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Indhold

Artikel

The Achmea Judgement of the Court of Justice of the European Union. The End of Intra-EU Investment Arbitration and other Imponderabilities

By Steffen Hindelang, Professor (wsr) at the University of Southern Denmark and Adjunct Faculty at Humboldt University of Berlin

The Court of Justice of the European Union (CJEU or Court) made it short and sweet: It took the Grand Chamber in its Achmea Decision (C-284/16) less than fifteen pages to conclude that Investor-State dispute settlement (ISDS) shall belong to the past, at least in an intra-EU context.

ISDS in this sense means investment tribunals established ad hoc for the individual case on the initiative of the foreign investor. Typically, three arbitrators decide on whether the foreign investor's host State, in the exercise of sovereign powers, has breached substantive guarantees contained in the bilateral investment treaty (BIT) in respect of the protection of the investor and its investment. The rules of procedure, so-called arbitration rules, are such as in the Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID Convention) or those developed by United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC). Awards are binding on the disputing parties and typically final, except in rare circumstances.

The CJEU's Achmea Decision originates in a request for preliminary ruling by the Bundesgerichtshof (German Federal Court of Justice, docket no. I ZB 2/15) in May 2016. In the German court proceedings, the Slovak Republic challenged an 2012 arbitral award (PCA Case No. 2008-13) rendered on the basis of the 1992 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic (the NCS BIT). Ruling in favour of a Dutch investor, the arbitral tribunal held the Slovak Republic was in breach of its substantive obligations under the NCS BIT when partly reversing the liberalisation of the private health insurance. In consequence, it awarded damages to the investor. The Slovak Republic has consistently argued in all the different fora that the investment tribunal lacks jurisdiction: As a result of the State's accession to the European Union (EU), recourse to an investment tribunal provided for in the NCS BIT was incompatible with EU law.

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On 6 March 2018, the CJEU essentially confirmed this view. In doing so, it deviated not only from the results reached by the investment tribunal and the Oberlandesgericht Frankfurt (Higher Regional Court Frankfurt, docket no. 26 SchH 11/10). It also completely side-lined Advocate General (AG) Wathelet's opinion, who could not find any incompatibility with EU law. The AG's "passionate" defence of investment arbitration prompted so much uproar that some Member States requested the re-opening of the oral proceedings.

The CJEU could safely decline such request as it came to the same conclusion as the Member States asking the oral proceedings to be re-opened: "Art. 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Art. 8 of the [NCS BIT], under which an investor from one of those Member States may, in the event of a dispute concerning 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" (para. 62). The Court arrived at this result as follows:

The CJEU's Argument : In Four Steps to Incompatibility

One: The CJEU started off by sketching the standard of review, i.e. the principle of autonomy of EU law, rooted in particular in Art. 344 TFEU. In a nutshell: This principle is to protect the characteristics of EU law, forming an independent source of law, enjoying primacy over the laws of the Member States, and having direct effect (paras. 32-34). The central idea behind the principle is "to guarantee consistency and uniformity in the interpretation of EU law" (para. 35). In this effort the CJEU is joined by the courts of the Member States. The "keystone mechanism" which binds all these courts together to a judicial dialogue is the preliminary reference procedure established by virtue of Art. 267 TFEU.

Two: Having said this, the CJEU turned to the question of whether this judicial dialogue between itself and the courts of the Member States would be disrupted by allowing for investment arbitration based on an intra-EU BIT. A precondition for such is that an investment tribunal's application of law is liable to relate to the interpretation or application of EU law (para. 39).

Referring to the dual nature of EU law, which forms part of the law of the Member States and is derived from a public international law source, the CJEU held that the arbitral tribunal "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital" (para. 42). Undeniably, it was about time to shatter the myth championed by some arbitral tribunals that intra-EU investment arbitration would not be able to affect the interpretation and application of EU law.

Three: Having arrived at this point, the Court had effectively placed an investment tribunal established on the basis of an intra-EU BIT under its scope of control, recalling that it is the CJEU's foremost responsibility to secure the uniform interpretation and equal application of EU law throughout the Union's territory. Now: An investment tribunal potentially applying and interpreting EU law could only have acquitted itself from the looming accusation of being "disruptive" in the judicial dialogue, if it either had access to the preliminary reference procedure, or its arbitral decisions could otherwise be reviewed and referred to the CJEU.

In regard to an arbitral tribunal's own access to the procedure under Art. 267 TFEU, the Court conceded that also "joint Member State courts" such as the Benelux Court of Justice may refer questions to the CJEU. However, while the Benelux Court of Justice formed an integral part of the domestic court systems of the Benelux countries, such integration in domestic procedure was missing in respect of investment tribunals. Hence, such tribunal could not be regarded as a (joint) Member States' court able to refer questions for preliminary ruling to the CJEU (para. 48).

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On this contentious question the Court was strikingly brief. This is not all too surprising since there are also good arguments not to deny an investment tribunal established on the basis of an intra-EU BIT (or Energy Charter Treaty (ECT)) access to the preliminary reference procedure. Indeed, one may wonder whether Miles Judgement (C-197/09), to which the Court repeatedly referred to, supports its finding. In the Miles Judgement, the dispute settlement body (of the "European Schools") was "a body of an international organisation which, despite functional links which it has with the Union, remains formally distinct from it and from the Member States" (para. 42). In other words, the rulings of the European Schools' dispute settlement body remain in its binding effect within the realm of this international organisation. This is the distinctive feature if compared to arbitral tribunals in an intra-EU context: the decisions of the latter tribunals directly bind the respondent Member State, and thus the tribunal decides in a binding fashion inter alia whether the exercise of governmental powers towards the investor was permissible or obligatory (also) under EU law. Hence, there is a stronger link between investment arbitral tribunals and the Member States compared to the situation in the Miles Judgement.

Be that as it may, the CJEU seemed not overly eager to get into the questions that had followed from granting arbitral tribunals access to the preliminary reference procedure, in particular what to do when arbitral tribunals simply did not wish to refer questions to the CJEU although they would be bound to do so. One can only speculate whether the CJEU would have taken a different stance, if investment tribunals had previously tried to enter in a dialogue by referring a question to Court for preliminary ruling. The chances were numerous, but they were all missed.

Four: Having excluded arbitral tribunals from the preliminary reference procedure, the Court had to address the question of whether the disruptive effects on the uniform application of EU law potentially flowing from an arbitral ruling could otherwise be contained.

The CJEU reasoned that, by its very purpose, an arbitral tribunal is largely placed outside the domestic court system of a Member State. The review of an arbitral award in a Member State's court, which then could refer questions on EU law for preliminary ruling to the CJEU, is typically rather limited in scope (paras. 52-53). Such review, one should add, is also uncertain to the extent that the venue of arbitration would have to be within the EU's territory in order to get in reach of a Member State's court.

In this context, the CJEU differentiated commercial arbitral tribunals from arbitral tribunals established on the basis of a BIT. While a commercial arbitral tribunal's jurisdiction stems from the consent of the disputing parties, an investment tribunal would ultimately derive its judicial powers from the State parties to the BIT (paras. 54-55). By providing for ISDS in their intra-EU BITs, the Member States themselves are substantially involved in disregarding the principle of autonomy of EU law: The adjudicative bodies so created bypass the mechanisms prescribed for in EU law to secure its uniform application (para. 56).

All this led the CJEU to conclude that ISDS in intra-EU BITs is not compatible with EU law.

Having repeatedly cautioned in the past that exactly such outcome could stand at the end of the CJEU's review of an ISDS clause in an intra-EU context someday, it would now be comfortable to join in the chorus of those either praising or condemning the Court's judgement. In fact, this might be just too comfortable in the light of another pressing question: What's next?

Beyond Incompatibility : Five Questions

While the Court's legal reasoning indeed largely deserves support, there are several legal and political issues begging answers: (1) What will happen to currently ongoing intra-EU investment arbitrations? (2) Will intra-EU investment arbitration indeed come to an immediate end after the CJEU's judgement? (3) Why are intra-EU BITs still perceived

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by several observers as a crucial tool to address and mitigate political risk in some Member States? (4) What are the Judgement's implications for the Energy Charter Treaty, recalling the large numbers of intra-EU investment arbitrations brought on its basis? (5) Are there any lessons learned from the Achmea Judgement for EU agreements with third countries, such as Canada, Singapore, or Vietnam?

The Achmea Judgement resolved the fiercely disputed legal question of compatibility of intra-EU investment arbitration with EU law. The Court is correct in stressing that ISDS as provided for in intra-EU BITs is at odds with the principle of autonomy of EU law. ISDS in an intra-EU context has potentially threatened the equal application of EU law throughout the Union's territory. The present ISDS mechanism did not sufficiently secure the Court's role as guardian of and last instance in interpreting and applying EU law.

Finito della musica? Not quite! One may in fact have some doubts whether arbitral tribunals, currently (or even in the future) adjudicating cases based on intra-EU BITs, automatically acquiesce the CJEU's reasoning. Indeed, if the arbitral seat is located outside the EU or the arbitration is conducted on the basis of the ICSID Convention and, moreover, if sufficient assets of the defending Member State (for enforcement of the award) are also located outside Europe, no Member State court might get its hand on the arbitral award. In such situations it might be tempting for a witty tribunal to defy the CJEU ruling as one of a domestic court which cannot trump public international law. This has been frequently done so in the past and today the Advocate General can even be called sympathetic to this practice. If indeed this happens, it will be interesting to see how domestic courts outside the EU would deal with such situation.

However, if one wants to be on the safe side – safe meaning here to faithfully adhering to the CJEU's ruling and securing the equal application of EU law – the European Commission would have to step up its efforts to get all intra-EU BITs terminated. It has been trying to convince the Member States for some years now without attaching particular urgency to the matter. In any event, the CJEU's Achmea Ruling provides the European Commission with some tailwind. However, some Member States are likely to continue to procrastinate.

Of Undue Consideration of "Political Sensitivities" and The Rule of Law. It seems that some Member States have been reluctant to abandon intra-EU BITs as they are still concerned about insufficient access to justice and due process in the courts of certain other Member States. That these concerns are real is well-evidenced by the EU Justice Scoreboard and the "Art. 7 TEU-Procedure" against Poland on rule of law deficits. When it comes to foreign investment, the European Commission tried to address these issues by proposing a mediation mechanism for foreign investors and their respective host States. Not only failed such proposal to secure sufficient political support, as such instrument lacks the teeth of a court judgment or arbitral award, it is also, obviously, missing the point. Rather, alternatives to intra-EU BITs should be developed from existing functional equivalents in EU law, i.e. substantive standards of investment protection in EU law should be made more transparent by the way of a "restatement" of the pertinent legal practice. On principle, foreign investors should make use of functioning domestic courts. Where such institutions lack quality, the EU and its Member States should work towards their improvement. Meanwhile, a "safety net" should be provided for foreign investors in case domestic courts fail to dispense justice. This "safety net" may take the form of an arbitral forum administered by the Permanent Court of Arbitration or that of a 'Unified Investment Court'; both integrated in the EU legal system. In any event, the EU and its Member States cannot afford to cower away from the rule of law within the Union. The rule of law constitutes one of the foundations of the EU. The EU is built on law and it has hardly more than law to make true one of its grand promises given to its citizens, i.e. a Europe-wide level playing field for their economic and increasing social activities.

The Energy Charter Treaty – Party on! According to UNCTAD, investment disputes on the basis of the ECT, which also contains an ISDS clause, account for about 20 percent of all known investment arbitrations globally by the end of 2016. Many of these cases constitute intra-EU disputes and, more recently, often relate to the withdrawal of government support schemes for renewable energy. Spain particularly has been subject to over 40 claims under this

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regime. Also, the claims of the Swedish power company Vattenfall against Germany were both brought on the basis of the ECT.

Parties to the ECT are the EU, the Member States (Italy being a special case), and several third countries. Despite the involvement of the EU itself and third countries, from an EU law perspective, there seems to be no compelling reason why investment disputes between an investor from one Member State and another Member State based on the ECT should in result be treated differently from such addressed in the CJEU's Achmea Judgement. So far, however, the European Commission has been utterly unsuccessful in convincing arbitral tribunals in ECT-based arbitrations of the special circumstances in intra-EU cases.

Just recently, in Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (hereafter "Masdar Solar"), the arbitrators furnished impressive proof of their evident hostility towards EU law. To "prove" that the reasoning in Achmea had no bearing on the ECT, the tribunal (para. 681) referred to the Advocate General's opinion in Achmea (para. 43), who pointed out that, at the time of ratification, neither the EU nor a Member State had "the slightest suspicion that [the ECT] might be incompatible with EU law".

This is a bold reasoning, to say the least. If one dares to think this argument through, then the result would be just grotesque. If a rule maker's perception of lawfulness at the time of passing a rule were of any relevance for assessing the legality of this rule, courts and tribunals around the world would be pretty much superfluous. Typically, not even in rogue states, do law makers announce beforehand that they intended to enact an illegal rule. The Tribunal in Masdar Solar took the fact that the Court did not explicitly reject the Advocate General's specious argument as a free ride to "respectfully adopt […] the Advocate General's reasoning" (para. 682).

Looking at the arbitrators' "approach" to this question it is doubtful that their attitude will change in the light of the CJEU's Achmea Judgement. As long as Member States' courts do not get their hands on the awards – which is not certain, as explained above – and regularly annul them, intra-EU arbitration on the basis of the ECT may just go on. Again, a solution seems to lie beyond the Court's Judgement.

Nobody Else, Apart from The Blue Sky? When it comes to investment protection clauses in agreements of the EU with third countries, the Achmea Judgement seems to be only of limited guidance. The Court in sibylline fashion remarked that an international agreement of the EU that provides 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, "[…] provided that the autonomy of the EU and its legal order is respected" (para. 57). The court's treatment in Opinion 2/13 of the EU's accession to the European Convention on Human Rights set the tone. As this one was not overly conciliatory, some caution is warranted. In its upcoming Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada, of the one part, and, the European Union and its Member States of the other part (CETA), the CJEU will be presented with the opportunity to let us know whether the ISDS mechanism contained therein respects the autonomy of the EU and its legal order. In terms of respect, one may wonder whether investment tribunals such as the one in "Masdar Solar" with their profound hostility towards EU law have rendered the cause of investment protection and its long-term sustainability a good service.

This is an updated version of a post which appeared first at Verfassungsblog.de.

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Publikationer

Tidsskiftsartikler

Bent Ole Gram Mortensen har sammen med Henrik Lund m.fl. udgivet ”The status of 4th generation district heating: Research and results” i Energy, vol. 164, side 147-159, 2018

Daniel Skov har udgivet ”Begrundelseskravet i lejeloven § 45, 3. pkt. sproglige tilfældigheder med store konsekvenser” i Tidsskrift for Bolig- og Byggeret, nr. 4/2018, side 561-569, 2018

Hans Viggo Godsk Pedersen har sammen med Hans Henrik Edlund, John Elling og Marianne Philip udgivet ”Aktuel Erhvervsjura” i Revision & Regnskabsvaesen, side 68-71, 2018

Hans Viggo Godsk Pedersen har sammen med Hans Henrik Edlund, John Elling og Marianne Philip udgivet ”Aktuel Erhvervsjura” i Revision & Regnskabsvaesen, side 80-84, 2018

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Peter Starup har udgivet ”Fremtidig udvisningspraksis efter lov nr. 469/2018 – lovgivning gennem »retningslinjer«” i EU-ret og Menneskeret, nr. 3, side 3-22, 2018

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Bøger

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Jane Ferniss har sammen med Jan Pedersen, Malene Kerzel og Claus Hedegaard Eriksen udgivet Skatteretten, Karnov Group, 8. udgave, 2018

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Suppleant til Disciplinærklagenævnet for Ejendomsformidling

Professor mso Jacob Juul-Sandberg er pr. 1. november 2018 udpeget af Danske Universiteter som suppleant til Disciplinærklagenævnet for Ejendomsformidling.

Nye tiltrædelser på Juridisk Institut

Søren Kaas er ansat som studentermedhjælper siden marts 2018.

Lotte Helms er ansat som videnskabelig assistent indenfor forskningsgruppen International ret. Hun assisterer Henning Bang Fuglsang Madsen Sørensen indenfor kriminalret-området.

Andrea Miinto er ansat som gæstelektor i privatretsgruppen. Han har sin anden ansættelse på et universitet i Italien.

Daniel Skov er ansat som videnskabelig assistent i privatretsgruppen.

Lisa Christensen er tidligere videnskabelig assistent, og er nu tilknyttet Juridisk Institut som ph.d.-studerende inden for offentlig ret.

Nanna Grønning-Madsen er ny ph.d.-studerende inden for International ret.

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Skræddersyet efteruddannelse

Hvis du har forslag til et efteruddannelseskursus, der kan indgå som en del af den obligatoriske efteruddannelse for advokater eller revisorer, hører vi gerne fra dig. Send en mail til institutleder Camilla Hørby Jensen på chj@sam.sdu.dk

Udtalelser om tompladsordningen

Advokat Claus H. Schultz og advokat Nils-Erik Kallmayer fra Advokatfirmaet Skjøde Knudsen & Partnere (www.skj-advokat.dk) har erfaring med tompladsordningen og udtaler:

"*Vi har fulgt faget **International Transport Law**, og kurset har givet et godt overblik over retsområdet. Faget har været relevant i forhold til de efteruddannelseskrav, der stilles til advokater.*"