Investment Protections Implications of Brexit and of EU-UK Trade and Cooperation Agreement

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On 24 December 2020, the European Union (the ***EU***) and the United Kingdom (the ***UK***) agreed a Trade and Cooperation Agreement (the ***TCA***) intended to settle their future relationship, with provisional application from 1 January 2021.

Following the UK's exit from the EU on 31 January 2020 and the end of the transition period under the Withdrawal Agreement, the UK is no longer a member of the EU single market or the EU customs union. Whilst the TCA does not change this fact, it sets out separate terms for the new on-going relationship between the EU and the UK.

Title II of Part Two, Heading One (Trade) of the TCA includes provisions relating to "*services and investment*" ("*SERVIN*").

Yet, as explained below, the provisions are minimal and are limited to dealing with investment liberalisation, establishment, operation, market access and non-discriminatory treatment. In respect of investment protection, the TCA is more notable for what is out than what is in.

The TCA provides only limited substantive protection

Although Title II of Part Two, Heading One (Trade) of the TCA covers investment, the TCA is in fact a free trade agreement without a specific investment chapter. It is not in any way a full investment agreement comparable to the recent investment agreements signed by the EU with Singapore and Vietnam. The fact that the TCA was signed as an agreement to which only the UK and the EU are parties (and not also the EU Member States who normally also enjoy competences with respect to investments), may provide at least one reason why the TCA does not put more emphasis on investment protection or on the resolution of investment disputes.

In terms of the substantive protections which investors typically look to, the TCA merely provides a guarantee of non-discrimination. Each party merely promises to provide investors of the other party with treatment no less favourable than that accorded to its own investors (National Treatment) (Article SERVIN.2.3) or to investors of a third country (MFN) (Article SERVIN.2.4).

Most significantly, and in sharp contrast to the existing investment agreements concluded by the EU (such as the EU-Canada Comprehensive and Economic Trade Agreement (***CETA***), the EU-Singapore Investment Protection Agreement (***EUSIPA***) and the EU-Vietnam Investment Protection Agreement (***EUVIPA***)[1]), the TCA does not offer protection against expropriation and does not offer guarantees as to fair and equitable treatment or full protection and security.

In addition, even the limited substantive protections included

within the TCA, are not available to all investors in the broadest sense. The TCA includes a narrow definition of "investor" which requires substantive business operations in the investor's home state and therefore creates an additional jurisdictional hurdle for investors to meet.

Furthermore, the TCA does not offer adequate procedural remedies

In addition to providing only limited substantive investment protection, the TCA also lacks the procedural remedies necessary to enforce even its limited protective standards.

In particular, the TCA does not provide for any form of Investor-State dispute settlement mechanism (***ISDS***). Investors have no right to bring claims either by arbitration or by way of any permanent investment court system. Indeed, Article SERVIN.2.4.4 explicitly provides that ISDS mechanisms included in other international agreements concluded by the EU and the UK are excluded from the scope of the MFN protection. Furthermore, the TCA lacks direct effect (Article COMPROV.16.1). This means that investors may not directly rely upon the TCA's guarantees before national courts.

Enforcement of the TCA's investment protection standards is only at the State-to-State level, namely by way of arbitration between the UK and the EU. This is unlikely to be an attractive option for most investors even if the UK or EU was ready to espouse their claim.

The TCA is silent on intra-EU BITs and the ECT

At present, following Poland's unilateral termination of the UK-Poland BIT in 2019, the UK has 11 bilateral investment treaties (***BITs***) in force with EU Member States (namely with Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia and Slovenia) as well as the Energy Charter Treaty (the ***ECT***). The TCA is silent as to the status of these BITs which therefore currently remain in

force[2]. Yet, the question is for how long.

Although the TCA does not explicitly terminate these remaining BITs, there is considerable uncertainty as to how long they will remain in force. The UK may voluntarily agree to terminate these BITs, or it may be forced to do so.

In a judgment of 6 March 2018 (the *Achmea* judgment (Case C-284/16)), the Court of Justice of the European Union (the ***CJEU***) found that bilateral investment agreements concluded by EU Member States (so-called ***intra-EU BITs***) were incompatible with EU law. To comply with this judgment, 23 EU Member States signed a plurilateral agreement (the ***Plurilateral Agreement***) on 5 May 2020 (which entered into force on 29 August 2020) terminating the existing intra-EU BITs in force between them (including the sunset clauses contained in those treaties). Although the UK refused to sign this Plurilateral Agreement, the European Commission has formally called on the UK to terminate these BITs and may refer the matter to the CJEU pursuant to Article 87 ("*New cases before the Court of Justice*") of the Withdrawal Agreement if the UK fails to comply. Furthermore, as Poland has done in November 2019, the EU Member States which still have BITs in force with the UK could unilaterally terminate those BITs.

In addition, the TCA is silent as to any effect on the ECT. It therefore does not prevent EU-UK investors relying on the investment protections granted under the ECT (to which the UK, the European Union and most of its Member States (with the notable exception of Italy) are parties). Yet, reliance on the ECT's protective standards remains uncertain in the longer term. The ECT (which in any event only offers energy sector focused protections) is currently subject to a modernisation process which is likely to lead to an evolution of the protections currently offered. Further, the CJEU is soon expected to rule in the *Energoalians TOB v. Republic of Moldova* dispute (Case C-741/19). Although the jurisdiction of the CJEU to provide broad guidance on the issue of investment

claims under the ECT in this case is debatable, the CJEU's upcoming judgment could potentially affect EU-UK investors.

Is the UK still a party to the various EU negotiated investment agreements?

As was explicitly mentioned in the European Council Guidelines of 29 April 2017 (point 13), following its withdrawal from the EU, investment agreements concluded by the EU and its Member States with third countries (such as CETA, EUSIPA and EUVIPA) no longer apply to the UK.

Although the entry into force of the EU negotiated investment agreements would have resulted in the termination of the UK's earlier BITs, this is not an issue because EUSIPA and EUVIPA had not yet entered into force at the end of the transition period on 31 December 2020. The current BITs concluded between the UK and, respectively, Singapore and Vietnam therefore remain in force. Further, the UK does not have an existing BIT with Canada. Canada and the UK could therefore decide in the future to initiate negotiations for the conclusion of a new BIT, whether on wholly new terms or on the basis of the provisions already agreed in CETA.

Conclusion

The TCA offers only very minimal investment protection to investors in respect of their EU-UK investments. Added to this, there is considerable uncertainty as to future developments. There can be no guarantee that the remaining UK-EU BITs will remain in force or that the EU and UK will negotiate a separate Investment Protection Agreement in the future. It is also highly unlikely that individual Member States will be authorised to enter into separate new BITs with the UK.

In this light, and in order to avoid being left merely with protection at a national level, it may now be advisable for investors to consider restructuring their investments in order

to try to secure continuing international protection under applicable BITs. Investors on both sides of the Channel should perhaps consider structuring their EU-UK investments via intermediary companies incorporated in third countries in order to take advantage of the protections offered by BITs concluded between such countries and the UK or the EU.

[1] EUSIPA, EUVIPA and the provisions on investment protection and investor-state dispute settlement (ISDS) contained in CETA have, however, not yet entered into force. They await ratification by national (and sometimes regional) parliaments in the EU member states.

[2] Since the TCA partially covers the same subject-matter as those BITs (*i.e.*, they all provide non-discrimination provisions), one possible argument may be that the TCA should be considered to be a "*successive treaty*" which, pursuant to Articles 30 and 59 of the Vienna Convention on the Law of Treaties (***VCLT***), replaces those earlier BITs. However, this is unlikely to be the case. As discussed above, the TCA was concluded solely between the EU and the UK, whilst, on the other hand, the BITs have been solely concluded between the UK and some EU Member States. The TCA and the BITs have therefore technically not been concluded by the same parties. Furthermore, the TCA does not cover exactly the same subject-matter as the BITs (which also include protection against expropriation, fair and equitable treatment or full protection and security and provision for ISDS mechanisms). Thus, even if the TCA could be considered to be a "*successive treaty*" under Articles 30 and 59 VCLT with respect to the "*National Treatment*" and "*MFN*" provisions, the earlier BITs which are still in force between the UK and certain EU Member States would still likely continue to apply with respect to the other protections granted under those BITs.
