INTRA-EU BITS, COMPATIBLE WITH EU LAW?

In a somewhat surprising development but one that will be warmly welcomed by the international arbitration community, the Advocate General of the Court of Justice of the European Union (AG), Mr Wathelet, has issued an opinion stating that the bilateral investment treaty (BIT) between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic is compatible with EU law. This is the first time that the compatibility of an intra-EU BIT with EU law has been considered by the AG and Court of Justice of the European Union, (CJEU).

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Whilst the opinion of the AG is not binding on the CJEU it is typically influential. The opinion runs contrary to the position repeatedly adopted by the EU institutions, including the EU Commission, that intra-EU BITs do conflict with EU law. The CJEU will have the final say on this but on the basis there are currently 196 intra-EU BITs in force the ramifications could be very significant.

Background to the referral

The request for a preliminary ruling by the CJEU was submitted in the context of an action brought before the German courts, by the Slovak Republic, seeking the annulment of an UNCITRAL award that had been handed down on 7 December 2012. In the award, having decided that they did have jurisdiction to determine the dispute, the tribunal comprising Professor v. Lowe QC (President), Albert Jan van den Berg and V. V. Veeder QC (Tribunal), awarded the claimant, Achmea, EUR 22.1 million plus interest and costs.

The Slovak Republic’s challenge vis-a-vis the jurisdiction of the Tribunal was on the basis that the Treaty of the Functioning of the European Union (TFEU) governed the same matter as the BIT and so the BIT should have been considered inapplicable or to have terminated in accordance with Articles 30 and 59 of the Vienna Convention on the Law of Treaties. They also argued that the arbitration provision within the BIT and specifying UNICTRAL arbitration was invalid as the CJEU had exclusive jurisdiction over Achmea’s claims.

Following the Tribunal’s award the Slovak Republic sought to have the decision annulled in the German courts. This was on the basis that the seat of the arbitration was Frankfurt.

The first instance court of Frankfurt (Oberlandesgericht Frankfurt am Main) dismissed the challenge. The Slovak Republic appealed to the Federal Court of Justice (Bundesgerichtshof) and the Federal Court in turn decided to stay the action and refer three key questions to the CJEU. The questions concerned articles 344, 267 and 18 TFEU. The relevant articles, in summary, establish the supremacy of the CJEU in interpreting questions of EU law and prohibit discrimination on the grounds of nationality.

The AG’s preliminary observations

Prior to providing his opinion the AG made a number of interesting preliminary observations.

The AG noted that there were currently 196 intra-EU BITs in force and so the CJEU’s ultimate decision on this issue is one of great importance. He also noted that the European Commission had intervened and had argued, as it has consistently in a number of intra-EU BIT arbitrations, that intra-EU BITs are incompatible with EU law.

However, the AG noted that there were a number of inconsistencies with the Commission’s position. The AG noted that for a long time, the argument of the EU institutions, including the Commission, was that BITs were instruments necessary for the accession to the EU. Consequently, the countries of Central and Eastern Europe were encouraged to sign them. What is more these treaties did not have provisions within them that said they ceased to apply once the relevant country joined the EU. The AG opined that if they were so incompatible then one would have thought that they would have such a provision. In addition, all Member States and the EU itself had ratified the Energy Charter Treaty (ECT) which is one of the largest multilateral investment treaties in the World. The ECT does not operate as an agreement between the EU and its Members States on the one hand and the non-EU countries on the other. It is instead a typical multilateral treaty and prior to it being signed the AG noted that no EU institution and no Member State sought an opinion

from the C of J on the compatibility of the ECT with EU law. The AG surmised that this was because "none of them had the slightest suspicion that it might be incompatible".

The AG's opinion

As mentioned at the outset of this article, the AG ultimately concluded that the BIT in question, was not contrary to the three relevant articles of the TFEU. The opinion runs to some 30 pages and so it is impossible to carefully analyse each argument in this article. Consequently, what appears here is a summary of some of the main arguments.

The AG began his analysis by looking at whether the presence of the Investor State Dispute Settlement (ISDS) mechanism in the BIT allowing investors from the Netherlands to have recourse to international arbitration against the Slovak Republic was discriminatory in that investors from other Member States did not enjoy such a right. If so, this would be contrary to article 18 of the TFEU. The AG determined that it was not. He argued that the situation was analogous with that provided for by the bilateral tax treaties relating to double taxation that are typically entered into between two Member States. These have been found not to be discriminatory by the CJEU notwithstanding the fact that a national from a third Member State cannot take advantage of them. He also noted, in a footnote, that EU law prohibits discrimination by a Member State against a national of another Member State only in the light of the treatment which the first Member State affords to its own nationals. Reverse discrimination, so granting more favourable rights to nationals of other Member States than those of your own, is not prohibited by EU law and hence the BIT was not contrary to article 18 of the TFEU.

The AG then went on to consider whether the Tribunal constituted in accordance with the ISDS mechanism within the BIT was a court or tribunal within the meaning of article 267 TFEU. If so then this meant that the Tribunal had the ability to refer questions of EU law to the CJEU for determination and in so doing furthered the autonomy of the EU legal system. The AG concluded that the Tribunal was indeed such a court or tribunal under article 267 TFEU. Whilst acknowledging that the CJEU had in the past, and on occasion, refused to answer a question for a preliminary ruling referred by arbitrators, it had, in other instances, been willing to take referrals. Having run through the necessary elements for coming within the definition of 'court or tribunal' under article 267 TFEU, the AG found that the Tribunal qualified.

The AG then had to determine whether the BIT was contrary to article 344 of the TFEU. This provision provides that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. The AG found that the BIT, and in particular the ISDS mechanism within the BIT, was not incompatible with this. The principle reason being that he was of the view that article 344 TFEU applies to disputes between Member States and not disputes between investors and Member States. This analysis is consistent with the analysis that was performed by the Tribunal at the jurisdiction challenge stage in the arbitration proceedings and other investment treaty tribunals that have dealt with this issue.

In addition, the AG found that the Tribunal was not having to rule on and interpret EU law. The Tribunal's jurisdiction was expressly confined to the alleged breaches of the BIT. The Tribunal's role was not to establish whether, by its conduct, the Member State failed to fulfil its obligations under the TFEU and other EU treaties but rather its role was to establish whether the BIT had been breached. Whilst it was acknowledged that EU law might have a bearing upon the scope of rights and obligations under the BIT (by virtue of the fact it was part of the applicable law) it had no impact on the substance of the dispute. The AG found that the scope of the BIT and the legal rights and obligations that it introduced were not the same as those granted under the EU treaties including the TFEU. The AG said that the rights contained within the BIT, which were absolutely standard, went beyond those granted by the EU treaties. The AG looked at the main legal rights conferred under the BIT, such as fair and equitable treatment, full security and protection, the umbrella clause, the ISDS mechanism and others and found that they either were unknown to EU law or were wider in scope than the equivalent provisions under the EU treaties. Consequently, again, in considering whether the BIT had been breached the Tribunal was not interpreting EU law.

Finally, the opinion considered whether the ISDS mechanism within the BIT had the effect of undermining the allocation of powers fixed by the EU treaties and the autonomy of the EU legal system again because the Tribunal may be interpreting EU law differently to that of the courts of other Member States and, ultimately, the CJEU. If the CJEU found, contrary to the AG's opinion, that the tribunals under the BITs were not courts or tribunals that were in a position to refer questions of EU law to the CJEU for a preliminary determination then the AG argued that should not be fatal. The reason for this was that, save in the case of disputes submitted to ICSID, the courts of Member States would always have the chance to reject an arbitration award that was in contravention of EU law. They would be able to do so at the annulment stage (if the seat of the arbitration was in a Member State) as in the present case or in the recognition and enforcement stage (assuming the award was being enforced in a Member State). The difficulty of ICSID with respect to this argument was recognised by the AG who opined that Member States should avoid the choice of ICSID in their BITs. However, whether this will be adhered to remains to be seen. Investors coming from the capital exporting Member States may argue that the inability of a Member State to interfere in the arbitration award vis-a-vis its alleged compatibility with EU law is actually a compelling reason to choose ICSID in the first place and in turn may put pressure on their government to include ICSID.

Conclusion

The controversy surrounding intra-EU BITs is likely to continue for the foreseeable future and the CJEU's decision will be eagerly awaited by the investment treaty arbitration community. The EU Commission's position on intra-EU BITs is clear and has been for quite some time, namely, they are incompatible with the devolution of powers to the EU and its institutions and so should be abolished. The AG's opinion provides a welcome counter-position to that and supports the position that a number of tribunals have reached, over the years, when considering these issues in respect of a jurisdictional challenge. It also supports that most noble of causes amongst the arbitration community, namely, party autonomy and freedom of choice.

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