Kluwer Arbitration Blog

The House Always Wins Remarks on AG Wathelet's Opinion in the C-284/16 Achmea Case

El?bieta Buczkowska, Patrycja Treder (K&L Gates LLP) and Wojciech Sadowski (Queritius) · Wednesday, November 22nd, 2017

The Opinion delivered on 19 September 2017 by Advocate General Wathelet in the case C-284/16 *Achmea* has already been widely commented on in the international arbitration community. The views are either critical or approving, but so far, they have mostly been focused on whether a particular legal point made by the Advocate General was right or wrong.

In this post we propose taking a different approach. We see the Opinion in the *Achmea* case as a game-changer and a turning point in the approach that the European Union may be taking towards investment treaty arbitration. As a consequence, we submit that focusing on individual detailed aspects of the Advocate General's Opinion may be off the mark. The Opinion is a one-package deal and it should be considered as a whole.

The simple reality is that the EU institutions can in principle take one of the two contrasting approaches to intra-EU investment treaty arbitration. They can either delegalize it or approve it.
The first approach had so far been pursued by the European Commission. In this respect the Commission insisted that the Member States should terminate intra-EU bilateral investment treaties and also prosecuted some of them for failing to do so. The European Commission in addition purported to intervene before investment treaty tribunals in numerous intra-EU investment treaty arbitrations or oppose the enforcement of certain intra-EU awards.

These efforts cost time, resources and money. Moreover, as it was rightly pointed out by Advocate General Wathelet in the *Achmea* opinion, the legal position of the European Commission and certain Member States opposing the validity of the intra-EU treaties was seriously flawed and their approach lacked coherence. Another key factor for consideration is that none of the investment treaty tribunals confronted so far with the objections against the validity of the intra-EU BITs actually found for the European Commission. The European Commission, it transpires from between the lines of the Advocate General's reasoning, was fighting a lost cause.

The sentiment across the European Union has also changed since 2015. In addition to Brexit, numerous other cracks have appeared in the European structures. Adherence to the rule of law principle by certain Member States has been doubted. The independence of national courts, which are the primary channel of enforcement of the EU rules and principles, has come under attack in some Member States. Even the Court of Justice of the EU recognized that in certain matters (if only exceptional), the principle of mutual trust between courts in different Member States can be

suspended. In other words, it now seems that the intra-EU investment treaty arbitration may still have a vital role to play also in the intra-EU dimension as the private enforcement mechanism of fundamental economic freedoms.

So what the Advocate General Wathelet actually does in the *Achmea* Opinion is to propose a radical departure from the line previously defended by the European Commission. The proposed deal is to recognize the conformity of the intra-EU bilateral investment treaties with the EU law. As any deal, however, it comes at a price.

The price is to subject intra-EU investment treaty tribunals to the fundamental principles of the EU law, and ultimately, to the supreme jurisdiction of the Court of Justice of the European Union. The Advocate General purports to achieve this objective in three steps.

Firstly, he proposes to recognize that neither the intra-EU bilateral investment treaties, nor the investor-state dispute resolution clauses contained in these treaties, are against the EU law. This 'legalization' of intra-EU investment arbitration is a pragmatic necessity, and a logical requirement for the proposed deal. Legal purity of reasoning in the Opinion on this point, accordingly, should be neither expected nor required, although admittedly, most arguments given by the Advocate General are compelling.

Secondly, the Advocate General proposes to recognize investment treaty tribunals as the "*courts or tribunals of the Member States*" in the sense of Article 267 TFEU. This principally means that the intra-EU investment treaty tribunals should be entitled to refer questions on the validity or interpretation of the EU law to the Court of Justice of the European Union.

What the Advocate General's Opinion does not spell out expressly, however, is that such investment treaty tribunals should also be regarded as the courts or tribunals against whose decisions there is no judicial remedy under national law in the sense of Article 267 *third indent* TFEU. This means that the investment treaty tribunals should actually ***be obliged*** to refer such questions to Luxembourg.

This implies that in the Advocate General's proposal, investment treaty tribunals would have to recognize the supreme jurisdiction of the European Court of Justice and follow the answers they receive.

Thirdly, the Advocate General is clear that if investment treaty tribunals want to operate in the intra-EU context, they will have to recognize the supremacy of the EU law, including over the bilateral investment treaties, and the supremacy of the European Court of Justice. This plea was made openly in para. 134 of the Opinion:

> "In that case, [i.e. if they are courts or tribunals of a Member State in the sense of Article 267 TFUE – annotation added] the arbitral tribunals 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 (99) over the laws of the Member States and over every international commitment given between Member States, the direct effect of a whole range of provisions applicable to their nationals and themselves, mutual trust between them in the recognition of common values on which the Union is based and the full application of and respect for EU law."

If the Opinion of the Advocate General is accepted by the Court, the choice before the investment treaty tribunals in Europe will be a hard one. They will have to agree to the terms and conditions of this *licence to practice investment treaty arbitration in the EU* as proposed by the Advocate General, and thus accept the limitations of their own supremacy and independence. Otherwise, the courts of the Member States of the EU will have clear instructions to set aside, or refuse the enforcement of non-conforming awards.

Either way, under the Advocate General's proposal, the House always wins.

***

This post is an abridged version of a forthcoming publication on the same topic which should be finalized in the next months.

This entry was posted on Wednesday, November 22nd, 2017 at 10:52 am and is filed under Achmea,

European Commission, European Law, European Union, Intra-EU BITs, Investment agreements, Investment Arbitration, Investor-State arbitration

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.