

**International  
Comparative  
Legal Guides**



# **Investor-State Arbitration**

# **2024**

**Sixth Edition**

Contributing Editor:

**Tafadzwa Pasipanodya**  
Foley Hoag LLP



**glg** Global Legal Group

## Expert Analysis Chapters

1

**The Rise of Climate Change-Related and Environmental Provisions in Investment Treaties**  
Diana Tsutieva, Foley Hoag LLP

6

**The Impact of EU Law on ISDS, Intra-EU BITs and the ECT**  
Prof. Dr. Nikos Lavranos, European Federation for Investment Law and Arbitration (EFILA)

## Q&A Chapters

10

**Australia**  
Corrs Chambers Westgarth: Nastasja Suhadolnik,  
Joshua Paffey, Betty Choi & Catherine Pagliaro

18

**France**  
Teynier Pic: Yann Dehaut-Delville &  
Sara Nadeau-Seguín

29

**Germany**  
WAGNER Arbitration: Florian Dupuy, Petrit Elshani &  
Sophie Eichhorn

36

**Hungary**  
DLA Piper Posztl, Nemescsói, Györfi-Tóth and  
Partners Law Firm: András Nemescsói &  
David Kohegyi

42

**Kenya**  
TripleOKLaw Advocates, LLP: John M. Ohaga &  
Franklin Cheluget

49

**Morocco**  
Hajji & Associés: Amin Hajji

54

**Nigeria**  
S. P. A. Ajibade & Co.: Dr. Babatunde Ajibade,  
Dr. Kolawole Mayomi, Emmanuel Bassey &  
Opeyemi Ojebode

61

**Saudi Arabia**  
Obeid & Partners: Zeina Obeid, Charbel Akiki,  
Aya Sabra & Tala Harakeh

67

**Singapore**  
WongPartnership LLP: Koh Swee Yen, Tiong Teck Wee,  
Monica Chong Wan Yee & Joel Quek

74

**Spain**  
Íscar Arbitraje: Javier Íscar  
Stampa Abogados: Dr. Gonzalo Stampa

80

**Switzerland**  
Walder Wyss: Michael Feit & Chloé Terrapon

86

**Turkey/Türkiye**  
EB LEGAL: Prof. Av. Esra Bicen

94

**United Kingdom**  
Fietta LLP: Jiries Saadeh & Miglena Angelova

100

**USA**  
Foley Hoag LLP: Tafadzwa Pasipanodya,  
Nicholas Renzler & Lucía Rueda

# The Impact of EU Law on ISDS, Intra-EU BITs and the ECT

European Federation for Investment Law and Arbitration (EFILA)



Prof. Dr. Nikos Lavranos

## The EU's Investment Law and Arbitration Policy Since the Lisbon Treaty

It is now more than 10 years ago that the Lisbon Treaty entered into force, by which the European Union (EU) obtained exclusive competence regarding foreign direct investment (FDI) (Art. 207 Treaty on the Functioning of the European Union (TFEU)). As a consequence thereof, the EU has become an active player in international investment law and arbitration by affecting the investment law policy of the Member States, both internally and externally, by introducing modifications to substantive and procedural aspects of international investment law. The primary focus of the EU's effort has been to modify, or as it calls it, "reform" the existing investor-State dispute settlement (ISDS) system contained in practically all bilateral investment treaties (BITs) and free trade agreements (FTAs). In addition, the Court of Justice of the EU (CJEU) has become another central player by rendering decisions that increase the tension between EU law and international investment law.

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

Subsequently, we will examine the recent developments regarding the ECT, in particular following the failure of the ECT "modernisation" process, which has resulted in the withdrawal of several EU Member States (France, Poland, Germany, Luxembourg) and the announcement of a common withdrawal of the EU and all its Member States from the ECT.

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

## The Termination Agreement Regarding Intra-EU BITs

Following the CJEU's *Achmea* judgment, delivered in March 2018, 23 Member States signed a Termination Agreement in May 2020 that would terminate all their intra-EU BITs. This Termination Agreement has entered into force for all signatory Member States.

For obvious reasons, the UK did not sign this Termination Agreement, and neither did Austria, Finland, Ireland, and Sweden.

The Termination Agreement declares all intra-EU BITs and all disputes based on them to be incompatible with EU law, and

thus moot. New intra-EU BIT arbitrations are declared to be no longer possible.

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

Indeed, following the *Achmea* judgment as confirmed by the Termination Agreement, domestic courts have started to reject the admissibility of intra-EU BIT disputes, as was the case by German courts in the *Raiffeisen Bank v. Croatia* dispute.

Nonetheless, new intra-EU BITs cases continue to be filed; for example, the *Addiko Bank AG v. Slovenia* case in March 2022, as well as the *LC Corp. v. Poland* (UNCITRAL) and *JCDecaux SA v. Czech Republic* cases, were both filed in 2020.

It remains to be seen how these cases will proceed and whether any awards will be enforceable within the EU.

Meanwhile, as an alternative to intra-EU BITs, the European Commission has proposed setting up an upgraded Solvit mechanism – so-called "Solvit-Invest" – which would be adapted to investment disputes. The Solvit-Invest procedure would aim to resolve individual cases amicably and prevent escalation into a formal legal dispute. The intention is to set up a Solvit branch that specialises in investment cases, equipped with specific independence safeguards.

Moreover, Solvit-Invest would allow the reporting of issues of general concern in a Member State, such as recurring investment protection missteps. In that case, contact points would be set up within Solvit-Invest where stakeholders could provide structured feedback. This feedback would provide a better overview of structural issues at the national and EU level.

However, as of the time of writing, no concrete steps have been taken to implement the Solvit-Invest proposal.

Obviously, the proposed Solvit-Invest mechanism cannot be considered an adequate replacement of the ISDS system contained in the intra-EU BITs. This means that European investors could only rely on domestic courts in Member States in order to seek protection against (in)direct expropriation and other unfair treatment, whereas the very same European Commission and the CJEU have repeatedly confirmed the existence of a significant backsliding of the Rule of Law level in several EU Member States – in particular, due to the political pressure and influence imposed on domestic court judges. Hence, the level of investment and investor protection within the EU is being significantly lowered. This could make it particularly attractive for European investors to restructure their investments via non-EU Member States, such as Switzerland or the post-Brexit UK.



## The Announced Common Withdrawal from the ECT by the EU and its Member States

After the intra-EU BITs and arbitration based on those treaties were terminated, attention shifted towards the ECT. Again, the CJEU took the lead in rendering its *Komstroy* judgment, which essentially extends the ban of investment treaty arbitration to intra-EU ECT disputes.

Indeed, the ban has already been applied by domestic courts, such as in the recent decision of the German courts, which granted the Netherlands' request for a declaration that the ECT claims against it initiated by *RWE* and *Uniper* were inadmissible.

In parallel, the ECT modernisation process, which resulted in a significant revision of the ECT text, has failed because, instead of signing up to the revised ECT text, several EU Member States opted to withdraw from the ECT. This has resulted in the announced common withdrawal of the EU and all its Member States from the ECT. This surprising and sudden *volte face* has thrown the ECT into an existential crisis. In fact, the UK is also now considering withdrawing from the ECT.

Meanwhile, the intra-EU ECT awards against Spain, Italy and other EU Member States continue to be issued by arbitral tribunals. Whilst enforcement of those intra-EU ECT awards appears to now be very difficult within the EU, the opposite is true for enforcement outside the EU. Indeed, the UK High Court has granted the *Antin* award holders the right to seize Spanish property in London, while the *Eiser* award has been successfully enforced in Australia and several enforcement proceedings are pending before US courts.

Nonetheless, the question arises: is there still any future for the ECT?

## The Investment Court System

In recent FTAs with Canada (CETA), Singapore and Vietnam, the EU and its Member States have replaced the ISDS system with the new so-called investment court system (ICS).

Essentially, the ICS would create a semi-permanent, two-tiered, court-like system, which significantly moves away from arbitration. The ICS would consist of a first instance tribunal with 15 members and an appellate tribunal of six members. The most important change is that the claimant would not have any say in the selection of the members of the tribunal. Instead, the Contracting Parties, including the Respondent in the respective dispute, would appoint all members by common agreement for several years.

Consequently, party autonomy, which is one of the hallmarks of arbitration, would be effectively eliminated. This obviously shifts the balance to the advantage of States.

In particular, it is not difficult to anticipate that States will appoint members whom they consider to be more pro-State biased rather than pro-investor biased. Indeed, the damaging effect of the politicisation of the appointment of members of international courts and tribunals is currently visible regarding the World Trade Organization (WTO) Appellate Body, for which the US refuses to agree on the re-appointment of several of the Body's members; this has effectively paralysed the Appellate Body and prevents it from carrying out its functions. As a consequence thereof, the EU – rather ironically – has proposed arbitration as a solution to overcome the current paralysis of the WTO Appellate Body.

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

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

Meanwhile, the ratification of CETA and the other EU FTAs is meeting significant opposition in many EU Member States because national parliaments are still not convinced that the ICS sufficiently addresses their concerns regarding the current ISDS system generally. While, at the time of writing, 17 out of 27 EU Member States have ratified the CETA investment chapter, there is still resistance; for example, in Ireland the Irish Supreme Court has rejected CETA by ruling that either changes to the Irish arbitration law or a referendum is needed for the ratification of CETA.

Therefore, if and when the ICS under the various EU FTAs will actually become operational remains questionable.

## Towards a Multilateral Investment Court

In 2017, the European Commission, together with Canada and Mauritius, convinced UNCITRAL to set up a Working Group with a broadly formulated mandate to identify and examine any of the perceived shortcomings of the current ISDS system and to propose possible solutions. The discussions began in late 2017 and have since then made significant progress. In these discussions, the European Commission, Canada, Mauritius and several South American States have repeatedly referred to the Multilateral Investment Court (MIC) as the panacea that would solve most, if not all, of the perceived shortcomings of the current ISDS system.

The MIC would be based on the ICS as contained in the EU's recent FTAs. However, many States are not convinced that creating a new international court would be the appropriate solution. In particular, Chile, Israel, Japan, Russia, the US and some Asian States are not yet convinced and instead consider reforming or modifying the existing rules and institutions, such as, for instance, the International Centre for Settlement of Investment Disputes (ICSID) Convention or the Permanent Court of Arbitration (PCA), to be a more effective and realistic option. In fact, revised ICSID Arbitration Rules entered into force in July 2022.

After all, in the past 50 years, more than 3,000 BITs and FTAs have been concluded and more than 1,250 ISDS disputes have been initiated, much to the general satisfaction of the users. Indeed, according to statistics provided by the United Nations Conference on Trade and Development (UNCTAD), States win more cases than claimants. Thus, States have little reason to complain about the current ISDS system, which is also confirmed by the fact that States continue to conclude BITs and FTAs with ISDS provisions.

Meanwhile, the first results of the UNCITRAL negotiations have been achieved.

First, a draft Code of Conduct for Adjudicators, which has been jointly submitted by the Secretariats of ICSID and UNCITRAL, has been adopted by the UNCITRAL Commission. The UNCITRAL Commission also adopted Guidelines on Mediation for International Investment Disputes.

Second, the Working Group agreed that third-party funding (TPF) should be regulated more tightly, in particular by requiring users of TPF to be more transparent with regard to the identity and content of the TPF agreement.

Third, the Working Group supports the establishment of an Advisory Centre for International Investment Law that mirrors the Advisory Centre at the WTO, which provides legal assistance to developing countries involved in WTO disputes.

The first contours of the Advisory Centre for International Investment Law have become visible. There is broad agreement that it should provide legal assistance to developing countries in investment disputes and that it should provide a forum for the avoidance of disputes by offering mediation and other Alternative Dispute Resolution (ADR) mechanisms. In addition, this Advisory Centre should also provide training and outreach activities for government lawyers of developing countries.

However, some details regarding the Advisory Centre still need to be worked out, for example: what is its institutional relationship with the envisaged MIC; how and by whom will it be financed; and whether SMEs may be permitted to use the services of the Centre as well.

While such discussions and negotiations will intensify in the years to come, it is too early to say whether the MIC proposal will gain sufficient traction and support from all the major economies, investors and the arbitration community generally. Possibly, parties may agree to adopt an incremental and flexible approach by taking several intermediate steps rather than going immediately for a full-blown, two-tiered permanent court, which would require significant financial resources. Thus, the parties could agree to first establish only an Appeal Court for disputes brought under specified investment treaties, which could later be further developed into a MIC with universal jurisdiction for all investment disputes.

In any event, the UNCITRAL parties have agreed that the Working Group III on ISDS reform must conclude its work by the end of 2026. Indeed, the number and length of the negotiations have been increased, and so more concrete results can be expected in the near future.

## Outlook

Over the past decade, the EU has become an active driver in shaping international investment law and arbitration. The impact of EU law on ISDS is particularly noticeable, by effectively banning intra-EU ISDS arbitrations based on intra-EU BITs and the ECT. Moreover, recognition and enforcement of intra-EU BITs/ECT awards within the EU is becoming very difficult, if not impossible.

All this will inevitably lower the level of investment and investor protection within the EU, which will force investors and their advisors to consider viable alternative solutions.

At the international level, while the ICS has been included in several EU FTAs, it has not yet become operational due to the resistance to the ratification process within EU Member States. However, if and when the ICS is put into operation, this could potentially have far-reaching consequences for investment treaty arbitration generally. This impact would be even more sweeping if the MIC proposal were to be embraced by a significant number of States around the world.

In any event, one thing is clear: EU law will continue to impact international investment law and arbitration over the coming years. The artificially created and unnecessary conflict between EU law and international investment law seems to have been decided in favour of EU law – at least within the EU and its Member States. Meanwhile, arbitral tribunals continue to push back against *Achmea* and *Komstroy*, and continue to exercise their jurisdiction.

Consequently, the arbitration community must think creatively of solutions that would effectively resolve or at least reduce the tension between EU law and international investment law in a mutually respectful way for the benefit of investors and their investments.



**Prof. Dr. Nikos Lavranos**, LL.M. is the first Secretary General of the European Federation for Investment Law and Arbitration (EFILA). He studied law at Goethe University, Frankfurt am Main, Germany. He obtained his LL.M. (*cum laude*) and Ph.D. law degrees from Maastricht University, the Netherlands.

In 2017, he set up NL-Investmentconsulting, a high-quality, boutique consultancy firm, which advises on all issues of investment law and arbitration.

He is listed as an arbitrator and mediator at the Vienna International Arbitration Centre (VIAC), arbitrator at the China International Economic and Trade Arbitration Commission (CIETAC), mediator at the Asian International Arbitration Centre (AIAC) and mediator for the Energy Community. Recently, he has also been added to the EU roster of arbitrators.

Prof. Dr. Nikos Lavranos acts as an independent external legal advisor and legal expert for several international law firms and sits as an arbitrator and mediator in investment treaty arbitrations.

He is guest professor at Leiden University and visiting professor at Vienna University, as well as adjunct professor at various other universities worldwide.

Prof. Dr. Nikos Lavranos is also Co-Editor-in-Chief of the *European Investment Law and Arbitration Review* and a permanent contributor to the *Kluwer Arbitration Blog*, *Borderlex*, the EFILA blog and the *Practical Law Arbitration* blog.

**European Federation for Investment Law  
and Arbitration (EFILA)**

Avenue Marnix 23, 5<sup>th</sup> floor  
1000 Brussels  
Belgium

Tel: +31 6 2524 9493  
Email: [n.lavranos@efila.org](mailto:n.lavranos@efila.org)  
URL: [www.efila.org](http://www.efila.org)

Since the European Federation for Investment Law and Arbitration (EFILA) was established in Brussels in 2014, it has developed into a highly regarded think-tank that specifically focuses on the EU's investment law and arbitration policy.

EFILA is unique in that it brings together arbitration practitioners, academics and policymakers who have extensive first-hand experience and a deep understanding of the relevant investment law and arbitration issues. EFILA provides a platform for a fact- and merit-based discussion on the pros and cons of the EU's investment law and arbitration policy.

In recognition of its important role, EFILA has been granted Observer Status at the UNCITRAL Working Group III, which is working on the reforms of the ISDS system.

EFILA's regular events, such as its Annual Conference and Annual Lecture, have established themselves as key events for the investment arbitration community.

Recently, Young EFILA was established in order to provide another forum for the new generation of arbitration specialists.

EFILA regularly submits its views to public consultations organised by the EU, ICSID, and OECD, as well as to the UNCITRAL Working Group III. All its submissions are published on its website.

Together with Queen Mary University of London, EFILA also publishes the *European Investment Law and Arbitration Review*.

[www.efila.org](http://www.efila.org)



# International Comparative Legal Guides

The **International Comparative Legal Guide (ICLG)** series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

**Investor-State Arbitration 2024** features two expert analysis chapters and 14 Q&A jurisdiction chapters covering key issues, including:

- Treaties: Current Status and Future Developments
- Legal Frameworks
- Recent Significant Changes and Discussions
- Case Trends
- Funding
- The Relationship Between International Tribunals and Domestic Courts
- Recognition and Enforcement

