

International Arbitration Alert

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Potential treaty claims against the United Kingdom, whatever the result of the General Election

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With the U.K. General Election on December 12, 2019, only days away, both of the leading parties are promising policies that, in different ways, may impact inward investors into the U.K. Whether this is the rapid Brexit promised by the Conservative Party or the nationalization of corporate assets promised by the Labour Party, inward investors into the U.K. may wish to consider whether they have the benefit of investment treaty protections.

The Labour Party has promised to nationalize rail, mail, water and energy assets, along with the “broadband-relevant” parts of BT Group plc, the British multinational telecommunications company. This would bring at least 5 percent of total U.K. assets currently held by companies into public ownership. In addition, Labour has said that it will require large companies to put up to 10 percent of their share capital into “Inclusive Ownership Funds,” which will be owed collectively by employees. The effect of this will be to dilute the shareholdings of existing shareholders.

These policies may constitute expropriation and depending on how the policy is carried out, those affected may have recourse to investor-state arbitration if their investments are owned by or through entities incorporated in jurisdictions which are parties to an investment treaty with the U.K. The U.K. is party to 92 bilateral investment agreements (BITs), as well as several multilateral agreements such as the Energy Charter Treaty.

Most BITs include a prohibition on unlawful expropriation: in order to be lawful, the expropriation must be non-discriminatory, in the public interest, and adequate compensation must be paid. Disputes by investors in relation to the potential policies outlined by the Labour Party are likely to center around the payment of adequate compensation. Typically, adequate compensation is calculated on a market value basis, but the proposal by Labour’s Jeremy Corbyn is that Parliament will decide the amount to be paid to companies if they are nationalized. If such compensation is said to be inadequate, this may give rise to claims.

Over the last few weeks, it has been reported in the U.K. press that National Grid and other energy companies that own electricity networks in England and Scotland have moved their U.K. operations to holding companies in Switzerland, Luxembourg and

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Hong Kong. The restructuring has reportedly taken place in order to allow the companies to take advantage of bilateral and multilateral investment treaties, including the Energy Charter Treaty, if nationalization goes ahead, and if they are not adequately compensated for the loss of their assets.

On the flip side, if the Conservative Party remain in government, Boris Johnson has guaranteed that he will “get Brexit done in January.” In that scenario, certain foreign investors in the U.K. may consider bringing claims against the state for violation of BIT protections, such as the fair and equitable treatment standard. For example, if investors can show that when they made their investments they had a legitimate expectation that the U.K. would remain in the European Union single market, and if Brexit breaches that expectation, then they may have claims. Whether the existence of a withdrawal mechanism in the Treaty of Lisbon negates any such legitimate expectation remains to be seen.

BIT claims based on changes in regulation are becoming increasingly common (as we noted in our recent alert entitled “Recent ECT Claims – Impact for Investors and Governments”). In a number of recent decisions, tribunals have shown themselves willing to find that investors may have legitimate expectations of stability, even where specific promises are not made to them, but rather where a regulatory or legal regime has been established with the overt aim of attracting investments, by holding out the prospect of a set of specific regulatory or legal principles that will be maintained.

Whoever wins the forthcoming General Election, investors in the U.K. should consider what protections may be available to them under investment treaties.

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