Termination of Intra-EU BITs: Commission and Most Member States Testing the Principle of Good Faith under International Law

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The long-awaited Agreement to terminate intra-EU BITs (bilateral investment treaties) was signed on 5 May 2020 (the "Termination Agreement"). According to the European Commission, the Termination Agreement "implements the March 2018 European Court of Justice judgment (Achmea case), where the Court found that investor-State arbitration clauses in [intra-EU BITs] are incompatible with EU Treaties."

The road the EU has taken to arrive at this point was described in a previous KAB post, so the aim of this post is to focus on two controversial provisions and provide some preliminary thoughts on their impact. I will also briefly consider the position and future of the Member States that chose not to sign the Termination Agreement.

Termination of Sunset Clauses and Pending Arbitrations

The two provisions of the Termination Agreement that have given and will continue to give rise to attention include (i) Articles 2 and 3, which terminate the sunset clauses in BITs and (ii) Articles 5 and 7, which purport to terminate all arbitrations under them commenced after the *Achmea* judgment. The interference with vested rights of third parties in the case of the former, and the arguably retroactive nature of the provision in the latter, renders the validity and application of these provisions suspect, as a matter of international law.

The *Contras* case (*Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*) provides an interesting analogy: Three days before Nicaragua seised the International Court of Justice of its case, the United States purported to qualify its declaration accepting the compulsory jurisdiction of the Court under Article 36(2) of the Statute by a notification that excluded disputes with Central American states from its scope. The original declaration included a 6-month termination period. The ICJ held that the notification was ineffective, pointing out that the termination notice in the original declaration was "inescapable" (Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, para. 61). The Court emphasised the principle of good faith in arriving at its conclusion (para. 60).

It may also be worth noting that under the Vienna Convention on the Law of Treaties, treaties do not generally produce retroactive effects (Art. 28) and termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination" (Art. 70(1)(b)).

While it is no secret that the EU Commission has disagreed for a long time with the jurisdiction of investment tribunals under intra-EU BITs, it cannot prevent such tribunals from ruling on the validity and effect of these clauses in existing and possible future cases. All it can do is try to influence the outcome (as it has done in numerous cases in the past), most likely by seeking to appear as an *amicus curiae*. Ultimately the Commission can bring infringement proceedings before the CJEU against the respondent state, if such arbitrations result in an award that is not to its liking, as it did in the *Micula* case (Cases *T-624/15*, *T-694/15* and *T-704/15*[fn]Technically the cases were brought by the Micula brothers and their companies, challenging the Commission's decision to declare Romania's partial

payment of the sum awarded in ICSID Case ARB/05/20 incompatible state aid. The General Court upheld the application in a decision discussed in a KAB post by Guillaume Croisant.[/fn]).

This would not contribute to the coherence of systems of international law (of which EU law is one, even if the Commission and EU lawyers do not always see it that way) or create legal certainty. While the Member States must have taken this risk into account when deciding to sign the Termination Agreement, the same cannot be said for EU investors that may have relied on the additional protection provided by an existing BIT (including its sunset clause) when making their investments. Most such investors will not have the appetite or stamina to pursue proceedings under the current uncertain legal regime, leading to the signatories to the Termination Agreement and the Commission having achieved their aims, regardless of the strict legal effect of Articles 2 and 3 of the Termination Agreement.

By contrast, those that are already involved in arbitrations that have ostensibly been unilaterally terminated (or the jurisdiction of the tribunals hearing them withdrawn) under Articles 5 and 7 may have invested enough in their disputes to wish to see them through, even in light of the serious uncertainties that surround the enforceability of any award that they may obtain.[fn]A further option is open for parties to any arbitration proceedings that were commenced but not concluded before the *Achmea* judgment, namely to enter into "structured dialogue" with a facilitator in order to try to achieve a settlement, under Article 9 of the Termination Agreement.[/fn]

Signatories – and Not Signatories – to the Termination Agreement

It is noteworthy that it has taken the Member States and the Commission over six months from the agreement on the terms of the Termination Agreement to its signature.[fn]The terms of the draft leaked at that time are virtually identical to those in the signed version.[/fn] Presumably the time was needed to try to coax all EU Member States to join the agreement, in which case the attempt appears to have failed. Four Member States have decided not to sign the Termination Agreement: Austria, Finland, Ireland and Sweden. Ireland has no BITs in force (with EU Member States or otherwise), but the other three appear not to have agreed to

all the terms of the Termination Agreement and be rather opting for bilateral termination of their individual treaties – an alternative also provided in the political Declarations of January 2019 (see para. 8 of the Declaration signed by Austria and para 8. of the Declaration signed by Finland and Sweden).

It will be interesting to see how those bilateral (termination) treaties differ from the plurilateral Termination Agreement. Sweden, for example, may wish to treat pending arbitrations differently, given its ownership of Vattenfall, even though that case (*Vattenfall AB v. Germany*, ICSID Case No. ARB/12/12) would not have been specifically affected, being brought under the Energy Charter Treaty (the "ECT"), rather than a BIT. (The Termination Agreement does not apply to the ECT.) While the main difference between the political Declarations is on its face over the ECT, one can also detect broader concerns over "due process" and interference in ongoing proceedings in the Declaration signed by Finland and Sweden (see p. 3). Overall, the Termination Agreement clearly goes further than the *Achmea* judgment, which may not have been to all Member States' liking.

Future terminations may in theory at least also be unilateral, leaving the sunset clauses intact, which could result in further infringement proceedings before the CJEU.

While the Commission on the whole got its way, it is clear that there is far less agreement among the Member States on the usefulness and legality of intra-EU BITs than the Commission press communications would suggest.

The UK has also not signed the Termination Agreement, even though its preliminary intention to do so was indicated at the time of the draft agreement, when it was still a Member State. Accordingly, the UK's existing BITs with EU Member States will remain in force, at least until the future relationship between the UK and the EU is clarified during the ongoing negotiations.