Kluwer Arbitration Blog

The Harvest Report of the First Half of 2019

Nikos Lavranos (NL-Investmentconsulting) · Friday, June 7th, 2019

The regular readers of the Kluwer Arbitration Blog will recall my blog at the beginning of this year in which I predicted that 2019 would be the 'Year of the big Harvest' for the European Commission regarding its efforts to permanently change the landscape of international investment law and arbitration.

This posts will review the first half of 2019 and assess to what extent my predictions have come true.

The Intra-EU BITs

Already on 15 January 2019, the European Commission could bring home its first harvest when all Member States issued a political declaration in which they expressed their intention to terminate all existing intra-EU BITs by 6 December 2019. If that is indeed going to happen, the European Commission's decade long relentless campaign to extinguish intra-EU BITs would be successfully concluded. The aim is apparently to terminate all intra-EU BITs by way of a multilateral treaty among the EU Member States. However, so far this treaty seems not yet to have been finally drafted. In the meantime, Member States are terminating their intra-EU BITs. For example, Poland terminated its BIT with the Netherlands as of February 2019. However, termination of the intra-EU BITs itself will not stop the number of cases unless the sunset clauses contained in the intra-EU BITs are also removed. So, it remains to be seen whether, and if so how, the Member States will execute their stated intention.

The ECT

The above mentioned political declaration also addressed the ever growing problem of the increasing tension between EU law and the Energy Charter Treaty (ECT). In that declaration, 22 EU Member States stated that due to the CJEU's *Achmea* judgment, EU investors cannot invoke the ECT against Member States anymore. Moreover, the Member States proclaimed that arbitral tribunals have lost their jurisdiction to hear intra-EU ECT disputes any longer. In addition, these Member States committed themselves to intervene in all proceedings before domestic courts and argue that intra-EU ECT awards are no longer to be recognized or enforced within the EU.

Despite the increasing pressure from the EU and the Member States, ECT arbitral tribunals continue to be unimpressed and are forcefully defending their jurisdiction. In early May, the *Ekosol v. Italy* tribunal – following the *Vattenfall* tribunal's extensive 70-page analysis – also rejected the arguments of the EU and the Member States.

Accordingly, the matter will have to be ultimately settled by the CJEU, once it receives a request for a preliminary ruling from a domestic court. However, the Swedish Court of Appeal reportedly has recently rejected such a request by Spain. On the other hand, Italy has reportedly been successful before the same Swedish court in staying enforcement proceedings regarding ECT awards against it in order to obtain preliminary rulings from the CJEU. Thus, it will be only a matter of time until such a request will land on the docket of the CJEU.

In the meantime and as predicted, the European Commission requested a mandate to start negotiating for reforming the ECT. In light of the dozens of ECT cases against several Member States, one can expect that the European Commission will do its utmost to "cetarize" the ECT and declare the ECT non-applicable for intra-EU disputes. Since the ECT is a multilateral treaty, it remains to be seen to what extent the other ECT Contracting Parties will follow the European Commission.

The "New Generation" EU Trade and Investment Agreements

As far as the investment court system (ICS) as contained in CETA and the other "new generation" EU trade and investment agreements is concerned, the Court of Justice of the EU (CJEU) finally gave its blessing. In its Opinion 1/17, issued on 30 April 2019, the CJEU concluded that the ICS is compatible with EU law and thus the agreement on the ICS can finally be ratified and enter into force. However, the CJEU made clear that the CETA tribunals, which make up the ICS, may under no circumstances apply or interpret EU law provisions, but are confined to interpret only CETA provisions. Moreover, the CJEU stressed that the CETA tribunals

> "[…] have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights." para. 160.

Considering the fact that the balancing of public interests against legitimate interests of investment and investor protection is the core business of every investment tribunal, one wonders what is left of the jurisdiction of the CETA tribunals.

In contrast to that, it is noteworthy that the CJEU explicitly prohibited the retroactive application of joint binding interpretations of the CETA parties. In this regard, the CJEU protected the Rule of Law and corrected a situation that was obviously violating the most fundamental principles of law.

However, by and large, the European Commission received full support for its envisaged ICS.

The MIC

Since the CJEU in its Opinion 1/17 also approved the envisaged multilateral investment court (MIC), which is based on the CETA ICS text, this Opinion gives a boost for the European Commission's efforts to promote its idea of a MIC, which is currently discussed in UNCITRAL Working Group III.

However, at the last meeting of the Working Group in the first week of April, the negotiations did not go as smoothly as the EU had anticipated. Several countries, under the leadership of Japan, continue to question the need for the MIC and instead prefer more incremental changes, which can be implemented much easier and faster. It is also noteworthy to mention that the interest of States in the subject of ISDS reforms has increased dramatically with more than 100 State present in the room. This enlarged group of participants certainly did not help to speed up the process. At the end of the day, the deadlock was resolved by a two-path approach in which both incremental improvements of the ISDS and the MIC proposal will be further discussed in parallel at the next meeting in the autumn. In the meantime, the European Commission will continue to step its efforts in convincing African and Latin American States to support its MIC proposal. It will be interesting to see whether the European Commission can start harvesting in the autumn.

Good Prospects for the Rest of the Year

Looking back to the first half year, it must be concluded that the harvest for the European Commission was very good indeed and the prospects for the rest of the year are good as well. If the intra-EU BITs are indeed terminated by the end of this year, that would finally close this file.

Similarly, the establishment of the CETA tribunals will enable the European Commission to prove to other States that a MIC can indeed be established according to the CETA ICS blueprint. After all, who could question the legality of the CETA tribunals after having received the blessing of the CJEU?

As far as the ECT is concerned, the harvest remains difficult to predict. A lot will depend on whether ECT tribunals will continue to hold the line and whether the CJEU will get an opportunity to pass its judgment on this issue soon. Besides, the ECT reform process will most likely not be concluded by the end of this year.

In short, most of the predictions at the beginning of this year were true. Nonetheless, just as in farming, weather conditions remain unpredictable and so are the predictions for the rest of this year.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

This entry was posted on Friday, June 7th, 2019 at 11:30 am and is filed under Arbitration, BIT, Energy Charter Treaty, EU Law, International arbitration, Intra-EU BITs, Intra-EU Investment Arbitration, Intra-EU ISDS, Investment Arbitration, Multilateral Investment Court
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.