EU Member States' Reaction to *Achmea*: A Comment on the Declarations of 15 and 16 January 2019 on the Termination of Intra-EU Bilateral Investment Treaties

The Member States of the European Union ('EU') have addressed the legal consequences of the *Achmea* judgment of 6 March 2018 (CJEU Case No. C-284/16) in three separate political declarations which were issued on 15 and 16 January 2019. In those declarations, every Member State has undertaken to terminate all existing intra-EU bilateral investment treaties ('BITs') by 6 December 2019 by means of either a plurilateral treaty or bilaterally, to comply with the *Achmea* judgment. A majority of Member States have also agreed to take steps to prevent intra-EU investor-state arbitration proceedings being filed under the Energy Charter Treaty ('ECT') –a multilateral treaty relating to investment in the energy sector– to which all Member States (except Italy) and the EU itself are currently parties.

According to the *Achmea* judgment, an arbitral tribunal constituted under an intra-EU BIT will be faced with situations where it has to apply and interpret EU law, even though it cannot make a request for a preliminary ruling to the Court of Justice of the European Union ('CJEU') to seek clarification in the interpretation of EU law. According to the CJEU, such a tribunal cannot thus ensure the full effectiveness of EU law, which in turn adversely affects the autonomy of such law.

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The political declarations issued by the Member States have to be understood in the context of the European Commission's (the 'Commission') communication of 19 July 2018, 'Protection of intra-EU investment', and the long-standing position the Commission has taken towards investment arbitration among Member States.

In its communication of 19 July, the Commission encouraged Member States to formally terminate their intra-EU BITs because investor-state arbitration clauses contained therein are inapplicable: the offer to arbitrate made by a Member State is invalid *in the light of the EU law framework*. This is the case because by signing an intra-EU BIT, Member States had effectively consented to remove certain disputes that could require the application and interpretation of EU law from the jurisdiction of their national courts, and, accordingly, bypass 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.

Furthermore, the Commission referred to an interpretation of Article 26 of the ECT in the light of EU law that leads to the incompatibility of the investor-state arbitration mechanism with EU primary law, as set out in that article. That incompatibility signifies that an ECT investor-state arbitration provision is inapplicable between Member States.

Each of the political declarations we are now examining presents a different view on the application of the *Achmea* judgment to the ECT.

The Majority Position

In the main declaration, signed by the governments of 22 Member States,[1] it is stated that EU law, which includes *Achmea* as a judgment of the CJEU, takes precedence over BITs concluded between Member States. As a result, any investor-state provision contained in an intra-EU BIT is contrary to EU law and thus inapplicable.

These Member States have based their position on the primacy of EU law over investment treaties concluded within the scope of application of EU law and pursuant to the principle of primacy of such law.

The majority of Member States have applied this principle in light of the CJEU's case law[2] and public international law provisions, in particular the *lex posterior* principle under the Vienna Convention on the Law of Treaties and customary international law. They have based their argument on both grounds because an investment treaty is both part of the domestic law of the Member States *and* an international agreement binding on the Member States parties to it.

Moreover, relying on the Commission's communication, the majority of Member States argue that because investment tribunals have interpreted the ECT as containing investor-state arbitration provisions as applicable between Member States, the provision would be incompatible with EU law and would have to be set aside. However, the majority of Member States declared that further discussion with the Commission is required as to whether any additional steps are necessary to draw all consequences that flow from the *Achmea* judgment in relation to the application of the ECT between EU Member States.

Therefore, the majority of the Member States have resolved to notify tribunals about the non-arbitrability of intra-EU BITs *and* ECT claims, as well as to request courts, even in any third country, to set aside or refuse to enforce such intra-EU investment arbitration awards due to a lack of a valid consent to arbitrate.[3]

Departing Declarations

Although the majority of the Member States is of the opinion that the *Achmea* judgment leads to the same consequences with respect to both the intra-EU BITs and the ECT, two additional declarations were issued reflecting the divergences between Member States on the applicability of the *Achmea* judgment to the ECT.

1 Spain, Belgium, France, the UK, the Netherlands, the Czech Republic, Germany, Ireland, Greece, Denmark, Italy, Croatia, Estonia, Latvia, Lithuania, Austria, Portugal, Slovakia, Poland, Romania, Bulgaria, and Cyprus.

2 See Judgment of the CJEU of 8 September 2009, *Budějovický Budvar* (C-478-/07, EU:C:2009:521), paras. 98 and 99; Judgment of the CJEU of 27 September 1988, *Matteucci* (235/87 EU:C:1988:460), para. 21.

3 Recently, the Commission has requested before United States courts that they refuse enforcement of two unrelated awards in relation to two investment arbitration cases against the Kingdom of Spain (*Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain,* SCC Case No. 2015/150 and *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain,* ICSID Case No. ARB/14/1).

Finland, Luxembourg, Malta, Slovenia, and Sweden hold a different position. According to these Member States, an intra-EU BIT containing investor-state arbitration such as the one described in the *Achmea* judgment, i.e., only concerning BITs, is contrary to EU law and thus inapplicable. However, they note that a number of investment tribunals have concluded post-*Achmea* that the ECT contains an investor-state arbitration clause (on which the *Achmea* judgment is silent) which is applicable between Member States. Given that this applicability of *Achmea* to the ECT provisions is currently being reviewed by the Swedish Court of Appeal in the *Novenergia* case against Spain, which raised the findings of the *Achmea* judgment in an objection before the court, these Member States did not declare that it does not have any bearings on its findings, nor that the ECT has become inapplicable. However, as of late April it has become known that the Swedish Court of Appeal will not refer the preliminary question back to the CJEU to clarify how broadly *Achmea* should be read.

Nonetheless, what the CJEU has already expressly recognised is that an international agreement providing for the establishment of a court responsible for the interpretation of the agreement's provisions and the decisions of which are binding on the CJEU, was not, in principle, incompatible with EU law, as long as the autonomy of the EU and its legal order are respected.

In this regard, as Belgium doubted regarding the effects that the inclusion of an investor-state dispute settlement scheme in the EU-Canada Comprehensive Economic and Trade Agreement ('CETA') might have regarding the CJEU's exclusive jurisdiction over the definitive interpretation of EU law, it is to be noted that Advocate General Bot found in his Opinion of 29 January 2019 that the investor-state dispute settlement mechanism of the CETA is compatible with EU primary law. He also states that the approach adopted by the Court in the *Achmea* judgment cannot be transposed to the examination of that mechanism.

According to the Advocate General, the reason for the establishment of a dispute settlement mechanism in the negotiation of the CETA, as well as any other with non-EU Member States, is the requirement of reciprocity in the protection afforded to the investors of each Party. Conversely, the protection among Member States rests on the principle of mutual trust. Thus, in order to justify his position, the Advocate General relies on the distinction between the reciprocity due to third countries and the principle of mutual trust among Member States. Recently, the CJEU also found that the investor-state dispute resolution provisions of the CETA are compatible with EU law, as discussed in the article of this issue of the *Outlook* authored by Víctor Ferreres.

In the declaration issued by the majority, the signatory Member States commit to take steps to withdraw pending investment arbitration cases (either under BITs or the ECT) initiated by member States' controlled undertakings

Lastly, another declaration was issued by Hungary, which went even further. Hungary issued a separate declaration stating that the *Achmea* judgement concerns solely intra-EU BITs, and does not apply to any pending or prospective arbitration proceedings initiated under the ECT, and that its applicability in intra-EU relations requires further discussion and individual agreements by the Member States.

Other Relevant Divergences in the Declarations

It is to be noted that in the declaration issued by the majority, the signatory Member States commit to take steps to withdraw pending investment

arbitration cases (either under BITs or the ECT) initiated by Member States' controlled undertakings (i.e., state-owned companies). This means that the states will somewhat direct the entities that they control to abandon ongoing arbitration proceedings brought against another Member State.

Interestingly, Sweden, among others, has circumscribed its commitment to such arbitrations only when they are BIT-based, so that the case brought by the Swedish-owned Vattenfall under the ECT is not covered and will go on along with the tribunal's dismissal on the intra-EU objection raised by Germany.

Equally, Hungary has not committed to terminate ECT cases initiated by its controlled undertakings, thus the arbitration by Hungarian oil and gas multinational MOL against Croatia is not likely to be abandoned.

Common Ground

Besides the commitment to terminate all BITs concluded between Member States, some common ground was found on two significant issues in all declarations.

(i) Intention for Older Awards and Settlements to Be Unchallenged

It seems that all Member States have agreed not to challenge arbitral awards and settlements regarding intra-EU BIT-based arbitration cases that took place before the *Achmea* judgment when those could no longer be annulled or set aside, or were voluntarily complied with or definitively enforced.

However, the declarations qualify that it will have to be '*in conformity with Union law*' rising some uncertainty. Moreover, the Commission is anyhow bound by these declarations and in its view compensation ordered by investment tribunals to be paid to victorious investors may constitute illegal state aid. Indeed, in December 2018 the Commission started proceedings against Romania for failing to recover a partly paid award rendered in the *Micula* case.[4]

(ii) Sunset Clauses Are Non-Applicable

Equally, all three declarations concur in holding that sunset or grandfathering clauses found in intra-EU BITs will be inapplicable. These clauses are designed to extend effects upon termination of the BITs, so that the defaulting state does not get off without consequences in the event it is to exit right after infringing the treaty.

However, investors are not a party to the BIT and may find it hard to challenge a termination by mutual agreement of the state parties, except perhaps by invoking the theory of investors' acquired rights in some form. Nevertheless, an investment tribunal could find that even if the underlying BIT has been terminated under EU law, the BIT's sunset clause still remains in force.[5] In this regard, there is a prior practice consisting on terminating a BIT only after amending the sunset clause or rather eliminating it and then terminating the BIT itself. However, for EU Member States sunset clauses are simply ineffective as regards intra-EU investment arbitration and thus for these states this approach appears unnecessary.

Finally, it is also to be highlighted that the declarations expressly inform the investor community that '*no new intra-EU investment arbitration proceedings should be initiated.*' For the majority of Member States, this includes also ECT-based claims; for some, it would only regard claims based on intra-EU bilateral investment treaties.

4 The Commission considers compensation ordered by investment tribunals as illegal state aid that must be recovered from the victorious investors. See *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20).

5 See *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004), Final Award, 12 April 2007.