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Edited by

Björn Arp
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Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
E-mail: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-4663-6

e-Book: ISBN 978-94-035-4693-3
web-PDF: ISBN 978-94-035-4703-9

Printed in the United Kingdom.

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Developments of Investment Arbitration in the European Union: *Achmea* and Beyond

José Carlos Fernández Rozas & Jaime Gallegos Zúñiga

§4.01 INTRODUCTION

The European Union (EU)'s assumption of investment law competences has not been consistent over the years. The European Commission has followed a piecemeal and not always adequate approach. This becomes particularly clear in the Commission's contemporary treatment of the pre-Lisbon Treaty investment system, which relied on bilateral investment treaties (BITs) signed between the EU Member States with investment arbitration provisions.[1] Part of the lack of a common position on investment pre-Lisbon, the EU also had very limited powers to negotiate investment agreements with third states.

The inconsistencies become particularly noteworthy in regard to BITs, which are international treaties subject to public international law and carry obligations for states parties that cannot be ignored. The EU's treatment differs between Intra-EU BITs and agreements between the Member States and third countries. But in both cases, it is based on an a priori consideration: the EU's opposition to those treaties, without offering alternative solutions at an initial stage. The transitional regime established by Regulation (EU) No. 1219/2012 of December 12, 2012, establishing transitional arrangements for bilateral investment agreements between the Member States and

1. Davide Rovetta, *Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues*, Eur. Y.B. Int'l. Econ. L. 221–233 (2013).

third countries,[2] brings about a harmonious solution. Nevertheless, individual solutions and arrangements persist. For example, the Commission tries to oppose those solutions that are contrary to its views by filing infringement proceedings.[3]

If a common denominator can be extracted from the EU, position during the contemporary period can be best described as a bias against the investment dispute settlement system in force both in BITs and in the Energy Charter Treaty (ECT), without taking into account its advantages. Three circumstances have conditioned the Commission's incoherent policy. First, the espousal of the claims against investment arbitration from certain groups, which has led to politicizing investment arbitration while it initially was created precisely with the aim of depoliticizing investment disputes. Second, the impact of the Court of Justice of the European Union (CJEU)'s jurisprudence in the cases C-205/06 (*Commission / Austria*), C-249/06 (*Commission / Sweden*) and C-118/07 (*Commission / Finland*), which declared the incompatibility of BITs with certain provisions on capital and payments in the EU Treaties.[4] In these proceedings, the Commission had argued, among other things, that the Member States had breached their obligation to bring their bilateral commitments in line with EU primary law in accordance with Article 307.2 of the Treaty Establishing the European Community (TEC). In all three decisions, the CJEU declared that Austria, Sweden and Finland had failed to comply with their obligations under the TEC, after pointing out that the clauses on the free transfer of capital contained in their BITs with third countries were contrary to the TEC, and that these states shall renegotiate or terminate those treaties. Specifically, the CJEU held that those clauses were incompatible with Articles 57.2, 59 and 60.1 TEC on the free movement of capital and payments; that it was up to the Member States to request the amendment of the respective treaties; and if these states found any incompatibility with EU law that could not be corrected with an amendment, they were obliged to denounce it, provided that the incompatibility was sufficiently clear.[5] These conclusions of the CJEU have been extended to almost all BITs concluded by the EU Member States with third countries.[6]

The negotiations between the EU and the US for a Transatlantic Trade and Investment Partnership (TTIP) agreement between 2013 and 2016 are also noteworthy. In these negotiations, the Commission's position was guided by the will to include certain criteria on transparency, and the possible creation of an appellate mechanism against arbitral awards. However, the Commission lacked well-structured policy

2. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, 40–46.
3. José Carlos Fernández Rozas, *Conjeturas en torno a la nueva política global europea en materia de inversión internacional tras el Reglamento nº 912/2014*, La Ley Unión Europea, 5–27 n. 18 (2014).
4. *See* Nikolaos Lavranos, *European Court of Justice–infringement of Article 307–Failure of Member States to Adopt Appropriate Measures to Eliminate Incompatibilities between the Treaty Establishing the European Community and Bilateral Investment Treaties Entered into with Third Countries Prior to Accession to the European Union*, 103 Am. J. Int'l L. 716–722 n.4 (2009); Francisco José Pascual Vives, *El subsistema regional comunitario ante el régimen internacional de protección de las inversiones extranjeras*, 36 Revista de Derecho Comunitario Europeo, 467–495 (2010).
5. *Ibid*.
6. *Ibid*.

guidelines and position papers to present its case during the negotiations effectively.[7] While those negotiations were not finalized, these approaches can be found in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) that came into force provisionally in 2017.[8]

§4.02 THE 2018 *ACHMEA* DECISION

After more than 150 intra-EU investment arbitrations, the CJEU's historic ruling C-284/16 in the matter of *Achmea v. Slovak Republic*, decided by majority,[9] represented a paradigm shift[10] as it declared the incompatibility between the arbitration clause included in the 1991 BIT between the Netherlands and Czechoslovakia, and EU law.

In 1993, Slovakia succeeded in the obligations of Czechoslovakia, including those contained in the 1991 BIT. Slovakia joined the EU in 2004. After Slovakia privatized the health insurance market, Achmea, part of a Dutch company, invested in that market during 2004. Following a change in government in 2006, the new Slovakian authorities reversed a portion of those economic policies, adopting such measures as prohibiting health insurance companies from distributing profits. In 2008, Achmea initiated arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) against Slovakia, using the city of Frankfurt am Main as the seat of arbitration, subjecting the dispute to German law, and arguing that the prohibition to distribute profits was a breach of Article 4 of the Slovakia-Netherlands BIT.[11] Slovakia, with the support of the European Commission, pleaded lack of jurisdiction, arguing the arbitral procedure provided for in Article 8.2 of the BIT was incompatible with EU law, as Slovakia had become an EU Member State.

The arbitral tribunal dismissed this jurisdictional objection in October of 2010. Slovakia's subsequent setting aside proceedings before the German courts against the arbitral tribunal's decision on jurisdiction were also dismissed.

The final ruling, issued in December of 2012, concluded that Slovakia had violated the principle of fair and equitable treatment (FET) and the free transfer of profits clause, ordering Slovakia to compensate the Dutch company with a sum in excess of EUR 22 million. Slovakia filed for setting aside before the Higher Regional Court of Frankfurt am Main, which was dismissed. Slovakia appealed on a point of law to the *Bundesgerichtshof* (German Federal Court of Justice) on the basis that the arbitration clause contained in Article 8 of the BIT was incompatible with Articles 18, 267, and 344 of the Treaty on the Functioning of the European Union (TFEU). In this

7. European Commission, The Transatlantic Trade and Investment Partnership (TTIP) https://ec.europa.eu/trade/policy/in-focus/ttip/.
8. *See* in this book, Ch. 3, David A. Gantz, *Investor-State Dispute Settlement in Canada's Recent Trade Agreements: Explaining the Differing Approaches in CETA, USMCA, CPTPP and the Canada-China FIPA*.
9. EU:C: 2018:158. Bjorn Arp, *Slowakische Republik (Slovak Republic) v. Achmea B.V.*, 112 Am. J. Int'l L. 469 n. 3 (2018).
10. Burkhard Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, 19 Magazine Eletrônica of Direito Processual 116 n. 3 (2018).
11. *Achmea B.V.* v. *The Slovak Republic*, UNCITRAL, PCA Case No. 200813.