

Arbitration: The *Achmea v Slovakia* Judgment of the CJEU, is it really the end of Intra-EU Investment Treaties?

Two leading arbitration practitioners say not necessarily. The CJEU's judgment is highly political, but legally flimsy.

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The judgment rendered on March 6, 2018 by the Grand Chamber of the Court of Justice of the European Union in the *Achmea* case will no doubt generate considerable discussion. It relates to the compatibility of arbitration provisions in Bilateral Investment Treaties with EU law in disputes between an investor from a Member State of the EU and another Member State of the EU, often called “intra-EU BIT claims”.

1. The Court issued its judgment following a request for a preliminary ruling from the German Federal Court of Justice, concerning an application for annulment against the final award in the *Achmea v Slovakia* arbitration.
2. With the support of the European Commission, Slovakia argued that the arbitration provision of the Netherlands-Slovakia BIT was contrary to Articles 267 of the TFEU (preliminary ruling procedure by court or tribunal of a Member State to the CJEU) and 344 TFEU (exclusivity of the CJEU jurisdiction for disputes concerning the interpretation or application of the EU Treaties). It was also argued that it was contrary to article 18.1 of the TFEU (anti-discrimination provision) on grounds of reversed discrimination by bilateral investment treaties, which do not apply to all EU citizens.
3. The Court answers positively to the first two questions, and doesn't answer the third one. It concludes that the arbitration clause under article 8 of the BIT in question is incompatible with these TFEU provisions.
4. This judgment constitutes a textbook example of result-oriented decision in which the Court obviously started with the desired outcome and then sought to reason it backwards. It is an attempt by the Court to bolster its supremacy over EU law, but it is a political attempt that fails to be legally convincing (I). In any case, it is not binding on international arbitration tribunals.
5. Furthermore, this decision has a fairly limited reach. Firstly, it expressly excludes commercial arbitration (§§ 54 and 55 of the judgment). Secondly, it does not apply to ICSID arbitration, which is governed by a different convention, that is the Washington Convention of 1965, under which contracting states must recognize ICSID awards directly and without any review, as they would for any final decision rendered by their own courts.

6. The judgment thus only relates to intra-EU arbitrations, other than ICSID arbitration, under intra-EU BITs. It is also specific to the BIT in question, which is the treaty between the Netherlands and Slovakia. While the questions referred by the Federal Court of Germany had a general reach, the answers given to them by the Court of Justice of the European Union is on the contrary limited to the treaty in question, both in its reasoning and in the answer itself (II).
7. The solution provided by this judgment, if it were to be applied in a general manner, would create serious doubts over the possibility of maintaining EU Member States as seats of investment treaty arbitrations and the EU would potentially incur international responsibility (III).

I. The political bolstering of the Court's power without any serious legal justification

8. The reasoning of the Court to justify its decision is divided in three parts.
9. First, the Court examines article 8 of the BIT, on the applicable law (§§ 39 and following). It notes that this article requires arbitral tribunals to take into account the contracting State's domestic law (in this instance, Slovakian law), the BIT itself, any other relevant agreement between the contracting States, any specific agreement on investment and the general principles of international law. The Court deduces from this general wording that, under this clause, the arbitral tribunal may apply EU law.
10. Second, the Court examines whether the arbitral tribunal can be characterised a court or tribunal of one of the Member States under article 267 of the TFEU, which provides for preliminary ruling requests and ensures the unity of EU law (§§ 43 and following). This is obviously a rhetorical question since the Court has long ruled negatively on this issue and has not changed its jurisprudence in that regard.
11. Third, the Court examines whether an arbitral tribunal could be subject to judicial review from the national courts of one of the Member States on annulment applications. It finds that annulment decisions are very rare in Germany, as in most States that are favourable to arbitration (§§ 50 and following). It deduces from this that no judicial review can effectively be exercised through an annulment application, and seems to consider, although the Court is not very clear on this, that the duty to comply with public policy (or international public policy in the case of France) would be insufficient to ensure full judicial review of the arbitral award (§ 53).
12. Given these reasons, the Court infers that an arbitral tribunal would intrude on the exclusive competence of EU courts in applying EU law.
13. The reasoning is of course highly artificial. Nowhere does the Court cite article 344 of the TFEU. An international arbitration tribunal ruling on a BIT rules exclusively on one treaty, the BIT itself. The Court has no jurisdiction to rule on the BIT, and article 344 of the TFEU is of no help in that respect. The decision thus consists of a mere assertion, in a fashion that is nearly

peremptory, that the Court of Justice of the European Union has exclusive competence over all issues in which other tribunals might apply EU law, other than commercial arbitration.

14. This is blatantly wrong. To give a simple example: take a foreign, non-EU judge, who has applied the law of a Member State, which comprises EU law, as a result of the parties' choice of law clause in their contract. If we were to follow the Court's reasoning, this would mean that the foreign decision will be subject to no review unless it is enforced in the EU. Yet, no one would even think of questioning the foreign, non-EU judge's competence to apply EU law. It is therefore hard to understand why an arbitral tribunal, ruling on a BIT, would be treated differently, and the Court does not even attempt to answer this question.
15. Everyone is of course entirely free to be convinced, or not, by the Court's reasoning that is essentially characterised by the desire to achieve a specific political goal at the expense of legal considerations.

II. The limited reach of the Court's judgment

16. Technically, the Court's judgment has a limited reach. Notwithstanding that commercial arbitration is expressly excluded (§§ 54 and 55) and that it does not apply to ICSID arbitration, the judgment is also limited to the Netherlands-Slovakia BIT and like treaties.
17. It is quite notable that the Court's reasoning begins with an analysis of the law that must be applied by the arbitral tribunal under the treaty. The Court notes in particular that article 8, paragraph 6 of the BIT expressly refers, among other things, to the law of the contracting State who is party to the dispute, and any other relevant international agreements between the contracting State and the investor's State. It concludes, after noting that EU law is precisely part of that State's domestic law and that it also derives from an international agreement between those States, that the arbitral tribunal constituted under this BIT may thus be called on to interpret or indeed apply EU law (§ 42).
18. It is only then that the Court develops its analysis to determine whether the arbitral tribunal can be regarded as a court or tribunal of a Member State under EU law. According to the Court, the answer to that question is that the arbitral tribunal cannot be regarded as such and it concludes that resorting to arbitration under the BIT is thus incompatible with EU law.
19. The answer given by the Court is therefore limited to the treaty in question insofar as it is based on the specificity of its provisions relating to the applicable law. One must therefore refrain from any generalization.

III. The potential problems arising from the judgment if it were to be given a general reach

20. If this judgment were to be generalized to all intra-EU BIT arbitrations, it would potentially create at least two categories of problems.

21. The first category relates to the issue as to whether it would be possible to maintain a seat within EU for intra-EU BIT arbitrations. Even if the Court seems to consider that the judicial review of the award is insufficient to ensure compliance with EU law, one might question the impact of such a judgment on annulment applications on grounds of lack of jurisdiction or violations of public policy or international public policy, grounds which are provided for in most States.

If this judgment were to be generalized to other investment treaties, what would happen to awards made in the EU in intra-EU disputes under BITs? If the answer were to be annulment, it is obvious that non-EU countries such as Switzerland, Singapore and soon the United Kingdom would gladly welcome intra-EU arbitrations on their territories. However, the problem would remain the same at the enforcement stage of the awards in the EU.

22. The second category of problems with this judgment, if it were to be generalized, would be that the EU could potentially be held internationally liable under investment treaties it is party to. A classic example is that of the European Energy Charter (ECT), which the EU is a party to, along with its Member States. This dual situation raises a number of issues, to which European authorities have never provided any convincing response, especially in terms of division of roles.

23. The question is here much more fundamental. If the EU, through its courts, were to try and overturn the arbitration clause of the ECT in order to forbid intra-EU arbitration, it would find itself in a position not far-removed from the fairly classic case in which a State party to a treaty uses its own law to avoid fulfilling its international obligations, or more precisely to allow one of its members to avoid fulfilling its international obligations. This position could also arguably infringe Article 16 of the ECT, which provides that, as between the ECT and other treaties concerned the same subject matter, even entered into subsequently, the most favourable dispute resolution provision for the investor should prevail.

It is doubtless that any such actions could potentially lead the EU to be held internationally liable, that is, if a claimant has the courage to sue the EU.

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