The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!

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Introduction

In a much anticipated judgment in *Slovak Republic v. Achmea B.V.* (Case C-284/16), the Court of Justice of the European Union ("CJEU") ruled yesterday that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia BIT (the "BIT") has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law. With this judgment, the CJEU decided not to follow Advocate General Wathelet in his opinion of 19 September 2017, in which he had proposed to the CJEU to rule that EU law did not preclude the application of an investor-state dispute settlement mechanism ("ISDS") established by means of a BIT between two EU Members States.[fn]The opinion has been extensively commented on in previously published posts on this blog (published here, here and here).[/fn]

In what will most certainly be regarded as a landmark decision, the CJEU set the first precedent with respect to the incompatibility of arbitration clauses contained in intra-EU BITs with EU law. Although not binding upon investment treaty tribunals, the CJEU's ruling is likely to have far-reaching consequences for investor-state disputes under the 196 intra-EU BITs currently in force and may be the first step towards more profound changes affecting intra-EU investment treaty arbitration as we know it today.

Background of the case

The CJEU's judgment is predicated on a dispute between Dutch insurer Achmea B.V. (formerly known as Eureko B.V.) and Slovakia. In 2006, Slovakia partly reversed the previous liberalisation of its health insurance market, thereby prohibiting the distribution of profits generated by Achmea's Slovak insurance activities. In 2008, Achmea brought arbitration proceedings against Slovakia under the BIT on the grounds of violation of substantive treaty standards. In its final 2012 award, the ad-hoc arbitral tribunal constituted under the UNCITRAL Rules and seated in Frankfurt, found that Slovakia had violated the BIT and ordered it to pay approximately EUR 22.1 million of damages to Achmea.

In the setting-aside proceedings subsequently brought by Slovakia before the German courts, Slovakia challenged the arbitral award on jurisdiction. It argued that the arbitral tribunal lacked jurisdiction to hear the claims because the arbitration clause embedded in Article 8 of the BIT was incompatible with EU law, more specifically articles 18, 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU"). In these proceedings, the Higher Regional Court of Frankfurt (*Oberlandesgericht Frankfurt*, decision of 18 December 2014 – Case 26 Sch 3/13) rejected Slovakia's arguments, finding that the BIT was not incompatible with the aforementioned provisions of the TFEU. The German Federal Court of Justice (*Bundesgerichtshof*, decision of 3 March 2016 – Case I ZB 2/15), hearing the case on appeal, referred questions on the compatibility with EU law of the BIT's arbitration clause to the CJEU for a preliminary ruling, thereby offering its view that the arbitration clause was not contrary to the provisions of the TFEU.

AG Wathelet's opinion

In his opinion, AG Wathelet concluded that neither intra-EU BITs, nor the ISDS clauses contained therein, were in breach of EU law. In particular, AG Wathelet noted that:

• the BIT did not constitute discrimination on grounds of nationality and thus did not violate Article 18 TFEU by granting preferential treatment to Dutch investors;
• the arbitral tribunal constituted under Article 8 of the BIT was a *"court or tribunal of a Member State"* within the meaning of Article 267 TFEU and was therefore able to request the CJEU to issue a preliminary ruling on questions of EU law; and
• investor-state disputes – contrary to intra-Member State disputes – did not fall within the scope of Article 344 TFEU and such disputes did not concern the interpretation or application of the EU Treaties.

The CJEU judgment

In its 6 March 2018 judgment, the CJEU drastically departs from Wathelet's opinion and the position taken by the German courts, ruling that the arbitration clause in the BIT is not compatible with EU law. In the CJEU's view, this arbitration clause removes disputes involving the interpretation or application of EU law from the mechanism of judicial review provided for by the EU legal framework.

The primacy of EU law

Before considering the questions referred to it by the German Federal Court of Justice, the CJEU recalls the principle of autonomy of the EU legal system, enshrined in particular in Article 344 TFEU. The CJEU states that EU law is characterised – *inter alia* – by the fact that it stems from an independent source of law, the EU Treaties, and by its primacy over the law of the EU Member States. These characteristics, according the CJEU, *"have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally…"*. Based on this fundamental premise, Member States are obliged to ensure, in their respective territories, uniform and consistent application of EU law. According to the CJEU, one of the keystones of the judicial system established by the EU Treaties and intended to ensure consistency and uniformity in the interpretation of EU law is the preliminary ruling procedure embodied in Article 267 TFEU.

The arbitral tribunal may be called on to interpret or apply EU law

In light of these considerations, the CJEU first finds that the arbitral tribunal constituted under the BIT must rule on the basis of the law in force of the contracting state involved in the dispute as well as other (international) agreements between the contracting parties, which includes EU law. In the context of resolving an investment dispute under the BIT, the arbitral tribunal may be called on to interpret or even apply EU law, particularly the provisions concerning freedom of establishment and free movement of capital.

The arbitral tribunal is not a court or tribunal of a Member State

The CJEU then considers whether an arbitral tribunal such as the one constituted under Article 8 of the BIT can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. Contrary to AG Wathelet, it answers this question in the negative, finding that the arbitral tribunal concerned is not part of the judicial system of either the Netherlands or Slovakia. The exceptional nature of its jurisdiction, so the CJEU, is one of the principal reasons for the existence of the BIT's arbitration clause. Consequently, the arbitral tribunal has no power to make a reference to the CJEU for a preliminary ruling.

The arbitral award is not subject to review by a court of a Member State which ensures compatibility with EU law

The CJEU further observes that the arbitral award rendered by the tribunal under the BIT is, in principle, final and – by virtue of the applicable procedural law which is determined by the tribunal itself through the choice of the arbitral seat – subject only to limited judicial review by the competent national courts. Although the CJEU acknowledges that in relation to commercial arbitration, it previously held that limited review of arbitral awards by the courts of the Member States may be justified under certain conditions, such considerations could not be applied to arbitration under Article 8 of the BIT. The CJEU reasons that while commercial arbitration is based on the parties' express consent, investor-state arbitration derives from a treaty by which Member States agree to remove disputes concerning the application or interpretation of EU law from the jurisdiction of their own courts, and hence from the system of judicial remedies which the TFEU requires them to establish on questions of EU law. Consequently, the CJEU finds that, by concluding the BIT, the Netherlands and Slovakia established a mechanism for settling investment disputes which is not capable of ensuring the proper application and full effectiveness of EU law.

In those circumstances, the CJEU concludes that the arbitration clause contained in the BIT is incompatible with certain key principles of EU law and that it has an adverse effect on the autonomy of EU law.

Commentary

The CJEU judgment is likely to send a shockwave through the ranks of proponents of investment treaty arbitration and large parts of the wider arbitration community. At the same time, one can see the judgment as the next step in the evolution of a trend marked by years of opposition by the European Commission against investor-state arbitration under existing intra-EU BITs, its relentless efforts to push several EU Member States to terminate their intra-EU BITs and the recent public backlash against ISDS more generally. As such, the CJEU's decision may need to be read within the political context in which it is rendered.

As some scholars have already noted, one should be careful not to jump to conclusions too hastily on the judgment's implications. Although one may expect an increase in the number of (successful) challenges of non-ICSID awards rendered under intra-EU BITs by arbitral tribunals seated within the EU, Professor Stephan Schill, for example, correctly points out that the implications for ICSID disputes and non-ICSID disputes before tribunals seated outside the EU, as well as intra-EU disputes under the Energy Charter Treaty (ECT), may be less clear. It also remains to be seen how investment treaty tribunals, who thus far tend to uphold the validity of intra-EU BITs, will react to the CJEU's judgment in pending and future intra-EU investment disputes.

The CJEU's judgment will undoubtedly fuel the ongoing policy debate about intra-EU investment protection and the future of ISDS in Europe. The pending preliminary ruling on Belgium's recent questions regarding the compatibility with EU law of the Investment Court System, as provided for in CETA, may offer further indications in that respect.