamental rights and obligations which by their nature apply not only to Man shall be guaranteed also for legal entities established by an Act.' (Article I of the Fundamental Law) 'Everyone shall have the right to freedom of speech. The right to freedom of speech may not be exercised with the aim of violating the human dignity of others. The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims, as provided for by an Act of Parliament, in court against the expression of an opinion which violates the community, invoking the violation of their human dignity.' (Article IX of the Fundamental Law) Another relevant provision is Section 5 of the Fundamental Law's closing and miscellaneous provisions, which declares that Constitutional Court rulings given prior to the entry into force of the Fundamental Law will no longer be effective. This provision is without prejudice to the legal effect of those rulings.

[61] The concept of inviolability, which was part of the Constitution in effect until 2012, never meant that what it referred to could not be restricted. See Gárdos-Orosz (n 39) 403–404.

However, the new paragraph (5) of Article IX of the Fundamental Law states that '[t]he right to freedom of speech may not be exercised with the aim of violating the human dignity of others.' Also, according to the Fundamental Law, the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic or religious community.

According to the relevant reasoning of the Fourth Amendment to the Fundamental Law, the proposed text's objective is to declare, at the level of the Fundamental Law, that human dignity may restrict the freedom of expression, and to lay the constitutional foundations for the possibility of penalising certain forms of hateful expressions by civil law means if the dignity of communities is violated. As it was not possible to combat hate speech effectively at the level of Acts of Parliament, it is justified to amend the Fundamental Law to this end. The proposed amendment's objective was to provide protection against communication violating the dignity of the listed communities.[62]

The *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary,*[63] edited by Gábor Halmai and Kim Lane Scheppele, includes a separate chapter evaluating this rule of the Fundamental Law. I concur with the following statements of the chapter: according to this opinion, one interpretation of the new rule of the Fundamental Law is that the amendment forms an exception, a lex specialis applicable to the assessment of restrictions on the freedom of expression and overriding the general limitation clause of Article I(3) of the Fundamental Law. However, the Amicus Brief claims that this would clearly run counter to practice recognised by international law. According to the author's opinion this is because the Fundamental Law permitted the necessary restriction earlier and therefore the only possible reason behind the amendment is to introduce a different standard, a lower protection to the freedom of expression than required based on the necessity and proportionality tests.

The Amicus Brief examines European examples and trends to conclude that the restriction of the freedom of expression to such extent in the interest of the Hungarian nation as a community is not acceptable in a democratic society, not even if the restriction is made through civil law means.[64]

To resolve the contradictions of the Fundamental Law, Imre Vörös recommended a solution that conforms to the theoretical/logical foundations of law and allows, through a loophole, a constitutional interpretation that meets European requirements to be reached.[65] In his opin-

[62] <http://www.parlament.hu/irom39/09929/09929.pdf> last accessed 14 November 2015.

[63] Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary. Authors: Miklós Bánkuti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, András László Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom and Renáta Uitz. Editors: Gábor Halmai, Kim Lane Scheppele, (2013) 3 Fundamentum. This particular chapter was written by Orsolya Salát. 31–37.

[64] Ibid 35.

[65] Vörös Imre, 'Vázlat az alapvető jogok természetéről az Alaptörvény negyedik és ötödik módosítása után (Az AB döntése, a Velencei Bizottság és az Európai Parlament állásfoglalásai) [About the Nature of Fundamental Rights after the Forth and the Fifth Amendment to the Fundamental Law]' (2013) 3 Fundamentum 61–64.

ion, a fundamental right is by definition a right with a special status and its essential content may not be restricted at all. The constitution, by incorporating a limitation standard specifying the framework of restricting fundamental rights by law, actually codifies the 'absolute, unrestricted standard' and all laws passed in connection with the fundamental right must be assessed on the basis of this standard. The special standard may not violate the general standard specified in the Fundamental Law, in contrast with the principle of civil law regulation, which is built on private autonomy. It is safe to conclude therefore that, for example, a rule affecting human dignity may not restrict the right to human dignity itself. If the content of the fundamental right understood to be part of the original standard is restricted in the Fundamental Law itself, there will be two contradictory standards in the Fundamental Law, and therefore the fundamental right will not be able to play its 'benchmark' role for legislation. According to Imre Vörös's paper, in such cases it is unclear whether the fundamental right should be understood with the content established with regard to the restriction standard of the Fundamental Law or with the content restricted by other provisions of the Fundamental Law, which makes the content of the fundamental right uncertain.[66]

Imre Vörös's conclusion is that the legislator in this way may remove from constitutional scrutiny any law regulating fundamental rights. Due to this irresolvable contradiction in the logic of law, the affected fundamental rights will not be able to serve their legal protection function in accordance with the requirement of legal certainty.

The content of Article IX (5) of the Fundamental Law is uncertain due to other provisions of the Fundamental Law, the general interpretation framework of the basic right and the obligations under international law based on Article Q of the Fundamental Law. As a result, Article IX (5) alone will not explain the constitutional content of Section 2:54 of the Civil Code. It is beyond doubt that Section 2:54 (4) and (5) need to be assessed within a new constitutionality framework and the existing practice of courts and the Constitutional Court must be re-evaluated. However, there is no clean slate, and the above prove that the freedom of expression and, naturally, the right to human dignity both have a core, an essential content and restriction standard that will not be changed in a democratic society, not even by the adopter of the constitution, the legislator or the courts.[67]

[66] The Fourth Amendment to the Fundamental Law includes a number of other examples to this phenomenon beyond the hate speech regulations. For instance, the new paragraphs (2) and (3) added to Article VII as a result of the amendment make the fundamental right conditional in a way that is likely to be incompatible with the restriction standard of Article I of the Fundamental Law. Similarly, the new paragraph (3) of Article IX concerning political advertisements during elections presumably restricts the same right in violation of the general restriction standard; the above fundamental right therefore will not apply to election law and a constitutionality review is impossible.

[67] Section 2.3 of the statement of reasons of Decision 143/2010. (VII. 14.) AB refers to this.

V Closing Remarks

I have described in the article what attempts at regulation in civil law had been made in the international and domestic regulatory environments before the Hungarian legislator decided to impose sanctions on hate speech within the framework of personality protection in the new Civil Code. I presented that this rule, alien to civil law at first glance, is indeed acceptable from the aspect of both civil law and constitutional law. However, it may only be accepted with significant interpretation constraints. One constraint is that communities do not have the right to dignity, which is only granted to individuals. As a result, imposing sanctions under civil law on hateful conduct is only possible if the conduct offending or insulting the community 'radiates' to the individual and takes the form of a violation of the person's subjective/absolute right. This is possible in very limited circumstances, but the principle of the radiation effect and its well-established criteria help in the identification of such circumstances.

In addition, the regulations in Section 2:54 of the Civil Code are unconstitutional for two reasons, despite the fact that the Fourth Amendment to the Fundamental Law was intended to lay a foundation for the interpretation of the Civil Code rules (albeit unsuccessfully in my opinion). In the paper, I argued that it is unacceptable that a member of the Hungarian nation may lodge a civil law claim in the event of a conduct insulting or offending the Hungarian nation because the restriction of the freedom of expression is not justifiable for the purpose of reaching a legitimate objective defined by the legislator in this particular case. I have shown that the rule in the regulations in question, allowing the prosecutor to file a claim, violates the constitutional requirements concerning the right to self-determination in litigation.

My objective in this paper was not to explore and describe the original intent of the legislator, the conduct of individuals will be determined primarily not by the text of the new law but by legal consciousness and the way the rule will be applied in judicial practice. [68] For these reasons, I attempted to identify, on the basis of an analysis of the relevant rules in the Fundamental Law, the narrow path of constitutional interpretation that meets other provisions of the constitution and the relevant international human rights standards. [69]

The judge is bound by the foundations of the existing legal system. From the aspect of basic principles, individual branches of law cannot be considered as completely separated. Judicial

[68] 'A law that primarily relies on the state's coercive measures is inefficient. [...] The purpose of the law is to provide a general norm or measure that members of society can adapt to in advance. This applies to the law, which is general in nature, and the decisions made in individual cases when the judges specified individual rules to apply in the given situation; these rules help us draw general conclusions about the interpretation of the law.' Szladits (n 34) 16.

[69] Could it be that the restrictive interpretation would simply mean in practice that a conduct that would otherwise qualify as incitement in criminal law would also generate a civil law clam that may be enforced in an adhesion procedure or a separate procedure? It is a consistent practice of criminal courts today that only compensation for the damage arising as a direct result of the criminal act may be claimed in the criminal procedure and compensation for damage arising as a consequence beyond the direct damage may not be enforced. (BH 1983. 148., BH 1985. 138., BH 1984. 439.) In an adhesion procedure, despite the above, the *solatium doloris* claim could not have been enforced despite the fact that incitement was established.

practice must define the boundaries of violations of the law that are seriously offensive and unreasonable in their manner of expression taking into account all arguments concerning the protection of minorities, the constitutional limitations of the freedom of expression and the true nature of anti-hate speech efforts, as such arguments may be used as a starting point in interpretation. If the interpretation is too broad or inconsistent, it may lead to a disproportionate restriction on the freedom of expression.

Tamás Szabados*

‘Precedents’ in EU Law – The Problem of Overruling

I Introduction

Legal precedent is a term strongly linked to Anglo-Saxon legal systems. The system of precedent ‘means that the judges make law in the course of resolving disputes between litigants’[1] and is a system where ‘the role of judicial decisions has not only been to apply but also define the legal rules.’[2] When the court has to decide a case, the judge ‘must always look back to see how previous judges have dealt with previous cases.’[3]

A fundamental element of the precedent system of English law is the doctrine of *stare decisis,* that is, the courts are bound by the decisions of the higher courts. In England, until 1966, even the House of Lords was bound by its own decisions.[4] What is binding from a decision is the *ratio decidendi.* The *ratio decidendi* must be distinguished from the *obiter dicta.* However, it is questionable what constitutes the *ratio decidendi.* It is described as the ‘necessary basis to the decision’[5] or the ‘reason for the decision’ which ‘constitutes the binding precedent.’[6] The *obiter* is the rest of the decision, the part of the decision which the judge stated without any obligation.[7] It may happen that a higher court does not accept the legal solution adopted by a lower court and overrules the principle established by the lower court.[8]

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1 PS Atiyah, Robert S. Summers, *Form and Substance in Anglo-American Law* (Clarendon 1987, Oxford) 115.

2 René David, John E. C. Brierley, *Major legal systems in the World Today* (3rd edn, Stevens 1985, London) 376.

3 Penny Darbyshire, *Eddey on the English Legal System* (5th edn, Sweet & Maxwell 1992, London) 159.

4 *London Tramways v London County Council* [1898] AC 375. Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. David Pugsley, ‘London Tramways (1898)’ in David Pugsley (ed), *Lawyers and Precedents* (Faculty of Law, University Exeter 2014, 38–50) 38ff; Darbyshire (n 3) 159–160; Eric Tjong Tjin Tai, Karlijn Teuben, ‘European Precedent Law’ (2008) 16 European Review of Private Law 827–841, 828ff.

5 David, Brierley (n 2) 379.

6 Darbyshire (n 3) 163.

7 David, Brierley (n 2) 379.

8 Darbyshire (n 3) 162.

These features of the common law system of precedent serve legal certainty. Legal certainty requires that court decisions must be predictable. Similar situations must be treated alike, unless a difference in the treatment is objectively justified. The uniformity of the application of law is thus a crucial element of legal certainty. Precedent reduces the courts' discretion[9] and 'is the guarantor of certainty and equality of treatment.'[10]

Though any overruling is seemingly against the demand for legal certainty, it may be necessary under certain circumstances. The social or economic circumstances or the legal environment may change, new demands arise or it may simply happen that the court gave a wrong judgment. Evolution of law or correction of erroneous judgments must be allowed. As Jaeger says, a legal system has to support a certain degree of uncertainty that is required for its development.[11]

Both the principle of legal certainty and equal treatment are recognised in European Union (the EU) law and is reflected in the practice of the Court of Justice of the European Union (the Court). In the vast majority of cases, the Court follows its own judgments and considers them applicable to future cases if the factual situation is similar or identical.

The development and the necessary adaptation of the case law of the Court are sometimes in conflict with the demand for legal certainty. The Court has therefore to strike a balance between legal certainty and changes frequently made necessary by the aims of integration.[12]

The aim of this paper is to analyse the nature of the case law of the Court and to examine the main reasons for eventual deviations from the previous decisions.

[9] Alec Stone Sweet, Margaret McCown, 'Discretion and Precedent' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Norstedts Juridik/Kluwer 2003, The Hague, 84–115) 85.

[10] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 Journal of International Dispute Settlement 5–23, 6.

[11] Marc Jaeger, 'Notion et politique du revirement. Propos intoductifs' in Eric Carpano (ed), *Le revirement de jurisprudence en droit européen* (Bruylant 2012, Brussels, 25–46) 25.

[12] Rostane Mehdi, 'Le revirement jurisprudentiel en droit communautaire' in *L'intégration européenne au XXIe siècle. En hommage à Jacques Bourrinet* (La documentation française 2004, Paris, 113–136) 114; Sweet, McCown (n 9) 85.

II Characteristics of the Case Law of the Court

Terminologically, we find certain signs that the Court's adjudication could be a system of precedent. The Advocate Generals and even sometimes the Court (at least in the English version of the decisions) use the term *'precedent'*,[13] *'stare decisis'*,[14] *'ratio decidendi'*[15] and *'obiter'*[16]. Although

[13] The use of the term 'precedent' in Advocate Generals' opinions and views: Case C-334/12 RX-II *Oscar Orlando Arango Jaramillo and Others v European Investment Bank (EIB)* (ECLI:EU:C:2012:733) View of AG Mengozzi, para 72; Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* (ECLI:EU:C:2012:663), Opinion of AG Cruz Villalón, paras 27 and 33; Case C-242/10 *Enel Produzione SpA v Autorità per l'energia elettrica e il gas* [2011] ECR I-13665, Opinion of AG Cruz Villalón, para 2; Case C-89/09 *European Commission v French Republic* [2010] ECR I-12941, Opinion of AG Mengozzi, paras 75–81; Case C-515/03 *Eichsfelder Schlachtbetrieb GmbH v Hauptzollamt Hamburg-Jonas* [2005] ECR I-7355, Opinion of AG Ruiz-Jarabo Colomer, para 2; Joined Cases C-80/99, C-81/99 and C-82/99 *Ernst-Otto Flemmer* (C-80/99) *and Renate Christoffel* (C-81/99) *v Council of the European Union and Commission of the European Communities, represented by: Bundesanstalt für Landwirtschaft und Ernährung and Marike Leitensdorfer* (C-82/99) *v Bundesanstalt für Landwirtschaft und Ernährung* [2001] ECR I-7211, Opinion of AG Tizzano, para 34; Case C-107/76 *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, Opinion of AG Capotorti, para 4.
Judgments of the Court and the General Court (CFI): Case C-334/12 RX-II *Oscar Orlando Arango Jaramillo and Others v European Investment Bank (EIB)* (ECLI:EU:C:2013:134), para 50; C-197/09 RX-II *M v European Medicines Agency (EMEA)* [2009] ECR I-12033, para 62; Case T-336/07 *Telefónica, SA and Telefónica de España, SA v European Commission* ECR, (ECLI:EU:T:2012:172), paras 361, 364, 432.

[14] Case 112/76 *Renato Manzoni v Fonds national de retraite des ouvriers mineurs* [1977] ECR 1647, Opinion of AG Warner, p. 1662; Joined cases C-267/95 and C-268/95 *Merck & Co. Inc., Merck Sharp & Dohme Ltd and Merck Sharp & Dohme International Services BV v Primecrown Ltd, Ketan Himatlal Mehta, Bharat Himatlal Mehta and Necessity Supplies Ltd and Beecham Group plc v Europharm of Worthing Ltd* [1996] I-6285, Opinion of AG Fennelly, para 139; Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola, para 36.

[15] Case 112/76 *Renato Manzoni v Fonds national de retraite des ouvriers mineurs* [1977] ECR 1647, Opinion of AG Warner, p. 1662; Case 130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* [1980] ECR 1887, Opinion of AG Capotorti, para 2; Case C-254/95 P *European Parliament v Angelo Innamorati* [1996] ECR I-3423, Opinion of AG Fennelly, para 33; Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola, para 36; Case C-443/11 *F. P. Jeltes and Others v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (ECLI:EU:C:2013:6), Opinion of AG Mengozzi, the title of point IV. A 1. is 'Miethe and its ratio decidendi'.
In the case law of the Court: Case C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) SA* (C-442/03 P) *and Diputación Foral de Vizcaya (C-471/03 P) v Commission of the European Communities* [2006] I-4845, para 44.
In the case law of the CFI: Case T-404/06 P *European Training Foundation (ETF) v Pia Landgren* [2009] ECR II-2841, para 216.

[16] Case C-107/76 *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, Opinion of AG Capotorti, para 4; Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola, para 36; Case C-170/11 *Maurice Robert Josse Marie Ghislain Lippens and Others v Hendrikus Cornelis Kortekaas and Others* (ECLI:EU:C:2012:311), Opinion of AG Jääskinen, para 36; Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others* (ECLI:EU:C:2012:11), Opinion of AG Kokott, para 184; Case C-235/09 *DHL Express France SAS v Chronopost SA* [2011] I-2801, Opinion of AG Cruz Villalón, para 57; Case C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949, Opinion of AG Kokott, para 135.
In the case law of the Court: Case C-352/09 P *ThyssenKrupp Nirosta GmbH v European Commission* [2011] ECR I-2359, para 132.

we can find terms used in Anglo-Saxon laws in the texts of the Court's decisions, this is only the semblance. The use of the common law terminology does not turn the Court's case law into a system of precedent as exists in Anglo-Saxon laws.[17]

The Court does not really deal with the nature and characteristics of its case law. This task tends to be left to scholars and the Advocates General of the Court. The eventual presence of the *stare decisis* doctrine in the Court's case law and the binding force of the Court's decisions have been discussed by several Advocates General. AG Fennelly's opinion in the *Merck v Primecrown* case analyses in detail whether and when the Court may deviate from a previous ruling. He held that 'as a matter of principle, the Court is of course not bound by its own previous judgments', since the doctrine of precedent or *stare decisis* is not followed as in the UK or in Ireland.[18] He added that 'it is none the less obvious that the Court should, as a matter of practice, follow its previous case-law except where there are strong reasons for not so doing.'[19] The Court may reconsider an earlier decision if there is 'strong evidence that this was wholly or partially incorrectly decided.'[20] As AG Lagrange put, 'the Court of Justice should [...] remain free when giving its future judgment... no one will expect that, having given a leading judgment [...] the Court will depart from it in another action without strong reasons, but it should retain the legal right to do so.'[21] It is the Court's responsibility 'to confront the realities of the situation with the legal rule in each action, which can lead it in appropriate cases to recognize its errors in the light of new facts, of new arguments or even of a spontaneous rethinking…'[22] According to AG Trstenjak, 'the binding authority of precedent is not an inherent feature of the Union's judicial system. Although, in the interest of legal certainty and the uniform interpretation of Community law, the Community Courts endeavour in principle to give a coherent interpretation to the law, the general structure of both the Community legal order and the judicial system means that the Community Courts are not bound by their previous decisions.'[23]

In the view of AG Maduro:

> The Court has always shown itself to be circumspect with regard to reversing an interpretation of the law given in earlier judgments. Without determining whether those judgments constituted legal precedents the Court has always shown deference to a line of well-established case-law. The force awarded by the Court to judgments it has delivered in the past may be considered to derive from the need to secure the values of cohesion, uniformity and legal certainty inherent in any system of law… Even

In the practice of the CFI: Case T-224/00 *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* [2003] ECR II-2597, para 200.

17 Jan Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 American Journal of Comparative Law 149–171, 162.

18 *Merck v Primecrown,* Opinion of AG Fennelly, para 139.

19 *Merck v Primecrown,* Opinion of AG Fennelly, para 142.

20 *Merck v Primecrown,* Opinion of AG Fennelly, para 143.

21 Joined cases 28-30/62 Da *Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* English special edition ECR 31, Opinion of AG Lagrange, point II. p. 42.

22 *Da Costa,* Opinion of AG Lagrange, p. 42.

23 Case C-331/05 P *Internationaler Hilfsfonds eV v Commission of the European Communities* [2007] ECR I-5475, Opinion of AG Trstenjak, para 85.

> though the Court is not formally bound by its own judgments, by the deference it shows them it recognises the importance of the stability of its case-law for its interpretative authority and helps to protect uniformity, cohesion and legal certainty within the Community legal system.[24]

AG La Pergola stated that 'the rule stare decisis has not been incorporated in the Community judicial system' and added that '...the Court is not technically bound by its earlier judgments, and may therefore [...] give a different answer to a preliminary question dealt with in an earlier decision, if such a result is justified by new matters brought to its attention in the later proceedings.'[25]

In its decisions, the Court refers back to its previous rulings, but the reference to and the application of former cases in the Court's adjudication is not supported by any reasoning or theory established in the Court's decisions.[26] The Treaties do not mention that the Court should follow its earlier decisions and this neither follows from the Statute of the Court of Justice of the European Union (the Statute) or the Rules of Procedure of the Court of Justice (the Rules of Procedure). Consequently, the Court's case law does not constitute a precedent system in the sense applied in Anglo-Saxon laws. Still, in its judgments, the Court often refers to the 'well established case law': in most of the cases, the decisions of the Court refer back explicitly to those earlier decisions that support the conclusion of the given case or from which the case must be distinguished.[27] It must be noted that the reference to previous decisions is selective. In a field, where there is a large number of decisions, the Court usually refers back only to some of its rulings and on other occasions it also happens that the Court makes reference to those cases that support its conclusion, leaving aside the contrary decisions.[28] Furthermore, the Court encourages counsels to include relevant references to the case law of the Court in their pleadings.[29] Similarly, in their opinions, the Advocates General seek for previous

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[24] Joined cases C-94/04 and C-202/04 C-94/04 *Federico Cipolla v Rosaria Fazari, née Portolese* (C-94/04) *and Stefano Macrino and Claudia Capoparte v Roberto Meloni* (C-202/04) [2006] ECR I-11421, Opinion of AG Poiares Maduro, para 28.

[25] *Sürül*, Opinion of AG La Pergola, para 36.

[26] Virág Kovács, 'Precedensjog az Európai Bíróság gyakorlatában' [Legal precedent in the practice of the European Court of Justice] (2000) 4 Jogelméleti Szemle, point 1 (A precedens a közösségi jogrendszerben) <http://jesz.ajk.elte.hu/kovacs4.html> accessed 1 August 2015.

[27] Katja Langenbucher, 'Argument by Analogy in European Law' (1998) 57 Cambridge Law Journal 481–521, 507; László Kecskés, *EU-jog és jogharmonizáció* [EU-law and legal harmonisation] (HVG-ORAC 2005, Budapest) 443; Sándor Vida, '"Precedensek" az EU Bírósága gyakorlatában' [Precedents in the practice of the Court of Justice of the EU] (2013) 68 Jogtudományi Közlöny 53–58, 53.

[28] Henry G Schermers, Denis Waelbroeck, *Judicial Protection in the European Communities* (5th edn, Kluwer 1992, Deventer, Boston) 97; Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, Oxford University Press 2006, Oxford) 628.

[29] Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities (February 2009), 19 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf> accessed 1 August 2015; Kovács (n 26) point 1 (A precedens a közösségi jogrendszerben).

decisions of the Court applicable to the case and, in the absence of such a decision, they state that 'there is no precedent for the present case'[30] or 'the questions referred for a preliminary ruling are without precedent.'[31]

However, the Court is not bound by its previous decisions.[32] The Court may reconsider a previous decision if it finds it subsequently erroneous or otherwise not appropriate.

Nevertheless, legal certainty requires a consistent and clear case law. Although the case law of the Court does not constitute a precedent system in a formal sense, deviations from the 'well established case law' are rare.

III The Relation between the Court, the General Court and the Civil Service Tribunal in Terms of Legal Precedents

The Court's decisions may not only be examined horizontally in terms of their binding force in a subsequent case, but also in the vertical relationship with the other forums having a subordinated role within the EU court system, namely the General Court and the Civil Service Tribunal.[33]

[30] Case C-547/10 P *Confédération suisse v European Commission* (ECLI:EU:C:2012:565), Opinion of AG Jääskinen, para 37.

[31] Case C-522/10 *Doris Reichel-Albert v Deutsche Rentenversicherung Nordbayern* (ECLI:EU:C:2012:114), Opinion of AG Jääskinen, para 3. Similarly: Case C-488/10 *Celaya Emparanza y Galdos Internacional SA v Proyectos Integrales de Balizamientos SL* (ECLI:EU:C:2011:714), Opinion of AG Mengozzi, para 18; Case C-274/10 *European Commission v Republic of Hungary* [2011] ECR I-7289, Opinion of AG Bot, para 59; Joined cases C-89/10 and C-96/10 *Q-Beef NV (C-89/10) v Belgische Staat and Frans Bosschaert (C-96/10) v Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV* [2011] ECR I-7819, Opinion of AG Jääskinen, para 3; Case C-362/09 P *Athinaiki Techniki AE v European Commission* [2010] I-13275, Opinion of AG Bot, para 75.

[32] John J. Barceló, 'Precedent in European Community Law' in D. Neil MacCormick, Robert S. Summers (eds), *Interpreting Precedents – A comparative study* (Aldershot 1997, Ashgate/Dartmouth, 407–436) 420; Anthony Arnull, 'Interpretation and Precedent in European Community Law' in Mads Andenas, Francis Jacobs, *European Community Law in the English Courts* (Clarendon Press 1998, Oxford, 115–136) 125; Ami Barav, 'The European Court of Justice and the Use of Judicial Discretion' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Norstedts Juridik/Kluwer 2003, The Hague, 116–149) 142; Langenbucher (n 27) 507; Kecskés (n 27) 442; Arnull, *The European Union and its Court of Justice* (n 28) 627; Vida (n 27) 53; Tjong Tjin Tai, Teuben (n 4) 8.

[33] Kieran Bradley, 'Vertical Precedent at the Court of Justice of the European Union: When Push Comes to Shove' in Kieran Bradley, Noel Travers, Anthony Whelan (eds), *Liber Amicorum in Honour of Nial Fenelly* (Hart 2014, Oxford, 47–65) 48.

1 The Court and the General Court

The General Court (formerly the Court of First Instance, CFI) is bound neither by its own decisions nor by the judgments of the Court,[34] therefore the *stare decisis* principle does not even apply at this level. The decisions of the hierarchically higher superior Court do not bind the General Court.[35] Still, the General Court regularly refers to and follows the decisions of the Court.[36] As AG Trstenjak explained, 'the Court of First Instance cannot be barred from distancing itself from an earlier decision. This is self-evident, since otherwise, if it were bound strictly by an earlier judgment, an appeal to the Court of Justice would be redundant... On those grounds a plea in law cannot be based on a departure by the Court of First Instance from an earlier judgment alone.'[37] In another opinion, AG Trstenjak remarked that it is not an error of law that may be challenged before the Court if the CFI does not make reference to a legal precedent.[38]

However, the decisions of the General Court may be challenged by appeal before the Court on points of law.[39] According to the first paragraph of Article 61 of the Statute, 'if the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.'

Since the General Court usually does not wish to risk its decision being set aside, the General Court rarely deviates from the decisions of the Court.[40] Pursuant to the second paragraph of Article 61 of the Statute, if on appeal the Court quashes the decision of the General Court and refers back the case to it, the General Court is bound by the decision of the Court on points of law. Another instance where the General Court is bound by a decision of the Court is if the Court finds that an action falls within the jurisdiction of the General Court: it shall refer that action to the General Court, whereupon the General Court may not decline jurisdiction.[41] Moreover, if in a review procedure the Court finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court.[42]

Nevertheless, the General Court is free to deviate from an earlier decision of the Court and induce the Court to change its previous approach on appeal confirming the position of the General Court.[43]

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[34] Neville L. Brown, Tom Kennedy, *The Court of Justice of the European Communities* (4th edn, Sweet & Maxwell 1994, London) 350; Barceló (n 32) 421.
[35] Arnull, Interpretation and Precedent in European Community Law (n 32) 130.
[36] Arnull, Interpretation and Precedent in European Community Law (n 32) 130.
[37] *Internationaler Hilfsfonds,* Opinion of AG Trstenjak, paras 86 and 87.
[38] Case C-414/08 P *Sviluppo Italia Basilicata SpA v European Commission* [2010] I-2559, Opinion of AG Trstenjak, para 127.
[39] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 256(1); Statute of the Court of Justice of the European Union (Statute) art 56.
[40] Kovács (n 26) point 4. (Egyszerű illusztrációként felhívott precedensek).
[41] Statute art 54(2).
[42] Statute art 62b.
[43] Langenbucher (n 27) 508.

Article 256 of the Treaty on the Functioning of the European Union (the TFEU) and Article 62 of the Statute are also worthy of mention in terms of the relation between the Court and the General Court.

Pursuant to the first paragraph of Article 62 of the Statute:

> In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court.

The second paragraph of Article 256 TFEU refers to cases where the General Court hears actions brought against decisions of the specialised courts (now only the Civil Service Tribunal), while the third paragraph of Article 256 TFEU bases the jurisdiction of the General Court to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute.

In *NMB II,* the CFI itself held that it 'is only bound by the judgments of the Court of Justice, first, in the circumstances laid down in the second paragraph of Article 54 of the Statute of the Court of Justice of the European Community,[44] and, secondly, pursuant to the principle of *res judicata*.'[45]

The complex relationship between the Court and General Court in terms of legal precedents may be illustrated by the *Jégo-Quéré* case,[46] where the interpretation and reconsideration of the Plaumann test was at stake. In the *Plaumann* case, the Court interpreted the conditions of the standing of private persons in relation to annulment actions.[47] Within the meaning of Article 173 of the Treaty establishing European Economic Community (EEC Treaty), 'any natural or legal persons may [...] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.' The question was how to interpret the 'direct and individual concern' condition. In the *Plaumann* case, the Court held that 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'[48] In *Plaumann,* a clementine importer company claimed for the annulment of a decision of the Commission rejecting the request of Germany to apply a lower customs tariff for fresh clementines imported from third countries. The Court rejected the importer's claim and

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[44] See now Statute art 61(2) discussed above.

[45] Case T-162/94 *NMB France SARL, NMB-Minebea-GmbH, NMB UK Ltd and NMB Italia Srl v Commission of the European Communities* [1996] ECR II-427, para 36. Arnull, *The European Union and its Court of Justice* (n 28) 635–637.

[46] Case T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-2365.

[47] Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* English special edition ECR 95.

[48] *Plaumann,* p. 107.

concluded that the clementine importer company was affected by reason of its commercial activity, which may be practised by anyone, and this is not sufficient to distinguish it as it would if it were the addressee of a decision. In *Jégo-Quéré,* the CFI reviewed the Plaumann test as to the meaning of 'individual concern'.[49] Jégo-Quéré, a fishing company, challenged Commission Regulation (EC) No 1162/2001 establishing measures for the recovery of the stock of hake adopted for the conservation of threatened fish stocks.[50] The Regulation aimed at controlling the fishing activity and techniques applied in certain areas. According to the CFI's interpretation, 'a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.'[51] Rejecting the CFI's definition, the Court accepted the Commission's appeal against the CFI's decision and confirmed the interpretation of the condition of 'individual concern' as set out in the *Plaumann* case.

This case shows that the General Court (earlier the CFI) is sometimes inclined to change the Court's practice. Notwithstanding this, in the *Kadi II* case, the General Court held that it 'considers that in principle it falls not to it but to the Court of Justice to reverse precedent in that way, if it were to consider this to be justified…'[52] Thus, although the General Court is only exceptionally bound by the decisions of the Court, it follows the Court's practice in principle. Nevertheless, by a decision adopting a solution other than those applied previously by the Court, the General Court has the possibility to call the Court for the reconsideration of its earlier case law.

2 The Civil Service Tribunal

Almost the same may be said about the Civil Service Tribunal. The Civil Service Tribunal is not formally bound by the decisions of the Court or the General Court (except regarding the reference back on appeal), but the possibility of appeal to the General Court makes deviations rare. An appeal may be brought before the General Court against final decisions of the Civil Service Tribunal and decisions of that Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility.[53] Article 13 of Annex I of the Statute provides that 'if the appeal is well founded, the General Court shall quash the decision of the Civil Service Tribunal and itself give judgment in the matter. It shall refer the case back to the Civil Service Tribunal for judgment where the state of the proceedings does not permit a decision by the Court. Where a case is referred back to the Civil Service Tribunal, the Tribunal shall be bound by the decision of the General Court on points of law.'

[49] See Eric Carpano, 'Autopsie d'un revirement avorté: retour sur la saga Jégo-Quéré / Unión de Pequeños Agricultores' in Eric Carpano (ed), *Le revirement de jurisprudence en droit européen* (Bruylant 2012, Brussels, 181–208) 181ff.

[50] Commission Regulation (EC) 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII *a, b, d, e* and associated conditions for the control of activities of fishing vessels [2001] OJ L159/4.

[51] *Jégo-Quéré,* para 51.

[52] Case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECR II-5177, para 123.

[53] Statute – Annex I. – The European Union Civil Service Tribunal art 9; see also TFEU art 257.

IV A Multi-Layered Precedent System

1 The Court and National Courts

In terms of the relationship between the Court and the courts of the Member States, two aspects are to be examined: the effect of the Court's rulings on the courts of the Member States and the effects of the decisions of the courts of the Member States on the other courts of the same or another Member State in matters relevant from the perspective of EU law.

Where the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union seems necessary before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling thereon under 267 TFEU.[54] Where any such question is raised in a case pending before a court or tribunal of last instance against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court.[55]

The Court's decision given in a preliminary reference procedure binds the referring court, but the decision has a wider effect: it has an impact on the courts of the same or other Member States facing an identical or similar factual situation and legal problem. According to AG Warner, the doctrine of *stare decisis* 'means that all Courts throughout the Community, with the exception of this Court itself, are bound by the *ratio decidendi* of' the Court's judgment.[56]

National courts (even of last instance) are not obliged to refer all cases to the Court. In *Da Costa,* the Court stated that 'the authority of an interpretation under Article 177 [now Article 267 TFEU – *added by the author*] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'[57] In the *CILFIT* judgment, the Court went further and extended this to situations 'where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.' The approach of the *CILFIT* judgment is underlined by the 'expectation that the Court will seek consistency in its judgments'.[58] Finally, in an *acte clair* situation, where the interpretation of EU law is obvious, the national court can decide not to refer the case and may decide itself based on the previous rulings of the Court.[59] These statements entail that the Court's decisions will also govern future situations arising before national courts, where the factual situation is identical or similar. Unless the Court finds its previous decision wrong, it will follow its ruling in later cases that are identical or similar.[60] The

[54] TFEU art 267(1).
[55] TFEU art 267(2).
[56] *Manzoni,* Opinion of AG Warner, p. 1662.
[57] *Da Costa,* p. 38.
[58] *Merck v Primecrown*, Opinion of AG Fennelly, para 142.
[59] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 16.
[60] Brown, Kennedy (n 34) 345.

Rules of Procedure provide that where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case law or where the answer to the question referred for a preliminary ruling admits no reasonable doubt, the Court may decide to rule by reasoned order.[61]

Nevertheless, in all these cases, a court may still decide to turn to the Court with a preliminary reference if it finds this necessary.[62] This may be a vehicle for the courts of the Member States to call the attention of the Court to possible conflicts or uncertainties in the case law and suggest the reversal of the Court's practice.[63] From another perspective, a preliminary ruling may oblige national courts to change their previous practice if the national rules or their interpretation were not in accordance with EU law.[64]

Many times, national courts do not refer a case to the Court, since they are not courts of last instance or they consider the case obvious or already settled by the Court and thus they decide the case themselves. It may also happen that a court considers the case purely national. The reticence of national courts to request preliminary ruling gives rise to a particular layer of EU law. If a national court decides a case concerning EU law, it is possible that other courts in the same Member State will follow that decision without a preliminary reference procedure. This constitutes national EU-law material. The question may be posed whether the decisions of the courts of the Member States on EU law have binding force on the other courts of the same Member State. If a higher court decides a case on EU law, a court of lower instance is not bound by this decision and may still request a preliminary ruling to the Court.[65] As far as the effect of decisions of the courts of other Member States on EU law are concerned, although the impact of such rulings is limited primarily by linguistic and cultural reasons, these decisions do not even have a legally binding force in another Member State; instead they may have at most a persuasive force.[66] The loyalty clause of the Treaty on European Union (the TEU) may be interpreted so that if a national court realises that in the same matter different line of adjudication developed in the same or in different countries, the court is obliged to request a preliminary ruling from the Court.[67]

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[61] Rules of Procedure art 99. Arnull, Interpretation and Precedent in European Community Law (n 32) 127.

[62] *Da Costa,* p. 38; *CILFIT,* para 15.

[63] Kecskés (n 27) 442; John Temple Lang, 'Precedents and Judicial Dialogue in European Union Law, Present and Future' in Carl Baudenbacher, Simon Plauzer (eds), *International Dispute Resolution. Volume 3. – The Role of Precedent* (German Law Publishers 2011, Stuttgart, 141–174) 163.

[64] Pascale Deumier, 'Le revirement de jurisprudence en questions' in Eric Carpano (ed), *Le revirement de jurisprudence en droit européen* (Bruylant 2012, Brussels, 49–68) 55.

[65] Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33. Brown, Kennedy (n 34) 354; Arnull, Interpretation and Precedent in European Community Law (n 32) 135–136.

[66] Brown, Kennedy (n 34) 355–356.

[67] TEU art 4(3); Temple Lang (n 63) 163. It must be noted that in practice the financial, human and linguistic resources of national courts are limited, so they are unable to take into account the practice of other Member States appropriately.

2 The Court and the European Court of Human Rights

The European Court of Human Rights created its own case law under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).[68] The Court had regard to the developments of the case law of the European Court of Human Rights and often cited in its decisions. In its practice, the Court's decisions have been in line with the decisions of the European Court of Human Rights.[69] From the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights (the Charter) became binding.

According to Article 52 (3) of the Charter:

> 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.

Article 53 of the Charter provides that:

> 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 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.

These provisions also entail that the Court cannot interpret rules on the protection of human rights more restrictively than according to the decisions of the European Court of Human Rights. When interpreting the Charter, it may happen more frequently in the future that the Court has to adapt its own case law to the developments of the adjudication of the European Court of Human Rights.[70]

By the Court's former case law and now by the binding provisions of the Charter, the precedent law of the European Court of Human Rights is in essence built into the practice of the Court.

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[68] *Convention for the Protection of Human Rights and Fundamental Freedoms,* signed 4 September 1950, 213 UNTS 222 (entered into force 3 September 1953). Yonatan Lupu, Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 British Journal of Political Science 413–439, 413ff; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law' (2009) 9 Human Rights Law Review 179–201, 179ff.

[69] For an exception, see Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859, paras 17–18 and *Niemietz v. Germany,* no. 13710/88, 16 December 1992, §§ 27–33, Series A251-B.

[70] Temple Lang (n 63) 156 and 159.

3 The Court and the EFTA Court

The Court also takes into account the case law of the EFTA Court. In some cases, it made references to the decisions of the EFTA Court.[71] In *Bellio F.lli,* the Court held that 'both the Court and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly.'[72]

V Overruling in the Case Law of the Court

The notion of overruling will be construed here as to refer to cases where the Court changes its view and give a different answer to a materially identical or very similar situation. It is not intended to address cases where the Court distinguishes a given case on the grounds of the factual circumstances (and accordingly give a different answer) or where the Court reaffirms a previous ruling and it simply changes the reasoning or supplements its arguments. Jaeger distinguishes between overruling *(revirement)* and innovation, where the first necessarily involves a break with earlier decisions, a change to a former solution, while the latter means only the addition of new reasons, more precision or a variation of the earlier solution.[73] Although this distinction is in substance right, it cannot be denied that an overruling may involve innovation.

The overruling of previous judgments may be necessary as an answer to errors committed in adjudication or to social and economic changes. AG Poiares Maduro stated that:

> It is true that stability is not and should not be an absolute value. The Court has also recognised the importance of adapting its case-law in order to take account of changes that have taken place in other areas of the legal system or in the social context in which the rules apply. It has also accepted that the appearance of new factors may justify adaptation or even review of its case-law.[74]

As AG Trstenjak set out 'the Court of Justice had to be put in a position to depart from its previous case-law if necessary and to steer developing Community law in a different direction.'[75] AG Jacobs went further in the *HAG II* case, stating that:

> The Court has consistently recognized its power to depart from previous decisions, as for example by making it clear that national courts may refer again questions on which the Court has already ruled. […] That the Court should in appropriate case expressly overrule an earlier decision is I think an inescapable duty...[76]

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[71] See for example Case C-192/01 *Commission of the European Communities v Kingdom of Denmark* [2003] ECR I-9693, paras 47, 49–53.

[72] C-286/02 *Bellio F.lli Srl v Prefettura di Treviso* [2004] ECR I-3465, para 34 cited by Temple Lang (n 63) 159 (fn. 43).

[73] Jaeger (n 11) 28.

[74] *Cipolla*, Opinion of AG Maduro, para 29.

[75] *Internationaler Hilfsfonds*, Opinion of AG Trstenjak, para 85.

[76] Case C-10/89 *SA CNL-SUCAL NV v HAG GF AG* [1990] ECR I-3711 (HAG II), Opinion of AG Jacobs, para 67.

In practice, the Court deviates from its previous decisions with relative restraint: the number of overrulings is not too high in its history of sixty years.

1 Form of Overruling

The identification of those decisions where the Court reverses its previous case law, is difficult, because the Court does not necessarily call the attention of the readers of its decisions to the deviation. If the Court deviates from its earlier case law, it rarely does it explicitly. In his opinion related to the *HAG II* decision delivered in 1990, AG Jacobs noted that 'the Court should in an appropriate case *expressly* overrule an earlier decision [...], even if the Court has never before expressly done so.'[77] *[italics added].* He stressed that 'the Court should [...] make it clear, in the interests of legal certainty, that it is abandoning the doctrine of common origin laid down in *HAG I*.'[78]

The problem also arises that sometimes the Court does not make it clear which earlier decisions have been overruled and which have not, as the effect of a new decision of the Court. For instance, the *Keck* judgment was criticised by several authors because it did not expressly list the cases overruled by the Court.[79] In other cases, the Court explicitly identifies the case to be overruled. Thus, in *Brown,* the Court overruled the interpretation of Directive 76/207/EEC given in the *Larsson* case,[80] to which it expressly referred in its judgment, in order to grant protection against dismissal for pregnant women who are unable to work at any time during the pregnancy because of illness resulting from the pregnancy.[81]

2 Reasons for Overruling in the Court's Case Law

It is difficult to classify the cases where the Court reversed its earlier line of case law. The reasons for overruling may be manifold. It may happen that the Court finds its earlier decisions inappropriate under the new circumstances or it wishes to restrict an unintended or unforeseen interpretation of the case law. The policy of overruling is not predefined.[82] Changes may be progressive or regressive.[83] In a progressive change, as Mehdi put it, the creative force of the Court is demonstrated.[84] However, this is not always the case. Sometimes a more restrictive approach, which leads to the alteration of an earlier line of decisions, seems more acceptable for the Court.

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77 *HAG II*, Opinion of AG Jacobs, para 67.
78 *HAG II*, Opinion of AG Jacobs, para 67.
79 Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] I-6097. Arnull, Interpretation and Precedent in European Community Law (n 32) 129; Arnull, *The European Union and its Court of Justice* (n 28) 630.
80 Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1997] ECR I-2757.
81 Case C-394/96 *Mary Brown v Rentokil Ltd* [1998] ECR I-4185 para 27. Arnull, *The European Union and its Court of Justice* (n 28) 630.
82 Jaeger (n 11) 27.
83 Jaeger (n 11) 33
84 Mehdi (n 12) 115.

a) Narrowing the interpretation of the previous case law

In the famous *Keck* case, the question was whether the French provision prohibiting resale at a loss is in conformity with the free movement of goods. Two French supermarket managers, who were prosecuted for selling certain products below their purchase price, argued that the French prohibition is a measure having equivalent effect in accordance with the previous *Dassonville* judgment.[85] In *Dassonville*, the Court stated that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'[86] The Court expressly noted that 'in view of the increasing tendency of traders to invoke Article 30 of the Treaty [now Article 34 TFEU – *added by the author*] as a means of challenging any rules whose effect is to limit their commercial freedom [...], the Court considers it necessary to re-examine and clarify its case-law on this matter.'[87]

Here, the reason for the deviation from the earlier case law has been that, in practice, parties interpreted the *Dassonville* judgment too broadly. Hence, the Court distinguished between rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling and packaging) and national provisions restricting or prohibiting certain selling arrangements. The former constitute measures of equivalent effect falling under the scope of application of the current Article 34, while the latter do not.[88] The Court itself indicated the deviation by the 'contrary to what has previously been decided' wording concluding that selling arrangements do not fall under Article 30 EEC Treaty.[89]

It is interesting that, in his opinion on one of the Sunday trading cases, AG van Gerven advocated a more cautious application of Article 30 EEC Treaty and a possible deviation from *Dassonville*.[90] In that case, the Court upheld the consequent application of the *Dassonville* decision. In *Keck,* AG van Gerven in turn did not wish to deviate from *Dassonville* and took it as a point of departure. In his opinion, he called attention to the need for the Court to adhere to its previous judgment:

> I will thus assume from now on that the broad Dassonville formula still remains the cornerstone of the Court's case-law concerning the sphere of application of Article 30 of the EEC Treaty. In order to avoid any confusion, I think that the Court owes a duty to the national courts to make this quite clear.[91]

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[85] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.
[86] *Dassonville,* para 5.
[87] *Keck,* para 14.
[88] *Keck,* paras 15–16.
[89] *Keck,* para 16.
[90] Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Opinion of Advocate General Van Gerven.
[91] *Keck,* Opinion of AG van Gerven, para 8.

The reason of its reconsideration might have also been that in *Dassonville* the Court gave a too general definition of measures having an equivalent effect.[92] In *Keck,* the Court limited this too broad definition. In relation to the *Keck* judgment, AG Maduro remarked that 'the Court took into consideration the consequences of its earlier case-law in the social context of the relevant rules and the legal systems responsible for applying them' and this led to the reversal of the previous case law.[93]

The Court touched several times upon the issue of whether the free movement of goods provisions bind private persons. In *Dansk Supermarked v Imerco,* the issue was that Imerco ordered china services from a UK company subject to the condition that the latter company may not sell them in the Scandinavian countries.[94] Dansk Supermarked, a Danish company, still obtained such products through a Danish reseller and put them on market. The Court held that individuals cannot derogate from the mandatory provisions on the free movement of goods and that a prohibition on the importation into a Member State of products lawfully marketed in another Member State under a private agreement may not qualify the importation of those products as improper or unfair commercial practice.[95] This implies that the Court assessed on the merits an agreement between private parties under the provisions on the free movement of goods. Subsequently, in *Vlaamse*, the Court declared that Article 30 EEC Treaty 'concern only public measures and not the conduct of undertakings.'[96] Here, the Court did not make any reference to the fact that it intended to reverse its earlier case law.

b) Giving a broader interpretation

In the aforementioned *Plaumann* case, Germany asked for authorisation from the Commission to suspend collection of the customs duty laid down in the Common Customs Tariff for fresh clementines and to apply a reduced tariff instead. The Commission refused this request by a decision. The issue was whether *Plaumann,* a German clementine importer company, may bring an action against the Commission for payment of compensation equivalent to the customs duties and the turnover tax paid because of the refusal of the request. The Court dismissed the compensation claim.[97] The Court required that the decision must first be annulled before bringing an action for compensation, since this could have proven that the act of the institution was wrongful. As the decision in question had not been annulled, Plaumann could not successfully claim damages. The Court changed its attitude on the precondition of annulment action in *Lütticke* and stated that an action for damages is an independent form of action.[98]

In the famous *van Gend en Loos* judgment, the Court found that one of the conditions of the direct effect of any article of the EEC Treaty is that it must contain a prohibition, a negative

[92] See Vida (n 27) 58 referring to Timmermans.
[93] *Cipolla,* Opinion of AG Poiares Maduro, fn 17 to para 29.
[94] Case 58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181.
[95] *Dansk Supermarked*, paras 17–18.
[96] Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, para 30.
[97] *Plaumann*, p. 108.
[98] Case 4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECR 325 para 6.

obligation.[99] Based on this, the Court attributed direct effect to Article 12 of the EEC Treaty, that provided that Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other. The Court abandoned the precondition of the existence of a negative obligation in *Lütticke v Hauptzollamt Saarlouis* in relation to the interpretation of the third paragraph of Article 95 EEC Treaty.[100] The first two paragraphs of Article 95 (now Article 110 TFEU) prohibit protectionist or discriminatory internal taxes. The third paragraph of Article 95 EEC Treaty (already not in force), imposed an obligation on the Member States to 'repeal' or 'amend' any provisions which conflict with the rules set out in the preceding paragraphs until the beginning of the second stage of the transitional period, that is until 1 January 1962. The Court considered that, upon the expiry of that period, the general rule emerges unconditionally into full force. After having acknowledged that the first paragraph of Article 95 had direct effect, the Court in essence stated that the third paragraph had the same effect, although it contained a positive obligation of amending or eliminating the national provisions violating the first two paragraphs of Article 95. The Court did not refer to the earlier approach taken in *van Gend en Loos,* requiring a negative obligation for the direct effect of a Treaty provision.

In the *van Duyn* judgment, the Court held that a Member State can deny the entry of a citizen of another Member State for reasons of public policy if that person would like to work for the Church of Scientology, an organisation, the activity of which was considered harmful by the host state. This holds even if the operation of that organisation is not legally prohibited by that Member State and the nationals of the host Member States are not restricted from taking part in the activity of the organisation. In the later *Adoui* and *Cornuaille* joined cases, the question was posed to the Court whether Belgian authorities could lawfully refuse a permit of residence from two French nationals who intended to work in Belgium in a bar, the activity of which was suspected to be linked to prostitution.[101] Two of the questions referred to the Court explicitly addressed the *van Duyn* case.[102] Nevertheless, reaching its conclusion, the judgment did not even refer back to *van Duyn.* The Court held that a 'conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct.'[103] Here, the Court construed public policy more narrowly, whereas it granted a wider protection for free movement rights.

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[99] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* English special edition ECR 1, II.-B.

[100] Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis*, English special edition ECR 205.

[101] Joined cases 115 and 116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1665.

[102] Questions (3) and (4) see *Adoui and Cornuaille*, para 6.

[103] *Adoui and Cornuaille*, para 8.

c) Defending the institutional balance

In the 302/87 *Parliament v Council* case, also known as the *Comitology* case, the Court stated that the European Parliament is not entitled to bring an annulment action against a Council decision of general application.[104] This reflected the wording of the EEC Treaty and Treaty establishing the European Atomic Energy Community (the Euratom Treaty), which did not mention the Parliament among the institutions entitled to bring annulment proceedings. The Court argued that various legal remedies were available to guarantee the Parliament's prerogatives. Shortly after, the question of the Parliament's right to bring annulment proceedings arose again. In the C-70/88 *Parliament v Council* (also known as *Chernobyl*) case, the problem was that the Parliament did not accept the legal basis for Council Regulation 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedstuffs following a nuclear accident or any other case of a radiological emergency and brought an action against the Council.[105] AG van Gerven suggested that the Court reconsider its earlier standpoint in order to provide adequate legal protection to the Parliament.[106] The Court started seemingly with a distinction and found that in the given case the available legal remedies (an action for failure to act or a reference for a preliminary ruling) were proved ineffective or uncertain. It reached, however, a more general conclusion, stating that the Court is obliged to maintain the institutional balance and defend the prerogatives of the Parliament. The lack of reference to the Parliament in the wording of the EEC Treaty and the Euratom Treaty was considered as a mere procedural gap and the Court found that 'an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement.'[107] Here, apart from the abovementioned 'distinction', the Court did not bother much that it gave another direction to its previous case law. It must be noted that the change in the case law was followed by the amendment of the EEC Treaty so as to include the Parliament among the institutions entitled to initiate annulment proceedings.[108]

[104] Case 302/87 *European Parliament v Council of the European Communities* [1988] ECR 5615.

[105] Case C-70/88 *European Parliament v Council of the European Communities* [1990] ECR I-2041. Analysed by: Margaret McCown, 'The Use of Judge-Made Law in European Judicial Integration: Precedent-Based Arguments in EU Inter-Institutional Disputes,' 17–19 <http://aei.pitt.edu/2141/1/002191_1.PDF> accessed 1 August 2015. The legislation concerned: Council Regulation (Euratom) 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency [1987] OJ L371/11.

[106] Case C-70/88 *Parliament v Council*, Opinion of AG van Gerven, paras 9, 12, 14 and 15.

[107] C-/88 *European Parliament v Council of the European Communities,* para 27.

[108] Temple Lang (n 63) 152. See the current TFEU art 263.

d) Providing a human rights conform interpretation

In *Akrich*[109] and in *Metock,*[110] the question was whether prior lawful residence may be required from the non-EU citizen spouses of Union citizens who wished to acquire a residence card in another Member State. In *Akrich,* the Court answered the question affirmatively, permitting national legislation to refuse to grant, under Regulation No 1612/68/EEC,[111] a right of residence in the Member State of origin to which a Union citizen had returned to establish herself with her spouse who was a national of a non-member country, since the third country national spouse had not previously been lawfully resident in a Member State. The judgment noted that the national court assessing the circumstances must have regard to the right to respect for family life under Article 8 of the ECHR. In the *Metock* judgment, the Court reversed its earlier ruling, stating that the conclusion of the *Akrich* case 'must be reconsidered'.[112] In *Metock,* the Court referred to the fact that the application of Directive 2004/38/EC does not depend on the prior lawful residence of third country family members.[113] The Court also found that the prior lawful residence requirement has a deterrent effect on the exercise of the freedom of movement of Union citizens: if a Union citizen cannot lead a normal family life together with his spouse, he will be discouraged from moving to another Member State. In addition, requiring prior lawful residence unilaterally by some Member States but not by others leads to the partitioning of the Internal Market in terms of the free movement of Union citizens. Finally, the Court underpinned its decision by referring here again to Article 8 of the ECHR that guarantees the right to respect for private and family life. Here, the broader internal market-friendly and the human rights conform interpretation have been intertwined.

e) Amendment of the treaties, changes in legislation and developments of the case law

In the *Hag* cases, the Court altered its case law due to the development of its adjudication on the relation between intellectual property rights and the free movement of goods. The common origin doctrine was in the background of the *Hag* cases. The German Hag AG, a coffee production and distribution company, was the holder of trademark 'Hag'. Subsequently, Hag AG set up a subsidiary in Belgium, Hag/Belgium and Hag AG's Belgian and Luxembourg trademarks were assigned to this subsidiary. At the end of the Second World War, the shares of the Hag Belgium were sequestrated as enemy property, and in 1971 Hag/Belgium assigned further its Benelux Hag trademarks to VZF. The problem in the *Hag I* case was that when Hag AG started

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109 Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

110 Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

111 Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2, 19.10.1968.

112 *Metock,* para 58.

113 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

to sell its coffees to Luxembourg retailers under its German trade mark, VZF brought a trademark infringement procedure against Hag AG. The question was whether free movement of goods provisions may prevent the holder of the trade mark from opposing the importation of products that bear the same trademark in another Member State, because the two trademarks previously belonged to the same holder. The Court answered the question so that, under the free movement of goods provisions, the marketing of products bearing an identical trademark cannot be prohibited by the holder of trade mark in another Member State in spite of the common origin of the trademarks. The same issue arose again in the *Hag II* case, when SA CNL-SUCAL NV (a company established through the purchase and transformation of VZF) commenced to sell decaffeinated coffee under the Hag trade mark in Germany and as a reaction Hag AG instituted proceedings against SA CNL-SUCAL in order to prevent the importation.[114] In his opinion, AG Jacobs called for the reversal of the *Hag I* judgment and he dealt with the possibility of overruling in detail. He found that the common origin doctrine developed in the *Hag I* decision did not have a legitimate basis on the grounds of the provisions of the EC Treaty and it was difficult to reconcile with later developments of the case law of the Court.

To answer the question, the Court referring to the Hag I case expressly declared that:

> […] it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods.[115]

Thus, the Court made clear the grounds for reconsidering its earlier judgment: the later development of the case law on industrial property rights and the free movement of goods.[116] Finally, the Court held that independently of their common origin each trademark holder can oppose the importation of the goods bearing an identical trademark in the Member State where the trademark belongs to him if the products are similar and they may be confused by the consumers.[117] However, the reversal of *Hag I* may be considered as 'a step backwards' by sacrificing or at least restricting the free movement of goods to guarantee stronger trademark protection.[118]

In *Bidar,* the amendment of the EC Treaty led to a change in the Court's practice. In this case, the Court had to decide whether a university student is entitled to a student loan even if he is not considered as settled in the host state under the law of the latter.[119] In the *Lair* and

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[114] Case C-10/89 *SA CNL-SUCAL NV v HAG GF AG* [1990] ECR I-3711.

[115] *Hag II,* para 10.

[116] Vida (n 27) 57. In the judgment, the Court referred to the following cases: Case 78/70 *Deutsche Grammophone Metro* [1971] ECR 487; Case 16/74 *Centrafarm v Winthrop* [1974] ECR 1183; Case 19/84 *Pharmonv Hoechst* [1985] ECR 2281; Case 102/77 *Hoffmann-La Roche v Centrafarm* [1978] ECR 1139; Case 3/78 *Centrafarm v American Home Products Corporation* [1978] ECR 1823.

[117] *Hag II,* paras 18–19.

[118] 'The Court of Justice changes its mind again' (1991) 16 European Law Review 365–366.

[119] Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

Brown cases, the Court answered the question so that assistance given to students for their maintenance and training, such as a student loan, falls outside the scope of Article 7 EEC Treaty (Article 12 EC Treaty, now Article 18 TFEU).[120] However, in *Bidar* the Court reconsidered these judgments taking into account the legal developments that occurred since *Brown* and *Lair.* At that time, education policy was outside the competences of the Community, and social policy fell within the competence of the Member States only in so far as it was not covered by specific provisions of the EEC Treaty.[121] However, since then the citizenship of the Union has been introduced and a new chapter on education policy has been inserted into the EC Treaty. In light of these developments, the Court concluded that the possibility of obtaining a student loan by a student resident in another Member State falls under the scope of Article 12 EC Treaty.

VI Conclusions

Previous decisions play an important role in the reasoning of the Court. However, the Court does not reveal much how it conceives its own case law. The Advocates General, the parties to the legal proceedings and academics are much more interested in understanding the particularities of the Court's adjudication.

Sometimes, the Court uses (at least in the English versions of the decisions) the terminology of the common law system of legal precedent. Some of the Advocates General and the parties to the procedure do the same. However, the Court's practice does not formally constitute a precedent system. Following Komárek's definition, the Court's decisions constitute precedents taken in a broader sense, according to which precedent means 'a prior judicial decision which has normative implications beyond the context of the particular case in which it was delivered.'[122]

The case law of the Court shows up certain specific features. The Court is not bound by its earlier decisions. Notwithstanding this, the Court only seldom deviates from its previous rulings. The General Court and the Civil Service Tribunal are not bound by the Court's decisions, nor do they have to follow their own decisions. The Court's case law is intertwined with the practice of the European Court of Human Rights, the EFTA Court and finally the courts of the Member States. This interlocking produces a multi-layered precedent law. The actors of this multi-layered system have regard to the case law of the other judicial organs.

The Court may overrule a former decision if it finds this appropriate. As AG Fennelly put it, 'while the judgments [...] are too few to admit of extensive generalizations, it appears that the Court will reexamine and, if need be, decline to follow earlier judgments which may have

[120] Case 39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 3161; Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205.

[121] *Bidar,* para 38.

[122] Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts' LSE Law, Society and Economy Working Papers 4/2011, 3. <http://www.lse.ac.uk/collections/law/wps/WPS2011-04_Komarek.pdf> accessed 1 August 2015.

been based on an erroneous application of a fundamental principle of Community law...'[123] This rarely happens and the Court does it not always explicitly. Often, a clear justification of the alteration is also absent. With this background, it is difficult to classify those cases where the Court reconsiders its practice. The reasons for altering a certain line of adjudication range from the protection of human rights *(Metock)* to the safeguarding prerogatives of the EU institutions *(Chernobyl).* In some of the cases an integrationist approach prevailed over a narrower interpretation *(Adoui),* in other cases the Court adopted rather a restrictive approach for reducing the number of complaints *(Keck).* Sometimes, the development of the Court case law in a related field led the Court to change its attitude *(Hag II, Bidar).*

[123] *Merck v Primecrown,* Opinion of AG Fennelly, para 146.

Thomas Thiede*

Private Enforcement of Anti-trust Damages in Europe

A Germanic Perspective on Directive 2014/104/EU

Abstract

If an undertaking infringes European or national competition law, the infringers must expect to face a large range of possible sanctions, of both a public law and a private law nature. Regarding the latter, we take note in this paper of anti-trust actions for damages by private claimants; these have become ever more significant in the anti-trust debate. Against a background of divergent developments in the European Member States, the European legislator has adopted Directive 2014/104/EU,[1] with the aim of facilitating the full compensation of damage suffered by those affected by violations of European or national competition law, and to coordinate public and private enforcement measures. The Member States must implement this Directive into their national systems. This paper gives an overview of the Directive, analyses its most important provisions and then discusses the international issues raised in cases concerning cross-border anti-competitive activities.

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[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ 2014 L349, 1 ff (DADA).

I Introduction

If an undertaking infringes EU competition rules, namely Art 101, 102 TFEU,[2] or national competition laws, such as the German Act against Restraints on Competition,[3] the Austrian Cartel Act 2005[4] or the Hungarian Cartel Act,[5] for instance, it must traditionally assume the possibility of public law sanctions. The most important of these – and arguably the one which dominates media coverage in this area – are fines, which may be imposed by the European Commission, or else by the National Competition Authorities (NCAs).

Over the past year, developments in Brussels have been influenced by the change in the European Competition Commissioner: Joaquín Almunia left the office, to be succeeded by Margrethe Vestager. Almunia's legacy is no mean one; his final year brought substantial fines, totalling approximately EUR 1.69 billion,[6] including a staggering EUR 953 million penalty imposed on six companies for their participation in an automotive ball bearings cartel.[7] Other notable 2014 penalties included fines on a manufacturer of high-voltage power cables (EUR 302 m),[8] three manufacturers of car seat foam (EUR 114 m),[9] four smart card chip producers (EUR 138 m),[10] and several financial services institutions for colluding on Swiss franc interest rate derivatives (EUR 94 m)[11].

There is a basic rule that EU competition law takes precedence (in application) over the anti-trust laws of the European Member States.[12] However, EU competition law only covers offences that extend, at the least in their impact, beyond the borders of any single Member State, and thus affect the European Single Market. Cartels and abusive practices by undertakings with a dominant market position that do not affect intra-(Member) State trade remain under the jurisdiction of the national legislator and the NCAs. These national competition authorities also handed out enormous fines in 2014 against many companies; the German *Bundeskartellamt*

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2 Treaty on the Functioning of the European Union (TFEU) OJ 2010 C83, 47.

3 German Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen,* GWB) (2013) I German Federal Law Gazette (dBGBl.) 1750 in the version valid on 1.10.2014, dBGBl I 2014, 1066.

4 Austrian Cartel Act (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen – Kartellgesetz 2005,* KartG 2005) (2005) 61 Austrian Federal Law Gazette (öBGBl) I No.

5 *1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról* (Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition).

6 Even this fell short of the 2013 figure, when fines totalled EUR 1.9 bn.

7 Commission Decision of 19.3.2014 (Case AT.39922 – Bearings), Official Journal (OJ) C238, 23.7.2014, 10–12. Notably, JKETK, a Japanese company, received full immunity for blowing the whistle on the cartel.

8 Commission Decision of 2.4.2014 (Case AT.39610 – Power Cables), OJ C319, 17.9.2014, 10–15.

9 Commission Decision of 29.1.2014 (Case AT.39801 – Foam), OJ C354, 8.10.2014, 6–9.

10 Commission Decision of 3.9.2014 (Case AT.39574 – Smart Card Chips), unpublished.

11 Commission Decision of 21.10.2014 (Case AT.39924 – Swiss Franc Related Derivatives), unpublished. UBS and Barclays received full immunity from prosecution for whistle-blowing on the cartel and cooperating with the Commission, saving them colossal fines of EUR 2.5 bn and EUR 690 m respectively. Several other banks received substantial reductions in fines for cooperating.

12 Art 3 para 2 (1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 001, 1–25.

alone clocked up almost EUR 1 billion,[13] fining – among others – beer brewers (EUR 338 million),[14] sugar producers (EUR 280 million),[15] and sausage manufacturers (EUR 338 million)[16]. The French *Autorité de la concurrence* imposed record fines of EUR 1.09 billion, among others against manufacturers of household and hygiene products.[17] In Austria, the courts had already imposed fines of about EUR 25 million in 2013 based solely on applications by the independent *Bundeswettbewerbsbehörde.*[18]

Those who engage in anti-competitive activities are, however, not only faced with the possibility of hefty fines and other public law sanctions, but also with civil law consequences, such as court actions brought by other enterprises other non-state, i.e. private, individuals who have sustained losses as a result of such anti-competitive conduct. Besides injunctions, such actions seek compensation for harm sustained due to the offence. The CJEU held as early as 1964, in the *Costa/ENEL* case,[19] that it is not only the Member States which are the legal subjects of the European legal order established by European primary law, but also individuals, who are subject to obligations under Community law and of course also have rights under the same law. Hence, it has been established since the 1960s that anti-competitive conduct can trigger an entitlement on the part of third parties to compensation under the European legal system. In 1974, in the *BRT I* case,[20] the CJEU also recognised that (what are now) Art 101 and 102 TFEU have a direct effect regarding individuals, and directly give rise to their having rights which must be upheld in the courts of the Member States. Originally, the CJEU – not following the opinion of Advocate General *van Gerven*[21] – rejected the idea of a compensation claim directly derived from European primary law in 1994 in the *Banks* case.[22] It was only with the suitably-named *Courage* case[23] in 2001 that the Strasbourg Court revised this position; nowadays it is established case law that there can be a compensation claim directly based on the TFEU.[24]

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[13] *Bundeskartellamt,* online, <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/23_12_2014_Jahresr%C3%BCckblick.html?nn=3591568> (31.3.2015).

[14] *Bundeskartellamt,* online <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B10-105-11.pdf;jsessionid=DE393BCB 2B8E5840ECD494C88D38EE7B.1_cid371?__blob=publicationFile&v=1> (31.3.2015).

[15] *Bundeskartellamt,* online <http://www.bundeskartellamt.de/SharedDocs/Meldung/ EN/Pressemitteilungen/2014/18_02_2014_Zucker.html?nn=3591568> (31.3.2015).

[16] *Bundeskartellamt,* online <http://www.bundeskartellamt.de/SharedDocs/Meldung/ DE/Pressemitteilungen/2014/15_07_2014_Wurst.html> (31.3.2015).

[17] *Autorité de la concurrence,* E vom 18.12.2014, 14-D-19, <http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14D19> (31.3.2015).

[18] *Bundeswettbewerbsbehörde,* Tätigkeitsbericht 2013 (2014), 37.

[19] *CJEU* 15.7.1964 –6/64, *Costa/Enel,* ECLI:EU:C:1954:66; cf also *CJEU* 5.2.1963 – 26/62, *Van Gend & Loos,* ECLI:EU:1963:1.

[20] *CJEU* 30.1.1974 – 127/73, *BRT/SABAM,* ECLI:EU:C:1974:6; cf also *CJEU* 18.3.1997 – C-282/95 P, *Guérin automobiles/Kommisson,* ECLI:EU:C: 1997:159.

[21] Opinion of the Advocate General *van Gerven* 13.4.1994 – C-128/92, *Banks & Co/British Coal Corporation,* ECLI:EU:C:1993:860, no 44, 45.

[22] *CJEU* 13.4.1994 – C-128/92, *Banks & Co/British Coal Corporation,* ECLI:EU:C:1994:130.

[23] *CJEU* 20.9.2001 – C-453/99, *Courage/Crehan*, ECLI:EU:C:2001:465, no 26.

[24] *CJEU* 13.7.2006 – verb C-295–298/04, *Manfredi,* ECLI:EU:C:2006:461, no 61; *CJEU* 14.6.2011 – C-360/09, *Pfleiderer,* ECLI:EU:C:2011:389; *CJEU* 6.11.2012 – C-199/11, *Otis uA,* ECLI:EU:C:684, no 40; *CJEU* 6.6.2013 – C-536/11, *Donau Chemie,* ECLI:EU:C:2013:366, no 21.

Such anti-trust claims for damages are being raised more often before some European Member States' courts;[25] notably in Germany,[26] the Netherlands,[27] and the United Kingdom[28]. On the other hand, it is difficult, if not impossible, to pursue such anti-trust actions in numerous other Member States.[29] In an Impact Assessment Report,[30] the European Commission states that, as far as it is aware, only a little over a quarter of all competition law infringements upheld in Commission decisions from 2006 to 2012 resulted in one or more *follow-on actions* for damages.[31] Moreover, so-called *stand-alone* actions, brought without a breach first being found by a competition authority, are extremely rare.[32] So far, only a fraction of the damage caused by competition law infringements has resulted in such claims, although the extent of this damage ranges from around EUR 5.6 to 23.3 billion per year.[33] As such, the wrongful gains remain in the hands of the offenders in a clear majority of cases.

Facing this discrepancy in a pivotal policy area of the European Union, it is hardly very surprising that the European legislator has been on the move, first publishing a green paper in 2005,[34] followed by a white paper in 2008.[35] A mere five years later, in July 2013, the European Commission adopted a whole package of measures; the centrepiece of these was the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions

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[25] Cf Cortese, 'Private Antitrust Enforcement – Status Quo in Italy' [2012] EuZW 730; Garzaniti, Vanhulst, Oeyen, 'Private Antitrust Enforcement – Status Quo in Belgium' [2012] EuZW 691; Kofler-Senoner, Siebert, 'Die private Durchsetzung von kartellrechtlichen Ansprüchen – Status Quo in Österreich' [2012] EuZW 650; Makatsch, Mir, 'Die neue EU-Richtlinie zu Kartellschadensersatzklagen – Angst vor der eigenen „Courage"?' [2015] EuZW 7; Motyka-Mojkowski, 'Die private Kartellrechtsdurchsetzung – Status Quo in Polen' [2012] EuZW 817; Vogel, 'Die private Durchsetzung des Kartellrechts – Status Quo in Frankreich' [2012] EuZW 897; Vollrath, 'Das Maßnahmepaket der Kommission zum wettbewerbsrechtlichen Schadenersatzrecht' [2013] NZKart 434.

[26] Cf § 33 GWB. Naturally, nowhere near all of the issues raised by private actions based on competition law breaches have been resolved in Germany either, cf. *Regional Court (LG) of Düsseldorf* 17.12.2013, 37 O 200/09, BB 2014, 149; Alexander, 'Wege und Irrwege – Europäisierung im Kartell- und Lauterbarkeitsrecht' [2013] GRUR Int 636; Zöttl, Schlepper, 'Die private Durchsetzung von kartellrechtlichen Schadensersatzansprüchen – Status Quo in Deutschland' [2012] EuZW 573.

[27] Cf Commission, Impact Assessment Report, COM(2013) 404 final = SWD(2013) 204 final (hereinafter Impact Assessment Report) no 52; Kortmann, Swaak, 'Private Antitrust Enforcement – Status Quo in the Netherlands' [2012] EuZW 770; Makatsch, Mir (n 25) 7; Mederer, 'Richtlinienvorschlag über Schadenersatzklagen im Bereich des Wettbewerbsrechts' [2013] EuZW 847 (848).

[28] Cf sec 47A Competition Act 1998. In the light of schedule 8 Draft Consumer Rights Bill, further changes favourable to private claimants can be anticipated in the Competition Act 1998 and Enterprise Act 2002; with respect, for example, to the status of the Competition Appeals Tribunal (CAT) as the main court for private anti-trust actions. Koch, Thiede, *ETL* (2014) no 2 Fn 13; Peyer, 'Die private Durchsetzung von kartellrechtlichen Ansprüchen – Status Quo in England und Wales' [2012] EuZW 617.

[29] Cf even just the critical assessment by Mäsch, 'Private Ansprüche bei Verstößen gegen das europäische Kartellverbot – „Courage" und die Folgen' [2003] EuR 825 (823).

[30] Commission, Impact Assessment Report, SWD(2013) 204 final.

[31] In 15 out of 54 Cases, Commission, Impact Assessment Report SWD(2013) 204 final, no 52.

[32] Mederer (n 27) 847 (848); Urlesberger, Ditz, 'CJEU overturns Austrian rule on access to files in anti-trust proceedings' [2013] ÖZK 135 (138).

[33] Commission, Impact Assessment Report SWD(2013) 204 final, no 67, 102, 172.

[34] Commission, *Green Paper, Damages actions for breach of the EC antitrust rules,* COM(2005) 672 final.

[35] Commission, *White Paper on damages actions for breach of the EC antitrust rules,* COM(2008) 165 final.

for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.[36] Parallel to this, the European Commission issued a communication on the most common economic methods for quantifying anti-trust damages when compensation claims are brought subsequent to competition law breaches,[37] supplemented by a Recommendation for collective legal protection,[38] as well as a comprehensive 'Practical Guide'[39].

The EU Council of Ministers passed the draft Directive on 10.11.2014;[40] the European Parliament also approved the proposal and the President of the European Parliament signed the Directive on 26.11.2014. Now the ball is in the Member States' court. They must transpose this Directive on certain rules for actions for damages under domestic law based on breaches of competition law provisions of the Member States and the EU (hereinafter: Directive on Anti-Trust Damages Actions or DADA) into national law within two years of its coming into force,[41] i.e. by 27.12.2016.

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[36] Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,* COM(2013) 404 final, cf from among the (abundant) literature on the proposal, and with further references: Fiedler, 'Der aktuelle Richtlinienvorschlag der Kommission – der große Wurf für den kartellrechtlichen Schadenersatz?' (2013) 37 BB 2179; Fiedler, Huttenlauch, 'Der Schutz von Kronzeugen- und Settlementerklärungen vor der Einsichtnahme durch Dritte nach dem Richtlinien-Vorschlag der Kommission' [2013] NZKart 350; Howard, 'Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions' (2013) 6 (4) JECLAP 455; Koch, Thiede, 'European Union' in Karner, Steininger (eds), *European Tort Law (ETL)* 2013 (2014) 699, no 3; Pfeffer, Rummel, 'Die Zukunft privater Schadenersatzklagen nach dem Richtlinienentwurf der Kommission vom 11.06.2013' (2014) 2 WuW 172; Polster, Steiner, 'Zur Passing-on defense im österreichischen Kartellschadenersatzrecht' [2014] ÖZK 43; Mederer (n 27) 847 ff; Rittenauer, Brückner, *Sonderschadenersatzrecht für Kartellgeschädigte* (wbl 2014) 301; Schuhmacher, *Schadenersatzklagen im Wettbewerbsrecht – der Richtlinienvorschlag der Kommission* (ecolex 2014) 193; Schwab, 'Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims' (2014) 2 (5) JECLAP 65; Steiner, *Der neue RL-V der Kommission zum Private Enforcement* (ecolex 2013) 1000; Weitbrecht, 'Schadenersatzansprüche der Unternehmer und Verbraucher wegen Kartellverstößen' [2012] NJW 881.

[37] Commission, *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union Text with EEA relevance,* OJ 2013 C167, 19.

[38] Commission, *Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights granted under EU Law,* OJ 2013 L201, 60.

[39] Commission, *Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union,* SWD(2013) 205.

[40] Poland, Slovenia and Germany declined to vote in the Council at the time due to dissatisfaction with the rules on joint and several liability, cf Council Document 14680/14 ADD 1 = 2013/0185 (COD).

[41] Art 23 Directive.

II Typical Cases

In practice, the most common type of case, which is also used as the basis for this paper, runs as follows: commercial undertakings in a certain field have engaged in anti-competitive activities for several years. They have made horizontal[42] or vertical arrangements[43] or, alternatively, one or more businesses with a dominant market position have abused their power in an anti-competitive fashion[44] so as to obtain higher prices than would in all likelihood be achieved were competition undistorted. The cartel has been discovered by a competition authority or (more likely) one of the cartel members has blown the whistle; the members of the cartel have been fined heavily by the competition authority.[45] The majority of the undertakings that participated in the activities have admitted this in the course of the proceedings before the relevant authority in order to be eligible for leniency programmes or to benefit from other bonus rules.

III An Overview of the Directive

The legal basis for the DADA is Art 103 TFEU (competition) and 114 TFEU (Common Market). This double basis was necessary because – as explained above – the harmonisation of the rules of the Member States in this respect concerns both actions for damages based on breaches of EU competition law and on breaches of national law; Art 103 TFEU would not have been sufficient as a basis for the harmonisation of national laws.[46]

Methodologically speaking, the DADA is very obviously based on the idea of creating a uniform European approach while at the same time trying to avoid any unnecessary interference with national procedural and liability rules. The primary aim of the DADA is to give victims effective means of recourse to obtain full compensation for the actual loss they have suffered, as well as any loss of profit, including interest.[47] Naturally, such full compensation is nothing new; the same was already set out by the CJEU in the *Manfredi* case[48]). Besides creating the means to bring actions for damages, the DADA is also intended to promote consensual dispute resolution.[49]

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[42] This includes, for instance, specific practices such as the formation of cartels, collusion, conspiracy, mergers, predatory pricing, price discrimination and price-fixing agreements. See references Rittenauer, Brückner, *Der Richtlinienvorschlag der Europäischen Kommission zu Schadenersatzklagen im Kartellrecht* (wbl 2014) 303 (309).

[43] This includes practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling.

[44] For example, with strategies to impede or exploit competitors and suppliers.

[45] For the question at issue here, it is of no relevance whether the proceedings took place before the Commission or the national competition authority. Weitbrecht (n 36) 881 (881).

[46] Cf Recitals 8, 9 DADA.

[47] Art 4; Art 2 (2) DADA; Recital 12 DADA.

[48] *CJEU* 13.7.2006 – verb C-295–298/04, *Manfredi,* ECLI:EU:C:2006:461.

[49] Art 18–19 DADA.

The DADA consists of a total of 24 articles, spread out over an introductory (covering subject matter, scope and definitions) and five further chapters, specifically the disclosure of evidence (chapter II), the effect of national decisions, limitation periods and joint and several liability (chapter III), the passing-on of overcharges (chapter IV), the quantification of harm (chapter V), consensual dispute resolution (chapter VI) and the final provisions on review, transposition, temporal application and entry into force (chapter VII).

From a practical perspective, it is worth noting, in particular, the rules on disclosure of evidence in actions for damages: the parties can obtain competition authorities' evidence and then use this before a court in private law actions. While this is good news for the practitioner, it is clearly problematic for the European Commission and the NCAs; cartels are often only exposed by whistle-blowers – often members of the same cartel. There are specific rules in the DADA to protect whistle-blowers[50] (and thus maintain the incentive to expose anti-competitive behaviour), which govern the interplay between the public and private enforcement of competition law.[51]

IV The DADA in Detail

1 Who can be Sued?

Under Art 1 para 1 DADA, all undertakings or associations of undertakings (assumed perpetrators of offences against European or national competition law) can be sued: it is notable that the DADA uses this established European term 'undertaking'. In this way, in accordance with how directives function as set out in Art 288 TFEU, the European term 'undertaking' is introduced into the liability, competition and procedural laws of the Member States.[52]

The CJEU decision in the *Akzo* case[53] is a good example of how this harmonisation can work well. This case concerned the liability of a parent company for anti-competitive activities by its subsidiary. Until this judgment, it was undisputed that liability must be assumed when the parent company has a controlling influence on the subsidiary; the CJEU held then that there is also a rebuttable presumption that, when the parent company owns 100% of the capital in the subsidiary, it does exercise a controlling influence on this subsidiary's conduct. Further, the parent company is in particular accountable for the subsidiary's conduct if the subsidiary, despite having separate legal personality, largely follows the instructions of the parent company rather than autonomously determining its own market activities. The decision is of great practical benefit, because in the future parent companies will not be able to avoid civil liability by simply

[50] Art 6 (6) lit *a,* Art 11 (4)–(6) DADA.
[51] Recitals 24, 26 and 27 DADA.
[52] Kersting, 'Die neue Richtlinie zur privaten Rechtsdurchsetzung im Kartellrecht' [2014] WuW 564 (565); Makatsch, Mir (n 25) 7.
[53] *CJEU* 10.9.2009 – C-97/08 P, *Akzo/Commission,* ECLI:EU:C:2009:536, no 59.

letting their subsidiaries become insolvent. Based on this decision, the claimant can recover not only from the assets of the subsidiary, but also from those of the group parent company.[54]

2 Standing; Passing-on Defence

Art 2 DADA contains a rule on who can bring actions for damages. This is set out in line with the 'any individual' formulation of the CJEU in *Courage;*[55] it covers all natural and legal persons that have suffered harm due to an infringement of European or national competition law.

According to the express wording of Art 12 DADA, this also includes indirect victims, i.e. it takes account of the interplay between direct and indirect purchasers. If a cartel overcharges for goods, it is often not only those who purchase directly from the infringer who are affected. In many cases, goods are sold on down a chain, sometimes after further processing. If the direct purchaser can in turn pass on the anti-competitive price to those who purchase from him, these indirect purchasers also suffer pecuniary damage. The question of the standing of such indirect purchasers was largely controversial in the Member States up until now; for instance, the German Federal Court of Justice only affirmed such a right to standing following the ORWI decision in 2011.[56]

As shown above, the question of standing for indirect purchasers is closely linked with the damage suffered by the direct purchaser, i.e. the intermediary trader. In the first instance, this means merely that the indirect purchaser only suffers damage if the purchaser further up the chain passes on the anti-competitive price to his own customers, i.e. the indirect purchasers. However, if the claimant can pass his loss on to the next level in the market, he has not actually suffered damage to this full extent. In this context, Germanic lawyers speak of *'Vorteilsausgleichung'* (roughly translated as 'off-setting the advantage gained'); in the general context here, it is taken into account in the *passing-on* defence.[57]

In Art 13, the DADA provides for just such a *passing-on* defence; the defendant infringer can invoke the defence that the interim trader bringing the action passed on all or part of the overcharge. The burden of proof in this respect is on the defendant; as such, he can accordingly require disclosure by the claimant or third parties. Besides this, under Art 12 para 5 DADA, the

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[54] Recital 11 DADA; Kersting (n 52) 564 (565); Makatsch, Mir (n 25) 7; cf also Vollrath (n 25) 434 (438) on the nexus between being subject to proceedings imposing fines and actions for damages, doubtful with respect to the need for amendments in German law Stauber, Schaper, 'Die Kartellschadensersatzrichtlinie – Handlungsbedarf für den deutschen Gesetzgeber?' [2014] NZKart 346 (347).

[55] *CJEU* 20.9.2001 – C-453/99, *Courage/Crehan,* ECLI:EU:C:2001:465, no 26.

[56] BGH 28.06.2011 – KZR 75/10, *ORWI,* BGHZ 190, 145, Tz. 20 f = BeckRS 2011, 26581 = BB 2012, 75 = EuZW 2012, 103 = GRUR 2012, 291 (Comm *Ackermann, Franck*) = GRUR-Prax 2011, 543 (Comm *Seitz*) = GWR 2012, 10 (Comm *Hooghoff*) = JuS 2012, 847 (Comm *Emmerich*) = JZ 2012, 789 = NJW 2012, 103 = WRP 2012, 209 = WuW 2012, 57 = ZIP 2012, 390.

[57] Cf in detail and with further references Polster, Steiner (n 356) 43 as well as BGH 28.06.2011 – KZR 75/10, ORWI, BGHZ 190, 145; Court of Appeal [2008] EWCA Civ 1086, Rz 109, 114, 147, 151 – *Devenish Nutrition v. Sanofi-Aventis SA (France and others);* High Court of Justice (Chancery division) [2009] EWHC 741 (Ch), no 36 – *Emerald Supplies v. British Airways*.

courts deciding the case are entitled to estimate the share of the overcharge passed on. The purpose of the rule is quite clear – intermediate traders who bring such claims must not be overcompensated (Art 12 para 2 DADA) – but, in my view, this construction certainly runs the risk of being too generous to the defendant. On the one hand, the defendant does not in fact have to provide complete proof, since the court may estimate the overcharge, whilst on the other, the option of requiring disclosure from the claimant means the defendant could delay the proceedings and obtain internal data from the claimant, and thus build up a certain level of intimidation with the aim of forcing a settlement. Any follow-on actions claims are likely to gain little benefit from this rule.

3 Harm

In line with the CJEU *Courage* and *Manfredi* decisions[58], it ought to be possible to seek full compensation. *Sedes materiae* is Art 3 para 1 DADA whereby '…any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm…'. Such full compensation also includes compensation for lost profits *(lucrum cessans),* plus interest from the point at which the harm was sustained;[59] this will make for significant sums, especially when it comes to long-running cartels.[60]

Actually quantifying the damage suffered from competition law infringements is one of the most difficult obstacles to actions for damages; so much so that the European legislator also supplies recommendations on such procedures. In the light of Recitals 45 and 46 DADA, the starting point must be that the quantification of anti-trust damage is very complicated with respect to establishing and evaluating the facts, and necessitates the use of complex economic models; moreover, obtaining data and carrying out the calculations is expensive and means specialists are essential. The Commission's 'Practical Guide' is therefore intended to simplify the quantification of harm caused by cartels, and, in particular, to guarantee uniform procedure across the Member States when it comes to assessing the harm.[61] Furthermore, the DADA states that the national competition authorities can assist the courts with quantifying the harm.[62] The Impact Assessment Report showed[63] that in about 95% of the cartels analysed there were definitely overcharges; accordingly, the DADA takes a decisive further step: under Art 17 para 2 DADA, there is a rebuttable presumption that cartel infringements cause harm.

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58 *CJEU* 20.9.2001 – C-453/99, *Courage/Crehan,* ECLI:EU:C:2001:465; *CJEU* 13.7.2006 – verb C-295–298/04, *Manfredi,* ECLI:EU:C:2006:461.

59 Art 3 (2), Art 12 (3) Directive; *CJEU* 13.7.2006 – verb C-295–298/04, *Manfredi,* ECLI:EU:C:2006:461, no 97.

60 Koch, Thiede (n 36) no 5.

61 Commission, *Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union,* SWD(2013) 205.

62 Art 17 (3) DADA.

63 Commission, *Impact Assessment Report* SWD(2013) 204 final.

As might be expected, this presumption is the subject of vehement debate in Austria,[64] because tort law concepts there are rooted in the occurrence of damage,[65] which the claimant always has to prove. From an Austrian perspective, therefore, any presumption of damage constitutes a quite substantial interference in national tort law. When a European rule has such a great impact on one national tort law, it is often useful to review the exact reservations advocated there. One major argument in the Austrian literature, that a quota cartel does not necessarily result in harm to the other market participants,[66] may sound quite persuasive. However, when such conduct is seen in the light of Community law (as it must be),[67] it becomes evident that a quota cartel is nothing more than a production cartel – and, hence, the argument raised must be disregarded. On the other hand, we have to concede that proving damage always represents a substantial enough problem in any action for damages exceeding a certain level of complexity, and mostly requires an economic understanding of the facts. To that extent, the fears being nursed might be well-founded, and the presumption of harm in the DADA could serve as a negative example for future legal unification projects by the European legislator. In any case, though, it is to be expected that numerous Member States will implement the presumption of damage extremely narrowly and explicitly limit it to cartels.[68]

Even where damage is presumed – circumventing an obstacle to successful actions – the judge will nevertheless have to put a figure on it. This remaining hurdle is eased by Art 17 para 1 DADA, according to which the Member States must ensure that quantification of the extent of the damage does not render it practically impossible for the victim to exercise his right to compensation. Hence, domestic courts ultimately should have the right to estimate the amount of damage when it has been proven that a claimant suffered harm, but it is excessively difficult to quantify its extent on the basis of the available evidence.

4 Disclosure of Evidence

The potentially high damage awards give the claimant a clear incentive to file an action. Obviously the risk of litigation must be considered; we note that, in this type of case, a double-digit number of joint defendants, and consequently considerable costs,[69] must be anticipated. The excessive volume of litigation rests very decisively on the available evidence for anti-competitive

[64] Rittenauer, Brückner (n 42) 303 (309).

[65] Cf Koziol, Welser, *Bürgerliches Recht* II (13rd edn, 2007) 303; Perner, Spitzer, Kodek, *Bürgerliches Recht* (4th edn, 2014) 288.

[66] Rittenauer, Brückner (n 42) 303 (309).

[67] *CJEU* 16.5.2013 – C-228/11, *Melzer/MF Global UK Ltd,* ECLI:EU:C:2013:305, no 32-35; *CJEU* 21.6.1978 – 150/77, *Bertrand,* ECLI:EU:1978:1431, no 14–16; *CJEU* 17.06.1992 – C-26/91, *Handte,* ECLI:EU:C:1992:268, no 19; *CJEU* 19.1.1983 – C-89/91, *Shearson Lehman Hutton,* ECLI:EU:C:1993:15, no 13; *CJEU* 3.7.1997 – C-269/95, *Benincasa,* ECLI:EU:C:1997:337, no 12; *CJEU* 27.4.1999 – C-99/96, *Mietz,* ECLI:EU:C:1999:202, no 26; *CJEU* 11.6.2002, C-96/00, *Gabriel,* ECLI:EU:C:2002:436.

[68] Rittenauer, Brückner (n 42) 303 (309).

[69] Buntscheck, '"Private Enforcement" in Deutschland: Einen Schritt vor und zwei Schritte zurück' [2013] WuW 947 (955); Makatsch, Mir (n 25) 7 (8); Mederer (n 27) 847 (848); Weitbrecht (n 36) 881 (883).

conduct. This evidence is, however, hard to come by:[70] neither press releases from the European or national competition authorities, nor public reporting contain information that will stand up in court. The information provided by the national authorities is currently limited: arguably claimants only get access to the index of files and anonymised decisions on the fines imposed, in each case with information that can hardly be used.[71] Understandably, potential claimants abstain from making claims in this situation.

However, the proof is out there, which is why the European legislator aims to compel access to evidence of the infringement that is in the hands of the defendants, third parties or competition authorities:[72] Art 5 and 6 DADA provide that domestic courts are entitled to order disclosure by competition authorities, the defendant, and third parties of specific evidence and relevant categories of evidence (Art 5 para 2, Art 6 para 9 DADA), and can penalise failure to do so (Art 8 DADA).

In order to avoid any actions to discover internal information on (potential) claimants or competitors, there must be a substantiated, reasoned application for the disclosure which plausibly supports the claim for damages.[73] For the same reason, under Art 5 para 3 DADA the court must, in addition to examining whether the disclosure is necessary, weigh up whether it is proportionate given the likelihood of infringement, the extent and costs of the disclosure, and how confidential the relevant information is. According to Art 5 para 4 s 2 DADA, confidential information must be protected, and under Art 5 para 7 DADA, the parties affected must be heard before the disclosure. Art 6 DADA adds specific provisions on court disclosure of evidence from competition authority files to these general considerations on disclosure of evidence.

A problem associated with leniency programmes, which has also been at issue before the CJEU, must be considered, too: Austrian competition authorities had – with reference to such programmes for whistle-blowers and the corresponding rule in § 39 (2) of the Austrian Cartel Act *(Kartellgesetz),* which makes access to the court files contingent upon the 'consent of the competition law rules infringer'[74] – refused to make relevant evidence accessible. The CJEU held in this respect that 'in the absence of binding regulation under European Union law'[75] it is up to the domestic courts, 'on the basis of their national law, to determine the conditions under

[70] Recitals 14 and 45 DADA.

[71] Makatsch, Mir (n 25) 7 (8).

[72] Cf on this in particular *CJEU* 14.6.2011 – C-360/09, *Pfleiderer,* ECLI:EU:C:2011:389, no 23; *CJEU* 6.6.2013 – C-536/11, *Donau Chemie,* ECLI:EU:C:2013:366, no 25.

[73] All evidence or categories of evidence must be determined as precisely as possible. The claimant must present the facts and evidence accessible with reasonable efforts which deliver plausible grounds for suspecting an infringement of competition law, as well as the existence of damage and a causal link between the infringement and the damage. If the evidence is in the sphere of a third party or the defendants, the relevance of such to substantiating the claimant's claim must be proven. Makatsch, Mir (n 25) 7 (9); Mederer (n 27) 847 (849); Koch, Thiede (n 36) no 8.

[74] In detail on the facts: Schlussanträge des GA *Jääskinen* – C-536/11, *Donau Chemie,* ECLI:EU:C:2013:67, no 51.

[75] *CJEU* 14.6.2011 – C-360/09, *Pfleiderer,* ECLI:EU:C:2011:389, no 23; cf also *ECJCJEU* 6.6.2013 – C-536/11, *Donau Chemie,* ECLI:EU:C:2013:366, no 25.

which such access must be permitted or refused by weighing the interests protected by European Union law'[76]. Moreover, the CJEU concluded, with respect to considerations regarding the protection of leniency programmes, that 'they do not necessarily mean that that access may be systematically refused' and formulated case-by-case[77] standards for assessment.[78]

As we have seen, public prosecution of anti-competitive conduct largely depends on whistleblowing. It is vital that some documents must be protected on a permanent or temporary basis by the national and European competition authorities. Of necessity, this puts a focus on how the treatment of whistle-blowers and their testimony is regulated; the crucial voluntary cooperation of undertakings with the competition authorities in order to expose cartels, which otherwise would become less likely for fear of possible later disclosure, is of course undisputed. Accordingly, Art 6 para 6 DADA prohibits the court disclosure of 'leniency statements'[79] and 'settlement submissions'.[80] However, the relevant national court confronted with this issue must ensure, upon reasoned application by the claimant, that actual leniency statements and settlement submissions are really at issue, as described in detail by the definitions of these terms in Art 2 para 16 and para 18 DADA; the corresponding contents of the document cannot be passed on and the authors must also be given the opportunity to be heard. The rule in Art 6 para 5 DADA furthermore protects proceedings before competition authorities, providing that the courts may only order the disclosure of certain information after such proceedings have concluded; this includes information that was put together for the competition authority's proceedings and by the competition authority and communicated to the parties,[81] as well as settlement submissions that have been withdrawn. In comparison to the provisions of Art 5 and Art 6 para 4 DADA, this sets higher proportionality standards in relation to the disclosure of competition authority evidence; the claimant's application must be sufficiently specific and the court must also take into account 'the need to safeguard the effectiveness of the public enforcement of competition law.' Further, it must be the case that no party or third party can reasonably provide the information.[82] Art 7 DADA sets out restrictions for evidence that is obtained by access to the files of a competition authority; these are identical to those in Art 6 DADA, in

[76] *CJEU* 14.6.2011 – C-360/09, *Pfleiderer,* ECLI:EU:C:2011:389, no 32.

[77] Kersting, 'Anmerkung zu C-536/11' [2013] JZ 737 (739); Hempel, 'Einsicht in Kartellverfahrensakten nach der Transparenzverordnung – Neues aus Luxemburg' [2014] EuZW 29.

[78] *CJEU* 6.6.2013 – C-536/11, *Donau Chemie,* ECLI:EU:C:2013:366, no 43.

[79] 'Leniency statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information, Art 2 (16) Directive.

[80] 'Settlement submission' means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure, Art 2 (18) Directive.

[81] Cf Recital 25 DADA.

[82] Art 6 (10) DADA.

order to block any attempts to circumvent that provision. In order to make sure that it is not possible to trade with the evidence, Art 7 para 3 DADA also restricts the right to use evidence only obtained by access to the files to the person that had access or the person that has succeeded to this person's rights or has acquired such a person's claim.[83]

The possible disclosure of evidence, in particular by competition authorities, must be considered when evaluating the volume of litigation. The rules discussed give claimants access to evidence but, at the same time, try not to jeopardise public law enforcement. Whether this very fine balance has been successfully struck seems doubtful. Given the leeway provided for the domestic courts to balance the interests at hand, we will observe future court practice and see how and to what extent applications for disclosure are considered;[84] numerous referrals to the CJEU for preliminary rulings seem inevitable.[85] On the other hand, the rules set out in Art 6 para 5 and 6 DADA (no disclosure of leniency statements and settlement submissions) fall behind the existing disclosure possibilities in some Member States; in the Netherlands, in the UK and also in Germany, there are avenues for obtaining a broader disclosure of competition authority documents.[86] These more extensive means were created subsequent to the *Pfleiderer* case, so that it is occasionally called into question whether the present rule in Art 6 para 6 DADA, with its unreserved exclusion of disclosure of leniency statements, is not in conflict with that CJEU decision. The CJEU, after all, held that a specific balancing between the interests of providing the information and the protection of the leniency statement must be conducted in each case individually.[87] Predictably, some Member States object that Art 6 para 6 DADA conflicts with Art 101 TFEU; in the light of the (alleged) conflict of this ban on the disclosure of leniency statements and settlement submissions with primary law, there is even open support for an action for annulment before the CJEU under Art 263 TFEU.[88] The outcome of these efforts is uncertain; as long as Art 6 para 6 DADA has not been declared void, the Member States must implement the Directive's provisions. In the longer term, however, a greater tendency might reveal

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[83] All other documents must be disclosed, Art 6 (9) DADA.

[84] Thus, apparently, Mederer (n 27) 847 (849).

[85] According to the *CJEU* in C-536/11, *Donau Chemie,* ECLI:EU:C:2013:366, no 31; C-360/09, *Pfleiderer,* ECLI:EU:C:2011:389, no 34 'on a case-by-case basis, […] , and taking into account all the relevant factors in the case' all interests protected by Union law must be taken into account and, in particular, there must be a weighing up of the right to damages and the protection of leniency programmes.

[86] Cf for the Netherlands, for example, Art 843a Wetboek van Burgerlijke Rechtsvordering; for the *UK High Court of Justice, National Grid v ABB & Others* [2012] EWHC 869 (Ch); part 31 Rules of Civil Procedure (CRP); Obersteiner, 'International antitrust litigation: How to manage multijurisdictional leniency applications' (2013) 4 ECLR 16 (25); for Germany *BVerfG* 6.3.2014 – 1 BvR 3541/13, NJW 2014, 1581; *OLG Düsseldorf,* 22.08.2012 – V-4 Kart 5+6/11 (OWi), NZKart 2013, 39 no 44; *OLG Hamm,* 26.11.2013 – 1 VAs 116/13 – 120/13, 122/13, NZKart 2014, 107 no ff; Bosch, 'Die Entwicklung des deutschen und europäischen Kartellrechts' [2014] NJW 1714; Harms, Petrasincu, 'Die Beiziehung von Ermittlungsakten im Kartellzivilprozess – Möglichkeit zur Umgehung des Schutzes von Kronzeugenanträgen?' [2014] NZKart 304; Lotzke, Smolinski, 'Einsichtsrecht der Zivilgerichte in Kartell-Akten' EWiR 401; Schweitzer, 'Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen' [2014] NZKart 335 (342); Yomere, Kresken, 'Die Entscheidung des OLG Hamm zum Akteneinsichtsrecht von Zivilgerichten in Bonusanträge und vertrauliche Kommissionsentscheidungen' [2014] WuW 485 (489).

[87] *CJEU* 14.6.2011 – C-360/09, *Pfleiderer,* ECLI:EU:C:2011:389, no 30.

[88] Makatsch, Mir (n 25) 7 (10).

itself; claimants will get increased access to important evidence, which is bound to increasingly affect documents held by competition authorities.

From a practical perspective, various other aspects must still be examined. Under Art 5 para 1 S 2 DADA, the defendant undertakings can also require the disclosure of evidence held by the claimant. Given numerous joint plaintiffs, this may very well lead to a veritable flood of applications and so the proceedings must be prepared very carefully in advance by the claimant with regard to possible *passing-on* defences, as related applications for disclosure by the defendants must be anticipated right at the start of the proceedings.

In any case, the claimant's application for disclosure necessarily involves high costs, given the Catch-22 situation that the claim for damages must be substantiated in order for the application for disclosure to be made without, logically enough, actually knowing the requisite information in advance, as it can only be obtained in the first place by the disclosure in question. The option allowed by Art 5 para 2 Directive will be helpful here, i.e. to apply for the disclosure of 'relevant categories of evidence', which in turn must be precisely circumscribed; in the words of the provision, 'as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification'. How these criteria will be handled in practice will depend on the skill of the practitioners involved. Here too, many an application for a preliminary ruling can be expected.

The rule in Art 7 para 2 and 3 DADA will influence the behaviour of the parties in litigation, because in general claimants usually demand evidence for their proceedings against the other cartel participants within the context of settlements. Since Art 7 DADA provides that evidence may only be used by the party who obtained it by access to the files, or their legal successor, victims may no longer be able to use the information obtained in the process of settlements which the cartel participants obtain for disclosure through access to competition authority files.[89]

Finally, practitioners who take into account the international perspective in cases of cross-border cartels will have ample opportunity to improve the position of their clients: under Art 5 para 8 DADA, the Member States may maintain rules or introduce rules that would lead to a more comprehensive disclosure of evidence. As already explained, some Member States already have such further-reaching disclosure and other ways of collecting evidence, so practitioners in cross-border situations should carefully weigh up which courts' jurisdictions should be invoked when bringing claims, which conflicts of laws rules are applied by these courts, and (finally) which Member States' substantive laws involve further-reaching opportunities for disclosure.

5 Binding Effect of the Decisions of Competition Authorities

Before criticising the Directive due to the continued existence of obstacles to successful damages actions, two other aspects should be considered. With respect to the protection against disclosure of documents held by the authorities, it must be taken into account that such authorities

[89] Makatsch, Mir (n 25) 7 (10).

not only collect such evidence but also render decisions as a result. If these decisions by the competition authorities are binding in any follow-on claim then a much more promising picture emerges for the claimant; such a binding effect has thus far been provided for (as far as is apparent) in respect of the decisions of the European Commission, as well as those of some Member States, for instance in Germany[90] and Austria[91].

Now, if a national competition authority has established an infringement of competition law and rendered a final decision, under Art 9 para 1 DADA the national courts are bound by this decision. In respect of final decisions that have been handed down by national competition authorities in other Member States, Art 9 para 2 DADA provides that these can be submitted as at least prima facie evidence that there was an infringement of competition law.

Insofar as a final decision of a national or European competition authority[92] exists, the volume of litigation must be evaluated anew. The defendant (and co-defendants) will be prevented from having questions already dealt with in the proceedings before the competition authority opened up again and thus from drawing out the proceedings in any subsequent action for damages. The conceivable objection that this breaches the defendant's right to be heard is not tenable, because the defendant has already had the opportunity to fight the competition authority decision at all instances in that context.[93] The main advantage from a claimant's perspective would also be that the decision's binding effect both takes over from the presumption of damage under Art 17 para 2 DADA and can settle the question of proportionality, in the sense of Art 5 ff DADA, to the claimant's advantage.

6 Limitation

Cartels are often only exposed after a decade or even more. Claims arising at the time when the cartel started could thus conceivably already be barred before the claimant knows anything of the cartel or any resulting claims. Hence, the rules on limitation in Art 10 DADA are intended to ensure that claimants have enough time to bring any claims for damages.

The limitation period for compensation claims should be at least five years and should not begin to run before the infringement has ended. Moreover, Member States must guarantee that the limitation period only begins to run when four cumulative conditions have been met: the victim knows or ought to know of the conduct constituting the infringement, that it has been deemed an infringement of the competition law of the European Union or of national competition law, of the fact that he or she has sustained damage as a result, and of the identity of the infringer that caused the damage. In order to ensure that follow-on claims can also be brought in good time after there has been a final decision by a competition authority, the DADA provides

[90] Cf Art 33 (4) GWB.
[91] Cf § 37a Austrian Cartel Act.
[92] Cf Art 16 Regulation (EC) Nr 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L001, 1.
[93] Rittenauer, Brückner (n 42) 306 (310).

for the limitation period to be suspended or interrupted during the competition authority proceedings, and to remain so for one year after the competition authority decision has become final.

Claimants (and legal counsel) will naturally welcome the minimum five year limitation period; this will change the situation in many Member States, for instance in Germany[94] and Austria,[95] while some other Member States do already have a five[96] or even six year[97] period.

However, it would seem doubtful whether the rule in Art 10 para 2 DADA, which provides that any limitation period only starts to run when the victim knows or ought reasonably to have known, also excludes the maximum absolute limitation periods which apply regardless of whether there was knowledge in some Member States.[98] In my opinion, the fairly unequivocal wording of Recital 6 DADA indicates otherwise, as it states the Member States should in fact have the option of maintaining or introducing generally applicable absolute limitation periods as long as the duration of them does not make exercising the right to full compensation practically impossible or excessively difficult. Since the balance between the claimant's interest in private enforcement and the interest in peace under the law is expressed directly with reference to the Member State's rules on absolute limitation periods,[99] we believe it is not likely that many Member States will depart from absolute limitation periods applicable regardless of whether there was knowledge, insofar as they have such provisions in the first place.[100]

7 Joint and Several Liability[101]

Art 11 para 1 DADA establishes the principle of joint and several liability; it provides that undertakings which have infringed competition law by their collusive conduct are jointly and severally liable for the damage caused. Each of the undertakings concerned can be obliged to

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94 Cf §§ 195, 199 German Civil Code (BGB); *Fiedler,* BB 2013, 2179 (2184).

95 Cf § 1489 Austrian Civil Code (ABGB).

96 For example in the Netherlands, cf Art 3:310 (1) Burgerlijk Wetboek; Faure, Hartlief, 'The Netherlands' in Koziol, Steininger (eds), *European Tort Law 2004* (2005) 420 (422).

97 For example in the United Kingdom for proceedings, cf section 32 Limitation Act; for proceedings before the CAT, the limitation period has thus far only been 2 years but should, as a consequence of the reforms described above, also be raised to 6 years, Morony, Jasper, 'England and Wales' in Mobley (ed,) *Private Antitrust Litigation* (2015) 56.

98 Thus, for example, Makatsch, Mir (n 25) 7 (11), i.e. in the case of Germany more than 10 years; § 199 (3) No 1 BGB.

99 Cf the detailed, comparative law descriptions by Zimmermann, Kleinschmidt, 'Prescription: Framework and Problems Concerning Damages Claims' in Koziol, Steininger (eds), *European Tort Law 2007* (2008) 26 (55) no 47 ff.

100 With a different forecast for Germany, Makatsch, Mir (n 25) 7 (11).

101 Art 19 DADA and the effect of consensual settlements on the solidary liability of the cartel participants will not be discussed here; according to Art 19 (1) DADA, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm. The remaining claim may in principle only be asserted against the cartel participants that did not settle, who in turn may not recover against the infringer that settled [Art 19 (2) S 2 DADA]. While Art 19 (3) provides that the settling victim can claim the remaining part from the settling infringer should the non-settling infringers not be able to pay, this can be expressly excluded in the consensual settlement. From a practical perspective, it must be noted that Art 19 of the Directive probably

compensate the entire damage, but can in turn seek contributions from the other infringers in proportion to their relative responsibility.[102]

The concept of joint and several liability is well-founded from a theoretical point of view. Rules with the same function can be found in several Member States[103] and in more recent academic work on European private law. For instance, Art VI–4:102 of the Draft Common Frame of Reference (DCFR) provides that '[a] person who participates with, instigates or materially assists another in causing legally relevant damage is to be regarded as causing that damage', and consequently such participants are liable under Art VI–6:105 DCFR solidarily. The Principles of European Tort Law (PETL), drawn up by prestigious academics in the field, – though not aimed at representing *restatements* of European law[104] – also provide in Art 9:101 (1) (a) PETL that 'liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim'. Obviously European consensus tends towards joint and several liability for intentional joint conduct as well as the internal recourse.[105]

I cannot see why this should not apply here. All the more surprising, therefore, is the rule adopted by the European legislator to protect whistle-blowers in the context of solidary liability. According to Art 11 para 4 and para 5 S 2 DADA, infringers granted immunity from fines under a leniency programme will only be solidarily liable within certain limits; in general, they are only liable to their own (direct and indirect) purchasers and suppliers, unless it is impossible to obtain full compensation from other cartel participants. A similar limitation is also in place when it comes to other cartel participants' recourse claims against the whistle-blowers; the

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makes settlements more attractive with the rule that settling infringers are freed from recourse claims by other infringers. In this manner, the settling infringer's secondary duty to compensate can even be excluded when the remaining compensation cannot be obtained by the non-settling infringers. This also means that in future there will be more disputes regarding shares of liability, Krüger, 'Die haftungsrechtliche Privilegierung des Kronzeugen im Außen- und Innenverhältnis gemäß dem Richtlinienvorschlag der Kommission' [2013] NZKart 483 (487).

102 Thus, if an undertaking pays more than its (relative) share for the damage caused to the claimant, it can in turn take recourse against the co-infringers, and in this respect the amount of this compensation should be determinable in their internal relationship according to national law; Recital 37 Directive sets out a number of criteria relevant for deciding the amount of the relative shares (such as turnover, market share and role within the cartel). This rule is basically in line with existing principles of solidary liability, cf for example the Austrian position OGH 5 Ob 39/11p = EvBl 2012,557 = ecolex 2012, 392 *(Wilhelm)* = RdW 2012, 523 = WuW 2012, 1251/KRInt 2012, 393 = ZVR 2013, 76; Koutsoukou, Pavlova, 'Der Gerichtsstand der Streitgenossenschaft bei Schadensersatzklagen wegen Verletzung des EU-Kartellrechts' [2014] WuW 153; Kriechbaumer, Bamberger, 'Private Enforcement – Die Rechtslage in Österreich' [2014] WuW 690.

103 See von Bar, Clive, *Study Group on a European Civil Code/Research Croup on EC Private Law (Acquis Group), Principles, Definitions and Model Rules of European Private Law,* Draft Common Frame of Reference (DCFR) (2009) Art VI–4:102, Rz 1–13 with extensive further reference.

104 Spier, *General Introduction in European Group on Tort Law, Principles of European Tort Law* (2005) no 31.

105 Neethling, 'Toward a European ius comune in tort law' (2006) 12-1 Fundamina 81 (88); Thiede, Sommer, 'Vorsätzliche Schädigung von Anlegern im europaweiten arbeitsteiligen Wertpapiervertrieb' [2015] ÖBA 175 (184).

amount of their contribution toward the compensation may not be higher than the damage which they have caused to their own direct and indirect purchasers or suppliers.

This privilege would seem – as far as it seems, with the exceptions of Hungary[106] and Malta[107] – absent in all European Member States. Very rightly so, as it is particularly in cases of joint and several liability that privileges applicable outside of the internal relationship between those jointly liable are avoided. This is mostly in order to shield the victim from the risk and burden of having to assess the financial capacities of the individual injuring parties.[108] This would be exactly the case here too: it remains unclear how it would be established that the victim 'cannot obtain full compensation'. Is it sufficient that the other cartel participants refuse to pay? Must they already be insolvent? Or does a failed execution attempt suffice?

Certainly, undertakings infringing European or national competition law will drag out public prosecution as far as possible, whereas whistle-blowers will not as the latter will rarely contest the administration's decisions. The decision against the whistle-blower will therefore be the first to become final. Being the first then means greater exposure to follow-on damages claims. Nevertheless, this privilege for whistle-blowers seems excessive, not least because the solution to the underlying problem is obvious – whistle-blowers should be privileged in their relationship internally, to the cartel members, but jointly and severally liable in full outside of this relationship, as is the case in so many Member States. This privilege within the relationship to the co-infringers when it comes to solidary liability is absolutely sufficient as protection.[109]

It is particularly unsatisfactory that the European legislator also grants privileges to another group of infringers besides the whistle-blowers, namely small and medium-sized enterprises (SMEs); after all, these constitute 99% of European undertakings.[110] SMEs are liable, under Art 11 para 2 DADA, only to their own purchasers if at the time of the infringement they had less than 5% market share and if full liability would endanger their economic viability and their assets would lose all of their value. Under Art 11 para 3 DADA, this does not apply if the SMEs at issue organised the infringement or coerced other undertakings to participate, or have previously been found to have infringed competition law. In respect of this special protection, the

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106 And even this appears uncertain in the light of the latest reform of Hungarian liability law, cf Menyhárd, 'Hungary' in Karner, Steininger (eds) *European Tort Law 2013* (2014) 305 (311), no 8.

107 See Art 81(3) Police Act as changed by Act IV of 2014: The Various Law (Criminal Matters) (Amendment) Act 2014 (An Act further to Amend Various Laws related to Criminal Matters): 'In any civil proceedings instituted against a protected witness based on the fact that the said witness was the perpetrator or was an accomplice in the crime on which he tendered evidence, the court shall, if it finds that the protected witness is responsible for the payment of damages, only hold him liable for such part of the damage as he may have caused and shall, […], hold him not liable jointly and severally with others.' Cf Caruana, Demajo, Quintano, Zammit, *ETL* (2014) no 1.

108 Cf Krüger (n 101) 483 (486).

109 Koch, Thiede (n 36) no 9.

110 Cf on the definition Commission, *Recommendation concerning the definition of micro, small and medium-sized enterprises* (2003/361/EC), OJ 2003 L124, 36 ff as well as Commission, *The new SME Definition (2005) 5 and finally Evaluation of the SME Definition* (2012), online <http://ec.europa.eu/enterprise/policies/sme/files/studies/executive-summary-evaluation-sme-definition_en.pdf> 4.

above explanations can be referred to *cum grano salis;* the questions of when economic viability can be deemed jeopardised and how assets could 'lose all their value' naturally arise.[111]

In summary, it may be noted that the privilege accorded to whistle-blowers and the derogation in favour of SMEs unnecessarily complicate the question of joint and several liability, which gives rise to more leverage for the defendants in the proceedings.[112]

V International Dimensions

All of the above makes it clear that, in arguably decisive matters (presumption of damage; evidence, limitation; joint and several liability), Member States will implement the DADA differently, due to the nature of a European Directive. Indeed, some Member States have already gone further than the standards set out in the Directive; these standards will apply (prospectively) even after the transposition of the Directive in the Member State's laws.[113]

Those practitioners who take the international dimensions of anti-trust damages actions into consideration thus have great opportunities, with regard to cross-border cartels, to substantially improve the position of their clients by carefully considering which courts to bring the action in – and which national law will be applied to decide the matter on the merits.[114]

1 International Jurisdiction

The first question confronting a potential claimant wishing to seek compensation from an undertaking which has infringed anti-trust law Europe-wide is the court in which Member State has adjudicary jurisdiction.[115] As such, the first factor is the international jurisdiction of the Member States.

The needs of the common European market have meant that the European legislator has been particularly active in the area of international jurisdiction. As early as 1968, the Brussels Convention on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters was adopted by the Member States of the European Community and came into force in 1973. The Brussels Convention was subsequently amended by four accession conventions, and was finally replaced (for fourteen of the then fifteen EC Member States) by Regulation 44/2001 on Jurisdiction and the Recognition and Enforcements of Judgments in Civil and Commercial

111 Kersting (n 52) 564 (568).

112 For this reason, Germany, Poland and Slovenia have refused their consent to the Directive's compromise in the Council, cf Council Document 14680/14 ADD 1 = 2013/0185 (COD).

113 Cf Art 4 S 2, Art 5 (8), Art 6 (9), Art 10 (4) Directive.

114 This is referred to as *forum shopping,* on the term see Lurger, Thiede, *The International Dimensions of Law* (2015) no 2/13.

115 The link between implementation of the DADA and the applicable law may only arise indirectly from the choice-of-law rules in some circumstances; namely under Art 3 para 4 Rome I Regulation; Art 14 para 2 Rome II Regulation; Art 14 para 3 Rome II Regulation, Directives must be applied in the form in which they have been implemented in the Member State whose court is seised.

Matters adopted by the EC Council in December 2000. The 'recast' of the Regulation entered into force on 1 January 2015 (hereafter Brussels I Regulation).[116] The Regulation, like the earlier Convention, lays down rules on direct jurisdiction applicable in the court of first instance to determine its own jurisdiction, and on the recognition and enforcement of judgments of other Member States of the European Union in which the Regulation applies. In the context of private enforcement with respect to anti-trust damages actions, international jurisdiction of the Member State courts is determined primarily by this Brussels I Regulation (recast). The regulation does not provide specifically for any cartel-related rules and so the general rules must be applied.

a) General jurisdiction at the place of the defendant's domicile, Art 4 Brussels I Regulation

The basic rule concerning direct jurisdiction is enshrined in Art 4 Brussels I Regulation, which provides that 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member state.' The Brussels I Regulation applies whenever the defendant is domiciled in a Member State, regardless of whether or not the claimant is situated in the European Union.)[117] For any undertakings, Art 4 Brussels I Regulation is extended by Art 63 Brussels I Regulation; accordingly, courts are internationally competent to hear an action against a defendant undertaking at the place where the registered headquarters or main branch of the undertaking is situated.

For the following discussion of competent courts in (potentially) other Member States, we have to keep in mind that the all-important paradigm then deviated from is set; when it comes to actions against undertakings which have infringed anti-trust law, it is basically the court of their domicile (their headquarters or main branch) which has jurisdiction to examine the legal and economic aspects of claims for anti-trust damages, as well as related cartel-related agreements.

b) Jurisdiction for contractual matters, Art 7 no 1 Brussels I Regulation

An exaggerated preference for the defendant's domicile does not provide the most appropriate solutions in all situations, actions and claims in cross-border cases, as this mostly takes the defendant's interests into account. As it seems odd to subjugate the interests of the claimant to

[116] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L351, 1 ff.

[117] The rationale for this long-standing rule in favour of the defendant's domicile was outlined clearly by the CJEU in *Handte v TMCS,* ECLI:EU:C:1992:268 noting that the rule reflects the purpose of strengthening the legal protection of persons established within a particular current national jurisdiction, and rests on the assumption that a defendant can usually best conduct their defence in the courts of their domicile. Another (likely) reason for favouring the defendant over the plaintiff is that the defendant's assets are most likely at their place of domicile and enforcement against persons or property can thus most easily be effected there. In this way, the rule tends to concentrate both adjudication of the merits and enforcement of the judgment in the same country, thereby avoiding unnecessary procedural complications (which were of course also relieved to great extent by the Brussels I Regulation recast).

those of the defendant in general, the Brussels I Regulation provides for particular alternative jurisdictions if the defendant is to be sued in the courts of a state other than that of their domicile. According to the European legislator, this freedom of choice was introduced in the light of the existence, in certain well-defined cases, of a particularly close relationship between the dispute in question and the court where it might be most convenient to adjudge the matter.

The first exception to the rule on general jurisdiction above is of interest with regard to an undertaking which violates European or national competition law where specific contracts were agreed upon which stipulated that violation of European or national competition law. According to Art 7 no 1 Brussels I Regulation, a 'person domiciled in a Member State may, in another Member State, be sued … in matters relating to a contract, in the courts for the place of performance'. The courts at the place where anti-competitive contractual agreements were performed have jurisdiction when it comes to declaring anti-competitive contractual agreements null and void. With regard to the topic chosen here, anti-trust damages under the DADA, we must note that potential claimants will not merely seek a declaration that a contractual agreement is null and void, but possibly also seek damages (as provided by the DADA) instead. This latter action for damages is arguably delictual in nature,[118] and could thus, under Art 7 no 2 Brussels I Regulation, open up the possibility of courts in the places where 'the harmful event occurred' having jurisdiction, that is jurisdiction in tort.

A fascinating follow-up problem[119] on the relation between both rules arises here. First, one may argue that the place of jurisdiction in relation to delict also decides on contractual, i.e. non-delictual, claims. The CJEU clearly rejected such annex-jurisdiction with reference to the restrictive interpretation of special jurisdiction in 1988.[120] *Vice versa*, the delict claims in relation to anti-trust violations could also be decided at the place of jurisdiction for contract.[121] The

[118] See *CJEU* 16.5.2013 – C-228/11, *Melzer/MF Global UK Ltd*, ECLI:EU:C:2013:305, no 32-35; *CJEU* 21.6.1978 – 150/77, *Bertrand*, ECLI:EU:C:1978:1431, no 14–16; *CJEU* 17.6.1992 – C-26/91, *Handte,* ECLI:EU:C:1992:268, no 19; *CJEU* 19.1.1983 – C-89/91, *Shearson Lehman Hutton*, ECLI:EU:C:1993:15, no 13; *CJEU* 3.7.1997 – C-269/95, *Benincasa*, ECLI:EU:C:1997:337, no 12; *CJEU* 27.4.1999 – C-99/96, *Mietz*, ECLI:EU:C:1999:202, no 26; *CJEU* 11.6.2002, C-96/00, *Gabriel,* ECLI:EU:C:2002:436.

[119] See Dornis, 'Von Kalfelis zu Brogsitter – künftig enge Grenzen der Annexkompetenz im europäischen Vertrags- und Deliktsgerichtsstand' [2014] GPR 352 (353) with further references; Czernich in Czernich, Kodek, Mayr, *Europäisches Gerichtsstands- und Vollstreckungsrecht* (4th edn, 2015) Art 7 EuGVVO no 19; Simotta in Fasching, Konecny, *Kommentar zu den Zivilprozessgesetzen V/1* (2nd edn, 2008) Art 5 EuGVVO no 84 ff.

[120] *CJEU* 27.9.2988 – C-189/87, *Kalfelis,* ECLI:EU:C:1988:459, NB contrary to the view of AG *Darmon* cf ECLI:EU:C:1988:312. Cf *CJEU* 11.10.2007, C-98/06, *Freeport plc/Olle Arnoldsson*, Slg 2007, I-8319; Geimer, 'Streitgenossenschaft und forum delicti commissi' [1988] NJW 2088 (3090); Geimer, Schütze, *Europäisches Zivilverfahrensrecht* (3rd edn, 2010) Art 5 EuGVVO no 222; Simotta in Fasching, Konecny (n 119) Art 5 EuGVVO no 85, 284; agreeing Mankowski in Magnus, Mankowski, *Brussels I Regulation* (2nd edn, 2012) Art 5 no 22.

[121] In favour, for example Kropholler, von Hein, Art 5 EuGVVO no 79, cf on this Spickhoff, 'Anspruchskonkurrenzen, Internationale Zuständigkeit und Internationales Privatrecht' [2009] IPRax 128 ff; Engert, Groh, 'Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof' [2011] IPRax 466 with further references; with a different opinion Gottwald, 'Anmerkung' [1989] IPRax 272 (274).

latter circumstance was submitted to the CJEU only recently, in the *Brogsitter* case;[122] the Strasbourg judges decided that a claim does not fall outside of Art 7 no 1 Brussels I Regulation just because it is raised on the basis of civil law liability against the other contractual party, but certainly it does 'where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract'.[123] This would be the case in principle, according to the judges, 'where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter'.[124]

From the perspective of the practitioner on the ground, the decision in *Brogsitter* is questionable, as it could mean that the jurisdiction at the place of the delict under Art 7 no 2 Brussels I Regulation is impeded.[125] If the claimant brings an action for damages, not at the place of jurisdiction for contractual matters under Art 7 no 1 Brussels I Regulation but at the place(s) of jurisdiction for delictual matters under Art 7 no 2 Brussels I Regulation (the latter being a different jurisdiction), then the defendant will only need to claim, in line with *Brogsitter*, that their conduct was contractually justified, or that an interpretation of the contract is certainly necessary to judge on the case, and thus that the court in the place of jurisdiction for contractual matters also has international jurisdiction for delictual claims. In consequence, a number of actions will be rejected at the place of jurisdiction for delict due to the annex competence of the courts at the place of jurisdiction for contract.

c) Place of jurisdiction for delictual matters, Art 7 para 2 Brussels I Regulation

The preference for the place of jurisdiction for contractual matters ultimately fits into a whole series of unfathomable CJEU decisions on special jurisdiction in relation to delictual matters; the system arising from these decisions is predominantly shaped by judge-made law and holds a host of uncertainties for the practitioner.

To start with, Art 7 no 2 Brussels I Regulation stipulates that, in matters relating to torts, delicts or quasi-delicts, a person domiciled in a Member State may sue in another Member State 'in the court of the place where the harmful event occurred'. The application of this rule is unproblematic in cases where the harmful conduct, that is to say the action eventually leading to the damage, and its result, the damage, are located in the same country. However, the wording is unclear with regard to cases where the place where the wrongful action took place and the place where the resulting damage arose are actually in two countries (delict over a distance). The CJEU held in the Bier case[126] that the provision must be understood as covering

[122] *CJEU* 13.3.2014 – C-548/12, *Brogsitter,* ECLI:EU:C:2014:148.
[123] *CJEU* 13.3.2014 – C-548/12, *Brogsitter,* ECLI:EU:C:2014:148, no 24 f.
[124] *CJEU* 13.3.2014 – C-548/12, *Brogsitter,* ECLI:EU:C:2014:148, no 25.
[125] Mansel, Thorn, Wagner,'Europäisches Kollisionsrecht 2014: Jahr des Umbruchs' [2015] IPRax 15.
[126] *CJEU* 30.11.1976 – 21/76, *Bier,* ECLI:EU:C:1976:166, no 24, cf on this Leible in Rauscher, *EuZPR* (2nd edn, 2011) I Art 5 Brüssel I-VO no 75; Gottwald, *MünchKommZPO* (3rd edn) III Art 5 EuGVO no 53; Simotta in Fasching, Konecny (n 119) V/1 Art 5 EuGVVO no 300 ff; OGH 4 Ob 146/04 f EvBl 2005/24; Thiede, 'Internationale Persönlichkeitsrechtsverletzungen' (2010) no 9/10 and recently, for example, *CJEU* 22.1.2015 – C-441/13 *Hejduk,* ECLI:EU:C:2015:28, no 18.

both the place where the damage occurred and the place where the event giving rise to the damage took place (ubiquity principle) and, as a rationale, referred to the equal proximity of both courts to the wrongful conduct or the infringement sustained.

As mentioned, these two places may, and quite frequently do, coincide, but the rule nevertheless poses problems in cases concerning international divisibility of damage; it was initially the *Shevill* case[127] that demonstrated the disadvantages of this ubiquity principle: following on logically from the *Bier* decision, the CJEU first had to confirm that, in all those cases in which damage was sustained in numerous legal systems, the courts both at the place of conduct and in all places of the damage had international jurisdiction.[128] The CJEU became aware of the possibility of *forum shopping* and, in response, introduced certain limitations on the choice of jurisdiction of the plaintiff; the court held that the tortfeasor could be sued at the place of their wrongful conduct, that is, in heir domicile, for all harm caused,[129] or before the courts of each Member State where damage was sustained by the victim. However, in the latter event, the courts of each Member State have jurisdiction solely in respect of the damage caused within their own territory. This technique was dubbed 'mosaic assessment' as it requires, where damage is sustained in several Member States, that the laws of all Member States concerned will have to be applied on a distributive basis as tiny pieces, thus only together giving the complete picture of the mosaic of full compensation.

ca) Place of conduct

Given that courts at the place of the tortfeasor's conduct have full recognition to decide on the entire case, it is essential to determine which court is that at the place of conduct. In *Shevill,* this jurisdiction had the distinct advantage that the defendant caused the Europe-wide damage only at one place of conduct, namely where it was registered. If this condition is fulfilled, the general definition of the place of conduct as the place at which the defendant caused the harmful event by its actions or omissions suffices. For instance, if an undertaking with a dominant position sells it goods under abusive conditions, and thus excludes third parties from the market,[130] this undertaking undoubtedly acts in this one Member State and the courts of this one Member State have international jurisdiction for the action brought by the third party so excluded.

The question, however, is how to proceed when there is no *one single* place of conduct, for example when horizontal cartel agreements are at issue. If the place of conduct is understood

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127 *CJEU* 7.3.1995 – C-68/93, *Shevill,* ECLI:EU:C:1995:61, no 32 = IPRax 1997, 111 (Comm Kreuzer, Klötgen 90) = Rev crit DIP 1996, 487 (Comm Lagarde) = ZEuP 1996, 295 (Comm Huber) = 1 ZZP Int (1996) 145 (Comm *Rauscher*); Simotta in Fasching, Konecny (n 119) V/1 Art 5 EuGVVO no 316.

128 In the Europe-wide cartels at issue here, therefore, this would also be courts in the Member States where the cartel had a concrete effect on the market.

129 With a different view Wurmnest, 'Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelikten' [2012] EuZW 933 (934) (limitation also of the courts at the place of conduct to the damage that occurred in that state).

130 Cf, for example, the Case in *OLG Hamburg,* 19.4.2007 – 1 Kart U 5/06, GRUR-RR 2008, 31 (32); Mankowski, 'Der europäische Gerichtsstand des Tatortes aus Art 5 Nr 3 EuGVVO bei Schadenersatzklagen bei Kartelldelikten' [2012] WuW 797 (802).

as the place at which the forbidden cartel agreement was concluded, there would only be a clear, single place of conduct in cases where a cartel was concluded just once, or at intervals but always in one particular place, such as at a fair that took place annually in the same city, for instance, and when the cartel participants then confirmed or modified the cartel during this fair every year.[131] Even at first glance, it is obvious that this sort of 'organised cartel'[132] would be rather rare, so we are left with the question of how to proceed when participants in cartels make their agreements over years in many different places around the world. In that case there is a multitude of places of conduct, and hence there are risks of *forum shopping,* on the one hand, and undue restriction of claimant jurisdictions on the other.

One may argue that the decision to implement the cartel agreement at the registered seat of the cartel participants should be centre-stage, and here again refer to the decision in *Shevill;* in this decision too, the place of conduct was undoubtedly the domicile of the defendant.[133] This leads, however, to a situation where the special jurisdiction under Art 7 no 2 Brussels I Regulation becomes largely redundant; after all, the courts at the domicile of the defendant have international jurisdiction under Art 4 Brussels I Regulation anyway.[134] Some accept this and argue that it is almost impossible precisely to determine the place of the conduct with regard to horizontal cartel agreements, and that the place where the cartel was discussed must be irrelevant from a jurisdictional perspective.[135] Finally, *Shevill* is drawn upon with respect to the mosaic perspective on the place of the result, since this perspective would also apply when there is a multitude of places of conduct and it is argued that, when a cartel is discussed and agreed in various different places, the power of the courts to decide on the case at these different places must be limited to that damage which arose in each state due to the specific agreement that was concluded there.[136]

The last restriction in particular is excessive. If, for instance, it is clear where the cartel participants made their arrangements, the court with jurisdiction there should be competent in respect of all the damage which arose.[137] If no such single, unambiguous location can be determined, it will be necessary to admit that – at least for questions of international jurisdiction – there is not a sufficient link between unlawful conduct and the place of jurisdiction.

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131 Basedow, *FS 50 Jahre FIW* (2010), 129 (139).

132 Basedow (n 131) 129 (138) thus refers to these kinds of cases as 'cartels with a solid organisation.'

133 Cf Mankowski (n 129) 797 (802); Bulst, 'Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht' [2004] EWS 403 (405).

134 Cf F Bydlinski, *Methodenlehre* (2nd edn, 1991) 444: translated here as 'If a certain interpretation results… , in (the) provision… becoming devoid of purpose and function, then this interpretation shall not be applied.' In the specific context cf also Mankowski (n 130) 797 (803); cf also Basedow (n 131) 129, 137 f.

135 *Cooper Tire & Rubber Co. and others v. Shell Chemicals UK Ltd. and others* [2009] EWHC 2609 (Comm) [65] (claimant is limited to the place of jurisdiction where the result occurred); in consequence also Bulst (n 1323) 403 (405) (place of conduct only where infringer has its seat).

136 Basedow (n 131) 129 (140).

137 With a different opinion Wurmnest (n 129) 933 (934) pointing to further, possible places of conduct.

cb) Place of damage

According to the interpretation of the CJEU, the so-called place of the damage is the place where the effects of the event triggering liability occur to the detriment of the victim.[138] Since competition law rules serve the proper functioning of the market,[139] logically the place of the damage must then be localised by reference to markets, specifically as the place where the defendant's infringement affected the market.[140]

d) Jurisdiction in relation to connected claims, Art 8 para 1 Brussels I Regulation

The above discussions clearly demonstrate that the complexity of the jurisdiction issue must not be underestimated in relation to Europe-wide cartels, for instance in cases of horizontal agreements. If there is a large number of defendants who participated in the cartel, it may be that full compensation can only be obtained if each participant undertaking is sued where it has its registered seat or where the relevant impact on the market occurred. The only practical way out of this dilemma is an action in one place of jurisdiction for closely connected claims under Art 8 no 1 Brussels I Regulation. This provision provides that several defendants can be sued together at the court of the state where one of them has their domicile, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In other words, practitioners thus have the option of examining the respective national implementations of the DADA (no 49) in the places of general and special jurisdiction where the members of the cartel are based in this respect and of bringing the action against one of the undertakings with its domicile in this legal system as the main defendant, and then to extend the action to all of the other infringers in the cartel under Art 8 no 1 Brussels I Regulation.

In favour of this approach, it may be said that one of the largest claimants of anti-trust damages within the context of the so-called bleach cartel, Cartel Damage Hydrogen Peroxide SA (CDC),[141] took exactly this path; presumably in the light of the claimant-friendly German rules, CDC sued six undertakings (which had already been prosecuted and fined by the European Commission) with registered seats in different Member States,[142] and where only one of which

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[138] CJEU 30.11.1976 – 21/76, *Bier,* ECLI:EU:C:1976:166, no 24; CJEU 16.7.2009 – C-189/08, *Zuid-Chemie,* ECLI:EU:C:2009:475.

[139] Bulst (n 133) 403 (406); Mankowski (n 130) 797 (804).

[140] Mankowski (n 12930) 797 (805); with another opinion Mäsch, 'Vitamine für Kartellopfer: Forum shopping im europäischen Kartelldeliktsrecht' [2005] IPRax 509 (516) looking for the centre of financial interests. Cf also *LG Dortmund* 1.4.2004 – 13 O 55/02, EWS 2004, 434 (435) = BeckRS 2010, 02135. The latter view is, however, in clear contradiction to settled CJEU case law, cf only *CJEU* 10.6.2004 – C-168/02, *Kronhofer,* ECLI:EU:C:2004:364, no 19 f.

[141] CDC is a company with its registered seat in Belgium, which has as its object the assertion of actions for damages that are ceded to it by some of the undertakings harmed by the hydrogen peroxide and sodium perborate cartel either directly or indirectly.

[142] The defendants were Akzo Nobel NV based in the Netherlands, Solvay SA based on Belgium, Kemira Oyj based in Finland, Arkema France SA based in France (CDC later withdrew the claim against this defendant), FMC Foret SA based in Spain and Evonik Degussa, which was the only one based in Germany (former defendant and now intervenor to support Akzo Nobel, Solvay, Kemira and Arkema France).

was based in Germany (as the main defendant), jointly for damages before the German Regional Court *(Landgericht)* in Dortmund,[143] and invoked in this respect Art 8 no 1 Brussels 1 Regulation.

The subsequent actions taken by CDC seem truly astounding from a strategic, litigational perspective, and will be described here with the necessary brevity. After the claim was served on all defendants in the initial proceedings, but before the time had expired for the submission of answers to the claim and the beginning of the oral hearing, CDC dropped the proceedings against the German undertaking (as main defendant) on the basis of a settlement. The Regional Court of Dortmund[144] was thus confronted with the question of whether Art 8 no 1 Brussels I Regulation is also applicable when the main defendant is no longer being sued at its place of domicile by the claimant and referred this question to the CJEU. Although it was rather dubious in the light of the prior *Melzer* case[145] – after all, good arguments can be found for denying the competence of a court based on the association of claims when the main defendant is no longer part of the proceedings[146] – the CJEU accepted the German court as internationally competent to adjudicate on the matter.[147]

2 Applicable Law

The next step in our international scenario relates to the applicable substantive private law. In order to determine which state's substantive law governs the dispute at hand, the competent court must determine which choice-of-law rule applies where an undertaking violates European or national competition law. Then, on that basis, the court must decide which State's private law to apply. In other words, after the court has selected the applicable choice-of-law rule and has made the choice between the 'competing' substantive Member State's laws, it can proceed to determine the substantive outcome on the basis of the chosen law (and, of course, the evidence presented by the parties).[148]

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143 *LG Dortmund,* 29.4.2013 – 13 O (Kart) 23/09, EuZW 2013, 600 = NZKart 2013, 472.

144 *LG Dortmund,* 29.4.2013 – 13 O (Kart) 23/09, EuZW 2013, 600 = NZKart 2013, 472.

145 *CJEU* 16.5.2013 – C-228/11, *Melzer/MF Global UK Ltd,* ECLI:EU:C:2013:305; cf on this with further references Thiede, Sommer (n 105) 175 (184).

146 Cf in detail Harms, 'Der Gerichtsstand des Sachzusammenhangs bei kartellrechtlichen Schadensersatzklagen' [2014] EuZW 129 (130 ff).

147 *CJEU* 21.5.2015 – C-352/13, *CDC v Akzo Nobel,* ECLI:EU:C:2015:335.

148 Notwithstanding the explanations with respect to implementation of the Directive in no 49, skipping the test of choice-of-law allows the claimant to choose a court and thereby the substantive law of a specific jurisdiction which favours them as it, for example, awards significant damages or has a particularly advantageous system of evidence. In other words, the claimant may sway the substantive legal entitlements to their own advantage and, accordingly, to the disadvantage of their opponents. If this was permitted, the law would not serve a neutral and predictable mediatory function between the parties, and would in essence be unfairly biased against the defendant. The choice-of-law rules, at times referred to as 'meta-law' insofar as they are laws about law, prevent this kind of forum shopping by parties by rendering only one national legal system exclusively applicable to the case at hand, regardless of where the claim is litigated and which court is deemed internationally competent. By basing their decisions as to which law is applicable to cases with a foreign element on the same choice-of-law rules, all European courts in whichever national jurisdiction are thus ultimately referring to the same substantive law.

With a view to the introductory cases above, it seems to be obvious that undertakings engaging in anti-competitive activities, in terms of economic size and impact, mostly operate in the whole European internal market. As a result, discussions on the choice-of-law rules nurse fears of a fragmentation of applicable law; just as in the realm of international jurisdiction, a 'mosaic assessment' seems possible.[149] At first glance, Art 6 para 3 lit a Rome II Regulation[150] seems to prove the point, as this regulation stipulates that the law applicable to non-contractual obligations arising out of a restriction of competition is the law of the country where the market is affected. The apprehension in practice is then constructed along the following lines: assuming that one Member State's court is competent to judge the full European violation of competition law, under art 6 para 3 lit a Rome II Regulation each law at the place(s) of anti-competitive actions must be applied. However, the latter law(s) only have relevance concerning the impact of that action on the markets of the Member State. Where damage is sustained in several Member States, the laws of all Member States concerned will have to be applied on a distributive basis as tiny pieces which only reveal the full picture of the mosaic if seen together, ideally adding up to full compensation. As a result, the competent Member State's court would have to assess whether and to what extent harm occurred in the respective Member State, and how such harm can be indemnified there. Bearing in mind the differences in each jurisdiction – which need not disappear, as this is a minimum standard Directive – as well as divergent codification techniques, such a Herculean task should not be left to judges. Some raise doubts as to whether this standard of factual and legal accuracy could ever be met in practice.[151] It is argued, as a practical alternative, that parties might bring their action solely in respect of the damage caused in the market of one Member State's territory. Of course, this way the aggrieved party will either fall short of full compensation or will have to pursue their claims in a number of courts throughout Europe, which would then clearly miss the goal set by art 3 DADA.

The fears appearing in the discussions are mostly unfounded. While Art 6 para 3 lit a Rome II Regulation may initially raise alarm with regard to a mosaic assessment, Art 6 para 3 lit b Rome II Regulation provides a solution to be commended for those fields where a mosaic assessment is still in play. According to this provision, where the market is affected in more than one country, the person seeking compensation for damage (who sues in the court of the domicile of the defendant) may choose to base their claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises. In other words, where private parties sue for damage caused by a sizable European cartel, they may choose the law at the domicile of one of the cartelists as the law applicable to the anti-competitive action in the rest of the world.

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149 Becker, Kammin, 'Die Durchsetzung von kartellrechtlichen Schadensersatzansprüchen: Rahmenbedingungen und Reformansätze' [2011] EuZW 503 (507); Wurmnest (n 129) 933 (938).

150 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, OJ 2007 L199, 40.

151 Koch, Thiede (n 36) no 8.

VI Summary

The DADA will provide for change in several Member States; national liability laws will at least undergo amendment in the specific sub-areas discussed in this paper. The European legislator aspired, on the one hand, to avoid hindering successful public prosecution by the European and national competition authorities and, on the other, to create real incentives for private actions for damages against the infringers. The former aspect explains the somewhat odd rules with respect to whistle-blowers and leniency programmes, the latter the extensive concessions towards potential claimants, for instance in the presumption of damage and the binding effect of decisions handed down by authorities. In particular, this binding effect of decisions by authorities facilitates follow-on claims to a hitherto unknown extent, so all practitioners should be advised to keep track of the decisions rendered by competition authorities very carefully – and be ready to let corresponding follow-on claims succeed them.

With regard to such actions, the international dimensions must never be neglected. If a Europe-wide cartel is at issue, claimants have a range of options to improve their position if they take the different implementations of the Directive in the various Member States into account and choose a place of jurisdiction and applicable law accordingly. If a group of infringers are sued, the claimant should weigh up which Member State's law appears particularly favourable and bring the claim against the main defendant domiciled there.

Note

Anna Doszpoth*

Nandor Knust: Criminal Law and Gacaca. Development of a Pluralistic Legal Model Illustrated with the Example of the Rwandan Genocide**

Book Review

The author, NandorKnust, is head of the International Criminal Law Section of the Max Planck Institute for Foreign and International Criminal Law in Freiburg imBreisgau, Germany. Within the framework of the Max Planck Research School for Comparative Criminal Law (IMPRS-CC), he carried out the research project, Criminal Law and Gacaca – Coming to Terms with the Rwandan Genocide by means of a Pluralistic Legal Model. During the preparation of his thesis, he conducted field research in the Great Lakes Region of Africa and also served as legal intern at the International CriminalTribunal for Rwanda. He completed his dissertation in 2011 at the Albert-Ludwigs-University (Freiburg imBreisgau) under the supervision of Prof.Dr.Dr.h.c. mult. Ulrich Sieber, which was published in the form of the present book in 2013 by Duncker&Humblot Berlin as part of the Criminal Law Series of the Max Planck Institute.

I Introduction

Immersing himself more and more deeply in his chosen research topic, NandorKnust became aware that the vast majority of projects carried out in connection with the transitional phase of Rwanda's history tend to focus on its various selected instruments by concentrating on the legitimacy and role of the ad hoc Tribunal established by the United Nations or highlighting the rather unique method of reinventing the traditional local form of justice, the Gacaca courts[1].

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[1] Knust, p. 5. For a detailed analysis of Gacaca courts see, for example: Phil Clark,*TheGacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*(Cambridge University Press 2010); Paul Christoph Bornkamm,*Rwanda's Gacaca Courts. Between Retribution and Reparation*(Oxford University Press 2012); for a detailed analysis of the ICTR including its case law (published after the reviewed book), see Vladimir Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts. Procedure and Human Rights Aspects* (Intersentia 2014).

However, he had the impression that a complex matrix of instruments, which would introduce transitional justice after the mass atrocities of 1994 as an integrated mechanism to transform Rwanda into a land accepting and ensuring the rule of law principle, was disregarded. Having decided to leave the existing trends behind, Knust analysed the three immensely different transitional approaches simultaneously applied in Rwanda from a structural, legal systematic and criminal policy perspective *as a holistic system,*[2] with the aim of revealing whether a pattern of minimum standards may be designed in order for the transitional phases to achieve the goalsagreed on.

II Transitional Model of Rwanda

NandorKnust's book is divided into seven main chapters; the first two provide readers with a detailed insight into the history of Rwanda as well as the formation and development of its judicial system. As Knustrelates,[3]since state power was insufficient for centralisation, local norms had to be created and applied to establish an effective conflict resolution mechanism, usually under the direction of the eldest members of the community. Apart from delivering justice to the victims and imposing penalties on the offenders, the original form of Gacaca jurisdiction laid a special emphasis on rituals involving the whole community by carrying out symbolic acts of reconciliation,[4] similar to the matooput tradition of Uganda.

More than a century after the establishment of a centralised administration and judicial system by German and Belgian colonisers with the growing dominance of written legal norms (which era was followed by the struggle of the country to gain independence and by continuing tensions between people belonging to the Hutu and Tutsi groups even after the transformation to the*Republic of Rwanda* in 1962), the traditional Gacaca courts gained anew importance after the genocide of 1994. The Rwandan national judiciary was incapable of carrying out proper criminal investigations and prosecutions due to the large number of perpetrators who were involved in genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, or other offences punishable under Rwandan law.

As a unique transitional mechanism, a specific system consisting of three levels of judicial bodies has been created. Since the mission of the top level criminal court, the International Criminal Tribunal for Rwanda (ICTR) established by the Security Council, was to focus on the criminal prosecution of the main perpetrators, further special chambers had to be founded within the national judicial system at ordinary courts of first instance and at military tribunals by *Loiorganique No. 8/96* to investigate the cases of lower level perpetrators. The capacity of

[2] Knust, p. 3.
[3] Knust, p. 22 et seq.
[4] Knust, p. 29. Such symbolic acts are, for example,public mournings with specific prohibitions concerning all community members, or tree-planting commemorating the victims, often next to the graves, to "protect" the deceased.

these chambers was, however, still not sufficient to prosecute all offenders and this was why in 2001 the government established approximately 11.000 Gacaca courts within the country with the aim of bringing all perpetrators to justice and at the same time, to involve all members of the local communities in the long and arduous process of reconciliation.

III The Framework of the Pluralistic Model

After providing a summary of the history and the essential aims of transitional justice, Knust introduces in Chapter 3 his most important innovation: a framework for a pluralistic model of transitional justice along its three main goals, whereby he connected selected instruments to each of them in order to open the opportunity for their evaluation in the book's final chapter.

(1) *Ending the culture of impunity.* The criteria that Knust connected to impunity are twofold; first, it is related to the act of punishment itself and, second, to the establishment and exercise of an effective state power by means of proper criminal procedures to punish perpetrators. Beside its legal functions, punishment also contributes to strengthening the common values of a society, as already realised in 1895 by sociologist Émile Durkheim,[5] while the application of the rule of law principle equates to the restriction on the state on carrying out unlawful acts.

(2) *Reconciliation.* This term basically aims at recreating the peaceful life of a community. Its material content lies in the examination and declaration of the individual criminal responsibility of perpetrators, from a procedural point of view, it refers to the application of fair criminal procedures including the participation of victims and witnesses.

(3) *Truth.* Knust divided the truth component into four subcategories: the *factual truth* requires objectivity and scientific evaluation and is hence the basis of criminal trials; the *narrative truth* is the one perceived by the individuals affected directly by the conflict and which enables them to disclose their personal experiences and to reveal their harms suffered. More importantly, *social truth* is created through the interaction between the members of a community and serves as a basis for *restorative truth,* the imminent element of which is hence consensus, and it aims at intentionally creating a record of past abuses as a foundation for the establishment of a common and peaceful future.

IV Comparative Analysis and Evaluation of the Three-Level Transitional Model

Chapters 4 to 6 display a detailed comparative analysis of both the material and the procedural rules to be applied by the ICTR, by national courts and by the Gacaca courts. Starting with the international conventions up to local unwritten traditions, Knust provides an exhaustive list of

[5] Émile Durkheim, *The Rules of Sociological Method* (The Free Press 1982, New York) 101 et seq.

sources of both international and Rwandan criminal law. Chapter 6 consists of a summary of the findings of the analysis in form of a table that allows readers to briefly and easily understand the main differences between the three systems regarding their material, legal and procedural rules.

Chapter 7 is the most complex part of the book; it evaluates the three-level judicial system of Rwanda in line with the criteria defined by Knust under Chapter 3. The aim of the closing chapter is hence to examine whether the main goals of transitional justice, namely ending the culture of impunity and finding reconciliation and truth could be realised via the three-level judiciary. At this point, Knust raises crucial questions. *Is it really the end of the era of impunity if justice turns a blind eye to the crimes perpetrated by members of the Tutsi minority? Is it a merit of the remembering policy that it affects all spheres of society, from criminal law through public debates and memorials up to the shortest books written for children, or is it just a disguised return of the traditionally strict and overwhelming social control?*

As Knust reveals, even if the transitional government happened to rebuild the effective state power, it cannot be regarded as an unbiased executive organ promoting equality, due to the asymmetrical ending of the culture of impunity.[6] Regarding reconciliation, one may suppose that this goal would be best realisable through direct interactions between community members, as in the course of locally held Gacaca trials. The personal interviews carried out by the author in Rwanda however pointed out that the neo-traditional Gacaca courts are often perceived as top-down created institutions,[7] which gives the aim of reconciliation a rather forced nuance instead of being a voluntary and honest step towards forgiveness. The realisation of the truth component is also problematic, since the trial procedure of the ICTR and of the special chambers are contradictory; furthermore, the procedural rights of the defendants are very poorly defined at the level of national courts and criminal trials are mainly based on the findings of the prosecutor's office, rarely even collecting information in favour of the defendants.

V Conclusions

The approximately 100 days of mass violence of 1994 led to the death of nearly 1 000 000 people; many others were seriously injured or incapacitated for life and still have to carry those scars that remind them of the appalling forces that carried out the process of genocidal violence. After laying down their guns, Rwandan society had to face the same challenges as experienced by other countries following the end of ethnic conflicts reaching the level of mass violence, the overthrow of military dictatorships or the collapse of autocratic regimes. These goals are nowadays widely recognised as the essential aims and components of transitional justice: ending the cul-

[6] Knust, p. 338. No offences committed by the Tutsi dominated Rwandan Patriotic Front and Rwandan Patriotic Army have been prosecuted.

[7] Knust, p. 73.

ture of impunity, reconciliation, re-establishment of justice, investigating and recording the truth and the creation of a stable peace.[8]

The establishment of an effective state power had to be the starting point for ensuring the restitution of social order, which was necessary to acknowledge the legitimacy of the judicial bodies of all three levels and to enforce the judgments they delivered. There are, however, significant differences to be found regarding the success of achieving the selected goals on the three different judicial levels; the ICTR was incapable and was not even originally created to end the culture of impunity completely by prosecuting all perpetrators, but it had a more important role than other forums, to make a precise record of the atrocities with its large bureaucratic infrastructure (however, bearing in mind the selective punishment-related criticism). The courts of the two further levels proved themselves to be more effective at promoting the process of reconciliation by laying higher emphasis on the role of victims and witnesses and not only involving them formally in the trials, even though there were heated debates in connection with the legal competence of the judges and prosecutors in the proceedings. In spite of the previously mentioned problematic components and their negative effects, Knust concluded that none of the court levels on its own would have been able to prosecute all perpetrators of the 1994 genocide, to record all past abuses, promote the process of open discussions and reconciliation and therefore completely fulfil the essential goals of transitional justice. Each of the judicial levels realised these goals to a different degree and only their simultaneous application and the combination of their strengths could contribute to the healing process of that divided society.

[8] Knust, p. 57. See further the definition applied by the International Centre for Transitional Justice,which also includes the components of reparation and institutional reform, and by the United Nations Rule of Law initiative further adding the element of national consultations.

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