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Intra-EU Investment Arbitration Post-Achmea: A Look at the Additional Remedies Offered by the ECHR and EU Law

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As it has been extensively discussed on this blog, in its landmark *Achmea* case the Court of Justice of the EU ("CJEU") found the arbitration provision of the bilateral investment treaty ("BIT") between the Netherlands and Slovakia to be incompatible with EU law.

This decision potentially affects the effectiveness of the roughly 200 BITs concluded between the EU Member States, although its overall implications are far from clear. Against that background, however, investors in EU Member States who object to State measures which have impacted their investments elsewhere in the EU might be expected to look for additional routes to a remedy. What might these be? Two, in particular, which stand out for closer analysis are the European Convention on Human Rights ("ECHR") and the fundamental principles of EU law.

The European Convention on Human Rights

47 States, spanning from Iceland to Russia, are parties to the ECHR, including all the EU Member States. Several of the rights and freedoms enshrined in the ECHR and its additional protocols, such as the right to property, the right to a fair trial and the provisions on protection from discrimination, may be engaged in the event of excessive State intervention. State measures restricting those rights must be necessary to achieve a legitimate aim, and proportionate to the aim pursued.

In many Contracting States, the ECHR is directly applicable before domestic courts and has precedence over national law. Constitutional courts, in particular, usually construe the rights enshrined in their respective domestic constitution in light with the ECHR and the European Court of Human Right's ("ECtHR") case law. The applicant must first exhaust these domestic remedies, if they are available both in theory and in practice, before lodging a complaint with the ECtHR within a period of six months from the date on which the final domestic ruling was rendered.

If the ECtHR finds that there has been a violation of the ECHR, and if the internal law of the State concerned does not allow full reparation to be made, the ECtHR can afford a 'just satisfaction' to the injured investor. In the Yukos case for instance, the ECtHR awarded the record amount of almost EUR 2 billion to the companies' former shareholders.

Fundamental principles of EU law

The internal market of the EU is based on four fundamental freedoms, namely the free movement of goods, persons, capital and services (which includes the freedom of establishment). Under

certain circumstances, State measures jeopardising an investment may constitute an illegal hinder to these freedoms, in particular the free movement of capital and services. Pursuant to the CJEU's case law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must (i) be applied in a non-discriminatory manner; (ii) be justified by imperative requirements in the general interest; (iii) be necessary and proportionate to these requirements; and (iv) be compatible with the fundamental rights, in particular the Charter of Fundamental Rights of the European Union and the ECHR (which, as we have seen, protect the investors' rights to property, to a fair trial and to be free from discrimination).

A selective advantage granted by a State or from State resources to certain companies over other investors may also be prohibited under EU State aid rules if they distort or threaten to distort competition and affect trade between Member States.

As it is the case for the ECHR, these fundamental principles of EU law are directly applicable before domestic courts and have precedence over domestic law. In addition, in a situation in which a Member State has failed to fulfil its obligations under the Treaties, the European Commission may request this State to amend its legislation and, should it refuse to do so, bring the matter before the CJEU. In theory, other Member States may also bring the matter before the CJEU but, for obvious political reasons, they have barely ever done so. This means that the investor does not have the right to initiate formally a Treaty action on its own but must file a complaint with the European Commission and convince this authority to take on its case. The investor will be afforded the possibility to intervene before the CJEU if the Commission were to launch infringement proceedings.

If the CJEU finds an infringement of EU law, it cannot itself award compensation to the investor but may only order the Member State to take specific steps to remedy its breach. The CJEU may only impose fines and/or penalty payments on the Member State if it fails to comply with the judgment. However, this judgment will constitute a precedent for a possible claim for damages against the Member State (and, under State aid law, for the Member State against the aid beneficiary) before domestic courts.

Use of parallel remedies

If an investor wishes to pursue its claim under an intra-EU BIT, would it also be able to, say, launch proceedings before the ECtHR? As we have already discussed in a previous post, where the claims carefully distinguish the causes of action (the investment rights on the one hand, human rights and fundamental freedoms on the other) and/or the precise plaintiffs to the actions (usually the shareholder(s) of a company operating in the State that allegedly violated the investment rights on the one hand, this latter company on the other), then objections based on *lis pendens* and similar issues would face much more difficulties. This distinction is especially important when the arbitration provision of the BIT provides for a so-called "fork in the road" provision which requires investors to choose a single avenue of relief at the outset of the dispute and preclude them from switching forums after having filed a request for arbitration or having started proceedings in court.

Since investors are not direct parties to the proceedings provided for at EU level, there seems to be no legal objection to the introduction of a complaint before the European Commission in parallel to investment arbitration proceedings and/or an application before the ECtHR.

Conclusion

As briefly outlined in this post, investors opposing what they see as excessive intervention from EU Member States are not limited to investment arbitration but may resort to additional or alternative remedies under the ECHR or EU law. In the post-*Achmea* world we can expect that investors are increasingly likely to consider these in their assessment of the potential remedies available to them in any given case; each offering a contrast in terms of procedures, substantive rules, chances of success, remedies and enforcement mechanisms.

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