

ASA Board Message

The Cost of *Achmea*

The latest President's Message was a satirical editorial on the decision of the Grand Chamber of the Court of Justice of the European Union of 6 March 2018 in the now-famous Achmea matter¹ The final footnote of that President's Message announced that ASA would soon give its views in a more sober and serious style. Given the potential impact of Achmea, the ASA Board has decided to do so in the form of an "ASA Board Message" rather than just a President's Message. This ASA Board Message does not purport to examine whether, as a matter of EU law, Achmea is right or wrong (the Board of ASA would not presume to lecture the highest court of the European Union on the application of its own laws²); nor does it purport to analyze the legal consequences of Achmea for intra-EU investor-state disputes. Likewise, it does not wade into the broader debate on the current efforts to reform and improve investor-state dispute resolution mechanisms; and it certainly does not aim to lobby in favor of this or that position taken in that debate. Rather, the Board of ASA has stepped back and considered some of the highly undesirable – albeit certainly unintended – consequences that Achmea is likely to have for the very policies the EU seeks to promote.³

Business abhors unmanaged risk and its nasty relative, unpredictability. International commerce and trade, when venturing abroad, leave behind the relative comfort of their home system and expose themselves to the vagaries of different political and regulatory systems, which are, or are perceived to be, often unknown variables. International investment law has long sought to remove the anxiety of venturing into the unknown by providing a system of minimum standards and basic protections on which international commerce and trade can rely, no matter where their business takes them.

Although the issue is not undisputed, the majority of studies support the conclusion that putting in place investment protections in the form of

¹ *Let's Get Rid of Arbitration!*, 36 ASA Bulletin 2/2018 (June).

² The Board of ASA is composed of highly experienced practitioners of international arbitration; one-third of its members are non-Swiss. The composition of the ASA Board can be seen on ASA's website: www.arbitration-ch.org.

³ It goes without saying that these very high-altitude views do not seek to convey the personal opinions or convictions of any ASA Board member on the myriad issues raised by *Achmea*. All members of the ASA Board remain free to express opinions that are different from the view put forward here.

bilateral investment treaties facilitates the flow of foreign direct investment into a country.⁴ As such, BITs do their part in ensuring a stable and predictable legal and regulatory environment: they give investors confidence that their investments are treated in accordance to basic rules of fairness, and they facilitate the rule of international law by holding states directly accountable for breaches of these fundamental safeguards.

On 6 March 2018, the Grand Chamber of the Court of Justice of the European Union (“CJEU”) issued its decision in Case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*. In this much discussed judgment, the CJEU held that Articles 267 (concerning the preliminary reference procedure) and 344 (concerning prohibition on EU Member States on submitting disputes concerning the interpretation or application of the EU treaties to any method of dispute settlement other than those set out in the treaties) of the Treaty on the Functioning of the European Union (“TFEU”) were incompatible with the investor-state arbitration provisions in a bilateral investment treaty. The CJEU rendered its judgment in response to a preliminary reference by Germany’s Federal Supreme Court, which itself was raised in the course of the claimant’s (Achmea’s) attempted enforcement in Germany of an arbitral award rendered under the bilateral investment treaty between the Netherlands and Slovakia.

The *Achmea* decision provides regrettably little detail on the CJEU’s rationale, especially when compared to the 273-paragraph, densely reasoned opinion of Advocate-General Melchior Wathelet, from which it departed. Be that as it may and as emphasized in the introductory text above, the aim of this ASA Board Message is not to opine whether the CJEU decided rightly or wrongly as a matter of European law. What is of concern is the series of far-reaching and unintended consequences that *Achmea* could bring about, in particular the fear that this decision, whether right or wrong as a matter of European law, may come at great cost not only to European investors, but to the European ideal itself.

Achmea proceeds on the premise of equal protection under the law across the member states of the European Union. This has long been a central tenet of the EU Commission’s position. For example, when the European Commission initiated infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden, requesting them to terminate bilateral investment treaties between them, it argued that “[s]ince enlargement [of the EU], such ‘extra’ reassurances should not be necessary, as all Member States are subject to the same EU rules in the single market,

⁴ <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>.

including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality).⁵

This premise – that the regulatory and judicial system of EU law already provides a sufficient and uniform level of protection throughout the EU – is, as the Commission well knows, a legal fiction, and a costly one for those investors whose legitimate expectations are disappointed by governments beholden to protectionist interests. Like it or not, such governmental measures are still taken, to varying degrees, even by EU member states. In the era of “{INSERT COUNTRY} First!”, it is a sad political reality that governments anywhere, are tempted into scoring easy points with their voters by pursuing nationalist measures over and against the rule of international law. EU members state governments are not immune to these temptations.

What happens if such measures are taken? The problem with *Achmea* is that, regardless of whether certain concerns that one may have as to investor-state arbitration in its current form are (or are not) legitimate and whether if the many proposals for reform are (or are not) worthy of serious consideration, the fact remains that at present there is no alternative to the dispute-resolution procedures set out in BITs. Denying investors the protection of an independent tribunal under a BIT is sending them to the local courts of the same country that infringed upon the investor’s rights: the accused host state is expected to fairly assess its own wrongdoing through its own courts. But there lies the problem: the notion that all member states have equally independent judiciaries in place eager to come to the aid of foreign investors against their own governments is belied by statistics and current political reality.⁶ Even within the EU, this is not an abstraction: on 2 July 2018, the Commission notified an EU member state (which is the recipient not only of considerable direct aid from EU bodies but also of very significant investment from EU-based investors) that it had launched proceedings under Article 7(1) of the Treaty on the European Union because the state in question was seen as undermining the independence of its judiciary.

⁵ See <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>.

⁶ There are still significant differences in perception and reality between EU Member States as far as the integrity of state authorities are concerned; see for example the 2017 Corruption Perceptions Index https://www.transparency.org/news/feature/corruption_perceptions_index_2017 and the 2018 EU Justice Scoreboard, Section 3.3.1 “Perceived judicial independence”, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

And what if a host state does not live up the supposed demands of EU law? The individual investor has no effective recourse outside the BIT. The investor, deprived of the direct remedy of a damages claim under international investment law, can file a complaint with the Commission, which, in the face of ever decreasing resources, may or may not decide to initiate infringement proceedings against that member state. This, of course, does not make the individual investor whole because at the successful end of an infringement case is a fine against the state flowing into the EU treasury, but not a payment of damages compensating the investor if that investor has a valid claim (and infringement proceedings against the host state face obvious political obstacles, in particular in the current political atmosphere). The investor can then, again, only seek compensation in the courts of the same member state who was responsible for the breach in the first place.

Achmea appears to outlaw investor state arbitration based on intra-EU BITs to the extent those arbitrations are seated, or resulting awards are enforced, in EU territory; and the Commission has already made it known that in its view, the rationale underpinning *Achmea* ought to apply to intra-EU claims arising under the Energy Charter Treaty or the ICSID Convention as well.⁷ While investors will now face significant obstacles in enforcing such awards within the EU, one is very likely wrong to believe that investors will just rely on the promise that EU law provides a uniform and adequate protection throughout the Union. Instead, sophisticated investors with access to an international platform will find alternative means to protect their investments. This will likely include making their investments into what they perceive as ‘riskier’ EU jurisdictions through entities situated in non-member states. The potential flight of capital may have the effect of hurting precisely what the Commission intended to protect: the EU internal market. Whether making investments through non-EU entities would be seen as circumventing *Achmea* is yet another source of legal uncertainty; whatever the answer to that question, the mere fact that it arises, will inevitably result in more costly litigation of the kind that all stakeholders, states included, normally seek to avoid and prevent. Worse, investors may judge that intra-EU investment in the very EU states that most need it is simply too risky and decide to invest elsewhere. Thus, *Achmea* may at the end of the day turn out to be a threat to the economic development of the EU itself.

THE BOARD OF ASA

⁷ http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm.

SAVE THE DATE

ASA General Meeting & Conference 2018

14 September 2018

Bern

Blockchain, Smart Contracts, and Arbitration

ASA Annual Conference 2019

1 February 2019, Geneva

For more information see www.arbitration-ch.org