Does Achmea Invalidates All Intra-EU BITs? Not necessarily!

On 19 June 2018, the European Commission published a [communication on the protection of intra-EU investments] (the ***Communication***).

One important take-away from this Communication is the implication that the European Commission draws from the judgment handed down by the Court of the Justice of the European Union (the ***CJEU***) in *Achmea*.

According to the Commission:

> *"In 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 Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, 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." (emphasis added)

In the Q&A that accompanied the Communication, the European Commission also emphasised that the *Achmea* judgment does not have consequences for agreements with third countries. According to the Commission, *Achmea "only concerns intra-EU*

disputes" and "*different legal considerations apply to external EU investment policies*".

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Shortly after the publication of the judgment in *Achmea*, my colleague Isabelle Van Damme and I published a first article in which we analysed the potential consequences of this judgment for 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).

Today, I (**provocatively**) develop that analysis further by arguing that, contrary to the position expressed by the European Commission in its Communication and in the Q&A, the findings of the CJEU in *Achmea* might *not* necessarily mark the end of (arbitration clauses in) all intra-EU bilateral investment treaties (***intra-EU BITs***)*. In addition, I also argue that, in some aspects, *Achmea* might also affect other types of international agreements concluded by the EU or other BITs concluded by EU Member States with one or more non-EU countries (***extra-EU BITs***).

Importantly, I must emphasize that this article is based on my reading of the *Achmea* judgment, and in particular of the relevant paragraphs regarding the applicable law clause at issue in that case. This article does not discuss whether other reasons (such as the principle of non-discrimination) not discussed in *Achmea*, might also justify the termination of all intra-EU BITs.

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In *Achmea*, the CJEU expressly referred to three elements in

order to establish whether an arbitral clause such as the one found in the 1991 Czechoslovakia-Netherlands BIT (the ***Czechoslovakia-Netherlands BIT***) undermined the autonomy of EU legal order:

– whether arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT were obliged to apply and interpret EU law (see paras 39 to 42 in *Achmea*);

– whether arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT could refer preliminary questions to the CJEU (see paras 43 to 49 in *Achmea*); and

– whether judicial review of awards rendered pursuant to the Czechoslovakia-Netherlands BIT guaranteed the autonomy of the EU legal order (see paras 50 to 56 in *Achmea*).

The starting point of this analysis is the fact that the CJEU answered positively to the first question of whether arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT were obliged to apply and interpret EU law (meaning that it became necessary to consider also the second and third questions). However, had the CJEU found that arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT *were not* obliged to apply and interpret EU law, it likely would have decided that the arbitration clause in that BIT did not undermine the autonomy of EU legal order and was thus valid. In that event, there would have been no need to address questions 2 and 3.

Thus, central to the CJEU's analysis was its assessment of the specific choice of law clause in Article 8.6 of the Czechoslovakia-Netherlands BIT. That clause defined (in a non-exhaustive manner) 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 that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT could potentially apply and interpret EU law. Given that such interpretation and application of EU law by arbitrators would affect the autonomy of the EU legal order, the CJEU concluded that the arbitration clause contained in the Czechoslovakia-Netherlands BIT was contrary to EU law. The CJEU also made clear (see para. 57 in *Achmea*) that other international agreements concluded by the EU or other extra-EU BITs must also respect the autonomy of the EU legal order.

With this in mind, I argue that *Achmea* does not necessarily have consequences for all intra-EU BITs. Intra-EU BITs containing a clause on the applicable law that does not include (or does not allow for the application of) the domestic law of the contracting parties would not necessarily affect the EU legal order on the basis of the reasoning in *Achmea* (irrespective of the answers that the CJEU brought to questions 2 and 3 above).

Conversely, the judgment in *Achmea* might be relevant also to the validity of arbitration clauses in BITs (and other international agreements) concluded by the European Union (or one of its Member States) with one or more third countries. Indeed, if such extra-EU BITs (or other extra-EU agreements) contain a choice of law clause which makes it possible for arbitral tribunals to interpret and apply the domestic law of an EU Member State, then the ruling of the CJEU to the first question in *Achmea*, will apply equally to that type of BIT.

Therefore, the central issue to the assessment of the validity of intra-EU (and extra-EU) BITs in light of the *Achmea* decision is the assessment of the applicable law clause contained in those BITs.

Non-exhaustive research among existing BITs shows that various forms of applicable law clauses co-exist. Some BITs do not contain rules on applicable law (or only contain very vague clause). Other BITs provide that the applicable law will be the BIT itself and other relevant rules of international law. Finally, some BITs contain more detailed clauses which provide that the applicable law will be the BIT itself, the domestic law of the State party to the dispute and the rules and principles of international law and any other agreement concluded between the States that have concluded the BIT.

I will examine the consequences of the judgment of the CJEU in *Achmea* in light of all those possibilities.

1. BITs that do not contain rules on applicable law

As explained by Yas Banifatemi** BITs that do not contain rules on applicable law are by no means exceptions. According to Banifatemi, "[t]*he vast majority of BITs entered into by countries such as the United States, the United Kingdom, France, or Germany do not contain a clause on the applicable law regarding investment disputes between one of the contracting States and the investors of the other contracting States*."

Within the EU, the Netherlands-Bulgaria (1999) BIT, the France-Czechoslovakia (1990) BIT or the France-Croatia (1996) BIT provide concrete examples of BITs which are silent on the issue of the applicable law.

When BITs are silent on the issue of the applicable law and this question cannot be resolved through the interpretation of the BIT, the application of the residual rules provided for in the arbitration rules chosen by the parties to the dispute will resolve the matter.

Article 42(1) of the ICSID Convention, for instance, provides that "[t]*he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the*

absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" (emphasis added).

Article 35 of the 2010 UNCITRAL Arbitration Rules provides that "[t]*he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate*".

In light of those provisions, it is very likely that, even if a BIT does not contain any applicable law clause, an arbitral tribunal established pursuant to that BIT is nevertheless susceptible of applying and interpreting the domestic law of the responding State. If this dispute involves an EU Member State (and since EU law is part of the law in force in every Member States), the arbitral tribunal will therefore be likely to apply and interpret EU law. Keeping in mind that the CJEU in *Achmea* found that such an application or an interpretation of EU law by an arbitral tribunal would affect the autonomy of the EU legal order, arbitration clauses contained in BITs which are silent on the applicable law clause (irrespective of whether they are intra-EU or extra-EU BITs) are also likely to violate EU law.

2. Applicable law clauses that provide for the application and interpretation of the BIT and/or the relevant rules of international law

The Energy Charter Treaty offers a good example of a treaty with an applicable law clause that provides for the application and interpretation of the rules of international law together with the Energy Charter Treaty itself. Article 26(6) of the Energy Charter Treaty provides that an arbitral tribunal with jurisdiction to rule on a dispute between an investor and a contracting party "*shall decide the issues in*

dispute in accordance with [that] *Treaty and applicable rules and principles of international law*".

It can be argued that such treaties or BITs are also likely to be contrary to EU law in the light of the *Achmea* judgment. Indeed, even if those BITs do not provide for the application and interpretation of the domestic law of the responding State, they are nevertheless susceptible to lead to the application and interpretation of EU law given that EU law is … international law.

Of course, it could be argued that EU law forms an legal order of its own, which is distinct from public international law (see for instance Case C-26/62 *Van Gend en Loos*). Nevertheless, under such an applicable law clause, a foreign investor (which has established a business in the EU) could potentially rely on EU law (and in particular on the fundamental freedoms provided for under the EU Charter of fundamental rights) in a dispute against an EU Member State even if the underlying BIT (or the Energy Charter Treaty) does not provide for the application and interpretation of the domestic law of that State but merely provides for the application of the relevant rules of international law.

In such a case, the arbitral tribunal with jurisdiction to rule on this dispute will be requested to apply and interpret EU law. However, since the judgment of the CJEU in *Achmea* provides explicitly that such interpretation and application of EU law by arbitral tribunals affect the autonomy of the EU legal order, arbitration clauses contained in such BITs shall also be considered as invalid under EU law. Again, this conclusion applies irrespective of whether the underlying BIT is an intra-EU BIT or an extra-EU BIT.

3. Applicable law clauses that provide for the application and interpretation of the BIT or of the domestic law of the State party to the dispute and/or of the rules and principles of international law

The third category of BITs that I wish to examine are BITs that contain an applicable law clause that provides for the application and interpretation of the BIT, the domestic law of the responding State or the rules and principles of international law.

The applicable law clause at issue in *Achmea* provides a good example. This clause (found in Article 8.6 of the Czechoslovakia-Netherlands BIT) reads as follows: "*The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: (i) the law in force of the Contracting Party concerned; (ii) the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; (iii) the provisions of special agreements relating to the investment; (iv) the general principles of international law*".

In *Achmea*, the CJEU clearly ruled that the arbitration clause in intra-EU BITs which contain such an applicable law clauses were contrary to EU law since they made it possible for arbitral tribunals to apply and interpret EU law (and they therefore affected the autonomy of the EU legal order). Although this conclusion by the CJEU was given in the intra-EU context, I see no reason not to expand this reasoning to arbitration clauses in extra-EU BITs that contain a similar applicable law clause.

4. Applicable law clauses that only provide for the application and interpretation of the BIT

The ISDS provision in the Sweden-Estonia (1992) BIT only applies to "*dispute*[s] *between one of the Contracting Parties and an investor of the other Contracting Party concerning* ***the interpretation or application of this Agreement***". Consequently, such a clause appears to provide for the resolution of disputes based on the interpretation or application of solely those BITs. This clause does not seem to allow for the application or interpretation of EU law.

I argue that – under *Achmea* – such intra-EU BITs (or extra-EU BITs containing a similar clause) could be valid under EU law. Indeed, such a clause could potentially pass the *Achmea* test given that it avoids (at least in theory) any application or interpretation of EU law (since the dispute is limited to the interpretation and application of the BIT in question) and thus avoids any interference with the EU legal order.

5. Applicable law clauses that provide that domestic law shall be treated as a matter of fact

If the applicable law clause contained in a BIT (either an intra-EU BIT or an extra-EU BIT) provides and clarifies that the arbitral tribunal should consider domestic law as a matter of fact, such clause could also potentially avoid any application or interpretation of EU law and avoid any interference with the autonomy of the EU legal order. Therefore, contrary to the arbitration clause contained in the underlying BIT at stake in *Achmea*, a BIT containing such applicable law clause will (probably) be seen as valid under EU 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 law is to be treated as a matter 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 (as it appears from the hearing report).

This being said, if the BIT at stake also includes international law as the applicable law, then what has been presented above (*see* section 2) also applies (to the extent that you can consider that EU law is international law).

6. Conclusion

This article might be a bit provocative. The table below illustrates the key aspect of my reasoning:

Applicable law clause	Intra-EU BIT	Extra-EU BIT
No clause	Probably contrary to EU law	Probably contrary to EU law
	E.g. Netherlands-Bulgaria (1999) BIT	E.g. Belgium-Luxembourg-Bangladesh (1981) BIT
BIT and relevant rules of international law	Probably contrary to EU law	Probably contrary to EU law
	E.g. Netherlands-Hungary (1987) BIT	E.g. Energy Charter Treaty – (*EU-Singapore FTA?*)
BIT, domestic law and rules and principles of international law	Contrary to EU law	Probably contrary to EU law
	E.g. Czechoslovakia-Netherlands (1991) BIT	E.g. Belgium-Luxembourg-Rwanda (1983) BIT
BIT only	Probably valid under EU law	Probably valid under EU law
	E.g. Sweden-Estonia (1992) BIT	No known examples
If applicable law clause clarifies that domestic law shall be treated as a matter of fact	Probably valid under EU law	Probably valid under EU law
	No known examples	E.g. CETA – (*EU-Vietnam FTA?*)

* *This would have been the case if the CJEU had ruled on the discriminatory nature of an arbitration clause contained intra EU-BITs. However, the CJEU refused to do so (para. 61 of the judgment in Achmea).*

** Yas Banifatemi, *The Law Applicable* in Investment Treaty

Arbitration, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Katia Yannaca-Small (ed.), Oxford University Press, 2010, p.200.
