

# SHAPING THE EU INVESTMENT REGIME: CHOICE OF FORUM AND APPLICABLE LAW IN INTERNATIONAL INVESTMENT AGREEMENTS\*

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**Abstract:** The paper examines the interplay between European Union Law and the international foreign investment protection regime. While the European institutions and its Member States shape the content of the future investment agreements and define the investment policy, it is worth analyzing in light of recent practice the eventual participation formulas of the European Union in investment arbitration, and the consideration of European Union Law as applicable Law in investment arbitration.

**Key words:** European investment regime; Applicable Law to investment arbitration; Participation of the European Union in investment arbitration; Bilateral Investment Treaties; International Centre for Settlement of Investment Disputes; European Court of Justice; self-contained regimes; principle of systemic integration.

**Resumen:** El trabajo examina la interacción entre el Derecho de la Unión Europea y el régimen internacional de protección de las inversiones exteriores. Mientras las instituciones de la Unión Europea y sus Estados miembros modelan el contenido de los futuros acuerdos europeos de inversión y definen el alcance de la política europea de inversiones, es importante analizar a la luz de la práctica más reciente, las posibles fórmulas de participación de la Unión Europea en el arbitraje de inversiones y la consideración del Derecho de la Unión Europea como derecho aplicable en el arbitraje de inversiones.

**Palabras clave:** Régimen europeo de inversiones; Derecho aplicable al arbitraje de inversiones; Participación de la Unión Europea en el arbitraje de inversiones; Tratados bilaterales de inversión; Centro Internacional para el Arreglo de Diferencias relativas a Inversiones; Tribunal de Justicia de la Unión Europea; regímenes autónomos; principio de integración sistémica.

**Summary:** I. Introduction. II. The European Union Participating in Investment Arbitration. 1. Participation and Consent. 2. The ICSID System. 3. Additional Systems within the Investment Arbitration Universe. III. European Union Law as Applicable Law in Investment Arbitration. 1. The Flexible Framework Envisaged by the International Investment Regime. 2. The Lack of Uniformity of the Choice of Law in the Conventional Investment Regime. 3. Its Progressive Recognition in the Arbitral Practice. 4. Is It Necessary to Include EU Law as Part of the Applicable Law in Investment Arbitration? 5. The Implications Arising from the Acceptance of European Union Law as Applicable Law in Investment Arbitration. IV. Final Remarks.

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## I. Introduction

1. The European Union (hereinafter: EU) is one of the leading players in international investment relations. Except for the signing of the Energy Charter Treaty (hereinafter: ECT),<sup>1</sup> a mixed-agreement concluded in 1994 by the EU and its Member States with the aim of developing energy cooperation among the States of Eurasia,<sup>2</sup> EU Member States have traditionally developed independent and autonomous investment policies. However, Articles 206 and 207 of the Treaty of Functioning of the European Union<sup>3</sup> (hereinafter: TFEU) have attributed the exercise of the investment protection policy to the EU on an exclusive basis. Therefore, since the entry into force of the Treaty of Lisbon the new EU investment regime is under discussion in Brussels, having become a major topic among the legal literature.<sup>4</sup>

2. The European Commission has already proposed several policy papers entitled “Upgrading the EU Investment Policy”,<sup>5</sup> “Establishing transitional arrangements for bilateral investment agreements between Member States and third countries”,<sup>6</sup> “Towards a comprehensive European international investment policy”,<sup>7</sup> and “Establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party”,<sup>8</sup> only the one concerning the establishment of transitional arrangements for bilateral investment treaties (hereinafter: BITs) between Member States and third countries having completed the legislative process at the time of closing these lines.<sup>9</sup>

<sup>1</sup> *Boletín Oficial del Estado* of 17 May 1995 and 14 July 1995 (provisional application) and 17 March 1998 (entry into force). The *Boletín Oficial del Estado* is the Official State Gazette in Spain: see <http://boe.es/index.php?lang=en>.

<sup>2</sup> As of October 2009, apart from the European Union, a total of 46 States had ratified the ECT (including all EU Member States). Belarus has not ratified this treaty but applies the ECT provisionally. Australia, Norway and Iceland have not yet ratified it, notwithstanding they were signatories. Moreover, on 20 August 2009 the Russian Federation officially informed the Depository that it did not intend to become a party. In accordance with Article 45.3.a) of the ECT, such notification results in Russia's termination of its provisional application (from 19 October 2009).

<sup>3</sup> Article 206 of the TFEU envisages that “By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.” Article 207.1 of the TFEU sets forth “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.”

<sup>4</sup> N. MAYDELL, “The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence”, in A. REINISCH AND CH. KNAHR (eds.), *International Investment Law in Context*, Utrecht, Eleven International, 2008, 73-92; M. BURGSTALLER, “European Law and Investment Treaties”, *Journal of International Arbitration*, vol. 26, 2009, 181-216; T. EILMANSBERGER, “Bilateral Investment Treaties and EU Law”, *Common Market Law Review*, vol. 46, 2009, 383-429; N. LAVRANOS, “New Developments in the Interaction between International Investment Law and EU Law”, *The Law and Practice of International Courts and Tribunals*, vol. 9, 2010, 409-441; M. BUNGENBERG, “The Division of Competences between the EU and its Member States in the Area of Investment Policies”, in M. BUNGENBERG, J. GRIEBEL AND S. HINDELANG (eds.), *European Yearbook of International Economic Law: International Investment Law and EU Law*, Heidelberg, Springer, 2011, 29-42; A. DE LUCA, “New Developments on the Scope of the EU Common Commercial Policy Under the Lisbon Treaty: Investment Liberalization vs. Investment Protection”, in K.P. SAUVANT (ed.), *Yearbook on International Investment Law & Policy (2010-2011)*, Oxford, Oxford University Press, 2012, 165-215; and A. DIMOPOULOS, “The Compatibility of Future EU Investment Agreements with EU Law”, *Legal Issues of Economic Integration*, vol. 39, 2012, 447-471.

<sup>5</sup> Note for the Attention of the 133 Committee “Upgrading the EU Investment Policy”, of 30 May 2006: see [www.iisd.org/pdf/2006/tas\\_upgrading\\_eu.pdf](http://www.iisd.org/pdf/2006/tas_upgrading_eu.pdf) (last accessed on 24 April 2013).

<sup>6</sup> COM (2010) 344 final, of 7 July 2010.

<sup>7</sup> COM (2010) 343 final, of 7 July 2010.

<sup>8</sup> COM (2012) 335 final, of 21 June 2012.

<sup>9</sup> Regulation (EU) No. 1219/2012 of the European Parliament and the Council, of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries (*OJ L* 351, of 20 December 2012, p. 40). For explanatory comments on its main provisions: see C. BROWN AND M. ALCOVER-LLUBIÀ, “The External Investment Policy of the European Union in the Light of the Entry into Force of the Treaty of Lisbon”, in K.P. SAUVANT (ed.), *Yearbook on International Investment...*, *op. cit.*, 145-163, pp. 153-163; and J.Á. RUEDA GARCÍA, “EU approves Regulation 1219/2012 on existing BITs between EU Member States and Third Countries” at <http://blogaila.com/2012/12/27/eu-ap->

3. While these proposals are being shaped by the European institutions and new investment agreements are negotiated with third States,<sup>10</sup> it is necessary to address certain legal problems arising from the interaction between EU Law and the international investment regime, such as the participation of the EU in the settlement of future investment disputes, and the applicability of EU Law in investment arbitration. This paper studies these issues, which are at the heart of any future investment dispute concerning the European investment regime.

4. As for the structure of the paper, Part II deals with several legal issues arising from the EU's intervention and participation in investment arbitration. Part III examines whether EU Law can be considered as applicable Law in investment arbitration. Finally, Part IV concludes by establishing some final remarks.

## II. The European Union Participating in Investment Arbitration

5. In this Section we address several preliminary issues regarding the EU participation in investment arbitration, before studying the different avenues through which its participation could be framed.

### 1. Participation and Consent

6. The EU has been participating in investment arbitration *lato sensu*, since the European Commission was granted leave to intervene as *amicus curiae* in arbitral proceedings.<sup>11</sup> In these cases the disputed national measures, that purportedly violated the international obligations protected under the investment treaties, had been adopted in order to comply with the State's obligations within the European integration process.

7. The legal arguments raised by the European Commission were aimed at underlining the problems created by the interplay between international investment Law and the European legal order. In particular, the European Commission discussed the issue of *res iudicata*, since legal actions dealing with the legality of the power purchase agreements concluded by Hungary with the foreign investor under the EU State aid regime had been initiated before the Luxembourg Court,<sup>12</sup> and the applicable Law in *AES Summit*;<sup>13</sup> and unsuccessfully challenged the jurisdiction of the arbitral tribunal in *Electrabel*.<sup>14</sup>

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[proves-regulation-12192012-on-existing-bits-between-eu-member-states-and-third-countries-by-jose-angel-rueda-2/](#) (last accessed on 5 May 2013).

<sup>10</sup> The European Union is currently negotiating trade, economic and investment agreements with Canada, Singapore, and India. The text of the negotiating mandates approved by the General Affairs Council of the EU for the investment protection chapter to be concluded with these three countries is available at [http://www.bilaterals.org/spip.php?page=print&id\\_article=20272&lang=en](http://www.bilaterals.org/spip.php?page=print&id_article=20272&lang=en) (last accessed on 12 June 2013). The European Commission also underlined the need to explore the suitability of concluding future investment agreements with China and Russia: see COM (2010) 343 final, of 7 July 2010, p. 8. Finally, in his State of the Union address on 12 February 2013, President Barack Obama announced that the Administration planned to notify Congress of its intent to launch negotiations on a Transatlantic Trade and Investment Partnership with the European Union: see <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/february/US-EU-TTIP> (last accessed on 23 March 2013). Along the same lines, the EU issued a press release the following day: see "European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership", MEMO/13/95, of 13 February 2013. As for the development of these negotiations: see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=943> (last accessed on 23 July 2013).

<sup>11</sup> *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic* (UNCITRAL, PCA Case No. 2008-13); *AES Summit Generation v. Republic of Hungary* (ICSID Case No. ARB/07/22); *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19); and *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20).

<sup>12</sup> By Judgment of 12 February 2012 the General Court dismissed the application in which the investor had sought the annulment of the European Commission's Decision declaring that the power purchase agreements concluded by Hungary conferred illegal State aid on the power generators (*OJ L 225*, of 27 August 2009, p. 53): see GC, Judgment of 12 February 2012, *Budapesti Erőmű Zrt v. European Commission* (Joined Cases T-80/06 and T-182/09) (*OJ C 89*, of 24 March 2012, p. 20).

<sup>13</sup> *AES Summit Generation v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010, paras. 6.5.4 and 7.6.12). The issue of applicable Law was also discussed in *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic* (UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, paras. 286-292).

<sup>14</sup> The tribunal meticulously rejected the objections to the jurisdiction raised, notwithstanding that it had not allowed the

**8.** In *Achmea* the tribunal declared that, with regard to the submissions presented by the Commission “all of the points made in those submissions have been taken into account by the Tribunal”.<sup>15</sup> In the same fashion, the tribunal in *Electrabel* devoted several pages in Parts IV and V of the award to comment on the submissions made by the Commission as *amicus curiae*. This intervention must be considered as a good sign of complementarity between EU and international investment Law.

**9.** Intervening as *amicus curiae* can be considered a useful way for the EU not only to raise awareness on the existing interactions between these international legal subsystems, but also to provide arbitral tribunals with some guidance regarding the interpretation of EU Law.<sup>16</sup> However, under the forthcoming European investment regime the EU is also expected to participate as a party to the arbitration.

**10.** The EU participation in investment arbitration, apart from its legal implications at EU level, immediately raises two intertwined discussions from the international Law standpoint.

**11.** Firstly, the application of the customary principles of international responsibility of States and International Organizations,<sup>17</sup> and the eventual management between the EU and its Member States of the financial consequences of such international responsibility,<sup>18</sup> should an arbitral tribunal award any compensation to the investor. And secondly, the choice of the international investment *forum* in which the EU would be entitled to appear, after having given its consent to international investment arbitration. Since the European Commission is partially addressing the first issue at this time,<sup>19</sup> in this section we only deal with the latter.

**12.** In order to participate in investment arbitration it is necessary for the EU to give its consent. The ECT provides for a unique example to explore how the expression of consent by the EU could be arranged. In Article 26.3 of the ECT the contracting parties give their “unconditional consent to the submission of a dispute to international arbitration or conciliation”.

**13.** However, Article 26.3.b.i) envisages an exception to this general rule in connexion with Annex ID of the ECT.<sup>20</sup> The contracting parties listed in Annex ID, including the European Union –listed as

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Commission to present arguments in this regard: see *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, paras. 5.31-5.38).

<sup>15</sup> *Achmea B.V. (formerly Eureka B.V.) v. Slovak Republic* (UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 217).

<sup>16</sup> M. BURGSTALLER, “Les aspects procéduraux de l’arbitrage – Qui est Partie? Le rôle de la Commission Européenne”, in C. KESSEDIAN ET CH. LEBEN (dirs.), *Le droit européen et l’investissement*, Paris, Panthéon-Assas, 2009, 123-142.

<sup>17</sup> “Draft Articles on the responsibility of International Organizations” (A/RES/66/100, of 27 February 2012).

<sup>18</sup> K. ARIF, “Draft Report on the Future European International Investment Policy”, PE454.567v01-00, of 20 December 2010, p. 7.

<sup>19</sup> COM (2012) 335 final, of 21 June 2012. The legislative process of this proposal can be followed at: <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0163%28COD%29&l=en> (last accessed on 6 September 2013).

<sup>20</sup> Annex ID of the ECT envisages that “The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an investor of another Contracting Party. In such cases, upon request of the investor, the Communities and the Member States concerned will make such determination within a period of 30 days. (This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States).

The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice.

Any case brought before the Court of Justice of the European Communities by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty. (Article 26(2)(a) is also applicable in cases where the Court of Justice of the European Communities may be called upon to examine the application or interpretation of the Energy Charter Treaty on the basis of a request for a preliminary ruling submitted by a court or tribunal of a Member State in accordance with article 177 of the EC Treaty). Given

European Communities— and 15 other EU Member States;<sup>21</sup> do not give such unconditional consent. Annex ID of the ECT, from the perspective of the EU interests, establishes a balance between the eventual recourse to international arbitration and the protection of the jurisdictional monopoly of the European Court of Justice (hereinafter: ECJ).<sup>22</sup>

**14.** Should an investment dispute against the EU arise under the forthcoming EU investment regime and the EU had given no unconditional consent,<sup>23</sup> it would be necessary for the EU institutions to define the scope of their competences with regard to the Member States so as to identify the respondent party in the arbitration. This issue, as set forth by the ECT, must be assessed in accordance with the exclusive jurisdictional functions exercised by the Luxembourg Court in all matters regarding the application and interpretation of EU Law,<sup>24</sup> recognized by Article 19.1 of the Treaty of the European Union (hereinafter: TEU).

**15.** Before initiating investment arbitration, from the standpoint of international Law, it is necessary to identify the international *forum* in which the EU would be entitled to appear after having determined the respondent party and given its consent to arbitration.

## 2. The ICSID System

**16.** The EU is currently neither a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>25</sup> (hereinafter: ICSID Convention), nor can it access to the International Centre for Settlement of Investment Disputes (hereinafter: ICSID) Additional Facility. Therefore, unless the ICSID Convention or the Additional Facility Rules are amended, the ICSID arbitration avenue is closed for the EU.

**17.** Amending a universal international agreement such as the ICSID Convention constitutes an extremely complex endeavor,<sup>26</sup> especially if we consider that Article 67 of the ICSID Convention only allows States<sup>27</sup> to join the Convention. The eventual accession of the EU would require the amendment of the ICSID Convention in order to open the door to other subjects of international Law to join this international treaty.

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that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.

As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them. Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty."

<sup>21</sup> In alphabetical order: Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Greece, Hungary, Poland, Portugal, Romania, Slovenia, Spain, and Sweden.

<sup>22</sup> It is important to recall that, according to the European Commission's proposal "Establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party", in case of mixed-agreements the responsibility between the EU and its Member States may be identified according to the distribution of competences set forth in the TFEU: see COM (2012) 335 final, of 21 June 2012, p. 5.

<sup>23</sup> Through an international investment agreement or by any other legal means: see A.M. STEINGRUBER, *Consent in International Arbitration*, Oxford, Oxford University Press, 2012, pp. 196-223.

<sup>24</sup> ECJ, Opinion of 8 March 2011, *Draft agreement on the creation of a unified patent litigation system* (Case 1/09), *Rep.*, p. I-1137.

<sup>25</sup> *Boletín Oficial del Estado* of 13 November 1994.

<sup>26</sup> B. POULAIN AND M. RAUX, "Actualité du droit européen des investissements internationaux", *Revue Générale de Droit International Public*, vol. 115, No. 4, 2011, 113-140, pp. 121-122.

<sup>27</sup> Article 67 of the ICSID Convention envisages "This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention."

**18.** A second major problem arises from Article 66.1 of the ICSID Convention,<sup>28</sup> which provides for an exception<sup>29</sup> to the rule regarding the amendment of international multilateral treaties set forth in Article 40 of the Vienna Convention on the Law of Treaties<sup>30</sup> (hereinafter: VCLT).<sup>31</sup> In fact, Article 66.1 of the ICSID Convention requires any amendments to the convention coming into force only after being accepted by all contracting States.

**19.** In sum, amending Article 67 of the ICSID Convention so as to open the convention to International Organizations such as the EU would require, as a result of the role played by Article 66.1 of the ICSID Convention, an unprecedented diplomatic effort.<sup>32</sup> Moreover, given the general objections to the ICSID system raised in Latin America,<sup>33</sup> this process could contribute to the weakening of the legal framework established by the ICSID Convention.<sup>34</sup>

**20.** Therefore, although the European Commission has expressed its confidence in the ICSID system<sup>35</sup> and has been in contact with the ICSID Secretariat in order to explore the EU accession to the ICSID Convention,<sup>36</sup> it is not likely that the amendment of the ICSID legal framework will take place either in the short or medium term.

**21.** In addition, this participation may not even be considered as urgent, if we note the arbitration *forum* available for the EU as well as the States with which the EU is currently negotiating investment-related agreements. Neither Canada<sup>37</sup> nor India have ratified the ICSID Convention.<sup>38</sup> Any investment dispute between investors of these States and the EU –or vice versa– would necessarily be submitted outside the framework of the ICSID system.

**22.** Apart from the restrictions set forth in Articles 66 and 67 of the ICSID Convention, the participation of the EU in the ICSID system could still be accomplished, in theory, by inserting references to

<sup>28</sup> Article 66.1 of the ICSID Convention sets forth “If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States *that all Contracting States have ratified, accepted or approved the amendment.*” (emphasis added).

<sup>29</sup> CH. SCHREUER, L. MALINTOPPI, A. REINISCH AND A. SINCLAIR, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge, Cambridge University Press, 2009, p. 1265.

<sup>30</sup> *Boletín Oficial del Estado* of 13 June 1980.

<sup>31</sup> Article 40 of the VCLT envisages “4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State. 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.”

<sup>32</sup> C. BROWN, member of the Directorate General for Trade of the European Commission, expressed his views on the difficulties arising from the EU requesting membership to the ICSID Convention: see C. KESSEDJIAN (dir.), *Le droit européen et l'arbitrage d'investissement*, Paris, Panthéon-Assas, 2011, p. 192.

<sup>33</sup> K. FACH GÓMEZ, “Latin America and ICSID: David versus Goliath?”, *Law and Business Review of the Americas*, vol. 17, No. 2, 2011, 195-230; E. FERNÁNDEZ MASÍA, “El incierto futuro del arbitraje de inversiones en Latinoamérica”, *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, vol. II, No. 3, 2009, 741-760; J.C. FERNÁNDEZ ROZAS, “América Latina y el arbitraje de inversiones: ¿matrimonio de amor o matrimonio de conveniencia?”, *Revista de la Corte Española de Arbitraje*, 2009, 13-38; and F. MANTILLA-SERRANO, “¿Existe hostilidad hacia el arbitraje de inversión en América Latina?”, in M.A. FERNÁNDEZ-BALLESTEROS AND D. ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, Madrid, La Ley, 2010, 789-806.

<sup>34</sup> Bolivia, Ecuador and Venezuela have already denounced the ICSID Convention and have also undertaken legal steps at national level aimed at eroding the impact of the international investment arbitration regime: see F.J. PASCUAL VIVES, “Consent to ICSID Arbitration: Recent Conventional and Arbitral Practice”, *Transnational Dispute Management*, No. 2, 2011, 1-43, pp. 17-42.

<sup>35</sup> COM (2010) 343 final, of 7 July 2010, p. 10; and *Investment Arbitration Reporter*, vol. 4, No. 8, 2011, pp. 3-8.

<sup>36</sup> SP (2011) 5857, of 6 April 2011, p. 6.

<sup>37</sup> Canada signed the ICSID Convention on 15 December 2006.

<sup>38</sup> Singapore, on the other hand, ratified the ICSID Convention on 14 October 1968.

the ICSID Rules of Arbitration in the forthcoming EU investment agreements. In this scenario EU investors, except for those established in Poland,<sup>39</sup> would be entitled to initiate an ICSID arbitration against a third State, although foreign investors from that State would not be invested with the same right. As one author has rightly argued, such a solution would be contrary to the general principle of reciprocity; one of the bedrocks of the Law of the Treaties, and third States may not accept this asymmetric regime.<sup>40</sup>

**23.** Finally, it is important to recall that the ICSID avenue could still be marginally open by resorting to the Additional Facility Rules, through which the ICSID Secretariat is authorized to administer certain types of proceedings between States and foreign investors falling outside the scope of the ICSID Convention. As amended from 2006, they currently do not allow the EU to participate in investment disputes submitted under the Additional Facility.<sup>41</sup> However, these rules may be amended by simple majority vote of the ICSID Administrative Council,<sup>42</sup> which provides for a much more realistic chance for the EU to finally be considered a party to international investment arbitration within the ICSID system.

<sup>39</sup> Poland has neither signed nor ratified the ICSID Convention.

<sup>40</sup> M. BURGSTALLER, "Investor-State Arbitration in EU International Investment Agreements with Third States", *Legal Issues of Economic Integration*, vol. 39, No. 2, 2012, 207-221, p. 213.

<sup>41</sup> Up to 42 investment claims have been submitted under the Additional Facility Rules, by order of registration: see *Metallclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000); *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999); *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1, Award of 18 September 2000); *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002); *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002); *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003); *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3, Award 30 April 2004); *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006); *Cargill, Incorporated v. Republic of Poland* (ICSID Case No. ARB(AF)/04/2, Order taking note of the discontinuance of 4 April 2005); *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1, Award of 18 August 2009); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3, Award of 16 June 2010); *Talsud, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/04/4, Award of 16 June 2010); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5, Award of 21 November 2007); *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6, Award of 16 January 2013); *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1, Award of 19 June 2007); *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009); *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2, Award of 17 September 2009); *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1, Award of 4 August 2010); *Europe Cement Investment and Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2, Award of 13 August 2009); *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4, Award of 22 May 2012); *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/08/1, Order taking note of the discontinuance of 27 October 2010); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1); *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/09/2, Award of 18 April 2013); *David Minnotte and Robert Lewis v. Republic of Poland* (ICSID Case No. ARB(AF)/10/1); *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1); *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2); *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland* (ICSID Case No. ARB(AF)/11/3); *Mobile TeleSystems OJSC v. Turkmenistan* (ICSID Case No. ARB(AF)/11/4, Order taking note of the discontinuance of 21 September 2012); *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1); *Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea* (ICSID Case No. ARB(AF)/12/2); *Mercer International, Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3); *Telefónica S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/12/4); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5); *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6); *Mobile TeleSystems OJSC v. Republic of Uzbekistan* (ICSID Case No. ARB(AF)/12/7); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8); and *Consolidated Exploration Holdings Ltd. and others v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/13/1).

<sup>42</sup> A.R. PARRA, "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes", *ICSID Review – Foreign Investment Law Journal*, vol. 22, No. 1, 2007, 55-68, pp. 57-61.

### 3. Additional Systems within the Investment Arbitration Universe

24. International investment arbitration is not only constrained to the ICSID system, notwithstanding that for multiple reasons the settlement of investment disputes under this regime has experienced a *big bang* in the last two decades.<sup>43</sup>

25. The enforcement of arbitral awards, for instance, constitutes one of the major advantages of the ICSID system. In this regard, it is important to distinguish the different legal regimes applicable to the enforcement of arbitral awards under Article 54 of the ICSID Convention, and other arbitration rules. The ICSID Convention has designed a system of recognition and enforcement of arbitral awards through which, notwithstanding the operation of the immunity of execution,<sup>44</sup> every contracting State is deemed to recognize the award as binding, and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court.<sup>45</sup> An ICSID arbitral award constitutes an *international decision*, and cannot be challenged before the national courts of any Member State of the ICSID Convention, for instance, on grounds of public order.<sup>46</sup>

26. Conversely, the awards rendered under the ICSID Additional Facility or the Rules of Arbitration of the United Nations Commission on International Trade Law (hereinafter: UNCITRAL), as any other *foreign decision*, shall be enforced under the system set forth by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>47</sup>

27. Apart from the institutional framework set forth under the ICSID Convention, international investment arbitration may be administered by other arbitration *forum*, such as the International Court of Arbitration of the International Chamber of Commerce (hereinafter: ICC); the Permanent Court of Arbitration (hereinafter: PCA); the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter: SCC); the London Court of International Arbitration (hereinafter: LCIA); or the Cairo Regional Centre for International Commercial Arbitration (hereinafter: CRCICA), just to mention five examples. Furthermore, investment arbitration may also be conducted on an *ad hoc* basis, under the Rules of Arbitration of the UNCITRAL. According to the latest reports provided for by the United Nations Conference on Trade and Development (hereinafter: UNCTAD), 314 arbitrations have been administered

<sup>43</sup> 177 investment arbitrations are currently pending at ICSID (175 original arbitrations, and two conciliations). Only in 2012 the ICSID registered 40 investment arbitrations under the ICSID Convention plus eight more investment disputes instituted under the ICSID Additional Facility. In the doctrine: see S.D. FRANCK, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", *Fordham Law Review*, vol. 73, 2005, 1521-1625, pp. 1539-1540; the reflections made by several authors in "La place du CIRDI dans le contentieux de l'investissement international", in CH. LEBEN (dir.), *Le contentieux arbitral transnational relatif à l'investissement*, Louvain-la-Neuve, Anthemis, 2006, pp. 345-361; and A. REINISCH, "The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration", in I. BUFFARD, J. CRAWFORD, A. PELLET AND S. WITTICH (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Leiden, Martinus Nijhoff, 2008, 107-126.

<sup>44</sup> Article 55 of the ICSID Convention sets forth "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."

<sup>45</sup> Article 54.1 of the ICSID Convention provides "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."

<sup>46</sup> P. BERNARDINI, "ICSID versus Non-ICSID Investment Treaty Arbitration", in M.A. FERNÁNDEZ-BALLESTEROS AND D. ARIAS (eds.), *Liber Amicorum Bernardo...*, *op. cit.*, 159-188; A.R. PARRA, "The Enforcement of ICSID Arbitral Awards", in R. DOAK BISHOP (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, JurisNet, Huntington, 2009, 131-138; S.A. ALEXANDROV, "Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention", in CH. BINDER, U. KRIEBAUM, A. REINISCH AND S. WITTICH (eds.), *International Investment...*, *op. cit.*, 322-337; and J.Á. RUEDA GARCÍA, "La aplicabilidad del Convenio de Nueva York al arbitraje de inversiones: efectos de las reservas al Convenio", *Cuadernos de Derecho Transnacional*, vol. 2, No. 1, 2010, 203-232.

<sup>47</sup> *Boletín Oficial del Estado* of 11 July 1977.

under the ICSID system (including the Additional Facility); 131 under the Rules of Arbitration of the UNCITRAL;<sup>48</sup> 27 under the SCC Arbitration Rules; and eight under the ICC Rules of Arbitration.<sup>49</sup>

**28.** All the abovementioned arbitration avenues –either institutional or *ad hoc*– are available in the investment universe to foreign investors outside the framework of the ICSID system. None of them expressly preclude an International Organization from participating in the settlement of investment disputes. Moreover, on 17 December 2012 the Administrative Council of the PCA adopted a new set of procedural rules for the arbitration of disputes involving at least one State, State-controlled entity, or International Organization (hereinafter: PCA Arbitration Rules 2012). These rules, which envisage the institution of disputes between International Organizations and private parties, may expand the role of the PCA as an arbitration *forum* for investment disputes.

**29.** The EU and third States might even define other alternatives or systems, as the negotiation of the future EU investment agreements progresses and the consolidation of new arbitration venues takes place.<sup>50</sup> For instance, legal literature has proposed the creation of a “European Investment Facility”,<sup>51</sup> whereas it is yet to be determined the impact on investment arbitration of the Union of South American Nations (hereinafter: UNASUR) Mediation and Arbitration Centre, a project currently under discussion in Latin America.<sup>52</sup>

**30.** However, since the negotiation of the first generation of EU investment treaties is ongoing, foreign investors operating within the EU must rely on the current dispute settlement mechanisms envisaged by the BITs concluded by the EU Member States until the former treaties enter into force,<sup>53</sup> provided they are in conformity with EU Law.<sup>54</sup> One of the latest mixed agreements concluded by the EU and its Member States with third parties containing an “investment chapter”, the Free Trade Agreement signed with Korea on 6 October 2010,<sup>55</sup> underlines the transitional character of the current situation. The agreement is silent as to the dispute resolution mechanisms applicable to the settlement of investor-State disputes. A footnote to Article 7.10 of the agreement excludes investment protection and investor-State dispute settlement procedures from its scope of application, notwithstanding that Article 7.16 of the

<sup>48</sup> For instance, the PCA has administered a total of 54 investment disputes, most of them under the Rules of Arbitration of the UNCITRAL: see “Annual Report (2012)”, pp. 12-15 (<http://www.pca-cpa.org>).

<sup>49</sup> Total claims by end of 2012: see “Recent Developments in Investor-State Dispute Settlement (ISDS)”, No. 1, 2013, pp. 3-4 (<http://www.unctad.org/diae>).

<sup>50</sup> C. BROWN AND I. NAGLIS, “Dispute Settlement in Future Investment Agreements”, in M. BUNGENBERG, A. REINISCH AND CH. TIETJE (eds.), *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013, 17-35.

<sup>51</sup> J. GAFFNEY, “How Important it is to Develop a Coherent Case Law? The Role of Judicial Dialogue in Investment Arbitration”, in C. KESSÉDJIAN (dir.), *Le droit européen...*, *op. cit.*, 47-77, pp. 59-60; N. LAVRANOS, “New Developments...”, *op. cit.*, pp. 438-439; and M. WIERZBOWSKI AND A. GUBRYNOWICZ, “Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions”, in CH. BINDER, U. KRIEBAUM, A. REINISCH AND S. WITTICH (eds.), *International Investment...*, *op. cit.*, 544-560, p. 560.

<sup>52</sup> UNASUR created a Working Group on Dispute Settlement and Investment, which has already drafted a Protocol creating a Mediation and Arbitration Centre: see <http://www.unasursg.org/inicio/documentos/otras-instancias/grupo-de-trabajo-de-soluci%C3%B3n-de-controversias-e-inversiones> (last accessed on 30 April 2013). The creation of this mediation and arbitration institution has received the political support of the Bolivarian Alliance for the Peoples of America (hereinafter: ALBA), with the occasion of the 1<sup>st</sup> Ministerial Meeting of Latin American States Affected by Transnational Interests, celebrated in Guayaquil (Ecuador) on 22 April 2013: see <http://cancilleria.gob.ec/estados-latinoamericanos-plantean-mecanismos-de-defensa-y-asistencia-reciproca-para-solucionar-controversias-con-las-transnacionales/> (last accessed on 6 May 2013).

<sup>53</sup> The list of the BITs signed by the EU Member States –in conformity with EU Law– has been published by the EU institutions: see List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (*OJ C* 131, of 8 May 2013, p. 2).

<sup>54</sup> See Articles 5 and 6 of the Regulation (EU) No. 1219/2012 of the European Parliament and the Council, of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

<sup>55</sup> *OJ L* 127, of 14 May 2011, p. 1; and *Boletín Oficial del Estado* of 9 July 2011.

same legal text envisages a future extension of the agreement to include investment protection. Only 21 EU Member States have concluded a BIT with Korea.<sup>56</sup> Therefore, from the equality standpoint the transitional regime is far from being ideal for EU or Korean investors operating in these territories and seeking to initiate investment arbitration.

**31.** Ultimately, the intervention and participation of the EU in investment arbitration is secured under the existing international investment regime, notwithstanding the problems raised within the ICSID system. The ICSID Additional Facility Rules, if amended, and the Rules of Arbitration of the UNCITRAL constitute operative legal frameworks through which the EU participation in investment arbitration could be shaped and developed.<sup>57</sup> Further, it should be noted that by including references to investment disputes between an International Organization and a private party, the PCA Arbitration Rules 2012 could be also very useful under the forthcoming EU investment regime.

**32.** In sum, as for the determination of the arbitral *forum* through which the participation of the EU in investment arbitration must be implemented, several available options can be ascertained after analyzing contemporary practice. It is noteworthy underlining that the election of the *forum* may have a decisive impact on the applicable Law to the arbitration as well as the eventual enforcement of the arbitral award.

### III. European Union Law as Applicable Law in Investment Arbitration

**33.** In this section we explore if and to what extent EU Law can be considered as applicable Law by an investment tribunal. As the paper aims at analyzing the EU investment regime from a conventional standpoint, it does neither refer to the cases in which the parties agree on the application of EU Law in a contract, nor it deals with the applicable Law to the jurisdictional issues.<sup>58</sup>

**34.** After studying, first, the different rules of procedure and the relevant multilateral and bilateral conventional practice, we then turn to analyze both the need to include EU Law as part of the applicable Law to an investment arbitration, and how the eventual consideration of EU Law as applicable Law could interact with the EU legal system.

#### 1. The Flexible Framework Envisaged by the International Investment Regime

**35.** Primarily, investment tribunals must settle disputes arising from the investment agreements' substantive provisions. An EU Member State could breach these international obligations when implementing EU Law into its legal system. In these cases an arbitral tribunal hearing an eventual investment dispute might resort to EU Law so as to understand the reasons behind the State's conduct.<sup>59</sup> Whereas the tribunal could bring in EU Law as a mere fact to the arbitration, as it has been already explored in the arbitral

<sup>56</sup> These Member States are, in alphabetical order: Austria; Belgium; Croatia; Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Italy; Latvia; Lithuania; Netherlands; Poland; Portugal; Romania; Slovenia; Spain; Sweden; and the United Kingdom.

<sup>57</sup> E. SILVA ROMERO, "Quel arbitrage d'investissement (institutionnel ou *ad hoc*)?", in C. KESSEDIAN (dir.), *Le droit européen...*, *op. cit.*, 93-118, pp. 112-118.

<sup>58</sup> As the tribunal in *CMS* found "Article 42 is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions": see *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8, Decision of 17 July 2003, para. 88).

<sup>59</sup> In these situations, the tribunal in *Electrabel* declared that "Two important and potentially competing values are here at stake: the substantive and procedural protections of the rights of a foreign investor and the economic integration of EU Member States into the European Union operating under the rule of Law. The task of this Tribunal is to ascertain the correct legal balance between these values, as required by the ECT, the ICSID Convention and the applicable rules and principles of international Law": see *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.113).

practice,<sup>60</sup> this situation is subject to change under the forthcoming EU investment regime, since the disputes initiated before investment tribunals could be based on the acts or omissions of the EU institutions.

**36.** It is important to analyse, first, whether the arbitration rules generally used, as a general proposition, would accept EU Law as applicable Law to the arbitration. In line with Article 42.1 of the ICSID Convention an arbitral tribunal shall apply the Law agreed by the parties or, in the alternative, the Law of the contracting State party to the investment dispute and such rules of international Law as may be applicable.<sup>61</sup> This provision, whose evolving interpretation has been discussed in extent in the legal literature,<sup>62</sup> establishes neither an explicit hierarchy between internal and international Law nor an independent treaty obligation on behalf of the host State towards the foreign investor,<sup>63</sup> notwithstanding that in those cases where a conflict between international and internal Law arises the former shall prevail.<sup>64</sup> In the absence of the parties' explicit agreement,<sup>65</sup> an ICSID tribunal is entitled to apply simultaneously both internal and international Law when dealing with the merits of an investment dispute.<sup>66</sup>

**37.** Article 54.1 of the Rules of Arbitration of the ICSID Additional Facility also gives preference to the Law designated by the parties in the arbitration proceedings.<sup>67</sup> In the absence of any designa-

<sup>60</sup> *AES Summit Generation v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010, paras. 7.3.4 and 7.6.6).

<sup>61</sup> Article 42.1 of the ICSID Convention envisages that "The Tribunal shall decide a dispute in accordance with such rules of Law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the Law of the Contracting State party to the dispute (including its rules on the conflict of Laws) and such rules of international Law as may be applicable." According to paragraph 40 of the Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID Convention "the term 'international Law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes."

<sup>62</sup> A. BROCHES, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure", in P. SANDERS (ed.), *International Arbitration. Liber Amicorum for Martin Domke*, The Hague, Martinus Nijhoff, 1967, 12-22; R. DOLZER, "Contemporary Law of Foreign Investment: Revisiting the Status of International Law", in CH. BINDER, U. KRIEBAUM, A. REINISCH AND S. WITTICH (eds.), *International Investment...*, *op. cit.*, 818-829, pp. 824-825; E. GAILLARD AND Y. BANIFATEMI, "The meaning of 'and' in Art. 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", *ICSID Review – Foreign Investment Law Journal*, vol. 18, 2003, 375-411; W.M. REISMAN, "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold", *ICSID Review – Foreign Investment Law Journal*, vol. 15, 2000, 362-381; G. SACERDOTI, "Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards", *ICSID Review – Foreign Investment Law Journal*, vol. 19, 2004, 1-48, pp. 16-26; and I.F.I. SHIHATA AND A.R. PARRA, "Applicable Substantive Law in Disputes between States and Private Parties: the Case of Arbitration under the ICSID Convention", *ICSID Review – Foreign Investment Law Journal*, vol. 9, 1994, 183-213.

<sup>63</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongezelő Zrt. v. Republic of Hungary* (ICSID Case No. ARB/12/3, Decision of 16 January 2013, paras. 71-72).

<sup>64</sup> The *ad hoc* Committee in the first *Amco Asia Corporation* annulment found that "Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up *lacunae* in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms. (...) The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention (...). The above view on the supplemental and corrective role of international law in relation to the law of the host State as substantive applicable law, is shared in ICSID case law": see *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1, Decision on the Application for Annulment of 16 May 1986, Part I.1, paras. 20-22).

<sup>65</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1, Award of 17 February 2000, paras. 63-66).

<sup>66</sup> *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 116); *Azurix Corp. v. Republic of Argentina* (ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 66-67); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Republic of Argentina* (ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, paras. 95-98); and *Sempra Energy International v. Republic of Argentina* (ICSID Case No. ARB/02/16, Award of 28 September 2007, paras. 235-237).

<sup>67</sup> Article 54.1 of the Rules of Arbitration of the ICSID Additional Facility sets forth that "(1) The Tribunal shall apply the rules of Law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the Law determined by the conflict of Laws rules which it considers applicable and (b) such rules of international Law as the Tribunal considers applicable."

tion made by the parties, the arbitral tribunal might refer either to the Law determined by the conflict of Laws rules, and such rules of international Law as it considers applicable. Therefore, under the ICSID Additional Facility the arbitral tribunal is invested with a wider power of appreciation concerning the applicable Law to the dispute.<sup>68</sup>

**38.** The principle of autonomy, according to which the applicable Law shall be agreed by the parties, is also embedded in the Rules of Arbitration of the UNCITRAL,<sup>69</sup> the International Court of Arbitration of the ICC;<sup>70</sup> the Arbitration Institute of the SCC;<sup>71</sup> the LCIA;<sup>72</sup> or the CRCICA.<sup>73</sup> These rules, except for the LCIA Arbitration Rules, provide for a more flexible approach by enabling the arbitral tribunal to apply the Law that it determines to be appropriate. In contrast to Article 42 of the ICSID Convention, the definition of the applicable Law under these rules becomes more unpredictable.<sup>74</sup>

**39.** In this regard, it is also necessary to recall the recently amended PCA Arbitration Rules 2012. Apart from recognizing the principle of autonomy as the primary option, in cases involving International Organizations and private parties, these rules refer both “to the rules of the organization concerned and to the Law applicable to the agreement or relationship out of or in relation to which the dispute arises, and, where appropriate, to the general principles governing the Law of intergovernmental organizations and to the rules of general international Law”.<sup>75</sup> Therefore, according to the PCA Arbitration Rules 2012, in the absence of any designation made by the parties, the rules of an International Organization –such as the EU– would be applicable to the dispute.

**40.** From the different sets of procedural rules available to conduct investment arbitration, we can find sufficient grounds to advocate for the consideration of EU Law as part of the applicable Law. The parties might agree on it (principle of autonomy) or even EU Law might be understood by the tribunal as part of the Law applicable to the dispute (PCA Arbitration Rules 2012).

<sup>68</sup> In these situations, in principle, the arbitral tribunal might select only one legal system as the applicable Law to the dispute: see N. ZAMBRANA TÉVAR, *La determinación del derecho aplicable al fondo en el arbitraje de inversiones*, Cizur Menor, Aranzadi, 2010, p. 270.

<sup>69</sup> Article 35.1 of the Rules of Arbitration of the UNCITRAL sets forth that “The arbitral tribunal shall apply the rules of Law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the Law which it determines to be appropriate.” With regard to the scope of this principle in the Rules of Arbitration of the UNCITRAL: see D. CARON AND L.M. CAPLAN, *The UNCITRAL Arbitration Rules. A Commentary*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2009, 111-146, pp. 112-118.

<sup>70</sup> Article 21.1 of the ICC Rules of Arbitration establishes that “The parties shall be free to agree upon the rules of Law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of Law which it determines to be appropriate.”

<sup>71</sup> Article 22 of the SCC Arbitration Rules provides “(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the Law(s) or rules of Law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the Law or rules of Law which it considers to be most appropriate. (2) Any designation made by the parties of the Law of a given state shall be deemed to refer to the substantive Law of that state and not to its conflict of Laws rules.”

<sup>72</sup> Article 16.3 of the LCIA Arbitration Rules provides “The Law applicable to the arbitration (if any) shall be the arbitration Law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration Law and such agreement is not prohibited by the Law of the arbitral seat.”

<sup>73</sup> Article 35.1 of the CRCICA Arbitration Rules, in line with the Rules of Arbitration of the UNCITRAL, envisages that “The arbitral tribunal shall apply the rules of Law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the Law which has the closest connection to the dispute.”

<sup>74</sup> As for the “predictability” of Article 42.1 of the ICSID Convention: see CH. SCHREUER, L. MALINTOPPI, A. REINISCH AND A. SINCLAIR, *The ICSID Convention...*, *op. cit.*, pp. 595-596.

<sup>75</sup> Article 35.1 of the PCA Arbitration Rules 2012 provides “The arbitral tribunal shall apply the rules of Law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall: (...) c) In cases involving intergovernmental organizations and private parties, have regard both to the rules of the organization concerned and to the Law applicable to the agreement or relationship out of or in relation to which the dispute arises, and, where appropriate, to the general principles governing the Law of intergovernmental organizations and to the rules of general international Law. In such cases, the arbitral tribunal shall decide in accordance with the terms of the agreement and shall take into account relevant trade usages.”

41. Having in mind the role of the principle of autonomy, in the next section we study the choice of Law made by the parties in the multilateral and bilateral conventional investment regime.

## 2. The Lack of Uniformity of the Choice of Law in the Conventional Investment Regime

42. As regards the multilateral investment practice, EU Member States agreed on the ECT that the disputes arising from this treaty must be decided not only by its provisions, but also by the applicable principles and rules of international Law.<sup>76</sup> This solution is consistent with the practice set forth within the North American Free Trade Agreement (hereinafter: NAFTA),<sup>77</sup> a significant treaty for the purposes of shaping the EU investment regime, if we consider that the EU is currently negotiating trade and investment agreements with Canada and the United States of America, and no Model BIT has been agreed between the EU Member States.

43. The abovementioned multilateral agreements do not envisage the national or municipal Law as part of the applicable Law to an investment dispute. This solution, which has been framed as impractical,<sup>78</sup> does not exclude the eventual consideration of national Law issues by an investment tribunal.<sup>79</sup> The use of the national Law as the applicable Law to an international dispute, in fact, was already accepted by the Permanent Court of International Justice when deciding on the *Serbian Loans* case.<sup>80</sup> In investment arbitration, a tribunal may resort to the national Law of the host State in order to assess if its acts or omissions are in breach of the obligations set forth in the international investment agreement.<sup>81</sup>

44. As for the bilateral investment agreements concluded by the EU Member States, if we consider the Spanish BITs as an example of a very rich and diverse conventional practice,<sup>82</sup> several ideas can be underlined.

45. Firstly, along the same lines of the ECT and the NAFTA, certain BITs set forth that investment disputes need to be addressed by the arbitral tribunal on the basis of these agreements' own provisions and the rules and principles of public international Law.<sup>83</sup> Secondly, in addition, Spanish BITs

<sup>76</sup> Article 26.6 of the ECT establishes that "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international Law."

<sup>77</sup> Article 1131 of the NAFTA sets forth "1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international Law. 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

<sup>78</sup> CH. SCHREUER, L. MALINTOPPI, A. REINISCH AND A. SINCLAIR, *The ICSID Convention...*, *op. cit.*, p. 592.

<sup>79</sup> N. ZAMBRANA TÈVAR, *La determinación del derecho aplicable...*, *op. cit.*, pp. 427-450.

<sup>80</sup> The Permanent Court of International Justice found that "it would be scarcely accurate to say that only questions of international law may form the subject of a decision of the Court. (...) (C)ases in which the Court must apply international law will, no doubt, be more frequent, for it is international law which governs relations between those who may be subject to the Court's jurisdiction. (...) The dispute submitted to the Court (...) relates exclusively to a nexus of municipal law between the Serb-Croat-Slovene State as borrower and the holders of certain Serbian loans. (...) The Court cannot base its decision on facts which are outside the scope of the relations existing between the borrowing State and the bondholders" (official translation): see *Affaire concernant le paiement de divers emprunts serbes émis en France*, *Recueil des Arrêts, Série A, Nos 20/21*, pp. 18-20.

<sup>81</sup> In the framework of the ECT: see *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan* (ICSID Case No. ARB/06/15, Award of 8 September 2009, para. 49); and *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14, Award of 22 June 2010, paras. 60-61).

<sup>82</sup> I. GARCÍA RODRÍGUEZ, "Spanish Practice on Investment Treaties", in C. JIMÉNEZ PIERNAS (ed.), *The Legal Practice in International and Community Law. A Spanish Perspective*, Leiden, Martinus Nijhoff, 2007, 567-598, pp. 591-597. The diversity constitutes a general trend in the BIT conventional practice dealing with the clause on applicable Law: see A. NEWCOMBE AND LL. PARADELL, *Law and Practice of Investment Treaties*, Alphen aan den Rijn, Wolters Kluwer, 2009, pp. 80-83.

<sup>83</sup> The BIT concluded with Mexico (*Boletín Oficial del Estado* of 3 April 2008, Article XV.1) envisages "Any tribunal constituted under this Section shall decide the disputes submitted to it in accordance with the provisions of this Agreement and the applicable rules and principles of international Law." (own translation). The BITs concluded by Spain are available at <http://www.comercio.es/acuerdos> (last accessed on 6 August 2013).

may also refer to the national Law of the contracting parties.<sup>84</sup> In fact, national Law has been generally considered as part of the applicable Law by investment tribunals when ruling on the merits.<sup>85</sup> Thirdly, these investment agreements may also refer to other relevant international treaties concluded between the contracting parties.<sup>86</sup>

**46.** Spanish BITs may exceptionally adopt certain variations from these formulas. For instance, the Spain-Argentina BIT refers to the general principles of international Law as well as the agreements

<sup>84</sup> The BIT concluded with Albania (*Boletín Oficial del Estado* of 13 February 2004, Art. 11.3) sets forth “The arbitration shall be based on the provisions of this Agreement, the national Law of the Party in whose territory the investment was made, including the rules relative to conflicts of Law, and the rules and generally accepted principles of international Law as may be applicable.” In the same fashion, in alphabetical order, see the BITs concluded by Spain with: Algeria (*Boletín Oficial del Estado* of 8 March 1996, Art. 11.3); Armenia (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Azerbaijan (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Belarus (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Bosnia and Herzegovina (*Boletín Oficial del Estado* of 3 July 2003, Art. 11.4); Colombia (*Boletín Oficial del Estado* of 12 September 2007, Art. 10.9); Dominican Republic (*Boletín Oficial del Estado* of 22 November 1996, Art. 11.2); Ecuador (*Boletín Oficial del Estado* of 10 April 1998, Art. XI.3); Egypt (*Boletín Oficial del Estado* of 30 June 1994, Art. 11.3); Georgia (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Former Yugoslav Republic of Macedonia (*Boletín Oficial del Estado* of 19 February 2007, Art. 11.4); Guatemala (*Boletín Oficial del Estado* of 17 June 2004, Art. 11.3); Equatorial Guinea (*Boletín Oficial del Estado* of 12 January 2004, Art. 11.3); Korea (*Boletín Oficial del Estado* of 13 December 1994, Art. 9.3); Kyrgyzstan (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Lybia (*Boletín Oficial del Estado* of 1 October 2009, Art. 11.3); Montenegro (*Boletín Oficial del Estado* of 4 June 2004, Art. 11.3); Namibia (*Boletín Oficial del Estado* of 18 August 2004, Art. 11.3); Nicaragua (*Boletín Oficial del Estado* of 25 April 1995, Art. XI.3); Poland (*Boletín Oficial del Estado* of 4 June 1993, Art. 11.3); Russian Federation (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Serbia (*Boletín Oficial del Estado* of 4 June 2004, Art. 11.3); Syria (*Boletín Oficial del Estado* of 18 February 2005, Art. 11.3); Slovenia (*Boletín Oficial del Estado* of 11 May 2000, Art. XI.3); Tajikistan (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Turkey (*Boletín Oficial del Estado* of 24 March 1998, Art. IX.3); Turkmenistan (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); Uzbekistan (*Boletín Oficial del Estado* of 17 December 1991, Art. 10.3); and Vietnam (*Boletín Oficial del Estado* of 17 December 2011, Art. 11.3). On the other hand, the BIT concluded with China (*Boletín Oficial del Estado* of 8 July 2008, Article 9.3), only refers to the principles of international Law by envisaging that “The arbitral decisions shall be based on the Law of the contracting party, including its rules on conflict of Laws, on the provisions of the present Agreement, as well as the universally accepted principles of international Law.” (own translation).

<sup>85</sup> In the recent arbitral practice: see *Jan Oostergetel and Theodora Laurentius v. Slovak Republic* (UNCITRAL, Award of 23 April 2012, para. 140); *Daimler Financial Services AG v. Republic of Argentina* (ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 50); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11, Award of 5 October 2012, para. 455); and *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca, B.V., ConocoPhillips Gulf of Paria and ConocoPhillips Company v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, paras. 320-324). In *CMS* the tribunal found that “The specific domestic legislation of Argentina and rules of international Law applied by the Tribunal will be discussed in connection with the issues contended. In addition to the Constitution and the Argentine Civil Code, the gas legislation and regulations will be analyzed, together with the measures adopted under the Emergency Law and other pertinent matters. The Treaty and customary international Law will also be applied in reaching the pertinent conclusions”: see *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 122).

<sup>86</sup> The BIT concluded with Bulgaria (*Boletín Oficial del Estado* of 16 June 1998, Art. XI.4) sets forth “The arbitration shall be based on: The provisions of this Agreement or any other agreements in force between the contracting parties; The universally recognized rules and principles of international Law; The national Law of the contracting party in whose territory the investment was made, including its rules on conflict of Laws.” (own translation). In the same fashion, in alphabetical order, see the BITs concluded by Spain with: Costa Rica (*Boletín Oficial del Estado* of 17 July 1999, Art. XI.4); Croatia (*Boletín Oficial del Estado* of 29 October 1998, Article 11.3); Cuba (*Boletín Oficial del Estado* of 18 November 1995, Article 11.3); El Salvador (*Boletín Oficial del Estado* of 10 May 1996, Article 11.3); Estonia (*Boletín Oficial del Estado* of 15 July 1998, Article 11.3); Gabon (*Boletín Oficial del Estado* of 25 January 2002, Article 11.3); Honduras (*Boletín Oficial del Estado* of 20 July 1996, Article 11.3); India (*Boletín Oficial del Estado* of 3 February 1999, Article 12.4); Jamaica (*Boletín Oficial del Estado* of 13 January 2003, Article 11.2); Jordan (*Boletín Oficial del Estado* of 10 January 2001, Article 11.3); Kazakhstan (*Boletín Oficial del Estado* of 30 April 1996, Article 11.3); Latvia (*Boletín Oficial del Estado* of 5 June 1997, Article 11.3); Lebanon (*Boletín Oficial del Estado* of 22 May 1997, Article 11.3); Lithuania (*Boletín Oficial del Estado* of 25 January 1996, Article XI.3); Moldova (*Boletín Oficial del Estado* of 12 February 2007, Article 11.3); Nigeria (*Boletín Oficial del Estado* of 11 February 2006, Article 12.3); Pakistan (*Boletín Oficial del Estado* of 12 June 1996, Article 11.3); Panama (*Boletín Oficial del Estado* of 23 October 1998, Article XII.3); Paraguay (*Boletín Oficial del Estado* of 9 January 1997, Article 11.3); Peru (*Boletín Oficial del Estado* of 8 March 1996, Article 9.3); Trinidad and Tobago (*Boletín Oficial del Estado* of 19 October 2004, Article 12.4); Ukraine (*Boletín Oficial del Estado* of 5 May 2000, Article 11.3); and Venezuela (*Boletín Oficial del Estado* of 13 October 1997, Article XI.4).

concluded between the parties, while dealing with the international Law applicable to the dispute;<sup>87</sup> the Spain-Czech/Slovak BITs do not mention the principles or rules of international Law as part of the applicable Law;<sup>88</sup> and the Spain-Romania BIT includes the particular agreements concerning the investment within the applicable Law to the arbitration.<sup>89</sup> Finally, certain Spanish BITs are silent with regard to this issue, leaving its definition to the parties to the arbitration,<sup>90</sup> and the arbitral tribunal with the additional task of assessing if the parties had explicitly or implicitly agreed on the applicable Law.<sup>91</sup>

**47.** In addition, Spanish BITs usually envisage a provision giving preference to the most favourable treatment provided for by the host State to the investor not only on a contractual basis,<sup>92</sup> but also should any other international agreement later be concluded between the parties.<sup>93</sup> If the treatment provided for by the EU Treaties to foreign investors were to be considered more favourable than the one granted by the BITs, a proposition that has been rejected by the doctrine<sup>94</sup> and the arbitral tribunal in *Achmea*,<sup>95</sup> these BITs provisions might have an impact on the determination of the applicable Law to investment arbitration.

**48.** The lack of uniformity in the choice of Law may also be ascertained in the bilateral investment practice of other EU Member States. Taking the BITs concluded by the Belgium-Luxembourg Economic Union,<sup>96</sup> France,<sup>97</sup> and Germany,<sup>98</sup> with Argentina as an example, we can identify that the pro-

<sup>87</sup> Article X.5 (*Boletín Oficial del Estado* of 18 November 1992) envisages that “The arbitral tribunal shall decide the dispute in accordance with the provisions of this agreement and, where appropriate, in accordance with other treaties in force between the parties, the national Law of the party in whose territory the investment was made, including its rules on private international Law, as well as the general principles of international Law.” (own translation). See also Article 10.4 of the BIT concluded with Chile (*Boletín Oficial del Estado* of 19 March 1994); and Article 11.5 of the BIT concluded with Uruguay (*Boletín Oficial del Estado* of 27 May 1994).

<sup>88</sup> Article 10.3 (*Boletín Oficial del Estado* of 7 February 1992) provides for “Arbitration shall be governed by: - The provisions of this Agreement; - The national Laws of the Contracting Party in whose territory the investment was made, including the rules concerning conflict of Laws; - The provisions of other Agreements entered into by the Parties.”

<sup>89</sup> Article 8.3 (*Boletín Oficial del Estado* of 23 November 1995) establishes that “The arbitration will be based on: The provisions of this Agreement; the rules and principles of international Law as generally accepted; The national Law of the contracting party in whose territory the investment was made, including its rules on conflict of Laws; The special agreements relating to the investment.” (own translation). See also Article 11.4 of the Spain-Morocco BIT (*Boletín Oficial del Estado* of 11 April 2005), notwithstanding that the latter only mentions the general principles (and not the rules) of international Law as part of the applicable Law to the arbitration.

<sup>90</sup> In alphabetical order, see the BITs concluded by Spain with: Hungary (*Boletín Oficial del Estado* of 9 September 1992, Article 10); Indonesia (*Boletín Oficial del Estado* of 5 February 1997, Article 10); Iran (*Boletín Oficial del Estado* of 10 August 2004, Article 11); Kuwait (*Boletín Oficial del Estado* of 1 April 2008, Article 11); Malaysia (*Boletín Oficial del Estado* of 8 March 1996, Article VIII); Philippines (*Boletín Oficial del Estado* of 17 November 1994, Article 9); and Tunisia (*Boletín Oficial del Estado* of 20 July 1994, Article 11).

<sup>91</sup> T. BEGIC, *Applicable Law in International Investment Disputes*, Utrecht, Eleven International, 2005, pp. 57-80. As it was demonstrated in *Asian Agricultural Products Limited*, problems may arise by referring to the parties’ arguments during the arbitration as a means of defining the applicable Law: see *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3, Award of 27 June 1990, paras. 20-24 and the dissenting opinion of Dr. Asante).

<sup>92</sup> See Article 7 of the BIT concluded with Slovakia.

<sup>93</sup> Article 7 of the BIT concluded with Hungary sets forth “If the provisions of Law of either Contracting Party or obligations under international Law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.” (emphasis added).

<sup>94</sup> CH. SÖDERLUND, “Intra-EU BIT Investment Protection and the EC Treaty”, *Journal of International Arbitration*, vol. 24, No. 5, 2007, 455-468, p. 462; and T. EILMANSBERGER, “Bilateral Investment Treaties...”, *op. cit.*, p. 395.

<sup>95</sup> The tribunal found that “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”: see *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic* (UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 263).

<sup>96</sup> BIT signed on 28 June 1990 (Article 12.7).

<sup>97</sup> BIT signed on 3 July 1991 (Article 8.4).

<sup>98</sup> BIT signed on 9 April 1991 (Article 10.5).

vision related to applicable Law is similar to the one set forth in the Spain-Argentina BIT. In this vein, the BITs concluded with Argentina must be considered as an exception.

49. The conventional practice is heterogeneous,<sup>99</sup> and the BITs concluded by the abovementioned Member States usually envisage multiple solutions when dealing with the applicable Law.<sup>100</sup> Whereas some BITs concluded by the Belgium-Luxembourg Economic Union<sup>101</sup> and Germany,<sup>102</sup> establish provisions regarding the applicable Law, in line with the Spanish BIT practice; several BITs concluded by France<sup>103</sup> and the United Kingdom<sup>104</sup> are silent.

50. From the conventional practice of the EU Member States, we can conclude the need to set forth a uniform system to designate the applicable Law in the forthcoming EU investment regime, by preferably using an explicit clause providing for the application, in the absence of any designation made by the parties, of the investment agreement, the rules and principles of international Law in force between the parties, and the national Law of the host party.

51. A wording of this kind would offer sufficient grounds to advocate for the consideration of EU Law as applicable Law to an investment dispute, if necessary. Firstly, by referring to the rules and principles of international Law, EU Law could be indirectly incorporated in an investment dispute through the principle of systemic interpretation<sup>105</sup> enshrined in Article 31.1.c) of the VCLT.<sup>106</sup> And, secondly, EU Law could be considered as part of the national Law of the host State. In sum, a clause such as the one set forth in paragraph 50 may allow an investment tribunal to call for the application of EU Law.

### 3. Its Progressive Recognition in the Arbitral Practice

52. The discussions about the consideration of EU Law as applicable Law to investment arbitration have progressively developed as a result of the EU assuming competence regarding the protection of foreign investments, the registration of more investment disputes against EU Member States,<sup>107</sup> and the lack of uniformity of the EU Member States conventional practice.

<sup>99</sup> See the conventional practice of several EU Member States, such as Austria (pp. 15-51); France (pp. 245-288); Germany (pp. 289-319); Italy (pp. 321-346); Netherlands (pp. 535-591); and the United Kingdom (pp. 697-754) in CH. BROWN (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford, Oxford University Press, 2013.

<sup>100</sup> Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge, Cambridge University Press, 2009, pp. 42-49.

<sup>101</sup> For instance, in alphabetical order, the BITs concluded with: Czech Republic (24 April 1989, Article 8.5); Morocco (13 April 1999, Article 11.4); and South Africa (14 August 1998, Article 10.5).

<sup>102</sup> For instance, in alphabetical order, the BITs concluded with: India (10 July 1995, Article 9.2); and Peru (30 January 1995, Article 10).

<sup>103</sup> For instance, in alphabetical order, the BITs concluded with: China (30 May 1984, Article 8); Czech Republic (13 September 1990, Article 10); India (2 September 1997, Article 9); Morocco (13 January 1996, Article 8); and South Africa (11 October 1995, Article 7).

<sup>104</sup> For instance, in alphabetical order, the BITs concluded with: China (15 May 1986, Article 7); Czech Republic (10 July 1990, Article 10); India (14 March 1994, Article 9); Morocco (30 October 1990, Article 10); and South Africa (20 September 1994, Article 8).

<sup>105</sup> S. ROBERT-CUENDET, "Les investissements intracommunautaires. Entre droit communautaire et accords internationaux sur l'investissement: concilier l'inconciliable?", *Revue Générale de Droit International Public*, vol. 115, No. 4, 2011, 853-895, p. 883.

<sup>106</sup> Article 31.3.c) of the VCLT provides "There shall be taken into account, together with the context: (c) any relevant rules of international Law applicable in the relations between the parties." This principle dilutes the risks of fragmentation when interpreting international treaties concluded within an institutional framework: see J.-M. SOREL AND V. BORÉ EVENO, "Article 31: General Rule on Interpretation", in O. CORTEN AND P. KLEIN (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, vol. I, Oxford, Oxford University Press, 2011, 804-837, pp. 828-829.

<sup>107</sup> According to the official data compiled by UNCTAD, the investment claims brought against the EU Member States amount to 87, in particular: Czech Republic (20); Poland (14); Slovak Republic (11); Hungary (10); Lithuania (5); Bulgaria (3); Croatia (3); Estonia (3); Germany (3); Latvia (3); Slovenia (3); Spain (3); United Kingdom (2); Belgium (1); France (1); Italy (1); and Portugal (1). See UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS)", No. 1, 2013, pp. 29-30 at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf) (last accessed on 6 May 2013). After the publication of this UNCTAD study, foreign investors have filed ICSID claims against Greece, Slovenia, Croatia,

**53.** The intervention of the European Commission as *amicus curiae* in certain arbitrations has also contributed to the debate. In several cases, EU Member States have faced investment claims attacking the national measures adopted so as to comply with the harmonization duties arising from the European integration process, making the intervention of the Commission necessary to assist the tribunal in identifying any EU rule relevant to the dispute.

**54.** In 2000 the arbitral tribunal hearing on the merits of the landmark *Maffezini* case already had the opportunity to address the role of EU Law in investment arbitration. In fact, when analyzing the international responsibility of the Kingdom of Spain for the delays and the additional costs experienced by the construction and operation of the claimants' project, the tribunal found that no violation of the Spain-Argentina BIT had taken place, since the national Law required the foreign investor to conduct an environmental impact assessment, and the investment project under discussion involved a highly toxic chemical industry.

**55.** The tribunal considered that the obligation to conduct an environmental impact assessment, a duty that the foreign investor circumvented by initiating construction prior to obtaining it, had been implemented by the Spanish authorities in order to comply with EU Law, in particular with Council Directive 85/337/EEC, of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment.<sup>108</sup> In *Maffezini* the arbitral tribunal, interpreted the national legislation in light of the EU obligations undertaken by Spain.<sup>109</sup>

**56.** In this case, EU Law had been duly implemented through a Royal Decree by the national authorities, making the tribunal's approach to the applicable Law easier. If Spain had not implemented the EU environmental impact assessment mandate properly, the tribunal might have had to deal with EU Law with more detail and depth in order to assess whether the Spanish authorities had acted in accordance with the national Law and, therefore, the tribunal might have been confronted with the possibility of deciding on the direct applicability of the EU Directive, should it have been sufficiently precise and unconditional, by operation of the principles of primacy and direct effect of EU Law. As we conclude *infra*, in these situations investment tribunals would be encroaching the jurisdictional competences of the ECJ.

**57.** More than a decade after the *Maffezini* award was rendered, the issue of EU Law as part of the applicable Law has become relevant again.<sup>110</sup> The tribunal in *Eastern Sugar* was invited by the respondent

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Bulgaria, Hungary, France, and Cyprus: see *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8, registered on 20 May 2013); *Impresa Grassetto S.p.A., in liquidation v. Republic of Slovenia* (ICSID Case No. ARB/13/10, registered on 4 June 2013); *Lieven J. van Riet, Chantal C. van Riet and Christopher van Riet v. Republic of Croatia* (ICSID Case No. ARB/13/12, registered on 21 June 2013); *EVN AG v. Republic of Bulgaria* (ICSID Case No. ARB/13/17, registered on 19 July 2013); *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21, registered on 9 September 2013); *Erbil Serter v. French Republic* (ICSID Case No. ARB/13/22, registered on 10 September 2013); and *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus* (ICSID Case No. ARB/13/27). Moreover, outside the ICSID system, investment disputes have been filed against Spain (*Charanne (The Netherlands) and Construction Investments (Luxembourg) v. Kingdom of Spain* (SCC Case)) and the Czech Republic (*Antaris Solar GmbH and others v. Czech Republic* (UNCITRAL Case)). The total number of investment claims brought against the EU Member States has increased up to 96.

<sup>108</sup> OJ L 175, of 5 July 1985, p. 40.

<sup>109</sup> The tribunal found that "Particularly noteworthy is the legislation on EIA. Strict procedures in this respect are provided in EEC Directive 85/337 of June 27, 1985 and in Spain's Royal Legislative Decree No. 1302/1986 of June 28, 1986. Chemical industries are specifically required under both measures to undertake an EIA. Public information, consultation with pertinent authorities, licensing and other procedures are also a part thereof. The EEC Directive, like the one that later came to amend it, requires 'that an EIA is undertaken before consent is given to certain public and private projects considered to have significant environmental implications.' Suspension of projects can be ordered under Spanish Law, particularly if work thereon is begun before the EIA is approved": see *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7, Award of 13 November 2000, para. 69).

<sup>110</sup> The role of EU Law in investment arbitration was also at stake in several disputes, although the investment tribunals never addressed this issue: see *Saluka Investments BV v. Czech Republic* (PCA Case, Partial Award of 17 March 2006, paras. 357-358); *Telenor Mobile Communications A.S. v. Republic of Hungary* (ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 50); *ADC Affiliate Limited & ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No.

State to consider the application of EU Law,<sup>111</sup> but concluded that both international and national Law applied and made no mention to EU Law in the award.<sup>112</sup> In this context, three recent developments in the arbitral practice may shed some light on how investment tribunals are dealing with this issue.

**58.** In *AES Summit*, an ICSID case based on the provisions of the ECT, the parties agreed on the ECT being the applicable Law.<sup>113</sup> Thus, the tribunal did neither interpret EU Law nor ponder its application to the dispute. In fact, the majority of the tribunal found that the disputed legislative measures undertaken by Hungary with respect to the foreign investor, consisting in the reintroduction of regulated pricing, were “not motivated by pressure from the Commission”,<sup>114</sup> which at that time had initiated investigations in order to assess the compatibility of the contracts negotiated by Hungary and the foreign investor in the electricity sector, with regard to the EU State aid regime.<sup>115</sup>

**59.** In *Achmea*, a case administered by the PCA pursuant to the Netherlands-Slovak BIT and the Rules of Arbitration of the UNCITRAL, the tribunal declared that it could apply EU Law in the merits phase, if necessary.<sup>116</sup> It is unlikely that it made such a finding, if the European Commission had not argued in its *amicus curiae* submission that the tribunal was bound to take EU Law into account. According to the website of the PCA the arbitral tribunal rendered its Final Award on 7 December 2012.<sup>117</sup> Although this award remains unpublished, the investor summarized its basic content and announced the outcome of the arbitration in a press release, confirming that the tribunal had ruled in its favor and had declared a breach of the BIT.<sup>118</sup>

**60.** Finally, in *Electrabel* an ICSID tribunal dealt with the issue of EU Law as part of the applicable Law, since the parties and the European Commission had raised multiple arguments in this regard.<sup>119</sup> In fact, both the respondent and the European Commission had advocated in favor of the consideration of the Commission’s Decision<sup>120</sup> –declaring that the power purchase agreements concluded by Hungary had conferred an illegal State aid on the claimant– as international Law applicable to the arbitration. According to the respondent, the tribunal had to interpret and apply the standards of protection set forth by the ECT in light of EU Law.<sup>121</sup> The tribunal addressed this argument in detail, notwithstanding that the claims brought by the claimant referred to the application of EU Law partially, and did not challenge the validity of the EU Decision.

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ARB/03/16, Award of 2 October 2006, para. 272); and *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8, Award of 11 September 2007, paras. 334-336).

<sup>111</sup> The respondent discussed the lack of jurisdiction of the tribunal and the need to apply EU Law by presenting before it two letters sent by the European Commission to the national authorities of the Czech Republic: see *Eastern Sugar B.V. (Netherlands) v. Czech Republic* (SCC Case No. 088/2004, Award of 27 March 2007, paras. 119-129).

<sup>112</sup> The tribunal found that “beyond the wording of the BIT, international Law applies, but that the Arbitral Tribunal should consider, before reaching any decision, how nonconflicting provisions of Czech Law might be relevant and, if so, could be taken into account”: see *Ibid.*, para. 197.

<sup>113</sup> *AES Summit Generation Limited & AES-Tizsa Erömu kft v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 October 2010, paras. 7.6.1-7.6.9).

<sup>114</sup> *Ibid.*, paras. 10.3.15-10.3.18.

<sup>115</sup> See *supra*, footnote 12.

<sup>116</sup> *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic* (UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 189).

<sup>117</sup> See [http://www.pca-cpa.org/showpage.asp?pag\\_id=1414](http://www.pca-cpa.org/showpage.asp?pag_id=1414) (last accessed on 6 May 2013).

<sup>118</sup> See the press release at <https://www.achmea.com/press/Paginas/international-arbitration-tribunal-rules-in-favour-of-achmea.aspx> (last accessed on 6 May 2013).

<sup>119</sup> The respondent discussed the applicability of EU Law thoroughly in its Rejoinder, after having examined the submissions presented by the European Commission acting as *amicus curiae*: see *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.63).

<sup>120</sup> OJ L 225, of 27 August 2009, p. 53.

<sup>121</sup> *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.78).

61. In fact, the tribunal distinguished between the “annulment claim”, which had been brought before the Luxembourg Court, and the “ECT claim” under which it had been constituted. Having made this distinction, it accepted the applicability of EU Law to the arbitration as international Law<sup>122</sup>, only to the extent that it was necessary to interpret the disputed national measures in light of the Decision issued by the European Commission.<sup>123</sup>

62. The tribunal’s decision in *Electrabel* basically followed and developed the argumentative approach that the *Maffezini* tribunal had already taken in 2000. An investment tribunal may consider EU Law as applicable Law as long as it neither interferes with its validity nor rules on its interpretation, being these issues exclusively reserved to the jurisdiction of the Luxembourg Court.<sup>124</sup> Whereas in *Maffezini* EU Law had been incorporated into national Law, in *Electrabel* it was considered as part of international Law.

63. In *Achmea*, pursuant to Article 8.6 of the Netherlands-Slovak BIT, the applicable Law had to be defined among the Law in force of the contracting party concerned; the provisions of the BIT, and other relevant agreements concluded between the contracting parties; the provisions of special agreements relating to the investment; and the general principles of international Law. In *Electrabel* the applicable Law had to be determined among the ECT, and the applicable rules and principles of international Law pursuant to the ECT.

64. In conclusion, in light of the arbitral and conventional practice, the wording already proposed on paragraph 50 would offer sufficient grounds to advocate for the consideration of EU Law as applicable Law to an investment dispute, if necessary, under the future EU investment regime. Consequently, we must turn next to address the necessity of including EU Law as part of the applicable Law in investment arbitration.

#### 4. Is It Necessary to Include EU Law as Part of the Applicable Law in Investment Arbitration?

65. It is no longer necessary to advocate for the consideration of EU Law as a mere fact in investment arbitration,<sup>125</sup> a less invasive argument used by the tribunal in *AES Summit*.<sup>126</sup> The international

<sup>122</sup> As a whole, including not only the EU Treaties, but also *le droit dérivé* (Regulations, Directives, and Decisions).

<sup>123</sup> In paragraph 4.124 of the decision, the tribunal found that “the fact that EU Law is also applied within the national legal order of an EU Member State does not deprive it of its international legal nature. EU Law remains international Law; EU Law is not limited to a treaty but includes a body of Law flowing from the EU Treaties. Legal rules created under the Treaties can apply directly within the different national legal orders, without any further procedural step taken by EU Member States”: see *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, paras. 4.119 and 4.124-4.126).

<sup>124</sup> ECJ, Opinion of 8 March 2011, *Draft agreement on the creation of a unified patent litigation system* (Case 1/09), *Rep.*, p. I-1137.

<sup>125</sup> In *Electrabel* the tribunal also declared that “where a binding decision of the European Commission is concerned, even when not applied as EU Law or international Law, EU Law may have to be taken into account as a rule to be applied as part of a national legal order, as a fact”: see *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.129). It is worth noting that in a case brought by the European Commission against the Slovak Republic before the ECJ, the Luxembourg Court analyzed if the investment contract concluded between a Swiss investor and the host State (Slovak Republic) granting preferential access to the former, could be considered as an investment protected under the Swiss-Slovak BIT: see ECJ, Judgment of 15 September 2011, *European Commission v. Slovak Republic* (Case C-264/09) (*OJ C* 319 of 29 October 2011, p. 2), paras. 43-52. Advocate General Jääskinen endorsed this analysis by declaring that “For the purposes of these infringement proceedings, however, the Court must adopt a certain ‘interpretative reconstruction’ of the elements of the legal situation created by these undertakings, in order to determine whether there is an obligation within the meaning of Article 307(1) EC. Nevertheless, for the Court these legal elements appear as facts relating to the alleged infringement, not as legal norms to be interpreted by the Court”: see Opinion of 15 March 2011, *European Commission v. Slovak Republic* (Case C-264/09), para. 80 (emphasis added).

<sup>126</sup> *AES Summit Generation v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010, paras. 7.3.4 and 7.6.6).

investment regime<sup>127</sup> and the arbitral practice (*Achmea* and *Electrabel*) have made legally possible to apply EU Law to investment arbitration. The issue that must be dealt with, before examining the implications of that assertion, is whether it is necessary under the forthcoming EU investment regime to include EU Law as part of the applicable Law.

**66.** The debate concerning the applicability of EU Law in investment arbitration has hitherto been invested with an academic profile. As analyzed in paragraphs 58-63, investment tribunals have tipped over it by restraining their interpretative competences and waiving the use of the principle of systemic integration set forth in several BITs. Whilst the EU Member States solely exercised the competence on the protection of foreign investments, investment tribunals need not enter into this complex issue. However, with the EU investment regime under negotiation, it is time to discuss the need to include EU Law in investment arbitration.

**67.** From the international Law standpoint, under the EU investment regime, breaches of an investment treaty could be performed both by the EU Member States and the EU institutions.

**68.** In the first case, an investment tribunal most likely would be assessing the compatibility of the national measures undertaken by the State vis-à-vis the investment. EU Law might be relevant for the settlement of the dispute but, as the arbitral practice has already suggested (*AES Summit*), it could be brought in as a mere fact to the arbitration, automatically eliminating any potential risks for the judicial interpretative monopoly of the ECJ over EU Law.

**69.** On the contrary, should the breach of the investment treaty be attributable to the EU institutions, the investment tribunal might be forced to undertake a legal analysis of *le droit dérivé*. The latter scenario could generate risks for the competences of the ECJ, since the investment tribunal would be invading the exclusive interpretative powers of the Luxembourg Court, as explained in paragraph 56.

**70.** In order to safeguard the judicial monopoly of the ECJ, the EU investment regime could envisage an asymmetric dispute resolution mechanism through which an arbitration tribunal would settle any investment disputes brought against the Member States, whereas the General Court, the ECJ or the Strasbourg Court would settle the disputes brought against the EU institutions in light of the EU Treaties or the European Convention of Human Rights and Fundamental Freedoms (EConVHR), respectively.<sup>128</sup>

**71.** Under this *de lege ferenda* regime, we could reach the conclusion that EU Law would not be relevant as applicable Law in investment arbitration, being only considered as a fact, when necessary. However, should the EU institutions and its Member States decide to include EU Law as part of the applicable Law, it is worth discussing the impact of this decision at EU level.

**72.** The European Commission would be entitled to intervene in investment arbitration as a non-disputing third party (*amicus curiae*). Until now, the Commission has intervened in several arbitrations, through which it has been allowed to inform the arbitral tribunal about the content and the scope of the EU Law provisions related to the investment dispute.<sup>129</sup>

**73.** From the EU Law perspective, the need to preserve the judicial interpretative monopoly of the Luxembourg Court over EU Law remains a major issue. The doctrine set forth by the ECJ in the *Nordsee* and *Eco Swiss* cases may offer some guidance in order to find procedural solutions to guarantee the fundamental role of this judicial institution within the EU legal system. In *Nordsee*, the ECJ concluded that a national court from a Member State is allowed to refer preliminary rulings while dealing with

<sup>127</sup> See *supra*, footnote 86.

<sup>128</sup> *Boletín Oficial del Estado* of 10 October 1979.

<sup>129</sup> See *supra*, Part II.1, paras. 6-9.

provisional measures or reviewing the validity of an arbitral award, should questions of EU Law arise in these contexts.<sup>130</sup> Further, in *Eco Swiss*, the ECJ faced a preliminary ruling in which a Dutch court had to decide whether to grant the annulment of an arbitration award founded on a failure to observe national rules of public policy. In this case, in light of the “Nordsee doctrine”, the national court asked the ECJ if a failure to comply with the prohibition laid down in Article 81.1 of the Treaty of European Community<sup>131</sup> would qualify as a matter of public policy within the meaning of the New York Convention.<sup>132</sup> By operation of the “Eco Swiss doctrine”, the restrictions imposed by Article 267 of the TFEU<sup>133</sup> to the referral of preliminary rulings by arbitral bodies might be partially circumvented.

**74.** Following this line of reasoning, it is worth distinguishing, first, between the investment arbitrations initiated under the ICSID system and those administered under other procedural frameworks. And second, between the investment arbitrations whose seat is located on the EU Member States and those administered elsewhere. Should investment arbitrations be initiated under the Rules of Arbitration of the UNCITRAL, the seat of the arbitration being a Member State,<sup>134</sup> national courts would be entitled to intervene in different phases of the proceedings and, eventually, preliminary rulings might be presented before the Luxembourg Court.<sup>135</sup> In those cases, any threats for the judicial monopoly of the ECJ would vanish by application of the “Eco Swiss doctrine”.<sup>136</sup>

<sup>130</sup> The ECJ noted that “if questions of Community Law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award –which may be more or less extensive depending on the circumstances– and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation”: see ECJ, Judgment of 23 March 1982, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*. (Case 102/81), *Rep.*, p. 1095, para. 14.

<sup>131</sup> Article 81.1. of the Treaty of the European Community is currently Article 101 of the TFEU, concerning competition Law: “The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

<sup>132</sup> The Luxembourg Court declared that “a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (...), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy”: see ECJ, Judgment of 1 June 1999, *Eco Swiss China Time Ltd and Benetton International NV* (Case C-126/97), *Rep.*, p. I-3055, para. 41.

<sup>133</sup> Article 267 of the TFEU envisages that “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised 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 ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”

<sup>134</sup> As the tribunal noted in *Electrabel* “this ICSID arbitration does not have its seat or legal place of arbitration in Hungary or elsewhere in the European Union. Such an arbitral seat could trigger the application of the *lex loci arbitri* and give rise to the jurisdiction of the local courts in regard to the arbitral process, including challenges to the award”: see *Electrabel v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.112).

<sup>135</sup> In *Achmea* –an investment arbitration conducted under the Rules of Arbitration of the UNCITRAL– the claimants unsuccessfully brought actions against the Award on Jurisdiction, Arbitrability and Suspension before the national courts in Germany, the seat of the arbitration being in Frankfurt am Main: see Decision of the Frankfurt Higher Regional Court of 10 May 2012 (26 SchH 11/10), available at <http://www.itaLaw.com/documents/26schh01110.pdf> (last accessed on 7 May 2013).

<sup>136</sup> S.W. SCHILL, “Luxemburg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements”, in M. BUNGENBERG, A. REINISCH AND CH. TIETJE (eds.), *EU and Investment Agreements...*, *op. cit.*, 37-54, pp. 51-53.

75. However, access to the ECJ would be barred not only for investment arbitrations initiated under the ICSID system, by reason of its autonomous (self-contained) character,<sup>137</sup> but also for those conducted outside the EU Member States. In these cases, EU Law would not be part of the *lex loci arbitri*, the national courts of the EU Member States would have no chance to invoke the “Eco Swiss doctrine”, and the ECJ would be unable to review the conformity of the decisions taken by these investment tribunals in the context of EU Law.

76. The choice of *forum*, as anticipated in paragraph 32, constitutes an important issue when dealing with the eventual applicability of EU Law in investment arbitration. Travelling the “ICSID route”, notwithstanding the benefits arising from the enforcement provisions set forth by the ICSID Convention,<sup>138</sup> could be detrimental to the judicial dialogue that must be fostered between the ECJ and investment tribunals.

77. Apart from ensuring the compatibility between the investment framework and the exclusive competences of the ECJ, the EU investment regime needs also to reach a compromise concerning the scope of the powers of the Luxembourg Court when interpreting the EU investment agreements. As part of the EU legal system, the interpretation of these agreements would be subject to the ECJ.<sup>139</sup> Any interpretation of their provisions given from Luxembourg, in principle, would not only produce *ad intra* effects (within the EU), but could also have an indirect effect (*ad extra*) in the activity of investment tribunals.

78. A two-way judicial dialogue must be implemented in order to establish a coherent dispute settlement mechanism under the forthcoming EU investment regime.<sup>140</sup> Managing and balancing this judicial dialogue can become a complex affair, but turns out to be a very important asset to protect, if EU Law were finally considered as necessary in investment arbitration. However, as explained in paragraphs 67-71, EU Law could be deliberately excluded from the provisions envisaging the applicable Law when concluding EU investment treaties. In this scenario, investment tribunals would only apply the investment treaty<sup>141</sup> as well as the rules and principles of international Law.

## 5. The Implications Arising from the Acceptance of European Union Law as Applicable Law in Investment Arbitration

79. Finally, we must consider certain implications of the acceptance of EU Law as applicable Law in international investment arbitration, from the standpoint of the European legal system.

80. Firstly, as for the interplay between investment tribunals and the ECJ, it is worthy to recall that an international investment tribunal is not a “court or tribunal of a Member State” within the mea-

<sup>137</sup> Z. DOUGLAS, “The Hybrid Foundations of Investment Treaty Arbitration”, *British Yearbook of International Law*, vol. 74 (2003), 152-289, pp. 213-226.

<sup>138</sup> See *supra*, Part II.3, paras. 25-26.

<sup>139</sup> ECJ, Judgment of 30 April 1974, *R. & V. Haegeman v. Belgian State* (Case 181/73), *Rep.*, p. 449, paras. 6-7.

<sup>140</sup> Some traces of this dialogue can already be perceived in the *Atel* case, in which the ECJ made an eccentric interpretation of Article 351.1 of the TFEU (extending its application to individuals) in order to find that the preferential access granted to an investor could be regarded as an investment protected by a BIT and, therefore, was not affected by the provisions of the EU Treaties: see ECJ, Judgment of 15 September 2011, *European Commission v. Slovak Republic* (Case C-264/09), *Rep.*, p. I-8065, paras. 41-53. Should the ECJ have found otherwise, the Slovak Republic would have been forced to modify the terms or effects of the contract at issue, or to deprive that contract of legal effects, in accordance with Article 351.1 of the TFEU. Slovak legislation declaring contracts providing for privileged access to the transmission system invalid and inapplicable would have not altered the fact that the national authority that entered the contract on behalf of the Slovak Republic would have remained bound by the contract at issue. Therefore, the only way for the Slovak Republic to comply with its obligation in this case would have been to enact legislation targeting the national authority and preventing it from implementing that contract, which would have been tantamount to an indirect expropriation of the investor’s right under the contract.

<sup>141</sup> As asserted in paragraph 77, it is yet to be explored the impact that any interpretation of the investment treaty made by the Luxembourg Court could generate in investment arbitration.

ning of Article 267 of the TFEU and, thus, it cannot refer preliminary rulings to the ECJ.<sup>142</sup> It is also true that as long as a tribunal finds no doubt while applying EU Law, in light of the ECJ case Law, no duty to refer a preliminary ruling arises.<sup>143</sup> It follows that, as ruled in the inter-State *Iron Rhine Railway* arbitration,<sup>144</sup> an arbitral tribunal may decide to apply EU Law without having to refer preliminary rulings to the ECJ,<sup>145</sup> provided that the tribunal restrains its activity only to analyzing whether the national measures taken by the host State in light of EU Law are in conformity with the international obligations enshrined in the BIT or the multilateral investment treaty applicable to the dispute.

**81.** Applying EU Law in this context does not threaten the judicial monopoly of the Luxembourg Court over its validity and interpretation.<sup>146</sup> Foreign investors may challenge the validity of a measure adopted by the EU with regard to their investments under the EU judicial system, and its validity with respect to the international investment obligations concluded by the EU before an arbitral tribunal. In order to assess a breach of the latter duties, an investment tribunal needs not to interpret EU Law, but only to ponder if the agreement has been breached.

**82.** However, if investment tribunals were to rule on the application of EU Law under the EU investment regime, as was suggested in paragraph 56, an infringement of the judicial monopoly of the ECJ over the interpretation of EU Law could take place.<sup>147</sup> Judicial comity or deference<sup>148</sup> between investment tribunals and the ECJ constitutes a pivotal element in the forthcoming EU investment regime.<sup>149</sup>

**83.** And secondly, should EU Law be considered as applicable Law to the arbitration, investment tribunals should refer to EU Law only when necessary for the settlement of the dispute. *Ad hoc* Committees have consistently found that in order to annul an arbitral award under Article 52.1.b) of the ICSID Convention for a manifest excess of the tribunal's powers<sup>150</sup> consisting of a failure to apply

<sup>142</sup> ECJ, Judgment of 27 January 2005, *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages et Culture SA* (Case C-125/04), *Rep.*, p. I-923, para. 13.

<sup>143</sup> ECJ, Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministero della Sanità* (Case 283/81), *Rep.*, p. 3415, paras. 10-11.

<sup>144</sup> *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005 (Reports of International Arbitral Awards, vol. XXVII, p. 35)*. In paragraph 104 of the award, the tribunal found "As to the necessity *vel non* of the Tribunal having to decide issues of EC Law in order to enable it to render its Award, the criteria elaborated in the application of Article 234 of the EC Treaty by national courts and the European Court of Justice will also apply by analogy. In this regard, *not all mention of EC Law brings with it the duty to refer*" (emphasis added). In the same fashion, in *Achmea* the investment tribunal ruled that the ECJ had a monopoly on the final and authoritative interpretation of EU Law, but it then recalled the *acte clair* doctrine to confirm that EU Law could be applied to the dispute, if necessary: see *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic* (UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 282).

<sup>145</sup> It is for the ECJ, should EU Member States reform its Statute, to change its case Law and start accepting preliminary rulings presented by investment tribunals: see K. VON PAPP, "Clash of 'Autonomous Legal Orders': Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ", *Common Market Law Review*, vol. 50, No. 4, 2013, 1039-1081; and S.W. SCHILL, "Arbitration Procedure: The Role of the European Union and the Member States in Investor-State Arbitration", in C. KESSEDIAN (dir.), *Le droit européen...*, *op. cit.*, 129-147, pp. 136-137 and 144-145.

<sup>146</sup> A. DIMOPOULOS, *EU Foreign Investment Law*, Oxford, Oxford University Press, 2011, p. 333.

<sup>147</sup> M. BURGSTALLER, "Investor-State Arbitration...", *op. cit.*, pp. 207-221; and A. REINISCH, "Les investissements intra-communautaires. Entre droit communautaire et accords internationaux sur l'investissement: concilier l'inconciliable?", *ICSID Review – Foreign Investment Law Journal*, vol. 28, No. 1, 2013, 179-196, p. 194.

<sup>148</sup> TH. BUERGENTHAL, "The Proliferation of International Courts and the Future of International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 5, 2001, 29-44, p. 41.

<sup>149</sup> As one author has already noted, investment tribunals need to "engage" with Luxembourg: see S.W. SCHILL, "Luxembourg Limits...", *op. cit.*, p. 54.

<sup>150</sup> Article 52.1.c) of the ICSID Convention sets forth that "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (...) (b) that the Tribunal has manifestly exceeded its powers."

the applicable Law, at the very least something more than a “serious error” is required.<sup>151</sup> Further, under Article 52.1.e) of the ICSID Convention a failure to state reasons constitutes another ground for annulment,<sup>152</sup> when the reasons provided for the tribunal are so contradictory that they effectively amount to no reasons at all.<sup>153</sup>

**84.** In *AES Summit*, notwithstanding that the parties to the arbitration had agreed on the ECT together with the relevant rules and principles of international Law as being the applicable Law to the arbitration, during the annulment phase the claimant unsuccessfully challenged the award on both grounds, by arguing that the arbitral tribunal had not pondered the impact of Hungarian and EU Law in the arbitration.<sup>154</sup> In other words, if the parties agree on the applicability of EU Law to an investment dispute initiated under the ICSID system, a non-application<sup>155</sup> of this legal system by the tribunal might trigger an annulment proceeding pursuant to Article 52.1.b) of the ICSID Convention.

#### IV. Final Remarks

**85.** As it can be inferred from the present paper, the design of the EU investment regime shall contribute to the development not only of the international investment regime, but also of the rules of public international Law created within the institutional framework of the international system as well as the principle of systemic integration.

**86.** Concerning the first part of the proposition, the EU participation in investment arbitration may consolidate the role played by the Rules of Arbitration of the UNCITRAL and even stimulate the creation of new arbitration *forum* outside the ICSID system. The PCA has recently adapted its arbitration rules in order to enable the institution of disputes in which one of the parties is an International Organization. Keeping in mind the objections raised by certain States to the ICSID system, from the standpoint of the choice of *forum*, and the technical and legal problems faced by the EU under this system, the international investment regime seems to be heading towards a larger decentralization.

**87.** Future international investment agreements negotiated by the EU and its Member States with third States must build bridges and foster the judicial dialogue between the ECJ and the investment tribunals, in order to diminish any potential conflict between these specialized regimes. By resorting to

<sup>151</sup> *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7, Decision on the Application for Annulment of 5 June 2007, para. 19).

<sup>152</sup> Article 52.1.e) of the ICSID Convention sets forth that “Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (...) (e) that the award has failed to state the reasons on which it is based.”

<sup>153</sup> *Compañía del Aguas del Aconquija S.A. & Vivendi Universal v. Republic of Argentina* (ICSID Case No. ARB/97/3, Decision on the Application for Annulment of 3 July 2002, para. 64).

<sup>154</sup> As for the arguments presented by the claimant, the *ad hoc* Committee found that “The Tribunal therefore was not required to evaluate the legality of Hungary’s reintroduction of regulated pricing under Hungarian or EU Law, since this was not part of its adopted standard. (...) In any case, as discussed at length above, an error of Law is not a valid basis for annulment. It is not open to *AES* or the *ad hoc* Committee to challenge the correctness of the standards applied by the Tribunal. Further, a tribunal is not required to address every argument invoked by a party if it considers that this argument is not essential in deciding the issue before it”: see *AES Summit Generation v. Republic of Hungary* (ICSID Case No. ARB/07/22, Decision on the Application for Annulment of 29 June 2012, paras. 174-175).

<sup>155</sup> The *ad hoc* Committee in *MINE* found that Article 42.1 of the ICSID Convention “grants the parties to the dispute unlimited freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties’ autonomy and to apply those rules. From another perspective, the parties’ agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal’s disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power”: see *Maritime International Nominees Establishment (MINE) v. Guinea* (ICSID Case No. ARB/84/4, Decision on the Application for Annulment of 14 December 1989, para. 5.03).

*ad hoc* arbitrations initiated under the Rules of Arbitration of the UNCITRAL, foreign investors and the EU might explore procedural avenues capable of establishing a judicial dialogue between national and international tribunals so as to safeguard the *ordre public communautaire*, for instance, by allowing the national courts of the EU Member States to refer preliminary rulings before the Luxembourg Court.

**88.** Foreign investors operating in the territory of the EU Member States shall have at their disposal multiple judicial avenues to settle disputes arising from their investment activities. Apart from the tribunals designed to protect the rights conferred by the future EU investment agreements, investors may resort to the ECJ in order to challenge the validity of the measures taken by the EU against their investment or even hit the road from Luxembourg to Strasbourg, so as to ponder the EU measures in light of the EConvHR. Should parallel proceedings were initiated by the same investors against the EU in two different *forum*, the effects of the decisions rendered by these international tribunals shall be constrained within the institutional framework in which they operate, notwithstanding that they might be used as a circumstantial argument before other tribunals.

**89.** As for the development of the rules of public international Law, it is worth noting that the EU participation in investment arbitration shall contribute to the application and further development of the rules of international responsibility (attribution), Law of the treaties (interpretation and systemic integration), and immunities. Investment tribunals will test the scope of these rules, created within the institutional framework of the international legal system.

**90.** As a result of the legal interaction between these specialized regimes, the development of the Law of the International Organizations will be enhanced as well as enriched. In sum, international investment Law will become more international and less self-contained.