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THE TERMINATION OF INTRA-EU BILATERAL INVESTMENT TREATIES AND THE IMPACT ON FOREIGN INVESTMENT PROTECTION IN EUROPE

To Our Clients and Friends:

On 5 May 2020, twenty-three European Union ("**EU**") Member States[1] signed an agreement purporting to terminate approximately 130 intra-EU bilateral investment treaties or "**BITs**" (the "**Termination Agreement**"). The Termination Agreement will enter into force 30 days after the Secretary-General of the Council of the EU receives a second instrument of ratification, approval or acceptance.[2]

The four EU Member States that have not signed the agreement are: Austria, Finland, Ireland and Sweden. Any intra-EU BITs concluded by these EU Member States shall not be affected by the Termination Agreement. The United Kingdom (the "**UK**"), which left the EU on 31 January 2020, was not a signatory, and its BITs with EU Member States therefore remain in force.

The Termination Agreement does *not* apply to multilateral investment treaties where EU Member States are parties, such as the Energy Charter Treaty (the "**ECT**").

Background

Intra-EU BITs are agreements between two EU Member States containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territories. Apart from providing for substantive investment protections against adverse state measures (such as expropriation, unfair or inequitable treatment or discrimination), these BITs typically include arbitration provisions allowing for the settlement of investment disputes between the contracting Member State hosting the investment, and investors of the other contracting Member State before a private international arbitration tribunal instead of national courts.

The preamble of the Termination Agreement considers, *inter alia*, that, "*in compliance with the obligation of Member States to bring their legal orders in conformity with* [EU law]", Member States must "*draw the necessary consequences from* [EU law] *as interpreted in the CJEU in* [the *Achmea* Judgment]". The *Achmea* Judgment (*Achmea B.V. (formerly known as Eureko B.V.) v. Slovakia*) was rendered by the Court of Justice of the European Union (the "**CJEU**") on 6 March 2018. The CJEU held that investor-State arbitration clauses in intra-EU BITs, such as the one in Article 8 of the BIT between The Netherlands and Slovakia,[3] are incompatible with EU law.[4] Further information about the *Achmea* Judgment can be found in our previous client alert here.

Following the *Achmea* Judgment, respondent EU Member States in intra-EU investment treaty arbitration proceedings (*i.e.*, involving an investor from an EU Member State) have consistently sought to challenge the jurisdiction of tribunals relying on the findings of the *Achmea* Judgment. So far, these efforts have proved unsuccessful; indeed, every single arbitral tribunal that has considered the "intra-EU objection" to jurisdiction has rejected it.

The Termination Agreement

(1) What does the Termination Agreement cover?

In summary, the Termination Agreement provides as follows:

- Pursuant to Article 2(1), certain intra-EU BITs are terminated – a full list of which is contained in Annex A to the Agreement.

- Article 2(2) confirms that the "sunset clauses" in those intra-EU BITs – that is, clauses in treaties that extend the protection of investments made prior to the date of termination of the BIT for a further period of time – are, likewise, terminated.

- Article 3 further clarifies that the sunset clauses contained in intra-EU BITs that have previously been terminated prior to the Termination Agreement are, similarly, terminated. The relevant BITs are listed in Annex B to the Agreement.

- Article 4(1) states that the signatories confirm that arbitration clauses in intra-EU BITs are contrary to EU law and are "*thus inapplicable*" as of "*the date on which the last of the parties to a*[n intra-EU BIT] *became a Member State of the* [EU]". The practical effect of this provision is that any arbitration clauses under the relevant BITs cannot serve as the basis for arbitration proceedings and the Termination Agreement applies retroactively as of the date the last contracting party to the BIT joined the EU.

- Article 4(2) confirms that the termination of the intra-EU BITs and sunset clauses described above shall take effect as soon as the Termination Agreement enters into force.

- Article 5 states that arbitration clauses in terminated intra-EU BITs shall not serve as the legal basis for new arbitration proceedings. In other words, a tribunal constituted under such BITs would lack jurisdiction since there would be no consent to arbitration.

- Article 7 sets out the "*duties*" of the signatories in either pending or new arbitration proceedings. Respondent states to either type of proceedings that have signed the Termination Agreement must inform the relevant arbitral tribunals in those proceedings of the "*legal consequences of the Achmea Judgment*" as described in Article 4 of the Termination Agreement – *i.e.*, that arbitration clauses in intra-EU BITs have no legal effect. (This is, however, a wider interpretation of what the CJEU in fact concluded in the *Achmea* Judgment, which is that intra-EU BITs "*such as Article 8 of the Agreement* [between the Netherlands and Slovakia]" (emphasis added) are precluded under EU law.)

- In addition, where those signatories are parties to judicial proceedings concerning an award issued on the basis of an intra-EU BIT, they are obliged to ask the competent court to "*set aside, annul* [or] *refrain from recognising and enforcing*" the award. (Of course, in the context of proceedings brought under the Convention on the Settlement of Investment Disputes (the "**ICSID Convention**"), national courts have no power to set aside or annul ICSID awards as the Termination Agreement envisages.)

The Termination Agreement then sets out two "*transitional measures*" designed to aid EU Member States involved in pending arbitration proceedings.

First, the Agreement provides that an investor may ask the Member State to enter into settlement discussions in such proceedings, which shall be overseen by "*an impartial facilitator*".[5] Any final settlement agreement must include an obligation for the investor to withdraw the arbitration claim or renounce execution of its award, as well as a commitment to refrain from initiating new arbitration proceedings.[6] The Termination Agreement, however, is silent as to what might happen if such settlement discussions are unsuccessful and how pending arbitration proceedings are then to proceed.

Second, the Termination Agreement entitles investors to "*access the judicial remedies under national law against a measure contested in Pending Arbitration Proceedings*" even if national time limits for bringing such actions have expired (but subject to the time limits in the Agreement). This is, again, subject to, *inter alia*, an investor withdrawing the pending arbitration proceedings and waiving all rights and claims pursuant to the relevant BIT.

It is yet to be seen how the Termination Agreement will impact pending arbitration and national court proceedings concerning intra-EU BITs. Ultimately, those tribunals and national courts will need to assess how the Termination Agreement interacts with other international obligations of the EU Member States that might also be in play, such as those under the ICSID Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(2) What does the Termination Agreement <u>not</u> cover?

The preamble to the Termination Agreement expressly notes that it does *not* cover intra-EU proceedings under Article 26 of the ECT, and the Termination Agreement suggests that this will be dealt with by the EU and its Member States "*at a later stage*".[7]

Further, Article 6(1) states that it does *not* affect "*Concluded Arbitration Proceedings*"– proceedings where a final award was rendered prior to the *Achmea* Judgment on 6 March 2018, and where no challenge to that award was pending (for example, annulment proceedings) on that date – which explicitly "*shall not be reopened*". Article 6(2) similarly notes that the Termination Agreement does not affect agreements to settle an arbitration that were initiated prior to the *Achmea* Judgment.

What Should Investors Consider Doing in Light of the Termination Agreement?

In light of the Termination Agreement, it would be wise for EU-based investors with investments in other EU Member States to consider structuring (or restructuring, as the case may be) their investments

through a vehicle incorporated outside of the EU in order to ensure they are fully protected by a BIT between a Member State and a third State not affected by the Termination Agreement.

Caution should be taken in the context of restructuring investments, however, and investors seeking to do so should seek legal advice. This is because, whilst the re-structuring of investments *before* a dispute arises with a view to maximising investment treaty protections is a legitimate business goal; undertaking such a restructuring when a potential dispute is already on the horizon, may result in the loss of treaty protection.

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[1] The twenty-three EU Member States are: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

[2] The press release can be accessed at ec.europa.eu.

[3] The Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 1 January 1992.

[4] The ruling can be accessed at curia.europa.eu.

[5] Termination Agreement, Article 9(7). If the parties fail to agree on a candidate, the Termination Agreement Director General of the Legal Service of the European Commission will designate a former Member of the CJEU to appoint one "*after having consulted*" the parties (Article 9(8)).

[6] Termination Agreement, Article 9(14)(a).

[7] Termination Agreement, p. 5.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration Practice Group, or the following:

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