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The Aftermath of the Achmea Case

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Abstract

The paper deals with the implications arising from the Achmea judgment which are far reaching not only for the arbitration community. With regard to investment arbitration, the decision controversially excluded the possibility of arbitration agreements in BITs concluded between EU Member States. The lack of proper reasoning concerning individual arguments used by the CJEU is discussed. The judgment is also being taken as example of increasing practice where decisions are being made based on political needs rather than as a result of legal assessment.

Keywords

Achmea; Case C-284/16; Investment Arbitration; Commercial Arbitration; (intra-EU) BIT; ICSID; EU Law Autonomy.

1 The *Achmea case*

On 6 March 2018, the Court of Justice of the EU ("CJEU") rendered a decision in case C-284/16 ("*Achmea case*"). The judgment immediately drew attention of the arbitration community and is often described as the end of the current investment protection and Investor – State dispute settlement ("ISDS") mechanism that is contained in the bilateral investment treaties ("BITs"). Considering its significance and implications for the legal relationships between states and investors, it is surprising that the CJEU restricted its findings to the mere statement, according to which Art. 267 and 344 TFEU[1] must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning

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1 Treaty on the Functioning of the European Union.

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.

Investment arbitration has long been an integral and crucial part of investment protection system. An alternative to the jurisdiction of national courts is in form of independent and qualified arbitrators can be seen as a prerequisite for any investment because national courts are often perceived as being connected and dependent on the state, if not biased. As a result, the investors consider it unlikely for the national courts to rule that the host state breached its obligations under BIT. It is not the aim of this paper to discuss whether the investors' position is sustainable or whether an alternate dispute resolution mechanism can be found. In any case, the mistrust is mutual and the states see arbitral tribunals in investment cases as regularly favouring the investors. The point is to show the major implication the Achmea decision has on the longstanding practice.

The CJEU held that arbitral tribunal such as the one established under the BIT in question and concluded between the Netherlands and the Slovak Republic is not part of the judicial system of a Member State within the meaning of Art. 267 TFEU. As such, is not entitled to make a reference to the CJEU for a preliminary ruling which was deemed necessary because the arbitral tribunal might be called upon to apply and interpret the EU law that must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.[2]

The CJEU then went on to examine whether the arbitral award is, in accordance with Art. 19 TEU[3], subject to review by a court of a Member State, ensuring that the questions of the European Union ("EU") law that might be subject to assessment by the arbitral tribunal can be submitted to the CJEU by means of a reference for a preliminary ruling. What has been a specific point of criticism by the CJEU is the arbitral tribunal's autonomy to determine both the procedural rules and the place of arbitration

2 Para. 41, *Achmea case.*
3 Treaty on European Union.

which then determines the applicable *lex arbitri*.[4] Further, it was reiterated that the choice of the applicable *lex arbitri* governs the scope of the possible review of an arbitral award by national courts. The control functions of the state in this particular case exercised by the German courts in accordance with section 1059 (2) ZPO[5] were described as being inadequate.[6]

It follows that the aforementioned features of the investment arbitration do not provide sufficient guarantee that the agreed dispute resolution mechanism would not prevent disputes arising in connection with the BIT from being resolved in a manner that ensures the full effectiveness of EU law.[7] The CJEU concluded that apart from the fact that the arbitral tribunal may have to deal with issues not only linked to the interpretation of the BIT but also to the interpretation and application of the EU law (with no sufficient mechanism concerning the access to the CJEU pursuant to Art. 267 TFEU), the exclusion of the jurisdiction of the civil courts of the Member State has not been agreed by private individuals but rather by the Member State itself. The arbitration agreement contained in the BIT between the Netherlands and the Slovak Republic thus calls into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties and has an adverse effect on the autonomy of EU law.[8]

Considering the aforementioned, Art. 267 and 344 TFEU effectively prevent Member States from entering into investment agreements that would enable investors from another Member State to bring disputes arising from the investment agreement before an arbitral tribunal the jurisdiction of which is the Member State bound to accept.

On one side, the decision in the *Achmea case* cannot be seen as being entirely surprising. The reserved (to say the least) position of the Commission towards intra EU investment treaties dates back to 2006 when a recommendation was made to the Members States to terminate such investment treaties with the explanation that they have been superseded by the EU law an there

4 Para. 51, *Achmea case.*
5 Code of Civil Procedure (Germany).
6 Para. 53, *Achmea case.*
7 Ibid., para. 56.
8 Ibid., para. 58, 59.

is no necessity for them in the single market.[9] The intra EU investment treaties have often been questioned with reference to the EU state aid rules.

2 The EU stance on investment protection

Since the European Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) concerning an ICSID[10] award of 11 December 2013 rendered in case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, it has been clear the EU would like to take control over the Member States' contractual autonomy when it comes to BITs. The Euroean Commission concluded that the payment of the compensation awarded by the ICSID tribunal constitutes state aid within the scope of the relevant EU legislation and is incompatible with the internal market. As a result, Romania was ordered not to fulfil its obligations ordered by the award and even to recover any sum which has already been paid out.

It needs to be stressed, that the *Micula saga* is far from over. On 18 June 2019, the General Court rendered a decision in joint cases T624/15, T694/15 and T704/15, by which it annulled the European Commission´s decision. However no conclusion can be drawn to the effect that that the General Court disagrees and overrules the principles laid down by the *Achmea case* judgment. Quite the opposite, the General Court clearly distinguished the situation it dealt with from the *Achmea case*.[11] It can therefore be assumed that the General Court fully accepted the findings of the judgment in the *Achmea case*.

The annulment is based on the fact that the compensation awarded by the arbitral tribunal relates mostly to a time period preceding Romania's accession to the EU. Because all events of the dispute taken into account by the arbitral tribunal took place before that accession, the General Court held that the arbitral award cannot have the effect of making the European Commission competent and EU law applicable to those earlier events

9 Stoyanov, M. Increased enforcement risk in intra-EU investment treaty arbitration [online]. *Allen & Overy Legal & Regulatory Risk Note* [cit. 18. 12. 2019]. https://www.allenovery.com/en-gb/global/news-and-insights/legal-and-regulatory-risks-for-the-finance-sector/europe/increased-enforcement-risk -in-intra-EU-investment-treaty-arbitration

10 International Centre for Settlement of Investment Disputes.

11 Para. 87, *Achmea case*, decision in joint cases T 624/15, T 694/15 and T 704/15.

in so far as they produced their effects before that accession.[12] It was correctly concluded that the date of the rendering of the award is irrelevant as it only calculates and retrospectively states / confirms a right to compensation that which arose at the time of the infringements of the investor's rights committed by Romania.

Given that the EU law cannot be applied retroactively to events that took place prior to when it became effective in Romania, it was stated that the amounts granted cannot constitute state aid within the meaning of EU law. Romania cannot be prevented from fulfilling its obligations under the arbitral award. Nevertheless, it is probably too early to consider this to be a binding principle. The European Commission appealed the General Court's judgment and the case is currently pending before the CJEU.[13]

Other examples of the European Commission's stance on this issue include the Decision of the European Commission C(2016) 7827 on State Aid SA.40171 (2015/NN) dated 28 November 2016 the subject of which was the promotion of electricity production from renewable energy sources in the Czech Republic. The European Commission specifically stated that any agreement on investment arbitration violates the EU law and is contrary to the core principles on which the EU law relies, especially the freedom of establishment, the freedom to provide services and the free movement of capital. The European Commission argued with reference to Art. 49, 52, 56, and 63 TFEU, as well as Art. 64 (2), 65 (1), 66, 75 and 215 TFEU that from the substantive point of view, the EU law fully covers the field of investment protection. The members States lack therefore the competence to act unilaterally and enter into agreements that may affect the common rules listed above or alter their scope. It has been noted that potential differences between the EU regulation and BITs (or other similar international treaties entered into by the Member States) could jeopardise the attainment of the EU's objectives.[14]

12 Ibid., para. 88.

13 Appeal Case before the General Court T-624/15 of 27 September 2019, Case C-638/19 P.

14 As to the risks connected with the existence of 2 different set of rules, see also Judgment of the Court of Justice (Grand Chamber) of 3 March 2009, Case C249/06, Judgment of the Court of Justice (Grand Chamber) of 3 March 2009, Case C205/06 or Judgment of the Court of Justice (Second Chamber) of 19 November 2009, Case C118/07.

With regard to the procedural aspects or rather the dispute resolution mechanism, similar objections to those raised in the *Achmea case* were raised. It was emphasized that any disputes need to be resolved in accordance with the existing case-law of the CJEU on the basis of the principle of primacy in favour of the EU law.

From this perspective, it is somehow difficult to comprehend the uproar created by the *Achmea case*. It generally confirms the longstanding position of the European Commission and can hardly be seen as surprising. One can argue that it has not so much been a question of "if" but only of "when". What probably made the case subject to longstanding academic arguments far exceeding the arbitration community is the vagueness and ambiguity of its wording. Considering the importance of the decision together with the fact that this is first decision that directly dealt with this question, it is unusually brief and leaves many questions unanswered. Given that the CJEU completely disregarded the arguments presented by the *Bundesgerichtshof* (Federal Court of Justice, Germany) in its request for preliminary ruling and also fully contradicted the well-reasoned opinion of the advocate general *Wathelet* from 19 September 2017,[15] some doubt arise as to whether the decision is purely a legal one or whether other motives could also have played a role. Some commentators call the decision political and attribute it to the effort to comply with the negative public opinion concerning investment arbitration.[16]

One can strongly disagree with the sentiment expressed by the author of the article just quoted who opined that in order to fully understand the decision in the *Achmea case*, broader political circumstances need to be taken into account.[17] What is objectionable is not the statement itself which is up to a large extent correct. It is however evident when put into the context that the author supports the approach taken by the CJEU. Decision-making based on political needs instead of legal arguments is one of the biggest challenges the EU is faced with at the moment. Paradoxically, the detachment of people in many Member States from the EU, where they no longer

15 Opinion of Advocate General Wathelet of 19 September 2017, Case C-284/16.

16 Šturma, P. Budoucnost investiční arbitráže po rozsudku Achmea. *Právnické listy*. 2018, No. 2, pp. 26–27.

17 Ibid., p. 26.

consider it as something they are actively being part of and can identify themselves with but rather see the EU and its institutions as a separate entity which attempts to limit the sovereignty of individual Member States can – at least partially – be ascribed to the feeling that certain rulings of the CJEU are driven more by the political implications rather than proper assessment of the law at hand. The contempt for the EU and its institutions including the CJEU is only a result hereof.

Because of the limited reasoning provide by the CJEU in the *Achmea case* judgment, many questions concerning its impact on the existing BITs and the ISDS mechanism remained unanswered. The legal uncertainty it created by not elaborating on certain crucial points is the most likely reason why the decision drew so much attention and why there is until now no definite agreement on its interpretation.

3 Investment and commercial arbitration

Given the ambiguous wording of the award in the *Achmea case*, some doubts have arisen whether its conclusions remain limited to the investment arbitration or whether it might in the end affect commercial arbitration as well. For this moment, such fears seem to be unfounded.

The CJEU specifically stated that proceedings such as those referred to in the BIT between the Netherlands and the Slovak Republic are different from commercial arbitration proceedings.[18] No proper explanation is given as to nature of the difference apart from the fact that commercial arbitration originate in the freely expressed wishes of the parties whereas investment arbitration is based on the Member State's decision to remove the jurisdiction of the national courts and judicial remedies which the second subparagraph of Art. 19 (1) TEU requires to be established in the fields covered by EU law.

This argument can hardly stand. In order for the parties in commercial arbitration to be able to express their will to subject their dispute to the arbitrators, the state first has to provide for the possibility to arbitrate in form of national *lex arbitri*. Furthermore, the participation of a Member State

18 Para. 55, *Achmea case*.

in arbitral proceedings is not restricted to investment arbitration. There is nothing to prevent a Member State to agree to an arbitration agreement in commercial disputes. The *lex arbitri* usually leaves it up to the parties to the arbitration agreement to determine the scope thereof. In other words, the arbitration agreement does not need to refer to a specific dispute. It is possible to agree that all disputes that may arise in the future from a defined (and possibly broad) list of legal relationships shall be resolved in arbitration. It should be noted that the mere fact that a dispute is classified as commercial does not mean that the adjudicator (be it national court or arbitral tribunal) won't have to asses issues related to the EU law.

The argument that investment arbitration needs to be assessed differently because of the participation of a Member State does not seem to be too compelling, as long as it remains based only on the acknowledgment of a Member State as an entity different from other parties participating in arbitration.

The differentiation seem to be artificially created in order to overcome existing case law that confirmed the existing control functions of the state contained in national *lex arbitri* to be sufficient in commercial arbitration despite the fact that arbitrators, unlike national courts and tribunals, are not in a position to request the CJEU to give a preliminary ruling on questions of interpretation of the EU law.[19] It was considered satisfactory that in order to forestall differences of interpretation of the EU law, its core principles should be open to examination by national courts when asked to determine the validity of an arbitration award (as a matter of public policy) and that it should be possible for those questions to be referred, if necessary, to the CJEU for a preliminary ruling.[20] Other than that, it follows from the character of arbitral proceedings and the interest in their efficiency that review of arbitration awards should be limited in scope and that setting aside of or refusal to recognise and execute an award should be possible only in exceptional circumstances.[21]

19 Judgment of the Court of Justice of 1 June 1999, Case C-126/97, para. 40.
20 Ibid.
21 Ibid., para. 35 or Judgment of the Court of Justice (First Chamber) of 26 October 2006, Case C-168/05, para. 34.

No reason is given why these principles do not guarantee uniform application of the EU law in investment arbitration. It is correct and consistent with the existing case law that arbitral tribunals (regardless whether in investment or commercial arbitration) are not considered to be a court or tribunal of a Member State within the meaning of Art. 267 TFEU which is authorised to ask the CJEU for a preliminary ruling.

Interestingly, the advocate general *Wathelet* tried to argue in favour of enabeling the (investment) arbitral tribunals to refer questions to the CJEU.[22] The *Ascendi* decision[23] left some space for the reconsideration of the existing doctrine. The CJEU assessed the character of Spanish *Tribunal Arbitral Tributário* and came to the conclusion that it fulfils all criteria needed to the qualification of an institution as court or tribunal as defined in Art. 267 TFEU, including requirements of compulsory jurisdiction (which is lacking in commercial arbitration since the contracting parties are under no obligation, in law or in fact, to submit to the jurisdiction of arbitrators)[24] and permanence.[25]

Regardless the above, the fact remains that no reasons were given why the lack of capacity to request preliminary ruling is acceptable in commercial arbitration but makes an arbitration agreement contained in a BIT contrary to the EU law.

4 Infringement of Art. 344 TFEU

Specific character and legal status of a state would only have to be considered in connection with the alleged incompatibility of arbitration agreements contained in intra-Member States BITs with Art. 344 TFEU. It prevents Member States from submitting disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties themselves.

When commenting on the *Achmea case* judgment, an argument was often raised that the application of this provision only covers disputes between

22 Opinion of Advocate General Wathelet of 19 September 2017, Case C-284/16, para. 84.
23 Judgment of the Court of Justice (Second Chamber), 12 June 2014, Case C377/13.
24 Para. 27, *Achmea case*.
25 Ibid., para. 26.

Member States and should not be extended to disputes between a Member State and private subject (the investor). Yet again, the CJEU decided not to elaborate on its conclusion so we were not provided with any explanation justifying the wide scope of the application of the Art. 344 TFEU.

It has been settled that Art. 344 TFEU encompasses participation of Member States in international dispute settlement mechanism.[26] There is no doubt that the provision is applicable to intra-Member States disputes and disputes between the EU and Member States.[27] Similarly, the creation of the Unified Patent Court has not been seen as breaching Art. 344 TFEU. It was stated that Art. 344 TFEU merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties and on the contrary the jurisdiction which is intended to be granted to the Unified Patent Court relates only to disputes between individuals in the field of patents[28].

The prevailing opinion seems to be that the existence of an international treaty between member States containing specific dispute resolution mechanism different from the one foreseen by the Treaties is generally not in conflict with Art. 344 TFEU if it is to be used by individuals in order to pursue their claims arising from such international agreement. The exact same analogy would be applicable in case of the intra-Member States BITs. Mere failure to exclude actions brought against a Member State by an individual does not justify the broad interpretation of Art. 344 TFEU. Besides, it needs to be reminded that while the *Achmea case* concerns investment arbitration with all its specifics, the conclusions are formulated in a general way. Therefore they would inevitably have to be applied to other actions brought by individuals. This would create

26 Judgment of the Court of Justice (Grand Chamber) of 30 May 2006, Case C-459/03.

27 See Opinion 2/13 of the Court of Justice of the European Union (Full Court) of 18 December 2014 pursuant to Article 218 (11) TFEU concerning the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 202 [online]. *EUR-Lex*. Published on 18 December 2014 [cit. 27. 12. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002

28 Opinion 1/09 of the Court of Justice of the European Union (Full Court) of 8 March 2011 pursuant to Article 218 (11) TFEU the creation of a unified patent litigation system – European and Community Patents Court, para. 63 [online]. *EUR-Lex*. Published on 8 March 2011 [cit. 27. 12. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CV0001

legal uncertainty in situations where specific dispute resolution mechanism has already been declared as not infringing Art. 344 TFEU.

5 The consequences of *Achmea case*

As can be seen, the judgment in the *Achmea case* left more questions than answers. The first is whether it needs to be read as being applicable to the specific arbitration agreement contained in the BIT concluded between the Netherlands and the Slovak Republic meaning that every single arbitration agreement contained in an intra-EU BIT will have to be assessed individually or whether it automatically precludes the commencement of arbitral proceedings based on any and all BITs. The CJEU repeatedly refers to provisions in intra-EU BITs *such as Art. 8 of the BIT* concluded between the Netherlands and the Slovak Republic. It is a strong enough indication that the result should be the same with regard to any intra-EU BIT.

It became one of the major issues straight after the publication of the judgment. Many commentators tried to distinguish between several institutions before which arbitral proceedings could be held. The reason was to try to find platform for investment arbitration that would comply with the requirements specified in the *Achmea case* judgment. The primary argument is that the judgment has no immediate effect. From the international law perspective, the BITs are governed by the 1969 Vienna Convention on the Law of Treaties which does not provide for the direct termination or suspension of the intra-EU BITs due to the rendering of the *Achmea case* judgment. There was an agreement that the consent of the EU Member States (as the BITs signatories) with the dispute resolution mechanism is still valid.

It was pointed out, that should enforcement of any award be sought outside the EU, the risks that the award will be refused because of the infringement of the EU law, is limited. This was especially for arbitral proceedings held before ICSID. Unlike awards that are subject to remedies provided for by the national *lex arbitri*, the ICSID Convention[29] stipulates in Art. 53 (1) that awards rendered in ICSID arbitration shall be binding on the parties

29 Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.

and shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention. It means that the award is not subject to review by the national courts and can only be assessed in the execution stage.

Various scenarios of investment via third (non-EU) countries were also being considered. In its majority, arbitral tribunals considered themselves not to be bound by the *Achmea case* judgment. Among the first cases that had to take the *Achmea case* decision into account are (i) *Masdar v. Spain*,[30] (ii) *Vatenfall v. Germany*[31] or (iii) U*P and C. D Holding v. Hungary*.[32] In all those cases, the arbitral tribunals refused that the conclusions reached by the CJEU in the *Achmea case* would be applicable in arbitration before ICSID and/or in arbitral proceedings based on the Energy Charter Treaty ("ECT").[33]

Since the backlash and refusal by the arbitral community to accept the *Achmea case* decision and apply it could be foreseen, the EU reacted quickly. In its Communication of 19 July 2018[34], the European Commission not only cited the *Achmea case* judgment, but took the position that it should be extended to multilateral agreements such as the ECT.[35] This position is nothing new. The opinion that the ECT's objective and the context is that it does not apply in an intra-EU situation in any event and Member States cannot be subject to arbitration under the ECT was already expressed by the European Commission in its decision C(2016) 7827 on State Aid SA.40171 (2015/NN) dated 28 November 2016 mentioned above.

30 ICSID Award, *Masdar Solar & Wind Cooperatief U. A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1.

31 ICSID Award, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

32 ICSID Award, *UP (formerly Le Chèque Déjeuner) and C. D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35.

33 Hrčka, D. Soumrak (nejen) investiční arbitráže? – Rozhodnutí SD EU C-284/16 a jeho důsledky. *Bulletin advokacie*. 2019, No. 7–8, p. 45.

34 Communication from the Commission to the European Parliament and the Council Protection of intra-EU investment, COM/2018/547 final [online]. *EUR-Lex*. Published on 19 July 2018 [cit. 27. 12. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0547

35 Dragiev, D. 2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration [online]. *Kluwer Arbitration Blog*. Published on 16 January 2019 [cit. 18. 12. 2019]. http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/

The fact that this is more a political than legal issue was confirmed by the consequent actions of the member States. On 15 January 2019, the 22 Member States (including Czech Republic) issued a declaration[36] confirming the nonconformity of the arbitration agreements in the intra-EU BITs with the EU law. They also undertook to terminate the intra-EU BITs and inform the arbitral tribunals hearing cases arising from such intra-EU BITs accordingly. Another 5 Member States (Finland, Sweden, Malta, Luxembourg and Slovenia) issued their own declaration on the following day.[37] They agreed with the conclusions contained in the *Achmea case* judgment but refused to apply them strictly to the ECT. Finally, a separate declaration has been issued by the government of Hungary[38] who went even further and specifically stated that *Achmea case* should only be applied to intra-EU BITs but not to the ECT.

6 Conclusion

The *Achmea case* decision is one of many examples of the strict approach by the EU when it comes to the interpretation and confirmation of the supremacy of the EU law. The CJEU presented its conclusion without giving regard to any arguments presented in the proceedings and stating the non-conformity of the intra-EU BITs with the EU law without proper reasoning. This lead to legal uncertainty with regard to both ongoing arbitral proceedings (since it was not clear whether this is a decision applicable in the particular case or whether it should be recognised as having universal effects) and the investors who were not given any information and assurances about the future of the BITs. Because the decision clearly did not reach

36 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection in the European Union [online]. *European Commission website*. Published on 17 January 2019 [cit. 18. 12. 2019]. https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf

37 Ibid.

38 Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection in the European Union [online]. *European Commission website*. Published 17 January 2019 [cit. 18. 12. 2019]. https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf

the intended goal, action on the political level needed to be taken. It is decisions such as this that make the EU and its policies detached from the population of the Member States. On the other hand, it also illustrates that the EU law is going to play increasing role even in field that so far enjoyed relative autonomy. In any case, it remains to be seen whether the *Achmea case* judgment really marked the end of intra-EU investment arbitration.

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