The end of Intra-EU BITs. Now what? (Part 1)

15 May 2020
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In this first of a series of four articles, we analyse the key aspects of the decision of the majority of EU Member States to terminate the bilateral investment treaties between them.

On 5 May 2020, the majority of EU Member States signed a plurilateral treaty for the termination of all bilateral investment treaties applicable between them. The termination treaty is a crucial milestone in the reshaping of the EU's investment law regime. This process garnered tremendous attention on 6 March 2018 with the Achmea decision by the Court of Justice of the European Union (CJEU).

We will explore the various consequences of the termination treaty in a series of articles over the coming weeks.

In this introductory post, we will consider the salient features of the termination treaty and assess how it presents an even more radical change to the intra-EU investment framework than the changes brought about by the Achmea decision.

In subsequent articles, we will consider the questions of how the termination treaty is going to change the landscape of investment arbitration within the EU. In particular, we will discuss:

- what happens to pending arbitrations – how should States and claimants deal with these;
- how substantive protections of intra-EU investments available under EU law compare to those commonly found in BITs and what the future holds for substantive protections of intra-EU investments; and
- how intra-EU investment claims will be determined in the future – and the prospects for an EU investment court.

What is the termination treaty exactly?

The Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union is a plurilateral treaty signed by 23 of the 27 Member States of the EU, with the abstention of Austria, Finland, Ireland, and Sweden. (The complete text of the termination treaty is available here).

Once the termination treaty takes effect for each signatory Member State, it will terminate all intra-EU BITs, listed in an annexed chart, to which that Member State is a party. The termination treaty also expressly abrogates so-called “sunset clauses” included in most intra-EU BITs, which extend the protections enjoyed by existing investments for an additional 10 or 20 years following the BIT’s termination. Likewise, in respect of intra-EU BITs that were terminated by Member States in recent years (as listed in Annex B), the termination treaty provides that “sunset clauses” in those BITs will also be deemed terminated.

From a procedural perspective, the termination treaty purports to bring to an end all investment arbitrations currently pending under intra-EU BITs and to foreclose any future claims that might be brought under such BITs.
For pending disputes, the termination treaty sets out transitional measures, which allow the parties to enter into a “structured dialogue” overseen by an “impartial negotiator” designated by the parties to find an amicable out-of-court settlement of their dispute. Such negotiations may be initiated within 6 months from the termination of the respective BIT. This new facilitation mechanism is heavily focused on EU law: the negotiations have to be conducted with due consideration of the relevant rulings of the CJEU and domestic courts, and of the case-law of the CJEU on the extent of reparations for damages under EU law.

Equally, the termination treaty provides that an investor, having withdrawn its BIT claims in a pending arbitration, is entitled to pursue domestic and/or EU law claims before the domestic courts of the respondent Member State. Significantly, the termination treaty purports to overrule applicable limitation periods by providing that recourse to national courts is available even if the domestic time limits for bringing such actions have expired.

It should be noted that the termination treaty affects disputes under intra-EU BITs only. It does not affect investor-State arbitrations conducted under the Energy Charter Treaty, to which almost all EU Member States (with the exception of Italy) and the EU itself are parties. The European Commission will no doubt turn to that thorny issue in due course.

**The termination treaty: a radical change with far-reaching consequences**

The termination treaty marks the latest key event in a long campaign by the European Commission to re-assert its authority over intra-EU investment affairs. The CJEU’s *Achmea* decision of 6 March 2018, which established that investment arbitration clauses contained in intra-EU BITs are incompatible with EU law and therefore invalid was a game-changer in this campaign, and it was followed up on 15 and 16 January 2019 by a series of Member State declarations regarding the impact of the decision. The termination treaty, however, has far-reaching consequences which go even beyond the scope of *Achmea*.

After 6 March 2018, Member States seized upon the *Achmea* decision to argue that arbitration clauses in intra-EU BITs were ineffective (from the date of the accession to the EU of the last of the Contracting Parties to the particular BIT) and hence the arbitral tribunal constituted on the basis of an intra-EU BIT lacked jurisdiction.

However, the *Achmea* decision directly addressed only the question of the incompatibility with EU law of investor-State dispute settlement provisions which allowed for arbitration. On that basis, Member States and the EU Commission concluded that the arbitration provisions in intra-EU BITs were necessarily void and unenforceable. The *Achmea* decision did not, however, purport to affect any other procedural or substantive protections available to investors under intra-EU BITs. Accordingly, if an investor perceived to have suffered any grievance under an intra-EU BIT, it could seek redress under the protections of the applicable intra-EU BIT before any domestic forum that complies with the terms of the *Achmea* decision.

However, the legal regime created by the termination treaty is markedly different. Once the termination treaty enters into force, all procedural and substantive provisions of intra-EU BITs as a whole will become ineffective. It follows that while investors are still free to bring actions before the domestic courts of EU Member States, they can no longer base their claims on an alleged violation of the substantive provisions of the applicable intra-EU BIT. Rather, investors will be required to rely solely on protections granted under the rules and principles of EU law, or the domestic law of the Member State in question. In a later article in this series, we will explore the differences in the standards of protection offered under EU law compared to those commonly available under BITs, and consider what steps, if any, investors may take to maximize their protection.

The date of the *Achmea* decision is a crucial pivot point for a number of the provisions of the termination treaty. The termination treaty does not apply to arbitration proceedings concluded before the issuance of the *Achmea* decision, where the award had been complied with prior to 6 March 2018 and no annulment or other review proceedings were pending on that date.

In our next article, we will discuss the fate of pending arbitral proceedings affected by the termination treaty.

Please contact us if you would like further information.

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