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Implications of *Achmea*

How the *Achmea* Judgment Impacts Investment Agreements with Non-EU Countries

Key Findings

- In the *Achmea* ruling, the European Court of Justice interpreted investor-state dispute settlement provisions as incompatible with EU law because it sidelines and undermines the powers of domestic courts.
- Although the *Achmea* ruling applies only to bilateral investment agreements between countries that are Member States of the EU, the case's reasoning may also be applied to agreements between the EU or EU Member States and third countries.
- Three key facets of the *Achmea* ruling suggest that investment agreements with third countries will also be incompatible with EU law:
    - Arbitration tribunals through investor-state dispute settlement are not part of the EU judicial system.
    - Such tribunals may resolve disputes that relate to the application or interpretation of EU law.
    - The awards of the tribunal are not subject to review by Member State courts.
- If the *Achmea* ruling is applied to agreements with third countries, there will be major implications — including the inability to enforce tribunals' awards under many existing agreements and to negotiate new agreements that include investment arbitration with the EU or EU Member States.

Introduction

Embodied in thousands of trade and investment treaties, the arbitration system known as investor-state dispute settlement (ISDS) creates a parallel system of justice accessible only to and heavily biased toward large corporations. When a corporation believes its investment in a country has been (or might be) harmed by government action, it can bring a lawsuit directly before a three-person arbitral tribunal, and governments can be forced to pay billions in damages to the corporate plaintiff.

In November 2017, more than 50 governments met as part of a working group of the UN Commission on International Trade Law (UNCITRAL) to discuss reforms to the ISDS system, with another meeting at the end of April 2018 to continue the discussion. Because the European Union is aggressively pushing a proposal to create a multilateral investment court to hear investment disputes, it is important for states to understand the implications of the European Court of Justice's *Achmea* opinion addressing the legality of agreements that include ISDS provisions.

On March 6, 2018, the European Court of Justice (ECJ) handed down its landmark ruling in *Achmea*.[1] The ECJ found an arbitration clause in an international investment agreement between two European Union (EU) Member States incompatible with EU law.

The *Achmea* ruling reveals that the ECJ understands ISDS as sidelining and undermining the powers of the courts of the Member States. In the words of the ECJ, by concluding international agreements with arbitration clauses, Member States

> "*remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law*"[2]

Removing disputes that may concern EU law from ordinary courts in the EU goes against the EU's constitutional charter, the EU Treaties. Therefore, it is not permitted under EU law.

This ruling is likely to have profound consequences for investment arbitration clauses in current and future investment treaties and chapters concluded by the EU or EU Member States. **Although the case's ruling only applies explicitly to bilateral investment agreements between EU member countries, the implications of the case may well extend much further to investment agreements between the EU[3] or EU Member States and non-EU countries.**

If the reasoning of *Achmea* applies to investment agreements with third countries, the consequences will be vast:

- Cases may be brought before EU (and EU Member State) courts — for instance, by public interest organisations — that question whether investment agreements concluded by Member States with third countries are compatible with EU law.
- Member States will be legally obliged to contest the jurisdiction of any arbitration tribunal established under provisions that do not follow the requirements outlined by *Achmea*.[4]
- If the seat of a tribunal is in a Member State whose national law permits applicants to challenge awards rendered by a tribunal, Member States will be obligated to challenge these awards should they lose the dispute.
- EU courts will no longer be able to enforce international investment awards that were rendered by tribunals whose jurisdiction conflicts with EU law.[5] Decisions made under bilateral investment agreements that were ratified before the Member State joined the EU may still be enforceable by EU courts,[6] although this is far from certain,[7] and such agreements represent only a narrow subset of Member States' bilateral investment agreements.[8]
- The European Commission will no longer have the ability to authorize new bilateral investment agreements that contain investment arbitration between Member States and other countries[9], or negotiate such agreements for the EU.

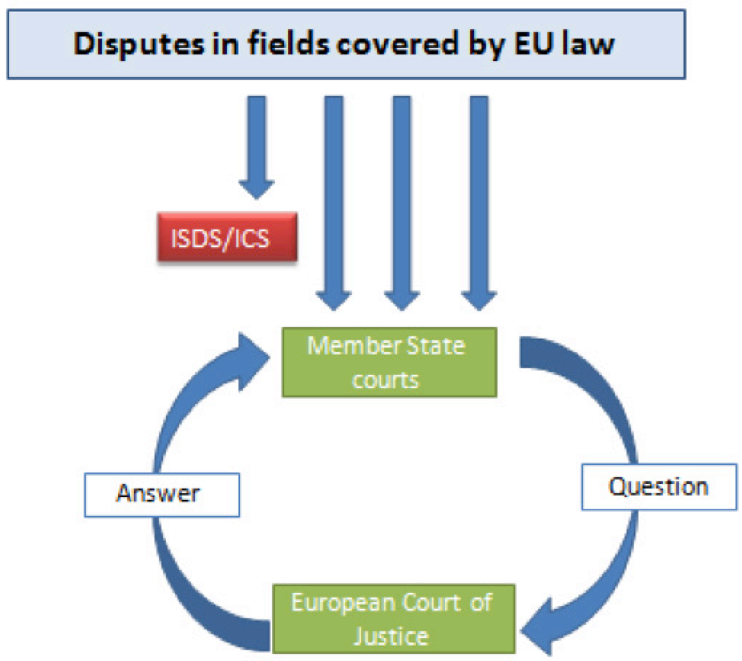
This legal briefing explains the *Achmea* case and examines how the ECJ's reasoning applies to agreements between the EU or EU Member States and non-EU countries.

The *Achmea* judgment explained

In the *Achmea* case, the government of Slovakia went before German courts to challenge an award rendered against it by an investment tribunal under a Dutch–Slovak bilateral investment treaty (BIT). The tribunal had awarded a Dutch investor (*Achmea*) EUR 22.1 million in damages because of the Slovak government's decision to partially reverse an earlier decision to privatize the health insurance market. The Slovak government argued that the arbitration tribunal had no jurisdiction over the dispute and that the dispute should have been resolved before the Slovak courts. The Slovak government thus challenged the investment award before German courts, which subsequently referred the case to the ECJ.

The ECJ found that the arbitration clause in the BIT was contrary to EU law because, essentially, it upset the judicial dialogue between the

FIGURE 1
How ISDS/ICS affects the EU's judicial system under Article 19 TEU and 267 TFEU



courts of the Member States and the ECJ. This judicial dialogue is of fundamental constitutional importance to the EU, and the ECJ refers to it as the "keystone" of the EU's judicial system. Under the EU Treaties, Member States must ensure that their courts are empowered to resolve disputes in fields covered by EU law. Those Member State courts, in turn, may and sometimes must refer to the ECJ for questions of EU law. This dialogue ensures the full and uniform interpretation and application of EU law in all Member States, as well as the judicial protection of the rights of individuals under EU law.[10]

In *Achmea*, the ECJ found that investment arbitration provisions are not compatible with EU law where (1) the investment tribunal is not part of the EU judicial system but (2) may still resolve disputes that are liable to relate to the interpretation or application of EU law, and (3) those decisions are not sufficiently reviewable by a Member State court. Therefore, it is likely that this same reasoning will be applied to investment agreements with non-EU countries as well.

Investment agreements with non-EU countries that are affected by *Achmea*

While it is clear that intra-EU BITs are incompatible with EU law, the reasoning of the *Achema* decision suggests that investment arbitration provisions between the EU or EU Member States and non-EU countries are also impermissible under EU law. The following section assesses investment arbitration provisions with third countries in light of the *Achmea* judgment.

1. Arbitration tribunals established under agreements with third countries are not part of the EU judicial system

In *Achmea*, the ECJ found that the arbitration clause in the BIT violated EU law because investment tribunals established under that clause were not part of the EU's judicial system, and therefore they were not subject to mechanisms under EU law to ensure that the rules of the EU are fully effective.[11] For instance, if a court of a Member State misapplies EU law or interprets it incorrectly, an individual may hold that Member State liable for damages and the European Commission may bring infringement proceedings against it.[12] These safeguards are absent in investment arbitration. Indeed, the ECJ noted that *"it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two [EU] member states that is one of the principal reasons for the existence"* of the arbitration clause in question.[13] Although the Court assessed the arbitration provisions within the Netherlands-Slovak BIT in particular, the same observation is pertinent to all investment arbitration tribunals. Thus, the ECJ's finding on this point would apply to any investment arbitration provisions between EU Member States and third countries.

2. Arbitration tribunals established under agreements with third countries may resolve disputes that could relate to the interpretation or application of EU law

Under *Achmea*, a tribunal that is not part of the EU judicial system will violate the ECJ's exclusive jurisdiction if it may be called on to resolve a dispute that could relate to the interpretation or application of EU law.[14]

The ECJ thus casts a very wide net: Disputes that are liable to relate to the interpretation or application of EU law must be resolved by courts that are part of the EU judiciary, to the exclusion of any other body. Moreover, the ECJ made clear that this was true even if the question before the tribunal is only whether the BIT has been violated and not specifically focused on the validity of EU law.[15] For the ECJ, the mere fact that the applicable law that tribunal must "*take account of*" could include EU law (as either domestic law or international law) was sufficient to consider that such arbitration clauses violate EU law.[16]

In addition, the ECJ's reasoning suggests that the real issue is not whether an investment tribunal is actually interpreting EU law, but whether the dispute in question falls within a field covered by EU law. Under the EU Treaties, Member States must ensure effective judicial remedies in fields within the EU's judicial system. Therefore, Member States must empower their domestic courts to provide judicial remedies in fields covered by EU law and, consequently, may not remove from their power any disputes in those fields by providing arbitration tribunals jurisdiction over them instead.

To our knowledge, no agreement between an EU Member State and a third country explicitly excludes disputes in fields covered by EU law from the jurisdiction of ISDS tribunals. In fact, almost all investment agreements allow tribunals to resolve disputes that involve EU law somehow.

As an initial matter, most international investment agreements are silent on the question of applicable law.[17] The rules that govern the procedure, either *ad hoc* or administered arbitration, make clear that tribunals have the power to interpret EU law. For instance, when ICSID tribunals hear these cases, ICSID rules require the tribunal to apply the law of the contracting state and international law.[18] Thus, investment agreements that are silent on the applicable law and permit disputes to be resolved by ICSID tribunals are contrary to EU law.

Similarly, investment agreements that are silent on the applicable law and allow disputes to be resolved under the UNCITRAL arbitration rules are also contrary to EU law because the UNCITRAL rules allow the tribunal to apply the law that it determines to be appropriate.[19] This provision does not prevent the tribunal from interpreting or applying EU law in its decisions; therefore, the tribunal could do so in violation of the ECJ's exclusive jurisdiction. The Stockholm Chamber of Commerce Arbitration Rules have a similar provision.[20]

BITs of Member States that do contain applicable law clauses do not fare better. Besides Ireland, which has no BITs, every EU Member State is party to at least one BIT that includes domestic or international law as part of its applicable law and which would therefore likely be found to violate EU law under *Achmea*. At the very least, such tribunals are not prohibited from taking EU law into account. In addition, although not addressed by *Achmea*, many investment agreements include a reference to domestic law in their definition of investment, for purposes of defining the applicability of the agreement. Because these provisions require the arbitration tribunals to apply domestic law to determine whether the investment is covered under the agreement, these provisions also conflict with EU law.

Even if arbitration clauses prohibit tribunals from taking EU law into account, it is questionable whether

BOX 1

Which countries could stand to lose from the Achmea case?

Argentina,[30] China,[31] Columbia,[32] India,[33] Iran,[34] Israel,[35] Kuwait,[36] Lebanon,[37] Mexico,[38] Panama,[39] Russia,[40] South Korea,[41] and Venezuela.[42]

These countries are the home states of investors that have used ISDS in the past (although not always against EU countries) and may therefore seek to invoke ISDS against Member States in the future, based on existing BITs they have with EU Member States. These countries are unlikely to be able to enforce arbitration tribunal decisions in the EU, significantly diminishing the value of investment protection provisions provided under their BITs with EU Member States.

BOX 2

ISDS awards that could be unenforceable as a result of *Achmea*

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Safa v. Greece (2016)[43]

In 2008, the European Commission ordered Greece to recover subsidies granted to the Hellenic Shipyards in order to abide by EU anti-competition rules. Greece expressed concern that ending the subsidies would endanger military shipbuilding essential to national security. In 2010, the EU issued an order allowing Greece to continue the subsidies as long as the shipyard's activities were limited to domestic military operations. In order to comply with the order, Greece announced that the shipyard would end contracts with foreign navies. Safa, a Lebanese investor in the shipyard, brought an ISDS claim under the Lebanon-Greece BIT. The tribunal must now interpret the 2010 EU order and determine whether Greece's decision to end the contracts was necessary to comply with the order.

Flemingo DutyFree v. Poland (2014)[44]

In 2008, the Centre for EU Transport Projects (CEUTP) agreed to co-finance an airport modernization project for the Chopin Airport in Warsaw, Poland. In the course of completing the project, Poland terminated commercial leases with airport vendors in Terminal 1. The Flemingo Group, owner of Polish duty-free operator BH Travel, brought an arbitration claim under the India-Poland BIT. The tribunal considered Poland's claim that the termination was necessary to secure EU funding, thus interpreting the terms of CEUTP's financing contract with Poland. Flemingo was awarded €20 million.

Gazprom v. Lithuania (2012)[45]

The EU's 2009 Third Energy Package rules — intended to encourage competition in energy markets — required Lithuania to separate gas retail operations from gas transmission operations. Once implemented, the new rules would have prevented Lietuvos Dujos, the Lithuanian gas utility partly owned by Russian company Gazprom, from maintaining both its stakes in retail and its stakes in transmission. Gazprom commenced UNCITRAL arbitration, alleging that Lithuania's energy market transformation violated the 1999 Russia-Lithuania BIT. The ISDS tribunal was called to interpret whether Lithuania's actions were necessary to comply with the EU's regulations.

Maffezini v. Spain (1997)[46]

In 1989, Argentinian investor EAMSA partnered with a Spanish public-private entity, SODIGA, to build a chemical production facility in Galicia, Spain. Allegedly on SODIGA's advice, EAMSA began construction of the facility before the environmental impact assessment (EIA) process was complete. The project ultimately failed, and EAMSA filed for arbitration under the Argentina-Spain BIT, claiming that the Spanish government was responsible for the additional costs resulting from the EIA. The tribunal explicitly cited EU law in considering the legality of Spain's actions, revealing another example of a tribunal interpreting EU law in its decisions.

that alone would render such a provision compliant with EU law. The ECJ has made clear that disputes in fields covered by EU law must be resolved through remedies provided by Member State courts. Removing such disputes from Member State courts by empowering investment tribunals to resolve such disputes violates EU law. Given the breadth of EU law and the fact that investment agreements deal more generally with an issue explicitly addressed by the EU Treaties — the free movement of capital between EU Member States and third countries — it is clear that Member States are required to ensure the exclusive jurisdiction of their judiciary to provide remedies for resolving disputes in those fields.

3. The awards of arbitration tribunals established under agreements with third countries are not subject to full review by Member State courts

Finally, the ECJ in *Achmea* found that the Netherlands-Slovak tribunal violated EU law because the tribunal's award was not subject to full review by a Member State court. The ECJ noted that the investment agreement provided the tribunal with the freedom to choose its seat and, consequently, the applicable law concerning the review of awards. Because the tribunal in question chose Germany as its seat and German law provides for a narrow basis upon which to review an arbitration award, the possibility for EU Member States to ensure compliance with EU law was inadequate.

Although the narrow basis for review may be acceptable in the context of commercial arbitration, the ECJ explained that investment arbitration is fundamentally different because it "*derive[s] from a treaty by which [EU] member states agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.*"[21]

One of the hallmarks of investment arbitration is that not only are awards subject to limited or no judicial review,[22] such awards can also be enforced outside the country against which they are rendered. To our knowledge, all BITs between EU Member States and third countries allow for the enforcement of awards outside the EU and, at the very least, limit judicial review of such awards. Consequently, these BITs also breach this requirement set by the ECJ.

Opinion 1/17: Agreements between the EU and third countries

Lastly, *Achmea* provides several pointers regarding the direction of the ECJ's upcoming judgment in *Opinion 1/17 (CETA)* concerning whether the EU's proposed Investment Court System (ICS) in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) is compatible with EU law.[23] This Opinion, expected in early 2019, will have profound consequences for international investment agreements containing some form of ISDS negotiated by the European Union itself, including

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the proposed multilateral investment court.

In negotiating recent agreements such as the CETA, the Commission has tried to address the legal issues of ISDS,[24] but these efforts are unlikely to be sufficient under *Achmea*. The Commission did not publicly disclose its legal analysis on the compatibility of ISDS mechanisms with the Treaties.[25] Moreover, under CETA, an ICS tribunal may "consider" EU law "as a matter of fact," and in so doing, those tribunals shall follow the prevailing interpretation given to EU law by the courts or authorities of the EU.[26] However, it does not explicitly exclude disputes in fields covered by EU law from the jurisdiction of ICS tribunals. This formulation is unlikely to pass muster under *Achmea* since a tribunal under CETA may still take account of EU law and resolve disputes that may relate to the interpretation or application of EU law.

In addition, the ECJ has already found that an ISDS mechanism in the EU–Singapore free trade agreement (FTA), which is similar to the one in CETA, removed disputes from the jurisdiction of EU member states.[27] These disputes may very well fall within areas covered by EU law and thus are likely to be found incompatible with EU law.

Conclusion: Legal uncertainty and the one-way street of investment arbitration with the EU

Investors from a wide range of countries are likely to be affected by the *Achmea* decision. The reasoning of the *Achmea* decision suggests that investment arbitration provisions between the EU or EU Member States and non-EU countries are also impermissible under EU law. The result is that although investors from the EU may continue to rely fully on the system of investment protection offered under these agreements in non-EU countries, investors from third countries may not benefit from the same level of reciprocity within the EU. Awards won by third country investors could be challenged and unenforceable before EU courts, and Member States may be required to renegotiate or even denounce these investment agreements. At the very least, *Achmea* casts considerable legal uncertainty over such investment agreements, diminishing any potential advantage they bring to foreign investment.

The result of *Achmea* then is that it further exaggerates the already lopsided nature of the current system of ISDS. Investors from EU countries have been the most frequent users of ISDS. The benefits of ISDS to investors from developing economies, for instance, are far less certain and they have used the system less often.[28] Even so, investors from lower middle-income countries have brought investment disputes against EU Member States in the past.[29] The ruling in *Achmea* may take away those few benefits from investors lower middle-income countries and thus make the skewed deal of ISDS entirely one-sided.

Endnotes

1. Case C-284/16, Slovak Republic v. Achmea, EU:C:2018:158 (6 Mar. 2018) [hereinafter *Achmea*].

2. *Id.* para. 55.

3. We note that the question of compatibility of the EU's investment agreements with EU law is currently already before the ECJ. *See* CJEU Opinion 1/17 (CETA).

4. Case C-459/03, Commission of the European Communities v. Ireland, EU:C:2006:345 (30 May 2006), paras. 132-133, 169.

5. Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, EU:C:1978:49 (9 Mar. 1978), para. 17; Case C-121/85, Conegate Ltd. v. HM Customs & Excise, EU:C:1986:114 (11 Mar. 1986), para. 26.

6. Treaty on the Functioning of the European Union (TFEU), 2010 O.J. (C 83) 47, art. 351. This article nonetheless requires Member States to "take all appropriate steps" to eliminate any incompatibilities between EU law and prior international law commitments.

7. It is unclear whether Article 351 TFEU protects individual investors. *See* Case C-812/79, Attorney General v. Burgoa, EU:C:1980:231 (14 Oct. 1980), para. 10. In addition, the provision requires Member States to "take all appropriate steps" to eliminate incompatibilities, which may include a duty to disavow investment arbitration, and the ECJ could conclude that protection of the autonomy of the EU legal order trumps Article 351 TFEU. *See* Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission, EU:C:2008:461 (3 Sept. 2008), para. 304.

8. For example, BITs concluded by France, Germany, the Netherlands, Belgium and Luxembourg, and Italy were concluded after these countries founded the European Economic Community in 1958.

9. Such authorization was previously possible under article 9 of the "grandfathering regulation." Commission Regulation 1219/2012, 2012 O.J. (L 351) 40, pp. 40–46. However, authorisation is not possible if investment agreements "conflict with Union law." *Id.* art. 9(1)(a).

10. *Achmea* para. 36.

11. *Id.* para. 43.

12. CJEU Opinion 1/09, Agreement Creating a Unified Patent Litigation System, EU:C:2011:123 (8 Mar. 2011), para. 82.

13. *Achmea* para. 45.

14. *Id.* para. 39.

15. *Id.* para. 40.

16. *Id.*

17. For example, the BITs of three of the EU's largest Member States – Germany, France, and the United Kingdom – generally have no clauses on the applicable law.

18. ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006), art. 42 (1). This provision provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, *the Tribunal shall apply the law of the Contracting State party to the dispute* (including its rules on the conflict of laws) and such rules of international law as may be applicable" (emphasis added).

19. UNCITRAL Arbitration Rules (as revised in 2010), UNICTRAL (Apr. 2011), Art. 35.

20. Arbitration Rules 2017, Arbitration Institute of the Stockholm Chamber of Commerce (1 Jan. 2017), art. 22(1).

21. *Achmea* para. 55.

22. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), *entered into force* 7 June 1959, art. V; ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006), art. 53(1).

23. This Opinion was requested by Belgium following the crisis over the signature of CETA in October 2016. For more background, see Laurens Ankersmit, *Belgium Requests an Opinion on Investment Court System in CETA*, 2 Envtl. L. Network Int'l Rev. 54 (2016), https://www.researchgate.net/publication/321703966_Belgium_Requests_an_Opinion_on_Investment_Court_System_in_CETA.

24. CETA Article 8.31 contains several provisions that aim to ensure that investment tribunals under CETA will not interpret EU law. For a detailed assessment of these safeguards, see Laurens Ankersmit, *The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System*, 13 J. for European Envtl. and Planning L. 46 (2016).

25. *See* Case T-644/16, ClientEarth v. Commission (9 Sept. 2016).

26. Comprehensive Economic and Trade Agreement (CETA), EU-Canada, art. 8.31(2), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

27. CJEU Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, EU:C:2017:376 (16 May 2017), para. 292.

28. *See, e.g.,* Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements*, OECD Working Papers on International Investment 2018/01 (2018), p. 28, https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en (concluding that "the several dozen econometric studies that have tested whether there is a correlation between the existence of international investment agreements and FDI inflows to developing countries show diverse and at time contradicting results"); Lise Johnson, Brooke Skartvedt & Jesse Coleman, *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?*, Columbia Center on Sustainable Investment (11 Dec. 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/; Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* Yearbook on International Investment Law and Policy 2009/2010, p. 539 (New York: Oxford University Press, 2010).

29. There are at least 15 known investment arbitration disputes brought by investors outside the EU against EU Member States, some of which are classified as lower middle income by the World Bank. Several of these disputes involve EU law questions, directly or indirectly, and involve fields covered by EU law.

30. *See, e.g.,* Bulgaria-Argentina, 21 Sept. 1993, art. 10(4); Hungary-Argentina, 5 Feb. 1993, art. 10(4); Netherlands-Argentina, 20 Oct. 1992, art 10(7); Sweden-Argentina, 22 Nov. 1991, art. 8(4).

31. *See, e.g.,* Cyprus-China, 15 Jan. 2001, art. 9(7); Czech Republic-China, 8 Dec. 2005, art. 9(5); Estonia-China, 2 Sept. 1993, art. 8(7); Latvia-China, 15 Apr. 2004, art. 9(3); Lithuania-China, 8 Nov. 1993, art. 8(6); Malta-China, 22 Feb. 2009, art. 9(5); Slovenia-China, 13 Sept. 1993, art. 8(7); Spain-China, 14 Nov. 2005, art. 9(3).

32. Colombia-Spain, 31 Mar. 2005, art. 10(9).

33. Greece-India, 26 Apr. 2007, art. 10(4); Portugal-India, 28 June 2000, art. 10(4); Romania-Argentina, 29 July 1993, art. 10(4).

34. See, e.g., Croatia-Iran, 17 May 2000, art. 11(3).

35. Israel-Lithuania, 2 Oct. 1994, art. 1(1).

36. See, e.g., Austria-Kuwait, 16 Nov. 1996, art. 9(7); Denmark-Kuwait, 1 June 2001, art.10(6)(e); Poland-Kuwait, 5 Mar. 1990, art. 10(3)(d).

37. See, e.g., Belgium/Luxembourg-Lebanon, 6 Sept. 1999, art. 9(5); Finland-Lebanon, 25 Aug. 1997, art. 9(4); Italy-Lebanon, 7 Nov. 1997, art. 7(3); Slovakia-Lebanon, 20 Feb. 2009, art. 8(4).

38. France-Mexico, 12 Nov. 1998, art. 9(6); Germany-Mexico, 25 Aug. 1998, art. 18.

39. Panama-Spain, 10 Nov. 1997, art. 12(3).

40. Russia-Spain, 26 Oct. 1990, art. 10(3).

41. South Korea-Spain, 17 Jan. 1994, art. 9(3).

42. Venezuela-Spain, 2 Nov. 1995, art. 11(4).

43. ICSID Case No. ARB/16/20 (2016).

44. UNCITRAL (2016).

45. PCA Case No. 2011-16 (2012).

46. ICSID Case No. ARB/97/7 (2000).

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