Kluwer Arbitration Blog

2019 in Review: Investment Arbitration in Europe

Deyan Draguiev (Colibra Insurance) · Thursday, January 9th, 2020

After the quite tumultuous 2018, which saw the seminal Achmea judgment of the Court of Justice of the European Union and the subsequent awards on jurisdiction by a number of investment treaty arbitration tribunals, 2019 comes as a sequence and furtherance to developments that were in process in the course of the previous year. The tense relationship between EU law and investment treaties seems to have been triggering ripples in the arbitration world in the course of the year.

2019 began with the political reverberations of the Achmea saga. In January 2019, the EU Member States adopted declarations that envisaged the termination of the intra-EU investment treaties and the establishment of a single EU regulation, and investment court loomed large on the scene once again. Most of the Member States extended the effect of Achmea also to intra-EU disputes within the context of the Energy Charter Treaty (ECT), while a handful of Member States argued that it would be more appropriate to wait until the Court of Justice has explicitly ruled on the compatibility of the ECT arbitration clause with EU law, which has not been the case yet. In a separate Declaration, Hungary rejected the application of the Achmea judgment to the ECT altogether. Some countries, *e.g.*, Hungary started terminating their BITs. Others, including those outside the EU, started reconsidering their investment treaty policy and treaty-making. Furthermore, on 24 October 2019, the European Commission announced that the EU Member States have reached agreement on a plurilateral treaty for the termination of all intra-EU bilateral investment treaties (BITs) ("Termination Agreement"). According to the Termination Agreement, all intra-EU BITs, listed as an annex to it, shall be terminated by the operation of that Agreement. Moreover, the sunset clauses contained in intra-EU BITs are made devoid of legal effect. The Termination Agreement nullifies the legal effect of the arbitration clauses contained in intra-EU BITs with the date of commencement 1 January 2007. Concluded investment treaty arbitrations are not prejudiced by the Termination Agreement. Hence, the Termination Agreement shall not alter the results of disputes which were already completed. Pending disputes, however, shall be resolved via so-called "structured dialogue". As envisioned under the Termination Agreement, this should be a procedure closed within the respective EU Member State. Therefore, the rationale of investment treaty arbitration – to internationalize the dispute with an investor and bring it before an impartial umpire – seems to be undermined. There is no clarity as to the consequences of the structured dialogue being not successful, which is why the Termination Agreement raises significant concerns on how it will operate in practice.

Regardless of various political moves, the arbitral stance of suspicion and disregard towards Achmea did not change radically. The tendency of arbitral tribunals constituted under the Energy Charter Treaty (ECT) to reject intra-EU jurisdictional objections, despite contrary views expressed

by most EU member states, was recently continued in the case of Landesbank Baden-Württemberg (LBBW) and others v. Kingdom of Spain. Under that case, the tribunal once more analysed the relationship between the provisions of the ECT and EU law, as Spain raised a jurisdictional objection under a claim arising from the Spanish renewables sector amendments. First, Achmea was differentiated on grounds that a provisional interpretation of Article 26 of the ECT appears to constitute an offer of arbitration by each EU member state to investors from all other contracting parties without any limitations regarding intra-EU disputes. The tribunal found that even if EU law were to prohibit Spain from making an offer of arbitration under Article 26 of the ECT, the tribunal must still give priority to the ECT as it does not operate under EU law but under international law and the ECT. The case is one more example that the Achmea case will continue to reverberate and lead to a widening gap between investment treaty tribunals and EU-law based interpretation by EU authorities such as the EU Commission and the Court of Justice of the European Union. Therefore, 2019 did not produce a full stop to the Achmea saga. Given the latest developments recently, the story will certainly continue even beyond this year's end.

One more saga produced its stages during 2019: the Micula dispute, which has touchpoints with the Achmea judgment and the EU-investment arbitration tensions. The EU General Court upheld the Micula application and annulled a 2015 decision of the EU Commission against Micula, considering that EU state aid law was inapplicable and that the Commission had exercised its powers retroactively. As a background to the saga, Romania gave certain rights and incentives to the business of Micula brothers. Since this happened prior to 2007, the year of the accession of Romania to the EU, it could be assumed that EU law should not extend to encompass this period. The CJEU reasoned that, contrary to the Commission's contention,

"it cannot be considered that the effects of the award constitute the future effects of a situation arising prior to accession […]since that award retroactively produced definitively acquired effects which it merely 'stated' for the past, that is to say, effects which, in part, were already established before accession" (§84).

With respect to the intra-EU aspect of the applicable BIT (concluded between Sweden and Romania), the General Court further distinguished, very briefly, the Micula case from Achmea, ruling that *"the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it", as opposed to the Achmea tribunal* (§87). In addition, the General Court ruled that the contested decision was unlawful because it considered the award as illegal state aid within the meaning of Article 107 TFEU since, pursuant to the Court's case-law, compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful aid, which was not the case here as EU State aid law is not applicable to situations pre-dating Romania's accession (§§103-104).

Later during 2019, the Micula saga reached the English Supreme Court, too: *Micula et al. v Romania 2018/0177*, where the enforcement of the widely discussed ICSID award against Romania was discussed. The UK enforcement proceedings started in the autumn of 2014. Romania filed a set-aside application against the ICSID award with the English High Court. In the alternative, the State also asked the court to vary or stay the registration of the ICSID award by the Micula brothers. There are two main issues which reached the UK Supreme Court to be decided: first, whether the High Court has the power to stay the enforcement of an ICSID award; and, second, where an ICSID award against an EU Member State has been stayed pending proceedings before the EU courts, whether the duty of sincere cooperation precludes an English court from ordering the State to provide security. The Supreme Court had not handed down its decision yet.

First, because in similarity to the Achmea saga, this eventual decision will also be an authoritative interpretation of the relationship between EU law and investment treaty arbitration, which is a tense one, as the Achmea story demonstrates. In addition, it will most likely come up after Brexit, therefore the UK Supreme Court's decision in the Micula case would be a harbinger of how the post-Brexit dialogue between UK and EU courts will be.

There were some reform and reconsideration moves in the course of this year.

Marking the latest step in its procedural rules overhaul, the International Centre for Settlement of Investment Disputes ("ICSID") Secretariat released the third Working Paper on Proposals for the ICSID Arbitration Rules Amendments in late August 2019 ("WP3"). The Contracting States, stakeholders and the public have submitted reform proposals regarding arbitrator challenges to the UNCITRAL secretariat, in preparation of UNCITRAL Working Group III meetings. The overarching proposal within the Working Paper included increasing the perceived and actual independence and impartiality of the tribunal, clarifying the removal threshold under WP3 proposed Arbitration Rule ("AR") 22 and second, introducing the option for disputing parties to submit challenges to an external decision-maker under proposed AR 23. Similarly, some contracting States proposed to subject the challenge decision to judicial review or validation by the Chair under proposed AR 23.

Moreover, there is the innovative idea of an Advisory Centre on Investment Law. The core competency of an Advisory Centre should be to represent, together with lawyers from the respondent States, under-resourced developing country respondents in international investment disputes and the immediate preparation of such disputes. There is currently no institution that provides assistance in the representation of respondents in international investment disputes — developing countries are left entirely on their own in the course of investment disputes. Also, an Advisory Centre should be established with the purpose to help developing countries because of the increased costs of investment disputes.

We will be waiting to see how these developments will have further implications during 2020 and beyond.

This entry was posted on Thursday, January 9th, 2020 at 11:00 am and is filed under 2019 In Review, Achmea, European Union, ICSID, Micula
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.