Investment Protection in the EU-UK Trade and Cooperation Agreement

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The EU-UK Trade and Cooperation Agreement ("**TCA**"), concluded on 24 December 2020 and provisionally applicable since the end of the transition period on 31 December 2020, regulates the relationship of the EU and the UK after Brexit. It forms a basis for an evolving relationship between the Parties and may further change, depending on scrutiny by the European Parliament or upon review by the Parties (Articles SERVIN.1.4 and FINPROV.3 of the TCA). It contains limited substantive protections for the Parties' investors and no investor-state enforcement mechanism. The TCA cannot be directly invoked before domestic courts, and its dispute resolution mechanism is limited to a "WTO-like" state-to-state arbitration.

This is a striking move away from recent treaties concluded by the EU with third states, such as CETA with Canada or the recently agreed in principle Comprehensive Agreement on Investment ("**CAI**") with China. These provide for or envisage further negotiations on investor-state dispute resolution ("**ISDS**") mechanisms in the form of investment court systems, that the EU aims to replace by a single Multilateral Investment Court. It also remains to be seen what position the UK will adopt with respect to ISDS in its future trade agreements.

The fate of the bilateral investment treaties ("**BITs**") concluded by the UK with certain EU member states before their accession to the EU remains uncertain. The same is true for the recognition and enforcement of intra-EU BIT awards in the UK.

The scope of investment protection included in the TCA

The crux of the matter is set out in Part Two (*Trade, Transport, Fisheries and Other Arrangements*), Heading One, Title II of the TCA (*Services and Investment*).

The TCA includes a strict definition of protected investors. Namely, an "**investor of a Party**" is defined as a natural or a legal person of a Party that seeks to establish, is establishing or has established an enterprise with a view to creating or maintaining lasting economic links in the territory of the other Party. Mere shell companies are excluded, as legal persons must be engaged in "substantive business operations" in their home state (Article SERVIN.1.2(h), (j) and (k)).

Also, the investment protection standard of the TCA does not apply to air services or related services (with some exceptions), to audio-visual services, to national maritime cabotage and inland waterways transport, or to measures regarding public procurement and subsidies (Article SERVIN.1.1(5)-(7)).

Substantive standards of protection under the TCA

The standards of protection under the TCA are similar to those under the WTO, but differ from the protection available under the CETA. These substantive standards of protection include:

- **market access**, which is limited to the prohibition of a number of enumerated limitations such as those concerning the number of enterprises that may carry out a specific economic activity, the participation of foreign capital or the types of legal entity through which an investor may perform an economic activity (Articles SERVIN.2.2/3.2);
- **national treatment** (Articles SERVIN.2.3/3.4);
- **most favoured nation treatment** ("**MFN**") with respect to investors of a third country and their enterprises (Articles SERVIN.2.4/3.5). Under the MFN provision, investors will not be able to import ISDS procedures

provided for in other international agreements (Article SERVIN.2.4(4)). This means that investors will not be able to invoke the TCA before an independent arbitration tribunal (see also Article SERVIN.2.4(5) regarding additional limitations to the MFN clause); and

- **provisions preventing** the introduction of: **nationality restrictions** for senior personnel (Article SERVIN.2.5); **enumerated performance requirements** based on trade, such as to export a given level or percentage of goods or services or to purchase, use or accord a preference to goods produced or services provided in its territory (Article SERVIN.2.6); **requirements that a service supplier has a local presence** as a condition for the cross-border supply of a service (Article SERVIN.3.3).

These standards of protection do not apply to non-conforming measures and exceptions which are listed, respectively, by the EU and the UK (Article SERVIN.2.7/3.6). As an example, the obligation to grant national treatment does not require the EU to extend to UK investors the treatment granted in an EU member state to natural persons or residents of another EU member state pursuant to the Treaty on the Functioning of the European Union ("**TFEU**"). The TCA also includes a denial of benefits clause (Article SERVIN.1.3).

The TCA does not include a Fair and Equitable Treatment ("**FET**") provision nor a clause protecting against expropriation. However, the TCA does not affect the application of the European Convention on Human Rights ("**ECHR**") (see also Article LAW.GEN.3), which protects, amongst others, the right to property (Article 1 of Protocol No. 1 to the ECHR).

Absence of ISDS mechanism but "WTO-like" state-to-state arbitration

Disputes arising under most of Part Two of the TCA are subject to a state-to-state arbitration mechanism (cf. Part Six of the TCA (*Dispute Settlement and Horizontal Provisions*)). This is an exclusive mechanism, meaning that the EU and UK courts will have no jurisdiction for the resolution of disputes under the TCA (Article INST.29(4A)). This answers the UK's demand to end the jurisdiction of the Court of Justice of the European Union ("**CJEU**") under the TCA (and so differs to the dispute resolution provisions of the earlier concluded Withdrawal Agreement, which provided for jurisdiction of the CJEU; see more here). Also, any interpretation of the

TCA given by the courts of either the EU or the UK shall not be binding on the courts of the other Party (Article COMPROV.13(3)).

The TCA includes additional explicit limitations to the role of the arbitration tribunal in state-to state-arbitration under the agreement. Its decisions cannot add to or diminish the rights and obligations of the Parties under the TCA (Article INST.29(3)). In addition, the arbitration tribunal shall have no jurisdiction to determine the legality of a measure alleged to constitute a breach of the TCA under the domestic law of a Party. Also, no finding made by the arbitration tribunal shall bind the domestic courts or tribunals of either Party as to the meaning to be given to the domestic law of that Party (Article INST.29(4)).

As mentioned above, the TCA does not contain an ISDS mechanism, and it expressly provides that it cannot be construed as conferring rights or imposing obligations on investors or be invoked in the domestic legal systems of the Parties (Article COMPROV.16). Investors facing state measures contrary to the TCA will thus have to convince the UK or the EU to take on their case before the arbitration tribunal in state-to-state arbitration. Investors will have the possibility to file *amicus curiae* submissions once an arbitration is instituted (Article INST.26(3)). The arbitration tribunal shall consider such *amicus curiae* submissions (Article INST.26(3)), but shall not be obliged to address, in its report, the arguments made therein (Annex INST: Rules of Procedure for Dispute Settlement, para. 41).

The state-to-state arbitration mechanism provides for *ad-hoc* arbitration (potentially with the assistance of a registry in the future, see Annex INST: Rules of Procedure for Dispute Settlement, para. 9a), but the applicable procedural rules are set out in the TCA (Part Six and Annex INST). These rules can be further amended by the Partnership Council (Article INST.34A(2)). In a way, reminiscent of the WTO dispute settlement process (although without an Appellate Body and with shorter timelines), the proceedings start by “good faith” consultations between the EU and the UK, which may last 30 days. The Parties can decide to prolong these consultations or refer the matter to an arbitration tribunal consisting of three independent arbitrators.

Procedures for state-to-state arbitration under the TCA

Unless the Parties agree on the composition of the arbitration tribunal within an

allotted timeframe (Article INST.15(2)), each Party shall appoint an arbitrator from the sub-list for that Party established pursuant to Article INST.27 (such list is yet to be compiled, but a similar list has recently been compiled for the Withdrawal Agreement). If a Party fails to appoint an arbitrator from its sub-list or if the Parties do not agree on the (non-EU/UK national) chairperson of the arbitration tribunal, the co-chair of the Partnership Council from the complaining Party shall select the relevant arbitrator by lot from the respective sub-list.

The arbitration tribunal may make use of assistants, who may be permitted to be present (but not take part) in the deliberations (Annex INST 14). Also, the drafting of any decision and report shall remain the exclusive responsibility of the arbitration tribunal and shall not be delegated (Annex INST 15). These provisions may be a reply to the Russian Federation's setting aside arguments regarding the role of the assistant to the tribunal in the Yukos arbitration.

According to Article INST.29(1), the arbitration tribunal can decide by majority vote. In no case shall separate opinions of arbitrators be disclosed.

The arbitration tribunal has up to 160 days to render a ruling on the basis of an interim report (and address eventual comments by the Parties) (Article INST.20). The rules to be used for the interpretation of the TCA are customary rules of interpretation under public international law (Article COMPROV.13). It is not clear whether rulings of the arbitration tribunal under the TCA, the definition of which also refers to the interim report (Article INST.20(6)), may be considered arbitral awards for the purposes of the New York Convention.

In case of a finding of a breach of the TCA by the arbitration tribunal, the respondent Party must take the necessary measures to comply immediately with the arbitration tribunal's ruling or notify the complaining Party of the length of the reasonable period of time required for compliance or agree to provide temporary compensation. In certain cases, a Party can even engage in cross-sector proportionate retaliation, including the suspension of parts of the TCA (Articles INST.21 to INST.25).

Mirroring the absence of standing for investors before the arbitration tribunal, the rulings of the tribunal are only binding on the EU (leaving it unclear whether this includes the EU member states as such) and the UK; they cannot create rights or obligations with respect to investors (Article INST.29(2)).

Article INST.2(2)(e) of the TCA also provides the Trade Partnership Committee with powers to explore the most appropriate way to prevent or solve any difficulty that may arise in relation to the interpretation and application of the TCA. The Partnership Council may even adopt decisions which shall be binding on the Parties and on the arbitration tribunal (Article INST.4).

Other topics covered by the TCA (relating to the level playing field on, *inter alia*, labour and social standards as well as environmental protection) are subject to a procedure before a Panel of Experts.

Recent trends in the EU and UK treaty landscapes

Perhaps surprisingly, although in line with its "WTO plus" context, the TCA departs from recent treaties concluded or currently negotiated by the EU – including with Mexico, Canada, Vietnam, and Singapore – which provide for ISDS mechanisms in the form of investment court systems (that the EU aims to replace by a single Multilateral Investment Court; see more here). As further discussed here, in its Opinion 1/17 of 30 April 2019, the CJEU distinguished such investment court systems from the conclusions it reached in *Achmea* with respect to arbitral tribunals established under intra-EU BITs, and ruled that CETA's investment court system is compatible with EU law.

The absence of an ISDS mechanism in the TCA is even more striking in light of the announcement made by the EU and China in the context of the conclusion in principle of the CAI on 30 December 2020, that their common objective is "*to work towards modernised investment protection standards and a dispute settlement that takes into account the work undertaken in the context of UNCITRAL on a Multilateral Investment Court*". According to the European Commission's summary of the CAI, whose legal text is not yet published, the CAI *includes a commitment by both sides to pursue negotiations on investment protection and investment dispute settlement within two years of its signature* and provides for a state-to-state dispute resolution mechanism similar to the one contained in the TCA.

It remains to be seen what the UK's policy will be with respect to the inclusion of ISDS mechanisms in trade agreements with third states. While the UK was historically in favour of the inclusion of such mechanisms, the International Trade Committee of the House of Commons requested to carefully consider and fully

evaluate specific alternatives to conventional ISDS provisions in a July 2019 report on UK investment policy.

Before the TCA, the UK concluded another trade agreement, the Comprehensive Economic Partnership Agreement ("**CEPA**"), with Japan. Akin to the EU-Japan Economic Partnership Agreement ("**EPA**"), the CEPA does not contain provisions on investment protection and ISDS. However, if either Party concludes an agreement containing such provisions with a third party (negotiations on this subject are ongoing between Japan and the EU), the CEPA allows the other Party to request a review of the investment provisions in the CEPA with a view to the possible inclusion of such provisions.

The BITs concluded by the UK with EU member states and the enforcement of intra-EU BIT awards in the UK

The TCA leaves unresolved the fate of the BITs concluded between the UK and 12 EU member states (namely Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland (unilaterally denounced by Poland on 22 November 2019, but the agreement contains a 15 year-sunset clause), Romania, Slovakia and Slovenia) prior to their accession to the EU. As the UK did not sign the 5 May 2020 agreement for the termination of BITs between EU member states (see more here) – and although the European Commission issued a reasoned opinion to the UK on this issue – these BITs have remained intact.

Finally, it also remains to be seen whether the UK will attract more interest when it comes to enforcement of intra-EU BIT/ECT awards now that it left the EU (on the new developments with respect to the intra-EU application of the (revamped) ECT, see more here). As a nod in this direction, the UK Supreme Court ruled in early 2020 in the *Micula* case, i.e. with respect to an ICSID award rendered by a tribunal constituted under the 2002 Sweden-Romania BIT, that the UK's enforcement obligations under the ICSID Convention could not be affected by the EU duty of sincere co-operation, as the UK's ratification of the ICSID Convention preceded its accession to the EU (see more here).