



EUROPEAN COMMISSION

LEGAL SERVICE

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To Mr Martin Doe
Legal Counsel
Permanent Court of Arbitration
Peace Palace, Carnegieplein 2
2517 The Hague
The Netherlands

Request dated 6 September 2011 from the arbitral tribunal dealing with (PCA) Case N° 2010-17: European American Investment Bank AG (Austria) v. The Slovak Republic

Your reference: (PCA Case N° 2010-17), European American Investment Bank AG (Austria) v the Slovak Republic

Dear Mr Martin Doe,

I refer to your letters of 6 and 9 September 2011. I understand that you write on behalf of an arbitral tribunal established under the Rules of Arbitration of the United Nations Commission for International Trade Law (UNCITRAL), pursuant to an investor-state arbitration clause set out in a bilateral investment treaty dated 15 October 1990 between Austria and the Czech and Slovak Federal Republic.

According to your letters this arbitral tribunal is currently seized of a claim which a private investment company - European American Investment Bank AG (Austria) - has brought against the Slovak Republic (PCA Case N° 2010-17). The defendant State contests the jurisdiction of the arbitral tribunal on the grounds of the invalidity or inapplicability of the bilateral investment treaty as a result of the accession of both Austria and the Slovak Republic to the European Union. It is in the context that you inform the European Commission that the arbitral tribunal is currently considering the question of whether the bilateral investment treaty concerned "*(...) continues to be in force and the effect, if any, which it possesses in light of the fact that the Respondent, the*

Slovak Republic, and the national State of the investor, Austria, are members of the European Union".

On behalf of the arbitral tribunal you invite the European Commission " (...) *to provide any observations that it may wish to submit for the Tribunal's consideration*" regarding the aforementioned question. Furthermore, you kindly request the Commission to limit its observations to no more than 25 pages and to submit these as soon as possible and no later than 29 October 2011. You also inform the European Commission that the arbitral tribunal is extending similar invitations to the governments of Austria and the Czech Republic.

Let me point out firstly, that all natural and legal persons, as well as all states that are directly or indirectly involved in the arbitration to which you refer, are subject to and bound by the law of European Union. All are therefore required to respect the primacy of European Union law as well as the autonomy of its judicial system.

Secondly, the fundamental elements of the European Union legal order and its judicial system, as designed by the founding Treaties and developed by the case-law of the Court of Justice of the European Union, form part of the public order of all its Member States and therefore of the law to be applied by the arbitrators. Member States that have concluded agreements conferring jurisdiction on courts or tribunals which rule on the scope of obligations imposed on EU Member States pursuant to EU law but are not bound to respect EU law are in breach of this public order. An arbitral award that breaches these principles cannot be recognised or enforced in the European Union.

Thirdly, I note that the bilateral investment treaty to which you refer deals with subject matters that fall squarely within the scope of the Treaty of the Functioning of the European Union. I refer in particular to the rules regulating aspects of foreign investment activity, including for post-establishment treatment and operation, i.e., rules on right of establishment and on capital movements and transfers.¹ Such rules include, first and foremost, the principle of non-discrimination on grounds of nationality. This principle requires the same treatment of investors from all EU Member States as regards both substantive standards of protection and procedural remedies.

Fourthly, I note that Article 8 of the bilateral investment treaty entitled 'settlement of disputes concerning investments' establishes a dispute settlement mechanism for disputes between a Contracting party and an investor of another Contracting Party regarding article 4 of the agreement ('compensation') and 5 ('remittances'). Where such disputes cannot be settled on an amicable basis (Article 8(1)), unless otherwise agreed, they shall be settled by an arbitral tribunal set up in accordance with UNCITRAL arbitration rules (Article 8(2)). The arbitral award is final and binding and Contracting Parties need to ensure recognition and enforcement of the arbitral award in accordance with their own laws (Article 8(3)).

Consequently, the arbitration claim brought by European American Investment Bank AG (Austria) against the Slovak Republic in PCA Case N° 2010-17 on the basis of the aforementioned dispute settlement provision, raises similar fundamental questions as other

¹ Including but not limited to the rules set out in Part Three, Title IV, Chapter 2 of the Treaty on the Functioning of the European Union, 'Right of Establishment', articles 49 to 55 and Chapter 4, 'Capital and Payments', articles 63 to 66.

investor-state arbitration based on investment treaties concluded between states that are or have become members of the European Union ('intra-EU bilateral investment treaties').

The pleadings enclosed with your letters of 6 and 9 September demonstrate that the arbitral tribunal dealing with PCA Case N° 2010-17 is informed of the position which the European Commission – guardian of the treaties of the European Union- has taken regarding similar arbitrations based on intra-EU bilateral investment treaties.²

This position is in summary as follows:

- Insofar as the arbitration claims involve questions of application and interpretation of law covered by the EU treaties, EU law takes precedence. Where there is a conflict with EU law, the general international law rule of '*pacta sunt servanda*' does not apply to treaties concluded between EU Member States.³
- In the EU judicial system, it is the task of the EU courts to ensure the authentic interpretation of EU law by both its institutions and the Member States, including by the domestic courts of the Member States.⁴ National courts of EU Member States also have to ensure the correct interpretation and application of EU law by Member States' national authorities.
- Whereas the Court of Justice of the European Union is the highest judicial authority of the Union, the primary role of applying Union law falls on the national courts and tribunals of EU Member States.
- The Court of Justice of the European Union has exclusive jurisdiction to review the legality of acts adopted by the EU institutions, to determine whether EU Member States have fulfilled their obligations under EU law in infringement proceedings brought by the European Commission against them, and to give preliminary rulings on questions of EU law as requested by EU domestic courts and tribunals.
- EU courts and national courts of EU Member States ensure procedural and substantive protection to private parties (including for investors) for breaches of Union law. The right of individuals to compensation from Member States for breaches of EU law is firmly grounded in EU law⁵ and is a principle inherent in the system of EU law.⁶ Consequently, an individual may bring a damages claim in the national courts of EU Member States on account of an act or omission of a

² Reference is made in particular to the position taken by the European Commission in *Eureka BV v Slovak Republic* (PCA-UNCITRAL- Case N° 2008-13), to which both the European American Investment Bank AG (Austria) and the Slovak Republic have extensively referred in their pleadings in PCA Case N° 2010-17.

³ Article 351 of the Treaty on the Functioning of the European Union only applies to treaties concluded between EU Member States and non-EU Member States.

⁴ See Article 19 of the Treaty on the European Union and Article 344 of the Treaty on the Functioning of the European Union.

⁵ Court of Justice of the European Union, Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy*, Judgment of 19 November 1991, [1991] ECR I-5357, Judgment of 19 November 1991, paragraph 33.

⁶ Court of Justice of the European Union, Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy*, *op. cit.*, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20; Case C-445/06, Judgment of 24 March 2009, *Danske Slagterier*, [2009] ECR p. I-2119, paragraphs 19 and 20.

legislative organ⁷ or on account of decisions of judicial bodies adjudicating at last instance which are in manifest breach of EU law.⁸

- Mutual trust by EU Member States in the application of EU law and in particular in the administration of justice in the European Union is one of the basic principles of the European Union.⁹
- In the Treaty on the Functioning of the European Union EU Member States have agreed not to submit disputes involving the application or interpretation of European Union law to any other method of dispute settlement than that set out in the EU treaties.¹⁰
- An international agreement cannot affect the allocation of responsibilities defined in the European Union treaties including the autonomy of the European Union legal system and the exclusive jurisdiction of EU courts.¹¹
- Under EU law, a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law.¹² A private party cannot rely on judicial settlement mechanisms that conflict with the EU judicial system. An investor cannot rely on provisions of bilateral investment treaties concluded between EU Member states which are inconsistent with EU law and the Union's judicial system.

In addition, I would like to draw your attention the recent Opinion 1/09 delivered by the Court of Justice of the European Union on 8 March 2011.¹³ The question examined by the Court of Justice was whether an envisaged international agreement to be concluded by the EU and its Members with third countries, which would lead to the setup of a new court structure (the "European and Community Patents Court") on patent-related disputes between private parties, was compatible with the "(...) *fundamental elements of the legal*

⁷ Court of Justice of the European Union, Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy*, *op. cit.*, paragraphs 34-35.

⁸ Court of Justice of the European Union, Case C-224/01 *Köbler*, [2003] ECR I-10239, paragraphs 30 to 59; Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177, paragraphs 30-40.

⁹ Court of Justice of the European Union, Case C-5/94, *Hedley Lomas*, paragraphs 19-20; Case C-533/08, *TNT Express Nederland BV v Axa Versicherung AG*, Judgment, 4 May 2010, paragraphs 49-50, not yet reported.

¹⁰ Article 344 of the Treaty on the Functioning of the European Union; Case C-459/03 *Commission v Ireland*, [2006] E.C.R. p. I-4635, paragraph 177.

¹¹ Court of Justice of the European Union, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71; Case C-459/03 *Commission v Ireland*, *op. cit.*, paragraph 123; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] E.C.R. I-6351, paragraph 282.

¹² General Court, Case T-70/89, *BBC v Commission*, [1991] ECR II-535, paragraph 77 (Judgment upheld by the Court of Justice of the European Union in Case C-77/89, *BBC v Commission*); See too: Joined Cases 180 and 266/80, *José Crujeiras Tome v Procureur de la République and Procureur de la République v Anton Yurrita*, Judgment of the Court of Justice of the European Union of 8 December 1981 [1981] ECR, page 02997, paragraph 20.

¹³ Court of Justice of the European Union, Opinion 1/09, Opinion delivered pursuant to Article 218(11) TFEU – Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties, 8 March 2011, not yet reported.

*order and judicial system of the European Union, as designed by the founding Treaties and developed by the case-law of the Court".*¹⁴

In its Opinion the Court of Justice recalled the fundamental principles of the EU legal order and its judicial system. It stressed the role of the EU courts as guardians of the EU legal order, the duty of EU Member States to ensure the full application of European Union law in all Member States and to ensure judicial protection of individuals' rights under Union.¹⁵

Noting that the proposed new court was outside the institutional and judicial framework of the European Union,¹⁶ the Court of Justice took the view that the envisaged agreement would alter the essential character of the powers which the Union's Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law. The Court's overall conclusion was that the envisaged agreement creating the new court was not compatible with the provisions of the European Union treaties.¹⁷

This recent opinion of the Court of Justice confirms in the clearest possible terms that the investor-state arbitration mechanism set out in the bilateral investment treaty on which the arbitral tribunal dealing with PCA Case N° 2010-17 was established is incompatible with the provisions of the European Union treaties. The arbitral tribunal is not a 'court or tribunal' of an EU Member State but a parallel dispute settlement mechanism entirely outside the institutional and judicial framework of the European Union. Such mechanism deprives courts of the Member States of their powers in relation to the interpretation and application of EU rules imposing obligations on EU Member States, which are presumably relevant in the arbitral proceeding. Furthermore, arbitrators are not obliged either to respect EU law, and cannot refer to the Court of Justice where an issue relating to the interpretation or validity of EU rules is raised in their proceedings.

Consequently, I must request that the arbitral tribunal declares that it has no jurisdiction to deal with the claim brought by the *European American Investment Bank AG (Austria) against the Slovak Republic* in PCA Case N° 2010-17.

Yours sincerely,



Luis Romero Requena

Director General

European Commission Legal Service

¹⁴ Court of Justice of the European Union, Opinion 1/09, paragraph 64.

¹⁵ Ibid., paragraphs 66-68.

¹⁶ Ibid., paragraphs 72- 73, 77-83, 86-88.

¹⁷ Ibid., paragraph 89.