# Category: International Investment Law

January 8, 2018

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

***By Andrea Carta and Laurens Ankersmit***

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 enforcement 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. Continue reading →



Written by Andrea Carta 1 Comment Posted in Courts of Member States, Direct effect and primacy, EU constitutional law, External Relations, Institutional law, Internal Market, International Investment Law, Public International Law Tagged with AG Wathelet in C-284/16 Achmea, Article 267 TFEU, autonomy of EU law, Benelux, concept of a 'court of a member state', Dutch-Slovak BIT, intra-EU investment agreements, ISDS, tax treaties
December 15, 2017

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## Case C-600/14, Germany v Council (OTIF). More Clarity over Facultative ‘Mixity’?

***By Hannes Lenk and Szilárd Gáspár-Szilágyi***

1. **Setting the context**

Opinion 2/15 on the division of requisite competences between the Union and its Member States for the conclusion of the EU-Singapore FTA has most certainly caused a flurry of academic discussions. Amongst the various topics discussed, two come to mind that are important for this short analysis. First, did the CJEU intend with its reasoning to effectively abolish ‘facultative mixity’ and ‘facultative EU-only’ agreements? (see here, here and here). Second, by placing almost all aspects of the EU-Singapore FTA under exclusive EU competences, with the exception of ISDS and non-direct foreign investment, did the Court of Justice implicitly determine the future of EU trade and investment policy? (see here, here and here). In other words, with a Commission that is determined to prioritize EU-only agreements, is the conclusion of mixed investment agreements in parallel to exclusive trade agreements a logical consequence of Opinion 2/15? Continue reading →



Written by Hannes Lenk 1 Comment Posted in EU constitutional law, External Relations, International Investment Law, International Trade Law Tagged with Case C-600/14, mixed agreements, Opinion 2/15
September 6, 2017

## Case C 142/16 Commission v Germany: the Habitats Directive meets ISDS?

***By Laurens Ankersmit***

Recently, the ECJ has found Germany in breach of its obligations under the Habitats Directive for authorising the operation of a coal-fired power plant near Hamburg, Germany without an appropriate environmental impact assessment. The case is the latest addition to a series of legal battles surrounding the environmental impact of the plant. On the one hand, the negative environmental impact, in particular for fish species in the Elbe river, has led to litigation opposing the authorisation of the plant, including these infringement proceedings before the ECJ. On the other, Swedish power company Vattenfall has opposed the environmental conditions attached to its water use permit before a national court and before an ISDS tribunal which in its view would make the project ‘uneconomical’. This post will discuss the general legal background of the case, the ECJ judgment, and comment on the wider implications of these legal battles for the relationship between investment law and EU law. Continue reading →



Written by Laurens Ankersmit No comments Posted in Environmental Law, EU constitutional law, External Relations, International Investment Law Tagged with Article 6 (3-4) Habitats Directive, Briels, Case C−142/16 Commission v Germany, compensating measures, Habitats Directive, ISDS, mitigating measures, Moorburg powerplant, Vattenfall I ISDS case, water use permit
June 20, 2017

## Opinion 2/15: Maybe it is time for the EU to conclude separate trade and investment agreements

***By Szilárd Gáspár-Szilágyi***

Opinion 2/15 is already causing quite a stir in legal academia. While some take an EU law perspective, others look at it from the perspective of investment law or public international law. In this short post I will not focus on purely legal issues. Instead, I will look at the Opinion's effects on the EU's investment policy and propose a change in the Commission's approach to the negotiation of international economic agreements. Continue reading →

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May 18, 2017

## Opinion 2/15 and the future of mixity and ISDS

***By Laurens Ankersmit***

Opinion 2/15 on the EU's powers to conclude the EU-Singapore Free Trade Agreement (EUSFTA) delivered Tuesday received considerable attention from the press. This comes as no surprise as the Court's Opinion has consequences for future EU trade deals such as CETA and potentially a future UK-EU FTA. Despite the fact that the ECJ concluded that the agreement should be concluded jointly with the Member States, the Financial Times jubilantly claimed victory for the European Union, belittling Wallonia in the process. This victory claim calls for three initial comments as there are aspects of the Opinion that might merit a different conclusion. Continue reading →

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January 10, 2017

## The power to conclude the EU's new generation of FTA's: AG Sharpston in Opinion 2/15

***By Laurens Ankersmit***

To say that the EU's new generation of trade agreements (such as CETA and TTIP) is politically controversial is becoming somewhat of an understatement. These free trade agreements (FTA), going beyond mere tariff reduction and facilitating hyperglobalization, have faced widespread criticism from civil society, trade unions, and academics. It may come as no surprise therefore that the legal issue over who is competent to conclude such agreements (the EU alone, or the EU together with the Member States) has received considerable public attention, ensuring that the Advocate General Sharpston's response to the Commission's request for an Opinion (Opinion 2/15) on the conclusion of the EU-Singapore FTA (EUSFTA) has made the headlines of several European newspapers.

The Opinion of Advocate General Sharpston in Opinion 2/15, delivered on 21 December, is partly sympathetic to the Commission's arguments on EU powers, but ultimately refutes the most outlandish of the Commission's claims to EU power vis-à-vis that of its constituent Member States. The Opinion is of exceptional length (570 paragraphs, to my knowledge the longest Opinion ever written), and contains an elaborate discussion on the nature of the division of powers between the EU and the Member States and detailed reasoning on specific aspects of the EUSFTA such as transport services, investment protection, procurement, sustainable development, and dispute settlement.

Given the breadth of the AG's conclusions, the aim of this post is to discuss the Opinion only in relation to investment protection and to reflect upon some of the consequences for the Commission's investment policy, perhaps the most controversial aspect of this new generation of trade agreements. Continue reading →



Written by Laurens Ankersmit 3 Comments Posted in Brexit, EU constitutional law, External Relations, Free movement of capital, International Investment Law, International Trade Law, Public International Law Tagged with AETR, common rules, ERTA, EU exclusive competence, EU implied exclusive powers, EU implied powers, EU-Singapore Free Trade Agreement, EUSFTA, foreign direct investment, Opinion 2/15, portfolio investment
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November 15, 2016

## ISDS in EU FTIAs. Yes, No, Maybe? A Domestic Enforcement Perspective

*by Szilárd Gáspár-Szilágyi*

### I. SETTING THE STAGE

In recent years ISDS has been on the lips of many politicians, academics, NGOs and even laymen, some of whom have recently 'discovered' that there is a mechanism through which foreign investors (often large multinationals, but not always) can bring claims against host-states before an international arbitral tribunal. The arguments in favour and against ISDS are plentiful, but one always catches my eyes. According to this argument (page 3), the EU does not need ISDS in its new free trade and investment agreements (FTIAs) with developed states, because the original rationale of this mechanism was to protect foreign investors from host-state jurisdictions where basic tenets of the rule of law were not observed. However, trading partners such as the US or Canada have well-functioning judicial systems that protect foreign investors; therefore, ISDS is not needed.

As a novice to the field of EU investment law, I must confess I am not yet fully convinced by the benefits of ISDS. Nevertheless, the afore-mentioned argument resonates with my previous field of research, concerned with the domestic enforcement of EU and US international agreements, and once again illustrates that there is often a disconnect between the international and the domestic enforcement of treaties.

I will not advocate for the 'greater' protection of foreign investors. Instead, I want to shed some critical light on the argument according to which foreign investors already enjoy high levels of protection in advanced domestic judicial systems. I will argue that the domestic protection of foreign investors is more complex. On the one hand, foreign investors can bring a claim before a domestic court against the host-state, invoking domestic standards of protection. On the other hand, they could also potentially bring a claim before the same domestic courts, relying on international standards of investment protection. As I will illustrate, the international and

domestic levels of enforcement should not be treated as worlds apart and the interplay between the two can shape the strategies of the treaty negotiators and of the investors. Continue reading →

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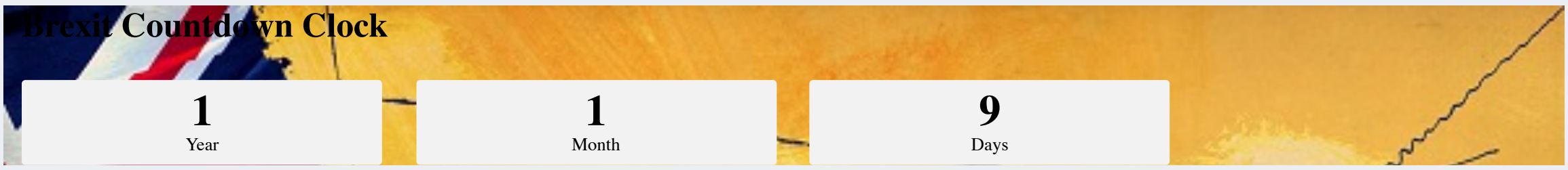


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