

HANDEL ANDERS!



With the support of:



INFRINGEMENT COMPLAINTS

Against:

THE NETHERLANDS

PORTUGAL

Submitted to the European Commission by:

Handel Anders!

Plataforma TROCA

Represented by:

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Note: This document provides the consolidated text of the two separate infringement complaints against The Netherlands and Portugal filed with the European Commission on 15 October 2026.

Introduction

The Complaints concern a violation of Art. 4(3) TEU by The Netherlands and Portugal resulting from their failure to take appropriate steps to eliminate the incompatibilities between their bilateral investment treaties concluded with third countries (**BITs**) and the autonomy of EU law (1) as well as the EU's sanction powers (2).

The Complaints are based on an assessment of a sample of 34 BITs concluded by Portugal and 70 BITs concluded by The Netherlands, all before 1 December 2009.

1. INCOMPATIBILITY WITH THE AUTONOMY OF EU LAW

In [Opinion 1/17](#), the CJEU held that an international agreement concluded by the EU with an investor-state dispute settlement (**ISDS**) mechanism is compatible with EU law “**only if it has no adverse effect on the autonomy of the EU legal order**” (§ 108).

The CJEU stated that an agreement would have such an effect if tribunals established thereunder can (i) interpret or apply EU law or (ii) **call into question the level of protection of public interests established by the EU institutions** (e.g. by finding that upholding such level of protection amounts to unfair treatment of a foreign investor).

This test is also relevant to assess the EU-law compatibility of an ISDS mechanism in an extra-EU BIT concluded by Member States (MS): EU law may be part of the applicable law and domestic measures challenged might be implementing EU law.

This is **illustrated by recent arbitration claims targeting the implementation of EU law** (e.g. PCA Case 2019-17; ICSID ARB/21/51, ARB/23/48 and ARB/23/49) and sanctions (PCA Case No. 2025-42; *Euroclear/Belgium*), including against The Netherlands (PCA Case No. 2025-47, *Petrogas v Netherlands*; PCA Case No. 2026-30, *Fridman v Netherlands*) (see [here](#)).

This does not contradict the Court's finding in C-741/19 (§ 65) that, in principle, extra-EU ISDS is not incompatible with EU law – as opposed to intra-EU ISDS. It also finds support in Opinion 1/17 (§ 150), academic work (e.g. [here](#) and [here](#)) and the Commission's practice under Regulation 1219/2012, requiring extra-EU BITs to include provisions such as those identified in Opinion 1/17 to ensure they comply with EU law (§§ 120-161).

Yet, none of the BITs assessed contains such provisions:

- (a) Except 1 BIT (Portugal-Angola, revised in 2021), **none** expressly exclude the arbitral tribunals' jurisdiction to interpret or apply EU law, while almost all of these BITs provide that domestic law (which extends to EU law) is part of applicable law or refer to arbitration rules that foresee the application of domestic law.

- (b) **None** include Opinion-1/17-type provisions preventing tribunals from treating implementation of EU public-interest measures as unfair investor treatment; instead, they contain unqualified protection standards that leave broad discretion on tribunals.

The lack of such safeguards creates a **material risk of adversely affecting the autonomy of the EU legal order**, which leads to the conclusion that the ISDS mechanisms under those BITs are incompatible with EU law.

2. INCOMPATIBILITY WITH EU SANCTION POWERS

All the analysed BITs guarantee free transfer of funds linked to an investment. Yet, with the exception of one BIT, none contain clauses enabling Portugal or The Netherlands to fulfil its EU obligations, in particular regarding restrictive measures decided by the Council under Art. 215 TFEU. **This violates EU law, as per CJEU case law** (Cases [C-118/07](#), [C-205/06](#) and [C-249/06](#)).

In these cases, free-transfer provisions in BITs concluded by Sweden, Austria and Finland were held incompatible with Council powers to unilaterally restrict movements of capital between MS and third countries, in the absence of a provision allowing these MS to fulfil their EU obligations. Accordingly, these MS were found in breach of (now) Art. 351 TFEU for failing to address these incompatibilities. Those cases concerned BITs concluded before their EU accession and were framed under Article 351 TFEU; the principle applies *a fortiori* in the context of post-accession BITs.

The current geopolitical context magnifies the risks arising from these incompatibilities. Sanctioned investors are invoking free-transfer provisions against MS implementing EU sanctions, including The Netherlands (PCA Case No. 2026-30; PCA Case No. 2025-42) or are likely to do so (*Euroclear/Belgium*).

The conflict between unconditional BIT free-transfer obligations and EU sanction powers – [acknowledged](#) by the Commission itself – is further illustrated by Regulation [2025/1494](#), which seeks to neutralise arbitration claims brought against MS in connection with EU sanctions, and Art. 2 of Regulation [2025/2600](#), which prohibits any transfer of assets or reserves to the Central Bank of Russia.

3. CONSEQUENCES

The Netherlands and Portugal are under an obligation to take all appropriate steps to eliminate these incompatibilities. Since their BITs are post-accession, this duty flows from the principle of sincere cooperation under Art. 4(3) TEU (EU:C:2008:391, §§ 33-43). It also flows from Regulation [1219/2012](#) (Recital 11 and Art. 3), which recalls that MS are required to “eliminate incompatibilities” in BITs and indicates that its application is “without prejudice” to Art. 258 TFEU.

Despite this, The Netherlands and Portugal have failed to take such steps and, thus, to fulfil their EU law obligations.

For these reasons, Handel Anders! and Plataforma TROCA, supported by Both ENDS, SOMO and Friends of the Earth Europe and European Trade Justice Coalition, request the Commission to initiate an infringement procedure against The Netherlands and Portugal under Art. 258 TFEU.