Brace for Impact? Examining the reach of Achmea v Slovakia

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Over the past two months, the judgment by the Court of Justice of the European Union ("CJEU") in Slovak Republic v Achmea BV, hereinafter referred to as "Achmea", has created much discussion among arbitration practitioners. Its reasoning and implications have already been addressed in several Kluwer Arbitration blog posts, available here, here and here. The overall consensus seems to be that the CJEU effectively put an end to investment treaty arbitration based on a bilateral investment treaty ("BIT") between member states of the European Union (so-called "Intra-EU BITs"). But can the decision of the CJEU in Achmea really be applied to all Intra-EU BITs? A closer look at the Achmea judgment reveals that its reasoning is specific to the BIT in question and its general reach might be limited.

An Adverse Effect on the Autonomy of EU law?

The reasoning of the CJEU in Achmea is based on two assumptions. First, arbitral tribunals established under the bilateral investment treaty between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, hereinafter referred to as the "Netherlands – Slovakia BIT", may interpret or apply EU law.[1] Second, arbitral tribunals constituted in accordance with the dispute resolution provision of the Netherlands – Slovakia BIT cannot be classified as a tribunal of an EU member state in the sense of Article 267 of the Treaty on the Functioning of the European Union ("TFEU") and are thus not capable to request a preliminary ruling from the CJEU. It follows from these two assumptions that the CJEU would not be able to exercise its authority over disputes involving the application of EU law. As a consequence, the CJEU considered the arbitration clause in Article 8 of the Netherlands – Slovakia BIT to be incompatible with EU law.

With regards to the applicability of EU law Article 8 (6) of the Netherlands – Slovakia BIT is pertinent. The provision provides that arbitral tribunals shall decide on the basis of the law, taking into account in particular though not exclusively the law in force of the contracting party concerned, the provisions of the treaty, other relevant agreements between the contracting parties, the provisions of special agreements relating to the investment and the general principles of international law. Given that the law in force of the contracting party concerned is to be taken into account, which in the Achmea case was Slovakian law, and that EU law forms part of the law in force in every EU member State, the CJEU held that the arbitral tribunal may be called on to interpret or indeed to apply EU law.

Very often the CJEU follows the opinion of the Advocate General, but in the Achmea judgment it did

not. Advocate General Wathelet, whose opinion is available here, held that disputes between investors and states to be settled under Article 8 of the Netherlands – Slovakia BIT do not concern the interpretation and application of EU law. In particular, the Advocate General considered EU law to have no impact on the substance of the dispute since the Claimant only invoked breaches of the BIT and neither party relied on provisions of EU law. Furthermore, the Advocate General held that arbitral tribunals constituted under Article 8 (6) of the Netherlands – Slovakia BIT are tribunals in the sense of Article 267 TFEU and are as such capable of referring a dispute to the CJEU for a preliminary ruling.

Although the Advocate General's reasoning diverged from that of the CJEU, both departed from the same viewpoint, namely that EU Law could potentially be applied by an arbitral tribunal settling a dispute between an investor and a state under the Netherlands – Slovakia BIT. This seems reasonable since Article 8 (6) of the Netherlands – Slovakia BIT provides that the arbitral tribunal shall take into account the law in force of the contracting party concerned. Notably, the second question, i.e. whether an arbitral tribunal settling a BIT dispute is considered a tribunal in accordance with Article 267 TFEU, may only arise if the first question, i.e. whether EU law might be applicable, is answered affirmatively.

But what would be outcome if the provisions relating to applicable law were different? In particular, would the reasoning on the adverse effect of the arbitration clause on the autonomy of EU law still apply? If the arbitral tribunal were to decide the dispute pursuant to rules that do not touch upon EU law, it is difficult to imagine how the autonomy of EU law could potentially be endangered.

Different BITs, Different Laws

A cursory review of the provisions on the applicable law found in Intra-EU BITs shows that the presumption of a general reach of the Achmea decision on all Intra-EU BITs might be premature.

Whilst a considerable number of Intra-EU BITs indeed refer to domestic or national laws of contracting states, and in accordance with the reasoning of the CJEU thereby also to EU law, many do not. In fact, there are Intra-EU BITs that do not contain an explicit rule on the applicable law to be applied by the arbitral tribunal when deciding on a dispute between an investor and a contracting party. Still others do not provide for the applicability of domestic laws but for a decision in virtue of the provisions of the BIT and general principles of international law.

By way of example, the BIT concluded in 1997 between Greece and Estonia stipulates in Art 9 (4) that an arbitral tribunal settling a dispute between an investor and a contracting party "shall decide the dispute in accordance with the provisions of this agreement and the applicable rules and principles of international law". Thus, the reasoning of the CJEU in Achmea, whereas the arbitral tribunal has to take into account EU law as part of the laws of the contracting states when ruling on possible violations of the BIT, could not be applied to a case under the BIT between Greece and Estonia.

The same holds true for the Energy Charter Treaty ("ECT"), which provides in Article 26 (6) that an arbitral tribunal deciding a dispute between an investor and a contracting party shall decide the issues in dispute in accordance with the ECT and applicable rules and principles of international law. Again, the concern of the court that its primacy on the interpretation of EU law would be endangered could not be per se an issue in a case under the ECT.

Interestingly, not even all of Slovakia's BITs provide for the applicability of its domestic laws when deciding a dispute between an investor and a state. For instance, this is the case in the BIT concluded in 1990 between the United Kingdom and the Slovak Republic. Art 8 (3) of that BIT foresees that

arbitral tribunals concerned with disputes between an investor and a host state, “shall, in particular, base its decision on the provisions of [the] Agreement”, without making any reference to domestic laws.

The Direct Impact is Technically Limited

There might be other ways for an arbitral tribunal constituted on the basis of an Intra-EU BIT to consider the applicability or interpretation of EU law. For instance, by holding that EU law forms part of the international legal order as held by the tribunal in Electrabel v Hungary,[2] or to consider it as a fact, as was the case in Micula v Romania,[3] where the EU accession of Romania played a considerable role in the considerations of the tribunal.

However, in the Achmea judgment the CJEU based its finding that EU law might be applicable or interpreted by the arbitral tribunal, on the explicit provision on applicable law of the Netherlands – Slovakia BIT. As the provisions on applicable law found in the close to 200 Intra-EU BITs differ, the reasoning of the CJEU itself limits the decision’s impact.

Technically, the Achmea judgment may only have a direct impact on those Intra-EU BITs that contain a similar rule on the applicability of domestic laws. For all others, there is no reason to automatically assume an adverse effect on the autonomy of EU law. Rather, the applicability of EU law needs to be examined on a case by case basis.

[1] The bilateral investment treaty between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic entered into force in 1992. As a successor to the Czech and Slovak Federative Republic, the Slovak Republic succeeded to the latter’s rights and obligations under the treaty in 1993. In 2004 the Slovak Republic became a member of the European Union, thus making the Netherlands – Slovakia BIT an intra-EU BIT.

[2] Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.122.

[3] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack; S.R.L. v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 December 2013.