

**EUROPEAN UNION: AN INSTRUMENT FOR THE PROVISION OF LEGAL
CERTAINTY TO FOREIGN INVESTORS**

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ABSTRACT

The article argues that the European Union (EU) can play an important role in providing legal certainty to foreign investors in the European continent. In particular, three elements of the Union's structure make this possible: 1) its legal order, 2) its group of institutions, and 3) its Court of Justice. The article explores these elements in detail, analyzing their relevance to the foreign investment climate. It concludes that as a consequence of these elements, the EU can provide legal certainty to foreign investors by creating transparent, stable and consistent laws and policies for the regulation of foreign investment, thus granting more predictability to the legal environment of EU member countries.

An attractive investment climate for foreign investors involves the existence of a predictable legal environment for the advancement of economic activities. Accordingly, countries are willing to adopt mechanisms that allow them to provide investors a legal environment with this characteristic. Traditionally, they agree Bilateral Investment Treaties (BITs) with other states or implement stabilization clauses in their contracts with investors. This article presents a different and unexplored alternative: the implementation of a regional organization. Specifically, it studies and analyzes the institutional structure and legal order of the European Union (EU) with the purpose of

determining its capacity for serving as an instrument for providing legal certainty to foreign investors in the European continent.¹

Legal certainty makes reference to the possibility that a person can plan his life knowing the legal consequences of his actions.² Its presence in a legal system is very important for investors because it allows them to know the law, and therefore, behave according with what it establishes, plan their conduct for the development of their economic activities, and enjoy and protect their rights. Legal certainty exists when the law is public,³ clear,⁴ non-retroactive,⁵ stable,⁶ and respected by people and national authorities.⁷

The article explores the structure and functioning of the EU by studying individually three fundamental aspects: its body of law, its institutions and its Court of Justice. Pursuant to the analysis of all these elements, the article asserts that the EU can be an instrument for providing legal certainty to foreign investors because its legal order and structure permit the creation of transparent, stable, coherent and uniform laws and policies, which provides certainty and predictability to foreign investors concerning the regulation of their investments. All this, accompanied by a supranational judicial institution in charge of enforcing this body of law and guaranteeing its implementation and respect by member countries.

¹ It must be mentioned that the analysis will be developed under the amended version of the EU treaties resulting from the Lisbon Treaty. Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O.J. (C 306) 1. This treaty is in not in force yet and is still pending ratification by some EU Member countries. The Lisbon Treaty was signed in Lisbon on December 13th, 2007. Up until January, 2009, 23 member countries have finished the ratification process. Europa, Treaty of Lisbon, http://europa.eu/lisbon_treaty/index_en.htm (last visited Jan. 20, 2009).

² PAUL CRAIG & GRAINNE DE BURCA, EU LAW 380 (Oxford University Press 2003). For Takis Tridimas, legal certainty. For the former, "the principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly." TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW 163 (Oxford University Press 1999).

³ ANTONIO-ENRIQUE PEREZ LUÑO, LA SEGURIDAD JURIDICA 32 (Ariel 1994) (1991).

⁴ *Id.*

⁵ *Id.* at 34.

⁶ *Id.*

⁷ *Id.* at 35.

1. The Role of the EU for the Provision of Legal Certainty

1.1 The Recognition of Legal Certainty in the EU

The idea of conceiving the provision of legal certainty through the EU begins taking into consideration its patent recognition within the EU's structure. The Court of Justice of the EU has stated that legal certainty is one of the principles of EU⁸ law which requires that the "rules of law be clear, precise and predictable in their effects,"⁹ guaranteeing that the "situations and legal relationships governed by Community law remain foreseeable."¹⁰ Therefore, the principle of legal certainty makes it that individuals can determine clearly their rights and obligations and make decisions consequently.¹¹ The existence of the principle of legal certainty in the EU is subjected to the fulfillment of several requirements. These requirements are that EU's measures and law: a) be clear and predictable, b) completely enforceable, c) have unity and

⁸ The general principles of Community law have been defined as "unwritten principles deriving from the common Constitutional traditions of the member states and developed by the European Court of Justice." The principles are mandatory for EU institutions and member countries. ANTHONY ARNULL, ALAN DASHWOOD, MICHAEL DOUGAN, MALCOLM ROSS, ELEANOR SPAVENTA & DERRICK WYATT, Q.C., WYATT AND DASHWOOD'S EUROPEAN UNION LAW 235 (Sweet & Maxwell 2006) (1980). The principles have several duties in the EU law: a) serving as an instrument of interpretation, ground for review, in the sense that they are used to justify the annulment of a Community measure, and as a source of liability in damages by EU institutions and member countries, (TRIDIMAS, *supra* note 3, at 17-23), b) defining and limiting the range of competences of EU institutions as they adopt binding acts and c) imposing duties on member states when these are acting in exercise of Union obligations. ARNULL, DASHWOOD, DOUGAN, ROSS, SPAVENTA & WYATT, Q.C., *Id.*

⁹ Case C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep (Nov. 18, 2008), http://curia.europa.eu/jcms/jcms/Jo1_6308/curia. See also Cases C-70/06, Comm'n. v. Portugal, 2008 E.C.R. I-1, C-76/06 P, Britannia Alloys & Chemicals v. Comm'n., 2007 E.C.R. I-04405, C-248/04, Koninklijke Coöperatie Cosun UA v. Minister van Landbouw, 2006 E.C.R. I-10211, C-308/06, Intertanko v. Secretary of St. for Transp., 2008 E.C.R. I-04057, C-161/06, Sloma-Lux sro v. Celní ředitelství Olomouc, 2007 E.C.R. I-10841, C-409/04, Teleos v. Commissioners of Customs & Excise, 2007 E.C.R. I-07797, C-178/05, Comm'n., v. Greece, 2007 E.C.R. I-04185, Joined Cases C-182/03 & C-217/03.

¹⁰ Case C-107/97, Max Rombi, 2000 E.C.R. I-03367.

¹¹ From the perspective of Juha Raitio, the principle of legal certainty within the EU is a concept that: "relates to the principle of non-retroactivity and the protection of legitimate expectations in particular, but more profoundly it can be related to the conceptual scale for weighing up and balancing between predictability and acceptability, between formal justice and material fairness, in legal decision-making." JUHA RAITIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW 387 (Kluwer Academic Publishers 2003).

coherence, and d) can be invoked by individuals and member states. Finally, it is required that national courts are submitted to rules establishing procedural exclusivity.¹²

The recognition and implementation of legal certainty as a principle within EU structure is reflected in several judgments of the Court of Justice of the EU. The Court has ruled that the principle must be observed by EU institutions and member states when they are exercising the powers granted to them by EU Directives.¹³ Moreover, the Court has judged that as a consequence of the principle: a) a Community measure must not commence being in force before it is published,¹⁴ b) the exercise of individual rights arising from EU law is prohibited from being subjected to conditions and limits by national administrative rules,¹⁵ c) a national provision constituting a variance of Community law must be modified,¹⁶ d) it is prohibited that a regulation be implemented retroactively, meaning that a factual situation is regulated by the existing legal rules at the moment of its occurrence,¹⁷ and e) EU institutions are forbidden from modifying measures already taken by them.¹⁸

¹² Takis Tridimas has also stated that one of the legal certainty's characteristics is its "nature diffuse" which makes it difficult to establish its content in precise terms. For this reason, legal certainty does not establish a specific result. TRIDIMAS, *supra* note 3, at 165-68.

¹³ Case C-288/07, The Comm'r of Her Majesty's Revenue & Customs v. Isle of Wight Council, (Sep. 16, 2008), http://curia.europa.eu/jcms/jcms/Jo1_6308/curia. See also Cases C-146/05, Albert Collée v. Finanzamt Limburg an der Lahn, 2007 E.C.R. I-07861, Joined Cases C-181/04 - C-183/04, Elmeka NE v. Ipourgos Ikononikon, 2006 E.C.R. I-08167.

¹⁴ Case T-348/04, Société internationale de diffusion et d'édition SA v. Comm'n (Apr. 15, 2008), <http://eur-lex.europa.eu>. However, exceptionally, this is possible when the pursued objective requires it and legitimate expectations of peoples involved are respected. See also Cases C-413/04, Eur. Parl. v. Council, 2006 E.C.R. O-11221, C-376/02, Stichting 'Goed Wonen' v. Staatssecretaris van Financiën, 2005 E.C.R. I-03445, and C-459/02, Willy Gerekens v. Grand Duchy of Luxembourg, 2004 E.C.R. I-07315.

¹⁵ Case C-490/04, Comm'n., v. Germany, 2007 E.C.R. I-06095.

¹⁶ Case C-522/04, Comm'n. v. Kingdom of Belg., 2007 E.C.R. I-05701.

¹⁷ Cases C-154/05, J.J. Kersbergen-Lap v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen, 2006 E.C.R. I-06249, C-290/00, Johann Franz Duchon v. Pensionsversicherungsanstalt der Angestellten, 2002, E.C.R. I-03567.

¹⁸ Joined Cases T-227/99 and T-134/00, Kvaerner Warnow Werft GmbH v. Comm'n., E.C.R. II-01205. The Court has also expressed that the principle of legal certainty looks that any act of the administration with legal effects must have a definitive character, mainly concerning its author and content. Case C-286/95 P., Comm'n. v. Imperial Chemical Industries plc, 2000 E.C.R. I-02341.

The principle of legal certainty is also expressed through the principle of legitimate expectations which has been seen as a “corollary” of the former.¹⁹ This principle is also a general principle within EU Community legal order and is present when an individual can rely “in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations.”²⁰ However, when an “economic operator could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot rely on the principle of the protection of legitimate expectations if the measure is adopted.”²¹ Likewise, he cannot expect that an existing situation remains unaltered where Community institutions have the legitimate power to modify it.²²

As can be noticed, many of the expressions and consequences of the principle of legal certainty flowing from the case law of the Court of Justice are of fundamental importance for foreign investors. Aspects such as the mandatory publication of EU law, the prohibition to modify it, its mandatory and non-retroactive character make it possible to conceive the EU as a fundamental mechanism for the adoption of clearer, transparent, and stable laws.

2.2. The Role of EU Law for the Provision of Legal Certainty

¹⁹ Case C-63/93, *Fintan Duff v. Minister for Agriculture and Food*, 1996 E.C.R. I-00569). The principle of legitimate expectations is different from the principle of legal certainty. On one hand, legal certainty provides that the rules have a clear and precise character. Regarding legitimate expectations, it looks that national public officials “exercise their power over a period of time in such a way as to ensure that situations and relationships lawfully created under Community law are not affected in a manner which could not have been foreseen by a diligent person.” Moreover, legal certainty is more used as a rule of interpretation, whereas legitimate expectations are considered a source that grants substantive rights. TRIDIMAS, *supra* note 3, at 170.

²⁰ Case T-113/96, *Edouard Dubois et Fils SA v. Council*, E.C.R. II-00125.

²¹ Case C-310/04, *Kingdom of Spain v. Council*, 2006 E.C.R. I-07285, Joined Cases C-182/03 & C-217/03, *Kingdom of Belg. v. Comm’n.*, (22. Jun., 2006), http://curia.europa.eu/jcms/jcms/Jo1_6308/curia, Case C-17/03, *Vereniging voor Energie, Milieu en Water v. Directeur van de Dienst uitvoering en toezicht energie*, 2005 E.C.R. I-04983.

²² Case C-340/98, *Italy v. Council*, 2002 E.C.R. I-02663.

EU law²³ constitutes the principal EU element for the provision of legal certainty because it is possible through it to adopt binding supranational and directly applicable laws that limit the action of member countries and compromise their international responsibility. As a result of its principles and special characteristics, EU law offers the opportunity to adopt clear, stable, coherent and transparent rules regulating the activity of foreign investors in the EU member countries. For example, the Court of Justice of the EU has stated that, as a development of the obligations assumed with the EU, member countries must not adopt national laws that go against Community law.²⁴ Therefore, the ability of EU members to modify rights or duties incorporated in an EU law is limited, which consequently, provides stability to the law and more certainty in the development of economic activities.

2.2.1. EU Principles Contributing to the Provision of Legal Certainty

The provision of legal certainty by means of EU law is founded in the recognition and implementation of several principles developed mainly by the case law of the Court of Justice of the EU. These principles make it possible for EU law to constitute an instrument for providing a stable, clear, coherent and transparent set of laws that regulate the activities of foreign investors, and therefore, can contribute to a great extent to the provision of legal certainty. Consequently, the following section will study

²³ EU or Community law has been defined as a “common internal law in the member states.” Its characteristics are: a) it protects the general interest of the EU, b) it is supported by a solidarity among member countries, c) it bounds “definitively and unconditionally” EU member countries, d) it forces member countries to recognize the consequences of their membership to the EU in their national territories, e) restrains member countries from adopting unilateral measures that breach Community law, f) it grants powers to member states and EU institutions, g) it prohibits member states from depriving EU institutions of the powers granted by the Community law, h) it forces EU institutions to respect the power amongst each other, i) it establishes institutions’ own forms of action, j) it is grounded in a duty of cooperation between member states and institutions, k) it respects fundamental rights and freedoms, l) individuals’ rights and duties must be protected by national courts, m) it establishes rights and duties for member countries and individuals, n) it is mandatory, o) it involves a uniform application and interpretation, p) it has direct effect and primacy over national law, q) it is an “independent source of law,” r) and it is guaranteed by the job of the Court of Justice. RENE BARRENTS, *THE AUTONOMY OF COMMUNITY LAW* 9-11 (Kluwer Law International 2004).

²⁴ Case 74/86, *Comm’n. v. Germany*, 1988 E.C.R. 2139.

the principles of loyal or sincere cooperation, transparency, primacy, direct effect and direct application.

2.2.1.1. The Principle of Loyal or Sincere Cooperation

A key element in the provision of legal certainty through EU law is the express legal recognition that the Union must guarantee consistency between its policies and activities.²⁵ This provides coherence to the EU's activity which generates higher levels of predictability and therefore a proper environment for legal certainty. One of the ways to promote consistency at the EU level is by means of the principle of loyal or sincere cooperation, a recognized and implemented principle of EU law²⁶.

The principle of sincere cooperation embraces two obligations for member states. In a positive way, member countries must take all the necessary measures, general or particular, to ensure the fulfillment of the obligations arising from the EC treaty or decisions of EU institutions. Moreover, member countries must facilitate the achievement of the goals of the EU.²⁷ It must be emphasized that these positive obligations are mandatory for all the three powers of the states: legislative, executive and judicial branch and include all levels of governments: central, regional or local.²⁸

²⁵ Consolidated Version of the Treaty on the Functioning of the European Union, Art. 7, May 9, 2008, 2008 (O.J.) (C 115) [hereinafter TFEU].

²⁶ The principle is incorporated in Article 4 of the Treaty of the EU, which establishes:

3. Pursuant to the principle of sincere cooperation, the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The member states shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The member states shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. Consolidated Version of the Treaty on the European Union, Art. 1 states: "The Union shall replace and succeed the European Community." Consolidated Version of the Treaty on European Union, Art. 4, May 9, 2008, 2008 (O.J.) (C 115) [hereinafter EU Treaty].

The principle also appears expressly recognized in Article 13 of the EU Treaty. In that provision, the Treaty orders EU institutions to "practice mutual sincere cooperation." *Id.*, Art. 13.

²⁷ C.W.A. Timmermans, *The Basic Principles*, in *THE LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES* 147 (P.J.G. Kapteyn, A.M. McDonnell, K.J.M., Mortelmans, C.W.A., Timmermans & L.A. Geelhoed eds., Wolters Kluwer 2008).

²⁸ *Id.* at. 149.

In the obligations flowing from the negative sense, member countries must not make decisions that affect negatively the achievement of the EU objectives.²⁹ These negative obligations involve aspects such as: a) the prohibition of adopting measures that affect the “effectiveness of Community law,” b) the impossibility of taking measures obstructing the internal operation of EU’s institutions, c) the duty of refraining from enacting measures affecting the development of the Community, and d) the prohibition of agreeing, with third countries, measures where EU law has already adopted one measure.³⁰

As a result of these obligations arising from the principle, the EU Court of Justice has stated that member states of the Union must “nullify the unlawful consequences of a breach of Community law.” Likewise, they must take all the necessary measures to guarantee that Community law is being respected in their territories. In order to do this, member countries have the possibility of choosing measures, although they are obligated to change the national law as soon as possible and guarantee that the rights arising from the Community law are “given full effect.”³¹ Finally, member countries cannot submit the fulfillment of their obligations to reciprocity.³² In other words, the lack of fulfillment of Community obligations by a member country cannot be justified by other member countries’ failure to fulfill their European obligations.³³

3.2.1.2. The Principle of Transparency

Another EU aspect for promoting legal certainty is the implementation and recognition of the principle of transparency within the EU. The principle contributes to

²⁹ *Id.* at. 147.

³⁰ *Id.* at. 151-53.

³¹ Joined Cases C-231/06 to C-233/06, *National Pensions Office v. Emilienne Jonkman*, 2007 E.C.R. I-05149.

³² Case C-45/01, *Christoph-Dornier-Stiftung für Klinische Psychologie v. Finanzamt Gießen*, 2003 E.C.R. 12911.

³³ Case C-38/89, *Ministère public v. Guy Blanguernon*, 1990 E.C.R. I-00083.

the existence of legal certainty by adopting clear and consistent Community laws and policies, allowing citizens' participation in the decision-making process and providing access to EU's activities. All these elements provide natural and legal persons with certainty about the creation, modification, content and meaning of EU laws and policies.

The principle of transparency imposes obligations for EU institutions. For instance, the EU Parliament has the duty to carry out its activities in the most open way possible³⁴ and guarantee the greatest level of transparency in its activities.³⁵ Moreover, the citizens and legal persons of the Union have the legal right to obtain access to Parliament documents submitted to the conditions and limitations established in the European Parliament and Council Regulation (EC) No 1049/2001 and Parliament's Rules of Procedure.³⁶ In addition, the Parliament allows natural or legal persons registered in a member state to address a petition to the Parliament on the EU's issues or activities directly affecting them.³⁷ In the case of the Council, transparency is promoted by allowing public access to its documents.³⁸ Concerning the Committee, it has the obligation of guaranteeing transparency in its decisions.³⁹

Likewise, due to the principle of transparency, EU institutions must adopt mechanisms of communication with citizens. EU institutions must provide EU citizens and representative associations with the possibility of publicly expressing and exchanging their opinions on EU areas. Therefore, EU institutions must keep "open, transparent and regular dialogue with representative associations and civil society." A clear recognition and development of this obligation is the Commission's duty of consulting with interested parties with the purpose of guaranteeing that Community

³⁴ TFEU, *supra* note 26, Art. 15.

³⁵ Rules of Procedure of the European Parliament, Rule 96, 2005 O.J. (L 44) [hereinafter EP Rules of Procedure].

³⁶ *Id.* Rule 97.

³⁷ TFEU, *supra* note 26, Art. 227.

³⁸ Council Decision 2006/683/EC, Council Rules of Procedure, Annex II Art. 5, 2006 O.J. (L 285) [hereinafter Council Rules of Procedure].

³⁹ Rules of Procedure of the European Economic and Social Committee, Rule 64, 2007 O.J. (L 93) [hereinafter Rules of Procedure of the European Economic and Social Committee].

actions are coherent and transparent.⁴⁰ Consequently, the Commission has issued a communication establishing general principles and minimum standards for consultation of interested parties, with the purpose of promoting their participation and adopting a more transparent consultation process.⁴¹ The consultation process seeks that regional and national authorities, civil society organizations, undertakings and associations of undertaking, individuals, academia, technical experts and even interested parties from third countries have the possibility of contributing to the adoption of a law or its implementation.⁴²

The policy of consultation involves several actions that benefit the provision of legal certainty. For instance, the Commission must carry out consultations as extensively as possible. Likewise, the process must begin as early as possible with the purpose that the people can participate and their opinions can contribute effectively. Moreover, the consultation process must include the participation of several parties: people to be affected by the policy, people implementing it, and people with a direct interest in it.⁴³

The principle of transparency is also developed through the publication of EU acts. The Treaty on the Functioning of the EU establishes in its Article 297 that legislative acts will be published in the Official Journal of the European Union. Likewise, regulations and directives addressed to all member states, and decisions not specifying to whom they are addressed must be also published in the Official Journal.⁴⁴ The publication of EU acts is of substantial importance for the provision of legal certainty

⁴⁰ EU Treaty, *supra* note 27, Art. 11.

⁴¹ *Commission Communication, Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, at 3, COM (2002) 704 final (Dec. 11, 2002).

⁴² *Id.* at 4.

⁴³ *Id.* at 16-19. The Commission offers the possibility of participating in and accessing the consultation process through the website http://ec.europa.eu/yourvoice/consultations/index_en.htm. Here it is possible to know and participate in the different consultations carried out by the Commission.

⁴⁴ TFEU, *supra* note 26, Art. 297.

because it publicizes EU law and establishes the moment at which an EU law begins being in force.⁴⁵

Additionally, the principle of transparency promotes positively the legal certainty by encouraging the existence of clear and consistent laws. The EU itself has recognized that the adoption of clear and consistent EU regulations through uniform principles of presentation and legislative drafting is of substantial significance for the understanding of citizens and “economic operators” of their rights and obligations.⁴⁶ For this reason, with the purpose of improving EU law's quality and providing legal certainty, the EU has adopted policies and guidelines for the adoption of EU legislation.

One of the principles guiding the drafting of EU legislation is that EU regulation must be characterized for being clear, simple and precise. Consequently, an EU regulation must be “clear, easy to understand and unambiguous; simple, concise, containing no unnecessary elements; precise, leaving no uncertainty in the mind of the reader.”⁴⁷ The objective of this first drafting principle is to make EU law more comprehensive. This drafting principle constitutes an expression of the EU principle of legal certainty because it seeks that citizens can predict the way in which the law will be applied.⁴⁸ A second principle conducting the drafting of EU law is that the adoption of EU laws must take into account the subjects who will be submitted to the law, especially considering the necessity that they are able to determine their rights and obligations clearly.⁴⁹

⁴⁵ EU law starts its legal force after its publication. As exception to this Rule, substantive community law will be applied to situations existing before its entry into force only if from its terms, objectives and general scheme that is the effect that must be given to that law. Joined Cases C-74/00 P and C-75/00 P, *Falck SpA v. Comm'n.*, 2002 E.C.R. I-07869.

⁴⁶ EUROPEAN COMMUNITIES, *JOINT PRACTICAL GUIDE OF THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COMMISSION FOR PERSONS INVOLVED IN THE DRAFTING OF LEGISLATION WITHIN THE COMMUNITY INSTITUTIONS* 5 (Office for Official Publications of the European Communities 2003).

⁴⁷ *Id.* at 10.

⁴⁸ *Id.*

⁴⁹ *Id.* at 13.

The EU's policy in the drafting of EU law also calls for consistency in the law's text. This coherence is achieved by: a) establishing coherent, and not contradictory rights and obligations, b) adopting provisions that are consistent with other EU laws, c) abstaining from adopting provisions that contradict or overlap other EU provisions.⁵⁰ Additionally, it is recommended that the text be simple, clear and direct⁵¹ and with substantive consistency, meaning that the act must not have contradictions in its own text.⁵²

Another guiding principle is that regulations, directives and decisions must express the reasons justifying them. This has the purpose that people affected by it can defend their interest and the EU judiciary power can review the act.⁵³ Finally, it is established that if, as a result of a new law, previous acts or provisions cannot exist anymore, these acts or provisions must be repealed expressly by the new act. This is a necessary action consequence of the principle of legal certainty.⁵⁴

Another expression of the interest that EU decision-making institutions have in improving legislation in the Union is the Interinstitutional Agreement on Better Law-Making. In the agreement, the European Parliament, the Council and the Commission expressly recognized the respect of the principle of legal certainty and agreed to improve the quality of EU law-making and encourage simplicity, clarity, consistency and transparency in the drafting process of EU law. In the agreement, the three EU institutions also emphasized the importance of providing the decision law-making process with higher levels of transparency and agreed to offer more information to the public during the legislative process. Lastly, the institutions called member countries to guarantee the proper and timely transposition of EU law into national legal systems.⁵⁵

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 17.

⁵² *Id.* at 21.

⁵³ *Id.* at 31.

⁵⁴ *Id.* at 72.

⁵⁵ Interinstitutional Agreement on Better Law-Making, Eur. Parl., Council, Commission 2003 O.J. (C 321) [hereinafter Interinstitutional Agreement on Better Law-Making].

Finally, several substantive EU laws establish mechanisms to provide transparency to EU laws. For instance, Regulation (EC) No. 178/2002 on general principles and requirements of food law⁵⁶ Article 9 establishes that there must be an “open, and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it.” Furthermore, it is established that several documents must be published: a) agendas and minutes of the Scientific Committee and the Scientific Panels, b) opinions of the Scientific Committee and the Scientific Panels immediately, including minority opinions, c) information grounded in the opinions, and results of its scientific studies, amongst others.⁵⁷ Another example of substantive laws establishing a mechanism providing transparency is the Regulation (EC) No. 1367/2006 which regulates access to information and public participation in Environmental Matters derived from the Aarhus Convention. The regulation looks to ensure a wide availability and public access to environmental information given to or emanated from EU institutions or bodies, promoting the public participation in plans and programmes related to the environment.⁵⁸ In development of this goal, the provided information must be updated if possible and will include the text of international treaties, convention or agreements, and EU law, policies, plans and programmes related to the environment, progress reports on the implementation of the previous documents, information about proceedings by violation of Community law, amongst others.⁵⁹

3.2.1.3. The Principles of Primacy, Direct Effect and Direct Application of EU Law

⁵⁶ European Parliament and Council Regulation 178/2002, 2002 O.J. (L 031), Art. 9.

⁵⁷ *Id.* Art. 38.

⁵⁸ European Parliament and Council Regulation 1367/2006, 2006 O.J. (L 264), Art. 1 [hereinafter Regulation 1367/2006].

⁵⁹ *Id.*

One of the main EU elements contributing to the provision of legal certainty is the recognition and implementation of the principles of primacy, direct effect⁶⁰ and direct application of EU law⁶¹. These principles are of considerable importance to foreign investors because they provide them with more stable laws that can be enforceable at national and EU level. The stability character derives from the prohibition of member states unilaterally modifying or eliminating EU laws through a national law. Therefore, foreign investors will avoid being surprised by unexpected changes in the law and their rights being modified or denied by member countries. Moreover, a violation of EU law derived from the principles might compromise the responsibility of the State, which can be an efficient persuasive instrument for forcing member countries to comply with EU law.

The supremacy principle of EU law was recognized by the member countries in a declaration made in the intergovernmental conference where the Treaty of Lisbon was adopted. There, member countries stated that, grounded on the judgments of the Court of Justice, EU treaties and laws established by the Union have primacy over member states' national law.⁶² This declaration clearly reflects the interest and level of awareness of member countries as to the supreme character of EU law. Despite governmental recognition, it must be emphasized that the principle of primacy has been mainly developed through the case law of the Court of Justice of the EU. The case *Flaminio Costa v E.N.E.L* is the leading case in this matter. There, the Court stated:

By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became

⁶⁰ The principle of direct effect means that people have the right to rely on an EU provision before member states' national Courts. Joined Cases C-102/98 and C-211/98, *Ibrahim Kocak v. Landesversicherungsanstalt Oberfranken und Mittelfranken* 2000 E.C.R. I-01287. A provision has direct effect when it is "clear and unconditional and bestows a legal right on a natural or legal person, exercisable against another natural legal person, or against the authorities of a member state." ARNULL, DASHWOOD, DOUGAN, ROSS, SPAVENTA & WYATT, Q.C., *supra* note 9, at 128.

⁶¹ The principle of direct application makes reference to the fact that a regulation is valid in the national legal order without the necessity of being incorporated by means of an incorporation process. *Id.*

⁶² Declaration Concerning Primacy, Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Dec. 13, 2007, 2008 O.J. (C 115).

an integral part of the legal systems of the member states and which their courts are bound to apply... This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law...The Precedence of Community Law is Confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all member states'...It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question...The transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail.⁶³

As a consequence and as development of the principle of primacy, the Court of Justice has ruled that: a) national judges have the duty to "disapply" a national law that contradicts EU law,⁶⁴ b) a national measure contravening EU law must be removed, otherwise its maintenance constitutes a breach of a member country's obligations assumed with the EU,⁶⁵ c) member states cannot allege provisions, practices or circumstances present in their national legal system as an excuse to not comply with Community law,⁶⁶ and d) all the national courts of a member country must recognize

⁶³ Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964, E.C.R. 00585.

⁶⁴ This was the Court's rule in the case C-208/05:

It is for the national court to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to those provisions.

⁶⁵ The Court's so stated:

If a provision of national law that is incompatible with a provision of the treaty, even one directly applicable in the legal order of the member states, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law; maintaining such a provision in force therefore amounts to a failure by the state in question to comply with its obligations under the treaty.

Case 74/86, *Comm'n v. Germany* 1988 E.C.R. 02139.

⁶⁶ Case 290/94, *Comm'n. v. Greece* 1996 E.C.R. I-03285.

and applied the principle.⁶⁷ Similar consequences arise from the principles of direct effect and direct application.⁶⁸

All these different expressions and consequences flowing from the principles prevent the modification or denial of rights flowing from EU law by member countries. Moreover, they guarantee its recognition and implementation at the national level by EU governments and national courts. All this is of substantial importance for foreign investors because they are provided with a superior stability in the law and therefore a higher level of certainty of the law influencing their investment. This is a pretty compelling reason for supporting the regulation of issues of foreign investors' interest by means of an EU law.

However, although the supremacy of EU law has been clearly recognized by the EU Court of Justice and EU member countries' governments, the same acknowledgment does not exist from the perspective of member countries' national courts and legal orders. In effect, the primacy of EU law over non-constitutional law has been widely accepted by member countries. However, the situation is different with relation to national Constitutions.

Among the EU member countries it is possible to identify several groups: a) a group that accepts supremacy of EU law over the national Constitution, b) a group that also accepts this supremacy but subjected to some limits, c) a group that does not accept it, and d) a group that does not have a defined position. The group of countries accepting the prevalence of EU law over national Constitutions is constituted by England,⁶⁹ Estonia,⁷⁰ Netherlands,⁷¹ Austria,⁷² Luxembourg,⁷³ Belgium and Sweden.⁷⁴

⁶⁷ Case C-118/00, Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants, 2001 E.C.R. I-05063.

⁶⁸ Case C-8/02, Ludwig Leichtle v. Bundesanstalt für Arbeit 2004 E.C.R. I-02641, Case C-290/94, Comm'n v. Hellenic Republic 1996 E.C.R. 03285.

⁶⁹ NIGEL G. FOSTER, FOSTER ON EU LAW 151-57 (Oxford University Press 2006).

⁷⁰ Anneli Albi, *Supremacy of EC Law in the New Member States*, 3 EUR. CONS. L. REV 25, 45 (2007).

The second group, the one that also recognizes the prevalence of EU law over national Constitutions, although limited by some circumstances, is made up by Czech Republic,⁷⁵ Ireland,⁷⁶ Spain,⁷⁷ Italy⁷⁸ and Germany.⁷⁹ To the group of countries that does not recognize the prevalence of EU law over the national Constitution belong Cyprus,⁸⁰ Poland,⁸¹ France,⁸² Lithuania,⁸³ Malta,⁸⁴ Slovakia,⁸⁵ and Romania.⁸⁶ Finally, the last group, the one integrated by countries where the relationship between

⁷¹ Constantijn A.J.M. Kortmann, *European Union Law and National Constitutions The Netherlands* (Nov. 2002) (XX Fide-Congress), http://www.nver.nl/documents/FIDE-Rapport_2002_Kortmann.pdf.

⁷² Stefan Griller, *Introduction to the Problems in the Austrian, Finnish And Swedish Constitutional Order*, in *EU ENLARGEMENT: THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL* 147, 152-53 (Alfred E. Kellermann, Japp W. de Zwaan & Jeno Czuczai eds., T.M.C. Asser Press 2000).

⁷³ KOEN LENAERT & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 687 (ROBERT BRAY ed., Sweet & Maxwell 2005).

⁷⁴ Griller, *supra* note 73, at 172 and LENAERT & NUFFEL, *supra* note 74, at 694.

⁷⁵ Wojciech Sadurski, *Solange, Chapter 3: Constitutional Courts In Central Europe—Democracy—European Union* 14 EUR. L.J. 1, 6-7 (2008).

⁷⁶ William Phelan, *Can Ireland Legislate Contrary to European Community Law?* 6 (Inst. for Int'l Integration Stud., Discussion Paper No. 237, 2007). Jonathan Tomkin, *Implementing Community Legislation into National Law: the Demands of a New Legal Order*, 4 JUD. STUD. INST. J. 130, 132-134 (2004).

⁷⁷ Carmen Plaza, *The Constitution for Europe and the Spanish Constitutional Court*, 12 EUR PUB L. 353, 358 (2006).

⁷⁸ CRAIG & BURCA, *supra* note 3, at 298-300.

⁷⁹ TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT* 157-58 (Cambridge University Press 2004).

⁸⁰ Christos G. Patsalides, *Scrutiny: Accommodating the Principle of Supremacy of Community Law to the Cypriot Legal Order - The Necessity for a Constitutional Amendment*, 12 EUR PUB L. 363, 365-68 (2006).

⁸¹ Adam Lazowski, *Accession Treaty Polish Constitutional Tribunal Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2003*, 3 EUR. CONS. L. REV 148, 156-57 (2007).

⁸² Chloé Charpy, *The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the Conseil Constitutionnel and the Conseil D'état*, 3 EUR. CONS. L. REV, 436, 459 (2007).

⁸³ Frank Hoffmeister, *Constitutional Implications of EU Membership: A View from the Commission*, 3 CROAT. Y.B OF EUR. L. & POL'Y 59, 80 (2007).

⁸⁴ LENAERT & NUFFEL, *supra* note 74, at 694.

⁸⁵ In the case of Slovakia, the supremacy of Community law over national law is grounded in Article 7 of the national Constitution. The Article establishes that "legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic." *Id.* at. 699. The lack of supremacy of EU law over the Constitution flows from Article 125 of the Constitution. Hoffmeister, *supra* note 84, at 86.

⁸⁶ In Romania, Article 145 of its national Constitution recognizes the supremacy of Community law over national laws. However, it has been considered that EU law is submitted to the national Constitution. *Id.*

Community law and municipal law has not been clearly established, is constituted by Finland,⁸⁷ Hungary,⁸⁸ Denmark,⁸⁹ Portugal,⁹⁰ Greece,⁹¹ Slovenia⁹² and Latvia.⁹³

As can be observed, the member countries' national courts and legal systems have a divergent perception as to the prevalence of EU law over national Constitution. This might be considered a potential limitation to the effectiveness and the possibility of regulating matters of interest for foreign investors by EU law. However, it must not be forgotten that the supremacy is recognized over non-constitutional law. Therefore, if the EU legislation complies with the national Constitution, the EU law will be applied and protected by the national courts and authorities. Moreover, it must be noticed also that, even recognizing the prevalence of the Constitution over the EU law, the responsibility of the member countries at the level of EU continues being in force. Therefore, the member country is still liable before EU institutions and member countries if it does not fulfill the obligations assumed in an EU instrument as a result of its national Constitution.

⁸⁷ In Finland, the Supreme Administrative Court recognized the supremacy of Community law over national laws. However, its supremacy over national Constitution is still pending to be determined. *Id.* at 78.

⁸⁸ In Hungary, the Constitutional Court has not decided about the relationship between EU law and national law. However, pursuant to Articles 50 and 77 of the national Constitution, it can be concluded that the Constitution represents the supreme law of the country. *Id.* at 87-88.

⁸⁹ Henning Koch, *The Danish Constitutional Order*, in EU ENLARGEMENT THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL 109, 112 (Alfred E. Kellermann, Japp W. de Zwaan, Jeno Czuczai eds., T.M.C. Asser Press 2000).

⁹⁰ Rui Manuel Moura Ramos, *The Adaption of the Portuguese Constitutional Order to Community Law*, in EU ENLARGEMENT THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL 131, 135-38 (Alfred E. Kellermann, Japp W. de Zwaan, Jeno Czuczai eds., T.M.C. Asser Press 2000).

⁹¹ In the case of Greece, the national Constitution gives primacy to Community law over national law pursuant to Article 28. Concerning its supremacy over the national Constitution, the doctrine is divided. Hoffmeister, *supra* note 84, at 81.

⁹² *Id.* at 86.

⁹³ Finally, in Latvia, traditional rules of international treaties apply. From this perspective, international treaties prevail over national statutes but not national Constitution. This position is legally found in Article 13 of the Latvian Law on International Treaties, and Article 16 of the Law on the Constitutional Court. *Id.* at 84. However, as can be seen, this Article regulates traditional international law instruments, but does not mention the specific case of EU law.

Concerning the principle of direct effect, the fact that it does not apply to all EU law provisions must be also taken into consideration.⁹⁴ The lack of direct effect for all the legal binding instruments of the EU constitutes to some extent a limitation to the effective and efficient provision of legal certainty to foreign investors. Nevertheless, it does not constitute a full restriction because member countries are still binding by the compromises assumed at the European level. Therefore, its conduct is restricted in some way. Moreover, in the case of Directives, they have the duty to implement them at national level respecting their content. However, foreign investors do suffer a restriction

⁹⁴ In order to establish if a provision has a direct effect, it must be considered whether the provision is clear and precise enough, unconditional, and without room for discretion as to its implementation. RICHARD GORDON QC, *EC LAW IN JUDICIAL REVIEW* 17 (Oxford University Press 2007). In the specific case of treaty provisions, it has been accepted that many of the EU treaties' provisions have direct effect. Concerning Regulations, they have direct affect and applicability. Therefore, its entry into force and implementation is autonomous or independent of the adoption of any measures of reception at national level. The recognition of the principle of direct application is of substantial importance to the existence of a simultaneous and uniform application of EU regulations in all member states. Case 94/77, *Fratelli Zerbone Snc v. Amministrazione delle finanze dello Stato* 1978 E.C.R. 00099. *See also* Case 50/76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, 1977 E.C.R. 00137. It imposes the obligation on member states of not obstructing the direct effect of Regulations. *Amsterdam Bulb BV*, 1977 E.C.R. 00137. Moreover, it prohibits the adoption of legislative measures, prior or after the existence of the regulation that is against its content. Case 31/78, *Francesco Bussone v. Ministro dell'agricoltura e foreste* 1978 E.C.R. 02429. A contrary situation occurs with EU Directives which are considered lack of direct effect. However, an individual can rely on the provisions of an unimplemented or improperly implemented directive against a State. Likewise, it can be done when the national measures adopted to implement it are not being applied in the required way to achieve the Directive's goal. Case C-62/00, *Marks & Spencer plc v. Commissioners of Customs & Excise* 2002 I-06325. In order to do this, the directive must appear unconditional (An unconditional provision is "an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the Community institutions or by the member states." (Case C-317/05, *G. Pohl-Boskamp GmbH & Co. KG v. Gemeinsamer Bundesausschuss* 2006 E.C.R. I-10611) and sufficiently precise. Case C-246/06, *Josefa Velasco Navarro v. Fondo de Garantía Salarial* 2008 E.C.R. I-00105. *See also* Case C-363/05, *JP Morgan Fleming Claverhouse Investment Trust plc. v. The Commissioners of HM Revenue and Customs*, 2007 E.C.R. I-05517. The obligation is sufficiently precise when it establishes an obligation in unequivocal terms. *G. Pohl-Boskamp GmbH & Co. KG*, 2006 E.C.R. I-10611. *See also* Case C-389/95, *Siegfried Klattner v. Elliniko Dimosio* 1997 E.C.R. 02719), Nonetheless, Directives do not have horizontal direct effect: "it means that individuals cannot rely on directives against other individuals in private actions." Finally, as a general rule, decisions, recommendations, and opinions do not have direct effect. Nonetheless, in the case of a decision, this can be embraced by direct effect character when it is addressed to a member state which fails to fulfill the commitment adopted in the decision. GORDON QC, *supra* note 95, at 20,

for claiming them before national courts until the implementation is not carried out. From this perspective, it would be more efficient for the protection of foreign investors that EU legal measures influencing their investments be adopted "regulations" which do have a direct effect and provide a more uniform content.

3.2.2. The Harmonization Role of the EU law

The importance of harmonizing laws to provide legal certainty has been recognized in the EU.⁹⁵ The EU law contributes to the provision of legal certainty by establishing uniform, common and binding rules within the territory of member countries through a harmonization process.⁹⁶ However, it must be noticed that this harmonization can only be exercised in those areas where the EU has exclusive competences.⁹⁷

Within the EU it is possible to find many legal instruments that provide a common and uniform regulation on many foreign investors' activities. For instance, the Treaty on the Functioning of the EU establishes that the EU will work in the recognition and enforcement of judgments and decisions in extrajudicial cases between member states. Moreover, it also states that the EU will work in the adoption of compatible rules regarding conflicts of law, jurisdiction, and civil procedure, and effective access to justice.⁹⁸ Other areas where EU law has harmonized instruments include electronic

⁹⁵ For instance, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market expresses that harmonization will increase the legal certainty of consumers and business because they will be able to count on a unitary and clear regulatory framework. European Parliament and Council Directive 2005/29, 2005 O.J. (L 149). Another example of harmonizing as an instrument to provide legal certainty is the directive 2007/65/EC which regulates issues on television broadcasting activities. In this directive, the interest for increasing legal certainty was one of the motivations for its enactment. European Parliament and Council Directive 2007/65, 2007 O.J. (L 332).

⁹⁶ NORBERT REICH, *UNDERSTANDING EU LAW* 47 (Intersentia 2005); B. De Witte, A. Geelhoed & J. Inghelram, *Legal Instruments, Decision-Making and EU Finances*, in *THE LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES* 318 (P.J.G. Kapteyn, A.M. McDonnell, K.J.M., Mortelmans, C.W.A., Timmermans & L.A. Geelhoed eds., Wolters Kluwer 2008).

⁹⁷ TFEU, *supra* note 26, Art. 2.

⁹⁸ *Id.* Art. 81.

commerce,⁹⁹ communications,¹⁰⁰ consumer protection,¹⁰¹ customs and trade,¹⁰² corporations,¹⁰³ labor law,¹⁰⁴ environmental law,¹⁰⁵ cosmetics products,¹⁰⁶ recognition of foreign judgments,¹⁰⁷ contractual matters,¹⁰⁸ tobacco,¹⁰⁹ tax,¹¹⁰ and carriage of goods and transportation of people.¹¹¹

3.2.3. Fulfillment of EU law

A substantial aspect in the study of the provision of legal certainty by means of EU law is to consider its levels of compliance by member countries. From 1978 to 2007, 50710 cases for violations of EU law have been detected. They originated as a consequence of complaints, Commission's self initiative or lack of communication regarding implementation of Directives. As of December 31, 2007 3,408 cases divided into 1,684 complaints, 1,072 Commission initiative cases and 652 for non-

⁹⁹ European Parliament and Council Directive 2000/31, 2000 O.J. (L 178).

¹⁰⁰ Council Directive 2002/38, 2002 O.J. (L 128), European Parliament and Council Directive 2002/21, 2002 O.J. (L 108), European Parliament and Council Directive 2002/20, 2002 O.J. (L 108).

¹⁰¹ European Parliament and Council Directive 2002/65, 2002 O.J. (L 271), European Parliament and Council Directive 94/47, 1994 O.J. (L 280), Council Directive 93/13, 1993 O.J. (L 95), European Parliament and Council Directive 1999/44, 1999 O.J. (L 171).

¹⁰² Council Regulation 2913/92, 1992, O.J. (L 302), Council Regulation 2603/69, 1969 O.J. (L 324), Council Directive 98/29, 1998 O.J. (L 148).

¹⁰³ Council Regulation 2157/2001, 2001 O.J. (L 294).

¹⁰⁴ European Parliament and Council Directive 2002/74, 2002 O.J. (L 270), Council Directive 91/553, 1991 O.J. (L 288), Council Directive 2001/23, 2001 O.J. (L 82), Council Directive 89/391, 1989 O.J. (L 183).

¹⁰⁵ European Parliament and Council Directive 2004/35, 2004 O.J. (L 143) and Regulation 1367/2006, *supra* note 197.

¹⁰⁶ Council Directive 76/768, 1976 O.J. (L 262).

¹⁰⁷ European Parliament and Council Regulation 805/2004, 2004 O.J. (L 97), Council Regulation 44/2001, 2001 O.J. (L 12).

¹⁰⁸ Convention on the Law Applicable to Contractual Obligations, Jun. 19, 1980, 1605 U.N.T.S. 80.

¹⁰⁹ European Parliament and Council Directive 2001/37, 2001 O.J. (L 194).

¹¹⁰ Council Directive 90/435, 1990, O.J. (L 225), Council Directive 90/434, 1990 O.J. (L 225), Council Directive 2003/49, 2003 O.J. (L 157), Council Directive 2008/7, 2008 O.J. (L 46), Council Directive 2006/112, 2006 O.J. (L 347).

¹¹¹ Council Regulation 881/92, 1992, O.J. (L 95), Council Regulation 684/92, 1992, O.J. (L 74), Council Regulation 4055/86, 1986 O.J. (L 378), Council Regulation 3922/91, 1991 O.J. (L 373).

communication were under examination.¹¹² However, it must be mentioned that most of the cases were closed before they arrived at the Court of Justice. For example, there were 2322 closures in 2007. Of this group, around 90% of the cases were closed before lodging the application before the Court of Justice.¹¹³

Taking these results into consideration, the EU Commission has considered that EU law enjoys of a “high rate of agreed conformity, strengthening understanding and support for the law, increasing the potential for future good application of the law and fulfilling intentions of the EU legislator.”¹¹⁴ The existence of high levels of compliance of EU law is a clear proof and indicator of the political interest and commitment of member countries in respecting EU obligations. This constitutes a patent demonstration of the effectiveness of EU law to provide legal certainty to foreign investors by a supranational law that is respected, recognized and implemented by member countries. However, it cannot be denied that there is a certain level of breaching of EU law that must be reduced in order to improve the level of effectiveness of EU law.

3.3. The Role of EU Institutions in the Provision of Legal Certainty

EU institutions develop a substantial role in the provision of legal certainty by creating EU legal instruments, promoting the adoption of laws and policies, and controlling their fulfillment. Moreover, they contribute to the adoption of coherent law and policies by exercising their duties through an honest cooperative work amongst themselves, which is expressly established by the EU Treaty.¹¹⁵ An example of this cooperative duty among the EU institutions is the European Parliament Council Commission Interinstitutional Agreement on Better Law-making. There, the institutions agreed to improve the general coordination in the exercise of their legislative powers

¹¹² *Commission Staff Working Document Accompanying the 25th Annual Report from the Commission on Monitoring the Application of Community Law (2007) Statistical Annex*, at 4, SEC (2008) 2855.

¹¹³ *Id.* at 14.

¹¹⁴ *Id.* at 5.

¹¹⁵ EU Treaty, *supra* note 26, Art. 13.

and agreed to keep each other continuously informed about their law-making activities.¹¹⁶ Finally, some EU institutions also promote transparency in the adoption of laws by allowing the participation of the private sector and civil society in the law-making decision process. From this perspective, the following section will study the EU institutions' role in the provision of legal certainty to foreign investors. The institutions to be studied are: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union¹¹⁷ and the Economic and Social Committee.¹¹⁸

3.3.1. The European Parliament

The European Parliament (EU Parliament)¹¹⁹ has several powers within EU structure, the legislative power being one of the principal ones.¹²⁰ The power to create Community law is one the main contributions of this institution to the provision of legal certainty: by the adoption of EU law, rights to foreign investors that cannot be modified by member countries through a national law can be recognized. An additional contribution of the EU Parliament is its power to carry out the codification of EU law. By means of an official codification, the set of acts being codified are put together in a unitary act. This activity helps the clarification of an EU law that had been modified

¹¹⁶ Interinstitutional Agreement on Better Law-Making, Eur. Parl., Council, Commission 2003 O.J. (C 321) [hereinafter Interinstitutional Agreement on Better Law-Making].

¹¹⁷ The European Central Bank and the Court of Auditors are other EU institutions established in Article 13. However, they will not be studied because they do not have a relevant role for the provision of legal certainty.

¹¹⁸ The EU institutional structure includes the Committee of the Regions. However, this institution will not be studied because it does not provide a role in the provision of legal certainty.

¹¹⁹ EU Parliament represents the EU citizens at EU level. EU Treaty, *supra* note 27, Art.10. Its members act independently. EP Rules of Procedure, *supra* note 36, Rule 2.

¹²⁰ EU Treaty, *supra* note 27, Art. 14. As a result of this power, the Parliament can adopt EU laws. However, this authority to enact EU laws is shared with the EU Council, which has led to consider that these institutions, along with the EU Commission, establish the "legislative planning" of the Union. EP Rules of Procedure, *supra* note 36, Rule 33.

several times,¹²¹ which contributes to the knowledge, understanding and certainty of the law applicable to foreign investor's activities. Moreover, the EU Parliament also contributes to the provision of legal certainty by controlling the implementation of European law.¹²² If a Parliament's committee believes that there is breach of EU law, it should report it. With the committee's recommendation, the Parliament's president can bring an action before the Court of Justice.

Another role played by the EU Parliament towards the provision of legal certainty is the development of a coordinated work with the other EU institutions. This coordination among institutions contributes to legal certainty because it promotes the adoption of coherent laws and policies in the EU and allows the Parliament to encourage the enactment and adoption of laws and policies in those areas where it does not have competence. An example of this coordinated work is the possibility that Parliament request from the Commission and the Council the development of policies to be implemented in the EU.¹²³ For instance, the Parliament, pursuant to Article 225 of the Treaty on the Functioning of the EU, has the power to submit a proposal to the Commission if it considers that a union act is necessary to implement EU treaties. Another example is the possibility that the EU Commission attends the Parliament's meetings, having even the possibility to be heard if it is so requested. The European Council and the Council can also be heard by the Parliament.¹²⁴

Finally, the coordinated role exercised by the Parliament is not only exercised at the EU level. The EU law establishes the duty for the EU Parliament to regularly inform

¹²¹ EP Rules of Procedure, *supra* note 36, Rule 80.

¹²² In this way, Rule 121 of the EP Rules of Procedure establishes: "Parliament shall, within the time limits specified by the Treaties and the Statute of the Court of Justice for action by the institutions of the Union and by any natural or legal persons, examine Community legislation and the implementing measures to ensure that the Treaties, in particular where Parliament's rights are concerned, have been fully respected." *Id.* Rule 121.

¹²³ European Parliament, Codecision,

<http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=46&pageRank=3&language=EN> (last visited Apr. 10th, 2009).

¹²⁴ TFEU, *supra* note 26, Art. 230.

national parliaments about its activities.¹²⁵ These meetings can constitute a fundamental mechanism for improving legal certainty because national Parliaments have the possibility to enact national laws that developed the content of EU law. Therefore, this coordinated work encourages coherence among national and European Parliaments.

3.3.2. The European Council

This institution, which is integrated by the Heads of State or Government,¹²⁶ represents the member states of the EU.¹²⁷ The Council has a very important role for the provision of legal certainty by determining the policies and priorities guiding the EU.¹²⁸ Revising the several presidential conclusions, it is possible to find a plausible political interest in the European Heads of Government for improving the conditions of legal certainty. By way of illustration, in 2002 the European Council requested from the Council the adoption of a Community Patent, which must be respectful of the principle of legal certainty.¹²⁹ In the area of securities market, the European Council also emphasized the importance of establishing a regulation that recognized the existence of transparency and legal certainty.¹³⁰ In addition, the Council has also stated that EU judgments and decisions should be “respected and enforced” and be respectful of the legal certainty of people and economic operators. According to this perspective, the Council requested larger compatibility and convergence between the different member countries’ legal systems.¹³¹ Moreover, the Council also has emphasized the important of guaranteeing full, effective and transparent execution of legislation as an action to

¹²⁵ EP Rules of Procedure, *supra* note 36, Rule 123.

¹²⁶ EU Treaty, *supra* note 27, Art. 10.

¹²⁷ Its members are its President and the Commission’s president. The High Representative of the Union for Foreign Affairs and Security Policy also participates in the work developed by the Council.

¹²⁸ For this reason, it has been considered the “architect of the European construction.” NICHOLAS MOUSSIS, ACCESS TO EUROPEAN UNION 43 (European Study Service 2008). However, it should be emphasized that this Council does not have legislative powers. EU Treaty, *supra* note 27, Art. 15.

¹²⁹ Presidency Conclusions, Barcelona European Council (Mar. 15-16, 2002).

¹³⁰ Presidency Conclusions Stockholm European Council (Mar. 23-24, 2001).

¹³¹ Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999).

further investment and improving the business environment through a legal environment friendlier to business.¹³²

Another clear evidence of the possibility of promoting policies in favor of legal certainty through the political interest of European Heads of Government is several of the presidential programs presented by European countries. For instance, during the EU German presidency, one of the main purposes of the government was to enhance legal certainty to citizens and the business sector. Consequently, the German presidency proposed to pursue a policy where companies had a “secure legal framework”. In order to achieve this goal, the presidency program included actions aimed at improving the protection of intellectual property and establishing a more coherent, consistent and secure system of consumer protection, which included the creation of a discussion platform for policymakers, scholars and legal practitioners. Moreover, the program included the adoption of more coherent civil and criminal law.¹³³ Other examples of presidency programs pursuing the provision of legal certainty are the programs of Slovenia and Finland. The former emphasized the necessity of enhancing and simplifying cooperation between the EU and national judicial authorities for civil and economic matters.¹³⁴ The latter called for working towards a more transparent and efficient Union, looking to achieve a more consistent decision-making and transparent operation.¹³⁵

3.3.3. The Council of the European Union

¹³² Presidency Conclusions, Brussels European Council (Mar. 22-23, 2005).

¹³³ German EU Presidency 2007 Programme, *available at* http://www.bmj.bund.de/enid/12fd6f1ee42916d005013d5ff590332c,d92b8e305f7472636964092d0933383036/Priorities_of_the_German_Presidency_in_the_Field_of_Justice/Increasing_legal_certainty_for_citizens__1ap.html.

¹³⁴ Slovenian Presidency Programme, http://www.eu2008.si/includes/Downloads/misc/program/Programme_en.pdf.

¹³⁵ Summary of the Programme for the Finish EU Presidency, <http://presidency.finland.fi/agenda.html>.

This EU's institution comprises ministerial government representatives of each member country of the Union.¹³⁶ The Council helps the provision of legal certainty by implementing its legislative power, which is exercised together with the EU Parliament. Additionally, the Council exercises a vigilant role on EU law fulfillment by member countries. This power is exercised through Articles 263 and 265 of the EC Treaty, which empower the Council with the authority of bringing an action before the Court of Justice of the European Union.

The Council also contributes to the provision of legal certainty by developing policy-making functions pursuant to the different EU treaties.¹³⁷ This would make it possible to develop policies in favor of the provision of legal certainty to foreign investors. This possibility is plausible taking the Council's activity into consideration. For instance, the Council has recognized that the adoption of international agreements with third countries is a fundamental instrument for providing legal certainty and foreseeability to European citizens at a worldwide level.¹³⁸ In another opportunity, the Council invited member states and the Commission to improve the levels of legal certainty and establish a more consistent and clear legal environment, so that SMEs could function better and take advantage of the opportunities of the single market.¹³⁹ In the area of transportation, the Council also emphasized the importance of adopting a new legislative framework for the regulation of public passenger transport services because this would improve transparency and legal certainty for both operators and

¹³⁶ Although the Council has been characterized as an intergovernmental organization, the Council is a supranational institution. MARTIN WESTLAKE & DAVID GALLOWAY, *THE COUNCIL OF THE EUROPEAN UNION* 8 (John Harper Publishing 2004) (1995).

¹³⁷ EU Treaty, *supra* note 27, Art. 16. The Council is considered the most powerful institution of the EU because all the relevant policy or legislative actions within EU are adopted with the Council's agreement. WESTLAKE & GALLOWAY, *supra* note 137.

¹³⁸ *EU Council Justice And Home Affairs Council, EU Council Factsheet Decisions in Civil Law Matters* (Jun. 6, 2008), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/101000.pdf.

¹³⁹ Council of the European Union, Press Release 2832nd Council Meeting Competitiveness (Nov.22-23, 2007).

authorities.¹⁴⁰ In the realm of Intellectual Property, the Council stated that the European Community patent system should be an instrument that complies with the principle of legal certainty.¹⁴¹ Finally, the Council expressed also its interest in the provision of legal certainty when it adopted a directive regarding shareholders in the banking, insurance and securities sectors. The Directive had as a purpose increasing "legal certainty, clarity and transparency" in the area of supervisory approval process with regard to acquisitions and increase of shareholdings in banking, insurance and securities sectors.¹⁴²

3.3.4. The Commission

The Commission is considered the "permanent executive and chief administrative body" in the EU.¹⁴³ Its overall mandate is to work for the general interest of the Union and adopt the required measures to achieve this goal.¹⁴⁴ The Commission mainly contributes to the provision of legal certainty by protecting EU law. In developing this duty, the Commission must guarantee the implementation of the Treaties and the decisions made by EU institutions.¹⁴⁵

¹⁴⁰ Council of the European Union, Press Release 2772nd Council Meeting Transport, Telecommunications and Energy (Dec. 11-12, 2006).

¹⁴¹ Council of the European Union, Press Release 2547th Council Meeting - Competitiveness (Nov. 26-27, 2003).

¹⁴² Council of the European Union, Press Release 2812th Council Meeting Environment (Jun. 28, 2007).

¹⁴³ STEPHEN C. SIEBERSON, *DIVIDING LINES BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES* 175 (T.M.C.Asser Press 2008). It is integrated by independent members who do not follow instructions from any government, institution, body, office or entity. However, the independency of Commissioners has been understood flexibly because they are national of member countries., making complete impartiality or independency not realistic. NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* 155 (Palgrave MacMillan 2006) (1989).

¹⁴⁴ The Court of Justice has recognized as one of the main duties of the Commission to guarantee that the general interest of the Community always prevails over national and personal interests. Case C-432/04, *Comm'n. v. Édith Cresson*, 2006 E.C.R. I-06387.

¹⁴⁵ The development of Commission's duty to implement of EU treaties and decisions adopted by EU institutions is carried out with the assistance of national agencies. However, this task is surrounded by several difficulties such as the lack of staff and financial resources, national agencies do not apply the policy in the way the Commission wants as a consequence of lack of training of national individuals in charge of applying or difficult understanding of the policy, national agencies' lack of interest in applying

Moreover, the Commission helps to enhance legal certainty by proposing legislative acts¹⁴⁶ and policies in favor of the promotion of legal certainty. This Commission's role can be identified in several EU documents. For instance, the European Council made a public recognition of the Commission's interest in working with member countries towards measures aimed at the provision of higher levels of predictability and legal certainty regarding the implementation of competition rules for services of general interest.¹⁴⁷ Likewise, in the White Paper on Services of General Interest, the Commission proposed measures such as consultation with interested parties, which would help to offer legal certainty and predictability to operators and authorities.¹⁴⁸ Furthermore, the interest of the Commission in improving the levels of legal certainty in the region led to the adoption of an expert group on legal certainty issues in clearing and settlement in securities.¹⁴⁹

The Commission also contributes to the cooperating role among EU institutions and national authorities. In development of this coordinated relation, EU law establishes that Commission consultation documents must be sent to national Parliaments upon publication. Moreover, the Commission also must send them the annual legislative

the policy and the existence of different interpretations of EU law. NEILL NUGENT, *supra* note 144, at 174-75.

¹⁴⁶ It has an almost exclusive authority to propose the adoption of EU laws to the Parliament and Council. EU Treaty, *supra* note 27, Art. 17. The exceptions to this power include the cases established in Article 289 of the Treaty of the Union: legislations adopted as a consequence of initiatives coming from member states or European Parliament, recommendations from the European Central Bank or request from the Court of Justice or the European Investment Bank. EU's policies, legislation and programs have been the result of Commission initiatives expressed in the form of explanatory communications and formal proposals of legal acts. MOUSSIS, *supra* note 129, at 45. It has an almost exclusive authority to propose the adoption of EU laws to the Parliament and Council.

¹⁴⁷ Presidency Conclusions, Nice European Council (Dec. 7-9, 2000).

¹⁴⁸ *Commission White Paper on Services of General Interest*, at 14 COM (2004) 374 final (May 12, 2004).

¹⁴⁹ The purpose of this group is advising the Commission and studying matters of legal uncertainty regarding the EU integration of securities clearing and settlement systems. The group is made up of legal experts coming from academia and the public and private sector. Press Release, Financial services: Commission sets up expert group on legal certainty issues in clearing and settlement (Feb. 1, 2005), *available at*

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/123&format=HTML&aged=0&language=en&guiLanguage=en> (last visited Dec. 4, 2008).

program or any other “instrument of legislative planning or policy” at the same time that it sends them to the European Parliament and the Council.¹⁵⁰ This coordinated work with national parliaments helps to generate a more coherent and stable EU law and national law implementing it.

3.3.5. European Economic and Social Committee

The European Economic and Social Committee¹⁵¹ represents the economic and social members of the civil society.¹⁵² It contributes to the provision of legal certainty by permitting the institutional participation and involvement of the civil society and private sector in the EU. It must be noticed that the Committee does not have legislative powers, however, it does have the authority to exercise an advisory role to the European Parliament, the Council and the Commission¹⁵³ when the treaties so establish or when the institutions consider it necessary. Likewise, the Committee can issue opinions by its own initiative if it judges the action appropriate.¹⁵⁴

The Committee has expressed its interest in the provision of legal certainty in many of its opinions. By way of illustration, the Committee celebrated the Commission’s decision to turn into a regulation with direct application the Rome Convention of 1980 on the law applicable to contractual obligations because this would contribute to generate greater legal certainty, and confidence.¹⁵⁵ Moreover, the Committee expressed that: “unification of the conflict rules will provide greater predictability as to

¹⁵⁰ Protocol on the Role of National Parliaments in the European Union, Art. 1, 1997 O.J. (C 340) and EU Treaty, *supra* note 27, Art. 12.

¹⁵¹ It is integrated up to a number of 350 members who are appointed from a list proposed by member countries and for a term of five years. TFEU, *supra* note 26, Art. 302.

¹⁵² Rules of Procedure of the European Economic and Social Committee, *supra* note 40, Preamble. The Committee is made up of three groups who represent employers, employees and “the various other economic and social components of organized civil society.” *Id.* Rule 27.

¹⁵³ EU Treaty, *supra* note 27, Art. 13.

¹⁵⁴ TFEU, *supra* note 26, Art. 304.

¹⁵⁵ *Opinion of the European Economic and Social Committee on the ‘Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation’* COM (2002) 654 final, at 2, 2004 O.J. (C 108).

which system governs contractual relations between natural persons, in turn facilitating and boosting commercial life, since the players involved will be more ambitious if less concerned about the future of their relations.”¹⁵⁶

In another opinion, the Committee emphasized the importance that the Commission established competition regulations that helped to enhance transparency and legal certainty.¹⁵⁷ In the area of social security, the Committee expressed its interest in the adoption of regulations that improved legal certainty and transparency.¹⁵⁸ Finally, in the area of electronic commerce, the Committee emphasized the necessity to adopt measures that generated larger legal certainty. Specifically, the Committee said: “Electronic commerce is undoubtedly hampered by differences and lack of clarity in the legal framework, which prevent its benefits from being fully felt. Moves to offer more legal certainty to providers and users are therefore to be welcomed.”¹⁵⁹ Finally, the Committee also supported the Commission and Council position of establishing electronic commerce under a context of legal certainty.¹⁶⁰

As can be observed, the different EU institutions can play a fundamental role in the promotion, adoption, implementation and control of laws and policies favoring the existence of legal certainty for foreign investors. Moreover, they contribute to the participation of foreign investors in the law and policy-making decision process.

¹⁵⁶ *Id.*

¹⁵⁷ *Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty*, at 10, 1998 O.J. (C 284).

¹⁵⁸ *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems* COM (2006) 16 final - 2006/0006 (COD), at 59, 2006 O.J. (C 324).

¹⁵⁹ *Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market*, at 38, 1999 O.J. (C 169).

¹⁶⁰ *Opinion of the Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee Electronic commerce and indirect taxation*, at 289, 1998 O.J. (C 407).

3.4. The Role of the Court of Justice of EU for the Provision of Legal Certainty

Another fundamental aspect for the provision of legal certainty to foreign investors through the EU is the existence of an independent and supranational Court that guarantees the enforcement of the rights and obligations recognized in EU laws. This role is in charge of the Court of Justice of the EU which is integrated by the Court of Justice, the General Court and the specialized courts.¹⁶¹ The Court of Justice has the power to rule that a member state has not complied with an obligation established in the EU treaty, review the legality of acts of the Union, judge that an EU institution has acted illegally, and help national courts in the implementation of EU law.¹⁶² The exercise of these powers is carried out through different proceedings: a) infringement proceedings, b) preliminary rulings, c) annulment proceedings, and d) special proceedings.¹⁶³ The following section will study the first two proceedings because they constitute the main instruments by which the Court of Justice contributes to the provision of legal certainty to foreign investors.

3.4.1. Infringement Proceedings

This action is of essential importance for the provision of legal certainty because it is the action by which it is possible to force member states to fulfill the commitments assumed in the EU laws. Therefore, this action represents the judicial mechanism by which is guaranteed the implementation of rights and obligations recognized and assumed at EU level by member countries. The violation of EU law can include actions

¹⁶¹ The EU Court of Justice's main goal is to "ensure that in the interpretation and application of the Treaties the law is observed."

¹⁶² ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 21 (Oxford University Press 1999).

¹⁶³ Tom Kennedy, *The European Court of Justice*, in *THE INSTITUTIONS OF THE EUROPEAN UNION* 125, 132-37 (John Peterson & Michael Shackleton eds., Oxford University Press 2006) (2002).

or omissions by the States, breaching of primary, secondary or general principles of unwritten EU law, and the failure to implement directives.¹⁶⁴

Unfortunately, an essential aspect related to the provision of legal certainty through this action is the fact that the action is unavailable to natural or legal persons. A person only has the power to file a complaint before the Commission against a member state as a consequence of a measure or practice that is against a Community law or principle. However, he does not have any power to force the Commission to begin a procedure against a member state. This constitutes a relevant limitation for foreign investors because they are not able to protect their rights directly in the EU Court. They will depend on the action of the Commission, and must bear the risk that the Commission decides not to pursue the case before the Court.

3.4.2. Preliminary Ruling Proceeding

This procedure¹⁶⁵ guarantees the uniform interpretation and application of EU law.¹⁶⁶ Accordingly, the proceeding allows the establishment of a unitary meaning of EU law which is applicable in all member countries of the Union. Therefore, a foreign

¹⁶⁴ P.J.G. Kapteyn, *Administration of Justice*, in *THE LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES* 421, 444-45 (P.J.G. Kapteyn, A.M. McDonnell, K.J.M., Mortelmans, C.W.A., Timmermans & L.A. Geelhoed eds., Wolters Kluwer 2008) and CRAIG & BURCA, *supra* note 3, at 418-24.

¹⁶⁵ The preliminary ruling proceeding has been defined as a:

[D]ialogue, by which courts and tribunals throughout the territory of the European Union may seek guidance from the European Court on matters of law which fall within its competence. The request of the national court for guidance is known as the preliminary reference and the answer given by the European Court as the preliminary ruling. DAVID W.K. ANDERSON, *REFERENCES TO THE EUROPEAN COURT 1* (Sweet & Maxwell 1995).

The relationship between Court of Justice and the national court referring the case is a one of cooperation instead of being one of hierarchy. This situation has led to the relationship being considered as a "dialogue or conversation" among two courts with the purpose of seeking a solution to the case. ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 96 (Oxford University Press 2006).

¹⁶⁶ Court of Justice Information Note on References from National Courts for a Preliminary Ruling, at 1, 2005 O.J. (C 143) [hereinafter Information Note on References from National Courts for a Preliminary Ruling]. See also ARNULL, *supra* note 166, at 97. This uniform interpretation of EU law avoids that domestic cases conflict with cases in other member states. GORDON QC, *supra* note 95, at 111.

investor from a member country doing business with an interest in doing business in the territory of another member country will have much clearer idea of the meaning of the applicable law in the new country hosting his investment.¹⁶⁷ Moreover, it makes possible the interpretation of EU law by a specialized court which protects foreign investors from being subjected to arbitrary, incoherent or lack of expertise legal opinion about the content or extension of rights and duties derived from EU law.

Furthermore, the existence of the preliminary ruling¹⁶⁸ merged with the principles of primacy and direct effect gives foreign investors the opportunity to claim their rights flowing from EU law in national courts. George and Takis Tridimas equal these elements to a “shield” and a “sword:”

[I]ndividuals may use Community law both as a “shield”, i.e. to defend themselves from action by the national authorities which infringes Community rights, and as a “sword”, i.e. to challenge national measures on grounds of compatibility with Community law. Consequently, the

¹⁶⁷ Furthermore, the preliminary ruling procedure also guarantees the effectiveness and credibility of EU law, improves the access of Community law to citizens, “entrenches” the EU law within the member states’ legal systems, Imelda Maher, *National Courts as European Community Courts*, 14 LEGAL STUD. 226, 226-27 (1994), and develops community law. Gerhard Bebr, *Article 177 of the ECC Treaty in the Practice of National Courts*, 26 INT’L COMP. L.Q. 241, 241 (1977).

¹⁶⁸ It must be emphasized that the competence of the Court is limited to interpreting or ruling on the validity of EU law, being excluded from making a decision on the application of EU law to the case’s factual situation or ruling on differences related to the interpretation or implementation of national laws. Information Note on References from National Courts for a Preliminary Ruling, *supra* note 167. In addition, the Court’s power circumscribes only to “questions of the interpretation and validity of Community law as provided for in the Treaty.” Moreover, the Court does not have the power to assert the legality of domestic law and will not decide a case where the claimant had the opportunity to bring a case of annulment pursuant to Article 230 (now Article 263) but failed to do it within the period time established for that. GORDON QC, *supra* note 95, at 112-13. Article 267 of EC treaty establishes that a national court or tribunal may submit a question to the European Court if it considers it necessary in order to issue its judgment. However, if a question appears in a case where the national court’s decision does not have judicial remedy under national law, the court must bring the case to the EU Court. Moreover, if there is a person in custody, the remittance must be done without delay. TFEU, *supra* note 26, Art. 267.

preliminary reference procedure provides an opportunity for individuals and, indeed, national courts to question governmental action.¹⁶⁹

Conclusion

After analyzing the legal order and structure of the EU, it is possible to state that this organization can serve as an instrument to provide legal certainty to foreign investors. Several factors support this conclusion. One of them is that legal certainty is recognized as one of the principles of EU law. The principle looks that the rule of law be clear, precise, and foreseeable for individuals and legal entities, which contributes to create a more certain and predictable legal environment for them. Likewise, it imposes obligations on member countries and makes them liable for its violation, which contributes towards guaranteeing its implementation and respect.

The provision of legal certainty to foreign investors is also achieved through the EU legal order, institutions and Court of Justice. The EU law establishes and develops the principles of primacy, direct and immediate effect, transparency, and loyal or sincere cooperation. These principles provide stability and transparency to EU law and help to assure its execution and consideration by member countries. Furthermore, the EU has an institutional structure and policies that promote a coordinated and transparent work among its institutions and the participation of investors during the decision-making process. Concerning the role of the Court of Justice of the EU, it guarantees the fulfillment of the regional law and the uniform meaning of its provisions. All these elements provide foreign investors with clear, coherent and stable laws, which generate a more certain legal environment for the development of their economic activities.

As a final point, it is of fundamental importance to mention that although the EU can serve as an instrument for providing legal certainty, it cannot compensate or

¹⁶⁹ George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. OF L. & ECON. 125, 128 (2004).

replace the lack of a proper investment climate for foreign investors in its member countries.¹⁷⁰ Factors such as political stability, government effectiveness, rule of law and lower risk of expropriation have a heavier impact in the decision of investing than membership to a regional organization.¹⁷¹ Therefore, the EU constitutes a complementary or additional instrument for improving a country's investment climate conditions for the attraction of foreign investment to its economy by providing a more certain legal environment, but it is not a mechanism that eliminates all the internal negative factors that affect a country's image as an attractive place to invest (insecurity, corruption, political instability, or lack of infrastructure, amongst others).

¹⁷⁰ In 2005 the World Bank analyzed the influence of RTA on the levels of FDI for a member country. It studied the FDI inflows of 152 countries between 1980 and 2002 taking into consideration bilateral and regional trade agreements. The World Bank concluded that the most open and stable countries attracted larger amounts of FDI. THE WORLD BANK, GLOBAL ECONOMIC PROSPECTS: TRADE, REGIONALISM AND DEVELOPMENT 2005 109 (World Bank, 2005).

¹⁷¹ *Id.*