



**British Institute of  
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# Brexit and International Arbitration



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# International Investment Law & the EU

- Investment and trade are inter-dependent and complementary.
- Around 1/2 of world trade in goods and services takes place between affiliates of multinational enterprises.
- EU - the largest source and destination of FDI in the world (measured by stocks and flows).

# Impact of Brexit on Commercial Arbitration

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- Impact of Brexit on arbitration in London
- Advantages of London as a seat do not derive from EU Law or being a member of the EU
- Arbitrability, challenges, and enforcement in accordance with domestic law and the New York Convention
- The main attractions of the UK legal system are impartiality, efficiency, courts with significant experience working on arbitration matters.

# 1996 Arbitration Act

- Discretion to tribunals to decide on procedural matters, support arbitration, require parties to adhere to procedural orders, compel witnesses to give evidence and to preserve evidence,
- English law as applicable law
- Significant financial center and law firms which service it

# International Framework

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- UK will remain a party to the New York Convention
- No impact on enforcement of England-seated arbitration proceedings
- No impact on enforcement of foreign arbitral awards in the UK

# Potential opportunity of Brexit

- Anti-suit injunctions
- West Tankers case: courts of EU member states (including English courts) cannot enjoin the litigants from bringing a claim before the courts of another member State in breach of an arbitration clause
- ECJ ruled that these were incompatible with the EU regime for recognition and enforcement of judgements, based on reciprocal respect between the courts of EU Member States

# Potential challenge of Brexit

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- EU Regulation 1215/2012 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters
- Likely to be a replacement mechanism
- But some uncertainty exists

# EU International Investment Law Policy

- Since 2009: Lisbon Treaty competence to conclude agreements covering FDI transferred from member states to EU
- EU Communication "Towards a comprehensive European international investment policy" (2010)
- Almost 1,200 BITs of EU Member States will be preserved until they are replaced by EU agreements (Regulation No 1219/2012)
- Allows for the Commission to authorize Member States to open formal negotiations with a third country to amend or conclude a BIT under certain conditions.

# EU Regulation 1219/2012

- Regulates two aspects of the transitional arrangements: existing and new BITs
- Allows member states to amend an existing BIT or conclude a new one with third countries
- Necessary condition: the terms, conditions and procedures set out in the regulation are respected
- To open negotiations or sign a BIT, member states must obtain authorization from the European Commission.

# EU Investment Treaty Making

- Progressive introduction
- Investment rules in the context of free trade agreements (FTAs with India, Singapore, Japan, the United States, Egypt, Tunisia, Morocco, Jordan, Malaysia, Vietnam and Thailand)
- Stand-alone investment agreements (China and Myanmar)
- Negotiations with Canada were concluded in 2014 (Comprehensive and Economic Trade Agreement (CETA))
- The EU-Canada trade and investment agreement is the first occasion for EU-wide rules on investment as part of a broad trade agreement.

# Main elements of EU ISDS reform

Multilateral Investment Court proposed in 2015

- a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal
- publicly appointed judges with high qualifications (similar to ICJ and WTO Appellate Body)
- the new Appeal Tribunal, similar principles to the WTO Appellate Body
- precisely defined jurisdiction (e.g. targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice)
- governments' right to regulate would be enshrined and guaranteed in trade and investment agreements.

# Investment Treaty Negotiations

The UK wishes to protect the rights of investors investing in a new independent State in Asia. In order to do so, the UK wishes to conclude a new BIT.

1. Is the United Kingdom allowed to discuss a possible new bilateral investment treaty under EU Law?
2. What is the role of the European Commission in this process?



# Brexit as a breach of FET?

The United Kingdom decides to leave the European Union by 2020. Two years before the referendum on EU membership, a South Korean investor invested a significant amount of money into a UK-based business of assembling consumer electronic products and selling them primarily to EU countries.

The investor is considering bringing a claim against the UK in the expectation that they will be unable to maintain tariff-free access to EU Member States.

- What would support this claim?
- What arguments would undermine this claim?