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The Intra EU-BITs in the Opinion of AG Wathelet between Light and Shadow

Anna De Luca (Macchi di Cellere Gangemi) · Sunday, February 4th, 2018

The present analysis critically focuses on some aspects of the Opinion on the intra-EU BITs issued by AG Wathelet in the *Achmea* case (Case C-284/16) in September 2017. The Opinion has been extensively commented on in previously published posts on this blog. As such posts have noted, the AG's position that intra-EU BITs are compatible with EU law certainly represents the most remarkable aspect of the Opinion for the arbitration community. This position, extensively analysed by the preceding posts and not further discussed here, clashes with the long-standing claim of the EU Commission on intra EU-BITs' incompatibility with EU law, submitted to investment tribunals in its several *amici curiae* briefs as of 2006. The EU Commission's claim, being weak from a public international law perspective, has been rather unsuccessful before investment tribunals until now.

The AG's view, endorsing some of the supportive arguments on intra-EU compatibility already made by intra-EU BIT-based tribunals,[1)] represents a positive note, coming from European circles, which sharply contrasts with the 'incompatibility narrative' dominant so far.

That notwithstanding the Opinion also presents perplexing aspects, possibly affecting its overall coherence. These aspects, which will be specifically investigated in the present post, are the AG's qualification of investment tribunals as MSs' courts pursuant to Article 267 TFEU and his 'no-discrimination' conclusion.

Are investment arbitral tribunals under intra-EU BITs court or tribunals within the meaning of Article 267 TFEU?

According to the AG intra-EU BIT-based tribunal would be courts or tribunals common to two MSs, thus permitted to request the Court to give a preliminary ruling. Investment tribunals would therefore meet the requirements established by the Court of Justice in its case-law to determine whether a certain Member State's 'body making a reference is a "court or tribunal" within the meaning of Article 267 TFEU', namely, they a) are established by law; b) have a permanent nature; and c) their jurisdiction is compulsory. (See, *inter alia*, Case C-377/13, *Ascendi Beiras Litoral e Alta*, para. 23)

To use the words of the AG, 'it cannot be disputed that an arbitral tribunal constituted…in accordance with Article 8 of the BIT is established by law' (Opinion, para. 96). This would be the case because said arbitral tribunal '…derives its jurisdiction not only from an international treaty but also from the Netherlands and Czechoslovakian statutes ratifying the BIT by virtue of which the BIT became part of the legal orders of those Member States.' (Opinion, para. 96) Given that investment tribunals' jurisdiction would be established by law, and Contracting Parties' public authorities are obviously involved in the choice of arbitration (Opinion, para. 96), investment arbitral tribunals would also be permanent (Opinion, para. 103 ff.) and their jurisdiction compulsory (Opinion, para. 110 ff.).

In the first place, the AG' position contradicts the well-established consensual nature of BIT-based arbitration, as is also acknowledged in a contradictory manner in the Opinion at para. 204.

In the second place, the 'establishment by law' argument is misleading. It confuses the conclusion of a treaty and its binding effects upon the Contracting Parties at the international level with treaty domestic implementation. 'Ratification', i.e., 'the international act…whereby a State establishes on the international plane its consent to be bound by a treaty'[2)] should be distinguished from a domestic implementing act. The latter is an internal statute or order incorporating the treaty into the domestic legal system, and turning it into domestic law applicable before domestic judges. Consequently, on the one hand, even unincorporated treaties, when duly agreed upon by a certain Contracting State (through ratification), binds it internationally; on the other, an implementing statute has a specific 'domestic' significance, which is inconsistently denied by the AG in respect of BITs (Opinion, para. 265), but is of little 'international' import, expect for State responsibility purposes.

In the third place, the public authorities' involvement argument is an element less decisive than the AG seems to believe. Public authorities' involvement is not a peculiarity of investment arbitration. Such involvement is present and often required

by law when parastatal entities consent to international commercial arbitration as means of resolution of contractual disputes with private counterparties.

Finally, to further support his view, the AG relies on two cases in which the Court of Justice gave two Portuguese arbitral tribunals the status of courts of that Member State, and uses the Benelux Court and European Patent Court as points of comparison. The afore-mentioned reliance and comparison are both misplaced.

In the case *Ascendi Beiras Litoral e Alta* (Case C-377/13) the Court qualifies the Portuguese 'Tribunal Arbitral Tributario' as a tribunal of that Member State, given that its general jurisdiction on taxation and customs matters stems directly from provisions of law. To quote the Court itself its jurisdiction '…is not, as a result, subject to the prior expression of the parties' will to submit their dispute to arbitration.' (para. 29) Additionally, the "Tribunal Arbitral Tributario" is included in the list of national courts in Article 209 of the Portuguese Constitution and, as a whole, is permanent in nature being it institutionalized and a stable element of Portugal's legal system. Arbitrators are appointed by the Etichs Board of the Centre for Administrative Arbitration, and selected from a panel formed in advance by the Centre itself; its decisions are qualified by law as judgments, and the applicable (substantive and procedural) law is Portuguese law. Similarly, in the second case, *Merck Canada v. Accord Healthcare Ltd and others* (Case C-555/13), the CJEU attributes the very same status to another Portuguese arbitral tribunal tellingly called 'Tribunal Arbitral necessário' vested by law with a general and compulsory jurisdiction on disputes concerning industrial property rights related to medicines (para. 19 ff.). Such Tribunal's decisions may be subject to appeal before the competent Court of Appeal. Like the 'Tribunal Arbitral Tributario', the 'Tribunal Arbitral necessário' is mentioned in the list of national courts of Article 209 the Portuguese Constitution, and Portuguese law governs both the procedure and merits.

Since the two Portuguese arbitral tribunals are clearly domestic administrative law arbitrations, the AG's analogies between the latters and international investment arbitration are more than perplexing. Similarly, his comparison between investment arbitral tribunals and the Benelux Court, the main judicial body of the Benelux Union, is inapposite. (Opinion, paras. 128-130) The Benelux Court is a creature quite different from arbitral tribunals since it is made up of judges belonging to the Supreme Courts of the three States Parties. Moreover, it has jurisdiction to give preliminary rulings on the interpretation of Benelux law upon referral of the domestic judges thereof, as opposed to the arbitral jurisdiction to decide actual cases on the basis of public international law.

Finally, even admitting AG's qualification of investment tribunals as courts under Art. 267 TFEU such tribunals still remain based on international treaties, which neither

provide for the preliminary reference procedure nor explicitly establish that the preliminary rulings of the CJEU are binding on the referring tribunal, as apposed to what is explicitly provided for in the Agreement on a Unified Patent Court (Article 21). Even in case of a referral by an investment tribunal the CJEU would not be in the position to accept its request for preliminary rulings. Pursuant to its consistent case law in case of referral by an international tribunal established by a non-European treaty, same treaty shall explicitly provide that its preliminary rulings are binding thereon (see, inter alia, Opinion 1/91, point 61, opinion 1/92, points 32-33; and 1/00, points 33).

Are intra-EU BITs really not discriminatory against the investors of third MSs?

It is the firm view of the AG that the TFEU does not contain a most favoured nation (MFN) clause. As a consequence, there is no discrimination where a Member State does not afford the nationals of another Member State the treatment which it affords, by convention, to the nationals of a third Member State. The Court's case-law on Article 18 TFEU would confirm the above (Opinion, para. 72). Since the fact that the reciprocal rights and obligations created by the BIT apply only to investors from one of the two Contracting Member States is a consequence inherent in its bilateral nature, 'a non-Netherlands investor is not in the same situation as a Netherlands investor so far as an investment made in Slovakia is concerned.' (Opinion, para. 75)

Nevertheless, pursuant to the CJEU's case-law discrimination problems might arise in respect of those intra-EU agreements granting reciprocal benefits only to the nationals of the Contracting Parties, excluding nationals of other MBs. Intra-EU bilateral treaties, albeit not per se discriminatory, may have a discriminatory effect from an European perspective. In this respect it is sufficient to mention the *Matteucci* case (Case 235/87), where the CJEU states that the application of EU law (and of the principle of equal treatment) cannot be precluded on the ground that it would affect the implementation of an agreement (in the case a cultural cooperation agreement outside the scope of application of EU law) between two MSs. As a result, when intra EU bilateral treaties have a discriminatory effect grounded on nationality, the concerned MSs might be obliged to remove it.

Final remarks

The AG's opinion on intra-EU BITs compatibility, albeit not original, is a welcome dissenting voice. However, the other aspects here commented are so unconvincing from a strictly legal point of view as to risk weakening the 'compatibility' conclusions.

Besides disregarding the consensual nature of investment arbitration and its public international law nature, the Article 267 TFEU based arguments are also not well founded in EU law, and partially contradictory with the compatibility arguments. Similarly, the conclusion that intra-EU BITs are not discriminatory is not undisputed, if one looks at the CJEU's case-law. For the afore-mentioned reasons the AG conclusions can hardly represent the last word on the matters. Moreover, as the post by Buczkowska and others aptly observe, the AG's opinion rests on policy arguments rather than on strictly legal arguments, and advances an intermediate policy approach towards intra-EU investment treaty arbitration (the recognition of its consistency with EU law against its subordination to EU law and the CJEU's jurisdiction). By adopting a prospective approach, thus entering into the on-going policy discussion on the future of intra-EU BITs, the Opinion appears, however, to be of less help to the CJEU from a judicial perspective than one may expect.

References

↑1 Among these arguments are those that i) intra-EU BITs and EU law do not regulate the same subject-matter (Opinion, para. 173 ff.); ii) EU law does not grant to investors and their investments the same level of protection granted to them by BITs, or even a comparable level of protection (Opinion, para. 199 ff.); and iii) BITs standards and EU law are complementary rather than incompatible (Opinion, para. 210).

↑2 Article 2 Vienna Convention on the law of treaties (VCLT).

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