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Intra-EU investments. The Court of Justice has restricted the use of arbitration proceedings for the settlement of disputes originating in the context of Bilateral Investment Treaties between Member States

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On 19 July 2018, the European Commission issued a Communication[1] on intra-EU investment protection. The Communication followed the judgment of the Court of Justice in the *Slowakische Republik v. Achmea BV* case[2], regarding the compatibility with EU law of an arbitration clause inserted in a Bilateral Investment Treaty (BIT) concluded between Member States. The judgment seems to limit the possibility for a Member State to include arbitration clauses in BITs concluded with another Member State.

[1] Communication from the Commission to the European Parliament and the Council, 19.07.2018, Protection of intra-EU investment, COM(2018) 547 final. Available at the following LINK.
[2] CJEU 06.03.2018, Case C-284/16, *Slowakische Republik v. Achmea BV*.

Achmea is a company belonging to a Netherlands insurance group operating in the healthcare field. Pursuant to the BIT concluded in 1991 between Netherlands and the then Czech and Slovak Federative Republic (NL-SVK BIT)[3] and as a result of the opening by the Slovak Republic in 2004 of the insurance market to national operators and those of other Member States in the sickness insurance segment, Achmea could offer private sickness insurance services on the Slovak market. However, in 2007, the Slovak government introduced a prohibition to the distribution of profits generated by sickness insurance activities and a dispute between Achmea and the authorities followed. Achmea invoked Article 8(2) of the NL-SVK BIT, according to which "… [e]*ach Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement*…". Achmea chose *Frankfurt am Main* (Germany) as seat of the arbitration, in that way making German law applicable to the arbitral proceedings. The Slovak Republic first raised an objection of lack of jurisdiction that was dismissed by the arbitral tribunal[4]. After its action brought before the *Oberlandesgericht Frankfurt am Main* (Higher Regional Court, Frankfurt am Main) seeking the setting aside of the arbitral award[5] was also dismissed, the Slovak Republic appealed against the dismissal to the *Bundesgerichtshof* (German Federal Court of Justice). The Federal Court of Justice, doubting of the compatibility of Article 8(2) of the NL-SVK BIT with Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU), decided to suspend the proceedings and to refer the issue to the Court of Justice of the European Union[6].

Article 18 TFEU provides for a generic prohibition from any discrimination based on nationality. The circumstance that investors from Member States other than the Netherlands and the Slovak Republic are unable to bring proceedings before an arbitral tribunal instead of a court of the State represents a difference of treatment, which may constitute a discrimination. However, the different treatment produced by an intra-EU BIT for nationals of the contracting Member States is discriminatory only if the nationals of other Member States are in an objectively comparable situation[7]. Before verifying the existence of discrimination, however, it is necessary to determine whether the arbitral tribunal has competence to interpret and apply EU law, *inter alia* in order to verify a possible breach of Articles 267 and 344 TFEU.

More particularly, Article 267 TFEU states that the Court of Justice of the European Union has jurisdiction to issue preliminary rulings on issues raised by national courts. According to the referring court, an arbitral tribunal is not entitled to make a reference to the Court for a

[3] On 1 January 1993, the Slovak Republic, as a successor State to the Czech and Slovak Federative Republic, succeeded to the rights and obligations of that State under the BIT, and on 1 May 2004 it acceded to the European Union.
[4] See point 11 of the judgment.
[5] By arbitral award rendered on 07.12.2012, the tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of 22.1 million of euro.
[6] Point 14 of the judgment: "…*The Slovak Republic expressed doubts as to the compatibility of the arbitration clause in Article 8 of the BIT with Articles 18, 267 and 344 TFEU. Although the referring court does not share those doubts, it nonetheless considered that, since the Court has not yet ruled on those questions and the questions are of considerable importance because of the numerous bilateral investment treaties still in force between Member States which contain similar arbitration clauses, it was necessary to make the present reference to the Court in order to decide the case before it*…".
[7] Point 22 of the judgment: "…*That is not so in the present case, since the fact that the reciprocal rights and obligations apply only to nationals of the two contracting Member States is a consequence that is inherent in the bilateral agreements concluded between them*…".

preliminary ruling since it could not be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU[8]. The referring court also doubts that Article 344 TFEU is applicable, since "… *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*…"[9].

In its judgment[10], the Court has emphasized that, according to Article 8(6) BIT[11], the arbitral tribunal must take into account the "… *the law in force of the Contracting Party concerned*…" when ruling on a possible breach of the BIT. Therefore, it cannot exclude European Union law from the substantive law that it considers, given the latter's primacy over national legislations[12]. Also for such reason, the Court considered incompatible with EU law the institution of an arbitral tribunal for the resolution of disputes arisen under a BIT between Member States[13]. The Court specified that, with respect to commercial arbitration, the requirement of efficient arbitral proceedings justifies the review of awards by the competent courts of the Member States being limited in scope, provided, however, that the fundamental provisions of EU law can always be examined in the course of the review proceedings and, if necessary, be the subject of a reference to the Court of Justice for a preliminary ruling by the national review court. However, according to the Court of Justice, arbitral proceedings such as those referred to by Article 8 of the BIT are different from commercial arbitration proceedings. In fact, while the latter originate from the private autonomy of the concerned parties, the former derive from a Treaty by which the Member States concerned consent to remove from the jurisdiction of their own courts. Hence, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, which may concern the application or interpretation of EU law[14].

As a consequence of the judgment of the Court of Justice, the Dutch Minister for Foreign Trade and Development Cooperation, *Sigrid A.M. Kaag,* declared to the *Tweede Kamer* (Lower House of Parliament) that the Government had no choice but to terminate the BIT with Slovakia together with other twelve similar BITs. At the same time, the Dutch Government announced the start of a process to draw up new models of BITs

[8] See points 19-21 of the judgment.
[9] See points 15-17 of the judgment.
[10] CJEU 06.03.2018, Case C-284/16, *Slovak Republic v. Achmea BV,* point 40.
[11] Article 8(6) NL-SVK BIT: "…*The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law*.".
[12] CJEU 06.03.2018, Case C-284/16, *Slovqk Republic v Achmea BV,* point 33: "… *Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other*…".
[13] CJEU 06.03.2018, Case C-284/16, *Slovak Republic v Achmea BV,* point 60: "…*Consequently, the answer to Questions 1 and 2 is that 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 BIT, 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*….".
[14] See points 54-55 of the judgment.

without an arbitration clause, as well as amending those in force. It is possible that other Member States will follow the Dutch example.

The Court's judgment paves the way towards a number of practical effects, such as the suspension of the execution of two arbitral awards regarding BITs with Spain and Poland, on which the Swedish Court of Appeal has jurisdiction in the system administrated by the Stockholm Chamber of Commerce[15].

In the light of the possible uncertainties of the law caused by the *Achmea* judgment, in its Communication of July 2018 the Commission stated that "…[i]*n the Achmea judgment the Court of Justice ruled that the investor-to-State arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States. Recourse to such clauses undermines the preliminary ruling procedure provided for in Article 267 TFEU, and is not compatible with the principle of sincere cooperation. This implies 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. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs...".*

The Commission also expressed the view that the *Achmea* judgment may give rise to legal uncertainty with regard to the arbitration clauses established under the Energy Charter Treaty of 1994[16], to which the European Union is signatory. As a result, the Commission stated that Article 26 of the Energy Charter Treaty concerning an arbitration mechanism between investors and States, as regards intra-EU relations, "… *if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, 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 participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States…".*

However, in arbitral proceedings relative to disputes arising in the context of the Energy Charter Treaty under the rules of ICSID, the International Centre for Settlement of Investment Disputes, headquartered in *Washington D.C.*, the arbitrators rejected the plea of lack of competences presented by certain parties on the basis of the *Achmea* judgement, by reiterating the non-applicability of that judgement in ICSID proceedings[17].

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[15] *Svea hovrätt,* Svea Court of Appeal, Stockholm. See: SCC 063/2015, *Novenergia v. Spain*, under the ECT; SCC 2014/163, *PL Holdings S.a.r.l. v. Poland,* under *Belgium Luxembourg Economic Union – Poland BIT*.

[16] Available at the following LINK.

[17] See ICSID 16.05.2018, ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, paragraph 678: "… *Upon consideration of the Parties' respective submissions and upon analysis, the Tribunal has concluded that the Achmea Judgment has no bearing upon the present case*…",

Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes, emphasized during an interview published on the *Kluwer Arbitration Blog*[18] the impartiality of ICSID towards the European Union, confirming that wide reference to the *Achmea* judgement had already been made in more than one proceeding before the ICSID. The issue, therefore, remains open.

available at the following LINK; see also ICSID 27.07.2018, ARB/13/27, *Marfin Investment Group v. Republic of Cyprus*.
[18] Available at the following LINK.

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