LIDW 2019: International Investment Disputes, 7 May 2019

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The session on International Investment Disputes of the LIDW 2019 was divided in three panels discussing the hot topics in investment law and the Investor-State Dispute Settlement (ISDS) system: investment protection post-*Achmea,* interim measures, security for costs, emergency arbitration procedures, and transparency in investment arbitration, as well as the wider issue of ISDS reform.

The first panel of the session was moderated by Professor Loukas Mistelis, Queen Mary University of London, and addressed the landscape of investment law and ISDS post-*Achmea*. The discussion was timely, especially in the light of the recent Decision of the Arbitral Tribunal in *Eskosol v. Italy* on the applicability of the January 2019 Declarations of the Member States of the European Union (EU) to the Energy Charter Treaty (ECT) and to the case. To begin, Professor Mistelis highlighted that most of the EU developments in investment law are the result of a trade law approach of the European Commission, rather than an investment law approach. He noted the probable lack of a logical basis for this approach. Thomas Sprange QC, King & Spalding, reviewed the Declaration on the Legal Consequences of the Judgment of the Court of Justice (of the European Union) in *Achmea* (*Slovak Republic v Achmea* Case C-284/16) and on Investment Protection in the European Union of 15 January 2019, as well as the separate Declarations submitted by Hungary on the one hand, and Finland, Sweden, Luxembourg, Malta, and Slovenia, on the other, on 16 January 2019. Thomas highlighted that the language of the Declaration of 15 January 2019 is aspirational, rather than legally binding. As such, the Declaration sets out a plan for the steps EU Member States should take in the future of intra-EU investment law and ISDS. He also stressed that the Declaration is not retroactive, irrespective of if one considers that such instrument produces have any legal consequences. Siddharth Dhar, Essex Court Chambers, discussed the position on English courts before and after *Achmea.* He identified two situations where the CJEU judgment is likely to become relevant:

1. set aside for a BIT arbitration seated in London is sought under Section 67 of the 1996 English Arbitration Act, and
2. an investor seeks to fight enforcement of a foreign award with the argument that the arbitral tribunal lacked jurisdiction to hear the matter.

Based on existing case law, it appears the English courts may find that international law applies in these situations, rather than EU law, where there is an intra-EU BIT. Siddharth also looked at the enforcement proceedings in England of the arbitral award rendered in *Micula v. Romania.* On this final point, Siddharth stressed that the consequences of Brexit will likely depend on what the withdrawal agreement negotiated between the EU and UK ultimately says. Matthew Weniger QC, Linklaters, looked at the CJEU Opinion 1/17, where Belgium asked for a ruling on the EU law compatibility of the

Investment Court System provided for by the CETA. Matthew pointed out that the Opinion seems to rest on three points of analysis:

1. whether the ISDS provisions under CETA are compatible with EU legal order;
2. whether the ISDS provisions under CETA are compatible with the principle of equal treatment; and
3. whether the court system provisions under CETA are compatible with the right of access to an independent tribunal.

The CJEU appears to have answered all three points in the affirmative.

The second panel was moderated by David Goldberg, White & Case, and focused on four hot topics of investment arbitration, namely: interim measures, emergency arbitration, security for costs, and transparency. Sylvia Tonova, Jones Day, kicked off the discussion of interim measures in the context of the sovereign right of States to prosecute criminal offences. She highlighted that the current view of ISDS in the popular press on this matter is that investment arbitration is nothing but a "get out of jail free card". Sylvia refuted this by noting that such requests are rarely granted and then focusing on a few key investment arbitration cases dealing with these interim measures, with special focus on *Quiborax v. Bolivia*, *Hydro v. Albania*, *Munshi v. Mongolia*, *Boyko v. Ukraine*, and *Nova Group v. Romania.* The conclusion is that the bar is high for a party to be awarded interim measures that avoid criminal proceedings and that they are only given if the party can show that the motive for the criminal proceedings was to interfere with the proceedings of the dispute. David Goldberg focused on the use of emergency arbitration in investment arbitration and discussed the highlights of the procedure available under the SCC Arbitration Rules, first introduced in 2010. David emphasized emergency arbitration decisions in *JKX Oil v. Ukraine, TSIKinvest v. Moldova* (see the inapplicability of the cooling-off period requirement in emergency arbitration proceedings), and *Puma Energy v. Benin*. David also raised the question as to whether fairness can be maintained in the ISDS context with the speed of the procedure, given that States barely have time to respond or appoint a counsel and thus sometimes do not even participate in the emergency proceedings. Yasmin Mohammad, Vannin Capital, addressed the issue of security for costs in investment arbitration proceedings and began with the short overview of the evolution of investment treaty protection, noting a growing reversal of roles within the traditional notion of investment importing and exporting states. She noted in this context the significant policy shift from the security for costs measure which was meant to protect respondent States against frivolous claims. Yasmin highlighted that a series of arbitral awards have said that exceptional circumstances must exist in order for a tribunal to order such measure. The discussion also considered the relevance of third-party funding in the context of security for costs, with a focus on the decision in *Armas v. Venezuela.* Yasmin noted that while funders generally support disclosure of the existence of a third-party funder, the disclosure of the very terms of the funding agreement is usually strongly opposed by clients. Finally, Charles Claypool, Latham & Watkins, discussed the issue of transparency and bullying campaigns in investment arbitration. Charles emphasized that on one hand there is an acknowledged need for transparency in investment arbitration, given that a State is a party to the dispute, while on the other hand there is a need to protect parties and their rights in the dispute. Looking at *Biwater Gauff v. Tanzania*, Charles noted that, in the light of the active press campaigns by both parties to undermine each other in the dispute, the arbitral tribunal held that aggravating the dispute was the limit of transparency. Charles emphasized that transparency is seen positively, but that when a party engages with the media, transparency is then likely being used as a rationale for undermining the proceedings. At the same time, Charles stressed that while it is notable that States generally seem to agree that transparency in ISDS proceedings is an important public interest, to date only five States have ratified the Mauritius Convention on transparency.

The third panel of the session, moderated by Sylvia Nouri, Freshfields, focused on the ongoing

conversation around ISDS reforms. Andrea Bjorklund, McGill University, looked at the development of such reform in the UNCITRAL Working Group III, in the light of the EU proposal of a court system (already present in CETA, for example). Andreas stressed that there appears to be no consensus among the States participating in the Working Group III as to whether there is a clear solution responding to the concerns raised in relation to the ISDS system. While it might be argued that there are two camps, one supporting systemic reform by way of this court system, and the other supporting incremental reform by adjusting the current investment arbitration procedure, Andrea noted that the discussion is still evolving. Andrew Cannon, Herbert Smith Freehills, focused on the steps taken by States in addressing the concerns with ISDS through the provisions in the new generation of international investment agreements. Andrew gave the examples of attempts to make the definition of 'investor' more definite in the new Belgium-Luxembourg Model BIT and clarifications added to the fair and equitable treatment standard in the new Dutch Model BIT, as well as the increased emphasis on investor's responsibility, especially in the context of environmental protection. Toby Landau QC, Essex Court Chambers, looked at the current amendment process of the ICSID Arbitration Rules. In this context, Toby took the position that we are witnessing a collective failure of imagination when it comes to procedural improvements of ISDS. This is explained, Toby said, by the fact that investment arbitration proceedings are modelled on the rules applicable in international commercial arbitration. He advocated that the time has come to address the real issue in question: whether the current procedure works at all for investment arbitration. As to the ICSID amendment process, Toby emphasized that the current improvements are not radical. To the contrary, the current version of the draft Arbitration Rules released in March 2019 drops several bold amendments suggested in the first draft of August 2018. Toby finalized his presentation by urging stakeholders to think outside the box when it comes to any ISDS reforms. Lola Fadina, UK Department for International Trade, concluded the panel and the session with an overview of ISDS reforms from a State perspective. Lola emphasized that States must provide for the right investment environment, as well as for access to justice while responding to any concerns raised in relation to the current system. She described the balancing act states must perform when protecting the interests of a state's investors, foreign investors, and public interests. Lola stressed the importance of the new generation of international investment agreements in the context of the current discussion.