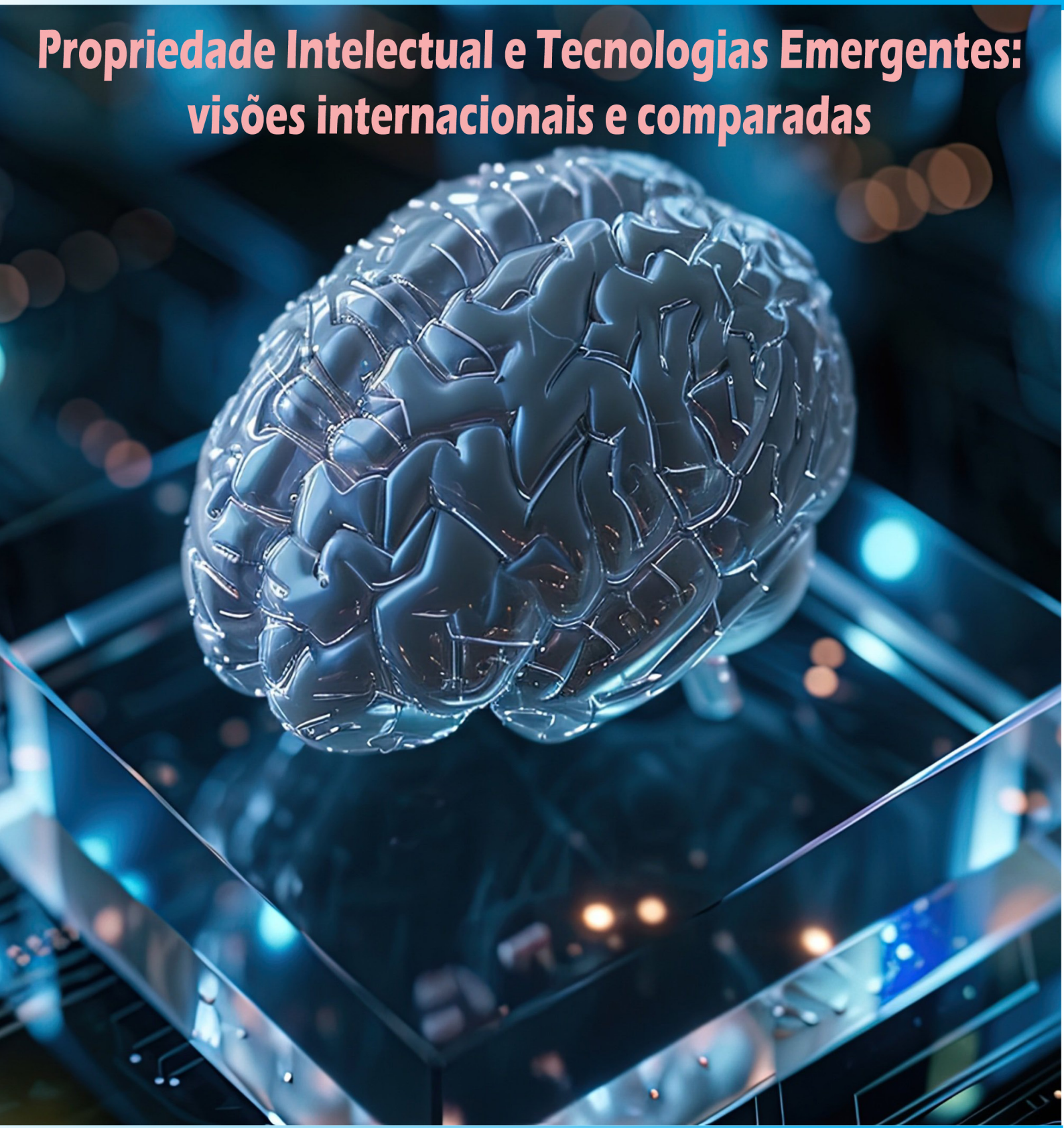
DIREITO.UnB
Revista de Direito da Universidade de Brasília
University of Brasília Law Journal

VOLUME 9 - NÚMERO 1 - Janeiro-Dezembro - 2025

Propriedade Intelectual e Tecnologias Emergentes: visões internacionais e comparadas



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Direito.UnB. Revista de Direito da Universidade de Brasília.
Programa de Pós-Graduação em Direito – Vol. 9, N. 1 (Jan../Dez 2025) –Brasília, DF: Universidade de Brasília, Faculdade Direito.

Anual 2025.

ISSN 2357-8009 (VERSÃO ONLINE)

ISSN 2318-9908 (VERSÃO IMPRESSA)

Multilíngue (Português/Inglês/Espanhol/Francês)

1. Direito – periódicos. I. Universidade de Brasília, Faculdade de Direito.

CDU 340

Revista de Direito da Universidade de Brasília
University of Brasilia Law Journal

Revista vinculada ao Programa de pós-graduação
em Direito da Universidade de Brasília

Janeiro – Dezembro de 2025, volume 9, N. 01

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IMAGEM

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NOTA EDITORIAL

A Revista DIREITO.UnB, Volume 9, Número 1, está no ar! O periódico é um espaço dedicado a estudos e debates interdisciplinares sobre problemas jurídicos alinhados às linhas de pesquisa do Programa de Pós-Graduação da Faculdade de Direito da Universidade de Brasília (PPGD/UnB), cuja Área de Concentração é Direito, Estado e Constituição.

O Programa organiza-se em cinco linhas de pesquisa: (1) Movimentos sociais, conflito e direitos humanos; (2) Constituição e democracia; (3) Internacionalização, trabalho e sustentabilidade; (4) Transformações na ordem social e econômica e regulação; e (5) Criminologia, estudos étnico-raciais e de gênero. Essas linhas orientam a produção acadêmica do PPGD/UnB e estruturam as contribuições que compõem a revista.

A Revista DIREITO.UnB, de periodicidade anual, constitui um espaço permanente para a publicação de artigos acadêmicos. Eventualmente, também são incluídos artigos-resenha, comentários e análises de jurisprudência e outras contribuições acadêmcias.

Esta edição conta com vinte e cinco artigos. A primeira seção é dedicada a um dossiê temático sobre Propriedade Intelectual e Tecnologias Emergentes: visões internacionais e comparadas, organizado pelos professores Dr. Guillermo Palao Moreno (Universitat de València – Espanha), Dr. Thiago Paluma (Universidade Federal de Uberlândia Brasil), Dra. Mônica Steffen Guise (Fundação Getulio Vargas – São Paulo, Brasil) e Dr. Fabrício Bertini Pasquot Polido (Universidade Federal de Minas Gerais – Brasil), que também assinam o prefácio deste número.

A segunda seção reúne trabalhos voltados a temas de Direito e Tecnologias, destacando análises contemporâneas sobre transformações digitais, regulação e desafios jurídicos emergentes.

A terceira seção apresenta artigos de fluxo contínuo, que refletem a diversidade de pesquisas desenvolvidas no âmbito das cinco linhas do Programa de Pós-Graduação em Direito da Universidade de Brasília (PPGD/UnB). Esses artigos espelham o caráter plural, crítico e interdisciplinar que marca a produção científica do Programa.

Inaugurando a segunda seção sobre Direito e Tecnologias, no artigo DEEPFAKE PORNOGRAPHY: UMA ANÁLISE JURÍDICA SOBRE DIGNIDADE HUMANA E INTELIGÊNCIA ARTIFICIAL, escrito por Márcia Haydée Porto de Carvalho, Isadora Silva Sousa, Pedro

Bergê Cutrim Filho e Wiane Joany Batalha Alves, investiga o impacto da manipulação de imagens por IA na dignidade e privacidade das vítimas. Os autores realizam uma abordagem legislativa e jurisprudencial para demonstrar a atual insuficiência do ordenamento jurídico brasileiro em oferecer respostas rápidas e eficazes contra a produção de conteúdo pornográfico sem consentimento. Dessa forma, "o estudo é de grande importância porque cada vez mais a evolução tecnológica traz consigo problemas de natureza sociojurídica, que exige do Estado uma resposta efetiva e rápida para salvaguardar a dignidade humana".

Na sequência, O ensaio USO DE INTELIGÊNCIA ARTIFICIAL PELO PODER PÚBLICO COM FINALIDADE DE INVESTIGAÇÃO ADMINISTRATIVA: FUNDAMENTOS DO USO COMPARTILHADO DE DADOS E COMPARAÇÃO COM A HERRAMIENTA DE LUCHA CONTRA EL FRAUDE ESPANHOLA, de Luis Henrique de Menezes Acioly, Alice de Azevedo Magalhães e Jéssica Hind Ribeiro Costa, examina o avanço da IA na administração pública. Utilizando o sistema espanhol como parâmetro, o estudo busca "compreender o panorama técnico-jurídico de compartilhamento e interoperabilidade de dados pessoais nos respectivos ordenamentos, e consignar a delimitação conceitual de inteligência artificial e estado da arte da discussão sobre o uso ético de tais sistemas".

Já o artigo MICRO TAREFAS, INTELIGÊNCIA ARTIFICIAL E TURKERS: NOVAS TECNOLOGIAS E O FUTURO DO TRABALHO, das autoras Clarissa Maria Beatriz Brandão de Carvalho Kowarski e Ana Luiza de Moraes Gonçalves Correia, alerta para as pesquisas e regulação sobre as microtarefas. Através da análise do caso Amazon Mechanical Turk, o artigo busca "compreender o conceito, o funcionamento e os riscos das plataformas de micro tarefas para os trabalhadores da plataforma (turkers), em especial, no contexto brasileiro, com a posterior exposição da ferramenta do cooperativismo de plataforma adotado por Trebor Scholz em prol de uma economia digital mais justa, de modo a auxiliar nas reflexões e no incentivo a mecanismos capazes de combater os princípios da ideologia do Vale do Silício, adotados pelas gigantes da tecnologia".

Encerrando esta seção, o artigo O 'CONTRATO DIGITAL' NA ERA DA DESINFORMAÇÃO: REGULAÇÃO DE PLATAFORMAS E CONSTITUCIONALISMO DIGITAL, de João Victor Archegas e Eneida Desiree Salgado, analisa como as plataformas digitais, seus modelos de governança e as dinâmicas de moderação de conteúdo se entrecruzam com o constitucionalismo liberal e com a ameaça crescente da desinformação. A partir da comparação entre os eventos de 6 de janeiro nos EUA e 8 de janeiro no Brasil, o estudo discute o papel das plataformas na arquitetura da esfera pública digital e avalia criticamente propostas governamentais de regulação. Os autores defendem caminhos multissetoriais e estratégias de co-regulação para reconstruir confiança, preservar a

liberdade de expressão e enfrentar o tecnoautoritarismo em ascensão

Nesta seção de artigos de fluxo contínuo, reunimos quatorze contribuições que refletem a vitalidade da produção acadêmica contemporânea em Direito, marcada pela diversidade temática, rigor metodológico e profundo compromisso social.

O artigo "AS BARREIRAS DE GÊNERO NA AVIAÇÃO CIVIL: O QUE ESPERAR NO FUTURO? UMA ANÁLISE DE DIREITO INTERNACIONAL COMPARADO E BRASILEIRO", de Inez Lopes, Valeria Starling e Ida Geovanna Medeiros, inaugura a seção com uma investigação abrangente sobre a permanência das desigualdades de gênero no setor aeronáutico. As autoras articulam normas da Organização da Aviação Civil Internacional, (OACI,) agência especializada das Nações Unidas responsável por estabelecer normas, padrões e práticas recomendadas para a aviação civil internacional, que adotaram diretrizes para desvendar mecanismos persistentes de exclusão e projetar caminhos institucionais para maior diversidade e inclusão.

Em "PÓS-GRADUAÇÃO STRICTO SENSU EM DIREITO: EQUIDADE DE GÊNERO NA DOCÊNCIA JURÍDICA", DANIELLE GRUBBA E FABIANA SANSON analisam a sub-representação feminina nos programas de pós-graduação, demonstrando como estruturas de poder, progressão acadêmica desigual e barreiras institucionais comprometem a presença de mulheres em posições de prestígio e liderança. As autoras defendem transformações culturais profundas para a construção de um ambiente acadêmico verdadeiramente equitativo.

O artigo de Delphine Defossez intitulado "PODEMOS FECHAR O CAIXÃO DO ISDS?" analisa a crescente controvérsia na União Europeia sobre a resolução de litígios entre investidores e Estados, especialmente no contexto do Tratado da Carta da Energia (TCE). Mesmo após decisões do Tribunal de Justiça da UE, arbitragens continuam a ser movidas contra Estados-Membros, muitas vezes em jurisdições externas. Isso cria dificuldades para os Estados, agravadas pela pouca atenção dos tribunais arbitrais às metas de mitigação climática. O texto destaca, porém, que alguns tribunais nacionais têm oferecido resistência ao negar o reconhecimento e a execução de sentenças arbitrais intra-UE.

O artigo "PODER JUDICIÁRIO: DEMOCRATIZAÇÃO E PROTEÇÃO DOS DADOS DO CONSUMIDOR NOS CADASTROS POSITIVO", de Monica Mota Tassigny, Cloves Barbosa de Siqueira e Rosanna Lima de Mendonça, examina a importância da atuação do Poder Judiciário na democratização do acesso às informações dos cadastros positivos e na proteção dos consumidores diante de possíveis desvios em sua finalidade pública. Analisa-se o funcionamento e o fundamento legal desses cadastros, as restrições de acesso impostas pelos bancos de crédito e a relação entre esse acesso e a Lei Geral de

Proteção de Dados (LGPD).

EM "ASPECTOS CONSUMERISTAS RELATIVOS À ENERGIA SOLAR FOTOVOLTAICA, de Antônio Carlos Efing e Nicolle Suemy Mitsuhashi, os autores analisam como a crescente adoção de sistemas de micro e minigeração de energia solar no Brasil tem colocado consumidores diante de novas relações jurídicas e desafios específicos. A pesquisa destaca que a aquisição e instalação desses equipamentos exige atenção reforçada ao dever de informação, às garantias contratuais e ao manejo adequado dos resíduos pós-consumo.

O texto "A FORMAÇÃO DO FACILITADOR EM JUSTIÇA RESTAURATIVA NO PODER JUDICIÁRIO BRASILEIRO", de Liliane Cristina De Oliveira Hespanhol E Eliana Bolorino Canteiro Martins, discute a formação ética e interdisciplinar necessária para consolidar práticas restaurativas no sistema de justiça. Os autores enfatizam que a efetividade da Justiça Restaurativa depende de profissionais capacitados para romper com lógicas punitivistas e promover práticas de diálogo e responsabilização transformadora.

Em "O VAZIO NORMATIVO E A INVIABILIDADE DE ACESSO AO DIREITO À SAÚDE MENTAL PELA COMUNIDADE LGBTQIAP+: A QUIMERA BRASILEIRA", de Mikhail Vieira de Lorenzi Cancelier* analisa como a ausência de reconhecimento formal da comunidade LGBTQIAP+ no ordenamento jurídico brasileiro restringe seu acesso ao direito à saúde, especialmente à saúde mental. A partir de um método dedutivo, o autor discute o direito à saúde como direito social, fundamental e da personalidade, destaca a invisibilidade normativa dessa comunidade e diferencia reconhecimento simbólico e efetiva constituição de direitos. Por fim, examina os impactos psicológicos decorrentes desse vazio jurídico, relacionando a insegurança normativa aos danos à saúde mental da população LGBTQIAP+.

O artigo "O FEDERALISMO COOPERATIVO, BOLSONARISTA E DE RESISTÊNCIA: DISPUTAS EM TEMPOS DE COVID-19", de Vera Karam de Chueiri e Gianluca Nicochelli, oferece uma leitura crítica dos conflitos federativos acirrados pela pandemia. As autoras examinam como a COVID-19 impactou o federalismo brasileiro, contrastando o modelo constitucional de 1988 com o chamado "federalismo bolsonarista", marcado por tensões entre União e entes subnacionais. O texto analisa decisões do STF e a atuação do Consórcio do Nordeste, que contribuíram para redefinir a dinâmica federativa durante a crise sanitária.

Na sequência, em "SOBERANIA ALIMENTAR E POLÍTICAS PÚBLICAS VOLTADAS À AGRICULTURA FAMILIAR", de Jaime Domingues Brito e Ana Cristina Cremonezi,

discute-se a relação entre soberania alimentar, segurança alimentar e políticas públicas de agricultura familiar no contexto dos ODS da Agenda 2030. Parte-se da hipótese de que tais políticas podem contribuir significativamente para a erradicação da pobreza, especialmente diante do retorno do Brasil ao Mapa da Fome. O estudo aponta avanços, retrocessos e potencialidades, ressaltando a importância da participação social, do fortalecimento da atuação municipal e dos caminhos necessários para ampliar a soberania alimentar em comunidades vulnerabilizadas.

O artigo "O USO DE ANIMAIS COMO FERRAMENTA DE APOIO AO DEPOIMENTO ESPECIAL DE CRIANÇAS E ADOLESCENTES", de Ana Carolina Cezar Dias, Mariana Carvalho e Luiza Souza, explora experiências inovadoras com cães de assistência emocional no sistema de justiça. O estudo evidencia os efeitos positivos da presença dos animais na redução da ansiedade, no acolhimento das vítimas e na qualidade do depoimento especial, apontando potenciais de expansão dessa prática no âmbito nacional.

O artigo "INFLUXO DAS POLÍTICAS INTERNACIONAIS NO SISTEMA TRIBUTÁRIO BRASILEIRO", de Isabela Dutra Ribeiro, Rosiane Maria Lima Gonçalves, Ebio Viana Meneses Neto e Carlos Eduardo Artiaga Paula, examina como políticas internacionais influenciam o sistema tributário brasileiro. Por meio de pesquisa bibliográfica sistematizada, os autores demonstram que tais políticas afetam a tributação interna por meio de incentivos fiscais voltados ao crescimento econômico, à geração de emprego e à redução das desigualdades. Destacam, contudo, os desafios de implementação, que incluem o risco de enfraquecimento de setores econômicos e a necessidade de conciliar interesses divergentes entre países.

O artigo "DA TRIBUTAÇÃO À CRIMINALIDADE: IMPACTOS DAS POLÍTICAS PÚBLICAS DE TRANSFERÊNCIA DE RENDA", de Luma Teodoro da Silva, Renato Bernardi e Ricardo Pinha Alonso, examina a criminalidade sob a perspectiva da teoria econômica, enfatizando a relação entre desigualdades sociais e delitos patrimoniais. Com base em método dedutivo e análise de dados, defende a adoção de políticas públicas e incentivos fiscais que ampliem autonomia financeira, educação e cultura. Os autores propõem mecanismos tributários, como a taxação de grandes fortunas, para financiar programas de renda mínima e contribuir para a redução da criminalidade e o desenvolvimento socioeconômico.

O artigo "RACISMO ESTRUTURAL E VIOLÊNCIA SIMBÓLICA", de Mayara Pereira Amorim e Vinícius Gomes Casalino, investiga o racismo estrutural na sociedade brasileira a partir das ferramentas epistêmicas da sociologia de Pierre Bourdieu, com especial

ênfase no conceito de violência simbólica. As autoras e autores demonstram como estruturas sociais historicamente consolidadas reproduzem privilégios e hierarquias raciais, sendo o direito um instrumento central de legitimação dessas arbitrariedades.

Por fim, o artigo "CRIME, LOUCURA E CASTIGO: PRECEDENTES SOCIOLÓGICOS INFRACIONAIS DE CUSTODIADAS NA BAHIA", também de Helena Loureiro Martins e Andréa Santana Leone de Souza, apresenta um estudo de caso no Hospital de Custódia e Tratamento Psiquiátrico da Bahia. A partir de entrevistas e análise normativa, as autoras identificam que, nos atos infracionais cometidos por mulheres sob custódia psiquiátrica, as principais vítimas são, majoritariamente, companheiros e filhos(as).

Desejamos a todas e todos uma excelente leitura. Que este volume inspire novas reflexões, diálogos e caminhos de pesquisa. Que 2026 seja um ano próspero, produtivo e repleto de investigações inovadoras, marcadas pelo compromisso ético, pela criatividade intelectual e pela construção coletiva de um campo jurídico mais inclusivo, plural e transformador.

Boa leitura!

Inez Lopes

Editora-chefe

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AGRADECIMENTOS

Agradecimentos| Acknowledgements | Agradecimientos | Remerciements

Ao longo dos últimos anos em que estivemos à frente da edição e supervisão da Revista Direito.UnB, construímos uma trajetória marcada por compromisso acadêmico, rigor editorial e intensa cooperação. Este último volume é fruto de um esforço coletivo que envolve organização, planejamento, foco e dedicação contínua de todas as pessoas que passaram pela equipe editorial.

A Revista Direito.UnB conta com a valiosa participação de professoras e professores da Faculdade de Direito da UnB e de diversas instituições de ensino superior, além de estudantes da pós-graduação e da graduação, técnicas, técnicos, estagiárias e estagiários que contribuíram de forma decisiva para o fortalecimento deste periódico. Agradecemos profundamente a todas e todos pela colaboração essencial para a conclusão de mais uma etapa no processo de difusão do conhecimento jurídico.

Reiteramos nossos agradecimentos a todos os professores, diretores, coordenadores, técnicos, estagiários e discentes da pós-graduação e da graduação, cuja dedicação e parceria tornaram possível cada número publicado. Sem a colaboração e o compromisso conjunto de todas essas pessoas, a Revista Direito.UnB simplesmente não existiria.

Encerramos, assim, nossa contribuição ao PPGD/UnB, com gratidão pelo caminho trilhado.

Como lembrado por Antoine de Saint-Exupéry, “o essencial é invisível aos olhos, e só se vê bem com o coração”. É com esse espírito de reconhecimento e sensibilidade que celebramos o encerramento de mais um ciclo editorial.

Gratidão!
Inez Lopes
Ida Geovanna Medeiros

PREFÁCIO

PROPRIEDADE INTELECTUAL E TECNOLOGIAS EMERGENTES: VISÕES INTERNACIONAIS E COMPARADAS

A convergência entre os projetos, pesquisas e atividades desenvolvidas pelos organizadores desse Dossiê Temático, possibilitou a publicação conjunta e a chamada de artigos sobre temas que discutam a relação entre Direito, Propriedade Intelectual e Tecnologias com temas igualmente urgentes na contemporaneidade: a Democracia, as Fake News, a Inteligência Artificial e as Relações de Trabalho.

Após avaliação dos artigos recebidos, oito artigos foram aceitos para publicação no presente dossiê, os quais oferecem perspectivas críticas e interdisciplinares sobre a Propriedade Intelectual e as Tecnologias Emergentes.

Inaugurando este Dossiê, artigo **SONORIDADE MARCÁRIA: EXPLORANDO AS IMPLICAÇÕES DO DIREITO INTERNACIONAL NA RE-GISTRABILIDADE DAS MARCAS SONORAS NO BRASIL,** os autores Rodrigo Róger Saldanha e Ana Karen Mendes de Almeida analisam de maneira crítica a evolução das marcas não tradicionais no ordenamento brasileiro, com especial atenção aos desafios jurídicos e procedimentais que cercam a proteção dos sinais sonoros. A partir de uma abordagem que articula direito internacional, propriedade intelectual e práticas empresariais contemporâneas, o estudo examina como tratados multilaterais, a exemplo do Acordo TRIPs, e experiências estrangeiras influenciam a interpretação da Lei de Propriedade Industrial no país.

O estud**o ¿EL DERECHO DE AUTOR MUERE DONDE NACEN LAS FAKE NEWS?,** de autoria de Janny Carrasco Medina e Oscar Alberto Pérez Peña, analisa a proteção conferida pelo direito de autor no contexto das notícias falsas, com foco especial nas chamadas obras órfãs e no cenário jurídico brasileiro. Os autores concluem que o sistema autoral tradicional é inadequado para lidar com as fake News.

Em **DESAFIOS PARA A CONCESSÃO DE PATENTES A SISTEMAS DE INTELIGÊNCIA ARTIFICIAL: UMA ANÁLISE A PARTIR DE DABUS**, Salete Oro Boff, Joel Marcos Reginato e William Andrade exploram o tratamento jurídico das invenções geradas por sistemas de IA. A pesquisa identifica a atual impossibilidade de proteger essas criações por meio de patentes e modelos de utilidade na legislação vigente, mas ressalta que o avanço tecnológico exige uma atenção contínua e uma possível evolução legislativa.

No trabalho I**NFRAÇÃO DE MARCAS NA CHINA: O PROBLEMA DO MODELO DE NEGÓCIO ORIGINAL EQUIPMENT MANUFACTURER – OEM,** os autores Eduardo Oliveira Agustinho, Fernanda Carla Tissot e Carlos Henrique Maia da Silva abordam os desafios da propriedade industrial no país asiático decorrentes da fabricação de produtos por encomenda para exportação. O texto "visa debater o entendimento da legislação e jurisprudências chinesas nos casos mais relevantes sobre o tema, notadamente a questão da não circulação de um bem ou mercadoria dentro do território chinês poderá configurar violação à propriedade intelectual de terceiros na China".

No artigo intitulado **A PROPRIEDADE INTELECTUAL COMO FERRAMENTA PARA DIFICULTAR O REPARO DE EQUIPAMENTOS ELETROELETRÔNICOS,** os autores Patrícia Borba Marchetto e João Vítor Lopes Amorim analisam o crescente movimento pela regulamentação do direito ao reparo e como as fabricantes utilizam a proteção da propriedade intelectual para restringir o conserto de dispositivos.

Por fim, no artigo **PROPRIEDADE INTELECTUAL E CAMPANHAS ELEITORAIS: A JUSTIÇA ELEITORAL NA REGULAÇÃO DESSA RELAÇÃO,** os autores João Araújo Monteiro Neto e Victor Wellington Brito Coelho discutem a necessidade de o Tribunal Superior Eleitoral regulamentar a interface entre os direitos de propriedade intelectual e sua utilização em campanhas políticas. Partindo da evolução dos meios tecnológicos nos pleitos, o trabalho analisa como a Justiça Eleitoral deve atuar para garantir a integridade dos processos democráticos frente ao uso de ativos protegidos.

Em suma, as contribuições reunidas neste dossiê não esgotam os temas debatidos, mas oferecem um panorama crítico e atualizado sobre as complexas interseções

entre Direito, tecnologia e Propriedade Intelectual a temas específicos. Espera-se que a leitura destes artigos fomente novas reflexões e inspire soluções que priorizem a ética, a sustentabilidade e a proteção dos direitos fundamentais perante os desafios contemporâneos

Boa leitura!

Guillermo Palao Moreno, Universidade de Valência (UV)
Thiago Paluma, Universidade Federal de Uberlândia (UFU)
Mônica Steffen Guise, (undação Getulio Vargas, São Paulo, FGV/SP)
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ARTIGOS

CAN WE CLOSE THE ISDS COFFIN? THE ROLE OF NATIONAL COURT IN ENFORCING THE INTRA-EU ARBITRATION BAN

PODEMOS FECHAR O CAIXÃO DO ISDS?O PAPEL DOS TRIBUNAIS NACIONAIS NA APLICAÇÃO DA PROIBIÇÃO DA ARBITRAGEM INTRACOMUNITÁRIA

Recebido: 01.02.2025
Aceito: 29.12.2025

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RESUMO

A Resolução de Litígios entre Investidores e Estados tem sido o centro de controvérsia durante décadas e a União Europeia (UE) está atualmente na vanguarda deste campo de batalha, com vários países europeus a retirarem-se ou a manifestarem a sua intenção de se retirarem do Tratado da Carta da Energia (TCE). Não passa um dia sem que seja noticiada uma nova decisão arbitral contra um Estado-Membro da UE, apesar dos acórdãos do Tribunal de Justiça da União Europeia (TJUE), sem que um tribunal nacional recuse a execução de uma decisão arbitral ou sem que os investidores tendem a sua sorte em jurisdições estrangeiras, como os EUA. Esta situação coloca os Estados-Membros numa posição difícil, especialmente porque os tribunais arbitrais não parecem ter em consideração a necessidade de medidas de mitigação das alterações climáticas. Parece que o único vislumbre de esperança poderá vir dos tribunais nacionais que se recusaram a reconhecer e a executar as sentenças arbitrais intra-UE.

Palavras-chave: ISDS. ECT. CJEU. National courts. Arbitral tribunals.

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ABSTRACT

Investor-State Dispute Settlement (ISDS) has been the center of controversy for decades and the European Union (EU) is currently at the forefront of this battlefield with various European countries either withdrawing or signifying their intention to withdraw from the Energy Charter Treaty (ECT). Not a day goes by without a new notice of a new arbitral award being made against an EU Member State despite the Court of Justice of the European Union (CJEU) rulings, a national court rejecting to enforce an arbitral award or investors trying their luck in foreign jurisdictions such as the US. This situation places Member States in a difficult position, especially since arbitral tribunals do not seem to give any consideration to the need for climate change mitigating measures. It seems that the only glimpse of hope might come from national courts which have refused to recognise and enforce intra-EU arbitral awards.

Keywords: ISDS. ECT. CJEU. National courts. Arbitral tribunals.

1. INTRODUCTION

Investor-State Dispute Settlement (ISDS) has been a persistent source of controversy for decades, primarily due to the substantial awards granted, its chilling effect on regulation, and the parallel legal system it creates[454]. Within the European Union (EU), this conflict is further exacerbated by significant debate surrounding the compatibility of ISDS with EU law, alongside a concerning lack of consideration for environmental concerns by arbitral tribunals[455]. This debate is even more central that most Bilateral Investment treaties (BITs) were concluded between Western European and Central and Eastern European States before the latter joined the EU. These BITs, with their ISDS provisions, have now become problematic intra-EU instruments[456]. As Barbou des Places, Cimiotta and Santos Vara noted intra-EU BITs are viewed "as an anomaly vis-à-vis the

454 DEFOSSEZ, DELPHINE. International Investment Agreements and their arbitration clause in the energy sector: A Poisonous Gift for Developing Countries? in Abdul Rafay, **Handbook of Research on Energy and Environmental Finance 4.0.** IGI Global, 2022; GODRON, KATHRYN; POHL JOACHIM. Environmental Concerns in International Investment Agreements: A Survey. **OECD Working papers on international investment 2011/01,** 2011.

455 REISCH, NIKKI; DE ANZIZOU, HELIONOR. **Investors v. Climate Action What recent case law and treaty reforms may mean for the future of investment arbitration in the energy sector.** CIEL, 2022. https://www.ciel.org/wp-content/uploads/2022/09/Investors-v.-Climate-Action_FINAL.pdf Accessed 30 January 2025.

456 DAMJANOVIC, IVANA; DE SADELEER, NICOLAS. **Values and Objectives of the EU in Light of Opinion 1/17:** 'Trade for all', above all. Europe and the World: A law review vol 4, Issue 1, p.1-25, 2020, p.20.

uniform integration of markets in Member States, as well as the uniform interpretation and effective application of EU rules on free movement of capitals and on the right of establishment."[457]

The inherent conflict culminated in the *Achmea*[458] and *Komstroy*[459] rulings by the Court of Justice of the European Union (CJEU), which effectively banned intra-EU ISDS due to their incompatibility with EU law, even under multilateral treaties like the Energy Charter Treaty (ECT). Despite these rulings, arbitral tribunals continue to issue awards against EU Member States, who are further burdened by a growing number of claims challenging climate policies[460]. In fact not a week goes by without a new notice of a new arbitral award being made against an EU Member State, a national court rejecting to enforce an arbitral award or investors trying their luck in foreign jurisdictions such as the US or the UK.

This complex situation is further compounded by arbitral tribunals' persistent non-recognition of the intra-EU ISDS ban in disputes involving states that remain or were historically part of the ECT's non-modernised framework. In fact, such an argument has only been successfully accepted once in the *Green Power* award[461]. Every time the Court of Justice gets its hands on a case relating to arbitral awards and ISDS, it takes the opportunity to extend the ban[462]. However, the arbitral tribunals have just as consistently rejected it, creating an ongoing battle where neither side appears ready to yield, leaving Member States to bear the consequences of heavy arbitral awards, even when the investment itself remains profitable[463].

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457 BARBOU DES PLACES, SEGOLÈNE; CIMIOTTA, EMANUELE; SANTOS VARA, JUAN. Achmea Between the Orthodoxy of the Court of Justice and Its Multi-faceted Implications: An Introduction. in S. Barbou des Places, E. Cimiotta and J. Santos Vara (eds) **European Papers A Journal on Law and Integration**, vol. 4. 2019, p.16.

458 Case C-284/16, **Slovak Republic v. Achmea,** ECLI:EU:C:2018:158.

459 Case C-741/19, **Republic of Moldova v. Komstroy LLC,** ECLI:EU:C:2021:65.

460 Case C-109/20, **Republic of Poland v.PL Holdings Sarl.,** ECLI:EU:C:2021:321. the CJEU barred Intra-EU Investment Arbitrations ruling that investment arbitration according to Article 26 (2) (C) of the ECT at the intra-EU level is not compatible with EU law.
LSG Building Solutions GmbH and others v. Romania, ICSID Case No. ARB/18/19; Mathias Kruck and others v. Spain, ICSID Case No. ARB/15/23.

461 **Green Power Partners K/S and another v Kingdom of Spain**, SCC Case No. V 2016/135; LAVRANOS, NIKOS. ECT arbitral tribunal declines jurisdiction by accepting Achmea objection raised by Spain for first time. **Practical Law**, 2022. https://uk.practicallaw.thomsonreuters.com/w-036-0563?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=fe9fb09dc1784843bc963dd1b9a54e80&skipAnonymous=true. Accessed 30 January 2025

462 See how Komstroy extended the Achmea ruling.

463 **NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,** ICSID Case No. ARB/14/11; HALLAK, ISSAM. Investor-state Protection disputes involving EU Member States. **PE 738.216, 2022.** https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/738216/EPRS_IDA(2022)738216_EN.pdf. Accessed 30 January 2025, p.2.

This situation places Member States in a difficult position, especially since arbitral tribunals often fail to adequately consider the pressing need for climate change mitigating measures. Although investors have used ISDS to challenge environmental measures since the 1990s, a recent and growing wave of arbitrations directly targets specific climate policies, such as the phasing out of fossil fuels[464]. Despite the increase in litigation relating to the effects of environmental measures, recent trends underscore how profoundly at odds the current system is with sustainable development goals and the Paris Agreement[465]. This has led some countries to question the rationale or added value of international investment agreements due to lack of concrete scientific evidence of any positive impact, leading to various terminations and replacements with national legislation[466].

The urgency of drastic climate action has exposed the unsuitability of certain existing international investment agreements (IIAs) and highlighted the sometimes overly rigid stance of tribunals[467]. The ECT, in particular, has been heavily criticised for its outdated investment provisions that allow fossil fuel companies to sue states over climate-related regulations, creating a significant regulatory chill[468]. The ECT is even

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464 DI SALVATORE, LEA. **Investor–State Disputes in the Fossil Fuel Industry.** IISD Report, 2021. https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf. Accessed 30 January 2025, p.iv.

465 UN 2030 Agenda for Sustainable Development.

466 DEFOSSEZ, DELPHINE. International Investment Agreements and their arbitration clause in the energy sector: A Poisonous Gift for Developing Countries? in Abdul Rafay, **Handbook of Research on Energy and Environmental Finance 4.0.** IGI Global, 2022; CARIM, XAVIER. International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa. **South Centre Investment Policy Brief No. 4,** 2015, p.4; OLIVET, CECILIA. Why did Ecuador terminate all its bilateral investment treaties? **Transnational Institute,** 2017. https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties. Accessed 30 January 2025; JOHNSON, LISE; SACHS, LISA; LOBEL, NATHAN. Aligning international investment agreements with the Sustainable Development Goals. **Columbia Journal of Transnational Law,** vol 58, 2019, p.62; J POHL, JOACHIM. Societal Benefits and Costs of International Investment Agreements. **OECD Working Papers on Int'l Inv., Working Paper No. 2018/01,** 2018, p.4-8; AISBETT, EMMA, Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation. **Dep't of Agric. & Res. Econ., U.C. Berkeley, Working Paper No. 1032,** 2007, p.1-5; J. YACKEE, JASON WEBB. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. **Virginia Journal of International Law,** vol 51, issue 2, p.397, 2010; VIDIGAL, GERALDO; STEVENS, BEATRIZ. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?. **The Journal of World Investment & Trade,** Vol.19, p.475-512, 2018.

467 Most older IIAs do not include any provisions relating to the environment allowing states to enact new measures due to the lack of focus on environmental concerns . VANDEVELDE, KENNETH J.. A Brief History of International Investment Agreements in Karl P. Sauvant and Lisa E. Sachs (eds.) **The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows.** Oxford University Press 2009; REES-EVAN, LAURA. The Protection of the Environment in International Investment Agreements – Recent Developments and Prospects for Reform. E**uropean Investment Law and Arbitration Review**, vol 5, Issue 1, p.355-391, 2020.

468 DI SALVATORE, LEA. Investor–State Disputes in the Fossil Fuel Industry. IISD Report, 2021. https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf. Accessed 30 January 2025; TIENHAARA, KYLA; DOWNIE, CHRISTIAN. Risky Business? The Energy Charter Treaty,

said to constitute the antithesis to the Paris Agreement and a substantial threat to energy transition. While the ECT was modernized in 2024 to address these issues, many European countries, including the EU itself, ultimately withdrew, deeming the reforms insufficient, the so-called *ECTodus*- following the Italian footsteps[469]. However, the ECT's 20-year sunset clause, found in Article 47(3) of the ECT, means that Member States may still face ISDS claims from past investments[470]. While some claim the sunset clause could be neutralised, Italy, "since its unilateral withdrawal in 2016, has faced at least seven arbitration claims based on this survival clause, with cumulative compensation claims exceeding USD 400 million."[471] ISDS has, therefore, still some sunny days ahead, leaving Member States in a complex and vulnerable situation.

However, a glimpse of hope is emerging from national courts, which are demonstrating an increasing unwillingness to recognize and enforce intra-EU arbitral awards. While the battle between the CJEU and arbitral tribunals has garnered extensive academic attention, the decisive role of national courts in this complex enforcement landscape remains underexplored. This begs the question as to whether national courts might not play a prevalent role and be the final nail in the ISDS coffin, at least in Europe.

To address this question, this article employs a doctrinal legal research methodology, primarily engaging with the complexities arising at the intersection of European Union law and public international investment law. The analysis relies on a systematic examination of primary legal sources, including key provisions of the Treaty on the Functioning of the European Union (TFEU), the Energy Charter Treaty (ECT), the Vienna Convention on the Law of Treaties (VCLT), and seminal judgments from the Court of Justice of the European Union (CJEU), various national supreme and appellate courts, and international arbitral tribunals. Complementary insights are drawn from leading academic scholarship in the fields of EU law, international investment law, and dispute settlement. The analysis is further underpinned by a critical theoretical framework that examines the interplay between EU law supremacy, public international law, and the principles of international

renewable energy, and investor-state disputes. **Global Governance,** vol 24, p.451-471, 2018; JOHNSON, LISE; SACHS, LISA; LOBEL, NATHAN. Aligning international investment agreements with the Sustainable Development Goals. **Columbia Journal of Transnational Law**, vol 58, 2019.

469 Italy withdrew in 2016 before the attempts to modernise the ECT. **Energy Charter,** Italy. https://www.energycharter.org/who-we-are/members-observers/countries/italy/. Accessed 30 January 2025; M. Menkes, 'ECTodus: A Brexit Lesson' **EU LAW Live,** (31 October 2022) https://eulawlive.com/op-ed-ectodus-a-brexit-lesson-by-marcin-j-menkes/; SCHAUGG, LUKAS. **Why Coordinated Withdrawal From the Energy Charter Treaty Remains Essential for Effective Climate Action.** IISD, 2025 https://www.iisd.org/articles/insight/coordinated-energy-charter-treaty-withdrawal-essential. Accessed 3 August 2025.

470 The withdrawal becomes effective only a year after the notice was given, Article 47(2).

471 CLIENTEARTH. Energy Charter Treaty Reform: Why withdrawal is an option. **ClientEarth,** 2021. https://www.clientearth.org/media/ub1b4hmk/ect-reform-withdrawal-itn-july-2021.pdf, Accessed 30 January 2025, p.3.

arbitration.

The article will first examine the reasons for ISDS's unpopularity, focusing on the pervasive regulatory chill effect it imposes on states' policy-making, particularly concerning climate action, and the specific backlash against the ECT. Subsequent sections will then critically examine the CJEU's jurisprudence, analyse national court responses to intra-EU arbitral awards, but also the foreign court getaway where investors increasingly seek enforcement of these awards in non-EU jurisdictions, and conclude by assessing the potential for national courts to reshape the future of ISDS in the EU.

2. WHY IS ISDS BECOMING SO UNPOPULAR? THE REGULATORY CHILL PROBLEMS

International investment agreements (IIAs) have been promoted for years as optimal tools to attract foreign investment. However, this premise has been put into questioning over the past decades by a growing body of research and examples such as Brazil, which successfully attracted significant foreign investment despite never ratifying BITs containing ISDS clauses[472]. The perception that ISDS is more burdensome than advantageous without many possibilities of reforming the system is gaining considerable momentum[473]. So is the argument that ISDS restrains States from enacting regulatory measures based on the fear of being sued and paying huge compensation, the so-called regulatory chill effect[474].

472 JOHNSON, LISE; SACHS, LISA; LOBEL, NATHAN. Aligning international investment agreements with the Sustainable Development Goals. **Columbia Journal of Transnational Law**, vol 58, 2019, p.62; POHL, JOACHIM. Societal Benefits and Costs of International Investment Agreements. **OECD Working Papers on Int'l Inv., Working Paper No. 2018/01,** 2018, p.4-8; E AISBETT, EMMA, Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation. **Dep't of Agric. & Res. Econ., U.C. Berkeley, Working Paper No. 1032,** 2007, p.1-5; J. YACKEE, JASON WEBB. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. **Virginia Journal of International Law**, vol 51, issue 2, p.397, 2010; VIDIGAL, GERALDO; STEVENS, BEATRIZ. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?.**The Journal of World Investment & Trade,** Vol.19, p.475-512, 2018.

473 WAIBEL, MICHAEL; KAUSHAL, ASHA; CHUNG, KYO-HWA; BALCHIN, CLAIRE. **The Backlash against Investment Arbitration. Perceptions and Reality.** Wolters Kluwer, 2010; SINGH, KAVALIJT; ILGE, BURGHARD. Introduction. In K. Singh, & B. Ilge (eds), Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices. Somos, 2016, pp. 1-16, p.5.

474 D TIETJE, CHRISTIAN; BAETENS, FREYA; ECORYS, **The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership.** Prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands 2014. https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf. Accessed 30 January 2025.

Beyond regulatory chill, IIAs and ISDS face criticism for being undemocratic, exacerbating inequalities, undermining the rule of law, and opposing green transition[475]. This perception is reinforced by the evolution of ISDS has evolved into a form of state sovereignty limitation, allowing foreign investors to directly challenge measures they deem unfavorable.[476] For instance, Bulgaria was sued after taking steps to lower electricity prices, which automatically decreased energy companies' profits[477].

ISDS has also become highly unpopular because most modern investor-state disputes have arisen from regulatory changes -rather than the traditional asset seizure- even when the underlying investment remains profitable. Spain, for example, has faced over 50 claims solely concerning its retroactive changes to energy subsidy schemes[478]. While 21 of these cases were resolved in favour of investors[479], Spain's refusal to pay resulting in ongoing litigations globally. In *NextEra v. Spain*, the investor was awarded USD 327 million based on the projected above-market rate of return (without the regulatory change)[480], demonstrating tribunals' willingness to award significant compensation despite continued profitability. In fact, Spain -alongside the Czech Republic- has faced some of the largest ISDS cases for a total awards of USD 464 million and USD 551 million, respectively[481].

From a climate change perspective, the threat of ISDS claims can have (and does have) a deterrent effect on ambitious climate measures[482]. In 2018, the UN Secretary-

475 SACHS, LISA; JOHNSON, LISE. Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities. Initiative for Pol'y Dialogue, **Working Paper No. 306,** 2018, p.2; TIENHAARA, KYLA. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. **Transnat'l. Envtl. L.,** vol. 7, issue 2, p.229–250, 2018, p.229–30; BROWN, JULIA. International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?**.W. J. Legal Stud.** Vol 3, N°1, Art 3. p.1–25, 2013, p. 24–25.

476 DEFOSSEZ, DELPHINE. International Investment Agreements and their arbitration clause in the energy sector: A Poisonous Gift for Developing Countries? in Abdul Rafay, **Handbook of Research on Energy and Environmental Finance 4.0.** IGI Global, 2022.

477 *EVN, Energo-Pro and ČEZ v. Bulgaria, ICSID Case No. ARB/15/19.*

478 Un Trade and Development, **'Investment Dispute Settlement Navigator: Spain'** <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain/respondent>. accessed 24 September 2024.

479 GRIERA, MAX. UK court may seize Spanish sovereign assets amid international arbitration quagmire. **EurActiv**, 2023. https://www.euractiv.com/section/politics/news/uk-court-may-seize-spanish-sovereign-assets-amid-international-arbitration-quagmire. Accessed 30 January 2025.

480 **NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,** ICSID Case No. ARB/14/11.

481 HALLAK, ISSAM. Investor-state Protection disputes involving EU Member States. **PE 738.216,** 2022. https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/738216/EPRS_IDA(2022)738216_EN.pdf. Accessed 30 January 2025, p.2.

482 REISCH, NIKKI; DE ANZIZOU, HELIONOR. Investors v. Climate Action What recent case law and treaty reforms may mean for the future of investment arbitration in the energy sector. **CIEL**, 2022. https://www.ciel.org/wp-content/uploads/2022/09/Investors-v.-Climate-Action_FINAL.pdf. Accessed 30 January 2025, p.1; THAKUR, TANAYA. Reforming the investor-state dispute settlement mechanism and the host

General noted:

> International investment agreements, which are meant to support foreign investment, often result in unintended consequences, such as constraining regulations that support sustainable development when the regulations impact investor profits. Some countries have become vulnerable to large financial penalties from arbitration panels set up to settle investor-State disputes, impeding their ability to implement policies in support of the Sustainable Development Goals[483].

While many (if not most) investment agreements have been signed before climate change actions became a priority, the lack of consideration given to environmental concerns by arbitral tribunals has raised alarms[484]. These concerns are exacerbated by systemic imbalance where 'neither States nor affected members of the public (third parties) can initiate arbitration, only investors can.'[485] The system not only creates an asymmetry regarding the power to initiate arbitration but also regarding the rights and obligations of the parties. A 2021 UN report highlighted that, 'most existing international investment agreements reflect an imbalance between rights and obligations of investors, which can have the unintended effect of facilitating irresponsible investor conduct or making it challenging for States to regulate such conduct.'[486] Indeed, most agreements confer rights to investors 'but hardly any obligations or responsibilities regarding human rights and the environment.'[487] Consequently, it remains difficult for States and affected communities to hold investors accountable. The report further notes, 'moreover, given the lack of explicit investor obligations concerning human rights and the environment

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state's right to regulate: a critical assessment. **Indian Journal of International Law,** vol 59, p. 173–208, 2021; BONNITCHA, JONATHAN. **Substantive Protection under Investment Treaties: A Legal and Economic Analysis.** Cambridge University Press, 2014.
On the opposite view see: SANDS, ANNA. Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo. World Trade Review, vol 22, p. 55-72, 2023.

483 U.N. SECRETARY-GENERAL. International financial system and development. **U.N. Doc. A/73/280,** para 62.

484 BERGE, TARALD LAURAL; BERGER, ALEX. Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity. **Journal of International Dispute Settlement,** Volume 12, Issue 1, p. 1–41, 2021; SACHS, LISA; JOHNSON, LISE; MERRILL, ELLA. Environmental Injustice: How treaties undermine human rights related to the environment. **Sciences Po Legal Review,** vol. 18, p.90-100, 2020.

485 REISCH, NIKKI; DE ANZIZOU, HELIONOR. Investors v. Climate Action What recent case law and treaty reforms may mean for the future of investment arbitration in the energy sector. **CIEL**, 2022. https://www.ciel.org/wp-content/uploads/2022/09/Investors-v.-Climate-Action_FINAL.pdf. Accessed 30 January 2025, p.1.

486 SECRETARY-GENERAL. Human rights-compatible international investment agreements. **United Nations General Assembly report A/76/238,** 2021. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/208/09/PDF/N2120809.pdf?OpenElement. Accessed 30 January 2025.

487 Ibid, p.6.

in the agreements, arbitrators tend to treat them as an autonomous and self-contained regime that prevails over other regulatory regimes,'[488] allowing arbitral tribunals to entirely disregard environmental actions.

Tietje and Baetens identified three categories of regulatory chill thus: 'anticipatory chill, specific response chill, and precedential chill'[489]. 'Anticipatory chill' involves a situation where States internalise the potential threat of ISDS posed by their commitments under IIAs while drafting the legislation[490]. For instance, Denmark and New Zealand have both admitted that 'the threat of investor-state lawsuits has hindered their climate policy ambitions.'[491] Investor protection can also be used to resist climate action, or at least make it much more expensive, as when Uniper sued the Dutch government in 2021[492]. Anticipatory chill has been described as the 'potentially most sweeping' kind of regulatory chill[493].

'Specific response chill' refers to the effect of a particular regulation once policymakers or a State become aware of the potential risk of an investor-state dispute. 'Precedential chill' happens when a State considers a concluded arbitration while contemplating future public policy measures[494]. For instance, The Netherlands agreed to pay Vattenfall EUR 52.5 million to close its oldest plant by 2020[495]. This decision followed the German *Vattenfall* saga- described as a 'turning point in the geopolitical landscape of ISDS'[496]- raising the question of how much this ordeal influenced the Dutch decision.

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488 Ibid, p.6-7.

489 TIETJE, CHRISTIAN; BAETENS, FREYA; ECORYS, **The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership.** Prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands 2014. https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf. Accessed 30 January 2025.

490 ibid.

491 Elizabeth Meager, **'Cop26 targets pushed back under threat of being sued'** Capital Monitor, (14 January 2022). https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/.

492 The action was withdrawn as part of the deal to nationalise Uniper. Uniper SE, **Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands,** ICSID Case No. ARB/21/22.

493 See: TIENHAARA, KYLA. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. **Transnat'l. Envtl. L.,** vol. 7, issue 2, p.229–250, 2018, p.229–30.

494 TIETJE, CHRISTIAN; BAETENS, FREYA; ECORYS, **The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership.** Prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands 2014. https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf. Accessed 30 January 2025, p.41.

495 EUROPEAN COMMISSION, **State Aid SA.54537 (2020/NN)** – Netherlands Prohibition of coal for the production of electricity in the Netherlands. 2020. https://ec.europa.eu/competition/state_aid/cases1/202025/284556_2165085_151_2.pdf. Accessed 30 January 2025.

496 WEGHMANN, VERA; HALL, DAVID. The Unsustainable Political Economy of Investor-State Dispute Settlement Mechanisms. **International Review of Administrative Sciences,** vol 87, issue 3, p. 480 - 496, 2021, p.488.

Similarly, Germany agreed to compensate RWE and LEAG with EUR 4.35 billion to pursue its plan to phase out coal by 2038 and avoid litigation[497]. One might also question whether a threat to initiate arbitration against France contributed to the watering down of a proposed law to end fossil fuel extraction on French territory by 2040[498].

In addition to diluting environmental actions, such cases could deter some Member States from complying with EU law. For instance, Germany was found in breach of its obligation under the Habitats Directive for authorising the operation of a coal-fired power plant without an appropriate environmental impact assessment[499]. The requirements for water permits were lowered to comply with an ICSID award[500]. In essence, an ISDS award may impose financial penalties for adhering to EU law.

The cumulative effect of these concerns is a profound regulatory chill, where states either refrain from enacting crucial public interest legislation (especially in areas like climate change) or water down existing measures, simply to avoid the threat of costly and unpredictable ISDS claims. This systemic pressure, driven by the unique privileges afforded to foreign investors, fundamentally undermines the democratic policy space of sovereign states, forcing governments into a difficult dilemma: either risk substantial financial penalties or compromise on critical public policy objectives. However, as later sections will explore, the evolving jurisprudence of national courts within the EU offers a burgeoning counter-narrative, potentially providing a crucial mechanism to mitigate this chill by reasserting domestic legal authority over investor-state disputes.

3. ENERGY CHARTHER TREATY (ECT) BACKLASH

The general criticisms against ISDS mechanisms find their most prominent and contentious manifestation within the framework of the Energy Charter Treaty (ECT). Signed in 1994, the ECT was designed to promote energy security and investment, particularly in post-Soviet states. However, it has evolved into the most litigated investment treaty globally, becoming a flashpoint for disputes in the fossil fuel industry, especially those

497 SIMON, FREDERIC. Brussels opens in-depth investigation into Germany's coal phase-out plan. **Euractiv,** 2021. https://www.euractiv.com/section/energy/news/brussels-opens-in-depth-investigation-into-germanys-coal-phase-out-plan/. Accessed 30 January 2025.

498 Letter from Conseil d'Etat. https://www.amisdelaterre.org/wp-content/uploads/2018/08/loi-hulot-contributions-lobbies-au-conseil-etat.pdf.

499 Case C 142/16 **Commission v Germany,** ECLI:EU:C:2017:301,

500 **Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany,** ICSID Case N° ARB/09/6, 11 March 2011.

challenging climate action policies[501].

The inherent conflict between the ECT's broad investor protections and the urgent need for a global energy transition became increasingly evident. The ECT's provisions, particularly its "fair and equitable treatment" standard and broad definition of "investment," offer powerful tools for fossil fuel investors to challenge government measures aimed at phasing out fossil fuels, promoting renewables, or implementing environmental regulations. This perceived incompatibility with the Paris Agreement and national climate targets fueled widespread calls for the ECT's reform[502]. Indeed, the Energy Charter Treaty has been criticised for years as constituting the antithesis to the Paris Agreement and a substantial threat to energy transition due to its outdated investment provisions, which allow companies to sue States over their climate policies[503]. Moreover, the Treaty was criticized for penalizing, rather than supporting, a transition to net-zero, a point highlighted by the UK Government in its withdrawal in 2024[504].

While the ECT had long escaped public attention, it gained notoriety for the hefty arbitral awards against states, attracting growing scrutiny and calls for reform or withdrawal. Responding to this growing pressure, the Energy Charter Conference embarked on a lengthy modernization process in 2017. In 2018, a list of topics for the modernisation of the ECT was adopted to drive 'an inclusive global energy transition in alignment with Paris Agreement objectives.'[505] After 15 rounds of negotiations, an "agreement in principle" on a modernised text was reached in June 2022, largely reflecting the EU's proposals.

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501 DI SALVATORE, LEA. **Investor–State Disputes in the Fossil Fuel Industry.** IISD Report, 2021. https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf. Accessed 30 January 2025,

502 NELSEN, ARTHUR, Revealed: secret courts that allow energy firms to sue for billions accused of 'bias' as governments exit. **The Guardian.** 2022 https://www.theguardian.com/business/2022/nov/14/revealed-secret-courts-that-allow-energy-firms-to-sue-for-billions-accused-of-bias-as-governments-exit#:~:text=%E2%80%9CThe%20energy%20charter%20treaty%20is,goal%20of%20the%20Paris%20agreement.%E2%80%9D. Accessed 30 January 2025.

503 DI SALVATORE, LEA. Investor–State Disputes in the Fossil Fuel Industry. IISD Report, 2021. https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf. Accessed 30 January 2025; TIENHAARA, KYLA; DOWNIE, CHRISTIAN. Risky Business? The Energy Charter Treaty, renewable energy, and investor-state disputes. **Global Governance,** vol 24, p.451-471, 2018; JOHNSON, LISE; SACHS, LISA; LOBEL, NATHAN. Aligning international investment agreements with the Sustainable Development Goals. **Columbia Journal of Transnational Law,** vol 58, 2019.

504 GOV.UK, UK Departs Energy Charter Treaty, 2024. https://www.gov.uk/government/news/uk-departs-energy-charter-treaty#:~:text=The%20UK%20government%20confirms%20its,to%20agree%20vital%20modernisation%20fail.&text=The%20UK%20will%20leave%20the,today%20(Thursday%2022%20February). Accessed 30 January 2025; NELSEN, ARTHUR. UK quits treaty that lets fossil fuel firms sue governments over climate policies. **The Guardian,** 2024. https://www.theguardian.com/environment/2024/feb/22/uk-quits-treaty-that-lets-fossil-fuel-firms-sue-governments-over-climate-policies. Accessed 30 January 2025.

505 EUROPEAN UNION, **European Union proposal for the modernisation of the Energy Charter Treaty.** https://energy.ec.europa.eu/document/download/43b875c5-7b10-491a-99a5-4ea05af41199_en Accessed 30 January 2025.

This modernised version, formally approved on 3 December 2024, aimed to address some of the criticisms by introducing a more tailored definition of investments and clarifying substantive protections. Significant proposed changes included the explicit elimination of intra-EU investor-state arbitration through the so-called 'disconnection clause'- found in Article 24(3) modernised ECT- and an option to phase out protection for existing fossil fuel investments after 10 years- Annex NI. For EU member States, investments made in their territories before 3 September 2025 will no longer be protected ten years after the date of entry into force of the modifications in Section C and no later than 31 December 2040[506]. New fossil fuel investments made on or after 3 September 2025 are not protected at all- which is in line with the carve-out option proposed by the UK and EU[507]. It also included optional flexibilities for states to phase out protection for certain fossil fuel investments.

Even with its amendments, the modernised ECT was perceived as failing to fully address the chilling effect problem or its fundamental compatibility with EU law. Indeed, the proposed extension of investment protections to potentially 'sustainable fuels' in the modernised ECT raised concerns that it could paradoxically lead to an even greater chilling effect, further constraining states' sovereignty and their ability to adopt new climate policies. Poland, for instance, noted that the ECT would impair the "accelerating energy transformation" due to potentially high damages arbitration proceedings[508]. Regarding the compatibility with EU law, despite the modernised version of the ECT foreseeing access to investment courts as an alternative avenue, such courts might still not satisfy the criteria to request a preliminary ruling from the CJEU[509]. This suggests the modernised version could still be incompatible with EU law and the *Achmea* and *Komstroy* rulings. Unsurprisingly, the Council of the European Union failed to agree on the reforms to the controversial ECT, indicating lingering dissatisfaction[510].

Despite these changes, the modernization efforts were widely deemed insufficient by many, particularly within the European Union. While it would immediately bar intra-EU arbitration and allow for the phasing out of protection for existing fossil fuel investments, critics argued it still hindered states' ability to adopt ambitious climate policies and

506 Annex NI, Section C (1).

507 Annex NI, Section B (1). See : European Commission, **Energy Charter Treaty modernisation** (WK 9218/2022 INIT, 27 June 2022).

508 SADOWSKI, WOJCIECH. Poland to Withdraw from the ECT: Who Does It Benefit? **Kluwer Arbitration** Blog, 2022. https://arbitrationblog.kluwerarbitration.com/2022/09/27/poland-to-withdraw-from-the-ect-who-does-it-benefit/#:~:text=Poland%20surprised%20the%20world%20when,Efficiency%20and%20Related%20Environmental%20Aspects. Accessed 30 January 2025.

509 As found in Article 267 TFEU and Case C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, ECLI:EU:C:1997:413.

510 European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP), point L.

did not sufficiently align with the Paris Agreement goals[511]. Both the unmodernised and modernised version are undoubtedly at odds with the climate crisis as it protects investors in climate-damaging fields such as fossil energy while creating a dilemma for countries due to its regulatory chill nature. As Bernasconi-Osterwalder explained, 'the announcements by several EU member states of their ECT withdrawal plans reflect the increased concern and recognition that companies will continue to use investment arbitration to undermine ambitious climate policy, even under the modernised ECT.'[512] It also left significant loopholes that could still be exploited by fossil fuel investors. A key point of contention was the absence of a strong position or proposal to address the highly controversial arbitration clause in Article 26 of the original ECT within the negotiation topics. Interestingly, amidst these modernization efforts, the Court of Justice of the European Union (CJEU) had a crucial opportunity to definitively rule on the compatibility of Article 26 of the ECT with EU law in Opinion 1/20 but dismissed the request due to insufficient information[513].

The perceived inadequacy of the modernised text, particularly regarding Article 26 and the lack of a definitive resolution of the conflict between the ECT and EU law, culminated in a wave of coordinated withdrawals. After failing to fully agree on the revised version and amidst growing calls from civil society, the European Parliament called for a coordinated EU exit, a solution that the Commission also ultimately recommended and implemented[514]. The European Union and the European Atomic Energy Community (Euratom) formally notified their withdrawal, which took effect on 28 June 28[515]. Prior to and concurrently with the EU's departure, a significant number of EU Member States, also announced and subsequently completed their formal withdrawals- a movement dubbed the *ECTodus*[516]. Even countries that had only provisionally applied the ECT, such

511 DIETRICH BRAUCH, MARTIN. Climate Action Needs Investment Governance, Not Investment Protection and Arbitration. **CCSI,** 2022. https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds. Accessed 30 January 2025.

512 Quote taken from IISD. Energy Charter Treaty Withdrawal Announcements Reflect Reform Outcome is Insufficient for Climate Ambition. **IISD,** 2022. https://www.iisd.org/articles/statement/energy-charter-treaty-withdrawal-announcements. Accessed 30 January 2025.

513 Opinion 1/20 of 16 June 2022, ECLI:EU:C:2022:48.

514 European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP); SIMSON, CAROLINE, In Reversal, Europe's Executive Arm Looks To United ECT Exit. **Law360.** -2023. https://www.law360.com/energy/articles/1574338/in-reversal-europe-s-executive-arm-looks-to-united-ect-exit. Accessed 30 January 2025; EUROPEAN COMMISSION, **European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty.** 2023 https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en. Accessed 30 January 2025.

515 SCHAUGG, LUKAS. **Why Coordinated Withdrawal From the Energy Charter Treaty Remains Essential for Effective Climate Action.** IISD, 2025. https://www.iisd.org/articles/insight/coordinated-energy-charter-treaty-withdrawal-essential. Accessed 3 August 2025.

516 MENKES, M., ECTodus: A Brexit Lesson. **EU LAW Live,** 2022. https://eulawlive.com/op-ed-ectodus-a-brexit-lesson-by-marcin-j-menkes/. Accessed 30 January 2025.

as Australia, terminated their provisional application[517].

Country[518]	Official Notification	Effective date of exit
Italy	31 December 2014	1st January 2016
Poland	27th December 2022	29th December 2023
France	7th December 2022	8th December 2023
Germany	19th December 2022	20th December 2023
Luxembourg	16th June 2023	17th June 2024
Slovenia	13th October 2023	14th October 2024
Portugal	1st February 2024	2nd February 2025
Spain	16th April 2024	17th April 2025
United Kingdom	26th April 2024	27th April 2025
Netherlands	27th June 2024	28th June 2025
European Union	27th June 2024	28th June 2025
Denmark	3rd September 2024	4th September 2025
Norway[519]	12th November 2024	10th January 2025

Crucially, however, the "sunset clause" (Article 47(3)) of the unmodernised ECT continues to pose a significant challenge. This clause stipulates that investments made before a state's withdrawal takes effect remain protected under the Treaty's terms for an additional 20 years from the date of withdrawal[520]. Despite some claims that this sunset clause could be unilaterally neutralised through mechanisms like to an *inter se* agreement among withdrawing states the legal efficacy of such an approach remains highly debated[521]. Indeed, the ECT includes a "safety net" in Article 16, which preserves

517 Australia deposited its declaration not to be a party to the ECT on the 28th of September 2021 with the effectively terminated on the 13th of December 2021. See: AUSTRALIAN GOVERNMENT. The Australian Treaties Database: Energy Chater Treaty. **Department of Foreign Affairs and Trade,** 2021. https://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/B5C43BB22EE8D60ACA256C8B0010A881. Accessed 30 January 2025.

518 Information from: **INTERNATIONAL ENERGY CHARTER,** Written notification of withdrawal from the Energy Charter Treaty. Energy Charter Secretariat News, 2023. https://www.energycharter.org/fileadmin/DocumentsMedia/Notifications/2023.06.16_-_Withdrawal_notification_Luxembourg.pdf. Accessed 30 January 2025.

519 Norway had provisionally applied the original ECT. It notified the depositary of its intention not to be a party to the ECT on the 12th of November 2024 with the provisional application effectively ended on the 10th of January 2025. See: **INTERNATIONAL ENERGY CHARTER.** Communication from the Depositary. Energy Charter Secretariat New, 2025. https://www.energycharter.org/media/news/article/communication-from-the-depositary-1/. Accessed 3 August 2025.

520 The withdrawal becomes effective only a year after the notice was given, Article 47(2).

521 ECKES, CHRISTINA; ANKERSMIT, LAURENS, The compatibility of the Energy Charter Treaty with EU law. **UVA-DARE,** 2022. https://pure.uva.nl/ws/files/70394470/ECKES_ANKERSMIT_Report_on_ect_compatibility_with_eu_law_2022.pdf. Accessed 30 January 2025, p.52.

the highest level of protection, and arbitral tribunals have repeatedly rejected arguments that EU membership modified the ECT or eliminated consent to intra-EU arbitration based on this article[522]. The chance of any such inter se modification being accepted by tribunals is, therefore, considered very unlikely. The experience of Italy, which withdrew from the ECT in 2016, highlights the difficulties: 'since its unilateral withdrawal from the treaty in 2016, Italy has faced at least seven arbitration claims based on the survival clause, with cumulative amounts in compensation claimed exceeding USD 400 million.'[523] In 2022, Italy was successfully sued by Rockhopper. It was condemned to pay EUR 190 million in compensation for its ban on developing further oil fields near the coast for environmental reasons[524]. While these withdrawals are a strong stand, the lingering sunset clause means ISDS still has some sunny days ahead.

Paradoxically, withdrawing from the unmodernised ECT might even prolong the protection afforded to investors for a longer period than if the modernised version had been widely adopted. Indeed, the modernised version would have immediately barred arbitration involving European investors and Member States and eliminated the protection 10 years earlier. By withdrawing, States will still be subject to claims concerning existing investments under the ECT and bound by its 20-year sunset clause[525]. This creates a risk of facing the "worst of both worlds," as states will be exposed to claims for decades without being able to benefit from any potential revisions in the modernised text. For instance, as Poland notified its withdrawal in December 2022, it only took effect in December 2023, and the protection afforded by the sunset clause will only end in December 2043, three years after the latest envisaged date under the modernised ECT. The only country which could potentially benefit from the withdrawal is Italy, whose 2016 withdrawal means its survival period will end in January 2036- four years before the intended date.

These withdrawals underscore a decisive rejection of the ECT's prior framework and, for many, even its modernised form. While the modernised ECT began its provisional application on 3 September 2025, for those parties that did not opt out, its ultimate entry into full force remains highly uncertain, as it requires ratification by three-fourths of the

522 **Vatenfall v. Germany,** ICSID Case No. ARB/12/12, paras. 195-196, 221; **Landesbank v. Spain,** ICSID Case No. ARB/15/45, para. 170-172; **Eskosol v. Italy,** ICSID Case No. ARB/15/50, para. 99-100; **BayWa v. Spain,** ICSID Case No. ARB/15/16, para. 271; **Silver Ridge v. Italy**, ICSID Case No. ARB/15/37, paras. 210; **Sevilla Beheer v. Spain,** ICSID Case No. ARB/16/27, para. 646-647.

523 CLIENTEARTH. Energy Charter Treaty Reform: Why withdrawal is an option. **ClientEarth,** 2021. https://www.clientearth.org/media/ub1b4hmk/ect-reform-withdrawal-itn-july-2021.pdf, Accessed 30 January 2025, p.3.

524 **Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic,** ICSID Case No. ARB/17/14. A recent ICSID committee annulled the award on procedural grounds- improper tribunal constitution under Article 52(1)(d) of the ICSID Convention- in June 2025.

525 See an example in **Encavis et al. v. Italy,** ARB/20/39, p.100.

remaining Contracting Parties[526].

4. THE CJEU VS ARBITRAL TRIBUNALS: IRRECONCILABLE POSITION

The widespread political backlash against the Energy Charter Treaty and the subsequent coordinated withdrawals by the EU and many of its Member States are fundamentally rooted in the profound legal incompatibility between the Treaty's investor-state dispute settlement (ISDS) mechanism and core tenets of EU law. This incompatibility has been unequivocally established by a series of landmark rulings from the Court of Justice of the European Union (CJEU), leading to an irreconcilable conflict with the approach taken by many arbitral tribunals. Indeed, over the last few years, we have witnessed a raging battle between the CJEU, which steadfastly maintains its position on the supremacy and autonomy of EU law, and arbitral tribunals, which continue to hold that they are not bound by the judgments of the CJEU. This fundamental disagreement places the Member States squarely between a rock and a hard place, forced to navigate conflicting legal obligations from two powerful legal orders.

The pivotal judgment, *Achmea,* laid the groundwork for this conflict by declaring arbitration clauses in intra-EU bilateral investment treaties (BITs) incompatible with EU law. The Court ruled that 'Member State are precluded, in an agreement inter se, from setting up a tribunal which, while being called on to resolve disputes relating to the interpretation or application of EU law, is set outside the EU judicial system and is capable of delivering final decisions.'[527] This reasoning is quite simple and builds on a long line of case law since arbitral tribunals cannot require a preliminary ruling- as they do not fall within the category of 'court or tribunal' under Article 267 TFEU contrary to the conclusion of the Advocate General- it is, therefore, incompatible with Article 344 TFEU, which mandates direct recourse to the CJEU for disputes concerning EU law interpretation[528]. The Court reached such a conclusion because the arbitral provision in the BIT was included to 'ensure that dispute resolution would take place outside the EU judicial system and through an ad hoc mechanism.'[529] In essence, the Court reaffirmed

526 Article 42(4) modernised ECT.

527 LONARDO, LUIGI. May Member States' courts act as catalysts of normalization of the European Union's Common Foreign and Security Policy?. **Maastricht Journal of European and Comparative Law,** vol 28, issue 3, p. 287–303, 2021, p.295.

528 *Slovak Republic v. Achmea* (n 5), paras 43 and 49. See: VAJDA, CHRISTOPHER. Achmea and the Autonomy of EU Law. **LAwTTIP Working papers.** 2019, p.10; FANOU, MARIA. Intra-European Union investor-State arbitration post-Achmea: RIP?. **Maastricht Journal of European and Comparative Law**, vol 26. Issue 2, p.316-340, 2019, p.325.

529 LONARDO, LUIGI. May Member States' courts act as catalysts of normalization of the European

its previous case law and *Opinion 2/13,* clarifying that Member States cannot subtract a dispute from the EU judicial system[530].

While *Achmea* was perceived as disruptive in the investment arbitration community, it was not surprising from an autonomy of EU law perspective[531]. As Damjanovic and de Sadeleer argued, 'The CJEU as the supreme guardian of the EU legal order considers EU law as specific international law to which other international law instruments should conform, when necessary to achieve the objectives of the EU founding Treaties.'[532] Indeed, since *Van Gend en Loos, the Court* has made clear that the Treaty established a 'new legal order' distinct from public international law[533]. The Court took a very strong stand to preserve its supremacy over the interpretation of EU law, simultaneously paving the way for necessary changes in investment treaty practice[534].

One of the central points of contention in *Achmea* was whether the dispute would require the arbitral tribunal to apply and interpret EU law. For the Advocate General, since the EU was not party to that specific BIT, that instrument was not part of EU law, implying no need for EU law interpretation. Moreover, the AG noted that arbitral awards cannot escape review by national courts, which could then refer a question to the CJEU[535]. The Court did not share this view, reasoning that the tribunal would have to consider both domestic and international treaties, and given that EU law forms part of both, arbitral tribunals might be asked to interpret or apply EU law[536]. Furthermore, the arbitral mechanism would not guarantee the full effectiveness of EU law and would conflict with the principle of autonomy of EU law[537]. The Court also recalled that: 'the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure

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Union's Common Foreign and Security Policy?. **Maastricht Journal of European and Comparative Law,** vol 28, issue 3, p. 287–303, 2021, p.295.

530 Opinion 2/13, ECHR II, ECLI:EU:C:2014:2454.

531 ECKES, CHRISTINA, **Some reflections on Achmea's broader consequences for investment arbitration.** European Papers. v.4, N 1, 2019, p.79-97, p.80.

532 DAMJANOVIC, IVANA; DE SADELEER, NICOLAS. I would rather be a respondent State before a domestic court in the EU than before an international investment tribunal in S. Barbou des Places, E. Cimiotta and J. Santos Vara (eds) **European Papers A Journal on Law and Integration.** Vol 4, 2019, p.24.

533 Opinion of AG Poiares Maduro delivered on 16 January 2008, case C-402/05 P, Kadi, para. 24. See: M JIRI, MALENOVSKÝ. A la recherche d'une solution intersystémique aux rapports du droit international et du droit de l'union européenne. 65 **Annuaire français de droit international,** vol 65, p.201- 234, 2019.

534 **Slovak Republic v. Achmea** (n 5), paras 58-60.

535 **Slovak Republic v. Achmea,** paras 239-241.

536 KOUTRAKOS, PANOS. The autonomy of EU law and international investment arbitration. **Nordic Journal of International Law,** vol 88, issue 1, p. 41–64, 2019, p. 48.

537 SHIPLEY, TRAJAN. The Principle of Autonomy of EU Law in the Context of Investor-State Dispute Settlement: A Public Policy Norm. **Brexit Institute Working Paper Series No 05/2024,** 2024.

of the EU and the very nature of that law.'[538] Finally, the 'Court ruled that Article 8 of the BIT was incompatible with the principle of sincere cooperation, and therefore capable of impairing the autonomy of EU law.'[539]

The *Achmea* judgment also provided crucial legal backing for the European Commission's long-standing efforts to dismantle intra-EU BITs[540]. These agreements were concluded before direct foreign investments were included in the common commercial policy, but then the Commission realised that they were incompatible with the internal market and could result in potential discrimination, so it advocated for their termination. As Barbou des Places, Cimiotta and Santos Vara noted

> The Commission considered intra-EU BITS, due to their nature of bilateral differentiated regimes on investments, as an anomaly vis-à-vis the uniform integration of markets in Member States, as well as the uniform interpretation and effective application of EU rules on free movement of capitals and on the right of establishment[541].

In light of these findings, the immediate question arose as to whether the Achmea ruling, concerning bilateral investment treaties (BITs), would also apply to multilateral agreements like the Energy Charter Treaty (ECT), to which the EU itself is a contracting party alongside its Member States. Indeed, the direct application of *Achmea* to the ECT was initially contested by some, including arbitral tribunals. For instance, in *Electrabel*[542]*,* the tribunal noted the EU's significant role in the ECT's conclusion and argued that 'the ECT's genesis generates a presumption that no contradiction exists between the ECT and EU law.'[543] This perspective implied a fundamental disagreement with the notion of Achmea's automatic extension to the ECT, particularly given the EU's direct participation. However, despite such arguments, it was consistently argued that there had never been

538 **Slovak Republic v. Achmea,** para 33.

539 GROUSSOT, XAVIER; OBERG, MARJA-LIISA X. The Web of Autonomy of the EU Legal Order: Achmea' in G. Butler and R. Wessel (eds) **EU External Relations Law: The Cases in Context.** Hart Publishing Ltd, 2022, p.930.

540 COMMISSION, Commission asks Member States to terminate their intra-EU bilateral investment treaties. **Press release IP/15/5198.** 2015.

541 S BARBOU DES PLACES, SEGOLÈNE; CIMIOTTA, EMANUELE; SANTOS VARA, JUAN. Achmea Between the Orthodoxy of the Court of Justice and Its Multi-faceted Implications: An Introduction. in S. Barbou des Places, E. Cimiotta and J. Santos Vara (eds) **European Papers A Journal on Law and Integration,** vol. 4. 2019, p.16.

542 "as a matter of legal, political and economic history, the European Union was the determining actor in the creation of the ECT". ICSID, case no. ARB/07/19, **Electrabel S.A. v. Republic of Hungary,** 30 November 2012, para 4.131.

543 Para 4.134.

any intention to apply the ECT in disputes opposing EU investors and Member States within the EU's internal market[544]. To clarify its position following *Achmea*, the European Commission explicitly stated that the ruling rendered Article 26 of the ECT inapplicable for intra-EU disputes, a stance confirmed by the Declaration of the Representatives of the Governments of the Member States[545]. This Commission stance foreshadowed the CJEU's explicit extension of the Achmea principle to the ECT in the *Komstroy* ruling, which then definitively cemented the incompatibility.

The uncertainty regarding the ECT's intra-EU applicability was finally and definitively resolved by the CJEU in *Komstroy.* Building directly on the principles established in *Achmea,* the CJEU unequivocally stated that the arbitration clause in Article 26 of the ECT does not apply to intra-EU disputes, as it would jeopardize the uniform application and autonomy of EU law. This ruling cemented the incompatibility of intra-EU ISDS under the ECT with the EU legal order. Indeed, as Advocate General Saugmandsgaard noted in his opinion that the ECT was 'entirely inapplicable to such dispute.'[546] This clarification effectively contradicts many of the arbitral awards which distinguished the facts from *Achmea* claiming it did not apply to the ECT. However, when Spain requested a re-consideration of a 2020 arbitral decision based on the *Komstroy* ruling, the tribunal denied it on the grounds that

> There was nothing in the reasoning in *Komstroy* which was not anticipated by the Tribunal or by the parties in their submissions leading to the 2020 Decision. *Komstroy* added nothing material to *Achmea* apart from its express application to the ECT, which had been taken fully into account by the parties in their arguments and by the Tribunal in its 2020 Decision[547].

Interestingly, in this decision, the tribunal followed the pro-claimant trend,

544 DAMJANOVIC, IVANA; DE SADELEER, NICOLAS. I would rather be a respondent State before a domestic court in the EU than before an international investment tribunal in S. Barbou des Places, E. Cimiotta and J. Santos Vara (eds) **European Papers A Journal on Law and Integration.** Vol 4, 2019, p.34.

545 EUROPEAN COMMISSION, **Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment.** COM (2018) 547 final, 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A547%3AFIN Accessed 30 January 2025; 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 https://finance.ec.europa.eu/system/files/2019-01/190117-bilateral-investment-treaties_en.pdf.

546 Opinion Advocate General Saugmandsgaard, Joined Cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others, Athesia Energy Srl and Others v. Ministero dello Sviluppo Economico and Gestore dei servizi energetici (GSE) SpA*, ECLI:EU:C:2020:876, para 55.

547 **Cavalum SGPS, S.A. v. Kingdom of Spain,** ICSID Case No. ARB/15/34, para 46.
Similar outcome is found in *Infracapital F1 Sàrl and Infracapital Solar BV v. Kingdom of Spain,* ICSID Case No. ARB/16/18, Decision on Respondent Request for Reconsideration regarding the Intra-EU Objection and the Merits, 01 February 2022, para 102.

inconsistent with the CJEU's ruling. Such attempts to limit the impact of the CJEU's case law clearly demonstrate a 'conflictual relationship (of those rulings) with international law.'[548]

Despite these clear and consistent rulings from the highest court of the European Union, arbitral tribunals have largely persisted in asserting jurisdiction over intra-EU investment disputes in stark defiance of these unequivocal pronouncements[549]. Drawing their authority from public international law and the specific investment treaties, these tribunals have typically rejected arguments that EU law renders the arbitration agreements invalid or that the CJEU's judgments are determinative of their jurisdiction. They often view themselves as adjudicating under an international legal framework that is separate from and not subservient to EU law. This has led to a continuing stream of arbitral awards against EU Member States, particularly in the renewable energy sector, directly evidencing the irreconcilable clash between the two legal orders.

In *Eurus Energy Holdings*, the arbitral tribunal even allowed a European investor to withdraw from the arbitration to avoid the dispute being classified as intra-EU[550]. One might question if the *Achmea* ruling did not rob the arbitral tribunals the wrong way. Indeed, in a pre-*Achmea* award- *Euram*- the arbitral tribunal mentioned its lack of power to assess the validity of an EU institution's act and that its interpretation was limited to the BITs itself[551]. However, since *Achmea,* most arbitral tribunals have asserted that this decision did not apply to the ECT or all intra-EU agreements or that the ECT prevails over EU law[552]. For example, in *UP* v *Hungary*, the International Centre for Settlement of Investment Disputes (ICSID) distinguished the circumstances in *Achmea* and the 'multilateral public international treaty' context of ICSID[553]. A similar argument was advanced in *Masdar v Spain,* where the ICSID Tribunal- relying on the Opinion of AG Wathelet in *Achmea*- ruled that the judgment was inapplicable to the Energy Charter Treaty as the ECT is a multilateral

548 GROUSSOT, XAVIER; OBERG, MARJA-LIISA X. The Web of Autonomy of the EU Legal Order: Achmea' in G. Butler and R. Wessel (eds) **EU External Relations Law: The Cases in Context.** Hart Publishing Ltd, 2022, p.934.

549 SARKANNE, KATARIINA. EU Law in investment arbitration: a view from international arbitral tribunals. **Europe and the World: A Law Review,** vol 5., p. 1-18, 2021.

550 *Eurus Energy Holdings Corporation v. Kingdom of Spain,* ICSID Case No. ARB/16/4.

551 **European American Investment Bank AG v Slovakia,** PCA Case No 2010-17, Award on Jurisdiction (22 October 2012) para 264 'if a Member State were minded to enforce an arbitral award that would violate EU law, tools remain in the hands of the EU institutions – and particularly the ECJ – to ensure a proper application of EU law'.

552 **Masdar Solar and Wind Cooperatief U.A. v. Kingdom of Spain,** ICSID case N° ARB/14/1, 2018, paras 679 and 682; ESPF *and others v. Italian Republic,* ICSID case N°. ARB/16/5, 2020, paras. 335-338 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, para 167; *JGC Holdings Corporation* (formerly JGC Corporation) v. *Kingdom of Spain,* ICSID Case No. ARB/15/27; *Sevilla Beheer BV and others v. Kingdom of Spain,* ICSID Case No. ARB/16/27, para 663.

553 UP and CD **Holding Internationale v Hungary,** ICSID Case No ARB/13/35, 2018.

external agreement[554]. Other tribunals have argued that the clause in intra-EU BITs or the ECT was valid and that EU law could not undermine such prior consent[555]. For instance, in the *Vattenfall II,* the tribunal noted that 'Article 16 ECT poses an insurmountable obstacle to the argument that EU law should prevail over the ECT.'[556] The Tribunal continued by noting, 'if the Contracting Parties to the ECT intended a different result, and in particular if they intended for EU law to prevail over the terms of the ECT for EU Member States, it would have been necessary to include explicit wording to that effect in the Treaty.'[557]

In *LSG,* the Tribunal ruled in favour of German companies based on the fact that Romania agreed to be bound by the ECT and that the withdrawal occurred after the proceeding began[558]. The Tribunal remained unconvinced by Romania's arguments based on the CJEU rulings. In most awards, the arbitral tribunals did not feel compelled to follow EU law, often asserting that the applicable law derived solely from the ECT and thus rendering EU law irrelevant, even in scenarios where the three prerequisites of the *Achmea* ruling were present, as seen in *Watkins Holdings and others v. Spain*[559]*.* A similar approach was adopted in *Encavis,* where the Tribunal concluded that 'Italy gave its unconditional and irrevocable consent to arbitrate the present dispute, regardless of its withdrawal from the ECT and The *Komstroy* and *Green Power* decisions are inapposite.'[560] The Tribunal also noted that 'there is no intra-EU exception in the plain terms of Art. 26 of the ECT.'[561] In this case, however, the Tribunal agreed with Italy that the reduction in subsidy was deemed beneficial for the public interest and was reasonable and foreseeable ultimately influencing the award amount.

The persistent disregard by arbitral tribunals for CJEU case law effectively renders the CJEU's decisions on intra-EU BITs irrelevant in arbitration proceedings. This places Member States in a difficult position; they have clear CJEU judgments in their favour, yet arbitral tribunals continue to reject the supremacy (and sometimes even the applicability) of EU law. By refusing, those tribunals are inevitably rejecting the argument that EU law

554 *Masdar Solar & Wind Cooperatief UA v The Kingdom of Spain,* ICSID Case No ARB/14/1.

555 **Antin Infrastructure Services Luxembourg S.à. r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain,** ICSID, Case no. ARB/13/31, 2018, para. 224.

556 **Vattenfall AB and others v. Federal Republic of Germany (Vattenfall II),** decision on the Achmea Issue ICSID, case no. ARB/12/12, 2018, para 229.

557 Ibid, para 229.

558 **LSG Building Solutions GmbH and others v. Romania, ICSID Case No. ARB/18/19;** Mathias Kruck and others v. Spain, ICSID Case No. ARB/15/23.

559 The first refers to whether the tribunal will need to interpret EU law. If so, how would the tribunal make a reference for a preliminary ruling to the CJEU knowing that it lacks permanence, state nature, and mandatory competence. Finally, a decision of the Tribunal would only allow for review by an ad hoc Committee which is contrary to EU law.

560 **Encavis et al. v. Italy,** ARB/20/39, p.98.

561 Ibid, p.102.

prevails over the ECT because the investment involved intra-EU investments, and the CJEU has the monopoly of interpreting EU law[562].

The tribunals' reluctance is even further highlighted by some attempts to argue that no incompatibility exists between EU law and the ECT[563]. In essence, these tribunals implied that the Court of Justice erred in its reasoning. The fundamental flaw in the tribunals' reasoning is that the European Commission has been raising the issue of compatibility of intra-EU investor-state arbitration since as early as 2006[564]. According to the Commission's consistent position, intra-EU investor-state arbitration is incompatible with EU law because most BIT provisions have been superseded by EU law. This is reinforced by the fact that no BIT agreements were signed between EU Member States after their accession, and the only reason is that they were deemed incompatible with EU law[565]. Despite these clear statements, arbitral tribunals often reject the argument that this note, along with the Declarations and Information Note of the EU Member States, constitute a withdrawal of consent to arbitrate, as demonstrated in the *Theodoros Adamakopoulos* award[566]. Interestingly, even the Termination Treaty, which was concluded by the majority of the EU Member States in 2020 to terminate BITs concluded among themselves, is frequently disregarded by arbitral tribunals. Therefore, unless Member States take a strong stand by withdrawing, arbitral tribunals will find ways to overlook the CJEU case laws and assert jurisdiction.

This ongoing defiance is starkly evidenced by recent data. A 2024 report highlighted Spain as the 'most non-compliant State' with arbitration awards globally. The report detailed 24 unpaid awards against Spain, totalling over USD 1.5 billion, a significant majority of which are intra-EU ECT claims[567]. This widespread non-compliance by a key Member State, driven by the EU's firm stance, underscores the practical impasse created by these conflicting legal interpretations and the ongoing refusal of EU states to recognize or enforce awards that conflict with EU law.

In fact, the *Achmea* objection has only been successfully accepted once in the

562 **Watkins Holdings S.à r.l. and others v. Spain,** ICSID Case No. ARB/15/44.

563 **Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3; PL Holdings S.A.R.L. v. Republic of Poland, SCC Case No V2014/163,** Partial Award, 28 June 2017, para 314-317.

564 **Commission notes in the Eastern Sugar v Czech Republic,** SCC N° 088/2004, para 126.

565 **Theodoros Adamakopoulos and others v Republic of Cyprus, ICSID Case No. ARB/15/49,** dissenting by Professor Mercelo Kohen, para 77.

566 **Theodoros Adamakopoulos and others v Republic of Cyprus, ICSID Case No. ARB/15/49,** para 179.

567 LAVRANOS, NIKOS. **Report on Compliance with Investment Treaty Arbitration Awards 2024.** 3rd ed. November 2024. https://www.internationallawcompliance.com/wp-content/uploads/2022/08/FULL-Report-2024-DEF-1-Nov-2024.pdf. Accessed 30 January 2025.

Green Power award[568]. Nonetheless, this award is no cause for celebration, as many tribunals have differentiated it from newer awards because the applicable rules were the SCC rules, and Stockholm was the seat. Consequently, the EU applied because of the *lex loci arbitri* principle. It also seems that the stormy relationship between EU law and international investment law is mainly confined to ISDS, largely due to the rigidness of the ICSID regime. Indeed, some non-ICSID intra-EU awards have been successfully challenged and set aside on the grounds of the tribunal's lack of jurisdiction[569].

Interestingly, the CJEU was given twice the option to review the compatibility of direct investment with EU law. In Opinion 1/17, the Court approach was more nuanced than in *Achmea,* ruling that the Investment Court System (ICS) envisaged by the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) was compatible with EU law. According to Damjanovic and de Sadeleer, the Court clearly distinguished between the internal EU dimension- such as the *Achmea* situation- and the external dimension- such as the Opinion 1/17 situation[570]. The Court was given a second opportunity in Opinion 1/20 to definitively rule on the compatibility of Article 26 ECT with EU law. The Court dismissed the request on the grounds of lack of sufficient information[571]. This refusal can be explained by the timing: when the request for an Opinion was submitted, negotiations on the draft modernised ECT were in their early stages, and by the time the Court came to analyse the request, the case *Komstroy* had been delivered, providing its own clarity[572]. Belgium's request was relatively straightforward: Is Article 26 ECT compatible with the EU treaties? Although understandably, the Court would need the text of the other provisions due to the interconnection between the substantive parts and the dispute settlement provisions, the current text of the ECT would have served as a basis. The Court's cautious approach not only restricted the scope of the Opinion procedure but also resulted in a missed opportunity to r unequivocally estate the incompatibility of Article 26 with EU law.

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568 **Green Power Partners K/S and another v Kingdom of Spain,** SCC Case No. V 2016/135; N LAVRANOS, NIKOS. ECT arbitral tribunal declines jurisdiction by accepting Achmea objection raised by Spain for first time. Practical Law, 2022. https://uk.practicallaw.thomsonreuters.com/w-036-0563?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=fe9fb09dc1784843bc963dd1b9a54e80&skipAnonymous=true. Accessed 30 January 2025.

569 See for instance the cases of: *Slot Group a.s. v. Republic of Poland,* PCA Case No. 2017-10. However, the Paris Court of Appeal in *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Poland* (Paris Court of Appeal, Chamber 5-16, April 19, 2022, No. 20-13085), annulled an intra-EU BIT ISDS award, although issued by an ICSID tribunal (S*trabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Poland,* ICSID Case No. ADHOC/15/.1), based on lack of the tribunal's jurisdiction.

570 DAMJANOVIC, IVANA; DE SADELEER, NICOLAS. **Values and Objectives of the EU in Light of Opinion 1/17:** 'Trade for all', above all. Europe and the World: A law review vol 4, Issue 1, p.1-25, 2020, p.12.

571 Opinion 1/20 of 16 June 2022, ECLI:EU:C:2022:485.

572 Ibid, para 44.

The EU institutions have consistently reinforced the CJEU's position, asserting their legal authority against such awards. Although in the *Micula,* the Court found a way around the problem -by declaring the award unenforceable since the payment of the award was qualified as illegal state aid and, therefore, prohibited under EU law- this case will easily be regarded as an exception by arbitral tribunals[573]. It also highlights that if Member States voluntarily pay an intra-EU investment award, that payment could be considered as constituting illegal state aid and result in sanctions. This position was reiterated in *Antin Infrastructure Services v. Spain,* where the Commission in March 2025 instructed Spain to refrain from complying with the award and to take measures ensuring that it is neither implemented nor enforced, whether domestically or internationally, despite two English judgment to the contrary[574]. This decision reflects the EU's continued firm stance against the validity of these awards within the Union. Another ruling that tribunals could easily disregard is the ruling in *Romatsa,* in which the CJEU concluded that some ICSID awards may be incompatible with EU law and may not be enforced[575].

However, the practical implications of such arbitral awards continue to manifest through persistent enforcement efforts in non-EU jurisdictions, where domestic courts frequently uphold their validity, asserting the supremacy of international treaty obligations over EU law. This divergence is exemplified by recent decisions from the U.S. Court of Appeals for the D.C. Circuit and the Swiss Federal Tribunal, which have affirmed the enforceability of intra-EU ECT awards, explicitly rejecting arguments based on the CJEU's rulings. These "foreign courts getaways" present a significant challenge to the EU's efforts to neutralize intra-EU ISDS.

In the ongoing controversy between the CJEU's decisions and those of the international investment tribunals, Member States find themselves in a challenging enforcement vacuum. It seems that the only glimpse of hope comes from European national courts to prevent the enforcement of incompatible arbitral awards within their jurisdictions.

5. ARE NATIONAL COURTS THE ONLY HOPE ?

573 Case C-638/19 P, **Commission v European Food SA and others,** ECLI:EU:C:2022:50.

574 EUROPEAN COMMISSION. **Commission finds that arbitration award ordering Spain to pay compensation in favour of Antin is illegal and incompatible State aid.** 2025. https://ec.europa.eu/commission/presscorner/detail/en/ip_25_847. Accessed 3 August 2025. **Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.** [2021] FCAFC 3; Infrastructure Services Luxembourg and another v. Kingdom of Spain [2023] EWHC 1226 (Comm).

575 C-333/19, **Romatsa and Others** ECLI:EU:C:2022:749.

To add a layer of complexity, Member States are increasingly turning to national courts in the hope of stopping ISDS proceedings or preventing the enforcement of the awards. For instance, in 2022, the Higher Regional Court of Cologne granted the Netherlands' request for a declaration that the claims by RWE and Uniper were inadmissible based on the intra-EU argument[576]. This was confirmed in 2023 by the German Federal Supreme Court, which emphasised the primacy of EU law[577]. This led to Uniper and RWE opting to discontinue their ISDS claims in 2023 and 2024, respectively[578].

National courts have demonstrated a growing willingness to set aside or refuse to recognise intra-EU arbitral awards, rendering them effectively meaningless. For instance, the Higher Regional Court of Frankfurt annulled the intra-EU ISDS proceedings, which was confirmed on appeal[579]. In 2024, the Third Chamber of the Second Senate of the German Constitutional Court dismissed both of *Achmea's* constitutional complaints as inadmissible[580]. The Court's reasoning was comprehensive and left no room for further debate on the matter in Germany.

In Sweden, the Swedish Supreme Court set aside an award on intra-EU grounds, and the Svea Court of Appeal has already set aside at least four awards issued under the ECT due to their incompatibility with EU law and fundamental principles of Swedish law[581]. The Paris Court of Appeal set aside two awards against Poland, ruling that the

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576 Decision of the Higher Regional Court of Cologne 19 SchH 14/21, 1 September 2022. See: MARKERT, LARS; DOERNENBURG, ANNE-MARIE. RWE and Uniper: (German) Courts Rule on the Admissibility of ECT-based ICSID Arbitrations in Intra-EU Investor-State Disputes. **Kluwer Arbitration Blog,** 2022. https://arbitrationblog.kluwerarbitration.com/2022/11/03/rwe-and-uniper-german-courts-rule-on-the-admissibility-of-ect-based-icsid-arbitrations-in-intra-eu-investor-state-disputes/#:~:text=On%201%20September%202022%2C%20the,the%20German%20Code%20of%20Civil. Accessed 30 January 2025.

577 Decision of Cologne Higher Regional Court – Docket I ZB 74/22- 1 September 2022 ; Decision of Cologne Higher Regional Court – Docket I ZB 75/22- 1 September 2022; Decision of the German Federal Court of Justice, Docket I ZB 43/22 - 27 July 2023.

578 *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V.* v. *Kingdom of the Netherlands,* ICSID Case No. ARB/21/22 (Order of the Tribunal taking note of the Discontinuance of the Proceedings and Decision on Costs, 17 March 2023); *RWE AG and RWE Eemshaven Holding II BV* v. *Kingdom of the Netherlands,* ICSID Case No. ARB/21/4 (Order of the Tribunal taking note of the Discontinuance of the Proceeding and Decision on Costs, 12 January 2024).

579 Docket No. 26 SchH 2/20; Docket No I ZB 16/21.

580 BUNDESVERFASSUNGSGERICHT 2 **BvR 557/19,** 23 July 2024; BUNDESVERFASSUNGSGERICHT 2 BvR 141/22, 23 July 2024.

581 In. 2020, the Court overturned a EUR 53.3 million arbitral award against Spain in **Novenergia II - Energy & Env't v. Kingdom of Spain, Civil Action No. 18-cv-01148** (TSC) (D.D.C. Jan. 27, 2020); In March 2024, it annulled a final award in Decision of 27 March 2024- T 15200-22, **Triodos v. Kingdom of Spain;** In June 2024, the Court €48 million Energy Charter Treaty award in Decision of 28 June 2024 – T 1626-19, Foresight Luxembourg Solar 1 S.à.r.l., et al. v Kingdom of Spain.
GLEISS LUTZ. Eu Withdraws from Energy Charter Treaty and implements ECJ's Komstroy ruling. **Gleiss Lutz,** 2024. https://www.gleisslutz.com/en/news-events/know-how/eu-withdraws-energy-charter-treaty-and-implements-ecjs-komstroy-ruling. Accessed 30 January 2025; GALVEZ, JOSEP. Decoding Arbitral Disputes: the benefits of non-EU venues. **Law360**, 2024. https://www.4-5.co.uk/assets/law360---decoding-arbitral-disputes-the-benefits-of-non-eu-venues.pdf. Accessed 30 January 2025

ISDS provision in the BIT was incompatible with EU law[582]. To reach its decision, the French Court of Appeal did not only rely on Achmea but also on Articles 4 and 7 of the Agreement for the Termination of Bilateral Investment Treaties between Member States of the European Union[583]. While annulling the arbitral award of around EUR 570.000, the Court of Appeal denied the request for a preliminary ruling[584]. These decisions signal a robust stance against the recognition of such awards. Moreover, the distinction between annulment at the seat and enforcement elsewhere underscores the critical gatekeeping role of national courts in the country where the arbitration was legally based. A successful annulment on intra-EU grounds at the seat effectively renders the award non-existent, profoundly impacting its global enforceability.

Nationals courts are playing their role as the guardians of EU autonomy. When reviewing arbitral awards or arbitration agreements, are not merely applying domestic procedural law but are increasingly acting as direct enforcers of fundamental EU public policy derived from CJEU jurisprudence, such as *Achmea, Komstroy, Van Gend en Loos'* 'new legal order' principle. The incompatibility of intra-EU ISDS with EU law is not just a technicality; it's a matter of the EU's constitutional identity. Not only are they ensuring the integrity of EU autonomy, the mounting body of jurisprudence from EU national courts also shapes investor strategy. The discontinuance of significant claims, such as those by Uniper and RWE following definitive German court rulings, demonstrates how national judicial clarity can directly deter new intra-EU ISDS proceedings and compel investors to reconsider the viability of existing ones within the EU legal space.

Beyond post-award challenges, EU Member States are also increasingly leveraging national courts for more proactive interventions, such as seeking declarations of inadmissibility of claims or, in certain circumstances, anti-arbitration injunctions to prevent proceedings from even commencing or continuing. The recent May 2025 landmark order of the Amsterdam Court of Appeal, compelling a Dutch investor to withdraw its intra-EU claim against Poland under a terminated BIT, imposing a daily penalty for non-compliance, exemplifies this assertive judicial strategy[585]. Such strategy aims to halt the arbitration at its very root rather than merely contesting an eventual award.

However, there is a lack of consistency in the approach, with some courts giving significant weight to the primacy of EU law, other relying on the *Achmea*/ *Komstroy* or the Agreement for the Termination of Bilateral Investment Treaties between Member

582 **Poland v Strabag et al, no. RG 20/13085;** Poland v Slot et al, no. RG 20/14581.

583 **Poland v Slot et al, no. RG 20/14581,** para 56.

584 Cour d'Appel de Paris, Pole 5-Chambre 16, Arrêt du 19 Avril 2022, N° RG 20/14581, **République de Pologne c. Société CEC Praha et Société Sot Group.**

585 Poland v LC Corp, ECLI:NL:GHAMS:2025:1065.

States of the European Union. Prior to the German Federal Supreme Cour's definitive stance, there were also inconsistent judgments in Germany, with the Higher Regional Court of Berlin's declining in 2022 the request to set the award aside, sending a strong message that 'arbitrations are immune from *Achmea and Komstroy'.*[586] Similarly, shortly after the *Achmea* decision, the Milan Court of Appeal recognised and enforced an award in favour of two Italian investors against an EU Member State[587]. In 2023, the Amsterdam District Court refused to grant an anti-suit injunction relief to Spain against enforcement proceedings by Dutch investment companies in the US. The Court noted that Spain "wrongly created an additional forum."[588] In 2024, the Brussels Court of Appeal issued an embargo on Spain. It authorised the seizure of 32 million that Eurocontrol owes or will have to pay to the Kingdom of Spain through its state-owned air traffic company, Enaire, in relation to the claim from Blasket Renewable Investments[589]. These examples demonstrate the potential for inconsistent judgments.

This lack of consistency exacerbates the complexity and uncertainty for Member States. It could also stain relationship with non-EU countries or the arbitration community, which might believe that ISDS should prevail. For instance, the German Federal Court of Justice clarified that the intra-EU ban did not apply to conflicts arising from BITs between EU States and third countries[590].

Not only are national courts stuck between a rock and a hard place, but by choosing

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586 HALONEN, LAURA; EICHHORN, SOPHIE. Berlin Court Finds that ICSID Arbitrations Are Immune from Achmea and Komstroy – At Least While They Are Ongoing. **Kluwer Arbitration Blog,** 2022. https://arbitrationblog.kluwerarbitration.com/2022/07/21/berlin-court-finds-that-icsid-arbitrations-are-immune-from-achmea-and-komstroy-at-least-while-they-are-ongoing/. Accessed 30 January 2025.

587 *Corte d'Appello di Milano (Italy), Gavazzi v. Romania,* Judgment of 21 September 2018; See: SORACE, FRANCESCO. Enforcing an ICSID Award Issued in an Intra-EU Investment Arbitration: An Italian Law Perspective. **The Italian Review of International and Comparative Law,** vol. 3, p.87-114, 2023.

588 *Kingdom of Spain v Blasket Renewable Investments LLC (AES Solar Energy Coöperatief U.A. and Ampere Equity Fund BV) C/13/730214/KG ZA 23-147 HH/MV.* For more information see: GALVEZ, JOSEP. Et tu, Brute? Amsterdam District Court declines to hear the anti-suit injunction petition by Spain to prevent renewable investors from enforcing arbitral awards in the US. A stab in the back from another fellow EU jurisdiction (Kingdom of Spain v Blasket Renewable Investments LLC. **Lexis**, 2023. https://plus.lexis.com/uk/document/?pdmfid=1001073&crid=3f29e837-8398-480b-a84d-735b9a12e9c1&pddocfullpath=%2Fshared%2Fdocument%2Fnews-uk%2Furn:contentItem:67XN-2KJ3-SC47-70G7-00000-00&pdcontentcomponentid=184200&pdteaserkey=&pdislpamode=false&pddocumentnumber=1&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=_t5k&earg=sr0&prid=7e958238-1c2a-440a-a360-ed245f96040b. Accessed 30 January 2025.

589 Brussels Court of Appeal, Judgment of the 17th Chamber, C**ivil matters- 2024/4621 of 18th June 2024.** For translation see https://www.italaw.com/sites/default/files/case-documents/italaw181954.pdf. See: AYLLON, LUIS. **Belgian Justice raises embargo on Spain to 80 million for non-payments of renewable energy.** The Diplomat, 2024. https://thediplomatinspain.com/en/2024/07/26/the-belgian-justice-raises-the-embargo-on-spain-to-80-million-for-non-payments-of-renewable-energy/90312/#:~:text=The%20Belgian%20Justice%20has%20raised,Investments%20to%2080%20million%20euros. Accessed 30 January 2025.

590 Bundesgerichtshof, BGH decision, Deutsche Telekom v India (2024) I ZB 12/23.

to give prevalence to EU law and the CJEU judgments, they are also disregarding traditional international law. Their decisions, however, do not inherently stop ICSID proceedings themselves, nor are they likely to significantly influence arbitral tribunals' decisions on jurisdiction or merits.

Interestingly, AG Wathelet, in his opinion in Achmea, identified two groups of Member States: those that never or rarely are "respondents in arbitral proceedings launched by investors" as they are the countries of origin of investors[591] and those that regularly appear as respondent States in intra-EU arbitrations and were in favour of the incompatibility argument[592]. Paradoxically, courts in the former group, investor-originating state, are often reluctant to recognize and enforce awards against respondent states.

The difficult position of national courts, and their increasingly pivotal role, became even more apparent following the CJEU judgment in March 2024, which held that the English Supreme Court violated EU law by enforcing a $356 million arbitral award in favour of Swedish investors against Romania[593]. The possibility of facing an infringement procedure is a critical incentive for national courts across Europe to abide by the rule. It sends a clear message that no national court, not even a supreme court, is immune from the EU's legal oversight if its decisions seriously compromise the autonomy and integrity of the EU legal order[594]. By launching an infringement procedure, the Commission and the CJEU demonstrate their commitment to upholding the primacy of EU law and ensuring that all EU-related matters are ultimately subject to the jurisdiction of the CJEU. This action reinforces the crucial role of national courts as guardians of EU law within their own legal systems. It provides a powerful legal and political incentive for them to align with the *Achmea and Komstroy* line of case law, thereby ensuring a consistent and unified application of EU law and defending Member States against intra-EU awards.

Beyond direct judicial actions, the European Commission has further tightened the noose on intra-EU enforcement. In a landmark decision in March 2025 concerning Antin Infrastructure Services v. Spain, the Commission concluded that the payment of an ICSID arbitration award against Spain would constitute illegal State aid under EU law. This powerful executive order reinforces the obligation for EU Member States and

591 Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria and the Republic of Finland, Opinion of AG Wathelet delivered on 19 September 2017, case C-284/16, Achmea para 34.

592 Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania and the Slovak Republic- Opinion of AG Wathelet delivered on 19 September 2017, case C-284/16, Achmea paras 35-38.

593 See section 7b) for the discussion. Case C-516/22, **European Commission v United Kingdom of Great Britain and Northern Ireland,** ECLI:EU:C:2024:231.

594 Ibid, para 87.

their national courts to resist enforcement, and it seeks to extend the reach of EU law even to enforcement attempts in third countries, creating significant tension with those jurisdictions that uphold such awards. It also reinforces the complex situation in which Member States and their courts are in.

In a sense, national courts, by safeguarding the principles of EU law and the state's ability to legislate, are beginning to reverse the regulatory chill effect of ISDS. However, this reversal is inherently limited by the potential for inconsistent judgments. National courts could change their position and, unless the doctrine of precedent applies, would be able to do so easily. Such uncertainties undermine any definitive reversal of the regulatory chill, as states cannot confidently amend their laws based solely on the potential that an award might not be enforced, especially when investors retain avenues to enforce awards outside the Union.

6. THE FOREIGN COURTS GETAWAY

While European national courts' position seems to show an inclination towards non-enforcement, investors are strategically pursuing enforcement of their awards in non-EU jurisdictions, particularly the United States and the United Kingdom courts[595]. These courts have largely prioritized international treaty obligations over EU law, creating a critical vulnerability for EU Member States. Spain, for instance, has been a significant target, with many major awards being pursued for enforcement in US courts.

a. The United States: A Prominent and Complex Venue

The United States has emerged as a primary forum for investors seeking to enforce intra-EU awards. While initial District Court judgments showed some inconsistency -with

595 DEFOSSEZ, DELPHINE, US and English Courts as the New Way to Circumvent the ban on intra-EU Arbitration. **TDM**, vol. 21. 2024; GALLORINI, CRISTIAN. The Termination of Intra-EU Investor-State Arbitration and the Enforceability of Intra-EU Awards in the United States District Courts. **ELTE Law Journal,** vol 1, N°1. p.25-47, 2022.
Some examples of cases in the US include: 9REN Holding **S.A.R.L. v. Kingdom of Spain, Civil Action 19-cv-01871 (TSC) [D.D.C. Feb. 15, 2023];** *NextEra Energy Global Holdings B.V. v. Kingdom of Spain,* 656 F. Supp. 3d 201 [D.D.C. 2023].
Some examples of cases in the Uk include: *Micula and Others v. Romania [2020]* UKSC 5 where the UK Supreme Court lifted a stay of enforcement of a ICSID arbitral award against Romania stemming from a breach of the Sweden-Romania BIT.

one judge rejecting Spain's EU law defence as a non-jurisdictional issue, and another upholding it as a matter of impaired legal capacity- this divergence was definitively resolved by the U.S. Court of Appeals for the D.C. Circuit in August 2024. The primary reason of the inconsistencies and the rejection of Spain's "backdoor" European law defences was that the judge viewed the intra-EU objection as a challenge to the arbitrability of the dispute rather than a jurisdictional one[596]. This initial decision seemed to clear a path for many more substantial awards against European states, leaving them with limited defence as the D.C. judge rejected both Foreign Sovereign Immunities Act (FSIA) jurisdictional objections and the EU defence[597]. Yet, in a later case, a different D.C. Judge refused enforcement of an intra-EU ICSID award, holding that the award was contrary to EU law and therefore US courts lacked jurisdiction under the FSIA[598]. In that specific instance, Judge Richard Leon ruled that the intra-EU ban impaired Spain's legal capacity to form an agreement to arbitrate[599].

In a landmark ruling, the Court of Appeals affirmed that U.S. District Courts have jurisdiction to hear applications to enforce intra-EU awards under the ECT[600]. It clarified that Spain's *Achmea-based* arguments were not jurisdictional defences under the Foreign Sovereign Immunities Act but rather pertained to the merits of the dispute. This key distinction paved the way for the enforcement of numerous high-value awards.

However, the Court of Appeals also tempered the power of lower courts, ruling that they had abused their discretion by issuing anti-suit injunctions against a foreign sovereign like Spain. While U.S. courts remain a formidable pro-enforcement venue for investors, this ruling restricts their ability to prevent a state from challenging enforcement in other jurisdictions. Prior to this Court of Appeal decision, the legal battle in U.S. courts has also extended to a direct conflict over injunctions. In cases like *AES Solar*[601]

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596 **NextEra Energy Global Holdings BV et al. v. Kingdom of Spain,** case number 1:2019-cv-01618, in the U.S. District Court for the District of Columbia, p.14.
This judge even granted NextEra an injunction preventing Spain from pursuing related litigation in the Netherlands, hindering Spain's efforts to resist the arbitral award's enforcement.

597 **RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain -** United States District Court for the District of Columbia Civil Action No 2019-3783; **Infrared Environmental Infrastructure GP Limited et al v Kingdom of Spain** - United States District Court for the District of Columbia Civil Action No 2020-0817.

598 **Blasket Renewable Invs. LLC v. Spain,** CIVIL 21-3249 (RJL), 29 March 2023.

599 Blasket Renewable Invs. LLC v. Spain, CIVIL 21-3249 (RJL), 29 March 2023, p.9; HINDELANG, STEFFEN; NASSL, JULIA; KUMAR JENA, ARGHA. Achmea Goes to Washington: how a US District Court Enforces EU Law. **Verfassungsblog,** 2023. https://verfassungsblog.de/achmea-goes-to-washington/. Accessed 30 January 2025.

600 MORRIS, DANIELLE; YOUNG, ALEX L. D.C. Circuit Resolves District Court Split on the Enforcement of Intra-EU Investment-Treaty Awards in the United States. **WilmerHale,** 2024. https://www.wilmerhale.com/en/insights/client-alerts/20240911-dc-circuit-resolves-district-court-split-on-the-enforcement-of-intra-eu-investment-treaty-awards-in-the-united-states. Accessed 30 January 2025.

601 a D.C. Judge granted an order against a Dutch decision which had required the investors to cease

and *9REN*[602], district courts granted "anti-anti-suit" injunctions, proactively ordering Spain to cease its efforts to block enforcement in foreign courts in the Netherlands and Luxembourg. Interestingly, an injunction was issued in favor of Spain, prohibiting German investors from pursuing court proceedings outside the EU, while parallel proceedings in a German court were not challenged in the US[603]. The purpose of these orders was to protect the U.S. courts' jurisdiction and the integrity of the enforcement process. The US Government itself has expressed criticism of these judgments, fearing that they could sour international relations with the EU bloc[604]. The Court of Appeal agreed when it noted that the District court has abused "its discretion in issuing the anti-anti-suit injunctions in NextEra and 9REN."[605]

b. The United States: A Prominent and Complex Venue

English courts have consistently rejected the intra-EU objection, positioning the UK as an undeniably investor-friendly jurisdiction[606]. The UK Supreme Court's 2020 ruling in *Micula v Romania* set a powerful precedent, holding that the UK was bound by its pre-existing international obligations under the ICSID Convention, in particular Article 54. The Court asserted that allowing an EU law conflict to serve as a defence would contravene the "self-contained" nature of the ICSID Convention and the UK's treaty obligations[607].

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their attempts to enforce a €26.5 million award against Spain or face a fine of at least €2 million: **AES Solar Energy Cooperatief UA et al v. Kingdom of Spain**- United States District Court for the District of Columbia Civil Action 1:21-cv-03249-RJL.

602 The judge enjoined Spain from attempting to stop the company from enforcing a €41.8 million award through proceedings in Luxembourg. **9REN Holdings SARL v Kingdom of Spain,** Civil Action N° 19-cv-01871, 15 February 2023.

603 **Kingdom of Spain (Ministry for Ecological Change and Demographic Challenges) v. RWE Innogy GmbH and RWE Innogy Aersa SAU** (Temporary Order from the Higher Regional Court Hamm Restricting Proceedings, I-9 W 15/23 2 O 97/23, 4 April 2023).

604 SIMSON, CAROLINE. US Backs Spain In $386M Solar Award Cases. **LAW360**, 2024. https://www.law360.com/internationalarbitration/articles/1793648?nl_pk=8e18f9b2-c60d-4d4f-91bc-186a9ba22010&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&utm_content=2024-02-06&read_main=1&nlsidx=0&nlaidx=0. Accessed 30 January 2025.

605 MORRIS, DANIELLE; YOUNG, ALEX L. D.C. Circuit Resolves District Court Split on the Enforcement of Intra-EU Investment-Treaty Awards in the United States. **WilmerHale,** 2024. https://www.wilmerhale.com/en/insights/client-alerts/20240911-dc-circuit-resolves-district-court-split-on-the-enforcement-of-intra-eu-investment-treaty-awards-in-the-united-states. Accessed 30 January 2025.

606 DYKE, JOSEPH, Spain Fails to Set Aside Registration of intra-EU ECT ICSID Award in the English Commercial Court. **European Investment Law and Arbitration Review**, vol. 9, issue 1, p.141-150, 2024; DYKE, JOSEPH. Infrastructure Services Luxembourg Sàrl and Energia Termosolar BV v Kingdom of Spain: Spain Fails to Secure Set Aside of Registration of Intra-EU ICSID Award in the English Commercial Court. **ICSID Review**, Volume 39, Issue 2, p.313–319, 2024.

607 *Micula* et al. v. Romania [2020] UKSC 5, para 86.

The Supreme Court explicitly rejected the idea that a conflict with EU law could constitute an 'exceptional possible types of defence to enforcement.'[608] Furthermore, it noted that EU law would not have prevailed even with a less strict interpretation, citing Article 351 TFEU, which stipulates that Member States' obligations are not 'affected by the provisions of the Treaties.'[609] This judgment was viewed as a glimmer of hope for award-holders[610].

This pro-enforcement stance was reaffirmed by the High Court in July 2023, citing the Australian High Court decision as "persuasive" and providing "separate free-standing support"[611]. Lord Justice Fraser concluded that Spain's entry into the ICSID Convention amounted to a waiver of sovereign immunity regarding enforcement[612]. Fraser J also noted that the CJEU's decision does not override the UK's pre-existing treaty obligations or relevant domestic law mechanism in the UK[613]. He also stated that with regard to the *Achmea and Komstroy* judgments, "there is no justification for interpreting their effect as, in some way, creating within the ECT itself, only a partial offer of arbitration to some investors, but not others, depending upon whether those investors were resident within Member States or elsewhere."[614] The Court also cite the UK's pre-Brexit treaty obligations and the fact that a "disconnection clause" was never agreed upon in the ECT to reject the claim. This represents a clear rejection of the intra-EU objection as a basis for the non-enforcement of arbitration awards in investor-state disputes. Interestingly, the declaration signed by the UK in 2019 confirming the incompatibility of investor-state arbitration clauses in intra-EU disputes was notably not mentioned by the courts. Instead, the High Court reaffirmed the primacy of international law, positioning the UK as undeniably investor-friendly.

In October 2024, the Court of Appeal unanimously dismissed the appeals by both the Kingdom of Spain and the Republic of Zimbabw[615]. The Court upheld the lower court decisions, including Lord Justice Fraser's judgment, confirming that both states were not entitled to sovereign immunity from the enforcement of ICSID awards in the UK.

Furthermore, English courts have been willing to grant robust enforcement

608 Para 86.

609 Para 85.

610 Laura Rees-Evans, **'English High Court Takes Pro-enforcement Stance in Intra-EU ECT Award Against Spain'** (Kluwer Arbitration Blog, 12 August 2023) <https://arbitrationblog.kluwerarbitration.com/2023/08/12/english-high-court-takes-pro-enforcement-stance-in-intra-eu-ect-award-against-spain/> accessed 23 September 2024.

611 Infrastructure Services Luxembourg and another v. Kingdom of Spain [2023] EWHC 1226 (Comm), para 116.

612 Para 91-103.

613 Para 125.

614 Para 101.

615 **Infrastructure Services Luxembourg and another v. Kingdom of Spain** [2024] EWCA Civ 1257.

measures. They have issued freezing and seizure orders in favor of investors, directly targeting state assets to compel payment. For instance, in 2023, the High Court froze bank accounts tied to Spain's Instituto Cervantes, and a similar order was issued against assets related to London Luton Airport Holdings[616]. These proactive measures highlight English courts' readiness to not only recognise awards but to actively assist investors in their collection, signalling that the UK will not hesitate to take direct action against the commercial assets of sovereign states.

This position remains a critical point of tension, particularly after the CJEU's March 2024 judgment found the UK to be in violation of EU law for enforcing the *Micula* award. In 2020, the UK Supreme Court unanimously ruled that the arbitral awards were enforceable in the UK despite recognising that such enforcement would be contrary to Union law[617]. This successful infringement procedure demonstrates that the UK can still be held legally accountable for decisions made by its national courts during its EU membership. While the UK's courts are now outside the direct authority of the CJEU, this ruling serves as a historical check on the limits of its legal position and underscores the ongoing legal challenges and political tensions its stance on these awards continues to generate with its largest trading partner. The UK could be the "Achilles' heel" of the EU, encouraging investors to enforce awards there, despite the EU's legal position[618].

c. The unexpected treats: Switzerland and Australia

While the US is the most prominent actor in enforcing intra-EU ISDS outside the EU, and the UK was seen as a potential threat, other countries such as Australia and Switzerland have also taken strong stances. In 2023, the High Court of Australia lived up to its enforcement-friendly and pro-arbitration reputation by confirming that sovereign immunity pleas are not a valid defence against the recognition and enforcement of an

616 **Blasket Renewable Invs.** LLC v. Spain, CIVIL 21-3249 (RJL), 29 March 2023; THE CORNER. UK court embargoes Aena's Luton shares over Spanish government cuts to renewables. The Corner, 2024. https://thecorner.eu/companies/uk-court-embargoes-aenas-luton-shares-over-spanish-government-cuts-to-renewables/115979/. Accessed 30 January 2025; AENA, Notice, 2024. https://www.cnmv.es/webservices/verdocumento/ver?t=%7Bb99b459f-8e46-4a5e-8484-0137c2093d47%7D. Accessed 24 January 2025.

617 *Micula and others v Romania* [2020] UKSC 5.

618 CROISANT, GUILLAUME. Micula Case: The UK Supreme Court Rules That The EU Duty Of Sincere Co-operation Does Not Affect The UK's International Obligations Under The ICSID Convention. **Kluwer Arbitration Blog,** 2020). https://arbitrationblog.kluwerarbitration.com/2020/02/20/micula-case-the-uk-supreme-court-rules-that-the-eu-duty-of-sincere-co-operation-does-not-affect-the-uks-international-obligations-under-the-icsid--convention/. Accessed 30 January 2025.

ICSID award- similar to the UK High Court decision[619]. The Australian court established that by ratifying the ICSID Convention, states waive their immunity against recognition and enforcement of ICSID awards[620]. Articles 53 to 55 of the ICSID Convention "constituted a relinquishment of sovereign immunity."[621] The Judges analysed the apparent inconsistencies between the English, French and Spanish texts of the ICSID Convention, in particular, the fact that while the English text refers to recognition, enforcement and execution separately, the French and Spanish text both refer to enforcement and execution as "execution" and "ejecución" respectively. However, in their opinion, there was no material difference between the texts referring to recognition and enforcement on the one hand and execution on the other[622]. Reliance on *Komstroy* to support the intra-EU objection was rejected as irrelevant, given that the dispute was based on the ICSID Convention and not the ECT directly[623]. This decision follows earlier decisions of the Federal Court of Australia[624].

Following this High Court ruling, several other enforcement proceedings against Spain that had been on hold are now moving forward. In August 2024, for example, the Federal Court of Australia dismissed a procedural manoeuvre by Spain in a separate case, reaffirming that its sovereign status would not shield it from enforcement actions[625]. The court issued orders for Spanish consular officials in Australia to provide information about Spain's assets, demonstrating a willingness to take decisive steps to assist in the enforcement process.

In a decisive April 2024 judgment, the Swiss Supreme Court rejected Spain's intra-EU defence[626]. The Court declared it was not bound by CJEU rulings, which it noted were the result of a "crusade" against intra-EU arbitration[627]. Critically, the Court characterised

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619 WATSON, DOUG; PLUMPTRE, PIERS; TYRRELL, THEO. UK and Australian courts confirm no sovereign immunity from recognition of ICSID arbitral awards against sovereign states. **Gibson Dunn,** 2023. https://www.gibsondunn.com/wp-content/uploads/2023/05/uk-and-australian-courts-confirm-no-sovereign-immunity-from-recognition-of-icsid-arbitral-awards-against-sovereign-states.pdf. Accessed 30 January 2025.

620 **Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor** [2023] HCA 11.

621 BAJAJ, GITANJALI; CAMPBELL, AUSTYN. **High Court of Australia rejects Spain's sovereign immunity claim and clarifies two-step process for arbitral awards under the ICSID Convention.** DLA Piper, 2023. https://www.dlapiper.com/es-pr/insights/publications/2023/04/high-court-of-australia-rejects-spains-sovereign-immunity-claim . Accessed 30 January 2025.

622 [2023] HCA 11, paras 59-62.

623 [2023] HCA 11, paras 78-79.

624 *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3; *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112.

625 *Infrastructure Services (Antin) v. Spain* [2024] FCAFC 113.

626 Arrêt du 3 avril 2024, Royaume d'Espagne contre A, 4A_244/2023.

627 Point 7.6.5. See: RAY, ALEC. The Swiss Supreme Court Upholds an Intra-EU Award Under the ECT. **Kluwer Arbitration Blog.** 2024. https://arbitrationblog.kluwerarbitration.com/2024/05/23/the-swiss-

the *Komstroy* decision as a "pro domo pleading" aimed at affirming the CJEU's primacy over the ECT, dismissing its reasoning as having no basis in international law[628]. The Court was also not convinced by the argument that articles 1(3) and (10) and 25 ECT excluded from the ECT's scope matters over which EU Member States had transferred their competencies[629]. The Supreme Court further noted that preventing EU investors from resorting to arbitration in an intra-EU context would be incompatible with the aim of the Energy Charter Treaty[630]. Moreover, even if Article 26 were found incompatible with EU law, EU law, according to the Swiss court, could not prevail over the ECT based on international law principles[631]. Interestingly enough, the Supreme Court pointed out that during the *travaux préparatoire* of the ECT, the European Union advocated for including a "disconnection clause"- which would have effectively excluded the ECT provisions in intra-EU disputes. However, such a clause never materialised, and the ECT does not contain any "carve-outs of intra-EU disputes."[632] This case and its reasoning strongly echo the UK High Court judgment.

Caution must be exercised, as the Swiss Supreme Court- rejected an appeal in March 2023 due to the lack of "sufficient domestic connection to Switzerland."[633] Switzerland might be an option only if there is a sufficient connection, making it an attractive forum only in certain circumstances.

While European national courts are increasingly solidifying their stance against intra-EU awards, non-European courts offer a starkly different, and increasingly reliable, avenue for investors. This creates a clear dichotomy: a domestic bulwark for Member States within the EU is being met with a global floodgate for enforcement outside of it.

7. INTER-SE AGREEMENT A VIABLE SOLUTION

Following the mass withdrawal of key EU Member States from the ECT, the EU and its Member States moved forward with a different strategy. The most pressing legal

supreme-court-upholds-an-intra-eu-award-under-the-ect/. Accessed 30 January 2025.

628 Point 7.6.5.

629 Point 7.7.2.

630 Point 7.8.2.

631 Point 7.8.3. see: DEVEREUX, STEVEN. EU attacks on investors rights. **J. World Energy Law Bus** Volume 17, Issue 5, p. 322–334, 2024.

632 Point 7.3; RAY, ALEC. The Swiss Supreme Court Upholds an Intra-EU Award Under the ECT. **Kluwer Arbitration Blog.** 2024 https://arbitrationblog.kluwerarbitration.com/2024/05/23/the-swiss-supreme-court-upholds-an-intra-eu-award-under-the-ect/. Accessed 30 January 2025.

633 **OperaFund v Kingdom of Spain,** Decision 5A_406/2022 of 17 March 2023.

challenge remains the ECT's sunset clause. To address this, the EU and its Member States have transitioned their discussions around an *inter-se* agreement from a theoretical possibility to a concrete legal action. Such an agreement is seen as the final mechanism to neutralize the ECT's sunset clause and mitigate 'legacy ISDS risks, particularly from fossil fuel investors affected by energy transition policies.'[634]

In June 2024, 26 EU Member States and the EU itself signed a declaration and a related agreement affirming their common understanding that the ECT's investor-state arbitration provision 'cannot and never could serve as a legal basis for intra-EU arbitration proceedings.' This approach is intended to provide legal certainty for withdrawing states, allowing them to pursue new climate measures aligned with Paris Agreement objectives while preserving investors' rights towards non-EU member states.

However, despite this political action, the legal enforceability of such an agreement and its acceptance as binding by arbitral tribunals remain highly uncertain. While *inter* se agreements seem a good solution in theory, it is uncertain whether any inter se agreement will be compatible with the ECT. Schaugg and Nikièma argue that such an agreement would be regarded as a modification of the ECT[635]. Their reasoning is that since the ECT does not include any provisions for modification, any changes would be governed by Article 41(1)(b) VCLT[636]. It is true that the first condition for a valid inter se agreement- namely that the modification it implements "does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations"- will easily be met as the agreement will only operate amongst signatories[637]. However, an *inter se* modification might be incompatible with the 'effective execution of the object and purpose of the treaty as a whole' as safeguarded by Article 41(b)(ii) VCLT. While the agreement would not directly affect states not party to it, limiting dispute settlement to domestic courts could fundamentally counter the ECT's purpose of providing an international mechanism for dispute resolution[638]. Non-parties to the inter se agreement could claim that such agreement deprives their investors of ECT benefits and challenge

634 IISD. IISD developed a model inter se agreement to neutralize the ECT sunset clause. **IISD,** 2024. https://www.iisd.org/itn/en/2024/10/09/iisd-developed-a-model-inter-se-agreement-to-neutralize-the-ect-sunset-clause/. Accessed 30 January 2025.

635 SCHAUGG, LUKAS; NIKIEMA, SUZY H. Model Inter Se Agreement to Neutralize the Survival Clause of the Energy Charter Treaty Between the EU and Other non-EU Contracting Parties. **IISD,** 2024. https://www.iisd.org/system/files/2024-07/energy-charter-treaty-survival-clause.pdf. Accessed 30 January 2025, p.2.

636 Ibid, p.2-3.

637 Article 41(1)(b)(i) VCLT.

638 HUREMANGIC, HARIS; TROPPER, JOHANNES. Mission impossible? Implementing Komstroy and modifying the Energy Charter Treaty' **Völkerrechtsblog,** 2021. https://voelkerrechtsblog.org/mission-impossible/. Accessed 30 January 2025.

it[639]. Moreover, companies could still counter it by incorporating in a non-EU State, such as Switzerland, which has not signed the withdrawal. By doing so, those companies will ensure any withdrawal will have no bearing on the protection they are afforded under the ECT.

A central conflict remains about the agreement's compatibility with the ECT's safety net provision in Article 16, which preserves the highest level of protection for investors. As tribunals have consistently held in the past, the ECT regime prevails over other treaty obligations if it is more favorable to the investor[640]. Consequently, the chance of any such inter-se modification being accepted by arbitral tribunals appears very unlikely and Article 16 ECT might be the major roadblock to implementing *inter se* agreements.

Although states have previously managed to neutralize survival clauses in bilateral investment treaties (IIAs), there is no established precedent in the context of a multilateral treaty like the ECT. To date, no arbitral tribunal has been confronted with a claim based on a neutralized survival clause[641]. Any inter se agreement removing the sunset clause might not conflict with the ECT as the sunset clause does not directly fall under Article 16 ECT. However, it will depend on the view of the tribunals; The effectiveness of the EU's inter-se agreement will ultimately depend on whether a future tribunal considers the lack of access to arbitration to be a fundamental contravention of the ECT's object and purpose.

8. CONCLUSION

The myth that bilateral agreements and the Energy Charter Treaty would reliably increase foreign investment is not only falling apart but is actively being rejected by countries that recognize their negative influence on regulatory sovereignty and the potential harm they pose to environmental goals. The ISDS mechanism has become a primary source of this systemic pressure, granting investors imbalanced privileges while imposing no responsibilities on their activities. On top of being undemocratic, the system has demonstrably shaped governmental actions in mitigating climate change, placing

639 BASEDOW, J. ROBERT. The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration. **Journal of International Economic Law,** vol 23, issue 1, p.271-292, 2020.

640 *Vatenfall v. Germany,* ICSID Case No. ARB/12/12, paras. 195-196, 221; *Landesbank v. Spain,* ICSID Case No. ARB/15/45, para. 170-172; *Eskosol v. Italy,* ICSID Case No. ARB/15/50, para. 99-100; *BayWa v. Spain,* ICSID Case No. ARB/15/16, para. 271; *Silver Ridge v. Italy,* ICSID Case No. ARB/15/37, paras. 210; *Sevilla Beheer v. Spain*, ICSID Case No. ARB/16/27, para. 646-647; RREEF infrastructure v Kingdom of Spain, para 75.

641 BERNASCONI-OSTERWARLDER, NATHALIE. Energy Charter Treaty Reform: Why withdrawal is an option. **IISD,** 2021. https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/. Accessed 30 January 2025.

states in the difficult dilemma of either paying investors substantial damages or taking urgent climate action. Indeed, the threat of costly and unpredictable ISDS claims has demonstrably restrained states from enacting crucial public interest legislation. This chilling effect finds its most prominent manifestation in the Energy Charter Treaty (ECT), which has become the most litigated investment treaty and a flashpoint for disputes challenging climate action. The EU's mass withdrawal from the ECT was a direct response to this problem, but left Member States vulnerable to claims due to the 20-year sunset clause.

The conflict between intra-EU investment arbitration and the EU legal order has reached a critical juncture, defined by a growing and unresolvable dichotomy. On one side, the European legal system, anchored by the CJEU's definitive rulings in *Achmea* and *Komstroy*, has established a clear and uncompromising position: intra-EU investor-state dispute settlement is fundamentally incompatible with the principles of EU law. This stance is being solidified by the alignment of national courts, acting as crucial domestic gatekeepers, bolstered by the EU's willingness to use infringement procedures to enforce its legal supremacy. On the other side, This unified stance by EU institutions, however, is met with an equally resolute counter-narrative from arbitral tribunals themselves. They consistently assert that their authority is derived from international law, not from a regional legal system like the EU. From their perspective, they are not bound by the judgments of the CJEU, and their mandate is to uphold the object and purpose of the investment treaty. They have consistently rejected arguments of incompatibility by pointing to the absence of a "disconnection clause" in the original ECT and by relying on its "safety net" provision (Article 16) to protect investor rights, regardless of a state's other treaty obligations. Despite Member States' concerted efforts to raise the incompatibility of intra-EU arbitration with EU law through various legal arguments, arbitral tribunals remain largely unyielding, continuing to claim jurisdiction.

The core of the dispute is a clash between two distinct legal systems: public international law and the EU's unique legal order. Arbitral tribunals, in their own legal vision, see themselves as creatures of international law, bound by treaties and principles such as the Vienna Convention on the Law of Treaties. They argue that a state's obligations under an international treaty cannot be unilaterally altered or nullified by a subsequent regional legal development, such as EU law. Conversely, the EU asserts the primacy of its own legal order within its borders, arguing that Member States cannot consent to an arbitration system that undermines the principles of EU law. This "war" of legal principles is at the heart of the jurisdictional battles that define the current landscape.

This leaves Member States caught in a "rock and a hard place," having to pay and participate in arbitrations they consider invalid. Their last hope appears to come from their national courts, which have increasingly demonstrated a willingness to deny

recognition and enforcement of intra-EU arbitral awards. They are acting as crucial domestic gatekeepers that increasingly align with the CJEU to resist awards, annul arbitration clauses, and provide a bulwark against the enforcement of intra-EU awards. Even if investors secure an arbitral award, they may be unable to get it recognized and enforced by EU national courts. National courts are demonstrating a growing willingness to deny recognition and enforcement of intra-EU arbitral awards, effectively becoming the EU's "secret weapon" and signaling the eventual end of intra-EU ISDS within the Union's borders. This solution, however, is not without its limitations, leaving room for conflicting judgments at the national level, as exemplified by the Higher Regional Court of Berlin's inconsistent ruling in 2022[642] and potential departure of this position in the future. While this is good news for Member States, national court refusals do not stop ISDS to begin with. This means that Member States will still have to pay and participate in the arbitration with the hope that their national courts or a national court in another Member State will set the award aside. The Spanish ordeal in US courts demonstrates how ineffective relying on other States' courts to set aside a judgment is[643].

In parallel, a counter-narrative has emerged from beyond the EU's borders with a growing number of non-EU jurisdictions- led by courts in the United States and the United Kingdom -have emerged as powerful havens for enforcement. These courts have consistently prioritised international treaty obligations, such as those under the ICSID Convention, over the principles of EU law. Their pro-enforcement stance, underscored by the issuance of asset-freezing orders and the dismissal of sovereign immunity claims, create an external path for investors to enforce awards that would be denied within the EU. This has created a new challenge where investors can strategically choose arbitration seats outside the EU, potentially turning jurisdictions like the UK into the EU's "Achilles' heel" for enforcement, as it is still a party to several BITs with EU countries and remains a key global legal hub. This dichotomy between the EU's internal legal order and the external pro-enforcement jurisdictions creates a complex, multi-jurisdictional conflict that leaves the ultimate fate of these awards in a state of ongoing legal battle.

The EU's coordinated withdrawal from the ECT and its pursuit of an *inter-se* agreement are a testament to its determination to regain legal control. However, these actions highlight the fragmentation of the global investment regime. The effectiveness of the EU's strategies ultimately rests on the uncertain future decisions of arbitral tribunals

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and the continued divergence in how domestic courts worldwide interpret conflicting legal obligations. This leaves the door open to ongoing legal battles, turning what was once a unified legal framework into a complex, multi-jurisdictional conflict that will define the future of international investment law.

Ultimately, the future of the EU's climate policy and its sovereign right to regulate hang in the balance. The internal victory of its legal system is now met with an external war fought in foreign courts and a protracted battle against the very treaties it sought to escape. The outcome of this unprecedented conflict will not only be a defining moment for international law but will determine whether the urgent imperatives of climate action can finally prevail over the enduring legacy of outdated investor protections. The EU may have won the battle for legal supremacy within its own borders, but the war against ISDS is far from over. This unprecedented conflict will determine whether the principles of EU law can truly dismantle a legal system designed to exist outside of it, or if the enduring legacy of ISDS will simply find a new home in a fragmented world through foreign gateways. One thing is certain; the final chapter of the intra-EU ISDS saga will not be decided by the CJEU alone but will require arbitral tribunals or foreign courts to come on board. In the meanwhile, investors and states will still fight for control of the legal battlefield.

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