

31ST ANNUAL ITA WORKSHOP AND ANNUAL MEETING

A TOUR AROUND THE ARBITRATION WORLD – EUROPEAN UNION

Saadia Bhatti

Dallas, 19 June 2019

CONTENTS

1

PART ONE: INVESTMENT ARBITRATION NEWS

2

PART TWO: COMMERCIAL ARBITRATION NEWS



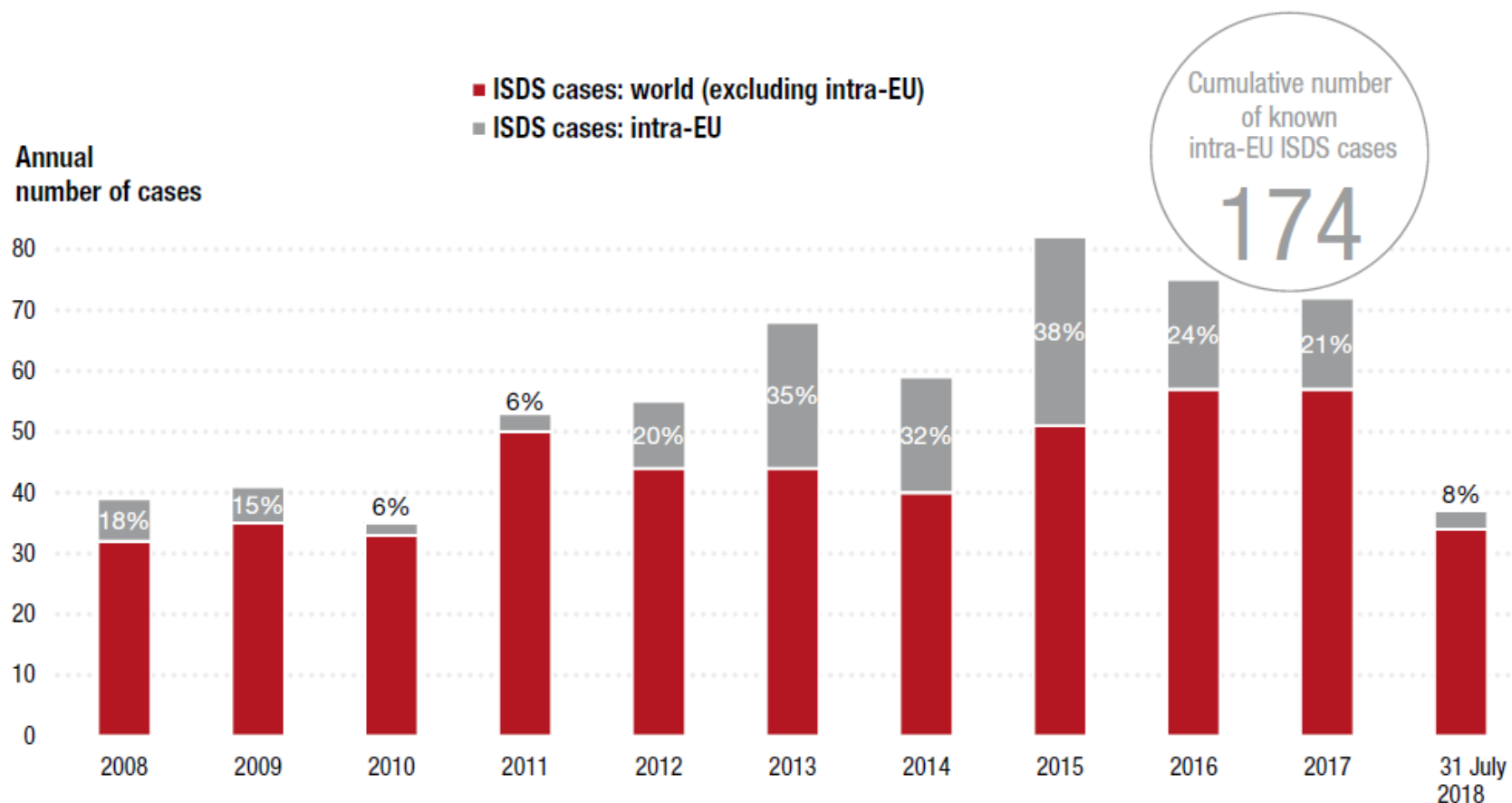
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FLASH NEWS – INVESTMENT ARBITRATION

1. ARE INTRA-EU ARBITRATIONS OVER?

20% of total Investment arbitration cases (2018)

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



Source: UNCTAD, ISDS Navigator.

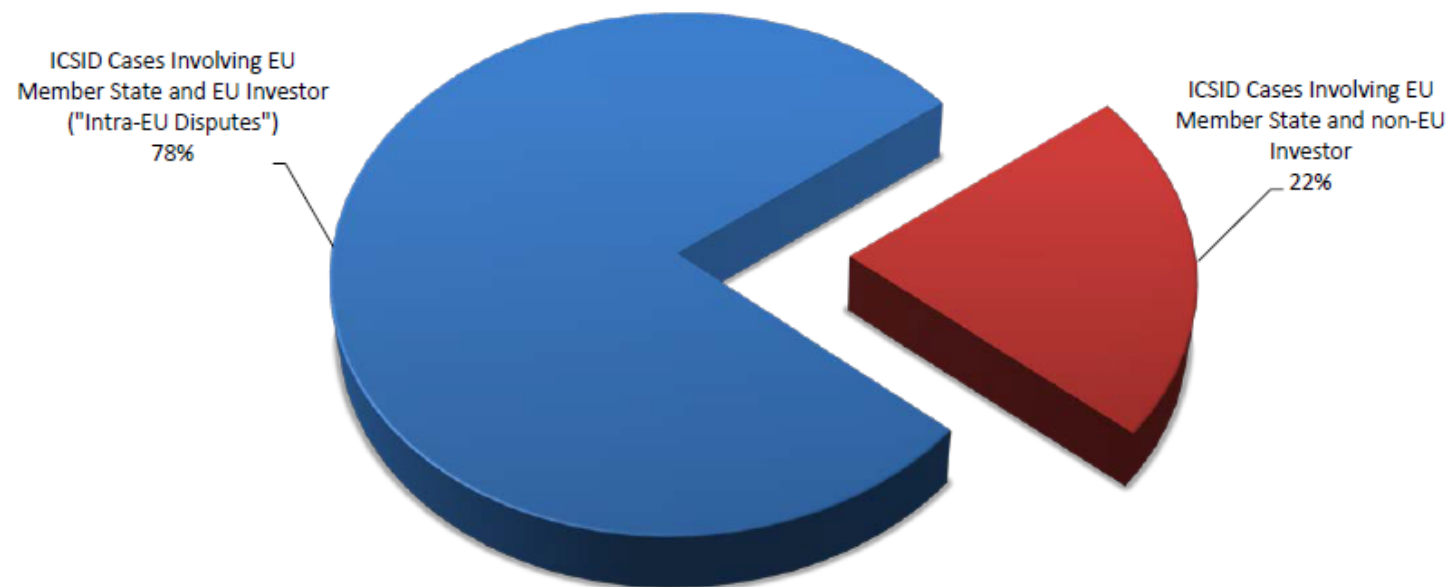
Note: The cumulative number of intra-EU ISDS cases includes known cases irrespective of each member State's individual date of accession to the EU. See figure 2 for the number of pre-accession ISDS cases.

EVOLUTION OF INTRA-EU ICSID CASES (2014)



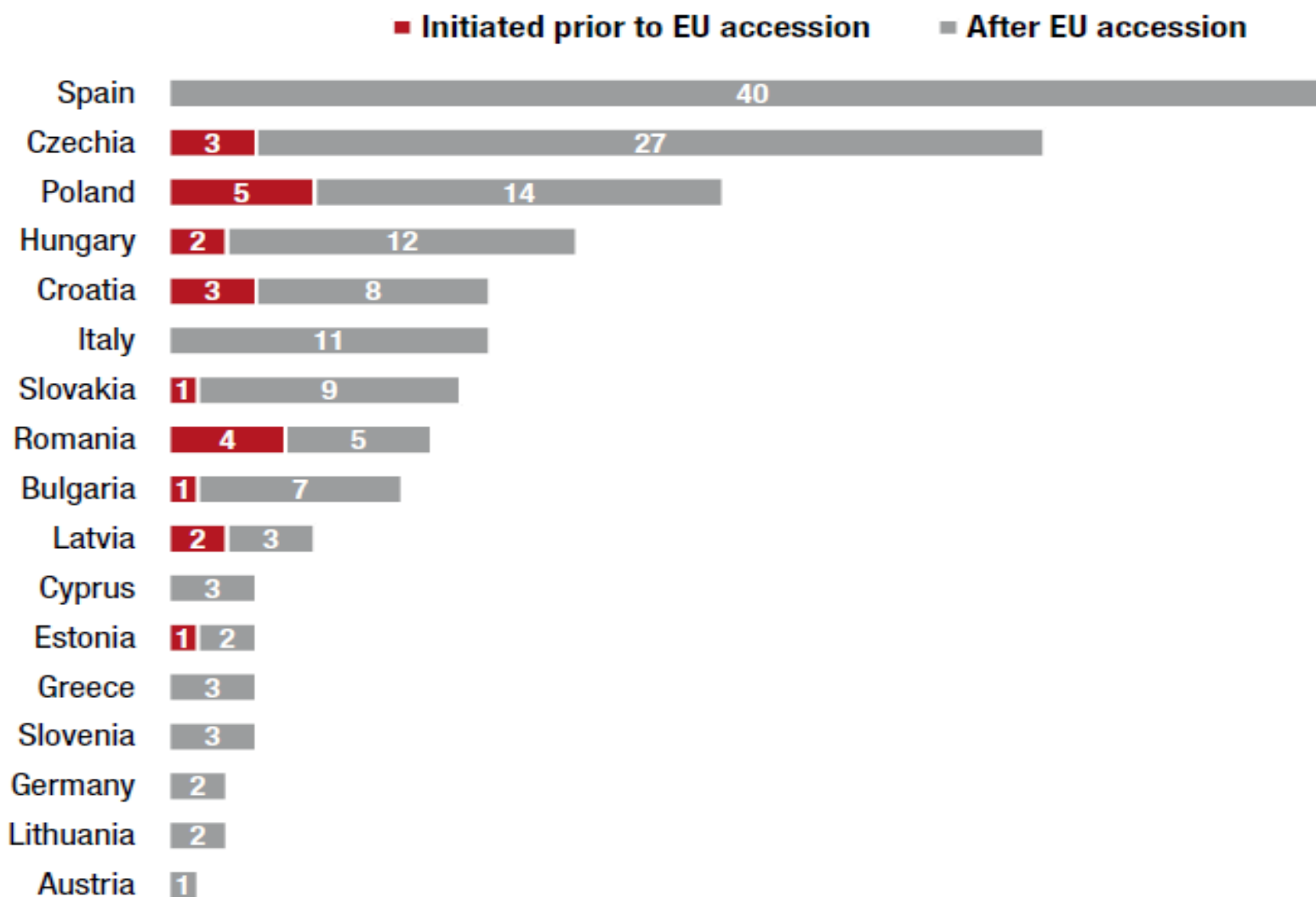
In 2014, 71% of the cases against an European Union State were brought by European Investors.

EVOLUTION OF INTRA-EU ICSID CASES (2017)



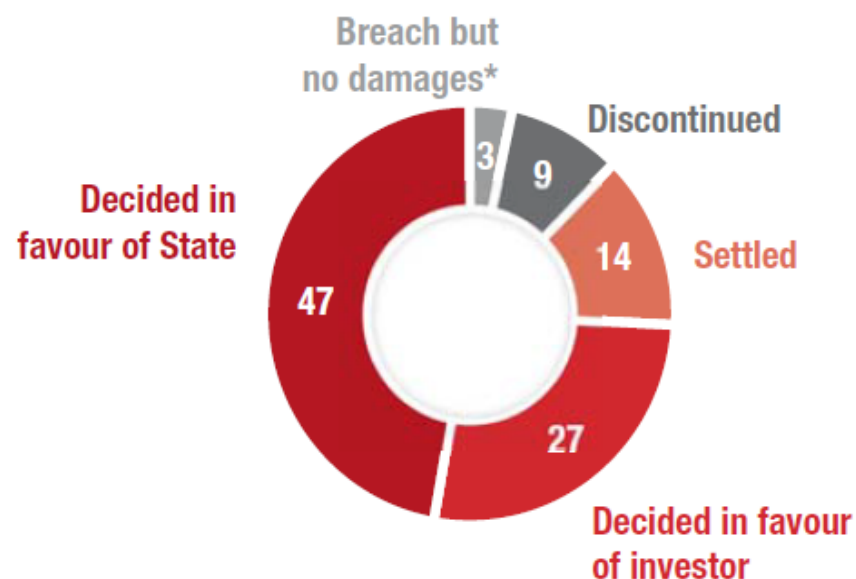
In 2017, 78% of the cases against an European Union State were brought by European Investors.

Figure 2. Intra-EU cases: most frequent respondents, 1987–31 July 2018
(Number of known cases)



Source: UNCTAD, ISDS Navigator.

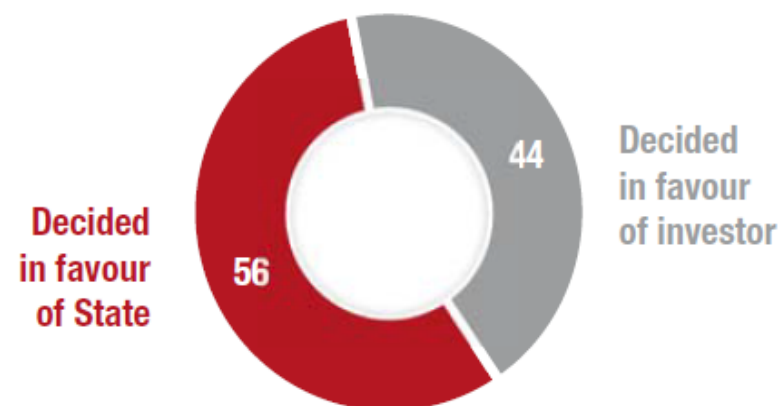
Figure 5. Results of concluded intra-EU cases, 1987–31 July 2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

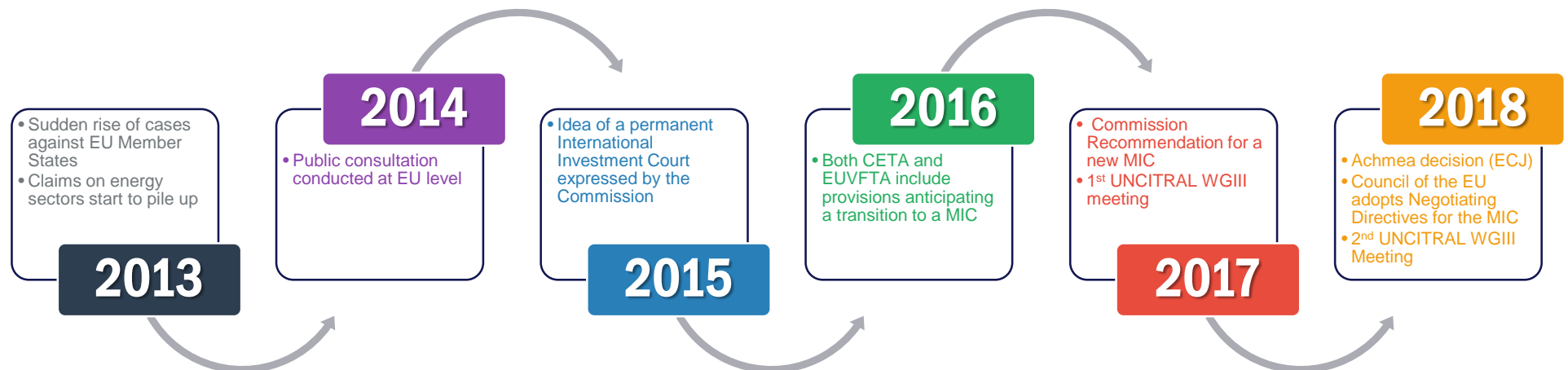
Figure 6. Results of decisions on the merits in intra-EU cases, 1987–31 July 2018 (Per cent)



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).

CHRONOLOGY OF EVENTS BEFORE ACHMEA

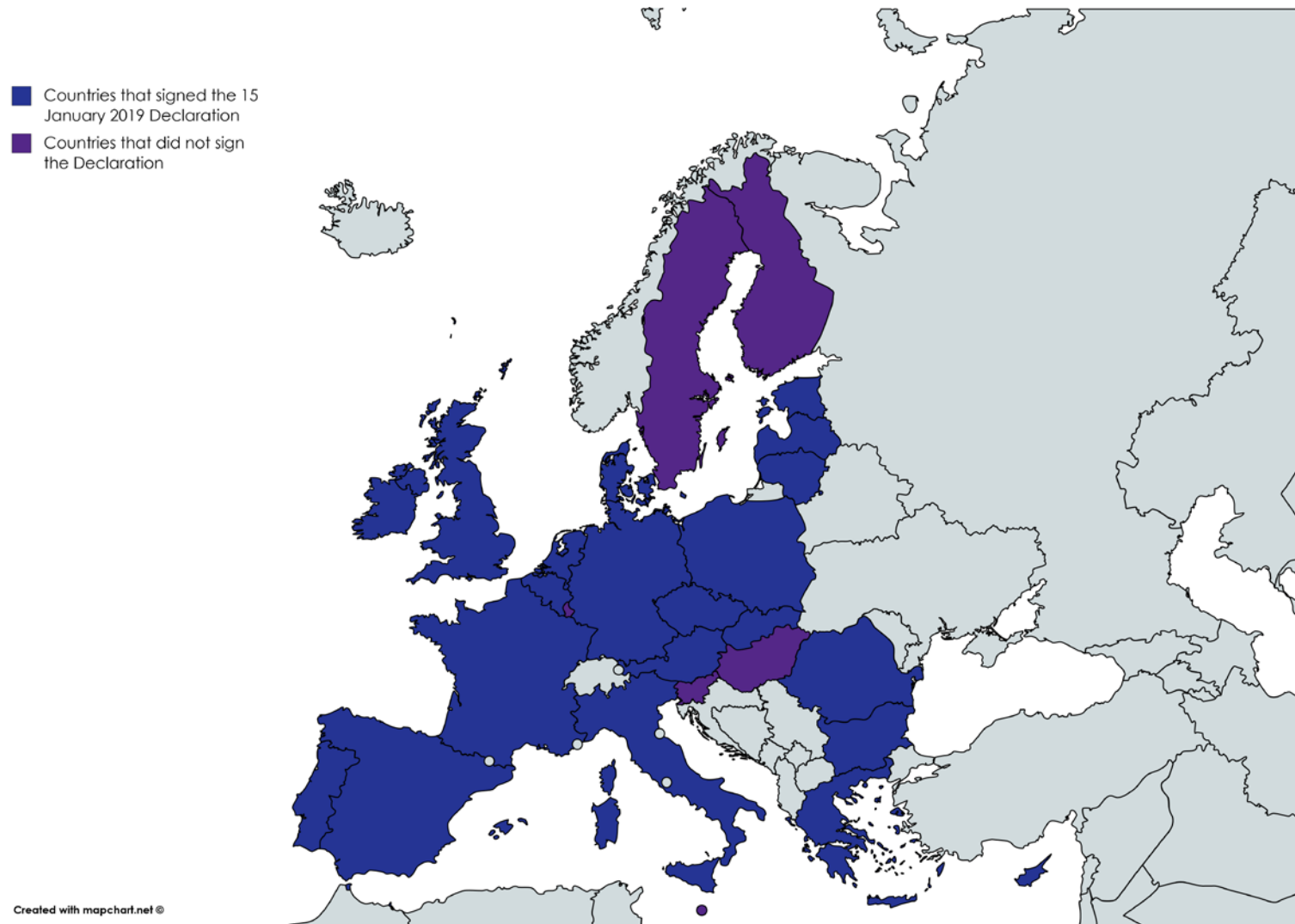


THE ACHMEA DECISION

Court of Justice of the European Union, Slovak Republic v. Achmea B. V. (Case C-284/16), 6 March 2018

- ◆◆ Ad hoc tribunal constituted under the UNCITRAL Rules, seated in Frankfurt
- ◆◆ Slovakia ordered to pay EUR 22.1 million of damages to Achmea
- ◆◆ Challenge of the award before the German Courts: the Tribunal lacked jurisdiction because Article 8 of the BIT was incompatible with EU law, specifically articles 18, 267 and 344 of the TFEU
- ◆◆ German Federal Court of Justice referred questions to CJEU for preliminary ruling
- ◆◆ AG Wathelet concluded that neither intra-EU BITs nor the ISDS clauses contained therein were in breach of EU law
- ◆◆ The CJEU drastically departed from Wathelet's opinion, ruling that the arbitration clause in the BIT is not compatible with EU law

THE 15 JANUARY 2019 DECLARATION ON THE LEGAL CONSEQUENCES OF *ACHMEA*



POST ACHMEA REACTIONS?



WHAT ARE THE ALTERNATIVES TO INTRA-EU ARBITRATION?



2. FUTURE OF EXTRA-EU ARBITRATIONS



A NEW DISPUTE FIELD: THE MIC



DECODING THE MIC



EU FDI SCREENING REGULATION

Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union

◆◆ Principles

- A cooperation and information-sharing mechanism
- Final decision to approve or block a foreign investment with the Member State
- Member States not required to set up their own screening mechanisms
- Provides legal certainty for Member States with such mechanisms
- Creates the first system to discuss inbound European M&A at EU-level

◆◆ Application

- Regulation applies from 11 October 2020, and applies to FDI's completed from 10 April 2019
- Member States shall
 - apply timeframes under their screening mechanisms.
 - notify the Commission of their existing mechanisms by 10 May 2019
 - Notify the Commission of any newly adopted screening mechanism or any amendment to an existing screening mechanism within 30 days of entry into force.
 - No later than 3 months after having received the notifications, the Commission shall make publicly available a list of Member States' screening mechanisms and keep that list up to date.

SCOPE OF EU FDI SCREENING REGULATION

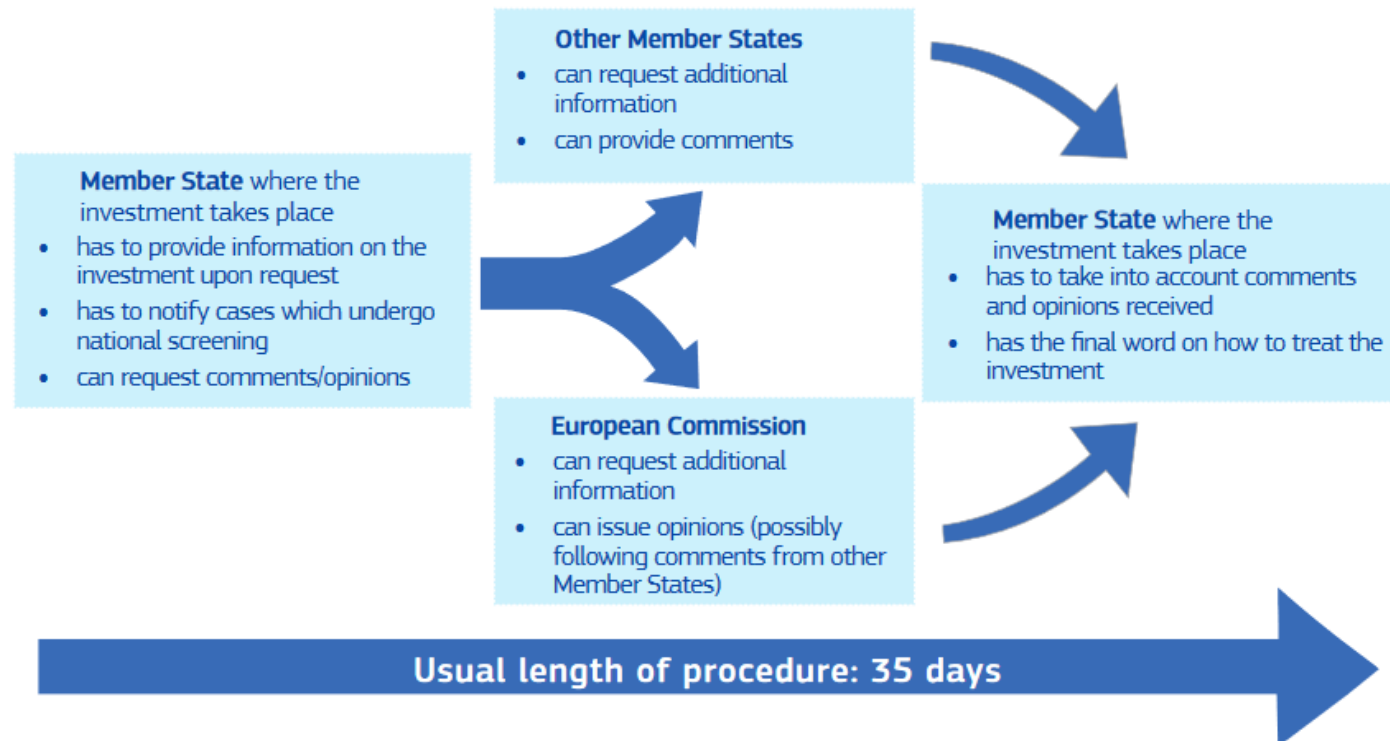
Article 4

Factors that may be taken into consideration by Member States or the Commission

1. In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on, inter alia:
 - (a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
 - (b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 ⁽¹⁵⁾, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
 - (c) supply of critical inputs, including energy or raw materials, as well as food security;
 - (d) access to sensitive information, including personal data, or the ability to control such information; or
 - (e) the freedom and pluralism of the media.
2. In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account, in particular:
 - (a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;
 - (b) whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or
 - (c) whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

EU FDI REGULATION

Source: European Commission



WHAT INFORMATION WILL BE EXCHANGED?

- Who is the investor and the target company?
- In which sectors do they operate and where?
- What is the value of the investment and where the funding is coming from?
- When does the transaction take place?

PROJECTS & PROGRAMMES OF UNION INTEREST

- The Regulation lists several EU funded projects and programmes which may be relevant for security and public order, and which will deserve a particular attention from the Commission.
- That list includes for instance Galileo, Horizon 2020, Trans-European Networks and the European Defence Industrial Development Programme. The list will be updated as necessary.

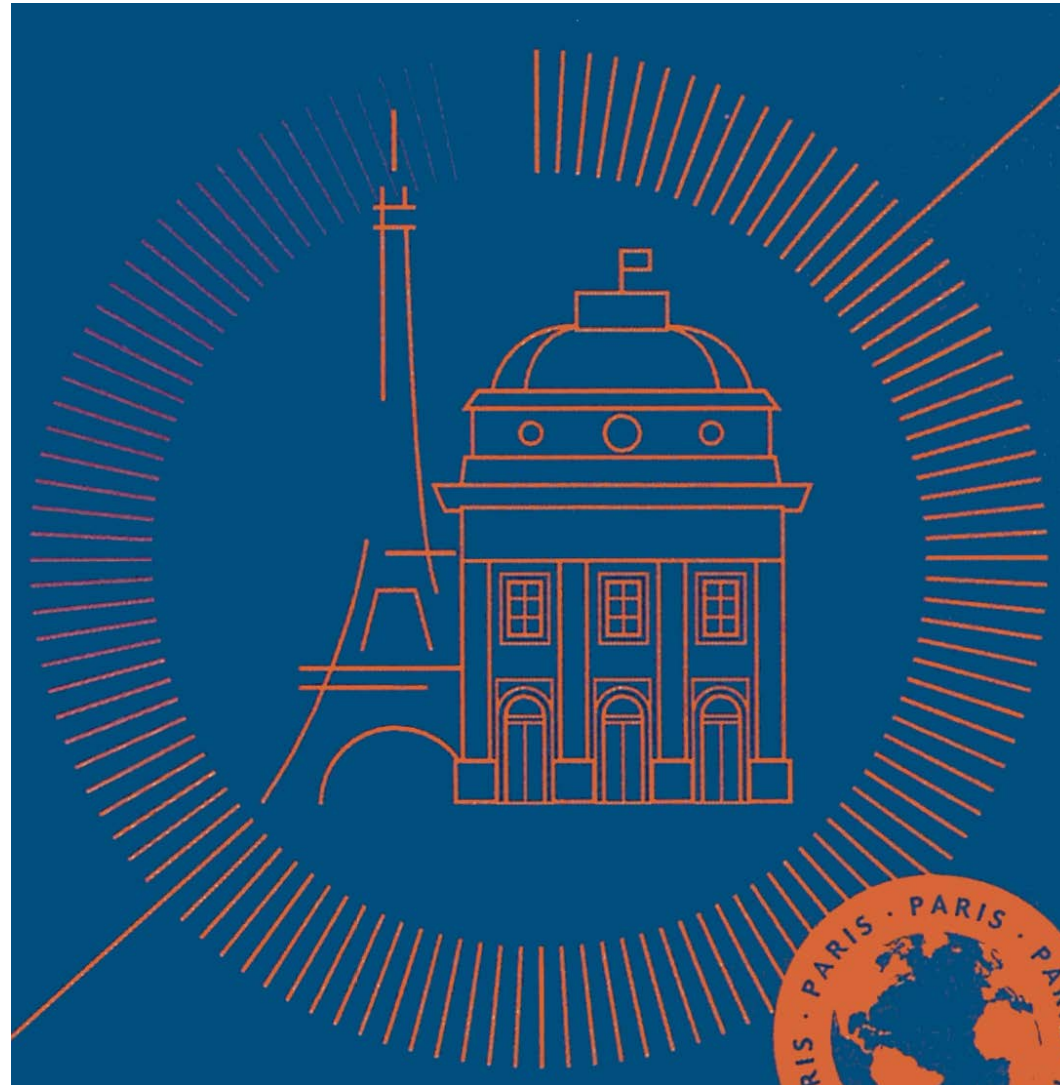
FLASH NEWS – COMMERCIAL ARBITRATION

1. WILL LONDON REMAIN A SEAT OF CHOICE AFTER BREXIT?
2. THE CREATION OF THE INTERNATIONAL COMMERCIAL COURT OF PARIS
3. THE PRAGUE RULES: A CIVIL WAR TO COMMON LAW?

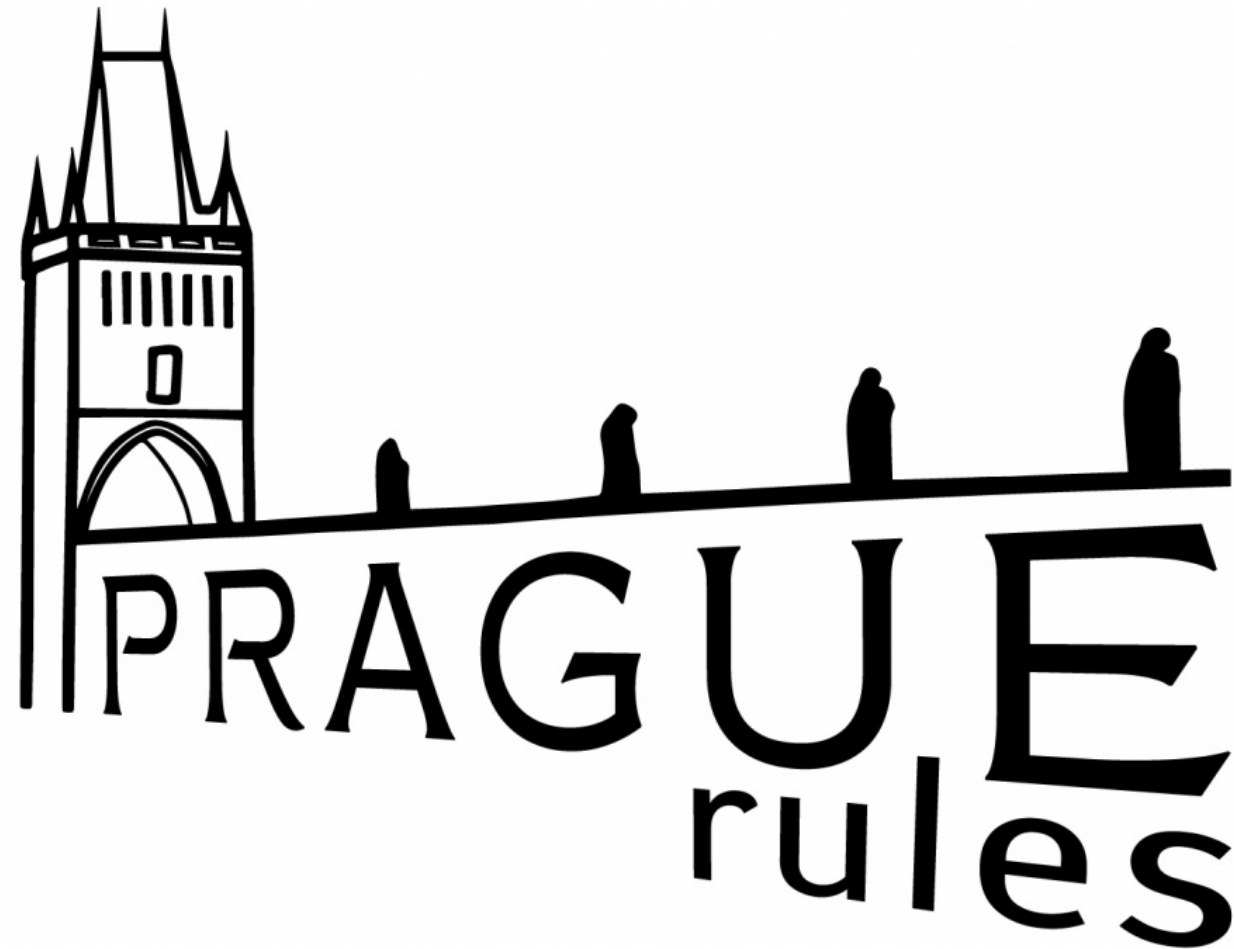
WILL LONDON REMAIN A SEAT OF CHOICE AFTER BREXIT?



THE CREATION OF THE INTERNATIONAL COMMERCIAL COURTS OF PARIS (ICCP)



THE PRAGUE RULES A CIVIL WAR TO COMMON LAW



YOUR CONTACTS



Saadia Bhatti

Counsel - Gide London
Dispute Resolution

☎ +44 (0) 20 7382-5668

✉ saadia.bhatti@gide.com

Gide Loyrette Nouel LLP

125 Old Broad Street - London EC2N 1AR
Tel. +44 (0)20 7382 5500



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