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EUROPEAN COURT OF JUSTICE DECLARES INVESTOR-STATE DISPUTE SETTLEMENT INCOMPATIBLE WITH EUROPEAN UNION LAW

Achmea (Bilateral Investment Treaty – Judgment) (Slowakische Republik (Slovak Republic) v Achmea BV) (C-284/16)

Introduction

By a decision handed down on 6 March 2018 in *Achmea (Bilateral Investment Treaty – Judgment) (Slowakische Republik (Slovak Republic) v Achmea BV) (C-284/16)*, the Court of Justice of the European Union (Grand Chamber) ("CJEU") held that the provision of the Bilateral Investment Treaty ("BIT") in force as between the Netherlands and the Slovak Republic that allowed for investor-state arbitration was not compatible with EU law. The decision has ramifications for around 200 intra-EU BITs that contain similar dispute resolution provisions.

Background

In 2004, the claimant Dutch investor set up a subsidiary in Slovakia offering private sickness insurance services following Slovakia's opening up of the market in 2004 as part of a reform of its health system. In 2006, a law was enacted prohibiting the distribution of profits generated by private sickness insurance activities. That law was declared unconstitutional by the Slovak Constitutional Court and a new law was enacted allowing distribution of such profits. The claimant contended that it had suffered financial damage as a result of the aforementioned legislative measures and commenced UNCITRAL arbitration (seated in Frankfurt) under the BIT.

Slovakia contended before the tribunal that the arbitration clause in the BIT was incompatible with EU law. The tribunal dismissed that objection by an interim award, which was unsuccessful in challenging at first instance and on appeal. By an Award handed down on 7 December 2012, the Tribunal awarded the claimant damages in the amount of EURO 22.1 million. Slovakia's set aside application before the German courts was unsuccessful at first instance. Slovakia appealed to the Bundesgerichtshof.

Slovakia contended that the arbitration clause in the BIT was incompatible with: (a) Article 18 (the general principle of non-discrimination) of the Treaty on the Functioning of the European Union ("TFEU"); (b) Article 267 TFEU (the preliminary rulings procedure); and (c) Article 344 TFEU (undertaking not to submit EU law disputes to any method of settlement other than that provided in the EU Treaties).

The Bundesgerichtsof decided to make a preliminary reference under Article 267 TFEU to the CJEU as to whether any of those EU law provisions gave rise to an incompatibility in respect of the arbitration clause – in light of the considerable importance of the questions being asked given the numerous BITs still in force between EU Member States containing similar arbitration clauses.

Decision

The CJEU ruled that Articles 267 and 344 TFEU had to be interpreted as precluding an arbitration clause in an intra-EU BIT.

The settled case law of the CJEU showed that an international agreement cannot affect the allocation of powers fixed by the EU Treaties – a principle that was enshrined in Article 344 TFEU which provided that Member States undertake not to submit disputes concerning the interpretation/application of the Treaties to any settlement method other than those provided for in the EU Treaties. The autonomy of EU law was justified by virtue of the essential characteristics of the EU and its law.

Therefore, the EU Treaties had established a judicial system intended to ensure consistency and uniformity in the interpretation and application of EU law, which was of paramount importance to the preservation of the EU legal order. It was therefore, in accordance with Article 19 TEU, for national courts/tribunals and the CJEU to apply EU law. The preliminary ruling procedure provided for in Article 267 TFEU also had the object of securing uniform interpretation of EU law.

The arbitral tribunal in the underlying dispute was called upon to rule on matters relating to the interpretation/application of EU law because the BIT required the tribunal to take account in particular of the law in force of the concerned Contracting Party and other relevant agreements as between the Contracting Parties.

Furthermore, the arbitral tribunal was not a court or tribunal "of a Member State" within the meaning of Article 267 TFEU.

Overall, the arbitration clause contained in the BIT was such as to call into question the principle of mutual trust between EU Member States as well as the preservation of the law established by the EU Treaties and ensured by the procedure in Article 267 TFEU. The arbitration clause was incompatible with the EU law principle of sincere cooperation.

The CJEU ultimately ruled:

"*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor*

from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".

Concluding Remarks

In light of the vast number of intra-EU BITs containing similar arbitration clauses, the decision of the CJEU (going against the Opinion of Advocate-General Wathelet delivered on 19 September 2017) to find such clauses incompatible with EU law is of profound significance to investor-state dispute settlement within the European Union.