

**TREATY TERMINATING INTRA-EU BILATERAL INVESTMENT TREATIES
AND ESTABLISHING A GRACE PERIOD FOR CLAIMS PENDING IN INTRA-EU
INVESTMENT ARBITRATIONS INCLUDING ON THE BASIS OF THE ENERGY
CHARTER TREATY**

Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Croatia, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland

THE CONTRACTING PARTIES,

CONSIDERING that bilateral investment treaties concluded between the Member States of the European Union contain provisions under which an investor from one Member State may, in the event of a dispute concerning investments in another Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction is outside of the system of judicial remedies established pursuant to the second subparagraph of Article 19(1) of the Treaty on European Union (“investor-State arbitration clauses”); and CONSIDERING that Arbitral Tribunals have interpreted Article 26 of the Energy Charter Treaty as investor-State arbitration clause between Member States, rejecting the opposite interpretation defended by Member States and the Commission;

RECALLING that in its judgment of 6 March 2018 in Case C-284/16, *Achmea v Slovak Republic*, the Court of Justice of the European Union held that “*Articles 267 and 344 [... of the Treaty on Functioning of European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*”

COMMITTED TO draw all necessary consequences from that judgment pursuant to their obligation under Article 4(3) TEU and in compliance with the general principles of European Union law of autonomy, primacy and direct effect;

RECALLING the declaration of the representatives of their governments, meeting in the Council of the European Union, of [date], on the legal consequences of that judgment;

WHEREAS:

(1) Investor-State arbitration clauses exist in all the bilateral investment treaties listed in Annex 1.

(2) The Court of Justice of the European Union has not limited the effects of its judgment of 6 March 2018 in Case C-284/16, *Achmea v Slovak Republic* in time. As a result, Articles 267 and 344 of the Treaty on Functioning of European Union, as interpreted by the Court of Justice of the European Union, produce legal effects from the date of entry into force of Union law in the Member States concerned.

(4) According to the case-law of the Court of Justice of the European Union, Union law takes precedence over international agreements concluded between Member States.¹ Furthermore, general principles of Union law and provisions of the Treaties take precedence over international agreements concluded by the Union, such as the Energy Charter Treaty.² Given that all the bilateral investment treaties listed in Annex I were concluded before the accession to the Union of at least one of the two parties, the same result follows also, under public international law, from Article 30 of the Vienna Convention on the Law of the Treaties.³ [For the Energy Charter Treaty, the same result follows from Article 30 of the Vienna Convention on the Law of the Treaties, because the Union has re-affirmed its commitment to the general principles of Union law and provisions of the Treaties in the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon and all accession treaties] Hence, all investor-State arbitration clauses contained in the bilateral investment treaties listed in Annex 1 became contrary to Union law and thus inapplicable as of the point in time when both parties to the bilateral investment treaty had become Member States of the European Union. If Article 26 Energy Charter Treaty did contain, contrary to the view of Member States and the Union, an investor-State arbitration clause applicable between Member States, that clause became inapplicable as of the entry into force of the Treaty of Amsterdam or as of the point in time when the relevant States had become Member States of the European Union.

(4) As a consequence, as of that point in time, there was no more valid offer for arbitration to investors, with the effect that any arbitration tribunal established on the basis of such provisions lacks competence and jurisdiction, due to a lack of a valid arbitration agreement.

(5) For reasons of legal certainty and in line with the case-law of the Court of Justice of the European Union⁴, it is appropriate to formally remove those provisions, which are incompatible with Union law, from the legal order. This Treaty may not be relied upon to claim that investor-State arbitration clauses continued to have legal effect until the entry into force of this Treaty.

(6) Where provisions of bilateral investment treaties listed in Annex 1 provide that investor-State arbitration is available for any period after denunciation or termination of the bilateral investment treaty (“sunset clauses”), such sunset clauses are equally contrary to Union law

¹ Judgments in *Matteucci*, 235/87, EU:C:1988:460, paragraph 21; and *Budějovický Budvar*, EU:C:2009:521, C-478/07, paragraphs 98 and 99.

² Judgment in *Western Sahara*, C-266/16, EU:C:2018:118, paragraphs 42 to 55.

³ UN treaties series, Vol. 1155,1-18232.

⁴ See, by analogy, Judgment in *Commission v France* (“French seafarer”), 167/73, paragraphs 34 to 48.

for the same reason as investor-State arbitration clauses, and the considerations set out in recitals (1) to (5) apply *mutatis mutandis*.

(7) Investor-State arbitration constitutes the essential feature of the bilateral investment treaties listed in Annex 1. Hence, it is appropriate to remove not only provisions on investor-State arbitration from the legal order, but also to terminate the bilateral investment treaties in their entirety.

(9) Investors from a Contracting Party, which had initiated investor-State arbitration prior to the judgment of 6 March 2018 in Case C-284/16, *Achmea v Slovak Republic* on the basis of one of the bilateral investment treaties listed in Annex 1 or the Energy Charter Treaty, may have decided not to pursue a parallel action before the competent domestic court, either due to a provision in the bilateral investment treaty prohibiting such parallel action, or for reasons of opportunity. As a result, domestic actions based on national law, including Union law, may now be time-barred. For reasons of equity, the contracting parties consider it appropriate to stipulate in their national legal orders that such investors may still bring actions in national courts, even where they would otherwise be time-barred, within six months from the entry into force of the present treaty, provided that they withdraw their arbitration claim by the time they bring such an action.

(10) In line with the declaration of the representatives of their governments, meeting in the Council of the European Union, of [date] and with their obligation of loyal cooperation pursuant to Article 4(3) of the Treaty on European Union, the Contracting Parties are committed to undertake best efforts to deposit their instruments of ratification, approval or acceptance no later than 6 September 2019. They will inform each other and the Secretary General of the Council of the European Union in due time of any obstacle they encounter, and of measures they envisage in order to overcome that obstacle.

HAVE AGREED AS FOLLOWS:

ARTICLE 1 - Termination of intra-EU bilateral investment treaties

The bilateral investment treaties listed in Annex 1 are hereby terminated and shall produce no effects, including as regards their sunset clauses.

ARTICLE 2 – Grace period for bringing actions before national courts

1. Investors who have filed a claim for arbitration prior to 6 March 2018 and whose intra-EU arbitration proceedings based on a bilateral investment treaty listed in Annex I or the Energy Charter Treaty were pending on the date of the declaration of the representatives of their governments, meeting in the Council of the European Union, referred to in recital 10, may still bring an action in the competent national court, even where it would be time-barred, within six months from the date of application of this Treaty in respect of the host and the home Member State, provided that they withdraw their arbitration claim by the time they bring such an action.
2. Those actions shall be limited to the subject matter covered by the arbitration proceedings.

3. Those actions shall be directed against the competent authorities of the responding Contracting Party.

ARTICLE 3 - Entry into force

1. This Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by two signatories. The instruments of ratification, approval or acceptance shall be deposited with the Secretary-General of the Council of the European Union.
2. For each signatory which thereafter deposits its instrument of ratification, approval or acceptance, this Treaty shall apply from the day following the date of deposit.
3. The Secretary General of the Council of the European Union shall publish this Treaty and information on the state of ratification, approval and acceptance by the Contracting Parties in the Official Journal of the European Union, part C.