**Investor Rights under EU Law and International Investment Law**

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**Abstract**

Are investors entitled to the same level of protection under investment treaties and EU law? This article will examine some of the principal differences and overlaps in the level and scope of protection which foreign investors can enjoy under intra-EU international investment agreements (IIAs) and EU law. The primary focus of analysis will be on key substantive protection standards which intra-EU IIAs offer and their counterparts in EU law. Comparative analysis of intra-EU investment treaties with EU rules on investment protection offers a fresh opportunity to revisit the origins and history of international investment agreement, trace their recent transformation and analyse their interactions with other international and supranational rules to which investors can also resort to protect their economic rights vis-à-vis host states.

**Keywords**

EU— fundamental rights – investment treaties – public policy

**1 Background**

The majority of intra-EU international investment agreements (IIAs) belong to the so-called first generation of investment agreements. Romania, for instance, signed its first IIA with the United Kingdom in 1976, shortly followed by a string of treaties with other European countries such as France, Germany and Belgium-Luxembourg Economic Union.[[1]](#footnote-1) Hungary’s first investment treaty with what is now an EU member state was signed in 1986, marking the beginning of a prolific treaty-making activity which resulted in more than 13 treaties with capital-exporting European states.[[2]](#footnote-2) Intra-EU IIAs are characterised by a considerable measure of homogeneity in terms of their structure, content, and objectives, which is not surprising given their largely shared historical origins in the Abs-Shawcross Convention and the OECD Draft Convention on the Protection of Foreign Property.[[3]](#footnote-3) Just like other first generation investment treaties, intra-EU IIAs were aimed at filling the gaps in the customary international law and protecting investments from capital-exporting European states into developing countries of Central and Eastern Europe. Alongside the traditional arsenal of investment protection standards, such as the non-discrimination and fair and equitable treatment standards and the expropriation clause, these IIAs provided for investor-state arbitration so as to depoliticize dispute settlement and to ensure equality of arms between foreign investors and host states.[[4]](#footnote-4) While exhibiting a certain degree of variance in their substantive and procedural terms, intra-EU IIAs could indeed be regarded as offering ‘a surprisingly uniform protection against political risk.’[[5]](#footnote-5)

Concerns over the applicability and scope of intra-EU IIAs became particularly amplified following a steadily growing number of arbitrations instigated under such treaties and the post-Lisbon transfer of competence over FDI from EU member states to the European Commission. In *Eureko v Slovak Republic*, the Commission called into question the continued existence of intra-EU IIAs, branding them as an ‘anomaly within the EU internal market’ due to an overlap between the protections afforded under such treaties and the internal market provisions in EU Law.[[6]](#footnote-6) The Czech Republic, for its part, also argued that the intra-EU IIAs and the EU internal market provisions ‘cover the same types of investors and investments, serve the same purposes, offer the same standards of protection, and provide for equivalent remedies.’[[7]](#footnote-7) Likewise, in *Commission v Republic of Slovakia*, the European Commission claimed that ‘there is no conflict between EU law and the Investment Protection Agreement itself because there is nothing in the Investment Protection Agreement that is incompatible with EU law.’[[8]](#footnote-8)

The question of an overlap between intra-EU IIAs and EU internal market disciplines is of practical and normative significance for a number of reasons. First, if the intra-EU IIAs and EU treaties were to cover the same protections and offer the same remedies, under Article 59 VCLT the intra-EU IIAs would be effectively terminated upon the accession by a relevant new member state to the EU.[[9]](#footnote-9) This calls into question the future of one of the most important regional and sectoral investment agreements – the Energy Charter Treaty which is akin to an intra-EU IIA in that it has EU member states among its signatories.[[10]](#footnote-10) Alternatively, the continued co-existence of intra-EU IIAs and EU treaties creates ample scope for conflict given the existing differences in the scope of protection they afford to investors. For instance, as observed by Kleinheisterkamp, ‘EU investor rights come with much more, albeit qualified and strictly framed, ‘policy space’ than the BITs or the ECT’ and ‘it is difficult to conceive how the unqualified investment treaty standards can be applied at the same time as the qualified EU standards.’[[11]](#footnote-11)

On the other hand, if intra-EU IIAs were to be terminated, the question arises as to whether EU law provides sufficiently effective protections to foreign investors – particularly in the light of the fact that the rising number of intra-EU arbitration cases appear to suggest that investors perceive IIA rights and remedies to be more effective than the rights and remedies afforded under EU law. Likewise, a recent proposal endorsed by Austria, Finland, France, Germany and the Netherlands has expressed a concern that a termination of intra-EU IIAs would leave their investors in the EU without appropriate substantive and procedural protections.[[12]](#footnote-12) The proposal can thus be seen as a reflection of a rather sceptical view shared by the capital-exporting member states of the EU about the effectiveness of protection afforded to investors under EU law. Finally, the fact that, despite a significant overlap, the protections contained in intra-EU IIAs and EU law respectively are characterised by a number of differences warrants an inquiry into historical and normative explanations behind the existing disparities.

**2 Investor Rights under Intra-EU IIAs and EU Law**

**2.1** ***The Prohibition of Discriminatory Treatment***

To begin with, what are the primary sites of overlap between intra-EU IIAs and EU law? The question has already received some attention in recent arbitral jurisprudence and legal scholarship.[[13]](#footnote-13) One of the core protections enshrined in IIAs is the guarantee of non-discrimination which variously manifests itself through such provisions as national treatment and the prohibitions of arbitrary and discriminatory treatment. For instance, Article 3(1) of the Netherlands–Czech Republic BIT requires host states ‘not to impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal’ of an investment. The principle of non-discrimination occupies a centrepiece in EU law. First, Article 18 TFEU prohibits any discrimination on grounds of nationality. The guarantee of non-discriminatory treatment also underpins EU provisions on free movement of goods, services, persons and capital as well as the provisions on the freedom of establishment.[[14]](#footnote-14) Historically, the importance attached to the prohibition of discrimination in EU law stems from the fact that both directly and indirectly discriminatory measures are seen by the CJEU as restrictions because they have the actual effects of preventing EU nationals from the exercise of internal market freedoms.[[15]](#footnote-15) Put differently, strong enforcement of non-discrimination guarantees under EU law has always been driven by the desire to remove any impediments to economic freedoms. As will be seen below, this linkage between a certain investor right and its impact on the exercise by private actors of their free movement rights is a defining feature of the EU approach to the protection of economic interests of individual and corporate business actors.

One aspect in which the scope of protection from discriminatory treatment may arguably be different under EU law and intra-EU IIAs respectively concerns the notion of regulatory flexibility. Although EU law treats economic freedoms as fundamental principles, it nevertheless expressly acknowledges these freedoms can be restricted to make room for competing public interests. For instance, Article 36 TFEU allows states to derogate from their free movement of goods commitment on the grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.[[16]](#footnote-16) A member state bears the burden of proof to establish that a discriminatory measure at issue falls under one of the expressly stated derogations and is proportionate.[[17]](#footnote-17) Even though derogations from EU economic freedoms are subject to a narrow interpretation, one could argue that EU law at least provides the necessary textual basis that allows to balance the protection of private economic interests with competing public welfare objectives. By contrast, most intra-EU IIAs belong to the first generation of investment treaties which include no exceptions for public policy measures. Investment arbitration jurisprudence suggests that arbitral tribunals are more likely to give weight to policy justifications where the applicable treaty expressly allows them to do so.[[18]](#footnote-18) Hence, the absence of public policy exceptions in an intra-EU IIA may result in an interpretation of investment protection commitments contained therein as non-derogable thus allowing the investor to prevail.

**2.2 *Protection Against Executive and Judicial Misconduct***

One of the core investment protection standards which invariably feature in most intra-EU IIAs is a guarantee of fair and equitable treatment. The emergence of the fair and equitable treatment (FET) standard and its rise to prominence has been a defining feature of the international law of foreign investment during the past two decades.[[19]](#footnote-19) While the protection of investment under traditional international law was virtually synonymous with the protection against uncompensated expropriation,[[20]](#footnote-20) FET has become the leading investment protection standard. Originally conceived as the politically more palatable alternative to the international minimum standard—and as a means of alleviating the opposition to the latter from various groups of states, FET came to encompass much more than customary international guarantees against denial of justice, arbitrariness, and discrimination.[[21]](#footnote-21) Particularly with regard to its version contained in the early generation IIAs, arbitral tribunals have construed the standard to require protecting investors (1) from governmental misconduct that displays ‘a relatively lower degree of inappropriateness’ in comparison with the higher threshold required in establishing a violation of customary international law;[[22]](#footnote-22) and (2) from lack of transparency, predictability, consistency and even-handedness in governmental action. In its material scope FET may extend to actions of the executive,[[23]](#footnote-23) judiciary[[24]](#footnote-24) and legislative bodies.[[25]](#footnote-25)

Does EU law provide a standard of protection equal to FET? In *Eastern Sugar v Slovak Republic*, the respondent argued that a similar protection is afforded by the guarantee of equal treatment contained in Article 18 TFEU.[[26]](#footnote-26) The tribunal, however, refused to accept such an argument, instead pointing to the absence of ‘any principle of EU law that specifically forbids treatment that is not fair and equitable.’[[27]](#footnote-27) In the tribunal’s view, any such principle, independent of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is not yet established in EU law.[[28]](#footnote-28)

Indeed, it is the flexibility of FET enabling investors to obtain a remedy in a wider range of circumstances that elevates it above other investment protection standards contained in EU law. What makes the standard unique is its remedial scope: FET ‘[e]nsures that even where there is no clear justification for making a finding of expropriation … there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended.’[[29]](#footnote-29) As FET entitles investors to a remedy for any degree of interference by the host state and, at the same time, can potentially be invoked against various types of misconduct perpetrated either through a single act or a composition of acts,[[30]](#footnote-30) it has truly become ‘a short-hand formula for the combined legal effects of all other standards of treatment prescribed by an investment treaty’[[31]](#footnote-31) – encompassing within its remit the protection against procedural injustices by the executive, judicial misconduct, infringement on property rights and contractual breaches.[[32]](#footnote-32)

It should be conceded that although no direct equivalent can be found in EU law the interpretation of the FET standard has been historically influenced by rules and principles governing judicial review under EU law. For instance, having originated in Germany, proportionality analysis ‘became a pan-European constitutional principle due to its adoption by the European courts. The [CJEU] developed proportionality as an unwritten, general principle of EU law.’[[33]](#footnote-33)

Despite these shared underpinnings, however, the existing intra-EU IIAs arguably offer a broader protection to foreign investors than that afforded by EU law. This is primarily due to the fact that intra-EU IIAs belong to the first generation of treaties which feature the broad and unqualified version of the FET standard. Those treaties may well lead, even nowadays, to the FET standard being construed in a more expansive manner, particularly compared with the more recent treaties. The content of the early IIAs was influenced by the then prevailing concerns over the security and protection of investment in developing countries which frequently suffered from political instability and weak governance. As such, the first generation of IIAs provide little to no textual guidance as to how investment protection was to be balanced against and reconciled with other competing socio-economic policy objectives. The subsequent rise of the regulatory state and, perhaps more importantly, the surge in the number of investment arbitration cases at the end of the 1990s propelled states to revise their investment treaty policies. Consequently, the new generation IIAs—including the recently launched Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada—feature a different formulation of key investment protection standards.[[34]](#footnote-34) For instance, CETA delimits the content of the FET standard by enumerating the categories of governmental misconduct that are likely to be regarded as unfair and inequitable.[[35]](#footnote-35) The scope of the FET standard has also been narrowed as CETA stipulates that no legitimate expectations exist unless there is evidence of a specific promise or representation made by the State.[[36]](#footnote-36) One could therefore argue that the wording of the standard under the older intra-EU investment treaties may result in a broader protection for the investor, whereas the more recent treaties, by virtue of their revised wording, may come closer to EU law as far as their protective scope is concerned.

A comparison of safeguards against executive and judicial misconduct in EU law and under IIAs respectively also points to the notion of good administration which captures some of the relevant developments in EU rules governing the protection of individuals vis-à-vis governmental authorities. Good administration can be described as an evolving framework concept ‘which draws together a range of rights, rules and principles guiding administrative procedures with the aim of ensuring procedural justice, public administrative adherence to the rule of law, and sound outcomes for administrative procedures.’[[37]](#footnote-37) Concrete procedural principles underpinning the notion of good administration originate from public law of the member states, particularly national rules and principles aimed at ensuring procedural fairness. As such, the concept is reminiscent of the many constitutive components of the FET standard in IIAs such as the requirement of due process, transparency and consistency.

The material scope of the right to good administration depends on its source and is not as broad as that which investors may enjoy under intra-EU IIAs. The two sources of the right to good administration requirements are Article 41 of the Charter and general principles as distilled by the CJEU in its case-law and now acknowledged in Article 6(3) TEU. The wording of Article 41 CFR suggests that its material scope is confined to ‘single case decision-making’,[[38]](#footnote-38) and includes ‘the right of an individual to be heard before the administration takes an ‘individual measure which would affect him or her adversely’, access of a person to ‘his or her’ (specific) file, and the obligation to give reasons for administrative decisions.’[[39]](#footnote-39) Contrastingly, the right to good administration as a general principle emerging from the CJEU case-law has a broader scope as it extends to executive activities involving ‘the creation of non-legislative acts with abstract-general content.’ Another crucial difference is that the guarantee of good administration as a general principle of EU law is applicable to all member states’ action within the scope of EU law, whereas the scope of the right to good administration under Article 41(1) of the Charter is limited to institutions, bodies, offices and agencies of the Union. As the possibilities of invoking the Charter by an aggrieved business actor in a dispute against the state are limited, it cannot be seen as an equivalent to the fair and equitable treatment standard in intra-EU IIAs.

**2.3 *Protection of Property Rights***

The protection against expropriation under investment treaties has traditionally been regarded as the principal function of IIAs, to the point that until recently international investment law, in the words of Schreuer, was almost synonymous with the protection against expropriation.[[40]](#footnote-40) The majority of intra-EU IIAs provide for a broad protection against expropriation, entitling investors to the Hull standard of full, adequate and prompt compensation. Although no direct equivalent to the expropriation clause exists in EU law, there are treaty provisions which determine the scope of protection afforded to investors’ property rights under EU law. One such provision is Article 345 TFEU which requires that ‘treaties shall in no way prejudice the rules in Member States governing the system of property ownership.’ Other EU law provisions relevant in the context of expropriation are the right to property, including the right to fair compensation in good time contained in Article 17 of the Charter which states that

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

The protection of property under the Charter is inspired by jurisprudence of the European Convention of Human Rights (ECHR), which has traditionally adopted a narrow reading of the idea of property protection, particularly in cases involving claims of indirect or regulatory expropriation.[[41]](#footnote-41) While the Court of Justice has so far produced limited amount of caselaw to under this provision, the existing jurisprudence allows to distil some of the key principles. First, in *Annibaldi*, the court acknowledged the absence of specific community rules on expropriation, and reinforced the principle that national measures in this area fall within the purview of Member states.[[42]](#footnote-42) The CJEU has also ruled in *Fearon v Ireland* that member states rules or systems of property ownership remain subject to the fundamental rule of non-discrimination. Another relevant ruling defining the outer scope of Article 345 is the EFTA Court decision in *Norwegian Waterfalls*, where the court found that a state ‘may legitimately pursue the objective of establishing a system of public ownership provided that the objective is pursued in a non-discriminatory and proportionate manner.’[[43]](#footnote-43) The characteristic feature of the protection against expropriation under EU law is that proprietary rights generally do not constitute an unfettered prerogative and their scope depends on the social function of the right or freedom.[[44]](#footnote-44) As the CJEU stressed, the rules governing property protection

…form part of the general principles of Community law. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.[[45]](#footnote-45)

Do intra-EU IIAs afford a greater protection to investors’ property rights than that available under EU law? Just as with the FET standard, expropriation clauses in investment treaties have recently undergone a gradual transformation. The first generation IIAs—exemplified by the intra-EU IIAs—exhibit a remarkable uniformity in their endorsement of the rule that host governments are free to expropriate foreign investment but only if such expropriation is in the public purpose, non-discriminatory, and—importantly—accompanied by the payment of ‘prompt, adequate and effective’ compensation. The new generation of IIAs depart from this drafting pattern by clarifying the limits of protection against state interference with property rights, particularly in the so-called regulatory expropriation scenarios. By way of example, the expropriation clause in the new generation IIAs is frequently accompanied by a reservation which excludes certain categories of governmental action from the scope of the otherwise absolute obligation to compensate:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[[46]](#footnote-46)

The recent modification of expropriation clauses in some of the new generation IIAs is a response to yet another fundamental shift in the international law on foreign investment, namely further liberalisation of investment markets, the change in the direction of investment flows, the steady rise of indirect, regulatory state interference in economic affairs, and the proliferation of investor claims seeking damages caused therefrom. It reflects a growing recognition of the need to exclude the pursuit by a host state of certain public policy objectives from the scope of expropriation provisions. The new generation IIAs are therefore arguably more in line with the EU law approach to the protection of property rights, particularly by sharing the same emphasis on situating the protection against expropriation within the social function of property rights. By contrast, due to their more liberal formulations, the first generation IIAs—including most of intra-EU IIAs—continue to provide for a categorical and absolute protection against expropriation, with no express exceptions for regulatory measures in pursuit of public policy objectives. Under these models, the task of drawing a line between compensable expropriation and non-compensable regulatory interference remains vested in arbitral tribunals. Although investment tribunals are gradually becoming more willing to balance the expressly stated IIA protections against other non-investment policy objectives, the lack of provisions specifically mandating such a balancing exercise in most intra-EU IIAs is likely to render it easier for investors to succeed in their expropriation claims as some tribunals can be averse to the very notion of balancing investor rights with other non-economic concerns. To name one example, the tribunal in *Renta4 v Russian Federation* opined that

For one thing, human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind *should not be diluted* by precisely the same notions of ‘margins of appreciation’ that apply to the former.[[47]](#footnote-47)

While the approach above only adds fuel to existing criticisms of the IIA regime for its inability to satisfyingly accommodate the conflicting issues at stake,[[48]](#footnote-48) for investors seeking redress against governmental action under an intra-EU IIA the notion of undiluted protection would mean a greater likelihood of success than under EU law.

**2.4 *Protection of Contractual Undertaking***

Umbrella clauses—also known as the observance of undertakings, sanctity of contract, and *pacta sunt servanda* standard[[49]](#footnote-49)—feature in a good number of intra-EU IIAs, most notably IIAs signed by the Netherlands, Finland, Denmark as well as in the IIAs of concluded between recently acceded EU member states such as Hungary’s treaties with Slovakia and Poland. It also features in Article 10(1) of the Energy Charter Treaty. While the wording of the standard may significantly vary, a typical umbrella clause requires that each contracting party observes any obligation it may have entered into with regard to an investment of an investor of another contracting party.[[50]](#footnote-50) For instance, Article 2(2) of the 1994 UK–Estonia BIT provides that ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.’[[51]](#footnote-51)

In its original design, the main objective of the umbrella clause was to protect against expropriation of contractual rights and to ensure that the same remedy as in the case of expropriation—full compensation—was available to foreign investors in the event of state interference with their contracts.[[52]](#footnote-52) Thus, umbrella provisions offer an additional layer of protection by enabling an investor to claim a remedy for breach of contract which may not readily be characterised as an expropriation or other international delict. In other words, umbrella clauses can entitle investors to redress if there is no arbitrariness, discrimination or lack of due process. It thus opens the door to investment claims going beyond the traditional remit of international law on the protection of foreign interests abroad. By enabling investors to bring contractual claims against host states in the absence of a breach of international law, umbrella clauses go further than other standards of treatment. The umbrella clause may not transform a breach of contract into an international wrong in the traditional sense[[53]](#footnote-53), but it nonetheless internationalises contractual claims by giving rise to a state’s responsibility for a breach which would not otherwise fall within the ambit of international law. Concerned about its potential to alter radically the scope of state responsibility under international law, some investment tribunals have construed an umbrella clause restrictively. Other tribunals, including in *Eureko v Poland*, which was brought under the Netherlands-Poland BIT, construed the standard in accordance with its ordinary and effective meaning. As opined by the *Eureko* tribunal, the umbrella clause ‘means what it says.[[54]](#footnote-54)

EU law does not offer an equivalent standard whereby an individual or corporation would have a direct standing against the host state simply on the basis of a contractual breach. In this regard, parallels can be drawn between EU law and customary international law whereby, despite some schools of thought postulating the internationalisation of contracts, the prevailing view is that a breach by a state of a contract with a foreign investor is not *per se* a breach of international law.[[55]](#footnote-55) Rather, something more than a mere breach of contract (such as an arbitrary termination or confiscation of the contractual rights, or the denial of justice) is required to give rise to a state’s international responsibility. As summarised in the UK government memorial in *Ambatielos*,

It is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach… but involves an obviously arbitrary or tortuous element, e.g. a confiscatory breach of contract – where the true basis of the international claim is the confiscation, rather than the breach *per se*.[[56]](#footnote-56)

While a breach of contract does *per se* is insufficient to give rise to state liability in EU law, it is possible to envisage a scenario where a claim could be brought against an EU member state based on a breach of contract if the state action leading to such a breach constitutes an impediment to one of the economic freedoms, such as the free movement of goods or services. However, unlike umbrella clauses in IIAs, which grant protection to investor claims arising from any breach of contract, the ability of an economic actors to claim redress for a contractual breach under EU law would necessitate showing something more.

In seeking redress for a breach of contract, intra-EU investors could also rely on the CFR, in particular its Article 17 (property rights) and Article 16 (freedom to conduct business). Yet even a cursory overview of EU jurisprudence suggests that neither of these fundamental rights offers the same level of protection as umbrella clauses. The presently limited protection of judicial protection of EU fundamental rights has already been strongly criticised in academic literature.[[57]](#footnote-57) Furthermore, unlike IIAs whose principal function is to protect foreign investors and investments, the CFR not only offers the guarantees which private actors can invoke in protecting their economic interests—such as the freedom to conduct business, but also safeguards the rights which can delimit the exercise of economic freedoms—such as the right of collective action.

A rather restrictive stance of the CJEU towards the protection of contractual entitlement is demonstrated in the case of *Sky Österreich GmbH v Österreichischer Rundfunk*.[[58]](#footnote-58) The case concerned Directive 2010/13 which obligated those possessing exclusive television broadcasting rights to provide other broadcasters with access to the satellite signal to make short news reports.[[59]](#footnote-59) The dispute arose as to the financial conditions under which access could be granted. Such limitation on the exercise by broadcasters of their exclusive broadcasting rights by the need ‘to promote pluralism through the diversity of news production and programming across the [European] Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.’[[60]](#footnote-60) In its request for preliminary reference, the Austrian Bundeskommunikationssenat questioned whether the right to produce short news reports constitutes an interference with the right to property, as laid down in Article 17 of the Charter, of the broadcaster which has acquired, on a contractual basis, broadcasting rights relating to an event of high interest to the public on an exclusive basis (‘the holder of exclusive broadcasting rights’).[[61]](#footnote-61)

One of the questions the CJEU had to address was whether the protection of property rights guaranteed under Article 17(1) of the Charter could be extended to audio-visual broadcasting rights acquired contractually. The Court held that Article 17 ‘does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.’[[62]](#footnote-62) It drew a distinction between contractually acquired entitlements and the ‘rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.’[[63]](#footnote-63) Although the contractually acquired exclusive broadcasting rights ought not be regarded as constituting mere commercial interests or opportunities but as having asset value, the Court held that a contractual clause could not confer an established legal position on a broadcaster, protected by Article 17(1) of the Charter, enabling it to exercise its broadcasting right autonomously, in the sense that it could demand compensation exceeding the additional costs directly incurred in providing other broadcasters with access to the signal.[[64]](#footnote-64)

The court’s interpretation of Article 17 CFR seems to suggest that while contractual rights may in some circumstances be regarded as assets having an economic value, their interpretation as absolute entitlements—and their ensuing eligibility for the level of protection enjoyed by property rights—hinges on the existence of other competing public welfare interests such as, in the given case, the freedom of expression and pluralism of the media which are guaranteed by Article 11 of the Charter. In other words, the Court’s judgement in *Sky* *Österreich* suggests that if there are competing fundamental freedoms at issue, a contractual right—even if qualifying as an asset having economic value—should not be seen as an absolute right the interference with which would entitle the right holder to monetary redress. By contrast, many intra-EU IIA containing an umbrella clause and no exceptions clause would enable investors to benefit from undiluted protection of their contractually acquired entitlements.

**2.5 *Protection of Physical Security***

A great number of investment treaties contain a state obligation to ensure full protection and security of investors and investments, either as a standalone provision or as part of the FET standard. The full protection and security clause features in a handful of intra-EU IIAs. For instance, Article 3(2) of the Czech-Netherlands BIT requires that

Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

While according to the traditional view full protection and security implies physical security, some tribunals have construed the standard as including legal security of investment.[[65]](#footnote-65) The latter approach was adopted in *Azurix v Argentina*, where the tribunal held that full protection and security ought to be understood as going beyond the protection and security ensured by the police.[[66]](#footnote-66) In the tribunal’s view, the stability afforded by a secure investment environment was as important from an investor's point of view as physical security.[[67]](#footnote-67) It is worth noting that the wording of the standard in some intra-EU IIAs such as, for instance, the Netherland – Romania BIT, militates against its broader interpretation by expressly confining the state’s obligation to full physical security of investments.[[68]](#footnote-68) The narrower interpretation of the standard was laid down by the tribunal in *AAPL v Sri Lanka*.[[69]](#footnote-69) The case concerned an investment made by the claimant in a Sri Lankan company involved in cultivating and exporting shrimp. In 1986, Eastern Sri Lanka where the investor’s shrimp farm was based, became affected by a major insurrection of the Tamil rebels. Consequently, during a counter-insurgency operation conducted by the Sri Lankan security forces, the investor’s farm was destroyed. Although the tribunal refused to accept the claimant’s argument that the full protection and security standard should be construed as strict liability[[70]](#footnote-70), it concluded that the governmental authorities ought to have taken precautionary measures to remove all suspected persons from the company’s farm prior to launching the counter-insurgency operation.[[71]](#footnote-71) Thus, Sri Lanka was found in breach of its due diligence obligation by not taking all possible measures that could be reasonably expected to prevent the ensuing physical destruction of the investor’s property.[[72]](#footnote-72)

Although no direct equivalent of the full protection and security standard currently exists in EU law, it could be argued that the latter offers a comparable, if not more elaborate, corpus of protections which investors can enjoy. Even if the obligation to provide full protection and security were to be confined to physical security, jurisprudence of the CJEU offers some pertinent examples of how such aspects of investment activity might be protected under EU law. The leading case is *Commission v France (Spanish Strawberries)* which concerned the passivity of the French authorities toward violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other member states, including Spain.[[73]](#footnote-73) Those private acts comprised, inter alia, more than a decade of interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other EU member states, and the damaging of those goods when on display in shops in France. Although the French government had been repeatedly called on to intervene and prevent such actions from taking place, the measures it adopted—such as increased surveillance and instructions to the police to take action—were found to fall short of an appropriate response. In particular, it transpired that the French Minister for Agriculture stated that, although he disapproved of and condemned the violence by the farmers, he in no way contemplated any intervention by the police in order to put a stop to it. The CJEU held that France thus failed to prevent damaging of agricultural products originating in other member states and to deal with threats creating the climate of insecurity. The failure to take appropriate preventive action, including measures against private individuals who imperil the free movement of goods, amounted to a breach of its obligations to ensure free movement of goods under what is now Article 34 TFEU.[[74]](#footnote-74)

The noticeably generous scope of protection afforded to economic actors vis-à-vis host states in this case can be explained by the fact that, over decades, EU internal market disciplines evolved and expanded so far as to place member states under an obligation to prevent harm from being caused to economic interests of business actors by private individuals. Thus, under EU law member states are under an obligation to ensure physical safety of assets belonging to a business actor not just from governmental action but also from action by private third parties. In seeking protection of their physical security, investors in the EU can also invoke fundamental rights, including the guarantee of personal liberty and security (Article 6); the freedom to pursue a freely chosen occupation (Article 15) and to conduct business (Article 16). Does the existence of this arsenal of protections elevate EU law above intra-EU IIAs? An overview of EU law suggests that the answer is far from straightforward. First, the surprisingly broad protection granted by EU law to investors in cases involving physical security of their investments is not to be seen as a reflection of the importance attached to the protection of foreign investment. Rather, the imposition by EU law of an obligation on states to safeguard physical security from interference by third parties is a by-product of the CJEU’s decade-long efforts to strengthen and widen the protection of EU economic freedoms. Second, although the CFR also offers a range of rights to which investors can resort in protecting their physical security, such rights—as already discussed earlier—can be subject to a somewhat narrow interpretation by European courts. Some of the reasons for the limited judicial protection of fundamental rights in EU law will be discussed below.

**3 Balancing Economic Rights and Policy Exceptions: Rhetoric and Reality**

As was mentioned at the outset, the prevailing view among legal scholars is that ‘EU investor rights come with much more, albeit qualified and strictly framed, ‘policy space’ than the rights provided in investment treaties.’[[75]](#footnote-75) The difference in the scope of protection afforded to investors under IIAs and EU law respectively could be linked to the historically limited space—at least until recently—investment treaties left for public policy considerations. By contrast, EU law is arguably better in ensuring that its provisions on economic freedoms are accompanied by public policy exceptions. However, a closer look at the architecture of EU internal market disciplines and in particular their interplay with fundamental rights produces a rather complex picture.

EU fundamental rights, despite comprising an impressive array of entitlements, are not unfettered and are subject to restrictive interpretation. For instance, neither the freedom to choose an occupation nor the freedom to conduct business, guaranteed by Article 15 and 16 CFR respectively, are absolute rights but ‘must be considered in relation to [their] social function’.[[76]](#footnote-76) Just as is the case with the protection of property, ‘restrictions may be imposed on the exercise of those freedoms, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.’[[77]](#footnote-77)

Furthermore, as mentioned earlier the CFR comprises an eclectic mix of rights and freedoms – from property rights and freedom to conduct business to rights of collective action and freedom of expression. As such, it can be invoked both for purposes of protecting private economic interests (e.g. when a business actor claims that its property rights are being encroached upon) and to restrict such economic interests (e.g. when a business actor’s exercise of contractual entitlements is restricted so as to accommodate a fundamental right). It is also noteworthy that CJEU jurisprudence to date is characterised by (and criticised for) prioritising economic freedoms, even in the cases where they infringe on fundamental rights.[[78]](#footnote-78) To investment lawyers, this prioritisation of free movements and back-footing of fundamental rights suggests that EU law does not always act as a fastidious guardian of non-economic interests. Rather, in balancing the competing non-economic interests with economic freedoms the CJEU has been frequently seen as putting the economic freedoms first. The question arises as to why, despite having long featured in EU law, fundamental rights and other non-economic concerns have in practice been frequently trampled by the protection of economic freedoms.

Recent EU law scholarship attributes the limited judicial protection of fundamental rights to the use by the CJEU of a two-stage breach/justification methodology – whereby a *prima facie* breach of free movement is established first, followed by the requirement that fundamental rights “defend” themselves at the justifications stage. This inevitably places fundamental rights on the procedural “back-foot”.[[79]](#footnote-79) Ever since its inception, economic integration has been a central task of the EU, with the free movement of goods, services and capital within the EU borders regarded by the EU treaties as critical to the functioning of a common market.[[80]](#footnote-80) Since the TFEU (and its predecessors) traditionally frame justifications as derogations from primary rights, ‘standard interpretative canons require the free movement provisions to be interpreted widely and exceptions from them narrowly.’[[81]](#footnote-81) Reynolds argues that ‘assessment at the justification phase, and the resultant application of a one-sided proportionality test, imposes evidentiary hurdles on fundamental rights not faced by free movement, namely questions of legitimacy of aim, appropriateness, and necessity.’[[82]](#footnote-82) While conceding that ‘a preference for free movement over fundamental rights undoubtedly exists’, Reynolds argues that this is not a consequence of ‘some contestable subjective attitude on the part of the Court’ but rather is a product of a greater historical significance of the free movement provisions.[[83]](#footnote-83)

In contrast with the historically reinforced centrality of free movement within the Rome Treaty and subsequent treaties, the recognition of the importance of fundamental rights has been a longer and more piece-meal process.[[84]](#footnote-84) For example, just as the first generation of IIAs made no provision for state measures in pursuit of public policy objectives, Rome Treaty made no mention of fundamental rights—‘seemingly because reference to them was viewed as unnecessary within a document charged with constituting an economic community.’[[85]](#footnote-85) Unlike economic freedoms which occupied a centrepiece in the founding EU treaties, EU fundamental rights were first introduced as general principles of Union law, and subsequently enshrined in the CFR.

Even despite being recognised as primary norms of EU law,[[86]](#footnote-86) the relationship between fundamental rights and economic freedoms has long remained uncertain. In principle, there is no a priory hierarchy between fundamental rights and economic freedoms, and the indivisibility of fundamental rights suggests that they should be equally promoted and protected.[[87]](#footnote-87) As EU law scholars put it, the protection of fundamental rights is yet to catch up with the protection of economic freedoms. Over decades, an increasingly expansive interpretation of free movement provisions inevitably entailed the widening of their material and personal scope – free movement can be triggered by rules that simply make economic activity less attractive to actors.[[88]](#footnote-88) Expansion of the scope of fundamental economic freedoms has inevitably limited a space for fundamental rights, and resulted in the latter being frequently invoked as *prima facie* ‘wrongs’ warranting justification.[[89]](#footnote-89) Since derogations from the free movement disciplines have always been subject to a narrow interpretation, a similar approach has been adopted in a growing number of cases involving clashes between fundamental rights and economic freedoms.[[90]](#footnote-90) For instance, in *Omega* the Court held that the protection of the fundamental right to human dignity, ‘particularly as a justification for a derogation from the fundamental principle to provide services, must be interpreted strictly.’[[91]](#footnote-91) The Court also stressed, in the same case, that ‘public policy may be relied on only if there is a genuine and sufficiently serious threatto a fundamental interest of society.’[[92]](#footnote-92)

The Court’s approach thus demonstrates a predisposition for generous interpretation of free movement disciplines and a rather cautious and tightly controlled interpretation of non-economic interests.[[93]](#footnote-93) A chance encounter with EU law may leave an investment treaty lawyer with an impression that EU law always accommodates public welfare considerations—be they in the form of treaty derogations or fundamental rights enshrined in the Charter. Indeed, the CJEU may indeed have taken a deferential view of member state measures in a wide range of cases ranging from control of waste disposals, promotion of renewable energy, improving air quality, protecting public health and preserving biodiversity.[[94]](#footnote-94) However, it also manifested reluctance to protect fundamental rights of collective action in cases where the latter restrict economic freedoms such as the freedom of establishment.[[95]](#footnote-95) Despite its ‘social rhetoric’, the invoking by the CJEU of a certain precedence of free movement rights over the fundamental right to strike has arguably exposed its more ‘liberal’ and less ‘social’ stance.[[96]](#footnote-96) The CJEU’s approach to balancing economic freedoms and fundamental rights can therefore be summarised as follows:

Whereas fundamental rights are concerned with placing a circle of protection around the individual or with asserting basic normative values, the implementation of the market freedoms is a functional project whose realization may often require fundamental rights to be limited or breached altogether.[[97]](#footnote-97)

**4 Conclusion**

Do intra-EU IIAs provide greater substantive protection of foreign investment than EU law? The foregoing analysis is not intended as an exhausting comparative analysis. Rather, it has sought to highlight the primary sights of overlap between substantive protections offered by intra-EU IIAs and EU law respectively and to examine some of the emerging differences. One conclusion that can safely be drawn is that intra-EU IIAs, by virtue to belonging to the first generation IIAs, do afford a greater level of protection to foreign investors than that offered under EU law. Intra-EU IIAs, unlike their more recent counterparts, contain broad and open-ended investment protection guarantees which are not expressly restricted by exceptions or reservations and which are not replicated under EU law.

Many of the fundamental protections available to investors under intra-EU IIAs also exist in and indeed draw origins from EU law. For instance, in developing the doctrine of legitimate expectations as a basis for investor rights, investment tribunals have drawn inspiration from CJEU jurisprudence and constitutional traditions of EU member states. Likewise, EU law offers protection against expropriation, and guarantees due process. Yet while intra-EU IIAs offer investors rights in an ‘undiluted’ form, EU law has stressed the importance of interpreting the relevant protections in light of their social function. Furthermore, the scope of rights enjoyed by investors under EU law often hinges on their relationship with fundamental economic freedoms: an investor right is likely to enjoy a strong protection if that is needed to ensure an unhindered exercise of free movement guarantees; and the very same right is likely to be sacrificed or subjected to a restrictive interpretation if its protection might hinder free movements. EU law provides for investor protection but only within the much broader context of establishing the internal market which is the ‘backbone’ of the European integration project and the main driver of European judicial activism.[[98]](#footnote-98) This pre-eminence of economic freedoms in the hierarchy of values protected by EU law is quite illuminating in the sense that it belies the social rhetoric of the EU.

Tracing the evolution of the CJEU’s approach to balancing the protection of economic freedoms with fundamental rights, including non-economic rights, also offers insights into how future IIAs should be framed to strike the right balance between investment protection and the pursuit competing public welfare objectives. Despite expressly recognising the importance of public welfare and stressing the need to interpret private rights in light of their social function, EU law—comprising internal market disciplines and fundamental rights—is far from being an ideal which future international economic agreements should inspire to emulate, particularly if their aim is to create a more balanced legal framework. The fact that fundamental rights have frequently been placed on a back-foot—despite having received an express recognition in the CFR and Article 6 TEU—is particularly noteworthy. One lesson that can be drawn from the history of a relationship between EU economic freedoms and fundamental rights is that a gradual shift towards a greater use of comprehensive exceptions for various public policy measures may not alter the nature of IIAs and render them more socially-friendly. While offering a textual basis for balancing investment protection with clashing non-economic values, such exceptions clauses may not be effective enough to militate against investment protection being prioritised because the latter has historically been a backbone of the entire treaty regime and its dispute settlement mechanism.

1. See <http://investmentpolicyhub.unctad.org/IIA> accessed 7 September 2016. [↑](#footnote-ref-1)
2. ibid. [↑](#footnote-ref-2)
3. See Hermann J Abs, *Proposals for Improving the Protection of Private Foreign Investments* (Rotterdam 1958) 35. For a general discussion of the Draft, see Georg Schwarzenberger, *Foreign Investments and International Law* (Steven & Sons, 1969) 109–134. The Abs-Shawcross Draft can be found in UNCTAD, *International Investment Instruments: A Compendium* (United Nations, 2000) vol. V, 395. [↑](#footnote-ref-3)
4. Aron Broches, ‘Settlement of Investment Disputes’ in Aron Broches (ed), *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 163. [↑](#footnote-ref-4)
5. Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 65. [↑](#footnote-ref-5)
6. *Eureko v Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction (26 October 2010) para 177. [↑](#footnote-ref-6)
7. ibid para 65. [↑](#footnote-ref-7)
8. Opinion of Advocate General Jääskinen, 15 March 2011, Case C‑264/09, *European Commission v Republic of Slovakia* [2011] ECR I-08065 para 78. [↑](#footnote-ref-8)
9. Such arguments were discussed in *Eureko v Slovak Republic* (n 6) para 63. [↑](#footnote-ref-9)
10. (1995) 2080 UNTS 100. [↑](#footnote-ref-10)
11. Jan Kleinheisterkamp, ‘Investment Protection and EU law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty’ (2012) 15(1) JIEL 85, 97. [↑](#footnote-ref-11)
12. The text can be found at <http://www.s2bnetwork.org/wp-content/uploads/2016/05/Intra-EU-Bits2-18-05.pdf> accessed 7 September 2016. [↑](#footnote-ref-12)
13. See eg Kleinheisterkamp (n 11). [↑](#footnote-ref-13)
14. Anna De Luca, ‘The Legal Framework for Foreign Investments in the EU: The EU Internal Market Freedoms, the Destiny of Member States’ BITs, and Future European Agreements on Protection of Foreign Investments’ in Leon Trakman and Nicola Ranieri (eds) *Regionalism in International Investment Law* (OUP 2013) 122-3. [↑](#footnote-ref-14)
15. Niamh Nic Shuibhne, ‘The Positive Scope of Free Movement Law: Non-Discriminatory Restrictions’ in Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law* (OUP 2013) 209. [↑](#footnote-ref-15)
16. Similarly, public policy and security derogations from free movement of services and capital are enshrined in Articles 45 and 65 respectively. [↑](#footnote-ref-16)
17. See Case 72/83, Campus Oil Limited v Minister for Industry and Energy [1984] ECR 2727, para 37: ‘Article [36], as an exception to a fundamental principle of the Treaty must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which is intended to secure and the measures taken pursuant to that Article must not create obstacles which are disproportionate to those objectives’. [↑](#footnote-ref-17)
18. See eg *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) paras 231–233, where the presence of the exceptions clause in the treaty enabled the respondent state to defend successfully its measures. By contrast, its defence in a largely similar case failed as the applicable treaty did not contain any exceptions clause. See *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) paras 224–230). [↑](#footnote-ref-18)
19. As early as in the 1990s, of some 335 BITs only 28 did not contain an FET clause. UNCTAD, Fair and Equitable Treatment (United Nations 1999) 22, referring to Mohamed Khalil, ‘Treatment of Foreign Investment in Bilateral Investment Treaties’(1992) 7 ICSID Review‑FILJ 339, 355. [↑](#footnote-ref-19)
20. Christoph Schreuer, ‘Interrelationships of Standards’ in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 1. [↑](#footnote-ref-20)
21. Although some of the more recent IIAs seek to clarify the scope of the standard by expressly stating that FET is a reflection of customary international law. See eg recent Canadian IIAs. [↑](#footnote-ref-21)
22. *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 293. [↑](#footnote-ref-22)
23. See eg *Waste Management Inc v Mexico*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) (2004) 43 ILM 967, para 98; and *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, Award, ICSID Case No ARB/05/16 (29 July 2008) paras 614-618. [↑](#footnote-ref-23)
24. See eg *Loewen v United States*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003) (2003) 42 ILM 811, para 143 [↑](#footnote-ref-24)
25. *PSEG Global Inc and Konya Ilgin Elektrik Üretimve Ticaret Ltd Širketi v Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007) para 250. [↑](#footnote-ref-25)
26. *Eureko v Slovak Republic* (n 6) para 247. [↑](#footnote-ref-26)
27. ibid para 250. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. *Sempra Energy International v Argentina,* ICSID Case No ARB/02/16, Award (18 September 2007) para 300. [↑](#footnote-ref-29)
30. See *Walter Bau AG v Thailand*, UNCITRAL Award (1 July 2009) paras 12.43-12.44 (finding that a breach of FET can also be creeping). [↑](#footnote-ref-30)
31. Rudolf Dolzer, ‘Fair and Equitable Treatment: A Key Standard in Investment Treaties’ (2005) 39 Intl Law 87, 91; see also FA Mann, ‘British Treaties for the Promotion and Protection of Investments’ (1981) 52 BYIL 241, 243 (suggesting that ‘the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment… so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of the specific instances of this overriding duty’). [↑](#footnote-ref-31)
32. *Noble Ventures Inc v Romania*, ICSID Case No ARB/01/11, Award (5 October 2005) para 182. [↑](#footnote-ref-32)
33. Alec Stone Sweet and Giacinto della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez’ (2014) 46 NYU JILP 911, 919. [↑](#footnote-ref-33)
34. The full text of the agreement is available at <http://investmentpolicyhub.unctad.org/IIA> accessed 7 September 2016. [↑](#footnote-ref-34)
35. See Article 8.10 CETA. [↑](#footnote-ref-35)
36. Article 8.10(4) CETA. [↑](#footnote-ref-36)
37. Herwig CH Hofmann and Bucura C Mihaescu, ‘The Relation Between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9 European Constitutional Law Review 73, 84. [↑](#footnote-ref-37)
38. ibid 86. [↑](#footnote-ref-38)
39. ibid 87. [↑](#footnote-ref-39)
40. See Schreuer (n 20) 1. [↑](#footnote-ref-40)
41. Steffen Hindelang, ‘Member State BITs – There’s Still (Some) Life in the Old Dog Yet: Incompatibility of Existing Member State BITs with EU Law and Possible Remedies’ in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy 2010-2011* (OUP 2012) 227 (citations omitted). [↑](#footnote-ref-41)
42. CJEU, Case C-309/96, *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997]ECR I*-*7493 para 23. [↑](#footnote-ref-42)
43. EFTA Case E-2/06, *EFTA Surveillance Authority v Norway* para 72. [↑](#footnote-ref-43)
44. See also Katharina A Byrne, ‘Regulatory Expropriation and State Intent’ (2000) Canadian Ybk Intl L 89, 104. [↑](#footnote-ref-44)
45. CJEU, **Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH*** [1998] ECR I-1953 para 21. [↑](#footnote-ref-45)
46. CJEU, Case 182/83, *Robert* *Fearon & Company Limited v Irish Land Commission*, [1984] ECR 3677 para 7. [↑](#footnote-ref-46)
47. *Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation*, SCC No 24/2007, Award (20 July 2012) paras 21-23. [↑](#footnote-ref-47)
48. Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 344. [↑](#footnote-ref-48)
49. See Stephan W Schill, ‘Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties’ (2009) 18 Minn J Intl L 1. [↑](#footnote-ref-49)
50. See eg Article 2(2) of the 2005 UK Model BIT, Article (3)4 of the 1997 Netherlands Model BIT, and Article 7(2) of the 2005 Germany Model BIT. [↑](#footnote-ref-50)
51. The full text is available at <http://investmentpolicyhub.unctad.org/IIA> accessed 7 September 2016. [↑](#footnote-ref-51)
52. See Thomas Wälde, ‘The ‘Umbrella’ (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases’ (2004) 1 (4) TDM 1, 15-6. [↑](#footnote-ref-52)
53. See more in James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 Arbitration Intl 351. [↑](#footnote-ref-53)
54. *Eureko BV v Poland*, UNCITRAL, Partial Award and Dissenting Opinion (19 August 2005) para 256. [↑](#footnote-ref-54)
55. See James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP 2002) 96; Ian Brownlie, *Principles of Public International Law* (6thedn OUP, Oxford 2003) 523-4; Stephen Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publ 1987) 111. [↑](#footnote-ref-55)
56. See Gerald Fitzmaurice, ‘Hersch Lauterpacht – The Scholar as Judge – Part I (1961) 37 BYIL 1, 64. [↑](#footnote-ref-56)
57. See below nn 78-79. [↑](#footnote-ref-57)
58. CJEU, Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECR I-0000. [↑](#footnote-ref-58)
59. ibid para 7. [↑](#footnote-ref-59)
60. ibid para 8. [↑](#footnote-ref-60)
61. ibid para 20. [↑](#footnote-ref-61)
62. CJEU; Joined cases C-120/06 P and C-121/06 P, *FIAMM and Others v Council and Commission* [2008] ECR I-6513 para 185. [↑](#footnote-ref-62)
63. *Sky Österreich* (n 58) para 34. [↑](#footnote-ref-63)
64. ibid. [↑](#footnote-ref-64)
65. *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Award (23 June 2006) para 408. [↑](#footnote-ref-65)
66. ibid. [↑](#footnote-ref-66)
67. ibid. [↑](#footnote-ref-67)
68. Some of the recent IIAs also expressly limit the obligation to physical security. See eg Article 8.10 CETA. [↑](#footnote-ref-68)
69. *AAPL v Sri Lanka*, ICSID Case No ARB/87/3, Final Award on Merits and Damages (21 June 1990) (1991) 30 ILM (1991) 577. [↑](#footnote-ref-69)
70. ibid para 48. [↑](#footnote-ref-70)
71. ibid para 85(b). [↑](#footnote-ref-71)
72. ibid paras 85-86. [↑](#footnote-ref-72)
73. **Case C-265/95 *Commission v France* [1997] ECR I-6959.** [↑](#footnote-ref-73)
74. ibid **para 66.** [↑](#footnote-ref-74)
75. Kleinheisterkamp (n 11) 97. [↑](#footnote-ref-75)
76. See CJEU, Case C-544/10 *Deutsches Weintor* [2012] ECRI-0000 para 54. [↑](#footnote-ref-76)
77. ibid para 54. [↑](#footnote-ref-77)
78. See for instance, Catherine Barnard, ‘Social Dumping or Dumping Socialism?’ (2008) 67 CLJ 262–4; Anne Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37 Industrial Law Journal126, 139; Philip AJ Syrpis and Tonia Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to Their Reconciliation’ (2008) 33 ELRev 411, 426. [↑](#footnote-ref-78)
79. Stephanie Reynolds, ‘Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights’ (2016) 53 CMLRev 643, 644. [↑](#footnote-ref-79)
80. See Art 26 TFEU. [↑](#footnote-ref-80)
81. Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013) 26. [↑](#footnote-ref-81)
82. Reynolds (n79) 644. [↑](#footnote-ref-82)
83. ibid. [↑](#footnote-ref-83)
84. ibid 650. [↑](#footnote-ref-84)
85. ibid. [↑](#footnote-ref-85)
86. The Charter enjoys primary law status pursuant to Art 6 TEU. [↑](#footnote-ref-86)
87. Sybe A de Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’ (2013) 9 Utrecht Law Review 169. [↑](#footnote-ref-87)
88. See Eleanor Spaventa, ‘Leaving *Keck* Behind? The Free Movement of Goods After the Rulings in *Commission* v. *Italy* and *Mickelsson and Roos*’ (2009) 34 ELRev 914, 923. [↑](#footnote-ref-88)
89. Reynolds (n 79) 665. [↑](#footnote-ref-89)
90. ibid 667-8. [↑](#footnote-ref-90)
91. CJEU, Case C-141/07, *Commission* v. *Germany* [2008] ECR I-6935 para 30. [↑](#footnote-ref-91)
92. ibid para 31. [↑](#footnote-ref-92)
93. See eg CJEU, Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 para 81, where the court held that the exercise of the fundamental right to strike was only permissible if jobs or employment conditions were ‘jeopardized or under serious threat’. [↑](#footnote-ref-93)
94. CJEU, Case C-2/90, *Commission v Belgium* [1992] ECR I-4431; Case C-379/98, *PreussenElektra AG v Schhleswag AG* [2001] ECR I-2099; Case C-320/03, *Commission v Austria* [2005] ECR I-9871; Case C-67/97, *Anklagemyndigheden v. Ditlev Blume* [1998] ECR I-8033. [↑](#footnote-ref-94)
95. See for example Vries (n 87) 191. [↑](#footnote-ref-95)
96. Norbert Reich, ‘Free Movement v. Social Rights in an Enlarged Union - the Laval and Viking Cases before the ECJ’ (2008) 9 (2) German Law Journal 125, 159-160. [↑](#footnote-ref-96)
97. Mark Dawson and Elise Muir, ‘Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law’ (2013) German Law Journal 1959, 1965. [↑](#footnote-ref-97)
98. Caroline Henckels, ‘Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference’ in Andrea K. Bjorklund (ed), *Yearbook on International Investment law and Policy 2012-2013* (OUP 2014) 315; see also Kleinheisterkamp (n 11) 100. [↑](#footnote-ref-98)