Recent developments regarding the impact of EU law on international investment law and arbitration in Europe and beyond

PROF. DR. NIKOS LAVRANOS, LLM[1]

MR. VÍCTOR M. BARRERA QUINTANAR, LLM CANDIDATE[2]

Abstract: This article examines recent developments in international investment law alongside significant changes in European Union (EU) law, with a focus on both substantive and procedural aspects of investor-State dispute settlement (ISDS). It analyses the EU's efforts to terminate intra-EU bilateral investment treaties (intra-EU BITs) and their implications for investors. Particular attention is given to the implications of the withdrawal of the EU and several of its Member States from the Energy Charter Treaty (ECT), the challenges investors face when enforcing favourable awards, and the increasing shift towards enforcement in jurisdictions outside the EU, i.e., such as the US, UK, Australia, and Switzerland. The article also reviews UNCITRAL Working Group III's endeavours to transition to the proposed Multilateral Investment Court (MIC), while also addressing recent trade agreements concluded by the EU with major international partners.

Key words: Investment law, Investment arbitration, ICSID, Achmea, BIT Termination, UNCITRAL Working Group III, Multilateral Investment Court, Komstroy, Energy Charter Treaty (ECT), ECT withdrawal, European Union Law, Award enforcement, Investment Dispute Resolution, Investor, State Dispute Settlement (ISDS), Termination Agreement, Investment Court System, CJEU, Arbitration, ISDS reforms.

Resumen: Este artículo examina los desarrollos recientes en el derecho internacional de inversión junto con los cambios significativos en el derecho de la Unión Europea (UE), con un enfoque en los aspectos sustantivos y procesales acerca de la solución de controversias entre inversores y Estados

1 Secretary General of EFILA; Visiting Professor, Leiden University. All views expressed in this article are of the authors alone and cannot be attributed to EFILA or any other organisation.

2 Attorney specialized in dispute resolution. LLM candidate at Leiden University's Advance Master of Laws in Advanced Studies in International Dispute Settlement and Arbitration.

(ISDS). Analiza los esfuerzos de la UE para terminar los tratados bilaterales de inversión intra-UE (intra-EU BITs) y sus implicaciones para los inversores. Se presta especial atención a las consecuencias retiro de la UE y de varios Estados parte de ésta del Tratado sobre la Carta de la Energía (ECT), los desafíos que enfrentan los inversores para ejecutar laudos favorables, y el creciente cambio hacia jurisdicciones fuera de la EU, i.e., como Estados Unidos, Reino Unido, Australia y Suiza para su ejecución. El artículo también revisa los esfuerzos del Grupo de Trabajo III de UNCITRAL para la transición hacia el propuesto Tribunal Multilateral de Inversiones (MIC), además de abordar los recientes acuerdos comerciales celebrados por la UE con socios internacionales de relevancia.

Palabras clave: Derecho de inversión, Arbitraje de inversión, ICSID, CIADI, Achmea, Terminación de BITs, Grupo de Trabajo III de UNCITRAL, Tribunal Multilateral de Inversiones, Komstroy, Tratado sobre la Carta de la Energía (ECT), Retiro del ECT, Derecho de la Unión Europea, Ejecución de laudos, Resolución de disputas de inversiones, Solución de controversias entre inversores y Estados (ISDS), Acuerdo de Terminación, Sistema de Tribunales de Inversión, TJUE, Arbitraje, Reformas del ISDS.

I. Introduction

In the past years significant developments took place that highlight the increasing impact of EU law on international investment law and arbitration by affecting the investment law policy of the EU Member States, both internally and externally, and by introducing modifications to substantive and procedural aspects of international investment law. The primary focus of the EU's effort has been to modify, or as it calls it, "reform" the existing investor-State dispute settlement (ISDS) system contained in practically all bilateral investment treaties (BITs) and free trade agreements (FTAs)[3]. The EU started this "reform" agenda with its Communication regarding the EU's future investment policy[4] in 2010 after it had obtained exclusive external competence for matters related to

[3] See for an extensive overview: G. Bermann, "General Aspects of Investor-State Dispute Settlement" in N. Lavranos and S. Castagna (eds), *International Arbitration and EU Law* (2nd edn, Elgar 2024) 152-204.

[4] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a

foreign direct investment (FDI) as per Article 207 of the Treaty on the Functioning of the European Union (TFEU)[5]. The first concrete results of these efforts are the new generation trade and investment agreements, which the EU has signed with Canada[6], Singapore[7] and Vietnam[8] as well as the recent updates of existing treaties with, for example, Mexico[9] and Chile[10]. In addition, the Court of Justice of the EU (CJEU) –in conjunction with domestic courts of the EU Member States– have rendered in the past years several far-reaching decisions that increase the tension between EU law and international investment law.

The following sections will review the impact of EU law on ISDS, intra-EU BITs and the Energy Charter Treaty (ECT) by discussing the most important recent developments. This analysis starts with the situation post-*Achmea*[11], which culminated in the Termination Agreement[12], which is now fully in force for 23 Member States that have ratified it[13].

Comprehensive European International Investment Policy", COM (2010) 343 final, 7 July 2010, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52010DC0343> accessed 23 January 2024.

5 Article 207(1) TFEU: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action". On the scope of the exclusive competence of the EU, see: N. Lavranos, "Mixed Exclusivity: The CJEU's Opinion on the EU-Singapore FTA" (2017), 2 *European Investment Law and Arbitration Review* 3-34.

6 EU-Canada Comprehensive Economic and Trade Agreement (CETA).

7 EU-Singapore Free Trade Agreement, Investment Protection Agreement and Digital Trade Agreement.

8 EU-Vietnam Free Trade Agreement (EVFTA).

9 EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement. Relevantly, on 17 January 2025 the EU and Mexico concluded negotiations for the modernization of the Agreement.

10 EU-Chile Interim Trade Agreement.

11 Case C-284/16 *Achmea BV v Slovak Republic* [2018] ECLI:EU:C:2018:158.

12 See: *Termination Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union*, [2020] OJ L 169/1, 29 May 2020, ELI <http://data.europa.eu/eli/agree_eums/2020/529/oj> accessed 23 January 2025.

13 As of January 2025, Austria, Finland, and Sweden have still not ratified the Termination Agreement. Neither has the United Kingdom, which was a member of the EU at the time of the agreement's signing.

Subsequently, we will examine the recent developments regarding the ECT, in particular following the failure of the ECT "modernisation" process, which has resulted in the withdrawal of several EU Member States (France, Poland, Germany, Luxembourg), while Ireland, Slovenia, Portugal, the Netherlands, Denmark and Spain have publicly announced and/or notified their intention to withdraw from the ECT[14]. In addition, the UK, now a non-EU Member State, also decided to denounce the ECT[15]. Most recently, the EU has also formally adopted a decision to withdraw from the ECT[16].

Moreover, given the increasingly arbitration-unfriendly climate within the EU, we can observe a rising number of successful enforcements of intra-EU ISDS awards outside the EU, which we will review as well[17].

Finally, we will focus on the external dimension of the EU's efforts to modernise the ISDS by reviewing the state of play regarding the Comprehensive Economic and Trade Agreement (CETA)[18] and the other EU investment agreements, and, on a global level, the first results of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on ISDS reforms, in particular regarding the proposed Multilateral Investment Court (MIC)[19].

---

14 See: IA Reporter, "Ireland to leave the Energy Charter Treaty" (6 June 2024), which mentions also all the other EU Member States, <https://www.iareporter.com/articles/ireland-to-leave-the-energy-charter-treaty/> accessed 23 January 2025.

15 See: UK Government, "UK Departs Energy Charter Treaty" (Press Release, 22 February 2024) <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty> accessed 23 January 2025.

16 See: European Commission, "EU Notifies Exit from Energy Charter Treaty and Puts an End to Intra-EU Arbitration Proceedings" (Press Release, 28 June 2024), <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513> accessed 23 January 2025; see generally: N. Lavranos, "Comment: Leaving the Energy Charter Treaty Also Means Leaving a Legal Mess Behind" (Borderlex, 10 July 2023) <https://borderlex.net/2023/07/10/comment-leaving-the-energy-charter-treat-also-means-leaving-a-legal-mess-behind/> accessed 23 January 2025; F. Eichberger, "ECT Modernisation Perspectives: No Winners: The Long End of the ECT Modernisation Process" (Kluwer Arbitration Blog, 8 May 2023) <https://arbitrationblog.kluwerarbitration.com/2023/05/08/ect-modernisation-perspectives-no-winners-the-long-end-of-the-ect-modernisation-process/> accessed 23 January 2025.

17 See: *Report on Compliance with Investment Treaty Arbitration Awards 2024* (3rd edn, November 2024) <https://www.internationallawcompliance.com/> accessed 23 January 2025.

18 See: for an extensive analysis: D. Overduin, "Investment Chapter in CETA: Groundbreaking or Much Ado About Nothing" in N. Lavranos and S. Castagna (eds.), *International Arbitration and EU Law* (2nd edn, Elgar 2024) 205-230.

19 See: F. Brodlija, "Sorting the Building Blocks of ISDS Reform: Recent Developments from the UNCITRAL Working Group III" (2024) 9(1) *European Investment Law and Arbitration Review*, 69-94.

II. The Termination Agreement Regarding Intra-EU BITs

Following the CJEU's *Achmea* judgment, delivered in March 2018, 23 Member States signed a Termination Agreement, which entered into force on 29 August 2020 and aims to terminate all their intra-EU BITs.

The Termination Agreement declares all intra-EU BITs and all disputes based on them to be incompatible with EU law, and thus moot. New intra-EU BIT arbitrations are declared to be no longer possible.

In addition, all sunset clauses are also declared inapplicable, meaning that investors cannot rely on the sunset clauses of those intra-EU BITs for investments made prior to their termination. In other words, whereas sunset clauses are intended to kick in when BITs are terminated in order to protect the vested rights of investors for investments made prior to termination of a BIT, the Termination Agreement retroactively takes that right away from investors.

Recently, domestic courts, in particular in France and Sweden, have annulled intra-EU ISDS awards by reference to the CJEU's jurisprudence, which declared an incompatibility of intra-EU ISDS awards with EU law[20].

Significantly, the German Federal Supreme Court ruled that the Netherlands could rely on a provision of German Procedural Law to effectively stop the intra-EU ECT ICSID proceedings, which were initiated by RWE and Uniper against the Netherlands[21].

Most recently, the German Constitutional Court refused to consider the constitutional complaint of Achmea against the setting aside of its award following the CJEU's *Achmea* judgment[22].

---

20 Regarding France, see: Paris Court of Appeal, *République de Pologne v Société STRABAG SE et al*, Case No. 20/13085, 19 April 2022; regarding Sweden, see: Svea Court of Appeal, *Festorino Invest Limited and others v Republic of Poland*, Case No. T 12646-21, 20 December 2023.

21 See: Federal Court of Justice (Bundesgerichtshof), Cases I ZB 43/22, I ZB 74/22, and I ZB 75/22 <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/EN/2023/2023126.html?nn=17683472> accessed 23 January 2025.

22 German Federal Constitutional Court (BVG) 2 BvR 557/19 and 2 BvR 141/22, both judgments dated 24 July 2024.

Thus, the bottom line of these developments is that intra-EU ISDS arbitration is *de facto* impossible now within the EU, which means that European investors can only rely on domestic courts in the Member States in order to seek protection against (in)direct expropriation and other unfair treatment. This conclusion is particularly depressing given the fact that the very same European Commission and the CJEU have repeatedly confirmed the existence of a significant backsliding of the Rule of Law level in several EU Member States – in particular, due to the political pressure and influence imposed on domestic court judges[23]. Hence, the level of investment and investor protection within the EU is being significantly and consistently lowered. Consequently, the only remaining option for European investors would be the European Court of Human Rights in Strasbourg, though, it remains to be seen whether this route will actually be a viable option[24].

All this makes it particularly attractive for European investors to (re)structure their investments via non-EU Member States, such as Switzerland or the post-Brexit UK. Additionally, as will be discussed below, this will increasingly compel European investors to enforce their intra-EU ISDS awards outside the EU.

III. The Withdrawal from the ECT by the EU and its Member States

After most of the intra-EU BITs and arbitration based on those treaties were terminated and declared incompatible with EU law, attention shifted towards the ECT. Again, the CJEU took the lead in rendering its *Komstroy* judgment[25], which essentially extended the ban of investment treaty arbitration to intra-EU ECT disputes.

---

23 See for example: *Commission v Poland (Independence of the Supreme Court)* (Judgment, 2019) C-619/18, EU:C:2019:531; *Commission v Poland (Disciplinary Regime for Judges)* (Judgment, 2021) C-192/18, EU:C:2021:596; *Commission v Hungary (Judicial Retirement Age)* (Judgment, 2012) C-286/12, EU:C:2012:687. See also D. V. Kochenov and N. Lavranos, "Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union" (2022) 14 *Hague Journal on the Rule of Law* 195, 195-219 <https://rdcu.be/d6lGb> accessed 23 January 2025.

24 See: R. Spano, "Intra-EU BITs and Achmea: On a Collision Course with Strasbourg?" (2024) 9(1) *European Investment Law and Arbitration Review* 161-172.

25 Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655.

In parallel, the ECT modernisation process, which resulted in a significant revision of the ECT text[26], and which was agreed "in principle" by all ECT Contracting Parties (including the EU and its Member States), failed because, instead of signing up to the revised ECT text, several EU Member States opted to withdraw from the ECT. In addition, in June 2024, the EU also announced that it is formally withdrawing from the ECT.

This surprising and sudden *volte face* has thrown the ECT into an existential crisis. Meanwhile, on 9 December 2024, the other non-EU Contracting Parties of the ECT have adopted the modernised ECT text, which is envisaged to provisionally enter into force as of 3 September 2025[27].

However, the (announced) withdrawals from the ECT has not prevented a UK-based investor (Klesch Group) from initiating ECT disputes against the EU[28], Germany[29] and Denmark[30]. Similarly, two ECT disputes have been initiated by European and a UK investor against Finland[31], while Croatia has also been hit by an ECT dispute initiated by a Hungarian investor[32].

---

26 Energy Charter Treaty Secretariat, "The Energy Charter Conference Adopts Decisions on the Modernisation of the Energy Charter Treaty" <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf> accessed 23 January 2025.

27 ECT Secretariat, <https://www.energycharter.org/media/news/article/the-energy-charter-conference-adopts-decisions-on-the-modernisation-of-the-energy-charter-treaty/> accessed 23 January 2025.

28 See: *Klesch Group Holdings Limited and others v European Union* (ICSID Case No. ARB(AF)/23/1).

29 See: *Klesch Group Holdings Limited and Raffinerie Heide GmbH v Federal Republic of Germany* (ICSID Case No. ARB/23/49).

30 See: *Klesch Group Holdings Limited, Klesch Refining Denmark A/S and Kalundborg Refinery A/S v Kingdom of Denmark* (ICSID Case No. ARB/23/48).

31 See: *Suomi Power Networks TopCo B.V., Supernova II Bidco BV and AMF Tjänstepension AB v Republic of Finland* (ICSID Case No. ARB/24/3); *Sauna UK BidCo Limited v Republic of Finland* (ICSID Case No. ARB/24/38).

32 See: *MOL Hungarian Oil and Gas Public Limited Company v Republic of Croatia* (ICSID Case No. ARB/24/19). Similarly, further cases have been commenced against other States, for example: *Suomi Power Networks TopCo B.V., Supernova II Bidco BV and AMF Tjänstepension AB v Republic of Finland* (ICSID Case No. ARB/24/37); *Stratius Investments Limited v Hungary* (ICSID Case No. ARB/24/6); *Mondi Investments Limited v Republic of Poland* (ICSID Case No. ARB(AF)/24/1); *ExxonMobil Petroleum & Chemical BV v Kingdom of the Netherlands* (ICSID Case No. ARB/24/44); *MOL Hungarian Oil and Gas Public Limited Company v Republic of Croatia* (ICSID Case No. ARB/24/19); *Berkeley Exploration Ltd v Kingdom of Spain* (ICSID Case No. ARB/24/22).

IV. The Enforcement of Intra-EU ISDS Awards Outside the EU

Meanwhile, the intra-EU ECT awards against in particular Spain[33], but also other EU Member States, continue to be issued by arbitral tribunals. Whilst enforcement of those intra-EU ECT awards appears to now be very difficult –if not impossible– within the EU, the opposite is true for the enforcement outside the EU. Indeed, the UK High Court[34] has granted the *Antin* award[35] holders the right to seize Spanish property in London, while the *Eiser* award[36] has been successfully enforced in Australia[37] and several enforcement proceedings are pending before US courts[38].

More recently, the shares of Spanish state-owned operator Aena, which operates Luton Airport in the UK, were temporarily seized by award holders[39]. This seizing order has now been lifted[40]. Further, a US court has allowed the enforcement of an adverse ECT award against Spain[41]. Similarly, the US Court of

33 See: *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); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain* (ICSID Case No. ARB/14/11); *9REN Holding S.à.r.l v Kingdom of Spain* (ICSID Case No. ARB/15/15).

34 *Infrastructure Services Limited and another v Spain, and Border Timbers and another v Zimbabwe* [2024] EWCA Civ 1257.

35 ICSID Case No. ARB/13/31 (n 33).

36 See: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36) Final Award, 4 May 2017.

37 See: *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157 (Judgment, 24 February 2020).

38 See: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v Kingdom of Spain*, Case 1:18-cv-01686-CKK; Case 1:17-cv-03808-LAK (United States District Court for the District of Columbia).

39 Susannah Moody, 'Award Creditor Targets Spanish Shares in London Airport' (Global Arbitration Review, 5 August 2024) <https://globalarbitrationreview.com/article/award-creditor-targets-spanish-shares-in-london-airport> accessed 23 January 2025.

40 Jack Ballantyne and Sebastian Perry, "London Court Lifts Freeze on Luton Airport Assets" (Global Arbitration Review, 20 September 2024) <https://globalarbitrationreview.com/article/london-court-lifts-freeze-luton-airport-assets> accessed 23 January 2025.

41 See: *Ioan Micula and others v The Government of Romania*, Civil No. 17-Cv-02332 (APM) (United States District Court for the District of Columbia). The United States Court of Appeals for the District of Columbia Circuit upheld the decision in No. 1:17-cv-02332.

Appeals recently issued an important decision clarifying that Spain cannot rely on sovereign immunity to prevent the enforcement of ECT awards in the US[42]. Finally, the Swiss Supreme Court also pushed back against the EU's argument that intra-EU ISDS awards could not be enforced in Switzerland[43]. Hence, it is now clear that the enforcement of intra-EU ECT awards is significantly more successful outside the EU than within the EU.

V. The Investment Court System

In recent FTAs with Canada (CETA), Singapore and Vietnam, the EU and its Member States have replaced the ISDS system with the new so-called investment court system (ICS)[44]. Essentially, the ICS would create a semi-permanent, two-tiered, court-like system, which significantly moves away from arbitration. The ICS would consist of a first instance tribunal with 15 members and an appellate tribunal of six members. The most important change is that the claimant would not have any say in the selection of the members of the tribunal. Instead, the Contracting Parties, including the Respondent in the respective dispute, would appoint all members by common agreement for several years.

Consequently, party autonomy, which is one of the hallmarks of arbitration, would be effectively eliminated. This obviously shifts the balance to the advantage of States. In particular, it is not difficult to anticipate that States will appoint members whom they consider to be more pro-State biased rather than pro-investor biased. Indeed, the damaging effect of the politicisation of the appointment of members of international courts and tribunals is currently visible regarding the

42 See: *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, No. 23-7031; *9REN Holding S.A.R.L. v Kingdom of Spain*, No. 23-7032; *Blasket Renewable Investments LLC v Kingdom of Spain*, No. 23-7038 (United States Court of Appeals for the District of Columbia Circuit, 16 August 2024).

43 See: *EDF Energies Nouvelles S.A. v Kingdom of Spain* (Judgment of the Swiss Federal Tribunal, Case No. 4A_244/2023, 3 April 2024).

44 See: Chapter 8 of the CETA. See also for a detailed analysis: M. Bungenberg and A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer 2020) open access <https://link.springer.com/book/10.1007/978-3-662-59732-3> accessed 23 January 2025.

World Trade Organization (WTO) Appellate Body, for which the US refuses to agree on the re-appointment of several of the Body's members; this has effectively paralysed the Appellate Body and prevents it from carrying out its functions[45]. As a consequence thereof, the EU –rather ironically– has proposed arbitration as a solution to overcome the current paralysis of the WTO Appellate Body[46].

The other important feature, which strongly deviates from arbitration, is the possibility of lodging an appeal on both points of law and fact. This will obviously increase the costs of the parties and further extend the length of the proceedings. It also gives both parties a second bite of the apple, which is exactly what arbitration intends to avoid by offering only a one-shot procedure with a final binding award.

Despite the initial success of the EU in introducing the ICS in its FTAs, it ought to be noted that Japan did not accept the ICS in its FTA with the EU. The ICS has also not been included in either the recently signed FTA between the EU and New Zealand, and the FTA between the EU and Mercosur, nor is it on the table in the EU's FTA negotiations with Australia.

Meanwhile, the ratification of CETA and the other EU FTAs is meeting significant opposition in many EU Member States because national parliaments are still not convinced that the ICS sufficiently addresses their concerns regarding the current ISDS system generally. While, at the time of writing, 17 out of 27 EU Member States (plus the UK) have ratified the CETA investment chapter[47], there is still resistance; for example, in Ireland the Irish Supreme Court has rejected CETA by ruling that either changes to the Irish arbitration law or a referendum is needed for the ratification of CETA[48]. Therefore, if and when the ICS under the various EU FTAs will actually become operational remains questionable.

---

45 See for a detailed analysis: P. Van den Bossche, "Can the WTO Dispute Settlement System Be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization" (*WTI Working Paper* No. 03/2023) <https://www.wti.org/media/filer_public/dc/68/dc6816ae-6d34-4f95-8d8d-837597ce54f3/wti_wp_03_2023.pdf> accessed 23 January 2025.

46 Commission, "WTO Multi-Party Interim Appeal Arrangement Gets Operational" (3 August 2020 <https://policy.trade.ec.europa.eu/news/wto-multi-party-interim-appeal-arrangement-gets-operational-2020-08-03_en> accessed 23 January 2025.

47 See for the ratification status: Council of the EU <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017> accessed 23 January 2025.

48 See P. Leonard, "Ratification of the ISDS Provisions in CETA - Current Court and Legislative Challenges" (2022) 7 *European Investment Law and Arbitration Review* 113-126.

VI. Towards a Multilateral Investment Court

In 2017, the European Commission, together with Canada and Mauritius, convinced UNCITRAL to set up a Working Group III with a broadly formulated mandate to identify and examine any of the perceived shortcomings of the current ISDS system and to propose possible solutions[49]. The discussions began in late 2017 and have since then made some progress, especially by drafting provisions for the creation of the Advisory Centre[50] and by adopting the Code of Conduct for arbitrators and judges[51]. In these discussions, the European Commission, Canada, Mauritius and several South American States have repeatedly referred to the Multilateral Investment Court (MIC) as the panacea that would solve most, if not all, of the perceived shortcomings of the current ISDS system[52].

The MIC would be based on the ICS as contained in the EU's recent FTAs. However, many States are not convinced that creating a new international court would be the appropriate solution. In particular, Chile, Israel, Japan, Russia, the US and some Asian States are not yet convinced and instead consider reforming or modifying the existing rules and institutions, such as, for instance, the International Centre for Settlement of Investment Disputes (ICSID) Convention

---

49 All documents of UNCITRAL Working Group III are available here: <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 23 January 2025.

50 United Nations Commission on International Trade Law, "Summary of the First Meeting on the Operationalization of the Advisory Centre" (18 December 2024) UN Doc A/CN.9/WG.III/WP.251 <https://undocs.org/en/A/CN.9/WG.III/WP.251> accessed 23 January 2025; "Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Statute of an Advisory Centre on International Investment Dispute Resolution" (7 February 2024) UN Doc A/CN.9/WG.III/WP.238 <https://undocs.org/en/A/CN.9/WG.III/WP.238> accessed 23 January 2025; "Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on the Establishment of an Advisory Centre on International Investment Law"(30 June 2023) UN Doc A/CN.9/WG.III/WP.230 <https://undocs.org/en/A/CN.9/WG.III/WP.230> accessed 23 January 2025; "Advisory Centre" (3 December 2021) UN Doc A/CN.9/WG.III/WP.212 and Add.1 <https://undocs.org/en/A/CN.9/WG.III/WP.212> accessed 23 January 2025. Inter alia, see further UNCITRAL Working Group III documents on the Advisory Centre.

51 UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session" (7 October 2022) <https://undocs.org/en/A/CN.9/1124> accessed 23 January 2025.

52 European Union and its Member States, "Submission to UNCITRAL Working Group III on Possible Reform of Investor-State Dispute Settlement (ISDS)" (24 January 2019) UN Doc <A/CN.9/WG.III/WP.159 http://undocs.org/en/A/CN.9/WG.III/WP.159> accessed 23 January 2025.

or the Permanent Court of Arbitration (PCA), to be a more effective and realistic option. In fact, revised ICSID Arbitration Rules entered into force in July 2022[53]. After all, in the past 50 years, more than 3,000 BITs and FTAs have been concluded and more than 1,300 ISDS disputes have been initiated, much to the general satisfaction of the users. Indeed, according to statistics provided by the United Nations Conference on Trade and Development (UNCTAD), States win more cases than claimants[54]. Thus, States have little reason to complain about the current ISDS system, which is also confirmed by the fact that States continue to conclude BITs and FTAs with ISDS provisions.

Meanwhile, the UNCITRAL Working Group III negotiations continue at a steady pace. The most recent discussions focus on the draft provisions for a "standing mechanism for the resolution of international investment disputes", i.e., the MIC. The 40-plus draft provisions are already fairly detailed and indicate that the creation of the MIC is likely to happen[55]. The MIC will consist of a Tribunal and an Appeals Tribunal, supported by a Secretariat. All members of both tribunals will be selected by the Contracting Parties for a non-renewable term. The members of the tribunals shall most likely serve on a full-time basis, meaning that they are not allowed to have any other jobs.

Compared with international arbitration, the MIC system will entirely cut out any influence of the investor/claimant regarding the selection of the members of the tribunals, the selection of the seat or the choice of the arbitration rules. Consequently, there is a clear danger that the MIC will become a pro-State biased institution.

In addition to drafting the provisions for the MIC, the UNCITRAL Working Group III has been discussing a whole range of so-called "cross cutting" issues, which aim to address mainly procedural issues, but which potentially could have far-reaching

53 International Centre for Settlement of Investment Disputes, "ICSID Administrative Council Approves Amendment of ICSID Rules" (21 March 2022) <https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules> accessed 23 January 2025.

54 United Nations Conference on Trade and Development (UNCTAD), "Facts and Figures on Investor–State Dispute Settlement Cases" (IIA Issues Note No. 3, 2024) <https://unctad.org/publication/facts-and-figures-investor-state-dispute-settlement-cases> accessed 23 January 2025.

55 United Nations Commission on International Trade Law, "Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes, Note by the Secretariat" (8 February 2024) UN Doc A/CN.9/WG.III/WP.239 <https://undocs.org/en/A/CN.9/WG.III/WP.239> accessed 23 January 2025.

consequences[56]. For example, the facilitation of counterclaims by Respondent States, the restrictions on Third Party Funding, the elimination of shareholders' claims and restrictions on the calculation of damages. If adopted, these "reforms" will create further hurdles for claimants to successfully obtain adequate compensation, while at the same time, increasingly shielding States from ISDS claims, which appears to be the ultimate goal of "reforming" "crossing cutting issues".

Since the UNCITRAL parties have agreed that the Working Group III on ISDS reform must conclude its work by the end of 2026, it remains to be seen whether all these reform proposals will gain sufficient traction and support from all the major economies, the investors and the arbitration community generally to be adopted.

In any event, the draft provisions of the MIC foresee an "opt-in" system, thereby allowing each State to decide whether or not to join the MIC and for which Investment Treaties it shall be applicable. This will arguably make the multilateral treaty, which will contain the MIC, more acceptable as an optional protocol for a large number of States.

VII. Outlook

Over the past decade, the EU has become an active driver in shaping international investment law and arbitration. The impact of EU law on ISDS is particularly noticeable, by effectively banning intra-EU ISDS arbitrations based on intra-EU BITs and the ECT. Moreover, recognition and enforcement of intra-EU BITs/ECT awards within the EU is becoming very difficult, if not impossible. Consequently, the enforcement of awards is now clearly shifting towards jurisdictions outside the EU, in particular, US, UK, Australia and Switzerland[57].

---

56 United Nations Commission on International Trade Law, "Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues" (10 August 2024) UN Doc A/CN.9/WG.III/WP.244 <https://undocs.org/en/A/CN.9/WG.III/WP.244> accessed 23 January 2025.

57 In the United States, see inter alia US District Court for the District of Columbia, *JGC Holdings Corporation v Kingdom of Spain*, Case 1:23-cv-02701-RC, [decision date not provided]; US Court of Appeals for the District of Columbia Circuit, *Micula v Government of Romania*, Case No. 23-7008, [decision date not provided]. In the United Kingdom, see inter alia Court of Appeal, *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*, [2024] EWCA Civ 1257, 22 October 2024; High Court, *NextEra Energy*

All this will inevitably lower the level of investment and investor protection within the EU. Therefore, it remains to be seen whether the European Court of Human Rights could compensate for this loss of investment and investor protection.

At the international level, it is notable that even after more than a decade of finalising the negotiations, none of the EU's so-called "new generation" investment agreements have entered into force. Meanwhile, the EU has signed a new type of "Sustainable Investment Facilitation Agreement" with Angola, which, however, lacks any ISDS provisions and provides for a very basic level of investment protection[58].

Despite the EU's limited success to get its investment treaties ratified by the EU Member States, it has been making significant progress in UNCITRAL Working III regarding the potential creation of the MIC and the reforms of the "cross-cutting" issues.

Thus, one can clearly identify a contradictory policy of the EU and its Member States regarding investment treaty arbitration: internally, within the EU, investment treaty arbitration is abolished within the EU, while externally, on the international level, it is maintained and further developed – albeit in a reformed version.

Consequently, whereas European investors are now prevented from bringing investment treaty arbitration proceedings against EU Member States, non-European investors continue to do so[59]. At the same time, European investors enthusiastically continue to bring claims against third countries[60].

Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain, CL-2023-000259, [decision date not provided]; Supreme Court, *Micula and others v Romania*, [2020] UKSC 5, 19 February 2020. In Australia, see inter alia High Court of Australia, *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.*, [2023] HCA 11, 12 April 2023; Federal Court of Australia, *Eiser Infrastructure Ltd v Kingdom of Spain*, [2020] FCA 157, 24 February 2020. In Switzerland, see inter alia Swiss Federal Tribunal, *Natland Investment Group NV and others v Czech Republic*, Case No. 4A_244/2023, 3 April 2024; Swiss Federal Tribunal, *EDF Energies Nouvelles S.A. v Kingdom of Spain*, Case No. 4A_244/2023, 3 April 2024.

58 See: EU-Angola Sustainable Investment Facilitation Agreement (1 September 2024) <https://trade.ec.europa.eu/access-to-markets/en/content/eu-angola-sustainable-investment-facilitation-agreement-sifa> accessed 23 January 2025; N M-P Potin, "EU-Angola Sustainable Investment Facilitation Agreement: Key Features, Benefits and Impact" (2024) 9(2) *European Investment Law and Arbitration Review* 245, 245-276.

59 See: *Klesch Group Holdings Limited and others v European Union* (ICSID Case No. ARB(AF)/23/1); *Klesch Group Holdings Limited and Raffinerie Heide GmbH v Federal Republic of Germany* (ICSID Case No. ARB/23/49); *Klesch Group Holdings Limited, Klesch Refining Denmark A/S and Kalundborg Refinery A/S v Kingdom of Denmark* (ICSID Case No. ARB/23/48); Huawei Technologies Co., Ltd. v Kingdom of Sweden (ICSID Case No. ARB/22/2).

60 See e.g.: *ENAGAS S.A. (España) and ENAGAS Internacional S.L.U. (España) v. Peru* (ICSID Case No. ARB/18/26), Award, 20 December 2024; *AXA S.A. v. United Mexican States* (ICSID Case No. ARB/24/49) (pending); *ENCORE Investment Group Limited v. Republic of Türkiye* (ICSID Case No. ARB/24/46) (pending); *Kurt Harald Grüninger, Alexandra Grüninger, and Sascha Spittel v. Republic of Costa Rica*

In sum, it is clear that EU law will continue to impact international investment law and arbitration over the coming years. The artificially created and unnecessary conflict between EU law and international investment law seems to have been decided in favour of EU law –at least within the EU and its Member States–. Meanwhile, arbitral tribunals continue to push back against *Achmea* and *Komstroy* and continue to exercise their jurisdiction[61]. However, most recently, two ICSID arbitral tribunals have declined jurisdiction in two intra-EU ECT disputes by accepting the EU law objections of Spain[62]. Further, domestic courts in jurisdictions outside the EU –i.e., US, UK, Australia and Switzerland– do not feel bound by EU law and thus continue to recognise and enforce intra-EU ISDS awards on the basis of their international treaty law obligations –stemming in particular from the ICSID Convention and New York Convention[63].

Consequently, the arbitration community must accept the lasting impact of EU law on international investment law, and deal with it by finding creative solutions for investors and their investments.

(ICSID Case No. ARB/23/16) (pending); *VINCI Highways SAS and VINCI Concessions SAS v. Republic of Peru* (ICSID Case No. ARB/21/60) (pending); IA Reporter, Germany's Wintershall lodges duo of treaty arbitrations against Russia, 1 October 2024, <https://www.iareporter.com/articles/germanys-wintershall-lodges-duo-of-treaty-arbitrations-against-russia/> accessed 23 January 2025.

61 See: *Vattenfall AB and others v Federal Republic of Germany* (Decision on the Achmea Issue, 31 August 2018) (ICSID Case No. ARB/12/12); *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (Award, 16 May 2018) (ICSID Case No. ARB/14/1); *Stadtwerke München GmbH, RWE Innogy GmbH and others v Kingdom of Spain,* Decision on Jurisdiction, 2 December 2019) (ICSID Case No. ARB/15/1).

62 See: *Sapec SA v Kingdom of Spain* (Decision on Jurisdiction, 2024) (ICSID Case No. ARB/19/23); *European Solar Farms v Kingdom of Spain* (Decision on Jurisdiction, 2024) (ICSID Case No. ARB/18/45); IA Reporter, 'Revealed: Unpacking the Reasons Why Two ICSID Tribunal Majorities Upheld Spain's Intra-EU Jurisdictional Objection under the Energy Charter Treaty' (17 October 2024) <https://www.iareporter.com/articles/revealed-unpacking-the-reasons-why-two-icsid-tribunal-majorities-upheld-spains-intra-eu-jurisdictional-objection-under-the-energy-charter-treaty/> accessed 23 January 2025.

63 See: IA Reporter, DC court declines Spain's request to stay proceedings for enforcement of intra-EU ECT award pending decision by US Supreme Court, 14 January 2025, <https://www.iareporter.com/articles/dc-court-declines-spains-request-to-stay-proceedings-for-enforcement-of-intra-eu-ect-award-pending-decision-by-us-supreme-court/> accessed 23 January 2025; IA Reporter, Analysis: Unpacking the DC Circuit Court's finding that US courts have jurisdiction to hear bids to enforce intra-EU ECT awards against Spain, but cannot issue anti-anti-enforcement injunctions, 17 August 2024, <https://www.iareporter.com/articles/analysis-unpacking-the-dc-circuit-courts-finding-that-us-courts-have-jurisdiction-to-hear-bids-to-enforce-intra-eu-ect-awards-against-spain-but-cannot-issue-anti-anti-enforcement-injunction/> accessed 23 January 2025. See also the Amicus Curiae Brief by International Law scholars submitted to the US Court of Appeals, <https://www.qmul.ac.uk/ccls/media/law/docs/news/Micula-Amicus-Brief-IS.pdf> accessed 23 January 2025.