

PIL DISCUSSION GROUP UNIVERSITY OF OXFORD

BREXIT AND INTERNATIONAL AGREEMENTS: THE WITHDRAWAL AGREEMENT AND BEYOND

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Brexit and International Agreements: The Withdrawal Agreement and Beyond

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International agreements in the Withdrawal Agreement

The Government's work on "transitioning" international agreements

- The UK Government has been working to put in place arrangements with third countries to replicate the effects of the current agreements.
- Since the UK Government is now determined to ratify the Withdrawal Agreement and "get Brexit done" with a deal, such preparatory work becomes relevant for the end of the transition period established by the Withdrawal Agreement.
- Details of the Government programme are published on go.uk, available [here](#) (last updated 5 November 2019).

International agreements in the Withdrawal Agreement – the UK vis-à-vis the EU

During the IP

- The Withdrawal Agreement provides for a “transition or implementation period” (**IP**) which will last from the date of entry into force of the Withdrawal Agreement until 31 December 2020 (Article 126).
- The UK will cease to be a Member State on exit day but Union law shall continue to be applicable to and in the UK during the IP (Article 127(1)).
- “Union law” includes international agreements to which the EU is party and those concluded by Member States on behalf of the EU (Article 2(a)(iv)).
- During the IP, the UK shall continue to “be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly” (Article 129(1)).

EU international agreements entering into force during the IP

- No specific reference in the Withdrawal Agreement to “EU” agreements entering into force during the IP. Will they be binding upon the UK?
- The European Commission affirmed in a [Q&A](#) (November 2018) that:

“[During the IP] the UK will be assimilated to a Member State for the purposes of the international agreements, including those agreements that would provisionally apply or enter into force during the transition period.” [Emphasis added]

EU international agreements entering into force during the IP – selected examples

- EU-Singapore Investment Protection Agreement
 - Upon provisional application / entry into force, it is said to suspend / terminate the UK-Singapore Bilateral Investment Agreement
- EU-Vietnam Investment Protection Agreement
 - Upon provisional application / entry into force, it is said to suspend / terminate the UK-Vietnam Bilateral Investment Agreement

International agreements after the IP

- “EU-only” agreements (e.g., CTC, GPA, Interbus, fisheries agreements) will no longer apply to the UK, unless the UK is already a party or accedes as a party in its own right.
- The UK will remain bound by “mixed” multilateral agreements to which it is a party in its own right (e.g., the ECT, the Paris Agreement, UNCLOS).
- The UK and the EU agree that mixed “bilateral” agreements will no longer apply to the UK after the IP.

International agreements after the IP (cont'd)

- Policy of replicating the effects of the current arrangements (Gov't explanation [here](#)):
 - Scrutiny of 2,000+ agreements (including non-binding arrangements).
 - Identification of those that need to be transitioned (bilateral agreements) and those to which the UK will need to accede in its own right (multilateral agreements).
 - For bilateral agreements, pursued replication by mirroring – to the extent possible – the existing provisions of international agreements.
- For agreements that will not be in force by the end of the IP, the Government is relying on “mitigations” to ensure continuity of the effect of the agreement(s) (examples include provisional application and Memoranda of Understanding).

Other key features of the Withdrawal Agreement

The UK's freedom to negotiate new treaties during the IP and beyond

- Areas of exclusive Member State competence
- Areas of exclusive competence of the EU
 - Preamble
 - Article 129(4)
- Matters of shared competence
- The Protocol on Ireland/Northern Ireland
 - Preamble
 - Article 4

The role of the Joint Committee established by the Withdrawal Agreement

- The Withdrawal Agreement establishes a **Joint Committee** to oversee the implementation and application of the Withdrawal Agreement (Article 164).
 - Power to “adopt decisions in respect of all matters for which this Agreement so provides” and to make recommendations (Article 166(1)).
 - Forum for “consultations” with the “aim of reaching a mutually agreed solution”, in the event of a “dispute regarding the interpretation and application of the provisions of [the] Agreement” (Article 169).

Resolution of disputes between the UK and the EU under the Withdrawal Agreement

- Disputes to be settled **arbitration** (Articles 167-181).
 - Joint Committee to establish a list of 25 experts in Union law and PIL.
 - The arbitration panel for any given dispute will comprise five members.
- Any **question of the interpretation of a provision of Union law** is to be referred to the CJEU (Article 174).
- Separately, the Commission may refer to the CJEU a claim that the UK has failed to fulfil its obligations under the Treaties or Part Four of the WA (including regarding international agreements) before the end of the IP (Article 87).
- The arbitral panel must refer any dispute as to whether the UK has complied with an adverse judgment arising out of this procedure to the CJEU (Article 174(1)).

Brexit and intra-EU bilateral investment treaties

Brexit and intra-EU BITs

- “Intra-EU BITs” are bilateral investment treaties between EU Member States.
- Background:
 - **CJEU judgment in *Achmea***, finding that EU law “precludes” an ISDS clause in an intra-EU BIT like that in the BIT between the Netherlands and the Czech and Slovak Federative Republic, March 2018 ([here](#)).
 - **Political declarations of EU Member States** (including the UK) announcing intention to terminate their intra-EU BITs, January 2019 ([here](#)).
 - **Agreement on the text of a multilateral treaty** terminating intra-EU BITs (majority of Member States (including the UK)), October 2019 ([here](#)).
 - Signature/ratification of the multilateral treaty expected imminently.

Brexit and intra-EU BITs

- Consequences for the UK?
 - “Union law” continues to bind the UK during the IP.
 - WA provides for proceedings against the UK at the CJEU where the Commission considers that the UK has failed to comply with an obligation under the Treaties or Part Four of the Agreement (Article 87).
- The UK’s options?

Implications

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Q & A