

**Court of Justice of the European Union
delivers judgment in *Achmea*: investor-
State dispute settlement clauses in intra-EU
BITs are contrary to EU law**

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INTRODUCTION

On 6 March 2018, the Court of Justice of the European Union (ECJ) delivered its long-awaited judgment in Case C-284/16 [Achmea](#) on whether an arbitration clause in a bilateral investment treaty concluded between two EU Member States (intra-EU BIT) is compatible with European Union (EU) law and, in particular, the autonomy of the EU legal order. Unlike the [Opinion of Advocate General Wathelet](#) delivered on 19 September 2017, the ECJ's response to that question was negative.

Achmea specifically concerned a clause providing for investor-State arbitration in an intra-EU BIT. The judgment did not deal with the question of whether similar forms of dispute settlement in international agreements between the European Union or a Member State, on the one hand, and one or more third countries, on the other hand, are also incompatible with EU law. That question is currently pending as a result of Belgium's [request](#) for an Opinion of the ECJ (Opinion 2/17) on the compatibility with the EU Treaties, including fundamental rights, of the chapter on investor-State dispute settlement (Chapter 8) in the [Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part](#) (CETA).

The judgment in *Achmea* nonetheless offers clarity on the test that will be applied by the ECJ in Opinion 2/17 in scrutinising whether the relevant CETA chapter is compatible with the principle of the autonomy of the EU legal order.

FACTS OF THE CASE

Achmea, a Dutch insurance company which had established a subsidiary in Slovakia in order to market private health insurance products, initiated investor-State arbitral proceedings against Slovakia following the adoption of new regulations governing the insurance sector. The proceedings were initiated on the basis of a 1991 BIT between the former Czechoslovakia and the Netherlands (the Czechoslovakia-Netherlands BIT).

In 2012, the arbitral tribunal sided with Achmea. Its award ordered Slovakia to pay Achmea damages of approximately EUR 22 million.

Subsequently, Slovakia sought the annulment of that award before the German courts (the place of arbitration was Germany) on the grounds that the arbitration clause in the Czechoslovakia-Netherlands BIT was contrary to:

- Article 344 Treaty on the Functioning of the European Union (TFEU) which prohibits EU Member States from submitting a dispute concerning the interpretation or application of EU law to any method of settlement other than those for which the EU Treaties provide.
- Article 267 TFEU which provides for a preliminary ruling mechanism that ensures that only the ECJ gives a final legally binding interpretation on EU law issues.
- Article 18 TFEU which prohibits discrimination on grounds of nationality.

The German court decided to stay the proceedings and refer these questions to the ECJ for a preliminary ruling.

THE ECJ RULES THAT THE ARBITRAL CLAUSE IN THE CZECHOSLOVAKIA-NETHERLANDS BIT IS CONTRARY TO EU LAW

The ECJ ruled that Articles 267 and 344 TFEU preclude an arbitral clause such as that found in the Czechoslovakia-Netherlands BIT. It was therefore not necessary to examine whether such a clause might also be discriminatory because investors of other Member States were precluded from having recourse to arbitration against Slovakia.

The ECJ considered Articles 267 and 344 TFEU together. Its starting point was that, as the ECJ had previously explained in [Opinion 2/13](#) on the accession of the European Union to the European Convention on Human Rights, those provisions help to preserve the principle of the autonomy of the EU legal order. Based on that premise, the ECJ then applied a three-step analysis in order to establish whether an

arbitral clause such as the one found in the Czechoslovakia-Netherlands BIT undermines that autonomy.

First step: arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT might need to apply and interpret EU law

The ECJ first examined whether the disputes that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT might need to resolve are liable to relate to the interpretation or application of EU law.

Although the ECJ recognised that the jurisdiction of such a tribunal is limited to making findings on infringements of the Czechoslovakia-Netherlands BIT, it focused on the provision in that treaty (i.e. Article 8.6 of the Czechoslovakia-Netherlands BIT) laying down the law to be applied by the arbitral tribunal in resolving an investor-State dispute.

The ECJ noted that the applicable law included the domestic law of the Member State concerned and other relevant agreements between the parties to the treaty. It followed that EU law (in particular, the fundamental freedoms), which forms part of the national laws of Member States, may be part of the applicable law. As a result, an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT might need to interpret and apply EU law.

Since the application and interpretation of EU law by such an arbitral tribunal could potentially affect the autonomy of the EU legal order, it was therefore necessary for the ECJ to turn to the second step of the analysis, namely whether such an arbitral tribunal could request a preliminary ruling from the ECJ.

Second step: arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT may not refer preliminary questions to the ECJ

If a tribunal is part of the judicial system of the European Union and may be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU, then it may ask the ECJ for a preliminary ruling on the interpretation of EU law. In that manner, the autonomy of the EU legal order is preserved.

Unlike Advocate General Wathelet (who had relied on Case C-377/13 [Ascendi Beiras Litoral e Alta](#)), the ECJ found that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT could not be regarded as a “*court or tribunal of a Member State*”. Such an arbitral tribunal was therefore precluded from referring preliminary questions to the ECJ. The ECJ distinguished Case C-377/13 [Ascendi Beiras Litoral e Alta](#) on the ground that the tribunal at issue in that case was part of a system of judicial resolution of a type of dispute for which the constitution of a Member State provided. A specific feature of an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT was that its *raison d’être* was to be distinct

from the courts of the Member States which are parties to that BIT. Therefore, such an arbitral tribunal is not allowed to refer preliminary questions to the ECJ.

Third step: judicial review of awards rendered pursuant to the Czechoslovakia-Netherlands BIT does not guarantee the autonomy of the EU legal order

The ECJ recognised that the autonomy of EU law may nonetheless be preserved, in the context of a review of an arbitral award rendered under the Czechoslovakia-Netherlands BIT, in the event that a court of a Member State may submit questions of interpretation of EU law to the ECJ by means of a reference for a preliminary ruling.

In this context, the ECJ considered it relevant that an arbitral award for which the Czechoslovakia-Netherlands BIT provides is subject to judicial review only to the extent that the national law, which is the law of the place of the seat of the tribunal, permits. In the specific case at issue, that national law was German law which provided only for limited review of whether an award was rendered based on a valid arbitration agreement and was consistent with public policy of the recognition or enforcement of the award. According to well-established case-law relating to commercial arbitration (Case C-126/97 [Eco Swiss](#) and Case C-168/05 [Mostaza Claro](#)), limited review of arbitral awards before the courts of the Member States was justified provided that such a review also covered fundamental provisions of EU law and that, if necessary, such questions of EU law could be referred to the ECJ.

However, according to the ECJ, that case-law may not be transposed to investor-State arbitration. The ECJ distinguished such arbitration from commercial arbitration by focusing on the fact that commercial arbitration proceedings “*originate in the freely expressed wishes of the parties* [while investment arbitration proceedings] *derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts [...] disputes which may concern the application or interpretation of EU law*”. As a result, investor-State arbitration, such as that for which the Czechoslovakia-Netherlands BIT provides, could prevent that disputes, which might concern the interpretation or application of EU law, are resolved in a manner that ensures the full effectiveness of EU law.

The ECJ therefore concluded that Articles 267 and 344 TFEU preclude Member States from concluding agreements that include a provision on arbitration such as Article 8 of the Czechoslovakia-Netherlands BIT.

ASSESSMENT

The judgment in *Achmea* settles only the question of the validity of clauses on investor-State arbitration in intra-EU BITs. In paragraphs 57 and 58 of its judgment, the ECJ underlined the distinction between intra-EU BITs and international

agreements between the European Union (and possibly also the Member States) and third countries which provide for the establishment of a court or tribunal with jurisdiction to interpret and apply such agreements. The ECJ also considered it important that, in the context of intra-EU BITs, the principles of mutual trust between the Member States and of sincere cooperation apply.

However, as the ECJ reiterated in *Achmea*, international agreements providing for dispute settlement mechanisms must also respect the autonomy of the European Union and its legal order. That fundamental condition thus applies also to agreements such as CETA and other trade and investment agreements under negotiation (including the agreement on the future relationship between the European Union and the United Kingdom) and a possible future agreement on the establishment of a Multilateral Investment Court.

When examining whether such international agreements to which the European Union is (or will become) a party respect the autonomy of the European Union and its legal order, the following guidance from the judgment in *Achmea* might be relevant.

First, it was essential to the ECJ's reasoning that the law to be applied, in resolving disputes regarding the Czechoslovakia-Netherlands BIT, included the domestic laws of the Member States which were parties to that agreement as well as the international agreements to which those Member States were parties. As a result, the applicable law included EU law and thus a tribunal might need to interpret and/or apply EU law.

In assessing the compatibility of the international agreements to which the European Union is (or will become) a party with the principle of autonomy of EU law, it is therefore relevant to consider whether such agreements provide for a similar clause on the applicable law.

International courts and tribunals with jurisdiction to consider whether a State has complied with its international treaty obligations, and which therefore might be called upon to scrutinise national law, typically consider the meaning of national law to be a question of fact. The agreements establishing such courts and tribunals either do not include domestic law as being part of the applicable law or they do not have a separate provision on what the applicable law is.

CETA offers a useful example. Article 8.31 of CETA provides that:

1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The 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 a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a 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.

By stating that domestic laws are to be treated as matters of fact, Article 8.31 of CETA may be interpreted as avoiding any interference with the autonomy of the EU legal order. In Opinion 2/17, the ECJ will likely need to address whether treating EU law in such context as a question of fact nonetheless involves interpreting EU law.

Second, courts and tribunals established by international agreements to which the European Union is a party are not part of the judicial system of the European Union. Consequently, and similarly to arbitral tribunals for which the Czechoslovakia-Netherlands BIT provides, they do not have the status of a court or tribunal of a Member State and therefore may not request, pursuant to Article 267 TFEU, preliminary rulings from the ECJ.

In order to overcome that obstacle and to preserve the autonomy of the EU legal order, the European Union has concluded agreements providing that the court or tribunal established by that agreement must, if necessary, refer questions on the interpretation of EU law to the ECJ. One example is Article 322(2) of the [Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part](#). That provision, which relates to State-to-State disputes, provides:

Where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.

Whether such a clause is compatible with Article 267 TFEU is a question that has not yet been put before the ECJ. Nor is it clear whether including such a clause in future agreements with third countries is a feasible model: third countries (including the United Kingdom in its negotiations for a trade agreement with the European Union) may insist on reciprocity and demand that sufficient deference be given also to their own courts' interpretation of domestic law.

Third, if courts and tribunals established by international agreements to which the European Union is a party may not request preliminary rulings from the ECJ, it must be examined whether their awards, such as the awards of a tribunal established on the basis of Chapter 8 of CETA, may nonetheless be subject to judicial review before a court or tribunal of a Member State in the context of which a reference to the ECJ may then be made.

For example, Article 8.23 of CETA provides that an investor may bring an investment claim under: (i) the ICSID Convention and Rules of Procedure for Arbitration Proceedings; (ii) the ICSID Additional Facility Rules; (iii) the UNCITRAL Arbitration Rules; or (iv) any other rules agreed upon by the disputing parties. It follows that an award rendered pursuant to Chapter 8 of CETA may escape judicial review by the courts or tribunals of the Member States when the parties have opted for a seat of arbitration located in a third country or if the investor opts for ICSID proceedings (for which the ICSID Convention provides for a specific review procedure). In those cases, it is unlikely that the judicial review mechanism put in place will be deemed to sufficiently preserve the autonomy of the EU legal order. In any event, the grounds for such review will be limited (otherwise the entire purpose of arbitration risks being undermined).

CONCLUSION

Although the judgment of the ECJ in *Achmea* only settles the question of the validity of investor-State arbitration clauses in intra-EU BITs, it suggests that the outcome of Opinion 2/17 might depend in particular on whether the ECJ agrees that the treatment of EU law as a question of fact means that the interpretation or application of EU law is not at stake before investment tribunals established under Chapter 8 of CETA – even if Belgium’s request is not limited to the compatibility of that chapter with the autonomy of the legal order and relates also to other parts of EU law. Should the ECJ take the opposite view, the European Union might need to reconsider the design of dispute settlement mechanisms for which its international agreements provide.

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