

CJEU on the compatibility with EU law of an arbitration clause in an Intra-EU BIT - Case C-284/16 (Slovak Republic v Achmea BV)

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Today, the CJEU has rendered its judgement in *Slovak Republic v Achmea BV* (Case C-284/16). The case concerned the compatibility with EU law of a dispute clause in an Intra-EU Bilateral Investment Treaty (BIT) between the Netherlands and the Slovak Republic which grants an investor the right to bring proceedings against the host state (in casu: the Slovak Republic) before an arbitration tribunal. In concrete terms, the German Federal Court of Justice referred the following three questions to the CJEU (reported here):

Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?

In his Opinion, Advocate General Wathelet answered all three questions in the negative and therefore affirmed the EU law compatibility of such a provision. Most notably (and rather surprisingly for many legal commentators), he concluded that the BIT's arbitration system did not fall outside the scope of the preliminary ruling mechanism of Article 267 TFEU. Hence, an arbitral tribunal established under the BIT was in his opinion eligible to refer questions on the interpretation of EU law to the CJEU.

The CJEU did not follow the Opinion of the Advocate General and held:

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.

The Court based this finding on a violation of Article 267 TFEU, Article 344 TFEU and Article 19 paragraph 1 subparagraph 2 TEU. An arbitral tribunal established under the BIT is in the Court's opinion an exception to the jurisdiction of the courts of the contracting states of the BIT. Thus, it does not form part of the judicial system of the Netherlands or Slovakia (para. 45) and cannot be classified as a court or tribunal "of a Member State" within the meaning of Article 267 TFEU (para. 46 et seq.). Consequently, it has no power to make a reference to the Court for a preliminary ruling (para. 49). A subsequent review of the award by a court of a Member State (which could refer questions on the interpretation of EU law to the CJEU) is not enough to safeguard the autonomy of EU law since such a review may be limited by the national law of the Member State concerned (para. 53). Unlike in commercial arbitration proceedings such a limited scope of review does not suffice in the case of investment arbitration proceedings because these arbitration proceedings do not originate in the freely expressed wishes of the parties. 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 which Article 19 paragraph 1 subparagraph 2 TEU requires them to establish in the fields covered by EU law, disputes which may concern the

application or interpretation of EU law (para. 55).

As the Court already found a violation of the provision with regard to the questions 1 and 2 it did not have to address the third question.

The judgement can be found [here](#).