

EU Plurilateral Agreement on Termination of Intra-EU BITs Enters Into Force – What consequences for Sunset Clauses?



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With some delay, we wanted to discuss the latest developments on intra-EU BITs that took place during the last couple of months^[1].

[As we already discussed](#), instead of the EU Member States agreeing, on a bilateral basis, to amend or terminate their respective intra-EU BITs, most of the EU Member States have elected, as envisaged in their [declarations of January 2019](#), to negotiate a single plurilateral agreement that will terminate all of the intra-EU BITs (the **Plurilateral Agreement**). That agreement received the political consensus of all EU Member States in October 2019. Twenty-three Member States (with the notable exceptions of Austria, Sweden, Finland, the United Kingdom^[2] and Ireland)^[3] signed the

agreement on 5 May 2020^[4] which entered into force on 29 August 2020^[5].

Purposes of the Plurilateral Agreement

The use of a Plurilateral Agreement to terminate, amend, interpret or complement a series of existing agreements is not novel. This method – which relies on Article 30(3) of the Vienna Convention on the Law of Treaties (the *VCLT*) (“*When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*”) – has been used in the past to, for example, modify bilateral tax treaties^[6] and conclude the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the “Mauritius Convention on Transparency”). It is currently being contemplated within the UNCITRAL Working-Group III as a possible method for establishing the Multilateral Investment Court, which is the preferred option of the European Union for ISDS reform. Such a method is typically preferred because, instead of concluding a high number of separate agreements whereby State parties amend or terminate existing agreements between themselves on a bilateral basis, it allows for the conclusion of a single multilateral agreement whereby the parties agree to amend all their respective (bilateral) treaties having the same subject-matter at once.

The entire premise of the Plurilateral Agreement is that, as a result of the *Achmea judgment*, intra-EU BITs, insofar as they have not yet been unilaterally or bilaterally terminated or their sunset clauses^[7] have not yet expired^[8], may not be applied “*after the date on which the last of the Parties to an intra-EU bilateral investment treaty became a Member State of the European Union*”^[9].

In essence, the Plurilateral Agreement serves three distinctive purposes: (i) it terminates all intra-EU BITs (including their sunset clauses); (ii) it prohibits the initiation of new intra-EU ISDS cases and provides rules regarding the management of pending cases; and (iii) it provides alternatives to the recourse – by investors – to intra-EU ISDS arbitration proceedings.

This blog article discusses, in particular, the issues that the Plurilateral Agreement raises with respect to the termination of the intra-EU BITs and the sunset clauses contained in those BITs.

Termination of the intra-EU BITs, including their sunset clauses

The Plurilateral Agreement terminates most intra-EU BITs, including the sunset clauses in those agreements^[10].

While States may terminate the international treaties to which they are party^[11], the fact that the Plurilateral Agreement also terminates the sunset clause in those intra-EU treaties might result in investors claiming that the Plurilateral Agreement deprives them from their rights acquired under the intra-EU BITs^[12]. As the tribunal in *Magyar Farming* noted, the purpose of a sunset clause is to “*acknowledge that long-term interests of investors who have invested in the host State in reliance on the treaty guarantees must be respected*”^[13]. Given that the purpose of a sunset clause is precisely to prolong the protection granted to investors under a BIT following its termination, investors might argue that the termination of the sunset clauses contained in the intra-EU BITs violates the protection of their legitimate expectation.

This tension has resulted in some debate on whether ISDS tribunals will give full effect to the termination of the sunset clauses in the intra-EU BITs. It has been argued that,

irrespective of the benefits and legitimate expectations that investors derive from a treaty, the States parties to a treaty may terminate, taking into account also Article 54 of the VCLT, a sunset clause, like any other clause of a treaty, by extinguishing this clause at the same time as they agree to terminate the rest of the treaty^[14]. Based on that understanding, sunset clauses are intended to have effects especially where a party seeks to unilaterally withdraw from a bilateral investment agreement but not where both parties consent to terminate the entirety of the agreement. Others consider that a sunset clause results in acquired rights for investors which must survive the termination of the treaty. In part, this argument has been based on Article 37(2) VCLT (which provides that “[w]hen a right has arisen for a third state [...], the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State”) and on the presumption that this provision reflects a general principle which is applicable to all third party right holders (and not solely third States), including investors^[15].

Overall, the debate suggests that investors are likely, following the entry into force of the Plurilateral Agreement, to continue to rely on the sunset clauses in the terminated intra-EU BITs and to insist on the distinct purpose of such clauses (of which the effect depends on termination). At the same time, respondent States will have strong arguments based on the notion of consent in international law. Should this tension need to be resolved as a matter of EU law, it will also become necessary to take into account, in particular, the principle of legitimate expectations as established in the case-law of the Court of Justice of the European Union^[16] and of the European Court of Human Rights^[17].

In view of all those elements, it therefore cannot be excluded

that further litigation regarding the consequences of the plurilateral agreement on investors' rights will take place before EU domestic courts based on a cause of action under EU law or domestic law.

[1] This blog post is largely based on a forthcoming publication, Quentin Declève & Isabelle Van Damme, 'Investment Arbitration under Intra-EU BITs' in José Rafael Mata Dona and Nikos Lavranos (ed), *International Arbitration and EU Law* (Edward Elgar Publishing Ltd, anticipated 2020).

[2] Under the Withdrawal Agreement, EU law continues to apply to the United Kingdom during the post-Brexit transition period.

[3] On 14 May 2020, following the non-signature of the Plurilateral Agreement by those Member States, the European Commission sent letters of formal notice to Finland and the United Kingdom for failing to effectively remove intra-EU BITs from their legal orders, see https://ec.europa.eu/commission/presscorner/detail/en/INF_20_859. Ireland did not sign the Plurilateral Agreement as it has no intra-EU BITs in place.

[4] Financial Stability, Financial Services and Capital Markets Union, 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' (European Commission, 5 May 2020) <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf>. Publication in the Official Journal of the European Union, [2020] OJ L 169/1.

[5] Publication in the Official Journal of the European Union, [2020] OJ L 281/1.

[6] OECD Study, 'Developing a Multilateral Instrument to Modify Bilateral Tax Treaties Action 15 – 2015 Final Report' (OECD/G20 Base Erosion and Profit Shifting Project, 2015), p

31, para 14.

[7] Plurilateral Agreement, Article 1(7).

[8] Ibid, recital VIII.

[9] Ibid, recital V.

[10] Ibid, Articles 2(1) and (2).

[11] VCLT, Articles 54 and 59.

[12] On this question, see also, for example, L. Halonen, 'Termination of Intra-EU BITs: Commission and Most Member States Testing the Principle of Good Faith under International Law' (Kluwer Arbitration Blog, 13 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/13/termination-of-intra-eu-bits-commission-and-most-member-states-testing-the-principle-of-good-faith-under-international-law/?doing_wp_cron=1590679658.9551689624786376953125>.

[13] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award of 13 November 2019, para 223.

[14] T. Voon and A.D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' [2016] 31(2) ICSID Review 413, 430.

[15] J. Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' [2012] 13(6) The Journal of World Investment & Trade 928, 944.

[16] The Court of Justice of the European Union has recognized that any trader who has justified hopes may rely on the principle of the protection of legitimate expectation (see: Case C-265/85 *Van den Bergh en Jurgens v. Commission* [1987] EU:C:1987:121, para. 44). See also Case T-203/96 *Embassy Limousines & Services v. European Parliament* [1998]

EU:T:1998:302, paras 74-76; Case T-106/13 *d.d. Synergy Hellas Anonymi Emporiki Etaireia Parochis Ypiresion Pliroforikis v. European Commission* [2015] EU:T:2015:860, para 66; Case T-271/04 *Citymo SA v. Commission of the European Communities* [2007] EU:T:2007:128, paras 105 and 111; Case C-153/10 *Staatssecretaris van Financiën v. Sony Supply Chain Solutions (Europe) BV* [2011] EU:C:2011:224, para 47; Case C-349/17 *Eesti Pagar AS v. Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* [2019] EU:C:2019:172, paras 96 and following and the case-law cited.

[\[17\]](#) In addition, the European Court of Human Rights has found that, in certain circumstances, a claimant could have a legitimate expectation that his claim would be determined in a certain manner (see: ECtHR, *Pressos Compania Naviera SA and Others v. Belgium*, judgment of 20 November 1995, para. 31 and ECtHR, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment of 23 October 1997, para. 70).

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