Achmea: Potential Consequences for CETA, the Multilateral Investment Court, Brexit and other EU trade and investment agreements

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On 6 March 2018, the Court of Justice of the European Union (the ***CJEU***) delivered its long-awaited judgment in Case C-284/16 *Achmea*. This case raised the issue of whether an arbitration clause in a bilateral investment treaty (***BIT***) concluded between two EU Member States (***intra-EU BIT***) is compatible with European Union (***EU***) law and, in particular, with the autonomy of the EU legal order.

As discussed in two previous posts (here and here), Advocate General Wathelet delivered, on 19 September 2017, an Opinion in strong support of international arbitration. He found that an arbitration clause such as that at issue in *Achmea* was not

incompatible with EU law. The CJEU disagrees.

In this article, we summarise the key findings of the CJEU's judgment and analyse its potential consequences for the EU-Canada Comprehensive Economic and Trade Agreement (***CETA***), for the proposed Multilateral Investment Court and for future EU trade and investment agreements (including the future agreement between the European Union and the United Kingdom).

Introduction

Achmea concerned specifically a clause providing for investor-State arbitration in an intra-EU BIT. No firm conclusions may therefore be reached, based on this judgment, on 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 the EU law. That question is currently pending as a result of Belgium's request for an Opinion from the CJEU (***Opinion 1/17***) on the compatibility with the EU Treaties, including fundamental rights, of the chapter on investor-State dispute settlement (Chapter 8) in CETA.

The CJEU's response in Opinion 1/17 will affect both similar chapters found in future international agreements negotiated by the European Union (such as a future EU-UK trade and investment agreement) but also the European Union's proposal for the establishment of a Multilateral Investment Court.

Although the judgment in *Achmea* offers clarity on the test that will be applied by the CJEU in Opinion 1/17 in scrutinising whether the relevant CETA chapter is compatible with the principle of the autonomy of the EU legal order, the CJEU's reasoning in *Achmea* underscores also the distinctions between intra-EU BITs and (trade and) investment agreements concluded or being negotiated by the European Union with third countries.

Facts of the case

Achmea, a Dutch insurance company which had established a subsidiary in Slovakia in order to market private sickness 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 ruled in favour of 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 CJEU gives a final legally binding interpretation of EU law.

- Article 18 TFEU which prohibits discrimination on grounds of nationality.

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

The CJEU rules that the arbitral clause in the Czechoslovakia-Netherlands BIT is contrary to EU law

The CJEU ruled that Articles 267 and 344 TFEU preclude an arbitral clause such as that found in the Czechoslovakia-

Netherlands BIT. It therefore was 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 CJEU considered Articles 267 and 344 TFEU together. Its starting point was that, as the CJEU 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 CJEU 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 CJEU first examined whether the disputes that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT might need to resolve were liable to relate to the interpretation or application of EU law.

Although the CJEU 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 an arbitral tribunal in resolving an investor-State dispute.

The CJEU 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 CJEU to turn to the second step of the analysis, namely whether such an arbitral tribunal could request a preliminary ruling from the CJEU.

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

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 CJEU 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 CJEU 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 CJEU. The CJEU 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 CJEU.

Third step: judicial review of awards rendered pursuant to the

Czechoslovakia-Netherlands BIT does not guarantee the autonomy of the EU legal order

Despite the answer to the second question, the CJEU recognised that the autonomy of EU law may nonetheless be preserved in the event that, in the context of a review of an arbitral award rendered under the Czechoslovakia-Netherlands BIT, a court of a Member State submits questions on the interpretation of EU law to the CJEU by means of a reference for a preliminary ruling.

In this context, the CJEU considered it relevant that an arbitral award (such as that for which the Czechoslovakia-Netherlands BIT provides), is subject to judicial review only to the extent that the *lex arbitri* permits. In the specific case at issue, the *lex arbitri* (German law) provided only for limited review. 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 is justified provided that such a review covers also fundamental provisions of EU law and that, if necessary, such questions of EU law can be referred to the CJEU.

However, according to the CJEU, that case-law may not be transposed to investor-State arbitration. The CJEU 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 CJEU 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. The CJEU's analysis was limited to that type of arbitration. In paragraphs 57 and 58 of its judgment, the CJEU itself 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 CJEU 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.

It is nonetheless the case that, as the CJEU reiterated in *Achmea* (*see* para. 57), 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 investments 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 CJEU'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. Moreover, national law may be evidence of whether a State has complied with its international obligations. 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 is the applicable law.

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 EU legal order. In Opinion 1/17, the CJEU will likely need to address whether treating EU law in such context as a question of fact nonetheless involves interpreting EU law.

That clause may be compared with Article 29.17 of CETA governing the settlement of disputes between the European Union and Canada on the application and interpretation of CETA (Chapter 29 of CETA) (which might also give rise to questions of interpretation of EU law). According to that provision, an arbitration panel "*shall interpret the provisions of* [CETA] *in accordance with customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties. The arbitration panel shall also take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body*". This is an example of a clause that is silent on what is the applicable law; it only appears to deal with interpretation. Other examples are clauses that only confirm that the applicable law is the BIT or the trade and investment agreement**. Unlike Article 8.31 of CETA, such types of clause do not state that a tribunal is to consider the meaning of domestic law as a question of fact. Whether the CJEU would nonetheless find that, before such a tribunal, the interpretation or application of EU law is a factual matter will likely remain uncertain even after Opinion 1/17 is delivered (likely in the course of 2019), taking into account

that, in order to respond to Belgium's request, it is not necessary for the CJEU to take a position on such other clauses.

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 CJEU.

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 CJEU. 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. Article 322(2), which relates to State-to-State disputes concerning the interpretation and application of a provision of that agreement relating to regulatory approximation, 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 CJEU. 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 of 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 CJEU, it must be examined whether the award of such a court or tribunal, such as a tribunal established pursuant to 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 CJEU may then be made.

For example, Article 8.23 of CETA provides that an investor may bring an investment claim under (i) the International Centre for Settlement of Investment Disputes (***ICSID***) Convention and Rules of Procedure for Arbitration Proceedings; (ii) the ICSID Additional Facility Rules; (iii) the United Nations Commission on International Trade law (***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 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 CJEU in *Achmea* settles only the question of validity of investor-State arbitration clauses

provided for in intra-EU BITs, the CJEU's analysis nonetheless offers guidance on how the CJEU might examine whether investor-State dispute settlement for which Chapter 8 of CETA provides is compatible with the autonomy of the EU legal order.

The judgment also suggests that, in negotiating trade and investment agreements, it is necessary to apply particular care to the wording of the clause on the applicable law. Any reference to the domestic law of the parties concerned should probably be avoided.

Furthermore, the question of whether investor-State arbitration clauses in investment agreements with third states (and possibly trade agreements) may be saved due to the fact that, in the context of such arbitration proceedings, domestic law (and thus EU law) is a question of fact awaits a response from the CJEU in Opinion 1/17.

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* *In that context, we note that, pursuant to Article 63 TFEU, the free movement of capital and payments applies, unlike other freedoms, also between the Member States and third States. If a BIT with a third country would include domestic law as the applicable law, it might mean that, in proceedings initiated by a non-EU investor against the European Union and/or a Member State, Article 63 TFEU applies*.

** *For instance, Article 9.19 of the EU-Singapore Free Trade Agreement provides that an arbitral tribunal, having jurisdiction to rule in investor-State arbitration cases,* "shall apply *[the Agreement]* interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the Parties"*. The EU-Singapore Free Trade Agreement contains a similar clause (Article 15.18) with respect to the settlement of dispute between the European Union and Singapore regarding*

the application and interpretation of the agreement itself.

[UPDATE added on 9 October 2018]: A small amendment was made to replace the references to “Opinion 2/17” to “Opinion 1/17”.
