# The Achmea ruling: remaining doubts

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If one had to name this year's most groundbreaking decision regarding investment arbitration in Europe that would probably be the Achmea judgment, rendered by the Court of Justice of the European Union (CJEU) on March 6, 2018[1]. And the year hasn't even ended...

In that judgment, the CJEU ruled that the arbitration clause contained in Article 8 of the bilateral investment treaty entered into by the Netherlands and the former Czechoslovakia in 1991[2] ('Netherlands-Slovakia BIT'), two Member States of the EU, had 'an adverse effect on the autonomy of EU law'[3] and was therefore, in the Court's view, incompatible with EU law. According to the CJEU, to the extent that disputes falling within the scope of this arbitration clause could concern the interpretation of EU law, those disputes should not be decided in arbitration, since arbitrators are not part of the EU judicial system and, consequently, are not obliged nor empowered to submit matters relating to the interpretation of EU law to the CJEU (as a request for a preliminary ruling).

The judgment was given as a preliminary ruling in the context of setting aside proceedings brought by the Slovak Republic before German courts, concerning an arbitral award made in 2012 by an arbitral tribunal constituted under the Netherlands-Slovakia BIT. The award ordered the Slovak Republic to pay the Dutch company Achmea damages in the principal amount of 22.1 million euros, following a reversal in the liberalisation policies applicable in the private health insurance market in Slovakia. Achmea brought arbitration proceedings on the ground of violation of the substantive provisions contained in the Netherlands-Slovakia BIT and obtained a favourable arbitral award against Slovakia.

The CJEU ruling raised serious questions as to its real implications for the present and future of intra-EU investment under the 190 bilateral investment agreements currently existing between EU countries ('intra-EU BITs') and the Energy Charter Treaty[4] ('ECT'). Indeed, to the extent that all of those treaties were contracted by EU Member States[5] and also provided for the arbitration of disputes between investors and Contracting States[6], the CJEU's line of reasoning seemed to be likewise potentially applicable to the arbitration provisions contained in those treaties (thus rendering them inapplicable).

That was, however, hard to accept, given the potential economic impact of the decision and the co-related legal uncertainty as to how (and whether) the Achmea ruling should be implemented by EU Member States in respect of other intra-EU BITs and the ECT: should EU countries terminate their intra-

EU BITs? How should this affect investments, disputes and arbitral decisions already existing under those treaties?

In a recent communication, dated 19 July 2018 ('Commission's Communication'), the European Commission sought to clarify some of those doubts[7]. In line with the stance previously adopted by the Commission[8], said communication asserts the 'incontestable incompatibility'[9] of intra-EU BITs with EU law and sets forth the Commission's view on the consequences, for all EU Member States, of the Achmea judgment. As put by the Commission, 'all investor-State arbitration clauses in intra-EU BITs are inapplicable and […] any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement'[10].

In its paper, the Commission not only relies on the Achmea judgment, but also seeks to demonstrate that EU law provides for adequate substantive and procedural safeguards for intra-EU investors, other than the protections conferred by intra-EU BITs and the ECT. That is indeed the self-proclaimed purpose of this paper: 'to provide guidance on existing EU rules for the treatment of cross-border EU investments'[11].

Among the substantive protections provided by EU law, the Commission's paper relies, *inter alia*, on the freedoms at the core of the Single Market (*v.g.*, free movement of capital and freedom of establishment[12]), on the prohibition against (unjustified) discrimination recognised in the Treaties, in EU secondary legislation and in EU case law, on general principles of EU law (*v.g.*, proportionality, legal certainty and the protection of legitimate expectations), and on certain fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (*e.g.*, the freedom to conduct a business and the right to property[13]).

Regarding the procedural safeguards available to foreign investors in a hypothetical post-violation scenario – *i.e.*, those measures that will be available as an intended substitute of the investor-state dispute settlement (ISDS) mechanism provided for in the treaties challenged by the Commission – the Commission paper mentions the *judicial* remedies available both at EU and Member State level, including recourse to national courts and the possibility of referral of matters relating to the interpretation of EU law to the CJEU.

Under Article 17(1) of the Treaty of the European Union[14], the Commission is entrusted with the task of monitoring the application of EU law and can bring infringement proceedings against Member States that

do not comply with EU law. In light of the Commission's verdict on the incompatibility of investor-State arbitration with EU law, it is possible that national courts of EU Member States will, from now on, refuse to give effect to arbitration clauses contained in intra-EU BITs or in the ECT and to arbitral awards rendered on that basis, even if the last word would again belong to the CJEU, particularly in respect of those aspects in the Commission's paper that go beyond the strict terms of the Achmea ruling.

It is, however, less clear whether (and to what extent) the Commission's Communication will impact arbitrations conducted in non-EU Member States under intra-EU BITs or under the ECT, in particular those under the ICSID Convention, which are, to a large extent, insulated from the control of EU authorities. It is unclear whether ICSID annulment committees and non-EU Member States will give deference to the position taken by EU authorities and whether EU Member States, if called to intervene, should refuse to recognise and enforce arbitral awards rendered in non-EU Member States on the basis of intra-EU BITs or the ECT.

Furthermore, it remains to be seen whether (and how) the Achmea ruling, together with the Commission's paper, will affect the decisions of arbitral tribunals, considering that, in the past, most arbitral tribunals have disagreed with the Commission's views concerning the interaction between investment treaties and EU law.

The situation of the ECT is particularly complex… While intra-EU BITs are only applicable as between Member States and can be terminated upon a decision of the EU Member States concerned (even if some contain clauses providing for the survival of certain obligations for some years after termination), the ECT is currently applicable between more than 50 signatories, including not only EU Member States, but also the EU itself and some third countries.

The Commission's Communication states that the Achmea judgment is 'relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards *intra-EU relations*', then specifying that that provision must not be applicable '*between investors from a Member States of the EU and another Member States of the EU*'[15] given the primacy of Union law. The legal grounds for this assertion are not entirely clear. Leaving aside issues of potential liability of the EU under the ECT, it is legitimate to ask whether, and upon what grounds, should a court of a *non-EU* Party to the ECT, either in the context of a non-EU dispute or in the context of a dispute brought between an investor

from a Member State and another EU Member State, refuse to give effect to Article 26 or to an arbitral award made under this provision, if it is under no obligation to comply with EU law and the Achmea ruling.

In particular, with regard to the measures mentioned in the Commission's Communication so as to tackle the lack of the substantive protection afforded by the intra-EU treaties and the ECT (already provided in any case to EU investors), the fact that the Treaties, EU secondary legislation and EU case law, among other EU instruments, are only in general applicable as between EU Parties, *i.e.*, EU investors and EU Member States, make it extremely unlikely that the non-EU Parties to the ECT agree, without more, on the termination of this treaty.

As argued in a paper written in the aftermath of the Achmea decision[16], the implementation of the CJEU's ruling and all of the above legal uncertainties surrounding the theoretical and practical implementation of that decision may have serious economic consequences on intra-EU investment. Much as the Commission believes in the existing EU rules for the treatment of cross-border EU investments, it remains to be seen whether its view will be upheld by courts and whether investors will easily give up their right to bring investor-State disputes in international arbitration, or whether they will relocate their investments and disputes to other jurisdictions, not directly affected by this decision.

In this context, the future establishment of a multilateral investment court (MIC) to settle investment disputes within the EU, as authorised by the EU Council previously this year[17], may allow investors to keep some of the key features of international arbitration (*v.g.*, the impartiality and independence of judges/arbitrators) even in the absence of the bilateral investment court system provided for in the intra-EU investment treaties.

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[1] Judgment of 6 March 2018, *Slowakische Republik v Achmea BV*, Case C-284/16, EU:C:2018:158.

[2] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29 April 1991.

[3] Judgment of 6 March 2018, Slowakische Republik v Achmea BV, Case C-284/16, EU:C:2018:158, ¶ 59.

[4] Energy Charter Treaty, opened for signature 17 December 1994, entered into force 16 April 1998.

[5] And, in the case of the ECT, the EU itself and other non-EU Parties.

[6] See, *e.g.*, Article 26 of the ECT.

[7] Commission's Communication COM/2018/547 final, *Protection of intra-EU investment*, 19 July 2018.

[8] See, *e.g.*, the 2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, ST 5123 2008 INIT, 8 January 2008.

[9] *Id.*, p. 2.

[10] *Id.*, p. 3.

[11] *Id.*, p. 1.

[12] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Arts. 63 and 49, respectively.

[13] Charter of Fundamental Rights of the European Union [2007] OJ C303/1, Arts. 16 and 17.

[14] Consolidated Version of the Treaty on the European Union [2016] OJ C202, Art. 17.

[15] Commission's Communication, pp. 3-4 (our emphasis).

[16] F. Vaz Pinto and C. Pitta e Cunha, *A morte anunciada dos tratados de investimento intracomunitários*, Expresso, 17 March 2018, available here.

[17] Council of the EU, *Multilateral investment court: Council gives mandate to the Commission to open*

*negotiations*, Press release 144/18, 20 March 2018, http://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/ (last accessed 30 August 2018).