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CJEU Does Not Buy Wathelet's Opinion in Achmea – What Is Left Unanswered?

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On March 6, 2018, the Court of Justice of the European Union ("**CJEU**") in its 12-page judgment backed the Commission in its grid to finally scrap the intra-EU BITs and defied Advocate General's attempt to preserve the system.

The purpose of this note is to concisely analyze this far-reaching judgment of the CJEU against the major precepts of the advisory opinion of Advocate General Wathelet ("**AG**"), previously discussed in several posts, and to determine what was, nonetheless, left unattended by the Court, and what may ensue in the aftermath.

General Observations

The CJEU held that the substantive provisions of the EU law preclude the ISDS mechanism of Article 8 of the Netherlands-Slovakia BIT and hence render any award stemming from the intra-EU BIT unenforceable in the Member States.

Key points worth noting before proceeding to the substance of the judgment:

- The CJEU employed the reverse order of the questions discussed by the AG in his opinion, effectively bypassing the third and, arguably, the most important question on discrimination under Article 18 TFEU pushed by the EU Commission.
- The CJEU conflated the first and the second questions and simultaneously considered whether the BIT in question conformed to Articles 267 and 344 TFEU.
- The CJEU did not entertain the request from the Czech, Hungarian, and Polish governments to fend off the AG's opinion on the matter.

The crux of the CJEU's reasoning consisted in a fundamental premise that an international agreement, *i.e.* the Netherlands-Slovakia BIT, cannot affect the allocation of powers fixed by the EU law. The CJEU further underlined that the Member States are to ensure the uniform application of the EU law in their territories. And the only way to ensure such uniformity and consistency is through a common judicial system of the European Union consisting of the national courts, tribunals, and the CJEU.

Given that the CJEU effectively avoided addressing the third question on whether the Netherlands-Slovakia BIT discriminate against other Member States, this note will follow the pattern set out by the CJEU, in particular addressing **three** pivotal issues of the Court's reasoning below.

I. Does the *Achmea* dispute concern the interpretation of the EU law?

In 2017, the AG opined that, although Article 8(6) of the Netherlands-Slovakia BIT subjects investment-state disputes to "the law in force of [the Netherlands or Slovakia]" and "other relevant Agreements between [them]" (*i.e.*, the EU Treaties), the dispute does not implicate the interpretation and application of the EU law *per se*. According to the AG, the Achmea Tribunal was called upon to rule on the breaches of the BIT in question, and the latter's provisions do not necessarily overlap with the EU law. For instance, the most-favored nation clause of Article 3(2), the umbrella clause of Article 3(5), the sunset clause of Article 13(3), and finally, the ISDS mechanism of Article 8 of the BIT have no equivalents in the EU law and the Treaties. Therefore, the Achmea Tribunal faced little risk of engrossing in the application and interpretation of the EU law, according to the AG.

In its recent judgment the CJEU decisively renounced the AG's proposition by pointing out that, to consider the potential infringements of the Netherlands-Slovakia BIT, the Achmea Tribunal could not but apply the EU law, specifically the provisions on the freedom of establishment and free movement of capital. This finding led the CJEU to the question of whether the Achmea Tribunal had the power to apply the EU law in principle.

II. Can the Achmea Tribunal be considered "any court or tribunal" within the confinements of Article 267 TFEU and thus apply the EU law in the first place?

Given the CJEU's position that Achmea Tribunal was essentially engaged in application and interpretation of the EU law, the question now lingers whether it had the right to do so. In other words, whether it constituted "[a] court or tribunal of a Member State" within the confinements of Article 267 TFEU.

The AG offered a number of criteria for the CJEU to determine that the Achmea Tribunal was indeed "[a] court or tribunal" under Article 267 TFEU and thus could legitimately apply the EU law. He surmised, in particular, that the Achmea Tribunal was "established by law" – the standard which was elaborated in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754), where arbitration of tax disputes was found sanctioned by a Portuguese law. In addition, the AG attempted to draw the analogy with the Benelux Court of Justice discussed in *Parfums Christian Dior* (C-337/95, EU:C:1997:517), recognizing that the latter, even though not a court or tribunal of a Member State, "should . . . be able to submit questions to [the CJEU], in the same way as court of any of those Member States."

The CJEU dismissed the AG's reasoning. First, it emphasized that tribunals arbitrating tax disputes in Portugal derive their power from the state's constitution. On the contrary, the ISDS mechanism of Article 8 of the Netherlands-Slovakia BIT does not form "part of the judicial system" of the contracting states, but is rather of "a precisely exceptional nature". Second, the Achmea Tribunal did not have "any . . . links with the judicial systems" of Slovakia and the Netherlands, as compared to the Benelux Court of Justice, whose principal task is to ensure cooperation and uniform application of law within the three Benelux states.

Consequently, the CJEU held that, as a matter of the EU law, the Achmea Tribunal cannot be considered "[a] court or tribunal of a Member State" and hence it was not authorized to apply and interpret the EU law in the first place. The CJEU never addressed other criteria advanced in the AG's opinion, such as the permanent nature of the Achmea Tribunal, its compulsory jurisdiction,

exclusion of *aequo et bono* in decision making, and the Tribunal's impartiality.

III. Does a limited judicial review of arbitral awards in the context of investment arbitration constitute a remedy for "effective legal protection" as required by Article 19 TEU?

According to the AG, the awards rendered under the BITs are similar to arbitral awards of the commercial arbitration. As such, these awards cannot avoid judicial review and/or be enforced without the assistance of a Member State. Further, neither the Commission nor the Member States ever sought to debate the incompatibility of arbitral awards with the EU law in the context of commercial arbitration.

In the AG's opinion, the CJEU judgments in *Eco Swiss* (C-126/97, EU:C:1999:269), *Genentech* (C-567/14, EU:C:2016:526), and *Gazprom* (C-536/13, EU:C:2015:316) involving set aside of arbitral awards of commercial arbitration prove that the Member States are able to safeguard the uniform application and interpretation of the EU law "whether in a competition matter or in other areas of [law]" (*i.e.*, in international arbitration). In addition, the AG weighted in that domestic courts are well equipped with the mechanisms of Article V of the New York Convention to protect the European public policy in the context of both commercial and investment setting.

The CJEU once again resolutely disagreed with the AG. It noted that the award rendered by the Achmea Tribunal is final by its nature, which in turn leaves little room for the judicial review by German courts under Paragraph 1059(2) of the German Code of the Civil Procedure [Judgment para. 53].

The CJEU accentuated on the crucial discrepancy between the investment and commercial arbitrations, noting that the former "originate[s] in the freely expressed wishes of the [private] parties". On the contrary, according to the CJEU, the BIT arbitration is conceived as an attempt of the Member States to remove from the jurisdiction of domestic courts and thus from the remedies for "effective legal protection" fixed by Article 19(1) TEU. In other words, the ISDS mechanism of Article 8 of the BIT falls foul with the states' obligations arising from Article 19(1) TEU to provide sufficient remedies in the fields covered by the EU law.

What the CJEU did not say?

- *Whether the ISDS in the intra-EU BITs constitutes discrimination under Article 18 TFEU?*

The CJEU left open a pivotal question of the alleged discriminatory nature of the BIT's ISDS provision, strongly pushed by the Commission. The AG noted that the reciprocal nature of the rights and obligations of the parties is "a consequence inherent in the bilateral nature of the BITs" and hence does not amount to discrimination within the meaning of Article 18 TFEU.

- *Whether intra-EU BITs are similar to intra-EU treaties on the avoidance of double taxation (DTA)?*

The AG stressed on the similarities between BITs and DTAs, namely that they are aimed at the same economic activities, which was not addressed by the CJEU.

- *What will happen to the ISDS mechanism of the Energy Charter Treaty in the wake of the CJEU's decision, given that all Member States and the EU itself are the parties to the ECT?*

The AG noted in his opinion earlier last year, that if any EU institution or any Member State had "the slightest suspicion" that the ISDS mechanism set forth in Article 26 of the ECT might be incompatible with the EU law, they would have sought an opinion from the CJEU. Nonetheless, it remains unclear what will happen to it, since the CJEU did not address the issue in the recent judgment.

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*Other recent posts on the Achmea judgment can be accessed here and here, as well as at the following link.

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