W(h)ither ISDS? The Impact of *Achmea* on Pending Arbitrations under Member States' BITs and the Energy Charter Treaty
Achmea: The principle of autonomy of EU law and its effects on ISDS

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Overview

• The principle of autonomy of EU law
  - definitive interpretation of EU law
  - The oversight of the CJEU

• The implications of autonomy:
  - relevance for other intra-EU cases and the Energy Charter Treaty
  - relevance for extra-EU BITs

• The legal effects of incompatibility
  - The obligations of investment tribunals
  - The obligations of Member States
  - The obligations of national courts
  - The rights of foreign investors
Autonomy as an EU law principle

• autonomy of the EU legal order: a constitutional principle of EU law aiming to identify the relationship between EU law, national and international law

  - internal autonomy: relationship between EU law and national law
  - External autonomy: relationship between EU law and international law

• The function of the principle of autonomy of the EU legal order

  - Unlike conflict of laws rules, aims to guarantee the integrity of the EU legal order

• judicial autonomy, as a rule of primary EU law: Art 19 TEU embodying the role and prerogatives of the CJEU, as the EU institution organ assigned the exclusive authority to provide authentic interpretation of primary EU law rules and determine the validity and interpretation of secondary EU law rules.
Autonomy and definitive interpretation of EU law

• A threat to the autonomy of the EU legal order arises only if ISDS can result in a **binding/ definitive interpretation** of EU law. The **mere possibility** of providing a binding interpretation of EU law suffices for autonomy to be breached.
  - Opinion 1/91
  - Opinion 2/13

• Do arbitral awards offer a **definitive** interpretation of EU law rules?
  - The intra-EU dimension
  - The extra-EU dimension
The conditions of autonomy: the interpretation of EU law

• EU law as applicable law under Netherlands-Slovakia BIT

• For autonomy purposes it does not matter if EU law is “applicable law” under the relevant BIT or how EU law is viewed under public international law

• What matters is the result: if a tribunal offers a binding interpretation of EU law
Autonomy and definitive interpretation of EU law: intra-EU BITs (I)

- In areas under EU law, Member States are precluded from adopting *inter se international obligations* that may conflict with EU law rules

- Autonomy acts as “external” primacy

- Only the CJEU can decide authoritatively whether such overlap leads to a conflict

- Intra-EU BITs cover the same area as EU law
  - intra-EU BITs and FET, expropriation, MFN, NT etc (AG Wathelet)

- By applying intra-EU BITs tribunals indirectly determine that there is no conflict with EU law
Autonomy and definitive interpretation of EU law: intra-EU BITs (II)

• Opinion 2/13 and the principle of mutual trust
  - when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States (para. 192),
  - “the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties ... in their relations with each other, including where such relations are governed by EU law... [violate EU law]” (para. 194)
Autonomy and definitive interpretation of EU law: EU IIAs

• Necessary to have a special link to EU law
  - Homogeneity (Opinion 1/91, Opinion 2/00)
  - Special link to sources of EU law (Opinion 2/13)
  - The cyclical argument of EU agreement as integral part of EU law
The oversight of the CJEU

• Autonomy is violated only if the CJEU cannot rule on the matter

• Arbitral tribunals are not Courts/ tribunals of a Member State
  - The analysis of AG Wathelet on arbitral tribunal characteristics
  - CJEU’s insistence on arbitral tribunals not being tribunals of Member States, as not part of their judicial system
  - More convincing argument in Opinion 1/09: an international court set up by an *inter se* agreement of Member States is not a Court or tribunal of a Member State
  - Patent court explicitly created as a national court!
The obligations arising out of intra-EU BITs incompatibility with the principle of autonomy

• The obligations of investment tribunals

• The obligations of Member states

• The obligations of national courts

• The obligations of EU investors
The EU law obligations of investment tribunals

• Arbitral tribunals are not under any (EU law) obligation to respect EU law
  - Arbitral tribunals not courts or tribunals of Member States

• Avenue of arguing international law invalidity/ inapplicability has failed so far in investment tribunals

• Would the denial of jurisdiction by tribunals render the termination of intra-EU BITs obsolete?
  - No precedence and treaties are different legal instruments
  - incompatibility remains: the potential use of ISDS suffices
The obligations of Member States: amending/ terminating intra-EU BITs

• EU law incompatibility does not (necessarily) result in international law invalidity or inapplicability

• Member States are under an obligation to eradicate incompatibility = amend/ terminate ISDS provision in accordance with international law

• The question of discrimination not answered by the Court!

• Member States can be held responsible for applying rules incompatible with EU law
  - Article 258 TFEU and infringement proceedings
Terminating intra-EU BITs

• Termination/ amendment needs to take into account the VCLT provisions
  - Unilateral termination possible, if no notice is given, then sunset clauses apply
  - Preferably done jointly: multilateral termination via EU/ MS treaty?
  - Consider BIT termination provisions, in particular sunset clauses
The question of sunset clauses

- The legal obligation to remove sunset clauses
  - The obligation to take “all appropriate and available measures” to eradicate incompatibilities
  - The duty of cooperation under Article 4(3) TEU

- The Czech example of consensual termination
  - two stage approach
  - First amendment of BIT to terminate the sunset clause
  - Secondly, consensual termination of the BIT
  - Followed with Italy, Malta, Denmark
The EU law obligations of national courts

• The obligation:
  - *Exportur*: National courts should disapply the provisions that are incompatible with EU law
  - applying the principle of primacy
  - The international law validity of intra-EU BITs remains intact, but they are disapplied by national courts

• The implications
  - *Eco Swiss*: EU law is public policy ground that allows review of awards
  - National courts seized of arbitrations where the seat or the enforcement is sought in any EU Member State **must** deny recognition/ enforcement
The obligations of Member States: Awards rendered/enforced outside the EU

- The conflicting obligations of Member States
  - Member States obliged under international law to comply with enforcement of such awards
  - This international law obligation of Member States does not conflict with EU law obligation to eradicate incompatibility but...
  - may result in a different violation of EU law

- Payment of awards constitutes state aid
  - Commission Decision 2015/1470 (Micula)
  - Payment of an award by a MS is not outside EU state aid law (Asteris)
  - Payment of compensation is not state aid when lawful
  - **Do awards rendered under ISDS based on intra-EU BITs constitute lawful compensation under EU law?**
    - MS willing to notify to COM
    - COM state aid decisions can be enforced against Member States
The rights of Member States: awards already enforced

- Can Member States claim back compensation paid under enforced intra-EU BITs?
  - Incompatibility results in obligations to eradicate incompatibilities, disapplying intra-EU BITs = implications *ex nunc*

- Possible under State aid rules?
  - Limitation period on recovery of aid (10 years) (C-52/84)
  - The question of lawful compensation
  - Political will by Member States and Commission?
The EU law rights of investors

• Would any amendment/termination of intra-EU BITs/denial to enforce/claim of paid compensation violate investors’ rights under EU law? = The doctrine of legitimate expectations

  - protection of assurances given by Member States?
  - protection of assurances regarding unlawful measures?

  - Legality of the subject matter of the assurances: only in exceptional circumstances can investors rely on the doctrine of legitimate expectations that unlawful measures can be maintained, such as in situations where similar measures have been found lawful (T-427/04 & T-17/05 France Telecom)

  - COM’s position under Eastern Sugar and Eureko

• Incompatibility only affects ISDS (not substantive provisions)

  - Enforcing intra-EU BITs in national courts
  - Settlement is still possible!
Achmea: an international law perspective

Professor Stefan Talmon, University of Bonn
“Ships that pass in the night, and speak each other in passing, only a signal shown, and a distant voice in the darkness; So on the ocean of life, we pass and speak one another, only a look and a voice, then darkness again and a silence.” (Henry Wadsworth Longfellow)
“Whatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules.”

(Achmea, Award on Jurisdiction, 2010)
The starting point: a dispute over jurisdiction

Achmea

jurisdiction

Slovak Republic

Article 8 BIT

Article 267, 344 TFEU

CJEU

Articles 267, 344 TFEU preclude application of Article 8 BIT
Article 267 TFEU
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties.

Article 344 TFEU
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 therein.

“autonomy of the EU legal system”
“the autonomy of EU law [...] is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law.”
“the founding treaties of the EU, unlike ordinary international treaties, established a new legal order”

“the EU has a new kind of legal order, the nature of which is peculiar to the EU”
(Opinion 2/13)

“the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the ‘basic constitutional charter’”
(AG Maduro, Kadi and Al Barakat)
Conflict between international and domestic law

Article 8 BIT

The principle of the autonomy of EU law

Article 27 VCLT
A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
Conflict between successive treaties: termination

Article 59 VCLT
1. A treaty shall be considered terminated if all the parties to it conclude a later treaty relating to the same subject matter and
   (a) the parties intended that the matter should be governed by the later treaty; or
   (b) the provisions of the treaties are so far incompatible that the two treaties are not capable of being applied at the same time.
Conflict between successive treaties: termination

BIT / ECT  ↔  TFEU

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Consequences of the termination of the BIT by conclusion of the TFEU

Article 70 VCLT
Unless the treaty otherwise provides or the parties otherwise agree, the termination of the treaty [...] in accordance with the present Convention:
(b) Does not affect any right, obligation [...] of the parties created [...] prior to its termination.

Article 13 (3) BIT
In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.
Conflict between successive applicable treaties: conflict rules

Article 30 VCLT
1. [...] the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
Priority clauses in a treaty
1. Article 30 (3) – (5) VCLT as residual rules
2. The general priority clause in Article 30 (2) VCLT

When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. Specific priority clause in Article 3 (5) BIT

If [...] obligations under international law [...] established hereafter between the Contracting Parties in addition to the present Agreement contain rules [...] entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.
Lex posterior-rule in Article 30 (3) and (4)(a) VCLT

**Article 30 (3) VCLT**
When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [...] in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

**Article 30 (4)(a)**
When the parties to the later treaty do not include all the parties to the earlier one:
(a) As between States parties to both treaties the same rule applies as in paragraph 3.
Compatibility of Article 8 BIT with the Articles 267, 344 TFEU

• Provisions are incompatible if they “are not capable of being applied at the same time” (Article 59 (1)(b) VCLT)
• Incompatibility requires that one provision requires what the other provision prohibits (EURAM v. Slovak Republic)
• Provisions are incompatible if they are mutually exclusive
• Incompatibility requires that an obligation under the BIT cannot be fulfilled without violating EU law
Compatibility of Article 8 BIT with the Articles 267, 344 TFEU

**Article 8 BIT**

The Slovak Republic consents to submit an investment dispute to an arbitral tribunal which may apply and interpret EU law with binding force for the Slovak Republic.

**Article 267, 344 TFEU**

The Slovak Republic must not consent to submit an investment dispute to an arbitral tribunal if the decision of the arbitral tribunal impairs the autonomy of the EU legal system.
Potential or actual incompatibility

“It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding [...] is not in principle incompatible with EU law [...] , provided that the autonomy of the EU and its legal order is respected.” (C-284/16, Achmea, Judgment, 6 March 2018, para. 57)

actual incompatibility

objection to the tribunal’s jurisdiction based on Articles 267, 344 TFEU does not possess an exclusively preliminary character and must be joined to the merits
The world according to general international law

• The principle of the autonomy of the EU legal system is a principle of EU constitutional law and not treaty law
  Article 27 VCLT applies, Article 8 BIT stands

• The BIT and the TFEU do not relate to the same subject-matter
  Articles 59 and 30 VCLT do not apply, Article 8 BIT stands

• There is no general *lex posterior*-rule with regard to treaties not relating to the same subject-matter in general international law
  Article 8 stands

• Specific priority clauses in treaties take precedence
  Article 3(5) BIT applies, Article 8 BIT stands
Plain sailing for investment arbitration!

Thank you!
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