CJEU's Advocate General Hints at Invalidity of Intra-EU ISDS Disputes Based on Energy Charter Treaty

I wanted to publish a short note on an Opinion handed down by Advocate General Saugmandsgaard Øe in which he provides his own personal answer to one of the most highly debatable questions among EU and arbitration practitioners. Namely, the impact of the *Achmea* judgment on intra-EU Investor-State disputes (***ISDS***) conducted pursuant to the Energy Charter Treaty (***ECT***).

As we know, in *Achmea* (Case C-284/16), the Court of Justice of the European Union (the ***CJEU***) found that intra-EU bilateral investment treaties (***intra-EU BITs***) and ISDS disputes initiated pursuant to those intra-EU BITs, were incompatible with EU law because they violated the principle of autonomy of the EU legal order and jeopardized the effectiveness, primacy and direct effect of EU law and the principle of mutual trust between the EU Member States. However, it remains unresolved whether the findings of the CJEU in *Achmea* extend to intra-EU arbitration proceedings conducted pursuant to the ECT.

Advocate General Saugmandsgaard Øe's Opinion was handed down on 29 October 2020 in a case (Joined Cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) e.a.*) currently pending before the CJEU. This case concerns the compatibility, with the freedom to conduct a business and the right to property (enshrined in Article 16 and 17 of the Charter of Fundamental Rights of the European Union), of an Italian measure aimed at reducing the incentives payable to photovoltaic energy operators. The case also raises some questions relating to the interpretation of the ECT.

Although the case did not require Advocate General Saugmandsgaard Øe to address this issue, his Opinion contains an interesting footnote (n° 55) in which he provides his opinion on whether the ECT can be relied upon in intra-EU ISDS proceedings.

This footnote reads as follows:

> *"While emphasising that it is unnecessary to resolve this issue in the present cases, I note that, in the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158), the [CJEU] held that Articles 267 and 344 [Treaty on the Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction it has undertaken to accept. In the light of that judgment,* ***it seems to me that, inasmuch as Article 26 of the Energy Charter, which is headed 'Settlement of disputes between an investor and a Contracting Party', provides that such disputes may be resolved by arbitral tribunals, that provision is not applicable***

> ***to intra-Community disputes**. In my view it may even be the case, having regard to the observations made by the Court in that judgment – especially in relation to the particular nature of the law established by the Treaties and the principle of mutual trust between the Member States –– that the Energy Charter **is entirely inapplicable to such disputes**. This, moreover, would seem to be the same conclusion as was reached by the representatives of the Governments of the Member States in the document entitled 'Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union' (available on the Commission website at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf), paragraph 5 of which states that, in the light of the Achmea judgment, 'Member States will terminate all bilateral investment treaties concluded between them'"* (emphasis added).

However, this Opinion is not binding on the CJEU, which can freely decide not to follow the opinions expressed by the Advocate Generals (especially in cases, such as this one, where the opinions address issues which are not necessary to resolve the case).
