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Investment in the Times of Achmea

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The CJEU judgement issued in the much-discussed (here and here) C-284/16 Slovak Republic vs. Achmea case has every chance of becoming a game changer in the field of the investment protection regime within the EU. Where does that leave the protection of investors within the EU?

The message of the CJEU to those who welcomed the AG Wachelet's opinion's conclusion that intra-EU BITs are not incompatible with the EU law seems clear: abandon all hope. That conclusion is justified not by the operative part of the CJEU's decision, but even more so by what the CJEU included and what it omitted in the grounds of the judgement.

In the operative part, the CJEU found that Articles 267 and 344 TFEU preclude a provision in an intra-EU BIT, under which an investor may bring an investment dispute against a Member State before an arbitral tribunal. More striking, however, is that the CJEU ignored a number of available more nuanced options and chose to cut the Gordian Knot instead. That may be indicative of the Court's barefaced approach and its determination to close the chapter of intra-EU BITs once and for all.

In the grounds of the judgement, the CJEU came to a different conclusion than AG Wathelet and found that arbitral tribunals in investment disputes are not courts of Member States within the meaning of Article 267 TFEU and they cannot request a preliminary ruling when faced with a question of application of the EU law. The Court also drew a line between the investment arbitration and commercial arbitration.

The Court has not considered that the conformity with the EU law could be ensured through the assistance of national courts at the seat of the arbitral tribunal (as considered in C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG*). Even the fact that the case at hand has been referred to the CJEU by a national court (the German *Bundesgerichtshof*) in the course of the revision of an arbitral award has not led the CJEU to a conclusion that such a procedure might be sufficient to ensure the conformity of arbitral awards with the EU law (as in the case C-174/84, *Bulk Oil (Zug) AG v. Sun International Ltd. and Sun Oil Trading Co.*).

It should also be pointed out that the European Commission so far presented a threefold approach to investment arbitration under an intra-EU BIT. Firstly, it acted as *amicus curiae* to arbitral tribunals; secondly, it intervened in revision stages of awards (including the ICSID *ad hoc* Committee) and thirdly, by initiating infringement proceedings against the Member States that

were reluctant to terminate their intra-EU BITs. The first approach, at least in theory, could give the European Commission an opportunity to present its views on the merits of the case. Similar chance was available in the second approach, although it was limited to the challenge grounds, usually including public policy considerations. In contrast to the latter, the third approach in its essence ignored circumstances of a specific case and questioned the dispute resolution mechanism under intra-EU BITs as a whole. In the Achmea decision, the CJEU did not consider whether the first two options could be sufficient to safeguard the autonomy of the EU law but endorsed the latter approach instead. Thus, the CJEU left little doubt as to the prospective outcome of the infringement proceedings, if they ever make it to the Luxembourg courtrooms.

The possible effects of the judgement should be considered against the background of the 2015 non-paper agreed by the delegation of five Member States (the 'first group states' as referred to in the AG Wathelet's opinion in the Achmea case). The non-paper identified three options of possible mechanism of binding and enforceable resolution of investment disputes: by conferring the jurisdiction in investment disputes directly to the CJEU, by establishing a permanent investment tribunal comparable to the Unified Patent Court, or to rely on the Permanent Court of Arbitration in The Hague as a court common to all Member States. The two latter options will only meet the essential requirement under the Achmea judgement if they prevent the adverse effect on the autonomy of EU law, in particular by providing for the procedure of reference for a preliminary ruling.

After the Achmea judgement, the Member States (and the 'second group states' as the usual suspects in particular) may breathe a sigh of relief. At first glance, the 'freezing effect' of the prospect of being summoned before an arbitral tribunal for making use of its regulatory powers seems diminished. Yet, it could be premature to perceive the Achmea judgement as strengthening the host state's position. In fact, the CJEU has augmented its own position and secured its judicial monopoly.

Where does that leave the protection of investment within the Single Market? The European Commission's approach in the proceedings was based on the premise that the EU law itself already provides for 'full protection' of investment. The CJEU stressed the importance of common values under Article 2 TFEU, as well as mutual trust and the principle of sincere cooperation. By endorsing the European Commission's view, the CJEU effectively vouched for the same 'full protection' of EU law, whether specific investment protection legislation will be introduced into the EU law (as proposed here) or not. Therefore, the Achmea judgement should be seen in its essence as a promise. Investors within the EU have been left with little choice but to rely on it. It remains to be seen if the European Commission and the CJEU can deliver on that promise.

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