

# Hungary Gives the Green Light for the Conclusion of a Termination Agreement for Intra-EU BITs

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On 17 December 2018, the Prime Minister of Hungary issued a decision entitled “Decision authorizing the conclusion of an Agreement to terminate bilateral agreements on encouragement and reciprocal protection of investments concluded between governments of certain Member States of the European Union”<sup>[fn]</sup>see also here at p. 35105.<sup>[/fn]</sup>

The rather succinct Decision confirms the Prime Minister’s approval of the commencement of negotiations on an agreement for the termination of Member State BITs and, in line with the relevant Hungarian regulation on the domestic procedure with regards to international treaties (Act No. L of 2005), the Decision authorises the Minister of Foreign Affairs to conduct the negotiations and to sign the resulting text on behalf of Hungary. It further calls on the Minister of Foreign Affairs and the Minister of Justice to draw up a text to be submitted to the Government for the ratification of the agreement by Hungary once it has been finalised.

The Hungarian PM’s Decision comes in the aftermath of the ground-breaking Achmea judgment of March 2008 (discussed in the numerous posts at the blog

here), in which the Court of Justice of the European Union (“Court”) held that investor-State arbitration clauses contained in intra-EU BITs are incompatible with EU law because they undermine the principle of autonomy of EU law by impairing the Court’s exclusive jurisdiction to interpret EU law. The Court’s ruling in *Achmea* is authoritative and binding on all EU Member States, who have an obligation to eliminate the incompatibility identified. Following *Achmea*, the Commission announced in its Communication on the Protection of intra-EU Investment of July 2018 that it had intensified its dialogue with the Member States, calling on them to take action to terminate their intra-EU BITs.

### **Hungary’s Intra-EU IIAs**

Hungary currently has 54 BITs in force, 22 of which are so-called intra-EU BITs.

Hungary was one of the first Member States in Central Europe to adopt bilateral investment treaties in an effort to attract large-scale foreign investment. Although certain safeguards for foreign investment had existed under domestic Hungarian law since the 1970s, BITs were considered to represent stronger guarantees for foreign investors. Hungary signed its very first BIT with Germany in April 1986, and entered into further BITs with France, Belgium, and Luxembourg that same year. By the time Hungary gained independence and concluded the so-called Europe Agreement in 1993, which formed the legal framework for Hungary’s accession process to the EU and specifically encouraged the conclusion of BITs with Member States of the then European Communities, Hungary had BITs in place with all Western European States. In addition, in the course of the 1990s, Hungary entered into BITs with nine countries in Central and Eastern Europe (“CEE”). Hungary also became a signatory to the New York Convention and the ICSID Convention, later also joining the Energy Charter Treaty (“ECT”). Upon Hungary’s accession to the EU in 2004 and the EU’s subsequent enlargements, Hungary’s BITs (as well as the BITs of the other CEE countries) concluded with EU Member States became intra-EU BITs.

### **ISDS Proceedings against Hungary on the Basis of its Intra-EU IIAs**

The majority of the sixteen known investor-State arbitration proceedings that have been commenced against Hungary to date concern investments made by Western European investors during the privatisation years of the 1990s. In the 1990s, in order to avoid bankruptcy following the collapse of the socialist regime, Hungary

set about privatising large segments of its national economy to foreign investors who were willing to acquire formerly State-owned companies and other assets. In addition, owing to its successful economic and political transformation, Hungary attracted a growing number of greenfield investments, soon becoming one of the most popular destinations for Western capital investment in CEE.

Twelve of the sixteen arbitrations brought against Hungary were commenced on the basis of intra-EU BITs or the ECT by investors incorporated in an EU Member State.

### **Hungary's Changing Position on the Applicability of its Intra-EU IIAs**

In these intra-EU arbitrations, contrary to other CEE States, most notably Slovakia and the Czech Republic, Hungary has long sought not to contest the validity or applicability of its intra-EU BITs or the ECT. When the European Commission was allowed to intervene as *amicus curiae* in the *AES Summit v. Hungary, Electrabel v. Hungary*, and *EDF International v. Hungary* arbitrations, Hungary distanced itself from the jurisdictional objections raised by the Commission based on the inapplicability of the ECT in the context of intra-EU disputes, expressly confirming that it considered the tribunal to have jurisdiction to entertain claims against Hungary on the basis of the ECT.<sup>[fn]</sup> *Electrabel S.A. v. Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶¶ 4.54, 5.26-5.30.<sup>[/fn]</sup>

It, therefore, came as something of a surprise that Hungary chose to contest the validity of intra-EU BITs before the Courts of the European Union by intervening in both the *Achmea* and the *Micula* cases, in the latter as the only other Member State besides Spain.

Since the *Achmea* judgment, however, Hungary has officially changed course and has begun to openly invoke the inapplicability of the arbitration clauses contained in its intra-EU BITs as an objection to jurisdiction.<sup>[fn]</sup> See, e.g., *UP and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), Award, 9 October 2018, ¶¶ 207-279.<sup>[/fn]</sup> It is also seeking the annulment of two unfavourable intra-EU BIT awards on this basis, despite the fact that it had not raised any intra-EU jurisdictional objections in the underlying arbitration proceedings.<sup>[fn]</sup> Hungary seeks to annul intra-EU BIT award, GAR, 3 April 2018; Three Crowns partners resign from panels considering *Achmea*, 9 August 2018; Another resignation from panel

weighing Achmea, GAR, 5 September 2018.[/fn]

## **Hungary Finally Moves to Terminate its Intra-EU BITs**

Despite this recent change to Hungary's defence strategy, Hungary remained silent until 18 December 2018 as regards the fate of its intra-EU BITs. Unlike other EU Member States, such as Italy, Denmark, Romania, Latvia, Poland and the Czech Republic,[fn]UNCTAD, Recent developments in International Investment Agreements (2008-June 2009), IIA MONITOR No. 3 (2009) International Investment Agreements, p. 5. Cecilia Olivet, A test for European solidarity – The case of intra-EU Bilateral Investment Treaties, Transnational Institute, January 2013, p. 6; Czech Republic terminated investment treaties in such a way as to cast doubt on residual legal protection for existing investments, IAREporter, 1 February 2011; Denmark and Czech Rep to terminate BIT, but not all EU Members agree with Czech view that intra-EU BITs are unnecessary, IAREporter, 17 July 2009; Investigation: Denmark Proposes Mutual Termination of its Nine BITs With Fellow EU Member-States, Against Spectre Of Infringement Cases, IAREporter, 2 May 2016; Nikos Lavranos, Romania's termination of its intra-EU BITs: a counterproductive move, Practical Law Arbitration Blog, 14 October 2016; Tom Jones, Romania paves way for intra-EU BITs termination, GAR, 15 March 2017; Latvia to terminate bilateral investment treaties with Poland, Czech Republic at EU request, the Baltic Times, 2 February 2018; Analysis of Bilateral Investment Treaties, Ministry of Treasury of the Republic of Poland, 25 February 2016; Marcin Orecki, Bye-Bye BITs? Poland Reviews Its Investment Policy, 31 January 2017; Marcin Orecki, Let the Show Begin: Poland Has Commenced the Process of BITs' Termination, Kluwer Arbitration Blog, 8 August 2017.[/fn] Hungary did not follow the recommendation of the European Commission, repeatedly addressed to the Member States since 2007, to voluntarily terminate their intra-EU BITs.[fn]See, for example, Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 4 January 2007, ¶ 16; Eastern Sugar B.V. v. The Czech Republic (SCC Case No. 088/2004), Partial Award, 27 March 2007, ¶ 126.[/fn] The PM's Decision marks a clear departure from Hungary's former position and paves the way for the termination of Hungary's intra-EU BITs. The Decision would seem to suggest that Hungary is contemplating the conclusion of a multilateral termination agreement with its EU counterparts.

The idea of a multilateral termination treaty was first raised by Austria, France, Finland, Germany and the Netherlands in their 2016 Non-Paper, which

recommended that Member States terminate and replace their existing intra-EU BITs with an appropriate level of substantive and procedural protection for all EU investors.[fn]Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands, 7 April 2016. Following the Achmea judgment, the Netherlands again suggested to terminate all intra-EU BITs through the adoption of a multilateral treaty between Member States, see Marie Davoise, Markus Burgstaller, Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?, Kluwer Arbitration Blog, 11 August 2018.[/fn] In light of Achmea and the Commission's Communication, which considers states that EU law provides for adequate and sufficient protection for cross-border EU investments, it would seem increasingly unlikely that Member States who have repeatedly been respondents in intra-EU investor-State arbitrations (such as Hungary) would voluntarily agree to an alternative EU-wide investment protection regime.

The text of the PM's Decision also leaves open whether the contemplated termination agreement will deal with the intra-EU application of the ECT's investor-State arbitration provisions. In this regard, it is noteworthy that Hungary's oil and gas company MOL, the second largest company in CEE, is currently pursuing a highly politicised ECT claim against Croatia over the treatment of its investment in Croatia's national oil and gas company, INA.[fn]MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (ICSID Case No. ARB/13/32).[/fn] Any change to the intra-EU applicability of the ECT would likely be acceptable to Hungary only if it contains an appropriate carve-out for pending proceedings.

The Hungarian PM's Decision is likely to be followed by similar authorisations issued by other EU Heads of State in preparation for the adoption of what is expected to be a common effort for the end game for intra-EU BITs.