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What Next for Intra-EU Investment Arbitration? Thoughts on the Achmea Decision

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On 6 March 2018, the Court of Justice of the European Union (the "**CJEU**") delivered its ruling in the case of *Slovak Republic v Achmea* ("**Achmea**"), holding that the investor-state arbitration provisions in a bilateral investment treaty ("**BIT**") between the Netherlands and the Slovak Republic are invalid, as they are incompatible with EU law.

In reaching the opposite conclusion to that set out in the Advocate-General's Opinion in September 2017, the CJEU decided that: (i) a tribunal formed under the BIT could be called on to interpret or apply EU law (because EU law is part of the law of both States and because EU law derives from an international agreement between the States), yet (ii) the dispute resolution mechanism of the BIT could prevent the kind of legal review of EU law questions that is required by EU law as a tribunal formed under the BIT had no power to make a reference to the CJEU. This had an adverse effect on the autonomy of EU law and, accordingly, the arbitration clause was incompatible with EU law.

The CJEU's judgment raises more questions than answers, not least as it looks, *prima facie*, to have far-reaching implications on both current and future intra-EU BIT disputes (there are currently 196 intra-EU BITs in force containing arbitration clauses which would potentially be affected). It is likely as a result that attempts will be made to distinguish or get around Achmea, in order to maintain some semblance of protection for intra-EU investment. We consider three possible areas of concern below.

Impact on Countries yet to Join the EU

Countries such as Serbia and Albania, who are currently in negotiations with the EU regarding accession, have concluded BITs with a number of EU Member States. Once they join the EU, arguably no dispute relating to an intra-EU investment made after that date could be referred to arbitration under those BITs (indeed, that was precisely the position in *Achmea*). However, what about investments made prior to accession? If the dispute itself arose before accession, it might be argued that neither the investment nor the measure giving rise to the dispute involve EU law, and so the CJEU's reasoning would not apply as no tribunal would need to consider EU law. However, this could become more complicated if the measure giving rise to the dispute did not arise until after accession, and even more so if the measure in question was a direct result of accession and the imposition of EU law into that State. Yet, when the investment was made, there would likely have been no expectation of EU law being relevant.

There is little to no direction as to whether future EU Member States will have to terminate their current BITs as a condition of accession. In any event, this will not affect investments made pre-accession, as many BITs contain 'sunset clauses' designed to protect investors post-termination of BITs.

It is, of course, only the ISDS (investor-state dispute settlement) mechanisms of intra-EU BITs that are potentially affected by the CJEU's decision. The substantive protections in the BITs still exist, yet the investor would have potentially no means of effectively enforcing them. Claims could be brought before the host State's courts, yet in many jurisdictions, i.e. those with less developed or slower court systems or where there may be issues of impartiality and lack of due process, this will not be a satisfactory alternative.

This uncertainty could (conveniently) give the European Commission the impetus required to push forward their proposals for an investment court system, mooted as an alternative to vocal opposition to the current system.

Impact on BITs Between the UK and other Member States post-Brexit

The immediate impact of the Achmea decision will be to reduce confidence in the EU as a place for investment treaty arbitration, both in terms of structuring any future investment (so as to avoid relying on intra-EU BITs) and choosing a seat for any arbitration (to avoid as far as possible any recourse to EU Member State courts). This could, however, make post-Brexit Britain more attractive.

As it currently stands, the Achmea decision arguably renders ISDS provisions in BITs between the UK and EU Member States invalid under EU law, yet once the UK leaves the EU, it will cease to be a Member State. It does not appear to be the case that the effect of the Achmea decision is to essentially 'strike' out ISDS provisions in BITs as if they never existed (although the European Commission may well argue to the contrary). Therefore, arguably, the ISDS provisions will continue to exist and could then be relied on post-Brexit as if the UK had never been a Member State. It could, however, also be argued that they should apply only to investments carried out or disputes that arose after the UK ceased to be a Member State (as until that point the UK had been subject to EU law and the supremacy of the CJEU).

Of course, the precise relationship that will exist between the EU and the UK post-Brexit remains to be seen. There is a debate surrounding the role of the CJEU and its influence on the UK going forward, which will clearly impact the UK's autonomy. The question of the proper resolution of investment disputes between the UK and EU Member States is also likely to be discussed in the Brexit negotiations. If, however, the CJEU is not the final point of authority post-Brexit, in line with the UK Government's stated objective, and in the absence of any alternative mechanism, then the UK could become a more attractive place (i) to structure investments through, and (ii) as a seat for BIT arbitrations against EU Member States.

Impact on Multilateral Treaties

The Achmea decision also raises questions concerning multilateral treaties such as the Energy Charter Treaty ("**ECT**"). Under this treaty, where a Member State is involved on both sides, it could be argued that the judgment in Achmea would apply as EU law may well need to be considered and applied. However, arguably disputes under the ECT differ from those under intra-EU BITS for at least the following two reasons:

(a) there are non-EU Member State signatories to the ECT, and

(b) both the European Union and Euratom are signatories to the ECT in their own right.

Where a dispute is intra-EU, it may be that the CJEU looks to assert its authority as in Achmea. However, different questions arise where the ECT is invoked by or against a party from outside the EU which has not agreed to be subject to the supremacy of EU law. This could create a situation where EU investors are unable to bring claims in arbitration against EU Member States, but non-EU investors are, effectively creating two classes of investor within the ECT, contrary to the wording of the treaty. Indeed, a key tenet of the ECT's investment protections is non-discrimination.

Moreover, as a signatory, the EU itself (and also Euratom) has given its *"unconditional consent to the submission of a dispute to international arbitration"* under Article 26(3)(a). In doing so, it has arguably also ratified the same consent given by the individual EU Member States that are signatories, and no declaration has been made by the EU that would appear to limit this consent. Arguably, therefore, the EU has already agreed, on an international level, that disputes falling under the ECT are to be dealt with by way of arbitration, effectively carving such disputes out from the jurisdiction of the CJEU. Any CJEU ruling that sought to undermine this would be undermining the political will of the signatories, and arguably also (as an institution of the EU) acting contrary to the EU's obligations under the ECT.

It is noted that the EU has never been party to an ECT dispute. Indeed, if it were, it could hardly argue that it lacked the capacity to set out the correct understanding of EU law to the tribunal. However, as the EU does not have sovereignty over the energy resources of its constituent member states, it is unlikely at the current time that it would ever be a party to such a dispute. Accordingly, there is currently uncertainty as to how the CJEU will deal with ECT claims in light of Achmea. For non-Member State investors, it may be advisable, where possible, to look to BITs as a more certain mechanism for asserting claims against Member States. When the dispute is between Member States, investors may wish to consider structuring their investments differently – through non-Member State entities that are either signatories to the ECT or, perhaps better still, that have relevant BITs.

Final Thoughts

The Achmea decision does not reach as wide as may be feared. It expressly excludes commercial arbitration and does not apply to ICSID arbitration (which is governed by the ICSID Convention). Whilst national courts of Member States will be bound by the decision, arbitral tribunals will not. Further, it may be possible to seek to isolate the decision as specific to the BIT in question. The UK could, meanwhile, seek to benefit from this uncertainty by positioning itself post-Brexit as the obvious jurisdiction for both structuring investments into the EU and bringing BIT disputes.

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This entry was posted on Saturday, April 21st, 2018 at 10:38 am and is filed under Achmea, Arbitration, Arbitration Proceedings, BIT, Brexit, CJEU, Investment Arbitration
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