

Intra-EU Bilateral Investment Treaties: compatible with EU law after all?

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In an advisory Opinion to the CJEU, Advocate General Wathelet has advised that an Investor-State Dispute Settlement mechanism between two Member States is not contrary to EU law. He also considers that, in disputes arising from bilateral investment treaties between two Member States, arbitral tribunals may refer questions on the interpretation of EU law to the CJEU by way of the preliminary reference procedure.

Investor-State dispute settlement (**ISDS**) continues to be a hot topic in EU legal circles.¹ One unresolved question is whether bilateral investment treaties (**BITs**) concluded between EU Member States, and specifically their dispute settlement mechanisms, are compatible with EU law. The European Commission has taken the clear view that they are contrary to EU law,² and in 2015 launched “infringement proceedings” against Austria, the Netherlands, Romania, Slovakia and Sweden in respect of their intra-EU BITs.³

The question recently reached the Court of Justice of the European Union (**CJEU**) in the context of a challenge to an arbitral award arising from the BIT between the Netherlands and Slovakia, concluded in 1991. On 19 September, an Advocate General of the CJEU (**the AG**) delivered an advisory opinion concluding that intra-EU BITs are in fact compatible with EU law.

Background

In 2004, the same year in which Slovakia joined the EU, Slovakia began to liberalise its health insurance sector. To benefit from this, Achmea B.V., part of a Dutch insurance group, set up a Slovakian provider of private sickness insurance in 2006. However, just a few months later, following a change in government, Slovakia reversed the 2004 liberalisation measures.

In 2008, Achmea brought arbitral proceedings against Slovakia under the Netherlands-Slovakia BIT, claiming that the measures violated various standards of investor protection contained in the BIT. These proceedings were conducted under UNCITRAL rules, and had their seat in Frankfurt, Germany. In its final award, the tribunal upheld part of Achmea’s claim, and ordered Slovakia to pay €22.1 million in damages.

¹ The inclusion of ISDS in the EU’s trade agreements with third countries was recently the subject of the CJEU’s Opinion 2/15 on the EU-Singapore FTA; see [here](#) for more information.

² See the Commission webpage “Get the facts: Intra-EU bilateral investment treaties” dated 23.07.2015, available [here](#).

³ The Commission also affirmed in several investment arbitrations in which it intervened as a non-disputing party to challenge the jurisdiction of the arbitral tribunals that the termination of intra-EU BITs was desirable. See the Partial award in the *Eastern Sugar B.V. v. The Czech Republic* case, available [here](#); and the Award on jurisdiction in *Achmea B. V. v. Slovakia* case, available [here](#).

During the arbitration, Slovakia had raised an objection to the jurisdiction of the tribunal, claiming that the BIT was incompatible with the EU Treaties, and should be considered inapplicable or to have been terminated. The tribunal rejected this objection as a preliminary matter in 2010. Slovakia raised these same arguments against the final award, in an action before the Frankfurt Higher Regional Court to have the final award reversed. After the Frankfurt Higher Regional Court dismissed the action, Slovakia appealed to the German Federal Court of Justice. The Federal Court made use of the preliminary reference procedure to refer a number of questions to the CJEU concerning the compatibility of intra-EU ISDS with the principle of non-discrimination;⁴ the allocation of powers between national courts and the CJEU;⁵ and the rule that EU Member States may not submit disputes concerning the interpretation of EU law to methods of settlement outside of the EU legal system.⁶

The AG's Opinion

As a preliminary point, the AG remarked on the “striking” position of the European Commission (§39), given that it had previously considered that BITs were necessary to help prepare Central and Eastern European countries for accession to the EU, and had encouraged candidate countries to enter into them (§40). The AG found it surprising that, if intra-EU BITs were considered contrary to EU law, the accession treaties of these countries did not provide for their termination (§41).

As regards the alleged incompatibility of the ISDS clause with EU law, he first considered that there was no discrimination on grounds of nationality. While the clause only benefitted investors from the Netherlands and Slovakia, Slovakia had also concluded BITs with 21 other Member States (§61), conferring substantially the same treatment on their investors. Nor were the nationals of other countries, which were not covered by a BIT with Slovakia, discriminated against. The AG relied on prior case law concerning Double Taxation Treaties, in which the CJEU had held that Member States were permitted under EU law to engage in bilateral treaties granting rights to each other's nationals in matters of taxation. By analogy, he argued that the same should be true of BITs (§73). That they provide for reciprocal rights and obligations applying only to investors from the contracting Member States is an “*inherent consequence*” of their bilateral nature (§75).

Second, he opined that ISDS arbitration did not undermine the allocation of powers between national courts and the CJEU, since the arbitral tribunals in question had all the attributes of a national court and **could therefore refer any questions on the interpretation of EU law to the CJEU by way of the preliminary reference procedure** (§131). In fact, he considered that, since the arbitral tribunal was a national court for the purposes of EU law, it was under an obligation to apply EU law in the same way as any other court (§§133-135).

Third, he advised that Member States were not undermining the EU legal order by agreeing to have their disputes with international investors resolved by arbitral tribunals. He noted that this followed from his finding that arbitral tribunals could make use of the preliminary ruling procedure, but even if that were not the case, he considered that the ISDS clause did not contravene Article 344 TFEU, which states that EU Member States may not submit disputes concerning the interpretation of EU law to methods of settlement outside of the EU legal system. This was because, firstly, that article did not apply to disputes between a Member State and an investor (§159). Second, the dispute did not **concern the interpretation of EU law** (§§173, 176, 177); it concerned the interpretation of the BIT which had a distinct, and much broader, scope than EU law, without being incompatible with it (§228). He therefore concluded that the ISDS clause did not undermine the EU legal system (§237). Moreover, he noted that national courts may review arbitral awards to ensure that they comply with EU law, and themselves make preliminary references to the CJEU where necessary (§239).

Wider implications

Although this case concerns the specific dispute settlement provisions of the Netherlands-Slovakia BIT, there are clearly implications for the many BITs still in force between EU Member States, as well as any proceedings that have already been brought under these BITs. Sixteen Member States lodged observations to the CJEU, although they appeared to be divided in their opinion, depending on whether they tended to be

⁴ Article 18 TFEU.

⁵ Article 267 TFEU.

⁶ Article 344 TFEU.

respondents in arbitrations brought under intra-EU BITs, or be the country of origin of the investor invoking them.

The Opinion is only advisory. The Court might not follow the Opinion, and might not even rule on all the issues discussed in the Opinion. For example, if the Court considers that the intra-EU BITs do in fact contravene the prohibition of discrimination on grounds of nationality, then it might not consider the other two questions.

On the other hand, if the Court agrees with the AG that arbitral tribunals hearing claims under intra-EU BITs can refer questions of EU law to the CJEU, this could have a significant impact on the conduct of such arbitrations. References to the CJEU are public, and the European Commission (and other Member States) have a right to submit observations. Another question is whether they will be required to refer questions of EU law to the CJEU as courts of last resort, or whether the tribunals will have a choice, and if so, whether they will, in effect, accept to interrupt arbitral proceedings to refer questions to the CJEU.⁷

Whatever the Court decides, it will be important to consider the extent to which its conclusions apply to other situations. This case concerns the specific ISDS mechanism contained in the Netherlands-Slovakia BIT, which was based on UNCITRAL rules. It remains to be seen which of the Court's conclusions will apply to BITs between EU Member States and third countries, or to ISDS based on other regimes. In particular, as the AG himself noted (§252), the rules of the International Centre for Settlement of Investment Disputes (ICSID) contain significant differences as regards enforcement and the possibility of national courts to review the compatibility of arbitral awards with EU law.

The Court is expected to hand down its judgment in the coming months.

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⁷ In the *Eastern Sugar B.V. v. The Czech Republic* case, the Tribunal seemed to opine that even if it had the possibility to refer to the CJUE, it would not do so for questions that are not difficult to address. See *Eastern B.V. v. The Czech Republic*, Partial Award, available [here](#), para. 137.