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# Investor-state protection disputes involving EU Member States

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State of play

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IN-DEPTH ANALYSIS

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Author: Issam Hallak  
Members' Research Service  
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EN

There are major concerns in the EU in relation to the investor-state dispute settlement (ISDS) systems associated with investor protection agreements. ISDS relies on a legal framework of arbitration that is separate from domestic courts.

This analysis provides an overview of ISDS cases involving current EU Member States. The main finding is that, on average, nearly 16 % of claimed amounts translate into (known) compensation in cases involving current EU Member State respondents. Nearly a third of the amounts claimed in EU Member States' pending cases relate to potential breaches of the Energy Charter Treaty (ECT), where most claimants are investors with reported EU home states only. Furthermore, the decision of the Court of Justice of the EU in the *Achmea* case is likely to have reduced the number of intra-EU initiated cases.

## **AUTHOR(S)**

Issam Hallak, Members' Research Service, EPRS

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To contact the author(s), please email: [eprs@ep.europa.eu](mailto:eprs@ep.europa.eu).

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[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu)

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## Executive summary

The European Union (**EU**) has exclusive competence in the area of common commercial policy, which covers international investment in the form of foreign direct investment. One key component of international investment policies are international investment protection agreements (**IPAs**). IPAs are state-to-state agreements or provisions in treaties that guarantee the protection of assets of investors from one party located in the territory of the other party. The EU Member States together have more than 1 200 IPAs in force, and some individual Member States have nearly one hundred.

An essential feature of IPAs is that private investors can take legal action against a state. This involves an investor-state dispute settlement (**ISDS**) procedure, pursuant to an IPA, at an arbitral tribunal, i.e. away from domestic courts. ISDS provisions have raised serious concerns in the EU on account of the large sums claimed by multinational firms in connection with new regulations, and especially the lack of trust in existing ISDS arbitral systems. The IPAs and their associated ISDS provisions are sometimes perceived as a legal framework that gives excessive protection to investors and may prevent states, including EU Member States, from regulating in favour of the environment, public health or public services.

In response, the EU has modified the legal mechanism applicable to the IPAs it signs. They now provide for an ad hoc 'investment court system', whose members and mechanisms are determined by the parties. In addition, the European Commission is actively participating in talks to reform the United Nations arbitration rules, one of the most widely used arbitral systems, with a view to enhancing transparency and predictability, while cutting costs. Nevertheless, the number of IPAs signed by the EU has stalled, and none of those following the revised model has as yet entered into force. This can be explained to some extent by the opinion of the Court of Justice of the EU (**CJEU**) of May 2017, which declared that the ISDS mechanism was an EU competence shared with its Member States. In June 2022, the European Parliament adopted a resolution on the future of EU international investment policy that welcomes the EU's new approach and calls for further steps, in particular to strengthen the right of states to regulate.

This analysis provides an overview of ISDS cases involving the current EU Member States as respondents, and initiated in the period 2000 to 2021. The results show that while the number of EU Member State ISDS cases and the amounts claimed boomed in the 2010-2017 period, these have since diminished. Moreover, on average, nearly 16 % of claimed amounts translate into (known) compensation in cases involving EU Member State respondents, in the form of either arbitral decisions or non-arbitral settlements. Nearly a third of the amounts claimed in EU Member States' pending cases relate to potential breaches of the Energy Charter Treaty (**ECT**), where most claimants are investors with reported EU home states only.

The CJEU's 2018 ruling in the *Achmea* case makes arbitral decisions incompatible with EU law in ISDS cases involving an EU investor and an EU Member State. The analysis shows that the proportion of non-EU claimants among ISDS cases with an EU Member State respondent has been substantially higher in the period since the CJEU *Achmea* decision.

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## List of abbreviations and acronyms

CJEU	Court of Justice of the European Union
ECT	Energy Charter Treaty
EU	European Union
IIA	international investment agreement
IPA	international protection agreement
ICSID	International Centre for Settlement of Investment Disputes
ISDS	investor-state dispute settlement
MIC	multilateral investment court
MS	Member State
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law



# 1. Introduction

## 1.1. Background

The Treaty of Lisbon<sup>1</sup> entered into force on 1 December 2009 and provides the legal basis for the EU's exclusive competence in the area of common commercial policy and customs union. Article 207 of the Treaty on the Functioning of the EU (TFEU)<sup>2</sup> specifies that the domains covered by the common commercial policy include foreign direct investment.<sup>3</sup> The European Commission's objectives for its international investment policy<sup>4</sup> include the securing of a 'predictable and transparent business environment', making the EU an attractive place for international investors – but protecting the EU's essential interests – and safeguarding the right of countries to regulate. A major instrument of the EU's international investment policy is the international investment protection agreement.<sup>5</sup>

The international investment protection agreement (**IPA**) is a policy instrument frequently used by countries worldwide, including EU Member States. IPAs are state-to-state agreements (or provisions in treaties), that create a legal framework with a view to protecting investments held by investors ('foreign investors') of one party located in the territory of the other party ('host country'). In order to avoid political hazard, IPAs typically provide for foreign investors to request dispute settlements away from the judicial system of the host country (out-of-court procedure).

In practice, investor-state dispute settlements (**ISDS**) are typically settled by means of international arbitral tribunals, and the arbitral procedure is detailed in the IPA, which may rely on one of the standard arbitral systems.<sup>6</sup> Accordingly, should the foreign investor (the 'claimant') consider that the host state (the 'respondent') breached the protection provisions of the IPA, the 'claimant' investor and the 'respondent' state appoint one or more arbitrators, who decide on the validity of the claim and the compensation (the 'award'). While the number of IPAs flourished in recent decades,<sup>7</sup> so did the number of cases against states and the amounts claimed. This analysis focuses on ISDS cases involving the current 27 EU Member States.<sup>8</sup>

<sup>1</sup> See the European Parliament [factsheet](#) for an overview of the Treaty of Lisbon (2009).

<sup>2</sup> Treaty on the Functioning of the European Union (TFEU), Title II: Common commercial policy, [Article 207](#).

<sup>3</sup> The scope of the competence was further defined in opinions of the Court of Justice of the EU. In particular, CJEU opinion [C-2/15](#) of May 2017 excludes portfolio management and ISDS mechanisms. See the following EPRS publications: L. Puccio, [CJEU Opinion on the EU-Singapore Agreement](#), May 2017; I. Hallak, [Multilateral Investment Court – Overview of the reform proposals and prospects](#), January 2020; I. Hallak, [EU international investment policy: Looking ahead](#), February 2022.

<sup>4</sup> DG Trade, [Objectives of EU investment policy](#).

<sup>5</sup> For a recent review of the EU's international investment policy, see I. Hallak, [EU International investment Policy](#), 2022.

<sup>6</sup> Looking at the entire UNCTAD ISDS Navigator dataset ending in December 2021, the most frequently used ISDS arbitration rules are those provided by 1) the World Bank International Centre for Settlement of Investment Disputes – ICSID and the ICSID [Additional Facility](#) (645 and 65, respectively, 710 in total); 2) the UN Commission on International Trade Law (UNCITRAL) – 368 cases; 3) the Stockholm Chamber of Commerce (SCC) – 53 cases; and 4) the International Chamber of Commerce (ICC) – 22 cases. Appointing rules provided for by ICSID and UNCITRAL are described in I. Hallak, [Multilateral investment court: Framework options](#), EPRS, European Parliament, June 2021.

<sup>7</sup> According to the UNCTAD [IIA Navigator](#), another UNCTAD database compiling international investment agreements (or treaties with investment provisions), as of September 2022 there are 3 289 international investment agreements or treaties with investment provisions signed (2 563 in force), of which 1 361 (41 %) have an EU Member State as a party (1 213 in force, 47 %).

<sup>8</sup> UNCTAD produces notes reviewing worldwide ISDS cases, e.g. [ISDS cases facts and figures 2020](#).

## 1.2. The data source and scope of the analysis

The analysis presented below aims to provide an overview of ISDS cases that involve current EU Member State respondents. The analysis is based on the ISDS Navigator, a publicly available dataset maintained by the United Nations Conference on Trade and Development (UNCTAD), which keeps track of investor-state dispute cases pursuant to international investment agreements<sup>9</sup> worldwide and reports the main details and decisions.<sup>10</sup> The information included in the ISDS Navigator is collected from primary sources and completed by a wide range of secondary sources. The earliest case in the database was initiated in 1987, and the period covered by the latest update available at the time of publication ends in December 2021.

## 2. EU ISDS cases

In the 2000-2021 period, 1 146 disputes were initiated worldwide, of which 267 respondents are current EU Member States (Figure 1<sup>11</sup>). Of the 370 cases pending worldwide, 84 involve an EU Member State respondent.

Among cases with respondents currently an EU Member State,<sup>12</sup> the largest known award (as of 2021) is US\$4.379 billion (Table 1), awarded in 2005.<sup>13</sup> The same case also represented the largest amount claimed (US\$10 billion).<sup>14</sup> The 10 largest cases are relatively well distributed over the 2000-2021 period as to the year of initiation, and in all cases claimant investors have one home state located in the EU.<sup>15</sup> Four of the ten largest ISDS cases use the ETC as the legal basis, the other six use bilateral (i.e. state-to-state) IPAs. Of the 10 largest cases, Czechia and Spain were respondents in two cases each, with total awards of US\$551 million and US\$464 million, respectively. The total amount claimed by the 10 largest projects with a known award was US\$21.2 billion, and the awards totalled US\$7.7 billion (equivalent to 36.3 % of the total amount claimed).

The sum total of the 10 largest amounts claimed in pending cases is US\$8.2 billion (Table 2) which is less than 40 % of that claimed in awarded cases previously reported. The largest amount claimed is US\$3.3 billion in a case involving a UK firm and the Romanian state. There are three other cases involving non-EU claimants, namely from Switzerland, the US and Russia, all of them with a bilateral

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<sup>9</sup> The generic term is 'international investment agreement' (IIA), protection of investment being one aspect of the IIAs. The latter may indeed cover other aspects of international investments, such as market access. Therefore, this report uses the term investment protection agreement (IPA) for clarity purposes, since ISDS cases refer to the protection of the assets and investments of foreign investors pursuant to international investment agreements. The EPRS briefing [EU international investment policy: Looking ahead](#) defines and reviews these aspects in relation to EU international investment policy.

<sup>10</sup> The [ISDS Navigator](#). UNCTAD is a permanent body established by the United Nations (UN) in 1964. It is part of the [UN Secretariat](#) and reports to the [UN General Assembly](#) and the Economic and Social Council (ECOSOC).

<sup>11</sup> The figure reports the outcome of 264 observations for which the outcome is known; three observations report an unknown outcome ('not available').

<sup>12</sup> For the purposes of clarity, the analysis considers EU membership at the time of publication, rather than at the time of the initiation of the case.

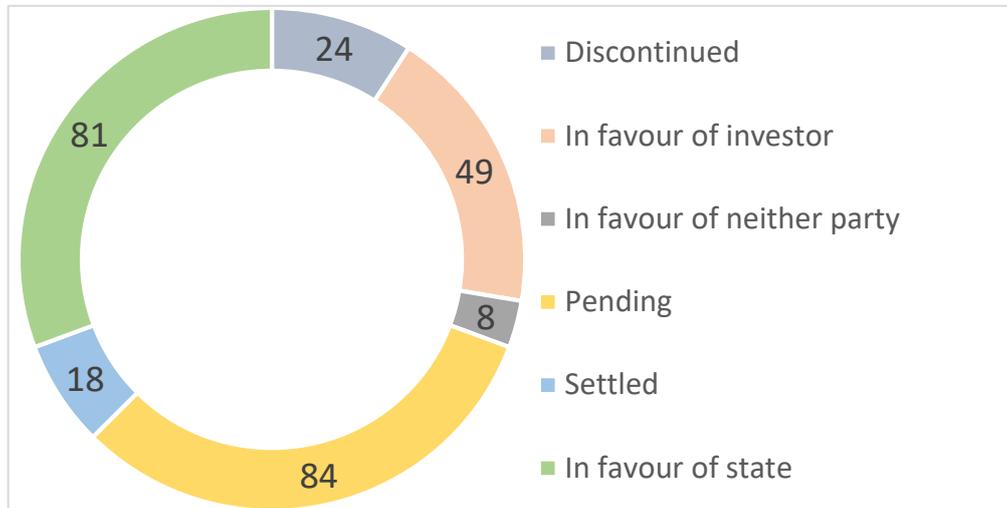
<sup>13</sup> [Eureko v Poland](#), 2003. Worldwide, the largest award (or settlement) in favour of the investor was ruled in 2014 and totalled US\$40 billion: [Hulley enterprises v Russia](#), 2005.

<sup>14</sup> Several decisions may be taken in a case. The table reports the latest date reported in the dataset.

<sup>15</sup> The home state of the claimant determines the IPA the claimant may use for the legal action, and an investor may have more than one home state. Of the ISDS cases reporting one of the top 10 largest compensations, 5 claimants had the Netherlands as a home state, 2 had Luxembourg, 2 had Sweden, and 1 had France.

IPA applicable. There are five EU claimant firms, for which the ECT is the applicable IPA. The role played by the ECT is thus apparent in both awarded and pending cases.

Figure 1 – Status/outcome of ISDS cases with EU Member State respondents



Data source: UNCTAD [ISDS Navigator](#); author's calculations.

The status/outcome refers to the status of the original arbitration proceedings, as of the date of the last update (December 2021). The statuses and outcomes are [defined](#) as follows:

- *Discontinued*: the arbitration was discontinued for a reason other than a (known) settlement, e.g. non-payment of arbitration fees;
- *In favour of investor*: the tribunal found that the respondent state had committed one or more breaches of the IIA applicable and awarded monetary compensation or non-pecuniary relief to the claimant investor;
- *In favour of neither party*: the arbitral tribunal found that the respondent state had committed at least one breach of the IPA applicable but did not award monetary compensation to the claimant investor;
- *Pending*: a case remains pending if any of the following elements remain to be decided: jurisdiction, liability (merits), compensation.
- *Settled*: the disputing parties settled the case and the arbitral proceedings were therefore discontinued;
- *Decided in favour of state*: the tribunal found that the respondent state had not committed any breach of the international investment agreement (IIA) applicable or dismissed the case for lack of jurisdiction.

Table 1 – Ten largest awards with a respondent currently an EU Member State

Case	Respondent	Claimant home state	IPA applicable	Amount claimed (US\$ million)	Amount awarded (US\$ million)	% of claimed	Year initiated	Year of decision
<a href="#">Eureko v Poland</a>	Poland	Netherlands	<a href="#">Netherlands - Poland</a>	10 000	4 379	44 %	2003	2005
<a href="#">Vattenfall v Germany (II)</a>	Germany	Sweden	Energy Charter Treaty	5 140	1 714	33 %	2012	2021
<a href="#">NextEra v Spain</a>	Spain	Netherlands	Energy Charter Treaty	586	324	55 %	2014	2019
<a href="#">Saluka v Czech Republic</a>	Czechia	Netherlands	<a href="#">Czechia - Netherlands</a>	1 900	281	15 %	2001	2006
<a href="#">CME v Czech Republic</a>	Czechia	Netherlands	Czechia - Netherlands	495	270	55 %	2000	2003
<a href="#">Rail World v Estonia</a>	Estonia	Netherlands/USA	<a href="#">Estonia - Netherlands;</a> <a href="#">Estonia - USA</a>	440	200	45 %	2006	2007
<a href="#">PL Holdings v Poland</a>	Poland	Luxembourg	<a href="#">Belgium/Luxembourg</a> <a href="#">– Poland</a>	480	178	37 %	2014	2017
<a href="#">Eiser and Energía Solar v Spain</a>	Spain	Luxembourg/UK	Energy Charter Treaty	280	140	50 %	2013	2017
<a href="#">EDF v Hungary</a>	Hungary	France	Energy Charter Treaty	100	133	133 %	2009	2015
<a href="#">Micula v Romania (I)</a>	Romania	Sweden	<a href="#">Romania - Sweden</a>	833	116	14 %	2005	2016
TOTAL				20 254	7 734	38 %		

Data source: UNCTAD [ISDS Navigator](#); compiled by the author.

Table 2 – Ten largest amounts claimed, pending cases with an EU Member State respondent

EU pending cases	Respondent	Claimant home state	IPA applicable	Rules	Amount claimed (US\$ million)	Year initiated
<a href="#">Gabriel Resources v Romania</a>	Romania	Canada/UK	<a href="#">Romania - UK</a>	ICSID	3 286	2015
<a href="#">Diag and Štáva v Czech Republic</a>	Czechia	Switzerland	<a href="#">Czechia-Switzerland</a>	Ad-hoc (none)	1 000	2017
<a href="#">CSP Equity Investment v Spain</a>	Spain	Luxembourg	ECT	SCC	976	2013
<a href="#">Invenergy v Poland</a>	Poland	USA	<a href="#">Poland - USA</a>	UNCITRAL	700	2018
<a href="#">Landesbank Baden-Würt and others v Spain</a>	Spain	Germany	ECT	ICSID	561	2015
<a href="#">Elitech and Razvoj v Croatia</a>	Croatia	Netherlands	<a href="#">Croatia - Netherlands</a>	ICSID	500	2017
<a href="#">E.ON SE and others v Spain</a>	Spain	Germany	ECT	ICSID	377	2015
<a href="#">Russian Fund v Lithuania</a>	Lithuania	Russia	<a href="#">Lithuania - Russia</a>	UNCITRAL	300	2019
<a href="#">LSG Building Solutions and others v Romania</a>	Romania	Austria/Cyprus/ Germany/ Netherlands	ECT	ICSID	250	2018
<a href="#">REENERGY v Spain</a>	Spain	Luxembourg	ECT	ICSID	239	2014
TOTAL					8 189	

Data source: UNCTAD [ISDS Navigator](#); author's compilation.

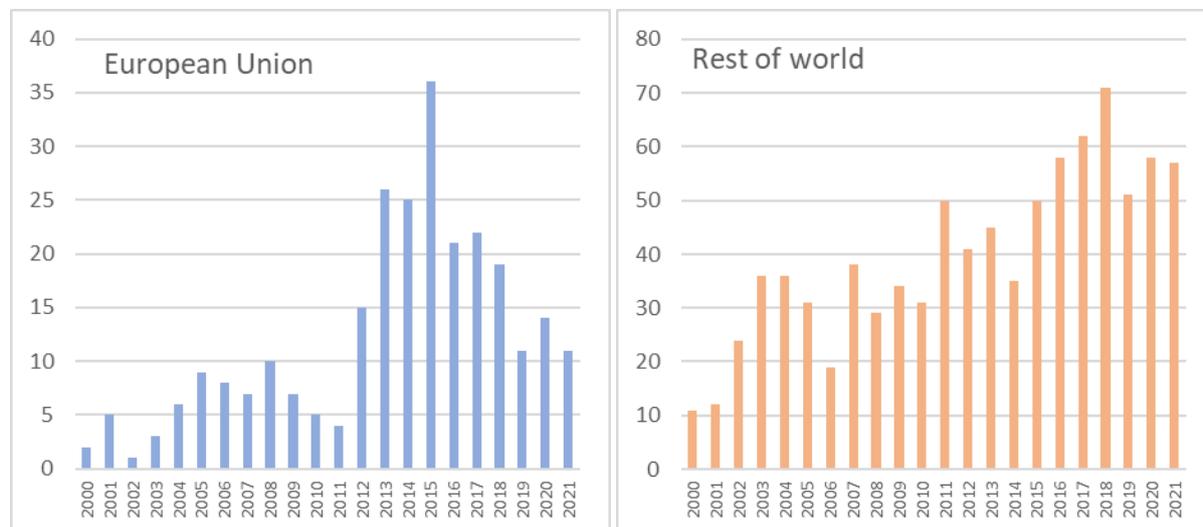
## 2.1. Historical perspective

The number of cases involving EU Member State respondents (Figure 2) jumped and peaked in the period 2012 to 2017. By contrast, the number of cases involving non-EU respondents grew continuously, from 11 in the year 2000 to more than 50 cases a year since 2017, with a peak at 71 in 2018. The amounts claimed (Figure 3) exhibit a different pattern, since both EU and non-EU cases peaked in the 2000s (EU cases peaked at US\$10.2 billion in 2004 and non-EU cases peaked at US\$119 billion in 2006). Nevertheless, the EU faced larger total yearly claimed amounts from 2013 until 2018, with a yearly average of US\$5.5 billion. Non-EU countries (the rest of the world) saw average claims of US\$25 billion a year in the 2010s. The distribution of amounts claimed is thus relatively uneven across the years with peaks in some years corresponding to individual cases.

Finally, Figure 4 reports the total amount awarded by year of initiation of the ISDS case. The figure depicts a very uneven pattern over the years, given that the cases initiated in the latter years are likely to be ongoing. The figure shows a peak in cases initiated in 2003 involving today's EU Member

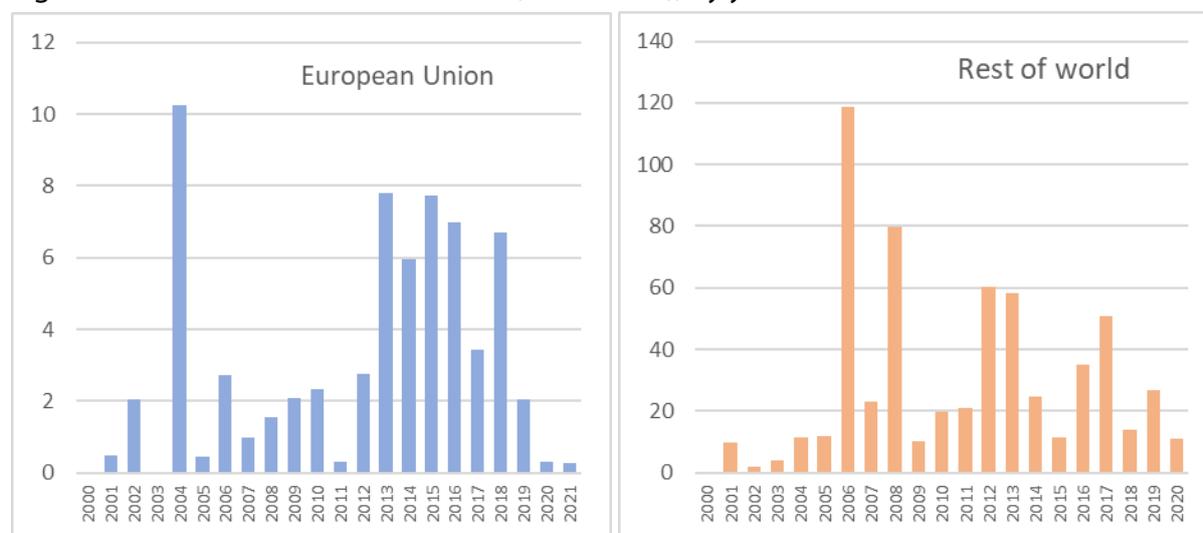
States (US\$4.5 billion), which includes the largest ever award for an EU Member State,<sup>16</sup> and in 2006 for the rest of the world (US\$120 billion), which includes the largest award ever (US\$40 billion).<sup>17</sup> In the cases initiated after 2005, the average annual total award was US\$239 million in the EU, and US\$2.6 billion in the rest of the world.

Figure 2 – Number of new cases, by year of initiation 2000-2021



Data source: UNCTAD [ISDS Navigator](#); compiled by the author.

Figure 3 – Total new amount claimed (US\$ billion), by year of initiation 2000-2021

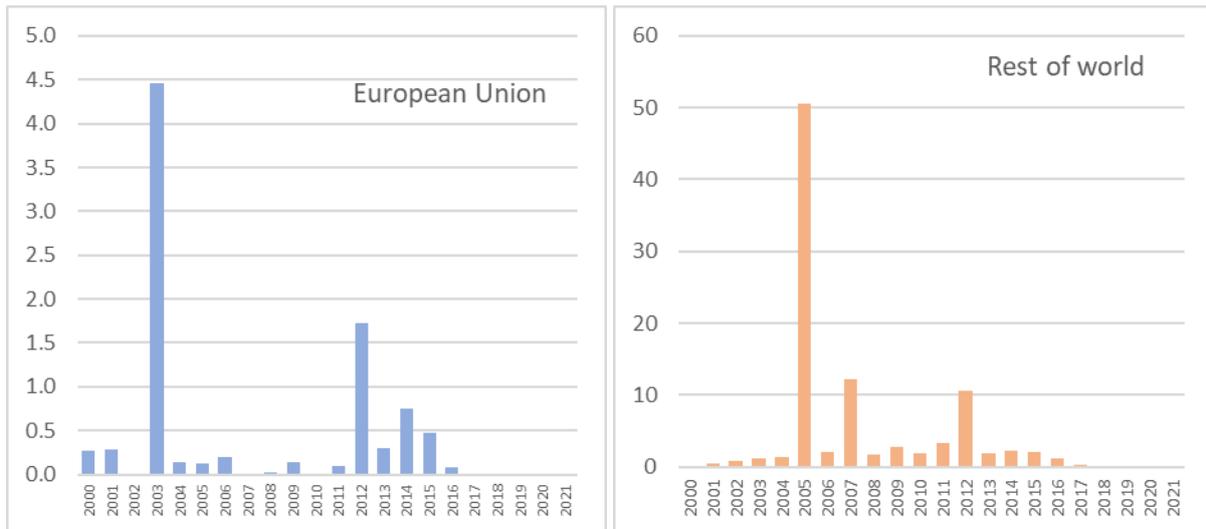


Data source: UNCTAD [Investment Dispute Settlement Navigator](#); compiled by the author.

<sup>16</sup> [Eureko v Poland](#) (2003); see Table 1. Poland was not yet an EU Member State when the case was initiated.

<sup>17</sup> [Hulley enterprises v Russia](#) (2005), pursuant to ECT.

Figure 4 – Total amount awarded or settled for (US\$ billion), by year of initiation 2000-2021



Data source: UNCTAD [Investment Dispute Settlement Navigator](#); author's calculations.

## 2.2. Claims versus awards and the role of the ECT

Table 3 shows the total amounts claimed and awarded (or settled for) in all ISDS cases, distinguishing between the cases where the respondents are EU Member States and those where respondents are non-EU countries (rest of the world). The total amount awarded (or settled for) is slightly above US\$9 billion for cases involving an EU Member State (US\$96.7 billion for cases involving non-EU respondents).

In ISDS cases with an EU Member State respondent and an arbitral decision in favour of the investor, the sum total of the awards represents 23.8 % of the total sum initially claimed (cases with non-EU respondents: 37.4 %). In settled cases, i.e. cases resolved before an arbitral decision was taken, total compensation represents 29 % of the total initially claimed (cases with non-EU respondents: 15.0 %). Altogether, in cases with EU respondents where payments have been decided (and are known), total awards represent 27.4 % of claimed amounts (non-EU respondents: 31.6 %).

Moreover, cases with EU respondents that did not result in a decision (or settlement) with a payment to the investor represented 42.1 % (US\$24.1 billion) of total claimed amounts of concluded cases (US\$57.2 billion). This means that overall, final payments to investors represent 15.9 % of the total amount claimed in concluded cases (cases with non-EU respondents: 19.0 %).

As to pending cases, the total amount claimed is US\$10.0 billion in cases with EU Member State respondents (cases with non-EU respondents: US\$110 billion), and the remaining cases still pending represent 14.9 % of all amounts claimed from EU Member State respondents (cases with non-EU respondents: 17.8 %).

Table 3 – Amounts claimed and awarded, EU Member States and rest of world

Outcome	Amount claimed (US\$ million)	Amount awarded (US\$ million)	Amount awarded as a share of claim
<b>EU Member States</b>			
Total	<b>67 240</b>	<b>9 084</b>	
- In favour of investor	10 250	2 440	23.8 %
- Settled	22 893	6 644	29.0 %
- In favour of state / neither, or discontinued	24 085	0	
<i>Subtotal – concluded cases</i>	<i>57 228</i>	<i>9 084</i>	<i>15.9 %</i>
- Pending	9 993	-	
- Not available	19	-	
<b>Rest of world</b>			
Total	<b>621 883</b>	<b>96 751</b>	
- In favour of investor	226 640	84 734	37.4 %
- Settled	79 915	12 017	15.0 %
- In favour of state / neither, or discontinued	203 576	0	
<i>Subtotal – concluded cases</i>	<i>510 131</i>	<i>96 751</i>	<i>19.0 %</i>
- Pending	110 448	-	
- Not available	1 304	-	

Data source: UNCTAD [ISDS Navigator](#); author's calculations.

The ISDS cases with an EU Member State respondent are pursuant to either the ECT or to bilateral (state-to-state) IPAs. Table 4 shows that among all ISDS cases with an EU Member State respondent, the ECT represents a large share of the claims and awards. Indeed, 46 out of 84 pending cases are pursuant to the ECT (55 %); the total amount claimed is US\$3.2 billion (32 % of the amount claimed in pending cases).

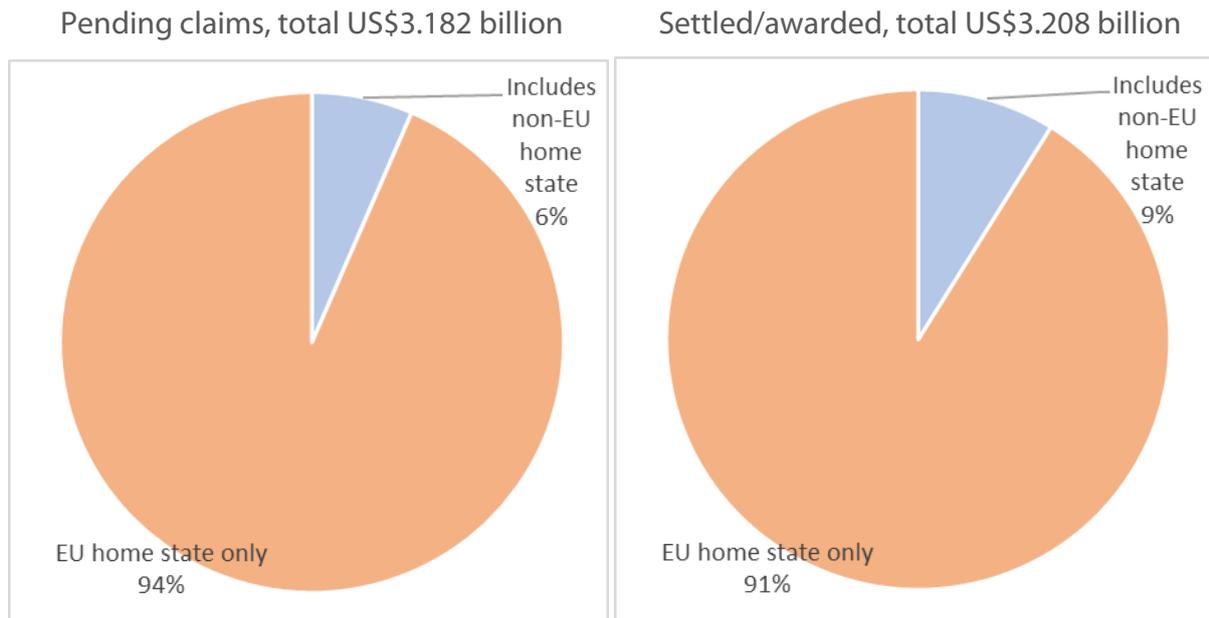
Table 4 – Applicable IPA of ISDS cases with an EU Member States respondent

Applicable IPA	Status	Number of cases	Claimed \$US million	Awarded \$US million
<b>Bilateral IPA</b>	Total	<b>165</b>	<b>47 067</b>	<b>5 876</b>
	- Pending	38	6,811	0
	- Awarded/settled	125	40 237	5 876
	- Unknown	2	19	0
<b>Energy Charter Treaty</b>	<b>Total</b>	<b>102</b>	<b>20 173</b>	<b>3 208</b>
	- Pending	46	3,182	0
	- Awarded/settled	55	16 991	3 208
	- Unknown	1	0	0

Data source: UNCTAD [ISDS Navigator](#); author's calculations.

Complementing Table 4, Figure 5 shows the share of the amounts claimed and awarded (or settled) under the ECT according to the home state of the investor claimant. The chart distinguishes between firms that report at least one non-EU home state ('Includes non-EU home state') and those reporting EU home state(s) only ('EU home state only').<sup>18</sup> Figure 5 shows that 94 % of ECT claimed amounts still pending, and 91 % of settled case amounts, originate from firms whose home state is in the EU only. The ECT therefore plays a major role in EU ISDS pending cases, and a large majority of claims stem from firms whose home state is in the EU.

Figure 5 – Energy Charter Treaty – EU v non-EU investor home state (amounts)



Data source: UNCTAD [ISDS Navigator](#); author's calculations.

Finally, Table 5 shows the distribution of amounts claimed and awarded/settled by main sector of activity involved.<sup>19</sup> It shows that EU respondents are affected in two sectors in particular, namely *K – Financial and insurance activities* (37.5 % of total amounts claimed) and *D – Electricity, gas, steam and air conditioning supply* (30.5 %). *K – Financial and insurance activities* comes first in terms of amounts awarded (53.8 %), followed by *D – Electricity, gas, steam and air conditioning* (35.2 %). The sectoral pattern differs from that of the whole world (includes the EU) where 77.2 % of total amounts awarded relate to sector *B – Mining and quarrying* (44.4 % of total amount claimed), followed by *K – Financial and insurance activities*, just 7.3 % of total amounts awarded.

<sup>18</sup> Indeed, the ISDS Navigator may report more than one home state for the investor claimant.

<sup>19</sup> The sector classification follows the UN International Standard Industrial Classification (ISIC) Rev.4. Whenever more than one sector is associated with a single case, the amount is split equally between each sector.

Table 5 – Amounts claimed and awarded by sector – world (includes EU) and EU

SECTOR	WORLD				EU			
	Claimed	% total	Awarded	% total	Claimed	% of total	Awarded	% total
A – Agriculture, forestry and fishing	3 462	0.5 %	318	0.3 %	150	0.2 %	8	0.1 %
B – Mining and quarrying	305 845	44.4 %	81 729	77.2 %	5 917	8.8 %	0	0.0 %
C – Manufacturing	37 698	5.5 %	3 917	3.7 %	8 490	12.6 %	251	2.8 %
D – Electricity, gas, steam and air conditioning supply	71 029	10.3 %	5 676	5.4 %	20 504	30.5 %	3 195	35.2 %
E – Water supply; sewerage, waste management and remediation activities	4 032	0.6 %	960	0.9 %	165	0.2 %	0	0.0 %
F – Construction	54 046	7.8 %	1 225	1.2 %	1 331	2.0 %	238	2.6 %
G – Wholesale and retail trade; repair of motor vehicles and motorcycles	2 082	0.3 %	128	0.1 %	530	0.8 %	20	0.2 %
H – Transportation and storage	20 570	3.0 %	495	0.5 %	637	0.9 %	53	0.6 %
I – Accommodation and food service activities	5 853	0.8 %	6	0.0 %	0	0.0 %	0	0.0 %
J – Information and communication	62 661	9.1 %	1 670	1.6 %	1 367	2.0 %	274	3.0 %
K – Financial and insurance activities	57 652	8.4 %	7 715	7.3 %	25 208	37.5 %	4 885	53.8 %
L – Real estate activities	51 277	7.4 %	1 193	1.1 %	1 050	1.6 %	14	0.2 %
M – Professional, scientific and technical activities	3 963	0.6 %	71	0.1 %	146	0.2 %	0	0.0 %
N – Administrative and support service activities	1 794	0.3 %	136	0.1 %	228	0.3 %	136	1.5 %
O – Public administration and defence; compulsory social security	1 138	0.2 %	238	0.2 %	35	0.1 %	0	0.0 %
Q – Human health and social work activities	256	0.0 %	0	0.0 %	432	0.6 %	9	0.1 %
R – Arts, entertainment and recreation	1 727	0.3%	40	0.0 %	0	0.0 %	0	0.0 %

Data source: UNCTAD [ISDS Navigator](#); author's calculations.

### 3. The effect of the *Achmea* case decision

In 2004, Slovakia opened its health system market to national and EU operators offering private sickness insurance services. Achmea, a Dutch insurance company, obtained authorisation as a sickness insurance institution, and set up as a subsidiary in Slovakia, through which it offered private sickness insurance services in Slovakia. Slovakia reversed the liberalisation by a law of 25 October 2007, prohibiting the distribution of profits generated by private sickness insurance activities. This decision was again reversed on 1 August 2011, following a judgment of the Constitutional Court of the Slovak Republic of 26 January 2011 that the prohibition was contrary to the Slovak constitution. Achmea considered that Slovakia's legislative measures had caused it damage and brought arbitration proceedings<sup>20</sup> against the Slovak Republic in October 2008 pursuant to Article 8 of the Netherlands-Slovakia bilateral investment agreement (1991).<sup>21</sup> On 7 December 2012, the arbitral tribunal ordered the Slovak Republic to pay Achmea an award of €22.1 million.

As Frankfurt am Main (Germany) was chosen as the place of arbitration, German law applied to the proceedings. Slovakia brought an action before the Oberlandesgericht Frankfurt am Main (Higher Regional Court) appealing that, since the accession of the Slovak Republic to the European Union on 1 May 2004, the Netherlands-Slovakia IPA constituted an agreement between EU Member States, so that 'in the event of conflict the provisions of EU law take precedence,' over the provisions of the IPA. Slovakia expressed doubts as to the compatibility of the arbitration clause in Article 8 of the Netherlands-Slovakia IPA with the TFEU,<sup>22</sup> and the referring court in Germany referred a question to the CJEU accordingly.

The CJEU judgment of 6 March 2018<sup>23</sup> establishes that the ISDS provisions contained in the IPA between the Netherlands and Slovakia, which envisage arbitral decisions, are **incompatible with EU law**. The judgment is considered to set the rule with respect to the incompatibility of similar ISDS provisions contained in IPAs between EU Member States, or 'intra-EU' IPAs.<sup>24</sup>

CJEU judgment of 6 March 2018:

*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*<sup>25</sup>

<sup>20</sup> [Achmea B.V. \(formerly Eureko B.V.\) v The Slovak Republic \(I\) \(PCA Case No. 2008-13\)](#).

<sup>21</sup> [Netherlands-Slovakia Bilateral Investment Treaty \(1991\)](#); [summary](#) of the IPA available at UNCTAD International Investment Agreements Navigator.

<sup>22</sup> The doubts expressed as to compatibility refer to Articles [18](#) (Non-discrimination), [267](#) (jurisdiction of the Court of Justice of the EU) and [344](#) (submission of disputes) of the TFEU.

<sup>23</sup> Judgment of the Court of 6 March 2018 ([C-284/16](#)) in the case *Slovak Republic v Achmea BV*.

<sup>24</sup> C. Fouchard and M. Krestin, [The judgment of the CJEU in the Slovak Republic v. Achmea case – a loud clap of thunder on the intra-EU BIT sky!](#), Kluwer Arbitration Blog, 7 March 2018.

<sup>25</sup> Following the decision of the CJEU, on 5 May 2020, 23 EU Member States signed the [multilateral termination agreement](#) for the termination of intra-EU IPAs, which entered into force on 29 August 2020. All EU Member States are signatories of the agreement, except Austria, Finland, Ireland and Sweden. Status (ratification, acceptance or approval) of the agreement by country is recorded in the Council's [Treaties and Agreements database](#). Note that



the European Commission reiterated that it supports the establishment of an appeal tribunal and the appointment of full-time arbitrators.<sup>29</sup> Although the MIC will remain an out-of-court framework, the full-time status of arbitrators and new codes of conduct, among other arrangements, are expected to enhance the arbitrators' independence.<sup>30</sup>

The Commission is also negotiating the 'modernisation' of the ECT.<sup>31</sup> The reform targets the ISDS framework and intends explicitly to allow countries to take action relating to legislation in the field of environmental protection and climate action for instance, with respect to existing investments. The objective is to prevent EU Member States from deciding to withdraw from the ECT. Nevertheless, following the Commission's announcement<sup>32</sup> in June 2022 of an agreement in principle reached on a modernisation of the ECT – and the publication of the proposed text – a number of EU Member States have formally informed the European Commission of their intention to withdraw from the ECT, including France, the Netherlands, Poland and Spain.<sup>33</sup>

## 4.2. Council

In its negotiating directives for a convention establishing a multilateral investment court (MIC),<sup>34</sup> the Council states that the reform initiative is part of the EU's new approach to ISDS, moving away from the existing arbitration framework towards a court system, thereby responding to some 'legitimate public concerns'. Among the new features, the court should be a permanent international institution, where the judges are 'tenured, qualified and receive permanent remuneration'. Their impartiality and independence should be guaranteed and proceedings before the court should be conducted in a transparent manner. The new court would provide for an appeal tribunal and it would be essential that the decisions be enforced. Countries would decide to assign to the authority of the court disputes arising under future and existing IPAs.

In its negotiating directives for the modernisation of the ECT,<sup>35</sup> the Council states that the ECT provisions should 'adjust to new political and economic global changes (including in the energy sector)'. While continuing to aim at a high level of investment protection, the ECT should explicitly reaffirm the 'right to regulate' in areas such as the protection of health, safety, the environment or public morals, social or consumer rights. Furthermore, the EU approach to its IPAs and in UNCITRAL talks should be reflected in the modernised ECT. The EU should also strive to ensure that a future multilateral investment court applies to the ECT. Finally, the modernised ECT should include provisions on sustainable development and contribute to the promotion of human rights and international labour standards, including through provisions on transparency and corporate social responsibility/responsible business conduct.

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<sup>29</sup> EPRS briefing [Multilateral investment court: Framework options](#) (2021) provides an overview of debated options. EU proposals are available on UNCITRAL [website](#), e.g. [possible reform for an ISDS](#) published in 2019.

<sup>30</sup> The MIC would provide a 'legal framework' for ISDS, but arbitral decisions would rely on the provisions of the IPA.

<sup>31</sup> See A. Wilson, '[Modernisation of the Energy Charter Treaty](#)', EPRS, European Parliament, April 2022.

<sup>32</sup> European Commission [news article](#) of 24 June 2022. The ECT Secretariat published an [overview](#) of the agreement in principle.

<sup>33</sup> For a recent overview, see the [statement](#) of 7 November 2022 of the International Institute for Sustainable Development (IISD). [Belgium](#) and [Slovenia](#) are seriously considering their withdrawal as well.

<sup>34</sup> See Wilson (2022).

<sup>35</sup> Council's negotiating directives of 2 July 2019 for the modernisation of the Energy Charter Treaty – Adoption ([9305/19 + ADD 1](#)) and [press release](#) (15 July 2019).

### 4.3. European Parliament

In June 2022, the European Parliament adopted a resolution on the future of EU international investment policy based on an own-initiative report for which Anna Cavazzini (Greens/EFA, Germany) was the rapporteur.<sup>36</sup> The resolution stresses that an alarming number of investment claims target environmental measures, and regrets that countries are being sued in relation to 'policies on climate, the phasing out of fossil fuels, or the just transition'. Parliament also urges the Commission to exclude 'investments in fossil fuels or any other activities that pose significant harm to the environment and human rights from treaty protections, in particular investor-state arbitration mechanisms'. The resolution also points out that 'even in the absence of legal proceedings, the explicit or implicit threat of recourse to investment arbitration can enhance the position of investors in negotiations with states (the 'chilling effect')'. Finally, it points out that the ECT is the most litigated investment agreement in the world today. It welcomes efforts to modernise the ECT and urges the Commission to ensure that a revised ECT will immediately prohibit fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement. It also welcomes the UNCITRAL talks with a view to reforming the ISDS system.

### 4.4. Stakeholder and expert opinions

In the EU, there were widespread protests as the EU and the United States launched negotiations on a transatlantic trade and investment partnership (TTIP) in 2013. The concerns about TTIP related to the ISDS system.<sup>37</sup> By giving 'so much power to multinational corporations', stakeholders feared that the investor protection provisions in the agreements would pose a 'threat for the environment, health and labour regulations'. Similar concerns were raised concerning the Canada-EU Comprehensive Economic and Trade Agreement (CETA). Some major associations still believe that the MIC proposed by the EU in response to the ISDS concerns would be insufficient to tackle the issue.<sup>38</sup> In response to criticism of the MIC, the Commission has pointed out on various occasions that the MIC aims to bring legitimacy, transparency and neutrality to decisions. The rights of parties and the precise role of the court in procedures should be determined by the investment agreements.<sup>39</sup>

Major associations campaigning against the ECT and ISDS in general, such as Stop ISDS, argue that governments fear that the ECT will hamper their efforts towards green transition.<sup>40</sup> Kyla Tienhaara and Lorenzo Cotula of the International Institute for Environment and Development published a report on fossil fuel assets and international investment agreements. The authors estimate that of the 257 foreign-owned coal power plants in their datasets, at least 75 % are protected by a treaty with ISDS provisions; 51 of these plants are protected by the ECT alone.<sup>41</sup>

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<sup>36</sup> [Resolution of 23 June 2022 on the future of EU international investment policy](#), European Parliament, (2021/2176/INI).

<sup>37</sup> See, for instance, Euractiv, [Anti-TTIP demonstrations seize European capitals](#), 13 October 2014.

<sup>38</sup> See, for instance, Greenpeace's [response](#) to the public consultation on a multilateral reform of investment dispute resolution, 15 March 2017. See also [Corporate Europe Observatory](#), which acknowledges substantial progress in the MIC, but views it as insufficient.

<sup>39</sup> European Commission, [Follow up given by the Commission to the opinions adopted by the Committee of the Regions during the plenary session](#), 19 July 2018.

<sup>40</sup> Stop ISDS, [ECT: "ecocide" treaty puts Member States and EU Commission at odds](#), 25 July 2022.

<sup>41</sup> K. Tienhaara and L. Cotula, [Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets](#), International Institute for Environment and Development (IIE) library, October 2020.

In her analysis,<sup>42</sup> Ivana Damjanovic (Australian National University) argues that international law for the protection of foreign investors is at a crossroads, and the EU has been an emerging actor in the field, in particular with the initiative to establish the multilateral investment court. To her, the approach of the EU is a 'pragmatic but ambitious long-term strategy for achieving the EU's internal integrationist and external trade objectives'.<sup>43</sup>

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<sup>42</sup> I. Damjanovic, [Between Aspirations and Reality: The European Union and International Investment Law Reform](#). Australian National University, PhD thesis, 2020.

<sup>43</sup> For further stakeholder positions, see I. Hallak, [Multilateral Investment Court Overview of the reform proposals and prospects](#) (2020), [Multilateral investment court: Framework options](#) (2021), and [EU international investment policy: Looking ahead](#) (2022), EPRS, European Parliament.

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There are major concerns in the EU in relation to the investor-state dispute settlement (ISDS) provisions associated with investor protection agreements. ISDS relies on a legal framework of arbitration that is separate from domestic courts. This analysis provides an overview of ISDS cases involving current EU Member States. The main finding is that, on average, nearly 16 % of claimed amounts translate into (known) compensation in cases involving current EU Member State respondents. Nearly a third of the amounts claimed in EU Member States' pending cases relate to potential breaches of the Energy Charter Treaty (ECT), where most claimants are investors with reported EU home states only. Moreover, the decision of the Court of Justice of the EU in the *Achmea* case is likely to have reduced the number of intra-EU initiated cases.

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