

Practical consequences post-Achmea: times change, wills change...

07 August 2020 - [by Joana Galvão Teles](#)

[1]As is generally known, by the *Achmea* decision dated 6 March 2018, the Court of Justice of the European Union (CJEU) decided that the arbitration clause included in the Bilateral Investment Treaty (BIT) entered into between the Netherlands and the former Czechoslovakia in 1991 (Netherlands-SlovakiaBIT) is incompatible with European Union (EU) law.

However, as it is also known, the relevance of this case goes well beyond its facts and the amounts in dispute.

What were the practical consequences of the *Achmea* decision?

The *Achmea* decision has had relevant political, legal and economic consequences, with a significantly different impact depending on whether one looks at it from the perspective of the Member States and/or the EU or from the perspective of investors.

Political consequences

First of all, the discussion in question is essentially **political** and should be understood and debated in the broader context of the discussion regarding the Investor-State Dispute Settlement (ISDS) system provided under the majority of investment treaties.

As a reputed Professor in Law in the University of Paris I Panthéon-Sorbonne and French arbitrator, Brigitte Stern, demonstrated in an interesting historic insight:**[2]** in the middle of XIX century, international law was based on sovereignty of States and on the use of force by the States as a way to either serve their interests or solve their disputes; this was followed by a new phase in which the States transferred their competences to international institutions and new private players, by means of the technological and international communications development. A clear example of this change was, indeed, the creation of the EU and the transfer of powers from the nations that would become part of the

EU to the EU, including in matters of foreign investment. International investment arbitration has gained greater acceptance, and has been subject to great development since then, and States were no longer the unique source of law because international organizations and private bodies became responsible for the development of soft law.[3] The growth of international investment arbitration reached a very important milestone in 1965 with the adoption of the ICSID Convention.[4]

The idea behind the ICSID system was to create an arbitral institution that gave foreign investors direct action on an international level against the State that violated the rules of protection of their investments, allowing a neutral and independent forum, being essential that this forum keeps free from political influences and arbitrators are independent and impartial.

With the adoption of the ICSID Convention, the consent given by a large number of States, the entering into in several contracts and over 3000 BITs, “investment arbitration has so far been an immense success – with the number of the cases rising each year since the 1970s”,[5] which has resulted in a significant limitation of state sovereignty.

Presently, as several specialists and practitioners in the area recognize, investment arbitration faces an existential crisis. Investment arbitration has been criticized by States (including States that are not members of the EU). The *Achmea* decision was a relevant driving force for that result.

The criticism is based on several grounds, such as the preconceived idea that there would be a tendency to illegitimately favour private companies over States, which would generally lose investor-state disputes (this idea is contradicted by statistics), the alleged lack of independence and impartiality of the arbitrators, the alleged lack of transparency and lack of publication of the arbitral awards, the impossibility of appeal from arbitral awards, among other factors, which, from another perspective, would be advantageous for international arbitration. The criticism levelled at the ICSID system are global and require global reforms which go beyond the EU.

In relation to the EU, the main opposition against intra-EU BITs has been carried out for several decades by the European Commission and by different routes, in view of defending the scope of protection and the primacy of EU Law. The mentioned opposition is explained by complex political-legal reasons related to the division of competences, namely regulatory powers between the Member-States and EU and, from another perspective, between the EU (including the Member-States) and arbitral tribunals and

organisations as the ICSID, created as organisation independent from the power of States (cf. for example, *Micula v. Roménia* initiated in 2005 and decided by the arbitral tribunal in 2013, a case which is not totally closed and is pending in several jurisdictions).

By the *Achmea* decision, the CJEU also decided the incompatibility of BIT intra-EU included in Netherlands-Slovakia BIT with the European Union Law. In particular, the CJEU decided the invalidity of the dispute resolution mechanism – *i.e.*, arbitration – included in intra-EU Netherlands-Slovakia BIT, creating, at least, a jurisprudential orientation which may be followed by other tribunals.

Regarding the political consequences, shortly after the *Achmea* decision, the European Commission adopted a Communication ‘Protection of intra-EU investment’ on 19 July 2018 on the consequences of the *Achmea* decision in view of asserting: *i)* the “incontestable incompatibility” of intra-EU BITs with European Union Law; *ii)* the inapplicability of the investment arbitration clauses contained in EU BITs, based on their invalidity; and also *iii)* the existence of substantive and procedural rules in EU law which grant an adequate level of protection to cross-border investments in the EU (which, as it is known and it is asserted by Member-States, it is not quite true).

Finally, on 15 January 2019, the Member-States issued a political declaration on the legal consequences of the CJEU judgement in the *Achmea* decision. Under the joint declaration, the signatory Member-States undertook to terminate their intra-EU BITs by means of a plurilateral treaty or several bilateral treaties, expressly ordering that investors should not initiate new arbitrations based on intra-EU treaties and undertaking to grant effective legal protection to investors against measures from the States that would were subject to intra-EU arbitrations.

The present context is explained by the occurrence of two transfers of powers by the European States – one to EU and another one through the respective intra-EU BITs –, which conflict and whose legal regulation is in conflict. Both the European Commission and the CJEU intend to control the application and interpretation of EU law. Besides this fact, a certain “distrust” in relation to arbitral tribunals and the fact that arbitral tribunals are not judicial bodies for the effects of the EU law have led to the declaration of incompatibility between investment arbitration clauses contained in the investment treaties entered into between EU countries and EU law.

Legal consequences

From a **legal** perspective, the issues are complex and arise from an emergent conflict which occurred during the last years, between EU law and international arbitration law.[\[6\]](#)

After a long period of time during which EU law and international arbitration law were separate worlds, which coexisted in a pacific way and almost without contact, in the last decade this situation has changed. Nowadays, European Union law and international arbitration law are realities in contact and, more than that, in conflict. This situation is explained by several reasons, such as, among others, the tension and differences between the notion, and the respective scope, of “public order” in each area of law. The notion of “public order” which arbitral awards would have to respect under the control of European Union law is increasingly broader. On the contrary, the notion of “order public” in accordance with international arbitration law is increasingly restrictive.[\[7\]](#)

In relation to the legal consequences of the *Achmea* decision, and in the sequence of the Communication of the European Commission and Declaration by Member-States mentioned above, on 5 May 2020, the “International Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union” (Agreement) was signed by 23 Member-States. In general terms, and without prejudice of possible discussions regarding its validity and applicability, the Agreement determines the termination of the Treaties and *sunset clauses*, respectively listed in Annex A and B of the Agreement (Articles 2 and 3 of the Agreement), with effects 30 days after the date on which the Depositary receives the second instrument of ratification, approval or acceptance (Article 16 of the Agreement). In the Portuguese case, the Agreement implies the termination of 10 BITs (entered into between, on the one hand, Portugal and, on the other hand, Germany, Czech Republic, Romania, Latvia, Hungary, Croatia and Slovenia) and the sunset clause included in the BIT entered into between Portugal and Poland.

Furthermore, under the Agreement, the States agreed on the effects of the termination of the treaties in pending and new arbitration proceedings (i.e., proceedings to be initiated in the future): the contracting parties of the relevant BIT have the duty to inform the Arbitral Tribunal of the legal consequences of the *Achmea* decision, in particular of the incompatibility of the arbitration clauses included in the BITs with EU law and the consequent inapplicability of those clauses, in the terms foreseen in Annex C of the

Agreement; and, in the case of an existing arbitral award pending in a national judicial court, the parties should request to the competent judicial court, including in third States, to challenge or annul the arbitral award which is an object of legal action for challenging or annulling the arbitral award or a legal action for recognition and enforcement of an arbitral award (Article 7 of the Agreement). In turn, arbitrations concluded before 6 March 2018 and/or arbitral awards issued and duly complied with by the parties before that date and/or arbitral awards which were not challenged, revised, annulled, enforced or an object of another legal action pending on this date should not be reopened and their effects should be protected (Article 6 of the Agreement). In the terms of the mentioned Agreement, “arbitration clauses shall not serve as a legal basis for New Arbitration Proceedings” (Article 5 of the Agreement).

Finally, the Agreement provides for a mechanism of “Structure Dialogue”, which may be requested by the Contracting Party or by investors in pending arbitration proceedings, i.e., arbitrations initiated prior to the *Achmea* decision in order to settle the dispute (Article 9 of the Agreement) and also recognises the parties’ possibility of resorting to the judicial remedies existing under national law(s), in a way as to react against a measure contested in pending arbitration proceedings, even if the national time limits for bringing actions have expired, within certain time limits set forth in paragraph 2 of Article 10 of the Agreement.

Thus, considering the content of the Agreement, it is possible to expect that, if the Agreement is complied with by the States, arbitral tribunals and judicial courts “located” in Member-States will tend, as general principle, to follow the *Achmea* decision (the same will not likely occur with: *i*) the national courts of States that are not members of the EU; *ii*) arbitral tribunals seated in States which are not members of the EU and, consequently, which are not subject to EU law; and *iii*) in the context of ICSID arbitrations).

However, not all tensions are resolved within the EU. Following the so-called *Solange* approach regarding its relation with CJEU,^[8] and other recent similar decisions, considering that *Achmea* appealed the German Constitutional Court, this Court could conclude that CJEU went beyond its powers (and acted *ultra vires*) when it decided that investor-State dispute settlement provision of the BIT in question is incompatible with EU law. The German Constitutional Court could conclude that CJEU violated the rights of the investor arising from the Treaty and the German Constitution, which was also applicable to the case as the seat of arbitration was in Germany. Furthermore, the German Constitutional Court could also consider that the consent given by the German State to the Agreement is also unconstitutional.^{[9]-[10]}

Therefore, it is not for certain that tensions between EU and Member-States as well as between European Union law and international arbitration law have come to an end, because the European Commission considers the possibility of initiating infringement proceedings against Germany for the German Constitutional Court's decisions.

Although it is possible to disagree with the position of the European Commission and the CJEU and consider that this position is based on "an absolutist view" of the unifying and controlling role of the CJEU in the interpretation and application of EU law, the truth is that, considering the abovementioned legal consequences, investment arbitration among the Member-States in the EU will disappear (possibly with the exception of the UK); and, at the same time, considering what is occurring with the *Free Trade Agreements* to which the EU is party and with the project for an Investment Multilateral Court, it seems that the death of investment arbitration in Europe is confirmed. Historically, it looks like a return of mechanisms of justice to the States and to the EU.

Economic consequences

From an **economic** point of view, the mentioned decision and Agreement will deeply affect the level of protection granted to investors from the EU with investments in other Member-States, mainly if new mechanisms would not be granted for the protection of the respective investments which were protected and now are no longer protected. In fact, foreign investors from the EU will lose substantial protections and dispute resolution mechanisms granted by the BIT, *i.e.*, the possibility of initiating an arbitration directly against Member-States as it was granted by the BIT. Consequently, the legitimate expectations of those investors in relation to their investments are violated.

Consequently, in relation to future investment, it is expected that, firstly, foreign investors from Member-States of the EU will relocate their investments to other States which grant broader protection to foreign investments, in particular to States which are not part of the EU. Furthermore, it is also expected that there would be a higher inequality between foreign investors from States outside of the EU who invest in Member-States of EU and foreign investors from Member-States from EU who invest in other Member-States of EU, because the first group of investors may have broader protection of their investments than the second group.

In conclusion, it seems that the discussion and guarantee of alternative solutions for the legal and effective protection of the rights of investors within EU is crucial and urgent. It was, indeed, a commitment of the Member-States and the EC in their political declarations and communication.

Additionally, as is arising from the abovementioned, the discussion goes well beyond the EU and the creation of an Investment Multilateral Court (which, indeed, is unknown whether it would solve and avoid all criticism and/or problems invoked related to ISDS). Without prejudice to possible new solutions regarding the substantive protection of foreign investments, one could ask whether a possible solution may be found through the acceptance of equality between arbitral tribunals and judicial courts in the terms and for the effects of control by CJEU and/or through the creation of last control mechanisms by EU and Member-States, as it occurs at the level of the States.

[1] The present article corresponds to an adjusted version of my intervention as speaker in the 3rd Edition of Lusophone Arbitration Practitioners Meeting (*"Encontro de Arbitralistas Lusófono"*) organized by the law firm Derains & Gharavi within the Paris Arbitration Week (PAW). This webinar took place on the 9th July 2020, in which I had the pleasure of participating. I would like to thank my colleagues and friends Filipe Vaz Pinto and Carolina Pitta e Cunha for some bibliographical elements and of their workpapers, which also partially contributed and were useful in my presentation of the topic.

[2] Available [here](#).

[3] *Idem*.

[4] Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), which may be found [here](#).

[5] Cf. <https://globalarbitrationreview.com/article/1211810/the-pendulum-has-swung-back>.

[6] For more developments on this subject, see George A. Bergmann *Arbitration International*, Volume 28, Issue 3, “Navigating EU Law and the Law of International Arbitration”, (LCIA 2012), pp. 397-445.

[7] *Idem*.

[8] Cfr., for example,

http://arbitrationblog.kluwerarbitration.com/2020/05/21/the-cjeu-german-constitutional-court-debate-and-impact-on-achmea-and-the-termination-agreement/?doing_wp_cron=1595006989.1606929302215576171875.

[9] *Idem*.

[10] Please note that, for example, recently and after the 3rd Edition of Lusophone Arbitration Practitioners Meeting (“*Encontro de Arbitralistas Lusófono*”) occurred on 9 July 2020, also the Portuguese Constitutional Court decided on the relation between the CJEU and the EU law application and the control by the Portuguese Constitutional Court, which may be consulted [here](#).

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