

The impact of the *Achmea* judgment on EU trade and investment agreements with third countries

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Introduction/ *Achmea* – Three-tier analysis

- 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*).

1/ Analysis of applicable law clauses in intra-EU and extra-EU BITs

- *Achmea* might not necessarily mark the end of (arbitration clauses in) all intra-EU BITs. In some aspects, *Achmea* might also affect extra-EU BITs.

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 (2001) 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 – (<i>EU-Singapore FTA?</i>)
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
	No known examples	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 – (<i>EU-Vietnam FTA?</i>)

1/ Analysis of applicable law clauses in intra-EU and extra-EU BITs

CETA (Article 8.31)

“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.”*

2/ Preliminary questions

EU-Ukraine Association Agreement (Article 322(2))

“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.”

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

This article has jointly been co-authored with Isabelle Van Damme

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

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