

# Achmea – A Year After: My Contribution in European Papers



Dear readers,

As we have just celebrated the first anniversary of the *Achmea* judgment (which the Court of Justice of the European Union (*CJEU*) handed down on 6 March 2018), I wanted to share with you an [article](#) that I have just published in the *European Papers*<sup>[1]</sup> on the implications of that judgment on investor-State dispute settlement and applicable law clauses in BITs and other agreements concluded by the EU (or its Member States) with third countries.

The article builds on two previous contributions published on this blog (see [here](#) and [here](#)).

The starting point of my analysis is the fact that, in *Achmea*, the CJEU's assessment of the choice of law clause in Article 8, para. 6, of the Czechoslovakia-Netherlands BIT was central to the Court's findings. That clause defined the law to be applied, in resolving disputes between a contracting party and an investor, by arbitral tribunals established pursuant to that BIT. The applicable law included "*the law in force of the*

*Contracting Party concerned*” and “*other relevant agreements between the Contracting Parties*“. Taking into account that EU law is part of the law in force in every Member State and derives from an international agreement between the Member States, the CJEU concluded in *Achmea* that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT might potentially apply and interpret EU law and that such a potential application or interpretation violated the autonomy of the EU legal order.

In my article, I argue that this reasoning is likely also to apply to extra-EU BITs which either contain an applicable law clause with a reference to the domestic law of the host State or which are silent on the issue of the applicable law clause.

However, if an applicable law clause contained in an extra-EU BIT solely provides for the application of the substantive provisions contained in the BIT itself, I argue that the findings of the CJUE in *Achmea* might not be applicable to such BITs.

The bottom line of my contribution is that, in negotiating future trade and investment agreements with third States, negotiators will need to apply particular care to the wording of the clause on the applicable law.

Have a nice read.

[\[1\]](#) European Papers, Vol. 4, 2019, No 1 (forthcoming).

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