



# *Achmea*: The Future of Investment Arbitration in Europe

2 July 2018

**BonelliErede**

# Agenda

The *Achmea*  
Proceedings

01



02

Issue and Developments

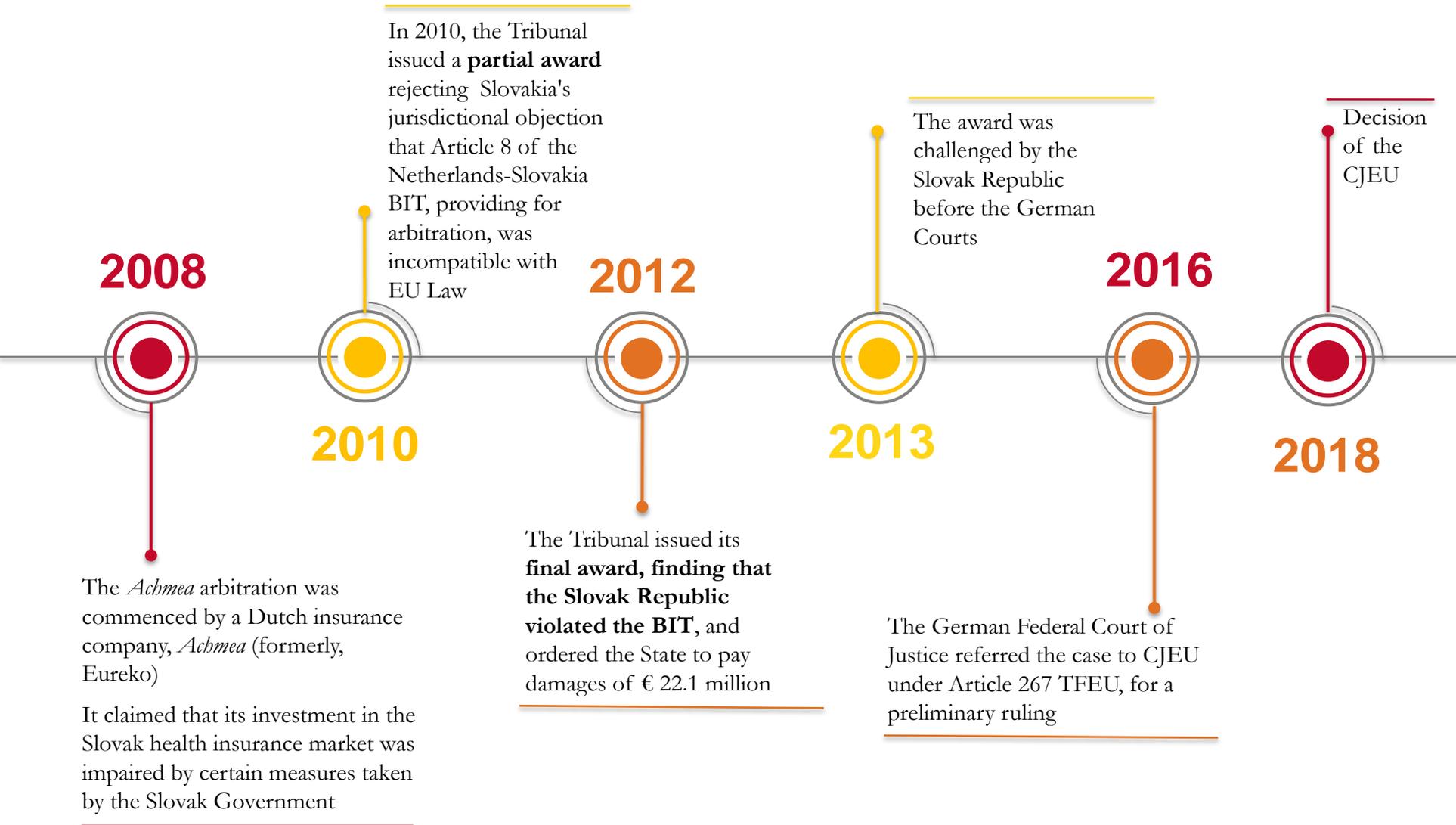
Implications

03

04

Concluding remarks

Commenced in 2008 by a Dutch company, *Achmea B.V.*, v. Slovak Republic, under Article 8 of the Netherlands-Czech and Slovak Republic Bilateral Investment Treaty



# The *Achmea* Proceedings: questions for the CJEU

The German Federal Court of Justice raised **three** questions to the CJEU:

1

Whether **Article 344 of the TFEU**, which prevents Member States from submitting disputes concerning the interpretation or application of the EU Treaties to settlement methods not contemplated by the EU Treaties, **precludes the application of a forum clause contained in an intra-EU BIT**

2

If the application of a forum clause contained in an intra-EU BIT is not excluded, whether **Article 267 TFEU**, which bestows upon the CJEU jurisdiction to rule on the interpretation of the EU Treaties, **precludes the application of a arbitration clause contained in an intra-EU BIT**

3

If questions 1 and 2 are to be answered in the sense that they do not preclude the application of a forum clause or an arbitration clause, **whether Article 18(1) TFEU**, which prohibits discrimination among EU Member States on grounds of nationality, **precludes the application of a forum clause contained in an intra-EU BIT**

The CJEU clarified that the **autonomy** and the **primacy of EU Law** are instrumental to the preservation of the European Union as an **independent legal order** built on a complex institutional system and on founding values shared by all Member States.

To preserve this institutional system, the EU Treaties have established an **autonomous judicial system** to ensure the uniform interpretation and application of EU Law.

1. The autonomy and the primacy of EU Law are instrumental to the preservation of the European Union as an independent legal order

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8. Articles 267 and 344 TFEU must be interpreted as precluding arbitration clauses in investment treaties

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7. **Investment arbitration is inconsistent with EU Law** because, in adjudicating investor-State disputes an investment tribunal may be called to consider EU Law issues without being required to refer those issues to the CJEU, as a court of a Member State would be

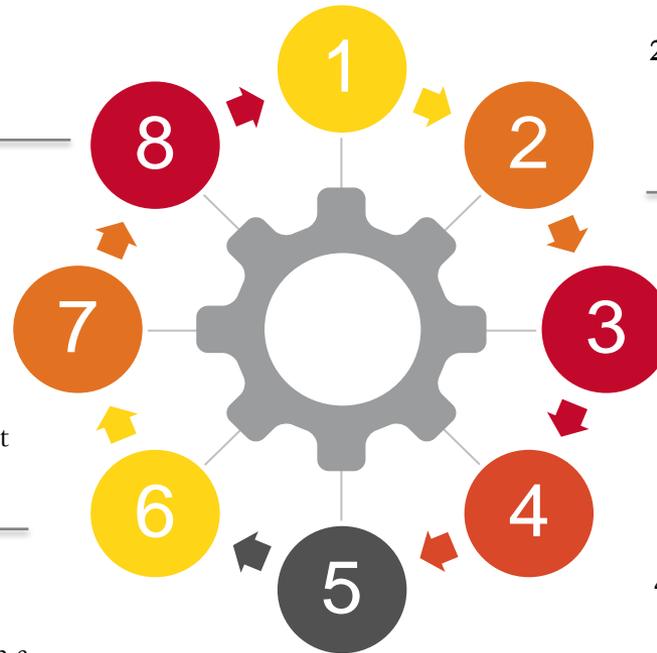
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6. Investment disputes would not be resolved by investment tribunals “in a manner that ensures the full effectiveness of EU law”.

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5. But an investment treaty tribunal cannot be regarded as a court of a Member State within the meaning of Article 267 TFEU and is prevented from seeking a preliminary ruling from the CJEU

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2. The EU Treaties have established an autonomous judicial system to ensure the uniform interpretation and application of EU Law

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3. In particular, Members States may not submit a dispute concerning the interpretation of the EU Treaties to any other body than the CJEU, which is empowered to give the final and authoritative interpretation of EU Law

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4. In adjudicating an investor’s claim under the BIT, a tribunal may also have to consider the law of the contracting party and international agreements entered into by the contracting states. Thus an investment treaty tribunal “may be called on to interpret or indeed to apply EU Law”

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1

**Incompatibility between dispute resolution clauses contained in BITs and EU law**

Are existing clauses and awards invalid?  
Are EU member states prohibited from concluding BITs with such clauses? Are awards enforceable?

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3

**Impact on intra-EU ECT arbitrations**

How might the CJEU address the issues identified in *Achmea* in ECT arbitrations?

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5

**Impact on Arbitrations based on BITs between EU and non-EU member States**

How might *Achmea* ruling impact arbitrations arising under BITs between EU and non-EU member States, And between non-EU member States?

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2

**Applicability of BIT substantive standards and EU law**

Are BIT substantive standards of protection (such as FET or FPS) incompatible with EU law? Does *Achmea* preclude investor-State arbitration when no EU law issue is at stake?

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4

**Impact on ICSID arbitrations**

How might the CJEU address the issues identified in *Achmea* in ICSID arbitrations?

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6

**Impact on commercial arbitration agreements**

Does the *Achmea* ruling have impact commercial arbitration agreements?

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## 02 - Set aside application of ICSID award

In *Dan Cake v Hungary*, Hungary applied for the annulment of the ICSID award relying on the *Achmea* award

## 04 - Withdrawal of intra-Eu investor-State claim

In *Airbus v. Poland*, Airbus, withdrew under the Netherlands-Poland BIT

## 01 – Non-ICSID award challenged in Court

Several arbitral awards based on intra-EU BIT have been challenged

## 03 - Bilateral jurisdiction objections

In several investor-State arbitrations based on intra-EU BITs, respondent States have raised jurisdictional objections at a relatively late stage of the proceedings

## 05 – Seat of arbitration

A debate exists as to whether arbitral institutions or tribunals should fix the place of arbitration in EU jurisdictions in proceedings brought on the basis of intra-EU investment treaties



The unanswered questions:

The *Achmea* ruling raises more issues than it solves

- The reasoning of the Court is not clear
- Several important issues raised by the Advocate General and the German Federal Court of Justice were not addressed by the CJEU
- The CJEU focused exclusively on the arbitration clause, but did not clarify whether and to what extent Intra-EU investment treaties' substantive protections overlap or are inconsistent with EU Law
- If EU Law plays no role in the arbitration, how can investment arbitration be inconsistent with EU Law?

# Implications: Impact on intra-EU investment treaties

## The unanswered questions

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The dispositive part of the ruling, read in isolation, suggests that even when the conflict is hypothetical, investment arbitration should not be allowed.

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Read in its entirety, the conclusion might be different.

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According to the Court, since an investment tribunal “*may be called on to interpret or to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital*”, investor-State arbitration “*could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law.*” (CJEU ruling, ¶¶42, 55-56, 58).

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*Ergo*, if the dispute does not involve EU Law at all, the “*full effectiveness of EU Law*” would not be in jeopardy.

### Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
  - (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
  - (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time

### Article 30

Application of successive treaties relating to the same subject matter

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

# Implications: Impact on intra-EU investment treaties

## Has the bell tolled for investment arbitration?

Is *Achmea* a death knell for intra-EU investment arbitration?

**Maybe not**

1

BITs have not been terminated under Article 59 of the Vienna Convention

2

When EU Law is not at stake, there is no actual inconsistency that makes the arbitration clause inapplicable under Article 30(3) of the Vienna Convention

This conclusion:

1. is not inconsistent with the principles stated by the Court;
2. is respectful of the autonomy of EU Law; and
3. does not encroach on the Court's power to interpret EU Law.

# Implications: Impact on arbitral award

The fate of arbitral awards issued on the basis of Intra-EU BITs

Do the awards issued on the basis of intra-EU BITs, such as the *Achmea* award, deserve to be set aside or refused enforcement?

Potential grounds for setting aside or refusing enforcement:



The invalidity of the arbitration agreement (lack of State's consent to arbitration) (Article V(1)(a) NY Convention)



Public policy (Article V(2)(b) NY Convention)



Non-arbitrability of the dispute under domestic law (Article V(2)(a) NY Convention)



A literal reading of the dispositive part of the CJEU ruling may lead a court to conclude that Intra-EU BIT awards must be set aside

If EU Law plays no role in the case, the award would not be a threat to the autonomy of EU Law and a court may conclude that the award can survive

# Energy Charter Treaty

The fate of arbitral awards issued on the basis of the ECT

“ [T]he *Achmea* Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party.

[T]he Tribunal concludes that the *Achmea* Judgment has no bearing upon its determination of the matters in issue in this arbitration ... ”

*(Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain,*  
ICSID Case No. ARB/14/1,  
Award of May 16, 2018, ¶¶ 679-683)

## Article 47(3) ECT

The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

# ICSID

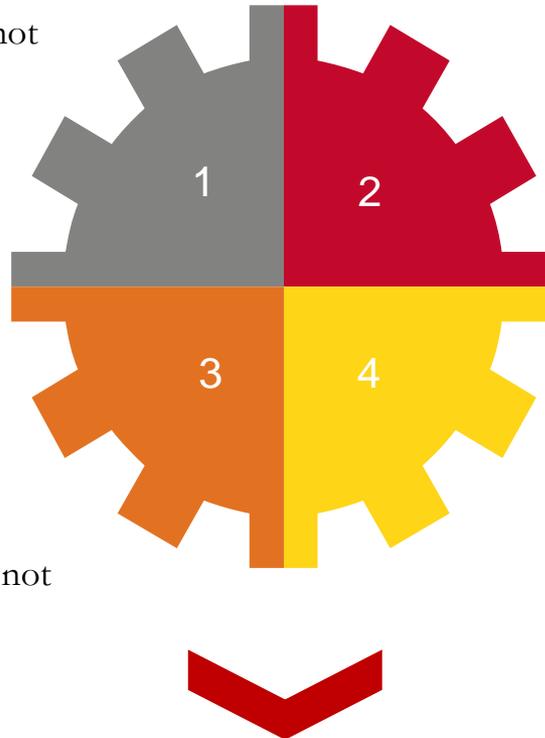
## The fate of arbitral awards issued on the basis of the ICSID Convention

1

The CJEU ruling does not concern the ICSID Convention

2

No review of ICSID awards by the State courts; obligation to recognize ICSID awards as binding and to enforce the pecuniary obligations “as if they were a final judgment of a court in that State” (Article 54), except for State immunity (Article 55)



3

The CJEU ruling does not concern the ICSID Convention

4

The host State’s (separate) consent is still required.

Unless EU Treaties trump the ICSID Convention, ICSID awards stand and must be enforced in the EU

## Concluding remarks:

### How Investors May Cope With *Achmea*'s Effects on Intra-EU BITs

The *Achmea* judgment casts doubt on the viability of arbitration's arising from intra-EU BITs, in particular where:



✓ The seat is in a Member State



✓ A treaty such as the ICSID Convention or ECT is NOT implicated

Despite this doubt:  
Investors in EU Member States may have international arbitration options standing outside an *Achmea* preclusion



International Commercial Arbitration

Energy Charter Treaty

ICSID or Washington Convention

Establishing an **investment vehicle** in a non-EU state that has a BIT with the EU host state

In the event an investment court system goes forward in the EU, taking the investment dispute there instead of to a national court

Possible options for investors  
are not necessarily negatives  
for EU States

# Concluding remarks

## Arbitration Clauses in Investment Agreements

A key point in *Achmea* is the European Court's clear distinction between commercial arbitration, on one hand, and arbitration based on intra-EU investment treaties on the other

**Arbitration based on  
intra-EU BIT**

Intra-EU BIT arbitration runs afoul of the Member States' obligation to resolve disputes in a manner that ensures the full effectiveness of EU law

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**Commercial Arbitration**

However, commercial arbitration proceedings "originate in the freely expressed wishes of the parties"

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The *Achmea* Judgment  
arguably does not touch  
international commercial  
arbitration

## Concluding remarks

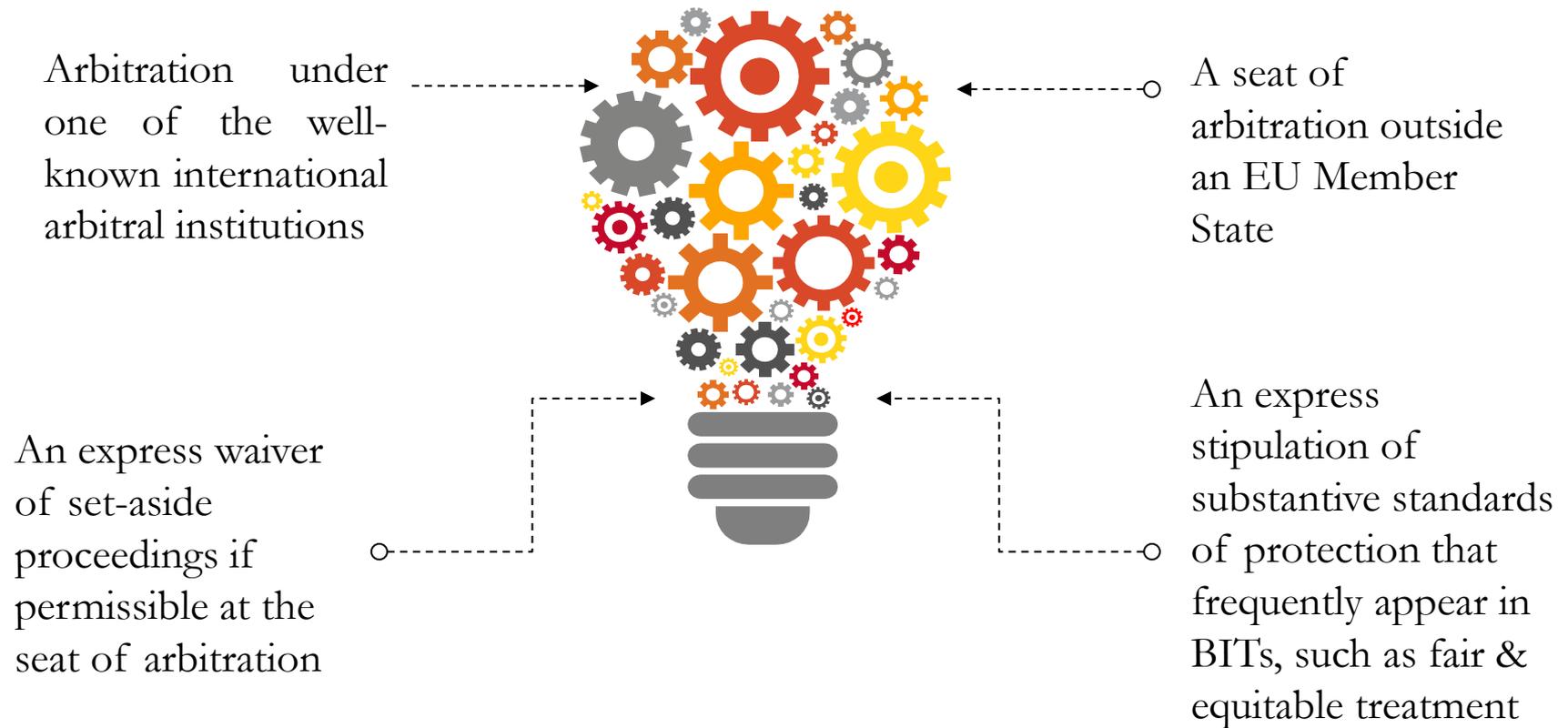
Treaty unavailability may point to arbitration under an investment contract as a useful avenue of redress, considering that:

- ✓ A covered investment in a BIT is a transaction involving a qualified investor and the host State .... and
- ✓ “What a BIT does is to provide an additional layer of protection for the one transaction”. (James Crawford, “Treaty and Contract in Investment Arbitration” Arb. International 24:3)
- ✓ An investment contract frequently contains an arbitration clause of its own

## Concluding remarks

How to limit the potential impact of *Achmea*

Investors may seek to limit the potential impact of *Achmea* with provisions in their investment contracts



# Concluding remarks

## Other Treaty options

### ENERGY CHARTER TREATY

If the investment is in the energy sector, a treaty arbitration alternative arguably standing apart from the intra-EU BIT issue may be to commence proceedings under the Energy Charter Treaty

### ICSID

- If ICSID arbitration exists as a possible dispute method in the relevant intra-EU BIT, an investor may wish to proceed under ICSID and seek to draw a distinction from the specific facts and ruling in *Achmea*, though this poses certain risks.
- If the investor prevails, seeking enforcement in a non-EU State may also be another point of distinction

### INCORPORATING AN INVESTMENT VEHICLE IN A NON-EU JURISDICTION

Restructuring an investment in a Member State by incorporating an investment vehicle in a non-EU jurisdiction, such as Switzerland or Norway (or even the UK post-Brexit) would be a potential way to avoid relying on arbitration under an intra-EU BIT, provided that such restructuring takes place before any dispute regarding the investment has arisen

An investment court system of the type in the Canada EU Comprehensive Economic and Trade Agreement, as well as in a series of investment agreements between the EU and third countries (such as Vietnam), and proposed by the Commission in the Transatlantic Trade and Investment Partnership, may be the future of investor-State dispute settlement under treaties



# Q & A

## *Achmea*: The Future of Investment Arbitration in Europe

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- ✓ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of May 16, 2018 and
- ✓ *PL Holdings S.à.r.l. v. Poland*, SCC Case No. 163/2014
- ✓ *Novenergia v. Spain*, SCC Case No. 063/2015
- ✓ *Dan Cake v. Hungary*, ICSID Case No. ARB/12/9
- ✓ *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL Ad Hoc Case (no No.)
- ✓ *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energía Termosolar B.V. v. Spain*, ICSID Case No. ARB/13/31
- ✓ *Airbus v. Poland* (no details available, probably ad hoc)