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ACHMEA II – Seizing Arbitral Tribunals to Prevent Likely Future Expropriations: Is it an Option?

Laurence Franc-Menget (Herbert Smith Freehills LLP) · Thursday, March 28th, 2013 · YIAG

On February 6, 2013, Achmea (a Dutch insurer, better known by its former name, Eureko) initiated UNCITRAL arbitration proceedings against the Slovak Republic on the basis of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (the "**Netherlands-Slovakia BIT**") [*The Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic was signed on 29 April 1991 and came into force on 1 October 1992*.] These proceedings appear to be of a new kind: aimed at preventing a likely expropriation [*Achmea press release "Achmea undertakes legal steps against Slovak Republic", 6 February, 2013; L. E. Peterson, "Dutch investor seeks to test limits of investment treaty arbitration by asking arbitrators to block state from expropriating its assets", IA Reporter; K Karadelis, "Measures targeting health insurers lead to new claim against Slovakia", GAR, 7 February 2013].*

The 2013 arbitration proceedings are the latest episode in a dispute between Achmea and the Slovak Republic dating back to 2006. In 2006, the Slovak Republic enacted a law banning private health insurers operating in the country from distributing profits to their shareholders. Further to Achmea's (Eureko at the time) previous claim, an arbitral tribunal upheld jurisdiction on the basis of the BIT and found Slovakia liable for breaching the fair and equitable treatment and the free transfer provisions of the Netherlands-Slovakia BIT in December 2012 [*Achmea v Slovakia, PCA Case No 2008-13, Award of 7 December 2012 (not public); Achmea press release, "International arbitration tribunal rules in favour of Achmea", 7 December 2012*]. Although the Slovak Constitutional Court reversed the law as unconstitutional in 2011, the arbitral tribunal ordered Slovakia to compensate Eureko, to the amount of €22 million, for the damage suffered within the period during which the law was in force. Slovakia challenged the final award before the German courts, as it had already done, without success, in respect of the decision on jurisdiction.

With the re-election of prime-minister Robert Fico in spring 2012, the dispute entered a new stage. On July 25, 2012, the government voted unanimously in favour of a new project aiming at instituting a single, state-run health insurer and pushing out the two

existing private providers by 2014 [*The Slovak Spectator, "Fico targets private health insurers again", 26 July 2012*]. On October 13, 2012, the Health Ministry presented a draft proposal containing three alternatives to the government: the acquisition by the state of the shares in the private health companies, the takeover of management of the private insurers' client portfolios or the expropriation of the private health insurance companies. In order to take effect, however, the draft law still has to receive parliamentary approval.

Achmea's new notice of arbitration dated 6 February 2013 appears to be a direct reaction to the new regulation that may be enacted by the State. The request for arbitration is not publicly available and the only information available so far is based on Achmea's press release, according to which the arbitration "seeks to avert the outright expropriation of UZP." Assuming that there is no other claim, this arbitration thus amounts to a request for purely pre-emptive measures against a State; in other words a request that a State refrain from enacting a law that would constitute a violation of the BIT.

The Achmea II case thus presents two original elements.

First, according to the press release, it seems that no pecuniary measures have been requested at this stage, since no damage has occurred. Although not uncommon in international arbitration against states (investment tribunals have on several occasions agreed to grant non-monetary relief [*On non-monetary relief in investment arbitration, see for instance: C. Schreuer, "Non-pecuniary Remedies in ICSID Arbitration", AI, 2012; M. Endicott: "Remedies in Investor-State arbitration: restitution, specific performance and declaratory awards" in P. Kahn, T. Wälde, New aspects of international investment law, 2007; C. Malinvaud, "Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration", ICCA Congress Series, 2009; P. Dunand, M. Kostytska, "Declaratory Relief in international arbitration", JIA, 2012*] in the form of declaratory awards [*See for instance: Saudi Arabia v Aramco, 27 ILR 117, 1963; Biwater Gauff v Tanzania, ICSID case n° ARB/05/22, Award of July 24, 2008*], orders for specific performance [*See for instance: Texaco v Libya, J.D.I, 1977, pp. 350-389*], prohibitory injunctions or mandatory orders [*ATA v Jordan, ICSID case n° ARB/08/2, Award of May 18, 2010. In two pending cases, the Claimant made requests for provisional injunctions: Philip Morris v Uruguay (UNCITRAL), Request for arbitration of February 19, 2010; Chevron v. Ecuador, PCA Case No 2009-23, First Interim Award on Interim Measures of January 25, 2012*]), arbitral tribunals generally favour pecuniary measures [*C Dugan, D Wallace, N Rubins, B Sabahi, Investor State Arbitration, 2008, p. 569*]. Furthermore, claims based solely on such measures are quite rare [To *our knowledge, only the Saudia Arabia v Aramco case was entirely limited to non-pecuniary remedies in the field of investor-state. This was, however, a very specific case since the parties had agreed that the award should be only declaratory. Saudi Arabia v. Arabian American Oil Company (Aramco), see above*].

Second, by contrast with existing awards ordering non-pecuniary measures, the investor's new claim is entirely aimed at pre-emptively challenging a new regulation which has not yet been adopted, thus assuming that the contemplated expropriation would not be in the public interest, would not be implemented in accordance with due process and would be discriminatory.

This kind of action raises a number of unresolved questions. Some of these questions are at the heart of the rationale of investor-state arbitration, according to which an arbitral tribunal is only entitled to exercise jurisdiction over disputes which the parties have agreed to submit to arbitration: (**1**) whether there is an existing dispute where there is a threat of expropriation but none has yet occurred, and (**2**) whether the State's consent to arbitration under the Netherlands-Slovakia BIT would apply to this kind of pre-emptive claim.

1. Is there a "dispute" between Achmea and Slovakia?

1.1 Pursuant to article 8 of the Netherlands-Slovakia BIT, "Each Contracting Party hereby consents to submit a dispute (…) to an arbitral tribunal…" [*Netherland –Slovakia BIT, Article 8*].

1.2 The pre-emptive nature of the Achmea II case raises the question of the existence of a dispute when the investor has not yet suffered any prejudice, and where expropriation is envisioned as a possibility but the conditions of its implementation remain unknown.

1.3 Under general international law, the ICJ has defined a legal dispute as a "disagreement on a point of law or fact, a conflict of legal views or interests between the parties" [*See for instance: Mavrommatis Palestine Concessions, Judgment No 2, 1924, P.C.I.J.; Case Concerning certain property (Liechtenstein v Germany), Preliminary objections, Judgment of 10 February 2005, §24].* Several ICSID arbitral tribunals have used this definition [*See for instance: Maffezini v Spain, ICSID Case n°ARB/97/7, Decision on Jurisdiction, 25 January 2000, §94; Tokios Tokelès v Ukraine, ICSID Case n°ARB/02/18, Decision on Jurisdiction, 29 April 2004, §106*] and there appears to be no reason why an ad hoc tribunal whose jurisdiction is based on a BIT should not follow the same path.

1.4 In addition, while commenting on article 25 of the ICSID Convention, Pr. Schreuer states that "[t]he existence of a dispute may be in doubt in several ways. An open question may not have matured into a dispute between the parties. Or a difference of opinion may not be sufficiently concrete to amount to a dispute that is susceptible of conciliation or arbitration" [*C. Schreuer, The ICSID Convention: A Commentary, 2009, Article 25, §41].*

1.5 Although it remains uncertain whether this commentary can be applied directly to non-ICSID arbitrations [*AES v Argentina, ICSID Case n° ARB/02/17, Decision on Jurisdiction of April 26, 2005, §43*], an interpretation of the "ordinary meaning" of article 8 of the BIT in accordance with general international law [*Pursuant to Article 31 of the Vienna Convention on the Law of Treaties*] might lead to a similar conclusion.

1.6 The question would thus be whether a mere draft law aimed at expropriating assets of a foreign investor, but not yet voted on by the Parliament, might rise to the level of a dispute under this definition.

1.7 In the ICSID case of Enron v Argentina [*Enron v Argentina, ICSID Case n°ARB/01/3, Award of 14 January 2004*], the investor alleged that certain taxes which

had been assessed but not yet collected amounted to a breach of the BIT. As here, Enron had thus not yet suffered any damage and would probably not suffer any should, ultimately, no taxes be collected. Logically, Argentina argued that the dispute between the parties was purely hypothetical, since the taxes might never be collected, or be collected only in a small amount [*Enron v Argentina, §72*]. The arbitral tribunal however rejected this argument on the ground that once taxes are assessed, there is, from the state's perspective, a liability on the part of the investor and a claim seeking protection under the treaty is thus no longer hypothetical because a specific dispute can be identified [*Enron v Argentina §74*].

However, in Achmea's case, the dispute is one step earlier: the act of the state at the origin of the dispute, and which is aimed at the expropriation of Achmea's subsidiary Union, has not even been voted on by the Parliament. Furthermore, the exact conditions under which the project would be implemented do not appear clear, as three are scenarios concerning how to return to a single-insurer system but none has been selected. Accordingly, whether an arbitral tribunal will, following the same line of reasoning as Enron, consider that, from the state's perspective, there is already, at this stage, a liability on the part of the investor remains doubtful. The context of the dispute and the previous regulations enacted by the State could, however, constitute an argument for Achmea that there is actually a dispute which is not hypothetical, in view of the state's previous attitude.

1.8 In any event, one might also ask whether Slovakia consented to submit purely pre-emptive claims to the arbitral tribunal by signing the BIT.

2. Did Slovakia consent to submit requests for pre-emptive claims to an arbitral tribunal under the BIT?

2.1 It is likely that Slovakia will argue that the arbitral tribunal does not have jurisdiction because, under the Netherlands-Slovakia BIT, it has not agreed to UNCITRAL's jurisdiction for pre-emptive claims. The investor will thus have to prove that the parties' consent to arbitration under the Netherlands-Slovakia BIT would extend to purely pre-emptive actions. It has long been established within the framework of ICSID arbitration that consent is the "cornerstone" of the jurisdiction of ICSID tribunals. The same can be said for ad hoc arbitrations in which the consent to arbitrate is based on a BIT.

As such, ordering purely pre-emptive remedies might collide with the fact that "[r]estrictions upon the independence of states cannot be presumed [*Permanent Court of International Justice, Decision of September 7th, 1927, §18*] ". According to this principle, the state should explicitly agree to any restriction of its legislative power. No aspect of the Netherlands-Slovakia BIT indicates any intent on the part of the contracting states to grant the tribunal powers to deal with a hypothetical future violation of the Netherlands-Slovakia BIT. Accordingly, the tribunal may also refuse jurisdiction over Achmea's claim on the ground of lack of consent.

2.2 However, the arbitral tribunal might equally consider that the absence of any reference to claims of this sort in the Netherlands-Slovakia BIT does not necessarily mean that it has no jurisdiction over these claims, which are of a peculiar nature. For

instance, the arbitral tribunal might interpret Achmea's claim as a purely procedural question, to be solved in the course of the proceedings. This is the approach adopted when issuing injunctive orders during arbitration. However, in those cases, the arbitral tribunals are not seized solely on the basis of the non-pecuniary relief sought against a state.

The question of consent appears therefore in a specific light in the Achmea II case, and it remains to be seen which position the tribunal will adopt.

In conclusion, Achmea's claim raises jurisdictional questions in relation to the notion of an actual dispute as well as to the scope of the State's consent to investor-state arbitration. At the same time, considering the overall context of this dispute, the practical interest of the kind of claim made by Achmea is obvious: this is a situation where the investor has already been subject to measures by the same government that have been considered by an arbitral tribunal to be a violation of the Netherlands-Slovakia BIT. An arbitral tribunal may thus be tempted to consider that this new claim is part of a broader dispute in which the investor has openly and repeatedly been targeted by Mr. Fico. On that basis, an arbitral tribunal may want to consider that there is a dispute and that as the State has agreed to submit all disputes to arbitration, without specific restriction, it has jurisdiction.

Should that be the case, however, what would be the kind of award that an arbitral tribunal could then pronounce on the merits without interfering with the state's sovereignty? It would not be acceptable to order a State not to enact a law. Could it be a declaration that, should the State enact the law in question, it will be in breach of the Netherlands-Slovakia BIT? How then would the arbitral tribunal determine the frontier between granting or refusing a pre-emptive measure and according to what criteria? How then would such an award be enforced against the State? Even assuming that an arbitral tribunal would have jurisdiction over such a claim, a number of additional open questions would remain.

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