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A Rollercoaster: The First Half of the Year 2018 for BITs and ISDS

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The first half of the year has been a rollercoaster when it comes to BITs and ISDS, in particular in Europe. Several developments at various levels can be distinguished with one common denominator: for better or for worse, the European Union (EU) and EU law have become one of the key drivers in shaping international investment law and arbitration. Below are some selected developments.

Last March, the long-awaited *Achmea* judgment by the Court of Justice of the EU (CJEU) has certainly been the most discussed *cause célèbre* in investment law and within the arbitration community. After the Advocate General's courageous attempt to save the ISDS clause in intra-EU BITs by a very innovative Opinion, the CJEU – following its long-standing jurisprudence – used the preliminary ruling-argument to effectively declare ISDS arbitration within the EU as being incompatible with EU law. From an EU law perspective that, in itself, is hardly surprising; however, the very short and unclear *Achmea* judgment has had and continues to have a significant impact on a wider scale (click here for the blogposts on *Achmea*).

First and foremost, the *Achmea* judgment signalled to the EU Member States that it is about time to sort out this issue by removing the possibility for foreign EU investors to be able to use international arbitration when – by virtue of EU law – domestic courts of the Member States are the only venue. Unsurprisingly, several Eastern and Central European Member States have used the *Achmea* judgment as an argument to announce or even to proceed with the termination of their intra-EU BITs (notably Poland and Romania, although Italy and Denmark had already done so previously). However, the letter of the Dutch Minister for Trade and Development to the Dutch Parliament was somewhat surprising. In her answers to the questions posed by left-wing members of the Dutch Parliament as to the consequences of the *Achmea* judgment, she stated that all Dutch intra-EU BITs will have to be terminated because of the *Achmea* judgment. In addition, she also mentioned that it would be necessary to look into the Energy Charter Treaty (ECT) as well. This wide interpretation of the *Achmea* judgment is arguably not supported by a close reading of it. The CJEU did not declare that intra-EU BITs must be terminated (neither was it asked to). The CJEU also did not declare that all ISDS provisions in intra-EU BITs are incompatible with EU law, but focused only on the particular one in the Netherlands-Slovak BIT, which was at issue in the case. Finally, the CJEU most certainly did not say anything regarding the ECT or intra-EU ECT ISDS disputes, which were definitely not the subject in the *Achmea* case. However, what is most interesting to note is how quickly and sweepingly the Netherlands changed its position from being a staunch supporter of ISDS (and, indeed, a supporter of *Achmea* in the setting aside proceedings

before the German courts) to a supporter of the European Commission's crusade against intra-EU BITs and intra-ECT ISDS cases. It remains to be seen whether, to what extent, how (unilaterally or mutually), and when all the 190 intra-EU BITs will be renegotiated or terminated. It is interesting to note that other important Member States such, as for example Germany or France, have apparently not yet drawn the same conclusions as the Netherlands.

The second noticeable development concerns the string of intra-EU ECT awards in the renewable energy sector against mainly Spain, Italy, and Czech Republic. While the first awards finally started to come out in 2017, the speed has picked up in 2018 with some interesting outcomes. While Spain was successful in thwarting off the first two claims against the retroactive removal of feed in tariffs, all other subsequent awards have resulted in losses for Spain and awarding claimants significant amounts of damages (EUR 128 million in *Eiser*, EUR 53.3 million in *Novenenergia*, EUR 64.5 million in *Masdar*). More generally, at least so far, arbitral tribunals have not been impressed by the attempts to ascribe any impact of the *Achmea* judgment on intra-EU ECT disputes. Indeed, the *Masdar* arbitral tribunal simply stated that the *Achmea* judgment has "no bearing on the case at hand". Nonetheless, Spain is using the *Achmea* judgment in ICSID annulment proceedings and in setting aside proceedings before domestic courts to escape the payment of these awards. It remains to be seen whether, and if so, to what extent arbitral tribunals will eventually bow to the pressure and follow the CJEU. In fact, the CJEU has already been asked by the Stockholm court to give its views on this matter. So, again, the CJEU will be in a central position to make or break the future availability of the ECT for European investors against EU Member States. In parallel, it appears that also within the ECT, the EU and some EU Member States are increasing the pressure to "reform" or "re-balance" the ECT provisions. In that context, one could expect that the EU and EU Member States might issue a declaration containing a so-called "disconnection clause", whereby the ISDS provisions would be declared inapplicable for intra-EU ECT disputes.

Speaking of reforms, another interesting development is the recently published new Dutch draft model of a BIT text, which was also opened for public consultation. As I described elsewhere in more detail, the draft text is a significant departure from the 2004 "gold standard" Dutch model BIT text by essentially taking on board many of the new "reform" elements contained in CETA. Since the Netherlands has already concluded almost 100 BITs and since the EU is mainly responsible for the negotiation of Free Trade Agreements (FTAs) – although the competence for the ISDS provisions remains with the Member States – the practical value of this draft model BIT text will probably remain limited. Nonetheless, the political signal is clear in that also the Netherlands is bowing to the pressure of the NGOs and forced to align itself with the EU's investment policy, which has proclaimed that "ISDS is dead".

Another reform project, which is driven by the EU and gained more international attention, is the push for a Multilateral Investment Court (MIC), which is currently debated and negotiated within UNCITRAL. The last meeting in April in New York has shown that many states are in the mood of changing the system in their favour and the MIC is one option that is considered by some to be an appropriate solution to deal with the (perceived) concerns regarding the current ISDS system and BITs generally. The next round of negotiations, which is scheduled for late October, will be an important indicator as to whether the MIC proposal will indeed gain traction among a substantial number of states.

Looking ahead into the second half of the year, the CJEU is likely to take again the center stage when it delivers its Opinion on the compatibility of the Investment Court System (ICS) that is now

included in CETA, EU-Singapore FTA, EU-Vietnam FTA, and EU-Mexico FTA (a hearing report can be found here). If the *Achmea* judgment is of any guidance, it seems likely that the CJEU would consider the ICS to be also incompatible with EU law. This would be for the same reason, which is that the ICS also cannot request preliminary rulings from the CJEU and thus is not under its control when it comes to the potential interpretation or application of EU law – something which the CJEU finds unacceptable. If that is, indeed, the outcome, it would mean the end of the EU's efforts in maintaining some sort of international arbitration for foreign investors in its treaties. In fact, since the CJEU's Opinion regarding the EU-Singapore FTA in which it held that ISDS is a mixed competence, the appetite of the EU to shape or reform the ISDS proceedings is rapidly fading away. This is also reflected by the fact that most recent EU-Japan FTA already does not include an ISDS chapter and neither is such a chapter envisaged for the currently on-going FTA negotiations between the EU and Australia and New Zealand.

In conclusion, the last half year has been very dynamic, to say the least. While the destruction of international arbitration within the EU seems to linger on, outside the EU investment disputes continue to be initiated and awards are issued. Indeed, in a remarkable move against the current trend, recently Mexico signed up to the ICSID Convention, thereby confirming its consent to arbitrate disputes under the current ISDS system. However, it remains to be seen whether the new Mexican President will ensure that Mexico will ratify the ICSID Convention anytime soon. In any event, the fact remains that States are still negotiating and concluding BITs and FTAs with ISDS provisions, in particular outside the EU. So, ISDS is not dead yet but still alive and kicking, and that will be the case for at least the rest of this year.

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