Debevoise In Depth

EU Member States Issue Declarations to Terminate Intra-EU Bilateral Investment Treaties

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On 15 and 16 January 2019, the 28 Member States of the European Union (including, for the moment, the United Kingdom) issued declarations undertaking to terminate bilateral investment treaties concluded between them ("intra-EU BITs") by 6 December this year. The Member States issued these declarations in response to the March 2018 judgment of the Court of Justice of the European Union ("CJEU") in *Slowakische Republik v. Achmea BV*, Case C-284/16 [2018] (the "*Achmea* Judgment").

Twenty-two of the 28 Member States have also signaled their view that the *Achmea* Judgment applies equally to intra-EU investor-State arbitration under the Energy Charter Treaty ("ECT"), and have undertaken to discuss with the European Commission ("EC") any steps necessary to ensure its uniform application in this context. The remaining member states—Finland, Luxembourg, Malta, Slovenia, Sweden, and Hungary—concluded that the *Achmea* Judgment is silent on the question of intra-EU investor-State arbitration under the ECT. These States considered it inappropriate to opine on the issue, with the first five expressly noting that the question is currently contested before the Svea Court of Appeal in Sweden.

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KEY TAKEAWAY

The Member States' declarations have intensified the uncertainty for all investors with potential claims or pending arbitrations under intra-EU BITs or the ECT, or awards subject to set aside or enforcement proceedings. Further developments in pending cases will also shed light on whether national courts outside of the EU will enforce awards issued under these treaties, or decline to enforce on public policy grounds in light of the Member States' declarations.

BACKGROUND: THE *ACHMEA* JUDGMENT

In 2016, the German Federal Court of Justice asked the CJEU to determine whether Article 8 of the Netherlands-Slovak Republic BIT (the dispute resolution clause at issue in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13) is compatible with EU law. In March 2018, the CJEU held that a clause "such as" Article 8 was not compatible. The court based its decision on the supposed threat posed by the clause to the constitutional structure and autonomy of the legal system of the EU, as well as its incompatibility with the principles of mutual trust and sincere cooperation enshrined in EU law.

On 31 October 2018, on the basis of the *Achmea* Judgment, the German Federal Court of Justice set aside the 2012 final arbitral award in *Achmea B.V. v. The Slovak Republic*, and overturned a 2014 judgment of the Higher Regional Court of Frankfurt that had dismissed an application to set aside that award.

In June 2018, the Svea Court of Appeal stayed the enforcement of a different intra-EU BIT award against Poland in *PL Holdings v. Poland* (SCC Case No. 2014-163). Following Poland's objections based on the *Achmea* Judgment, the Svea Court found that there was "sufficient reason" to order the stay but did not set out further grounds for its decision.

The scope of the *Achmea* Judgment, and its implications for similar clauses in other treaties providing for international arbitration, has been the subject of much debate, including before national courts and international tribunals. The consequences for the arbitrations of the International Centre for Settlement of Investment Disputes ("ICSID") have been particularly contentious, as those arbitrations operate within a self-contained system governed by a multilateral treaty whose parties include many EU and non-EU Member States. The implications of the *Achmea* Judgment on investor-State arbitration under the ECT—a multilateral treaty to which EU Member States, non-EU Member States, and the EU itself are parties—have also been a point of controversy. Spain has asked the Svea Court of Appeal, in the context of proceedings to set aside the *Novenergia* award, to seek a preliminary ruling from the CJEU on the compatibility of the ECT with EU law.

Importantly, according to publicly available information, in the ten months since the *Achmea* Judgment, there have been no decisions by intra-EU investment tribunals finding that either the *Achmea* Judgment or the principles underlying the decision deprive these tribunals of jurisdiction. This is particularly true of ICSID tribunals, as reflected in six publicly available or reported decisions since the *Achmea* Judgment, in which those tribunals have rejected requests to reopen proceedings on the basis of the *Achmea* Judgment or found that their jurisdiction is unaffected. For example, the

tribunal in *UP and C.D. v. Hungary* (ICSID Case No. ARB/13/35) held that "[t]he *Achmea* decision contains no reference to the ICSID Convention or to ICSID arbitration … and … cannot be understood or interpreted as creating or supporting an argument that, by its accession to the EU, Hungary is no longer bound by the ICSID Convention."

To date, every investment tribunal to consider the question has come to the same conclusion—refusing to reopen proceedings or declaring that the *Achmea* Judgment does not undermine its jurisdiction. (Examples include: *Antin v. Spain*; *Masdar v. Spain*; *Novenergia v. Spain*; *Antaris v. Czech Republic*; *Vattenfall v. Germany*; *Greentech v. Spain*.)

THE DECLARATIONS

The first declaration, dated 15 January 2019, is signed by all Member States except Finland, Hungary, Luxembourg, Malta, Slovenia, and Sweden. It states that "Member States are bound to draw all necessary consequences from [the *Achmea* Judgment] pursuant to their obligations under Union law". As a result, the Member States conclude that:

- the investor-State arbitration clauses contained in intra-EU BITs are contrary to EU law;
- thus, intra-EU tribunals have no jurisdiction (as there is no valid consent to arbitrate); and
- the sunset or grandfathering provisions that provide that investment protections continue for a specific period following termination of a BIT "do not produce effects".

The declaration lists nine commitments that the Member States undertake to follow "without undue delay":

1. By the declaration, the Member States **inform** intra-EU BIT and ECT investment arbitration **tribunals** about the legal consequences of the *Achmea* Judgment;
2. Member States with investors bringing intra-EU BIT and ECT investment arbitrations will **cooperate with the respondent Member State(s)** to **inform the tribunals** determining those arbitrations about the legal consequences of the *Achmea* Judgment. They will **request courts** hearing set aside or enforcement proceedings regarding intra-EU BIT and ECT awards to **set aside** and **not to enforce** as they are not based on valid consent.

3. By the declaration, the Member States inform investors that **no new intra-EU investment arbitrations should be initiated**;

4. The Member States will take steps under national laws to **withdraw any pending investment arbitration cases** brought by **Member State-controlled entities** against another Member State;

5. The Member States will **terminate all intra-EU BITs** by a multilateral treaty, or if more expedient, bilateral treaties;

6. The Member States will ensure effective legal protections against State measures that are the object of pending intra-EU investment arbitration proceedings;

7. Pending negotiation of a multilateral termination treaty (or bilateral termination treaties), the Member States **will not challenge settlements and arbitral awards** in intra-EU investment arbitrations **that can no longer be annulled or set aside**;

8. The Member States will enter into a multilateral termination treaty or bilateral termination treaties by no later than 6 December 2019, and will inform other Member States and the European Council of obstacles encountered and proposed resolutions;

9. The Member States will discuss with the EC any steps necessary to ensure uniform application of the *Achmea* Judgment as regards the ECT.

The second declaration, dated 16 January 2019, is signed by Finland, Luxembourg, Malta, Slovenia, and Sweden. It proceeds in the same terms as the first declaration, but concludes that, regarding investor-State arbitration under the ECT, "[i]t would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty." This declaration notes the findings of several investment arbitration tribunals that the *Achmea* Judgment does not apply, observes that this interpretation is currently being challenged in the *Novenergia* case, and states the "importance of allowing for due process".

The third declaration, also dated 16 January 2019 and signed only by Hungary, differs from the first and second declarations in its exclusion of the commitment regarding pending investment arbitration cases brought by Member State-controlled entities against other Member States, and states that the *Achmea* Judgment concerns only intra-EU BITs. Unlike the second declaration, Hungary makes no reference to *Novenergia*, but notes that, as the *Achmea* Judgment does not address investor-State arbitration under

the ECT, "it is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra-EU application of the ECT."

IMPLICATIONS

Clear policy, legal uncertainty

The declarations have intensified the uncertainty for all investors that are considering or are pursuing proceedings under intra-EU BITs, as well as investors with awards subject to set aside or enforcement proceedings. It is unclear how tribunals will react to being "informed" that there is no valid consent to arbitrate, especially given the reactions of tribunals to the *Achmea* Judgment to date and the individual rights of investors. The power of arbitral tribunals to determine their own jurisdiction is a cardinal principle of international arbitration, so Member States will not have the final word on jurisdiction. Further, investors and tribunals may also need to wait until the 6 December 2019 deadline, or potentially longer, to understand the mechanism by which intra-EU BITs are to be terminated and the resulting legal position. Of particular note, and of import for the design of this mechanism, is the statement that sunset and grandfathering clauses will have no effect, especially for EU investors considering initiating an intra-EU BIT or ECT investment arbitration.

The combination of these clear policy statements and the lack of clarity regarding their legal consequences may dissuade investors from pursuing investor-State arbitration under intra-EU BITs or the ECT. The *Achmea* Judgment had already created an uncertain climate for many investors, and the declarations heighten the adverse climate facing investors under intra-EU BITs and the ECT.

It is not yet clear whether this adverse climate extends outside the EU. Since investment tribunals have, so far, concluded that the *Achmea* Judgment does not deprive them of jurisdiction or provide a basis to reopen proceedings, investors may seek to enforce the resulting awards in jurisdictions outside the EU where the respondent Member State has assets. Courts in those jurisdictions could decide to enforce the award under the New York Convention, or refuse to enforce on public policy grounds in light of the EU Member States' declarations.

Previous settlements and awards

The commitment not to challenge settlements and awards that have been complied with or can no longer be annulled likewise lacks specificity: "Member States will discuss, in the context of the plurilateral Treaty or in the context of bilateral terminations, practical arrangements, in conformity with Union law, for such arbitral awards and

settlements". It is therefore unclear what impact the declarations will have on the EC's position on recent awards by intra-EU BIT or ECT investment arbitration tribunals, particularly those which it considers to be in violation of EU law. For example, in October 2014, the EC had commenced infringement proceedings against Romania in respect of part-payment of an award to the Micula brothers in *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*.

Brexit

The future legal landscape of the UK remains uncertain as Brexit negotiations continue. The impact of these declarations on BITs between the UK and current or future EU Member States in the event that the UK exits the EU is therefore an open question.

Future developments

Some Member States had already begun terminating their intra-EU BITs even before the *Achmea* Judgment. For example, the Czech Republic, Denmark, Ireland, Italy, Poland, and Romania had all terminated, or begun to terminate, their intra-EU BITs before March 2018. However, the recent declarations indicate a commitment to terminate *all* intra-EU BITs, with a question mark over the fate of investor-State arbitration under the ECT as it applies between Member States. Developments over the course of this year may shed greater light on how, and the extent to which, this commitment will be implemented. In particular, these developments may clarify whether EU investors will need to resort to national courts to challenge State measures affecting investments.

The impact on cases brought under the ECT will also be the subject of further discussion, especially in light of the reactions of the six Member States that have distinguished the applicability of the *Achmea* Judgment to the ECT.

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Please do not hesitate to contact us with any questions.

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