Digesting the AG Wathelet Opinion in Case C-284/16 Slowakische Republik v Achmea BV. Is it A Trap?

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I. Introduction

On 19 September 2017 the Advocate General (AG) to the Court of Justice to the European Union (CJEU) Melchior Wathelet delivered his long-awaited Opinion in Case C-284/16 Slowakische Republik v Achmea BV. As already explained in another post, Bundesgerichtshof ("German Federal Court of Justice") requested a preliminary ruling from the CJEU on the compatibility of certain provisions of the 1991 BIT between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ("BIT") with EU law. The case before the German Federal Court of Justice arose out of the efforts of Slovak Republic to set aside the Frankfurt-seated UNCITRAL Award in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic). In his shockingly firm Opinion, the AG concluded that the BIT, and specifically its dispute resolution mechanism, are not incompatible with the EU law and do not run afoul of Articles 344, 267, and 18 Treaty of Functioning of the European Union ("TFEU"). As acknowledged in the Opinion, the outcome of the case is of "fundamental" importance" and outreaches the particularities of the dispute at hand given the *(i)*

uncertain future of the numerous intra-EU BITs, *(ii)* volume and importance of the current intra-EU investor-state disputes, and *(iii)* complicated political implications of the ongoing clash over the future of investment disputes in general and the European participation therein. Indeed, the position of the AG appears to be in a stark contrast to the view of the European Commission (EC) and its notorious efforts to dissolve the intra-EU ISDS. What is more, the Opinion was issued shortly after:

- the EC issued a Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes;
- the Belgian government requested an opinion from the CJEU regarding the compatibility of Chapter 8 provisions of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which establish the Investment Court System (ICS), with the European Treaties, including basic rights.

II. Positives of the Opinion

The AG Opinion is extremely interesting and gives the international community of lawyers and practitioners food for thought. Further, many of the conclusions of the AG deserve support:

1. No discrimination

The AG concludes that the BIT (Art. 8) is sound with the prohibition on the discrimination under Art. 18(1) TFEU by way of comparison with bilateral double taxation conventions. According to the CJEU case law (C-376/03), the latter are not discriminatory whereas the benefits which they grant are "an integral part thereof and contribute to the overall balance". On the basis of this, the AG concluded that Art. 18(1) TFEU does not contain an MFN clause and does not prevent Member States from affording treatment to nationals of another Member State which is not afforded to national of a third Member State. Art. 18(1) TFEU provides equal treatment compared to nationals of the respective Member State (national treatment) (AG Opinion, para. 67-75). Apart from clarifying the scope and the meaning of Art. 18 TFEU, these arguments of the AG recognise the *lex specialis* character of reciprocal rights and obligations established by bilateral intra-EU treaties whereas those rights and obligations lay at the core of the treaty regime.

2. No violation of Art. 344 TFEU

The AG's primary argument with regard to the question whether disputes referred to in Art. 8 of the BIT do not violate Art. 344 TFEU (monopoly of dispute settlement) as such disputes do not even come under Art. 344 TFEU since they do not represent disputes between Member States or between Member-States and the Union. Referring to Opinion 2/13 CJEU (Accession of the Union to the ECHR), the AG determined that disputes involving individuals are outside of the scope of the provision (AG Opinion, paras. 146-153).

Alternatively, even if Art. 344 TFEU applies, the investor-State disputes do not concern the interpretation or application of the EU Treaties. First, the jurisdiction of the arbitral tribunal is confined to rulings on breaches of BIT, and, second, the BIT legal rules are not the same as those of the EU Treaties. The AG makes the important finding that the scope of the BIT is wider than the EU treaties the BIT contains rules which have no equivalent in EU law and are not incompatible with it.

III. Is it A Trap? The international nature of the arbitral tribunals

Notwithstanding the positive sides of the Opinion, it should be accepted with some caution. Its careful reading reveals some arguments which are troublesome and inconsistent. In answering the second question of the preliminary request, namely whether Art. 267 TFEU (the preliminary reference procedure) precludes the application of the ISDS provision of the BIT, the AG makes the conclusion that the arbitral tribunal is common to the Member States parties to the BIT and is permitted to request preliminary rulings. Applying the CJEU case law test, the tribunals are considered courts under Art. 267 TFEU. The AG goes even further by determining that they are "…**required — and if they failed to do so their awards would be null and void on the ground that they would be contrary to public policy** — to respect the principles set out by the Court … including, in particular, **the primacy of EU law** over the laws of the Member States and over **every international commitment given between Member States**…" (Emphasis added). (AG Opinion, para. 134).

1. Possible political goals

If adopted, such opinion would possibly lead, as observed by Nikos Lavranos, to an "Europeanisation" of investment-State arbitration and would be integrated by the EU, which would be a diplomatic way to achieve the EC goals. This goal might be reaffirmed if one considers other passages from the Opinion. In arguing that the

BIT does not undermine the allocation of powers within the EU and the autonomy of the EU legal system, the AG concludes that the awards made by the arbitral tribunals cannot avoid review by national courts and, if required, requesting preliminary rulings from the CJEU. Realizing that this principle applies only to UNCITRAL arbitrations conducted on the territory of a Member State, the AG merely points out that in the Achmea case Art. 8 of the BIT does not refer to ICSID.

2. Legal incorrectness

Some of the proposed views does not stand legal scrutiny from the perspective of public international law.

First and foremost, it is legally incoherent to regard investment arbitral tribunals as courts or tribunals of the Member States. It might be beneficial to consider them as such only for the purposes of Art. 267 TFEU. However, this may not be supported given the independent international status of the investor-State arbitral tribunals. The powers conferred to the arbitral tribunals stem exclusively from the treaty regime established by the parties (See *Electrabel S.A. v. The Republic of Hungary*, (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, para. 4.112).

Secondly, if ICSID tribunals are required to make references for preliminary rulings each time they need to apply a question of EU law (See Art. 267 TFEU), they would effectively be placed under the supremacy of the CJEU. Admittedly, abitral tribunals have long accepted unique nature of EU law and that it should be applied both as national law and also as international treaty law. (See Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3), Award, para. 278). However, conflicts between international legal rules which have the same hierarchical power and regulate the same subject-matter is a complex question and cannot be ab initio resolved in favour of EU law based on the internal supremacy alleged by AG.

3. Inconsistency

Apart from the foregoing, the AG Opinion demonstrates some inherent inconsistencies. Giving a negative answer to the second question, the AG determined that the arbitral tribunals participate in the dialogue between courts and, where necessary, are required to request preliminary ruling. However, in his analysis of the third question, the AG argues that disputes resolved by the arbitral

tribunals constituted under the BIT do not concern questions of interpretation or application of EU Treaties and are thus are not incompatible with Art. 344 TFEU. While the AG puts those arguments in further alternative, whether an investor-State dispute concerns interpretation or application of EU law is a matter of fact and cannot be automatically changed dependent on the alternatives construed.

IV. Conclusion

The AG Opinion in *Achmea* is certainly a breakthrough in the intra-EU ISDS saga. The analysis of the AG has many positive traits and views which should, in the author's opinion, be adopted by the CJEU in its decision. Still, one should be careful and consider the overall effect of the proposed solutions which promises to be far-reaching.

The author holds a position of Research Assistant at the LCIA. Opinions expressed in this article are the author's own and do not, in any way, reflect the view of the LCIA.