A View on the Achmea Judgment

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The purpose of the presentation

- To identify key tenets of the CJEU's reasoning in the Achmea case
- To have a look at rather weak spots in the Court's argumentation
- To highlight the current tension between EU law and international investment law and arbitration

The CJEU Achmea judgment (C=284/16)

- The Dutch company Achmea merged with another company providing health insurance services in Slovakia.
- Slovakia thereafter radically altered its state policy with regard to health insurance.
- Achmea commenced an investment arbitration against Slovakia, based on a BIT between the Netherlands and the latter, arguing breaches of standards under this treaty.
- The seat of arbitration was *Frankfurt am Main* in Germany.
- Achmea won the dispute, but Slovakia requested anullment of the award.
- *BGH* decided to verify whether the award would be incompatible with EU law, as Slovakia argued.

Core legal issues

- Is a dispute resolution provision providing for arbitration contained in an intra-EU bilateral agreement (BIT) compatible with EU law? (art. 267 and 344 TFEU)
- What should the national court asked for enforcement of the arbitral award do if such provision is contrary to EU law?

The CJEU's answer

- The dispute resolution clause is irreconcilable with fundamental principles of EU law, in particular autonomy, sincere cooperation and division of powers among EU law organs

Reasons

- German law, which includes EU law, is applicable in the investment arbitration under the BIT
- The specific nature of EU law may be maintained solely by MS' courts and the CJEU, as these may ensure primacy, direct effect, consistency, and uniform application of EU law
- Arbitrators are not obliged to submit preliminary references to the CJEU
- MS cannot resolve their dispute with investor arising out of an intra-EU BIT in arbitration since it would contradict article 344 TFEU
- The review of investment arbitral award is limited under the German law - the compliance with EU law cannot be guaranteed

The context

- A lasting tension between EU and investment law
- The Commission has sought to introduce an EU-law dispute resolution mechanism for intra-and extra-EU investment disputes (an EU investment court)
- MS mostly unsuccessful with the arguments based on EU law before investment tribunals (e. g. Anglia Auto Accessories Ltd. v. Czech Republic, Busta and Busta v. Czech Republic) and facing the enforcement of arbitral awards (e.g. Micula v. Romania)

The Weak points of the decision

- Lack of an analytically reliable distinction between investment and commercial arbitration (hence possible negative spill-over effects on the latter)
- Art. 267 TFEU has never been addressed to arbitrators, hence no surprise they do not comply with it
- The dispute between the investor and Germany does not fall within the scope of art. 344 TFEU (only disputes between MS)
- No effective access to justice for an EU investor
- Important questions left without answer (E. g., what about arbitrations based on BITs that do not refer to domestic law as applicable?)

A Reaction by Arbitral Tribunals

- Tribunals refuse Achmea in unison (e. g. the *Vattenfall II* award on jurisdiction): https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf