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1-1-2019

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Repository Citation

Rutledge, Peter B.; Larsen, Katherine M.; and Newton, Amanda W., "European Decision Could Have Killed Investment Treaties, Affecting Arbitration and Investments" (2019). *Popular Media*. 306.
https://digitalcommons.law.uga.edu/fac_pm/306

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European Decision Could Have Killed Investment Treaties, Affecting Arbitration and Investments

A broader interpretation of the *Achmea* decision implicates the autonomy of EU laws and could discourage investment among EU member states.

By Peter "Bo" Rutledge, Katherine M. Larsen and Amanda W. Newton

A dramatic upheaval in investor-state arbitration last year recently led to the apparent demise of investment treaties throughout Europe and could have broad implications for both international arbitration and foreign investments in the European Union. In May 2018, the Court of Justice of the European Union found in *Achmea v. Slovak Republic* that the bilateral investment treaty between the Netherlands and the Slovak Republic (a so-called intra-EU BIT) contained an arbitration clause that was incompatible with European law.

Interpreted narrowly, the *Achmea* decision was viewed by some as affecting only those other pre-existing intra-EU BITs that contain the same arbitration provision. A broader interpretation of the *Achmea* decision, on the other hand, implicates the autonomy of EU laws and could discourage investment among EU member states.

With an eye toward the post-*Achmea* confusion regarding the arbitrability of intra-EU BITs, 21 EU member states filed a declaration in January 2019 that denounced all investor-state arbitration clauses and committed these member states to the termination of their intra-EU BITs. Citing *Achmea*, the member states pledged that no new intra-EU investment arbitration proceedings would be initiated and promised to request that courts set aside or choose not to enforce any award related to an intra-EU investment treaty.

Arguably, the impact of *Achmea* should not come as a shock—in the past 15 years, the European Commission has grown increasingly disenchanted with investor-state arbitration proceedings, maintaining that they are incompatible with EU law because they allow disputes regarding the application of EU law to be decided by a court outside the EU's judicial system. By this view, the *Achmea* decision is just one step of many in the EC's continued opposition to intra-EU investor treaties, undermining the individual member states' autonomy and pushing toward an EU controlled European Multilateral Investment Court System.

However, arbitral tribunals before *Achmea* had ignored the EC's opposition, finding they did have jurisdiction to decide questions of EU law. Thus, the *Achmea* decision marked a shift away from arbitral tribunals' long-standing jurisprudence and toward the position staked by the EC.

The *Achmea* decision stemmed from a 2008 dispute between the Slovak Republic and Achmea, a company based in the Netherlands. Pursuant to the BIT between the Netherlands and the Slovak Republic, Achmea commenced arbitration proceedings in Germany. A German tribunal found that Slovak Republic violated Achmea's rights under the BIT, awarding Achmea approximately 22 million euros. The Slovak Republic filed a set-aside action in the German court, alleging that the arbitration clause in the BIT violated the European Union Treaty, which was referred to the CJEU.

The CJEU held that the arbitration provision in the intra-EU BIT was incompatible with EU law because it called upon an arbitral tribunal to interpret or apply EU law governing the establishment and free movement of capital. This provision undermined the principle vesting such authority in the European courts and the courts of member states because review of the merits of the tribunal's award would be minimal at best. Consequently, in the CJEU's view, the BIT's arbitration provision created an unsustainable risk that a decision-maker outside the European judicial system would, effectively, have the last word on the meaning of European law in an intra-European dispute.

Although it is too early to determine the full reach of *Achmea*, the response in European courts has been mixed. In *Republic of Poland v. PL Holdings S.á.r.l.*, for instance, the Svea Court of Appeal held that the arbitral award should not be set aside, as it did not violate a protective public interest. Soundly rejecting *Achmea*, the court held that the arbitral award did not implicate European law, so the arbitral tribunal had no reason to apply EU law. In *Vattenfall v. Federal Republic of Germany*, the tribunal limited the application of *Achmea* to investor-state disputes in bilateral intra-EU treaties, finding that *Achmea* did not govern multilateral treaties between EU member states and third parties. The tribunal also contended that the Energy Charter Treaty was an agreement between member states, third states, and the EU itself, meaning that it was not an intra-EU agreement falling under the purview of *Achmea*.

As the scope of *Achmea* is worked out, investment agreements between EU member states and non-EU countries may be affected. Just like intra-EU BITs, the arbitration tribunals established under such agreements are typically not within the EU judicial system and may involve disputes that require a tribunal to interpret or to apply EU law.

In the United States, a broad interpretation of *Achmea* could also have vast ramifications. In 2017, the US invested an estimated \$3.2 trillion in foreign direct investments in the EU, and the United States is party to nine BITs with EU member states. Currently, there are at least three known arbitrations between U.S. investors and European member states pursuant to such BITs. The scope of *Achmea* could affect the outcome of those matters, especially if the decision is broadly interpreted. Even if *Achmea* is read narrowly, *Achmea* might well undermine investor confidence in the stability of dispute resolution mechanisms within the EU.

With more questions than answers at this point regarding the arbitrability of international BITs, the bar should watch carefully for the outcome of one upcoming

federal case pending in the District of Columbia. In *Novenergia v. Spain*, a Swedish court refused to enforce an arbitration award for Novenergia on the grounds that the arbitration provision in the Energy Charter Treaty was incompatible with *Achmea*. Novenergia then filed suit in the D.C. District Court, seeking enforcement of the award (on the ground that the Swedish court's annulment of the award does not obligate the U.S. court to refuse enforcement). The *Novenergia* case is still pending, but the upcoming decision should provide useful insight into how U.S. courts will respond to the post-*Achmea* chaos.

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