The End of Intra-EU BITs: Fait Accompli or Another Way Out?

Kluwer Arbitration Blog
November 16, 2016

Sebastian Lukic (Schoenherr) and Anne-Karin Grill

Please refer to this post as: Sebastian Lukic and Anne-Karin Grill, 'The End of Intra-EU BITs: Fait Accompli or Another Way Out?', Kluwer Arbitration Blog, November 16 2016, http://arbitrationblog.kluwerarbitration.com/2016/11/16/the-end-of-intra-eu-bits-fait-accompli-or-another-way-out/

Currently, around 190 bilateral investment treaties between EU Member States ("intra-EU BITs") are still in force. Most of these intra EU-BITs were concluded in the 1990s. Prior to the two enlargement rounds in 2004 and 2007, relatively little attention was paid to the two existing intra-EU BITs. However, after 2004, the status of intra-EU BITs changed. At least when it comes to the perception of the European Commission, they shifted from being tolerated exceptions to serious impediments to the EU single market.

Most recently, the next chapter of the European Commission's endeavors to do away with these impediments has been opened: On 29 September 2016, the European Commission requested Austria, the Netherlands, Romania, Slovakia and Sweden, by way of reasoned opinion, to terminate their intra-EU BITs. The instrument of a reasoned opinion constitutes the second stage in infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union ("TFEU"). In case the Member State fails to comply with what is asked from it, the issue will ultimately be brought before the Court of Justice of the European Union ("CJEU").

In the European Commission's view, intra-EU BITs overlap and conflict with the EU single market. Intra-EU BITs only protect investors from the respective BIT Treaty States and not investors from all EU Member States. Thus, intra-EU BITs result in a more favourable treatment of investors from certain EU Member States that concluded intra-EU BITs and discriminate against investors and investments from other EU Member States who didn't do so. Also, the European Commission argues that intra-EU BITs provide for parallel jurisprudence through arbitration. The outcome of arbitration may not only constitute illegal state aid (in this regard the European Commission invokes *Micula v. Romania*, ICSID Case No. ARB/14/29). Furthermore, according to the European Commission, such parallel jurisprudence may conflict with the jurisdiction monopoly of the CJEU on EU law as provided for under Article 19 of the Treaty on the European Union.

The European Commission has thus, in fact, intervened in several investment arbitrations to allege the supremacy of EU law over intra EU-BITs: In *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, the arbitral tribunal had to deal with two letters from the European Commission. In *AES v. Hungary*, ICSID Case No. ARB/07/22 and *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, the European Commission filed amicus-curiae briefs. In *Achmea B.V. v. The Slovak Republic*, UNCITRAL PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), the European Commission submitted written submissions describing intra-EU BITs as an "*anomaly within the internal market.*"

So far, arbitral tribunals have mostly rejected the European Commission's arguments on the supremacy of EU law and found that the respective intra-EU BITs were not incompatible with EU law (see e.g. *Achmea B.V. v. The Slovak Republic*, UNCITRAL PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010).

Furthermore, on 3 March 2016, the German Federal Court of Justice ("BGH") requested the CJEU to issue a preliminary ruling on the compatibility with EU law, in particular Articles 344, 267 and 18 TFEU, of arbitration agreements concluded in intra-EU BITs (CJEU C-284/16, *Achmea*). Notably, in its request, the BGH did not share the European Commission's viewpoint: In fact, the BGH argued, in accordance with the prevailing legal opinion in Germany that Article 344 TFEU only applies to disputes between Member States and not to disputes between Member States and investors. Also, according to the BHG, Article 267 TFEU may not pose an obstacle to intra-EU BITs. The argument is based on the CJEU's ruling in C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV* where it was held that Member State courts may review awards, e.g. in enforcement proceedings, and refer questions of EU law to the CJEU under Article 267 TFEU. Accordingly, the arbitration agreements concluded under intra-EU BITs may not constitute an infringement of Article 267 TFEU even though the review of awards is limited to violations of *ordre public*. As regards Article 18 TFEU, the BGH supports a very arbitration-friendly approach: Referring to several CJEU decisions on the issue of discrimination, the BGH argues that in order to remedy a possible discrimination, access to investment arbitration shall be granted to investors from all Member States instead of sacrificing intra-EU BITs.

The CJEU's preliminary ruling on intra-EU BITs will definitely provide important guidance on the relationship between EU law and intra-EU investment arbitration as well as the future of intra-EU BITs in general. It will also be determining as regards the future of intra-EU BITs in general. One hypothetical but possibly crucial question remains: What may we expect if the CJEU rejects the BGH's arguments and adopts the opinion of the European Commission?

In April 2016, the delegations of Austria, Finland, France, Germany and the Netherlands presented a "non-paper" to the EU Council's Trade Policy Committee with a compromise solution for the future: A single agreement between all Member States consisting of two elements. First, the "*phasing-out of existing intra-EU BITs*" and second an appropriate "*investment protection after the phasing-out of intra-EU BITs.*" The "non-paper" suggests a coordinated termination of intra-EU BITs with immediate effect, i.e. without sunset clauses, in order not to delay the phasing out process for several years. At the same time, the substantive and procedural protection granted to investors should not decrease after termination. Investors should not lose their rights overnight. The "non-paper" proposes alternatives for the investment protection after the coordinated termination of intra-EU BITs. It strongly favours an investor-to-state mediation scheme to promote amicable settlement. Besides this extraordinarily innovative approach, it supports a binding and enforceable investment dispute settlement mechanism and addresses three alternatives: (i) first, to confer jurisdiction to the CJEU based on Article 273 TFEU; (ii) second, to model the dispute settlement system of the Unified Patent System; (iii) third, to rely on the Permanent Court of Arbitration ("PCA") and agree on a "*compromis*" within the meaning of the 1907 Hague Convention. The "non-paper" suggests that the third alternative would be the preferable to achieve a new dispute settlement mechanism within a reasonable timeframe. Nevertheless, it is conceded, that the first two alternatives would better comply with the EU's trade policy on investor-to-State dispute settlement and should therefore be envisaged as a long-term perspective. Thus, under the third alternative, the PCA could provide a provisional mechanism. Established in 1899, the PCA is an intergovernmental organisation that provides financial, logistical, technical, linguistic and also general secretarial support for international arbitrations. The PCA's procedural rules are aimed at disputes involving at least one State, State-controlled entity, or intergovernmental organisation and thus reflect the public international law elements that may arise in disputes involving such parties. Members of the Court are potential arbitrators appointed by the Member States. Each Member State is entitled to nominate up to four persons of members of the Court. However, parties are not limited to this list of arbitrators and may nominate other arbitrators who are not listed. Also, the Secretary-General of the PCA may be called upon to appoint the arbitrators.

In the end, the CJEU's preliminary ruling will – in one way or the other– finally put an end to the legal uncertainty European investors are exposed to. In practice, many arbitral tribunals will have to thoroughly scrutinise the CJEU's decision and draw conclusions for any pending proceedings. In case the CJEU confirms the European Commission's view, the procedural protection of intra-EU investments will have to be reconsidered so as to devise a dispute settlement mechanism that suits both, the need for procedural guarantees for investors and compliance with EU law.