PERENCO V. ECUADOR AND *ACHMEA B.V. V. THE SLOVAK REPUBLIC*: PRACTICAL LIMITATIONS WHEN SEEKING RELIEF UNDER A B.I.T.

Authors
Stanley C. Ruchelman
Marie de Jorna

Tags
Achmea
Bilateral Investment Treaty
Perenco

Marie de Jorna is a French lawyer who is admitted to the Paris Bar. She holds a Master 1 Degree in Business from the University Paris 1, Pantheon-Sorbonne and a Master 2 Degree from the University of Poitiers. She is currently training in U.S. tax matters at Ruchelman P.L.L.C.

INTRODUCTION

The immediate reaction of tax advisers in seeking relief for a client faced with a cross-border tax dispute is to seek Competent Authority relief under the Mutual Agreement Procedure of an applicable income tax treaty. As explained in Paul Kraan's article elsewhere in this edition of *Insights*, a Bilateral Investment Treaty ("B.I.T.") can also protect against certain abuses by foreign tax authorities. A B.I.T. is designed to promote foreign investment between two nations. One of the main points of the treaty is to assure an investor from one state that its investment in the other state will be treated fairly. Typically, this means that the foreign investor or its local subsidiary will not be the target of unfair sovereign acts, but it also protects against unfair or confiscatory tax assessments. Approximately 3,000 B.I.T.'s are currently in effect.

Compared to an income tax treaty, which aims to avoid double taxation by allocating taxing rights between its parties and provides a dispute resolution process to be followed by the Competent Authorities of its parties' tax administrations, a B.I.T.is structured to ensure that the foreign investor and its local subsidiary will receive the same treatment as domestic companies, including fair and equitable treatment and protection from expropriation. In addition, the dispute resolution provision under a B.I.T. grants a foreign investor the right to bring an action before an international arbitration panel that is enforceable as a judgment in the event obligations imposed on a party to a B.I.T. are violated. However, the wheels of justice grind slowly, as will be seen below.

An example of a company seeking relief from confiscatory tax assessments under a B.I.T. involves a French oil and gas company, Perenco Ecuador Limited ("Perenco"), which in 2008 filed a petition requesting arbitration by the International Centre for Settlement of Investment Disputes ("I.C.S.I.D.") against the government of Ecuador ("Ecuador").[1] This petition was filed following the enactment of a law in Ecuador that increased the participation of the Ecuadorian government at the expense of Perenco. Five similar petitions were filed with the I.C.S.I.D. in response to these measures.

A B.I.T. between two Member States no longer has a role to play in resolving disputes that arise entirely within the European Union in light of the *Achmea* decision in 2018, which dismissed the competency of the B.I.T. as an avenue for a resident of one Member State to obtain relief against another Member State based on European Union ("E.U.") law.

---

1 *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* I.C.S.I.D. case No. ARB/08/6.

© Ruchelman P.L.L.C., 2022. All rights reserved.

This article will explore two cases where arbitration under a B.I.T. provided ephemeral benefits. They are *Perenco v. Ecuador* and *Achmea v. The Slovak Republic*.[2]

PERENCO V. ECUADOR

Context of the Dispute

Ecuador's Amazonian Region is known for its important oil resources. Perenco is one of several foreign oil companies that have been granted permission to exploit the area's oil reserves.

In 1993, Ecuador put in place Law 44. This law permitted oil contractors to operate through participation contracts. Under those contracts, the private company assumed all the risks and costs of exploration and exploitation in return for the grant of a right to receive a share of the revenue generated from the production of oil.

In 2002, Perenco became a party to two participation contracts related to oil exploration and production activities in Blocks 7 and 21, situated in the Ecuadorian Amazonian Region. Four years later, Perenco and an unrelated company, Burlington, formed a joint venture regarding production in those blocks, with Perenco having the majority interests.

In 2005, international oil prices began to rise. In 2002, the price of Ecuadorian crude oil was approximately U.S.$15 per barrel. By 2005, prices reached U.S.$50 per barrel and generated extraordinary profits for oil companies. As a result, the Ecuadorian government announced that it would renegotiate the participation contracts in order to provide a greater share of the revenue to itself.

In 2006, Law 42 was adopted in Ecuador. It allocated 50% of "extraordinary income" derived from production of oil to the Ecuadorian government. Extraordinary income was defined as any revenue earned per barrel that exceeded a specified reference price. The reference price was set at U.S.$25 per barrel for the Block 7 participation contract and U.S.$15 per barrel for the Block 21 participation. Thus, for example, if in 2006 the reference price was U.S.$25 and the prevailing price of oil was U.S.$45 per barrel, the Ecuadorian government would be entitled to U.S.$10 per barrel ((U.S.$45 - U.S.$25) x 50% = U.S.$10 per barrel).

A second decree issued in October 2007 increased the Ecuadorian government's share of revenue from sales above the reference price from 50% to 99%, effectively freezing Perenco's profits at slightly more than the reference price.

Perenco's Request for Arbitration at the I.C.S.I.D.

The governments of France and Ecuador entered into a B.I.T. (the "F-E B.I.T.") on September 7, 1994. Article 4 of the F-E B.I.T. provides as follows:

> Each Contracting Party shall ensure fair and equitable treatment in accordance with the principles of international law, to investments of nationals and companies of the other Contracting Party and to ensure the enjoyment of the right thus recognized is hampered in either law or in fact.

---

[2] Case C-284/16.

© Ruchelman P.L.L.C., 2022. All rights reserved.

In particular, though not exclusively, shall be regarded as barriers of fact or law in fair and equitable treatment, any restriction to purchase and transport of raw materials and auxiliary materials, energy and fuel and means of production or operation of any kind, interference with the sale and transport of goods within the country and abroad, as well as any other measures having a similar effect.

Investments made by nationals or companies of either Contracting Party shall enjoy full protection and security by the other Contracting Party.

Neither of the Contracting Parties shall impair the management, maintenance, use, enjoyment or disposal of investments of nationals or companies of the other Contracting Party.

Article 6 of the F-E B.I.T. provides as follows:

1. The Contracting Parties shall not take any measures of expropriation or nationalization or any other measures the effect of which is, directly or indirectly dispossessing nationals and companies of the other party (hereinafter referred to as "expropriation") of their investments, except for a public purpose and provided that such measures are not discriminatory nor contrary to a specific commitment undertaken pursuant to the laws of the Contracting Party between those nationals or companies and the host State. The legality will be verifiable by judicial proceedings.

   The expropriation of measures that could be taken shall be subject to the payment of fair and adequate compensation amounting to the real value of the investment and the concerned is assessed in relation to a normal economic situation and prior to any threat of dispossession.

   Such compensation, its amount and has no later than the date of expropriation. The compensation shall be paid without delay, and effectively realisable freely transferable. It produces until the date of payment, shall include interest at the market rate of interest.

2. Nationals or companies of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or national revolt in the other Contracting Party benefit, on the part of this latter, from a treatment no less favourable than that accorded to its own investors or to those of the most favoured nation.

   In the event of a declaration of a national state of emergency, these companies or nationals receive fair and adequate compensation for the loss allegedly suffered as a result of the events referred to above.

Article 9 of the F-E B.I.T. provides for relief ultimately through arbitration, as follows:

> 1. The Contracting Parties shall not take any measures of expropriation or nationalization or any other measures the effect of which is, directly or indirectly dispossessing nationals and companies of the other party (hereinafter referred to as "expropriation") of their investments, except for a public purpose and provided that such measures are not discriminatory nor contrary to a specific commitment undertaken pursuant to the laws of the Contracting Party between those nationals or companies and the host State. The legality will be verifiable by judicial proceedings.
>
> The expropriation of measures that could be taken shall be subject to the payment of fair and adequate compensation amounting to the real value of the investment and the concerned is assessed in relation to a normal economic situation and prior to any threat of dispossession.
>
> Such compensation, its amount and has no later than the date of expropriation. The compensation shall be paid without delay, and effectively realisable freely transferable. It produces until the date of payment, shall include interest at the market rate of interest.
>
> 2. Nationals or companies of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or national revolt in the other Contracting Party benefit, on the part of this latter, from a treatment no less favourable than that accorded to its own investors or to those of the most favoured nation.
>
> In the event of a declaration of a national state of emergency, these companies or nationals receive fair and adequate compensation for the loss allegedly suffered as a result of the events referred to above.

On April 30, 2008, Perenco petitioned the I.C.S.I.D. to begin arbitration proceedings, contending that its rights under Articles 4 and 6 were violated by the Ecuadorian government.

Perenco submitted that Ecuador breached Article 4 of the of the F-E B.I.T. because it failed to accord Perenco's investment in Blocks 7 and 21 fair and equitable treatment. The participation contracts were written so that Perenco's participation was tied exclusively to the volume of the production and not according to the oil price fluctuations. By enacting the Law 42, Ecuador undermined this expectation.

When the arbitration process under the F-E B.I.T. began, Perenco ceased making payments under Law 42. In response, the Ecuadorian government seized all crude production from Blocks 7 and 21. In response, Perenco submitted that the enactment of the Law 42, the seizure of Perenco's crude production from the Blocks 7 and 21, and the cancellation of the contracts breached Article 6 of the B.I.T. which prohibited expropriation. In total, Perenco claimed damages of U.S.$1.572 billion.

© Ruchelman P.L.L.C., 2022. All rights reserved.

In 2009, the I.C.S.I.D. arbitration panel issued a decision recommending provisional measures restraining Ecuador from demanding Perenco pay any amount.

The Answers From Ecuador

Ecuador challenged the authority of the I.C.S.I.D. arbitration panel to adjudicate the dispute. Ecuador contended that Perenco was not a French company within the meaning of the F-E B.I.T. and that the I.C.S.I.D. arbitration panel lacked jurisdiction over Perenco's Blocks 7 and 21 contract claims because the dispute was not a technical and/or economic dispute.

As to the substantive issue, Ecuador responded that Article 4 of the F-E B.I.T. was not breached because Law 42 did not modify the participation contracts as the contracts did not guarantee Perenco a right to a given revenue stream. In addition, Ecuador argued that Article 6 of the B.I.T. was not breached as the measures taken were all legitimate exercises of Ecuador's police powers and that they were legitimate responses to Perenco's illegal conduct. Finally, Ecuador argued that there was no expropriation as Perenco was not deprived of the contract's benefits.

Decisions of the I.C.S.I.D. Arbitration Panel in 2011 as to Jurisdiction and in 2014 as to Liability

In 2011, the I.C.S.I.D. arbitration panel determined that it had jurisdiction over Perenco's contract claims because Perenco was indirectly owned by French citizens.

In 2014, the I.C.S.I.D. arbitration panel concluded that Ecuador was liable for breaches of the participation contracts and for acting in violation of the fair and equitable treatment standard of Article 4 of the F-E B.I.T. The I.C.S.I.D. arbitration panel went on to conclude that the cancellation of the contract constituted a breach of Article 6 of the B.I.T.

In sum, the I.C.S.I.D. arbitration panel considered that the enactment of Law 42 imposing the sharing ratio of 99% for the Ecuadorian government and 1% for Perenco with regard to amounts in excess of the reference price was in breach of fair and equitable treatment under Article 4 of the F-E B.I.T., but did not constitute an expropriation prohibited by Article 6 of the F-E B.I.T.

"In sum, the I.C.S.I.D. arbitration panel considered that the enactment of Law 42 imposing the sharing ratio of 99% for the Ecuadorian government and 1% for Perenco with regard to amounts in excess of the reference price was in breach of fair and equitable treatment under Article 4 of the F-E B.I.T., but did not constitute an expropriation prohibited by Article 6 of the F-E B.I.T."

Environmental Counterclaim by Ecuador

In 2015, Ecuador presented an environmental counterclaim on the basis of an environmental catastrophe in the two oil blocks situated in the country's Amazonian rainforest that had been worked by the consortium headed by Perenco.

In August 2015, the I.C.S.I.D. arbitration panel issued an interim decision on the environmental counterclaim and recommended that the parties seek to negotiate a resolution. If the parties could not arrive at a settlement, the I.C.S.I.D arbitration panel advised that it would proceed to appoint an independent expert. In the end, no agreement was found, and an independent expert was chosen.

Applications of Perenco to Apply the Conclusions in the Dispute Between Burlington and Ecuador

At the same time that Ecuador was pursuing a counterclaim against Perenco based on environmental damages, it pursued a claim against Burlington, the other

© Ruchelman P.L.L.C., 2022. All rights reserved.

company that joined Perenco in exploiting the oil reserves in Block 7 and Block 21. The claim against Burlington raised all the same issues that had been raised against Perenco. On February 7, 2017, the Burlington I.C.S.I.D. arbitration panel rendered its decision on the counterclaims of Ecuador, finding Burlington liable for environmental damages.

On April 18, 2017, Perenco filed a dismissal application based on concepts of *res judicata*. It argued that Ecuador brought the same dispute against Perenco and Burlington in two separate proceedings and that Ecuador's counterclaims concern the same subject matter and are premised on the same legal basis. It pointed out that Ecuador did not dispute that it sought identical overlapping compensation with regard to the same alleged damage in both proceedings. As all factual and legal issues forming the basis of Ecuador's counterclaims against Perenco have been determined, there was nothing more for the arbitration panel to decide.

In response, Ecuador asserted, among other things, that Perenco's motion was not timely made as the parties in both disputes were arbitrating counterclaims for more than five years. If Perenco wished to prevent parallel litigation of the counterclaims, it should have filed a *lis pendens* application as early as December 2011. In Ecuador's view, Perenco waited until it knew the result of the Burlington arbitration and sought to take advantage once the decision in the Burlington arbitration was reached.

The arbitration panel ruled in favor of Ecuador. According to the decision, Ecuador's counterclaims in the two proceedings progressed in parallel, although the counterclaims were presented in the Burlington matter more than ten months earlier. The parties were fully aware of this fact. While parallel proceedings are generally avoided, neither panel had the power on its own motion to order the consolidation of the parts relating to counterclaims. Moreover, Perenco never challenged the jurisdiction of the arbitration panel to hear Ecuador's counterclaims nor their admissibility.

Perenco filed a second dismissal application on January 30, 2018, contending that that Burlington's payment in full satisfied Perenco's obligations on the counterclaims. This application was dismissed.

Award of Damages on the Perenco Claim and the Ecuadorian Counterclaim

On September 27, 2019, the I.C.S.I.D. arbitration panel issued the final award in the arbitration proceedings. It ruled that Perenco was entitled to damages in the amount of U.S.$448,820,400. This was balanced by an award in favor of Ecuador in the amount of U.S.$54,439,517 for environmental damages to Block 7 and Block 21 and for remedying the damages to infrastructure.

Perenco acted quickly in taking steps to enforce the award. In October 2019, it asked the U.S. Federal Court of the District of Columbia to enter a judgment against Ecuador in the net amount set forth in the Award. According to the I.C.S.I.D. rules, the place of arbitration controls the process for enforcing the award. Here the arbitration was held in the U.S. Under Section1391(f)(4) the Foreign Sovereign Immunities Act ("F.S.I.A.").

At about the same time, Ecuador petitioned the I.C.S.I.D. for an order annulling the award. The circumstances in which annulment is granted are limited. An *ad hoc* committee of three members was appointed to address Ecuador's petition.

In May 2021, the *ad hoc* committee issued a decision concluding the annulment proceeding and largely confirming the award. The committee reduced the damages awarded from U.S.$448.82 million to around U.S.$412 million, finding that there was a lack of reasoning in the original award. Although Ecuador was ordered to pay the reduced award by July 27th, 2021, Ecuador refused to do so. Instead, it petitioned the U.S. District Court for the District Court of Columbia to rule that Perenco *owed* unpaid income tax in the amount of U.S.$40,845,760.13, as finally determined by the courts in Ecuador. In broad terms, a determination is final and binding when no further appeal is available or the time for filing an appeal has run. The District Court was asked to allow a set-off of that amount against the award of the *ad hoc* committee.

On September 20, 2021, Perenco filed its response with the U.S. District Court. Claiming that Ecuador's request for a tax set-off fails under a common law rule known as the "revenue rule." The common law revenue rule is a judicial doctrine that prevents courts in one country from being used by a foreign government as a tool to collect lost tax revenue of any kind. The leading authority in the U.S. is *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929).[3]

Ecuador's reliance on the final determination against Perenco for taxes owed proved to be faulty. On November 8, 2021, the Tax Chamber of the Ecuadorian National Court of Justice issued a decision remanded one of the seven tax judgments for which Ecuador claimed set-off to a lower court for further consideration on the merits. This did not stop the Ecuadorian government from pursuing its claim for a set-off. On February 16, 2022, Ecuador submitted a response brief arguing that the six other judgments should be decided on their own merits and that the remanding of a single judgment should not bar Ecuador from seeking setoff for the six other judgments. On February 22, 2022, Perenco responded, arguing that even if Ecuador could prove that the tax claims are enforceable, those claims still could not be set off against the award because a final determination of the amount due does not yet exist.

No decision has been reached by the U.S. District Court as of the date of publication of this article.

Takeaway

The long history of arbitration and litigation between Perenco and Ecuador brings to mind the Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (1803). That case involved an individual, William Marbury, who was nominated to a Federal office by John Adams, then President of the U.S., and whose nomination was approved by the Senate. Nonetheless, James Madison, the Secretary of State, refused to issue a commission to Mr. Marbury confirming appointment to the office. A writ of mandamus was sought from the Supreme Court, which refused to order Mr. Madison to issue the commission. The Supreme Court held that Mr. Marbury had a right to the commission but no remedy against the Secretary of State, Mr. Madison, to issue the commission.

[3] See also *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.,* 268 F.3d 103 (2d Cir. 2001); *European Community v. RJR Nabisco Inc.,* 355 F.3d 123 (2d Cir. 2004). For a full discussion of the revenue rule, see Doobay and Ruchelman, "Adventures in Cross-Border Tax Collection: Revenue Rule vs. Cum-Ex Litigation," Volume 175, Number 3 *Tax Notes Federal* 359, April 18, 2022.

© Ruchelman P.L.L.C., 2022. All rights reserved.

In *Perenco v. Ecuador*, Perenco was found to have been damaged by the acts of the Ecuadorian government which violated the F-E B.I.T. Perenco even had a remedy authorized by the F-E B.I.T. An arbitration procedure before the I.C.S.I.D. was available and access to the U.S. Federal District Court for the District of Columbia to enforce a decision of the I.C.S.I.D. Notwithstanding the right and the remedy, the matter has not been finally resolved after 14 years of litigation before the I.C.S.I.D. and the U.S. Federal District Court for the District of Columbia. Like Mr. Marbury more than 200 years ago, Perenco seems to have a right, but no effective remedy for the violation of that right by the Ecuadorian government. That may change one day when a judgment is issued and assets seized in satisfaction of the judgment, but the cost in terms of legal expense and time-value of money is appalling.

ACHMEA B.V. V. THE SLOVAK REPUBLIC: THE END OF B.I.T.S AT THE INTRA-E.U. LEVEL

Context of the Dispute

Following a reform on its health system in 2004, the Slovak Republic opened its market to foreign private insurance companies. It is in this context that Achmea, member of a group of insurance companies based in the Netherlands, formed a subsidiary in the Slovak Republic to provide sickness insurance.

In 2006 and 2007, the Slovak Republic partly reversed the liberalization of the private health insurance market by enacting a law prohibiting the distribution of profits generated by private health insurance companies operating in the Slovak Republic. Ultimately, the Constitutional Court of the Slovak Republic determined that the prohibition was contrary to the Slovak constitution. Consequently, the Slovak Republic allowed the distribution of profits by a law enacted in 2011.

In 2008, Achmea brought an arbitration proceeding against the Slovak Republic according to the arbitration clause that appears in Article 8 of the B.I.T. between the Netherlands and the Slovak Republic ("the N-S B.I.T."). The arbitration took place in Germany.

The N-S B.I.T. was concluded in 1991 and entered into force on January 1, 1992. In accordance with Article 3(1) of the N-S B.I.T."), the two countries undertook to ensure fair and equitable treatment of the investments of investors from the other country and not to impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment, or disposal of those investments. In accordance with Article 4 of the N-S B.I.T., each country guaranteed the free transfer of profits in a freely convertible currency without undue restriction or delay of payments relating to an investment, such as profits, interest, and dividends.

Achmea contended that the relevant law enacted by the Slovak Republic was contrary to the Article 4 of the N-S B.I.T. and initiated arbitration proceedings in Germany.

Article 8 of the N-S B.I.T., provides a dispute mechanism to resolve claims under the N-S B.I.T. It provides as follows:

> 1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably.

“During the arbitration, the Slovak Republic raised an objection to the jurisdiction of the arbitration panel based on European Union law. The arbitration panel dismissed the objection and damages in the principal amount of €22.1 million.”

2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement.

3. The arbitral tribunal referred to in paragraph 2 of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.

4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

   ○ the law in force of the Contracting Party concerned;

   ○ the provisions of this Agreement, and other relevant agreements between the Contracting Parties;

   ○ the provisions of special agreements relating to the investment;

   ○ the general principles of international law.

7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.

During the arbitration, the Slovak Republic raised an objection to the jurisdiction of the arbitration panel based on European Union law. The arbitration panel dismissed the objection and damages in the principal amount of €22.1 million. The Slovak Republic brought an action before the Higher Regional Court in Frankfurt, Germany to

© Ruchelman P.L.L.C., 2022. All rights reserved.

set aside the award. The Higher Regional Court dismissed the action. The Slovak Republic appealed the dismissal to the German Federal Court of Justice, contending that Article 8 of the N-S B.I.T. was incompatible with Articles 267 and 344 of the Treaty on the Functioning of the European Union ("T.F.E.U.").[4]

Article 344 provides as follows:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Article 267 provides as follows:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> a. the interpretation of the Treaties;
>
> b. the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The matter was referred to the Court of Justice of the European Union because it had not yet ruled on the question and the matter was of considerable importance to the numerous bilateral investment treaties in force between Member States of the E.U. containing similar arbitration clauses. The C.J.E.U. ruled that the dispute resolution provision of the N-S B.I.T. was incompatible with Articles 267 and 344 of the T.F.E.U.

According to the C.J.E.U., an international agreement cannot affect the allocation of powers fixed by the foundation treaties governing the operations of the E.U. and the autonomy of the E.U. legal system. That principle is enshrined in Article 344 of the T.F.E.U., which provides that Member States cannot submit a dispute concerning the interpretation or application of the foundation treaties to any method of settlement other than those provided for in those treaties. The essential characteristic of E.U. law is that it stems from an independent source of law – the foundation treaties – and reflects the primacy of E.U. law over the laws of the Member States.

---

[4] The T.F.E.U. is one of two treaties forming the constitutional basis of the European Union, the other being the Treaty on European Union.

In order to ensure that the specific characteristics and the autonomy of the E.U. legal order are preserved, the foundation treaties established a judicial system intended to ensure consistency and uniformity in the interpretation of E.U. law. The keystone of the legal system is Article 267 of the T.F.E.U., which, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States. In this way, a system is established securing uniform interpretation of E.U. law.

Applying these principles to the dispute resolution provisions of the N-S B.I.T., a resolution of the dispute between Achmea and the Slovak Republic will involve the application of E.U. law which can only be resolved by the courts of E.U. Member States and the C.J.E.U. The arbitration panel that is used to resolve a dispute under the N-S B.I.T. is not a court established by a Member State and its decision is not reviewable by the C.J.E.U. By entering into the N-S B.I.T., the Slovak Republic established a mechanism for settling disputes between an investor and a Member State which could prevent the disputes from being resolved in a manner that ensures the full effectiveness of E.U. law, even though they might concern the interpretation or application of that law.

As a final point, the C.J.E.U. differentiated use of a dispute resolution system in commercial arbitration from reliance on an arbitration panel to resolve a claim against a Member State of the E.U. The former involves a dispute between private parties. The latter involves a dispute involving a private party and a Member State of the E.U., which can be resolved only by a court of a Member State.

Consequently, Articles 267 and 344 of the T.F.E.U. must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the N-S B.I.T. under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Consequences of the *Achmea* Decision

In January 2019, 28 Member States of the E.U., including the U.K., adopted a political declaration calling for the termination of all intra-E.U. B.I.T.'s. Included in the declaration were the following three points:

- All arbitration proceedings based on intra-EU B.I.T.'s are incompatible with E.U. law, are invalid from the very beginning, and pending disputes must be terminated.
- Courts are to be notified that intra-E.U. B.I.T. awards cannot be recognized or enforced.
- State-owned companies must withdraw from arbitration proceedings under intra-E.U. B.I.T.'s.

In October 2019, the European Commission announced the agreement of Member States to the termination of approximately 190 intra-E.U. B.I.T.'s. Awards in arbitration proceedings concluded before March 6, 2018, the date of the judgment in the *Achmea* case, will remain in effect.

“While the decision by the C.J.E.U. can be understood at various levels, several commentators view the decision in the Achmea case as a huge step backward in rights of investors.”

In May 2020, 23 Member States signed an agreement to collectively terminate all intra-E.U. B.I.T.'s. Sunset clauses that promised continued coverage by a B.I.T. for a period of time after its termination no longer had effect. Finland, Sweden, Austria, and Ireland abstained from signing the agreement, as did the U.K.

Internal investments by persons resident in the E.U. continue to benefit from the protections conferred by the fundamental freedoms of the single market, the freedom of establishment, and the right to free movement of capital. They also enjoy rights guaranteed by the Charter of Fundamental Rights and the general principles of E.U. law. However, these rights can be enforced only by the courts of Member States, guaranteed by Article 19 of the Treaty of the European Union, under the control of the Court of Justice of the European Union.

In July 2018, the European Commission published a communication on the protection of intra-European investments, and in May 2020, it launched a public consultation on the protection of investments within the European Union, in order to promote investment all over the European Union.

Takeaway

While the decision by the C.J.E.U. can be understood at various levels, several commentators view the decision in the *Achmea* case as a huge step backward in rights of investors. One article summarizes the *Achmea* case and the follow-up steps by the E.U. as extremely troubling:

> We demonstrate that the CJEU's *Achmea* judgment has resulted in significantly more damage beyond the termination of intra-EU BITs. It made the application of EU law difficult, if not impossible. Indeed, it has opened the floodgate to deficient judicial protection in the face of structural backsliding of the rule of law in some EU Member States. While the motives of the CJEU and by extension the European Commission to safeguard their ultimate control over the internal market by exclusively relying on the preliminary ruling system of integrated European judiciary may be understandable, they cannot serve as a credible justification for the long-term consequences of disempowering investors in the name of an ideological stance regarding EU judiciary, which cannot work in the backsliding Member States, where the ‘integration of the EU's judiciary’ could stand for the absence of independent adjudication. Consequently, the Achmea judgment and post-*Achmea* developments such as the recently signed Termination Agreement to terminate the intra-EU BITs have been leading to significant—possibly irreparable in the short- to medium-term—lowering of the procedural and substantive protection standards for European investors in times when they are in need of more rather than less protection.[5]

---

[5] Kochenov, D.V., and Lavranos, N., *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, Hague J Rule Law (2021), available here.

Disclaimer: *This article has been prepared for informational purposes only and is not intended to constitute advertising or solicitation and should not be relied upon, used, or taken as legal advice. Reading these materials does not create an attorney-client relationship.*