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NINTH EDITION

Editor
James H Carter

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
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Chapter 16

EUROPEAN UNION

Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova[1]

I INTRODUCTION

Under the Treaty on the Functioning of the European Union (TFEU), the European Union obtained a new exclusive competence in respect of foreign direct investment, including the negotiation of treaties protecting such investment. The delicate interrelationship between the powers of the European Union and the Member States in this area is not settled. Developments in 2017 confirmed the European Union institutions' active stance in the negotiation and finalising of investment treaties concluded directly by the European Union and third states.[2] The *Achmea* judgment issued by the Court of Justice of the European Union (CJEU) in March 2018 contributed to further uncertainty regarding the legal status of existing bilateral investment treaties (BITs) concluded by the Member States prior to their accession to the European Union.

II THE YEAR IN REVIEW

i Developments affecting investment protection treaties of Member States

Extra-EU bilateral investment treaties

As explained in the previous editions of this chapter, Regulation (EU) No. 1219/2012 confirmed that extra-EU BITs remain binding on the Member States under public international law. These treaties will be progressively replaced by investment protection agreements negotiated directly between the European Union and third countries. The transitional period will apply at least until 2020, at which point the Commission will present a report on the application of Regulation (EU) No. 1219/2012 to the European Parliament and the Council.

In parallel, the EU has pursued negotiations of free trade agreements with third countries that will contain investment chapters governing investment promotion and protection, or separate stand-alone investment agreements concluded by the EU and its Member States with third countries.

1 Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova are partners at Dentons.

2 The authors recommend to consult the 2013, 2014, 2015, 2016 and 2017 publications of the IAR concerning the same jurisdiction which may cover important developments from previous years that could not be included in this year's edition by reason of volume.

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On 17 October 2014, the EU and Singapore concluded the negotiations of the investment chapter of the EU–Singapore Free Trade Agreement (EUSFTA).[3] The EUSFTA text is not yet binding and will be subject to ratification. When ratified, it will replace 12 existing BITs between the EU Member States and Singapore.

On 4 March 2015, the Commission sought the clarifications of the CJEU on the following points in relation to the EUSFTA: 'Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: – Which provisions of the agreement fall within the Union's exclusive competence? – Which provisions of the agreement fall within the Union's shared competence? and – Is there any provision of the agreement that falls within the exclusive competence of the Member States?'[4]

On 16 May 2017, the CJEU, sitting as a full court, issued an opinion in response to the above questions. The CJEU ruled that the EUSFTA included both provisions within the exclusive competence of the EU and provisions within the shared competence of the EU and the Member States. As a result, the EUSFTA must be concluded not only by the EU, but also by all EU Member States. In particular, the CJEU disagreed with the Commission that investment provisions other than those relating to foreign direct investment, and the provisions on investor–state dispute settlement fell within the EU's exclusive competence. At the same time, the CJEU agreed with the Commission that the EU had exclusive competence in relation to the termination of foreign direct investment provisions contained in extra-EU BITs with third countries with whom the EU concluded a new investment treaty.[5]

Following this opinion, on 18 April 2018, the Commission submitted the final text of the EUSFTA, which was split into two distinct agreements – the EU–Singapore Free Trade Agreement and the EU–Singapore Investment Protection Agreement, to the Council of the European Union for approval.[6] Once approved, the agreements will be sent the European Parliament, following which they will need to undergo ratification by the Member States.

In contrast, the negotiated text of the free trade agreement between the EU and Vietnam, which contains a detailed investment chapter, continued to undergo legal review in 2017 and has not yet been transmitted to the Council of the European Union. The

3 'EU and Singapore conclude Investment talks', European Commission, Press Release, Brussels, 17 October 2014.

4 Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/15) (2015/C 363/22), OJEU C 363/19, 3 November 2015.

5 Opinion 2/15 of the CJEU (Full Court), 16 May 2017, ECLI:EU:C:2017:376.
Prior to the issuance of this opinion, the Advocate General ('AG') appointed to assist the CJEU with the case delivered a very detailed opinion on the questions posed to the CJEU. According to AG Sharpston, the EUSFTA can be concluded only as a mixed agreement, by the EU and the Member States acting jointly. The AG's opinion excludes any type of investment other than foreign direct investment from the scope of the exclusive competence of the EU and takes a view that such matters are of mixed competence. In addition, in contrast to the Court of Justice, the AG opined that termination of the existing extra-BITs concluded prior to the entry into force of the TFEU falls within the competence of EU Member States that entered into those BITs in accordance with Article 351 TFEU. Thus, the AG's opinion adopted a controversial view that the EU does not have an external (international law) competence to act in such termination matters. This view was not followed by the Court of Justice. However, the AG's opinion may still be used as a source of legal interpretation for future matters. See Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion procedure 2/15 initiated following a request made by the European Commission, ECLI:EU:C:2016:992.

6 'European Commission proposes signature and conclusion of Japan and Singapore agreements', European Commission, Press Release, 18 April 2018.

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Commission announced the conclusion of the negotiations of that free trade agreement and made the negotiated text available to the general public 'for information purposes' on 1 February 2016.[7]

In parallel, on 15 February 2017, the European Parliament voted in favour of adoption of the Canada–EU Comprehensive Economic and Trade Agreement (CETA).[8] The CETA entered into force provisionally on 21 September 2017.[9] That provisional application was made possible following the Commission's decision 'to propose CETA as a 'mixed agreement' to 'allow for a swift signature and provisional application' of those chapters of the CETA that fall within the EU's exclusive competence.[10] However, in accordance with the decision on the provisional application of the Council of the European Union, CETA's provisions on investment protection, investment market access with regards to portfolio investment and the investment court system are not subject to provisional application.[11]

As a mixed agreement, the CETA will need to be ratified by each Member State to enter into force and the ratification process has not yet been completed. Between June 2017 and April 2018, eight Member States ratified the CETA, namely Croatia, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Spain and Portugal.[12] The ratification process and entry into force of the CETA could be delayed following Belgium's application to the CJEU for an opinion concerning the compatibility of the CETA with EU law.[13] Specifically, in its request submitted on 6 September 2017, Belgium seeks an opinion 'regarding the compatibility of the ICS [Investment Court System provided in the CETA] with: 1) The exclusive competence of the CJEU to provide the definitive interpretation of European law; 2) The general principle of equality and the 'practical effect' requirement of European Union law; 3) The right of access to the courts; 4) The right to an independent and impartial judiciary'.[14]

In contrast to the existing BITs, the CETA and the EU–Vietnam Free Trade Agreement each provide for a novel investment tribunal system, whereby a permanent investment tribunal

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7 'EU-Vietnam Free Trade Agreement: Agreed text as of January 2016', European Commission, 1 February 2016.

8 'European Commission welcomes Parliament's support of trade deal with Canada', European Commission, Press Release, 15 February 2017. The CETA was signed by the EU and Canada on 30 October 2016.

9 'EU-Canada trade agreement enters into force', European Commission, Press Release, 20 September 2017.

10 'European Commission proposes signature and conclusion of EU-Canada trade deal', European Commission, Press Release, 5 July 2016.

11 Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p. 1080–1081; see also 'CETA - a trade deal that sets a new standard for global trade', European Commission, Fact Sheet, 15 February 2017.

12 See Council of the European Union, CETA, Ratification Details, available at http://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017 See also 'Seimas ratified a free trade agreement between Canada and the EU and issued a special statement', Embassy of the Republic of Lithuania to Canada, 25 April 2018.

In addition to these Member States, Malta, the only EU Member State that does not require ratification of the CETA under its internal laws, also completed its internal procedures necessary for the approval of the CETA.

13 'Minister Reynders submits request for opinion on CETA', Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, Press Release, 6 September 2017.

14 Belgian Request for an opinion from the CJEU, available on the Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation website at https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta The Opinion procedure is currently pending.

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will be established by the trade committees constituted under the respective treaties. These trade committees will appoint the tribunal's members. An equal number of the tribunal's members will consist of nationals of the Member States, nationals of Canada or Vietnam respectively, and nationals of third countries, appointed for a specific term. The Tribunal 'shall hear cases in divisions consisting of three members', one of whom shall be a national of the Member State, the second one a national of the other contracting party under the respective agreement and the third one a national of a third country. Awards will be subject to appeal before an appeal tribunal. The appeal tribunal's members will also be appointed by the trade committee similar to the method of appointment of the investment tribunal.[15]

This approach is consistent with the Commission's Concept Paper 'Investment in TTIP and Beyond – the Path for Reform' presented to the European Parliament. The Concept Paper, released in May 2015, suggested the creation of a permanent multilateral arbitration court, permanent list of arbitrators and bilateral appeal of arbitration awards.[16]

Intra-EU bilateral investment treaties

According to the Commission, all Member States have now been requested to terminate their intra-EU BITs, that is treaties concluded between two Members States prior to the accession of one of them to the EU.[17] Moreover, in June 2015 the Commission initiated infringement proceedings against five EU Member States, namely Austria, the Netherlands, Romania, Slovakia and Sweden, expressing the view that certain intra-EU BITs of these states violated EU law and asking these states 'to bring the intra-EU BITs between them to an end'.[18] In particular, the Commission expresses the view that the intra-EU BITs in question contain provisions that overlap with the TFEU provisions on the freedom of establishment and the free movement of capital and, for this reason, may affect common provisions of EU law or

15 CETA, Article 8.27 ('2.The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries. … 6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.') and Article 8.28 (Appellate Tribunal); EU-Vietnam Free Trade Agreement, Agreed text as of January 2016, Article 12 of Section 3 'Resolution of Investment Disputes' of the Investment Chapter of Chapter 8 of the Agreement ('2. … the Trade Committee shall, upon the entry Into force of this Agreement, appoint nine Members of the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries. … 6.The Tribunal shall hear cases in divisions of three Members, of whom one shall be a national of a Member State of the European Union, one a national of Vietnam and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.') and Article 13 (Appeal Tribunal).

16 Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

17 Commission Staff Working Document, Capital Movements and Investments in the EU, SWD(2012) 6 final, 3 February 2012, p. 13.

18 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', European Commission, Press Release, Brussels, 18 June 2015.

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alter their scope.[19] The Commission also argues that the investor–state dispute settlement mechanism in these treaties contravenes the provisions of Article 344 of the TFEU, according to which Member States undertake not to resolve disputes regarding the interpretation or application of EU law other than as determined by EU law, in particular through referral to the CJEU.[20] The Commission also suggests that the investor–state arbitration clause constitutes direct discrimination against investors from other Member States that may not have the possibility to refer a dispute to arbitration.[21]

In its response to the Commission's formal notice, Sweden has expressed its disagreement with the Commission's arguments, including those relating to investor–state arbitration. Sweden has also indicated that it 'can accept the termination of its bilateral investment protection treaties with other member states', provided that such 'termination should take place in a coordinated manner, under common forms, ensuring predictability, and in a manner that investors are guaranteed continued protection even after termination'.[22] Sweden has also indicated that the suggested 'notice from the parties that the treaty … would terminate with immediate effect would contravene the principle of legal certainty'.[23]

Similarly, Austria has indicated that 'termination of intra-EU BITs without their replacement would mean a deterioration of the investment climate in the EU and a potential disadvantage for European investors over those from third countries. Therefore, Austria supports, together with other Member States, the development of a pan-European acquis-compliant investment protection mechanism'.[24]

Consistent with this approach, on 7 April 2016, Austria, Finland, France, Germany and the Netherlands submitted a policy document, the Non-paper on Inter-EU Investment Treaties, to the Trade Policy Committee of the Council of the European Union with a view 'to reach a compromise solution for the termination' of intra-EU BITs.[25] The Non-paper proposed a coordinated termination of the intra-EU BITs 'through the conclusion of a multilateral agreement among the Member States … which would replace and supersede pre-existing intra-EU BITs'. The signatories of the Non-paper indicated that, upon the entry into force of such agreement, they would 'be prepared to immediately (i.e., without sunset

19 Response to letter of formal notice regarding the treaty between the Government of the Kingdom of Sweden and the Government of Romania regarding the promotion and mutual protection of investments (COM ref. SG-Greffe 2015D/6898, matter number 2013/2207), Sweden, Ministry of Foreign Affairs, Legal Affairs Division, 19 October 2015, Paragraph 9 (referring to the Commission's formal notice of 19 June 2015).

20 Id., Paragraph 27.

21 Id.

22 Response to letter of formal notice regarding the treaty between the Government of the Kingdom of Sweden and the Government of Romania regarding the promotion and mutual protection of investments (COM ref. SG-Greffe 2015D/6898, matter number 2013/2207), Sweden, Ministry of Foreign Affairs, Legal Affairs Division, 19 October 2015, Paragraph 40.

23 Id., Paragraph 39.

24 'Bilateral investment protection treaties, including intra-EU BITs', Austria's Federal Ministry of Science, Research and Economy, statement available at http://www.bmwfw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen.aspx.

25 'Intra-EU Investment Treaties', Non-paper from Austria, Finland, France, Germany and the Netherlands, Council of the European Union, Trade Policy Committee (Services and Investment), 7 April 2016, Paragraph 1.

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clauses) terminate all existing intra-EU BITs'.[26] This approach would avoid potential conflicts between the Agreement and the intra-EU BITs signed between individual Member States that would continue to apply by virtue of their respective sunset clauses.

ii Developments affecting the interrelationship between EU law and protection granted by bilateral investment treaties – the Achmea judgment

On 6 March 2018, the Grand Chamber of the CJEU rendered its long-anticipated judgment in Case C-284/16 following a request for a preliminary ruling under Article 267 TFEU from the German Federal Court of Justice in the *Achmea (previously known as Eureko) v. Slovak Republic* proceedings.[27] In that case, Slovakia challenged both the interim and the final award rendered by an arbitral tribunal constituted under the Netherlands–Slovakia BIT. The challenge was brought in Germany, the seat of the arbitration. Slovakia requested the Frankfurt Higher Regional Court to set aside the interim award on jurisdiction on the basis of its 'intra-EU jurisdictional objection', arguing that the arbitration clause in the intra-EU BIT between the Netherlands and Slovakia was incompatible with EU law. When the Frankfurt Higher Regional Court refused to refer the matter to the CJEU, Slovakia appealed the decision before the German Federal Court of Justice.

The German Federal Court of Justice referred the following questions to the CJEU:

> *1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date? If Question 1 is to be answered in the negative: 2. Does Article 267 TFEU preclude the application of such a provision? If Questions 1 and 2 are to be answered in the negative: 3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*[28]

In a landmark decision, the CJEU found that Article 8 of the Netherlands–Slovakia BIT 'ha[d] an adverse effect on the autonomy of EU law'.[29]

The CJEU concluded that:

> *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*

26 Id., Paragraph 4.

27 Case C-284/16, *Slovak Republic v. Achmea BV*, CJEU (Grand Chamber), judgment, 6 March 2018. The judgment is final and not subject to appeal within the EU system.

28 See Case C-284/16, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 23 May 2016 – *Slovak Republic v. Achmea BV*, OJEU C 296/19, 16 August 2016.

29 *Achmea* judgment, Paragraph 59.

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> *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*'.[30]

The Case C-284/16 judgment raises numerous questions regarding the possibility of bringing investor–state arbitration proceedings under existing intra-EU BITs as well as enforcement in the EU of arbitral awards issued on the basis of such BITs.

The Case C-284/16 judgment does not appear to address the question of compatibility between the Energy Charter Treaty (ECT) and EU law.[31] Contrary to intra-EU BITs, the ECT is a multilateral agreement, to which EU Member States, non-EU Member States and the EU are parties. In the *Achmea* judgment, the CJEU acknowledges that the EU has the 'capacity to conclude international agreements,' and that such capacity 'necessarily entail[s] the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected'.[32]

Under public international law, the Case C-284/16 judgment also should not affect the validity of existing intra-EU BITs. In principle, they will remain in force until they are terminated. However, it appears that under EU law the intra-EU BITs may have become unenforceable, notably as regards the arbitrations clauses containing language similar to Article 8 of the Treaty.

Therefore, an open question is whether the Case C-284/16 judgment's reasoning applies only to arbitrations brought under intra-EU BITs containing an arbitration clause similar to Article 8 of the Netherlands–Slovakia BIT or extends to any arbitration brought under an intra-EU BIT. Under Article 8 of the Netherlands–Slovakia BIT, an investor–state arbitral tribunal should decide the dispute on the basis of, *inter alia*, 'the law in force of the Contracting Party concerned'.[33] The law in force of a contracting party that is also a Member State of the EU necessarily incorporates EU law. Thus, in the *Achmea* case the CJEU perceived a risk that an arbitral tribunal constituted under a bilateral treaty between two Member States could (wrongly) interpret and apply EU law. That risk was further aggravated, in the opinion of the CJEU, by the fact that arbitral tribunals cannot submit to the CJEU a request for a preliminary ruling under Article 267 TFEU and, thus, cannot ensure the compliance and consistency of their decisions with EU law.[34]

Not all intra-EU BITs contain language similar to Article 8 and require an arbitral tribunal to apply, *inter alia*, the law in force of the contracting party concerned. Most

30 *Achmea* judgment, Paragraph 60.

31 On the latest developments concerning the compatibility between the ECT and EU law, see *The International Arbitration Review*, Eighth Edition, Chapter 14, 'European Union', pp. 170-172.

32 Achmea Judgment, Paragraph 57.

33 Id., Paragraph 6.

34 Id., Paragraph 49.
This risk would be removed if arbitral tribunals constituted to hear investor–state disputes were allowed to address requests for a preliminary ruling to the CJEU. For instance, in their Non-paper on Inter-EU Investment Treaties, Austria, Finland, France, Germany and the Netherlands suggest to allow tribunals constituted under the 'Compromis' proposed in that Non-paper 'to directly address requests for preliminary rulings to the ECJ'. See 'Intra-EU Investment Treaties', Non-paper from Austria, Finland, France, Germany and the Netherlands, Council of the European Union, Trade Policy Committee (Services and Investment), 7 April 2016, Paragraph 14.

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importantly, numerous disputes brought under inter-EU BITs do not concern the application of any EU law requirement and do not require the tribunal to address any issue of EU law. The *Achmea* judgment does not specify whether such disputes could be affected by its reasoning and further clarification is needed in this respect.

The *Achmea* judgment's reasoning appears to be motivated by policy concerns and to espouse the Commission's view that settlement of disputes under intra-EU BITs may undermine 'the full effectiveness of EU law'.[35] Significantly, the Case C-284/16 judgment's reasoning and conclusions did not follow the opinion of the Advocate General in that case delivered on 19 September 2017.[36]

The Case C-284/16 judgment will likely accelerate the process of termination of intra-EU BITs. Prior to and following the issuance of the Case C-284/16 judgment, a number of EU Member States announced that they had sent or intended to send termination notices with respect to their existing intra-EU BITs. As regards pending investor–state arbitrations brought under intra-EU BITs, a number of respondent states have also requested the arbitral tribunals to consider the impact of *Achmea* on their jurisdiction. Whether those tribunals would be willing to reopen the jurisdictional debate and accept the respondent states' *Achmea*-based arguments will be clarified in 2018 and 2019.

The impact of *Achmea* on arbitral awards already issued under intra-EU BITs also remains unclear. In principle, the Case C-284/16 judgment should not affect annulment of awards issued under the auspices of the ICSID Convention. The ICSID Convention provides for a self-contained annulment mechanism. An *ad hoc* annulment committee constituted under the ICSID Convention is not part of the jurisdiction of EU Member States and is not bound by the judgments of the CJEU. However, it is not excluded that the Commission may object to the enforcement in an EU Member State of an ICSID award issued under an intra-EU BIT. The Commission could, for instance, rely on the *Achmea* judgment to bring infringement proceedings against that Member State, which in turn would create obstacles to the enforcement of the award within the EU.

As regards non-ICSID awards issued on the basis of intra-EU BITs, the impact of the *Achmea* judgment will depend on the seat of the underlying arbitration proceedings. The judgment does not produce legal effect outside the EU. Therefore, in principle, a non-EU Member State court hearing a set-aside application bought against an award at the seat of arbitration would not be bound by the Case C-284/16 judgment. In contrast, an EU Member State court is bound by judgments of the CJEU and may consider that *Achmea* should give rise to the annulment of an arbitral award on the grounds of public policy. In case of doubt, an EU Member State court may seek further clarifications from the CJEU through a request for a preliminary ruling.

The same reasoning applies to the enforcement of arbitral awards issued on the basis of intra-EU BITs within the EU. The CJEU will likely be asked to state its position in this respect though separate requests for preliminary rulings.

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35 *Achmea* judgment, Paragraph 56.

36 In his opinion, AG Wathelet proposed that the CJEU answer the questions addressed to it as follows: 'Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal'. See Case C-284/16, *Slovak Republic v. Achmea BV*, Opinion of the Advocate General Wathelet, 19 September 2017, Paragraph 273.

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Finally, the judgment to be issued in the *Micula v. Commission* case[37] pending before the CJEU may also clarify the interrelationship in EU Member States' jurisdictions between the ICSID Convention and EU law. That judgment is expected in late 2018.

III OUTLOOK AND CONCLUSIONS

In 2017, the EU continued to adjust its policy and negotiating position on investment protection treaties. This has affected the negotiation and ratification of EU free trade agreements containing chapters on investment protection and has prompted the negotiation of separate investment treaties. That policy will be impacted by the *Achmea* judgment issued by the CJEU in March 2018. The Case C-284/16 judgment will have far-reaching consequences as regards the future application of intra-EU BITs. The judgment expected in the pending proceeding before the CJEU in the *Micula v. Commission* case and the opinion to be issued by the CJEU following Belgium's request on the compatibility of the CETA dispute-settlement mechanism with EU law will further reshape the contours of investment protection and the investor–state dispute settlement mechanism within the EU.

37 *Micula et al. v. Commission*, Case T-704/15. The case concerns the applicants' request for annulment of Commission Decision (EU) 2015/1470 of 30 March 2015 whereby the Commission deemed that payment of compensation awarded by an ICSID tribunal in an arbitration brought against Romania under the Romania–Sweden BIT constituted state aid incompatible with the TFEU.

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Appendix 1

ABOUT THE AUTHORS

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Edward Borovikov is the managing partner of Dentons' Brussels office. Edward is a highly regarded trade and competition law attorney with substantial experience in issues of global trade and investment, cross-border commercial regulations, and international trade policy. He has in-depth experience in WTO, EU, and Russian/Customs Union/Eurasian Economic Community trade law and practice, trade policy and international trade and investment negotiations, including those on the EU–Russia partnership and cooperation agreement and Russia's WTO accession, as well as competition law and practice.

Edward's authoritative counsel to clients on issues of international trade and commerce reflects a valuable combination of legal skill and knowledge, broad economic understanding and well-informed diplomatic insight. The major legal rankings recognise him as a leading trade and customs and competition lawyer.

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Anna Crevon is a partner in Dentons' Paris office. Her practice focuses on international arbitration, both investor–state and commercial. Anna represented clients in a wide range of arbitration cases conducted under the auspices of ICSID, LCIA, ICC and SCC, as well as *ad hoc* arbitrations, with particular emphasis on oil and gas, pharmaceutical and other regulated sectors. She has extensive experience advising on matters relating to the Energy Charter Treaty

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