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Press and Information

Advocate General's Opinion in Case C-284/16
Slovak Republic v Achmea BV

According to Advocate General Wathelet, the arbitration clause in the investment protection agreement concluded between the Netherlands and Slovakia is compatible with EU law

That clause does not constitute discrimination on grounds of nationality, is compatible with the preliminary ruling mechanism and does not undermine either the allocation of powers fixed by the Treaties or the autonomy of the EU legal system

In 1991, the former Czechoslovakia and the Netherlands concluded an agreement on encouragement and protection of investments [1] ('the BIT'). [2] That agreement provides that disputes between one contracting State and an investor of the other Contracting State are to be settled amicably, or failing that, before an arbitral tribunal.

Following the dissolution of Czechoslovakia in 1993, Slovakia succeeded to that country's rights and obligations under the agreement.

In 2004, Slovakia opened its sickness insurance market to private investors. Achmea, an undertaking belonging to a Netherlands insurance group, then established a subsidiary (Union Healthcare) in Slovakia, in order to offer private sickness insurance there. However, in 2006, Slovakia partly revoked the liberalisation of the sickness insurance market and prohibited, inter alia, the distribution of the profits from sickness insurance activities and the sale of insurance portfolios.

In 2008, Achmea initiated an arbitral procedure against Slovakia on the basis of the BIT, on the ground that the abovementioned prohibitions were contrary to that agreement. In 2012, the arbitral tribunal found that Slovakia had indeed infringed the BIT and ordered it to pay Achmea damages of approximately €22.1 million.

Subsequently, Slovakia brought an action before the German courts[3] to have the arbitral tribunal's award reversed. Slovakia contended that the arbitration clause in the BIT was contrary to several provisions of the FEU Treaty. [4]

Hearing the case on appeal, the Bundesgerichtshof (Federal Court of Justice, Germany) asks the Court of Justice whether the arbitration clause challenged by Slovakia is compatible with the FEU Treaty.

The Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania and the European Commission submitted observations in support of Slovakia's arguments, whereas Germany, France, the Netherlands, Austria and Finland state that the disputed clause and, more generally, the similar clauses commonly used in the 196 BITs currently in force between the EU Member States are valid.

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[1] Agreement on reciprocal encouragement and protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.
[2] Bilateral Investment Treaty.
[3] Since the place of arbitration was Frankfurt am Main (Germany), the German courts have jurisdiction to determine the legality of the arbitration decision.
[4] Namely, Article 18 TFEU, Article 267 TFEU and Article 344 TFEU.

In today's Opinion, Advocate General Melchior Wathelet observes, first of all, that the **disputed clause does not constitute discrimination on grounds of nationality prohibited by EU law** and, therefore, does not infringe Article 18 TFEU. While only Netherlands investors are enabled by that clause to submit a dispute relating to an investment made in Slovakia to the arbitral tribunal, the investors of most of the other Member States benefit from an equivalent protection on the basis of the BITs which their respective Member States of origin have concluded with Slovakia. In that regard, the Advocate General points out that equally nor do investors from a Member State which has not concluded such a BIT with Slovakia suffer discrimination on grounds of nationality because of the clause in question. According to the Advocate General, the FEU Treaty and the case-law of the Court require 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 and not as investors from a third Member State.

Next, the Advocate General considers that the arbitral tribunal constituted on the basis of the disputed clause is a court or tribunal common to the Netherlands and Slovakia, permitted to request the Court to give a preliminary ruling. That arbitral tribunal derives from binding legal provisions (in particular those of the BIT concluded between the Netherlands and Czechoslovakia), is part of a permanent arbitration system established by the two Member States concerned, has compulsory jurisdiction to determine investment disputes in the context of *inter partes* proceedings and takes its decisions with complete independence and impartiality, on the basis of rules of law. Consequently, according to the Advocate General, **the arbitration system does not fall outside the scope of the preliminary ruling mechanism established by Article 267 TFEU and is, therefore, compatible with that article.** Furthermore, in such a case, that system of arbitration cannot undermine either Article 344 TFEU, which requires the Member States to submit a dispute concerning the interpretation or application of the Treaties to a method of settlement provided for therein, or the allocation of powers determined by the Treaties and, accordingly, the autonomy of the EU legal system.

Lastly, should the Court find that the arbitration system at issue falls outside the scope of the preliminary ruling mechanism, the Advocate General notes that the requirement provided for in Article 344 TFEU applies only to disputes between Member States or between Member States and the Union. It follows that **a dispute between an investor and a Member State does not come under that article.**

Similarly, the Advocate General considers that although EU law is part of the law applicable to disputes between the Netherlands investors and Slovakia, that fact does not mean that those disputes concern the interpretation and application of the Treaties. In that context, the Advocate General **rejects the Commission's argument that EU law offers investors**, in particular through fundamental freedoms and the Charter of Fundamental Rights of the European Union, **full protection in the field of investments.** According to the Advocate General, the scope of the BIT at issue is wider than that of the EU and FEU Treaties and the guarantees of the protection of investments introduced by that agreement are different from those afforded in EU law, **without however being incompatible with EU law.**

For those reasons, the Advocate General is of the view that **the disputed clause does not undermine the allocation of powers fixed by the Treaties and, thus, the autonomy of the EU legal system.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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