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INTRA-EU INVESTMENT TREATIES: IS IT TIME TO RESTRUCTURE YOUR INVESTMENT?

To Our Clients and Friends:

Yesterday, the Court of Justice of the European Union (**CJEU**) issued its much awaited ruling on the compatibility of intra-EU bilateral investment treaties (**BITs**) with EU law, in *Achmea B.V. (formerly known as Eureko B.V.) v. Slovakia*.^[1]

The CJEU determined that arbitration provisions found in BITs concluded between EU Member States are incompatible with EU law. Adopting the policy views expressed by the European Commission in recent years, the CJEU's decision goes against the Advisory Opinion of the Attorney General Wathelet issued in September 2017^[2], who had advised that there is no incompatibility with EU law. The decision also goes against a long line of decisions from international arbitration tribunals rejecting the suggestion that EU law precludes the jurisdiction of such arbitral tribunals.

The decision itself is surprisingly light in terms of its reasoning and leaves many questions unanswered. For example, it is not clear how the CJEU ruling will impact pending disputes against EU Member States under intra-EU BITs. It also appears to suggest that arbitration under the Energy Charter Treaty may be unaffected.

However, the ruling no doubt will have consequences for the protection of foreign investments within the EU going forward. Investors will not be able to commence arbitration proceedings under BITs between EU Member States. Thus, in order to maximize protection from potential adverse government actions, investors from EU Member States with investments in other EU Member States should seriously consider restructuring their investments in order to ensure that they can take advantage of investment treaty protections.

Background to the Dispute

The question of compatibility of intra-EU BITs with EU law was brought before the CJEU following a request for preliminary ruling by the German Federal Court of Justice (Bundesgerichtshof) (**BGH**) in 2016.^[3] The BGH referred the issue to the CJEU in the context of a challenge to an arbitral award rendered under the Netherlands and Slovakia BIT of 1991 in *Achmea B.V. (formerly known as Eureko B.V.) v. Slovakia* in December 2012. The Slovak Republic was seeking to set aside the UNCITRAL award before the Frankfurt courts (Frankfurt was the seat of arbitration). The arbitral tribunal had awarded the claimant, Achmea, EUR 22.1 million plus interest and costs.

The Slovakia argued *inter alia* that the BIT was incompatible with EU law based on certain provisions of the Treaty of the Functioning of the European Union (**TFEU**) and that the EU courts had exclusive

jurisdiction over Achmea's claims. The first instance court in Frankfurt initially dismissed Slovakia's application to have the award set aside. Slovakia subsequently appealed to the BGH, following which BGH referred the questions on incompatibility to the CJEU, while enunciating its view that the BIT was in fact compatible with EU law.

Although not binding on the CJEU, the EU Advocate General (AG) also weighed in the discussion with an Advisory Opinion in September 2017 in which he opined that intra-EU BITs are indeed compatible with EU law. The AG expressly disagreed with the European Commission's position (which had intervened and filed written submissions in a number of intra-EU BIT arbitrations^[4]) that intra-EU BITs are incompatible with EU law.^[5]

CJEU's Decision

The BGH's opinion and the AG's Advisory Opinion, however, did not sway the CJEU. In fact, the CJEU ruled that the arbitration clause featured in the Netherlands and Slovakia BIT of 1991 has an adverse effect on the autonomy of EU law and was therefore incompatible. The Court opined that the BIT established a mechanism for settling disputes between an investor and a Member State by an arbitral tribunal which falls outside the judicial system of the EU and thus did not ensure the full effectiveness of EU law should the dispute in question require the interpretation or application of EU law.

Implications of the CJEU Decision

Currently, there are more than 190 BITs between EU Member States still in force and the CJEU's ruling today will therefore have ramifications for the future of investment protection within the EU. Although it remains to be seen how future investment treaty tribunals will interpret the CJEU's ruling, they may consider that they lack jurisdiction when asked to hear disputes brought by European investors against EU Member States under intra-EU BITs in light of this ruling. At the very least, any EU national court that is asked to assist in arbitration proceedings seated in EU Member States or hear recognition/enforcement applications for investment treaty awards under intra-EU BITs would need to consider the CJEU's ruling. What this decision means for arbitrations taking place outside the EU or under the self-contained regime of the ICSID Convention rules, however, is unclear.

From the face of the decision, it appears that the CJEU left open the question as to whether its findings would apply to the provisions of multilateral treaties, such as the Energy Charter Treaty (ECT), to which the EU itself is a Party. In particular, the CJEU appeared to distinguish between agreements only signed between two EU Member States and those signed by the EU itself (such as the ECT). To date, all ECT tribunals that have considered jurisdictional objections based on EU law have rejected such arguments.^[6]

What Should Investors Consider Doing in Light of the Decision?

In light of today's ruling, it would be wise for EU based investors with investments in other EU Member States to consider restructuring their investments to ensure that their corporate structure includes at least one entity outside the EU in a country that has a BIT with the relevant EU Member State. As has been consistently confirmed by investment treaty tribunals, re-structuring of investments *before* a dispute

arises with a view to maximizing investment treaty protections is a legitimate business goal. By undertaking such a restructuring, investors will ensure that they have additional remedies should they face adverse government actions against their investments.

[1] The ruling can be accessed at curia.europa.eu.

[2] Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea BV*, 19 September 2017, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CC0284&from=EN>.

[3] See the press release No. 81/2016 dated 10 May 2016, in which the BGH announced that it requested a preliminary ruling from the CJEU, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=2&anz=83>.

[4] For example, in *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004; *AES v. Hungary*, ICSID Case No. ARB/07/22; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19; *Charanne v. Spain*, SCC Case No. V062/2012; *Isolux v. Spain*, SCC Case V2013/153; *Blusun v. Italy*, ICSID Case No. ARB/14/3; *Novenergia v Spain*, SCC Case No. 2015/063; in enforcement proceedings in *Micula v Romania* No. 15-3109-cv (2d Cir.).

[5] In the recent years, the Commission has been increasing pressure on arbitral tribunals hearing disputes under intra-EU BITs to decline jurisdiction and also on EU Member States. In 2015, for example, it initiated infringement proceedings against five EU Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) and requested them to terminate their intra-EU BITs, see press release dated 18 June 2015 available at: http://europa.eu/rapid/press-release_IP-15-5198_en.htm. In late November 2017, the European Commission's Competition Office has indicated that any compensation to be paid by EU Member States to foreign investors following successful investment treaty claims would constitute state aid requiring approval from the Commission: see report dated 10 November 2017 available at: http://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf.

[6] See for example *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC No. 062/2012; *RREEF v. Spain*, ICSID Case No. ARB/13/30; *Eiser Infrastructure v. Spain*, ICSID Case No. ARB/13/36; *Blusun v. Italy*, ICSID Case No. ARB/14/3; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19.

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Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration practice group, or the following:

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