

## EU INVESTMENT TREATY PROTECTION FUTURE UNCERTAIN: WHAT SHOULD INVESTORS DO?

Recent developments mean that European Union investors in other EU Member States are unlikely to be able to rely in the future on applicable bilateral investment treaties (BITs). The position for UK investors in those EU Member States with BITs with the UK (and vice-versa) also remains highly uncertain.

During May 2020:

- 23 Member States signed a Termination Agreement terminating their intra-EU BITs;
- the European Commission (EC) commenced infringement proceedings against the UK and Finland for failing to terminate their intra-EU BITs; and
- the EC launched a consultation on an EU investment protection and facilitation framework.

Meanwhile, negotiations for a UK-EU free trade agreement are ongoing, however the fate of investment protection and investor-State dispute settlement (ISDS) provisions in the agreement is unknown.

Given this uncertainty, affected stakeholders should make their views known to the EC and to the UK Government.

Investors should also review their investment structures and insurance to seek to mitigate the potential consequences of unjustified governmental measures.

### BITS AND ISDS

BITs are treaties between States aimed at the promotion of investment, by prescribing various protections to qualifying investors (nationals of one State), such as fair and equitable treatment (FET), no unlawful expropriation, etc. They are governed by international law.

The treaties typically provide that the investor may bring a claim against the host State for breach of a BIT in international arbitration.<sup>1</sup>

#### Key issues

- Most intra-EU BITs have or will be terminated
- Interested stakeholders should respond to the recently launched EC consultation
- The UK's position on EU ISDS is uncertain
- Investors should assess their exposure to political risk and review whether they can take steps to mitigate that risk

<sup>1</sup> For a 'refresher course' on BITs, see our previous briefing ['BITs – Still Value for Money'](#)

There are over 2,500 BITs worldwide, nearly 200 intra-EU BITs and 11 BITs between the UK and EU Member States.

Those 11 are with: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Malta, Poland, Romania, Slovakia and Slovenia.

UK investors have brought over 20 BIT cases against EU Member States.

In addition, there are multilateral instruments such as the Energy Charter Treaty (ECT) to which the UK, most EU Member States and the European Union are parties.

## **THE DEMISE OF BITS IN THE EU**

For several years, the EC has been unhappy with intra-EU BITs for being incompatible with the spirit and letter of the law of the Single Market, because they give advantages to some investors from some Member States and not others, and purport to override the authority of the European Court of Justice (ECJ).

On 6 March 2018, the ECJ held that an arbitration clause in an intra-EU BIT was incompatible with EU law, in the case of *Slovak Republic v Achmea BV (Achmea)*.

The ECJ decided that the clause improperly removed from its ultimate jurisdiction disputes involving the interpretation of EU law. This cast considerable doubt over the legal effectiveness of intra-EU BITs as a means of protecting EU investors' rights when investing in those EU Member States, because any arbitral award might be set aside or refused enforcement.

In January 2019, all EU Member States (then 28, including the UK) issued declarations agreeing to terminate intra-EU BITs by the end of the year by way of a plurilateral treaty, unless bilateral terminations were considered more expedient. The UK did not take any steps to implement the declaration prior to leaving the EU.

## **THE RISE OF A MULTILATERAL INVESTMENT COURT**

In addition, the EU has been advocating for some time for a permanent multilateral investment court to replace international arbitration as the forum for resolving investment disputes, as reflected in its recent agreements with Canada, Mexico, Singapore and Vietnam.

Consultations regarding the creation of this court are currently ongoing.<sup>2</sup>

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<sup>2</sup> [https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-\(mic\)](https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic))

## **TERMINATION AGREEMENT**

On 5 May 2020, a Termination Agreement was signed by 23 EU Member States, but not by Austria, Finland, Ireland, Sweden and the UK.

Subject to its ratification, the Termination Agreement terminates all intra-EU BITs listed in its Annex A, and also the sunset clauses in those treaties. (Sunset clauses typically allow investors to bring claims within a period after the BIT's termination so long as the investment was made before termination.)

The Termination Agreement does include some transitional arrangements for arbitration proceedings initiated before 6 March 2018. While these transitional arrangements provide recourse to national courts if certain requirements are met, those national courts will not hear claims for breaches of the BIT's substantive protections and proceedings, including any appeals, could be lengthy.

The Termination Agreement does not apply to and will not affect intra-EU disputes heard under the ECT, but the EU is currently seeking to renegotiate the ECT including its ISDS provisions.<sup>3</sup>

## **WHAT ABOUT PRIOR AWARDS?**

Notwithstanding the *Achmea* decision, arbitral tribunals constituted under intra-EU BITs in a series of publicly-available awards have upheld the validity of their arbitration clauses. However, a number of these awards are now being challenged before EU national courts.

There is also a category of awards made under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) that may be safe because they have their own annulment and enforcement regime.

The Termination Agreement seeks to stop this. It states the arbitration clauses in each relevant BIT to be contrary to EU treaties and as such inapplicable. Those arbitration clauses cannot serve as a legal basis for arbitration as of the date on which the last of the parties to the BIT became an EU Member State.

Nevertheless, the Termination Agreement does not seek to void any awards or settlements made prior to 6 March 2018, where no challenge, annulment or enforcement proceedings were pending on that date.

## **THE UK AND FINLAND INFRINGEMENT PROCEEDINGS**

On 14 May 2020, the EC issued letters of formal notice to the UK and Finland, commencing infringement proceedings against them for their failure effectively to remove intra-EU BITs from their legal orders given their (purported) incompatibility with EU law. The EC states that the UK and Finland have failed to engage in discussions with Member States to proceed with the bilateral termination of the relevant BITs.

The UK and Finland therefore have four months in which to provide a 'satisfactory response', failing which the EC may decide to take steps formally requiring both countries to comply with EU law. While the UK left the EU on 31 January 2020, EU law continues to apply to the UK until the end of the transition period on 31 December 2020.

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<sup>3</sup> <https://www.euractiv.com/wp-content/uploads/sites/2/2020/04/EU-Proposal-for-ECT-Modernisation-V2.pdf>

## **NO ISDS IN THE UK AND EU DRAFT FTA TEXTS**

Both the EC and the UK Government have now released draft working texts of the free trade agreement currently under negotiation between them. Both texts include investment chapters aimed at securing 'national treatment' protections with placeholders for 'most-favoured-nation treatment'.

However, unlike some previous EU free trade agreements (such as EU-Canada), neither party's proposals include specific provisions aimed at securing FET or protection against unlawful expropriation or an ISDS mechanism.

This may be because both parties are seeking to conclude the negotiations by the end of 2020. If the agreement did include an ISDS mechanism, the agreement would be a 'mixed agreement' requiring ratification by individual EU Member States in addition to the approval of the Council of the EU and the European Parliament.

## **EC CONSULTATION**

On 26 May 2020, the EC launched a public consultation on an 'Investment protection and facilitation framework'.<sup>4</sup>

It stated that the aim of the process is to assess the current framework of investment protection, including both substantive rules and dispute settlement mechanisms, which will then feed into its upcoming policy initiatives.

The EC added that it was clear that it would in the years to come be required to take actions to mobilise private investment in the EU, particularly in light of the economic damage caused by the Covid-19 pandemic.

The consultation period is open until 8 September 2020.

## **CONCLUSION**

Interested stakeholders are encouraged to complete the EC's survey to inform the EC of their perspective on how best to promote investment by providing appropriate rights and remedies, while balancing the interests of States and investors.

Investors in the 11 Member States with BITs with the UK should also make their views known to the UK Government.

All investors should assess the political risk profile of their international investments and review whether that risk can be mitigated by insurance and/or structuring their investment such as to be covered by an effective BIT.

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<sup>4</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation>

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