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Trade, Labor and EU Law Perspectives

Moving on Up? Intra-EU investor-State dispute settlement following the decision in *UP v Hungary*

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I. Introduction

*“You’ve done me wrong, your time is up
You took a sip from the devil’s cup
You broke my heart, there’s no way back
Move right out of here, baby, go on pack your bags”*

M People, ‘Moving on Up’ (verse one).

Intra-EU investor-State dispute settlement (‘ISDS’) has had a rough few years. From the European Commission’s (‘EC’) decision to treat the payment of compensation following an investor-State arbitral award in *Micula v Romania*[2] as **illegal state aid**,[3] to the *Achmea decision*[4] of the Court of Justice of the European Union (‘CJEU’) earlier this year, which held that intra-EU bilateral investment treaties (‘BITs’) are incompatible with EU law. The latest development in this turbulent relationship comes in the form of the award in the *UP v Hungary case*,[5] decided earlier this month by an ICSID tribunal composed of Dr Karl-Heinz Böckstiegel, L. Yves Fortier QC, and Sir Daniel Bethlehem QC. This short note expounds upon the decision and discusses some of its implications for investment arbitration.

II. *Achmea* and the CJEU’s Treatment of Intra-EU BITs

The *Achmea decision*[6] was rendered following a **reference from the German Bundesgerichtshof (federal court) to the CJEU**. [7] Briefly, the case concerned the setting-aside of an *ad-hoc* investor-State arbitration, established under United Nations Commission for International Trade Law (‘UNCITRAL’) rules and seated in Frankfurt, between the Dutch insurance company Achmea BV and Slovakia. The **original award in 2012**[8] rejected all of Slovakia’s objections to the tribunal’s jurisdiction (paras. 152 – 180) and ordered Slovakia to pay €22.1 million in damages to Achmea (para. 352). Slovakia subsequently applied to the German courts (as Frankfurt was the seat of arbitration) to set the award aside on the ground that the dispute resolution clause of the Netherlands-Slovakia BIT was contrary to EU law. Under the dispute resolution clause, the parties agreed to submit disputes to an arbitral tribunal constituted under

UNCITRAL rules, and the tribunal was to decide on the basis of law, taking into account certain factors such as law in force between the parties, provisions of the BIT, and general principles of international law. Slovakia argued that this clause contravened the following articles of the Treaty on the Functioning of the European Union ('TFEU'):

- Article 18 (non-discrimination on the grounds of nationality);
- Article 267 (CJEU jurisdiction to give rulings on the interpretation or application of EU law); and
- Article 344 (exclusive jurisdiction of the EU's dispute resolution mechanisms in matters concerning the interpretation of EU law).

In his opinion, **Advocate General ('AG') Wathelet**[9] concluded that the BIT was not contrary to EU law because: (1) the preferential treatment given to Dutch investors did not constitute discrimination under Article 18 TFEU; (2) the tribunal was able to request preliminary rulings from the CJEU because it met the definition under Article 267 TFEU of a "court or tribunal of a Member State"; and (3) investor-state disputes did not concern the interpretation or application or the EU treaties under Article 344 TFEU.

The **CJEU**, [10] however, did not agree with the AG's opinion. In particular, it held that that the arbitration clause was in violation of EU law, because:

1. As disputes under the BIT may involve the interpretation or application of EU law, the dispute resolution clause had the effect of removing disputes concerning the interpretation or application of EU law from the EU's mechanisms of dispute resolution, and this was contrary to Article 344 TFEU (para. 56)
2. The *ad-hoc* arbitral tribunal was not a court of a member State, and therefore had no power to refer disputes to CJEU (paras. 46 – 49). As such, it would be deprived of the opportunity to ensure the uniform application of EU law.
3. The *ad-hoc* Tribunal was able to choose its own procedure, and its award was final, subject only to limited review based on the law of the seat. In this case, limited review concerning the validity of the arbitration agreement and challenges on the grounds of public policy. (paras. 51 – 53). The CJEU noted that, although it has found that limited review is appropriate in the case of commercial arbitration, ISDS provisions were different as they "*derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from [the system of judicial remedies they are required to establish in fields governed by EU law], disputes which may concern the application or interpretation of EU law*" (paras. 54 – 55).

The CJEU found, therefore, that the ISDS provision in the Netherlands-Slovakia BIT was incompatible with the TFEU (para. 62), as the BIT established a dispute resolution mechanism which undermines "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" (para. 58), and, accordingly, has "an adverse effect on the autonomy of EU law" (para. 59).

III. The Decision in *UP v Hungary – Achmea* does not apply to ICSID Tribunals

On 9 October 2018, the Tribunal in *UP and CD Holding Internationale v Hungary* (ICSID Case No. ARB/13/35) ('*Up*') rendered its award. The dispute concerned an alleged breach of the 1986 France-Hungary BIT. The Claimants were involved in issuing meal vouchers for use at supermarkets and restaurants. Their business plummeted when the Hungarian government

introduced, in 2011, SZEP cards (a dematerialised alternative to paper vouchers) and Erzsébet vouchers (which could similarly be used to pay for food), as these new reforms benefitted from lower tax rates. Thus, the Claimants alleged that Hungary's legislative measures indirectly expropriated their business, and that Hungary breached the standard of 'fair and equitable treatment' ('FET') to be accorded to investors under the BIT.

The Tribunal determined, in 2016, that it had jurisdiction to decide the dispute. After the CJEU rendered its *Achmea* decision, Hungary requested that the Tribunal hear submissions on that judgment's impact on the arbitration, arguing that the Tribunal was bound by the decision in *Achmea*. In particular, Hungary argued:

1. the tribunal was unable to “ignore interpretative decisions issued by a specific body in charge of the interpretation of the treaty in question” (citing para. 66 of the International Court of Justice ('ICJ')'s *Diallo* judgment)[11]; and
2. the *Achmea* judgment formed part of the law applicable in the dispute, and was to take precedence over the BIT.

The Tribunal firmly rejected Hungary's arguments. It began by noting that the ICSID Convention was “a multilateral public international law treaty for the specific purpose of resolving investment disputes between private parties and a State (here, Hungary). Thus, this Tribunal is placed in a public international law context and not in a national or regional context” (para. 253).

It then found that the *Achmea* decision was not apt to determine the outcome of *Up*. Whilst, *Achmea*, the German courts had limited competence to review the award (and in that context submitted the preliminary reference to the CJEU, the *Up* tribunal would not be open to review by the courts of the place of the arbitration (the English courts), which was only open to challenge through the annulment procedure in Article 52 of the ICSID Convention (*Up*, paras. 254 – 255). Furthermore, by virtue of Article 54 of the ICSID Convention, the Award would fall to be enforced in the territories of signatories to the ICSID Convention (many of which are not EU Member States) as if they were judgments of the courts in that State (*Up*, paras. 256 – 257).

The *Achmea* decision, according to the Tribunal, “cannot be understood or interpreted as creating or supporting an argument that, by its accession to the EU, Hungary was no longer bound by the ICSID Convention” (*Up*, para. 258). Hungary did not withdraw from the ICSID Convention, nor was there any implied withdrawal therefrom (*Up*, para. 260).

Furthermore, the *Achmea* decision in no way demonstrated that Hungary had retroactively withdrawn its consent to arbitration when Hungary acceded to the EU, and, even if it had, the 20-year survival clause in Article 12(2) precluded any “implicit termination” of the arbitration clause in the BIT (*Up*, paras. 264 – 265). Therefore, the Tribunal decided that there was no cause to disturb its finding of 2016 that it had jurisdiction to determine the dispute between the parties (*Up*, para. 266).

As to the substance of the dispute, the Tribunal found that Hungary had breached its obligations, and ordered it to pay the Claimants compensation for unlawfully expropriating their investment (*Up*, para. 419). There was no need to examine whether Hungary had also breached the FET standard since it would not lead to any damages in excess of those arising from the unlawful expropriation (*Up*, para. 493).

IV. Observations – Pushing back against the CJEU

The decision in *Up* will be welcomed by investors and proponents of ISDS. The Tribunal dealt with the question of the applicability of the *Achmea* decision succinctly (in three pages) by dismissing its application to the ICSID Convention and the particular dispute between the parties. It did not deal with some of the more acerbic arguments of the Claimants concerning, *inter alia*, the non-primacy of EU law (*Up*, para. 219).

The Tribunal's decision pushes back against the broadest reading of *Achmea* (that all intra-EU ISDS clauses are contrary to EU law), and clarifies that the institutional nature of ICSID immunises it from the decision in *Achmea*, which the Tribunal read as being limited to *ad hoc* arbitration. Although **other commentators** have also read the *Achmea* decision as excluding ICSID arbitration,[12] there is nothing in the text of the *Achmea* decision which sets this out explicitly. Indeed, the CJEU's main criticism of the *ad hoc* tribunal in *Achmea*, (i.e. that it was final, and not subject to review, and therefore that the States had chosen to remove a dispute that may concern EU law from the ambit of the EU dispute resolution system) applies equally to ICSID arbitrations. In this way, the decision in *Up* can be read as actively pushing back against the CJEU's decision by carving out an exception for ICSID arbitration.

Although the European Commission attempted on 20 August 2018 to intervene in the proceedings (para. 95), the tribunal dismissed its intervention on 27 August 2018 because the case was already in its end-stages and further submissions would be unnecessary and disruptive to the proceedings.

However, the larger problem with the troubled relationship between ISDS and the EU remains. The EU does not seem to be willing to give up ground, and investor-State tribunals are still generating awards in intra-EU BIT cases. Although judicial intermingling can result in 'decisional fragmentation', in which different courts render contradictory judgments on the same subject-matter,[13] the *Up* tribunal managed to avoid this on the face of the award by carving out from the reach of *Achmea* a safe-space for ICSID arbitration. Nevertheless, as the overall relationship between the EU and ISDS demonstrates, courts and tribunals overlapping in their substantive jurisdiction can result in existential problems in the regimes that they govern.

This judicial territory-marking only seems to create uncertainty, which tends to push the issue further away from resolution. There are ISDS provisions in almost 200 intra-EU BITs currently in force. As things stand, investors are unsure if they can rely on these clauses, and States are unsure what legal effect these provisions still have. Of course, ever-lurking as contextual shadows are both calls for an institutionalised investment court, and the United Kingdom's imminent exit from the European Union. This would perhaps make post-Brexit Britain a more attractive location for investment disputes and BIT-planning, but the position for the other Member States, at the moment, remains hanging in the balance.

We will know more about the decision's impact, and the responses from the stakeholders involved (including, of course, investors, the EU and its Member States), in due course. Going forward, it seems unlikely that either side will wholly concede to the other, and the fissures that have developed seem a long way from healing.

[1] The authors would like to thank M People for their hum-worthy 1993 smash hit 'Moving on Up', which inspired the title of this blog post.

[2] ICSID Case No. ARB/05/20, Award (11 December 2013). The Final Award of the Tribunal can

be found here: <https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf>

[3] http://europa.eu/rapid/press-release_IP-15-4725_en.htm

[4] Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, ECLI:EU:C:2018:158 <http://curia.europa.eu/juris/document/document.jsf?docid=199968&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1977367>

[5] ICSID Case No. ARB/13/35, Award (9 October 2018) <https://www.italaw.com/sites/default/files/case-documents/italaw10075.pdf>

[6] Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, ECLI:EU:C:2018:158 <http://curia.europa.eu/juris/document/document.jsf?docid=199968&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1977367>

[7] BGH, I ZB 2/15, Decision (3 March 2016) <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=74612&pos=0&anz=1>

[8] PCA Case No. 2008-13, *Achmea BV v Slovak Republic*, Final Award (7 December 2012) <https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf>

[9] Opinion of 19 September 2017, *Slovak Republic v Achmea BV*, C-284/16, ECLI:EU:C:2017:699 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194583&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1978095>

[10] Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, ECLI:EU:C:2018:158 <http://curia.europa.eu/juris/document/document.jsf?docid=199968&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1977367>

[11] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 <https://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>

[12] see, for example: <http://arbitrationblog.kluwerarbitration.com/2018/04/21/what-next-for-intra-eu-investment-arbitration-thoughts-on-the-achmea-decision/>

[13] Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013), pp.5-7.

*The views presented in this Post are those of the authors and do not represent their respective organisations' views in any way.

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