# 23 EU Member States Sign Treaty to Terminate Intra-EU Bilateral Investment Treaties

**11 May 2020**

On 5 May 2020, 23 out of the 27 Member States of the European Union ("EU") signed a treaty for the termination of bilateral investment treaties ("BITs") concluded between them (the "Termination Treaty"). The Termination Treaty also purports to render without legal effect the sunset provisions in current and previously terminated BITs between the signatory States. The Termination Treaty does not affect either the Energy Charter Treaty ("ECT") or intra-EU BITs involving Austria, Finland, Ireland and Sweden, which did not sign the Termination Treaty.

The Termination Treaty will have significant consequences for the legal avenues available to resolve disputes under the affected BITs, and it even purports to affect proceedings already underway.

Below, we provide an overview of the key terms of the Termination Treaty and its implications for the uncertain future of investment treaty arbitration.

## KEY TAKEAWAYS

The Termination Treaty affirms that investor-State arbitration clauses in intra-EU BITs between signatory States are contrary to EU law. National courts and investment treaty tribunals will need to address the wide-ranging implications of the Termination Treaty on both pending and future proceedings under the affected BITs, including at the enforcement stage.

- *Future proceedings:* If the termination of sunset clauses is applied, investors will no longer enjoy rights under the affected BITs, including the right to commence new investor-State arbitrations for prior breaches.

- *Pending arbitrations:* Member States will intensify efforts to resist jurisdiction of arbitral tribunals under affected BITs. If the arbitration was commenced before 6 March 2018, when the *Achmea* judgment was issued, investors will have certain options, including to negotiate a binding settlement or to withdraw the

proceedings and pursue remedies before the national courts of the signatory Member States, even if applicable limitation periods have expired.

- *Enforcement proceedings:* Investors seeking to enforce awards or settlement agreements under the affected BITs before national courts will continue to face arguments that such awards and settlements are unenforceable, which will be amplified by the entry into force of the Termination Treaty.

## BACKGROUND

The Termination Treaty is the latest step in the EU's determination that investment disputes between EU nationals and Member States should be resolved by national courts and a standing investment court, not investment treaty tribunals.

On 6 March 2018, the Court of Justice of the European Union ("CJEU") held that an investor-State arbitration clause "such as" Article 8 of the Netherlands-Slovak Republic BIT (at issue in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13) was not compatible with EU law (the "*Achmea* Judgment"). The CJEU based its decision on Article 8's supposed threat to the constitutional structure and autonomy of the EU legal system, and its incompatibility with the principles of mutual trust and sincere cooperation enshrined in EU law.

In the 26 months since the *Achmea* Judgment, and with the exception of one minority opinion, publicly reported decisions by tribunals constituted under intra-EU investment treaties have consistently rejected requests to reopen proceedings or deny jurisdiction on the basis of the *Achmea* Judgment or its underlying principles.

Member States have nonetheless pressed forward with their intention to terminate intra-EU BITs and reform the intra-EU BIT dispute settlement system. On 15 and 16 January 2019, as we reported here, the then-28 EU Member States issued declarations undertaking to terminate intra-EU BITs by 6 December 2019.

Those declarations led, albeit with some delay, to the signature of the Termination Treaty on 5 May 2020 by 23 of the 27 Member States. The Termination Treaty does not affect intra-EU BITs involving Austria, Finland and Sweden, which did not sign the Treaty, or Ireland, which also did not sign the Treaty and terminated its only intra-EU BIT (with the Czech Republic) in 2011. The Termination Treaty also explicitly carves out intra-EU disputes under the Energy Charter Treaty ("ECT"), which will be dealt with "at a later stage." The ECT is currently undergoing a separate renegotiation process.

## THE TERMINATION TREATY

The Termination Treaty: (i) terminates BITs between the signatory Member States and states that it renders without legal effect the sunset clauses in these BITs and in any previously terminated BITs between them; (ii) requires signatory Member States to inform tribunals about the legal consequences of the Treaty and *Achmea*, and seek set-aside and resist enforcement of awards under affected BITs; and (iii) outlines settlement and transition frameworks for pending disputes commenced before 6 March 2018 and related proceedings under the affected BITs. The Termination Treaty will come into force 30 days after the EU Secretary General receives the second instrument of ratification, approval or acceptance from a signatory Member State (**Article 16**).

### Termination of Intra-EU BITs and their Sunset Clauses

First, the Termination Treaty states that arbitration clauses in the affected BITs are "contrary to the EU Treaties" and "cannot serve as legal basis" for arbitration proceedings (**Articles 4-5**). As we noted in a previous update, a tribunal's power to determine its own jurisdiction is a cardinal principle of international arbitration. Tribunals have already rejected arguments that the January 2019 Member State declarations deprived tribunals of jurisdiction in ongoing proceedings. However, the Treaty significantly adds to the uncertainty for future disputes and will likely prompt additional arguments that tribunals lack jurisdiction over ongoing arbitral proceedings.

Second, the Treaty purports to terminate the sunset clauses in a series of affected BITs. The purpose of sunset clauses is to ensure that a BIT's protections continue in effect for a specified period following its termination. These clauses typically allow investors to commence arbitration notwithstanding the termination of the BIT, with respect to breaches of the BIT occurring before termination or, in some cases, during the sunset period.

Sunset clauses are thus an important protection for investors, but they are an obstacle to the EU's determination to put an end to investor-State arbitration over all intra-EU disputes. The Termination Treaty provides that such sunset clauses shall not produce legal effects, not just in affected BITs otherwise in force (**Article 2, Annex A**), but also in BITs that were already terminated but contained a sunset clause that "may" still have legal effect (**Article 3, Annex B**).

### Pending Arbitration Proceedings

The Termination Treaty also affects proceedings currently underway. The signatory Member States are required to: (i) inform tribunals about the legal consequences of the *Achmea* Judgment (as described in **Article 4**); and (ii) request that national courts

(including non-EU) "set the arbitral award aside, annul it or to refrain from recognizing or enforcing it" (**Article 7**). The Treaty does not affect arbitrations in which a final award or settlement was reached prior to 6 March 2018, as long as the award was at that date duly executed with no challenge pending, or the award was set aside or annulled prior to the entry into force of the Treaty (**Articles 1(4) and 6**).

In addition, the Treaty envisages two new mechanisms for arbitrations commenced under the affected BITs before 6 March 2018 (the date of the *Achmea* Judgment), but makes clear that the parties may agree to other methods of dispute settlement. The first is a "structured dialogue" (**Article 9**), which is essentially an opportunity for settlement. The mechanism is subject to various conditions, principally suspension of the arbitration or, where an award has been issued but not enforced, that the investor forgo or suspend enforcement proceedings. The settlement procedure is available where a potential violation of EU law "can be identified" and the measure in question has not been found to be legal under EU law in a final and binding decision of a Member State national court or the CJEU (**Articles 9(6) and (3)**). The settlement procedure is to be overseen by a "facilitator," who must be a non-national of either signatory Member State with an "in-depth knowledge" of EU law.

The second is a "transitional measures" mechanism (**Article 10**). Investors in pre-*Achmea* arbitrations that are still pending can seek remedies under national or EU law before signatory Member State courts, even if time limits under national law have expired, subject to withdrawal or waiver of rights under the affected BIT.

Investors will therefore need to assess whether to settle the dispute altogether, or seek relief from national courts instead, or continue the arbitration and take the risks of a finding of no jurisdiction or difficulties in enforcing any resulting award.

## What about the United Kingdom?

Following its exit from the EU on 31 January 2020, the UK is no longer a Member State. Although the UK had signed the political declaration in 2019, it has not signed the Termination Treaty. The UK has 12 BITs in force with EU Member States, but this protection may be short-lived. Investment protection in the UK's future partnership with the EU remains under negotiation. Publicly available information indicates, however, that protection under any future UK-EU agreement will be weaker than that currently afforded by the UK's intra-EU BITs.

## LOOKING AHEAD

Despite the fact that neither the *Achmea* Judgment nor the January 2019 declarations have prevented tribunals from asserting jurisdiction over intra-EU investor-State arbitrations, the risks for investors look set to intensify in the wake of the Termination Treaty. In addition to new jurisdictional objections based specifically on the Treaty, investors with the option to do so will also need to make judgment calls about whether to settle pending arbitrations or pursue alternative remedies in national and EU courts. Given the reliance investors place on sunset clauses in making their investments, the effect of their termination remains to be seen and will no doubt prompt further decisions by tribunals. Investors can also expect greater uncertainty at the enforcement stage, where States are increasingly invoking *Achmea*-related arguments and the case law is still developing.

***

Please do not hesitate to contact us with any questions.


Donald Francis Donovan
dfdonovan@debevoise.com
New York


Lord (Peter) Goldsmith QC
phgoldsmith@debevoise.com
London, Paris


David W. Rivkin
dwrivkin@debevoise.com
New York, London


Catherine Amirfar
camirfar@debevoise.com
New York


Tony Dymond
tdymond@debevoise.com
London, Hong Kong


Mark W. Friedman
mwfriedman@debevoise.com
New York, London


Antoine F. Kirry
akirry@debevoise.com
Paris


Wendy J. Miles QC
wjmiles@debevoise.com
London


Ina C. Popova
ipopova@debevoise.com
New York, Paris


Dietmar W. Prager
dwprager@debevoise.com
New York


Natalie L. Reid
nlreid@debevoise.com
New York


Samantha J. Rowe
sjrowe@debevoise.com
London, Paris


William H. Taft V
whtaft@debevoise.com
New York


Patrick Taylor
ptaylor@debevoise.com
London, Paris


Merryl Lawry-White
mlawrywhite@debevoise.com
London


Mark McCloskey
mmccloskey@debevoise.com
London