The Slovak Republic v. Achmea B.V., Judgment of the Court (Grand Chamber) of 6 March 2018, Request for a preliminary ruling from the Bundesgerichtshof (C-284/16, ECLI:EU:C:2018:158)

Member State

Slovakia

Topic

Rule of law

Deciding Court Original Language

Court of Justice of the European Union

Deciding Court English translation

Court of Justice of the European Union

Registration N

C-284/16

Date Decision

6 March 2018

ECLI (if available)

ECLI:EU:C:2018:158

Subject Matter

Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic — Provision enabling an

investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party — Compatibility with Articles 18, 267 and 344 TFEU — Concept of ‘court or tribunal‘ — Autonomy of EU law.

Legal issue(s)

When an arbitral tribunal can be considered as a “court or tribunal of a member state” based on Article 267 TFEU.

Facts of the case

Achmea B.V. (which was formerly known as Eureko B.V.) is an undertaking belonging to a Dutch insurance group. Following its EU membership and while a reform of Slovakia‘s health system was considered to be necessary, the Slovak Republic opened the Slovak health market in 2004 to national and foreign operators offering private sickness insurance services. After being approved as a health sickness body, Achmea established a subsidiary (Union Healthcare) in Slovakia, to which it supplied a considerable amount of capital (approximately EUR 72 million) and through which it offered private sickness insurance. Following a change of government in 2006, the Slovak Republic partly revoked the liberalisation of the sickness insurance market.

Achmea initiated an arbitral procedure against that State in October 2008, in the application of Article 8 of the Netherlands-Czechoslovakia BIT, and claimed damages of EUR 65 million. Achmea argued that Slovakia‘s restrictive measures amounted to a breach of the following articles of the BIT: Article 3(1) on fair and equitable treatment, Article 3 (2) on full security and protection, Article 4 on transfer of payments related to investments and Article 5 on expropriation.

The arbitral tribunal and the parties agreed that the PCA should act as the Registry and that the language of the case should be English. By Procedural Order No. 1, the arbitral tribunal set the place of the arbitration as Frankfurt am Main (Germany). In the context of the arbitral proceedings, the Slovak Republic raised an objection to the jurisdiction of the arbitral tribunal. It claimed that the Treaty for Functioning of the EU governed the same matter as Netherlands-Czechoslovakia BIT and that BIT should be considered inapplicable or to have terminated in accordance with Articles 30 and 59 of the Vienna Convention on the Law of Treaties of 23 May 1969.

The Slovak Republic also maintained that, consequently, the arbitration clause in Article 8(2) of that BIT could not be applied, as it was incompatible with the TFEU Treaty. It added that the Court of Justice of the EU had exclusive jurisdiction over Achmea‘s claims and that certain provisions of that BIT, such as Article 4, concerning the free transfer of payments, had been held by the Court to be incompatible with the TFEU.

By its Award of 26 October 2010 on Jurisdiction, Arbitrability and Suspension, the arbitral tribunal

rejected that objection to jurisdiction and declared that it had jurisdiction.

The Slovak Republic‘s action before the German courts seeking the reversal of that award did not succeed.

By a Final Award on 7 December 2012, the arbitral tribunal held that a part of the measures adopted by the Slovak Republic, namely the ban on the distribution of profits and the ban on transfers, breached Article 3 (fair and equitable treatment) and Article 4 (free transfer of payments) of the BIT and ordered the Slovak Republic to pay Achmea damages of EUR 22.1 million plus interest, as well as the costs of the arbitration and the legal costs incurred by Achmea.

As the place of arbitration was Frankfurt am Main, the Slovak Republic brought an action to have the Final Award reversed before the Higher Regional Court in Frankfurt. As that court decided to dismiss the action, the Slovak Republic lodged an appeal on a point of law against that decision before the Federal Court of Justice in Germany. In that context, the Slovak Republic maintained that the Final Award should have been reversed because it was contrary to public policy and the arbitration agreement that had given rise to the award was also null and void and contrary to public policy. The Slovak Republic argued that the arbitral tribunal, having been unable to request the Court to give a preliminary ruling under Article 267 TFEU, failed to take account the higher-ranking provisions of EU law on the free movement of capital and breached its rights of defence when it quantified damages. With regards the assertion that the arbitration clause established by Article 8 of the Netherlands-Czechoslovakia BIT was null and void, the Slovak Republic maintained that that agreement was contrary to Articles 267 and 344 TFEU and to the principle of non-discrimination set forth in Article 18 TFEU.

The German Federal Court of Justice established that the Court had not yet given a ruling on those issues and decided to stay proceedings and to refer the following questions to the Court of Justice of the EU for a preliminary ruling:

1. Whether Art. 344 TFEU precludes the application of an investor-State arbitration provision in a BIT between Member States of the EU, where the BIT was concluded before one of the Contracting States (Slovakia) acceded to the EU, but arbitral proceedings are not commenced until after that date.

Art. 344 provides that “Member States undertake not to submit a dispute concerning the interpretation or application of the [EU] Treaties to any method of settlement other than those provided for therein”.

2. If the first question is to be answered in the negative, whether Art. 267 TFEU precludes the

application of the same provision.

Art. 267 regulates referrals by “any court or tribunal of a Member State” to the Court to give a ruling on questions regarding “the interpretation of the Treaties; or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”.

3. If both the first and second questions are answered in the negative, whether Art. 18 precludes the application of the investor-State provision in the BIT in the circumstances as set out under question (1).

Art. 18 prohibits “any discrimination on grounds of nationality”.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court found that Arts. 344 and 267 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Art. 8 of the BIT (Case C-284/16, Slovakia Republic v Achmea B.V., para. 60). The crux of the Court‘s analysis was that investor-State arbitration is a mechanism that cannot ensure that disputes in which the interpretation or application of EU law is engaged will be decided by, or will be able to be reviewed by, a competent court within the EU judicial system.

More specifically, the arbitration provision in the BIT was considered by the Court as contrary to the autonomy of the EU legal system.

The Court considered Arts. 344 and 267 together and found that, pursuant to Art. 344, an international agreement cannot affect the allocation of powers fixed by the EU Treaties or, therefore, the “autonomy of the EU legal system”. Art. 344 provides that Member States must not submit a dispute concerning the interpretation or application of EU Treaties to any method of settlement other than those provided therein. With respect to Art. 267 TFEU, the Court noted that this provision establishes the preliminary ruling procedure – a mechanism described by the Court as a “keystone” of the EU judicial system. This mechanism, in the Court‘s view, enables a “dialogue” between EU Member State courts and, more specifically, between the courts and tribunals of the Member States and the Court. The Court observed that this system serves to ensure the consistency and autonomy of EU law.

The Court analysed the wording in Art. 8(6) of the BIT, which provides that an arbitral tribunal is called on to apply, amongst others, the law of the “Contracting Party Concerned” and which may, therefore, require an arbitral tribunal to apply or interpret EU law. Yet such an arbitral tribunal could not “be classified as a court of tribunal ‘of a Member State‘ within the meaning of Art. 267 TFEU, as it is not part of the judicial system of either The Netherlands or Slovakia”. The Court concluded that an arbitral tribunal did not have the power to make reference to the Court for a preliminary ruling on issues of interpretation or application of EU law that might arise.

On the limited scope of judicial review:

The Court analysed the procedure governing the judicial review of the validity of awards made

under intra-EU BITs. In short, such review can only be exercised by the national court of the seat and to the extent that the national law permits. In the present case, German law provided only for a limited scope of review concerning the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the award. The Court was concerned that the lack of possibility for judicial review, in instances where issues of EU law might be engaged, in turn prevents the “full effectiveness of EU law” (Ibid., para. 56). At the same time, the Court considered that there was a distinction to be made between commercial and investment-treaty arbitration, as commercial arbitrations “originate in the freely expressed wishes of the parties” while the latter “derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts disputes which may concern the application or interpretation of EU law.” The Court did not cite any authority in support of this proposition, nor did it consider a situation where a Member State is a party to a commercial contract containing an arbitration clause.

In light of its findings on Arts. 344 and 267, the Court did not consider it necessary to explore whether intra-EU BITs are compatible with the principle of anti-discrimination in Art. 18.

It needs to be highlighted that The Court distinguishes the BIT from other treaties to which the EU is a party.

The Court also stated in its judgment that “according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected”.

The Court, therefore, distinguished the BIT from other agreements that provide for “the possibility of submitting those disputes to a body which is not part of the judicial system of the EU”, provided that the EU was party to them.

Use of Judicial Interaction technique(s)

Preliminary reference

Impact on Legislation / Policy

Termination of intra-EU BITs.

(Link to) full text

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0284

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