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Comment on and Issues Raised by the Achmea Ruling of the Court of Justice of the European Union from an Arbitration Perspective

On March 6, 2018 the sword of Damocles which has been hanging over the investor-state arbitration (ISA) came down upon the 196 Bilateral Investment Treaties (BITs) concluded between the Member States of the EU when the Grand Chamber of the CJEU issued its ruling in the *Achmea* case.[1] The operative paragraph of the judgment states: *"Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."*

On its face, this ruling appears to be a very strong affirmation of the primacy of EU law over treaties concluded by the Member States. It is essentially grounded on the finding by the Court that arbitral tribunals are not capable of making references under TFEU article 267 (in line with its Opinion 2/13[2]) and hence it is impossible for the CJEU to exercise its authority over disputes involving the application of EU law. The arbitration clause in the Netherlands – Slovakia BIT, and presumably other similar intra-EU clauses, is thus declared to be incompatible with the EU law.

This ruling is relatively short, as compared to the complex nature of the issues raised by the case, and very blunt. In consequence, upon examination, perhaps due to its very brevity, this ruling seems to leave open and unclear a number of major issues. In particular, in the respectful opinion of the author of this comment, the CJEU has left uncertain the answers to the following questions:

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1 Judgment rendered in case C-284/16 – Achmea [ECLI:EU:C:2018:158] on 6 March 2018.

2 Opinion 2/13 – Accession of the EU to the ECHR [EU:C:2014:2454] of 18 December 2014.

1. What are the incompatible rules of EU law the arbitral tribunal might be called on to apply?
2. Are all arbitral proceedings in the EU at risk?
3. What is the effect of its judgment on the Energy Charter?
4. What is the effect of the *Achmea* judgment on extra-EU BITs?
5. Must the 196 intra-EU BITS now disappear?
6. What is the fate of the Multilateral Investment Court?
7. Does this ruling mean that the current award and pending cases are null and void?
8. What is the fate of survival clauses in intra-EU BITs?
9. What is the impact of this decision on investor-state proceedings outside the EU?
10. What is the impact of this ruling on proceedings under the ICSID Rules?
11. What is the significance of this judgment for the exercise of competence over "foreign direct investment" by the EU?

All these questions cannot be answered today with certainty. This note will simply seek to explain the nature of the concerns raised above.

1. What are the incompatible rules of EU law the arbitral tribunal might be called on to apply?

Nowhere in the judgment does the CJEU explain which rules of the EU law would be shielded from its control. Are all the elements of the typical BIT in conflict with the rules prohibiting discrimination against EU citizens, the freedom of establishment or free movement of services and capital? Arbitrators have held in the *Eureko* case[3] and others that BITs constitute a separate body of law and have denied any inherent conflict. These are major questions which require answers. The Commission and other critics have argued that BITs concluded by individual EU Member States discriminate against the investors of other EU Member States. Unfortunately, the Court does not address this very significant argument.

2. Are all arbitral proceedings in the EU at risk?

The Court suggests that the situation is very different between ordinary commercial arbitration proceedings where EU law is applied by arbitrators in private matters and treaty-based BIT arbitrations where States assume obligations to refer the matter to arbitrations. But, if the capacity to rule on matters of EU law is the central problem, is there not a danger for all arbitration proceedings in the EU which involve EU law? It is by no means clear that private commercial arbitrations are much more subject to domestic courts than investor-state proceedings under the UNCITRAL Rules. Indeed, the general thrust of all modern arbitration legislation is to shield all but exceptional cases from

[3] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic).

control by the courts. Does this not infringe the general duty of EU Member States to subject their laws to EU law?

3. What is the effect of its judgment on the Energy Charter?

If investor-state arbitration under BITs violates EU law why is this not also the case for claims brought by EU investors against the government of another EU Member State under the Energy Charter? The object and purpose and procedures are the same as those under BITs. The Court leaves us in the dark with respect to the Treaty that has generated more investor-state claims than any other. Will intra-EU claims under the Energy Charter be prohibited but the right to make extra-EU claims will survive?

4. What is the effect of the Achmea judgment on extra-EU BITs?

Member States have concluded some 1200 BITs with third countries. Indeed, they invented the whole technique. The *Achmea* ruling only relates to intra-EU BITs but what will be the consequence for claims against an EU Member State under a BIT with a third country? The procedure is the same and EU law may be potentially relevant to the decision of the case.

5. Must the 196 intra-EU BITS now disappear?

The Commission has been calling upon Member States to abrogate their intra-EU BITs. Must they now proceed to do this or could they amend the dispute settlement procedure in some way to make it subject to the jurisdiction of domestic courts and the CJEU? This is a key question and one which the Court does not expressly answer even if the Court's ruling has only criticised the arbitration clause in the BITs.

6. What is the fate of the Multilateral Investment Court?

Will the Commission be able to press ahead with its policy of promoting the creation of a Multilateral Investment Court (or even be able to justify the investment tribunals in the CETA, VietNam and Spore agreements) or will they be deemed in conflict with the CJEU under Article 340? The primacy of the CJEU in the enforcement of EU law seems to be a central underlying theme of this decision, and of many others. Does this not suggest that the Court may be hostile to any other court dealing with foreign investment protection?

7. Do the principles of the intertemporal validity of law save the *Achmea* award or does this ruling mean that the current award and pending cases are null and void?

The BIT allowing the Eureko[4] *Achmea* claim was a valid law when the claim was made. Is the ruling only prospective on the basis of principles governing the intertemporal

[4] The undertaking Achmea used to be called Eureko.

validity of law? Is it fair to declare this award retroactively invalid or is the current award actually null and void? Is it simply unenforceable in the EU and can be enforced as an arbitral award under the New York Convention elsewhere in the world? Would the enforcement of the Eureko *Achmea* award in a third country violate local or EU public policy? Arbitrators have already upheld the validity of such proceedings on the ground that they reflect a separate body of law from EU law; how will foreign courts deal with this question?

8. What is the fate of survival clauses in intra-EU BITs?

Many of the intra-EU BITs contain survival clauses by which they remain in force for a considerable period of time after denunciation. Should they not also survive the *Achmea* ruling? Can the court destroy the protections carefully erected by the States which concluded these BITs?

9. What is the impact of this decision on investor-state proceedings outside the EU?

The governing law of most BIT claims against and EU Member State are brought under the law of an EU Member State – in the Eureko (Achmea) case Germany. But the UNCITRAL Rules or the ICSID Convention do not preclude the choice of third countries as providing the governing law. What would be the consequences of organising a claim outside the territory of the EU? This is not impossible. Would the CJEU have to declare the claimant in contempt and the participating state in violation of EU law? It is doubtful that the CJEU could stop proceedings conducted outside its borders.

10. What is the impact of this ruling on proceedings under the ICSID Rules?

The ICSID Convention contains its own rules of procedure and allows for proceedings to be brought against a State party in Washington or elsewhere. Could the CJEU enjoin an investor and an EU Member State from proceeding under a BIT in accordance with the ICSID Convention? This is by no means certain since the Washington Convention does not contain rules of revision and annulment for violation of public order. Would the Member State be violating its obligation of loyal cooperation with the EU by proceeding in this way? What if the complainant proceeds regardless and insists on their right to an arbitration in Washington under the ICSID convention and the relevant BIT?

11. What is the significance of this judgment for the exercise of competence over "foreign direct investment" by the EU?

It is urgent to know whether the EU is competent to adopt a regime of investment protection complete with a dispute settlement system which might replace the network of intra-EU BITs. It is equally urgent to know the consequences of this judgment for the 1200 extra-EU BITs concluded by the Member States and now in force. The *Achmea* ruling of the CJEU is only addressed to intra-EU BITs, but the consequences for arbitration

provisions currently in these BITs or for a court system which the Commission wishes to may well be in jeopardy, as well. We can only speculate on these questions also.

The Court seems to have opened a Pandora's box and left the arbitration world with more questions than answers. Perhaps the Commission, having obtained what it wanted, will soon be suffering from a severe case of buyer's remorse.