



The Dutch move to terminate intra-EU BITs following the *Achmea* decision

10 MAY 2018

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The Netherlands has announced that it will seek to terminate its bilateral investment treaties (BITs) with Slovakia and other European Union member states. This decision of the Dutch government is an important step following the much anticipated ruling issued on the 6 March 2018 by the Court of Justice of the European Union (CJEU) in *Achmea v Slovakia*. In this groundbreaking case, the CJEU ruled that the arbitration clause contained in the Netherlands-Slovakia BIT is incompatible with EU law, as it removes disputes involving the interpretation or application of EU law from the competence of the EU legal framework.

The *Achmea* decision potentially has serious implications for the 196 BITs in force between EU member states. It seems likely that EU member states will be required to terminate their intra-EU BITs. However, BITs typically include a so-called sunset clause, which provides that the treaties will continue to apply a specific period of time (15 years in the case of the 2004 Dutch model BIT) to investments made before termination of the BIT. Investors may therefore still seek to bring proceedings under those BITs, notwithstanding termination, although no doubt there would be significant problems with establishing jurisdiction of the tribunal, or indeed upon enforcement, in light of the *Achmea* decision.

Outline proposals have been made for a multilateral agreement among the EU member states to terminate all intra-EU BITs (including their sunset clauses), but as yet there is no detail as to how such an agreement would be drawn up or would take effect. It is clear, however, that EU member states will now have to step up efforts to establish an alternative mechanism for the binding and enforceable resolution of investment disputes between themselves. As noted in our article on the recent EU/Mexico trade deal, the EU favours the establishment a multilateral investment court to replace investment arbitration.

The Netherlands is the first EU member state to take the decisive step of terminating its intra-EU BITs following the *Achmea* decision. It remains to be seen whether other member states will follow suit. However, given the number of investments that are structured using a Dutch corporate vehicle (principally for tax reasons), investors holding assets in Europe via such structures may need to rethink whether their investments are still afforded protection under any applicable BITs.

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