Implications of the CJEU's Achmea decision
(C-284/16) on tax treaty arbitration

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Achmea decision

On 6 March 2018 the Grand Chamber of the CJEU ruled in the Achmea decision (C-590/16) that the bilateral investment treaty (BIT) between the Netherlands and the Slovak Republic violated EU law because it allowed an arbitral tribunal to interpret provisions of EU law in a way that is contrary to the substance of and reasoning behind EU law. In its judgment, the CJEU clarified that arbitral tribunals are subject to EU law in the same way as ordinary courts.

The decision

In 2004, the Slovak Republic opened its market to private parties offering sickness insurance services. Achmea, a Dutch insurer, entered the Slovak market and started offering those services. In 2006, the Slovak Republic brought a claim against Achmea in the regional court of Bratislava for paying taxes in Slovak currency. Achmea submitted its defence to the court, which decided to arbitrate the dispute under the BIT. The arbitral tribunal dismissed the claim in 2011 and ordered the Slovak Republic to pay Achmea damages. The Slovak Republic brought an action to set aside that arbitral award before the Federal Supreme Court of Justice, which rejected the application of the arbitral tribunal for a public hearing on the merits of the case (par. 36).

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Implications on tax treaty arbitration

To assess the implications of the Achmea decision for tax treaty arbitration, consider the arbitral clauses in Article 25 of the tax treaty between the Netherlands and Germany signed in 2012. This clause is largely similar to Article 25(3) of the OECD Model.

On the one hand, the actio is thereby not to be understood as if it is an action to object to the substance of and reasoning behind EU law. On the other hand, the actio is thereby not to be understood as if it is an action to object to the substance of and reasoning behind EU law.
There is a tax treaty arbitral award, which refers questions on this point to Luxembourg, or until the European Commission would launch an infringement procedure. It would have to be analysed in further detail what the consequences would be for cases actually decided through tax treaty arbitration, should the CJEU conclude a breach of EU law of the arbitration clause. There seem to be various cures (if necessary), such as appointing the CJEU as arbiter (as Germany and Austria did in their treaties) or granting national courts a "full review" role. As long as not all 28 Member States have signed up for mandatory MAP binding arbitration under the MLI, treaty arbitrations will remain outside the EU judicial system (the case that they fall within the EU system might be stronger when all 28 Member States sign up). Finally, considering the CJEU’s argumentation in Achmea, it even seems plausible whether an “Advisory Commission” (Article 8) or an “Alternative Dispute Resolution Commission” (Article 10) should be regarded as tribunals being “situated within the EU judicial system”, even though disputes resolution through those tribunals is advocated in the directive on tax dispute resolution mechanisms that was adopted on 10 October 2017 (Council Directive (EU) 2017/1852) and, as Jonathan Schwarz notes, one would expect that directive’s strength to be “its status in EU law subject to the general jurisdiction of the Court of Justice of the EU”.  

As a postscript: on 20 March 2018 the Council adopted the negotiation directives authorising the Commission to negotiate, on behalf of the EU, a Convention establishing a multilateral court for the settlement of investment disputes (MIC). According to paras. 6 and 7 of the negotiation directives, the Convention should not only allow the EU to bring agreements to which the EU is or will be a party to under the jurisdiction of the MIC, but also Member States and third countries should be allowed to nominate agreements to which they are or will be Parties to. Interestingly, the footnote relating to the latter option reads: “Without prejudice to the question of their validity or applicability under EU law, bilateral investment treaties concluded among Member States (as intra-EU BITs), as well as the intra-EU application of the Energy Charter Treaty shall not fall within the scope of these directives.”

One might infer from this footnote that: (i) interpretation of intra-EU BITs should remain within the EU judicial system (as decided in Achmea) and (ii) interpretation of BITs between Member States and third countries may apparently be tasked to an institution outside the EU judicial system (the MIC). This latter inference of course, would expect to be the EU’s position in the negotiation, that disputes liable to relate to the interpretations of BITs may remain open to review by the CJEU.

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[1] Case C-284/16, Slowakische Republik (Slovak Republic) v Achmea BV, 6 March 2018, EU:C:2018:158.