May 2020

Newsletter

Special Edition

Time to Act for EU Investors – EU States Cancel Intra-EU BITs

On 5 May 2020, all but four EU Member States have signed an agreement to terminate their intra-EU bilateral investment treaties. What are the consequences for the protection of EU investments? How does this agreement affect pending arbitration proceedings? And how should investors react in order to ensure adequate protection?

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An Epilogue to the Post-Achmea Saga – Time to Reassess the Structure of EU Investments

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The judgment of the Court of Justice of the European Union ("CJEU") in the Achmea case has certainly been the most debated in the arbitration community over the last years, and parties to pending intra-EU investment arbitration proceedings have spent considerable time and money arguing its consequences before tribunals. The saga may have come to an end on 5 May 2020 with a majority of EU Member States signing an agreement to terminate their intra-EU bilateral investment treaties (the "Agreement"). Only four Member States have not signed the Agreement. In light of these new developments, investors would now be well advised to consider restructuring their investments in Europe through extra-EU countries, to ensure adequate protection going forward. Switzerland and its excellent global network of investment treaties is an attractive choice.

Background – The Aftermath of Achmea

In the now famous Achmea case (*Slovak Republic v. Achmea B.V.*, C-284/16), the CJEU ruled that the arbitration clause of the BIT between the Netherlands and the Slovak Republic was incompatible with EU law. The Achmea ruling sent shockwaves through the international arbitration community. Because it left many questions unanswered, it was not only profusely discussed and commented by experts, but it also gave rise to numerous arguments and challenges before tribunals and in enforcement proceedings. Important areas of uncertainty were the consequences of the Achmea ruling on arbitrations under the Energy Charter Treaty ("ECT"), as well as its impact on proceedings under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). The Agreement clarifies some of these questions.

The Agreement in Brief

The Agreement, which was signed by 23 Member States on 5 May 2020, will automatically terminate any bilateral investment treaties ("BITs") between any of the signatory Member States. Austria, Finland, Sweden and Ireland have not signed the Agreement. Ireland's only intra-EU BIT was already terminated in 2011. The UK, which has left the EU on 31 January 2020, has not signed either. However, the non-signatories' BITs might well be affected as well in the long run. The EU Commission has sent letters of formal notice to Finland and the UK on 14 May 2020 for failing to effectively remove intra-EU BITs from their legal orders.

The Agreement is not yet in force, and is subject to ratification. It will enter into force 30 days after the EU Secretary-General receives an instrument of ratification, approval or acceptance from two Member States. However, signatory Member States may decide to apply the Agreement provisionally (Article 17).

In a nutshell, the Agreement

i. terminates any BITs between the signatory Member States (Article 2);

ii. renders without effect the sunset clauses contained in any BITs (currently in force or already terminated) between the signatory Member States (Articles 2 (2) and 3);

iii. obliges signatory Member States parties to arbitration proceedings to inform arbitral tribunals about the legal consequences of the Achmea ruling (Article 7 (a));

iv. obliges signatory Member States, where they are parties to judicial proceedings concerning an arbitral award issued on the basis of a BIT between any of the signatory Member States, to seek annulment or resist enforcement of such award (Article 7 (b)); and

v. provides for transitional measures and a settlement procedure for arbitration proceedings under affected BITs initiated prior to 6 March 2018 (Articles 8, 9 and 10).

Termination of the Sunset Clauses in intra-EU BITs

Sunset clauses extend the protection of investments for a certain time following termination of a BIT. Such clauses typically allow investors to initiate arbitration proceedings on the basis of an arbitration clause contained in a terminated BIT, with respect to breaches which occurred before termination. The Agreement provides that such sunset clauses contained in BITs between signatory Member States currently in force (Article 2 (2) and Annex A) or already terminated (Article 3 and Annex B) shall not produce legal effects. Investors are therefore prevented from initiating arbitrations even for breaches which occurred before the entry into force of the Agreement.

Impacts on Arbitration Proceedings

The Agreement makes clear that arbitration clauses in the affected BITs are contrary to EU law and "*shall not serve as legal basis*" for initiating **new arbitration proceedings** (Articles 4 and 5). In other words, investors are now precluded from initiating arbitrations on the basis of the affected BITs.

As to **concluded arbitration proceedings**, the Agreement does not affect arbitrations which ended with a settlement agreement or with a final award issued prior to 6 March 2018, as long as the award was duly executed prior to 6 March 2018 with no challenge, enforcement or similar proceedings pending, or the award was set-aside or annulled before the entry into force of the Agreement (Article 6 (1)).

Pending arbitration proceedings are not automatically discontinued following the entry into force of the Agreement. The Agreement merely obliges the respondent State to inform the arbitral tribunal about the consequences of the Achmea ruling (Article 7 (a)), and in case of judicial proceedings concerning an award, request the competent national court to set the award aside, annul it or to refrain from recognising and enforcing it (Article 7 (b)).

Finally, for arbitrations **initiated prior to the Achmea ruling**, i.e. before 6 March 2018, the Agreement contains two additional mechanisms, described as "transitional measures". Article 9 envisages a facilitated settlement procedure ("structured dialogue"), subject to a number of conditions. Article 10 allows investors to seek remedies under national law even if the time limits have expired, on condition that the investor withdraws the arbitration proceedings and waives its rights under the relevant BIT.

What about Arbitrations under the Auspices of ICSID?

Some commentators previously expressed the view that the Achmea ruling does not apply to arbitrations under the auspices of ICSID. However, the recitals of the Agreement now expressly confirm that the Agreement covers all investor-State arbitration proceedings based on intra-EU BITs between the signatory Member States under any arbitration convention or set of rules, including ICSID. However, there seems to be a fundamental contradiction between Article 7 (b) of the Agreement, which obliges the respondent State to seek annulment or resist enforcement of the award, and Article 54 of the ICSID Convention, which obliges its contracting states to enforce ICSID awards *"as if it were a final judgment of a court in that State"*. The relationship between the Agreement and the ICSID Convention will surely continue to give rise to arguments in pending proceedings.

What about Arbitrations under the Energy Charter Treaty?

The Agreement makes clear that it does not cover intra-EU proceedings on the basis of the ECT. This is consistent with the findings of tribunals over the last two years. However, there is little doubt that debates on the compatibility of intra-EU ECT arbitrations with EU law are not over since the Agreement expressly indicates that the EU and its Member States *"will deal with this matter at a later stage"*. For the time being, however, the Agreement slightly strengthens the procedural position of investors currently parties to intra-EU ECT arbitrations.

Implications for EU Investors - The Swiss Advantage

Even though the Agreement leaves certain questions open and tribunals may still be convinced to uphold their jurisdiction in current proceedings, it has now become increasingly evident that EU investors would be well advised to reassess the structure of their investments in the EU in order to ensure adequate protection. Prudent investors might wish to consider reorganizing their investments through corporate structures located outside of the EU, in countries which have concluded investment treaties with the EU Member State(s) where their investments are located. The obvious candidate is Switzerland, with its wide network of investment treaties, its business friendly legal and political environment, and its

excellent trade relations with the EU. Such restructuring should be implemented as soon as possible to ensure that they will be effective in the context of a dispute. Measures to obtain BIT protection taken *before* the facts leading to a dispute arise have been generally accepted as admissible by arbitral tribunals.

Conclusion

Following the Achmea ruling, challenges by respondent States in pending proceedings have increased. The Agreement will undoubtedly further intensify the risks for investors in investor-State arbitrations. More than ever, prudent investors are well advised to take proactive steps to ensure that their foreign investments within the EU still benefit from adequate protection. Reorganizing investments through extra-EU structures would be an effective solution. Located in Europe and offering a wide network of investment treaties as well as an ideal legal and political landscape, Switzerland would be an obvious choice.