

CLIENT ALERT

Update: Legal Considerations for U.K. and EU Investment and Trade Treaties after Brexit

May.24.2017

In this alert, we provide updates on recent headlines:

- European Court of Justice (ECJ) opines on scope of EU's supremacy over the EU-Singapore Free Trade Agreement. The highlights include:
 - Investor-State Dispute Settlement (ISDS) requires unanimous Member States approval.
 - The possibilities for a U.K. trade treaty with the EU separate from any withdrawal agreement.
- U.K. Conservative Party champions ratification of EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore FTA, and other trade treaties in the U.K. parliamentary election due on 8 June 2017.

This article follows our previous alert, [Legal Considerations for the U.K.'s Investment and Trade Treaties After Brexit](#), following the notification under Article 50 of the Treaty on the European Union (TEU) regarding the United Kingdom's intent to leave the European Union.

THE SCOPE OF EUROPEAN UNION COMMON COMMERCIAL POLICY PRIMACY

As noted in our previous update, in 2016 the European Commission [sought an opinion](#) from the ECJ regarding the exact scope of the EU's supremacy regarding the common commercial policy (see Treaty on the Functioning of the European Union (TFEU) [Article 3\(1\)\(e\) and Article 207\(1\) and \(3\)](#)) as part of the finalization of the EU-Singapore FTA. [That opinion](#) was released on 16 May 2017.

In reviewing the various topics of the Singapore FTA, the ECJ decided that the EU had sole competence to enter into treaties under the common commercial policy on the subjects of:

- Access to the respective markets for goods and services.
- Direct foreign investment.
- Intellectual property rights.
- Anti-competitive conduct.
- Sustainable development.
- A bundle of cooperation requirements including notification, verification, mediation, transparency, and dispute settlement between the treaty contracting parties.

UNANIMOUS MEMBER STATES APPROVAL OF ISDS REQUIRED

The ECJ decided that non-direct foreign investment was outside the scope of the common commercial policy. The ECJ also concluded that ISDS provisions for direct enforcement of an investor's rights against the EU or a Member State by the investor

itself fell outside the exclusive competence regime. Accordingly, a treaty which contains an investment chapter with ISDS provisions would fall to unanimous approval by the Member States under TFEU [Article 207\(4\)](#). In the particular case of the Singapore FTA, because the treaty contains both of these aspects beyond the scope of exclusive competence, the treaty will require unanimous Member State ratification.

The ECJ's opinion does not impact the ratification of CETA, the Canada-European Union treaty signed on 30 October 2016, which has already been treated as a mixed competence agreement and was [approved by the European Parliament](#) on 15 February 2017. Ratification by the Member States is pending.

The ISDS mechanisms in these two treaties replicate the existing approach in the EU-South Korea FTA, which involves a new Investment Court System (ICS) discussed in our prior alert that would replace the traditional arbitration model with a panel of publicly-appointed judges from among the Parties and third country appointees, as well as an appellate mechanism. ICS would also involve transparency measures that are finding currency elsewhere in the investment arbitration sphere, such as the [Mauritius Convention on Transparency](#), which will enter into force on 18 October 2017 for those States which have ratified it. Of EU Member States, the following are signatories: Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Sweden and the U.K. However, at this time none of these EU signatories have ratified the Convention (only three States have ratified as of the date of this note: Canada, Mauritius, and Switzerland). A current list of States that have signed and ratified the Convention [is available here](#).

Although the European Commission has indicated that it intends to pursue ICS in all its future investment treaty negotiations, the opinion of the ECJ confirms that any future treaties with ISDS mechanisms will require the consent of the EU's membership. The concerns raised at the Member State level during the process of completion of CETA indicate that this could create significant challenges to the finalization of future treaties with ISDS features. Please see our 3 March 2017 Podcast on this topic: ["PODCAST: CETA, ISDS, and the Belgian Veto – A Warning of Failure for Future Trade Agreements with the EU?"](#)

IMPLICATIONS OF ECJ OPINION FOR BREXIT

There are also potential implications in the ECJ opinion for Brexit more generally. Under Article 50 TEU, a departing member leaves after notification under one of two conditions: (i) upon entry into force of a withdrawal agreement; or (ii) 2 years after the notification was given (unless extended by unanimous agreement of the remaining Member States) if no withdrawal agreement has yet been ratified. Such withdrawal agreement is approved by the European Parliament and ratified by qualified vote of the European Council (*i.e.*, by 55 percent of Member States representing 65 percent of the EU population – a minimum of 20 of the remaining 27 members).

It is therefore theoretically possible that the U.K. will leave the EU without a withdrawal agreement but – given the scope of common commercial policy defined by the ECJ's decision – could thereafter enter into an agreement as a third-party state within that scope which is solely within the purview of the EU itself to conclude, and not its Member States. Nevertheless, it would seem politically unlikely such an outcome could happen swiftly.

THE TRAJECTORY OF UNITED KINGDOM GOVERNMENT POLICY ON TRADE TREATIES

The recent announcement of a U.K. general election due to take place on 8 June 2017 raises another point from our previous alert: the intentions of the U.K. as to the future bilateral status of the EU's agreements after Brexit. As we previously discussed, the EU has an extensive existing list of trade treaties with third party states. [See here](#) for lists of the EU's current trade treaties.

The presently governing Conservative Party is expected to be returned with a continuing majority in the Westminster Parliament after the election. Its [recently published manifesto](#) states a policy to "seek to replicate all existing EU free trade agreements and support the ratification of trade agreements entered into during our EU membership." The United Kingdom can therefore be expected to champion ratification of CETA and the EU-Singapore FTA, as well as to approach the EU's existing trade partners to extend the scope of the existing treaties bilaterally, as we suggested could be practically possible. We note that the two other main national parties, Labour and the Liberal Democrats, do not have such express policy goals for the coming parliamentary term in their manifestos.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Ian A. Laird

Partner – Washington, D.C.

Phone: +1 202.624.2879

Email: ilaird@crowell.com

John Laird

Associate – London

Phone: +44.20.7413.1324

Email: jlaird@crowell.com