

Most EU Member States Agree To Terminate Their Intra-EU Bilateral Investment Treaties

May 7, 2020

On May 5, 2020, most Member States of the European Union signed a multilateral agreement for the termination of all bilateral investment treaties (“**BITs**”) in force between them.¹

The Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (“**Termination Agreement**”) has been signed by 23 of the 27 EU Member States. Austria, Finland, Ireland, and Sweden abstained. Upon its entry into force for each EU Member State, the Termination Agreement will automatically terminate 130 bilateral investment treaties listed in an annexed chart as currently in force between the signatories (“**intra-EU BITs**”). The Termination Agreement also abrogates so-called ‘sunset clauses’ included in numerous intra-EU BITs, which extend the protections enjoyed by existing investments following the treaty’s termination.

The Termination Agreement seeks to bring to an end investment arbitrations currently pending under the soon-to-be terminated intra-EU BITs. It sets out transitional measures, which allow the parties to stay such arbitrations and enter into moderated settlement discussions (“structured dialogue”), or the investor to withdraw its BIT claims and instead pursue domestic and/or EU law claims in the domestic courts of the respondent EU Member State.

The Termination Agreement does not affect arbitration proceedings under intra-EU BITs in which arbitral awards have been rendered and executed prior to March 6, 2018. It also does not apply to investor-State arbitrations under the Energy Charter Treaty, to which almost all EU Member States and the EU itself are parties, or to BITs between EU Member States and third countries.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

PARIS

Claudia Annacker

+33 1 40 74 68 99

cannacker@cgsh.com

Laurie Aichtouk-Spivak

+ 33 1 40 74 68 24

lachtoukspivak@cgsh.com

Enikő Horváth

+ 33 1 40 74 69 17

ehorvath@cgsh.com

Severin Klinkmüller

+ 33 1 40 74 68 65

sklinkmueller@cgsh.com

LONDON

Christopher P. Moore

+ 44 20 7614 2227

cmoore@cgsh.com

FRANKFURT

Richard Kreindler

+ 49 69 97103 160

rkreindler@cgsh.com

ROME

Ferdinando Emanuele

+39 06 6952 2604

femanuele@cgsh.com

NEW YORK

Howard S. Zelbo

+1 212 225 2452

hzelbo@cgsh.com

Ari MacKinnon

+1 212 225 2243

amackinnon@cgsh.com



Background

On March 6, 2018, the Court of Justice of the European Union (“CJEU”) held in its judgment in *Slovak Republic v. Achmea BV* (“**Achmea Judgment**”), that the arbitration of investor-State disputes under intra-EU BITs is incompatible with EU law.²

As discussed in our alert memorandum on the *Achmea Judgment*,³ the CJEU held that investor-State arbitration clauses in BITs between the Member States of the European Union undermine the effective application and autonomy of EU law and are therefore contrary to the EU Treaties.

After the *Achmea* Judgment, all EU Member States adopted declarations in January 2019 that investor-State arbitration clauses in intra-EU BITs are contrary to EU law and thus inapplicable, and that any arbitral tribunal established under an intra-EU BIT lacked jurisdiction.⁴ In the declarations, the EU Member States further committed to terminate all their existing intra-EU BITs.

The Termination Agreement

The Termination Agreement formalizes the EU Member States’ commitments in their January 2019 declarations. It reiterates that arbitration clauses in intra-EU BITs are inapplicable due to their conflict with the EU Treaties and therefore cannot serve as a legal basis for the arbitration of investor-State disputes.⁵

Termination of intra-EU BITs and sunset clauses

The Termination Agreement terminates more than 130 intra-EU BITs, which are listed in an annex.⁶ It further prescribes the termination of all “sunset clauses” in the relevant BITs, which would otherwise extend the investment protections available under those BITs for a period of typically 10 to 20 years after their termination. The Termination Agreement also terminates sunset clauses in 11 intra-EU BITs that were previously terminated.⁷

The Termination Agreement is expressly limited to intra-EU BITs and does not apply to EU Member States’ and the EU’s obligations under the Energy Charter Treaty, or to BITs concluded with non-EU Member States.⁸

The listed intra-EU BITs will terminate as soon as the Termination Agreement enters into force for each EU

Member State, *i.e.*, 30 days after receipt by the EU Council of the second instrument of ratification, approval or acceptance and 30 days after the relevant Member States have deposited their instruments of ratification, approval or acceptance.⁹ EU Member States may also decide to apply the Termination Agreement provisionally, in accordance with their constitutional requirements.¹⁰

Settlement of pending intra-EU arbitrations

The Termination Agreement’s impact on investor-State arbitrations under intra-EU BITs differs depending the status of the arbitration proceedings, but applies regardless of the governing arbitration rules.

“*Concluded arbitration proceedings*”. Arbitration proceedings in which a final award has been rendered and executed or a settlement agreement signed prior to March 6, 2018 (the date of the *Achmea* Judgment) remain unaffected by the Termination Agreement.¹¹ Such proceedings shall not be reopened. Any agreement to settle a dispute being the subject of intra-EU arbitration proceedings initiated prior to March 6, 2018 is also unaffected.¹²

“*New arbitration proceedings*”. With respect to arbitration proceedings initiated on or after March 6, 2018, the Termination Agreement provides that arbitration clauses in intra-EU BITs “*shall not serve as legal basis for New Arbitration Proceedings*”.¹³ The Termination Agreement contains no further provisions with respect to “new arbitration proceedings.”

“*Pending arbitration proceedings*”. The Termination Agreement contains detailed provisions applicable to arbitration proceedings that were initiated before March 6, 2018 and remain pending at the date of the entry into force of the Termination Agreement. In addition to pending arbitration, “pending arbitration proceedings” also include intra-EU arbitrations that resulted in a final award that has not been executed prior to 6 March 2018, including awards that are the subject of pending annulment, recognition and enforcement proceedings.

In “pending arbitration proceedings,” the parties may resort to two “transitional measures” to resolve their dispute in compliance with EU law, as set forth below.

In turn, in both “pending” and “new arbitration proceedings,” EU Member States must inform arbitral

tribunals that investor-State arbitration clauses in intra-EU BITs cannot serve as a legal basis for arbitration proceedings. A template statement to this effect is annexed to the Termination Agreement.¹⁴

“Structured Dialogue” Process

Within six months from the termination of the relevant intra-EU BIT by virtue of the Termination Agreement, either party to a “pending arbitration proceeding” may request the other party to enter into a “structured dialogue” to settle their dispute.¹⁵ A structured dialogue must be initiated where the CJEU or an EU Member State court has found in a final judgment that the contested State measure violates EU law.¹⁶

A “structured dialogue” is a written procedure in which the parties submit settlement proposals and exchange written observations. The Termination Agreement prescribes specific formal requirements and rigid time periods for each step of the dialogue. Within six months, a party-appointed “impartial facilitator” shall guide the parties to an “*amicable, lawful and fair out-of-court and out-of-arbitration settlement of the dispute.*”¹⁷ The facilitator is required to possess in-depth knowledge and take due account of EU law, the case-law of the CJEU, and decisions of the EU Commission,¹⁸ emphasizing the importance of EU law in the settlement process.

An amicable settlement reached by the parties at the end of their structured dialogue must be formalized by a binding settlement agreement. As part of such settlement, the investor must withdraw its BIT claims or renounce the enforcement of an existing award, as the case may be, and commit to refrain from raising its claims in new arbitration proceedings. A settlement may also include a waiver of all other rights and claims related to the measures challenged under the relevant intra-EU BIT.¹⁹

If the parties fail to reach a settlement, their respective positions are recorded, but the dispute remains unresolved.²⁰ The Termination Agreement does not provide a mandatory mechanism for resolving a deadlock in negotiations, and the facilitator may not force the parties to agree on a final settlement agreement.

Access to domestic courts

The Termination Agreement also allows an investor to pursue domestic and/or EU law remedies in the

domestic courts of the respondent EU Member State provided that the investor withdraws its BIT claims, waives all rights under the relevant BIT, renounces enforcement of any existing arbitral award, and agrees to refrain from instituting new arbitration proceedings.²¹

An investor may initiate domestic court proceedings within six months from the termination of the relevant intra-EU-BIT, or from the date on which a request for a “structured dialogue” process is rejected, even if otherwise applicable time limits have expired under domestic law.²² Any claim submitted to an EU Member State court must be based exclusively on domestic law and/or EU law.²³ The Termination Agreement does not permit an investor to invoke the substantive investment protections of intra-EU BITs in the domestic court proceedings.

The Termination Agreement clarifies that it does not create any new remedies that would not otherwise be available to the investor under the applicable domestic law.²⁴ An investor must therefore meet all procedural and substantive requirements applicable under domestic law when pursuing its claims in domestic courts, other than time limits for bringing actions.

Implications for Investors and Investment Arbitrations

In accordance with prior commitments, the EU Member States have taken a significant step toward phasing out their remaining intra-EU BITs. The four Member States that have not signed the Termination Agreement, whose intra-EU BITs (about 30) will remain in force,²⁵ can be expected to come under renewed pressure to terminate their intra-EU BITs, including the initiation of EU treaty infringement procedures by the European Commission.

Investment treaty tribunals constituted under the soon-to-be terminated intra-EU BITs, in turn, will likely face challenges to their jurisdiction. In light of the unanimous rejection of the *Achmea* Judgment by arbitral tribunals to date,²⁶ such tribunals will certainly scrutinize the effect of the Termination Agreement, and in particular the validity under international law of its termination of more than 130 intra-EU BITs, including their sunset clauses. It therefore remains to be seen whether the coordinated termination of most intra-EU BITs will operate as

smoothly as contemplated in the Termination Agreement.

The Termination Agreement may be expected to create additional hurdles for the recognition and enforcement of intra-EU awards within the European Union. Some EU Member State courts have already demonstrated their willingness to follow the *Achmea* Judgment, and set aside awards rendered under intra-EU BITs due to their incompatibility with the EU Treaties.²⁷ The enforcement of such awards outside the EU may also become more difficult, since the EU Commission has intervened in enforcement proceedings outside the EU in an attempt to uphold the primacy of the EU Treaties over intra-EU BITs.²⁸

Future of Investment Protection in the European Union

As a result of the termination of intra-EU BITs, including the elimination of investor-State arbitration to settle intra-EU investment disputes, European investors will face substantial uncertainties. While the European Commission has issued a communication on the investment protections for intra-EU BITs under EU law,²⁹ the EU Member States have not yet agreed on a mechanism with both robust substantive investment protections and remedies that allow investors to enforce these protections directly against the host State.

The Agreement is a significant step towards abolishing the bilateral investment protection system currently in place between EU Member States and will likely strengthen the role of the European Union as the central actor for investment protection in Europe. EU Member States and the EU will likely seek to agree on alternatives to the substantive investment protections currently available under intra-EU BITs.

As regards remedies, the EU's agenda, pursued by the European Commission, has for some time foreseen a transition towards a European system of investment protection and a move away from arbitration as a means to settle investment disputes. Notable projects include the creation of a standing multilateral investment court,³⁰ and a rebalancing of investor rights and States' sovereign prerogatives, as reflected in the investment chapters of the EU's recent free trade agreements.³¹

Conclusion

The Termination Agreement will result in a profound change in the investment protection system within the European Union. Ambitious in its scope, the Termination Agreement's objective to bring investment arbitrations under intra-EU BITs to an end will be tested in practice.

It remains uncertain which mechanism will replace the current bilateral system of investment protection within the European Union. Meanwhile, European investors investing in EU Member States will likely consider structuring their investments through third States to attract the benefit from protection under their BITs with EU Member States. In the context of the United Kingdom's departure from the EU, it bears noting that the Termination Agreement does not affect the United Kingdom's BITs with EU Member States.

...

CLEARY GOTTLIB

- ¹ Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, signed on May 5, 2020 (available [here](#)).
- ² *Slovakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018).
- ³ *European Court of Justice: Investor-State Arbitration Under Intra-EU Bilateral Investment Treaties Is Incompatible With EU Law*, Cleary Gottlieb Alert Memo (Mar. 9, 2018) (available at https://www.clearygottlieb.com/-/media/files/alert-memos-2018/2018_03_09-investorstate-arbitration-under-intraeu-bilateral-investment-treaties-pdf.pdf).
- ⁴ Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 15, 2019) (available [here](#)). Six EU Member States signed similar declarations on January 16, 2019.
- ⁵ Termination Agreement, Article 4(1).
- ⁶ Termination Agreement, Article 2, Annex A.
- ⁷ Termination Agreement, Article 2(2), 3, Annex B. Some EU Member States, including Romania, Poland, Ireland and Italy, have already terminated some of their intra-EU BITs, either unilaterally or by agreement with the other EU Member State.
- ⁸ See also on the EU's supportive position towards BITs with third countries, European Commission, *Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, COM(2020) 134 final (Apr. 6, 2020).
- ⁹ Termination Agreement, Articles 4(2), 11, 15, 16. The Agreement itself enters into force 30 days after the date on which the second instrument of ratification, approval or acceptance has been deposited.
- ¹⁰ Termination Agreement, Article 17.
- ¹¹ Termination Agreement, Articles 1(4), 6.
- ¹² Termination Agreement, Article 6(2).
- ¹³ Termination Agreement, Articles 1(6), 5.
- ¹⁴ Termination Agreement, Article 7(a), Annex C.
- ¹⁵ Termination Agreement, Article 9(1)-(6). Entering the structured dialogue is only permitted if the arbitration is suspended and the investor does not pursue the enforcement of any existing arbitral award, and that no national court, the CJEU, or the EU Commission has already found that the disputed State measure does not violate EU law.
- ¹⁶ Termination Agreement, Article 9(3).
- ¹⁷ Termination Agreement, Article 9(7).
- ¹⁸ Termination Agreement, Article 9(8), (10).
- ¹⁹ Termination Agreement, Article 9(14).
- ²⁰ Termination Agreement, Article 9(13).
- ²¹ Termination Agreement, Article 10(1).
- ²² Termination Agreement, Article 10(1)(a).
- ²³ Termination Agreement, Article 10(1)(b), (3).
- ²⁴ Termination Agreement, Article 10(4).
- ²⁵ Ireland, which has not signed the Agreement, has already terminated all of its intra-EU BITs.
- ²⁶ To date, only one instance is publicly known, in which a member of an arbitral tribunal established under an intra-EU BIT has found the tribunal to lack jurisdiction in light of the CJEU's *Achmea* Judgment. See, *Theodoros Adamakopoulos and Others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen (Feb. 7, 2020).
- ²⁷ *The BGH's Achmea Decision: Arbitration Clauses in "Intra-EU BITs" Are Invalid*, Cleary Gottlieb Alert Memo (Nov. 30, 2018) (available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/the-bghs-achmea-decision-arbitration-clauses-in-intra-eu-bits-are-invalid?>).
- ²⁸ For instance, in the *Micula v. Romania* arbitration (*Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award (Dec. 11, 2013)), the EU Commission has repeatedly intervened in the ongoing U.S. enforcement proceedings to advocate against confirming the intra-EU award. The Commission has also intervened in U.S. enforcement proceedings of intra-EU awards rendered under the Energy Charter Treaty against EU Member States.
- ²⁹ See Communication from the European Commission to the European Parliament and the Council, *Protection of intra-EU investment*, COM(2018) 547 final (July 19, 2018).
- ³⁰ See, e.g., Council of the European Union, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes* (Mar. 20, 2018).
- ³¹ See Free Trade Agreement between the European Union and the Republic of Singapore (signed Oct. 19, 2018) Chapter 14; Comprehensive and Economic Trade Agreement between the European Union and Canada (signed Oct. 30, 2016), Chapter 8, Section F.