Termination of intra-EU bilateral investment treaties: the UK – the last safe haven?

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Since late August 2020, the agreement for the termination of bilateral investment treaties (**BITs**) between 23 EU Member States (the **Termination Agreement**) has begun to enter into force, pursuant to its ratification by certain Member State parties.[1] The Termination Agreement is the culmination of various legal developments stemming from a 2016 Court of Justice of the European Union (**CJEU**) decision in the case of *Slovak Republic v. Achmea B.V.* (Case C-284/16) (the ***Achmea* judgment**), which found that investor-State arbitration clauses in intra-EU BITs are incompatible with EU law. On 15 January 2019, 21 member states (including the UK) issued a declaration to the effect that they would terminate their intra-EU BITs either plurilaterally or bilaterally (whichever was more expedient) by 6 December 2019. Following this declaration, the Termination Agreement confirms that intra-EU BIT arbitration clauses "are contrary to the EU Treaties and thus inapplicable", thereby creating far-reaching consequences for investor-State dispute settlement (**ISDS**) within the EU.

ISDS mechanisms

ISDS provisions are contained within many BITs, multilateral investment treaties (such as the Energy Charter Treaty (**ECT**)), free trade agreements (**FTAs**) and other investment agreements. They provide a dispute resolution mechanism for investors who have invested in a foreign country and subsequently find themselves in a position where the State in question has breached its obligations under the relevant treaty, agreement and/or international law. Under many ISDS provisions, the parties submit to the jurisdiction of a neutral arbitral tribunal for the settlement of disputes. This neutrality provides an important assurance to foreign investors who may be reluctant to commence proceedings against a host State in the courts of that same State.

The *Achmea* judgment and relevant provisions of the Termination Agreement

The *Achmea* judgment concerned an arbitration clause in the Netherlands-Slovakia BIT, which Slovakia had argued was incompatible with EU law. In its judgment, the CJEU found that the clause effectively placed disputes concerning the interpretation or application of EU law outside the EU's judicial review mechanism. Article 267 of the Treaty on the Functioning of the European Union (**TFEU**) sets out a preliminary ruling procedure that provides a dialogue between the CJEU and the courts and tribunals of EU Member States, in order to achieve uniform and consistent interpretation of EU law and to ensure its full effect and autonomy. The CJEU held that an arbitral tribunal with jurisdiction over an investor-State dispute may be required to interpret or even apply EU law, despite the fact that it is not a "tribunal of a Member State" for the purposes of Article 267 TFEU. Such an arbitral tribunal would therefore have no power to make a reference to the CJEU via the preliminary ruling procedure. Further, arbitral awards issued pursuant to such ISDS

provisions are, in general, final and subject only to limited challenge or appeal by the courts of the seat of the arbitration (or in the case of ICSID awards, annulment before an ad hoc committee), which means there is no formal mechanism by which they can be reviewed for compatibility with EU law by the CJEU.

The Termination Agreement gives effect to the CJEU's ruling in *Achmea* by terminating all intra-EU BITs between the signatories and confirming that the arbitration clauses contained within these BITs are inapplicable. The Termination Agreement will have no effect on arbitrations concluded before 6 March 2018 (the date of the *Achmea* judgment), so long as there were no pending challenge, set-aside, annulment or enforcement proceedings (or similar) on 6 March 2018 and the award was executed prior to that date. On the other hand, the Termination Agreement requires that Member States inform arbitral tribunals of new or pending arbitrations (including those where tribunal proceedings have concluded prior to 6 March 2018 but enforcement proceedings are ongoing) that the arbitration clause contained within the relevant intra-EU BIT cannot serve as a legal basis for those proceedings. The Termination Agreement provides for "structured dialogue" between the parties involved in pending arbitrations, with a view to entering into a settlement. However, not only must the investor suspend the proceedings against the State as a pre-condition to this "structured dialogue", but there is also no obligation on the State to enter into a settlement agreement (or the "structured dialogue") at all. Further, where the Member State in question is party to judicial proceedings concerning an arbitral award issued on the basis of a terminated intra-EU BIT, it must ask the competent national court (including in any third country) to set the arbitral award aside, annul it or refrain from recognising and enforcing it. These provisions are evidently cause for concern for those investors involved in, or contemplating, investor-State arbitration based on intra-EU BITs.

The Termination Agreement also applies to any "sunset clauses" contained within intra-EU BITs. Sunset clauses provide that the protections afforded to investors in certain BITs will be extended for a specified period of time following the termination of the BIT, so long as the investment was made prior to such termination. However, there is a question around whether investors have a legitimate expectation that their rights will be prolonged for the duration specified in a sunset clause, especially considering investors may rely on the provisions (including sunset clauses) contained in the relevant BIT when deciding whether to invest in a foreign State. Investors may therefore seek to bring investor-State arbitration claims based on their rights enshrined in sunset clauses, despite their purported termination.

Finally, it is worth noting that the recitals to the Termination Agreement state that it "does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage". It appears that for now, at least, investors may still bring intra-EU claims against States under the ECT. Furthermore, any arbitration clauses contained in extra-EU BITs, FTAs or other multilateral investment treaties will remain unaffected by the Termination Agreement.

Non-signatories to the Termination Agreement

Austria, Finland, Ireland, Sweden and the UK are not signatories to the Termination Agreement (Ireland having already terminated its only intra-EU BIT). On 14 May 2020, the European Commission announced that it had sent letters of formal notice to the UK and Finland for failing to terminate, and failing to engage in any discussions to terminate, their intra-EU BITs. The announcement ended with a reminder that EU law continues to apply to the UK until the end of the Brexit transition period on 31 December 2020. On 30 October 2020, the Commission issued a further statement announcing that it had sent the UK a "reasoned opinion" concerning the UK's failure to remove intra-EU BITs from its legal order. In the announcement, the Commission stated that if it does not receive a satisfactory response from the UK by 30 December 2020 (the day before the transition period is due to end), it may decide to refer the case to the CJEU. The Commission considers that it is competent to launch an infringement procedure against the UK for any failure to fulfil an obligation under EU law before 31 December 2020. The UK has

not yet announced an intention to terminate its 11 intra-EU BITs, which, as of January 2021, will become extra-EU BITs and therefore outside the scope of the *Achmea* judgment.

Protections for investors post-*Achmea*

The termination of intra-EU BITs has left investors without the rights commonly found in BITs, such as the right to fair and equitable treatment, protection against unlawful expropriation, the right to full protection and security and free transfer of funds and access to international arbitration to resolve such disputes. In order to reassure investors in the aftermath of the *Achmea* judgment, the Commission published guidance on the protections offered to investors under EU law, regardless of the proposed termination of intra-EU BITs. For example, the Commission considers that EU investors benefit from the fundamental freedoms of the Single Market, including the free movement of capital and the freedom to provide services across borders. The Commission emphasised that investors can also rely on the rights set out in the Charter of Fundamental Rights of the EU, including access to justice and the right to protection from discrimination. Finally, investors were reminded of the swathe of sector-specific EU legislation regulating areas such as financial services, transport, energy, telecoms, public procurement, intellectual property and company law. Investors ostensibly have the ability to enforce these rights through the national courts and ultimately through the CJEU via preliminary rulings or infringement proceedings.

However, many consider that the existing protections for investors in EU law are not as well established and do not provide the same level of legal certainty as the protections set out in intra-EU BITs. Even the drafting of the Termination Agreement suggests that the Commission is aware of this, as can be seen in one of the recitals: "further measures and actions…may be necessary…to ensure a higher level of protection of cross-border investments within the European Union and to create a more predictable, stable and clear regulatory environment to incentivise investments within the internal market".

The EU has recently concluded a public consultation with the aim of assessing the existing intra-EU investment climate and mapping out possible improvements. In particular, the idea of an EU investment arbitration court (similar to the EU's proposed Multilateral Investment Court as envisaged in certain FTAs) has been suggested as a replacement for the neutral ISDS mechanism of the intra-EU BITs. Perhaps understandably, it appears investors continue to have misgivings about bringing investor-State claims in the national courts of that same State.

The UK – a favourable place for investment?

It is not clear why the UK has not engaged with the termination process, but one explanation could be that it is a strategic bid to retain the protections contained within its intra-EU BITs, and thus make the UK an attractive location for EU investors post-Brexit. In turn, when UK investors look to invest in the EU, it may be that investments in the Member States with which the UK has signed BITs are more attractive, those States being: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia and Slovenia. Investors may also look to the UK when considering how to structure their investment in one of the remaining EU Member States. For example, investors may wish to consider investing in the EU via a UK subsidiary, as such an entity should still benefit from the provisions contained in the 11 existing UK-EU BITs.

While the Commission may argue that investors continue to enjoy access to the rights enshrined in EU law, it appears many investors still value the perceived higher protections contained in BITs and will be eagerly awaiting the Commission's proposals for "a more predictable, stable and clear" investment environment. In the meantime, this development may be one of the opportunities for the UK economy going forward in a post-Brexit world.

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1. Article 16 of the Termination Agreement states: "1. This Agreement shall enter into force 30 calendar days after the

date on which the Depositary receives the second instrument of ratification, approval or acceptance. 2. For each Contracting Party which ratifies, accepts or approves it after its entry into force in accordance with paragraph 1, this Agreement shall enter into force 30 calendar days after the date of deposit by such Contracting Party of its instrument of ratification, approval or acceptance."↩

Your Key Contacts

James Langley
Partner, London
D +44 20 7246 7440
M +44 7814 024954
james.langley@dentons.com

Lara Armes-Venter
Associate, London
D +44 20 7246 7588
lara.armes-venter@dentons.com

Catherine Gilfedder
Senior Associate, London
D +44 20 7246 7232
catherine.gilfedder@dentons.com

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