Why Brexit May Be Good for UK Investors Abroad

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Following the referendum on 23 June 2016 the UK's Prime Minister has recently indicated that the UK will invoke Article 50 of the Treaty on European Union ("TEU") by the end of March 2017. It is expected that within two years from then the UK will withdraw from the EU.

In this entry we consider potential ramifications of the UK's withdrawal from the EU on its investment treaty regime. In particular we ask whether Brexit would be good for UK investors abroad: first, with respect to the UK's intra-EU BITs and second, with respect to the UK's extra-EU BITs. We also consider whether Brexit could have negative ramifications, in particular in the form of potential claims against the UK.

Brexit and the UK's intra-EU BITs

Twelve out of almost a hundred of the UK's BITs currently in force were concluded with another EU Member State (i.e. Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia).

For more than a decade, some EU Member States and the European Commission have raised doubts regarding the jurisdiction of arbitral tribunals in intra-EU BIT arbitrations. They argue that intra-EU BITs are incompatible with EU law. To date arbitral tribunals seized under intra-EU BITs do not appear to have followed these arguments.

On a number of occasions, the European Commission has also called on EU Member States to terminate their intra-EU BITs. Three EU Member States terminated all (Italy, Ireland) or some (Czech Republic) of their intra-EU BITs. These terminations did not affect any of the UK's intra-EU BITs. Earlier this year, Poland considered taking measures towards terminating its intra-EU BITs (including the one with the UK); a step that was followed by Denmark. More recently, Romania initiated legislation aimed at terminating all of its twenty two intra-EU BITs (including the one with the UK).

Two additional recent developments may affect the status quo of intra-EU BITs, including – while the UK remains an EU Member State – the UK's intra-EU BITs.

First, in a decision dated 3 March 2016 the German Federal Court of Justice requested a preliminary ruling from the Court of Justice of the European Union ("CJEU") in accordance with Article 267 of the Treaty on the Functioning of the European Union ("TFEU") to decide whether Articles 344, 267 and / or 18(1) TFEU run counter to the commencement of arbitration under an intra-EU BIT (Case C-284/16 *Achmea*). This case is currently pending before the CJEU.

Second, on 29 September 2016 the European Commission issued reasoned opinions in the infringement proceedings initiated on 18 June 2015 under Article 258 TFEU against five EU Member States (Austria, the Netherlands, Romania, Slovakia, and Sweden). The European Commission formally requested these EU Member States to terminate their intra-EU BITs. If the requests are not complied with in a set period, the European Commission may bring the matter before the CJEU.

Thus, as long as the UK remains an EU Member State, claims brought by investors under the UK's intra-EU BITs are likely to face challenges on EU law grounds. However, if and when the UK withdraws from the EU, the UK's intra-EU BITs will lose their intra-EU character. Unless these treaties are terminated before then (a step that at least some of the UK's counterparts seem to be considering), these treaties will remain in force as a matter of public international law. In this scenario, following the UK's withdrawal from the UK, UK investors in one of the remaining EU Member States with a BIT in force with the UK may rely on these treaties without facing any obvious challenges to a tribunal's jurisdiction based on EU law grounds.

Brexit and the UK's extra-EU BITs

The UK Government is of the view that there are opportunities to negotiate free trade and investment trade deals following Brexit. Reports suggest that the UK may seek deals with a number of countries, including the United States, China, and Australia.

However, as a consequence of the EU's exclusive competence over foreign direct investment, there are severe restrictions with respect to the UK's ability to conclude any treaties with third States in investment matters while the UK remains an EU Member State. This assumes, of course, that the UK would want to comply with EU law as long as it remains an EU Member State.

In particular, any conclusion or negotiation of new investment treaties by the UK with third States would be subject to Regulation 1219/2012. One effect of this Regulation is that while an EU Member State the UK will not be able to commence negotiations on investment agreements, at least with those States with which the EU has already negotiated or is currently negotiating an investment agreement (including the United States, China, Japan, and Canada). Further, it has recently been reported that the EU may consider legal action against the UK if the latter proceeds with negotiations with third States.

One crucial point in this context is what constitutes "negotiations". The term does not appear to be defined in Regulation 1219/2012. Presumably, negotiations would be taking place upon a decision by the UK Government to commence formal negotiations with a third State. "Informal talks", however, would seem to be possible.

While there are legal constraints for the UK to negotiate new trade and investment agreements with third States as an EU Member State, it is fair to say that the EU has made only slow progress with its treaties since it acquired exclusive competence for foreign direct investment at the time of the entry into force of the Lisbon Treaty almost seven years ago. This is clear from the experience with the Comprehensive Economic and Trade Agreement ("CETA") with Canada and the Transatlantic Trade and Investment Partnership ("TTIP") with the United States.

CETA is due to be signed this week. However, over the last few weeks increasingly doubts have been voiced whether this would indeed happen. In particular, the Walloon Parliament (one of the Belgian regional parliaments) opposes CETA. Further, although the German Constitutional Court rejected applications for an interim injunction against Germany's consent to sign, conclude, and provisionally apply CETA, it nevertheless did so upon several conditions. Last week, the European Council concluded its meeting by encouraging "continued negotiations with a view to finding a solution to the

outstanding issues as soon as possible." The effort to finalize CETA is regarded by many as a test of the EU's credibility as a global trade and investment negotiator.

Whereas finalizing CETA is at risk, TTIP's fate is even less clear. Earlier this month, the 15th round of TTIP negotiations took place in New York. However, politically the TTIP negotiations are unlikely to make any substantial progress any time soon. Recently, EU trade ministers recognized publicly that a deal will not be reached before President Barack Obama leaves office next January.

Thus, the EU faces increasing difficulties to negotiate trade and investment treaties with third States. It may well be that the flexibility that the UK may have when it exits the EU will prove to be beneficial when negotiating these agreements (though negotiating an agreement with the EU may prove difficult).

Brexit and potential investment claims against the UK

If Brexit may be good for UK investors abroad, in the EU and elsewhere, could there be negative ramifications for the UK? In principle, foreign investors in the UK could claim that the UK's decision to withdraw from the EU results in a breach by the UK of its international legal obligations contained in its BITs.

Foreign investors in the UK could argue that they could not reasonably have foreseen that the UK would decide to cease to be an EU Member State after over forty years of EU membership, especially as no Member State has ever withdrawn from the EU to date. Foreign investors in the UK may argue that the UK violated their legitimate expectations by deciding to withdraw from the EU and that the losses they incurred were caused by that decision.

In practice, it may be difficult for potential claimants to succeed with such claims. The UK could raise a number of counter-arguments. First, it could argue that it was its sovereign right to decide to withdraw from the EU and that the possibility of withdrawal is explicitly provided for in Article 50 TEU. Second, there needs to be an act (or, possibly an omission) that would be attributable to the UK that could be said to violate an international legal obligation contained in a BIT. Third, absent any specific assurances given to investors, any such claims should not be allowed to succeed.

Further reading

For a more detailed discussion see our recent article: "Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs", Journal of International Arbitration 33, Special Issue (2016): 565-575.