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# The Future of Investment Arbitration in Europe: AIA Conference, June 2018

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It has long been said that investment treaty arbitration is at crossroads. This is probably most true within the European Union, where a profound recalibration and reform of the system is underway. On 6 March of this year, the Court of Justice of the European Union (the "CJEU") rendered its judgment in Case C-284/16 *Slowakische Republik v. Achmea BV* ("Achmea"), finding that arbitration clauses included in international agreements between the Member States providing for investor-State arbitration are incompatible with Articles 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU"). The CJEU is also expected to issue shortly its Opinion 1/17 on a Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU regarding the compatibility of Chapter Eight ("Investments"), Section F ("Resolution of investment disputes between investors and states") of the Comprehensive Economic and Trade Agreement between Canada and the European Union ("CETA") with the EU Treaties and fundamental rights. Adding more complexity to the debate, the United Kingdom is soon to withdraw from the European Union, which raises fundamental questions regarding the implications for the United Kingdom's bilateral investment treaties ("BITs") and, particularly, the Energy Charter Treaty ("ECT").

These issues were explored on 1 June 2018 in Brussels by arbitration and public international law specialists during the aptly-titled conference "The Future of Investment Arbitration in Europe", organized by the Association for International Arbitration (AIA).

The first panel of the conference discussed the possible fate of intra-EU BITs after the *Achmea* judgment and canvassed the options available to investors for the enforcement of their rights. Moderated by Prof. Nikos Lavranos, the panel included Dr. Anna Plevri (University of Nicosia), Dr. Richard Happ (Luther Hamburg), Andras Nemescsoi (DLA Piper Budapest) and Johan Billiet (Billiet & Co. Brussels). The first question that was addressed was the scope of the *Achmea* judgment and whether it was limited to the Netherlands-Slovakia BIT or it was applicable to other intra-EU investment treaties as well. A consensus appeared to emerge on the panel and in the audience that the CJEU's findings will ultimately affect all arbitrations under intra-EU BITs, including ICSID arbitrations. However, some panelists considered that the ECT, as an international

agreement to which the European Union itself is a party, remained at this stage outside the scope of application of *Achmea*. It was agreed that the *Achmea* judgment will prevent new cases from being filed on the basis of intra-EU BITs, but may also affect ongoing cases where either no award has been issued or where the State may still apply for the annulment or revision of an award upholding jurisdiction. It was added that, despite the limitations of the judgment, it is not certain that the CJEU will not in the future find fault with the substantive protections included in BITs or even with commercial arbitration. Looking at the options available to investors for the protection of their rights, the panelists explored whether domestic courts could be a forum for their claims. It emerged that no uniform answer to this question exists, as the courts of some Member States may be prevented from hearing such claims on account of the dualist nature of their legal systems. Mediation was explored as a possibility, with the caveat that in the absence of an enforceable dispute resolution mechanism, the incentive to use this tool may be considerably diminished. Other available options that were discussed included the conclusion of investment contracts, parliamentary lobbying and the restructuring of investments.

The second panel explored the degree to which the international arbitration landscape has changed due to greater gender, cultural and legal diversity. Moderated by Diego Brian Gosis (GST LLP Miami), the panel included Prof. Verónica Sandler (Austral University), Grant Hanessian (Baker McKenzie New York), Dr. Alejandro López-Ortiz (Mayer Brown Paris) and Saadia Bhatty (Gide Loyrette Nouel London). The panel looked into how women are represented in various types of disputes and made the provocative suggestion that gender should be used as a tool in making appointments to arbitral tribunals, in a way that is not too dissimilar to jury selection in the United States. The panel also explored the degree to which perceived cultural differences or stereotypes play a role in the appointment of arbitrators. It was agreed that, as best practices of the arbitration community are being developed, the differences in approaches between common lawyers and civil lawyers in arbitration have diminished. Where they appear to persist is with regard to evidence. For instance, in answer to the perceived common-law bias of the IBA Rules on the Taking of Evidence in International Arbitration, a draft of the Inquisitorial Rules on the Taking of Evidence in International Arbitration (or the “Prague Rules”) has recently been published. The panel discussed whether and how the Prague Rules could mark the beginning of a dialogue to recalibrate arbitration so that it can better reflect the needs of all its users.

The third panel, moderated by Dr. Todd Weiler and including Dr. Martins Paparinskis (UCL Faculty of Laws), Prof. Dr. Eric De Brabandere (Leiden University), Louise Woods (Vinson & Elkins London) and Robert Volterra (Volterra Fietta), looked into whether the proposed investment court model included in the CETA is compatible with European Union law and whether it could provide a useful template for investor-State dispute resolution. No consensus emerged between the members of the panel or in the audience regarding the compatibility of the proposed court with European Union law. In one view, in *Achmea*, the CJEU intentionally omitted to analyze a number of points so as to retain sufficient flexibility that would later allow it to find the investment court in the CETA compatible with the European Union treaties. In another, it is questionable whether the envisaged investment court could be considered a “court or tribunal of a Member State” so that it could be found compatible with the European Union treaties in light of *Achmea*. The panel also examined whether the proposed investment court answered the objections raised against the current investment arbitration system. Some members of the panel considered that the latter’s alleged pro-investor bias had no support in the statistics and debated whether creating a system where only States were in control of appointments was a solution to this perceived problem. The panelists considered that the perceived inconsistency between different awards was to some extent justified by the different wording employed in the multiple investment treaties that were applicable. Finally,

there was some disagreement among the panelists about the review of awards under the CETA on the grounds of manifest errors of fact or law, some panelists strongly suggesting that it would result in a *de novo* review of the entire case and could not work towards the stated goal of improving cost and efficiency of these proceedings; others being less persuaded.

The fourth panel was moderated by Graham Coop (Volterra Fietta) and included Gordon Nardell QC (20 Essex Street), Kathleen Paisley (Ambos Law), Bernhard Maier (Squire Patton Boggs London) and Frederic Yeterian (Philax International (UK) Ltd). The panel concentrated on the effects on the ECT of the United Kingdom's withdrawal from the European Union. A common thread during the discussions was that, at the moment, there is considerable uncertainty in the energy markets as a result of not knowing the terms of the withdrawal. The panelists were of the view that, until there is clarity on the United Kingdom's position with regard to the treaties it benefits from, its relationship with the ECT is unlikely to change. The panel debated whether *Achmea* could apply in intra-EU ECT arbitrations and noted that presently there is uncertainty surrounding this point. In one view, the principles set out by the CJEU in *Achmea* are equally apposite in the ECT context, which could result in situations where the treaty is interpreted differently, depending on the parties to a dispute. The panelists also debated whether investors could file claims under the ECT as a result of Brexit, for instance by arguing the breach of their legitimate expectations due to changes in the regulatory framework. It was mentioned that the answer to this question depends on whether a tribunal would consider that Article 50 of the Treaty on the European Union acts as a bar to a claim based on legitimate expectations. Finally, the panelists looked into whether claims arising before Brexit based on intra-EU BITs or the ECT could nonetheless be asserted post-withdrawal, when the *Achmea* judgment could be seen as no longer applicable. There was some support for this view, provided that the European Union and the United Kingdom did not agree otherwise in the withdrawal agreement.

The closing address was given by Iuliana Iancu (Hanotiau & van den Berg Brussels), who summarized the day's remarks and invited the audience to reflect on whether what some perceive as the gradual reduction in investment protection throughout the European Union will have an effect on foreign direct investment volumes.

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