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FOCUS ON

Brexit & the US Administration

The Best Option for Dispute Resolution

Brexit and the Free Flow of Data

What to Expect from Trump's FTC and DOJ in Terms of Merger Policy

McDermott Will & Emery

IN
International News

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An apocryphal Chinese curse condemns its target to live in interesting times. There is certainly nothing dull about these times. It would be naïve to claim that with every challenge comes opportunity, but there are ways in which prepared investors and businesses can continue to function effectively during this period of uncertainty and change.

On a global scale, M&A deal value during H1 2017 grew by 27.8 per cent compared to the same period last year; there are ways for international investors to take advantage of the bilateral trade environment that is replacing multilateralism; and businesses can take certain steps in all their contractual arrangements to ensure that potential price changes post-Brexit have been taken into consideration. Significantly, some rocks can still be relied upon. While Brexit may have an impact on cross-border litigation, the framework for international arbitration will remain untouched, providing a reliable method of resolution for the inevitable disputes.

McDermott Will & Emery continues to lead the charge in navigating the potential legal ramifications of the new reality. Our global team of multi-disciplinary legal advisors is helping companies evaluate the outcomes of Brexit and protecting their commercial interests; while our US regulatory team is equally skilled at solving the legal challenges and spotting the business opportunities afforded by the current US administration.

Please contact me if you have any comments on our articles or would like to discuss any of the issues raised.

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Cross Border M&A: The Impact of Brexit, the Trump Administration, and China's Crackdown on Capital Flight

NICHOLAS AZIS, CHRISTIAN VON SYDOW AND JACOB A. KUIPERS

The combination of Brexit, the Trump Administration, and China's tightening grasp on capital, appear to have created a perfect storm that is hampering M&A activity. Is the future for M&A really as bleak as some commentators fear? CONTINUED >

As noted in the previous issue of *International News*, globalism has been replaced with nationalism in key jurisdictions, putting the globalised world order in question. As a result of Brexit, the Trump Administration's protectionist policies, and China's aggressive crackdown on capital flight, there are now greater uncertainties in the global transactions market. In fact, H1 2017 saw 12.2 per cent fewer deals than during the same period in the previous year.

The situation, however, is not quite what it seems. Despite this downturn, transaction value during H1 2017 actually grew by 27.8 per cent compared to the same period last year.

PROTECTIONISM AND THE TRUMP ADMINISTRATION

The Trump Administration's policies to date have mainly targeted two of the three pillars of globalisation: the free flow of 1) goods and services (trade); and 2) people (immigration).

Given the Administration's scrapping of the Trans-Pacific Partnership, stepping back from the Transatlantic Trade and Investment Partnership, and renegotiating the North American Free Trade Agreement, one would expect the third pillar of globalisation, the free flow of capital, to be next in the crosshairs. This is especially true given the high profile examples where this nationalist posture has held up cross-border deals, such as Ant Financial's (China) takeover of MoneyGram (US).

Although this example suggests a negative outlook for cross-border M&A in the United States, international deal making is not doomed.

First, nationalist policies like trade protectionism and anti-immigration reform do not necessarily restrict cross-border deal flow. In fact, the opposite may be true as a World Bank study found that when trade protectionism increases, so does international investment.

Second, having domestic companies become more prominent internationally, through cross-border acquisitions, could be complementary to the Trump Administration's nationalism.

> "The free flow of capital is likely to remain firm in US M&A markets."

Third, the Trump Administration's pro-business agenda has created an optimistic outlook that is partially echoed in an all-time high stock market and the US dollar rallies, making US targets more expensive than their foreign counterparts. US buyers are therefore finding foreign targets more appealing, driving additional cross-border M&A (see the section on Germany below). Indeed, outbound M&A deals from the United States topped US$ 114.1 billion in Q1 2017, more than a 100 per cent increase compared with Q1 2016.

Although changes to corporate tax rates, cash repatriation, and other cross-border adjustment taxes could significantly impact cross-border deal flow, cross-border M&A is unlikely to be hampered by the Trump Administration, as the free flow of capital should remain firm in US M&A markets.

GERMANY REAPS THE BENEFITS

H1 2017 saw Germany become the second most targeted country for acquisitions in Europe after the United Kingdom, both in terms of deal value and count. This is reflected by Germany's 170 per cent rise in value of inbound activity when compared with the same period in 2016: €22.2 billion to €59.8 billion, a Mergermarket record for the country.

Inbound activity in Germany was boosted by several mega deals, including the €40.5 billion merger between US-based Praxair and the Germany-based technological group Linde, which accounted for 63.1 per cent of Germany's total deal value. Even if this mega-merger is discounted, the inbound activity from American dealmakers still improved significantly, growing from €3 billion and 43 deals last year to €7.2 billion and 51 deals, an increase of 135.6 per cent.

These gains come despite the significant loss of Chinese investment and Germany's introduction in July 2017 of additional protectionist regulations to limit foreign companies looking to acquire businesses in key sectors and technologies. The fact that Germany, currently one of the biggest beneficiaries of the reduction in globalisation, was willing to implement measures to curb foreign investment shows the extent of the paradigm shift that has taken place. Given the importance and quality of German manufacturing and industrial sectors, however, Chinese interest is likely to return, even if investors have to be more cautious when selecting potential targets.

Despite outbound activity dropping significantly in terms of value, the actual deal count stayed fairly level, indicating that German investors are still looking for opportunities abroad. This drop in value could be attributed to the weak Euro, which may have deterred German dealmakers from pursuing larger transactions outside the Eurozone.

With the return of solid economic growth, low interest rates, growing investor confidence, and a strengthening Euro, German outbound acquisitions are likely to increase and could make up for the thus far lacklustre deal value seen in 2017. Furthermore, as a result of Trump's threats of protectionist legislation and the growing desire for products "Made in America", German companies could look to strategically acquire US-based operations. Doing so would allow them to shift their production for the American market across the Atlantic in order to fulfil this criterion.

THE UNITED KINGDOM'S TRAJECTORY TOWARDS GREATER PROTECTIONISM

The over 10 per cent decline in the value of sterling in the immediate aftermath of the Brexit vote and the unparalleled availability of cheap acquisition finance was expected by many commentators to lead to a wave of opportunistic takeover bids for underpriced UK targets. There is, however, little evidence that the devaluation of sterling had any effect as there has been a decline across the board, most dramatically in mid-market deals. It seems that company decision makers and M&A professionals are waiting for greater clarity before making M&A investment decisions.

It is, however, worth noting that the United Kingdom still remains the most targeted country for acquisitions in Europe, even if Germany is closing in. To deter the more egregious asset stripping of key parts of the economy, Prime Minister Theresa May has made her intentions clear: "A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as [certain industries are] to Britain"

Such statements should, however, be seen in the context of the trajectory of UK Government policy over the last 10 years. Kraft's takeover of UK confectioner Cadbury in 2010 led to significant changes to the Takeover Code, whose rules had previously favoured the rights of acquirers over those of UK targets. Additional changes requiring heightened disclosure of a buyer's intentions for a target company were announced by the Takeover Panel in September this year, which will further put pressure on the buy-side in UK takeovers. Undoubtedly, these changes have led a reduction in public takeover activity in the UK market, with acquirers much less likely to engage in speculative activity.

> "Chinese interest is likely to return, even if investors have to be more cautious."

In October 2017, the UK Government released proposals to further increase its powers to intervene in proposed UK investments by foreign buyers on grounds of national security, broadening the scope beyond the traditional defense industries. The shift in policy is not party political as all the principal political parties in the United Kingdom are aligned with this evolving policy of greater state intervention and protection.

As far as Brexit is concerned, what is certain is that over the long term, regulations applying to large swathes of the UK economy will change as UK regulation gradually diverges from EU regulation. This will be most pronounced in the financial services, energy, life sciences and agricultural/ food sectors, where EU regulation is most concentrated. This flexibility away from EU regulation and the evolving regulatory environment is expected to lead to greater opportunities for cross border M&A in those sectors that benefit, and consolidation in those that will not.

Following Brexit, it is also expected that UK policy makers will develop domestic competition policy to protect or nurture sectors of strategic importance to the UK economy. This may lead to industries holding protected status, which will have both positive and negative implications for M&A activity. On a practical level, the United Kingdom is currently submerged within EU-wide merger thresholds and notifications are made to the EU Commission, with reference to the UK local competition authority voluntary. Post-Brexit that is likely to change, with transactions involving a UK component subject to UK review. This may impact timetables, although the United Kingdom traditionally has an efficient competition review process.

THE FUTURE'S BRIGHT

The United Kingdom is fundamentally shifting away from globalisation towards a more nationalistic system. The Trump Administration has the clear ambition of curtailing free trade and immigration. And China is committed to limiting capital flight. These all sound like doors slamming shut, but windows are actually opening due to the high value of cross-border deals, the Trump Administration's overall pro-business agenda, a dramatically increased interest in Germany, and the forthcoming changes to the UK regulatory landscape. The cross-border M&A market will continue to be strong for those who see opportunities behind the headlines.

A longer version of this article was presented at the 2017 Cross-Border M&A Conference.

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Dispute Resolution Options Post-Brexit

JACOB GRIERSON AND THOMAS GRANIER

Amidst all the uncertainty surrounding Brexit, the continuing relevance, power, and reliability of international arbitration as a dispute resolution mechanism remains a very welcome example of stability.

On 22 August 2017, the UK Government issued a paper containing proposals to establish a cross-border civil judicial co-operation framework between the European Union and the United Kingdom (the Future Partnership Paper). Because the framework of the future EU-UK relationship has yet to be defined, considerable uncertainties remain regarding certain aspects of cross-border litigation that are currently governed by EU Regulations.

In contrast with litigation and so many other areas, Brexit is, however, unlikely to affect the rules governing international arbitration proceedings. As a result, parties should opt for arbitration rather than litigation until such time as the rules applying to cross-border litigation involving the United Kingdom and the European Union post-Brexit are clarified.

THE UNCERTAINTY OF CROSS-BORDER LITIGATION

Numerous aspects of cross-border litigation within the European Union are currently regulated by instruments designed to facilitate access to justice by providing predictability and fostering judicial co-operation between Member States. The following are the main regulations that apply:

> EU Regulation Rome I provides rules to determine which law should apply to contractual obligations in cross-border disputes involving parties from different EU Member States (except Denmark, which opted out). Accordingly, if parties to a contract have not chosen a law to govern that contract, the Rome I regulation will designate the law.

- EU Regulation Rome II provides rules to determine which law should apply to non-contractual obligations in cross-border disputes involving parties from different EU Member States (again excluding Denmark).
- EU Regulation Brussels I *bis* prescribes which court in the European Union has jurisdiction to decide a given cross-border dispute between parties from different jurisdictions in the EU.

The rules set forth in these (and other) EU instruments play a fundamental role in intra-EU litigation, because they provide parties with predictability with respect to the law that should govern their disputes and which jurisdiction will be competent to hear them.

As long as the United Kingdom remains part of the European Union, cross-border litigation involving a UK component will continue to be governed by these EU regulations. Upon Brexit becoming effective, however, this framework will cease to apply to such litigation under Article 50(3) of the Treaty on European Union.

The United Kingdom will therefore have to choose whether it wishes to apply different rules to such litigation than those set forth in EU law, or to adopt rules aligned with EU law. Given its stance in the Future Partnership Paper, the United Kingdom appears to be leaning towards the second option. The result would be rules that "reflect closely the substantive principles of co-operation under the current EU framework" (paragraph 19 of the Paper).

Needless to say, however, the choice is not the United Kingdom's alone. The European Union will also have to agree to put in place rules that are aligned with EU law.

The consequences of Brexit on cross-border litigation are likely to remain unknown for some time, but parties to contracts need some predictability now with respect to future UK-EU litigation.

The lack of predictability created for the United Kingdom by Brexit has led a number of other EU Member States (including, most recently, Belgium) to propose changes to their own court systems (including the introduction of English-language courts) to try to attract cases that would otherwise have been destined for the UK courts. Such proposals may, however, ultimately face the same uncertainty in relation to disputes involving nationals of the United Kingdom and other EU Member States as a question mark hangs over what rules will apply to enforcement of their judgments in the United Kingdom post-Brexit.

INTERNATIONAL ARBITRATION AS A GUARANTEE OF LEGAL CERTAINTY

The better answer, we believe, is to rely on arbitration agreements.

Unlike cross-border litigation, international arbitration is not subject to the EU instruments mentioned above. In particular, the Rome I and Brussels I *bis* Regulations expressly exclude arbitration from their scope.

> "International arbitration is not subject to EU instruments."

International arbitrations conducted in London will instead continue to fall within the ambit of the English Arbitration Act 1996, which is not in any way dependent on EU law. In addition to providing a clear and comprehensive framework for international arbitration, the Arbitration Act 1996 is applied by English courts in a pro-arbitration fashion. This approach has contributed to establishing London as one of most successful locations for arbitration in the world. Accordingly, the legal framework that regulates arbitration proceedings and the enforceability of arbitral awards is unlikely to be adversely affected by Brexit.

To the contrary, parties conducting international arbitrations in London may, post-Brexit, again be able to ask the English courts to issue anti-suit injunctions to prevent their contractual counterparties from litigating before other EU Member State courts in breach of an arbitration agreement. The English courts are currently forbidden from issuing such anti-suit injunctions because it is considered by the Court of Justice of the European Union to be contrary to the EU Regulation Brussels I. This may perhaps change post-Brexit.

Nor will Brexit affect the recognition and enforcement of foreign arbitral awards in the United Kingdom. These will continue to be governed by the UK Arbitration Act 1996 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which provides a clear and favourable set of rules for the recognition and enforcement of arbitral awards in all 157 signatory States (which include the United Kingdom, and all EU Member States), and by other international instruments that are not subject to EU laws.

International arbitration is undoubtedly the best available dispute resolution mechanism in the drafting of international contracts involving the United Kingdom and the European Union for those seeking legal certainty. It is one of the few areas that companies can rely on amidst the potential uncertainty of the post-Brexit world.

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Brexit and UK Health Care

SHARON LAMB

There is no dedicated and standalone focus on health in the Brexit negotiations. The final position will be affected by multiple negotiation streams, so businesses must prepare for a wide range of outcomes.

One of the key, and most controversial, arguments for the United Kingdom's exit from the European Union was that Brexit would release additional funding for UK public health services. At this stage, there is still a wide range of options for the final Brexit deal so the question of additional funding is not yet answered.

The health sector is affected by multiple and parallel ongoing Brexit negotiations: trade, supply of goods, procurement, workforce, research, pharmacy and medicines, access to technologies and reciprocal health care are all highly relevant. There is no separate, standalone negotiation stream for health in the exit discussions, which means it is not always easy to assess the impact on the UK health sector.

Negotiation positions have been published in certain important areas, providing some signposts for their general direction. For example, the United Kingdom has published its position on workforce and availability of goods so it is easier to see the direction of travel in these areas.

In other areas the future picture is less clear; for example in science and innovation (including medical research), the United Kingdom has only set out its "vision" for the future of its partnership with the European Union. Progress in many areas is likely to be stalled unless key terms on trade and financial issues are resolved.

Health care businesses are advised to prepare for this uncertainty by including flexibility in their arrangements.

There are three key areas for health affected by Brexit: workforce, tariff and pricing, and procurement.

HEALTH CARE WORKFORCE

In the immediate aftermath of the Brexit vote, many health care organisations expressed serious concerns about the right of EU health workers to remain in the United Kingdom, and the future recruitment of health care staff if there was loss of freedom of movement.

As far as the right to remain is concerned, something of an early comfort has been offered to the thousands of foreign health care professionals that bolster the country's services. The government has confirmed that EU citizens that are resident in the United Kingdom will continue, from a specified date that is not before March 2017, to benefit from rights to live and work in the United Kingdom.

> "The recognition of professional qualifications is as important as freedom of movement."

The precise disentangling of health care worker's rights and obligations is more complicated, but the United Kingdom and European Union have published their positions. In late September this year, the EU taskforce published a RAG rated table setting out 60 workforce related areas. There is still divergence (red) on important issues and further discussion (yellow) to "deepen" understanding in others, but there are areas of convergence (green) in relation to some aspects of residence rights, frontier workers and social security co-ordination.

At the moment, it is likely that freedom of movement will end, but trade associations and representative bodies of NHS and other health care providers have called for post-Brexit immigration rules to allow health and care providers to continue to recruit from EU countries if they are unable to fill vacancies with resident workers.

A further concern, the recognition of professional qualifications, is as important as freedom of movement to employers of health care workers. Both the United Kingdom and the European Union have issued comforting signals on this subject and this will be an area where it is likely to be in both parties' interests to find resolution.

TRADE IMPORTS

The outcome of the trade negotiations on customs and duties to be applied to goods and supplies between the United Kingdom and remaining EU Member States will be one of the most significant factors affecting the cost of doing business in the health care sector.

The European Union, taken as a whole, is the United Kingdom's largest trading partner. According to November 2017 UK parliamentary reports, UK exports to the European Union in 2016 were £241 billion, whilst UK imports from the EU were £312 billion: 53 per cent of all UK imports, representing an increase of 3 per cent on the previous year.

There are no reliable figures for overall National Health Service (NHS) imports but, given the percentage share of government health spend in the United Kingdom and the heavy reliance in the NHS on EU supplies of IT, infrastructure, health equipment and supplies, even marginal tariffs on the supply of goods would be costly, especially given existing financial pressures.

Early and shared notifications have been made by the United Kingdom and the European Union to the World Trade Organization (WTO), committing to maintaining market access and seeking agreement on tariff apportionments. Until a final decision is reached, health care businesses should, at the very least, be taking the following steps in all their contractual arrangements to ensure that potential price changes have been taken into consideration:

> Review termination, change in law and *force majeure* provisions to prevent pricing changes from making contracts unaffordable.

> Check the tariff changes that may apply if the WTO rules are adopted, and allow for flexibility in pricing clauses.

> Map supply chains to check the impact of tariffs at different stages; this is particularly key for manufacturers of health care products.

HEALTH CARE PROCUREMENT

There is a range of possible procurement regimes that may be adopted, including a bespoke regime, or reliance on the WTO Government Procurement Agreement (GPA). The United Kingdom is a member of the GPA as part of the European Union and may need to re-join after Brexit, although there are some arguments that a fresh application may not be necessary.

The GPA sets out procedures, thresholds and principles that apply to procurements by government bodies listed in the GPA. Some of these procedures will look and feel very familiar to procurement specialists and will ensure continuity of service.

Given the substantial intra EU-UK trade, there is considerable enthusiasm for ensuring that suppliers have confidence that any process is not only fair and transparent but also allows for effective remedies. The NHS will continue to want and need EU suppliers of health care goods, products, equipment and IT to provide services to the public; and likewise the EU market will want to access UK health care providers.

The procurement of NHS services has been a controversial topic; some commentators have argued Brexit can be used to reverse perceived privatisation of public services. In reality, the NHS procurement rules do not stem from European legislation, but from the NHS purchaser and provider split, and market economy in health, which has been a policy of successive governments for almost two decades. Any change in this area would therefore be a matter of policy change for the UK Government.

> “Some of these procedures will look and feel very familiar to procurement specialists.”

There is a high degree of flexibility in EU procurement rules for NHS procurements under the light touch regime. Interestingly, the GPA does not contain a similar light touch regime so there would be no clear GPA regime that applied. Even upon Brexit, however, NHS procurements and NHS choice are regulated by a series of standalone regulations that will not be affected by Brexit. Any change in this area would, again, be a matter of policy change for the government.

Planning for an uncertain outcome is always difficult, but businesses are advised to ensure contracts and trade arrangements have flexibility around pricing and future changes in law. Flexibility clauses may sometimes increase the price of doing business, as parties factor in the risk of changes, so it will be important to keep a close and on-going watch on the negotiations.

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Brexit and the UK Insolvency Regime

ALICIA VIDEON AND EMMA JOLLEY

The UK financial sector thrives on confidence, underpinned by a well-developed and respected legal system. Brexit has knocked global confidence in the UK market, but businesses can still rely on the predictability of the English law system.

Amidst the many uncertainties surrounding Brexit, the potential loss of passporting rights has arguably received the most attention.

"Passporting" permits a financial services firm authorised in the United Kingdom to operate throughout the European Economic Area (EEA), without having to obtain operating licences in other EEA Member States. If the United Kingdom leaves the single market, UK financial institutions will lose their passporting rights, unless they are replicated in a bespoke agreement. This could have a major impact on lending activities throughout the European Union.

The European Banking Authorities' recent opinion on relocating to another EU Member State illustrates the gravity of the issue and how seriously it is being taken. The financial sector is exerting pressure to achieve a solution, including a transition agreement to alleviate some of the uncertainty.

The impact of Brexit on the UK insolvency regime has received less attention, but this may change when the current economic cycle turns and the country actually exits the European Union.

THE INSOLVENCY REGIME

The United Kingdom has traditionally been dominant in the restructuring and insolvency market, partly because of its reliable and well-developed insolvency laws and sophisticated court system.

> It will be vital to identify which jurisdictions and laws will best suit their needs.

There is a concern, however, that restructuring and insolvency procedures conducted under English law will be less certain in outcome, and more complex and costly as a result of Brexit. This would mean that businesses could become harder to rescue from financial difficulty, potentially increasing the rate of company failure.

Post-Brexit, the United Kingdom will no longer be a Member State for the purposes of the European Insolvency Regulation (EIR) or European Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation). Unless alternative solutions are found, there are implications for two key areas that will come into effect immediately upon Brexit.

Automatic Recognition of Insolvency Proceedings and Judgments

The most important implication is that UK insolvency proceedings, office-holders and judgments will cease to be automatically recognised under the EIR in EU Member States.

Recognition is vital for successful cross-border insolvencies and restructurings. In general, a UK officeholder will have to seek recognition under local laws, which is likely to be burdensome and to reduce certainty that a UK insolvency will be effective throughout the European Union.

The UK and EU position papers on judicial co-operation in civil and commercial matters address only limited aspects of co-operation on insolvency matters, most likely because of the complexity of this issue. The EIR was negotiated for over 10 years before it became effective, and co-operation on cross border insolvency laws is notoriously difficult to achieve. It seems unlikely that there will be a quick resolution of this issue.

Recognition of UK Schemes of Arrangement

The second implication concerns the basis on which UK schemes of arrangement are recognised in the European Union.

Companies incorporated outside the United Kingdom often choose English law schemes of arrangement to restructure their debts because the process is well-understood and predictable.

> Participants can take comfort in the efficacy and efficiency of the English insolvency regime.

An English court, when determining whether or not to sanction a scheme, will consider whether or not the order will be recognised in other jurisdictions where creditors might challenge it. The Brussels Regulation is commonly relied on as the basis for recognition. Post-Brexit, companies will need to demonstrate that the scheme will be recognised under the rules of private international law of the jurisdictions in question. This is again likely to be burdensome.

There is much speculation about the solutions for these two issues. The following are just some of the possibilities, and there is no obvious front runner:

- The application of the EIR application could be extended to the United Kingdom post-Brexit, but this seems unlikely.
- The United Kingdom could seek to negotiate bilateral agreements with each EU Member State.
- If the United Kingdom acceded to the European Free Trade Association the Lugano Convention would apply.

Even before the Brexit referendum, other countries were improving their restructuring and insolvency regimes, which in itself posed a threat to the United Kingdom's dominance. As in so many sectors, the UK's own review of its national restructuring and insolvency regime is likely to be put on hold until the Brexit negotiations move forward.

Whatever happens post-Brexit, market participants can take comfort in the efficacy and efficiency of the English insolvency regime and the creativity and expertise of the English legal system, notably its courts. These will remain a significant advantage and will undoubtedly adapt to whatever emerges over the next two years.

For companies experiencing financial distress post-Brexit, it will be vital to identify which jurisdictions and laws will best suit their needs. There will be opportunities to review this as the Brexit uncertainty lifts, as long as companies plan in advance.

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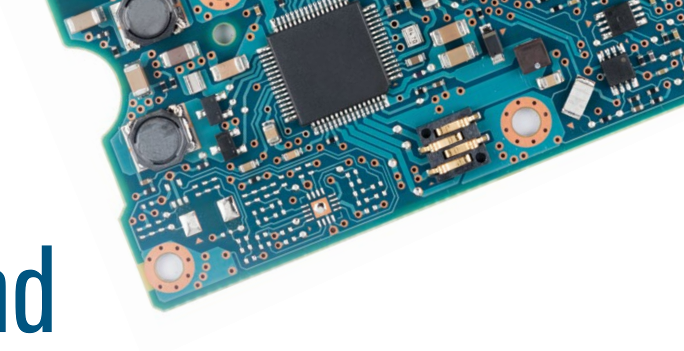

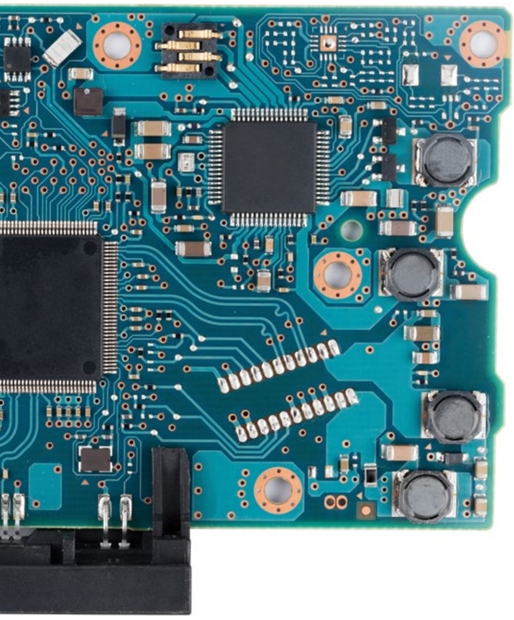

Brexit and the Free Flow of Data

ASHLEY WINTON AND PAUL MCGRATH

One of the less publicised but nonetheless important aspects of Brexit is whether or not UK companies will be able to maintain a free flow of personal data between the United Kingdom and the European Union.

The forthcoming General Data Protection Regulation (GDPR) will have a significant effect on businesses that process personal data. Its extra-territorial effect means that it will apply to non-European businesses if they do business in Europe or monitor the activities of Europeans. The GDPR becomes directly applicable across all EU Member States from 25 May 2018, 10 months before the United Kingdom is expected to leave the European Union.

On 14 September 2017, the UK Government introduced an extensive Data Protection Bill that runs to over 200 pages and includes provisions dealing with the flow of personal data after Brexit.

The Bill seeks to do a number of key things, including: i) take advantage of provisions in the GDPR that permit more specific rules to be introduced in particular areas, most notably employment; ii) address certain processing that does not currently fall within EU law, for example, in relation to immigration and the intelligence services; iii) implement the EU Law Enforcement Directive; and iv) deal with Brexit.

> "The EU has demanded particular protection for EU data that remains in the UK after Brexit."

In relation to Brexit, the Bill suggests replacing references to European data protection authorities with references to the Information Commissioner's Office (ICO), which is the UK data protection authority. In addition, it provides that the ICO will co-operate and conduct joint operations and joint enforcement with European data protection authorities, and "have regard" to decisions and advice from the European Data Protection Board (EDPB).

This last provision is particularly important. The EDPB will comprise representatives of each of the national data protection authorities in the European Union, and its function is to ensure consistent application of the GDPR, provide additional guidance reflecting best practice, and issue official opinions in relation to the GDPR. It is likely that, without the pragmatic voice of the ICO within its membership, the EDPB will provide ever-more data subject-friendly recommendations and opinions. The key question currently relates to the extent to which the ICO will import that guidance into post-Brexit UK law.

In its policy paper The exchange and protection of personal data, the UK Government has stated that it hopes UK law will remain "adequate" so there can be a free flow of personal data between the European Union and the United Kingdom. In contrast, in its position paper on the Use of Data and Protection of Information Obtained or Processed before the withdrawal date, the European Union says it is concerned that UK law will not be adequate and, moreover, demands particular protection for EU data that remains in the United Kingdom after Brexit.

Until a concrete decision is in place, companies' best course of action is to prepare for compliance with UK data protection law and the European GDPR if they have entities or customers in the European Union; and keep a close eye on the ICO's adoption of EDPB opinions.

Gemma Cullen also contributed to this article.

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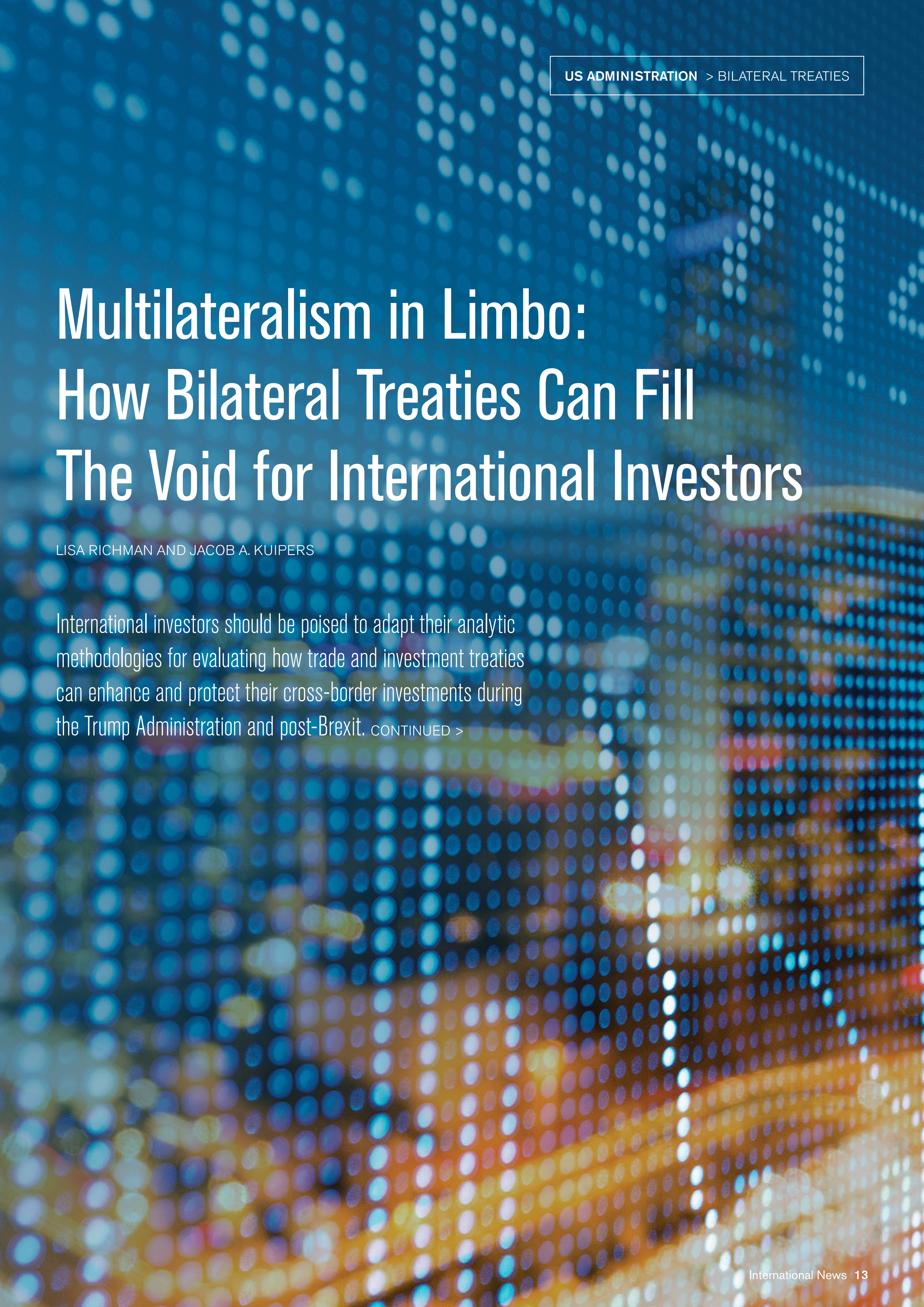

Multilateralism in Limbo: How Bilateral Treaties Can Fill The Void for International Investors

LISA RICHMAN AND JACOB A. KUIPERS

International investors should be poised to adapt their analytic methodologies for evaluating how trade and investment treaties can enhance and protect their cross-border investments during the Trump Administration and post-Brexit. CONTINUED >

As highlighted on p.4 recent actions by the United States and the United Kingdom call into question their status as global leaders of multilateral trade and investment co-operation. The United States, under the Trump Administration, and the United Kingdom, following the Brexit referendum, have embraced "go it alone" policies.

The results have been dramatic. In the first few months of the Trump Administration, the United States called for the renegotiation of the North American Free Trade Agreement (NAFTA) and halted its involvement in multilateral trade and investment treaties with various countries that border the Pacific Ocean (the Trans-Pacific Partnership). The United Kingdom is currently negotiating its withdrawal from the European Union, arguably one of the most comprehensive examples of multilateral co-operation.

Both countries have challenged the benefits of multilateral trade and investment agreements, contending that they have lost far more than they have gained by being part of the multi-country approach to investment co-operation. In the place of multilateral agreements, the United States and United Kingdom are hoping to negotiate bilateral treaties that make them better able to leverage their position to get more from the partnering country.

THE IMPORTANCE OF INTERNATIONAL TRADE AND INVESTMENT TREATIES

International trade and investment treaties come in a variety of structures. From the most comprehensive, which include provisions on *both* investment and trade, *e.g.*, NAFTA, to those that focus solely on investment *or* trade.

These treaties can also be among multiple participating countries (known as multilateral) or they can be between two countries (known as bilateral).

The various permutations of these treaties allow countries to tailor them to their specific trade and investment relationships. Their flexibility has helped fuel an explosion of such treaties over the last 50 years. There are now over 3,200 international trade and investment treaties worldwide.

Regardless of how they are structured, international trade and investment treaties are a motivating factor in an international investor's decision on whether or not to invest in a potential cross-border project.

First, such treaties can break down trade barriers by reducing or eliminating tariffs between countries.

Second, some treaties provide legal protections to private parties against state involvement. These protections include national treatment and most-favoured nation clauses, which require the state to offer the same or better terms to foreign investors as those offered to any domestic entity or other foreign investor. Other protections prohibit the state from expropriating the assets of a foreign investor or from violating its other commitments to the investor, sometimes referred to as an umbrella clause. Another protection is the application of a standard of fair and equitable treatment to the foreign entity's investments.

Third, many international trade and investment treaties offer an investor-state dispute settlement mechanism that allows the investor to bring a claim directly against the state before an arbitral tribunal, often in a neutral seat. If a state violates the protections afforded to international investors under the treaty, the investor has a mechanism to recoup the cost of the harm it suffered as a result of the state's actions. In concert, these provisions reduce risk and provide significant incentives to international investors in an effort to increase trade and investment flows between participating countries.

3,200+

international trade and investment treaties worldwide

A multilateral approach to trade and investment treaties may offer even greater opportunities for cross-border trade and investment flow. By having multiple countries join under the umbrella of a single treaty, a multilateral trade and investment treaty opens multiple markets and creates consistency of investment and trade rules across several countries. Such a system can allow global companies with multinational supply chains to efficiently move goods, services and capital freely across borders without risk of sovereign interference, depending on the terms of the relevant treaties.

MULTILATERALISM UNDER FIRE

Despite the advantages multinational treaties offer cross-border entities, the United States and United Kingdom—once leaders in promoting multilateral trade and investment deals—have backed away from some of the most influential trade and investment agreements of the last 30 years.

In both countries, nationalist politics has brought greater scrutiny to these treaties. Some policymakers argue that multilateral trade and investment treaties threaten national sovereignty by allowing the interests of other countries and private, cross-border entities to take precedence over national interests. At the same time, certain politicians have tied these treaties to the outsourcing of domestic industries and greater immigration that allegedly erode the cultural fabric of the country. As a result, multilateralism is perceived as globalist, which flies in the face of the currently popular nationalist agenda both countries are experiencing.

The Trump Administration, in particular, views multilateral negotiations as a zero-sum game, whereby one country's loss in another country's gain. With this in mind, the current US Government argues that multilateral treaties put the United States at a negotiating disadvantage, where it is forced to negotiate away its own interests in order to bring more countries into agreement. There doesn't appear to be much appetite for the argument that international trade and investment agreements provide win-win scenarios where all countries benefit. The result, some argue instead, is unfavourable trade and investment treaties that do more harm than good to the US economy.

At the time of going to press, the United Kingdom has expressed no intention of voluntarily withdrawing from multilateral treaties to which it is a member, such as the Energy Charter Treaty. Until negotiations are concluded, investors will not know whether or not the United Kingdom i) will automatically cease to be a party to all or parts of investment agreements to which it was a party as a result of its EU membership, ii) must formally give notice of termination, or iii) can pursue other options. The impact of "sunset clauses" within its current agreements, which provide for the continuation of certain provisions for a certain period of time, often decades after termination, is also unclear.

BILATERALISM IN THE SPOTLIGHT

Although the United States and United Kingdom appear to be embracing bilateralism instead of multilateral trade and investment agreements, leaders in both countries still appear to believe in global trade and investment. The Trump Administration and the UK Government have both signalled that each will work on a bilateral level to promote their country's trade and investment abroad.

They argue that bilateral treaties provide a better opportunity to extract more gains in the zero-sum game of treaty negotiation. By being able to negotiate one-on-one, the US and UK Governments believe they have better leverage. Both governments have already started eying other potential bilateral partners, including Japan, Russia, Taiwan and Vietnam.

IMPACT ON CROSS-BORDER BUSINESS

The transition from multilateral to bilateral agreements has the potential to disrupt the current international trade and investment landscape.

Several bilateral treaties in *lieu* of a single multilateral treaty may take longer to enact. Each treaty will likely require several rounds of negotiation, approval and ratification by a legislative authority. It may therefore take several years for new bilateral treaties to replace any multilateral treaties that have been eliminated.

Bilateral treaties may create a greater patchwork of trade and investment protections with varying mandates and provisions. If the United States and United Kingdom attempt to leverage one-on-one negotiations, investors should expect to see treaties that are highly specific to the participating countries. The greater specificity in treaties, the less integrated they are across other agreements. This has the potential to hinder efficiency and promote complexity in an already confusing landscape.

The added time and complexity brought on by bilateralism could increase the cost of conducting business across borders. Navigating and interpreting diverging trade and investment regulations, which might contradict one another, will force international businesses to greater scrutinise their international projects.

All is not lost, despite these potential new roadblocks. To avoid increased risk brought on by greater uncertainty and complexity, international investors should seek out ways to take advantage of the bilateral environment.

Investors can do this by considering a multi-tiered investment structure that leverages the benefits of a number of bilateral agreements. Although a more complicated process, investors can gain a competitive advantage by mastering the complexity and ensuring that they comply with any requirements for securing BIT protection in each relevant circumstance.

Investors also can utilise political risk insurance, which is often available in addition to BIT protection, to reduce trade and investment risks.

Through thoughtful project structuring and planning, investors can account for additional risks, notwithstanding some of the options that may disappear or be foreclosed as a result of recent US and UK policy decisions.

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Update on the NAFTA Renegotiations: What You Need to Know

LISA RICHMAN

The cancellation of US involvement in the TPP, and its potential withdrawal from NAFTA have sparked considerable anxiety over the loss of protections and opportunities both investment treaties afford. But there are alternatives.

The Trump Administration has proposed substantial changes to the terms of the North American Free Trade Agreement (NAFTA), a multilateral trade and investment agreement between the United States, Canada and Mexico. During five rounds of negotiations, the representatives of the parties to NAFTA have made some progress, notably on the technical aspects of the agreement in the latest round of talks in Mexico City, such as digital trade, telecommunications, anti-corruption, customs procedures, and health and safety standards for food. They have not, however, managed to make progress on crucial aspects of the agreement, including investor-state dispute settlement.

WHAT DOES NAFTA CURRENTLY PROVIDE?

NAFTA currently provides certain protections for the benefit of investors from all three countries, including

> Elimination or reduction of tariffs for qualifying products.

> Cross-border intellectual property protection.

> Access to government procurement opportunities.

> Protection against expropriation without compensation and discrimination.

> The right to fair and equitable treatment.

> Most-favoured nation and national treatment protection.

Like some other bilateral and multilateral treaties, one of the key protections is that NAFTA provides an investor from the United States, Canada or Mexico the option to enforce its claims in an international arbitration through investor-state dispute settlement (ISDS).

WHAT IS BEING PROPOSED?

Shortly after his inauguration, President Trump signed a presidential memorandum pulling out of the Trans-Pacific Partnership (TPP). The TPP, which was negotiated for seven years between and among 12 countries (including the United States), remains one of the largest trade agreements ever contemplated. The purpose of the TPP was, among other things, to promote economic growth and enhance labour and environmental protections between and among the 12 countries.

One of the contemplated TPP provisions covers ISDS. Broadly speaking, ISDS is a dispute resolution mechanism that allows an investor from one country (the home state) that invests in another country (the host state) to bring claims that the host state (or an individual, agent or affiliate acting on behalf of or under the authority of the host state) violated the investor's rights granted under a treaty before an independent arbitral tribunal.

The investor does not have to first seek redress in national courts in the host state. This is an advantage, particularly because international arbitral awards are universally recognised and enforceable in over 140 countries worldwide under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also referred to as the New York Convention.

After having scrapped the TPP, President Trump has moved towards undoing NAFTA. Although he has not yet proposed a wholesale termination of NAFTA, US representatives have proposed significant changes to NAFTA, including the following:

> A proposal that NAFTA should automatically expire after five years unless all three signatory countries agree to renew it, which could impede the aim of providing stability.

> Changes to "rules of origin" provisions increasing the percentage of parts in cars that must be manufactured in North America in order to avoid import taxes from 62.5 per cent to 85 per cent.

- Expanding and enhancing intellectual property protections.
- Changes to provisions relating to agricultural trade, aviation trade and government procurement.
- An intent to remove ISDS from the agreement or make substantial changes to the dispute resolution mechanism.

President Trump has threatened to terminate NAFTA entirely unless the NAFTA countries can reach a resolution on these revisions.

WHAT COULD TERMINATION OF NAFTA MEAN FOR INVESTORS?

In addition to the impact on all investors of not having access to ISDS, the loss of the intellectual property protections and guaranteed access to lucrative government procurement contracts are likely to be the most obvious detriment to businesses if NAFTA is terminated.

While IP protections similar to those in NAFTA exist under the World Trade Organization (WTO), private parties lack standing to bring claims under the WTO dispute resolution system. As a result, companies that benefit from the IP protections contained in NAFTA will want to watch the negotiations carefully and determine whether or not investment restructuring is necessary and possible should NAFTA termination become an imminent risk.

Elimination of import permits or licenses, and local content, local production and export performance requirements when shipping products could increase the cost of manufacturing products that are produced partly in one NAFTA country but sold in another. This is most likely to hit exporters from the NAFTA countries and could result in an increase in the cost of imports into the United States and reduce exports from the United States, particularly if Mexico and Canada maintain NAFTA protections with each other.

On the flip side, the elimination of NAFTA could mean an increase in American jobs and less competition in the United States for US-manufactured or grown products, which could provide a boon for investors in US agriculture and manufacturing.

Economists largely agree that NAFTA has provided significant benefits to the North American economies. Regional trade increased over the treaty's first two decades, from roughly US$290 billion in 1993 to more than US$1.1 trillion in 2016. Cross-border investment also increased, with US foreign direct investment (FDI) in Mexico in that period going from US$15 billion to more than US$100 billion. US FDI in Canada during that period rose from US$70 billion to US$392 billion.

> "Other trade agreements may kick in that could help to reduce the impact of some of the changes."

Some experts also note that it is difficult to separate NAFTA's direct effects from other factors, including rapid technological change, expanded trade with other countries such as China, and tariff cuts on trade between the United States and most other countries when the US joined the WTO in 1995.

Despite China's arrival on the scene, however, Canada and Mexico remain the two largest destinations for US exports, accounting for more than a third of total exports.

Counterbalancing this is the increase in the bilateral trade deficit between the United States and Mexico, and the loss of hundreds of thousands of jobs in the United States, some of which can be blamed on the decline in US manufacturing jobs that might have occurred even in the absence of NAFTA. The impact of these lost jobs may be outweighed by higher productivity and lower consumer prices.

POTENTIAL ALTERNATIVES

If the United States withdraws from NAFTA, other trade agreements may kick in that could help to reduce the impact of some of the changes. For instance, because the NAFTA countries are all WTO members, in the absence of NAFTA, each must apply the import tariffs they offer to all other WTO countries.

It is possible that the United States and Canada could revert to the free trade agreement between them that was superseded by NAFTA, to provide for the continuation of certain protections, such as zero tariffs. Canada and Mexico could choose to continue to implement NAFTA between each other.

Unlike the situation regarding tariffs, the three NAFTA countries do not have another bilateral or multilateral investment treaty currently in force to protect investments from one of the NAFTA countries in the other two countries. Once the TPP is enacted, this will resolve the issue between Canada and Mexico, but not between the United States and the other two countries.

In the interim, another alternative is to restructure existing investments in order to continue to try to maintain some of the NAFTA-like benefits available under other trade and investment agreements. The United States, Mexico and Canada maintain a network of investment treaties with other countries that provide many of the same protections as NAFTA.

While keeping an eye on NAFTA renegotiations, companies should also investigate those alternatives to determine whether or not they might provide some measure of additional protection.

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What to Expect from Trump's FTC and DOJ in Terms of Merger Policy

JOEL GROSBERG AND LOUISE ABERG

After a long wait and months of speculation, President Trump has finally appointed new antitrust leadership at the Department of Justice's Antitrust Division and the Federal Trade Commission.

The new antitrust leadership at the Federal Trade Commission (FTC) and Department of Justice (DOJ) is likely to follow a mainstream Republican philosophy of merger enforcement. Both new leaders served in the FTC and DOJ during President George W. Bush's Administration so merger enforcement under President Trump is likely to be similar to the merger policy under President Bush.

This means we should expect merger challenges only if the economic evidence supports a cause of action, potentially a new approach for challenges based on vertical theories, scepticism for potential competition theories, and a greater emphasis on efficiencies.

THE NEW LEADERSHIP

The new head of the DOJ Antitrust Division started at the beginning of October.

On 27 September 2017, the US Senate finally confirmed Makan Delrahim to head the DOJ Antitrust Division. Mr Delrahim served in the Division from 2003 to 2005, where he primarily handled appellate matters and international coordination. Under Mr Delrahim, the DOJ Antitrust Division is expected to be less aggressive than during the Obama Administration, but it will not signal a return to Reagan-era *laissez faire* policies.

DOJ has also named several deputies to serve under Mr Delrahim: Andrew Finch, Bernard Nigro, Luke Froeb, Donald Kempf and Roger Alford. These positions are not subject to Senate confirmation.

The FTC is on the road to gaining new leadership. The agency is headed by five Commissioners, of whom not more than three can belong to the same political party. One of the Commissioners acts as Chairman. On 19 October 2017, President Trump nominated Joseph Simons to be the Chairman of the FTC and Rohit Chopra as Democratic Commissioner. Mr Simons is a seasoned antitrust lawyer with experience as director of the FTC's Bureau of Competition during President George W. Bush's Administration. Both nominees must now go through the confirmation process at the Senate.

As of early December 2017, there is still one seat to fill, which could rise to three if the two current Commissioners, Acting Chairman Maureen Ohlhausen and Terrell McSweeney, step down.

Given how long the Senate confirmation process can take, it may be several months before the new leadership starts at the FTC. Once it is in place, it is unlikely that there will be a dramatic change from merger enforcement under the Obama Administration, but Mr Simons will be more likely to demand solid economic evidence before challenging a transaction.

GREATER FOCUS ON TRADITIONAL HORIZONTAL MERGER ANALYSIS

The FTC and DOJ are likely to focus on traditional horizontal merger theories and are less likely to challenge deals based on potential competition/innovation theories.

In Mr Delrahim's first speech as head of the Antitrust Division, he stated that blocking a pro-competitive transaction can be just as dangerous as clearing an anti-competitive one: "The goal should be to promote, not stifle competition."

Luke Froeb, the new Chief Economist at the DOJ Antitrust Division, has publicly stated that he does not find market shares and concentration necessarily to be reliable indicators of competitive effects of a horizontal merger on the market. When he was Director of the FTC Bureau of Economics, he stated: "[M]arket shares and concentration may be poor predictors of merger effects." Deputy Assistant Attorney General Don Kempf has previously stated that, short of mergers to monopoly, "Most increases in concentration lead to an increase in competition, not a decrease."

Under the Trump Administration, we have already started to see changes in how DOJ will analyse horizontal transactions. In June 2017, DOJ approved the Dow/Dupont merger under the leadership of Andrew Finch, who was at the time Acting Assistant Attorney General of the Antitrust Division. Unlike the European Commission, DOJ concluded that the transaction did not raise innovation concerns, and therefore did not require the divestiture of research and development assets for new crop protection chemicals.

MORE CREDIT TO EFFICIENCIES

Under the Bush Administration, the agencies cleared a few controversial transactions based partly on the significant synergies of the transaction. Under the Trump Administration, it is to be expected that the antitrust agencies will similarly give significant credit to cost savings in analysing whether to challenge or clear a transaction.

When Mr Kempf served on the Antitrust Modernization Commission, he expressed the view that the Horizontal Merger Guidelines gave insufficient credit to merger efficiencies, urging the FTC and DOJ to give more credit to efficiency arguments when analysing mergers.

POTENTIAL NEW APPROACH TO VERTICAL TRANSACTIONS

While, initially, the mainstream view was that the antitrust agencies were likely to be sceptical about questioning most vertical transactions, DOJ has already challenged a major high-profile vertical transaction under Mr Delrahim's leadership.

In addition, on 16 November 2017, Mr Delrahim indicated in a speech that DOJ would "Return to the preferred focus on structural relief to remedy mergers that violate the law," thereby limiting the use of behavioural remedies in the case of vertical transactions, where such remedies have historically been common. According to Mr Delrahim, "A behavioural remedy supplants competition with regulation; it replaces disaggregated decision making with central planning." Mr Delrahim also said that, in his view, behavioural remedies might only serve to delay the exercise of anticompetitive market power by merged companies.

This position is in stark contrast with DOJ's previous policy. The question now is whether the FTC, under Mr Simons' leadership, will take a similar stance, or whether the FTC will continue to resort to behavioural remedies when concerns arise in vertical transactions.

DATA-DRIVEN APPROACH

Under the new leadership, the FTC and DOJ are unlikely to challenge transactions without the data and economic analysis to support it. Internal documents and customer testimony will still remain important factors, but greater weight is likely to be placed on the economic evidence.

In 2001-2002, when Mr Simons was Director of the FTC's Bureau of Competition, the FTC decided not to bring a challenge against two proposed transactions in the cruise industry: the combination of Royal Caribbean Cruises and P&O Princess Cruises, and the competing hostile tender offer by Carnival Corporation for Princess. The market was concentrated but, on the basis of empirical economic analysis, the FTC found that there was no likelihood of coordinated interaction between the companies on pricing post-merger.

CO-OPERATION AMONG COMPETITION AUTHORITIES

There will continue to be co-ordination between the US antitrust regulators and foreign jurisdictions, but we may see some differences in merger enforcement. As deputy assistant general for antitrust, Mr Delrahim worked on the co-ordination of international antitrust enforcement. Since being nominated for his new role, he has publicly indicated that he will continue focusing on this topic during his term.

In his comments, he has, however, hinted that he may be concerned that enforcers outside the United States, such as the European Commission, could bring actions against American companies out of protectionism. As we saw in the Dow/DuPont matter, there may be some differences in merger enforcement among antitrust regulators in global transactions.

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