

Nicolas de Sadeleer

The End of the Game.
The Autonomy of the EU Legal Order
Opposes Arbitral tribunals under intra-EU
BITs



Professor EU Law, USL
Jean Monnet Chair
Guest Professor, UCL



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The judgment

A two stage process

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1. Features of the EU legal order

An international agreement cannot affect the **allocation of powers** or, consequently, the **autonomy** of the EU legal order (§ 32). That principle is enshrined in Article 344 TFEU.

The autonomy 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" (§ 33).

- **Structured network of principles and rules**
- **A set of common values**

1. Features of the EU legal order

+ Principle of **mutual trust**

+ **Sincere cooperation**

+ Need to ensure the **uniform and effective interpretation of EU law**

> CJEU and domestic courts must ensure full application of EU law (Article 19 TEU).

Preliminary ruling procedure (Article 267 TFEU)

'Keystone' of the EU judicial system.

The object of that procedure is to secure the **'uniform interpretation** of EU law, thereby serving to ensure

- + its **consistency**,
- + its **full effect** and its **autonomy**
- + **the particular nature of the law** established by the Treaties'.

2. Features of the intra-EU ISDS: a 3 steps process

- + A . Is EU law likely to be interpreted and applied?
- + B. Can the arbitral tribunal be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU?
- + C. Review of the arbitral award by the courts of the Member State.

A . Is EU law likely to be interpreted and applied?

+ Although the arbitral tribunal had to rule on the case in light of the investment rights, it nevertheless 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". (§42).

B. Is the arbitral tribunal be regarded as a court or tribunal of a Member State?

“**Exceptional nature**” of the ISDS compared with that of the national courts.

The tribunal instituted under the Netherlands-Slovakia BIT is **not part of the “judicial system” of the contracting parties** (§45).

C. Is the arbitral tribunal be regarded as a court or tribunal of a Member State?

ISDS differ from:

> **commercial arbitration tribunals**, the awards of which can be subject to a limited review by the national courts,

> **a tax tribunal in Portugal** (Tribunal Arbitral Tributário)

> **Benelux Court**

C. Review of the arbitral award by the courts of the Member State

- + Judicial review can only be exercised by the tribunal instituted by the Netherlands-Slovakia BIT "to the extent that national law permits".
- + The German Code of Civil Procedure provides only for limited review (§53).

Commercial arbitration and ISDS

- + The **commercial arbitration** procedure originates in the "freely expressed wishes of the parties".
- + whereas the **investment arbitration** at issue stems from a bilateral treaty, by which Member States agree "to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which ... Article 19(1) TEU requires them to establish in the fields covered by EU law". (§55).

Inconsistency of the ISDS with EU law

By concluding the BIT, the MSt have established a mechanism for settling disputes between an investor and a MSt « which could prevent those disputes from being resolved in a manner that ensures the **full effectiveness of EU law** » (§56).

Inconsistency of the ISDS with EU law

Call into question

- + The principle of mutual trust between the MSt
- + The preservation of the particular nature of EU law (§58).

2. Future of intra-EU arbitration



2. The future of intra-EU arbitration

- + The preliminary rulings of the CJEU is binding on other courts *erga omnes*.
- + M.St. that are contracting parties to an EU-internal BIT are obliged to comply with the ruling in *Achmea* as of 6 March 2018.

2. The future of intra-EU arbitration

- + M.St. are required to **denounce** the arbitration clauses contained in the BITs as soon as possible.
- + Infingement proceedings (Article 258 TFEU)
- + Intra-EU investors cannot set up a more protective layer of investment protection than the one provided for under EU law.
- + **No future** for intra-EU BITs.

3. *Achmea* and pending arbitration proceedings



Implications for BITs that do not allow arbitral tribunals to take national law into account

- + In accordance with Article 8(6) of the Netherlands-Slovakia BIT, the tribunal has to take into account "*the law in force of the Contracting Party concerned*" as well as the provisions of the BIT.
- + Is EU law applicable where the BIT does not allow the arbitral tribunal to consider national law, or only allows it to "apply national law as a matter of fact"?

Implications for BITs that do not allow arbitral tribunals to take national law into account

+ **Formalistic argument.** From an EU perspective, domestic courts have to focus on the **nature** and the **effects** of the arrangement at **issue** and not on its **denomination**.



+ **Cross-border investments** are falling within the scope of the **internal market**.

Achmea and pending arbitration proceedings

- + ***Achmea***: the annulment proceedings could be brought before German courts. However, the CJEU took the view that the procedural safeguard for the correct implementation of EU law was insufficient.
- + **Arbitrations held under UNCITRAL**: domestic court could review whether the award breaches a public policy interest.
- + **Arbitrations held under ICSID Convention (binding on all MSt but Poland)**: awards are final and binding (Article 54).

Achmea and pending arbitration proceedings

Non ICSID awards might be challenged in state courts:

- + > **annulment proceedings** at the seat of the investment tribunal (see *Achmea*, *Nova Energia*)
- + > **recognition or exequatur proceedings** under Article V NYC
- + > **execution of the award** (juge des saisies, Article 1395 Belgian Judicial Code; Articles 7 and 8 loi hypothécaire; principe est l'insaisissabilité des biens appartenant aux pouvoirs publics in accordance with Article 1412 bis)

Referral for preliminary rulings (Article 267 TFEU)

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- + Where procedural domestic law requires the court to grant an application for annulment of an award where such an application is founded on the failure to observe **national rules of public policy**,
- + such an application must also be granted where it is founded on **the failure to observe EU law** (Article 102 TFEU)