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Decision of the European Court of Justice in the *Achmea* case

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Investor-State Dispute Resolution Provisions in Intra-EU BIT's are Incompatible with EU Law

On 6 March 2018, the Grand Chamber of the Court of Justice of the European Union rendered its long-awaited decision in *Slovakia v Achmea* (C-284/16) ruling that investor-state dispute resolution provisions were not compatible with EU law.

On 6 March 2018, the Grand Chamber of the Court of Justice of the European Union ("**CJEU**") rendered its long-awaited decision in *Slovakia v Achmea* (C-284/16). The case concerned a preliminary reference sent to the CJEU by the German Federal Court in the context of an appeal against the rejection by a lower German Court of a challenge to the final award handed down in an investment treaty arbitration between Slovakia and Achmea. The award had been rendered in the context of an arbitration arising from the Czech Republic-Netherlands bilateral investment treaty, enacted on 1 January 1992 (the "**BIT**").

The German Federal Court asked the CJEU whether the investor-state dispute resolution provision in the BIT was compatible with the EU treaties and in particular with Articles 344[1], 267[2] and 18[3] of the Treaty on the Functioning of the European Union ("**TFEU**"). The CJEU determined that it was not and that Articles 267 and 344 TFEU prohibited same.

Prior to entering into its formal reasoning, the CJEU set out the backdrop to its answer and reiterated, at length, that the autonomy of the EU judicial system, whose observance the CJEU assures, was the CJEU's most paramount concern.

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[1] _ Article 344 provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

[2] _ Article 267 provides in relevant part that "[t]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; [...]
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. [...]"

[3] _ Article 18 provides in relevant part that "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

The CJEU then set out three reasons why it considered that intra-EU investor-state arbitration was incompatible with EU law. First, it held that investor-state arbitral tribunals, constituted pursuant to an intra-EU BIT, were called upon to interpret and apply EU law. This is so because EU law is both part of the domestic law of the Member States and is derived from an international agreement between Member States.

Second, the CJEU held that arbitral tribunals are not courts or tribunals "of a member state" pursuant to Article 267 TFEU and therefore cannot refer questions of interpretation and application of EU law to the CJEU. In this regard, the CJEU emphasised that the arbitral tribunal in question did not constitute part of either the Dutch or Slovak judicial system nor indeed did it have any link to such a system of the EU Member States.

Third, the CJEU held that it was not sufficient, for the purposes of safeguarding the unity and coherence of EU law, that the courts of the law of the seat could refer a preliminary question to the CJEU during annulment or enforcement proceedings. The CJEU was also concerned by the limited nature of the grounds of challenge to investor-state awards. Whilst the CJEU recognised that considerations of efficiency justify a limited control by Member State courts of commercial arbitration awards, the same reasoning could not apply to an intra-EU investment arbitration awards. This was so because by signing an intra-EU BIT, Member States had effectively consented to remove from the jurisdiction of their national courts certain disputes that could require the application and interpretation of EU law and, accordingly, avoid the system of judicial remedies that all Member States are obliged to establish in areas covered by EU law pursuant to Article 19(1) of the Treaty of the European Union. Such considerations were notably absent from commercial arbitrations where arbitral proceedings result from the free will of the parties.

However, the CJEU explicitly recognised that an international agreement providing for the establishment of a court responsible for the interpretation of the agreement's provisions and whose decisions are binding on the CJEU was not, in principle, incompatible with EU law, so long as the autonomy of the Union and its legal order are respected. Thus, the biggest unanswered question consequent on the *Achmea* judgement is what will now happen to intra-EU disputes that have been brought under the Energy Charter Treaty. This treaty is an international agreement that both the Union and the Member States have entered into and which contains investor-state dispute resolution provisions. Arguably, and despite the strong pronouncements made by the CJEU in *Achmea* relating to investor-state dispute resolution, there appears to be scope in the CJEU decision to distinguish disputes under the Energy Charter Treaty from pure intra-EU BIT disputes.

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