The impact of the *Achmea* decision

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1. Good morning ladies and gentlemen. Let me first of all thank Dirk Buschle and Smaranda for their kind invitation to deliver the key note speech today.
2. The title of my keynote is: The impact of the *Achmea* decision of the European Court of Justice of the EU. However, the *Achmea* judgment will only serve as a hook for discussing the wider impact of the *Achmea* decision for investor-state-dispute settlement provisions, which are typically contained in bilateral investment treaties (BITs) and the Energy Charter Treaty (ECT). Effectively, I will talk about the impact of EU law on international investment law and what *Achmea* means for you as members of the Energy Community, candidate states for the accession to the EU and for states that are otherwise associated with the EU.

Summary of *Achmea* case

3. Let me first start with a quick summary of the *Achmea* case. I know many of you are familiar with it, but probably not all of you.
4. Achmea is a Dutch health insurance company, which had invested in the Slovak Republic when the health insurance market was privatized. Some years later, the Slovak Government decided to re-nationalize the health insurance market, which effectively led to the expropriation of Achmea. Subsequently, Achmea started an international arbitration procedure against Slovakia on the basis of the BIT between the Netherlands and Slovakia. The arbitral tribunal found that Slovakia breached the BIT and awarded Achmea 22 million EUR in compensation. However, Slovakia brought an annulment proceeding against the award before the Frankfurt Court, which was rejected. Subsequently, Slovakia appealed at the German Federal Civil Court, that court, while not convinced by the Slovak arguments, nonetheless, requested a preliminary ruling from the European Court in Luxembourg. The main question was: whether the investor-state dispute settlement provision is incompatible with EU law – as was claimed by Slovakia and the European Commission.
5. The European Court decided that indeed this investor-state arbitration provision in this BIT is incompatible with EU law. In particular, the European Court decided that international arbitral tribunals do not qualify as “domestic courts” of the Member States and therefore are unable to request preliminary rulings from the European Court when they have to interpret or apply EU law.
6. In other words, international arbitral tribunals operate “outside” the preliminary ruling system and thus outside the final control of the European Court. This would endanger the uniformity and consistency of EU law.

7. Consequently, Achmea was not entitled to use international arbitration in order to obtain compensation but instead should have gone to the domestic courts of Slovakia. The question of course is whether Achmea would have got a fair trial and would have also won the case?

The fundamental questions raised by *Achmea* judgment

8. But the *Achmea* judgment raises some more fundamental questions, such as:
   (i) what is the impact of *Achmea decision* on the other 200 bilateral investment treaties (BITs), which are still in force between the EU Member States?
   Can European investors not invoke them either anymore?
   (ii) Zooming in on energy disputes: Can European investors still use the Energy Charter Treaty?
   In this context, it should be noted that the Energy Charter Treaty is the most often used investment treaty for claims by European investors against EU Member States. For example, Spain currently faces more than 30 claims because of the retroactive withdrawal of the feed-in-tariffs for renewable energy.
   (iii) What about the 1,200 bilateral investment treaties, which the EU Member States have concluded with third States? The so-called extra-EU BITs.
   (iv) What about the bilateral investment treaties (BITs) of the candidate countries such as Albania, Macedonia, Montenegro, Serbia and Turkey, which want to join the EU?
   As it happens, most of these candidate countries are also members of the Energy Community, namely, Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine.
9. Because the Achmea judgment is so vague, the assessment on the potential impact of it has been very divers.
10. However, what we do know is that the European Court did not explicitly refer to other arbitration provisions in other BITs. Neither did the European Court mention the Energy Charter Treaty or any other international trade and investment agreements.
11. So, *prima facie*, the impact of the *Achmea* judgment should be considered to be limited to this specific case and this specific dispute resolution provision in this specific BIT between the Netherlands and Slovakia.
12. However, we all know that judgments of the European court are *de facto* binding on all EU Member States and their courts and institutions.
13. We also know that EU law is the "Supreme Law of the Land", which enjoys primacy over all domestic law of the Member States, but also enjoys supremacy over their international treaty obligations.

14. Bearing that in mind, many experts argue that the *Achmea* judgment effectively applies to all investor-state dispute settlement provisions contained in all the 200 BITs between the EU Member States.
15. This is so, they argue, because all international arbitral tribunals are in a similar position as the *Achmea* tribunal, namely, they cannot ask preliminary questions to the European Court and therefore operate "outside" its control.
16. Therefore, many argue that *de facto* none of the intra-EU BITs can be invoked any longer by European investors for claims against EU Member States.
17. That is certainly the view of the European Commission, which has been pushing EU Member States to terminate all intra-EU BITs as soon as possible.
18. But also several Member States, including for example the Netherlands, have - after the *Achmea* judgment came out - publicly stated that they will terminate their intra-EU BITs.
19. However, I am not aware of any termination of a BIT after the *Achmea* judgment. Indeed, I just checked with regard to the Netherlands-Poland BIT, which was up for automatic extension for another 10 years as of 1st of August and as far as I can see none of the Parties have announced that they want to terminate it, which they had to do before 1st of August, so this BIT is now automatically extended until 2029.
20. So, we have to see how quickly the EU Member States will actually take away the investment protection offered by these BITs from their investors. After all, some EU Member States may still consider them important and useful for their investors.

The enforcement problem

21. But even if those BITs would remain in force for some time, we have another problem caused by the interaction between EU law and investment law, which concerns the enforcement of awards.
22. I refer here to the *Micula* case, which is still pending before the European Court.
23. This case concerns a 250 million EUR ICSID award by the Micula brothers, who are Swedish/Romanian investors, against Romania.
24. As you know, ICSID awards are automatically enforceable and there is no review or annulment procedure foreseen before domestic courts. So, when Romania started to pay out parts of the award, the European Commission interfered by prohibiting Romania from paying the award because this would constitute illegal state aid.
25. So, here we have a clash between on the one hand the international treaty obligations of Romania based on the ICSID Convention and the BIT, and, on the other hand, EU law. Of course, for Romania it sounds like a gift from heaven if it could avoid paying 250 million EUR, but from the perspective of the claimant it seems very unfair.

26. In any event, the case is pending and will probably be appealed, so we have to wait for a few years before we receive the definite answer from the European Court.
27. Nonetheless, both *Achmea* and *Micula* clearly show that domestic courts must give full effect to EU law, which in turn means that international arbitration based on intra-EU BITs will not have a long future within the EU and its Member States.
28. This means that European investors must turn to the domestic courts of the EU Member States for investment protection. However, as you all know, in many countries – even within the EU – that is not a practical option – as the European Commission and European Parliament themselves have recently confirmed regarding 2 Member States. So, we are talking about effectively taking away a necessary and important tool for investment protection and dispute resolution, without putting something else in place.
29. I leave it up to you to decide whether this is a good development.

What about the ECT?

30. So, after we have concluded that the end of intra-EU BITs is nearing, the next question is: what about international arbitration based on the Energy Charter Treaty (the ECT)?
31. As I mentioned before, the ECT is the most often used investment treaty for European investors against European States. Not only Spain, but also Italy, Czech Republic and other EU Member States are facing dozens of claims because of the retroactive withdrawal of guaranteed feed-in-tariffs for renewable energy.
32. We all know that we need more renewable energy in order to meet the targets of the Paris agreement. Most States need to significantly expand their renewable energy production levels and therefore must use subsidies to achieve that.
33. However, granting subsidies – in particular for a long period of 10 or 20 years – can be a dangerous thing for States. Unexpected economic or financial crisis, trade wars, government changes etc can hit a State so massively that it needs to cut down or even completely withdraw the promised subsidies from the investors.
34. But also accession to the EU can suddenly turn a perfectly legal subsidy into a subsidy that is considered illegal under EU law and therefore needs to be withdrawn and collected back from the recipient.
35. So, this is an important point for all of you who are in the accession process: make sure that any subsidies that you grant is compatible with EU law. And if you give subsidies, make sure that they are given only on the condition that they have been declared compatible with EU law by the European Commission.

36. Turning to the ECT: Effectively, international arbitral tribunals under the ECT are in the same position as the *Achmea* tribunal; that is, they also cannot request preliminary rulings from the European Court.
37. So, arguably, if the European Court would be asked to determine whether investment arbitration under the ECT is compatible with EU law, the European Court would probably come to the same conclusion as in *Achmea*.
38. In fact, in one of the setting-aside proceedings regarding an ECT award against Spain, the Stockholm Court has asked exactly this question to the European Court.
39. So, in about 2 years we will have an answer to this question from the European Court.
40. And if the European Court would indeed conclude that European investors could not use international arbitration under the ECT for claims against EU Member States any longer, that would significantly weaken the ECT.
41. Meanwhile, it is possible that the EU and the Member States will take steps themselves to effectively exclude the applicability of the ECT.
42. For example, they could adopt a declaration in which they state that the ECT arbitration clause cannot be used for intra-EU disputes anymore – a so-called disconnection clause.
    Indeed, the European Commission has been arguing in many cases that the ECT already contains an implicit disconnection clause, but so far none of the tribunals has agreed with that.
43. Another option could be that the EU and its Member States follow Italy and withdraw from the ECT, so that no claims are possible anymore - save for the investments covered by the sunset clause.
44. Whatever steps are taken, as is the case with intra-EU BITs, the option for using international arbitration under the ECT is going to be further restricted or even completely taken away.
45. Again, I leave it up to you to decide whether this will give investors the necessary legal certainty to make the investments in renewable energy that are needed to meet the Paris targets.

The impact on extra-EU BITs

46. Going beyond the intra-EU situation, the *Achmea* judgment could also have an impact on the 1,200 BITs which the Member States have concluded third States. The so-called extra-EU BITs.
47. After all, the arbitral tribunals established under these BITs are in the same position as the *Achmea* tribunal; that is, they also cannot ask preliminary questions to the European Court when EU law is at issue.
48. So, they also operate outside the control of the European Court.
49. Moreover, one could raise the question: why should for example a Chinese or an American investor have access to international arbitration against, say Bulgaria, whereas a Dutch or French investor does not have that right anymore?

50. I am not sure it is the purpose of the EU to give more rights to non-European investors than to its own investors.
51. On the other hand, if a tribunal is seated outside the EU, let's say in Washington or Geneva, why should they care about judgments of the European Court or European law?
52. But then we come across again the issue of recognition and enforcement of those awards in the EU.
53. It is possible that because of *Achmea* domestic courts of the EU Member States may refuse to recognize and enforce such awards.
54. At this point in time, we simply cannot say what the impact of the *Achmea* judgment will be on extra-EU BITs.
55. In any event, one thing is clear: EU law is increasingly interfering with BITs and international arbitration as a dispute settlement tool.

What can you do?

56. So, what can you do to avoid these problems?
57. You could for example make sure that your BITs are only applicable to the extent they are compatible with EU law.
58. A good example for that is the Austria-Croatia BIT from 1999, which states that

> "The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal *acquis* of the European Union (EU) in force at any given time."

59. So, this BIT accepts the supremacy of EU law – already in 1999! – so long before Austria or Croatia became member of the EU.
60. In my view, you do not need to amend your BITs, but could simply adopt a joint interpretative note or attach a protocol to the BITs.
61. In this way, you are arguably complying with the *Achmea* judgment and all other future judgments of the European Court.
62. However, for accession candidate countries, the European Commission might very well demand more from you, namely, the termination of all your BITs with the current EU Member States.
63. An interesting point in this context is the UK post Brexit: soon it will become a third non-EU Member State! So, you might be able to keep the BITs with the UK.
64. Regarding subsidies for renewable energy, I would recommend to work very closely with the European Commission and get approval before you grant them. This will save you a lot of trouble.

65. I guess, the same applies to your energy policy generally. In light of the third Energy Package, the North Stream and South Stream pipelines etc, the European Commission plays a very important role and so does European law.
66. Accordingly, if you are not yet a Member State of the EU and even if you will never be one, it is important to follow very closely what the impact of EU law is on investment law and international arbitration.
67. Candidate countries need to realize that they must fully transpose and implement the whole EU law *aquis* by the time of accession. This also includes international treaty obligations.
68. Thus, you should use the time until accession is completed for making your BITs as well as your subsidies EU law proof.
69. In the meantime, it is important to underline the fact that other dispute settlement options, such as Mediation exist.
70. Indeed, this exactly what the Energy Community's Dispute and Negotiation Centre offers.
71. In fact, I am very honoured to be one of the members of the Panel of Mediators. And I am, of course, always available to help you.
72. In this context, it is important to underline the fact that a new UNCITRAL Convention has recently be finalized, which will make it possible to recognize and enforce Mediation settlements. When this Convention enters into force, it will make Mediation an even more attractive tool for dispute resolution.
73. After all, Mediation is fast, cheap and usually maintains the relationships between the parties and thus makes future cooperation possible.

Conclusions

74. In conclusion, it is too early to identify the precise impact of the *Achmea* judgment, but I have the feeling that the impact will be very broad and not limited to the specific Netherlands-Slovak BIT that was at issue in *Achmea*.
75. In my view, all intra-EU BITs will be affected – either because they are considered inapplicable or because they will be formally terminated.
76. I also think that - in the long-run - European investors will not be able anymore to use the international arbitration clause in the ECT for disputes against EU Member States.
77. For the rest, I can only hope that the other 1,200 extra EU BITs will be maintained as is also stipulated in the so-called "grandfathering Regulation", which I had the pleasure to be one of the negotiators.
78. Meanwhile, the European Commission is pushing its idea of an international investment court – either on a bilateral basis such as with Canada, Mexico, Vietnam and Singapore or on a multilateral

basis as is currently negotiated within UNCITRAL. Indeed, at the end of October the UNCITRAL Working Group will meet here in Vienna again to continue the discussion.

79. This investment court system, of course has very little to do with arbitration. Moreover, it remains to be seen whether the European Court will consider it compatible with EU law, which I personally very much doubt.
80. We will hear the verdict from the European Court in the next few months.
81. So, the bottom line is: the European Court remains the most important, but also the most unpredictable player in this game.
82. The *Achmea* judgment is just the first ruling of the European Court in a long chain of many upcoming decisions.
83. So, in this sense the *Achmea* judgment marks the beginning of a long process in which the relationship between EU law and international arbitration will be re-calibrated.

84. Thank you very much for your attention!

85. I am happy to take a few questions.