



EU TRADE POLICY



FEDERICA, PHD.

*JEAN MONNET MODULE ON
EU FOREIGN POLICY*



WHAT IS THIS MODULE ABOUT...

- Which are the main features of the EU foreign trade and investment policy?
- What is the role of the EU within the World Trade Organization?
- Which is the role of the EU institutions in negotiating trade and investment agreements with third countries?
- What is the role of the EU Court of Justice in the EU trade and investment-related matters?

LECTURES' AND SEMINARS' CONTENT

- the main features of the EU foreign trade policy and the role of the EU within the World Trade Organization (**Lecture No. 1**)
- the EU foreign investment policy (I): general regulatory framework (**Lecture No. 2**)
- the EU foreign investment policy (II): relationship with EU member states and with third countries (**Lecture No. 3**)
- the role of the EU institutions in negotiating trade and investment-related agreements with third countries (**Lecture No. 4**)

- the role of courts and tribunals in trade (and investment-related) matters (**Seminar No. 1**)
- web-sources and materials on EU trade policy (**Seminar No. 2**)

Seminar No. 1

THE ROLE OF COURTS AND TRIBUNALS IN TRADE (AND INVESTMENT-RELATED) MATTERS



Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Trade Policy

	TRADE DISPUTES	INVESTMENT DISPUTES
WTO		
ECJ		
PCA		
ICSID		
CETA		
DCFTA		
ICJ		
ITLOS		
EUROPEAN COMMISSION		
BIT		
FTA		

THE WTO IN BRIEF

LOCATION: Geneva, Switzerland

ESTABLISHED: 1 January 1995

CREATED BY: Uruguay Round negotiations (1986-94)

MEMBERSHIP: 164 members representing 98% of world trade

FUNCTIONS:

Administering WTO trade agreements

Forum for trade negotiations

Handling trade disputes

Monitoring trade policies

Technical assistance and training for developing economies

Cooperation with other international organizations



<https://www.wto.org>

WTO AGREEMENTS

Goods

Services

**Intellectual
property**

Disputes

GATT

GATS

TRIPS

**Dispute
settlement**

Other goods
agreements
and annexes

Services
annexes

*Market access
commitments*

Countries'
schedules of
commitments

Countries'
schedules of
commitments

DISPUTE SETTLEMENT IN THE WTO

It is regulated by the DSU (**Understanding on rules and procedures governing the settlement of disputes**)

DSB supervises its application

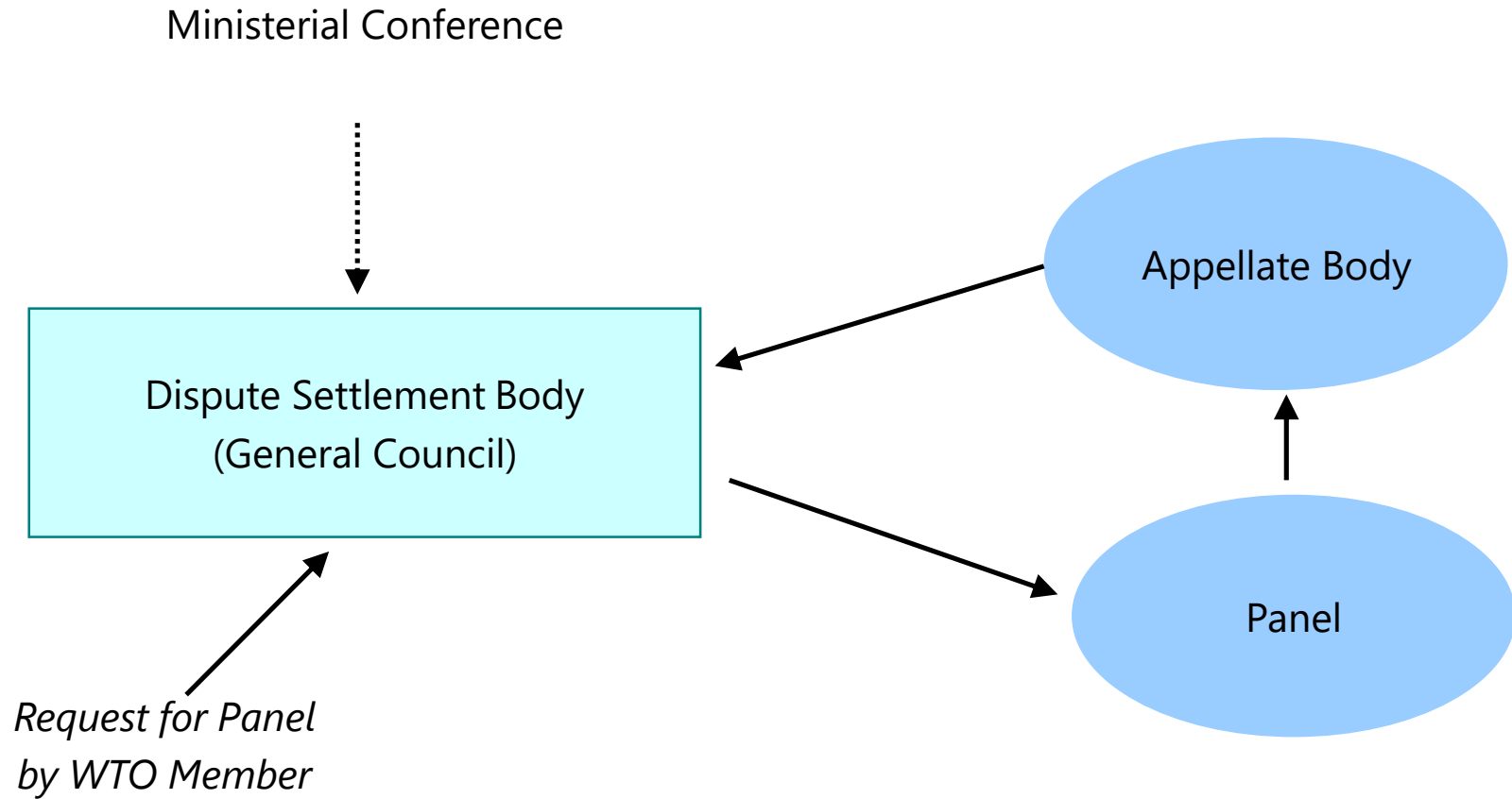
Compulsory jurisdiction

Members obliged to bring disputes under the Covered Agreements to WTO dispute settlement

Exclusive jurisdiction

No other fora

DISPUTE SETTLEMENT IN THE WTO: RELATIONSHIP OF PLAYERS



IMPLEMENTATION

Member must bring the measures into conformity with its WTO obligations

Member must inform DSB of its intentions in for implementation of the recommendations

- **Surveillance** by the DSB
 - Status reports on implementation
- **Temporary** measures
 - **compensation** or
 - **suspension of concessions** (retaliation)

EU AND THE WTO (1)

The WTO's highest decision-making body is the **Ministerial Conference**. The EU Trade Commissioner represents the EU in this forum.

The European Commission also represents the EU in

- the **General Council** of the WTO; and the
- **subsidiary WTO bodies**

The 28 member States of the EU are also WTO members in their own right. The European Commission speaks for all EU member States at almost all WTO meetings.

The **Commission** regularly informs the European Parliament's International Trade Committee (INTA) of WTO issues.

- When **an agreement is negotiated at the WTO**, the Commission needs the formal authorisation of the Council and European Parliament to then sign the agreement on behalf of the EU.
- The **Commission initiates and handles WTO complaints** with the Council support and may propose retaliatory measures to the Council.

Permanent Mission of the European Union to the World Trade Organization (WTO)

https://eeas.europa.eu/delegations/world-trade-organization-wto_en



EU AND THE WTO (2)

Dispute cases involving the European Union (formerly European Communities)

[back to top ▲](#)

Place your mouse over a dispute number in the table below to see the title of the dispute. Click on the dispute number to go to a page giving detailed information for that dispute.

	as complainant	as respondent	as third party
European Union (formerly EC) See this on a map	102 case(s): DS8 , DS15 , DS38 , DS39 , DS40 , DS42 , DS53 , DS54 , DS63 , DS66 , DS73 , DS75 , DS77 ,	85 case(s): DS7 , DS9 , DS12 , DS13 , DS14 , DS16 , DS17 , DS25 , DS26 , DS27 , DS48 , DS62 ,	198 case(s): DS2 , DS18 , DS21 , DS22 , DS32 , DS33 , DS44 , DS46 , DS50 , DS56 , DS58 , DS70 , DS76 , DS99 , DS103 , DS113 , DS122 , DS126 , DS132 , DS156 , DS162 , DS163 , DS175 , DS177 , DS178 , DS179 , DS184 , DS188 , DS192 , DS194 , DS202 ,

https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm

SETTLEMENT OF DISPUTES BEFORE INTERNATIONAL TRIBUNALS OF THROUGH ARBITRATION

- 1) An international tribunal (e.g., ICJ, ITLOS).
- 2) A dispute resolution panel (e.g., WTO).
- 3) Arbitration
 - PCA
 - *Ad hoc* arbitration



INVESTMENT DISPUTE SETTLEMENT

DIPLOMATIC PROTECTION

JURISDICTIONAL CLAUSES IN INVESTMENT TREATIES

- *host State – home State investment disputes*
- *host State- foreign investor investment disputes*

HOST STATE

**BILATERAL
INVESTMENT
TREATY (BIT)**

HOME STATE

(State of nationality of the investor)

STANDARDS OF
PROTECTION of foreign
investments/investors

TODAY:
more than 3000 BITs

FOREIGN INVESTOR

- NATURAL PERSON
- JURIDICAL PERSONS (MNEs)

**What is an
investment?**

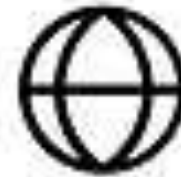
- Financial contribution
- Certain duration
- Risk

HOST STATE



HOME STATE

State-to-State arbitration



ICSID

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

- State-investor arbitration
- Investor-State arbitration

FOREIGN INVESTOR

ICSID SYSTEM

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965

- ICSID Convention
- Washington Convention

Entered into force 14 October 1966

- 139 members / 154 signatories



INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

ICSID SYSTEM

Conciliation Rules

Commission: fact-finding functions and proposal of a solution for the dispute

Arbitration Rules

Final award: binding to the parties to the dispute

Art. 52 ICSID Convention: Annulment procedure

Art. 54 ICSID Convention: enforcement of arbitral awards



ICSID SYSTEM

Arbitral tribunals established *ad hoc*

No rule of precedent

- However, tendency of consistency

ICSID JURISDICTION

Article 25 Washington Convention

1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. [...]

Legal Dispute and **Investment** not defined in Convention

APPLICABLE SUBSTANTIVE LAW

The applicable law as provided by the BIT jurisdictional clause (eg. *Uruguay - USA BIT (2006), Article 30. Governing Law*)

WHEN the BIT does not provide for the applicable law

- Article 42 ICSID: domestic law of the *host* State + relevant rules of international law

Decision *ex aequo et bono* (upon express request by the parties to the dispute)

ARTICLE 52: ANNULMENT

(1) *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

NGOS PARTICIPATION IN INVESTMENT ARBITRATION PROCEEDINGS AS *AMICI CURIAE*

Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) in effect from 10 April 2006

new Rule 37(2) → written amicus curiae submissions

- “(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; and (c) the non-disputing party has a significant interest in the proceeding”.

new Rule 32(2) → attendance of non-parties at hearings

- “(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information».



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

[ABOUT](#)[SERVICES](#)[PROCESS](#)[CASES](#)[ARBITRATORS](#)[ICSID DOCUMENTS](#)[RESOURCES](#)

CASES

RECENTLY REGISTERED

April 21, 2015
9REN Holding S.a.r.l v. Kingdom of Spain (ICSID Case No. ARB/15/15)

April 20, 2015
Alvarez y Marin Corporación S.A. and others v. Republic of Panama (ICSID Case No. ARB/15/14)

RECENTLY CONSTITUTED

April 24, 2015
Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/14/29)

April 7, 2015
Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20)

RECENTLY PUBLISHED

April 22, 2015 - Elsamex, S.A. v. Republic of Honduras (ICSID Case No. ARB/09/4) Order Taking Note of the Discontinuance of the Proceeding (April 21, 2015)

April 21, 2015 - Spence International Investments et al. v. Republic of Costa Rica (ICSID Case No. UNCT/13/2) Procedural Order No. 1 (February



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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- CASES**
- ARBITRATORS
- ICSID DOCUMENTS
- RESOURCES

Search this site...

ICSID > Cases

Cases

Refine By:

Case Status

- Pending
- Concluded

Case Type

- Arbitration
- Conciliation

Applicable Rules

- ICSID Convention - Arbitration Rules
- ICSID Convention - Conciliation Rules
- ICSID Additional Facility - Arbitration Rules
- ICSID Additional Facility - Conciliation Rules
- UNCITRAL
- Ad Hoc

Stage of Proceeding

- Annulment
- Consolidation
- Correction
- Interpretation
- Original

Claimant

Respondent

Claimant(s) Nationality(ies)

- Albanian
- Argentine
- Australian
- Austrian

Respondent(s) Nationality(ies)

- Albanian
- Algerian
- Argentine
- Armenian

Case No.

SEARCH

RESET

Case Count : 519

Case No.	Claimant(s)	Respondent(s)	Status
ARB/15/15	9REN Holding S.a.r.l	Kingdom of Spain	Pending
ARB/15/14	Álvarez y Marín Corporación S.A. and others	Republic of Panama	Pending
ARB/15/13	Devinci Salah Hourani and Issam Salah Hourani	Republic of Kazakhstan	Pending
ARB/15/12	PT Ventures, SGPS, S.A.	Republic of Cabo Verde	Pending
ARB/15/11	Total E&P Uganda BV	Republic of Uganda	Pending
ARB/15/10	Orange SA	Hashemite Kingdom of Jordan	Pending
ARB/15/9	Poltava Gas B.V. and Poltava Petroleum Company	Ukraine	Pending
ARB/15/8	Aktau Petrol Ticaret A.Ş. and Som Petrol Ticaret A.Ş.	Republic of Kazakhstan	Pending
ARB/15/7	WalAm Energy Inc.	Republic of Kenya	Pending
ARB/15/6	Mobil Investments Canada Inc.	Canada	Pending
ARB/15/5	BP Energy Services Company LLC	Republic of Costa Rica	Pending

CETA - NEW RULES FOR ISDS

Main features of the new **Investment Court System**

- a permanent court inspired by public international courts
- made up of a Tribunal of First Instance and an Appeal Tribunal
- not based on temporary ad hoc tribunals
- professional and independent adjudicators
 - appointed for long terms of office by both parties taking into account all interests at stake
 - held to the highest ethical standards through a strict code of conduct
- will work transparently by opening up hearings to the public; publishing documents submitted during cases; allowing interested parties (NGOs, trade unions, citizens' representatives) to intervene in the proceedings and make submissions.

CJEU - OPINION 1/17 (30 APRIL 2019)

[FREE TRADE AGREEMENT WITH CANADA]

- the investor-state dispute settlement provisions of the Canada-EU's Comprehensive Economic and Trade Agreement ("CETA") are compatible with EU Law
- the Court has confirmed that this mechanism is compatible with EU law, as tribunals would not be in a position to apply or interpret EU law (other than those provisions relating to CETA) and thus to affect the autonomy of EU law.



DEEP AND COMPREHENSIVE FREE TRADE AGREEMENT (DCFTA)

Chapter 14 Dispute Settlement

based on the model of the WTO Dispute Settlement Understanding

- Consultation
- arbitration panel (3 experts)
- [*amicus curiae*]



EUROPEAN COURT OF JUSTICE

OPINIONS ON FTAs:

CJEU - OPINION 2/15 (16 May 2017) [Free Trade Agreement with Singapore]

- 'foreign direct investment' term in the TFEU includes both investment liberalization in the pre-establishment phase and substantive investment protection post-establishment
- however, portfolio investment and ISDS are not covered by Article 207(1) TFEU and remained under shared competences

CJEU - OPINION 1/17 (30 April 2019) [Free Trade Agreement with Canada]

the investor-state dispute settlement provisions of the Canada-EU's Comprehensive Economic and Trade Agreement ("CETA") are compatible with EU Law

INTRA-EU BITS:

On **6 March 2018**, the Court of Justice of the European Union issued its decision in the **Achmea case** (C-284/16) between the Slovak Republic and Dutch insurer Achmea BV.

- the CJEU found investor-state dispute settlement provisions in intra-EU BITS to be incompatible with EU law

(preliminary reference by the German Federal Court of Justice over whether EU law precluded the application of an arbitration clause in an IIA between EU member states.)

ECJ - PRELIMINARY REFERENCE PROCEDURE

when a national court or tribunal refers a question of EU law to the European Court of Justice (ECJ) for a preliminary ruling so as to enable the national court, on receiving that ruling, to decide the case before it

Article 267 TFEU

'Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon.'

While lower courts have discretion as to whether to make references to the ECJ, Article 267 TFEU excludes such discretion in the case of final courts of appeal.

DISPUTE SETTLEMENT IN EU TRADE POLICY

- Provides a rapid and effective means of settling disagreements on whether a country has acted in conformity with its international obligations;
- Applies the agreements, and develops the interpretative understanding of the agreements

The European Union has included dispute settlement mechanism based on the WTO dispute settlement mechanism in all of its Free Trade Agreements since 2000

Since 2009 the European Union also includes investor-to-state dispute settlement mechanisms in trade and investment agreements

Since 2015 the European Commission has been working to establish a Multilateral Investment Court project.

THE MULTILATERAL INVESTMENT COURT PROJECT

Since 2015 the European Commission has been working to establish a Multilateral Investment Court.

The overall objective for creating a Multilateral Investment Court is to set up a permanent body to decide investment disputes. It would build on the EU's groundbreaking approach on its bilateral FTAs and be a major departure from the system of investor-to-State dispute settlement (ISDS) based on ad hoc commercial arbitration.

A Multilateral Investment Court, like the approach in the FTAs, would bring the key features of domestic and international courts to investment adjudication.

The idea is that the Multilateral Investment Court would:

- have a **first instance tribunal**
- have an **appeal tribunal**
- have **tenured, highly qualified judges**, obliged to adhere to the strictest ethical standards and a dedicated secretariat.
- be a **permanent body**
- rule on disputes arising **under future and existing investment treaties**
- **prevent disputing parties from choosing** which judges ruled on their case

For the EU, the Multilateral Investment Court would replace the bilateral investment court systems included in EU trade and investment agreements.

Both the **EU-Canada Comprehensive Economic Trade Agreement (CETA)** and the **EU-Vietnam Free Trade Agreement** foresee setting up a permanent multilateral mechanism and contain a reference to it.

DISPUTE SETTLEMENT IN INTERNATIONAL LAW

A. Settlement of disputes through diplomacy

B. Settlement of disputes before international tribunals or through arbitration

Permanent tribunals

- International Court of Justice (ICJ)
- International Tribunal for the Law of the Sea (ITLOS)
- European Court of Human Rights (ECHR)
- Inter-American Court of Human Rights (IACHR)
- African Court of Human and Peoples' Rights (ACHR)
- World Trade Organization (WTO) Appellate body

▪ **Grounds for jurisdiction → Consent of the States parties to the dispute**

International Court of Justice

(15 judges)

Advisory Opinions (requested by
UN organs)

Contested Case (between states
only)

Effect of Decision: have no binding effect,
though have moral force

Effect of Decision: binding, final and
without appeal (on the state parties)

INTERNATIONAL COURT OF JUSTICE

Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice

Christina L Davis Julia C Morse

International Studies Quarterly, Volume 62, Issue 4, December 2018, Pages 709–722, <https://doi.org/10.1093/isq/sqy022>

countries are more likely to file ICJ cases against important trading partners than against states with low levels of shared trade.

Economic interdependence changes the incentives for how states resolve their disputes

Trade encourages the use of the ICJ. In the midst of a conflict, states face uncertain political relations and risk that an escalating dispute could spill over to harm trade

ICJ CASES BY DISPUTE TYPE

	<i>Number</i>	<i>Percent</i>
Aerial incident	14	10
Borders/maritime delimitation	39	29
Diplomatic or consular relations	14	10
Use of force	23	17
Property rights	17	13
Trusteeship or decolonization	5	3
Other	24	18
Total cases	134	100

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Regulation establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party

23 July 2014

The Regulation is built upon three main principles:

- (1) the overall operation of the allocation of financial responsibility must be 'budget neutral' as regards the EU
- (2) a third-country investor should not be disadvantaged by the need to manage the financial responsibility within the EU
- (3) the mechanism must respect the fundamental principles governing the EU's external action

FINANCIAL RESPONSIBILITY

Article 3 of the Regulation 912/2014

- who actually undertakes the conduct giving rise to the foreign investor's claim
 - where the measures concerned are taken by the EU institutions, then financial responsibility should rest with the EU institutions
 - where the measures complained of are taken by a Member State of the EU, then financial responsibility should rest with that Member State.

BUT where the actions of the Member State are 'required' by the law of the EU that financial responsibility should lie with the EU.

IUS STANDI

where the EU has afforded the treatment, it will act as the respondent in the claim.

the member State acts as the respondent where it has afforded the treatment

HOWEVER, the EU may act as a respondent, when

(a) the EU may bear 'all or at least part of the potential financial responsibility' and

(b) 'the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union'

UNRESOLVED ISSUES

What if a difference arises between the member State and the Commission about the determination of who should be the respondent?

- TFEU →: a decision by the Commission can be reviewed by the ECJ in accordance with Article 263(1) TFEU and the member State has the opportunity to raise a claim against the Commission under Article 263(2) TFEU

ARTICLE 263 TFEU

(1) The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission [...] intended to produce legal effects vis-à-vis third parties. [...]

2) It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

[...]