The EU-UK Trade Agreement – Initial Impressions of the Dispute Settlement Provisions

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On Christmas Eve, the European Union ('EU') and United Kingdom ('UK') finally reached a draft trade agreement ('the Agreement') that will govern their post-Brexit affairs from 01 January 2021.[1] The deal, which has not yet been formally adopted or entered into force, comes to a hefty 1,246 pages and represents a major achievement of the negotiating teams who have managed to produce in one year a deal that would, in normal times, take at least five. One area that had been a matter of high political sensitivity was what would happen in the inevitable event of a dispute about the interpretation of the Agreement. The UK government was adamant that the European Court of Justice ('ECJ') would not have a role in settling such disputes as it could not be considered independent – a position captured in the old maxim *in propria causa nemo judex*. Presumably, the EU would have been equally discontent if the UK Supreme Court ('UKSC') had been given jurisdiction over disputes between the two sides. Happily, Part Six of the Agreement imposes some order on this potential quagmire.

The main headline is that the parties have agreed that 'arbitral tribunals' should be established to resolve disputes where initial consultations do not bear fruit (Article INST.14(1)). Thus, there will be no standing body such as the ECJ, the UKSC or the World Trade Organisation ('WTO') Appellate Body to resolve disputes but, rather, a series of *ad hoc* panels will be formed when needed. The general absence of ECJ and UKSC involvement was confirmed in Article INST.29(4A) – evidently a last-minute clarification judging by the use of uppercase. The decision not to create a new standing body is unsurprising – the broader deal itself is comparatively 'thin' and in any event the negotiators probably had enough to attend to without creating a new court architecture. Furthermore, the need for such a body was eased by the agreement that existing international courts and tribunals may be approached by an aggrieved party where they have jurisdiction over a 'substantially equivalent obligation' as the one under dispute in the Agreement (Article INST.12(1)). Thus, there will be parallel jurisdiction in some cases between a putative arbitral tribunal and another body such as a WTO panel.

In terms of significance, this lack of a standing tribunal with a dedicated set of individual panellists may limit the scope for a particularly coherent, distinctive or imaginative body of jurisprudence to emerge in the context of this EU-UK deal. Indeed, the decisions of the tribunals are expressly stated not to 'add to or diminish the rights' of the parties under Article INST.29(3) and so their wings have already been clipped. Of course, the WTO's Dispute Settlement Understanding makes the same claim[2] yet its Appellate Body now has a rich tradition of judicial activism, leaning towards *stare decisis* at times, as seen in *US – Stainless Steel (Mexico)* where it was 'deeply concerned' by a panel's departure from its jurisprudence. Note, however, that the Appellate Body has a permanent existence giving it much more opportunity to develop its own body of reasoning.[3] The lack of a standing body in the EU-UK context may result in greater reliance on the existing jurisprudence of other fora such as the WTO

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[1] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland (24 December 2020) <https://bit.ly/3aO2E83>.

[2] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 01 January 1995) 1867 UNTS 154 <https://bit.ly/34LZDRV> Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes Article 19(2).

[3] *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of the Appellate Body (30 April 2008) WT/DS344/AB/R <https://bit.ly/3pmMCGn> para 162.

Appellate Body. In terms of the implications of this, it should be borne in mind that the EU is one of the biggest trading blocks in the world and has been one of the most active litigants at the WTO. Thus, any reliance on WTO jurisprudence might allow disproportionately EU-influenced approaches and arguments (albeit developed while the UK was still a member) to creep in via the back door. Of course, this is a speculative point, and it must be assumed that the arbitral tribunals will be highly sensitive to any perception that they are drawing too liberally from any particular font.

In terms of the composition of the individual tribunals, they are to be comprised of three arbitrators for whom a selection process has been established (Article INST.15). In the first instance, the hope is that the parties will simply agree on which members will be appointed to a given tribunal and who will serve as chairperson (Article INST.15(2)). If there is no agreement, under Article INST.15(3), each party appoints one arbitrator from their respective list of arbitrators while the chairperson – who has the potential to break ties under Article INST.29(1) – is drawn by lot (i.e. at random) from a list of chairpersons comprised of non-EU or UK citizens (Article INST.15(4) and Article INST 27(1)(c)). The usual requirements for tribunal members in terms of expertise and independence are established (Article INST.16) as is the mandate that the arbitral tribunals are expected to fulfil: namely to provide an 'objective assessment' in fact and law on any matters brought before them (Article INST.17(a)). The provisions here seem to be intended to produce as simple an arrangement as possible based on an off-the-shelf model of an arbitral tribunal.

Given this bland even-handedness, it might seem unlikely that either side will have any 'edge' before the tribunal. That may be correct. However, if one sees the EU as an amalgam of 27 separate States rather than as a genuine collective, this arrangement may seem to favour the UK. This is because, in any given proceedings, the chances of a French, Spanish, Italian, German, Danish, Irish, Estonian (etc.) panel member being selected are very low (specifically, one in twenty-seven). On the other hand, the UK will always have a UK panel member in place. Again, the Agreement emphasises that the arbitrators must be independent and must not simply align their judgments with their 'home' power. Still, it is hard to deny that, in reality, jurists are influenced by their home jurisdictions and home jurisprudence in many subtle and subconscious ways. These factors being as they are, the tribunals seem set to have more of a British aura about them than, say, a Portuguese or Romanian one.

A related point to the one above is that individual EU member states are highly unlikely to have a panel member in place deciding on cases that will impact them and who can recognise the importance of issues that may have special significance to them. For example, in a fishing dispute concerning the UK, Belgium, and the Netherlands, the EU arbitrator may be Belgian. The Belgian arbitrator may understand the historic importance of Belgian fishing in the North Sea, but they may have less grasp of the history and significance of Dutch fishing in that body of water. In turn, they may decide in a manner than the Dutch see as incorrect. It is for this reason, and to avoid such problems, that the International Court of Justice always allows States to have a 'national' judge on the bench – even if it means bringing someone in *ad hoc*.[4] The EU-UK position may result in internal jockeying for panel shortlisting and appointments on the EU side in a way that will be less pronounced in the UK (though there may still be some internal representations from regional governments within the UK arguing for, say, a Scottish arbitrator to be listed or appointed). This point may become a source of some political tension within the EU, or just another issue to be diplomatically negotiated or bureaucratically smoothed over. Time will tell.

[4] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) UKTS 67 (1946) <https://bit.ly/38EPTtF> Article 31(2)-(3).

Moving to enforcement, the decisions of the arbitral tribunals are intended to have bite. They are 'binding' on the parties (Article INST.29(2)). The decisions are referred to as 'rulings' and if those rulings hold that one party has 'breached' (as opposed to some softer term) the Agreement, then the offending party 'shall take the necessary measures to comply immediately with the ruling' (Article INST.21(1)). Where immediate compliance is not possible, the parties are encouraged to agree on a reasonable period of time for compliance or, failing such agreement, the arbitral tribunal can be asked to set the period instead (Article INST.22(1)-(2)). Temporary measures are provided for in cases where the appropriate timescales are not met. In particular, the prejudiced party may engage in 'suspension of obligations' (i.e. countermeasures), provided the measures comply with the detailed provisions on their deployment (Article INST.24).

Given the importance of the EU-UK trade deal to both parties, it is unsurprising that robust enforcement procedures have been implemented. There has been much concern in the EU over potential UK efforts to undercut standards in order to gain an edge in international trade. For its part, the UK has pointed out that it has higher standards in areas such as environmental protection and animal welfare than the EU and that countries such as France subsidise their industries far more than the UK. The position seems to be broadly balanced. No doubt, there will be some efforts on both sides to get an edge – but the economic and reputational costs of any 'races to the bottom' are likely to be too high to be sustainable. The arbitral tribunals will be on hand to call-out any instances of unfair competition that do emerge. That is all to the good for both parties.

In summary, at first glance, the dispute settlement provisions of the EU-UK Trade Agreement seem to offer a simple and pragmatic mechanism for the speedy resolution of trade related disputes between close neighbours. The use of *ad hoc* panels rather than a standing body may afford slightly greater prominence to EU-originated trade jurisprudence. The composition of the tribunals may give slightly greater prominence to UK-based jurists relative to those from individual EU nations. Robust and timely enforcement mechanisms are in the interests of all. One thing is for certain: all eyes will be on the first arbitral tribunal when the work begins.