JONES DAY

COMMENTARY

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Restructuring Recommended After CJEU Decision on Intra-EU Bilateral Investment Treaties

IN SHORT

The Ruling: On March 6, 2018, the Court of Justice of the European Union ("CJEU") issued a judgment in the *Achmea v. Slovakia* case on whether the investor–state arbitration provision in the Netherlands–Slovakia Bilateral Investment Treaty ("BIT") is compatible with EU law.

The Result: With little analysis and against the opinion of its own Advocate General, the CJEU ruled that the investor–state arbitration provision in the BIT is incompatible with EU law.

Looking Ahead: The ruling raises concerns for investors in the European Union that route their investments through another EU Member State. Savvy investors will no doubt consider restructuring to include jurisdictions outside of the European Union in their corporate holding chain if they wish to preserve the potential to resort to investor–state arbitration.

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The Decision

In December 2012, an UNCITRAL tribunal awarded Achmea €22.1 million in a dispute brought against Slovakia under the Netherlands–Slovakia BIT. The Slovak Republic then sought to set aside the award in Germany, the seat of the arbitration, arguing that granting an investment tribunal jurisdiction under an intra-EU BIT is incompatible with the Treaty of the Functioning of the European Union ("TFEU"). The German courts referred the question to the CJEU for a preliminary ruling on the compatibility of the BIT in question with EU law.

Eventually, in September 2017, the CJEU's Advocate General issued an opinion that the BIT was in fact compatible with EU law. Before that, several investment tribunals, including the *Achmea* tribunal, had similarly found that intra-EU BITs were indeed compatible with EU law.

However, the CJEU ignored these various prior decisions and opinions and instead ruled that the investor–state arbitration provision in the BIT violates EU law. The CJEU's opinion primarily focused on the fact that investment tribunals are not part of the EU legal system and may be called on to interpret or apply EU law without being able to refer EU law issues to the CJEU or without necessarily being bound by EU law or CJEU decisions. Thus, the CJEU could not directly ensure consistency and uniformity in the interpretation of EU law.

> Savvy investors with investments in the European Union will no doubt consider restructuring their investments and holding structures in order to take advantage of BITs concluded between the host (investment) State and countries outside of the European Union.

Interestingly, the CJEU did not address the fact that non-EU courts might also have to interpret EU law in the context of foreign court proceedings, again without referrals to the CJEU. The CJEU also took the view that domestic court review of an arbitral award at the enforcement stage was not in and of itself sufficient insurance that EU law would be uniformly interpreted and applied.

In our view, the CJEU drew a flawed distinction between investment arbitration tribunals and commercial arbitration tribunals, as the CJEU admitted that the latter can decide issues of EU law despite the limited review of their awards by domestic courts. The CJEU posited that intra-EU BITs are agreements by Member States to resolve disputes outside of the EU legal system in violation of their duties under the TFEU, whereas commercial arbitration agreements are somehow different because they are between private parties. However, this attempted distinction fails to acknowledge that a private party's ability to resolve a dispute through commercial arbitration stems from the various Member States' own national arbitration laws, which also remove certain disputes from the jurisdiction of the EU courts.

The Implications

First, the CJEU did not directly opine on an investment tribunal's jurisdiction to hear a dispute brought under an intra-EU BIT. The CJEU also left open the question as to whether its decision would apply to arbitrations conducted under the Energy Charter Treaty ("ECT"), to which the EU is a party. Nor did the CJEU opine on what duties Member States may have with regard to existing intra-EU BITs, although the European Commission has previously put significant pressure on them to withdraw from those

agreements. Investment tribunals are entitled to determine their own jurisdiction, applying the applicable treaty and international law, and they may decide that the CJEU decision is not binding on them.

Second, pending and future arbitrations involving EU investors and countries may (and should) consider the impact of the CJEU's decision on the enforceability of future awards. Any EU national court that is asked to rule on an intra-EU BIT award, either as it constitutes the seat of the arbitration or as the situs of recognition and enforcement, would need to consider this decision.

Third, ICSID awards would currently appear to be on a safer ground for purposes of enforcement, as they are largely insulated from national court review, but the General Court of the European Union's decision in the pending *Micula* case could affect ICSID awards within the European Union.

Finally, savvy investors with investments in the European Union will no doubt consider restructuring their investments and holding structures in order to take advantage of BITs concluded between the host (investment) State and countries outside of the European Union. This should, of course, be done long before an investment dispute arises so as to avoid any allegations of abuse of process or bad faith. And, of course, other issues will have to be taken into account, with legitimate tax planning being primary among them.

TWO KEY TAKEAWAYS

1. The CJEU decision has implications for pending and future investment arbitrations based upon intra-EU BITs and potentially the ECT.
2. Thus, investors in EU countries should consider restructuring their investments to incorporate treaty planning that does not depend upon an intra-EU BIT.

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