

Safe Haven for Investors in (and Through) the UK Post-Brexit?

At 11:00 p.m. on December 31, 2020, the Brexit transition period ended and European Union (EU) law ceased to apply in the United Kingdom (UK). The EU-UK Trade and Cooperation Agreement (TCA) now governs the relationship between the EU and the UK, and has been applied provisionally since January 1, 2021. The TCA is, however, silent on the future of the UK's bilateral investment treaties (BITs) with EU member states. This *Insight* explores the legal landscape for the UK's BITs with EU member states (UK-EU BITs) and the corresponding implications for investors.

BITs provide for reciprocal protection and promotion of investments in the countries where they apply, including access to international arbitration and legal remedies where the terms of the BITs are violated. International law commentators had speculated as to whether the TCA would legislate for the future of the ten UK-EU BITs in force.¹ This speculation was fuelled by the EU's continuing campaign, fronted by the European Commission (EC), to remove investor-state disputes between member states (intra-EU ISDS) from the purview of international arbitration tribunals, instead seeking to have such disputes resolved by member state national courts and, ultimately, the Court of Justice of the European Union (CJEU).

The UK was in a unique position vis-à-vis the EC's ongoing shift away from intra-EU ISDS, given that it formally left the EU on January 31, 2020, with the UK-EU BITs intact, but until December 31, 2020, remained subject to EU law.

Background

The EC's move away from intra-EU ISDS has gained significant momentum in recent years following the CJEU's March 6, 2018, judgment in *Slovak Republic v. Achmea BV*.² There, the CJEU held that that an investor-state arbitration clause "such as" Article 8 of the Netherlands-Slovak Republic BIT³ was not compatible with EU law. The CJEU based its decision on Article 8's supposed threat to the constitutional structure and autonomy of the EU legal system, and its incompatibility with the principles of mutual trust and sincere cooperation between EU member states, as enshrined in EU law.

On the heels of the *Achmea* judgment, on January 15 and 16, 2019, all EU member states (at that time including the UK) issued political declarations committing to terminate BITs entered into amongst them (intra-EU BITs). On May 5, 2020, twenty three of the EU's twenty seven Member States signed the [Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union](#) (the Termination Treaty).⁴ In addition to terminating all intra-EU BITs between its signatories, the Termination Treaty purports to render without legal effect the sunset clauses in current and previously terminated BITs between its signatories. Sunset clauses provide additional protection to investors, guaranteeing that all investments made prior to termination will remain protected for an agreed period of time. The Termination Treaty explicitly carves out intra-EU disputes under the Energy Charter Treaty, a multilateral investment treaty which is currently undergoing a separate renegotiation process.

The UK, Austria, Finland, and Ireland (which had already terminated its only intra-EU BIT) did not sign the Termination Treaty.

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Following Brexit, the UK's intra-EU BITs became "extra-EU BITs" and, unlike Austria's and Finland's extant intra-EU BITs, they are now insulated from the implications of the *Achmea* judgment. The TCA's silence on UK-EU BITs preserves that position.

This creates a potential investment protection haven in the UK (including in offshore territories to which UK-EU BITs have been extended such as Guernsey, Jersey, and the Isle of Man) for investors invested in or investing into EU member states with which the UK maintains BITs. The EU member states with which the UK currently maintains BITs are Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia, and Slovenia. While the UK's BIT with Poland⁵ was terminated unilaterally by Poland in 2019, its 15-year sunset clause remains applicable, during which

time investors may still bring claims against the state parties to the BIT in respect of investments that existed prior to Poland's unilateral termination.

However, trouble may lie ahead. The UK, pursuant to the EU-UK Withdrawal Agreement,⁶ remained bound by EU law throughout the Brexit transition period concluding on December 31, 2020, and liable to infringement proceedings for any failure to fulfil its obligations under the EU treaties. Accordingly, the EC initiated an infringement procedure against the UK (and Finland) on May 14, 2020, for its failure to sign the Termination Treaty. On October 30, 2020, the EC followed up with a "reasoned opinion" in relation to the infringement procedure, noting that if a satisfactory response by the UK was not forthcoming by December 30, 2020, the EC may decide to refer the case to the CJEU. It appears that the UK has not yet issued a response (satisfactory or otherwise) to the EC's "reasoned opinion."

The implications of the *Achmea* judgment for the UK are now, arguably, academic insofar as EU law has ceased to have direct effect in the UK. What were once intra-EU BITs maintained by the UK are now extra-EU BITs. However, the EU-UK Withdrawal Agreement provides a four-year period within which the EC can bring the UK before the CJEU for any EU treaty breaches committed before the end of December 2020.⁷ Therefore, while the EC has apparently not yet taken steps to bring the UK before the CJEU, it still has time to do so. Any judgment arising from such infringement proceedings (including hefty financial penalties that the EC could seek) would be binding on the UK.⁸ While the CJEU cannot compel the UK to terminate its UK-EU BITs, there are wider implications (discussed below) that could prove problematic.

Implications

The UK is, at present, attractive to investors as a place from which to invest into EU member states with which the UK maintains BITs, and offers a potential structuring solution for investors from EU member states wishing to invest in other EU member states with the protections afforded by a UK-EU BIT. The prospect of an adverse CJEU judgment and its consequences may, however, render some investors cautious. If an adverse CJEU judgment materializes, arbitrations and related proceedings arising out of UK-EU BITs may in certain circumstances encounter stumbling blocks similar to those facing intra-EU BIT arbitrations and awards following the *Achmea* judgment.

While investor-state arbitration tribunals have consistently rejected requests to reopen proceedings or deny jurisdiction on the basis of the *Achmea* judgment or its underlying principles, including subsequent developments such as the Termination Treaty, national

courts have been more willing to follow and apply *Achmea* more broadly. For example, Germany's Higher Regional Court (the Oberlandesgericht) recently publicized a ruling⁹ that proceedings brought by an investor against Croatia pursuant to the Austria-Croatia BIT were invalid on the same basis as the *Achmea* judgment, i.e., that the investor-state arbitration clause in the underlying BIT offended the autonomy of EU law.¹⁰ Investors will be particularly concerned with the practice of national courts given their role in enforcing arbitral awards. While the UK is no longer an EU member state, it is conceivable that an EU member state court would decline to enforce an award rendered under a UK-EU BIT if it is the CJEU's position that the UK's failure to terminate such a BIT while it was an EU member state meant that the BIT had become unlawful as a matter of EU law. Such concerns are likely to be most acute for investors that invested under UK-EU BITs while the UK was a member state, or that advance claims based on measures taken during that period. Those investors (if their claims are successful) may well encounter recovery issues within the EU. Although no such concerns would likely arise for enforcement outside of the EU, it remains to be seen what the approach will be within the EU.

Further developments in this area will be of interest to any investors contemplating investing in reliance on the protections contained in UK-EU BITs, as well as the parties to the three publicly reported pending arbitrations under UK-EU BITs.¹¹ According to publicly available information, there are no awards rendered pursuant to UK-EU BITs undergoing enforcement proceedings at present.

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¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investments, GR. BRIT. T.S. NO. 52 (1997); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Croatia for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 29 (1998); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 42 (1993); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the

Republic of Estonia for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 30 (1995); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, GR. BRIT. T.S. NO. 3 (1988); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Latvia for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 60 (1995); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Lithuania for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 3 (1994); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Malta for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 62 (1986); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments, GR. BRIT. T.S. NO. 84 (1996); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Slovenia for the Promotion and Protection of Investments, GR. BRIT. T.S. NO. 50 (1999).

² Case C-284/16) Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158 (Mar. 6, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=432158>. The *Achmea* judgment was the subject of an earlier [ASIL Insight](#).

³ The underlying intra-EU BIT in *Achmea B.V. v. The Slovak Republic* (UNCITRAL, PCA Case No. 2008-13).

⁴ The Termination Treaty was the subject of an earlier [ASIL Insight](#).

⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments, GR. BRIT. T.S. NO. 26 (1988).

⁶ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019 O.J. (C 384) 1 [hereinafter EU-UK Withdrawal Agreement].

⁷ EU-UK Withdrawal Agreement, art. 87.

⁸ *Id.*, art. 89.

⁹ The judgment itself is unavailable publicly at time of writing.

¹⁰ Press Release, Oberlandesgericht Frankfurt Am Main, Schiedsklausel in einem Investitionsschutzabkommen verstößt gegen Unionsrecht (Feb. 15, 2021), <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/schiedsklausel>.

¹¹ *AS Norvik Banka, Alexander Guselnikov, Grigory Guselnikov and others v. Republic of Latvia* (ICSID Case No. ARB/17/47); *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* (ICSID Case No. ARB/15/31); *Inicia Zrt, Kintyre Kft and Magyar Farming Company Ltd v. Hungary* (ICSID Case No. ARB/17/27).