The *Achmea* decision: significant uncertainties linger

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In the *Achmea* decision of March 2018 the Court of Justice of the European Union (the "**CJEU**") ruled that investor-state arbitration clauses in intra-EU BITs are not compatible with EU law. While any arbitral tribunal constituted under these clauses may be required to interpret or apply EU law, the CJEU observed that such tribunals are not state courts within the meaning of Article 267 TFEU. Hence, they cannot refer to the CJEU for preliminary rulings on EU law, jeopardising the full effectiveness of EU law.[1] Further, the CJEU deliberately refrained from pronouncing on whether the same conclusion applies to investor-state arbitrations between Member States under the ECT, to which the EU itself is a contracting party.

In this context, Spain is seeking the annulment by Swedish courts of a EUR 53 million award rendered in the *Novenergia* case. Spain requested, in the alternative, to refer to the CJEU for a preliminary ruling on the compatibility of the ECT with EU law in view of *Achmea*. However, should the Swedish court seek a preliminary ruling, a decision by the CJEU in this regard is not to be expected any time soon.

The European Commission makes itself clear

Amidst this legal uncertainty, the European Commission (the "**EC**") has advanced its position. Following the *Achmea* judgment, it released a communication on the subject, in which it observed that intra-EU BITs confer rights upon investors from one Member State, resulting in a conflict with the principle of non-discrimination under EU law. The communication also argued that intra-EU BITs set up an alternative system of dispute resolution, removing litigation involving EU law from domestic courts and entrusting this litigation to private arbitrators, who cannot fully and effectively apply EU law.

The EC's communication focused on how the EU legal system sufficiently

1 On 31 October 2018, Germany's highest court, which referred the preliminary question on intra-EU BIT's compatibility with EU law to the ECJ, followed the *Achmea* judgment and set aside the EUR 22 million award in favour of the investor, Achmea, on the basis that there was no valid arbitration agreement under the Netherlands-Slovakia BIT and, therefore, the arbitral tribunal had no jurisdiction.

protects intra-EU investors. It also dealt with the question of Article 26 ECT: the EC observed that, if interpreted correctly, this Article does not cover arbitrations between investors from one Member State against another Member State. Thus, the EC, as it had previously stressed in *amicus curiae* submissions, equates Article 26 ECT with other intra-EU BITs arbitration clauses. Consequently, the EC considers that intra-EU arbitration under the ECT should suffer the same fate.

Moreover, the EC asserted that any arbitral tribunal constituted under intra-EU BITs "lacks jurisdiction due to the absence of a valid arbitration agreement". Therefore it declared that national courts must annul or refrain from enforcing awards rendered on that basis. It also highlighted that all Member States must terminate intra-EU BITs, under penalty of potential infringement proceedings.

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In the meantime, arbitral tribunals seem to be turning a deaf ear to the EC's opinion. Since the *Achmea* decision, arbitral tribunals hearing investment claims under the ECT have neglected to apply the CJEU's conclusions for the determination of their jurisdiction over proceedings. Besides the *Masdar* and *Antin* ECT cases, already discussed in the previous issue of the Outlook, there have been two post-*Achmea* arbitral decisions that have addressed the intra-EU issue intertwined with the special standing of ICSID arbitration under international law: *Vattenfall v. Germany* and *Up v. Hungary*.

The Uncertainties on Intra-EU Arbitration under the ECT

On 31 August 2018, an ICSID tribunal hearing a Swedish investor's claim against Germany under the ECT (*Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12) ruled exclusively on the *Achmea* issue. In that case, since the tribunal considered that the *Achmea* decision amounted to a new fact, Germany was allowed to submit a new jurisdictional objection after the jurisdictional phase was over. In its analysis, the tribunal agreed with the claimants that in ICSID arbitration the tribunal's jurisdiction was not circumscribed to any domestic laws and should be examined in the light of Article 26 of the ECT —under which the parties' consent was given— and interpreted in accordance with international law.

Firstly, the tribunal found no wording in Article 26 nor any principle in public international law granting primacy to EU law over the ECT or other rules. In the tribunal's view, the EC's suggestion that EU law should be used to harmoniously interpret Article 26 ECT (thus excluding intra-EU arbitration) would lead to rewriting Article 26 with external rules. This would contradict the ordinary meaning of its wording and create a new set of "intra-EU" obligations, while maintaining another set of obligations applicable to the rest of disputes.

Secondly, the tribunal refrained from considering whether the ECT posed the same EU law concerns as those that the ECJ found in relation to the Dutch-Slovak BIT.

Thirdly, the tribunal highlighted Article 16 ECT, which establishes that international agreements concerning any right to dispute resolution shall not be construed

to derogate from any provision of Part V (including Article 26) where any such agreement is more favourable to the investor. Additionally, it observed that depriving EU investors of their right to invoke arbitration against a Member State would go against the ECT's purpose of encouraging the flow of investments.

Lastly, concerning the respondent's allegation that any compensation in favour of the claimant would infringe EU-law and render the award unenforceable, the tribunal considered that the enforceability of the award was a separate issue from its jurisdiction. The tribunal concluded that possible EU-law breaches as a result of any post-arbitration actions by the claimant were not before it.

Is ICSID really a different story?

The second of the abovementioned decisions, *Up and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), represents a hybrid case between *Achmea* and *Vatenfall*; it is an ICSID arbitration based on an intra-EU BIT.

In August 2018, the *Up* case tribunal rejected the EC's request to intervene in this ICSID arbitration on the basis that according to ICSID Rule 37(3) the EC's submission would not assist the tribunal and would disrupt the proceedings. The tribunal held that the parties had long ago decided upon the issue and furthermore that the tribunal itself had taken the *Achmea* decision into consideration when drafting the award.

The award was issued shortly thereafter, on 9 October, granting the French claimants EUR 23 million in compensation for the expropriation of their investment in the meal voucher market through changes to legislation on fringe benefits provided to employees. The award lacks a thorough discussion of the *Achmea* judgment, finding that that case differed substantively from the circumstances surrounding *Achmea*. Instead, the tribunal highlighted that, as opposed to the *Achmea* case, its jurisdiction was based on the ICSID Convention, which placed it in the international law plane independent from any regional context.

ICSID awards are exclusively subject to the annulment proceedings established in Article 52 of the ICSID Convention. Moreover, no further review by any domestic court is allowed. Further, under Articles 53 and 54 of the ICSID Convention Hungary cannot appeal the award and must recognise it as a final judgment of a Hungarian court.

The tribunal found no reason to conclude that Hungary's accession to the EU would terminate its obligations under the ICSID Convention, particularly since there is no rule or provision in EU law

that may lead to the interpretation that obligations under the ICSID Convention are incompatible with EU law. Moreover, the tribunal considered that Hungary failed to demonstrate that it had denounced the ICSID Convention in any way. The tribunal highlighted that even assuming that such denunciation had taken place, Hungary's consent to ICSID arbitration as contained in the BIT could not be retroactively withdrawn in light of Article 72 of the ICSID Convention. Although the tribunal's arguments on this point were scant, it is worth mentioning that the tribunal's view here manifestly departs from most interpretations that ICSID tribunals and legal scholars have adopted of Article 72.

While these recent ICSID awards provide proof that arbitral tribunals do not feel bound by the *Achmea* judgment, particularly on the basis of the special characteristics of ICSID arbitration, new questions arise as to its effects on ICSID arbitration clauses contained in intra-EU BITs. There may also be legal and factual implications for the potential termination by Member States of intra-EU BITs, which typically contain a so-called survival clause. Theoretically, such a clause would keep the treaty obligations in force for many years after its termination.

Be that as it may, as observed by the *Vatenfall* tribunal, it seems logical that if the EU or its Member States find that there is any incompatibility between the ECT, ICSID clauses, and EU-law, it is they who should tackle this problem and remedy the situation. Looking at how things are unfolding, further action by these parties is to be expected.