ARTÍCULOS DE DERECHO PROCESAL Y ARBITRAJE

THE TERMINATION AGREEMENT: THE FUTURE OF INTERNATIONAL INVESTMENT ARBITRATION IN THE EU

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1. Foundations of International Investment Protection

Since the end of the Second World War, the international economic order has been progressively reshaped by a commitment to the liberalization of trade and investment. This liberal *ethos*, embodied in the General Agreement on Tariffs and Trade[332] and later the World Trade Organization, sought to dismantle tariff barriers and promote the cross-border flow of goods, services, capital, and—albeit to a more limited extent—people.

Foreign direct investment (FDI) emerged as the cornerstone of trade-liberalization-driven global economic integration, enabling the transfer of capital, technology, and know-how from investor (capital-exporting) States to host (capital-importing) States.

a) Bilateral Investment Treaties (BITs)

FDI in its early stages was marked by high sovereign risk, where political instability, abrupt regulatory shifts, and expropriation frequently undermined investment security and investors' rights.

In response to pervasive legal uncertainty and sovereign risk, States began concluding Bilateral Investment Treaties in the late 1950s. These reciprocal agreements between sovereign States aimed to promote and protect cross-border investments by establishing clear legal standards to mitigate sovereign risk, enhanced legal predictability, and depoliticized investor-State relations[333].

While the content of specific treaties differs, most bilateral investment treaties (BITs) incorporate a common set of substantive protections designed to safeguard the rights of

[332] General Agreement on Tariffs and Trade (GATT), October 30, 1947, 55 U.N.T.S. 194.
[333] Cornell Law School Legal Information Institute. "Bilateral Investment Treaty." *Wex*, last modified March 2023.

investors[334]. Among these guarantees are: (i) the prohibition of unlawful expropriation, requiring it to serve a public purpose, to follow due process and adequate compensation to be provided; (ii) fair and equitable treatment (FET), the protection of investors' legitimate expectations through legal certainty and administrative transparency; (iii) most-favored-nation status, obliging host States to treat foreign investors as their own nationals; and (iv) to provide complete protection to the investment.

b) Investor-State Dispute Settlement (ISDS)

A hallmark of modern BITs is the inclusion of Investor-State Dispute Settlement (ISDS) mechanisms. ISDS empower foreign investors to initiate direct claims against host States before independent international arbitral tribunals[335], bypassing the requirement to exhaust local judicial remedies[336].

The International Centre for Settlement of Investment Disputes (ICSID) holds a central role among ISDS forums.. Established in 1965 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, it was created by the World Bank to serve as a specialized and depoliticized institution dedicated exclusively to the resolution of investment disputes. ICSID operates within a self-contained procedural framework in which its awards are binding and automatically enforceable in all ICSID Contracting States without the need for recognition or *exequatur* by domestic courts[337].

2. The EU's Legal Stances Against Intra-EU Investor-State Arbitration

During the late 1990s and early 2000s, a dense network of BITs was rapidly concluded across Europe[338]. These treaties, in line with global practice, became the backbone of the continent's investment protection framework, providing substantive guarantees for the protection of foreign investors and procedural mechanisms—international arbitration—for the resolution of disputes.

For many years, this regime functioned with little challenge, enjoying broad acceptance. However, over the past decade, growing tensions emerged between ISDS and the

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[334] Thomson Reuters. "Bilateral Investment Treaty (BIT)." *Practical Law UK Glossary*, Resource ID 45022491. Maintained 2025.
[335] Columbia Center on Sustainable Investment (CCSI). *Primer: International Investment Treaties and Investor-State Dispute Settlement*. May 31, 2019. Updated December 19, 2021.
[336] Thomson Reuters. "Investor-State Dispute Settlement (ISDS)." *Practical Law UK Glossary*. Maintained 2025.
[337] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), adopted March 18, 1965; entered into force October 14, 1966.
[338] Jeswald W. Salacuse, "4 A History of International Investment Treaties," in *The Law of Investment Treaties*, 3rd ed. (New York: Oxford University Press, February 2021), 96–167,

European Union's internal legal order. Increasingly, the European Union—through both the jurisprudence of the Court of Justice of the European Union (CJEU) and the decisions of the European Commission (EC)—expressed a frontal opposition to ISDS operating between EU Member States and EU investors where the application or interpretation of EU law is at stake.

This opposition has been consolidated through two principal legal doctrines. First, the EC has developed a substantive line of reasoning based on EU State aid law, arguing that arbitral awards which impose financial obligations on Member States may constitute unlawful State aid[339], incompatible with Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). Second, the CJEU has articulated a doctrine rooted in the autonomy and primacy of EU law that establishes that intra-EU investor-State arbitration mechanisms are fundamentally incompatible with the Founding Treaties[340].

The signing of the *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*[341] on 29 August 2020 represented the culmination of this sustained opposition to intra-EU investor-State arbitration mechanisms. Endorsed by 23 Member States, the Agreement formally terminated more than 200 intra-EU BITs, dismantling the parallel system of investment protection that had operated alongside the EU legal framework for decades.

For understanding this tectonic shift—and the legal developments underpinning it—is essential to fully comprehend the broader transformation of the Union's approach to international investment protection.

3. The State Aid Doctrine

a) Development of the EU State Aid Regulation

Since the inception of the European project, the creation of a unified and competitive internal market has been one of its core objectives. As it is established in the 1957 Treaty of Rome[342], Article 2: "*The Community shall have as its task, by establishing a common*

339 Jokin Beltrán. "EU State Aid Law: Further EU Challenges to Investment Arbitration." *Investment Arbitration Outlook*, no. 9 (October 1, 2022). Uría Menéndez.

340 nrique Arnaldos Orts and Jana Lamas de Mesa. "IntraEuropean Union Investment Protection: What Now?" *Investment Arbitration Outlook*, no. 8 (October 1, 2021), Uría Menéndez.

341 *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*, O.J. L 169/1, May 29, 2020 (entered into force Aug 29, 2020).

342 *Treaty Establishing the European Economic Community* (Treaty of Rome), March 25, 1957, 298 U.N.T.S. 11 (entered into force January 1, 1958).

market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities (...)". In pursuit of this objective, Member States recognized early on that State intervention in favor of domestic economic actors could distort competition and fragment the internal market, so to prevent it and ensure fair competition across the Union, the Founding Treaties enshrined a general prohibition on State aid to constrain undue government interference in the economy[343]. This framework is primarily codified in Articles 107[344] and 108 TFEU[345].

Unlawful State aid is defined by the presence of four cumulative criteria[346]: (i) intervention by the State in the economy or through State resources, (ii) conferment of a selective advantage in the form of an economic benefit not available under normal market conditions, (iii) potential to distort competition, and (iv) capacity to affect trade between Member States of the European Union.

The EC is the institution entrusted with the authority to supervise and enforce this regime. The CJEU has also played a fundamental role by interpreting and progressively expanding the concept of State aid. Through its jurisprudence, the Court has clarified that the notion of State aid encompasses not only direct subsidies, but also more subtle forms of economic advantage. In line with this expansive interpretation, both the CJEU and the Commission have held that arbitral awards rendered in BIT proceedings may qualify as State aid when their execution entails the transfer of public resources to private actors on terms that breach EU market rules.

[343] Lena Hornkohl, "Protecting the Internal Market From Subsidisation With the EU State Aid Regime and the Foreign Subsidies Regulation: Two Sides of the Same Coin?," *Journal of European Competition Law & Practice* 14, no. 3 (April 2023): 137–151

[344] European Union. Consolidated Version of the Treaty on the Functioning of the European Union. Official Journal of the European Union, C 115, May 9, 2008. Article 107: 1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

[345] European Union. Consolidated Version of the Treaty on the Functioning of the European Union. Official Journal of the European Union, C 115, May 9, 2008, Article 108: The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. (…) If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid (…)The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. (…)

[346] European Commission, *Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016/C 262/01), OJ C 262, 19 July 2016.

In this context, the Commission has formally identified two cases—*Micula v. Romania*[347] and *Antin v. Spain*[348]—in which arbitral awards rendered under the ICSID Convention were determined to constitute unlawful State aid and therefore to be incompatible with EU law.

b) The Micula Case

The case arose from Romania's decision to repeal—three years ahead of schedule—a fiscal incentive scheme established under Emergency Government Ordinance No. 24/1998 (EGO 24), which had granted tax benefits to investors. The measure was withdrawn during Romania's EU accession process, following the EC's determination that it constituted incompatible State aid under Articles 107 and 108 TFEU.

In response, the Micula brothers initiated ICSID arbitration under the Sweden–Romania BIT, claiming that the abrupt revocation of the benefits promised under EGO 24—on which they had relied when establishing their business operations—breached the fair and equitable treatment standard.

The ICSID tribunal upheld the claim[349], holding that Romania's abrupt and unilateral withdrawal of the EGO 24 incentives violated the investors' legitimate expectations and breached its treaty obligations, awarding the claimants EUR 82 million in compensation.

Less than two years after the issuance of the final award by ICSID, the European Commission determined that Romania's payment of the award constituted unlawful State aid[350] and, therefore, could not be executed. Although the award qualifies the payments as "compensation for damages", the Commission denied that this nature excluded the application of Article 107 TFEU. On the basis of the *Asteris*[351] precedent, it affirmed that

[347] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 (Dec. 11, 2013), award issued by an ICSID tribunal under the Sweden–Romania BIT.
[348] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award dated June 15, 2018; Rectification Decision January 29, 2019; Annulment Committee Decision July 30, 2021.
[349] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 (Dec. 11, 2013), award issued by an ICSID tribunal under the Sweden–Romania BIT.
[350] European Commission. *Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v. Romania of 11 December 2013*. Official Journal of the European Union L 232/43, April 9, 2015.
[351] *Joined Cases 106 to 120/87, Asteris AE and others v. Hellenic Republic and European Economic Community*, Judgment of the Court (Fifth Chamber), 27 September 1988, ECLI:EU:C:1988:457; [1988] ECR 05515.

only compensations arising from a general regime of civil liability without selectivity use of public funds are excluded from the scope of State aid rules.

It was found that the award and its subsequent execution did not amount to neutral compensation for damage, but rather reinstated the unlawful benefits originally granted under EGO 24, as it fulfilled the criteria to be considered unlawful State aid: (i) it conferred an economic advantage unavailable under normal market conditions, (ii) was selective, (iii) involved public funds from the Romanian State budget —consistent with the CJEU's jurisprudence[352] that judicial decisions can entail State aid—, and (iv) was likely to distort competition and affect trade between Member States.

Moreover, the Commission emphasized that although the facts underlying the arbitral dispute predated Romania's accession to the EU in 2007, the enforcement of the award took place afterward, qualifying as "new aid" subject to EU law and the Commission's *ex ante* control. This position reflected well-established CJEU case law, which provides that EU law governs legal effects arising after accession, even if they originate from facts predating membership[353].

Although the Micula brothers successfully challenged the Commission's decision before the General Court of the European Union[354], which annulled it for lack of temporal jurisdiction, the CJEU[355] subsequently overturned that ruling and upheld the Commission's assessment.

c) The Antin Case

Between 2007 and 2012, Spain implemented an incentive scheme for renewable energy under Royal Decree 661/2007[356], offering guaranteed feed-in tariffs and stable returns for up to 25 years. Attracted by this regulatory framework, Antin Infrastructure Services invested in two solar power plants in the country. However, in the aftermath of the 2008 financial crisis and under growing fiscal pressure, Spain retroactively repealed the scheme

[352] *Joined Cases C399/10 P & C401/10 P, Bouygues SA and Bouygues Télécom SA v. European Commission and Others*, Judgment of the Court (Grand Chamber), March 19, 2013, ECLI:EU:C:2013:175; [2013] ECR I175.

[353] *Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG*, Case C122/96, Judgment of the Court (Sixth Chamber), October 2, 1997, ECLI:EU:C:1997:458; [1997] ECR I05325 and *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, Case C162/96, Judgment of the Court, June 16, 1998, ECLI:EU:C:1998:293; [1998] ECR I03655.

[354] *European Food and Others v. Commission*, Cases T624/15, T694/15 & T704/15, Judgment of the General Court, June 18, 2019, EU:T:2019:423, annulling Commission Decision (EU) 2015/1470.

[355] *European Commission v. European Food and Others* (Micula case), C516/22 P, Judgment of the Court (Fourth Chamber), January 25, 2022; affirmed in Grand Chamber judgment of October 2, 2024, ECLI:EU:C:2022:50

[356] *Real Decreto 661/2007, de 25 de mayo, por el que se regula la actividad de producción de energía eléctrica en régimen especial*. BOE No. 126, 26 May 2007, enter into force 1 June 2007.

for existing installations, replacing it with a discretionary remuneration system subject to periodic review.

In response, Antin initiated ICSID arbitration under the Energy Charter Treaty (ECT)[357], arguing that Spain had violated the fair and equitable treatment standard through arbitrary and disproportionate regulatory changes. The tribunal agreed, finding that the reforms had fundamentally disrupted the economic framework of the investment, and awarded Antin EUR 112 million in compensation, later revised to EUR 101 million[358].

Nonetheless, enforcement of the award was ultimately blocked by the EC[359], which—consistent with its reasoning in the *Micula* case—determined that the arbitral award constituted State aid under Article 107(1) TFEU. The Commission found that the award met the requirements of unlawful State aid, as it (i) involved a transfer of public funds (requiring an active decision by Spanish authorities), (ii) conferred an economic advantage (as the benefits under Royal Decree 661/2007 exceeded normal market conditions), (iii) was selective (benefiting only Antin), and (iv) had the potential to distort competition and affect trade within the liberalized EU energy market. Moreover, the Commission considered that the compensation arose from a new legal right created by the arbitral award in 2018 and classified it as "new aid" under Article 108(3) TFEU.

The Commission also dismissed the applicability of Article 351 TFEU and the principle of legitimate expectations, concluding that Antin had received no concrete assurances and that this principle cannot be invoked to justify measures that contravene EU law.

d) Establishing Precedent: The Commission's Use of State Aid Law in Micula and Antin

The *Micula* and *Antin* cases marked a turning point in the European Commission's interpretation of investment arbitration under EU State aid law. In both cases, the Commission affirmed that arbitral awards rendered under ICSID, based on intra-EU BITs or the Energy Charter Treaty, could constitute unlawful State aid within the meaning of Article 107(1) TFEU.

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[357] *Energy Charter Treaty*, adopted December 17, 1994, entered into force April 16, 1998, 2080 U.N.T.S. 95.

[358] Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31, initiated under the Energy Charter Treaty, award issued June 15, 2018.

[359] European Commission. *Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v. Romania of 11 December 2013*, O.J. L 232/43, April 9, 2015.

Although formally framed as compensation for damages, the Commission reasoned that the awards effectively reinstated the economic advantages originally granted through incentive schemes—Romania’s EGO 24 and Spain’s Royal Decree 661/2007—that had already been deemed incompatible with the internal market. As such, enforcement of the awards was seen not as neutral reparation but as the reconstitution of previously conferred unlawful State aid.

Additionally, the Commission identified the legally relevant moment for assessing the existence of aid as the point at which the arbitral awards became enforceable and payment was due—not the moment when the investors' rights to compensation first arose. On this basis, the payments were classified as “new aid,” allowing for the Commissions oversight under Article 108 TFEU.

4. The Incompatibility Doctrine

A recently consolidated strand of EU legal doctrine developed by the Court of Justice of the European Union holds that international investment arbitration mechanisms established under intra-EU BITs or multilateral agreements such as the ECT are fundamentally incompatible with the constitutional architecture of the European Union.

Arbitral tribunals, while often called upon to interpret and apply Union law, operate entirely outside the EU judicial system. The Court reasons that this structural separation undermines the principles of autonomy, primacy, and uniformity of EU law by bypassing the exclusive jurisdiction of the CJEU under Article 267 TFEU[360] to provide authoritative interpretations of Union law.

Therefore, the Court holds that allowing Member States to submit such disputes to external arbitral bodies contravenes Article 344 TFEU[361], infringes the principle of

[360] Treaty on the Functioning of the European Union (TFEU), Art. 267:
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

[361] Treaty on the Functioning of the European Union (TFEU). Article 344 :
“Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

effective judicial protection enshrined in Article 19 TEU[362], and endangers the integrity and primacy of EU law.

a) The Achmea Case

This development reached its most prominent expression in Achmea B.V. v. Slovak Republic and Komstroy LLC v. Republic of Moldova.

The *Achmea* case arose from a dispute between the Dutch insurer Achmea B.V. and the Slovak Republic, following Slovakia's 2006 decision to reverse the earlier liberalization of its health insurance market by prohibiting the distribution of profits from private health insurers. In response, Achmea initiated arbitration proceedings in 2008 under the Netherlands–Slovakia BIT, alleging a breach of the treaty's substantive protections. In 2012, the *ad ho*c arbitral tribunal, constituted under the UNCITRAL Rules, issued an award finding that Slovakia had violated its obligations under the BIT and ordered it to pay Achmea EUR 22.1 million in damages[363].

Slovakia subsequently challenged the arbitral award before German courts, arguing that the arbitral tribunal lacked jurisdiction on the grounds that the arbitration clause in the Netherlands–Slovakia BIT was incompatible with EU law. Although the lower court dismissed this claim[364], the German Federal Court of Justice[365] referred preliminary questions to the CJEU concerning the clause's compatibility with EU law and this ultimately ruled that the arbitration mechanism did indeed violate the EU treaties.

The CJEU[366] underscored the fundamental incompatibility between the EU legal order and international investment arbitration, as it contravened the principle of autonomy, enshrined in Article 344 TFEU. This defining feature, the Court explained, underpins "*a*

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[362] Treaty on European Union (TEU). Article 19:
The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
The Court of Justice shall, in accordance with the Treaties: rule on actions brought by a Member State, an institution or a natural or legal person; give preliminary rulings at the request of courts or tribunals of the Member States; rule in other cases provided for in the Treaties.

[363] *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*, PCA Case No. 200813, Final Award, December 7, 2012, conducted under the UNCITRAL Arbitration Rules.

[364] *Oberlandesgericht Frankfurt am Main*, decision of December 18, 2014, *Slovak Republic v. Achmea B.V.*, Case No. 26 Sch 3/13.

[365] *Bundesgerichtshof*, decision of March 3, 2016 (Case I ZB 2/15), referring questions to the CJEU on the compatibility with EU law of an investorState arbitration clause in an intra-EU BIT.

[366] *Slovak Republic v. Achmea B.V.*, Case C284/16, Judgment of the Court (Grand Chamber), March 6, 2018, ECLI:EU:C:2018:158.

structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States(...)" which obliges Member States to ensure the uniform application of EU law. To safeguard the uniform application of EU law, the Court stressed the central role of the preliminary ruling procedure under Article 267 TFEU. This mechanism requires national courts to refer questions on the interpretation of Union law to the CJEU, allowing it to issue binding rulings that clarify its scope and, thus, preserving legal coherence across the Member States.

In light of these considerations, the CJEU concluded that arbitral tribunals established under BITs do not confine themselves to applying the domestic law of the contracting States but may also interpret relevant international agreements, including EU law. It further held that such tribunals cannot be regarded as "courts or tribunals of a Member State" within the meaning of Article 267 TFEU, given their exceptional jurisdictional character and independence from national judicial systems. As a result, they lack access to the preliminary ruling procedure, effectively removing disputes involving EU law from the Union's judicial framework.

The Court concluded that arbitration clauses in intra-EU BITs are incompatible with the EU legal order. In line with this reasoning, the CJEU found that the Netherlands and Slovakia had enshrined a dispute resolution mechanism within the BIT incapable of guaranteeing the proper application and full effectiveness of EU law. Accordingly, it concluded that the arbitration clause "*has an adverse effect on the autonomy of EU law*" and must be deemed incompatible with the Treaties.

b) The Komstroy case

In 1999, a complex cross-border electricity supply arrangement was established involving Ukrainian and Moldovan state-owned entities, a Ukrainian distributor (Energoalians), and a British Virgin Islands intermediary (Derimen). Although Derimen served as a contractual intermediary, electricity was physically delivered from Ukrenergo to Moldtranselectro, with volumes agreed directly between them. When Moldtranselectro partially defaulted on its payments—leaving a debt exceeding USD 16 million—Derimen assigned the claim to Energoalians, which, after unsuccessful attempts at recovery in domestic courts, initiated ad hoc arbitration under the ECT and the UNCITRAL Rules. On 25 October 2013, the tribunal found Moldova in breach of its ECT obligations and awarded Energoalians the full amount claimed[367].

[367] *Energoalians SARL v. Republic of Moldova*, ad hoc UNCITRAL arbitration under Article 26(4)(b), ECT, Final Award, October 25, 2013.

Moldova challenged the award before the Paris Court of Appeal, arguing that the ECT was inapplicable because the underlying operation did not qualify as an "investment" under the Charter. On 12 April 2016, the Paris Court of Appeal annulled the award for lack of jurisdiction[368]. Komstroy LLC, as successor to Energoalians, appealed the decision, and on 28 March 2018, the French Court of Cassation overturned the annulment[369], remanding the case to a differently composed chamber of the Paris Court of Appeal for reconsideration.

Before issuing a new ruling, the appellate court referred three preliminary questions to the CJEU, seeking clarification on whether the contractual claim at issue qualified as an "investment" under Articles 1(6) and 26(1) of the ECT, and whether such a claim could validly give rise to arbitration under the treaty's dispute settlement mechanism.

Therefore, a central legal issue emerged, whether the CJEU had jurisdiction to interpret the ECT notwithstanding the fact that both parties to the dispute, Komstroy (a Ukrainian company) and the Republic of Moldova, were non-EU entities. The Court affirmed that the ECT is a mixed agreement, concluded jointly by the European Union and its Member States, and as such, its provisions form an integral part of the EU legal order upon entry into force[370]. Consequently, they fall within the scope of Article 267 TFEU, which empowers the CJEU to issue preliminary rulings on the interpretation of EU law.

Additionally, in an expansive interpretation of previous case law[371], the Court rejected the notion that the non-EU nationality of the litigants limited its jurisdiction, emphasizing that its competence is determined not by the identity of the parties, but by whether the interpretation of an EU law provision is necessary to resolve the case before the referring court. Where an international agreement applies in both EU and non-EU contexts, the CJEU may intervene to ensure its uniform interpretation across the Union.

The seat of arbitration—Paris, France—was also pivotal, as the award was rendered within the territory of an EU Member State. Accordingly, the annulment proceedings were governed by French procedural law (*lex fori*), which, as it incorporates EU law,

[368] *Komstroy LLC (formerly Energoalians SARL) v. Republic of Moldova*, Paris Court of Appeal, 12 April 2016, Case No. 13/22531.
[369] *Cour de cassation (Chambre commerciale, financière et économique),* judgment of 28 March 2018, Case No. 16 16.568, *Komstroy LLC* v. Republic of Moldova.
[370] *Republic of Moldova v. Komstroy LLC*, Case C741/19, Judgment of the Court (Grand Chamber), 2 September 2021, ECLI:EU:C:2021:655, para. 33.
[371] *Hermès International v. FHT Marketing Choice BV*, Case C-53/96, EU:C:1999:302, Judgment of the Court (Sixth Chamber), 15 June 1999; *Parfums Christian Dior SA v. Tuk Consultancy BV* and *Assco Gerüste GmbH v. Wilhelm Layher GmbH & Co. KG*, Joined Cases C-300/98 and C-392/98, EU:C:2000:688, Judgment of the Court, 14 December 2000.

required French courts—pursuant to Article 19 TEU and the principle of primacy—to apply Union law.

On this basis, the Court unequivocally confirmed its jurisdiction to interpret the ECT and held that Article 26(2)(c), which allows investor-State arbitration, was inapplicable in this case, as it would breach Article 344 TFEU by referring disputes involving EU law to a non-EU forum—even where both parties were extra-EU entities—thereby undermining the uniform interpretation of Union law and the principle of effective judicial protection enshrined in Article 19 TEU.

c) The Legacy of Achmea and Komstroy: The Demise of Intra-EU Investment Arbitration

The *Achmea* judgment signed the death sentence of intra-EU investment arbitration based on BITs, effectively rendering arbitration clauses contained in intra-EU BITs incompatible with Union law, thereby invalidating their use as a legitimate dispute resolution mechanism within the internal market.

In its aftermath, the European Commission adopted a firm position opposing the recognition, and enforcement of arbitral awards rendered under intra-EU BITs, arguing that they infringed the principles of autonomy and primacy of EU law. This position ultimately culminated in the 2020 Termination Agreement, through which all remaining intra-EU BITs were formally extinguished.

Furthermore, the *Komstroy* judgment expanded the incompatibility doctrine established in *Achmea*, beyond intra-EU BITs to include ISDS mechanisms embedded in multilateral treaties ratified by the EU as in the case of the ECT.

5. The Termination Agreement

Following the *Achmea* ruling, EU Member States issued a series of declarations on 15[372] and 16[373] January 2019 addressing the legal consequences of the Court of Justice's ruling and reaffirming their commitment to the integrity of the EU legal order. Building on this political and legal consensus, on 24 October 2019, Member States reached a multilateral treaty—*the Agreement for the Termination of Bilateral Investment Treaties between the*

[372] Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Brussels, 15 January 2019).
[373] Declaration of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, issued by Finland, Luxembourg, Malta, Slovenia, and Sweden; and Declaration of Hungary of 16 January 2019 on the same matter (Brussels, 16 January 2019).

Member States of the European Union—aimed at formally and collectively ending the intra-EU BIT regime.

This development sent shockwaves through the globe, as it definitively and formally terminated the longstanding ISDS infrastructure within the EU—rendering intra-EU BITs, which had served for decades as a cornerstone of investor protection, legally obsolete and unenforceable.

a) Legal Scope

The Termination Agreement and the coordinated termination of intra-EU BITs codified the legal conclusion reached by the CJEU in *Achmea*, as explicitly acknowledged in the Agreement's preamble:

> *[I]nvestor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union*.[374]

The definitive intent to completely dismantle the intra-EU BIT regime is clearly articulated in Articles 2 and 3 of the Agreement as it is provided that that all BITs listed in Annex A (190)[375] and their sunset clauses and the sunset clauses of the already-terminated BITs of Annex B (23)[376].

By extinguishing the sunset clauses—provisions that prolong the substantive protections of a BIT, including access to arbitration, beyond its conclusion—the Termination Agreement ensured that no residual investor rights or arbitration mechanisms would survive its entry into force. As a result, the EU effectively achieved the complete dismantling of intra-EU investment arbitration as of the Agreement's effective date.

Although declaratory in nature and similar to Clause 5 of the preamble, Article 4(1) of the Termination Agreement plays a crucial interpretative role by affirming that ISDS clauses in intra-EU BITs are incompatible with the EU Treaties and are invalid not only

[374] Preamble 5 of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (Brussels, 5 May 2020).
[375] Annex A (pages 17–37) of the *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*. Brussels, 5 May 2020. O.J. L 169/1.
[376] Annex B (pages 38–39) of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. Brussels, 5 May 2020. O.J. L 169/1.

from the date of the *Achmea* judgment —6 March 2018—, but retroactively from the moment the last contracting party to a given BIT acceded to the European Union.

b) Effects on Concluded, New and Pending Arbitration Proceedings

With respect to arbitration procedures, the Treaty delineates its effects across three distinct scenarios: concluded arbitrations (Article 6), newly initiated proceedings (Article 5), and pending cases—including those in which an award has been rendered but not yet enforced (Articles 7, 8,9).

"Concluded Arbitration Proceedings" refer to cases that ended with a settlement or a final award prior to 6 March 2018, and where the award was either executed before that date with no further set-aside proceedings or was annulled before the Termination Agreement entered into force. As established in Article 6, these proceedings are not subject to the Agreement's provisions, which have no retroactive effect in such cases and cannot be used to reopen or affect them.

In contrast, "New Arbitration Proceedings"—defined as those initiated after 6 March 2018—are subject to a general prohibition and should not proceed. Pursuant to Article 5 of the Agreement, arbitration clauses contained in intra-EU BITs shall not serve as a legal basis for initiating new proceedings.

With respect to "Pending Arbitration Proceedings"—defined as those initiated before 6 March 2018 but not yet concluded—the Termination Agreement establishes a series of provisions. Contracting parties are required to jointly notify the arbitral tribunals of the legal implications of the *Achmea* judgment. In addition, where a Member State is involved in judicial proceedings concerning an award rendered under an intra-EU BIT, it must request the competent court—including those in third countries where enforcement is sought—to set aside, annul, or refuse recognition and enforcement of the award. Moreover, the Agreement also introduces transitional measures for investors engaged in such proceedings, notably the possibility of participating in a Structured Dialogue (Article 9) and seeking recourse before domestic courts (Article 10).

c) Dispute Resolution Method for Pending Cases: Structured Dialogue

The Termination Agreement introduces a confidential settlement mechanism known as the "Structured Dialogue," which may be initiated by either the investor or the Member State [Article 9(1)] within six months following the termination of the relevant intra-EU

BIT [Article 9(2)], and is conducted under the supervision of an impartial facilitator [Article 9(7)].

As a mandatory precondition for initiating the Structured Dialogue, the investor must suspend any ongoing arbitration or, where an award has been rendered but remains unenforced, commit not to initiate enforcement proceedings [Article 9(1)]. Access to the mechanism is further precluded if the investor has previously challenged the contested measure before a national court.

Furthermore, the facilitator is jointly appointed by the investor and the respondent State [Article 9(8)] to act as an intermediary and mediate between the parties. If no agreement is reached within one month, the Director-General of the Legal Service of the European Commission may designate a former judge of the Court of Justice to make the appointment.

The Structured Dialogue aims to achieve an amicable settlement within six months of the facilitator's appointment [Article 9(10)]. If no agreement is reached, the facilitator may propose a final settlement [Article 9(12)], to which each party must respond within one month, with any rejection requiring a written justification [Article 9(13)]. Should a settlement be reached, it becomes legally binding and must include the investor's commitment to: (i) withdraw any pending claims or renounce enforcement of any arbitral award—including prior compensation received—and (ii) refrain from initiating new arbitration proceedings [Article 9(14)].

In sum, the Structured Dialogue marks a paradigmatic shift away from binding investor-State adjudication toward a markedly asymmetrical process that prioritizes the preservation of the EU legal order at the expense of legal certainty and enforceable remedies for investors. By conditioning access on the investor's waiver of procedural rights, imposing strict eligibility requirements, and excluding those who have already pursued judicial review, the mechanism effectively dismantles the formal and substantive protections once granted under intra-EU BITs.

d) Dispute Resolution Method for Pending Cases: National Courts

Article 10 of the Agreement also offers investors a judicial alternative to resolve pending intra-EU arbitration claims by allowing them to bring proceedings before national courts.

However, this access is subject to the same series of strict conditions as the Structured Dialogue. Furthermore, the Agreement restricts the legal basis for claims to domestic or

EU law, expressly excluding the substantive protections contained in intra-EU BITs, as Article 10(3) clarifies that the provisions of a BIT shall not form part of the applicable legal framework before national courts.

6. Navigating legal uncertainty: the future of intra-eu investment arbitration after the termination agreement

The Termination Agreement marked the culmination of a broader evolution in EU legal doctrine, defined by sustained opposition to investor-State arbitration mechanisms based on BITs, and signaled the beginning of a new chapter in the regulation of investment protection within the Union—albeit one still fraught with unresolved questions and legal uncertainties.

Inside the EU, some Member States—namely Austria, Sweden, and Finland[377]—have not signed the Termination Agreement, while Ireland has no intra-EU BITs in force[378]. Nonetheless, these States are also aligning with EU law by pursuing bilateral termination. Finland and Sweden began consensual terminations in 2020, resulting in the withdrawal from multiple treaties, and Austria has followed a similar path, terminating several BITs. These developments indicate that even the remaining holdouts are on course to eliminate their intra-EU BITs in the near future.

Outside the EU, the effects of the Termination Agreement have created a legal divide between the treatment of intra-EU investment arbitration within the Union and overseas, giving rise to significant enforcement challenges. While the EU and its Member States are bound by the Termination Agreement, ICSID awards rendered under intra-EU BITs remain enforceable in third countries. This asymmetry places EU Member States in a situation akin to that of the *Micula* case, facing conflicting obligations— between compliance with EU law within the Bloc and adherence to the ICSID Convention under international law abroad.

This fragmentation may also encourage forum shopping, prompting intra-EU investors to restructure their investments through third countries where BIT protections remain in force. The United Kingdom, now outside the EU and no longer bound by the obligations of the Brexit transition period or the duty of sincere cooperation[379], may leverage its remaining BITs with EU Member States and its geographic proximity as a strategic

[377] Kurtz Nagy Kinetics, "Agreement on the Termination of Intra-EU Bilateral Investment Treaties: Sunset in Stone?" *Kluwer Arbitration Blog*, 4 November 2020.
[378] *Micula and Others v. Romania*, [2020] UKSC 5, Supreme Court of the United Kingdom, 19 February 2020.
[379] Dentons, "Termination of intra-EU bilateral investment treaties: the UK – the last safe haven?," *Dentons Insights*, November 9, 2020

asset[380]. Canada similarly offers an alternative through the CETA[381], which provides modernized investment protection standards and access to ISDS. The United States and Switzerland also represent viable options beyond the reach of EU legal constraints, enabling investors to circumvent the effects of the Termination Agreement.

The legal status of intra-EU disputes under the Energy Charter Treaty remains equally uncertain. Although the Termination Agreement expressly excludes ECT-based claims from its scope—Preamble 10—, the CJEU's ruling in *Komstroy* extended the *Achmea* doctrine to investment arbitration under the Charter. As a result, such claims may be considered unenforceable within the EU. While the Commission has indicated its intention to address this issue, no concrete action has yet been taken.

Beyond the formal extinction of intra-EU BITs under the Termination Agreement, many voices argue that it does not definitively preclude investment arbitration within the EU. Arbitral tribunals have consistently upheld jurisdiction over cases initiated after the *Achmea* case (*Eskosol v. Italy*[382]*, United Utilities v. Estonia*[383]*, and Marfin v. Cyprus*[384]), relying on the principle of "perfected consent"—the idea that once an investor accepts a standing offer to arbitrate, the host State's consent becomes irrevocable. Furthermore, Article 25 of the ICSID Convention prohibits the unilateral withdrawal of consent once arbitration proceedings are underway—a principle upheld in *Veolia v. Lithuania*, where the tribunal maintained jurisdiction despite the invocation of the Termination Agreement. Additionally, a growing body of post-*Achmea* jurisprudence—including *Griffin v. Poland*[385]*, Hydro Energy v. Spain*[386]*, and AMF v. Czech Republic*[387]—ruled that intra-EU BITs may still provide a valid jurisdictional basis for arbitration. Looking ahead, arbitral tribunals will be central in navigating legal uncertainty, exercising their authority under *Kompetenz-Kompetenz* to determine jurisdiction amid normative fragmentation.

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[380] Paralika, Marily. "The termination of intra-EU BITs: How did EU Member States get here and what happens next?" Fieldfisher, June 8, 2020.

[381] *Comprehensive Economic and Trade Agreement (CETA)*. Chapter 8, Article 8(1) (Definitions). Concluded 30 October 2016; provisionally applied 21 September 2017.

[382] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Final Award, September 4, 2020.

[383] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Final Award, 21 June 2019.

[384] *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Final Award, July 26, 2018.

[385] *GPF GP S.à.r.l. (Griffin) v. Poland*, SCC Case No. 2014/168, Award on Jurisdiction (Feb. 2017) & Final Award (29 Apr. 2020). *GPF GP S.à.r.l. v. Republic of Poland*, [2018] EWHC 409 (Comm) (UK High Court, Mar. 2 2018).

[386] *Hydro Energy 1 S.à r.l. & Hydroxana Sweden AB v. Kingdom of Spain.* ICSID Case No. ARB/15/42. Final Award 5 Aug. 2020

[387] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 201715, Final Award 11 May 2020.

Moreover, the attempt to extinguish sunset clauses raises complex legal questions as Article 54(b) of the Viena Convention of the Law of the Treaties (VCLT) permits States to consensually amend or terminate treaties but Article 70(1)(b) provides that such termination must not affect legal situations created prior to termination unless explicitly agreed. Retroactively nullifying the protections afforded by sunset clauses may thus undermine legal certainty and conflict with foundational principles such as *pacta sunt servanda*, the protection of legitimate expectations, and the non-retroactivity of treaty termination under Article 28 VCLT. Arbitral practice remains divided on this issue: in *Magyar Farming*[388], the tribunal held that sunset clauses could be applied, whereas in *UP and C.D. Holding v. Hungary*[389], the tribunal accepted that such clauses could, in principle, be removed by mutual agreement.

In light of these complexities, the future of intra-EU investment arbitration remains far from settled. While the Termination Agreement has advanced the EU's objective of eliminating BIT-based investor-State investment arbitration in the internal market, multiple legal uncertainties persist—ranging from the enforceability of sunset clauses and pending claims to the treatment of intra-EU disputes by non-EU jurisdictions. The fragmentation between the EU legal system and international law continues to generate conflicting obligations, legal uncertainty, and procedural asymmetries. Whether arbitral tribunals will continue to assert jurisdiction, how third country structuring strategies will evolve, and what role the ECT will ultimately play are questions that remain unanswered. Ultimately, only time—and future case law—will reveal how these tensions will crystallize and whether the EU's vision of a unified internal investment regime will fully materialize in practice.

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