ALERT MEMORANDUM

European Court of Justice: Investor-State Arbitration Under Intra-EU Bilateral Investment Treaties Is Incompatible With EU Law

March 9, 2018

In a March 6, 2018 judgment in *Slovak Republic v. Achmea BV*, the Court of Justice of the European Union found that investor-State arbitration under the bilateral investment treaty between the Netherlands and Slovakia is incompatible with EU law.[1]

In stark contrast with a consistent line of investment treaty awards, the Court ruled that a provision in a bilateral investment treaty ("**BIT**") concluded between EU Member States ("**intra-EU BIT**") that allows an investor from one EU Member State to arbitrate investment disputes against another EU Member State is incompatible with EU law because it adversely affects the autonomy of EU law. Specifically, the Court found that the investor-State arbitration provision in the Netherlands-Slovakia BIT is contrary to Articles 344 and 267 of the Treaty on the Functioning of the European Union ("**TFEU**"). The TFEU ensures the uniform and effective application of EU law by (i) prohibiting, under Article 344, EU Member States from submitting disputes concerning the interpretation or application of EU law to dispute settlement methods other than those provided for in the EU founding treaties and (ii) establishing, under Article 267, a preliminary reference procedure that allows the Court and EU Member State courts to engage in a judicial dialogue on the interpretation of EU law.

The Court held that because arbitral tribunals constituted under intra-EU BITs may be called upon to interpret and apply EU law to rule on possible infringements of the BIT, but may not request preliminary rulings from the Court, and their awards are subject only to limited judicial review by EU Member State courts, investor-State arbitration under intra-EU BITs threatens the effective application of EU law.

The *Achmea* judgment has potentially far reaching implications, calling into question the investor-State arbitration mechanisms in the nearly 200 existing intra-EU BITs.

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Factual Background

Achmea B.V. ("**Achmea**"), a Dutch insurance company, began providing insurance products in Slovakia through a local subsidiary in 2004. A change of government two years later led to the partial reversal of the liberalization of the Slovak health insurance market, prohibiting the distribution of profits generated by Achmea's Slovak subsidiary.

In response, Achmea initiated an UNCITRAL arbitration under the 1991 Netherlands-Slovakia BIT.[2] The arbitral tribunal seated in Frankfurt issued a final award on December 7, 2012, holding that Slovakia had breached its obligations under the BIT, and ordering Slovakia to pay damages to Achmea.[3] Slovakia subsequently brought an action to set aside the award before the Higher Regional Court of Frankfurt, arguing, *inter alia*, that the BIT's investor-State arbitration provision was incompatible with EU law. The Frankfurt Court upheld the award and Slovakia lodged an appeal to the German Federal Court of Justice (the *Bundesgerichtshof*), which in turn requested the Court of Justice of the European Union ("**CJEU**") to issue a preliminary ruling on the compatibility of the investor-State arbitration provision of the Netherlands-Slovakia BIT with EU law.[4]

The request for a preliminary ruling asked the CJEU to decide whether Articles 344, 267 or 18(1) TFEU preclude investor-State arbitration under an intra-EU BIT.

Following oral arguments in June 2017, in which observations were lodged by 16 EU Member States, the Advocate General of the CJEU concluded in his Opinion of September 19, 2017 that intra-EU BITs are compatible with EU law.[5]

The Judgment: Investor-State Arbitration Under Intra-EU BITs Is Incompatible With EU Law

In the March 6, 2018 judgment, the CJEU's Grand Chamber found that investor-State arbitration under an intra-EU BIT adversely affects the autonomy of EU law, and is incompatible with the duty of sincere cooperation incumbent upon EU Member States to ensure the uniform and effective application EU law.[6]

Specifically, the CJEU held that an investment treaty tribunal does not qualify as a "*court or tribunal of a Member State*" that is competent, pursuant to Article 267 of the TFEU, to request preliminary rulings on the interpretation of EU law from the CJEU.[7]

At the same time, the CJEU found that in the context of resolving an investment treaty dispute, arbitral tribunals constituted under intra-EU BITs are called upon to interpret and apply EU law, as part of the law in force in the host State and as international norms in force between the Contracting Parties to the BIT.[8]

The Court confirmed that the preliminary reference procedure is a keystone of the judicial system of the EU legal order that allows a judicial dialogue between the CJEU and EU Member State courts, thereby ensuring the uniform and effective application of EU law.[9] The Court emphasized that investment treaty arbitration, unlike commercial arbitration, effectively removes, by way of a treaty, disputes that may concern the interpretation or application of EU law from the jurisdiction of the domestic courts.[10] At the same time, judicial review by EU Member State courts of investment treaty awards is limited in scope.[11]

The Court concluded that where EU Member States had entered into BITs that include an investor-State arbitration mechanism, this could result in disputes under the BITs being adjudicated in a manner that undermines the full effectiveness of EU law.[12] The Court accordingly held that investor-State arbitration under intra-EU BITs impaired the autonomy of EU law, which is ensured by Articles 344 and 267 TFEU.[13]

Having found that investor-State arbitration under intra-EU BITs is incompatible with EU law, the Court did not rule on the question whether such arbitration is also incompatible with Article 18(1) of the TFEU, which enshrines the principle of non-discrimination.

Implications For Investors and EU Member States

The Court's March 6, 2018 judgment is limited to investor-State arbitration under intra-EU BITs. The judgment's analysis does not concern the substantive protections accorded under intra-EU BITs and does not preclude the possibility of resolving intra-EU investor-State disputes in domestic courts. While the

judgment is directly relevant to investor-State arbitration mechanisms included in the nearly 200 intra-EU BITs currently in force, it does not by its terms address investor-State arbitration clauses in investment treaties concluded between an EU Member State and a third State.

Although the *Achmea* judgment is not binding on investment treaty tribunals, the judgment may be expected to influence investor-State arbitration under intra-EU BITs in various ways.

Investment treaty tribunals operating under intra-EU BITs may face the dilemma of either having to decline jurisdiction, or risking that an award be set aside or denied enforcement on grounds of incompatibility with EU law.

The judgment may also affect the enforcement of arbitral awards that have previously been issued under intra-EU BITs. Where a foreign investor has been awarded damages by an arbitral tribunal constituted on the basis of an intra-EU BIT, the enforcement of such an award in the European Union could meet significant obstacles. Domestic courts of EU Member States have to comply with the CJEU's judgment when ruling on applications for the enforcement of arbitral awards, potentially leaving investors with no choice other than to attempt to seek enforcement outside the European Union. Likewise, where EU Member State courts are asked to set aside awards made on the basis of an intra-EU BIT, they may annul such awards on the ground that they are contrary to public policy.

In the case of an arbitral tribunal constituted under the rules of the Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States ("**ICSID**"), the pecuniary obligations imposed by an ICSID award are enforceable as if the award were a final judgment in each Contracting State to the ICSID Convention, with no possibility for set aside proceedings before domestic courts.[14] However, investors may also find it difficult to enforce an ICSID award that is contrary to EU law, as current examples show.[15]

Impact on the Future of Investor-State Arbitration in the European Union

The *Achmea* judgment informs the ongoing debate regarding the future of investor-State arbitration within the European Union. The European Commission, supported by some EU Member States, has long maintained that investor-State arbitration is incompatible with EU law.[16] On the other hand, investment treaty tribunals facing questions of EU law have routinely held that investor-State arbitration is not incompatible with EU law, and have found themselves competent to interpret questions of EU law.[17]

The judgment is thus likely to have a profound impact on investor-State arbitration within the European Union. Following a consistent line of CJEU judgments affirming the supremacy of the EU legal order over obligations imposed under treaties concluded between EU Member States, the judgment may curb international arbitration as a means for EU investors to settle disputes with EU Member States. It remains to be seen whether investors will seek to seat investor-State arbitrations in non-EU Member States. Investors may also consider restructuring their investments in EU Member States to benefit from protection under BITs with third States.

For EU Member States, the Court's finding of an incompatibility of investor-State arbitration with EU law will make revisions of their intra-EU BITs hard to avoid. The judgment also has the potential to revitalize efforts to phase out existing intra-EU BITs, as already pursued by some EU Member States.[18]

Conclusion

The future of investor-State arbitration within the European Union is evolving, with the *Achmea* decision potentially increasing the likelihood that investor-State disputes will one day be settled by a standing investment court, as has been advocated by the European Commission.[19]

In answering the lingering question of the compatibility of investor-State arbitration under intra-EU BITs with EU law, the CJEU has created potential roadblocks for investment treaty arbitration in the European Union, leaving arbitral tribunals, foreign investors and EU Member States to confront these uncertainties going forward.

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[1] *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018) ("**Judgment**").

[2] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (signed Apr. 29, 1991). Slovakia succeeded to Czechoslovakia's rights and obligations under the BIT in 1993.

[3] *Achmea B.V. (formerly known as 'Eureko B.V.') v. The Slovak Republic* (UNCITRAL), PCA Case No. 2008-13, Award (Dec. 7, 2012).

[4] Federal Court of Justice *(Bundesgerichtshof)*, Decision, Case I ZB 2/15 (Mar. 3, 2016).

[5] *Slovak Republic v. Achmea BV*, Court of Justice of the European Union, Opinion of Advocate General Wathelet, Case C-284/16 (Sep. 19, 2017).

[6] Judgment, ¶¶ 58, 59.

[7] Judgment, ¶¶ 43-49.

[8] Judgment, ¶¶ 39-42.

[9] Judgment, ¶ 37.

[10] Judgment, ¶ 55.

[11] Judgment, ¶¶ 50-53.

[12] Judgment, ¶ 56.

[13] Judgment, ¶ 59.

[14] Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, Articles 53(1), 54(1).

[15] In the *Micula v. Romania* arbitration (*Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award (Dec. 11, 2013)), Romania, after having been found to have violated its obligations under the Romania-Sweden BIT, was prohibited by a 2015 Decision of the European Commission from paying the awarded damages to the investor, on the basis that such award was incompatible with EU State aid rules. Subsequently, attempts to enforce the award in Belgium and the United Kingdom failed, as domestic courts refused to contradict the Commission's decision. Currently, the *Micula* claimants are seeking to enforce the award in the United States.

[16] In 2015, the European Commission initiated infringement procedures against Austria, the Netherlands, Romania, Slovakia, and Sweden, and requested them to terminate their intra-EU BITs. *See* European Commission, *Press Release: Commission asks Member States to terminate their intra-EU bilateral investment treaties* (June 18, 2015). The Commission has also intervened as *amicus curiae* in several investor-State arbitrations involving issues of EU law. *See, e.g.*, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19; *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17.

[17] *See, e.g.*, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction (Oct. 22, 2012); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (Mar. 27, 2007).

[18] *See*, *Intra-EU Investment Treaties*, Non-paper from Austria, Finland, France, Germany and the Netherlands (Apr. 7, 2016) (available at www.bmwi.de). To date, some EU Member States, including Romania, Poland, Ireland and Italy, have begun terminating their intra-EU BITs, either unilaterally or by seeking agreement with the other EU Member State.

[19] *See, e.g.*, European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes*, COM(2017) 493 final (Sep. 13, 2017).