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THE CEE LAW FIRM

Compatibility of the arbitration clause in a bilateral investment treaty with EU law

On 19 September 2017, an Advocate General of the Court of Justice of the European Union (CJEU) presented his opinion on the compatibility of an arbitration clause in a bilateral investment treaty concluded between two member-states of the European Union (EU) with EU law.

As for the background of the case, a Dutch company, Achmea, initiated an arbitral procedure against Slovakia on the basis of an agreement on encouragement and protection of investments concluded between the former Czechoslovakia and the Netherlands (BIT) in 2008. The arbitral tribunal found Slovakia liable for violating the BIT and compelled the country to pay Achmea damages of over EUR 20 million.

Subsequently, Slovakia brought an action before the German courts and requested the annulment of the arbitral tribunal's award, stating that the arbitration clause in the BIT was contrary to the Treaty on the Functioning of the European Union (TFEU).
The German Federal Court of Justice (Bundesgerichtshof) asked the CJEU whether the arbitration clause challenged by Slovakia is compatible with the TFEU, namely its Articles 18, 267 and 344.

Several countries (mostly the more recent members of the EU) and the European Commission submitted observations in support of Slovakia. On the other hand, Germany, France, the Netherlands, Austria and Finland submitted observations in support of Achmea.

Melchior Wathelet, an Advocate General of the CJEU, presented his opinion on the above-mentioned question submitted to the CJEU for preliminary ruling, in which he recommends the CJEU to rule that EU law does not prevent the application of intra-union agreements to protect investments.

At first, Mr. Wathelet analysed whether Article 8 of the BIT constitutes discrimination on the grounds of nationality prohibited by Article 18 of the TFEU. Based on the case law, Mr. Wathelet proved that the TFEU does not contain any most favoured nation clause. The TFEU only requires that investors from a Member State other than Slovakia, on Slovak territory in a situation governed by EU law, are treated in the same manner as Slovak investors. Thus, there is no discrimination under the TFEU if Slovakia does not grant the same treatment to investors from another Member State as it grants to investors from a third Member State according to an agreement. Mr. Wathelet then concluded that **such investor-state dispute settlement, as stipulated in the BIT, which grants Dutch investors the right to use international arbitration against Slovakia, does not constitute discrimination on grounds of nationality prohibited by Article 18 of the TFEU**.

Secondly, Mr. Wathelet asked whether the arbitration foreseen in the BIT is compatible with the preliminary ruling mechanism under Article 267 of the TFEU. For such an assessment, he used the criteria of legal origin, permanency, obligatory jurisdiction and contradictory nature of the rulings. The legal

origin of the arbitral tribunal is ensured not only in the BIT itself, but also by Dutch and Slovak law approving the BIT. According to the case law, the permanency of a tribunal shall be regarded in relation to the institution performing the arbitration procedure (i.e., the stability of the procedure) and not to the arbitral tribunal whose composition might change. As both the Slovak and Dutch law foresaw the use of arbitration in cases related with the BIT and as Slovakia gave its preliminary approval with the arbitration, the jurisdiction of the arbitral tribunal under the BIT shall be binding for Slovakia as well as for the investor. After analysing the nature and conditions of the arbitration procedure under the BIT, Mr. Wathelet proved that it satisfies the requirements of the application of legal rules, and the independence and impartiality of arbitrators. In summary, there is no reason why such a tribunal, common to several Member States, could not bring questions to the CJEU as well as the courts of any of the Member States. And therefore, **Article 267 of the TFEU must be interpreted as not precluding the provisions of the BIT, which provides for the resolution of disputes between investors and States by an arbitral tribunal which must be regarded as a "court of a Member State" within the meaning of Article 267 of the TFEU**.

Finally comes the assessment of compliance of the BIT with Article 344 of the TFEU. It has already been proved by the case law that Article 344 of the TFEU shall not apply to disputes between investors and states who are parties to a bilateral investment treaty. Article 344 of the TFEU might be infringed only if the arbitrators decide on the interpretation and application of the provisions of EU law. The fact that EU law is a part of the applicable law in the matter of disputes between the investors and states shall not automatically imply that such disputes concern the interpretation and application of EU law. This is further explained on the extension of the applicability of the BIT, which is larger than the applicability of EU law when it covers more areas which are not regulated by EU law. Nevertheless, EU law and its autonomy shall always be protected by the courts of Member States, as the arbitral award issued following the procedure foreseen in the BIT might always be subjected to a review in case of an action for annulment or during a request for execution which might only be brought before national courts, which are obliged to protect their national as well as EU law. Therefore, **the dispute settlement procedure established by the BIT is compatible with Article 344 of the TFEU, as well as with the definition of the powers provided for by the Treaty on the EU and the TFEU and the autonomy of the European Union's legal system**.

In conclusion, Mr. Wathelet as Advocate General, proposed that the CJEU rule that "*Articles 18, 267 and 344 TFEU must be interpreted as not precluding the use of the procedure for resolving disputes between an investor and a State created by a bilateral investment protection agreement concluded before the accession of a Contracting State to the European Union, a Contracting State may, in the case of a dispute relating to an investment in the other Contracting State, bring proceedings against that other Contracting State before the arbitration tribunal.*"

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