VAN BAEL & BELLIS

Investment Protection Implications of the EU-UK Trade and Cooperation Agreement (TCA)

As part of our series of Client Alerts on the TCA[1], this Client Alert provides our analysis of the investment protection provisions of the TCA. It considers and discusses where EU-UK investors stand as a result of Brexit and the TCA and what steps should now be taken by investors to maintain international protection for EU-UK investments.

In light of the minimal protections offered by the TCA and continuing uncertainty as to future developments, our recommendation is that investors should consider restructuring their EU-UK investments in order to guarantee continuing, enhanced protection under international law.

BACKGROUND

On 24 December 2020, the European Union ("EU") and the United Kingdom ("UK") agreed a Trade and Cooperation Agreement (the "TCA"), 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.

[1] See our Client Alert "Implications of the EU-UK Trade and Cooperation Agreement on trade in goods", dated 01 January 2021.

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, the TCA does not offer protection against expropriation and does not offer guarantees as to fair and equitable treatment or full protection and security.

Indeed, 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.[2]

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,

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[2] For a fuller description of the State-to-State dispute settlement mechanism included within the TCA, please see our Client Alert "Implications of the EU-UK Trade and Cooperation Agreement on trade in goods", dated 01 January 2021.

Slovakia and Slovenia) as well as the Energy Charter Treaty ("ECT"). The TCA is silent as to the status of these BITs which therefore currently remain in force. 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 intra-EU investment claims is debatable, the CJEU's upcoming judgment could potentially affect EU-UK investors.

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 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.

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