

Łukasz Dawid Dąbrowski

SGH Warsaw School of Economics, Poland

ldabro@sgh.waw.pl

ORCID: 0000-0003-2251-7791

<https://doi.org/10.26881/gsp.2026.3.05>

Intra-EU Investment Arbitration in the Case Law of the Court of Justice of the European Union

1. Introduction

Investment arbitration is a key element of every bilateral investment treaty on the mutual protection and promotion of investments (BIT). Globally, nearly three thousand BITs have been concluded, including several hundred agreements between EU Member States and non-EU countries,¹ as well as around 200 BITs between EU Member States.² The main objective of BITs is to create favourable and fair conditions for investments made by investors of one contracting party in the territory of the other contracting party.³ In other words, BITs are intended to reduce legal barriers to foreign investments.⁴ BITs guarantee a basic set of rights, including national treatment, most-

¹ The list of bilateral investment agreements, which refers to Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Article 4 point 1, OJ C 147, 11.05.2017, p. 1.

² Ł.D. Dąbrowski, "Polish Bilateral Investments Treaties after the Lisbon Treaty" [in:] *Poland in the European Union. Report 2022*, ed. A.A. Ambroziak, Warsaw 2022, p. 161.

³ See: K.J. Vandevelde, "A Unified Theory of Fair and Equitable Treatment," *New York University Journal of International Law and Politics (JILP)* 2010, vol. 43, no. 1; P. Juillard, *Bilateral Investment Treaties in the Context of Investment Law*, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe, 28–29 May 2001, Dubrovnik, Croatia 2001, p. 1; T. Gazzini, "Bilateral investment treaties" [in:] *International Investment Law: The Sources of Rights and Obligations*, eds. T. Gazzini, E. De Brabandere, The Hague 2012, p. 28 *et seq.*; M. Perkowski, E. Gruszevska, "Interpretation of Bilateral Treaties for the Promotion and Protection of foreign investments," *Studies in Logic, Grammar and Rhetoric* 2013, vol. 32(45), no. 1, p. 94 *et seq.*

⁴ K.J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, Thomas Jefferson School of Law Research Paper No. 2993300, 2017, p. 37, <http://ssrn.com/abstract=2993300> [accessed: 14.10.2021].

favoured-nation treatment,⁵ protection against expropriation, and compensation for investments.⁶

Furthermore, in the event of a dispute between an investor and the host state, they provide investors with access to a neutral dispute resolution mechanism (arbitration).⁷ Although not all BITs contain provisions on arbitration,⁸ and some agreements provide for arbitration only for a limited range of claims – usually in relation to expropriation⁹ – arbitration, nonetheless, constitutes a key mechanism for the protection of foreign investors.¹⁰

Despite its procedural character, investment arbitration functions as a safeguard intended to encourage and protect investments.¹¹ Accordingly, BITs that lack an arbitration mechanism are of limited practical value to investors.¹² At present, investment arbitration has become a contentious political issue¹³ not only within the EU but also globally.¹⁴ Several key concerns underpin this opposition. First, there is a widespread perception – albeit inaccurate¹⁵ – that investors invariably prevail in

⁵ See: B. Kingsbury, S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ Working Paper 2009/6 (Global Administrative Law Series), p. 39 *et seq.*

⁶ Ł.D. Dąbrowski, "Arbitration Procedure in Bilateral Investment Treaties – Interactions between National, European and International Courts" [in:] *Case-Law and the Development of International Law. Contributions by International Courts and Tribunals*, eds. P. Galvão Teles, M. Almeida Ribeiro, Leiden–Boston 2021, p. 248.

⁷ Ł.D. Dąbrowski, "Pozycja przedsiębiorstw międzynarodowych w świetle dwustronnych umów inwestycyjnych" [in:] *Podmiotowość prawnomiędzynarodowa i jej współczesne aspekty*, eds. E. Cała-Wacinkiewicz, J. Menkes, J. Nowakowska-Małusecka, W.S. Staszewski, Warszawa 2020, p. 316.

⁸ K.J. Vandevelde, "A Brief History of International Investment Agreements," *U.C. Davis Journal of International Law & Policy* 2005, vol. 12, no. 1, p. 188; *idem*, *Bilateral Investment Treaties: History, Policy and Interpretation*, Thomas Jefferson School of Law Research Paper No. 3022249, 2010, p. 370, <https://ssrn.com/abstract=3022249> [accessed: 14.10.2021].

⁹ For example, the Agreement between the Government of the Polish People's Republic and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, concluded in Beijing on 7 July 1988, Article 10, *Journal of Laws* 1989 No. 13, item 67.

¹⁰ See: J. Pohl, K. Mashigo, A. Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment, no. 2012/02, p. 16 *et seq.*

¹¹ Opinion of Advocate General Wathelet delivered on 19 September 2017, C-284/16, *Slovakische Republik v Achmea BV*, ECLI:EU:C:2017:699, para. 77.

¹² Compare: E.L. Trakman, "Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo," *UNSW Law Journal* 2012, vol. 35, no. 3, pp. 979–1012.

¹³ OECD, "The impact of investment treaties on companies, shareholders and creditors" [in:] *OECD Business and Finance Outlook*, Paris 2016, p. 227; G. Harten, "A Critique of Investment Treaties" [in:] *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, eds. K. Singh, B. Ilge, Amsterdam 2016, p. 44 *et seq.*, <https://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf> [accessed: 25.08.2025].

¹⁴ See: Z.Ph. Williams, "What, When, Where and Why? Patterns in Investor-State Arbitration" [in:] *Rethinking Bilateral Investment Treaties...*, p. 35 *et seq.*; S.M. Schwebel, "In defense of bilateral investment treaties," *Arbitration International* 2015, vol. 31, no. 2, p. 184 *et seq.*

¹⁵ UNCTAD statistics show that in sixty-two intra-EU arbitration proceedings concluded over several decades, investors prevailed in only ten cases (representing 16.1% of the sixty-two cases); M. Baker,

arbitral proceedings.¹⁶ Second, arbitration is often viewed as an instrument accessible primarily to the largest and most powerful economic actors.¹⁷ Third, critics argue that arbitration may impede the pursuit of legitimate public policy objectives.¹⁸

Historically, BITs constituted the primary instruments for preparing the states of Central and Eastern Europe for accession to the EU. Association agreements envisaged the conclusion of BITs between Member States and candidate countries. For instance, agreements with Poland¹⁹ and Romania,²⁰ in sections entitled *Promotion and Protection of Investments*, stipulated that the objective of cooperation in this field was for each state to establish a legal framework conducive to investment. This objective was to be achieved, in particular, through the conclusion of BITs between the candidate states and the Member States.²¹ These provisions therefore encouraged the signing of BITs.²² Arbitration clauses, in turn, were designed to address the lack of mutual trust – specifically regarding the candidate country's compliance with the right of EU investors to an effective remedy – in the relationship between candidate states and the EU.²³

Following the entry into force of the Treaty of Lisbon on 1 December 2009, foreign direct investment was incorporated into the scope of the common commercial policy, an area in which the EU holds exclusive competence to legislate and adopt legally binding acts.²⁴ The Treaty of Lisbon thereby conferred upon the EU the responsibility for

C. Dowling, "Developments and reform of investor-state dispute settlement Q&A with Meg Kinnear" [in:] *International Arbitration Report*, Issue 8, June 2017, p. 3.

¹⁶ See: P. Eberhardt, C. Olivet, "Profiting from Injustice: Tracing the Rise of Investment Arbitration Industry" [in:] *Rethinking Bilateral Investment Treaties...*, p. 248 et seq.

¹⁷ Ł.D. Dąbrowski, "Arbitration Procedure...", p. 259.

¹⁸ B. Bielszczuk, S. Zaręba, *The Significance of the Energy Charter Treaty and Perspective for Reform*, PISM, No. 113(1809), 2021, www.pism.pl/publications/The_Significance_of_the_Energy_Charter_Treaty_and_Perspective_for_Reform [accessed: 25.08.2025].

¹⁹ European Agreement establishing an association between the Republic of Poland, of the one part, and the European Communities and their Member States, of the other part, concluded in Brussels on 16 December 1991, Article 73, *Journal of Laws* 1994 No. 11, item 38.

²⁰ European Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part, concluded in Brussels on 31 December 1994, Article 74, <https://op.europa.eu/en/publication-detail/-/publication/9988f56a-dde3-4e6a-ac49-f7e09fab69d2/language-pl> [accessed: 26.12.2023].

²¹ See: B. Ilge, "An Account of the EU's Engagement with Bilateral Investment Treaties" [in:] *Rethinking Bilateral Investment Treaties...*, p. 155 et seq.

²² Opinion of Advocate General Szpunar delivered on 3 March 2021, C-741/19, *Republic of Moldova v Komstroy*, a company the successor in law to the company Energoalians, ECLI:EU:C:2021:164, para. 101.

²³ *Ibidem*, para. 102.

²⁴ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47. Under Article 3(1)(e) TFEU, the EU has exclusive competence with respect to common commercial policy. Pursuant to Article 2(1) TFEU, where the Treaties confer exclusive competence on the EU in a given area, only the EU may legislate and adopt legally binding acts. According to Article 207 TFEU, "the common commercial policy shall be based on uniform principles, particularly with regard to (...), foreign direct investment, (...)." Consequently, only the EU may legislate and adopt legally binding acts in this area; Member States may do so independently only if authorised by the EU.

negotiating investment agreements.²⁵ The Treaty on the Functioning of the European Union (TFEU), however, does not contain transitional provisions in this regard. In turn, Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishes transitional provisions for BITs²⁶ – though only in relation to agreements with non-EU states.

This distinction implies that the legal status of BITs depends on whether they are intra-EU agreements (that is, treaties concluded between EU Member States) or extra-EU agreements (that is, treaties between an EU Member State and a third country).²⁷ As investment arbitration constitutes a core element of an investment treaty, it can similarly be classified as either intra-EU or extra-EU arbitration. In principle, BITs remain binding under public international law. Extra-EU BITs continue to apply until they are superseded by EU-wide international investment agreements concluded between the Union and non-EU countries.²⁸ By contrast, the legal status of intra-EU investment agreements – and, consequently, intra-EU investment arbitration – has been shaped primarily through the case-law of the Court of Justice of the European Union (CJEU).

The primary purpose of this article is to examine the judgments of the CJEU delivered in preliminary ruling proceedings concerning intra-EU investment arbitration. The analysis focuses on the Court's decisions in the *Achmea*, *Komstroy*, *PL Holdings*, and *Micula* cases, as well as on Opinions 1/09 of 8 March 2011, 2/15 of 16 May 2017, and 1/17 of 30 April 2019. In addition, the article examines institutional and judicial developments that have shaped the post-*Achmea* landscape: the 2024 *inter se* declaration on the non-applicability of the ECT arbitration clause to intra-EU disputes, the European Commission's referral of Hungary to the CJEU for contradicting this position, the enforcement divergence whereby courts in the United States, Switzerland, Singapore, and Australia have refused to follow the *Achmea* doctrine, and the CJEU's expanding scrutiny of commercial and sports arbitration. The objective of this article is to present and critically assess selected arguments developed in the Court's reasoning, which has directly led to the elimination of intra-EU investment arbitration from the EU legal order. In addition, the article advances the *Functional Autonomy Test* as an effects-based framework for evaluating the compatibility of arbitral mechanisms with EU law and the structural requirements of the Union's judicial order. This analysis provides the foundation for two theses. First, the CJEU's exclusion of intra-EU investment arbitration and its simultaneous endorsement of arbitral mechanisms negotiated at the Union level reveal that the Court's constitutional project is not driven solely by legal autonomy, but by the political imperative of

²⁵ See: Ch.R. Drahozal, "Diversity and Uniformity in International Arbitration," *Emory International Law Review* 2017, vol. 31, no. 3, p. 410 *et seq.*

²⁶ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional provisions concerning bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, p. 40.

²⁷ See: M. Baker, C. Dowling, "Developments and Reform...", p. 3 *et seq.*

²⁸ J. Rogers, S. Goodall, C. Dowling, "Brexit and investor-state dispute settlement. What impact will Brexit have on foreign direct investment?" [in:] *International Arbitration Report...*, pp. 24–27.

consolidating the EU's exclusive authority over international dispute settlement. By reframing investment protection as a matter of institutional loyalty and mutual trust among Member States, the Court transforms a doctrinal principle of autonomy into a tool of political integration, exposing the blurred boundary between constitutional reasoning and institutional self-preservation.

Second, the CJEU's categorical rejection of investment arbitration, contrasted with its acceptance of commercial arbitration, highlights a fragile conceptual distinction. Both mechanisms may entail the interpretation of EU law outside the Union's judicial system, yet only investment arbitration is characterised as a systemic threat. This asymmetry indicates that the decisive factor is not legal coherence but political integration, thereby exposing a paradox in the Court's reasoning on party autonomy and judicial protection.

Accordingly, the article is structured into sections that provide a concise account of each case, with subsections addressing the factual and legal background as well as the Court's ruling. A separate section – central to the analysis – critically assesses selected arguments advanced in the Court's reasoning, examines the emerging enforcement divergence between EU and non-EU jurisdictions, and develops the *Functional Autonomy Test* as a framework structured around four criteria: systematicity of removal, relevance of EU law issues, adequacy of judicial review, and the balance between party autonomy and public order. The article concludes with a set of final observations.

2. Achmea case (C-284/16) – judgment of 6 March 2018²⁹

2.1. Factual and legal background of the case

Achmea, a Dutch investor, initiated arbitration proceedings against Slovakia under the BIT concluded between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.³⁰ Slovakia had partially reversed the liberalisation of its private health insurance market by introducing restrictions on investors' ability to distribute

²⁹ Judgment of the Court (Grand Chamber), 6 March 2018, C-284/16, *Slowakische Republik (Slovak Republic) v Achmea BV*, ECLI:EU:C:2018:158.

³⁰ Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2650/netherlands---slovakia-bit-1991-> [accessed: 28.12.2023].

profits – a regulatory measure of a restrictive nature, which was subsequently found unconstitutional.³¹ Such action constituted a breach of the BIT's provisions.³²

Frankfurt am Main was designated as the seat of arbitration, and German law therefore governed the arbitral proceedings.³³ The arbitral tribunal awarded *Achmea* compensation in the principal amount of EUR 22.1 million.³⁴ The case, however, raised a fundamental question: in light of Articles 267 and 344 TFEU, may an investor from one EU Member State initiate arbitration proceedings against the host state – another EU Member State – on the basis of a BIT? In other words, is intra-EU investment arbitration compatible with the TFEU?

2.2. The court ruling

The CJEU has held that Article 267 TFEU is a cornerstone of the EU judicial system, establishing dialogue between courts, particularly between the CJEU and national courts. Its purpose is to ensure the uniform interpretation of EU law, safeguarding its

³¹ In 2004, the Slovak Republic opened the Slovak market to foreign and domestic insurance undertakings offering private health insurance services. *Achmea* (belonging to a Dutch insurance group), after obtaining a licence as a health insurance undertaking, established a subsidiary in Slovakia, into which it contributed capital and through which it offered private health insurance services on the Slovak market. In 2006, Slovakia partially reversed the liberalization of the private health insurance market by prohibiting the distribution of profits generated from activities in the field of private health insurance. In 2011, the Slovak Constitutional Court ruled that the prohibition was unconstitutional, and consequently, Slovakia again allowed the distribution of profits. However, *Achmea* considered that the government's actions had caused it harm and initiated arbitration proceedings against Slovakia under Article 8 of the BIT between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.

³² Pursuant to Article 3(1) of the BIT, the Contracting Parties undertook to ensure fair and equitable treatment of the investments of investors of the other Contracting Party and to refrain from hindering, through unfair or discriminatory measures, the management, maintenance, use, enjoyment, or disposal of such investments. Pursuant to Article 4 of the BIT, each Contracting Party shall ensure the free transfer of payments related to investments, in particular profits, interest, and dividends, in freely convertible currency, without undue restriction or delay. Furthermore, under Article 8 of the BIT, any disputes between one Contracting Party and an investor of the other Contracting Party in respect of that investor's investments shall, as far as possible, be settled amicably. If it is not possible to resolve the dispute amicably, each Contracting Party agrees to submit the dispute to arbitration. The arbitral tribunal shall decide on the basis of: 1) the applicable law of the relevant Contracting Party; 2) the provisions of this Agreement and any other relevant agreements between the Parties; 3) the provisions of any specific agreements relating to the investment; and 4) general principles of international law. The award of the arbitral tribunal shall be final and binding on the parties to the dispute.

³³ Under the provisions of the German Code of Civil Procedure, an arbitral award may be set aside only if one of the grounds for annulment arises, including the invalidity of the arbitration agreement under the law to which the parties have submitted it, and the conflict of recognition or enforcement of the arbitral award with public policy.

³⁴ Slovakia filed a motion to set aside the arbitral award with the higher regional court in Frankfurt am Main (Germany), which dismissed the motion. Subsequently, the Slovak Republic appealed this decision to the Federal Court of Justice (Germany). Slovakia raised the objection of lack of jurisdiction of the arbitral tribunal.

coherence, effectiveness, autonomy, and the special nature of the Treaties. As national courts form part of the EU judicial system, their decisions are subject to mechanisms guaranteeing the full effectiveness of EU law. By contrast, arbitral tribunals are not “courts or tribunals of a Member State” within the meaning of Article 267 TFEU and, thus, cannot submit preliminary ruling requests. Under Article 344 TFEU,³⁵ international agreements may not undermine the distribution of powers established by the Treaties or the autonomy of EU law, the protection of which lies with the CJEU.

Under BITs, arbitral tribunals must apply the law of the contracting state and relevant agreements between the parties. Since EU law forms part of the law in force in every Member State, tribunals may be required to interpret provisions concerning fundamental freedoms such as establishment and capital movement. BITs also provide that arbitral awards are final, with review limited under the *lex fori* to grounds such as invalid arbitration agreements or breaches of public policy.

EU law rests on common values shared by all Member States, including mutual trust that these values will be respected through compliance with EU law. The principle of sincere cooperation requires Member States to ensure the application of EU law within their territories and fulfil Treaty obligations. Investment arbitration threatens both mutual trust and the special character of EU law safeguarded through the preliminary ruling procedure.

The Court further recognised that an international agreement establishing a judicial body with binding interpretative authority is not inherently incompatible with EU law, provided the autonomy of the EU legal order is preserved. However, BIT-based tribunals lie outside the EU judicial system, as they are created by Member States, not the Union. Accordingly, the CJEU concluded that investment arbitration is incompatible with the principle of sincere cooperation.

In its analysis, the CJEU distinguished between commercial and investment arbitration.³⁶ The Court emphasised that investment arbitration differs fundamentally from commercial arbitration: while the latter is rooted in party autonomy, the former derives from treaties through which Member States agree to withdraw disputes – potentially involving the interpretation or application of EU law – from the jurisdiction of their own courts and, consequently, from the system of judicial remedies established by EU law. By concluding BITs, Member States created dispute settlement mechanisms between investors and states that risk preventing disputes from being resolved in a manner that guarantees the full effectiveness of EU law, even where its interpretation or application is at stake.

³⁵ Pursuant to Article 344, the Member States undertake not to submit disputes concerning the interpretation or application of the Treaties to any procedure for settlement other than those provided for therein.

³⁶ It observed that the need for efficiency in arbitration justifies only limited judicial review of arbitral awards by Member State courts, provided such review can safeguard fundamental provisions of EU law and, where necessary, enable referrals to the CJEU.

3. *Komstroy case (C-741/19) – judgment of 2 September 2021*³⁷

3.1. Factual and legal background of the case

The case concerned a dispute between the Republic of Moldova and the company Komstroy (which had succeeded to the rights of Energoalians, a Ukrainian distributor) arising from the interpretation of the Energy Charter Treaty (ECT) provisions.³⁸ In the case, Ukrenergo (a Ukrainian producer) sold electricity through intermediaries (Energoalians → Derimen → Moldtranselectro) to Moldova. However, Moldtranselectro (a Moldovan state-owned company) paid only part of the due amounts, despite the assignment of receivables between the companies, which led to legal disputes.³⁹

Considering that certain actions by the Republic of Moldova constituted a significant breach of obligations under the ECT,⁴⁰ in this context – with particular relevance to ECT provisions on economic activity in the energy sector⁴¹ and the definition of “investment”⁴² – Komstroy (Energoalians) initiated *ad hoc* arbitration proceedings pursuant to Article 26(4)(b) of the ECT.

³⁷ Judgment of the Court (Grand Chamber), 2 September 2021, C-741/19, *Republic of Moldova v Komstroy LLC*, successor in law to the company Energoalians, ECLI:EU:C:2021:655.

³⁸ Energy Charter Treaty, Lisbon, 17 December 1994, OJ 1994, L 380, p. 24, approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997, OJ 1998, L 69, p. 1.

³⁹ Ukrenergo, a Ukrainian producer, sold electricity to Energoalians, a Ukrainian distributor, which resold it to Derimen, a company registered in the British Virgin Islands, which in turn sold the electricity to Moldtranselectro, a Moldovan state-owned enterprise, for export to Moldova. The quantity of electricity supplied was determined each month directly between Moldtranselectro and Ukrenergo. In this supply chain, Derimen paid the full amount due to Energoalians, whereas Moldtranselectro paid only part of its obligations to Derimen. Subsequently, Derimen assigned to Energoalians the claims it held against Moldtranselectro. Moldtranselectro partially settled its obligation to Energoalians by assigning to it the claims it held. Energoalians unsuccessfully attempted to recover the remaining portion of the debt, first through Moldovan courts and then through Ukrainian courts.

⁴⁰ The purpose of the Energy Charter Treaty (ECT) is to facilitate economic growth by taking measures aimed at liberalizing investment and trade in the energy sector. In the case, the relevant provisions of the ECT concerned: business activities in the energy sector, the concept of investment, and the regulation of investment disputes, which, pursuant to Article 26 of the ECT, may be submitted: 1) to the courts or administrative tribunals of the host State; 2) in accordance with any previously agreed dispute settlement procedure (if any); 3) to international arbitration or conciliation proceedings. The arbitral tribunal decides on the basis of the provisions of the ECT, applicable rules, and principles of international law. Despite the multilateral nature of the ECT, Article 26 is in practice intended to regulate bilateral relations between the Contracting Parties in a manner analogous to the provisions of a bilateral investment treaty.

⁴¹ “Economic activity in the energy sector” is defined as any economic activity related to the exploration, extraction, refining, production, storage, land transportation, transmission, distribution, trade, marketing, or sale of energy materials and products, except for those listed in Annex NI, and excluding the distribution of heat to multiple consumers (Article 1, point 5).

⁴² “Investment” means any kind of asset owned or directly or indirectly controlled by an investor and includes: a) tangible and intangible property, movable and immovable property, and any property rights such as leases, mortgages, pledges, or other security interests; b) a company or enterprise, or shares, stock, or other forms of equity participation in a company or enterprise, bonds, and other debt

The arbitration proceedings took place in Paris. The tribunal found that the Republic of Moldova had breached its obligations under the ECT and ordered it to pay compensation to Energoalians. Moldova appealed to the Paris Court of Appeal, seeking annulment of the award on the ground of a public policy violation, specifically concerning the jurisdiction of the *ad hoc* arbitral tribunal.⁴³ The Court annulled the award, holding that the assigned receivable at issue did not constitute an “investment” within the meaning of the ECT.⁴⁴ In turn, before the French Court of Cassation, three key issues arose: 1) whether the CJEU had jurisdiction, given that the dispute involved the Republic of Moldova and a Ukrainian company and thus appeared unrelated to the EU; 2) whether the ECT should be interpreted as including the acquisition of a receivable from an electricity supply contract – unrelated to an investment – owed by a company of a non-Contracting Party to a state-owned company of another Contracting Party, even absent any contribution by the acquirer in the host Contracting Party’s territory; and 3) what categories of disputes between a host state and an investor may be submitted to arbitration under the ECT.

3.2. The court ruling

The CJEU confirmed its jurisdiction to rule on the preliminary reference. It recalled that, under established case law, the ECT, concluded by the Council pursuant to Articles 217 and 218 TFEU, constitutes – so far as the EU is concerned – an act of an EU institution. Once in force, its provisions form part of EU law, which the Court is competent to interpret in preliminary ruling proceedings. The mixed nature of the ECT, concluded jointly by the EU and Member States, does not affect this competence.

The Court noted that the parties had submitted their dispute to an *ad hoc* arbitral tribunal seated in Paris, making French law the *lex fori*. As the arbitration was seated in the territory of a Member State, EU law was likewise applicable.

On the notion of “investment,” the CJEU held that the claim did not arise from an investment agreement. The contract between entrepreneurs concerned only the

of a company or enterprise; c) monetary claims and claims to performance under a contract, having economic value and related to an investment; d) intellectual property; e) returns; f) any rights granted under law or contract, or under any licences or permits issued in accordance with the law, for carrying out economic activity in the energy sector (Article 1, point 6).

⁴³ Under French law, “an application to set aside an arbitral award is admissible only if: 1) the arbitral tribunal wrongly assumed or declined jurisdiction; 2) the composition of the arbitral tribunal was not in accordance with the law; 3) the arbitral tribunal exceeded the scope of the submission to arbitration; 4) there was a violation of the principle of adversarial proceedings; 5) recognition or enforcement of the award would be contrary to international public policy” (Article 1520, Code de procédure civile).

⁴⁴ The Paris Court of Appeal held that the dispute between Energoalians and Moldova concerned a claim assigned by Derimen to Energoalians, which consisted solely of the sale of electricity. Because of the absence of any contribution by Energoalians in Moldova, such a claim could not be regarded as an “investment” within the meaning of the ECT and could not justify the jurisdiction of the arbitral tribunal. However, following a cassation appeal filed by Komstroy (the legal successor of Energoalians), the French Court of Cassation annulled the decision of the Paris Court of Appeal and remitted the case for reconsideration.

supply of electricity, produced by other entities in Ukraine and resold to one of the entrepreneurs. This constituted a standard commercial transaction, which cannot qualify as an “investment” within the ECT.

Regarding the arbitral tribunal’s jurisdiction, the Court reaffirmed its reasoning in *Achmea*. It stressed that the autonomy of EU law derives from the Treaties, which establish the Union’s constitutional framework, allocate competences, regulate institutional functioning, and create a judicial system ensuring consistency and uniformity – most notably through the preliminary ruling procedure. To preserve this autonomy, only courts within the EU judicial system may request preliminary references under Article 267 TFEU. An arbitral tribunal, even when applying the ECT, falls outside this system and thus lacks such competence. Moreover, an international agreement cannot modify the division of powers set by the Treaties or undermine the integrity of the EU legal order.

The Court concluded that while the ECT may oblige Member States to submit to arbitration with investors from third countries, it cannot impose such obligations in disputes between an investor from one Member State and another Member State. Accordingly, the investor–State arbitration mechanism under the ECT does not apply in intra-EU disputes.

The EU and its Member States have committed to ambitious climate objectives, including phasing out fossil fuels and transitioning to renewable energy sources. However, the ECT provides legal protections for fossil fuel investments, enabling companies to challenge government policies that may negatively affect their investments – even when such policies are aimed at reducing carbon emissions. The treaty’s ISDS mechanism allows investors to bypass domestic courts and bring claims directly before international arbitration tribunals. This has raised concerns that the ECT could be used to contest climate and energy policies, potentially delaying or obstructing the EU’s energy transition. The EU’s decision to withdraw from the ECT reflects these concerns, particularly the risk that the treaty’s ISDS mechanism undermines the Union’s climate goals. Fossil fuel companies have previously used the ECT to sue governments over climate and energy policies, with potential costs to taxpayers running into the billions.⁴⁵

Following the Council of the European Union’s approval of the withdrawal on 30 May 2024, on 26 June 2024 twenty-six EU Member States, Euratom, and the EU signed an *inter se* declaration regarding the non-applicability of Article 26 of the ECT to intra-EU disputes,⁴⁶ affirming that Article 26 can never serve as a basis for investor–

⁴⁵ See: *EU notifies exit from Energy Charter Treaty and puts an end to intra-EU arbitration proceedings*, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513 [accessed: 15.08.2025]; *Energy Charter Treaty: EU notifies its withdrawal*, <https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal> [accessed: 15.08.2025].

⁴⁶ Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings, of 26 June 2024, OJ C, 6.08.2024, <https://energy.ec.europa.eu/publications/declaration-legal-consequences-judgment-court-justice-komstroy-and->

State arbitration within the EU, and that the *sunset clause* in Article 47(3) cannot be invoked to keep such arbitration alive after withdrawal. Hungary refused to sign and issued its own declaration,⁴⁷ and in July 2025 the European Commission formally referred Hungary to the CJEU for contradicting the EU's collective position on intra-EU arbitrations under the ECT.⁴⁸ In a notable institutional response, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) issued a communication in October 2024 announcing a new policy of selecting seats outside the EU for intra-EU investment treaty disputes to ensure the enforceability of awards.⁴⁹

4. PL Holdings case (C-109/20) – judgment of 26 October 2021⁵⁰

4.1. Factual and legal background of the case

The case concerned a dispute between Poland and the company PL Holdings regarding the jurisdiction of an arbitral tribunal established under the BIT between the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg,⁵¹ in connection with an allegation of expropriation.⁵² The arbitral

common-understanding-non_en [accessed: 14.06.2026]. See also: Belgian Ministry of Foreign Affairs, Energy Charter Treaty: Member States sign declaration and initial *inter se* agreement clarifying non-applicability of ECT arbitration provisions intra-EU, 26 June 2024, <https://diplomatie.belgium.be/en/news/energy-charter-treaty-member-states-sign-declaration-and-initial-inter-se-agreement-clarifying-non-applicability-ect-arbitration-provisions-intra-eu> [accessed: 14.06.2026].

⁴⁷ Declaration of the Representative of the Government of Hungary, of 26 June 2024, on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and of the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings, see European Commission, *July infringement package – key decisions on energy*, https://energy.ec.europa.eu/news/july-infringement-package-key-decisions-energy-2024-07-25_en [accessed: 14.06.2026].

⁴⁸ European Commission, Press Release IP/25/1799: Commission refers Hungary to the Court of Justice of the European Union for contradicting the Union's position on intra-EU arbitrations under the Energy Charter Treaty and not abiding to the case law of the Court of Justice, 16 July 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1799 [accessed: 14.06.2026].

⁴⁹ SCC Arbitration Institute, Policy – Deciding the Seat in Intra-EU Investment Arbitrations Administered under the SCC Rules, adopted by the SCC Board on 16 October 2024, https://sccarbitrationinstitute.se/wp-content/uploads/2025/01/scc_policy_seat_of_arbitration_2024-1.pdf [accessed: 14.06.2026]. See also: SCC Introduces New Policy on Deciding the Seat of Arbitration in Intra-EU Investment Treaty Disputes, SCC Arbitration Institute, 5 November 2024, <https://sccarbitrationinstitute.se/en/news/scc-introduces-new-policy-on-deciding-the-seat-of-arbitration-in-intra-eu-investment-treaty-disputes> [accessed: 14.06.2026].

⁵⁰ Judgment of the Court (Grand Chamber), 26 October 2021, C-109/20, *Republiken Polen v PL Holdings Sàrl*, ECLI:EU:C:2021:875.

⁵¹ Agreement between the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, of the one part, and the Government of the Polish People's Republic, of the other part, on the Promotion and Reciprocal Protection of Investments, signed on 19 May 1987, *Journal of Laws* 2001 No. 15, item 153.

⁵² PL Holdings is a company incorporated in Luxembourg. Between 2010 and 2013, it acquired shares in the capital of two Polish banks. As a result of the merger of these banks in 2013, PL Holdings

tribunal ordered Poland to pay compensation to PL Holdings and to bear the costs of the arbitral proceedings. Poland brought an action before the Svea Court of Appeal in Stockholm, Sweden, seeking to set aside the award. PL Holdings argued that, even assuming the “offer to arbitrate” under the BIT was invalid, an *ad hoc* arbitration agreement had nevertheless been concluded under Swedish law and according to the rules of commercial arbitration.⁵³

The Stockholm Court of Appeal, acting in the first instance, dismissed Poland’s action. On appeal, the higher court considered, first, that the *Achmea* judgment applied, thereby rendering the arbitral proceedings invalid. However, it also held that such invalidity did not preclude a Member State and an investor from another Member State from subsequently concluding an *ad hoc* arbitration agreement to resolve the dispute. According to the court, the validity of such an agreement derives from the parties’ mutual consent and may be established under the same principles governing commercial arbitration. In light of this reasoning, the referring court asked the CJEU whether Articles 267 and 344 TFEU preclude national legislation permitting a Member State to conclude with an investor from another Member State an *ad hoc* arbitration agreement allowing the continuation of arbitral proceedings initiated under a BIT arbitration clause rendered invalid because of its incompatibility with the TFEU.

4.2. The court ruling

The CJEU reaffirmed its reasoning in *Achmea*, holding that a Member State cannot, by concluding an *ad hoc* arbitration agreement replicating an invalid BIT clause, submit a dispute potentially involving EU law to a tribunal outside the EU judicial system. Such an agreement would have the same legal effects as the invalid clause and thus circumvent obligations under the Treaties. The Member State’s consent to jurisdiction in these circumstances would, in substance, reproduce its original acceptance of the BIT clause and be equally invalid.

The Court also referred to the Agreement for the Termination of Bilateral Investment Treaties between EU Member States,⁵⁴ which obliges national courts to annul, set aside, or refuse recognition and enforcement of awards rendered under invalid clauses. This principle applies *mutatis mutandis* where proceedings initiated under such a clause are continued on the basis of an *ad hoc* agreement with identical content. Any attempt by a Member State to “cure” the invalidity of an arbitration clause

became the owner of 99% of the shares of the new bank formed through this merger. In July 2013, the Polish Financial Supervision Authority decided to suspend PL Holdings’ voting rights attached to the shares in this new bank and ordered their compulsory sale. PL Holdings decided to initiate arbitration proceedings against Poland before the arbitral tribunal established at the Arbitration Institute of the Stockholm Chamber of Commerce, seeking compensation.

⁵³ According to Swedish law provisions, disputes concerning matters that may be subject to a settlement between the parties can, by agreement of the parties, be submitted for resolution by a single arbitrator or a panel of arbitrators.

⁵⁴ Article 7(b) Agreement on the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ 2020, L 169, p. 1.

through such an agreement would breach its duty to contest the clause's validity and would be incompatible with the fundamental principles of the EU legal order.

In *PL Holdings*, the Court concluded that the protection of rights derived from EU law must be ensured within the judicial system of the Member States. It should be noted, however, that in practice national courts often impose conditions on investors' ability to invoke international law that are difficult to satisfy, alongside procedural time limits that are hard to reconcile with business realities and the scale of investments at stake.⁵⁵

5. *Micula* case (C-638/19 P) – judgment of 25 January 2022⁵⁶

5.1. Factual and legal background of the case

The case illustrates the European Commission's role in enforcing EU State aid rules. Romania's payment of arbitration compensation to the Micula investors⁵⁷ was considered by the Commission to constitute unlawful State aid, which it ordered to be suspended and recovered.⁵⁸ The investors challenged this decision before the General Court, arguing that the Commission lacked competence and that no "advantage" within the meaning of State aid law had been granted, particularly with respect to sums awarded before Romania's accession to the EU.⁵⁹ In 2019, the General Court annulled the decision, siding with the investors without examining their additional

⁵⁵ The judgment of the Conseil d'État (France) of 21 December 2007, No. 280264, held that the provisions of Article 3 of the Agreement between the Government of the French Republic and the Government of the People's Democratic Republic of Algeria on the Promotion and Reciprocal Protection of Investments, signed in Algiers on 13 February 1993, contain obligations exclusively between the two signatory States and, consequently, cannot be invoked by individuals. See also the judgment of 21 December 2011, *Air Transport Association of America et al.* (C-366/10, EU:C:2011:864).

⁵⁶ Judgment of the Court (Grand Chamber), 25 January 2022, C-638/19 P, *European Commission v European Food SA*, established in Drăgănești (Romania), ECLI:EU:C:2022:50.

⁵⁷ In the late 1990s, Romania introduced tax incentives for companies investing in disadvantaged regions. These benefits were available to businesses with special investment certificates. Ioan and Viorel Micula, Swedish nationals living in Romania, owned the European Food and Drinks Group, which operated in the Ștei-Nucet region through subsidiaries including European Food SA, Starmill SRL, and Multipack SRL. The companies qualified for the incentives and invested in the local mining area. In 2004, Romania abolished most of these incentives, keeping only a corporate income tax exemption. The Miculas and their companies initiated arbitration to recover losses from this change. Soon after, Romania became an EU Member State, which meant EU law began to apply in the country. In 2013, the arbitral tribunal ruled that Romania had breached the BIT and ordered it to pay significant damages. The Commission warned that carrying out the award would be treated as State aid and must be reported. Romania partially paid by offsetting tax liabilities of European Food.

⁵⁸ In 2019, the European Commission appealed a judgment concerning Romania's payment of compensation to certain investors (27 August 2019; appeal under Article 56 of the Statute of the CJEU).

⁵⁹ November 2015 actions in Cases T-624/15, T-694/15, T-704/15; legal basis Article 108 TFEU and Article 107(1) TFEU.

claims. On appeal, the Commission argued that the Court had misinterpreted EU law, wrongly excluded the arbitral award from the scope of State aid rules, misconstrued the concept of “advantage,” and failed to take into account the relevance of the *Achmea* judgment.

5.2. The court ruling

The CJEU held that, as of 1 January 2007, the Commission had competence under Article 108 TFEU to review Romania’s measures as potential State aid. State aid is deemed “granted” on the date when the beneficiary acquires a legal right to the payment under national law. In cases of arbitral compensation, that right arises only with the award itself, when payment becomes enforceable. The General Court erred in considering that the aid was granted upon the abolition of the tax incentive scheme and therefore wrongly concluded that the Commission lacked competence under Article 108 TFEU.

The CJEU further stressed the relevance of *Achmea*: from Romania’s EU accession onward, Articles 107 and 108 TFEU apply. The compensation did not exclusively concern pre-accession damages, and the arbitral tribunal could not be regarded as part of the EU judicial system. The Court also clarified that Romania’s consent to arbitration under the BIT does not affect this conclusion. Such consent stems not from party autonomy but from an inter-state treaty substituting arbitration for recourse to domestic courts. Following accession, however, the EU judicial system supersedes these mechanisms, rendering prior consent to arbitration without legal effect.

6. Opinions of the CJEU

6.1. Opinion of the Court 1/09 of 8 March 2011⁶⁰

The proceedings examined whether the proposed unified patent litigation system – the European Community Patent Court – was compatible with EU law, particularly Article 344 TFEU.⁶¹ The proposal built on the European Patent Convention (Munich, 1973), an international agreement among thirty-eight states, including all EU members. Although patents are granted by the European Patent Office through a unified procedure, each remains a bundle of national rights subject to domestic law. To address this fragmentation, the Commission proposed a Community patent with unitary effect across the EU, governed by a specialized patent court established by international agreement between the EU, its Member States, and certain third countries.

⁶⁰ Opinion of the Court 1/09 (Grand Chamber) of 8 March 2011, ECLI:EU:C:2011:123.

⁶¹ This prohibits Member States from submitting disputes on Treaty interpretation to unauthorized fora.

The draft envisaged a court with first-instance (central, local, and regional) divisions, an appellate court, and a secretariat. It would apply the Patent Court Agreement, EU law, the European Patent Convention, and other international rules. While the draft permitted preliminary references to the CJEU, the patent court itself would have exclusive jurisdiction over certain disputes.

The CJEU held that Article 344 TFEU did not bar the creation of such a court, since it would adjudicate patent disputes between private parties, not disputes on Treaty interpretation. However, the Court emphasized that the new body would lie outside the EU judicial system established by TEU. By excluding national courts from their ordinary jurisdiction and their ability to refer questions under Article 267 TFEU, the draft undermined the uniform interpretation of EU law.

The Court underlined that Member States may not transfer jurisdiction over matters requiring interpretation or application of EU law to an international tribunal, as this would threaten the autonomy and supremacy of Union law, violate the duty of loyal cooperation, and compromise judicial protection of individual rights. The proposed system was therefore incompatible with EU law.

6.2. Opinion of the Court 2/15 of 16 May 2017⁶²

This opinion addressed whether the EU could conclude a Free Trade Agreement with Singapore alone, or whether it required Member State ratification as a mixed agreement. The FTA is a “new generation” agreement covering goods, services, intellectual property, investment, procurement, competition, and sustainable development across seventeen chapters.

Under TFEU, the EU has exclusive competence in common commercial policy, including trade in goods and services, foreign direct investment (FDI), intellectual property, and measures directly affecting trade. However, only provisions with a direct and immediate effect on trade fall within its exclusive competence. The investment chapter distinguishes between direct investment – establishing lasting economic links – which is covered by exclusive EU competence, and non-direct investment (for example, portfolio investment, real estate, loans), which falls under shared competence. Investor–state dispute settlement mechanisms and state-to-state dispute settlement concerning non-direct investment also fall within shared competence.

Accordingly, the EU alone may conclude provisions on goods, services, FDI, intellectual property, and commercial policy, subject to Council approval and Parliament’s consent. Provisions on non-direct investment and related dispute settlement require Member State ratification. The agreement must therefore be concluded as a mixed agreement, preserving Member States’ role in areas outside exclusive EU competence.

⁶² Opinion of the Court 2/15 (Grand Chamber) of 16 May 2017, ECLI:EU:C:2017:376.

6.3. Opinion of the Court 1/17 of 30 April 2019⁶³

This opinion concerned the compatibility of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada with Union law.⁶⁴ CETA establishes an Investment Court System composed of a tribunal, appellate tribunal, and a prospective multilateral court. CETA tribunals apply international law, including the Vienna Convention, but cannot rule on domestic law; they may only treat it as fact. Their interpretations do not bind national courts, and CETA lacks direct effect. Investors retain the option to pursue domestic remedies.

The CJEU confirmed that international agreements may establish dispute settlement bodies if they do not undermine the autonomy of Union law. Unlike *Achmea* or Opinion 1/09, CETA tribunals are confined to interpreting CETA and cannot displace the EU judicial system or review public interest legislation. Their hybrid model blends arbitral and judicial features, with appeals to a CETA appellate tribunal and interpretative guidance provided by CETA bodies. The Court concluded that the Investment Court System (ICS) mechanism is compatible with EU law.

7. Polemical commentary on certain arguments of CJEU

The CJEU's case law on investment arbitration is now well-established. Nonetheless, certain arguments advanced by the Court continue to raise legitimate doubts. It is therefore important to consider the divergent views expressed by the Advocates General in the cases under analysis, as well as aspects of the Court's reasoning that remain underdeveloped. These factors provide grounds for a justified debate on the coherence and persuasiveness of the Court's current position.

The CJEU held that the limited judicial review of arbitral awards is incompatible with EU law. Nevertheless, potential CJEU scrutiny may still arise in annulment proceedings before the courts of the seat of arbitration, or in opposition to recognition and enforcement before the courts of the state where enforcement is sought. Thus, despite the binding nature of arbitral awards, their execution ultimately depends on the intervention of national courts, which provide the enforcement mechanisms relied upon by investors in investment arbitration. This view was explicitly endorsed by the Advocate General in *Achmea*.⁶⁵ Support for this interpretation lies in the fact that, in each of the relevant cases, national courts in France, Germany, and Sweden – as well as the CJEU itself – had the opportunity to assess compliance with EU law, and indeed

⁶³ Opinion of the Court 1/17 (Grand Chamber) of 30 April 2019, ECLI:EU:C:2019:341.

⁶⁴ CETA covers tariff reductions, trade in goods and services, investment, procurement, competition, intellectual property, and sustainable development. Some provisions apply provisionally, but the contested investor–state dispute settlement mechanism (ISDS) does not.

⁶⁵ Opinion of Advocate General Wathelet delivered on 19 September 2017, C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2017:699, paras. 238–239.

exercised that power. This system of judicial control allowed the CJEU to exclude investment arbitration from intra-EU relations.

The CJEU has consistently emphasized that judicial review by national courts can safeguard EU law only within the limits set by domestic legal frameworks. National laws generally provide for restricted review, particularly regarding the jurisdiction of arbitral tribunals.⁶⁶ Consequently, arbitral awards are not subject to substantive review by Member State courts, and full compliance with EU law cannot be assured. The limited scope of appeal also prevents questions of EU law arising in arbitral proceedings from being adequately examined by national courts and, where necessary, referred to the CJEU for a preliminary ruling.

This raises the question of whether removing the “limited review” model would alter the Court’s position. Put differently, could an expanded scope of annulment proceedings before national courts “rescue” intra-EU investment arbitration? It should be noted, however, that even under the existing limited framework there remains a crucial ground for review: the incompatibility of an arbitral award with the fundamental principles of the legal order, namely its conflict with public policy. This position was advanced by the referring court in the *Achmea* case.

This safeguard, although exceptional in nature, should not be underestimated. First, the concept of public policy in EU Member States has increasingly been interpreted as encompassing compliance with Union law, thereby transforming it into a meaningful vehicle for ensuring consistency with constitutional requirements of the EU legal order. Second, public policy review provides a flexible yet effective tool, allowing national courts to prevent the enforcement of awards that threaten fundamental principles such as the primacy of EU law, the integrity of the internal market, or the protection of fundamental rights. Third, this ground of review has already proven operational in practice: courts in France, Germany, and Sweden have invoked public policy to test arbitral awards against EU law standards, demonstrating that the mechanism is neither purely theoretical nor redundant. Finally, reliance on public policy ensures that the balance between the finality of arbitration and the supremacy of EU law is maintained: arbitral autonomy is respected in the vast majority of cases, while the courts retain an ultimate safeguard for exceptional instances of conflict. In this sense, public policy review offers a pragmatic equilibrium: it preserves the efficiency and attractiveness of arbitration while providing a constitutional safety valve to secure the Union’s legal coherence.

⁶⁶ For example, according to the Polish Code of civil procedure, a judgment of an arbitration court issued in Poland may only be set aside by the court in a special motion if: 1) an arbitration clause is void, invalid or has expired according to relevant law; 2) a party was deprived of the possibility to defend his/her rights before an arbitration court; 3) a judgment of an arbitration court concerns a dispute which is not covered by an arbitration clause or falls beyond the scope of that clause; 4) requirements concerning the composition of an arbitration court or the basic principles of proceedings before that court were not met; 5) a judgment was achieved by means of an offence or on the basis of a false or falsified document; or 6) when other judgment has been issued in the same case between the same parties (Articles 1205, 1206 of Polish code of civil procedure of 17 November 1964).

The practical viability of this safeguard is further confirmed by the emerging enforcement divergence between EU and non-EU jurisdictions. While the CJEU has effectively dismantled intra-EU investment arbitration within the Union, courts outside the EU have in several significant cases declined to follow the *Achmea* and *Komstroy* approach. In August 2024, the US Court of Appeals for the DC Circuit in *NextEra Energy Global Holdings BV v Kingdom of Spain* ruled that US courts have jurisdiction to enforce intra-EU ECT awards, notwithstanding Spain's reliance on EU law and the *Achmea* line of cases.⁶⁷ In April 2024, the Swiss Federal Tribunal in *EDF v Spain* strongly pushed back against the CJEU's position that consent to intra-EU ECT arbitration was void *ab initio*.⁶⁸ In Singapore, two separate courts reached the same conclusion within weeks of each other: in January 2026, the Singapore International Commercial Court in *DNZ v DOA* dismissed Poland's application to set aside a non-ICSID ECT award,⁶⁹ and in February 2026, the Singapore High Court in *NextEra Energy Global Holdings BV v Kingdom of Spain* dismissed Spain's application to set aside the registration of an ICSID ECT award.⁷⁰ Both ruled that EU law does not override international treaty obligations in non-EU fora. Australian Federal Court has similarly confirmed enforceability of intra-EU ICSID awards.⁷¹ This enforcement divergence reveals the geographic limits of the CJEU's

⁶⁷ *NextEra Energy Global Holdings BV v Kingdom of Spain*, No. 23-7031 (D.C. Cir. Aug. 16, 2024). The DC Circuit held that US courts have jurisdiction under the Foreign Sovereign Immunities Act to enforce intra-EU ECT awards, rejecting Spain's argument that EU law invalidated the arbitration agreement. See: A. Atteritano, G. Zarra, *Intra-EU awards are still valid and enforceable outside the EU*, Hogan Lovells, 13 June 2024, <https://www.lexology.com/library/detail.aspx?g=7a20081e-15ad-4b33-a863-64734b9958d2> [accessed: 14.06.2026].

⁶⁸ Judgment of the Swiss Federal Tribunal 4A 244/2023 of 3 April 2024 (*EDF International S.A. v Kingdom of Spain*). The Swiss Federal Tribunal rejected Spain's argument that the CJEU's *Komstroy* judgment rendered consent to arbitrate under the ECT void *ab initio*, emphasising the autonomy of Swiss arbitration law and the finality of arbitral awards under international law. See: Global Arbitration News, *Switzerland: Landmark Decision by the Swiss Federal Court on the Validity of the Jurisprudence of the European Court of Justice on the Applicability of the Energy Charter Treaty to Intra-EU Investor-State Arbitrations*, 23 July 2024, <https://www.globalarbitrationnews.com/2024/07/23/switzerland-landmark-decision-by-the-swiss-federal-court-on-the-validity-of-the-jurisprudence-of-the-european-court-of-justice-on-the-applicability-of-the-energy-charter-treaty-to-intra-eu-investor-s> [accessed: 14.06.2026].

⁶⁹ *DNZ v DOA* [2026] SGHC(I) 1, Singapore International Commercial Court, 9 January 2026. The SICC upheld an ECT arbitration award against Poland, ruling that EU law does not override Poland's obligations under international law in a Singapore court, https://www.elitigation.sg/gd/s/2026_SGHC_I_1 [accessed: 14.06.2026]. See: P. Weiss, *In Significant Win for International Investors, Investment Treaty Arbitration Award Enforced in Singapore Despite EU Law Objection*, 2026, <https://www.paulweiss.com/insights/client-memos/in-significant-win-for-international-investors-investment-treaty-arbitration-award-enforced-in-singapore-despite-eu-law-objection> [accessed: 14.06.2026].

⁷⁰ *NextEra Energy Global Holdings BV v Kingdom of Spain* [2026] SGHC 43, High Court of Singapore, 24 February 2026, https://www.elitigation.sg/gd/gd/2026_SGHC_43/pdf [accessed: 16.06.2026].

⁷¹ *Basket Renewable Investments LLC v Spain* [2025] FCA 1028, Federal Court of Australia, 29 August 2025. The Federal Court confirmed that intra-EU ICSID awards against Spain are enforceable in Australia, holding that Spain waived its foreign state immunity by ratifying the ICSID Convention and that its EU law obligations cannot override its treaty commitments under international law. See: P. Weiss, *In Significant Win...*

constitutional project: the Court can dismantle arbitration within the EU judicial space, but its jurisprudence does not automatically determine the treatment of such awards by courts in third States. In this sense, the CJEU's approach has produced systemic fragmentation rather than the legal coherence it purports to protect.

The CJEU has adopted a differentiated approach to arbitration depending on whether it is commercial or investment-related. Yet it is clear that international commercial arbitration, like investment arbitration, may produce awards that conflict with EU law and similarly presuppose a lack of confidence in the judicial systems of the Member States. Nevertheless, the CJEU has not questioned the validity of commercial arbitration.

This inconsistency was highlighted by the Advocate General in his opinion in *Achmea*,⁷² in which he noted that any form of arbitration has the potential to undermine the allocation of competences laid down in the TEU and TFEU, thereby endangering the autonomy of the EU legal order (para. 245). It should further be emphasized that the "limited" mechanism of judicial review applies equally to both commercial and investment arbitration. Neither national regulations nor international procedures provide for a meaningful distinction in this regard.

Another point of contention is the CJEU's differentiated treatment of "freedom of choice" (party autonomy) depending on whether the agreement in question is commercial or investment in nature. In its case law, the Court has acknowledged that commercial arbitration is rooted in the parties' autonomy of will. By contrast, investment arbitration derives from an international treaty, through which Member States consent to remove disputes that may involve the application or interpretation of EU law from the jurisdiction of their own courts and, consequently, from the system of judicial remedies they are obliged to maintain under Article 19(1), second subparagraph, TEU.

This distinction was further elaborated by the Advocate General in his opinion in *Komstroy*.⁷³ He emphasized that commercial arbitration reflects the exercise of party autonomy. Its basis lies in an arbitration agreement – either incorporated into the underlying contract at the time of its conclusion or agreed upon after a dispute has arisen. The jurisdiction of a commercial arbitral tribunal therefore always derives from a specific agreement concerning a clearly defined dispute. Such jurisdiction cannot be regarded as part of the state's system of judicial protection; rather, it stems from the individual autonomy of the parties engaged in commercial exchange. It is this autonomy that enables them to determine that their dispute will be resolved through commercial arbitration.

Investment arbitration, by contrast, operates according to a different logic. The dispute settlement mechanism contained in an international treaty constitutes

⁷² Opinion of Advocate General Wathelet delivered on 19 September 2017, C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2017:699, paras. 238–239, point 245.

⁷³ Opinion of Advocate General Szpunar delivered on 3 March 2021, C-741/19, *Republic of Moldova v Komstroy*, a company the successor in law to the company Energoalians, ECLI:EU:C:2021:164.

a general and standing offer of arbitration, the acceptance or rejection of which rests with the investor. By making such an offer, the state pre-emptively renounces the possibility of submitting disputes with investors from other Member States to its national courts. This renunciation is systemic, as it may encompass all disputes falling within the scope of the treaty. In effect, the state creates a system of judicial protection outside the framework it is required to guarantee. However, Member States are not permitted, through international commitments, to remove from the EU judicial system any disputes involving the interpretation or application of EU law.

Similarly, in *PL Holdings*,⁷⁴ the Advocate General stressed that party autonomy – or freedom of choice – in commercial arbitration applies to disputes between parties of equal standing. In such cases, both the arbitration agreement and the underlying legal relationship are founded on the parties' autonomous decision.

Several observations may be made in response to the above views. Contrary to the Advocate General's opinion in *Komstroy*, the jurisdiction of a commercial arbitral tribunal does not always concern a dispute precisely defined in the arbitration agreement. Strictly speaking, the submission of a specifically determined dispute to arbitration occurs only in two situations: first, when the parties, after a dispute has arisen, agree to refer that particular dispute to arbitration (*ex post*); and second, when an arbitration agreement is concluded in anticipation of disputes arising from a single, clearly defined legal relationship, typically a specific contract (*ex ante*). Such scenarios are relatively narrow; for example, a lease agreement for commercial premises that provides for arbitration in the event of disagreement over rental indexation.

Moreover, even in such cases, the scope of contractual cooperation is often shaped by EU legislation, such as directives and regulations in fields including telecommunications, energy, banking, competition, and consumer protection. Arbitral tribunals are therefore frequently required to interpret and apply EU law; yet these proceedings remain outside the judicial system envisaged in the CJEU's case law. The Court's reasoning has likewise not addressed situations in which cooperation between states and investors is based on civil law contracts (commercial agreements rather than investment treaties) that themselves provide for arbitration as the chosen method of dispute resolution.

Furthermore, neither the CJEU nor the Advocates General have clearly explained the precise distinction between party autonomy in commercial (civil) matters and in investment disputes. Autonomy is present both at the moment when states conclude an international agreement and on the part of investors, who may choose whether or not to invoke the arbitral option. It is precisely through the exercise of their sovereign will that states bind themselves to investment treaties: by doing so, they undertake to respect investors' rights and, in the event of violation, to submit disputes to arbitration at the investor's discretion.

⁷⁴ Opinion of Advocate General Kokott delivered on 22 April 2021, C-109/20, *Republiken Polen v PL Holdings Sàrl*, ECLI:EU:C:2021:321, para. 52.

The arbitration clause in commercial contracts functions in a comparable way: the contracting parties agree in advance to submit all disputes arising from the performance of their agreement either to arbitration (or to domestic courts). In commercial arbitration, party autonomy governs disputes between parties of equal standing. In investment treaties, by contrast, rights are granted to investors through the mutual consent of states, acting as equal subjects of international law. Once arbitration is initiated, procedural equality is established between the investor and the state. Against this background, it is difficult to sustain the view that, in investment arbitration, party autonomy underlies only the arbitration clause, but not the substantive legal relationship itself, since the state, by concluding a BIT, expressly accepted that relationship through an exercise of its sovereign will.

It should also be stressed that it is not the state that renounces the possibility of having a dispute with an investor from another Member State resolved by its own courts. The situation is, in fact, the reverse: it is the investor who chooses to forego litigation before state courts. As a rule, BITs grant investors the option of pursuing claims either before domestic courts or through arbitration. A similar situation occurs in commercial arbitration, where, in a systematic manner – most often in codes of civil procedure – the parties to civil (commercial, economic) contracts are given the option of opting out of state courts in favour of arbitration courts. This applies to contracts between entities with domestic private, state, or foreign (international) capital.

A final concern arises from the abandonment of the principle of mutual trust in the context of commercial arbitration. Intra-EU civil and commercial relations no longer rest fully on the presumption that each Member State shares a common set of values with the others and, accordingly, respects and gives effect to EU law. Permitting disputes in commercial matters to be resolved through arbitration indirectly undermines this principle, as it removes the review of compliance with EU law from the Union's judicial framework.

In its case law, the CJEU has emphasized “party autonomy” and the supposedly “specific” logic that differentiates commercial arbitration from investment arbitration. Yet the exclusion of investment arbitration appears to depend less on the substantive nature of the dispute than on its legal basis. This is particularly evident in the Advocate General's opinion in *Komstroy*, which stresses that “it is not permissible for Member States, through an international commitment, systematically to remove from the EU judicial system all disputes concerning the interpretation or application of EU law.”

Such reasoning is not entirely convincing. It can be argued that the Court implicitly accepts that Member States, through private-law (commercial) agreements, may in fact remove disputes involving the interpretation or application of EU law from the Union's judicial system, even though the very effect the CJEU seeks to avoid, namely the interpretation of EU law by a body outside the Union's judicial system, is identical in both scenarios: disputes arising under international treaties and those governed by commercial contracts.

In both types of arbitration, this is systemic – governed by national law in commercial (civil) disputes, and by international law in investment disputes. Additionally, given the growing scale of cooperation between states and foreign investors (and even with national investors) in sectors such as construction, transport, or new technologies, the result may be equally the same: this development risks producing effects functionally analogous to those the CJEU sought to prevent through its case law on investment arbitration.

This tension calls for an evaluation of arbitral mechanisms according to their practical impact on the EU judicial system rather than their formal origin. The proposed *Functional Autonomy Test* provides a coherent, effects-based method for assessing their compatibility with EU law, while addressing the inconsistencies in current CJEU jurisprudence as well as the concerns raised by Advocates General and critical commentary. Its central objective is to ensure coherence by focusing on the functional consequences of arbitration for the autonomy of EU law, regardless of their formal origin – whether the mechanism derives from a commercial contract or an international treaty. The Test is structured around four interrelated criteria.

Criterion 1: Systematicity of Removal. Investment arbitration generally operates on a systemic level,⁷⁵ removing entire categories of disputes from the jurisdiction of national courts through standing, treaty-based offers of arbitration. By contrast, commercial arbitration is usually *ad hoc* and confined to specific contractual relationships. However, commercial arbitration may also take on systemic characteristics, particularly in sectors such as construction, energy, or infrastructure, where arbitration is used repeatedly across a wide range of disputes. Some cases can have a direct impact on public schemes and programmes adopted in the public interest by legislatures.⁷⁶ The Test must therefore examine not merely the formal source of arbitration (treaty versus contract) but also its practical scale, frequency, and systemic impact.

Criterion 2: Relevance and Depth of EU Law Issues. The greater the involvement of EU law in the dispute – such as matters relating to competition, state aid, free movement, or consumer protection – the greater the risk posed to the autonomy of the EU legal order.⁷⁷ Both commercial and investment arbitration frequently require arbitral tribunals to interpret and apply provisions of Union law. The CJEU's formal distinction between these categories is therefore unconvincing. For the purposes of the Test, the relevance of EU law must be treated as origin-neutral: any arbitral mechanism that engages substantively with EU law raises autonomy concerns.

⁷⁵ This systemic diversion is precisely what concerned the Court in *Achmea* and *Komstroy*.

⁷⁶ F. Gelinas, "Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalization" [in:] *Sustainable Development in World Trade Law*, eds. M. Gehring, M.-C. Cordonier Segger, The Hague 2005, p. 586, <https://ssrn.com/abstract=1336099> [accessed: 25.08.2025].

⁷⁷ In *Micula*, for example, the arbitral tribunal effectively ruled on the applicability of EU state aid law, an area falling squarely within the exclusive jurisdiction of the Commission and the Court. By contrast, in CETA, the tribunals are expressly limited to applying the agreement itself, with domestic law treated only as a matter of fact, which significantly reduces the autonomy risk.

Criterion 3: Judicial Review and EU-Law Safeguards.⁷⁸ Arbitral awards must remain subject to judicial review capable of ensuring effective protection of EU law, including the possibility of preliminary references under Article 267 TFEU.⁷⁹ Yet the scope of such review is limited in most Member States, both in commercial and in investment arbitration. The Test should therefore avoid the presumption that commercial arbitration is “safe” merely because some review exists, or that investment arbitration is “unsafe” simply because review is restricted. Instead, the inquiry must focus on whether effective merits-focussed review of EU-law questions is realistically available in practice, irrespective of the arbitration’s legal origin.

Criterion 4: Balance between Autonomy and Public Order. Party autonomy can justify the use of arbitration, but this justification must yield where the functional effect of arbitration is to undermine the uniform application and supremacy of EU law. The CJEU has drawn a sharp dichotomy between party autonomy in commercial arbitration and state consent in investment arbitration. This distinction, however, is overstated. States exercise autonomy when they conclude bilateral investment treaties, just as investors exercise autonomy in opting for arbitration rather than domestic litigation. The decisive issue is therefore not *who* exercised autonomy, but whether the exercise of autonomy is compatible with the structural requirements of the EU legal order.

Taken together, the four criteria establish a flexible but rigorous framework for assessing the compatibility of arbitral mechanisms with the autonomy of EU law. Their application reveals important distinctions. Intra-EU investment arbitration under bilateral treaties generally fails the Test: it involves systemic removal of disputes from national courts, frequent and substantive engagement with EU law, and inadequate opportunities for judicial review. By contrast, single *ad hoc* instances of commercial arbitration may pass, provided they remain confined to isolated contractual relationships, touch only peripherally on EU law, and are subject to effective review by domestic courts with the possibility of preliminary references to the CJEU. However, an intermediate category – systemic commercial arbitration (for example, through sector-wide arbitration clauses in state contracts) – poses greater risks. Where such mechanisms replicate the structural features of treaty-based investor – State arbitration by removing broad categories of disputes from national courts, they must be assessed according to the stricter standard applicable to investment arbitration.⁸⁰

⁷⁸ The Court has repeatedly emphasized that arbitral awards are subject only to limited review by Member State courts, typically confined to jurisdictional issues and public policy. Such limited review is insufficient where EU law rights are substantively engaged.

⁷⁹ This criterion offers a more nuanced approach than the current jurisprudence: instead of outright prohibition, arbitration could be tolerated if designed with robust review mechanisms that ensure EU law questions ultimately reach the Court.

⁸⁰ In *Achmea* and *Komstroy*, intra-EU arbitration is incompatible because it creates a standing system for displacing national courts, involves frequent EU-law questions, and provides inadequate review not simply because it is treaty-based. In *PL Holdings*, an *ad hoc* agreement replicating an invalid BIT clause remains incompatible if it reproduces the systemic displacement and weak review.

Unless they are coupled with robust judicial safeguards ensuring effective control of EU law questions, their compatibility with the EU legal order cannot be sustained.⁸¹

The *Functional Autonomy Test* thus shifts the analysis from formalistic distinctions to an effects-based inquiry, aligning arbitral practice with the structural requirements of Union law while preserving space for legitimate arbitration in commercial relations.⁸²

The relevance of the *Functional Autonomy Test* is further underscored by subsequent institutional and judicial developments. In July 2025, the German Federal Constitutional Court (*Bundesverfassungsgericht*) dismissed two constitutional complaints concerning, respectively, intra-EU and extra-EU investment arbitration. In the first case (Case No. 2 BvR 1277/23), EU investors had initiated ICSID arbitration proceedings against Germany under the ECT. In the second case (Case No. 2 BvR 85/24), the constitutional complaint was brought by the Republic of India in connection with investment arbitration under the Germany–India bilateral investment treaty. The investors in the first case argued that the declaration that their pending ICSID arbitration proceedings were inadmissible – based on the CJEU’s *Achmea* and *Komstroy* case law – violated their fundamental rights under the German Basic Law, including their constitutional right of access to justice and their right to the lawful judge. The *Bundesverfassungsgericht* held that the *Bundesgerichtshof*’s reliance on the CJEU’s jurisprudence was “not untenable.”⁸³ It thereby provided important constitutional confirmation that reliance on the CJEU’s *Achmea* and *Komstroy* jurisprudence in assessing the admissibility of intra-EU investment arbitration was not constitutionally untenable, and demonstrated that the CJEU’s judicial authority is being reinforced not only at the Union level but also within Member States’ constitutional orders.

At the same time, the CJEU’s expanding scrutiny of arbitration beyond the investment context illustrates the broader relevance of examining the effects of arbitral mechanisms on the autonomy and effective application of EU law, rather than relying solely on their formal classification. In *Seraing* (C-600/23, 1 August 2025), the

⁸¹ In *Micula*, incompatibility arises from the centrality of EU state aid law and the lack of review, rather than from the mere fact of arbitration. In Opinion 1/17 on CETA, compatibility is confirmed because disputes are limited to CETA provisions, EU law interpretation is excluded, and public law review mechanisms remain intact.

⁸² By shifting from source-based formalism to an effects-based analysis, the *Functional Autonomy Test* provides several advantages. It resolves the inconsistency in the Court’s treatment of commercial and investment arbitration, explains why certain treaty mechanisms (like CETA) are acceptable while others (like intra-EU BITs) are not, and offers legislators a framework for designing arbitration mechanisms that respect EU autonomy. Moreover, it introduces operational indicators of “systematicity” such as standing offers, repeat-player usage, and predictable EU-law engagement, allowing courts and policymakers to distinguish high-risk mechanisms from those that are functionally benign.

⁸³ Decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 31 July 2025, Cases Nos. 2 BvR 1277/23 and 2 BvR 85/24. In Case No. 2 BvR 1277/23, concerning intra-EU investment arbitration under the Energy Charter Treaty, the Court held that the *Bundesgerichtshof*’s reliance on the CJEU’s *Achmea* and *Komstroy* jurisprudence was not “untenable.” See: *Bundesverfassungsgericht*, Order of 31 July 2025, 2 BvR 1277/23, paras. 1 *et seq.*; *Bundesverfassungsgericht*, Press Release No. 83/2025, 31 July 2025, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2025/bvg25-083.html> [accessed: 8.08.2026].

Court held that judicial review arbitral awards rendered in the context of mandatory sports arbitration must be sufficiently effective to ensure compliance with EU public policy and EU law. This means that national courts must be capable of reviewing such awards for compliance with EU public-policy requirements and, where necessary, of ensuring access to the preliminary ruling procedure under Article 267 TFEU, rather than relying solely on domestic public policy concepts.⁸⁴ Although *Seraing* does not establish a general rule applicable to commercial arbitration as such, it reinforces the principle that the compatibility of an arbitral mechanism with EU law depends, in relevant circumstances, on the availability of effective judicial review. This echoes, in a different procedural context, the concern underlying *Achmea* with safeguarding the autonomy and uniform application of EU law.

Similarly, in *International Skating Union v Commission* (C-124/21 P, 21 December 2023),⁸⁵ the Court held that, in the specific context of mandatory arbitration imposed by a sports governing body found to have infringed EU competition law, the exclusive submission of disputes to Court of Arbitration for Sport (CAS) – with judicial review confined to the Swiss Federal Tribunal, a non-EU court unable to make preliminary references under Article 267 TFEU – reinforced the restriction of competition by precluding effective judicial review of compliance with Articles 101 and 102 TFEU. Although the ruling was confined to the particular circumstances of the ISU case, its underlying logic – that where an arbitral mechanism is mandatory and exclusive, its compatibility with EU law may depend on the availability of effective judicial review capable of safeguarding the uniform application and effectiveness of EU law – carries broader implications for the relationship between arbitration and EU law. These developments therefore support the need for a coherent, effects-based framework such as the *Functional Autonomy Test*, capable of assessing arbitral mechanisms irrespective of their formal classification and by reference to their effects on the autonomy, effectiveness, and uniform application of EU law.

8. Final remarks

The CJEU's case law on intra-EU investment arbitration, when read together with its Opinions on other international judicial mechanisms, reflects a deliberate effort to delineate the constitutional boundaries of the Union's legal order. The judgments in *Achmea*, *Komstroy*, *PL Holdings*, and *Micula* are not isolated interventions but rather form part of a coherent line of reasoning first articulated in Opinion 1/09 on the Unified

⁸⁴ On the emerging "effective review" doctrine, see Judgment of the Court (Grand Chamber), 1 August 2025, C-600/23, *Seraing*. On the extension of the CJEU's scrutiny to sports arbitration, see Judgment of the Court, 21 December 2023, C-333/21, *European Superleague Company v FIFA (ISU v Commission)*.

⁸⁵ Judgment of the Court (Grand Chamber), 21 December 2023, C-124/21 P, *International Skating Union v European Commission*, ECLI:EU:C:2023:1012, <https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex:62021cj0124> [accessed: 16.06.2026].

Patent Court. In that Opinion, the Court held that Member States may not transfer disputes implicating EU law to adjudicatory bodies situated outside the Union's judicial framework, even where such mechanisms are intended to promote legal efficiency. This principle provides the foundation for the exclusion of intra-EU investment arbitration: once arbitration is understood as "systematically" removing disputes from the CJEU's supervisory jurisdiction, it becomes constitutionally incompatible with the EU legal order.

At the same time, the Court's Opinions in 2/15 and 1/17 introduce important nuances to this position. In Opinion 2/15 on the EU–Singapore Free Trade Agreement, the Court recognised that investor–State dispute settlement falls within shared rather than exclusive EU competence, thereby requiring Member State participation. This acknowledgment illustrates that the Court does not reject arbitration *per se*, but only those arbitral structures that bypass or diminish its role in safeguarding the uniform application of Union law. Opinion 1/17 on CETA went even further, endorsing a hybrid tribunal system explicitly precluded from interpreting either domestic law or EU law beyond the provisions of the agreement itself. By validating this model, the Court signalled that arbitration is acceptable where its jurisdiction is contractually circumscribed and institutionally coordinated at the EU level.

Placed within this broader jurisprudential context, the strict prohibition of intra-EU investment arbitration acquires a more precise constitutional meaning. It does not reflect a categorical rejection of arbitration as a mode of dispute settlement, but rather a strategy to preserve the centrality of the EU judicial system. The decisive dividing line is not between arbitration and adjudication, nor between efficiency and legality, but between mechanisms that are institutionally embedded within the EU's constitutional framework and those created independently by the Member States. Intra-EU BITs are thus invalidated not only because they risk inconsistent interpretation of Union law, but also because they perpetuate a fragmented model of sovereignty that is incompatible with the post-Lisbon allocation of exclusive EU competence over foreign direct investment.

This constitutionalisation of judicial authority, however, is not without cost. The Court's reasoning often glosses over internal inconsistencies that weaken its persuasiveness. Both commercial and investment arbitration may entail the interpretation and application of EU law, yet only the latter is treated as a systemic threat to the Union's legal order. Likewise, the Court's endorsement of the CETA Investment Court System demonstrates that external adjudication is permissible when negotiated at the Union level – a distinction that appears more political than strictly legal. The paradox for investors is evident: their rights receive stronger procedural protection when the EU concludes agreements with third countries than when they operate within the supposedly integrated internal market.

Furthermore, the Court's insistence on judicial exclusivity risks undermining the principle of party autonomy, a cornerstone of international arbitration. In the investment context, a state's consent to arbitrate – expressed through an international treaty – remains an act of sovereign will no less valid than a private party's decision

to arbitrate contractual disputes. By treating such sovereign consent as incompatible with the autonomy of EU law, the CJEU effectively redefines sovereignty within the Union. Member States are no longer free to provide investors with neutral arbitral fora, even where such mechanisms form an integral part of their economic policy.

In conclusion, the CJEU's case law and Opinions collectively reflect a constitutional reordering in which the autonomy of EU law is elevated above the functional advantages of arbitration. Through this jurisprudence, intra-EU investment arbitration has been dismantled and the Court's monopoly over the interpretation of Union law firmly entrenched. Yet persistent inconsistencies – the Court's tolerance of commercial arbitration, its endorsement of CETA-style tribunals, and its neglect of investors' demand for neutral and reliable remedies – indicate that the debate remains unresolved. Moreover, the growing divergence between EU and non-EU courts on the enforcement of intra-EU awards demonstrates that the CJEU's constitutional project, while effective within the Union's judicial space, has not achieved universal recognition and has instead produced a fragmented enforcement landscape.

Additionally, the growing divergence between EU and non-EU courts on the enforcement of intra-EU awards demonstrates that the CJEU's constitutional project, while effective within the Union's judicial space, has not achieved universal recognition and has instead produced a fragmented enforcement landscape. The *Functional Autonomy Test* proposed in this article offers a coherent framework for navigating these evolving boundaries: by assessing arbitral mechanisms according to their functional consequences for the EU legal order rather than their formal origin, it provides legislators, courts, and practitioners with operational criteria for distinguishing compatible from incompatible mechanisms. Furthermore, the CJEU's own expanding scrutiny of commercial arbitration – evidenced by its emerging "effective review" doctrine – suggests that the boundary between tolerated and prohibited arbitration will continue to shift, potentially destabilising settled expectations in commercial relations as well.

The central challenge lies in reconciling the constitutional imperative of safeguarding EU judicial autonomy with the economic reality that both intra-EU and extra-EU investors require predictable and impartial mechanisms for dispute resolution. Unless this tension is meaningfully addressed, the Union risks weakening the very investment climate that its legal order is intended to protect.

Literature

Atteritano A., Zarra G., *Intra-EU awards are still valid and enforceable outside the EU*, Hogan Lovells, 13 June 2024, <https://www.lexology.com/library/detail.aspx?g=7a20081e-15ad-4b33-a863-64734b9958d2> [accessed: 14.06.2026].

Baker M., Dowling C., "Developments and reform of investor-state dispute settlement Q&A with Meg Kinnear" [in:] *International Arbitration Report*, Issue 8, June 2017.

- Bieliszczuk B., Zaręba S., *The Significance of the Energy Charter Treaty and Perspective for Reform*, PISM, No. 113(1809), 2021, www.pism.pl/publications/The_Significance_of_the_Energy_Charter_Treaty_and_Perspective_for_Reform [accessed: 25.08.2025].
- Dąbrowski Ł.D., "Arbitration Procedure in Bilateral Investment Treaties – Interactions between National, European and International Courts" [in:] *Case-Law and the Development of International Law. Contributions by International Courts and Tribunals*, eds. P. Galvão Teles, M. Almeida Ribeiro, Leiden–Boston 2021, pp. 246–260.
- Dąbrowski Ł.D., "Polish Bilateral Investments Treaties after the Lisbon Treaty" [in:] *Poland in the European Union. Report 2022*, ed. A.A. Ambroziak, Warsaw 2022, pp. 161–178.
- Dąbrowski Ł.D., "Pozycja przedsiębiorstw międzynarodowych w świetle dwustronnych umów inwestycyjnych" [in:] *Podmiotowość prawnomiędzynarodowa i jej współczesne aspekty*, eds. E. Cała-Wacinkiewicz, J. Menkes, J. Nowakowska-Małusecka, W.S. Staszewski, Warszawa 2020, pp. 309–322.
- Drahozal Ch.R., "Diversity and Uniformity in International Arbitration," *Emory International Law Review* 2017, vol. 31, no. 3, pp. 393–414.
- Eberhardt P., Olivet C., "Profiting from Injustice: Tracing the Rise of Investment Arbitration Industry" [in:] *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, eds. K. Singh, B. Ilge, Amsterdam 2016, pp. 243–252, <https://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf> [accessed: 25.08.2025].
- Freshfields Bruckhaus Deringer, *Three jurisdictions, one message: Intra-EU arbitral awards remain enforceable beyond the EU*, 2026, <https://www.freshfields.com/en/our-thinking/blogs/risk-and-compliance/three-jurisdictions-one-message-intra-eu-arbitral-awards-remain-enforceable-bey-102mohp> [accessed: 14.06.2026].
- Gazzini T., "Bilateral investment treaties" [in:] *International Investment Law: The Sources of Rights and Obligations*, eds. T. Gazzini, E. De Brabandere, The Hague 2012.
- Gelinas F., "Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalization" [in:] *Sustainable Development in World Trade Law*, eds. M. Gehring, M.-C. Cordonier Segger, The Hague 2005, pp. 577–591, <https://ssrn.com/abstract=1336099> [accessed: 25.08.2025].
- Harten G., "A Critique of Investment Treaties" [in:] *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, eds. K. Singh, B. Ilge, Amsterdam 2016, pp. 41–50, <https://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf> [accessed: 25.08.2025].
- Ilge B., "An Account of the EU's Engagement with Bilateral Investment Treaties" [in:] *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, eds. K. Singh, B. Ilge, Amsterdam 2016, pp. 155–170, <https://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf> [accessed: 25.08.2025].
- Juillard P., *Bilateral Investment Treaties in the Context of Investment Law*, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe, 28–29 May 2001, Dubrovnik, Croatia 2001.
- Kingsbury B., Schill S., *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ Working Paper 2009/6 (Global Administrative Law Series).
- OECD, "The impact of investment treaties on companies, shareholders and creditors" [in:] *OECD Business and Finance Outlook*, Paris 2016, pp. 223–253.

- Perkowski M., Gruszevska E., "Interpretation of Bilateral Treaties for the Promotion and Protection of foreign investments," *Studies in Logic, Grammar and Rhetoric* 2013, vol. 32(45), no. 1, pp. 89–109.
- Pohl J., Mashigo K., Nohen A., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment, no. 2012/02.
- Rogers J., Goodall S., Dowling C., "Brexit and investor-state dispute settlement. What impact will Brexit have on foreign direct investment?" [in:] *International Arbitration Report*, Issue 8, June 2017.
- Schwebel S.M., "In defense of bilateral investment treaties," *Arbitration International* 2015, vol. 31, no. 2, pp. 181–192.
- Trakman E.L., "Choosing Domestic Courts Over Investor–State Arbitration: Australia's Repudiation of the Status Quo," *UNSW Law Journal* 2012, vol. 35, no. 3, pp. 979–1012.
- Vandevelde K.J., "A Brief History of International Investment Agreements," *U.C. Davis Journal of International Law & Policy* 2005, vol. 12, no. 1, pp. 157–194.
- Vandevelde K.J., "A Unified Theory of Fair and Equitable Treatment," *New York University Journal of International Law and Politics (JILP)* 2010, vol. 43, no. 1, pp. 43–106.
- Vandevelde K.J., *Bilateral Investment Treaties: History, Policy and Interpretation*, Thomas Jefferson School of Law Research Paper No. 3022249, 2010, <https://ssrn.com/abstract=3022249> [accessed: 14.10.2021].
- Vandevelde K.J., *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, Thomas Jefferson School of Law Research Paper No. 2993300, 2017, <http://ssrn.com/abstract=2993300> [accessed: 14.10.2021].
- Weiss P., *In Significant Win for International Investors, Investment Treaty Arbitration Award Enforced in Singapore Despite EU Law Objection*, 2026, <https://www.paulweiss.com/insights/client-memos/in-significant-win-for-international-investors-investment-treaty-arbitration-award-enforced-in-singapore-despite-eu-law-objection> [accessed: 14.06.2026].
- Williams Z.Ph., "What, When, Where and Why? Patterns in Investor-State Arbitration" [in:] *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, eds. K. Singh, B. Ilge, Amsterdam 2016, pp. 29–40, <https://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf> [accessed: 25.08.2025].

Summary

Łukasz Dawid Dąbrowski

Intra-EU Investment Arbitration in the Case Law of the Court of Justice of the European Union

This article examines the legal framework governing investment arbitration in the EU as developed in the jurisprudence of the Court of Justice of the European Union (CJEU). It analyzes the judgments in the *Achmea*, *Komstroy*, *PL Holdings*, and *Micula* cases, contextualised through the CJEU's Opinions 1/09, 2/15, and 1/17, as well as subsequent institutional and judicial developments – including the 2024 *inter se* declaration on the Energy Charter Treaty and the growing enforcement divergence in non-EU jurisdictions.

This article presents and critically assesses selected arguments developed in the Court's reasoning, which has directly led to the elimination of intra-EU investment arbitration from the EU legal order. From this analysis, two central theses emerge. First, the CJEU's exclusion of intra-EU investment arbitration forms part of a constitutional project aimed at centralising all disputes involving EU law within its judicial monopoly – a project whose geographic limits are exposed by the refusal of courts in the United States, Switzerland, Singapore, and Australia to follow the *Achmea* doctrine. Second, the Court's tolerance of commercial arbitration, contrasted with its categorical rejection of investment arbitration, exposes an unstable conceptual distinction that the CJEU's own expanding scrutiny of commercial arbitration is progressively eroding. To address these tensions, this article proposes a *Functional Autonomy Test* as an original, effects-based framework for evaluating the compatibility of arbitral mechanisms with EU law, structured around four criteria: systematicity of removal, relevance of EU law issues, adequacy of judicial review, and the balance between party autonomy and public order.

Keywords: bilateral investment treaties, Lisbon Treaty, extra-EU investment agreements, intra-EU investment agreements, investment arbitration, Court of Justice of the European Union, Energy Charter Treaty.

Streszczenie

Łukasz Dawid Dąbrowski

Wewnątrzunijny arbitraż inwestycyjny w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej

Niniejsze opracowanie analizuje ramy prawne regulujące arbitraż inwestycyjny w Unii Europejskiej, ukształtowane w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej (TSUE). Przedmiotem analizy są wyroki w sprawach *Achmea*, *Komstroy*, *PL Holdings* oraz *Micula*, rozpatrywane w kontekście opinii TSUE 1/09, 2/15 i 1/17, a także późniejszych zmian o charakterze instytucjonalnym i orzeczniczym, w tym deklaracji *inter se* z 2024 r. dotyczącej Traktatu Karty Energetycznej oraz narastających rozbieżności w zakresie uznawania i wykonywania orzeczeń arbitrażowych w państwach spoza Unii Europejskiej.

Celem artykułu jest przedstawienie oraz krytyczna ocena wybranych argumentów rozwinętych w rozumowaniu Trybunału, które bezpośrednio doprowadziło do wyeliminowania arbitrażu inwestycyjnego wewnątrz Unii Europejskiej z unijnego porządku prawnego. Przeprowadzona analiza pozwala na sformułowanie dwóch zasadniczych tez. Po pierwsze, wyłączenie przez TSUE arbitrażu inwestycyjnego *intra-EU* stanowi element szerszego projektu konstytucyjnego, zmierzającego do skoncentrowania wszelkich sporów obejmujących stosowanie prawa Unii w ramach monopolu jurysdykcyjnego Trybunału. Geograficzne granice tego projektu uwiadaczniają się jednak w odmowie sądów Stanów Zjednoczonych, Szwajcarii, Singapuru i Australii przyjęcia doktryny wyrażonej w wyroku *Achmea*. Po drugie, akceptacja arbitrażu handlowego przez TSUE, przy jednoczesnym kategorycznym odrzuceniu arbitrażu inwestycyjnego, ujawnia niestabilne rozróżnienie koncepcyjne, które ulega stopniowej erozji w związku z coraz szerszym zakresem kontroli sprawowanej przez Trybunał nad arbitrażem handlowym.

W celu przewyciężenia wskazanych napięć w opracowaniu zaproponowano Test Funkcjonalnej Autonomii (*Functional Autonomy Test*) jako oryginalne, oparte na analizie skutków podejście do oceny zgodności mechanizmów arbitrażowych z prawem Unii Europejskiej. Test ten opiera się na czterech kryteriach: systemowym charakterze wyłączenia sporów spod jurysdykcji sądów państw członkowskich, znaczeniu zagadnień prawa Unii dla rozstrzygnięcia sporu, adekwatności kontroli sądowej oraz zachowaniu równowagi między autonomią stron a ochroną porządku publicznego.

Słowa kluczowe: dwustronne umowy inwestycyjne, traktat lizboński, pozaunijne umowy inwestycyjne, wewnątrzunijne umowy inwestycyjne, arbitraż inwestycyjny, Trybunał Sprawiedliwości Unii Europejskiej, Traktat Karty Energetycznej.