HiLL PUBLISHING

Journal of Humanities, Arts and Social Science, 2025, 9(11), 2096-2106
https://www.hillpublisher.com/Journals/jhass/
ISSN Online: 2576-0548
ISSN Print: 2576-0556

Enforcement of ICSID Arbitral Awards and Autonomy of European Union Law

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How to cite this paper: Dimitris Liakopoulos. (2025) Enforcement of ICSID Arbitral Awards and Autonomy of European Union Law. *Journal of Humanities, Arts and Social Science*, 9(11), 2096-2106.
DOI: 10.26855/jhass.2025.11.003

Received: October 10, 2025
Accepted: November 7, 2025
Published: December 3, 2025

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Abstract

This paper aims to investigate the criticisms related to the autonomy of EU law and the application of Article 351 TFEU that respects the obligation of Member States of the Union to enforce an arbitral award according to Article 54 of the ICSID Convention. The violation of the principle of loyal cooperation as a form of subject of the same case, according to the conclusions of the Advocate General Emiliou in the *Commission v. United Kingdom and Ireland and Nord* case, allows us to analyze the application of Article 351, par. 1 TFEU and the related consequences related to the provision that has also been referred to the British Supreme Court. This paper attempts to demonstrate the relevant maturity in the sector that the results will be good for the next few years, towards an evolution of the law of the Union, as a testimony of an international daily reality of a global, plural world where the disputes continue and need solutions of greater protection both in international and European Union law.

Keywords

Convention of ICSID; autonomy of EU law; enforcement of arbitral awards; CJEU; BITs agreements; investment disputes; VCLT; CJEU; European Union law; enforcement of awards; loyal cooperation

1. Introduction

In 2013, the *Micula* case (Northmore-Ball, Harvey, & Courtier, 2021; Tietje & Wackernagel, 2015)[1] highlighted in the law of the European Union the problems related to a conflictual relationship between international investment law and EU law (Giardina, 2011). One of the main problems was the obligation to enforce arbitral awards relating to international investments that were focused on the compensation of damages to be paid by a Member State, i.e. the state of the investment that was in conflict with the rules of the Union especially in the area of state aid pursuant to Articles 107-108 Treaty of the Functioning of the European Union (TFEU) (Blanke & Mangiamelli, 2021; Kellerbauer, Klamert, & Tomkin, 2024). The award of the *Micula* case highlighted the respect of the Union in front of the fulfilment of obligations of international law.

In March 2024, through the *Commission v. United Kingdom of Great Britain and Northern Ireland case* (Hope, Ivars, & Lazarchuk, 2024)[2], the Court of Justice of the European Union (CJEU) for the first time took a position on

[1] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I],* Case ICSID ARB/05/20, Award, 11 December 2013; *Ioan Micula, Viorel Micula and others v. Romania [II],* Case ICSID ARB/14/29, Award, 5 March 2020: https://www.supremecourt.uk/cases/uksc-2018-0177.html,

[2] CJEU, 14 March 2024, case C-516/22, *European Commission v. United Kingdom of Great Britain and Ireland of Nord*, ECLI:EU:C:2024:231, published in the electronic Reports of the cases.

the enforcement of an award by a Member State against another Member State, which issued an award under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)[3]. We are talking about an international agreement for the Member States of the Union that ratified it before they joined the EU and pursuant to Article 351 TFEU, the relevant obligations that were prior to the accession of the EU (Galanis, 2023). The important point of this judgment is the violation of Union law by the United Kingdom as a result of the Supreme Court of the State after its withdrawal from the Union and before the transition period (Shipley, 2023)[4]. Article 351 TFEU generally respects and protects the rights of third countries according to the principles of international law by clearly specifying rights that are claimed by third states. Rights that have the power to attribute the common participation of relations between member states and the national judge.

The main point enforced an arbitral award dating back to 2013 in the *Micula v. Romania* case. An arbitral tribunal that was established under the ICSID Convention ordered Romania to pay investors from Sweden for significant damages. The Commission recognized and enforced the related award after the Supreme Court of the United Kingdom violated the principle of loyal cooperation under Article 4, par. 3 of Treaty of European Union (Liakopoulos, 2019), the clause contained in Article 351 TFEU, and the related preliminary ruling procedure under Article 267 TFEU (Schwarze et al., 2019), as well as the suspension obligation of Article 108, lett. 3 TFEU. The Advocate General (AG) Emiliou made some reflections on his proposed conclusions[5].

Article 351 TFEU is the basis of a derogation from the primacy of Union law with respect to international obligations for Member States prior to accession to the Union in a restrictive interpretation. According to the final conclusions of the AG Emiliou, the factual interest of the parties concerning the enforcement of arbitral awards under the ICSID Convention and the existence of a right under Article 351, par. 1 TFEU by the contracting party for the enforcement of the award[6] is a right that implies the application as an available possibility in question that prevails over an international obligation relating to real cooperation that is part of the reference to Article 4 TEU (Liakopoulos, 2019). The investors in the *Micula* case who were established in Sweden, had the award enforced by a British court through the transition period, and the United Kingdom, as a non-member of the EU it was not obliged to respect obligations arising from the EU before another member state.

Thus, Article 351, lett. c)TFEU was not applicable as a subordination clause. The British Supreme Court did not share this opinion and followed a more varied path, since it affirmed the violation of Article 4, par. 3 TEU due to a failure to comply by a British judge and the obligation to suspend the proceedings pending a decision, which was based on Article 351 TFEU. The United Kingdom thus violated the obligation of loyal cooperation to another member state, namely Romania, enforcing an arbitral award as we have seen in the *Micula v. Romania* case, violating Union law which prohibited the decision of the Commission, and as a consequence to an unlawful state aid. The United Kingdom, according to the Supreme Court, did not comply with obligations established under Article 267 TFEU; therefore, the related doubts on the interpretation of Article 351 TFEU did not require a preliminary ruling and the judge of last instance as an obligatory step. We can talk about a risk that followed the British judge, and at the same time, it was easy to follow wrong interpretations about it.

The relevant judgment from the CJEU has followed the path for an infringement action against the United Kingdom as a former member of the EU and the Commission which has incurred during the transitional period of withdrawal from the Union obligations derived from the rules of the Union[7]. This action was filed on 29 July 2022. The Commission has asked the CJEU to clarify on behalf of the United Kingdom, the enforcement of the arbitral award in the *Micula* case. The incumbent obligations are based on Article 4, par. 3TEU, Article 127, par. 1 of the Withdrawal Agreement[8] and Article 251, let. 1 TFEU. These obligations deal with the enforcement of the arbitral award despite

[3] See the Convention for the Settlement of Investment Disputes between States and Nationals of Other States, concluded in Washington on 18 March 1965.

[4] Supreme Court of the United Kingdom, case of 19 February 2020, *Micula v. Romania,* UKSC 2018/0177: https://www.supremecourt.uk/cases/uksc-2018-0177.html.

[5] CJEU, see the conclusions of the Advocate General Emiliou presented in 9 November 2023, case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2023:857, published in the electronic Reports of the cases.

[6] CJEU, 14 March 2024, case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland,* op. cit., par. 76.

[7] In particular, the United Kingdom did not present itself and did not also present a counter-appeal so that the sentence was pronounced in absentia.

[8] See the EU-UK withdrawal agreement: https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-withdrawal-agreement_en.

the fact that the subject matter of decisions of the Commission is decided by the Union.

This also followed Article 351, let. c)TFEU, which has wrongly applied the rights of third states and been prejudiced by treaties, Article 267, par. 1, lett. a), b) and par. 3 TFEU and, Article 127, par. 1 relating to the withdrawal, which highlighted as an argument the suspension injunction of 2014 and the decision that failed to address a court and to interpret the law of the Union according to the act, which was not an acte clair and/or an acte clairé. Furthermore, the procedure had to take into account Article 108, par. 3 TFEU with Article 127, par. 1, which asked Romania to violate the obligations that were incumbent upon the law of the Union and the suspension of 2014.

The judgment followed the path we saw in the *Achmea* case regarding the autonomy relationship of Union law and the arbitration rules of investor-state disputes as provided by international law (Ahmad, 2019). Article 351 TFEU respects the international obligations for the Member States of the Union that will have to comply with Article 54 of the ICSID Convention, that is with an arbitral award following the principles of interpretation of international treaty law. The relevant case is also based on the violation of a court of last instance relying on the principle of acte clair (Delhomme, Larripa, 2018; Turmo, 2019)[9]. The principle of autonomy of Union law also follows the jurisprudential path we saw in the *Achmea* (Fanou, 2019; Kochenov & Lavranos, 2021; Korom, 2022; Pohl, 2018; Zarra, 2014) and *Komstroy* (Dashwood, 2022; Garcìa & Ángel, 2022; Thierry, 2021)[10] cases as decisions that made it impossible to enforce ICSID arbitral awards of the Union, as well as the exclusive violation of the jurisdiction of a judge of the Union in matters of international investments.

2. What Was the Subject Matter for the Court of Justice of the European Union?

The award of December 2013 condemned Romania under the ICSID Convention to compensation in favor of foreign investments of a Bilateral Investment Treaty (BIT) that was concluded in 2002 between Romania and Sweden before the accession of the Union. Romania in 2014 arranged the payment as compensation pre-established by the arbitral award, and the Commission adopted an injunction based on EU Regulation 659/1999 ordering Romania to suspend forms of enforcement of an international award pending the verification relating to the Union legislation on state aid. The relevant incompatibility was confirmed by the Commission through a decision in 2015[11]. The investors then turned to the court of the EU, where with a judgment called: *European Food SA* of 18 June 2019, the appeal was upheld[12].

The Commission appealed the relevant judgment and then annulled by the CJEU on 25 January 2022[13] where it was confirmed that the Commission could not adopt a decision that concerned state aid and as object situations occurred before the accession of Romania to the EU. For the CJEU, the Court of First Instance followed an error of law as in the *Achmea* judgment, which was irrelevant. Therefore, the Court itself has allowed Romania to follow the path that the states take when it is a BIT which thus becomes devoid of object after the accession of Romania to the EU. Not all the points of the investors that are requested by the Tribunal have been examined, therefore, they have referred the case for a new review. Until today the case remains pending from the General Court.

The award registered at the High Court of England and Wales on 17 October 2014 was based on the Arbitration Act of 1966 which as a consequence complies with the ICSID Convention and is also part of the United Kingdom[14]. The High Court on 20 January 2017 did not accept Romania's application to set aside the registration but impartially received the stay of execution as the first proceeding before the General Court. On 27 July 2018 the Court of Appeal precluded for the English judges the principle of loyal cooperation according to Article 4, par. 3TEU which ordered the immediate execution of the award according to the limits of a decision of the Commission which prohibited Romania from providing the related compensation requested. Thus the appeal for the *Micula* investors was rejected and consequently the stay of execution which was ordered for the High Court and requested a related guarantee from

[9] CJEU, 4 October 2018, case C-416/17, *Commission v. France,* ECLI:EU:C:2018:811, not yet published.
[10] CJEU, 2 September 2021, case C-741/19, *Republic of Moldova v. Komstroy LLC,* ECLI:EU:C:2021:655, not yet published, par. 42.
[11] Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania. Arbitral award *Micula v Romania* of 11 December 2013 (notified under document C(2015) 2112) (Only the Romanian text is authentic) (Text with EEA relevance, OJ L 232, 4.9.2015, p. 43-70
[12] General Court, 18 June 2019, case T-624/15, T-694/15 and T-704/15, *European Food SA and others v. European Commission,* ECLI:EU:T:2019:423, published in the electronic Reports of the cases.
[13] CJEU, 25 January 2022, case C-638/19 P, *European Commission v. European Food SA and others*, ECLI:EU:C:2022:50, published in the electronic Reports of the cases.
[14] Arbitration Act 1996: https://www.legislation.gov.uk/ukpga/1996/23/contents

Romania. The Supreme Court of the United Kingdom in the *Micula v. Romania* case, by the judgment of 19 February 2020, ordered the enforcement of the award. However, the basis of Article 351, par. 1 TFEU includes the enforcement of the award as a discipline of a multilateral treaty, where the ICSID Convention was concluded by the United Kingdom before the final accession to the Union, thus necessarily obliging the enforcement as a claim by third states that are party to an agreement.

3. Breach of Loyal Cooperation after the Failure of the British Supreme Court to Consider the Cases Pending from the Commission and the Judicial Bodies of the Union

The principle of loyal cooperation has been referred to all this long jurisprudence from the Commission as support to the infringement action against the United Kingdom. Thus, the loyal cooperation for the Commission puts before a judicial authority of a member state of the Union, as the object of investigation from the Commission, a proceeding that should suspend another carrying the minimum risk of creating conflicts with a future judgment and a decision for the Commission.

First of all, the related procedure was based on the execution for the investors of *Micula* who followed the path of the British Supreme Court, and the Commission issued an interpretation with provisions according to the law of the Union and to measures already decided, as the subject of pending proceedings by judicial bodies of the Union. The principle of loyal cooperation applied to the United Kingdom binds the law of the Union through the transition period. The Supreme Court has decided on the subject according to the obligations that come from the ICSID Convention. Thus, the award becomes binding and has not called into question the domestic judge of the execution. It focuses on a contrast between the obligations of the United Kingdom, the ICSID Convention, and the law of the Union as a binding protagonist for the case in progress.

The conclusions of the AG Emiliou were not so original, but they followed the *Masterfoods* case of 2000[15], where the Supreme Court suspended the proceedings and refrained from issuing a final decision as a duty of loyal cooperation. The national judges suspended the proceedings of a dispute where the validity of a decision of the commission depended, fulfilling the duty of loyal cooperation. Thus, the risk of conflict between causes is avoided, allowing the law of the Union and the General Court to decide on the validity. The Supreme Court had to suspend the proceedings. The CJEU, according to the *European Food SA* case, excluded the risk of a judgment that conflicted with the Commission. The idea of the Commission is based on the application of Article 351 TFEU as an interpretation for the Supreme Court, which accepted the international obligations of the United Kingdom that were not in conflict with the law of the Union and the pending question of the CJEU in the European *Food SA* case. The AG stated that the Supreme Court verified that Article 351, lett. 1 TFEU has been applied to a case by examining the international obligation relating to the enforcement of the award. The existing risk was in conflict with the application of loyal cooperation, which focused on national judges who rendered decisions not all equal with the implementation of an award. It is also not so convincing that the British Supreme Court was not obliged to be supported by the CJEU and the ICSID Convention since the CJEU is obliged to decide on a preliminary reference and Article 351, lett. 1 TFEU.

4. Application of Article 351 TFEU From the Supreme Court of The United Kingdom

Article 351, lett. 1 TFEU establishes some rights and obligations for conventions that are concluded for Member States with third states. Particularly, it requires be application of a convention that is concluded before the entry of the Treaty of the ECC of 1958 and the accession of the Union, as well as that a third state derive from a convention rights that respect the Member State concerned. It is a general application for international conventions without taking into account the object that affects the application of the treaties of the Union and to disapply rules of primary law, derived for the respect of obligations that are assumed by third states. Par. 1 of Article 352 TFEU subordinates obligations that come from the participation of the Union and that respect contracts with third states. In this way, rights are protected for third states that derive from agreements concluded with Member States before their accession to the Union.

It is important for the CJEU to consider the legal relationship of a normative contrast through different legal systems at the intra-European level without allowing for the member states to wait for the obligations deriving from the law of the Union and to fulfill the contractual nature before the accession[16]. Therefore, the British Supreme Court,

[15] CJEU, 14 December 2000, case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd,* ECLI:EU:C:2000:689, I-11369.
[16] CJEU, 22 September 1988, case C-286/86, *Deserbais,* ECLI:EU:C:1988:434, I-04907, parr. 17, 18.

after the withdrawal of the United Kingdom, has followed to prevail the international obligations that derive from the ICSID Convention and the obligation that derives from the principle of loyal cooperation according to Article 4, par. 3TEU.

The judge of the Supreme Court considered Article 351, lett. 1 TFEU as a protection for international agreements of a binding nature for a member state that also finds application when the state fulfills obligations of a collective nature, erga omnes partes, that compliance is not in the precise interest of one or more third states but for the states party to a multilateral treaty between member and third states[17]. The supreme court addressed an original intra-EU dispute where a Swedish investor challenged Romania the recognition of an ICSID arbitration award as an obligation of a collective nature that compliance is ensured by Article 351 TFEU for obligations imposed by the law of the union, as well as of loyal cooperation.

The English judge made an incisive, selective interpretation of Article 351 TFEU and not what the spirit of the same Article requires. Perhaps he had to deal with conflicts with international agreements and, at the same time, affirm the obligations of an ICSID convention that prevails from the law of the Union, given that the United Kingdom had adhered to the ICSID convention before it entered the Union. There is no reference to par. 2 of Article 351 TFEU regarding the obligation for the state (or/and) Member States that are interested to resort to all the means available to eliminate the incompatibilities for the treaties of the Union and the conventions in conflict with them. A choice that affirmed the incompatibility with an award and the execution of an ICSID, the 2015 decision of the Commission, and the compensation for damages relating to state aid that are prohibited by the Union.

The Supreme Court was not suited to follow and decide on the incompatibility between international obligations and the ICSID Convention, Union law, thus avoiding addressing an autonomous obligation that puts a Member State to eliminate the incompatibility with obligations of membership from the Union according to par. 2 of Article 351 TFEU. The choice made has opened the impossibility for the obligation of elimination between agreements concluded with third states and individuals, even before accession to the Union, and at the same time, the incompatibility of a member of the Union arises when the presence of a conflict of a conventional type is in danger of a conflict between treaties in the future.

5. Autonomy of Union Law and Enforcement of an Award by a Member State of the Union

The Supreme Court of the United Kingdom noted and affirmed in its judgment, together with the reference to the *Romatsa* and others case[18]. In the *Micula v. Romania* case, several Member States of the EU, such as Sweden, France, Luxembourg, Belgium, have initiated proceedings for the enforcement of the relevant award according to a decision of the Commission in 2015. The Belgian judge has submitted to the CJEU a preliminary reference regarding the enforcement of the award that respected the principle of loyal cooperation according to Article 4, lett. 3TEU. The Belgian judge of the Court of Appeal referred to the CJEU in the *European Food SA* case to enforce the arbitral award even in case the Union law could not give specific attention to the ICSID Convention with reference to the principle of loyal cooperation according to the principle of res judicata. The order in the *Romatsa and others* case confirmed the *European Food SA* case and the need to protect the autonomy of Union law as a mechanism for resolving disputes between states and investors[19].

The exclusive jurisdiction in the field of foreign direct investment had to do with the incompatibility of Union law, according to the resolution of state-investor disputes. This is an incompatibility where the CJEU protected the autonomy of Union law also in a broad and varied way. Protecting Union law brings to mind the old *Van Gend en Loos* case[20] where the CJEU affirmed and considered that the legal system in the field of international law is characterized by unique modalities as a form of recovery that was also taken in consideration in the *Costa v. Enel* case[21] as an autonomy legal source linked to the characteristics of distinction of the Union to a legal system with primacy and direct effectiveness to the Union. The autonomy of Union law identifies the specific obligations of national

[17] CJEU, 6 April 1995, joined cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission*, ECLI:EU:C:1995:98, par. 84, not published. 18 November 2003, case C-216/01, Budějovický Budvar, ECLI:EU:C:2003:618, I-13617, par.148.

[18] CJEU, order of 21 September 2022, case C-333/19, *Romatsa and others,* ECLI:EU:C:2022:749, published in the electronic Reports of the cases.

[19] CJEU, 25 January 2022, case C-638/19 P, *European Commission v. European Food SA and others*, op. cit., par. 140.

[20] CJEU, 5 February 1963, case C-26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Administratie der Belastingen,* ECLI:EU:C:1963:1, I-0003.

[21] CJEU, 15 July 1964, case C-6/64, *Costa v. Enel,* ECLI:EU:C:1964:66, I-01141.

jurisdictional authorities, as implementation of Union rules, thus recognizing the validity of the discipline in terms of adaptation to international law, i.e. as application of rules by national bodies of the Member States. The autonomy is connected with the CJEU, the control of validity and interpretation of legal acts of the Union (Liakopoulos, 2019)[22]. Therefore, the CJEU has developed the concept of jurisdictional autonomy of the Union according to international agreements which provides for the resolution of disputes[23].

In the *Achmea* case[24], Articles 267 and 344 TFEU made available the international agreement that was concluded between the Member States for the investor of one of these states to a dispute concerning the investments of another Member State, thus initiating the relevant proceedings before an arbitration tribunal where the jurisdiction will also be accepted by the Member State[25]. According to Article 344TFEU, it is noted that the CJEU followed a closed, self-sufficient interpretative line with the obligation to resolve the dispute, as well as to attribute to the uniformity of European Union law. In any case, we note the legal nature of the controversy consists of. Its field of application concerns the Treaty of Lisbon and the judges will first of all have to look at the procedure in a compositional way presupposing the configurability of a broad dispute resolution mechanism with the exception of the disputes provided for by Article 259 TFEU. The problem is the effect of the ban which dates back to the validity of the resolution of disputes, which are part of the violation of any procedures, that the member states themselves are binding according to the Articles of the Treaty of Lisbon. Judicial will is based on the specialty criterion which provides in a general way the relative behaviors that are part of the judge's power based above all on a general rule.

This agreement for the Member States comes from the jurisdiction of their own judges to a system that is based on Article 19, letter 1 TFEU where it requires the Member States to establish in a disciplined manner the areas of Union law. After Romania's accession to the Union, the Union's jurisdictional system followed the procedures for disputes relating to the application of Union law. Thus, the international agreement provided for dispute resolution mechanisms in contrast with the need to protect the autonomy of Union law[26].

The compensation claimed in the *Micula* case in the award of 11 December 2013 and the decision of the Commission of 2015 did not relate to damage suffered before accession. The dispute before the arbitral tribunal included all the elements before Romania was a member of the Union as it was not bound by the rules of the law of the Union[27]. In the *European Food SA* case the CJEU established that the arbitral tribunal does not belong to the judicial system of the Union according to Article 267 TFEU. The arbitral award is not subject to Article 53 and 54 of the ICSID Convention, as a review by a court of a Member State which is in accordance with the law of the Union.

Romania has not given the possibility for a dispute in the context of an arbitration procedure provided by the BIT. Unlike the commercial arbitration procedure, it has not found the agreement that reflects the autonomy of will for the parties that is part of a treaty concluded between the states in a preventive and general way, concerning thus the application of the law of the Union to an arbitration procedure starting from the accession of Romania to the Union.

The arbitration clause, which is foreseen in Romania and Sweden formed the basis of the arbitral award, as the subject of the decision of 2015, namely of Article 8TBU between Sweden and Romania which discussed the autonomy of Union law in the preliminary ruling and the violation of the principle of loyal cooperation.

The CJEU in the *Romatsa* order and before the *European Food SA* ruling had doubts about the interpretation of Article 344TFEU. The court provided for the function of the autonomy of the Union and the respect of the international obligations according to Articles 53 and 54 of the ICSID Convention. Article 344 TFEU is in conflict with Article 351 TFEU, which regulates any relations that are incompatible with the obligations of the Member States and the participation of the Union that derive from the conventions stipulated with third states and the needs of an integration that respects international law. Article 351 TFEU leaves to the Member States of the Union the relative resolution of profiles of incompatibility of obligations that derive from international agreements according to the law of the Union. Thus, a circular interpretation of Article 344 TFEU does not comply with Article 351TFEU, which was inserted in the Treaty to resolve the obligations of the Union and international obligations. The CJEU has inserted the antinomy and considered the attention of the application of Article 351, lett. c)TFEU and in generic way Article

[22] CJEU, 22 October 1987, case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost.*, ECLI:EU:C:1987:452, I-04199, par. 17.
[23] CJEU, *Opinion 1/91,* 14 December 1991, ECLI:EU:C:1991:490, I-06079, par. 40. Opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, I-01137, parr. 55, 68.
[24] CJEU, 6 March 2018, case C-284/16, *Slowakische Republik v. Achmea BV*, op. cit., par. 60.
[25] CJEU, 25 January 2022, case C-638/19 P, *European Commission v. European Food SA and others,* op. cit., par. 138.
[26] CJEU, 26 October 2021, case C-109/20, *Polonia v. PL Holdings Sarl,* ECLI:EU:C:2021:875, published in the electronic Reports of the cases, par. 45.
[27] CJEU, 25 January 2022, case C-638/19 P, *European Commission v. European Food SA and others,* op. cit., par. 140.

344TFEU.

The autonomy of the Union is expressed in the *Commission v. United Kingdom and Northern Ireland* case[28] arguing that the logic followed by the CJEU was based on the interpretation made to the *European Food SA* judgment and the *Romatsa* ordinance through the *Achmea* and *Komstroy* jurisprudence (Dashwood, 2022; Paschalidis, 2022)[29].

6. Some Thoughts on Article 54 of the ICSID Convention

The choice of respect between the law of the union and the fulfillment of obligations of international law according to the ICSID Convention is a difficult choice as it carries out critical considerations. Article 54 of the ICSID Convention, in the execution of an arbitral award, seems like a conclusion that comes from the CJEU but has not carried out a mandatory analysis according to Article 54 of the ICSID Convention and Article 351 TFEU.

In our opinion the Supreme Court of the United Kingdom had to construct obligations arising from Article 54 of the ICSID Convention and following rules that interpreted treaties according to Article 31 and 32 of the Vienna Convention of the Law of Treaties (VCLT) (Fitzmaurice & Merkouris, 2020; Hollis, 2020; Liakopoulos, 2025). Article 54 of the ICSID Convention interpreted in good faith the attribution of terms of an object and its objectives. Article 64 of the ICSID Convention created an unconditional right for states to submit to the International Court of Justice (ICJ) any dispute relating to the interpretation of ICSID. Thus, the interpretation of a supplementary type was examined by the Supreme Court of the United Kingdom. The preparatory works of the ICSID Convention as a conclusion justifying the interpretation provided of Article 54 of the Convention. Thus the court interpreted Article 54 of the ICSID Convention but in "contrast" with Article 31 and 32VCLT since no precise position was taken on the relevant Articles[30]. The CJEU did not consider the terms of Article 54 of the ICSID Convention in the context and the object, purpose of the Convention as required by Article 31, letter 1VCLT.

The conclusions of AG Emiliou are focused on the fact that the United Kingdom has violated Article 351 TFEU and the CJEU was not able to interpret even incidentally the provisions relating to international agreements which are part of the law of the Union[31]. Thus, the incidental interpretation did not have the power to interpret provisions for international treaties where the Union is not a contracting party to the ICSID Convention. The international treaty imposed the obligation arising from the provisions of the treaties of the Union (Boute, 2012)[32]. Therefore, it is understood that Article 54 of the ICSID Convention created an obligation for the United Kingdom as an identification of rights which correspond to non-member states of the Union but which remains in fact and not in law of the Union, i.e. outside the competence of the CJEU.

The possibility of an incidental interpretation by the CJEU, as a rule of an international agreement for the Union, is not a party which is implicitly equivalent to the ICSID Convention, i.e. as part of the law of the Union and as an object of interpretation by the CJEU. Thus, the CJEU[33] regarding the interpretation of a treaty has posed the preliminary question of an agreement which is pronounced by a national judge who interprets a treaty deciding on the preliminary reference and according to Article 267 TFEU. The Commission has thus established the relevant facts which are connected with a violation constituting according to Article 54 of the ICSID Convention. The Supreme Court of the United Kingdom having the legitimate power of interpretation of Article 54 of the ICSID Convention, as a contracting party, has affirmed and respected all the contracting parties of the ICSID Convention including also the members who are not members of the union, such as for example the United Kingdom. The interpretation of Article 54 can be decided by the ICJ and the procedure provided by Article 64 of the ICSID Convention and not by the CJEU.

Romania had no interest, as did other parties to the ICSID Convention, in initiating proceedings before the ICJ and interpreting Article 54 by the United Kingdom. The only one that could contest was the European Commission, as

[28] CJEU, 14 March 2024, case C-516/22, *European Commission v. United Kingdom of great Britain and Ireland of Nord,* op cit., par. 86.

[29] CJEU, 2 September 2021, case C-741/19, *Republic of Moldova v. Komstroy LLC*, op. cit., parr. 40-66.

[30] CJEU, 25 February 2010, case C-386/08, *Brita GmH,* ECLI:EU:C:2010:91, I-01289, par. 40-43.

[31] CJEU, see the conclusions of the Advocate General Emiliou presented in 9 November 2023, case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland,* op. cit., par. 82

[32] CJEU, 15 September 2011, case C-264/09, *Commission v. Slovakia,* ECLI:EU:C:2011:580, I-08065, par. 40.

[33] CJEU, 2 August 1993, case C-158/91, *Levy,* ECLI:EU:C:1993:332, I-04287, par. 21. 28 March 1995, case C-324/93, *The Queen v. Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith*, ECLI: ECLI:EU:C:1995:84, I-00563, par. 29.

an institution of the Union, except that for the Union the ICSID convention has the nature of res inter alios acta.

The Supreme Court of the United Kingdom unlike the CJEU has the power to interpret with legitimate manner Article 54 of the ICSID Convention, the CJEU had to accept the interpretation of the Supreme Court of the United Kingdom without being able to challenge it. Such interpretation is exclusive for the national judge but not for the European Commission. The CJEU could have established a precise interpretation in good faith according to Article 54 of the ICSID Convention, the rules of interpretation of treaties and Articles 31 and 32 VCLT. An interpretation that did not put the European Commission in exercise of its powers in the CJEU and in consequence its obligation to respect interpretative rules as part of customary international law. According to the interpretation of Article 54 of the ICSID Convention by the Supreme Court of the United Kingdom, as suggested by the AG, it is not sufficient to create obligations for third states that will have to be protected by Article 351 TFEU[34].

For the AG, the Supreme Court of the United Kingdom has failed to verify that any third party state that is a party to the ICSID Convention can claim international responsibility for the United Kingdom and take action against it through the procedures that are provided for by international law, thus obtaining the cessation of an unlawful act for compensation for damage caused. The Supreme Court of the United Kingdom has taken a position according to Article 54 of the ICSID Convention where any third party state that is a party to the ICSID Convention can sue the United Kingdom before the ICJ due to the failure to recognize and implement the award according to Article 54 of the ICSID Convention.

For the AG, Article 54 has created obligations for the United Kingdom but was against third party states that are members to the ICSID Convention respecting the execution of the award, without creating a right to claim the execution of obligations by the United Kingdom. Thus, Article 48 of the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts which is different from the injured state and has the right to invoke under Article 48, par. 1, letter a) the responsibility of another state, as a breached obligation against a group of states which includes the injured state established for the protection of a collective interest and the group concerned. Para. 106 of the Supreme Court of United Kingdom recognized Article 54 of an obligation to protect collective interest which created a system for investments thus ensuring compensation awarded to all states by the ICSID Convention and requiring the United Kingdom to implement the award.

This position according to the AG, is based on Article 54 and creates problems erga omnes for the states that are parties to the ICSID Convention. The Supreme Court does not base on the preparatory works of the Convention as a conclusion[35]. For the AG, the British Supreme Court did not refer to the preparatory works of the ICSID Convention and the assessment of Article 54 of the ICSID Convention thus obliging the contracting states. The preparatory works regulate the existence of a general interest for the parties that are members to the ICSID Convention and respect the agreement. The preparatory works legitimately interpret Article 32VCLT as a complementary interpretation where the Supreme Court on Article 54 of the ICSID Convention had a meaning that formulates the provision of its context as the object and objective of the Convention that respects the VCLT for the preparatory works.

The AG did not accept that Article 54 could create obligations for all contracting states since Article 42 of the draft Articles on the International Responsibility of States[36] was used in its final conclusions[37] establishing that a multilateral treaty should frame obligations that are binding and applicable for all states parties. Thus, the obligations of a multilateral treaty also include reciprocity (Simma, 1989)[38] posing according to the AG that the ICSID Convention with an exceptional manner can create the related bilateral obligations but without any other argument in favor that applies to the case in question. Moreover, it is stated that every multilateral treaty with an individual manner investigates the rules interpreting the treaty. These are established according to Article 31 and 32VCLT evaluating collective and bilateral obligations. This is a position that it has not been executed by the British Supreme Court as well as by

[34] CJEU, see the conclusions of the Advocate General Emiliou presented in 9 November 2023, case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland,* op. cit., par. 144.
[35] CJEU, see the conclusions of the Advocate General Emiliou presented in 9 November 2023, case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland,* op. cit., parr. 107-108.
[36] International Law Commission, Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, 2001, p. 298.
[37] CJEU, see the conclusions of the Advocate General Emiliou presented in 9 November 2023, case C-516/22, *European Commission v. United Kingdom of Great Britain and Ireland of Nord,* op. cit., par. 99.
[38] CJEU, 2 September 2021, case C-741/19, *Republic of Moldova v. Komstroy LLC,* op. cit., par. 64.

the AG Emiliou[39] since it interpreted Article 54 of the ICSID Convention as obligation of violation that gave rise to the BIT between Sweden and Romania. Lastly, Article 8, par. 6 required Romania to implement the award.

The AG confirmed that the British Supreme Court did not include the Sweden-Romania BIT and Article 54 did not create rights in favour of third states. This is not a conclusion that influences and/or adds anything to the case since the BIT involved only two members as parties to the ICSID.

The ICSID Convention did not offer other indications to interpret Article 54. According to the AG, the national judge of a Member State of the Union under request for enforcement of the award will be binding for the respect of the law of the Union and thus had to implement international law to the ICSID Convention ensuring various margins of maneuver.

The ICSID Convention for Member States binds the states of the Convention that are parties and that recognizes the enforcement of ICSID arbitral awards if they were judgments of domestic law without reviewing remedies offered by the Convention including a preliminary ruling. Articles 53 and 54 of the Convention do not allow national judges to doubt the award. The application of the *Achmea* judgment aggravated the conflict with mechanisms of arbitration between state-investor in Union where the law of the Union for obligations under Articles 53 and 54 of the ICSID Convention recognized the enforcement of awards for the Member States of the Union that had to respect. The *Achmea* case was the basis of examination for an arbitration established according to UNICTRAL rules and not of the ICSID Convention where the award was not prevented to the national judge of a state that the arbitration takes place. The prerequisites for the *Achmea* case were the application of Article 54 TFEU for the autonomy of the law of the Union. The conclusions of the AG were quickly expressed a general concern for the Commission as it stated that the application of Article 351 TFEU did not resolve the "conflict" between international law and Union law as a complex situation for the autonomy of Union law and as a step forward from the *Achmea* case.

7. Final Considerations

The present work starting from a case before the CJEU, namely the *Commission v. United Kingdom and Northern Ireland* judgment, was taken into account that Article 351, lett. a) TFEU was necessary for a rule of the Union law and to the obligation for the rights to be respected by the state in question. The supreme court of the United Kingdom took into account that a third state as a party to the ICSID Convention has the relevant right to enforce an award from the courts of the United Kingdom without prejudice to what regulated the TFEU in the field of state aid. The CJEU contested and adhered to the conclusions of the AG Emiliou who tried to distinguish between precise factual interests for the parties enforcing arbitral awards and the ICSID Convention and the existence of the right pursuant to Article 351, lett. c) TFEU of the contracting party as enforcement and application of an award.

The above concluded paragraphs speak for the will of the CJEU to consolidate a jurisprudence that has been seen in cases such as *Achmea, Komstroy,* where the application of Union law to intra-EU disputes between state and investors for the protection offered by bilateral, multilateral treaties in the investment sector has been affirmed. The autonomy of Union law supported a broad interpretation and the basis of a position towards the application of the ICSID Convention, according to Article 351, letter c) TFEU. The CJEU has respected the rules of international law as an application of Union law and in disputes concerning intra-EU investments as doubts for the protection of the autonomy of Union law. The CJEU has reflected on the interpretation of Article 344 TFEU recalling a protective function of the autonomy of law where the CJEU has regulated the respect of international obligations that come from the ICSID Convention and perhaps put in conflict what is established by Articles 344 and 351 TFEU. This provision leaves to the Member States of the Union the resolution of issues that are incompatible with the obligations that derive from other previous international agreements, such as for example the ICSID Convention with the law of the Union. Thus, Article 344 TFEU to an interpretation that implicitly after the *Achmea* and *Komstroy* cases has lost what pre-established Article 351 TFEU, has been inserted in the treaty that resolved the antinomies between EU and international obligations.

Thus, the CJEU had the opportunity to express itself on the relationship between Union law and the ICSID Convention. Article 351 TFEU and Article 54 ICSID created a distinct separation between international law and Union law that was not actually intended to be saved in the composition. The national judge enforced the award that was in conflict with Union law thus asking the principles of Union law, such as that of loyal cooperation, to prevent the

[39] CJEU, see the conclusions of the Advocate General Emiliou presented in 9 November 2023, case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, op. cit., parr. 150-157.

national judge from following international obligations that bind the Member States. Thus the judgment demonstrates that the Member States risk having negative effects on the Union legal system and on the international one. The old jurisprudence and the constraints for the Member States are obstacles to the commitments established by the ICSID Convention. Also, Article 54 of the ICSID Convention is an obstacle to the application of Article 351 TFEU for the principle of autonomy of Union law.

The judges of the CJEU have the maturity and awareness of the competent courts that play a guarantor role to facilitate legal concepts by developing a cross-fertilization coherence to an intensive international order from the past. We need a continuous cooperation between international law and EU law in order to build an intersystemic system of relations towards a continuous process of European integration based on logic and small steps. Time passes but the maturity now in the sector shows that the results will be good for the next few years towards an evolution of the law of the Union, as a testimony of an international daily reality of a global, plural world where the disputes continue and need solutions of greater protection both in international and EU law.

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