Arthur Hartkamp

Some Practical Consequences of the Achmea *Judgment for Intra EU Investment Arbitration*

Summary: 1. Introduction – 2. The essential reasons for the decision – 3. Consequences for arbitration on the basis of an Intra-EU BIT – 4. Consequences for arbitration on the basis of other investment treaties which a Member State is a party to – 5. Arbitration on the basis of an agreement to settle a dispute through arbitration (not related to an investment treaty) – 6. Summary.

1. *Introduction*

In its *Achmea* judgment the EU Court of Justice[1] has declared Article 8 of the Bilateral Investment Treaty (BIT) between the Slovak Republic and the Kingdom of the Netherlands to be precluded by Articles 267 and 344 TFEU. Under such Article 8 an investor from one of the above-mentioned EU 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.

In this paper I want to discuss some consequences of said judgment for the practice of investment arbitration, in the light of the interaction of EU law and national arbitration law.

I shall make the following distinctions between intra-EU investment arbitrations:

- arbitration on the basis of an Intra-EU BIT (no. 3);
- arbitration on the basis of other investment treaties which a Member State (or the EU itself) is a party to (no. 4);
- arbitration on the basis of an agreement to arbitrate (no. 5).

I shall restrict myself to the consequences of the judgment and not deal

[1] CJEU, 6 March 2018 (Grand Chamber), C-284/16, (*Slovakia/Achmea*), ECLI:EU:C:2018:158.

with developments leading up to the judgment[2]. The paper reflects my views at the time of the conference; later developments are not discussed[3].

2. *The essential reasons for the decision*

The basic considerations of the CJEU may be summarized as follows:

a) *An international agreement cannot affect the allocation of powers established by the Treaties or, consequently, the autonomy of the EU legal system. Such principle is enshrined in particular in Article 344 TFEU, under which the 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 in the Treaties (para. 32).*

b) *EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law implementing them will be respected. It is precisely in that context that the Member States are bound to ensure in their respective territories the application of and respect for EU law, by virtue, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU (paras 34, 37). The arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital (para. 42).*

[2] Regarding EU law and arbitration in general, see M. Cremona, A. Thies & R.A. Wessel (eds), *The European Union and International Dispute Settlement* Oxford, Hart Publishing, 2017.

[3] Later developments include: (i) Communication from the Commission to the European Parliament and the Council, *Protection of intra-EU investment*, COM(2018)547/2; (ii) ICSID Case No. Arb/12/12, *Vattenfall/Germany*, Decision on the *Achmea* Issue, 31 August 2018; (iii) Bundesgerichtshof 31 Oct. 2018, ECLI:DE:BGH:2018:311018BIZB2.15.0 (*Aufhebung Achmea-Urteil*); (iv) *Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the* Achmea-*Judgment*, Brussels 15 January 2019.

c) *An arbitral tribunal cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, and is not, therefore, entitled to make a reference to the Court for a preliminary ruling (para. 49).*

d) *There is not a sufficient supervision of the awards of the arbitral tribunal. Firstly, because the tribunal itself may establish its seat and, consequently, the law applicable to that supervision and the court called upon to exercise it. Secondly, because such judicial review can be exercised by that court only to the extent permitted by national law. In the case at issue (where German law is applicable), paragraph 1059(2) of the Code of Civil Procedure provides only for limited review, concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award (para. 53).*

e) *Consequently, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of the same law. This is precluded by Articles 267 and 344 TFEU (paras. 56, 60).*

3. *Consequences for arbitration on the basis of an Intra-EU BIT*

When we consider the consequences of the afore-mentioned judgment for arbitral proceedings and awards, we should distinguish between proceedings that were concluded at the date of the judgment, proceedings that were still pending at that date and proceedings that were commenced after that date.

3.1. *Annulment of the basis of a pending or concluded arbitration?*

In my view, the judgment should be interpreted in the sense that it does not entail the groundlessness of an arbitration that was commenced before the date of the judgment at issue, and consequently procedural acts effected (including awards rendered) before that date should not be considered to be

retroactively deprived of their legal basis and thus possibly of their validity. New national legislation would normally include transitory provisions of law protecting legal acts, including procedural acts, performed before its entry into effect from such a drastic interference by the new legal norm. In the context of EU law the same result may be reached by considering the nature of the TFEU provisions breached by the BIT. Such articles (267 and 344 TFEU) should not be interpreted as directly affecting the validity or the contents of a legal act in private law, e.g. an arbitration agreement. It is possible to construe the basis of an investment arbitration based on a BIT differently from the concept of an arbitral agreement in private law, by arguing that it is the BIT that grants the investor the right to bring its claim before an arbitral tribunal and imposes on the host state the obligation to accept that option. However, even according to that interpretation the situation created by the institution of the arbitral proceedings resembles the 'normal' contractual arbitration to such an extent that, in my view, it would be reasonable and preferable to choose an interpretation of the relevant legal provisions that protects the validity of legal acts performed before the *Achmea* judgment was rendered, especially if we take into account the dire consequences of the opposing view.

3.2 *Jurisdiction of arbitrators*

Does the judgment at issue terminate or preclude the jurisdiction of an arbitral investment tribunal? Jurisdiction is lacking not only in the absence of a valid arbitration agreement, but in general in the absence of «powers that are permissible under the law applicable to the arbitration agreement and under the lex arbitri»[4]. It could be argued that the jurisdiction is affected by the *Achmea* judgment. On the other hand, unlike a State court an arbitral tribunal is not bound by a judgment of the CJEU. If a Member State invokes lack of jurisdiction the tribunal will act wisely by suspending the proceedings and awaiting the decision of the State court when seized of the matter at the request of the interested party. If the tribunal were to fear that an award might encounter difficulties in the execution phase, it may, depending on the circumstances, refrain from rendering an award which would not be easily enforceable.

[4] N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford, Oxford University Press, 2015/5.110.

3.3. *Is the award annullable?*

In the *Achmea* proceedings the tribunal had chosen Frankfurt as the seat of the arbitration, meaning that German law was the law applicable to the arbitration. According to German law (§ 1059 para. 1 sub a and para. 2 sub b *Zivilprozessordnung*) the two relevant grounds for annulment were invalidity of the arbitration agreement or the situation where execution of the award would lead to a result contrary to public policy. The same rules apply in many countries (e.g. art. 1052 and 1065 of the Dutch Code of Civil Procedure).

In arbitration, where public policy meets EU law two issues must be distinguished. Already a good while ago the question has arisen whether an arbitral award must be annulled as being contrary to public policy where the arbitrators have failed to apply or have incorrectly applied a rule of EU law[5]. The CJEU held that this is only the case where the rule breached by the award concerns public policy[6] or where the court's domestic rules of procedure require it to grant an application for annulment founded on the failure to observe national public policy rules[7].

Such ground for contrast with public policy is not at stake here. In the *Achmea* judgment a provision of a BIT is considered incompatible with art. 267 and 344 TFEU, because an arbitral tribunal may incorrectly apply EU law without adequate supervision of a public court (a national court or the CJEU following a reference). The referring court (the *Bundesgerichtshof*) had held that the supervision provided by German law was, in fact, adequate due to the CJEU's judgment in Eco Swiss:

> «it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances».

According to the *Bundesgerichtshof*, § 1059 *Zivilprozessordnung*, with

[5] CJEU, 1 June 1999, C-126/97, *Eco Swiss/Benetton*.

[6] E.g. art. 101 TFEU, which according to *Manfredi* (C-295-298/04) and *T-Mobile* (C-8/08) is a rule of public policy. It has been argued that the same applies to the treaty rules on State aid, which is important because investments more often than not go hand in hand with breaching such rules. See E. Paasivirta, *European Union and Dispute Settlement: Managing Proliferation and Fragmentation*, in *The European Union and International Dispute Settlement*, p. 30 ff., pp. 40-43.

[7] See e.g. *Eco Swiss* (relating to the predecessor of art. 101 TFEU) and *Asturcom* (C-40/08) relating to unfair contract clauses.

its reference to public policy, was adequate for that purpose, but on this point the CJEU disagreed. The CJEU (paras 54 and 55, see no. 5 *infra*) clarified that its previous holding concerned commercial arbitration, which originates in the freely expressed wishes of the parties, but that the situation is different for arbitration deriving from a treaty, for which the limited supervision of German law is insufficient.

So the question posed in this section relating to the annullability of the award is not whether the ground 'inconsistency with public policy' can be used on the basis of an incorrect application by the tribunal of an important rule of EU law (which is not at stake in the case at hand), but whether the treaty article on which the arbitration is founded is incompatible with articles 267 and 344 TFEU. I believe this question should be answered in the negative. Again, the TFEU provisions need not be interpreted as directly affecting the validity or the contents of a legal act in private law and do not provide grounds for annullability. Consequently, the outcome depends on national law. Modern legal systems tend to be reluctant to invalidate arbitral awards. If the mere breach of a rule of EU law in an award does not suffice for its invalidation, the same should apply where the basis of an award is problematic for the reasons explained in the *Achmea* judgment.

3.4. *Transitory law; res judicata*

If, contrary to what was said in 3.1 above, a new rule of national law entailed the invalidity or annullability of a legal act performed before its entry into force, transitory law would have to deal with such problem. National legislators that take their task seriously are normally mindful and act accordingly. In my country we have several provisions of transitory law respecting the existing rules governing proceedings and jurisdiction[8]. The *Achmea* judgment does not contain such rules and the temporary effect of the judgment is not subject to any limitation[9]. Perhaps the CJEU will find an opportunity to remedy this lacuna in future cases[10]. If not, we must seriously consider the possibility that the judgment may impact on the jurisdiction of arbitral tribunals and the validity of awards rendered before

[8] Art. 27, 66 and 74 Overgangswet Nieuw BW. These provisions have been drafted with a view to the entry into force of the New Civil Code but they are also applied beyond that scope.
[9] In remarkable contrast to the investment treaties which normally extend their protection to investments made before their termination.
[10] According to *Barber* (C-262/88, para. 41) a restriction of that kind may be permitted only by the Court in the actual judgment ruling on the interpretation requested.

the judgment was issued. In that case the outcome will be dependent on the application and interpretation of national rules, including transitory law, controlled by the principles of equivalence and effectiveness. According to existing case law, the principle of effectiveness does not require, as a general rule, a national court to refrain from applying domestic rules of procedure to examine a judicial decision (including an arbitral award) that has become final and rescind it if it is found to be contrary to EU law[11].

3.5. *Is the award enforceable?*

If enforcement is sought in a EU Member State, the court seised will have to check – as Regulation 1215/2012 is not applicable to arbitration – its domestic law or Treaty law, in particular the 1958 New York Convention, for the existence of grounds for refusal. The most relevant ground in this respect is contrast with public policy[12]. This ground would oppose enforceability of an award that was found to have breached a rule of EU law applicable to the dispute relating to public policy or, perhaps, to a value of comparable significance. Would that ground also be applicable if enforcement is sought of an award based on a BIT covered by the *Achmea* judgment, where the contents of the award in itself do not violate EU law but the award is based on a rule of EU Treaty law containing a prohibition to submit the dispute to arbitration? In my view, this would be an undesirable extension of the scope of the concept of public policy, but at the same time it must be acknowledged that a development in that direction is not impossible. Of course, the matter is only relevant for enforcements sought within EU Member States, and even then, as the application of public policy is dependent on the circumstances of the case, it is possible that the public policy aspect will lose its interest to the extent that the case is less closely connected with the law of the Member State (including EU law).

[11] See A.S. Hartkamp, *European Law and National Private Law*, Intersentia, 2016, paras 2.3.2.5 and 2.3.2.6, quoting inter alia *Eco Swiss*, C-126/97; *Kapferer*, C-234/04; *Pizzarotti*, C-213/13; and *Asturcom*, C-40/08.

[12] See, apart from domestic laws, art. V (2) New York Convention and art. art. 17 I and art. 36 Uncitral Model Law.

4. *Consequences for arbitration on the basis of other investment treaties which a Member State is a party to*

4.1. *Arbitration on the basis of an Extra-EU BI*

Is the reasoning of *Achmea* valid for a bilateral investment treaty between an EU Member State and a third country? In such cases, too, it is possible that EU law is applicable to the dispute irrespective of whether the investor is based in the Member State or in the third country. In both cases the tribunal may have its seat in a Member State whose courts only have a limited supervision of the arbitral award. However, other considerations mentioned in § 2 above do not apply, in particular the premise that both states parties to the investment treaty have breached their obligations, contained in the EU Treaties, to respect the EU legal order and the common values on which it is founded. It is my belief that this reason would suffice to show that the *Achmea* reasoning does not hold good for extra-EU BITs, but there are also further reasons.

Firstly, transposing the outcome of the judgment to extra-EU BITs would lead to arbitrary results. The prejudicial consequences of that judgment for investment arbitration would apply if the Member State were the defendant in the arbitration, but not if the third country were the defendant, meaning that the EU-based investors would be protected, but not investors based in the other countries. At least, in the most common case, that is where the defendant is the host State. If, on the contrary, the arbitration were brought against the investor (e.g. in case of alleged breach of contract by the investor), the consequences of *Achmea* would occur only if the investor is EU-based, not if the same is domiciled in a third country.

Secondly, in regulation 1219/2012 the EU has taken the stance that extra-EU BITs may continue existing and even enter into force until a bilateral investment treaty between the EU and the respective third country will be concluded[13]. Of course, the Court of Justice may examine the

[13] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. The idea on which the regulation is based is that since the Lisbon Treaty foreign direct investment as a part of the common commercial policy falls under the (exclusive or shared) competence of the EU (art. 3 para. 1 sub e, art. 207 VWEU), so that the Member States are no longer competent to conclude treaties by themselves and all existing treaties must be replaced by EU-wide investment treaties. See on this problem of competences Opinion 2/15 on the Free Trade Agreement with Singapore, paras. 78, 238 ff, 285 ff. Investment treaties concluded with a third country before its accession to

validity of this regulation, but in my view investors, member states and third countries may derive from the regulation the justified reliance that the BITs will not be declared entirely or partly incompatible with EU law, insofar as that would negatively affect them.

4.2. *Arbitration on the basis of a multilateral investment treaty which the EU and one or more Member States are a party to*

a) The European Energy Charter (ECT). The ECT is a Treaty relating to (inter alia) investments in the energy sector concluded in 1994 between the EU, all its Member States and a number of other European (and neighbouring) States. In its preparation the EU played a leading role. It would seem to me that *Achmea* should not impact upon investment arbitrations between (investors in) Member States and third countries, on the same grounds as set out in no. 4.1 above. Moreover, I doubt whether that impact should be accepted for arbitrations between Member States. The Commission has not opposed the ECT, on the contrary, the EU as a whole has actively promoted its creation. In that light it would be odd to invalidate a significant part of the Treaty. Renegotiation would be a more elegant way forward.

b) Other Treaties. The EU is seeking to conclude new trade agreements with several countries, including Canada, Vietnam and Singapore[14], setting forth provisions on investment protection and arbitration. It is envisaged that arbitration will be replaced by a new multilateral investment court[15]. From the perspective of the *Achmea* judgment it is clear that such a court in itself does not solve all problems. For that to be achieved the new court must be integrated in one way or another in the EU legal order, preferably by means of the possibility of a reference procedure following the example of art. 267 TFEU[16].

---

the EU are protected by art. 351 TFEU, but the state concerned shall take all appropriate steps to eliminate incompatibilities with EU law. See the judgments C-205/06 (*Commission/Austria*), C-249/06 (*Commission/Sweden), C-118/07 (Commission/Finland).*

[14] For the treaty with Singapore see the previous footnote. Opinion 2/15 concerns competence, not compatibility of the treaty provisions with EU law.

[15] An CJEU Opinion (1/17) on the proposals for CETA is expected in the beginning of 2019.

[16] In the association agreement with Ukraine (L 2014, 161/4) this model is followed for the arbitration panels charged with disputes under art. 322.

4.3 *Arbitration based on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)*

This Treaty, ratified by 153 countries, was concluded in 1965 under the auspices of the World Bank. It is not an investment treaty obliging contracting states to arbitration, but it creates an institution acting as registry in international investment arbitrations and it regulates a number of effects of awards based on the treaty regulations. The role of national courts as to the supervision of awards is entirely eliminated: there is no appeal for annulment of an award (that is taken care of by ad hoc committees of ICSID itself[17]). Another rigorous rule relates to recognition and enforcement: each contracting state shall recognize an award rendered pursuant to the ICSID convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state[18].

ICSID proceedings are often followed in arbitrations based on BITs, which may designate ICSID as registry or may allow investors to choose ICSID. In both cases, if an intra-EU BIT is concerned, the *Achmea* judgment appears to be applicable, because the Member State accepting the BIT has breached its obligations under art. 267 and 344 TFEU. It makes no difference that the arbitration is conducted under the procedural rules of a multilateral treaty. In case of an extra-BIT the outcome would be different, see no. 4.1 above.

5. *Arbitration on the basis of an agreement to settle a dispute through arbitration (not related to an investment treaty)*

As is also apparent from the Bundesgerichtshof's referring judgment, some of the reasons why the *Achmea* judgment has surprised many experts are, on the one hand, the expectation that investment disputes are not

> «disputes concerning the interpretation or application of the Treaties» (art. 344 TFEU)

and, on the other, the consideration in *Eco Swiss* (para. 35):

[17] See for the grounds art. 52 ICSID.
[18] Art. 54 ICSID.

> «Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances».

However, as far as *Eco Swiss* is concerned , insufficient attention has been paid to the fact that the CJEU had opened its considerations (para. 32) by noting that it referred to cases where questions of EU law are raised in «an arbitration resorted to by agreement». This part of the sentence is gratefully seized by the *Achmea* court to practice the noble art of distinguishing:

> «54 It is true that, in relation to commercial arbitration, the Court has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C126/97, EU:C:1999:269, paragraphs 35, 36 and 40, and of 26 October 2006, *Mostaza Claro*, C168/05, EU:C:2006:675, paragraphs 34 to 39).
>
> 55 However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and 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 (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C64/16, EU:C:2018:117, paragraph 34), disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT».

This raises the question what will be the outcome if an investor and a Member State (host state to the investment) agree in the contract underlying the investment that disputes will be submitted to arbitration: will the Member State breach its obligations under art. 344 TFEU or does the clause constitute a commercial arbitration proceeding as meant in para.

55 of the *Achmea* judgment? Taking into consideration the careful way in which the court builds on its judgment in *Eco Swiss* I presume the latter is correct, meaning that this form of investment arbitration will not be affected by the *Achmea* judgment.

6. *Summary*

The CJEU has declared intra-EU BITs to be incompatible with arts. 267 and 344 TFEU. This judgment came as a surprise to many arbitration experts and scholars, particularly after AG Wathelet's opinion strongly advocating the opposing view. The judgment will have significant consequences for investment arbitration within the EU. The government of the Netherlands has immediately announced that it will terminate its twelve intra-EU BITs, preferably in coordination with other EU Member States[19]. In this paper it is argued that the judgment, which is comparable to a legislative measure, in conformity with generally accepted principles of transitory law should not affect the validity of procedural acts performed prior to the date of the judgment and that national courts should be reluctant in applying notions of public policy in refusing to enforce arbitral awards.

The effects of the judgment will not only be relevant for awards based on intra-EU BITs, but also in intra-EU investment arbitrations based on multilateral treaties, including arbitrations under ICSID. However, an exception should be accepted for the Energy Treaty Charter.

Arbitrations between (investors in) Member States and third countries should be unaffected by the judgment, irrespective of their basis in extra-EU BITs or in multilateral investment treaties.

All that has been said applies to arbitrations based on investment treaties only. Arbitrations between investors and Member States based on an agreement unrelated to an investment treaty are not covered by the prohibition in the judgment[20].

[19] *Kamerstukken II* [Parliamentary Documents Second Chamber of Parliament] 2017/18. 21501-02, 1863.
[20] Text finalised on 17 February 2019.