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Bilateral investment treaties (BITs) in light of Achmea case

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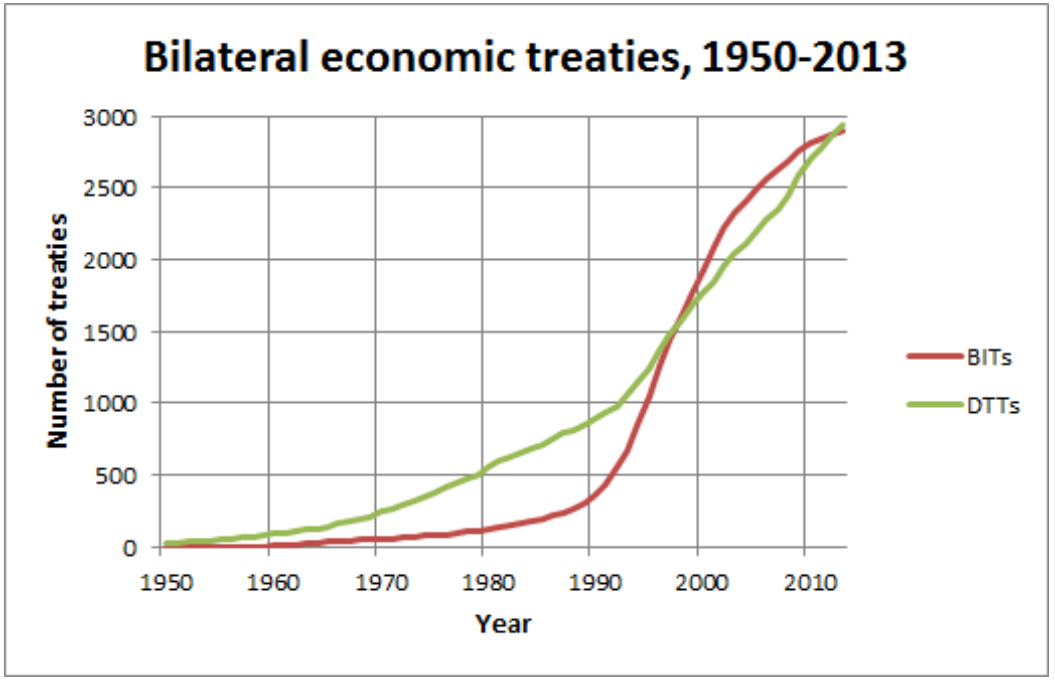
A brief overview of ISDS system

LEGAL BASIS:

- Bilateral investment treaties (BITs): thousands, same but different

- Multilateral investment treaties (MITs):
  - NAFTA chapter 11
  - Energy Charter Treaty (ECT)
  - TTIP? CETA? TPP?



ISDS system

- Ad hoc arbitral tribunals
- Parties choose arbitrators
- Speedy
- Confidential
- Result: damage award
- Enforcement (New York Convention, ICSID Convention)
- Most BITs: no exhaustion of local remedies
- Controversies about ICSID

What did the CJEU decide in its preliminary ruling in

Slovak Republic v Achmea BV and on what legal justification?

Developments leading to the CJEU's preliminary ruling

- **26** OCT 2010: **Award on Jurisdiction, Arbitrability and Suspension** in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic);
  Applicable arbitration rules: UNCITRAL (1976); Netherlands-Slovak Repubic BIT

- **10** MAY 2012: **Decision of the Frankfurt Higher Regional Court**

- **7** DEC 2012: **Award**

- **19** SEP 2013: **Preliminary Decision of the German Federal Supreme Court**

- **18** DEC 2014: **Judgment of the Higher Regional Court of Frankfurt**

- **19** SEP 2017: **Opinion of Advocate General of the European Court of Justice**

- **6** MAR 2018: **Judgment of the Grand Chamber of the CJEU**

PCA Case No. 2008-13

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE CZECH AND SLOVAK FEDERAL REPUBLIC, SIGNED ON 29 APRIL 1991, ENTERED INTO FORCE ON 1 OCTOBER 1992 ("TREATY")

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES ("UNCITRAL ARBITRATION RULES")

-between-

ACHMEA B.V.
(formerly known as "Eureko B.V.")

("Claimant")

-and-

THE SLOVAK REPUBLIC

("Respondent," and together with Claimant, the "Parties")

FINAL AWARD

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7 December 2012

Background information

- Slovakia went before German courts to **challenge an award** rendered in proceedings between the Slovak Republic and Achmea BV concerning an arbitral award of 7 December 2012 made by the arbitral tribunal provided for by the Agreement on encouragement and reciprocal protection of investments between the **Kingdom of the Netherlands and the Czech and Slovak Federative Republic ('the BIT')**.

- The arbitral tribunal had awarded a **Dutch investor (*Achmea*)** 22.1 million EUR in damages because of the Slovak government's decision to partially reverse an earlier decision to privatize the health insurance market.

- The Slovak government argued that **the arbitration tribunal had no jurisdiction** over the dispute and that **the dispute should have been resolved before the Slovak courts**.

- The Slovak government thus **challenged the investment award** before German courts, which subsequently referred the case to the CJEU for preliminary ruling.

CJEU *Achmea* Judgment

- The request for a preliminary ruling concerned the interpretation of Articles 18, 267 and 344 of the TFEU.

Article 18

"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality shall be prohibited**.

…."

Article 267
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give **preliminary rulings** concerning:

(a) the **interpretation** of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

….

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal **shall** bring the matter before the Court.

…

Article 344
(ex Article 292 TEC)

Member States undertake **not to submit** a dispute concerning the **interpretation or application** of the Treaties to **any method of settlement other than those provided for therein**.

The Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

‘(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

(2) Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?’

JUDGMENT OF THE COURT (Grand Chamber)

6 March 2018 (*)

(Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic — Provision enabling an investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party — Compatibility with Articles 18, 267 and 344 TFEU — Concept of 'court or tribunal' — Autonomy of EU law)

In Case C-284/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 3 March 2016, received at the Court on 23 May 2016, in the proceedings

Slowakische Republik (Slovak Republic)

v

Achmea BV,

Key findings of *Achmea* ruling

- Intra EU BIT investor-state dispute settlement provisions are incompatible with EU law because they sideline and undermine the powers of domestic courts of EU Member States.
- The case's reasoning may also be applied to investment agreements between the EU or EU Member States and third countries - 3 key facets suggest that investment agreements with third countries will also be incompatible with EU law:
  - Arbitration tribunals through ISDS are not part of the EU judicial system.
  - Such tribunals may resolve disputes that relate to the application or interpretation of EU law.
  - The awards of the tribunal are not subject to review by EU Member State courts.

- If the *Achmea* ruling is applied to agreements with third countries, there will be major implications, including the inability to:
  - enforce tribunals' awards under many existing agreements;
  - negotiate new agreements that include investment arbitration with the EU or EU Member States.

CJEU's legal grounds for the *Achmea* ruling

- Preoccupation is NOT the possibility for an investment tribunal to apply EU law (no doubt about the arbitrability of EU law), BUT the **absence of the possibility for the CJEU to effectively control the proper application of EU law by the Tribunal** in order to ensure *"full effectiveness of EU law"* – thus articles 267 and 344 **preclude the arbitration clause** in the BIT and does NOT just preclude the *application* of the arbitration clause

- Lack of jurisdiction on the basis of which the *Achmea award* needs to be set aside

- commercial arbitration – originates in the freely expressed wishes of the parties, contrary to arbitration clauses in BITs – BUT: the consent is given, just at different times:
  - by the State in he BIT itself,
  - by the investor when the dispute arises

- Arbitral tribunals are NOT tribunals of a Member State

- Supremacy of EU law above international treaties? Domestic courts of EU MS must set aside the award!

Conclusion of the CJEU in Achmea

Investment arbitration under intra-EU BITs is generally incompatible with the autonomy of EU law!

Some questions that follow this conclusion

1. What are potential implications of the CJEU preliminary ruling in the *Achmea case*?

2. What is the aftermath of the *Achmea* issue in the *Vattenfall v Germany case*?

3. What is the possible indication of the Achmea for the CJEU Opinion 1/17 (CETA agreement)

What are potential implications of the CJEU preliminary ruling in the Achmea case?

What is the aftermath of the Achmea issue in the Vattenfall v Germany case?

What is the possible indication of the Achmea for the CJEU Opinion 1/17 (CETA agreement with its ICS tribunal, which may “consider” EU law “as a matter of fact” envisaged)?

Some possible responses to the Achmea effects

- Legal **uncertainty**
- **One-way street** of investment arbitration with the EU

- reappearance of the traditional practice of **investment contracts**

- Implementation of **simpler strategies** by EU MS – e.g. structuring the future investment in another MS through a vehicle situated outside the EU in order to benefit from a BIT containing an arbitration clause compatible with EU Law and providing for arbitration mechanism that is immune from an intervention of the EU and will seek enforcement of an award issued against MS outside the territory of the EU

Thank you for your kind attention!

Q & A

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