The Fate of BITs between EU States after *Achmea*

On 6 March 2018, the Grand Chamber of the Court of Justice of the European Union ('CJEU') rendered its decision in *Slovak Republic v. Achmea, B.V.*[1], ruling that the dispute resolution provisions included in bilateral investment treaties ('BITs') concluded between Member States ('Intra-EU BITs') are not compatible with European Union ('EU') law and, in particular, with Articles 267 and 344 of the Treaty on the Functioning of the European Union ('TFEU').

With this decision, the CJEU chose not to follow the (non-binding) opinion of the Advocate General Wathelet[2]—in favour of compatibility—, generating considerable uncertainty regarding the future of investment arbitration in the EU. Indeed, the protections accorded in over one hundred BITs signed by EU Member States and Eastern European states that later became EU states may have become effectively non-enforceable, at least in EU Member States.

The *Achmea* case concerned a preliminary reference to the CJEU by the German Federal Court of Justice ('*Bundesgerichtshof*')—under Article 267 of the TFEU—on whether the dispute resolution provisions included in Intra-EU BITs were compatible with Articles 344,[3] 267[4] and 18[5] of the TFEU. In the end, the CJEU did not analyse Article 18 since the incompatibility of the BIT with EU law was already determined based on Articles 344 and 267.

1 Case number C284/16 ('*Achmea*').
2 The opinion of the Advocate General Wathelet was analysed by V. Ferreres, C. Gual and A. Solano in Issue 2 (2018) of the Investment Arbitration Outlook. See online at http://fr.zone-secure.net/18320/473892/#page=12.
3 Article 344 of the TFEU 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.*'
4 Article 267 of the TFEU provides in its 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.'
5 Article 18 of the TFEU establishes 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.*'

Álvaro López de Argumedo
Litigation and International Arbitration

Jesús Saracho
Litigation and International Arbitration

The *Bundesgerichtshof* requested a preliminary ruling from the CJEU in the context of an appeal by the Republic of Slovakia against the rejection by the Frankfurt Regional High Court (*Oberlandesgericht Frankfurt am Main*) of a challenge to the final award handed down in a dispute pursuant to the BIT between the Kingdom of the Netherlands and the Czech Republic, concluded in 1991 (the 'Dutch-Czech BIT').

Intra-EU Bilateral Investment Treaties: to be or not to be?

The ruling of the CJEU relies on two fundamental ideas: (i) the *autonomy* of the EU legal system—which principle is enshrined in, *inter alia*, Article 344 of the TFEU—; and (ii) that the CJEU must safeguard this system.

Having set out these fundamental tenets of EU law, the CJEU provides a threefold analysis of why dispute resolution provisions in Intra-EU BITs are not compatible with EU law.

First, the CJEU considers that arbitral tribunals constituted under Intra-EU BITs are required to *interpret and apply EU law*. This is because Intra-EU BITs establish that arbitral tribunals shall resolve disputes taking into account the law in force of the contracting party concerned and other agreements between the parties. EU law forms part of both the domestic law of the Member States and international agreements between them. As such, arbitral tribunals are bound to interpret and apply EU law.

In contrast, the Advocate General had suggested that the fact that EU law forms part of the domestic law of one of the parties does not imply that the arbitral tribunal has to interpret and apply EU law, for two reasons: (i) the jurisdiction of the arbitral tribunal is confined to ruling on breaches of the BIT—it does not have jurisdiction to rule on alleged breaches of EU law—; and (ii) the scope of the BITs and the applicable legal rules are not the same as those of EU law.

The CJEU departs from the Advocate General's idea that it is not necessary to apply EU law even if it is part of the applicable law. Rather, it takes notice that, according to the BIT itself, the arbitral tribunal must consider, among other legal sources, the law of the host state and any agreement the states parties to the BIT may have entered into. As EU law falls under both categories, the CJEU concludes that the arbitral tribunal must consider EU law in its decision.

Second, the CJEU holds that arbitral tribunals—as referred to in Article 8 of the Dutch-Czech BIT—cannot be classified as a court or tribunal of a Member State within the meaning of Article 267 of the TFEU. This is significant. If an arbitral tribunal were to be considered a court or tribunal of a Member State, issues of interpretation or application EU law that arise during an arbitration and that, per the CJEU's earlier finding, arbitral tribunals are required to consider, would still be under the safeguard of the CJEU, thus ensuring homogenous application of EU law and the autonomy of the EU legal system.

The CJEU emphasizes three key points in making its finding: (i) the Arbitral Tribunal set up under Article 8 of the Dutch-Czech BIT was not part of the Dutch or Slovak judicial systems; (ii) an arbitral tribunal's jurisdiction is exceptional in nature as shown by the very existence of the Dutch-Czech BIT; and (iii) arbitral tribunals do not have any link to the judicial systems of the Member States such that, for example, the arbitral process could be considered a step in proceedings before a national court and, as such, arbitral decisions may not be subject to '*mechanisms capable of ensuring the full effectiveness of the rules of the EU*'.[6]

6 *Slovak Republic v. Achmea, B.V.* (Case number C284/16), para. 43.

The CJEU considers that arbitral tribunals constituted under Intra-EU BITs are required to interpret and apply EU law

The consequence of the foregoing is that arbitral tribunals, in general, are not entitled to refer a matter to the CJEU for a preliminary ruling. This is in keeping with the CJEU's settled case law on the issue of what is a court or tribunal of a Member State under Article 267 of the TFEU.

On this issue, the Advocate General had held that, according to the criteria established by the CJEU's settled case law, the Arbitral Tribunal constituted by virtue of Article 8 of the Dutch-Czech BIT was a court within the meaning of Article 267 of the TFEU, since: (i) arbitral tribunals constituted in accordance with a BIT are established by law; (ii) they are permanent because this does not '*relate to the composition of the Arbitral Tribunal as such but to the institutionalisation of arbitration as a dispute settlement method*'; (iii) their jurisdiction is compulsory since the Slovak Republic gave its consent to arbitration in the BIT; (iv) the procedure before the Arbitral Tribunal is *inter partes*; (v) the arbitrators apply rules of law in the settlement of the dispute to the exclusion of a decision *ex aequo et bono*; and (vi) the members of the arbitral tribunal are independent and impartial since rules applied in investor-state disputes guarantee the independence and impartiality of arbitrators.

According to the settled case law referred to by the Advocate General, it is not obvious how a tribunal constituted under an Intra-EU BIT would fulfil the criteria of permanence and compulsory jurisdiction required for a body to be considered a court or tribunal under Article 267 of the TFEU. The Advocate General was thus impliedly asking the CJEU to depart from its earlier case law and relax the strict test usually applied as regards what bodies may refer preliminary questions. The CJEU clearly rejects any changes to the above-mentioned criteria.

The CJEU holds that arbitral tribunals cannot be classified as a court or tribunal of a Member State within the meaning of Article 267 of the TFEU

Third, the CJEU analyses whether it is a sufficient safeguard to the autonomy of the EU legal system that an arbitral award may be subject to review by a court of a Member State, for example on an annulment or enforcement application, such that if the court of the Member State has a question on the interpretation and application of EU law, it may request a preliminary ruling from the CJEU, itself the main tool for preserving the autonomy of the EU legal system.

The CJEU holds that the fact that a court of a Member State may decide on a potential set-aside application (and therefore consider referring a preliminary question to the CJEU) is not sufficient to preserve the application of EU law in a case such as *Achmea*. This decision is based on two grounds: (i) the limited options to seek judicial review of an investor-state award which depend entirely on the law applicable in any given Member State; and (ii) the fact that, depending on the seat of the arbitration—which as the CJEU notes may not be located in any of the Member States—it may not be possible to ensure submission of a preliminary question to the CJEU.

In addition, the CJEU highlights that whereas commercial arbitrations result from the free will of the parties and therefore limited judicial review may be justified in the name of efficiency, Intra-EU investment arbitrations imply that Member States have effectively consented, through the signing of an international treaty, to remove from the jurisdiction of their courts specific disputes which could require the application and interpretation of EU law. In this way, they avoid the system of judicial remedies that Member States are obliged to follow pursuant to Article 19(1) of the Treaty of the EU.

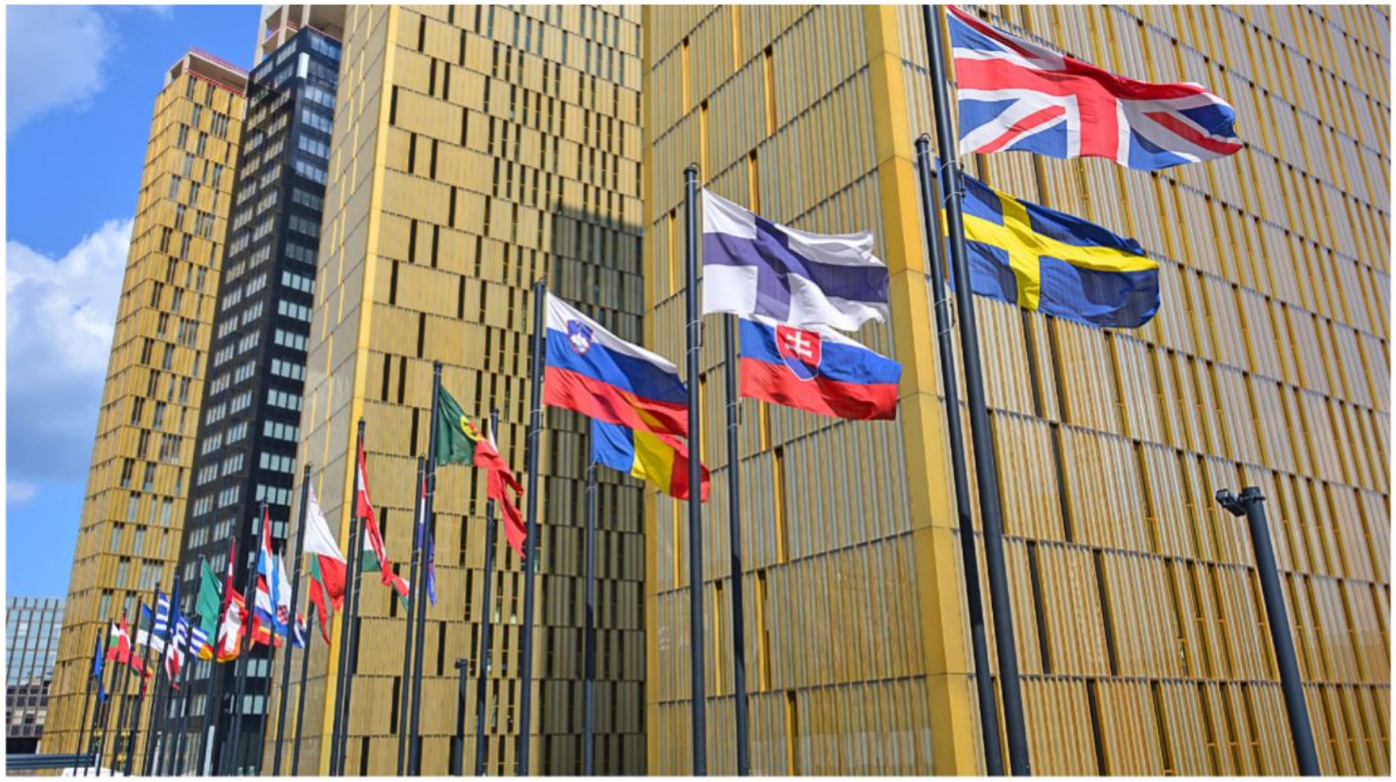
In light of the foregoing, the CJEU concludes that dispute resolution provisions in Intra-EU BITs represent an unacceptable risk to the full effectiveness and autonomy of EU law.

Notwithstanding the above, the CJEU expressly recognises, albeit in *obiter dictum*, that according to settled case law the EU has the capacity to conclude international agreements which submit disputes arising from these agreements to a body created specifically for that purpose (unlike EU Member States), as long as the autonomy of the EU legal order is not undermined.

The Potential Impact of the *Achmea* Decision

The *Achmea* decision confirms the uncertainty over the survival of Intra-EU BITs. While the decision is now EU law and has *erga omnes* effects on all future decisions, it does not settle several important issues, such as: (i) whether Intra-EU disputes brought under the Energy Charter Treaty ('ECT')—of which both the Member States and the EU are contracting parties—are compatible with EU law; and (ii) whether dispute settlement provisions in international agreements between the EU or a Member State and one or more third countries are also incompatible with EU law.

With respect to Intra-EU disputes brought under the ECT, the CJEU seems to have tried to preserve the ECT by asserting that the EU may conclude international treaties establishing a body responsible for the interpretation of their provisions, as long as the autonomy of EU law is respected. However, the arbitral tribunal in the recent *Masdar Solar & Wind Cooperatief U.A. v. Kingdom*



of Spain (ICSID Case ARB/14/1) case completely dodged the issue concluding that the decision in *Achmea*, which is not an ECT case, cannot be applied to multilateral treaties to which the EU itself is a party, such as the ECT.

Thus, it is to be expected that a further preliminary reference to the CJEU will be required on Intra-EU claims under the ECT. The opportunity for clarification may come sooner than expected as it has been rumoured that the Svea Court of Appeal in Sweden is considering precisely such a reference in an annulment application against the award rendered in *Novenergia v. Kingdom of Spain* (SCC Case 063/2015).

In the ECT context, another potential reference to the CJEU may be necessary to resolve whether the dispute settlement provisions in the ECT may apply as between (i) the EU and third parties, or (ii) a Member State and a non-Member State.

On the issue of compatibility with EU law of dispute settlement provisions in international agreements between the EU or a Member State and one or more third countries, *Achmea* raises further questions. These may be clarified in the context of Belgium's request for a CJEU Opinion over the validity of some provisions of the Comprehensive Economic and Trade Agreement between Canada and the EU (more commonly known as CETA); particularly, CETA's Chapter 8 on investor-state dispute settlement.

As already mentioned, in *Achmea* the CJEU declared that international agreements providing for dispute settlement mechanisms must also respect the autonomy of EU law. Since CETA establishes that domestic laws are to be treated as matters of fact,[7] the CJEU's decision will likely have to deal with whether treating domestic law as fact would still involve interpreting EU law. Be that as it may, the Opinion resulting from Belgium's request may shed further light on whether investor-state dispute settlement is permitted at all where the EU is involved.

In the meantime, on 19 July 2018, the European Commission issued a 28-page communication to the European Parliament and the Council on protection of intra-EU investment,[8] in which it declares that Intra-EU BITs create '*a parallel treaty system overlapping with single market rules, thereby preventing the full application of EU law* [...] *in such a way that they constitute the basis for the award of unlawful state aid.*' The communication also restates the Commission's view that Intra-EU BITs are incompatible with

7 Article 8.31 of CETA provides in its relevant part that '[t]*he Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.*'

8 Communication COM(2018) 547/2. See online at http://ec.europa.eu/finance/docs/policy/180719-communication-protection-of-investments_en.pdf

EU law. Additionally, the Commission urges Member States '*to formally terminate their intra-EU BITs*' and national courts to '*annul any arbitral award rendered on that basis and to refuse to enforce it.*' The Commission adds that '*all investor-state arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement*.'

Importantly, the Commission refers to the investor-state arbitration mechanism established in Article 26 of the ECT as regards relations between Member States, stating that, '*interpreted correctly*' the investor-state arbitration clause is not applicable between Member States. In support of this conclusion, the Commission declares that Article 26 of the ECT '*if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable* [because it] *opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion*'.

The fact that a court of a Member State may decide on a potential set-aside application is not sufficient to preserve the application of EU law

In terms of the politics, it is rumoured that the 28 Member States are negotiating both the termination of the over one hundred existing Intra-EU BITs, including their sunset clauses, and other measures to counter the effects of awards rendered under Intra-EU BITs.

It may be asked whether it is fair for an investor who has relied on a system created by states and spent a significant amount of money to then be unable to invoke its provisions because years later the CJEU suddenly declares such provisions contrary to EU law. Should states have requested the CJEU to use its prerogative to ascribe prospective effect to any related preliminary question, so that awards already rendered are unaffected?

The knock-on consequences of the long-standing dispute as to whether Intra-EU BIT arbitration is permissible within the EU cannot but have an effect on arbitral awards rendered by such tribunals. As a result of *Achmea* and the European Commission's communication of 19 July 2018, it is now to be expected that Intra-EU investment treaty awards will become more frequently subject to challenge in either annulment or enforcement proceedings to the extent permissible by the applicable procedural law. Further, if the rumours of the termination of all Intra-EU BITs became a reality, that would open another can of worms, the consequences of which would need further analysis.