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FACT SHEET ON INTRA-EUROPEAN UNION INVESTOR–STATE ARBITRATION CASES

HIGHLIGHTS

- Intra-European Union (EU) investor–State arbitration has been a prominent topic in domestic and international discourses. Recent developments related to the *Achmea* case put a spotlight on the future of intra-EU cases based on bilateral investment treaties and the Energy Charter Treaty (ECT). This Note presents statistics and facts on intra-EU investor–State arbitration cases by the end of July 2018.

- The overall number of known intra-EU cases (treaty-based arbitrations initiated by an investor from one EU member State against another EU member State) totalled 174 by 31 July 2018, which constitutes 20 per cent of the 904 known investor–State dispute settlement (ISDS) cases globally.

- Most known intra-EU cases were brought against three EU member States: Spain (40 cases), Czechia (30) and Poland (19). Investors from the Netherlands, Germany, Luxembourg and the United Kingdom initiated about half of the known intra-EU arbitrations.

- Ninety-five per cent of intra-EU cases were based on investment treaties signed in the 1990s or earlier. About 45 per cent of the cases were brought pursuant to the ECT (1994).

- By 31 July 2018, some 91 intra-EU ISDS cases had been concluded and 83 were pending. Out of the concluded cases, 47 per cent were decided in favour of the State and 27 per cent in favour of the investor, with monetary compensation awarded. The remaining cases were settled, discontinued or the tribunal found a treaty breach, but did not award monetary compensation.

- A review of 49 decided intra-EU cases revealed that claims involved investment projects at various stages of their lifespan and were directed against both measures of general application and individual measures, including – on some occasions – State conduct with a distinct EU dimension. These measures affected different types of assets held by investors, most frequently shareholdings in local companies operating in a broad range of economic sectors. The alleged adverse effect of the challenged State conduct ranged from a failure to secure a business opportunity or diminution in profits to the total loss of a business enterprise.

- Annex 2 contains a mapping of principal issues (jurisdiction, admissibility and merits) discussed by tribunals in intra-EU arbitral decisions publicly available by 31 July 2018.

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1. Statistics on intra-EU investor–State arbitration cases

The overall number of known treaty-based arbitrations initiated by an investor from one European Union (EU) member State against another EU member State ("intra-EU" arbitrations) totalled 174 by 31 July 2018. This constitutes about 20 per cent of the 904 known investor–State dispute settlement (ISDS) cases globally (figure 1, annex 1). Only three known intra-EU disputes were initiated in the first seven months of this year.[1]

Important developments have taken place at EU level in 2018. In particular, on 6 March 2018, the Court of Justice of the European Union (CJEU) ruled that the ISDS clause in the bilateral investment treaty (BIT) between the Netherlands and Slovakia (1991) – examined in the context of the *Achmea* case – was incompatible with EU law. Following this decision, the German Federal Court of Justice, which had referred the issue in the *Achmea* case to the CJEU, set aside the final award in that arbitration (box 1).

Box 1. The CJEU's *Achmea* judgment and its first impact on intra-EU arbitrations

The CJEU judgment, rendered on 6 March 2018, relates to a long-running investment arbitration brought by Achmea, a Dutch company, against Slovakia under UNCITRAL Arbitration Rules. The arbitral tribunal had decided in favour of the claimant in 2012, after having assumed jurisdiction over the claims in a 2010 decision.[a] Slovakia sought to set aside the arbitral decisions before German courts (Germany being the seat of arbitration), contending that the arbitration clause in the invoked Netherlands–Slovakia BIT (1991) was contrary to several provisions of the Treaty on the Functioning of the European Union (TFEU). The German Federal Court of Justice (Bundesgerichtshof), hearing Slovakia's appeal case, submitted the request for a preliminary ruling to the CJEU.

In its judgment of 6 March 2018, the CJEU examined the investor–State arbitration clause in the Netherlands–Slovakia BIT (1991) and ruled that it was incompatible with the TFEU.[b] The CJEU's reasoning suggested, more generally, that ISDS provisions in other intra-EU BITs were also incompatible with EU law.

With reference to the CJEU's judgment, the German Federal Court of Justice (Bundesgerichtshof) proceeded to set aside the final award rendered in the *Achmea v. Slovakia* arbitration. In its decision of 31 October 2018, the German Federal Court of Justice held that no valid arbitration agreement existed between the parties.[c]

In several ongoing intra-EU ISDS proceedings, the respondent States sought to introduce arguments based on the CJEU's *Achmea* judgment. It remains to be seen which impact the *Achmea* developments will ultimately have on intra-EU disputes conducted under various arbitration rules, based on BITs and the ECT.

Source: UNCTAD.

Notes:

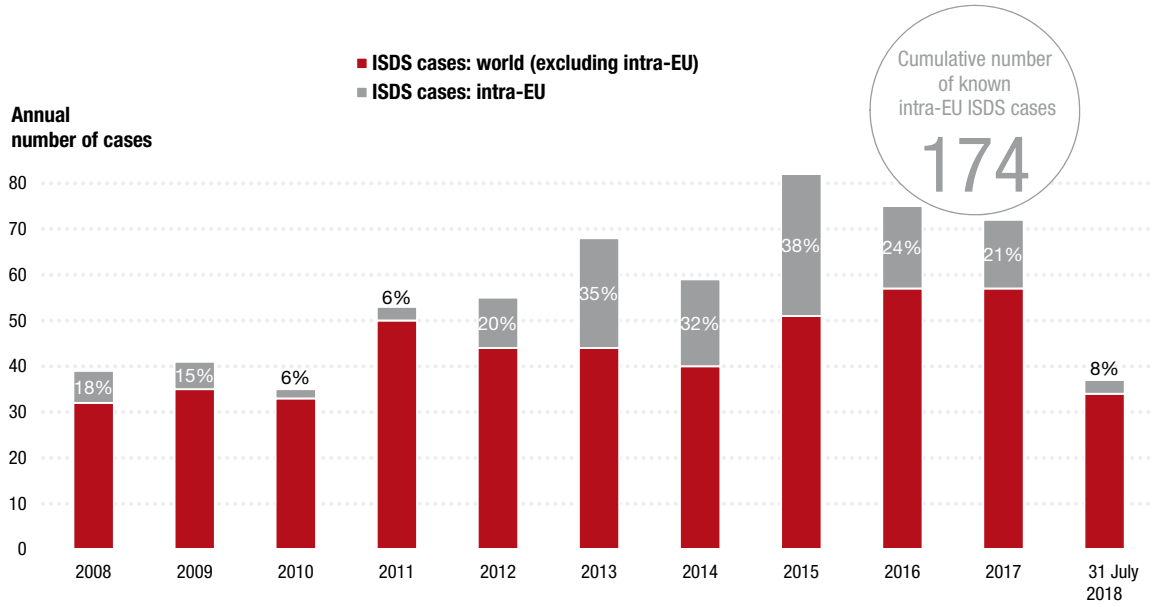
[a] *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic* (I) (PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; Final Award, 7 December 2012.

[b] CJEU, Slovak Republic v. Achmea BV (Case C-284/16), Judgment, 6 March 2018.

[c] German Federal Court of Justice, Decision, 31 October 2018.

[1] Less than 10 per cent of the 37 known cases filed so far in 2018 are intra-EU disputes. If this trend persists until the end of the year, the share of intra-EU disputes will be significantly lower than the historical average of 20 per cent.

Figure 1. Known ISDS cases and share of intra-EU cases, 2008–31 July 2018



Source: UNCTAD, ISDS Navigator.

Note: The cumulative number of intra-EU ISDS cases includes known cases irrespective of each member State's individual date of accession to the EU. See figure 2 for the number of pre-accession ISDS cases.

Intra-EU cases: respondent States

Spain, Czechia and Poland were the most frequent respondents in known intra-EU cases to date (figure 2). About half of all intra-EU disputes were directed against these three member States.

New EU member States (that acceded the EU in 2004 or thereafter) were respondents to twice as many known cases (117) as the EU-15 countries (57 cases). The 40 known intra-EU cases against Spain account for most disputes in the latter category. About 13 per cent of cases were initiated against current EU member States prior to their date of accession.

Intra-EU cases: home States of claimants

Investors from the Netherlands, Germany, Luxembourg and the United Kingdom brought the most intra-EU cases (figure 3).

Investment treaties invoked

Ninety-five per cent of intra-EU cases were based on investment treaties signed in the 1990s or earlier. The remaining cases were based on treaties signed in 2000 to 2002. The Energy Charter Treaty (ECT) (1994) was the most frequently invoked treaty, accounting for about 45 per cent of known intra-EU cases (76 cases). The Czechia–Germany BIT (1990) was second with 9 cases. The three known intra-EU disputes initiated in the first seven months of 2018 were based on the ECT.[2]

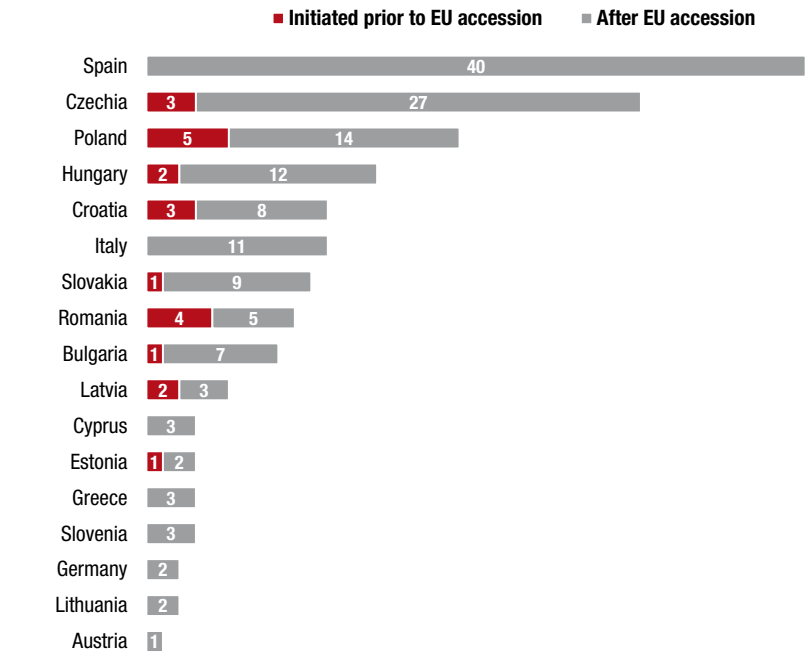
Economic sectors involved

About 83 per cent of the intra-EU cases related to activities in the services sector. Half of the services cases related to the supply of electricity, gas, steam and air (77 cases) and 15 per cent to financial and insurance services (24 cases). The remaining cases in the services sector included information and communication; water supply sewerage and waste management; transportation and storage; and others. Twelve per cent of all intra-EU cases involved activities in the manufacturing sector and the remaining five per cent concerned primary industries.

[2] After 31 July 2018, two more intra-EU disputes – both based on intra-EU BITs – were filed at ICSID.

Figure 2. Intra-EU cases: most frequent respondents, 1987–31 July 2018

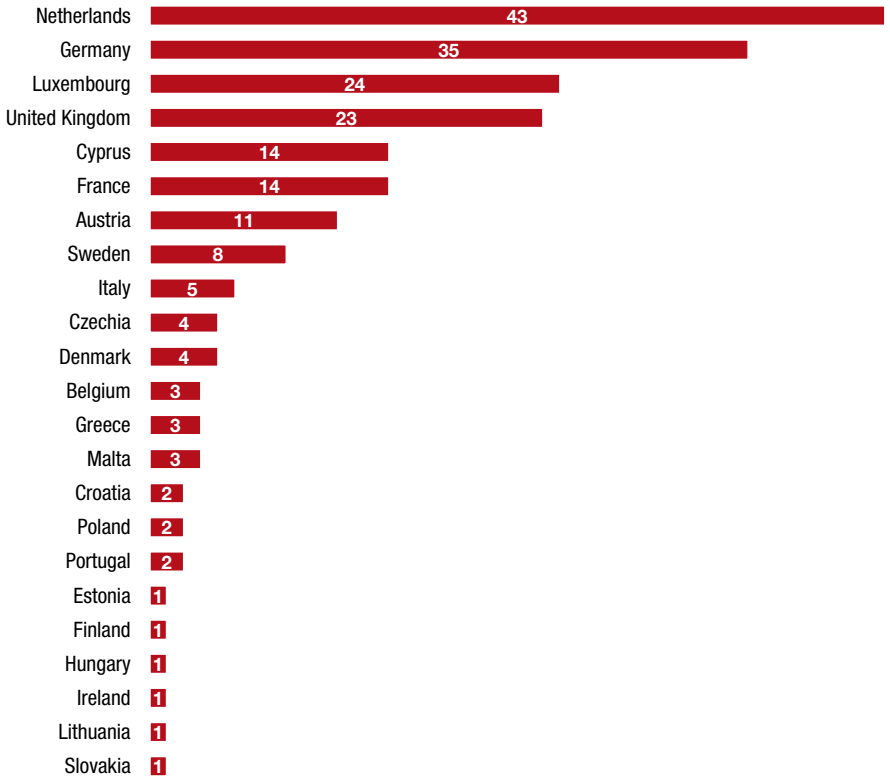
(Number of known cases)



Source: UNCTAD, ISDS Navigator.

Figure 3. Intra-EU cases: most frequent home States of claimants, 1987–31 July 2018

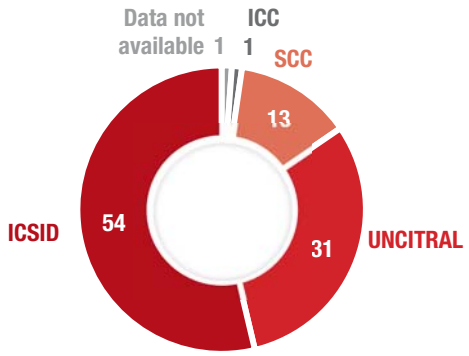
(Number of known cases)



Source: UNCTAD, ISDS Navigator.

Note: Several cases were brought by two or more claimants having different (EU and non-EU) nationalities.

Figure 4. Known intra-EU cases filed by arbitral rules, 1987–31 July 2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

Arbitral forums and rules

About 55 per cent of the known intra-EU cases were filed under the ICSID Convention (figure 4). The UNCITRAL Arbitration Rules were the second most used procedural basis, followed by the Arbitration Rules of the Stockholm Chamber of Commerce (SCC) Arbitration Institute.

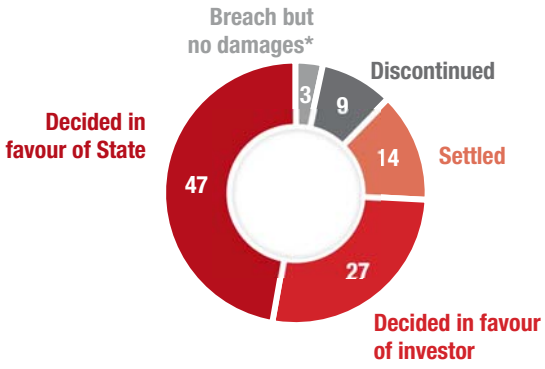
Overall outcomes

By 31 July 2018, some 91 intra-EU ISDS cases had been concluded and 83 were pending. About 45 per cent of all concluded cases were decided in favour of the State, and about one-quarter were decided in favour of the investor, with monetary compensation awarded. The remaining cases were settled, discontinued or the tribunal found a treaty breach but did not award monetary compensation (figure 5).

Of the cases that were resolved in favour of the State, one-quarter were dismissed for lack of jurisdiction and three-quarters were dismissed on the merits.

Looking at the totality of the cases decided on the merits (i.e. where a tribunal had to determine whether the challenged measure breached any of the IIA's substantive obligations), about 55 per cent were decided in favour of the State and 45 in favour of the investor (figure 6).

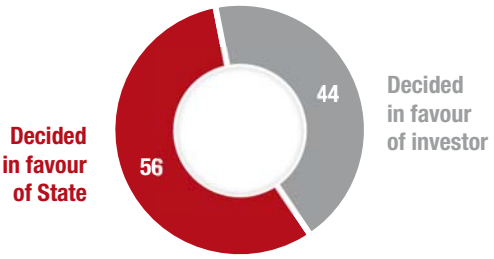
Figure 5. Results of concluded intra-EU cases, 1987–31 July 2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

** Decided in favour of neither party (liability found but no damages awarded).*

Figure 6. Results of decisions on the merits in intra-EU cases, 1987–31 July 2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

Note: Excluding cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons), and (iv) decided in favour of neither party (liability found but no damages awarded).

Overall amounts claimed and awarded

On average, successful claimants in intra-EU disputes were awarded about 45 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was $232 million (approx. €203 million) and the median $100 million (approx. €88 million).[3] The average amount awarded was $104 million (approx. €91 million) and the median $34 million (approx. €30 million). These amounts do not include interest or legal costs, and some of the awarded sums may have been subject to set-aside or annulment proceedings.

ICSID annulment proceedings and judicial review by national courts

Disputing parties initiated annulment proceedings in about 25 per cent of the decided intra-EU cases conducted under the ICSID Convention (7 out of 27 decided cases).

At 37.5 per cent, domestic set-aside proceedings were more frequent in non-ICSID Convention cases (18 out of 48 cases, in which at least one decision or award was rendered).

2. Decided intra-EU investor–State arbitrations: facts, measures and salient issues

This section covers 49 intra-EU arbitrations that were decided by tribunals (i.e. excluding pending, settled or discontinued cases) and for which the arbitral decisions were publicly available by 31 July 2018 (annex 2). It provides an overview of the following issues:

- Affected investment – stage of business activity and types of assets impaired
- Types of challenged measures
- Alleged rationale underlying the challenged measures
- Alleged adverse effects of the challenged measures
- Salient legal issues that have arisen in the proceedings

Annex 2 contains a mapping of principal legal issues (jurisdiction, admissibility and merits) discussed by tribunals in intra-EU arbitral decisions.

Out of the 49 reviewed cases, 10 were dismissed for lack of jurisdiction, and more than half of the remaining cases (22 out of 39) ended with the dismissal of all claims on the merits. In 14 cases, tribunals decided in favour of the investor, awarding compensation. In three more cases, tribunals found that the respondent State had breached the treaty, but awarded no damages to the claimants.

Affected investment: stage of business activity and types of assets impaired

Intra-EU disputes have involved businesses at various stages, ranging from pre-investment activities to the dissolution of an enterprise (table 1).

Table 1. Investment stages and activities

Stage of investment	Activity affected	Case examples
Pre-investment stage	Participating in public tenders	*Bosca v. Lithuania* *Nordzucker v. Poland*
	Obtaining approvals for the project	*ECE v. Czechia*
Development stage	Constructing a production facility	*Blusun v. Italy*
Operational stage	Producing goods, providing services	Renewable energy cases against Spain *Emmis v. Hungary* *HICEE v. Slovakia* *Micula v. Romania (I)* *EURAM Bank v. Slovakia* *Rompetrol v. Romania*

[3] Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

Table 1. Investment stages and activities

Stage of investment	Activity affected	Case examples
Dissolution stage	Bankruptcy proceedings	*Dan Cake v. Hungary* *Oostergetel v. Slovakia*

Source: UNCTAD.

In many cases, the affected assets owned by investors were shareholdings in companies that operate in various sectors (e.g. banking, sale of automobile parts, health insurance, food manufacturing, oil refining, yarn and thread manufacturing, marketing of pharmaceuticals, construction, radio broadcasting, customs processing, frozen-food warehousing, supply of visual aids and technologies for the blind) (table 2).

Table 2. Examples of types of affected assets owned by investors

Types of affected assets (not exhaustive)	Case examples
Shareholdings in local companies (The relevant local companies may own a large variety of tangible and intangible assets)	*A11Y v. Czechia* *Accession Mezzanine v. Hungary* *Achmea v. Slovakia (I & II)* *Antaris Solar and Göde v. Czechia* *Antin v. Spain* *Austrian Airlines v. Slovakia* *Binder v. Czechia* *Busta v. Czechia* (and most other cases)
Rights under contracts, e.g. for airport management, supply of heating or energy, and other	*ADC v. Hungary* *AES v. Hungary (II)* *Electrabel v. Hungary* *OKO v. Estonia* *Roussalis v. Romania* *UAB v. Latvia*
Land	*Gavrilovic v. Croatia*
Government bonds	*Poštová banka and Istrokapital v. Greece*
Claims to money under commercial arbitration awards	*Anglia v. Czechia* *Gavazzi v. Romania*

Source: UNCTAD.

Types of challenged measures

Intra-EU cases involved challenges to conduct at all levels of government (central, regional and municipal) as well as all branches of power (legislative, executive and judicial).

In several cases, investors complained about the acts of entities and persons that were not State organs, but whose acts could allegedly be attributed to the government. Such entities/persons have included, in particular, State-owned enterprises and bankruptcy trustees or liquidators.

Conduct that has given rise to investor claims can be divided into measures of general application (e.g. legislative acts that apply to all persons that fall within the act's scope) and individual measures (i.e. acts or conduct directed at a specific person or entity). Sometimes, a single case may combine challenges to general and individual measures.

(i) Measures of general application

Legislative acts concerning the renewable energy sector were among the most frequently challenged measures of general application in intra-EU ISDS proceedings (table 3).

Table 3.	Examples of measures of general application	
Respondent State	Measures challenged (as alleged)	Case examples
Spain	Legislative acts concerning the renewable energy sector, abolishing the earlier legal regime and replacing it with a new regime based on different principles and significantly less benefits for producers	Renewable energy cases against Spain
Italy	Legislative acts placing certain restrictions on the use of agricultural land for solar plants and amending the rules on 'feed-in tariffs'	*Blusun v. Italy*
Greece	Legislation concerning restructuring of government bond obligations	*Poštová banka and Istrokapital v. Greece*
Czechia	Abrogation of tax incentives and introduction of a levy for solar energy producers	*Antaris Solar and Göde v. Czechia* *JSW Solar and Wirtgen v. Czechia*
Slovakia	Legislation prohibiting private health insurance companies to distribute profits and requiring them to reinvest all such profits in the provision of public health care	*EURAM Bank v. Slovakia* *HICEE v. Slovakia*
Hungary	Legislation introducing regulated prices for electric energy	*AES v. Hungary (II)*
Romania	Legislation revoking the majority of incentives previously granted to investors in the country's "disfavoured" regions	*Micula v. Romania (I)*
Romania	Legislation abolishing duty-free activities at airports	*EDF v. Romania*
Czechia	Legislation concerning quotas for the production of sugar	*Eastern Sugar v. Czechia*

Source: UNCTAD.

Given that a measure of general application may affect multiple actors, a single measure can give rise to multiple claims. The most prominent example are the 40 intra-EU cases against Spain arising out of its regulatory reforms in the renewable energy sector (box 2). Multiple claims may also be filed in respect of an individual measure, for example if several foreign shareholders in the affected local enterprise launch separate arbitrations.

Box 2. Arbitration claims against Spain arising out of its renewable energy reforms

In 2007, Spain passed legislation that created favourable conditions for investing in its renewable energy sector. By the end of 2013, Spain had an estimated accumulated tariff deficit (the financial gap between the subsidies paid to energy producers and revenues derived from energy sales to consumers) of some $35 billion (€30 billion), which threatened the sustainability of Spain's electricity system. In response, Spain adopted a series of legislative acts that first changed certain features of the original 2007 regime and later abolished the regime altogether and replaced it with a new one by June 2014.

Renewable energy investors from other EU member States have sought to recover a total compensation of at least $9.1 billion (€7.8 billion) in 40 ISDS proceedings against Spain under the ECT.[a]

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