A European Law Reading of Achmea

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An interesting perspective concerning the *Achmea* judgment of the ECJ[1] relates to the way how the Court addresses investment arbitration from the perspective of European Union law. This paper takes up the judgment from this perspective. There is no doubt that *Achmea* will disappoint many in the arbitration world who might read it paragraph by paragraph while looking for a comprehensive line of arguments. Obviously, some paragraphs of the judgment are short (maybe because they were shortened during the deliberations) and it is much more the outcome than the line of arguments that counts. However, as many judgments of the ECJ, it is important to read the decision in context. In this respect, there are several issues to be highlighted here:

First, the judgment clearly does not correspond to the arguments of the German Federal Court (BGH) which referred the case to Luxembourg. Obviously, the BGH expected that the ECJ would state that intra EU-investment arbitration was compatible with Union law. The BGH's reference to the ECJ argued in favor of the compatibility of intra EU BIT with Union law.[2] In this respect, the *Achmea* judgment is unusual, as the ECJ normally takes up positively at least some parts of the questions referred to it and the arguments supporting them. In contrast, the conclusion of AG Wathelet were much closer to the questions asked in the preliminary reference.

Second, the Court did not follow the conclusions of Advocate General Wathelet.[3] As the AG had pushed his arguments very much unilaterally in a (pro-arbitration) direction, he obviously provoked a firm resistance on the side of the Court. In the *Achmea* judgment, there is no single reference to the conclusions of the AG[4] – this is unusual and telling, too.

Third, the basic line of arguments developed by the ECJ is mainly found in paras 31 – 37 of the judgment. Here, the Court sets the tone at a foundational level: the Grand Chamber refers to basic constitutional principles of the Union (primacy of Union law, effective implementation of EU law by the courts of the Member

States, mutual trust and shared values). In this respect, it is telling that each paragraph quotes Opinion 2/13[5] which is one of the most important (and politically strongest) decisions of the Court on the autonomy of the EU legal order and the role of the Court itself being the last and sole instance for the interpretation of EU law.[6] *Achmea* is primarily about the primacy of Union law in international dispute settlement and only in the second place about investment arbitration. *Mox Plant*[7] has been reinforced and a red line (regarding concurrent dispute settlement mechanisms) has been drawn.

Although I don't repeat here the line of arguments developed by the Grand Chamber, I would like to invite every reader to compare the judgment with the Conclusions of AG Wathelet. In order to understand a judgment of the ECJ, one has to compare it with the Conclusions of the AG – also in cases where the Court does (exceptionally) not follow the AG. In his Conclusions, AG Wathelet had tried to integrate investment arbitration into Union law and (at the same time) to preserve the supremacy of investment arbitration over EU law even in cases where only intra EU relationships were at stake. Or – to put it the other way around: For the ECJ, the option of investors to become quasi-international law subjects and to deviate of mandatory EU law by resorting to investment arbitration could not be a valuable option – especially as their home states (being EU Member States) are not permitted to escape from mandatory Union law by resorting to public international law and affiliated dispute resolution mechanisms. Therefore, from a perspective of EU law the judgment does not come as a surprise.

Finally, this judgment is not only about investment arbitration, its ambition goes obviously further: If one looks at para 57 the perspective obviously includes future dispute settlement regimes under public international law and their relationship to the adjudicative function of the Court. One has to be aware that Brexit and the future dispute resolution regime regarding the Withdrawal Treaty is in the mindset of the Court. In this respect the wording of paragraph 57 seems to me to be telling. It states:

"It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its

capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*[8]."

Against this background of European Union law, the *Achmea* judgment appears less surprising than the first reactions of the "arbitration world" might have implied. Furthermore, the (contradictory[9]) statement in paras 54 and 55 should be read as a sign that the far reaching consequences with regard to investment arbitration do not apply to commercial arbitration (*Eco Swiss*[10] and *Mostaza Claro*[11] are explicitely maintained).[12] Finally, it is time to start a discussion about the procedural and the substantive position of individuals in investment arbitration in the framework of Union law. As a matter of principle, EU investors should not expect to get a better legal position as their respective home State would get in the context of EU law. Investment arbitration does not change their status within the Union. In this respect, *Achmea* is simply clarifying a truism. And, as a side effect, the disturbing *Micula* story should now come to an end, too.[13]

Footnotes

[1] ECJ, 3/6/2018, case C-284/16, *Slovak Republic v. Achmea BV*, EU:C:2018:158.

[2] BGH, 3/3/2016, ECLI:DE:BGH:2016:030316BIZB2.15.0

[3] Conclusions of 9/19/2017, EU:C:2017:699. The same outcome had occured in case C-536/13, *Gazprom*, EU:C:2015:316, which was also related to investment arbitration.

[4] The Court only addresses the issue whether the hearing should be reopened because some Member States had officially expressed their discomfort with the AG's Conclusions, ECJ, 3/6/2018, case C-284/16, *Amchea*, EU:C:2018:158, paras 24-30.

[5] ECJ, 12/18/2014, Opinion 2/13 (*Accession of the EU to the ECHR*), EU:C:2014:2454.

[6] For the political connotations of Opinion 2/13, cf. *Halberstam*, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward." German L.J. 16, no. 1 (2015): 105 ff.

[7] ECJ, 5/30/2015, case C-459/03 *Commission v Ireland*, EU:C:2006:345.

[8] Highlighted by B.Hess.

[9] Both, commercial and investment arbitration are primarily based on the consent of the litigants, see *Hess*, The Private Public Divide in International Dispute Settlement, RdC 388 (2018), para 121 – in print

[10] ECJ, 6/1/1999, case C?126/97, *Eco Swiss*, EU:C:1999:269.

[11] ECJ, 10/26/2006, case C?168/05, *Mostaza Claro*, EU:C:2006:675.

[12] It is interesting to note that the concerns of the ECJ (paras 50 ss) regarding the intervention of investment arbitration by courts of EU Member States did not apply to the case at hand as German arbitration law permits a review of the award (section 1059 ZPO). The concerns expressed relate to investment arbitration which operates outside of the NYC without any review of the award by state court, especially in the context of articles 54 and 55 ICSID Convention.

[13] According to the ECJ's decision in *Achmea*, the arbitration agreement in the *Micula* case must be considered as void under EU law. However, Micula was given by an ICSID arbitral tribunal and, therefore, there is no recognition procedure open up a review by state courts of the arbitral award, see articles 54 and 55 ICSID Convention.