Brexit Lawsuits, But Not As You Know Them

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Ioannis Glinavos Di 9 Mai 2017

Calling in the lawyers is becoming a frequent response to the challenges of Brexit. While court actions on matters of constitutional law are well known, there is another, less publicised, avenue of legal resistance. Let us consider the case of foreign financial firms that established themselves in the City of London to take advantage of the UK's much lauded position as the centre of European finance. The government's decision to interpret the Referendum result as a mandate to leave the single market heralds a fundamental change to the regulatory environment under which foreign firms had established in the UK.

Foreign owned financials could seek legal redress arguing that the changes brought about by Brexit (from the point of exit onwards) will violate legitimate expectations protected by Bilateral Investment Treaties (BITs) the UK has signed with their country of origin. BITs offer rights, protections and standards to investors that are in some ways superior to those enjoyed under domestic, or even EU law. These protections will survive Brexit as they are creatures of international law, not linked to the UK's EU membership. They are also enforced by an international system of Investor-State Dispute Settlement (ISDS) tribunals. Treaties promise to create favourable conditions for investment, reciprocally. These conditions include the fair and equitable treatment of businesses investing in the UK, freedom from discrimination, full protection and security.

For example, assuming a hard Brexit takes place in 2019, a Mexican-owned bank operating out of the City will be able to sue the UK in an investment tribunal for the loss of passporting rights on the strength of the UK-Mexico BIT of 2006. There is good precedent for suing western governments for radical changes in regulatory regimes. Spain is an example. Almost every foreign investor in the energy field has sued Spain for recent changes in incentives structures for renewable energy generation. The Spanish government had aimed to make the country a leader in clean energy. Spain promised a stable and welcoming environment to clean energy generators, which, it is claimed, acted as a guarantee of their successful commercial enterprise and financial viability. One could say the same about the UK and financial services.

Government promises can only be violated at a price. Relying on precedents found in investment arbitration awards against Mexico, Equador and Turkey, a claimant could argue that the UK will be in violation of treaty standards post Brexit. It all depends on whether tribunals will agree to protect the investors' legitimate expectations. In cases against Argentina, for example, it was held that expectations must be based on conditions offered by or prevailing in the host State at the time the original investment is made. To return to our Mexican bank example, it could be claimed that the loss of passporting represents a fundamental breach of representations made by the UK at the time of establishment. Could the UK counter that its policy volte-face does not constitute a violation of treaty standards, but was a result of an internal democratic process? Defending regulatory changes on the basis of political decisions has had a poor record of success in investment tribunals. The whole point of commitments in BITs is to protect investors from arbitrary policy changes. Not even arguments based upon economic emergencies seem to impress tribunals as shown in cases against Argentina. Claimants would argue moreover that the UK's refusal to guarantee the payment of compensation for the costs arising from the loss of passporting rights, necessarily renders the UK's actions unlawful.

Could someone actually win such a case? While early decisions on the Spanish cases did not favour investors, claimants scored a notable win in May 2017. Actually, the brilliance of this method of leveraging Brexit is that one does not have to win. The precedent of Argentina is indicative of how aggrieved investors may use ISDS tribunals in the Brexit context. Tribunals tend to hear disputes even when the alleged violations have led to losses stemming from measures falling short of outright expropriations or shut downs. It is crucial to emphasise here that these actions will not be coming to tribunals necessarily because investors expect to win substantial amounts in compensation. Rather, they will be surfacing at increasing volumes because of the political leverage they create. Countries like Greece, Spain, and Argentina have already experienced the consequences. Having investors complaining in tribunals is not conducive to market stability. Investors will be hoping to force

settlements. Theresa May has already shown willingness to compromise by making promises to certain members of the auto industry to shield them from the consequences of Brexit. Why shouldn't financials get the same treatment, especially if they can wave an ISDS stick at the government? The consequence of all this? The Brexit bill is about to become a lot bigger.

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