German Federal Court of Justice (Bundesgerichtshof) requests ECJ to give a ruling on the validity of arbitration agreements in Bilateral Investment Treaties amongst Member States

Slovakia and the Netherlands concluded a BIT in 1992 which included an arbitration agreement for disputes between foreign investors and one of the contracting parties. Slovakia became a EU member state in 2004. Later, a health insurance company from the Netherlands that had operated on the Slovakian market obtained an award from an arbitral court in Frankfurt, Germany, granting € 22 million damages against Slovakia.

Slovakia now argues before German state courts that by its accession to the EU its offer for concluding an arbitration agreement had become invalid because of its incompatibility with EU law. The Upper Regional Court (*Oberlandesgericht*) of Frankfurt, decision of 18 December 2014, docket no. 26 Sch 3/13, decided against Slovakia. By its appeal to the Federal Court of Justice (*Bundesgerichtshof*) Slovakia continues seeking the setting aside of the arbitral award for lack of jurisdiction of the arbitral tribunal. The *Bundesgerichtshof*, by its decision of 3 March 2016, docket no. I ZB 2/15, requested the Court of Justice of the European Union to give a ruling on the validity of arbitration agreements in BITs between Member States of the European Union, in particular in light of Articles 344, 267 and 18 I TFEU.

The *Bundesgerichtshof* expressed its view that there should be no conflict with Articles 344, 267. However, the Court poses the question whether there might be a discrimination against investors of other Member States unable to proceed under equivalent BIT proceedings. Even if this were the case, the Court further holds that the consequence of a dicrimination of this kind would not necessarily be the invalidity of the arbitration clause but rather the access of discriminated

investors to the BIT dispute settlement mechanism.

For those who read German, the Court’s press release of today about its decision (full text is not yet available) can be found here:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=1&anz=82