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AG Wathelet in C-284/16 Achmea: Saving ISDS?

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A few months ago, AG Wathelet delivered a remarkable defence of investor-state dispute settlement (ISDS) in international investment agreements between Member States in his Opinion in C-284/16 *Achmea*. The case concerned a preliminary reference by a German court (the Federal Court of Justice, or *Bundesgerichtshof*) regarding the validity of an award rendered by an ISDS tribunal under the Dutch-Slovak bilateral investment treaty (BIT). This monetary award against the Slovak government was the result of the partial reversal of the privatisation of the Slovak health care system. The Opinion is the latest development in the legal controversies surrounding ISDS and EU law after the *Micula* cases and, of course, the recent Request for an Opinion by Belgium (Opinion 1/17) on the compatibility of CETA with the EU Treaties. Although many aspects of this Opinion merit critical commentary, this post will focus on two issues:

1. the question whether ISDS tribunals set up under intra-EU BITs should be seen as courts common to the Member States and are therefore fully part of the EU's judicial

system.
2. whether the discrimatory access to ISDS in the Dutch-Slovak BIT is compatible with Article 18 TFEU and justified under EU internal market law.

Facts

The case concerns in essence a dispute over Slovak health care reforms between a Dutch investor (currently called Achmea) and the Slovak government. Achmea had been present on the Slovak insurance market since 1997 and expanded to the health insurance market in 2006. Following a number of privatisation measures in 2004 on the Slovak health care insurance market, subsequently revoked in 2006 by a newly elected social-democratic government, Achmea decided to bring a claim before an ISDS tribunal on the basis of the Dutch – Slovak BIT. The case got the attention of the legal service of the European Commission as it believed that, because of Slovakia's accession to the EU, such cases should be resolved under the EU's own judicial system on the basis of the internal market provisions, and not under the rival Slovak-Dutch BIT with its own form of dispute settlement. As a result, the legal service wrote an amicus brief to the established ISDS tribunal inviting the tribunal to decline jurisdiction, because the ISDS mechanism in the BIT:

"*conflict[s] with EU law on the exclusive competence of EU courts for claims which involve EU law, even for claims where EU law would only partially be affected*."

Unsurprisingly, the tribunal declined to do so and issued an award of around 25 million EUR against Slovakia. When Slovakia subsequently decided to challenge the award before German courts, these proceedings resulted in a preliminary reference by the *Bundesgerichtshof* essentially asking whether the ISDS mechanism set up under the BIT was compatible with the Treaties.

ISDS as a court common to the Member States within the meaning of Article 267 TFEU?

In his opinion, which closely follows an article written by his referendaire Paschalis Paschalidis, a former ISDS lawyer, the AG suggested that there was no such conflict of jurisdiction between the EU courts and ISDS. For the AG, the ISDS tribunal in question is not a rival to the EU's judicial system, *but part of it*. The AG therefore proposes that the ISDS tribunal is a court or tribunal within the meaning of Article 267 TFEU, common to two Member States. The AG comes to this conclusion by first suggesting that an ISDS tribunal is in fact a "court or tribunal" within the meaning of Article 267 TFEU and secondly that this "court or tribunal" is not an international court or tribunal but rather something like the Benelux court and should therefore be in the position to make preliminary references. Both points are prone to criticism.

Firstly, ISDS was invented to give foreign investors an alternative to domestic courts because of their alleged bias towards the host government and is therefore not part of the domestic judicial system. Indeed, the full court of the ECJ in Opinion 2/15 has already underlined that ISDS rivals with domestic courts and is not part of the domestic judicial system, when it held that ISDS *"removes disputes from the jurisdiction of the courts of the Member States*" (para. 292). It is quite surprising that the AG did not take this expression of the full court into consideration.

Second, the AG rather easily found that several criteria of the ECJ's case-law of what constitutes a 'court or tribunal' within the meaning of Article 267 TFEU were met. In applying the criteria laid out by the Court, the AG pays little attention to the fact that the tribunals are set up by an international agreement rather than through domestic law, to the ad-hoc nature of ISDS, and to the long-held criticism that ISDS arbitrators lack the basic judicial safeguards for judicial independence.

For instance, ISDS tribunals are certainly not institutionalised or permanent. They are established to resolve the dispute at hand only and dissolve afterwards, only in certain instances making use of established facilities. While ICSID does offer a somewhat institutionalized basis for the administration of disputes in Washington DC, UNICITRAL arbitration is not institutionalized at all. If the AG would be followed by the ECJ, the tribunal in the Gabriel Resources case (concerning the biggest cyanide based open pit mine project in Europe) would potentially become a court common to two Member States and have jurisdiction to resolve disputes which may involve questions of EU law. This tribunal is based in Washington DC and consists of three specialized in international investment law. The tribunal is not subject to any form of accountability towards the Romanian or the EU legal system (this 'independence' is of course the whole point of ISDS). Would such a tribunal be equally committed to the European project of an ever closer union and not only refer questions to the ECJ but also accept the autonomous nature of the EU legal order?

Moreover, the lack of independence of members of these tribunals is one of the most cited criticisms of the ISDS system. Because of the ad hoc and asymmetrical nature of the system, arbitrators have a financial incentive to favour expansive interpretations of investor rights, both in order to increase the legal fee in the case itself and to ensure reappointment in future cases. Moreover, ISDS arbitrators are not barred from working as lawyers for investors or host-governments on the side, creating potential conflicts of interest where one case may influence the outcome of another case. Even the European Commission's improved ICS system in that sense still does not meet the independence criteria of the Magna Carta for Judges, let alone the 'old' ISDS system. The lack of engagement with this point of public criticism is also striking.

Third, the AG suggests that constructing the ISDS tribunal under the Dutch-Slovak BIT as a court common to two Member States is similar to the approach taken by the ECJ towards the Benelux court in *Dior*. However, the AG omits two rather important points. In *Dior*, the Court's decision was clearly based on the consideration that proceedings before the Benelux court were but *"a step in the proceedings before the national courts leading to a definitive interpretation of common Benelux rules."* Indeed, the situation is rather different for ISDS awards which are final decisions enforceable throughout the world with very limited or no judicial review at all. This begs the question of what happens if a tribunal gets it wrong on EU law: who would be liable and what can be done about it if enforcement is sought outside the EU, in Geneva for instance? Should the Commission start infringement proceedings against the Netherlands or Slovakia?

Moreover, the AG does not discuss the special nature of the Benelux court as a court of the Benelux countries, which have a special status under the EU Treaties (Article 350 TFEU). If Member States are indeed more generally permitted to create bilateral or multilateral courts which may deal with questions of EU law more generally, this would have constitutional consequences for the "Community" method of rule-making, opening the door further for bilateralism and inter-governmentalism. This would seem to go against the spirit of Article 344 TFEU which states "*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*."

What about discrimination?

Another interesting aspect of the AG's Opinion is the approach towards discrimination on the EU internal market. The Dutch-Slovak BIT gives certain economic operators the advantage of resorting to ISDS. However, the agreement is discriminatory, in that only investors from the home state and their subsidiaries may bring a claim against the host state before an ISDS tribunal. All other economic operators are precluded from doing so, unless they are based in a State that is party to a BIT providing for rights equivalent to those in the Dutch-Slovak BIT.

According to the AG's own analysis, access to ISDS in disputes involving Slovak authorities is not available to Czech, Italian, Estonian, Irish, Cypriot and Lithuanian investors (except, in the case of the latter four States, in disputes in the field of energy). Nevertheless, in the AG's view, this discrimination is not caught by Article 18 TFEU, in accordance to which "*any discrimination on grounds of nationality shall be prohibited*" within the scope of application of the Treaties.

Central to the AG's reasoning is the parallel he draws between intra-EU BITs and bilateral conventions for the avoidance of double taxation (henceforth, simply, bilateral conventions) in force between Member States.

Indeed, he recommends that the ECJ apply the case-law on the Dutch-Belgian double taxation agreement (Case C-376/03, *'s-Hertogenbosch*).

In that ruling, the Court found that a Member State did not violate the treaty provisions on free movement of capital, even if reserved certain tax advantages to residents of a Member State, with which it had concluded a bilateral convention, whilst excluding other EU citizens from the same favourable fiscal treatment.

According to the AG, investors accessing ISDS on the basis of an intra-EU BIT are in the same position as non-resident taxpayers receiving an advantageous fiscal treatment on the basis of a bilateral convention.

The solution proposed by the AG to the *Bundesgerichtshof*'s question on discrimination is original. However, when taking into account the special status of bilateral conventions under EU law, the proposed analogy with BITs appears to require a more elaborate analysis, which the AG's Opinion does not provide.

In his Opinion in the *'s-Hertogenbosch* case, AG Ruiz-Jarabo Colomer had pointed out that the "*eradication of the phenomenon of double taxation is an objective of the Treaty, closely linked with [the] establishment of the internal market*" and that "*t<u>he fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders</u>*." (Emphasis added).

Hence, not only the compatibility of bilateral conventions on double taxation with the EU legal system is beyond doubt; these conventions are also a necessary instrument for the attainment of the internal market objectives. Their absence leaves in place serious obstacles to free movement in the Union.

Also, as the Commission submitted in the *Achmea* case, the conclusion of bilateral conventions on double taxation had an express legal justification in Article 293 of the EC Treaty: EU primary law required Member States to enter into negotiations in view of concluding bilateral conventions for the benefit of their nationals.

The repeal of Article 293 after the Lisbon Treaty has no impact on the compatibility of bilateral conventions with EU law: it simply removes the obligation for Member States to enter into negotiation to conclude such conventions. As AG Ruiz-Jarabo highlighted, the function of bilateral conventions is to eliminate a fundamental obstacle to the freedoms of establishment and of movement of capital. It therefore seems safe to assume that they are now part of the internal market *acquis* and valid, even without a provision expressly requiring their negotiation.

Can the same be said of intra-EU BITs? Are they necessary to the functioning of the internal market or to achieve other Treaty objectives? Would their absence be an obstacle to free movement and, if so, would this obstacle be of such a fundamental nature to justify a derogation from the non-discrimination principle?

The analysis in AG Whatelet's Opinion does not support an affirmative answer to these questions.

Indeed, there seem to be valid reasons in support of negative answer: one may argue that neither the EC Treaty nor the TFEU could have encouraged Member States to abandon the "Community" method to promote cross-border investments on a bilateral basis, since this would have been intrinsically incompatible with the idea of a genuine internal market, comprising "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*". BITs have the effect of fragmenting the internal market into a complex and uneven network of bilateral regimes, virtually re-creating the borders that Union law is meant to erase and potentially distorting investment patterns within the EU.

Furthermore, as we know, free movement in the EU has been achieved through negative integration (the direct application of the Treaty provisions on the fundamental freedoms to remove obstacles in national laws) or through positive measures (secondary EU legislation, harmonising national measures affecting the internal market), without the need of conferring investment rights or special remedies for EU undertakings or citizens exercising their freedom of movement.

Directive 2006/123/EC (the Services Directive) expressly requires Member States to observe the general principles of non-discrimination, transparency and proportionality, as well as to make available information on "*the means of redress in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers*". By doing so, the Services Directive suggests that such means of redress must be made available without distinctions to all EU operators, as they are provided for by national law. Negotiating access to such remedies on a bilateral basis is neither required nor justified, particularly when it leads to a range of different treatments on the basis of nationality.

In his Opinion, the AG further considers the fact that access to ISDS is not extended to investors of other Member States to be a "*consequence inherent in the bilateral nature of BITs*" and that ISDS is "*not a benefit severable from the remainder of a BIT, but is an integral part thereof to such an extent that a BIT without an ISDS mechanism would be pointless since it would not achieve its aim, with is to encourage and attract foreign investment*."

Again, the parallelism with Paragraph 61 of the *'s-Hertogenbosch* ruling does not fully convince, once the context of this case is taken into account: Member States intervening in the case had pointed out that the conclusion of bilateral conventions was based on an assessment of the tax systems involved and that, therefore, the conventions' provisions could not be applied beyond their scope. The selective application of the rights and obligations deriving from bilateral double taxation conventions was, in the Court's view, necessary to preserve the ”*overall balance*” of these agreements (the discussion on this point is well reflected in AG Ruiz-Jarabo’s Opinion, notably at Point 99 and subs.).

Against this background, the AG’s Opinion in the *Achmea* case appears to simply make the point that a bilateral agreement must be applied bilaterally. However, it does not clearly explain why the resulting discrimination should be acceptable from the standpoint of EU law.

Concluding remarks

Taken as a whole, the Opinion of the AG appears too eager to defend the compatibility of intra-EU BITs with the EU Treaties failing to engage with the widespread criticism of the ISDS system. Perhaps even more importantly, the Opinion fails to take into account several crucial aspects of EU primary law, such as the special status of the Benelux within the EU and the context in which double taxation treaties operate. Given the constitutional importance of this case, the Opinion misses the much needed opportunity for a thorough and balanced reflection on the many challenges that ISDS, and investment disputes in general, pose to the EU legal and judicial system.

[correction 22 March 2018: the post previously mentioned that Achmea had sought to enforce the award before German courts, but it was the Slovak Republic that brought the action]

TOPICS:
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