INSIGHT

THE FIRST EVER INTERPRETATIVE PRELIMINARY RULING CONCERNING THE VALIDITY OF AN INTERNATIONAL AGREEMENT BETWEEN EU MEMBER STATES: THE *ACHMEA* CASE

EMANUELE CIMIOTTA*

ABSTRACT: In its judgment of 6 March 2018, in *Achmea* (case C-284/16 [GC]), the CJEU for the first time ruled on the validity, in light of EU law, of an international agreement between Member States. The judgment raises several important legal questions. This *Insight* concentrates exclusively on those related to the concept of "tribunal" within the meaning of Art. 267 TFEU and the consequences of the declaration of invalidity contained therein.

KEYWORDS: autonomy of EU law – interpretative preliminary ruling – declaration of invalidity – national tribunal under Art. 267 TFEU – BIT – arbitration clause.

I. THE FACTS OF THE CASE

In the judgment delivered on 6 March 2018, in *Achmea*,[1] the CJEU ruled on the compatibility with Arts 18, 267, 344 TFEU of the arbitration clause contained in Art. 8 of the Bilateral

* Assistant Professor of International Law, Senior Lecturer in European Union Law, Sapienza University of Rome, emanuele.cimiotta@uniroma1.it.

[1] Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea BV* [GC]. For some initial comments, see B. HESS, *A European Law Reading of Achmea*, in *Conflict of Laws*, 8 March 2018, www.conflictoflaws.net; S. HINDELANG, *The Limited Immediate Effects of CJEU's Achmea Judgment*, in *Verfassungsblog*, 9 March 2018, www.verfassungsblog.de; V.D. THYM, *The CJEU Ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals*, in *EU Law Analysis*, 9 March 2018, www.eulawanalysis.blogspot.it; C. ECKES, *Don't Lead with Your Chin! If Member States Continue with the Ratification of CETA, They Violate European Union Law*, in *European Law Blog*, 13 March 2018, www.europeanlawblog.eu; P. NIEMELÄ, *Achmea – A Perspective from International (Investment) Law*, in *European Law Blog*, 15 March 2018, www.europeanlawblog.eu; A. DIMOPOULOS, *Achmea: The Principle of Autonomy and Its Implications for Intra and Extra-EU BITs*, in *EJIL Talk!*, 27 March 2018, www.ejiltalk.org; F. MUNARI, C. CELLERINO, *EU Law is Alive and Healthy: The Achmea Case and a Happy Good-bye to Intra-EU Bilateral Investment Treaties*, in *SIDIBlog*, 17 April 2018, www.sidiblog.org; S. GÁSPÁR-SZILÁGYI, *It is Not Just About Inves-*

ISSN 2499-8249
doi: 10.15166/2499-8249/202

Investment Treaty (BIT) concluded between the Netherlands and (then) Czechoslovakia in 1991, still applicable to Slovakia after the dissolution of Czechoslovakia in 1993. The clause enabled an investor from a State Party to bring proceedings before an *ad hoc* arbitral tribunal in the event of a dispute concerning investments in the other State Party. In sharp contrast to what contended by the referring judge[2] and suggested by the Advocate General, in its Opinion of 19 September 2017,[3] the Court issued a declaration of invalidity, due to the alleged adverse effect of the arbitration clause on the autonomy of EU law.[4]

Here are the main facts of the case. In 2006, Slovakia partly reversed the liberalization of its health insurance market and prohibited the distribution of profits generated by private related activities. In 2008, Achmea (a company belonging to a Dutch insurance group and established in Slovakia since 2004 to provide sickness insurance services in that State) instituted arbitration proceedings against Slovakia pursuant to the BIT, arguing that such prohibition violated the agreement and caused financial damage to it. In 2012, the arbitral tribunal found that Slovakia had breached the BIT, and ordered it to pay compensation in favor of Achmea. Subsequently, Slovakia brought an action before the German courts (the arbitration took place in Germany, hence German courts had jurisdiction to review its lawfulness), seeking annulment of the arbitral award on account of the inconsistency of the arbitration clause with Arts 18, 267, 344 TFEU. The German Federal Court of Justice, having heard the case on appeal, requested the CJEU to give a preliminary ruling on the interpretation of those EU Treaty provisions, in view of determining whether the arbitration clause is compatible with them.

The importance of the judgment is witnessed by the wide participation in the proceedings before the Court. Sixteen Member States submitted written observations either in support or opposition to the validity of the clause at issue. The legality of clauses of similar kind contained in nearly two hundred BITs currently in force between Member States could have also been affected.[5] Thus, the *Achmea* judgment is expected to have a systematic and direct influence on intra-EU investment law and procedure: a crucial area for economic and financial growth within the EU.

tor-State Arbitration. A Look at Case C-284/16, Slovak Republic v. Achmea BV, in *European Papers – European Forum*, www.europeanpapers.eu, forthcoming.

[2] *Achmea BV* [GC], cit., paras 14-23.

[3] Opinion of AG Wathelet delivered on 19 September 2017, case C-284/11, *Achmea BV*.

[4] *Achmea BV* [GC], cit., paras 59-60.

[5] In the operative part of its ruling, the Court affirmed: "[a]rticles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, *such as* Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic" (*ibid*., para. 62, emphasis added).

II. The judgment and its reasoning

For the first time the Court was asked to interpret EU law so as to ascertain the legality of an international agreement between Member States. Not for nothing has the referring judge decided to address the Court notwithstanding it did not share Slovakia's doubts regarding the compatibility of the BIT with the TFEU.[6] As widely known, over time the interpretative preliminary ruling procedure set forth in Art. 267 TFEU has been used *de facto* in order to indirectly review the validity of national laws in force within single Member States.[7] The *Achmea* judgment extends this practice to international agreements concluded between Member States.

It is settled case-law of the CJEU that an international agreement between the EU (or its Member States) and third parties cannot affect the allocation of powers envisaged by the EU Treaties or, consequently, the autonomy of the EU legal order.[8] In *Achmea*, for the very first time, the Court opened up this principle to include *inter se* agreements between Member States.

The concept of "tribunal" for the purposes of Art. 267 TFEU was also at stake. In the Court's view, the *ad hoc* arbitral tribunal created in accordance with the BIT cannot be classified as such, since it is not part of the Dutch or Slovak judicial system. It was precisely the exceptional nature of its jurisdiction, compared with that of the ordinary court system of the two Member States, that was one of the principal reasons for the existence of Art. 8 BIT. As a result, according to the Court, the tribunal has no power to make a reference for a preliminary ruling,[9] despite it might be called on to interpret and apply EU law.[10]

Lastly, the CJEU concentrated on the related question whether an award made by the arbitral tribunal at hand could at least be subject to review by a judge of a Member State enabled to refer the questions of EU law addressed by the tribunal, thereby ensuring respect of Arts 19 TEU and 267 TFEU. The Court found that such a judicial review can be carried out only to the extent that national law allows it and the arbitral tribunal is itself to choose its seat and, consequently, the national law applicable to the procedure governing the review process, pursuant to Art. 8, para. 5, BIT. This requirement was not completely met in *Achmea*, since German law provided only for limited judicial review.[11] Moreover, according to the Court, although the review of the validity of arbitral awards by national judges may legitimately be limited in scope in the context of

[6] *Ibid.*, para. 14.

[7] For further insights, see B. De Witte, *The Impact of* Van Gend en Loos *on Judicial Protection at European and National Level: Three Types of Preliminary Questions*, in A. Tizzano, J. Kokott, S. Prechal (dir.), *50ème anniversaire de l'arrêt Van Gend en Loos, 1963-2013, actes du colloque, Luxembourg, 13 mai 2013*, Luxembourg: Office des publications de l'Union européenne, 2013, p. 93 *et seq.*

[8] See, *inter alia*, Court of Justice, opinion 2/13 of 18 December 2014, para. 201, and the case-law cited.

[9] *Achmea BV* [GC], cit., paras 43-49.

[10] *Ibid.*, paras 39-42.

[11] *Ibid.*, paras 51-53.

commercial arbitration (provided that fundamental provisions of EU law may be examined), the same considerations do not apply to investment arbitration. While the former originates in the "freely expressed wishes of the parties", the latter derives 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 Art. 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law".[12]

For all these reasons, the CJEU decided that, by stipulating the BIT, Slovakia and the Netherlands had created a dispute-settlement mechanism which proved unable to ensure the full effectiveness of EU law, although the disputes falling under its competence could have concerned the interpretation or application of that law.[13]

III. Some of the problems related to the scope and consequences of an interpretative preliminary ruling indirectly concerning the validity of an agreement between Member States

This finding raises a number of legal problems, including as regards the scope and consequences of the preliminary ruling procedure under Art. 267 TFEU (in the context of the broader and highly sensitive issue relating to the externalization of the judicial powers derived from the EU Treaties). Here some of them will be sketched, with the aim of stimulating further reflections.

First, it is not entirely clear why arbitral tribunals constituted in accordance with intra-EU BITs should in any case be considered not capable of ensuring the full effectiveness of EU law. If it is only because they are supposed to be unable to make references for a preliminary ruling pursuant to Art. 267 TFEU, since they are not established by law (i.e. one of the parameters laid down in well settled case-law of the Court),[14] then it may be wondered whether this conclusion could be upheld also in respect of arbitral tribunals directly and intentionally set up by Member States through *inter se* agreements. These tribunals draw their jurisdiction from a legal act – like national tribunals – not from a contract governed by private law – like contractual arbitration, whose referrals for preliminary rulings have traditionally been held inadmissible.[15] Moreover, it cannot reasonably be excluded that they act as organs common to the States Parties to the BIT[16] – being entrusted with national judicial functions and issuing decisions simultaneously attributable to those States – since they form part of the domestic legal systems

[12] *Ibid.*, paras 54-55.

[13] *Ibid.*, para. 56.

[14] See, for instance, Court of Justice, judgment of 6 October 2015, case C-203/14, *Consorci Sanitari del Maresme* [GC], para. 17, and the the case-law cited.

[15] See, *inter alia*, Court of Justice, judgment of 27 January 2005, case C-125/04, *Denuit and Cordenier*.

[16] This is also maintained by AG Wathelet, in its Opinion, *Achmea BV*, cit., para. 85.

of those States, by virtue of the internal implementation of the BIT.[17] They are independent (Art. 8, paras 3-5, BIT) and apply rules of law, including EU law (Art. 8, para. 6, BIT). Their jurisdiction is compulsory (Art. 8, paras 1-2, BIT),[18] their procedure is *inter partes* and their awards are final and binding upon the parties to the dispute (Art. 8, para. 7, BIT).[19] Besides, the arbitral tribunal in the main proceedings was called on to rule on an infringement of the BIT, which it had to interpret in the light of EU law: as a result, it interpreted and applied EU law provisions, especially those on the free movement of capital and the right of establishment.

Second, it seems hard to explain how a State could first conclude (or take over) an agreement encompassing an arbitration clause and implement it as a whole and then, when a concrete dispute arises, challenge the lawfulness of that clause. The BIT at hand in *Achmea* entered into force at a time when the authority of the CJEU, the preliminary ruling procedure and the autonomy of EU law were already in need to be protected. It is only the accession of Slovakia to the European Union in 2004 (which transformed the Dutch-Slovak BIT into an intra-EU BIT) that may have altered such a background: in the event of conflict, the provisions of EU law prevail, in the matters governed by them, over the provisions of the BIT. Normally, pursuant to the law of treaties, after having acquiesced in the validity of an agreement, by reason of its conduct, a Contracting Party loses its right to invoke a ground for invalidating it.[20] However, it may be wondered whether the supervening intra-EU character of the Dutch-Slovak BIT has any bearing on the application of this rule. In this sense, it may be also questioned whether the international law norms on the application of successive treaties (on one hand, the 1993 Dutch-Slovak BIT; on the other, the 2003 Treaty on the accession of Slovakia to the EU and the 2007 Lisbon Treaty) relating to the same subject-matter could be of some relevance.[21]

[17] In a similar vein to the mixed arbitral tribunals established in accordance with the peace treaties that brought World War I to an end: D. ANZILOTTI, *Corso di diritto internazionale (introduzione – i soggetti – gli organi)*, Roma: Athenaeum, 1923, p. 163.

[18] As distinct from what provided by other intra-EU BITs, which leave to the investor of one Contracting Party the free choice to decide to whom – among a number of dispute-settlement mechanisms, whether arbitral or judicial, national or international – submitting an investment dispute with the other Contracting Party. See, for instance, Art. 9 of the 1999 BIT between the Czech Republic and Bulgaria.

[19] In the same sense, as regards investment arbitration tribunals in general, see J. BASEDOW, *EU Law in International Arbitration: Referrals to the European Court of Justice*, in *Journal of International Arbitration*, 2015, p. 367 *et seq*., p. 376 *et seq*., who considers those tribunals as entitled to request a preliminary ruling from the CJEU, because they fulfil each and every condition listed by the Court in order to identify a "tribunal" for the purposes of Art. 267 TFEU. In particular, the BITs enable the investor to pursue its case either in a national court of the host State or in an *ad hoc* arbitral tribunal. Therefore, such *ad hoc* tribunals are substitutes of the national courts and form part, in that capacity, of the domestic judicial system of the respective Member State.

[20] Art. 45 of the 1969 Vienna Convention on the Law of Treaties, which, on this point, reflects customary international law.

[21] See Arts 30 and 59 of the 1969 Vienna Convention on the Law of Treaties.

Third, it is not entirely clear what are the legal consequences of the *Achmea* judgment for the Dutch-Slovak BIT (thus, apart from indirect effects on mixed investment agreements still to be ratified;[22] further repercussions on extra-EU BIT's and free trade agreements between the EU and third countries providing for an investment protection regime;[23] judicial implications for pending and future intra-EU investment arbitrations).[24] Can, as a matter of EU law, the declaration of incompatibility contained therein entail the invalidity of the Dutch-Slovak BIT (or of the sole arbitration clause, in so far as it is not deemed to be essential to the accomplishment of the object or purpose of the BIT)? Can the Dutch-Slovak BIT (or the arbitration clause) be considered void and no more in force within the EU legal system? How can this be enforced? Usually, it is for the Member State whose national law is under scrutiny to amend or repeal that law in order to align it with the findings of the CJEU. And, usually, a preliminary ruling stating the invalidity of an agreement between the EU and third parties brings about the invalidity of the Council's decision that concluded the agreement on the part of the Union. *Quid iuris* in respect of an *inter se* agreement between Member States? Has the *Achmea* judgment a direct impact on the lawfulness and/or the applicability of such agreement within the EU legal order? Alternatively, are the Contracting Parties required under EU law to take the necessary and available measures to adjust the agreement consistently or put an end to it? Are they merely called upon to do this? Is it only up to the Contracting Parties to determine what the *Achmea*'s implication are?[25] What if they fail to take any measure to this end? Is the European Commission or a Member State entitled to institute infringement proceedings in accordance with Arts 258-260 TFEU and lead the Court to step-in once again?

[22] See C. ECKES, *Don't Lead with Your Chin!*, cit., who mentions the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the request to give an opinion on the compatibility with EU law of the investor court system it envisages, which was submitted to the CJEU by Belgium, pursuant to Art. 218, para. 11, TFEU. In the author's view, the clear indication of incompatibility in *Achmea* and the EU principle of loyalty would compel Member States to suspend the CETA ratification process and wait for Court of Justice, Opinion 1/17, which is likely to find the CETA investment chapter to be capable of undermining the autonomy of EU law.

[23] V.D. THYM, *The CJEU Ruling in Achmea*, cit.; P. NIEMELÄ, *Achmea – A Perspective from International (Investment) Law*, cit.; A. DIMOPOULOS, *Achmea*, cit.; S. GÁSPÁR-SZILÁGYI, *It is Not Just About Investor-State Arbitration*, cit. As a matter of principle, probably the arguments put forward in *Achmea* may be extended to the CETA, the EU-Singapore Free Trade Agreement, the Transatlantic Trade and Investment Partnership, and the Energy Charter Treaty: see V.D. THYM, *The CJEU Ruling in Achmea*, cit.

[24] S. HINDELANG, *The Limited Immediate Effects of CJEU's Achmea Judgment*, cit.; A. DIMOPOULOS, *Achmea*, cit.: national courts in Member States would be obliged to set intra-EU BITs provisions conflicting with EU law aside and find arbitral awards incompatible with that law in the event these awards are challenged before them; arbitral tribunals would be obliged to stop pending proceedings and decline their jurisdiction over future cases based on intra-EU BITs similar to the *Achmea* one. For a slightly different view, see S. GÁSPÁR-SZILÁGYI, cit.

[25] As advocated by P. NIEMELÄ, *Achmea – A Perspective from International (Investment) Law*, cit.; A. DIMOPOULOS, *Achmea*, cit.; S. GÁSPÁR-SZILÁGYI, *It is Not Just About Investor-State Arbitration*, cit.

IV. A few brief concluding remarks

It is precisely the need to preserve the autonomy of EU law – through its effective and uniform application – ensured by the preliminary ruling procedure, along with the need to prevent that, by concluding *inter se* agreements, Member States could derogate from their ordinary judiciary and remove disputes on the interpretation and application of EU law from the CJEU's jurisdiction, that might probably lead to a different conclusion: the arbitral tribunals provided for in such agreements may be regarded as a "tribunal" within the meaning of Art. 267 TFEU. Indeed, put in these terms, perhaps those tribunals should not only be considered as empowered to refer preliminary questions to the Court, but also obliged to do so, any time they believe that a decision on questions relating to the interpretation or the validity of EU law is necessary to enable them to settle a dispute between an investor and a Member State. In fact, the viability and scope of judicial remedies against their arbitral awards (along with the prospect that, in accordance with Arts 19 TEU and 267 TFEU, national judges may be called on to review *ex post* the consistency of those awards with EU law, and make a reference to the Court if need be) is contingent upon the specific national law applicable to the procedure concerned, which is freely chosen by the arbitral tribunal itself and may considerably vary from State to State. The above solution would make sure that any *ad hoc* arbitral tribunal set up on the basis of clauses of intra-EU BITs like the one in *Achmea* – wherever its seat is located and, hence, whichever the national law applicable to the procedure governing judicial review of the validity of its awards may be, provided the tribunal is required to determine its own procedure applying the United Nations Commission on International Trade Law arbitration rules (which enable it to choose its own venue) – is called to cooperate with the CJEU pursuant to Art. 267 TFEU and, consequently, ensure the full effectiveness of EU law. Besides, the Court itself conceives the preliminary ruling procedure as the "keystone" of the judicial system established by the EU Treaties in order to preserve the autonomy of EU law.[26]

Moreover, perhaps the *Achmea* judgment is meant to contribute to the present Union's agenda aimed at pushing Member States to terminate existing intra-EU BITs to which they are parties, since these treaties are likely to undermine the consistent and effective application of EU (highly advanced) provisions on the protection of foreign direct investments and related subject-matters within the single market.[27] There is ample

[26] *Achmea BV* [GC], cit., para. 37.

[27] On the latest EU policy *vis-à-vis* international investment treaties and the EU scepticism about investor-state dispute settlement mechanisms, after the entry into force of the Lisbon Treaty and the new EU competence over the conclusion of international agreements covering foreign direct investments, see C. Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, in *European Journal of International Law*, 2015, p. 639 *et seq.*; D. Gallo, F. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, in *Fordham International Law Journal*, 2016, p. 1081 *et seq.*

evidence of initiatives undertaken by the EU institutions to that purpose, which unfortunately have not fully achieved the expected outcome so far.[28] However, one thing is a legal and political need, which may be welcomed and supported, another is the tool used for pursuing it. It seems that the Court has (once again in its case-law) wished to remedy against a European political stalemate.[29] In doing so, though, it probably went a bit too far, since, in the meanwhile of a tentative political compromise, the arbitration clause under its scrutiny could have been considered at least in line with Art. 267 TFEU,[30] under the conditions indicated above.

[28] A detail summary is available in F. MUNARI, C. CELLERINO, *EU Law is Alive and Healthy*, cit., para. 5.

[29] In fact, perhaps the *Achmea* judgment could furnish the European Commission with a legal argument to justify a shift from the political measures aimed at convincing Member States to abandon intra-EU BITs (that it has unsuccessfully taken so far) to more effective judicial measures (under Arts 258 and 260 TFEU), which could finally compel reluctant Member States.

[30] For a similar view, but on different grounds, see S. HINDELANG, *The Limited Immediate Effects of CJEU's Achmea Judgment*, cit.