

# European Investor-State Dispute Settlement in the Post-Achmea Era

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**Abstract:** *The Court of Justice of the European Union (“Court”) issued a landmark decision dated 6 March 2018 in a matter between the Slovak Republic and a Dutch company Achmea B.V. (Case C-284/16), in which it ruled that arbitration agreements concluded in bilateral investment treaties between two EU member states are incompatible with the EU law. In doing so, the Court set afoot a chain of intra-EU Bilateral Investment Treaty (BIT) denunciations, leaving investors from EU countries without the possibility to settle their disputes with EU host states through a well-established dispute settlement mechanism. The present paper explores potential ways of dispute settlement between investors and states from the EU following the Achmea decision.*

**Keywords:** *Achmea decision, intra-EU BITs, investment law, investor-state dispute settlement, ISDS reform.*

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**JEL Classification:** K33, K41

**DOI:** <https://doi.org/10.62768/ADJURIS/2025/5/01>

**Please cite this article as:**

Benáková, Tamara, „European Investor-State Dispute Settlement in the Post-Achmea Era”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 10-20, <https://doi.org/10.62768/ADJURIS/2025/5/01>

## 1. INTRODUCTION

The investor-state dispute settlement (ISDS) mechanism is undergoing a major reform worldwide.<sup>1</sup> One of the key catalysts for change was the decision of the Court of Justice of the European Union (“CJEU”) in case *Slovak Republic*

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<sup>1</sup> BALTAG, Crina. Reforming the ISDS System: In search of a balanced approach? *Contemporary Asian Arbitration Journal* [online]. 2019, 12(2), 279–312 [viewed 24 September 2025]. Available from: <https://ssrn.com/abstract=3498239>; POPA TACHE, Cristina Elena, and Cătălin-Silviu SĂRARU. Lawfare, Between its (Un)Limits and Transdisciplinarity. *Precedente Revista Juridica*, 2023, 23, 37-66. Doi: 10.18046/prec.v23.5889. hal-04460761f.

*v. Achmea B.V.*, which ultimately led to the termination of bilateral investment treaties (“BITs”) concluded between EU Member States. The present paper explores the remedies available to EU investors seeking to invest in another EU Member State.

## 2. THE *ACHMEA* OBJECTION TO INTRA-EU BITS

### 2.1. CJEU’s decision in the matter *Slovak Republic v. Achmea B.V.*

CJEU’s ruling in the matter between the Slovak Republic and the Dutch company Achmea B.V. (“Achmea Judgment”) sparked an extensive debate among scholars and practitioners in the field of international investment law.<sup>2</sup> To understand its implications for the protection of investors’ rights in the European Union, it is essential to understand the background and the reasoning behind the CJEU’s judgment.

The original dispute between the Slovak Republic and the Dutch Company Achmea B.V. (“Achmea”) concerned Achmea’s rights to freely dispose with its assets in the territory of the Slovak Republic. Achmea initiated arbitration proceeding against the Slovak Republic pursuant to Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of Netherlands and the Czech and Slovak Republic (“BIT”). Article 8 of the BIT stipulated that both contracting States consented to resolution of disputes with investors through arbitration under UNCITRAL Arbitration Rules. In accordance with Article 8(6) of the BIT, the tribunal was instructed to decide the matter in accordance with the law of the respective contracting party to the BIT.<sup>3</sup>

At the outset of the arbitration, Slovakia raised jurisdictional objections based on the membership of the Slovak Republic in the European Union.<sup>4</sup> When deciding on these jurisdictional objections, the arbitral tribunal emphasized its conclusions on the jurisdiction are limited only to that particular case.<sup>5</sup> In other words, the arbitral tribunal indicated that it in no way wishes to establish a precedent for resolution of the intra-EU jurisdictional objection. The arbitral tribunal dismissed Slovakia’s jurisdictional objections and awarded the investor damages of EUR 22.1 million plus interest and costs of the arbitration.<sup>6</sup>

The Slovak Republic decided to challenge the award and filed for a set-

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<sup>2</sup> BIONDI, Andrea, and Giorgia SNAGIUOLO. *The EU and the Rule of Law in International Economic Relations. An Agenda for an Enhanced Dialogue*. Edward Elgar Publishing Limited, 2021, p. 14.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award dated 7 December 2012, para. 352 [online]. Available from: <https://italaw.com/sites/default/files/case-documents/italaw3206.pdf> [accessed on 2025.09/06].

aside proceeding before the Higher Regional Court in Frankfurt am Main, Germany.<sup>7</sup> The Higher Regional Court dismissed Slovakia's application and Slovakia appealed while arguing that the Article 8 of the BIT (cited above) is incompatible with Articles 18, 267 and 344 of the Treaty on Functioning of the European Union ("TFEU").<sup>8</sup> It was the German Supreme Court that raised the preliminary question with the CJEU, stating that it in fact does not consider Article 8 of the BIT incompatible with the provisions of the TFEU.<sup>9</sup>

The CJEU's judgment on the preliminary questions is based on the following considerations:

- The CJEU previously ruled that no international agreement can affect the allocation of powers among the Member States fixed by the EU treaties;<sup>10</sup>
- The EU law has primacy over national laws of the Members States and it is autonomous with respect to the international law;<sup>11</sup>
- In order to ensure the primacy of the EU law and its uniform application, Article 267 of the TFEU provides for the preliminary ruling procedure in which the CJEU provides authoritative rulings on the application of the EU law.<sup>12</sup>

In the eyes of the CJEU, the arbitral tribunal established in accordance with the Article 8 of the BIT is called on to interpret the German law, part of which is the EU law. As such, the arbitral tribunal would interpret the provisions concerning EU's fundamental freedoms, while not being able to recourse to the CJEU for the preliminary ruling procedure.<sup>13</sup> The CJEU also noted that a provision allowing two Member States to submit disputes to an adjudicative body that is not part of the judicial system of the EU calls into question the principle of mutual trust between the Members States and the preservation of the particular nature of the law established by the Treaties.<sup>14</sup>

Notably, in determining whether Article 8 of the BIT is incompatible with the EU law, the CJEU did not consider customary international law and the law of treaties to resolve the conflict between two international treaties.

## **2.2. The "Achmea objection" in the ISDS case law and the denunciation of the intra-EU BITs**

The *Achmea* Judgment set afoot a chain reaction of respondent states

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<sup>7</sup> Judgment of the Court of Justice of 6 March 2018. *The Slovak Republic v. Achmea B.V.*, Case C-284/16, para. 12. ECLI:EU:C:2018:158.

<sup>8</sup> *Ibid.*, para. 14.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, para. 32.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, para. 37.

<sup>13</sup> *Ibid.*, para. 42, and 52.

<sup>14</sup> *Ibid.*, para. 58.

raising the “*Achmea* objection” in their respective investment arbitrations.<sup>15</sup>

That being said, arbitral tribunals were not ready to accept the *Achmea* Judgment and oftentimes rejected intra-EU jurisdictional objections, albeit for various reasons. For example, the arbitral tribunal in *A.M.F. Aircraftleasing v. Czech Republic* held that it is not called on to decide the dispute by applying the EU law, thus referring to the *Achmea* Judgment’s notion that EU law is applicable whenever the national law of a member state applies. The BIT in that particular case did not include a provision which would specify what law is applicable to the dispute as such and the tribunal ruled that in that case, the provisions of the BIT as well as customary international law is applicable, excluding any possibility to interpret and apply the EU law.<sup>16</sup>

The tribunal in *CEF Energia v. Italian Republic*, a case based on the Energy Charter Treaty, went a little further with its analysis of the *Achmea* Judgment and concluded that the judgment was issued in a specific circumstances of the case, the CJEU did not opine on the compatibility of the ISDS system as such, and the tribunal was not called on to decide on matters of EU law (unlike the tribunal in the *Achmea* case).<sup>17</sup>

It was not long after the *Achmea* Judgment was issued that the EU Member States signed a plurilateral agreement on termination of the intra-EU BITs (“Termination Agreement”).<sup>18</sup> EU Member States agreed to terminate the BITs as well as strip all sunset clauses of their effects. The basic principles of the Termination Agreement were as follows: (i) no new arbitration proceedings were to commence,<sup>19</sup> (ii) concluded arbitration proceedings were to remain intact,<sup>20</sup> and (iii) pending arbitration proceedings could be settled in a special structured dialogue or before national courts under specific circumstances.<sup>21</sup>

After the Termination Agreement entered into force, no other instrument of international law replaced the terminated intra-EU BITs.

### 3. PROTECTION OF INVESTORS’ RIGHTS AFTER THE DENUNCIATION OF THE INTRA-EU BITS

Whether the CJEU’s stance on the compatibility of the intra-EU was

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<sup>15</sup> E.G. *CEF Energia B.V. v. Italian Republic*, SCC Case No. 2015/158; *Mercuria Energy Group Limited v. Republic of Poland* (III), SCC Case No. V 2019/126; *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. the Czech Republic*, PCA Case No. 2016-12; *A.M.F. Aircraftleasing Meier & Fisher GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15.

<sup>16</sup> *A.M.F. Aircraftleasing Meier & Fisher GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, para. 372-374.

<sup>17</sup> *CEF Energia B.V. v. Italian Republic*, SCC Case No. 2015/158, para 96.

<sup>18</sup> Agreement for the termination of the Bilateral Investment Treaties concluded between the Member States of the European Union dated 29 May 2020.

<sup>19</sup> *Ibid*, Article 5.

<sup>20</sup> *Ibid*, Article 6.

<sup>21</sup> *Ibid*, Articles 9-10.

justified or well-argued is at this point irrelevant. Foreign investors within the EU have to face the new reality of the EU without the rules for State's conduct toward foreign investors from other Member States. While most legal scholarship focused on the CJEU's reasoning in the *Achmea* Judgment and what it means for the BITs in force, the crucial question for European business remains: what recourse do I have against the host state that is interfering with my investment?

The answer can be three-fold. The investor could utilize the "last resort remedy" of customary international law, i.e. the diplomatic protection. Another remedy is national judiciary under national laws. Lastly, certain investors could rely on a specific procedure of structured dialogue under the Termination Agreement.

### 3.1. Diplomatic protection under customary international law

The current investor-state dispute settlement has evolved from hundreds of years of states attempting to protect citizens on foreign territory.<sup>22</sup> The cornerstone of the protection of aliens is the so-called diplomatic protection.<sup>23</sup> This is a concept of dispute settlement established through the customary international law that allowed states of investors to elevate the claims of individuals to the level of public international law and pursue their claims against host states on a state-to-state basis.<sup>24</sup>

Historically, aliens—in other words outsiders—received different treatment in different jurisdictions.<sup>25</sup> Certain countries even refused to acknowledge legal capacity of aliens and denied them access to justice.<sup>26</sup> Accordingly, the concept of diplomatic protection evolved at times when only states were subject to international law and aliens had severely limited options to protect their rights abroad.<sup>27</sup>

A landmark decision in the area of diplomatic protection of foreign investors is the case *Mavrommatis Palestine Concessions* before the Permanent

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<sup>22</sup> NEWCOMBE Andrew and Lluís PARADELL. Law and Practice of Investment Treaties: Standards of Treatment. Kluwer Law International, 2009, p. 3.

<sup>23</sup> ZHOU Jingtong. Evolving Paradigms of Investor Safeguards: An Analytical Review of Diplomatic Protection in the Era of Contemporary International Investment Agreements. *Information Systems and Economics* [online]. 2024, 5(4) [viewed 23 September 2025]. Available from: doi:10.23977/infse.2024.050421.

<sup>24</sup> TEJERA PEREZ, V. J. Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards. *Journal of International Dispute Settlement* [online]. 2012, 3(2), 445–475 [viewed 23 September 2025]. ISSN 2040-3593. Available from: doi:10.1093/jnlids/ids002.

<sup>25</sup> NEWCOMBE, *op.cit.*

<sup>26</sup> *Ibid.*

<sup>27</sup> DUGARD John 'Diplomatic Protection' In CRAWFORD James, Alain PELLET, and Simon OLLESON (eds.), *Oxford Commentaries on International Law: The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 1051.

Court of International Justice (“PCIJ”).<sup>28</sup> The case was commenced pursuant to Article 26 of the Mandate for Palestine, which provided for PCIJ’s jurisdiction concerning disputes between the Mandatory and another Member of the League of Nations.<sup>29</sup> Greece brought a claim on behalf of its citizen Mr. M. Mavrommatis, who alleged that British government (having its mandate over Palestine) failed to recognize his concession rights to construct and operate electric tramway system as well as supply electric power and drinking water in Jerusalem and the same concession rights in the city of Jaffa.<sup>30</sup>

Britain objected to the PCIJ’s jurisdiction stating that the dispute was not between the Mandatory and a Member State of the League of Nations. Rather, the dispute was between a private individual and another state.<sup>31</sup> PCIJ decided—by majority—that it had jurisdiction over the dispute concerning Mr. Mavrommatis’s concessions pertaining to Jerusalem.<sup>32</sup> While doing so, PCIJ noted that “*the State is entitled to protect its subjects*” and by elevating the claims of its nationals to the inter-state level, the state is merely asserting its own rights to “*ensure, in the person of its subjects, respect for the rules of international law.*”<sup>33</sup> With respect to the merits of the case, PCIJ held in short that Mr. Mavrommatis’s rights were expropriated but refused to award compensation. Rather, the PCIJ held that Mr. Mavrommatis was entitled to re-adapt his concession in the light of the economic situation at that time.<sup>34</sup>

While foreign investors might benefit from the diplomatic protection as much as they benefit from investor-state dispute settlement mechanisms established through BITs, the core issue with this method of dispute settlement is the investor’s dependence on the State’s willingness to assert the investor’s rights.<sup>35</sup> Translated to the realm of today’s European Union, it is difficult to imagine that—for example—the Czech Republic would pursue a dispute with another EU Member State claiming that Czech national’s rights under international law were infringed. Even if the investor’s claims fit the requirements for diplomatic protection, the investor has rather limited control over the proceeding.<sup>36</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> BJORGE, Eirik, and Cameron MILES. *Landmark cases in public international law*. Bloomsbury Publishing Plc, 2017.

<sup>32</sup> Judgment of the Permanent Court of Justice dated 30 August 1924. The Mavrommatis Palestine Concessions Case, PCIJ Series A. No. 2.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> JURATOWITCH, Ben. The relationship between diplomatic protection and investment treaties. *ICSID Review* [online]. 2008, 23(1), 10–35 [viewed 26 September 2025]. Available from: doi:10.1093/icsidreview/23.1.10.

<sup>36</sup> ZHANG, Rui. Beyond Diplomatic Protection: The Evolution of Investor Rights in International Law. *Journal of Research in Social Science and Humanities* [online]. 2024, 3(9), 82–85 [viewed 25 October 2025]. Available from: doi:10.56397/jrssh.2024.09.10, pp. 83–84.

### 3.2. Recourse to national judiciary

One of the often-raised arguments against the intra-EU BITs is that judiciary of the EU Member States is sufficiently reliable and independent so that a foreign investor should not have difficulties defending their claims against the host state before the host state's courts. However, recourse to national judiciary may have a number of downsides for foreign investors.

It should be noted that the key drivers for the investor-state dispute settlement mechanism established by the BITs were the foreign investor's protection in countries with underdeveloped legal system and judiciary.<sup>37</sup> Despite the fact that likely the majority of EU Member States would have adopted constitutional safeguards to protect fundamental rights of aliens and nationals,<sup>38</sup> the concerns about the independence and impartiality of the host state's judiciary may remain.<sup>39</sup>

Additionally, in a vast majority of European jurisdictions, national judiciary operates in the official language of each particular country.<sup>40</sup> This alone makes it significantly more difficult for foreign investors to lead effective litigation against the host state.

Enforceability of investors' claims through national judiciary might be hindered by the nature of the claims themselves. The nature of the claims brought by investors under the BITs often prevents such disputes from being dealt with before the national courts. By way of an example, should a foreign investor bring a claim against a Member of the European Union for a denial of justice, such a claim would already involve the national judiciary's failure to accord justice.<sup>41</sup> A claim for denial of justice encompasses denial of access to courts, excessive length of proceedings, serious procedural defects in proceedings or irrational outcome going beyond the misapplication of law and can be brought against the host state only once the investor has exhausted the local remedies.<sup>42</sup>

Lastly, certain claims of foreign investors that can be raised against the

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<sup>37</sup> HASTINGS WENDT, Michael. The evolution of investor-state disputes settlements in a global economy. *South Carolina Journal of International Law and Business* [online]. 2022, 19(1) [viewed 15 September 2025]. Available from: <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1257&context=scjilb>.

<sup>38</sup> BENÁK, Jaroslav. Historický vývoj ústavního soudnictví a přístupu jednotlivce k ústavnímu soudu. *Časopis pro právní vědu a praxi* [online]. 2018, 26(3), 397 [viewed 25 September 2025]. Available from: doi:10.5817/cvpv2018-3-2.

<sup>39</sup> KEITA, Kain, et al. Sovereignty issues and legal framework challenges for foreign direct investment in developing countries. *International Journal of Law and Society (IJLS)* [online]. 2023, 2(2), 142–154 [viewed 26 September 2025]. Available from: doi:10.59683/ijls.v2i2.41.

<sup>40</sup> KERN, Christoph A. English as a Court Language in Continental Courts. *Erasmus Law Review* [online]. 2012, 5(3), 187–209 [viewed 24 October 2025]. Available from: doi: 10.5553/elr22 1026712012005003005.

<sup>41</sup> PAULSSON, Jan. *Denial of justice in international law*. Cambridge: Cambridge University Press, 2011.

<sup>42</sup> *Ibid.*

host states pursuant to BITs, could not be brought before the national courts. Whether a certain claim can be litigated before national courts is a question of national law—namely remedies that are available under that national law. However, when the national law itself regulates certain aspects of the foreign direct investment in a manner that discriminates against the foreign investor or otherwise infringes the investor's rights or if the issue is discontinuance of State aid originally provided to investors, it would be particularly difficult for the foreign investor to raise a claim before national courts against the host state for adopting certain legislation or for changing the state's subsidies policy.<sup>43</sup> This is simply because national judiciary is bound by the national law and is obliged to apply it. A change in a state's legislation normally does not give rise to claims against that state. However, when certain conditions are fulfilled, change in a state's legislation might give rise to claims under international investment law. In fact, claims based on adoption of certain laws or the provision of subsidies have been fairly frequent in the intra-EU disputes.<sup>44</sup>

In sum, national judiciary cannot serve as a full replacement of the investor-state dispute settlement mechanism. Apart from the procedural considerations such as independence and impartiality of the judiciary or purely practical issues like language of the proceedings, the nature of investors' claims normally brought under the BITs often prevents such claims from being litigated before national courts.

### 3.3. Structured dialogue under the Termination Agreement

When the EU Member States decided to terminate all intra-EU BITs, the Termination Agreement provided for a specific dispute resolution process called "structured dialogue" that is available to investors, who are parties to pending arbitration proceedings and (i) the proceedings have been suspended pursuant to the request of the investor, and (ii) the investor has undertaken not to enforce, recognize or execute an award, if it was already issued.<sup>45</sup>

The structured dialogue is essentially a form of mediation, in which the investor and the host state are to reach a settlement. However, the procedure may only commence if a violation of EU law is at stake.<sup>46</sup> Should parties to the pro-

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<sup>43</sup> A typical example of breaches of rights of foreign investors is the frustration of their legitimate expectations through a change in the legal framework. See e.g. *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018. Available from: <https://www.italaw.com/cases/2080>.

<sup>44</sup> DEL GUAYO, Iñigo. International Arbitration in the Renewable Field: Recent Developments in Spain. In: *The Global Energy Transition* [online]. Hart Publishing, 2020 [viewed 25 October 2025]. Available from: doi:10.5040/9781509932511.ch-012.

<sup>45</sup> Termination Agreement, Article 9(1).

<sup>46</sup> Termination Agreement, Article 9(3),(4),(6).

ceeding fail to reach a settlement, the mediator is tasked to propose a final resolution of the matter. The parties to the proceeding are then free to accept or decline the final resolution.<sup>47</sup>

By virtue of the Termination Agreement itself, this dispute resolution procedure is available to only a very limited number of investors. Even though it is a form of dispute settlement mechanism, it is not—by design—a final form of dispute settlement as the “mediator” according to Article 9 of the Termination Agreement does not have authoritative power to render a decision that would finally resolve the dispute between the investor and a Member State.

The structured dialogue is more of an escape route for the investor, who commenced arbitral proceeding against the host state at a time the host state had obligations towards to the investor under a particular BIT, but was not able to finish the arbitral proceeding before the Termination Agreement and would end up with an unenforceable arbitral award. It does not provide for any substantive standards of treatment or elaborated dispute resolution mechanism. As such, the structured dialogue cannot be considered as replacement of the ISDS mechanism.

#### 4. CONCLUSION

The CJEU’s decision in the *Achmea* case has significantly influenced the reform of the investor-state dispute settlement mechanism within the EU to the point where EU Member States have decided to terminate all existing BITs. The termination of all intra-EU BITs has left foreign investors with limited options to protect their rights. They can resort to diplomatic protection provided that their “home state” is willing to pursue the investor’s case. Another option is to assert investor’s claims before the national courts of the host state. By doing so, the investor would be deprived of the possibility to have an international adjudicating body without any connection to either the state of the investor, or the state of the investment. Lastly, investors who have pending cases at the time the Termination Agreement was adopted are entitled to try the so-called structured dialogue. This specific procedure resembles mediation, and its sole purpose is to find amicable solution to the dispute. Neither of these three options is capable to fully replace the investor-state arbitration because the scope of rights protected under the BITs is broader than national legislation.

Neither of these options provide a comparable means of dispute resolution to investor-state arbitration. Investors domiciled within the European Union, thus, lack the same level of protection as investors domiciled outside the European Union. This discrepancy, however, might not be the final state of affairs. The European Union has been promoting the establishment of a multilateral investment court, a permanent adjudicative body to decide on investment disputes.

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<sup>47</sup> Termination Agreement, Articles 11-14.

This system of dispute resolution would address all the concerns that CJEU had with the bilateral investment dispute resolution mechanism.<sup>48</sup> That being said, this project is still at its very beginning, and it is not entirely clear when European investors would benefit from this new institution.

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<sup>48</sup> European Commission Fact Sheet, Multilateral Investment Court, available at: [https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en) [accessed on 24 October 2025].

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