The Battle of the Giants

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THE BATTLE OF THE GIANTS: EU LAW, ECHR AND THE ENERGY CHARTER TREATY; THE REMATCH TO PROTECT PROPERTY RIGHTS IN EUROPE

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Abstract:
This article explores the various levels of compensation for expropriated investments in the European legal framework. This article is timely, because it adds to the discussion on the changing position of UK investors after Brexit and whether their international protection is equal to their protection under EU law. In order to critically evaluate the proposition that energy investors are granted equivalent protection of their investments under the EU legal framework, as compared to the legal framework of investment treaties (BITs, FTAs, IIAs), this article evaluates the existing rules on compensation under the Energy Charter Treaty, the EU law and the European Convention on Human Rights.

I. INTRODUCTION: THE SOVEREIGN RIGHT OF EXPROPRIATION AND INTERNATIONAL RULES FOR COMPENSATION

Different standards of compensation for expropriation are one of the most pressing issues in Europe because of the different treatments given to protect the right to property. There are procedural and substantive tensions between different compensatory rights, which are available to energy investors making investments in the European Continent. In Europe, there is some nuance about the diverse set of laws which refer to the protection of property rights and the standards of protection offered in case of expropriation. Different schools of taught have argued that the EU legal order offers the highest standard of protection to foreign investors making investments in Europe, resulting in the superfluous nature of the intra-EU international investment agreements.[1] This tension is accentuated when the different spheres of economic market integration, human rights and investment law have respectively claimed to grant the maximum level of property protection. Moreover, the with the UK's exit from the EU fast approaching, the UK investors in the EU will no longer have access to the protection under EU law but will continue to benefit from the protection under the European Convention on Human Rights (ECHR) and the international investment agreements. This article revisits the concept of compensation for expropriation across

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[1] The argument advanced in Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 Journal of International Economic Law 1, 98. Differently, however, *"…all BITs offer foreign investors fair and equitable treatment (FET) and protection against expropriation; rights which do not exists as such in EU Law …"* in Angelos Dimopoulos, *EU Foreign Investment Law*, (OUP, 2011) 315.

different legal frameworks in Europe. It takes particular care to identify the different standards of property protection in the context of EU Law, the ECHR and the Energy Charter Treaty. This article gives new and clear evidence to elucidate that, contrary to the current understanding, based on the principle of proportionality, compensatory rights under international investment protections offer the most structured, consistent and certain regime of compensatory standards of property protection for energy investors in Europe.

Under most public laws (national and international) states have the sovereign right to take or modify property rights of individuals. Most domestic laws will provide for a compensation process when private property is taken for public purpose. Common law countries also refer to this type of property taking as eminent domain.[2] Most importantly, the notion of a state taking private property is well-known as expropriation. Expropriation is considered one of – if not – the most drastic interference of a state with property rights. Aiming to protect foreigners, international law has widely recognised expropriation as a fundamental power of any sovereign state and has incorporated rules, which deal with the conditions and consequences for a legal way to undertake this type of property intrusion.[3]

The interference with property rights in the form of expropriation is not *per se* illegal under international law, as long as certain conditions are met. This is well illustrated in Article XVII of the Declaration of the Rights of Man and the Citizen which defines the right of property as a "sacred right" which cannot be affected unless it is for public purpose, legal and with appropriate and advance payment.[4] This Declaration appears to be reflected in the Responsibility of States for Internationally Wrongful Acts in the particular compensation provisions, which provide that:

> "…compensation shall cover any financially assessable damage including of lost profits insofar as it is established…"[5]

In the particular context of investment arbitration, most of the bilateral and multilateral investment treaties contain rules on expropriation, which will include the description of measures and conditions equivalent to direct or indirect expropriation.[6] Investment agreements consider as property those investments made by the foreign investor in a host-state, therefore property and investment are sometimes used indistinctively in the wording of certain investment agreements. As a matter of fact, most of the modern investment treaty provisions about expropriation deal with the word investment instead of property, this is because the scope of these treaties covers the protection and promotion of investment of an investor and therefore, under investment treaties, expropriation rules aim to protect investments.[7]

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[2] Energy Charter Treaty Secretariat, 'Expropriation Regime under the Energy Charter Treaty', <http://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Expropriation_2012_en.pdf> accessed on 9 November 2018.

[3] For a clear and general explanation of expropriation on international investment law see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (OUP, 2012) 98.

[4] 1789 *Declaration des Droits de'l Homme et du Citoyen*.

[5] Responsibility of States for Internationally Wrongful Acts, Article 36 (2).

[6] Ursula Kriebaum, 'Expropriation', in Marc Bungernber, Jorn Griebel, Stephan Hobe and August Reinisch (eds) *International Investment Law* (Nomos Hart, 2015) 967.

[7] Dolzer and Schreuer (n3) 99.

A careful analysis of most of the investment treaties as well as international investment arbitration practice reveals that the key requirement for the legality of expropriation is a fair monetary compensation, meaning that payment should be equivalent to the value of the property at the time of its expropriation or right immediately before the expropriation became publicly known. More generally, and similarly to the Declaration of the Rights of the Man and the Citizen, the legality of expropriation in investment treaties is conditioned to serve for public purpose,[8] the measure must be legal (i.e. not arbitrary or discriminatory)[9], follow principles of due process and must be accompanied by a payment equal to the value of the expropriated investment.[10]

In this regard, the US and UK BIT models as well as some multilateral treaties own their wording to a historical justification.[11] In 1938, foreign property was nationalised by the Mexican State and the then US Secretary Cordell Hull demanded Mexico to pay "adequate, effective and prompt compensation" a demand which became a controversial, but well-known standard of protection of foreign property.[12] As matter of fact, the Energy Charter Treaty (ECT) was the first multilateral investment agreement to adopt the Hull formula into its expropriation treaty standard.[13]

II. EXPROPRIATION AND COMPENSATION UNDER THE ENERGY CHARTER TREATY

A. The Scope of "Property" Protected under the ECT

The Energy Charter Treaty is a multilateral agreement, to which the EU and its Member States (with the exception of Italy) are signatories.[14] This means that disputes arising

[8] See for example *ADC Affiliate Limited and ADC& ADMC Management Limited v The Republic of Hungary* (Award), 2 October 2006, ICSID Case No. ARB/03/16, paras 429-433; *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States* (Award), 29 May 2003, ICSID Case No. ARB(AF)/00/2, para 122 and *LG&E Energy Corp, LG&E Capital Corp. and LG&E International INC. v Argentine Republic* (Decision on Liability), 3 October 2006, ICSID Case No. ARB/02/1, paras 194-196.

[9] Case concerning *The Factory at Chorzow (Chorzow Factory* case) (Merits), 13 September 1928, No. 13, Series A-No. 17, 37.

[10] Dolzer and Schreuer (n3) 100 and *Oil European Group B.V. v Bolivarian Republic of Venezuela* (Award), 10 March 2015, ICSID Case No. ARB/11/25, para. 395.

[11] US BIT Model Article 6; UK BIT Model Article 5; NAFTA Article 1110 and ECT Article 13. See also Jason L Gudofsky, 'Shedding light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study' (2000) 21 *Northwestern Journal of International Law & Business* 254.

[12] Patrick M Norton, 'Back to the Future: Expropriation and the Energy Charter Treaty' in TW Wälde (ed), *The Energy Charter Treaty: An East-west Gateway for Investment and Trade* (Kluwer Law International 1996) 365-385 and Green Hackworth, *Digest of International Law* IV (1942) Chapters XII-XV (Washington Printing Office) 655-665.

[13] *"… The adoption of the Hull formula in the ECT is especially significant because it is the first multilateral agreement to adopt that formula and because the Treaty governs the energy sector that has often been the battleground for expropriation disputes…"* in Norton (n12) 366.

[14] In December 2014 Italy notified its withdrawal from the Energy Charter Treaty, taking effect on 1 January 2016, pursuant to ECT Article 47(3). The ECT will continue to apply to Italy for a period of 20 years, see Energy Charter Secretariat, 'Italy at Intentional Energy Charter'

out of cross-border energy investments within the EU could also fall within the ECT's substantive protections, including takings of private foreign property in the form of expropriation.

As already mentioned, investment treaties aim to protect foreign investments, and as such investment agreements consider property rights as investments. Property and investment are sometimes used indistinctively in the wording of certain investment agreements. In the particular context of the ECT, it contains a non-exhaustive and broad list of the type of assets and activities that constitutes an investment. This list includes certain common activities in the energy sector such as exploration, extraction, refining, sale of energy materials and products.[15]

The ECT also includes (in)tangible and (im)moveable, property rights, any form of equity participation in a company, claims to money, intellectual property (IP) rights, and basically any other right conferred by law.[16]

B. Definition and Standard of Expropriation under the ECT.

In terms of protecting investments against expropriation; ECT Article 13 does not permit any type of interference that amounts to nationalisation, expropriation or any other equivalent effect, unless such interference is:

1. For a public interest;
2. Not discriminatory;
3. According to due process; and
4. Accompanied by *prompt, adequate and effective compensation* (emphasis added), which should amount for the fair market value of the investment immediately before the expropriation became publicly know as to affect the value of the investment.

This means that, under the ECT, obligation to compensate as well as the other three requirements mentioned above should be satisfied for the expropriation measure to be considered lawful. Conversely, if any of these requirements are not satisfied; expropriation occurred unlawfully. It is important to highlight, that under the ECT, the obligation to compensate plays a bigger role as failure to do so, could entitle an investor to a claim that the expropriation measure was a wrongful act. Therefore, at request of the investor, expropriation claims require from the arbitral tribunal to grant payment of damages caused for unlawful expropriation.[17]

<http://www.energycharter.org/who-we-are/members-observers/countries/italy/> accessed 9 November 2018. For this research, the United Kingdom counts as one of the 28 Member States of the European Union, as it should be until the appropriate legal mechanism for its exit has been concluded.

[15] In this case, the arbitral tribunal discussed the broad coverage of the ECT's investment definition and it held that the ECT has a *"…broad and non-exhaustive list of different assets encompassing any right, property or interest…"* in *Plama Consortium Limited v Bulgaria,* (Decision on Jurisdiction) ICSID Case No. ARB/03/24, 8 February 2005, para. 125.

[16] ECT Article 1.

[17] *ADC v Hungary* (n8); *Compañía del Desarrollo de Santa Elena v Republic of Costa Rica* (Award), 17 February 2000, ICSID Case No.ARB/96/1, *Siemens A.G. v The Argentine Republic* (Award), 17 January 2007, ICSID Case No. ARB/02/08 and *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (Award), 20 August 2007, ICSID Case No. ARB/97/03.

In practice, the claimant will firstly be required to establish that its investment was protected under the investment agreement. Secondly, the arbitral tribunal would have to analyse and decide if the interference against that specific property right amounts to expropriation. Thirdly, once expropriation has been established, the question is if the right amount of compensation was paid.[18] The outcome of this final assessment will vary depending on the lawfulness or unlawfulness of the measure, as unlawful expropriation is likely to be calculated – and compensated– with damages.

1. Direct Expropriation under the ECT

As with many other investment agreements, the ECT makes reference to the type of measures than have the equivalent effect to expropriation.[19] Direct expropriation consists in a state's taking of property for public purpose. This direct taking of property could involve transfer of title and/or physical seizure of the property.[20] In investment arbitration it is widely known that physical taking of an investment occurs less frequently, and therefore direct expropriation occurs only in exceptional cases.[21]

In *Kardassopoulos v Georgia* case, an ECT tribunal had the opportunity to decide on one of the rare cases where there is a classic direct expropriation. In this case, a decree deprived the investor of his rights in an oil pipeline.[22] The tribunal reviewed the criteria listed in ECT Article 13 against the taking of the Claimant's rights in an oil pipeline. The tribunal had to determine if Mr. Kardassopoulos' investment was expropriated lawfully. In doing so, the tribunal confirmed that, generally, when an expropriation is lawful the applicable standard of compensation is the one of prompt, adequate and effective payment.

More importantly, the tribunal reviewed the criteria established in ECT Article 13, where the assessment given to the four criteria had the same weight and value. First, the tribunal concluded that Georgia's oil pipeline infrastructure was of crucial national importance, and which it was a matter of Georgia's energy independence in the region. Nonetheless, despite the national and public importance of the pipeline in question, the arbitral tribunal was not sure that the solution carried out by the Respondent could be reconciled with Georgia's treaty obligations.[23]

Secondly, the tribunal analysed if the measure was not discriminatory based on the investor's nationality. In here, the tribunal found absence of an intention to discriminate. The tribunal concluded the Georgian Government did not discriminate

[18] Kriebaum (n6) 963- 964.
[19] ECT Article 13(1).
[20] UNCTAD Series on International Investment Agreements II, 'Expropriation' <http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> accessed on 9 November 2018.
[21] Historically, most expropriations were direct, recent practice, however, has resolved issues mostly related to indirect expropriation. Dolzer and Schreuer (n3) 101. See for example, *LG&E v Argentina* (n8) para. 187; and *Burlington Resources Inc v Republic of Ecuador,* ICSID Case No. ARB/08/05 (Decision on Liability), 14 December 2012, ICSID Case No. ARB/08/05, para. 538. Under the ECT, the only case registered where the arbitral tribunal successfully found a breach of indirect expropriation is: *Ioannis Kardassopoulos v Georgia* (Award), 3 March 2013, ICSID Case No. ARB/05/18 and ARB/07/15, para. 387.
[22] *Kardassopoulos v Georgia* (Award), (n21), para. 387.
[23] *Idem*, para. 391.

against Kardassopoulos because he was a foreign investor, but rather there was a better deal with another foreign investor.[24]

Thirdly, the tribunal then studied if the expropriation followed due process. For this tribunal, the notion of due process was described as the basic legal mechanism which gives a reasonable time to be heard and claim legitimate rights. Due process includes a reasonable and advanced notice of an expropriation, fair hearing and an unbiased and impartial adjudicator. In this case the Georgian Government failed to give a reasonable time to the Claimant to have his rights heard following the expropriation.[25]

Fourthly, the tribunal found no evidence of any payment made to the Claimant, and therefore the Respondent breached the ECT's obligation of prompt, adequate and effective compensation payment.[26] To conclude, the tribunal found that the Respondent acted not in exercise of its *bona fide* police powers , this is because the expropriation process faced some irregularities as there was no payment (at all) under the ECT formula.[27]

The tribunal also contributed to the understanding of the method for calculating compensation in an unlawful direct expropriation under the ECT. To do so, first the tribunal confirmed that the ECT is silent about the rules of unlawful expropriation as ECT Article 13 only refers to fair market value (FMV) as standard of compensation when the expropriation has been lawful. Therefore, to identify the appropriate standard of compensation in the case of an illegal expropriation the tribunal's starting point was the aim of 'wiping-out' the effects of this unlawful taking. According to the *Kardassopoulos* tribunal, FMW can only be calculated when the expropriation is lawful and an unlawful expropriation cannot be compensated under this same criterion, as this will put unlawful and a lawful expropriation on equal terms. Most importantly, the tribunal concluded that there must be a factual basis to grant a higher recovery than the FMV when the expropriation has been unlawful but bearing in mind that it is not possible to impose punitive damages.[28] The evidence in this case showed that it was likely the Claimant would have sold his shares in the same year the expropriation took place. Therefore, the tribunal concluded that the appropriate standard for calculation of compensation should be the one the day before the expropriation decree to place to avoid any diminution to the investment's value.[29]

Therefore, one could conclude that under the ECT, the test for direct expropriation would give equal weight and value to consider if the direct expropriation was carried out because of a public interest, not discriminatory, according to due process and accompanied by the adequate payment. An absence on any of these four criteria will amount to unlawful expropriation. In terms of the applicable standard of expropriation the tribunal noted that the primordial aim of compensation should be to 'wipe-out" the effects of the unlawful act while avoiding any diminution on the value of the investment. For the tribunal, given the fact it was the Claimant's intention to sell

[24] *Idem*, para. 393.
[25] *Idem*, paras 395-404.
[26] *Idem*, para. 408.
[27] *Idem*, para. 397.
[28] *Idem*, para. 513.
[29] *Idem*, paras 515-516.

his investments the same year the expropriation took place; the right moment to calculate compensation was the day before the expropriation decree took place.

2. Indirect Expropriation under the ECT

An analysis of ECT practice reveals that the majority of the expropriation cases relates to claims of indirect expropriation. More specifically, the indirect taking of property rights as an investment, which deprives the investor of using the investment in a meaningful way, is perhaps the most frequent vehicle used by a host-state to interfere with the investor's investment.[30] As a consequence, the conceptualization and categorisation of indirect expropriation has been the subject of numerous scholarly writings fuelled by diverse case law under international investment treaty law. For purposes of this article, to put it simply, indirect expropriation should be categorised as creeping, *de facto,* regulatory or constructive expropriation.[31]

Under the ECT, the notion of lawful expropriation is what a willing buyer is prepared to pay to a normally willing seller.[32] This gives the ECT expropriation provision two important effects:

1. The first one is a temporal condition, which requires the payment to be in an immediate manner and before the transgression (or modification) to the investment affects the value of it.

2. Secondly, ECT's expropriation provision characterises the payment with four cumulative qualifications, which are: promptitude, adequacy, effectiveness and in accordance with the fair market value.

These mentioned qualifications (promptitude, adequacy, effectiveness in accordance with the fair market value) make the expropriation standard determinate and with clear intent. It is determinate and clear as the investor knows since the pre-investment stage that in case of expropriation, it would receive a compensation in the amount of a fair value of the investment. This approach to compensation is what is known as an objective standard, as there is no illegal act, which provoked any damage to the investor's property (investment). Corollary, when the expropriation measure does not follow any of the before mentioned requirements; relying only on the fair market value will not compensate the damages of an illegal act, and therefore the compensatory measure used is subjective.

In addition to the wording of Article 13, ECT tribunals have clarified the criteria that tantamount to compensate an indirect expropriation. This section will briefly discuss these cases, which so far have contributed to the understanding of expropriation and compensation under the ECT.

[30] For example, in *ADC v Hungary* the tribunal concluded that expropriation made because of public interest must be fully evidenced. This means that the Respondent should satisfy that public interest could have only be met by depriving the investor's property, in *ADC v Hungary* (n8) paras 429-433.
[31] UNCTAD Series, 'Expropriation' (n20).
[32] Dolzer and Schreuer (n3) 297.

Subsequently, special attention will be given to investment arbitration cases between EU parties; parties, which arguably could also rely upon other different legal frameworks such as the ECHR to seek remedies for an illegal expropriation.

In one of the first ECT cases, *Nykomb v Latvia* the arbitral tribunal had to decide if the non-payment of double tariff from Latvia to the Claimant constituted a violation of ECT Article 13. The tribunal concluded that 'regulatory/legislative takings' must primarily be assessed by the degree of possession, taking or control over the investment. In the present case, the regulatory measure as such did not interfere with the degree of possession or control over the investment, shareholder's rights or management control. Therefore, squashing the payment of double tariff was not tantamount to indirect expropriation.[33]

Consequently, ECT cases have given attention to the assessment of the regulatory measures and their level of interference with the investment as an expropriatory measure. For example, in *Petrobart v Kyrgyz Republic* case, the issue discussed was whether regulatory measures could result in making an investment worthless (i.e. creeping or constructive expropriation).[34] For the tribunal in *Petrobart* it was not sufficient that a regulatory measure disregarded the legitimate interest of an investor, as the measure should also transfer economic values from the investor to the host-State.[35] Building on that, the *Plama v Bulgaria*[36] tribunal produced a list of decisive elements as an assessment of indirect expropriation, which is based on three elements:

1. The level of impact of the State's conduct on the economic use, enjoyment and value on the rights to the investment (which should approach a total impairment of the investment);
2. The level of irreversibility and permanence of contested measures and
3. The extent of the loss economic value of the investment.[37]

In *Al-Bahloul v Tajikistan* the analysis of expropriation referred to the question whether certain actions of the State constituted a permanent taking of the Claimant's contractual rights. The tribunal concluded that the delay on the issuance of exploration licenses, the dissolution of an investor's joint venture and the reduction of share interest of the State in the investor's company did not deprive the claimant permanently.

[33] *Nykomb Synergetivs Tecnology Holding AB v Latvia* (Arbitral Award), 16 December 2003, SCC Case, paras 4.3.1 – 4.3.1.3.
[34] *Petrobart Limited v The Kyrgyz Republic* (Award), 29 March 2015, SCC 126/2003, 35.
[35] *Idem*, 77. This is, however, not a position broadly accepted in investment treaty arbitration see for example *Windstream Energy LLC v Government of Canada* (Award), 27 September 2016, UNCITRAL, para. 284; and previous practice as examined by Louis Yves Fortier and Stephen L. Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2005) 13 Asia Pacific Law Review 79, 100. Similarly, also in MC Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-12) 37 North Carolina Journal of International Law and Commercial Regulation 159,161.
[36] This approach is very similar to the one followed in *Tecmed v Mexico* (n8) para. 116.
[37] *Plama v Republic of Bulgaria* (Award) (n15) para. 193.

This is because, the Claimant was not deprived of anything to which it had been entitled, thus did not result in an irreversible and permanent taking on the Claimant's rights.[38]

Similar to the methodology of *Kardassopoulos*; the intra-EU *Electrabel* tribunal also analysed if the termination of power purchase agreements (PPA) amounted to indirect expropriation in accordance with the four criteria established in ECT Article 13.[39] In particular, the *Electrabel* tribunal paid special attention to the Claimant's burden of proof on establishing that the investment's interference has the same effect as if the investment suffered direct expropriation. In other words, the Claimant had to prove that the indirect expropriation has the same effect as direct expropriation. The tribunal followed the *Tecmed* standard, which requires a radical deprivation or loss of significant value.[40]

In *Electrabel*, the State's interference with contractual rights did not substantially deprive the investment as a whole. The justification was that the investor could always meet the test for indirect expropriation by slicing its investment as the particular circumstances required.[41] The notion of substantial deprivation was also analysed by the *Charanne* tribunal, which shared the opinion that for an indirect expropriation to occur there has to be a substantial harm in the investor's propriety rights.[42] Lastly, in the *Yukos* cases, the tribunal concluded that the measures taken by the Respondent had an equivalent effect to expropriation, which did not qualify as lawful under the ECT Article 13.[43] In doing this analysis, instead of giving special attention to the substantial deprivation measure, the tribunal opted to follow the methodology in the *Kardassopoulos* and *Electrabel* cases and equally weighted the four elements listed in Article 13.[44]

Having analysed the ECT practice on the notion of expropriation it could be concluded that there is an acceptable level of tolerance of State's interference with the foreign investment, which is considered to not amount to expropriation. In the ECT, the lowest threshold for property interference to amount to unlawful expropriation is that the alleged measure fails to comply with at least one of the four requirements of ECT Article 13.

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[38] *Al-Bahloul v Tajikistan* (Partial Award), 2 of September 2009, SCC Case No.V064/2008, paras 278-288.

[39] In public interest, not discriminatory, under due process and accompanied by prompt, adequate and effective payment.

[40] *Electrabel v Hungary* (Decision on Jurisdiction, Applicable Law and Admissibility), 30 November 2012, ICSID Case No. ARB/07/19, paras 6.53-6.54.

[41] *Idem*, paras 6.57-6.64. The tribunal did not only rely on the *Tecmed* criteria but also referred to *Metalclad v Mexico* (Award), 30 August 2010, ICSID Case No. ARB(AF) 97/1, *Pope & Talbot v Government of Canada* (Interim Award), 26 June 2000, UNCITRAL, paras 102-104, *S.D. Myers v Canada* (Second Partial Award), 21 October 2002, paras 282-285, *Lauder v Czech Republic* (Award), 3 September 2001, UNCITRAL, paras 200-201, *CME v The Czech Republic* (Partial Award), 13 September 2001, UNCITRAL, paras 603-604 and *GAMI v Mexico* (Final Award), 15 November 2004, UNCITRAL, paras 284-285.

[42] *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain* (Final Award), 21 January 2016, SCC 062/2012, paras 461- 467.

[43] *Yukos Universal Limited (Isle of Man) v The Russian Federation* (Final Award), 18 July 2014, PCA Case No. AA 227, para. 1580.

[44] *Idem*, paras 1581-1585.

In addition, the ECT practice has also imposed a higher threshold for property interference to be considered as unlawful, which is the fact that the State's measure must commit an irreversible and substantial degree of possession over the investment which either provokes a radical harm on the value of the investment or at least transfer permanently its value to the state in question.

From this analysis, it could be concluded that the indirect expropriation under the ECT practice has taken a balanced approach between the economic effects suffered by the investor and the government's powers to regulate the general and national welfare. This means, that even where there has been a national interest to protect this should not affect the investor's right to compensation. Lastly, as discussed above, the analysis on the ECT practice shows that public interest is only an element to define the legality of expropriation. Under the ECT practice it can be concluded fairly that public interest plays the same level of importance as all the other requirements embodied in (i.e. not discriminatory, carried out under due process of law, and compensation).

However, as discussed further in this article, in the context of indirect expropriation, arbitral tribunals have looked closer into expropriation as a 'side-effect' of regulatory governmental changes.[45] These regulatory governmental changes, which are often carried out for public purpose reasons, are defined as a state's right to regulate. Arguably, in some indirect expropriation cases, arbitral tribunals could not grant compensation payment if there is evidence that the regulatory measure was carried out for legitimate public purpose reasons. At this point, from the ECT practice analysed above, it would be fair to mention that there is balanced approach between an unlimited and limited government's right to regulate for public purpose and an investor's right to receives compensation. Thus, ECT practice shows that arbitral tribunals will often grant compensation payment, even when there was a genuine regulatory measure in place.[46] More recently, this notion of the right to regulate has played a bigger role in new forms of trade agreements. For example, the EU-Canada Comprehensive and Economic Free Trade Agreement crystalizes the balance between a pure 'sole-economic effects' and legitimate state's regulatory actions.[47]

C. Compensation for Indirect Expropriation under the Energy Charter Treaty

Having explored the notion of expropriation under the ECT, it is also relevant to understand the remedies granted by ECT tribunals on the basis of illegal expropriation. For example, for direct expropriation the *Kardassopoulos* tribunal looked into the differences between restitution and compensation for damages on the basis of the *Chorzów Factory* case, and whether the financial assessment of the compensation includes (or not) punitive damages. The arbitral tribunal concluded that the differences between compensation standards should be depend on the applicable law and the unique circumstances of the disputed measures. In this particular case, the tribunal gave a heavy weight to the temporal requirement of ECT Article 13 in concluding that the

[45] UNCTAD, 'Expropriation' (n20) xi; similarly, Christoph Schreuer, 'Introduction: Interrelationship of Standards' in August Reinisch (ed), *Standards of Investment Protection* (OUP, 2008) 1.

[46] More broadly, in other areas of investment arbitration practice, it is perhaps NAFTA cases which has contributed in a particular way to the principle of the government' powers to regulate for public purpose. There is a particular body of NAFTA practice which has concluded that regulatory actions do not necessarily amount to expropriation.

[47] CETA Annex.8A(2); similarly 2012 US Model BIT Annex.B [4.a] (interpretation of Art.6). See also Akatherini Titi, *The Right to Regulate in International Investment Law* (Nomos, 2014), 101-102.

Respondent was obligated to pay compensation promptly and right after the taking of the claimant's investment.[48]

In the *Yukos* cases there was a general disagreement between the parties about the date of expropriation. In these sets of cases, the arbitral tribunal considered different times for valuating compensation and the inclusion of damages in the valuation of the payment claimed. The tribunal concluded that the date of expropriation should be the date when the investment suffered a substantial and irreversible deprivation. On the second –very controversial– issue, the arbitral tribunal found that when the expropriation is unlawful, the claimant should be entitled to select the most convenient date of valuation, which could be either the date of expropriation or the date of the arbitral award.[49] This approach seen in the arbitration practice favours the position of the foreign investor.

To sum up, the analysis of the ECT practice reveals that in addition to the *Hull* formula, arbitral tribunals have shown consensus on taking into account the degree of possession, interference and permanence of the measures taken against the investment in order to calculate an adequate amount for compensation. However, there are two aspects that still remain debatable. The first one is whether damages should be included in the calculation of compensation and therefore going beyond the fair market value standard established in the ECT. Secondly, the *Yukos* cases have raised a new discussion about the date of valuation, which -again- goes beyond the ECT standard. ECT Article 13 establishes that calculation of payment of a lawful expropriation should be done immediately right after the interference or before state interference becomes publicly known as to not affect its value. In contrast, the *Yukos* cases decided that when the expropriation is unlawful, the claimant is entitled to choose the date of valuation, which could be the date of the expropriation or the date of the arbitral award.

III. EXPROPRIATION AND COMPENSATION UNDER ECHR

Foreign investors, whose business are within Europe, might also have the benefit of additional protection for their property under the ECHR, which is binding on the European States. Even after Brexit, the UK will continue to be bound by ECHR by way of its implantation in the Human Rights Act (1998). States, which interfere with private property, might have their measures challenged not only in State Courts, but also in front of the European Court of Human Rights in Strasbourg (ECtHR).[50] Comparing this protection to the ECT, some crucial differences will be observed and most importantly, greater safeguards for states' right to regulate are put in place.

For there to be a successful claim under Article 1 Protocol 1 of the ECHR (A1P1)[51] there needs to be a consideration of three questions; firstly, whether or not the economic

[48] *Kardassopoulos v Georgia* (n21) para. 517.
[49] *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (Final Award), 18 July 2014, PCA Case No. AA226, paras 1765-1766; *Yukos v Russian Federation* (n44), paras 1765-1766 and *Veteran Petroleum Limited (Cyprus) v Russian Federation* (Final Award), 18 July 2014, PCA Case No. AA228, paras 1765-1766.
[50] But only if all domestic remedies have been exhausted, Article 35 European Convention on Human Rights (4 November 1950) 213 UNTS 221 (ECHR).
[51] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 213 UNTS 262 (entered into force 18 May 1954) (P1).

activity falls within the definition of a "possession;" secondly, whether there has been state interference with such possessions, which either amounts to "deprivation" or "control of use" of that property; and finally, whether there is a duty on the State to pay compensation. Although this analysis is comparatively similar to the analysis of expropriation under international investment treaties (whether there is a covered investment; whether state's interference or measure amounts to expropriation and if there is expropriation, whether it was lawful (including the question of compensation)) the protection of property under ECHR is arguably narrower, as State's margin of appreciation to regulate private property and avoid payment of compensation is broader.

A. The scope of "possessions" or "property" protected under A1P1 of the ECHR

A1P1 is entitled "protection of property." The text of the provision itself refers to "peaceful enjoyment of […] possessions." Neither of the two terms is further defined in the ECHR itself. It is therefore necessary to refer to the ECtHR and its jurisprudence.

As a matter of principle, the ECtHR has explained that the classification of rights falling within the definition of possessions, is based on substance, and not on form. Importantly therefore, the ECtHR conducts an autonomous interpretation of the meaning of possessions under A1P1, which is independent of any meaning in the domestic law of the Respondent State and whether on the whole, an applicant has "title to a substantive interest" under A1P1 which includes *"physical goods, certain rights and interests constituting assets."* [52]

The ECtHR interpreted "possessions," which merit protection under A1P1, to include not only tangible property and land, but also intangible property, intellectual property,[53] goodwill[54] and licences.[55] All these categories are protected under A1P1, if they give rise to the interests of a proprietary nature, or put differently, it matters, if the "bundle of financial rights and interests" has or is capable of having "substantial financial value."[56] Importantly, as with the ECT and its definition of "investment", the

[52] *Oneryildiz v Turkey* (2005) 41 EHRR 20, para. 124. The principle similarly expressed in *Depalle v France* (2012) 54 EHRR 17, para. 68.

[53] Including filing of an application for registration of a trade mark in *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36 paras 72, 78.

[54] *British American Tobacco (UK) Limited and Others v Secretary of State for Health* [2016] EWHC 1169 (Admin) (19 May 2016) para. 719 (referring with approval to *Breyer Group Plc v Department of Energy & Climate Change* [2015] EWCA Civ 408). These propositions reflected in ECtHR and UK jurisprudence: (1) *Van Marle v The Netherlands* (1986) 8 EHRR 483 (the right to practice as accountants); (2) *Ian Edgar (Liverpool) Limited* (goodwill in the business of the distribution of firearms); (3) *Denimark Limited v UK* (2000) 30 EHRR CD 44; and (4) *R (Malik) v Waltham Forest NHS PCT* [2007] EWCA Civ 265.

[55] Licence to sell tobacco is "possession", particularly once it guarantees an important share of the applicant's turnover: *Vékony v Hungary* [2015] ECHR 5 (13 January 2015), para. 29 (relying on *Centro Europa 7 SRL and Di Stefano v Italy* [GC], no 38433/09, ECHR 2012, paras 177-178). Withdrawal of a licence to carry on business activities amounts to interference with the right to peaceful enjoyment of possessions under A1P1: *Capital Bank AD v Bulgaria*, no 49429/99, ECHR 2005-XII, para. 130; *Rosenzweig and Bonded Warehouses Ltd v Poland*, no 51728/99, 28 July 2005, para. 49; *Bimer SA v Moldova*, no 15084/03, 10 July 2007, para. 49; and *Tre Traktörer AB v Sweden*, 7 July 1989, Series A no 159 (revocation of alcohol retail licence), para. 53.

[56] *Anheuser-Busch Inc v Portugal* (n53) para. 76.

definition of "possessions" is not presented with a closed list and permits the Court to make a case-by-case analysis of property, deserving of A1P1 protection.

B. The three rules under A1P1 of the ECHR

Property is protected against state's interference under ECHR, and includes "peaceful enjoyment of possessions" under A1P1 ECHR, which contains three distinct rules:[57] the first rule is of a general nature and states the principle of peaceful enjoyment of property (first sentence of first paragraph).[58] The second rule covers deprivation of possessions, subject to certain conditions (also referred to as expropriation, second sentence of the first paragraph). The third rule recognises the power of Contracting States to control the use of property in accordance with the general interest (second paragraph). Importantly, the ECtHR recognises the inter-linked nature of the three rules and the general principle from the first rule is always to be used when interpreting the second two rules.[59]

The distinction between the second (deprivation/expropriation) and the third rule (control of use) leads to two important differences.[60] Firstly, the operation of the proportionality principle, whereby the law applies more strictly (and with that favourably to the right holder) in the case of the former; and secondly, the duty to compensate.[61]

Comparing the three rules of A1P1 to ECT Article 13 leads to an important observation. Unlike the ECT, A1P1 does not offer protection against direct and indirect expropriation expressly. Instead, A1P1 draws the distinction between "deprivation" and "control of use." As is explored in the two sub-sections below, the case law of ECtHR interprets "deprivation" strictly, which effectively means that A1P1 offers protection against direct expropriation. State measures, which under the ECT qualify as indirect expropriation, would most likely fall under "control of use" and not "deprivation" or expropriation under the meaning of A1P1.

C. The second rule of A1P1: (direct) expropriation under ECHR

The second rule of A1P1 prevents deprivation or expropriation of property, unless in the public interest and subject to the conditions provided for by law and by the general

[57] *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom* (30 August 2007) [2007] ECHR 5559, para 52; referring with approval to *Anheuser-Busch Inc v Portugal* (n53) para. 62.
[58] *Beyeler v Italy* [GC], no 33202/96, ECHR 2000-I.
[59] *AGOSI v UK* (1987) 9 EHRR 1, para. 48 (referring with approval to *Sporrong and Lönnroth* [1982] ECHR 5, para. 61; and *Lithgow and Others* [1986] ECHR 8, para. 106.
[60] As noted by Justice Green in *BAT v Secretary of State for Health* (n54) para. 732.
[61] Examined in the following section.

principles of international law.[62] ECtHR case law demonstrates that in most cases expropriation will not occur, if the applicant retains title to the property right at issue.[63] Differently to Article 13 ECT, there is no express protection against indirect expropriation.

Furthermore, the severity of the economic consequences (severity of the measure) is not a factor, which is especially – or at least not on its own – relevant to the distinction between expropriation and control of use (i.e. second and third rule).[64] State measures, which under ECT practice are qualified as indirect expropriation through "substantial deprivation" test, might not be qualified as deprivation or expropriation under ECHR. As put by the ECtHR, the distinction between the two rules cannot be inferred simply by the fact that the applicant lost ownership of a possession (property) and must instead be based on the critical consideration of whether the regulatory measure in question intended to pursue a legitimate public interest objective:

> "…The statutory provisions which resulted in the applicant companies' loss of beneficial ownership were thus not intended to deprive paper owners of their ownership, but rather to regulate questions of title […] The applicant companies were therefore affected, not by a "deprivation of possessions" […] but rather by a "control of use" of land […]"[65]

In comparison to Article 13 ECT, and specifically in relation to state measures, which do not take away investor's title to property, ECHR offers less protection.

D. The third rule of A1P1: control of use (cf indirect expropriation) under ECHR

The third rule of A1P1 provides Contracting Parties the power to control the use of property within their jurisdiction. The margin of appreciation States have in controlling the use of property is broad and includes the need to implement the measures, the aims of such measures and their effects. State authorities' assessment of all three should be accepted, unless the interference was "*manifestly unreasonable and imposed an excessive burden on the person concerned*."[66] Not only must the measure taken have a

[62] The most obvious, and yet unique cases of deprivation, were the "demolition" cases, where compensation was ordered to be paid: (1) *NA v Turkey* (Application NO 37451/97) (11 October 2005) *(*a licence to build a hotel obtained; later revoked and hotel demolished) and (2) *Yildirir v Turkey* (Application No 21482/03) (24 February 2010) (applicant bought land in reliance of the records in the Land Register; the property had been illegally constructed; later the applicant order to demolish the property, although such order was in public interest, compensation was due). Also, if legislative measures secure transfer of title/ownership from one individual to another, this could amount to deprivation *James and Others v the United Kingdom*, 21 February 1986, Series A no. 98.

[63] Examples of control of use cases: (1) *AGOSI v UK* (n59) para. 51 (the prohibition on the importation of gold coins (Kruegerrands) into the UK); (2) *Air Canada v UK* (1995) 20 EHRR 150, para. 32 (seizure of an airplane, which was returned only after the payment of compulsory fee); (3) *Pinnacle Meat Processors Company v UK* (1999) 27 EHRR CD217 (measures adopted in the wake of BSE crisis, cattle deboning business declared unlawful (six applicants in consequence went out of business); (4) *Andrews v UK* (App No 37657/97, 26 September 2000) (firearms control legislation banning the sale of certain guns).

[64] Justice Green in *BAT v Secretary of State for Health* (n54) para. 770.

[65] *JA Pye v UK* (n57) para. 66.

[66] *James and Others v UK* (n62) paras 46, 50. Also confirmed in *Vékony v Hungary* (n55) para. 33.

legitimate aim, that it is "in the public interest," but there must also be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. The notion has also been termed as the "fair balance test" that must be struck between the demands of the general interest of the community and the requirements of the protections of the individual fundamental rights. This test will fail, if "*the person concerned has had to bare 'an individual and excessive burden*.'"[67]

Regardless of the severity of the economic effect, most cases of revocation of licences or permits to conduct businesses, or cases, in which there was no taking of title, will fall within the third rule of A1P1 and will not amount to expropriation.[68] In the case of non-renewal of licence to trade in tobacco, the ECtHR found this standard to be made, due to the following factors: (i) the serious economic consequences on the applicant (its business was consequently wound up), resulting in the finding of the measure being "severe," (ii) the absence of a proper transitional protection (the applicant only had three months to adjust after the licence was denied); (iii) the absence of protection against arbitrary, discriminatory or disproportionately harsh consequences (serious irregularities in the procedure); (iv) manner of the introduction of the impugned law (the measure was implemented with particular haste and even then with constant changes) and (v) the arbitrariness of the rules themselves (rules to obtain the new concession were "verging on arbitrariness").[69]

Comparatively however it can be concluded, that indirect expropriation cases under the ECT test and other investment treaties, would most likely, in the context of A1P1 ECHR fall within the remit of "control of use" and not, within the definition of "deprivation" (or expropriation). It is therefore difficult for a property owner (or investor conversely) to establish that a state's measure falls within the remit of the second rule of A1P1, which would attract state's duty to pay compensation for the expropriated property. These rules are explored next.

E. ECHR Standard of Compensation for violation of A1P1

A1P1 does not itself mandate a State's duty to pay compensation. Instead, if the ECtHR finds that the Respondent State breached its obligations under A1P1, it can award just

[67] *Idem,* para. 32 (referring to *Rosenzweig and Bonded Warehouses Ltd v Poland,* no 51728/99, 28 July 2005, para. 48 and *James and Others v UK* (n62) para. 50.

[68] *Vékony v Hungary* (n55) para. 30 (the cancellation and non-renewal of the applicant's tobacco licence constituted a measure of control of the use of property); similarly, in *Tre Traktörer v Sweden* (n55) para. 55 ("Severe though it may have been, the interference at issue did not fall within the ambit of the second sentence of the first paragraph. The applicant company, although it could no longer operate La Cardinal as a restaurant business, kept some economic interests representing by the leasing of the premises and the property assets contained therein, which it finally sold in June 1984 [] There was accordingly no deprivation of property in terms of [A1P1]").

[69] *Vékony v Hungary* (n55) para. 36 (ECtHR focused on five characteristics of the procedure to obtain the licence: (1) the long duration of the previous licence (20 years) was disregarded in the assessment of suitability for the new concession; (2) there was no possibility under the new scheme for a former licence holder to continue tobacco sales under the new arrangements; (3) the new regime allowed for a single entity to obtain more than one licence, which reduced the possibility of small retailers to obtain a new concession; (4) absence of transparent rules in obtaining the concession; and (5) no privilege given to previous licence holder).

satisfaction to the applicant, which can be either a natural or legal person,[70] under ECHR Article 41, if the Court finds such satisfaction necessary.

It has been noted that there are four conditions to award compensation under Article 41. Firstly, the ECtHR has to find that there was a violation of the ECHR, or in the present case, A1P1. Secondly, domestic law of the Respondent State (state in breach) allows for only (if any) partial reparation to be made to the applicant. Thirdly, there must be an injured party. And finally, the award of satisfaction is necessary as per the ECtHR discretion.[71] The wording of the provision "the Court shall, if necessary, afford" leaves the award of reparation for a violation of the ECHR at the Court's complete discretion.[72] This approach is different to the ECT, where the payment of a full and adequate compensation is a prerequisite of a lawful expropriation and state's discretion to refuse or reduce payments in cases of expropriation is non-existent.

The wording of the ECHR does not define the compensation due for interference with the right to property. Unlike in international investment treaties referred to above, ECHR does not refer to full market value of the expropriated investment/property. Instead, the Court devised its rules according to which it awards compensation through jurisprudence. Although there is no binding precedence for ECtHR, the Court will strive for consistency in its jurisprudence.[73]

1. *Deprivation (direct expropriation): a flexible approach to compensation*

As evident from ECtHR jurisprudence, compensation will normally be due in cases of deprivation of property, that is cases of expropriation under the second rule of A1P1 (second sentence of the first paragraph).[74] Notably however, state measures, which do not interfere with investor's title to property, will not amount to expropriation. Effectively therefore ECHR under the second rule of A1P1 offers protection against direct expropriation. Indirect expropriation or "measures of equivalent effect" are treated as "control of use," which attracts compensation only in rare circumstances.

The standard of compensation is the full value of the property taken. At the same time, the award of compensation is not mandatory or automatic,[75] and the ECtHR can award less than the full value of the property, if it deems it necessary. Equally, it can refuse compensation all together, if there are exceptional circumstances. The clearest example of the Court's jurisprudence to award full compensation is demonstrated in the "demolition cases."[76] These are cases in which the Respondent State first issued a

[70] ECHR Article 34, and Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights*, (CUP, 2016) 85.
[71] Ichim notes that the ECtHR extrapolated these four conditions in its first case, in which it considered awarding just satisfaction, *Idem*, 65 (referring to the *Vagrancy* cases: *De Wilde, Ooms and Versyp v Belgium* (Article 50), 10 March 1972, Series A no 14, para 21).
[72] Ichim (n70) 76.
[73] *Idem* (criticism of the present approach for its vagueness and lack of consistency).
[74] *Friend v United Kingdom (Countryside Alliance)* (2010) EHRR SE6 (24 November 2009), para. 57; *Banér v Sweden*, no 11763/85, Commission decision of 9 March 1989; *JA Pye v UK* (n57) 79.
[75] Unlike in investment treaty cases of expropriation, where compensation is one of the four conditions of a lawful expropriation, and therefore a mandatory condition, if a State has expropriated an investment.
[76] *NA v Turkey* (n62) (licence to build a hotel on a public beach; should never have been granted) and *Yildirir v Turkey* (n62) (applicant bought land in reliance of the records in the Land Register; the property had been illegally constructed; later the applicant order to demolish the property; even though such order was in public interest, compensation was due).

permit or a licence, which allowed the applicant to build or acquire tangible property. After a passing of certain time, the Respondent State rescinds the permit or licence previously granted and orders demolition of the property built (for example a hotel). This according to the ECtHR can be done for legitimate public interest. Despite this, the ECtHR ordered the Respondent State to pay full compensation.

If the Court is to award full compensation in the amount of the full market value of the property taken, the question in front of the Court is, at which point in time is the market value to be assessed.[77] This question has not been addressed consistently by the ECtHR and has seen a divergence in approach. In the case of *Papamichalopoulos* the Court followed the distinction between unlawful (arbitrary) and lawful expropriation, as interpreted in public international law and the authority of the PCIJ case of *Chorzow*. According to this rule, ECtHR in the case of *Papamichalopoulos* held that if expropriation is inherently unlawful, full reparation is necessary. This can be done either by way of restitution of property (*restitutio in integrum*) or by way of monetary compensation, in the amount of full market value at the time of the Court's judgment.[78]

This approach was contrasted to the award of compensation in cases of lawful expropriation, where restitution of property was not possible, and the compensation was owed to the applicant. If expropriation was contravening A1P1 solely for the lack of the payment of the compensation for the deprived property, and was not "inherently" unlawful, the ECtHR awarded compensation in the amount of full value of the property, valued at the time of the deprivation (taking), and not later, at the time of the Court's decision.[79]

The clarity of the Court's approach in awarding different standard of compensation in unlawful and lawful expropriation cases was however abandoned after the decision in the *Guiso-Gallisay v Italy* case.[80] The Court found Italy to have violated the guarantees of A1P1 in a case defined as "constructive expropriation" in which the property in land was taken from the applicants, albeit not by direct taking of title in the land. Without a systemic reference to its previous jurisprudence or the rules under public international law,[81] the Court awarded compensation in the amount of fair market value at the time of the deprivation, when the applicant lost the right to ownership.[82] In cases like *Guiso-Gallisay* in which the restitution of property is no longer possible (or desirable on public interest grounds) the ECtHR removed the distinction between unlawful and lawful expropriation, as the awarded compensation is valued at the same time, that is the time of the deprivation of property.[83] The shift in jurisprudence is not a clear sign of a new practice however, as the ECtHR followed the previous approach in some cases after the *Guiso-Gallisay* ruling.[84]

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[77] As discussed in relation to the ECT and the *Yukos* case, see Part A, Section 3.
[78] Ichim (n70) 102 (referring to *Papamichalopoulos and Others v Greece* (Article 50), 31 October 1995, Series A no 330-B, paras 36–9).
[79] Ichim (n70) 102 (referring to *Former King of Greece and Others v Greece* [GC] (just satisfaction), no 25701/94, 28 November 2002, para. 78).
[80] *Guiso-Gallisay v Italy* (just satisfaction) [GC], no 58858/00, 22 December 2009.
[81] ILC Draft Articles on State Responsibility.
[82] *Guiso-Gallisay v Italy* (n80) paras 49-52.
[83] Ichim (n70) 103-104.
[84] Ichim (n70) 105 (referring to *Seceleanu and Others v Romania*, no 2915/02, 12 January 2010, para. 57; *Maria Atanasiu and Others v Romania*, nos. 30767/05 and 33800/06, 12 October 2010, para. 241).

Notwithstanding the remit of the cases discussed, the ECtHR has exercised its complete discretion to award compensation under Article 41 ECHR in numerous cases in order to either reduce the amount of the compensation to be awarded[85] or, in cases of exceptional circumstances, to deny compensation completely.[86] In particular in cases, where expropriation is a measure of broader economic reform (including constitutional changes or transition from monarchy to a republic) or a measure, with which the State aims to achieve greater social justice, the ECtHR permitted compensation in the amount less than full market value.[87]The *"duty to pay is not a binary all or nothing; there may be cases where the public interest leads to the result that less than full compensation is payable."*[88]

The definition of exceptional circumstances in which compensation for expropriated property, despite a finding of violation of A1P1, can be refused, is at complete discretion of the Court. That leads to two consequences. On the one hand the Court has complete discretion to accord the Respondent State with a wide margin of appreciation if the measures taken are of particular public interest. On the other hand, this unfettered discretion, even in cases of direct expropriation of property, leaves the applicant – in certain circumstances – with no remedy for the violation of A1P1 ECHR and leaves the outcome of future cases unpredictable.[89]

2. *Control of use (cf indirect expropriation): no compensation beyond the fair balance test*

If the ECtHR characterises State's interference under the third rule of A1P1, there is no duty to compensate. These cases are not cases of expropriation, rather cases of control of use of property. Consequently, the case law on deprivation of property is not directly applicable.[90] The test is one of "fair balance" and A1P1 will only be violated, if the burden imposed on an individual is excessive.[91] The Court is to examine the *"burden placed on the applicant as the result of the [measure]."*[92] Even if there are severe economic consequences, this burden must be *"weighed against the general interest of the community [context specific]."*[93] If the measure "survives" the fair balance test, the State is under no obligation to compensate the applicant.

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[85] ECtHR can award less than FMV: *Vistinš and Perepjolkins v Latvia Vistins* (Application no 71243/01) (22 October 2012), para. 112.
[86] *BAT v Secretary of State for Health* (n54) paras 806, 809 (referring with approval to *Vistinš v Latvia* (n85)).
[87] Ichim (n70) 102 (referring to *Former King of Greece*, para. 78).
[88] *BAT v Secretary of State for Health* (n54) para. 809 (summarizing the principles laid out in *Vistinš v Latvia* (n85), paras 108-114; similarly, in *James and Others v UK* (n62) para. 54); Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8(5) The Journal of World Investment & Trade 717, 743 (recognises the benefit of the ECHR approach and recommends it in investment treaty arbitration, where at present the all-or-nothing approach still applies).
[89] An example of such "exceptional circumstances" in which, even if there were "absolute expropriation" (which the court did not find), no compensation would be payable is the recent case of standardised packaging of tobacco products; claims denied in *BAT v Secretary of State for Health* (n54) paras 811-812.
[90] *JA Pye v UK* (n57) para. 79.
[91] *Vékony v Hungary* (n55) para. 35 and *BAT v Secretary of State for Health* (n54) para. 791.
[92] *Vékony v Hungary* (n55) para. 35.
[93] *Idem*, para. 35.

A demonstration of the amount of compensation awarded for s State violating the third rule of A1P1 is the case of *Vekony v Hungary*. In such cases the discretion as to the standard of compensation to be awarded is broad, and the Court's approach not systematic, or at least, not explained in its jurisprudence.

Whereby the Court has the discretion[94] to award compensation for loss suffered (*damnum emergens*) and future profits (*lucrum cessans*) in most cases the criteria for the amount awarded are not explained, and often, as in the case of *Vekony*, the Court will award compensation in lump sum for all loss suffered (material damages and non-pecuniary damages). The certainty of such practice is wanting.[95]

IV. Compensation for Expropriated Property in CJEU jurisprudence

Under the EU law there are many principles that feed into an understanding of the EU's protection of property rights. However, it is yet unclear and controversial what is the scope of application for the protection of property rights. For example, it is yet uncertain if the European Union has –and offers– a clear scope for the protection of deprivation of property. In addition, there is no test for direct and indirect expropriation and compensation standards. So far, the analysis of the CJEU case law in the *Bosphorus* and *Nold* cases reveals that the EU legal order protects property rights aiming to establish conditions under which these rights could be altered or modified.[96] The caveat is that these protections and conditions would only operate, if the modification on the property right results from an act derived from the implementation of EU Law. Therefore, under CJEU case law, there is no remedy for expropriation from an act derived from MS' national law that falls outside the scope of EU law. However, special attention should be paid to cases such as *Åklagaren v Hans Åkerberg Fransson* where it was discussed if the CJEU jurisdiction covers acts derived from a national act. In this case, the Court concluded that the CJEU's scope of application does not govern or precludes national courts to apply provisions that are contrary to the Charter of Fundamental Rights, unless that infringement was clear from the text of the Charter, the case law or in cooperation with the CJEU.[97]

In terms of substance, according to the CJEU, there are two principal ways to analyse and conceptualise the notion of the right to property. First, it could be argued that the EU as market union treats the right of property as an economic right.[98] However, there is no explicit provision under the TFEU, which gives direct recognition to this type of economic interests of individuals. Therefore, it is difficult to claim a legal protection (or right), which is not explicitly embodied in the EU law. EU scholars have previously explained that the common commercial policies of TFEU Articles 3 and 207 present limitations in the EU competences to regulate compensation for expropriation.

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[94] If there is a ban on business activity, ECtHR has broad discretion on whether or not any compensation is to be made, *Friend v UK* (n74) 57.

[95] Ichim (n70) 107, 170-172 (questions the fairness of this approach).

[96] Case C-84/95 *Bosphorus* (1996) ECLI:EU:C:1996:312 and Case C-4/73 *Nold* (1974) ECLI:EU:C:1974:51; see also Dimopoulos (n1) 113.

[97] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (2013) ECLI:EU:C:2012:340.

[98] Anna De Lucca, 'Indirect Expropriation and Regulatory Takings: what Role for the 'Legitimate Expectations" of Foreign Investors?' in Giorgio Sacerdoti, Pia Acconci, Mara Valenti and Anna De Lucca (eds.), *General Interests of Host States in International Investment Law* (CUP, 2014) 58-75.

More precisely, it has been argued that property regimes are excluded from the TFEU, as property should be safeguarded as a national competence of each Member State.[99]

Nonetheless, there is an alternative option, which is the effect of the *Hauer* principle.[100] This principle states that through TEU Article 6(3) there is recognition of the rights embodied in the Charter of Fundamental Rights of the EU (CFREU).[101] This Charter refers to the right to property as one individuals cannot be deprived of, unless it is in the public interest and under the conditions provided by the law, subject to fair compensation paid in good time for their loss.[102]

Despite having identified the right to property within the *acquis,* there are two difficulties that remain. From the reading of CFREU Article 17 it is not clear what is the scope of its application as well as the conditions and consequences of the breach of this fundamental right. As mentioned, MS' authorities are bound to comply with CFREU when implementing EU law, and therefore access to the protections presumes that one shall exhaust local remedies. Corollary, this exhaustion of local remedies means that an individual making the claim will be subject to the national standard of compensation (which for a foreign investor could be potentially less favourable than the *Hull* formula).

In order to tackle these difficulties, one shall look carefully into the Court of Justice of the European Union (CJEU) case law.[103] The CJEU has established that any interference with the right to property should be proportional to public policy objectives.[104] According to the CJEU, the right to property is not an unfettered prerogative, and it is possible to deny or restrict it, as long as those restrictions or prohibitions are consistent with general objectives pursued by the EU. Most importantly, this interference should not be disproportionate or intolerable.[105]

In this sense, there is nothing in the *acquis* referring to the law of expropriation, its definition, requirements or consequences. Moreover, the analysis of the law of expropriation is limited and only very general concepts can be drawn from case law.

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[99] Dimopoulos (n1) 112.

[100] Case C-44/79 *Hauer v Land Rheinland-Pfalz* (1979) ECLI:EU:C:1979:290, para. 15. Moreover, the CJEU in this case confirms direct links between the standard of protection under CFREU Article 17 and standards of protection under ECHR and case law developed by ECtHR. This link is also expressly acknowledged in CFREU Articles 52 and 53 (express references to ECHR).

[101] Case C-501/11 *Schindler Holding and others v Commission* (2013) ECLI:EU:C:2013:522; and *Hauer* (n100) paras 15 and 17.

[102] CFREU Article 17.

[103] See for example the liability for legislative activity in Case C-120/06 and Case C-1201/06 P *FIAMM v Council and Commission and Fedon v Council and Commission* (2008) ECLI:EU:C:2008:476, para. 122.

[104] Case C-74/99 *Federal Republic of Germany v European Parliament and Council of the European Union* (2000) ECLI:EU:C:2000:547; and Case C-74/99 *The Queen v Secretary of State for Health and Others*, Opinion of AG Fennelly, para. 147. For the proportionality principle see the joined cases of C-402/05 and C415/05 *Kadi and Al Barakaat v Council and Commission* (2008) ECLI:EU:C:2008:461, para. 356 and Phillip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart, 2014) 199.

[105] Case C-265/87 *Schräder v Hauptzalant Gronau* (1989) ECLI:EU:C:1989:303, para. 15.

In *The Queen v Secretary of State for the Environment* the Advocate General Léger gave an opinion in which he mentions that any act of denying or limiting an owner her right to property, which results in being prevented from disposing of her rights amounts to expropriation.[106] In this particular case, they key standard is one of proportionality. The CJEU examined whether the State's implementation of an EU Directive was a proportional measure.[107] For AG Léger, the proportionally of a measure should be in accordance with public policy interests, such as public health which in this case was the fact that polluted water can affect agricultural practices as well as damage the health of other persons – and in this respect, environmental concerns are part of the EU key objectives.[108] All in all, the imposition of this Directive on the farmers' land in order to reduce water pollution caused by nitrates is not unjustified as such compliant with the principle of proportionality.

This means, in the EU specific context, that proportionality between the measure and the policy objectives is the core standard to admit interference with individual's property right. This has created ambiguity and uncertainty for the property right owner, as the level of compensation might vary in accordance with this "proportionality test." Equally, there is no clear approach to the calculation of compensation. Moreover, the CJEU has freely spoken about the EU fundamental right to property as one, which does not necessarily include a general right of full compensation.[109] This approach is supported by the priority given to the proportionality test and the measure implemented aiming to preserve a legitimate public interest, which may call for a lesser reimbursement than the full market value.[110] This approach of proportionality was also discussed in *Schränder v Hauptzollamt* were the CJEU defined proportionality as the actions which do not affect the position of the producers which consequently does not exceeds the discretion of the authority.[111]

V. BATTLE OF THE GIANTS? A COMPARATIVE ANALYSIS OF EXPROPRIATION AND COMPENSATION UNDER THE ECT, ECHR AND EU LAW

There are significant differences on the notion of property protection in Europe, particularly between the investment framework (ECT) and other European frameworks (EU law and ECHR). To put it simply, an energy investor from a MS investing in another MS, whose property is allegedly unlawfully expropriated is subject to different notions and regimes of expropriation and remedies within Europe.

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[106] Case C-293/97 *The Queen v Secretary of State for the Environment,* Opinion of AG Léger (1998) ECLI:EU:C:1998:469) paras 61-61 and Case C-280/93 *Germany v Council* (1994) ECLI:EU:C:1994:367, para. 78.

[107] According to Council Directive 91/676/EEC, Member States have to designate vulnerable zones which might be affected due water pollution caused or induced by nitrates from agricultural sources in Opinion of AG Léger in C-293/97 (n106), paras 1-6. See also Case C-240/83 *Procurer de la Republique v ADBHU* (1985) ECLI:EU:C:1985:59, para. 13.

[108] TFEU Article 130. It is widely accepted now that public health objectives are important obligations which can take precedence over fundamental rights such as the right of property, see more recently the joint cases [2016] EWHC 1169 (Admin), para. 440.

[109] Case C-347/03 *ERSA* (2005) ECLI:EU:C:2005:285.

[110] Strik (n104) 203.

[111] Case C-265/87 *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* (1989) ECLI:EU:C:1989:303. It is worth observing that there is no equivalent provision to ECHR Article 41 in CFREU.

Moreover there are important differences in the definition of expropriation and the resulting compensation. If the measure is compensable, each regime differs in the way of calculating the compensation payment. While under the EU legal order, the interference with investors' property will be tested for proportionally, under the ECT, there is a balanced approach between a government's regulatory power and the government's treaty obligations. Furthermore, the standard of compensation varies: under the ECT, expropriatory measures will attract the award of FMW, (or the *Hull* formula), whereas this is not the case in EU law. Thus, for intra-EU energy investors the ECT offers clearer compensatory standards. In other words, whereas the CJEU focuses primarily on the proportionality analysis, the ECT tribunals will focus on the fundamental requirements of due process and adequate financial relief.[112]

Comparing the legal frameworks of property protection under the ECHR and ECT, it can be observed that the safeguards put in place to preserve state's right to regulate are much broader under the three rules of A1P1 ECHR when compared to ECT Article 13. Whereas both legal instruments acknowledge the state's sovereign power to expropriate private property or investment, ECHR protection of property appears to be more restricted. The two systems appear to share a broad definition of "possessions" and/or "investment" which includes intangible rights and other rights of economic and financial value. In contrast, the two systems differ in the definition of expropriation and the definition is more stringent under A1P1 ECHR. Under the ECtHR jurisprudence, measures, which arguably meet the test of substantial deprivation and consequently amount to indirect expropriation under ECT, could fall foul of the definition of "deprivation" under A1P1 ECHR and instead qualify as measures of "control of use of property", which do not attract compensation, except in extreme circumstances ("the fair balance tests"). Finally, even if a measure is one of deprivation (expropriation), ECtHR's broad discretionary powers under Art. 41 ECHR could result in the compensation being reduced from full market value, or taken away completely. This is not an option under ECT; if an arbitral tribunal finds that a measure falls within the definition of expropriation in Article 13, full compensation must be paid to the foreign investor.

VI. CONCLUSION

Previously the proponents of the abolishment of intra-EU BITs and the applicability of ECT in intra-EU disputes do not offer a comprehensive comparative analysis of the legal protection offered to the intra-EU investors under the various legal frameworks in Europe. From the analysis presented here it can be concluded that the ECT offers clear guarantees against unlawful expropriation and the resulting remedies. In contrast, the EU legal order does not offer the same clarity for cases of expropriation of investments. In other words, the EU law gives to Member States broad discretion in which they

[112] Strik (n104) 200. See also "… *the protection in Article 5 of the BIT against expropriation is by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects "assets" and "investments" rather than the arguably narrower concepts of "possessions" and "property" protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law…"* in *Eureko B.V. v The Slovak Republic* (Award on Jurisdiction), PCA Case No. 2008-13, 26 October 2010, 261.

regulate domestic systems of property ownership, and the need to pay compensation in cases of interference with such property.[113] The CJEU interpreted any relevant provisions only in limited terms[114] The CJEU has recognised the absence of specific EU rules on expropriation because as a national measure, interference with property rights falls within the competence of each MS, and not the EU.[115]

However, the analysis here evaluated the different European regimes and compared them with property protections rights available for intra-EU energy investments under the ECT.[116] For example, the Charter of Fundamental Rights of the European Union (which is binding to the MS) strengthens property rights[117] and determines the types of conditions and consequences of interference and deprivation measures against them.[118] Although there is not much guidance in practice as to the interpretation of the Charter yet, given its express links and references to the ECHR, it is likely that the type of protection given in cases of expropriation will resemble the approach of the ECtHR under A1P1.[119]

This article revealed a fundamental difference between the EU law and the ECT, as the ECT provides for much more clarity when defining direct and indirect expropriation and the methods by which intra-EU energy investors under the ECT are entitled to a fair compensation payment, even when the measure related to the protection of a public national interest.[120]

In addition, the ECT draws distinctions between acts by the government or authorities and loss caused by non-governmental agents. The ECT guarantees compensation of the governmental authorities that amounts to destruction or demands that part of that investment requires restitution or compensation. For example, as seen in *Plama v Bulgaria* the arbitral tribunal recognised that a state's conduct provoking negative effects on the economic value of the investment (even with no physical control or loss of title over the asset at stake), could result in expropriation.[121] In the ECT, the

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[113] Article 345 TFEU. See for example *"…all BITs offer foreign investors fair and equitable treatment (FET) and protection against expropriation; rights which do not exists as such in EU Law …"* in Dimopoulos (n1) 315.

[114] European Commission, 'The EU Single Market: Provisions of the Treaty on the Functioning of the European Union (TFEU)' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0001.01.ENG>, accessed on 19 October 2018.

[115] C-309/96 *Annibaldi v Sindaco del Commini di Guidoma* (1997) ECLI:EU:C:1997:631.

[116] Kleinheisterkamp (n1) 98.

[117] For many years the Charter was not seen as a document considered part of the legal instruments of the European Union, instead it was considered an authoritative statement. After the Lisbon Treaty, the document has become legally binding in EU, in Damian Chamlers, Gareth Davis and Giorgio Monti, *European Union Law* (CUP, 2010), 238. See also Christopher McCrudden, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper 13/10 <http://jeanmonnetprogram.org/archive/papers/01/013001.html> accessed on 9 November 2018.

[118] CFREU Article 17; and Dimopoulos (n1) 113.

[119] Express references to the need to observe ECHR and the case law developed by ECtHR: Arts 52 and 53 of the Fundamental Charter. Also, in line with the *Hauer* principle (n100).

[120] CP Andrews-Speed and TW Wälde, 'Will the Energy Charter Treaty help international investors?', <https://www.buyat.dundee.ac.uk/2/product-catalogue/publications/books-and-working-papers/energy-related/will-the-energy-charter-treaty-help-international-energy-investors> accessed on 18 October 2018 and Christoph H Schreuer, 'Rapport: The Concept of Expropriation under the ECT and other Investment Protection Treaties', in Clarisse Ribeiro (ed.) *Investment Arbitration and the Energy Charter Treaty* (Juris 2006) 110.

[121] Other arbitral tribunals have not considered the existence of expropriation if the investor has not been deprived physically from its property, see for example *Petrobart v Kyrgyzstan* (n34) 77 and *CMS Gas Transmission Company v The Argentine Republic* (Award), 12 May 2005, ICSID Case No.ARB/01/8, para. 254.

coverage of expropriation is as exhaustive as possible: nationalisation, expropriation and any other measures having equivalent effects are forbidden, unless the measure was for public interest and accompanied by compensation.[122]

In contrast to the EU analysis of public interest, the ECT observes public purpose not as a core element to regulate property rights, but public purpose as a requirement of the expropriation's legality.[123] For all these reasons, under the different regimes available for cross-border intra-EU energy investors, the investment protections under the ECT gives more certainty and greater likelihood of receiving fair monetary compensation. Therefore, it is possible to conclude that for clearer and perhaps greater economic certainty the ECT seems like a more appropriate regime to regulate foreign direct investment. Most importantly, the discussion here has shed some light on the debate regarding a potential overlap between the EU right to property and the ECT substantive protection of compensation in case of expropriation. This is because the *rationale* used in each system tackles different elements of property rights, and in the case of the ECT the protection is broader, ensuring that the foreign investor will be entitled to full monetary compensation in accordance with the fair market value. Differently however, under the EU law, the expropriation measure will be judged primarily against proportionality, where compensation takes a secondary role giving to the investor a minimum level of financial protection.

Notwithstanding the general state of uncertainty, it can be tentatively concluded that after the UK leaves the UK, it is unlikely that the UK energy investors are losing a great deal of protection for their potentially expropriated investments. The reasons for this tentative conclusion, albeit in these still uncertain times for any predictions on Brexit, are two-fold: firstly, Brexit will not affect UK's ECT membership, thereby allowing UK investors to seek ECT protection against the remaining EU Member States. And secondly, Brexit will not affect the UK's Membership to the Council of Europe and all UK investors will continue to benefit from property protection under A1P1 of ECHR. Because it is likely that the protection under CFREU will follow the jurisprudence established by ECtHR, UK investors will not be losing property protection by no longer having access to CJEU or CFREU. That said, the UK will have a complex task to negotiate a continuous access to EU's FTAs (for example CETA or Singapore-EU FTA)[124] or future Free Trade Agreements with third countries (for example with the United States, Canada or Mexico).

[122] ECT Article 13(1).
[123] Sergei N Lebedev, 'Introduction: The Concept of Expropriation under the ECT and other investment protection' in Clarisse Ribeiro (ed.) *Investment Arbitration and the Energy Charter Treaty*, (Juris 2006) 144 and Energy Charter Secretariat (n2).
[124] Signed in October 2018 and includes an Investment Protection Agreement, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=96>1 accessed 9 November 2018.