Kluwer Arbitration Blog

Foreign Investments in Poland in Light of the Achmea Case and "Reform" of Polish Judicial System – Catch 22 Situation?

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On 6 March 2018, the Court of Justice of the European Union ("CJEU") in the case no. C?284/16 Slovak Republic v. Achmea BV ("Achmea case") (available here) stated that arbitration agreements concluded between the Member States of the European Union ("EU") in the so-called intra-EU BITs have an adverse effect on the autonomy of EU law. *Achema* case is a precedent in many respects and has already resulted in many comments. It must be noted that the Judgment of the CJEU *prima facie* is not surprising – taking into account primacy and autonomy of the EU law – especially the four freedoms of the Single Market of EU: free movement of goods, capital, services and labour. This post aims however to highlight a probably unintended aspect of the *Achmea* case which might lead to difficulties of a legal situation for foreign investors in EU Member States in which judicial systems are not efficient or have issues with political influence (see the fifth edition of the EU Justice Scoreboard, available here).

The Achmea case, as entire EU Law, is based on the principle of mutual trust and cooperation between EU Member State. Using the words of the CJEU in the *Achmea* case:

> "EU law is […] based on the fundamental premise that **each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded**, as stated in Article 2 TEU. **That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized**, and therefore that the law of the EU that implements them will be respected […] In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system […] it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law […] Article 8 of the BIT [**arbitration agreement** – added by the author] **is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties**, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, **and is not therefore compatible with the principle of sincere cooperation**" [emphasis added].

The mutual trust between the EU Members led the CJEU to the conclusion that an arbitration agreement concluded in the intra-EU BITs is incompatible with EU Law. This should not be controversial. However, the devil, as always, lies in the detail. Poland can serve as an example.

In 2016, the Polish Government initiated a so-called "reform" of the Polish judicial system (*see* my post on this reform here). The Polish Government "reformed" the Polish Constitutional Tribunal, the National Council of the Judiciary of Poland (constitutional organ safeguarding independence of courts and judges), the Polish Ordinary Courts and finally the Supreme Court. Many of the amendments are deemed by some unconstitutional. The reform of the Polish judiciary lead to the precedent procedure adopted under art. 7(1) of the Treaty on European Union (*see* here).

Simultaneously with the "reform" of the Polish judicial system, the Polish Government started to terminate intra-EU BITs (see my posts here, here). Until now, Poland commenced the procedure to terminate its BIT with Portugal, Denmark, Netherlands, Cyprus, BLEU – Belgian – Luxembourg Economic Union, France, Austria, United Kingdom, Bulgaria, Germany, Finland, Spain, Greece, Sweden, Latvia, Lithuania, Hungary and Croatia. The Polish Government persistently repeats:

> "the law, as well as access to courts in Poland, guarantees foreign investors the protection of their investments with a possibility to execute investors' rights before courts. Poland , as an EU Member State, established democracy which respects market rules and has a confident, independent, and impartial judiciary system".

One may say that reasons given by the Polish Government to justify termination of intra-EU BITs concur with the reasoning of the CJEU in the *Achmea* case. However, in the light of the "reform" of the Polish Judicial system reasons given by the Polish Government are questionable, especially in the eye of other EU Member States. On 13 March 2018, it was reported that the Irish High Court decided to ask the CJEU for a ruling on the effect of recent legislative changes in Poland which are, in the opinion of the Irish Court

> "so immense, the High Court has been forced to conclude that the common value of the rule of law has been systematically damaged and democracy in Poland has been breached. The recent changes in Poland have been so damaging to the rule of law that this Court must conclude that the common value of the rule of law as well as democracy in Poland had been breached. Respect for the rule of law is essential for mutual trust in the operation of the European arrest warrant" (the case deals with an extradition due to the issued European Arrest Warrant, *see* here, here, here).

We will have to wait for the decision of the CJEU regarding the "reform" of the Polish Judicial system and its effects on the mutual trust and cooperation between Poland and other EU Members. At this moment, one may aptly ask the question: If the arbitration agreements concluded in the intra-EU BITs are incompatible with EU Law (what is now confirmed by the CJEU) and if the rule of law has been violated in Poland, then where and how should foreign investors execute their rights?

Prof. Nikos Lavranos in his Kluwer blog post proposed to

> "One way to improve the situation could be to draft and adopt an EU regulation on investment protection that would incorporate the substantive and procedural standards currently contained in the gold standard BITs, such as in particular the Dutch BITs.
>
> Accordingly, this regulation would contain the Fair and Equal Treatment, Most-Favored-Nation, National Treatment standards as well as an (in)direct expropriation with full compensation provision and an umbrella clause. The procedural standards would include specified timelines for concluding the proceedings and guarantees for the impartiality and independence of domestic courts."

This proposition sounds interesting. However, it is somewhat doubtful that an EU regulation would intervene into a procedural aspect of investment protection before domestic courts or influence institutions of a particular judicial system of an EU Member State in order to guarantee the impartiality and independence of domestic courts from political influence (institutional aspect).

Hence, another solution which would allow foreign investors to execute their rights would be a creation of a separate, independent adjudicatory body (whether *ad hoc* or permanent) which would represent a neutral forum. It could be similar to the Iran-United States Claims Tribunal or take the form of the (EU) Multilateral Investment Court. Namely, on 20 March 2018, the Council adopted the negotiating directives authorising the EU Commission to negotiate, on behalf of the EU, a convention establishing a multilateral court for the settlement of investment disputes (see here). It would, therefore, be important to include intra-EU investment disputes under the jurisdiction of the court. An example of other independent bodies and committees which could serve as an example are the Advisory Commission and the Alternative Dispute Resolution Commission, which will act under the EU Council Directive 2017/1852 of 10.10.2017 on tax dispute resolution mechanisms in the EU.

The *Achmea case* has "emancipated" EU Member States and investors from arbitral tribunals constituted under the intra-EU BITs. Now the EU, in order to guarantee investors right for independent and impartial proceedings, must provide them with an independent body of a different external appearance but of an identical function. One could say that intra EU-BITs constitute a thesis, whereas the *Achmea* case constitutes the antithesis. The synthesis will be reached once the EU adopts an effective mechanism for the protection of EU investors and replace the old system. Until that moment, foreign investors are probably in a "Catch 22" situation.

This entry was posted on Sunday, April 22nd, 2018 at 1:02 am and is filed under Achmea, Arbitration, Arbitration Agreements, Investment Arbitration, Poland, Rule of Law
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