Kluwer Arbitration Blog

Agreement on the Termination of Intra-EU BITs: Sunset in Stone?

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On 5 May 2020, 23 Member States of the European Union ("EU") signed an Agreement for the Termination of all Intra-EU Bilateral Investment Treaties ("Agreement"). Following ratification by the Kingdom of Denmark (6 May 2020) and Hungary (30 July 2020), the Agreement entered into force on 29 August 2020 (Article 16).

The Agreement comes in response to two developments. First, the contentious *Achmea v Slovak Republic* (C-284/16) ruling ("*Achmea* ruling"), where the European Court of Justice determined that investor-State arbitration clauses in intra-EU BITs violate fundamental principles of autonomy and are incompatible with EU law (specifically Articles 267 and 344 of the Treaty on the Functioning of the European Union) (see prior blog coverage here). Second, the Declarations of 15 and 16 January 2019, where several Member Sates committed to terminate their intra-EU BITs as a consequence of that judgment. To that end, the Agreement has the effect of terminating intra-EU BITs upon its entry into force through ratification or provisional acceptance (Article 17) by signatories also extinguishing the BITs' sunset clauses.

Right or wrong, just or unjust, it remains to be seen, but the Agreement, in its current form, appears to be an affront to the rule of law, which may undermine its intended purpose.

The Agreement, its Object and its Purpose

The Agreement aims to terminate some 130 intra-EU BITs (Annex A) along with their sunset clauses and declares that they cannot serve as legal bases for arbitral proceedings (Article 2). It further terminates the sunset clauses of already terminated BITs (Annex B) and deprives them of legal effect (Article 3). Following Denmark and Hungary's ratification and provisional application by the Slovak Republic (8 June 2020) and Spain (11 August 2020), only five intra-EU BITs have been terminated as of 10 September 2020.

The Agreement targets three categories of proceedings (concluded, pending and new), pivoting on the key date of 6 March 2018 (the date of the *Achmea* ruling). The Agreement has the following effects on these three categories of proceedings:

- *Concluded proceedings* are proceedings concluded before 6 March 2018 (and not subject to

further review proceedings). These proceedings are deemed closed and unaffected by the Agreement (Article 6).

- *Pending proceedings* are proceedings active as of 6 March 2018. These are subject to transitional measures, which envisage a structured dialogue regime focused on dispute settlement (Article 9) or access to national courts even if the limitation periods under the applicable domestic laws have expired (Article 10).
- *New proceedings* are those raised after 6 March 2018. These proceedings are regarded as defective as the arbitration clauses contained in the intra-EU BITs "cannot serve as a legal basis" for arbitration proceedings (Article 4).

Accordingly, the goal of the Agreement is clear: investor-State dispute settlement ("ISDS") for intra-EU BITs in the relevant EU Member States as we know it, will cease to exist, full stop. Or, at least that is the intention…

The Agreement: A Discordant Aim

Although the Agreement purports to give teeth to the *Achmea* ruling, it has been unable to fulfil that aim in its entirety. The lack of uniformity weakens its undergirding rationale to align EU BIT practice with the *Achmea* ruling. The Agreement does not apply to the Energy Charter Treaty ("ECT") (the most relied on treaty to raise an investor-State investment dispute), despite EU Members claiming that the *Achmea* ruling renders the ECT inoperable (see e.g., jurisdictional objections by Germany in the *Vattenfall case* and by Spain in the *Novenergia II case* where the EU filed amicus briefs supporting the Member States). Four EU Member States – Austria, Finland, Ireland and Sweden – have not signed the Agreement. There are 32 intra-EU BITs between them that will remain in force. And despite Brexit formalising on 31 January 2020, the United Kingdom ("UK"), which was a Member of the EU at the time of the *Achmea* ruling, is also excluded from the Agreement, precluding the Agreement from applying to an additional nine BITs.

Moreover, the Agreement coming into force does not immediately signal an end for all pending and new arbitrations. For pending arbitrations, where consent is already established, it seems untenable that one party (i.e., a Member State) can withdraw, cancelling the arbitration and triggering the transitory measures. Typically, even when a Respondent host State does not participate, the tribunal, if satisfied it has jurisdiction, will continue *ex parte* (e.g., Russia's non-participation in the Crimean-related disputes).

If it is an arbitration before the International Centre for the Settlement of Investment Disputes ("ICSID"), ICSID Convention Article 25 provides enhanced protection by expressly preventing a party from unilaterally withdrawing from that arbitration. Instead, parallel proceedings may begin to trend following Lithuania's example, which has recently cited the Agreement as its rationale for raising its counterclaim in an ongoing 2016 ICSID arbitration, *Veolia et al v Lithuania*, before its local courts.

For new arbitrations, it remains with tribunals to determine their own jurisdiction (*vis-à-vis kompetenz-kompetenz*). The trend among ISDS tribunals has been to reject jurisdictional objections by Respondent Member States in the aftermath of the *Achmea* decision, such as in *UP and C.D Holding Internationale v Hungary*, *Griffin v Poland*, *Addiko Bank v Croatia*, *AMF v Czech Republic* and *Hydro Energy 1 v Spain*, and by local courts in related enforcement proceedings, as

happened in *Micula v Romania*. It remains to be seen whether the Agreement, effectively seeking to nullify Party consent to disputes initiated after 6 March 2018, would impact this trend.

The Way Forward

As a starting point, State sovereignty is absolute and States are masters of their own treaties. Undoubtedly, the Agreement's Member States have contemplated potential resistance from intra-EU investors. Their primary defence is that concerted termination of a treaty is permissible under Article 54 of the Vienna Convention on the Law of Treaties ("VCLT").

Moreover, the mass culling of the intra-EU BITs, along with their sunset clauses, cleans the slate and aligns intra-EU BIT practice for the majority of EU Members with the *Achmea* ruling. It also paves the way to modernise the investment law regime across the EU, which may include advancement of a multilateral institution for international investment arbitration, a well-known goal for many European countries.

With the ECT also undergoing modernisation negotiations, the EU could, in nearly one fell swoop, redefine investor-State dispute settlement within the European region. Also, since the COVID-19 pandemic is forecast to generate an unknown increase in investment treaty disputes (as discussed in this Blog's archive on COVID-19), the termination of intra-EU BITs has the added benefit of avoiding potential liability through the traditional intra-EU ISDS avenues.

The proof, however, will be in the pudding. As mentioned, the Agreement terminates intra-EU BITs including their sunset clauses. A sunset clause extends the life of a treaty beyond its date of termination. For example, Article 13(3) of the Netherlands-Poland BIT provides:

> "In respect of investments made before the date of the termination of this Agreement the foregoing Articles thereof shall continue to be effective for a further period of 15 years from that date."

A sunset clause operates similar to that of a stabilisation clause, by offering a limited and finite degree of protection to an exacting and specific class of investors. Reneging on that promised representation, to the detriment of those in reliance, frustrates the expectations derived therefrom. The expectations defaced include both the effect of that promised sunset clause (e.g., fifteen year post-termination BIT protection) as well as the embedded procedural right of access to that terminated treaty's extended coverage (e.g., *vis-à-vis* the dispute resolution clause). Viewed in this light, the Agreement is akin to a State measure of retroactive application that destroys investment-backed expectations of current Claimant foreign investors who have protection under the sunset clauses of the intra-EU BITs.

Accordingly, Claimant investors may test the Agreement's import. Pursuant to VCLT, Article 70(1)(b), the termination of a treaty ordinarily "*does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination*." Further, States are obliged to live up to their promises and adhere to basic notions of good faith (e.g., VCLT, Article 26 or *pacta sunt servanda*), particularly when those representations are codified, concretised over time and relied on by others. The retrospective withdrawal of consent to

arbitrate investment disputes vis-à-vis the premature termination of a sunset clause challenges the good faith obligations of the Agreement's Members (see another Kluwer blog post) by taking away any accrued rights held by investors (should these rights exist for the non-party beneficiaries of BITs).

Claimant investors may also turn to international law (e.g., estoppel) and supranational law (e.g., legitimate expectations) to raise further objections against the Agreement.

Conclusion

At present, the way forward appears to be business as usual. On the front end, corporate restructuring to ensure investment treaty protection is a safe option for investors willing to avoid the uncertainty of challenging the Agreement (e.g., through Canada to obtain protection under the Comprehensive and Economic Trade Agreement between Canada and the EU).

On the back end, enforcement of an intra-EU BIT award in jurisdictions where EU law does not apply can circumvent the Agreement altogether (e.g., the United States, Switzerland and after 31 December 2020, the United Kingdom). While it is prudent to consider the Agreement's transitory measures on a case-by-case basis, it remains open for new and pending intra-EU BIT arbitrations to simply stay the course.

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