Kluwer Arbitration Blog

2019: the Year of the Big Harvest!

Nikos Lavranos (NL-Investmentconsulting) · Sunday, December 30th, 2018

While the jury is still out on whether winter is coming or has already arrived regarding ISDS and investment treaties, I would rather turn to agriculture and use the metaphor of sowing the seeds and harvesting.

Since July 2010, when the European Commission published its very first Communication on ISDS and investment treaties, it has been relentless sowing the seeds for changing the current ISDS system for good. In the beginning, the Commission was rather careful and claimed that its efforts were build upon the Member States' 50 years of "gold standard" BITs expertise, so the EU's policy would "not be a revolution, but rather an evolution". However, since the high times of the TTIP debate around 2013/14, the Commission – pushed by the European Parliament and anti-ISDS NGOs – has become much more active, self-assured and radical.

As will be highlighted below, the Commission has been sowing several plots of land in parallel and 2019 promises to be the year of the big harvest for the Commission and the Member States.

The Intra-EU BITs

Regarding the intra-EU BITs plot of land, the Commission had to be particularly patient and tenacious. Since the early 2000's the Commission had been pushing the Member States to terminate their intra-EU BITs for their apparent incompatibility with EU law. Whereas most Member States failed to respond to that pressure, the number of intra-EU BITs cases was continuously increasing, while at the same time the Commission remained unsuccessful with its amicus curiae interventions to convince arbitral tribunals to relinquish their jurisdiction. Hence, the Commission eventually initiated infringement proceedings against five Member States, while the *Achmea* setting aside proceedings were unfolding before the German courts. The moment the German *Bundesverfassungsgericht* had submitted preliminary questions to the CJEU as to the compatibility of the ISDS provision in the relevant intra-EU BIT, the Commission knew that the time of harvest was coming. Indeed, the vaguely formulated *Achmea* judgment of the CJEU essentially forces the Member States to terminate their intra-EU BITs (and may even have a spill over effect on the ECT). Accordingly, one can expect that the Member States will take steps towards terminating the intra-EU BITs in 2019. Thus, soon the Commission can expect a big harvest by the termination of some 190 intra-EU BITs – potentially including their sunset clauses.

The "New Generation" EU Trade and Investment Agreements

Also, the second plot of land, namely of developing the so-called "new generation" EU trade and investment agreements, faced initial problems by using the wrong seeds and by failing to anticipate the heavy anti-ISDS/TTIP storms, which raged throughout Europe. Whereas the Commission first tried to save TTIP by incremental changes of the ISDS provisions, it became clear that there would be no chance of getting it approved by the European Parliament. Leaving TTIP unattended and letting it quietly die, the Commission turned its attention to the other treaties by using a different sort of seeds for CETA and EU-Vietnam FTA. The Commission replaced several important DNA bits of investment arbitration with DNA new bits, such as for example replacing the broad FET standard with a closed list of FET-breaches and by replacing the ISDS system with the investment court system (ICS). The new crop was fairly successful since the Commission was able to incorporate it into the EU-Mexico FTA and EU-Singapore FTA. However, Japan did not like this new crop, so it was not included in the EU-Japan FTA. Moreover, the ICS crop is not even part of the FTA negotiations with Australia and New Zealand. Hence, it seems that the Commission has lost appetite to include investment protection and dispute resolution provisions in its FTA. This, of course, has mainly to do with the fact that the CJEU did not give the EU full exclusive competence regarding the ISDS provisions.

Moreover, the fate of the ICS in CETA is still in the hands of the CJEU, which will render its Opinion in 2019. Thus, it remains to be seen whether the Commission will have a big harvest from that plot of land, though it seems unlikely that CJEU will spoil the harvest.

The MIC

The MIC plot of land, which lies next to the CETA plot, is a new testing ground to roll out a modified ICS crop for the global market. In the UNCITRAL glass houses in New York and Vienna, the Commission has been testing the idea of replacing ISDS with a multilateral investment court (MIC) with appeal tribunal on a global level. The first two rounds of tests have been concluded and the results look promising enough for launching the new crop in 2019 by tabling a draft text for a MIC. The Mauritius Convention will serve as an example, which will allow each State to decide whether, and if so, for which of their BITs they want to defer the disputes to the MIC. If all EU Member States, plus Canada, Singapore, Vietnam, Mexico and Mauritius sign up to it, this would arguably constitute a sufficiently sustainable basis. Thus, with some luck and good weather, the Commission could have the first MIC harvest in 2019.

The ECT

The fourth plot of land on which the Commission has been sowing for several years without much of a harvest is the ECT. As in the case of intra-EU BITs, the number of intra-EU ECT disputes against Member States has exploded, notably against Spain, but also – albeit at a much lower level – against Italy, Czech Republic, Slovak Republic and last but certainly not least Germany (*Vattenfall*). Also, in the ECT cases the Commission and the Member States have been so far unsuccessful in convincing ECT arbitral tribunals to refuse their jurisdiction. In addition, in contrast to intra-EU BITs, the ECT is a different type of – multilateral crop – and the applicability of the *Achmea* judgment on the ECT remains a matter of discussion. In spite of these obstacles, for

the following reasons, the poor harvest situation regarding the ECT may very well change in 2019.

First, preliminary questions as to the compatibility of ECT awards with EU law have been asked to the CJEU, though the CJEU will most likely not issue its judgment in 2019, that may be the case with the Opinion of the Advocate General. It would seem likely that the outcome will be similar to the *Achmea* judgment.

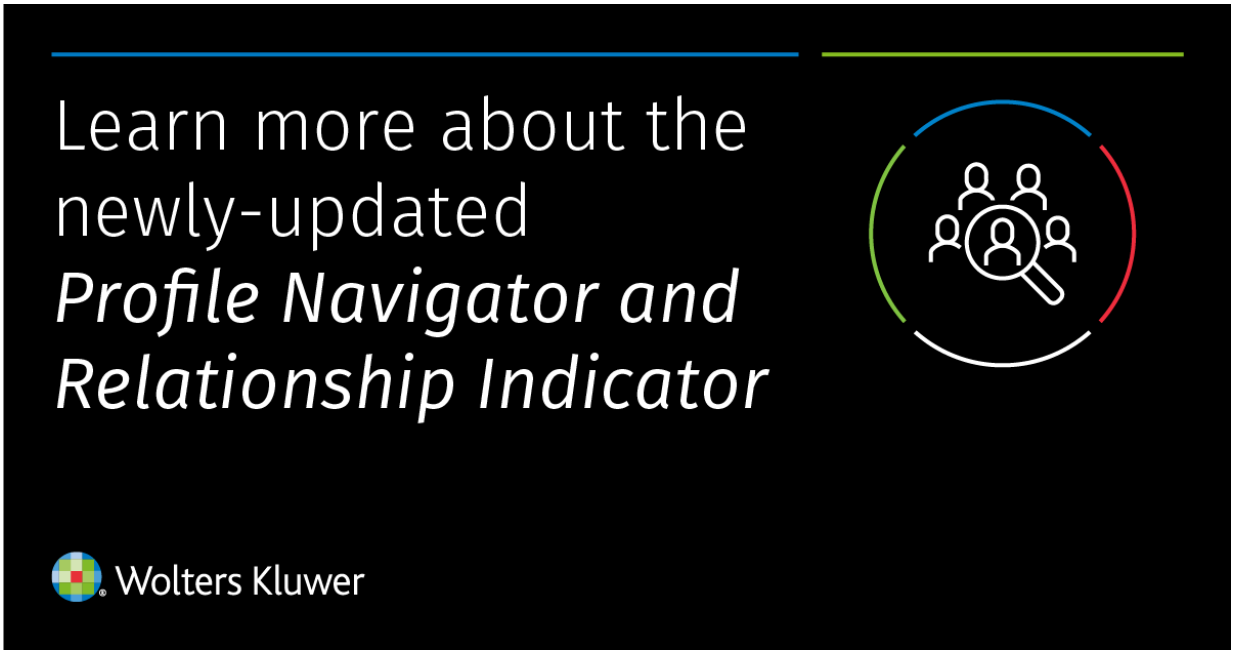
Second, the "modernization" process of the ECT will take off in 2019. This offers the Commission and the Member States an excellent opportunity to "disconnect" themselves from the ECT – either by adopting a unilateral declaration or, following the example of Italy, by withdrawing from the ECT. Indeed, this "modernization" process encompasses a whole range of ECT provisions, protection standards and principles, which could be "CETAarized". For example, by replacing the open FET provision with the closed list of FET breaches contained in CETA or by narrowing down the definitions of investor and investment. In short, 2019 could be a good year for a big ECT harvest for the Commission and the Member States.

The Unpredictable Art of Farming

The art of farming is not one for the faint of heart. The reality of farming is a lot of hard work and never knowing for sure if your crop will be a bounty or a loss until harvest time arrives. Everyone understands that weather conditions play a large role in determining how well farmers' crops are growing, but the realities are subtle and vary from crop to crop.

However, with a little bit of luck and help from the CJEU, the Member States and some States, the Commission might be able to have some successful harvests for the various plots of land discussed above. In any event, the Commission has certainly been working hard for the past nine years in rooting out the weeds from the existing investment arbitration landscape.

A first assessment of the 2019 crop condition will take place at the EFILA Annual Conference on 31 January 2019.



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