

European Court of Justice Rules on Intra-EU Bilateral Investment Treaty

CJEU ruling on the incompatibility of a BIT provision with EU law may have implications for existing intra-EU BITs.

Key Points:

- The CJEU's decision differs from Advocate-General Melchior Wathelet's 2017 Opinion and will likely become controversial.

On 6 March 2018, the Court of Justice of the European Union (CJEU) issued its [long-awaited judgment](#) in Case C-284/16, *Slovak Republic v. Achmea BV*.

The case relates to the 2012 award in *Eureko* (Achmea's predecessor) *v. Slovak Republic*, under the aegis of the 1991 agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (the BIT). Article 8 of the BIT provides for the arbitration of disputes between one Contracting State and an investor from the other Contracting State.

With the seat of the arbitration in Frankfurt, Germany, the Slovak Republic sought to set aside the award before the German courts, arguing that the arbitration clause in the BIT is contrary to the Treaty on the Functioning of the European Union (TFEU). In March 2016, the German Bundesgerichtshof (Federal Court of Justice) made a request to the CJEU for a [preliminary ruling on the issue](#).

On 19 September 2017, Advocate-General Melchior Wathelet [issued an Opinion in Case C-284/16](#). A-G Wathelet commented that “[t]he question is of fundamental importance in the light of the 196 intra-EU BITs currently in force and the numerous arbitral procedures between investors and Member States in which the European Commission has intervened as amicus curiae in order to support its argument that intra-EU BITs are incompatible with the FEU Treaty, an argument which the arbitral tribunals have systematically rejected as unfounded.”¹ He further concluded that:

- “The characteristics of the arbitral tribunals constituted in accordance with Article 8 of the BIT, and in particular of the arbitral tribunal involved in the present case, are such that they allow the ordinary courts and tribunals of the Member States to ensure compliance with [European public policy rules], as they do in the context of international commercial arbitration.”²

- “Article 8 of the BIT does not undermine the allocation of powers fixed by the EU and FEU Treaties and, thus, the autonomy of the EU legal system.”³

The CJEU’s *Achmea* judgment did not follow A-G Wathelet’s Opinion. The CJEU reasoned that the autonomy of EU law (vis-à-vis Member States’ law and international law) is guaranteed through “a judicial system intended to ensure consistency and uniformity in the interpretation of EU law,”⁴ the “keystone” of which is the preliminary ruling procedure contemplated in Article 267 TFEU.⁵

Article 8(6) of the BIT requires an arbitral tribunal to “decide on the basis of the law, taking into account in particular, though not exclusively, the law in force of the Contracting Party concerned ... other relevant agreements between the Contracting Parties.” The CJEU found that “the law in force of the Contracting Party concerned” and “other relevant agreements between the Contracting Parties” included EU law and, therefore, a tribunal constituted under Article 8 of the BIT could “be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.”⁶ The CJEU further determined that a tribunal constituted under Article 8 of the BIT “cannot be regarded as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.”⁷

The CJEU recalled that in [Eco Swiss, C-126/97](#), and [Mostaza Claro, C-168/05](#), the ECJ had found that commercial arbitration tribunal awards are subject to Member State courts’ review (albeit of a limited nature). These courts could therefore seek preliminary rulings from the CJEU on “fundamental provisions of EU law.”⁸ However, the CJEU distinguished the *Eureko* award from a commercial arbitration tribunal award on the ground that commercial arbitration proceedings:

“... originate in the freely expressed wishes of the parties, [whereas an arbitral proceeding constituted under Article 8 of the BIT] derive from a treaty ...”⁹

Based on the foregoing, the CJEU concluded that “Article 8 of the BIT has an adverse effect on the autonomy of EU law.”¹⁰

The CJEU acknowledged that “an international agreement providing for the establishment of a court responsible for the interpretation of [the EU’s] provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law.”¹¹ However, Article 8 of the BIT “was concluded not by the EU but by Member States.”¹²

Implications

The CJEU’s decision in *Slovak Republic v. Achmea* is certain to give rise to significant discussion. This may include whether the decision is relevant to claims raised under the Energy Charter Treaty — to which the EU itself is a contracting party — or to arbitrations initiated under the ICSID Convention, and the treaty’s impact on the status of the 196 intra-EU BITs that remain in force.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[Charles Claypoole](#)

charles.claypoole@lw.com
+44.20.7710.1178
London

[Claudia T. Salomon](#)

claudia.salomon@lw.com
+1.212.906.1230
New York

[Sophie J. Lamb QC](#)

sophie.lamb.qc@lw.com
+44.20.7710.3012
London

[Sebastian Seelmann-Eggebert](#)

sebastian.seelmann@lw.com
+49.40.4140.30
Hamburg

[Fernando Mantilla-Serrano](#)

fernando.mantilla@lw.com
+33.1.4062.2000
Paris

[John Adam](#)

john.adam@lw.com
+33.1.40.62.29.10
Paris

You Might Also Be Interested In

[High Court Ruling Helps Protect Confidentiality of Arbitral Awards](#)

[ICC Court Clarifies Summary Dismissal Procedure in Arbitration](#)

[English Courts Stay Enforcement of ICSID Award](#)

[Call for Cybersecurity Guidelines in International Arbitration](#)

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <https://www.sites.lwcommunicate.com/5/178/forms-english/subscribe.asp> to subscribe to the firm's global client mailings program.

¹ Opinion of Advocate General Wathelet in Case C-284/16 *Slowakische Republik v Achmea BV*, § 3.

² *Id.* at § 245.

³ *Id.* at § 256.

⁴ *Slovak Republic v. Achmea B.V.*, Court of Justice of the European Union, Grand Chamber, Case C-284/16, Judgment, 6 March 2018, § 35.

⁵ *Id.* at § 37.

⁶ *Id.* at § 42.

⁷ *Id.* at § 49.

⁸ *Id.* at § 54.

⁹ *Id.* at § 55.

¹⁰ *Id.* at § 59.

¹¹ *Id.* at § 57.

¹² *Id.* at § 58.