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The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?

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Abstract

The Trade and Cooperation Agreement between the European Union and the United Kingdom has established new institutions and dispute-settlement arrangements. This article reviews in detail these arrangements and finds that they are mostly intergovernmental in nature. Consequently, they are weaker than the corresponding provisions that used to apply to the UK when it was a member of the European Union. The article then considers the capacity of the new arrangements to resolve disputes. The article proposes that resolution, in this context, means that a dispute can be terminated without further action by either party that obstructs the functioning of the Trade and Cooperation Agreement and prevents it from achieving its objectives. The article identifies design flaws and weaknesses in the dispute-resolution procedures. For example, there is no independent institution responsible for enforcing compliance; the Parties may take "remedial" measures, "safeguard" measures or "rebalancing" measures without any prior authorization; the dispute-settlement tribunals do not have power to enforce compliance or impose sanctions; and the only "punishment" for non-compliance is the authorization of retaliatory action. The article argues that such flaws and weaknesses are likely to reduce the effectiveness of the resolution procedures to bring disputes to a closure or prevent disputes from spilling-over into unrelated policy areas and bilateral issues. Moreover, compliance is incentivized by the threat of retaliation which is an inefficient means of protecting the proper functioning of the Agreement. Retaliation creates by itself new barriers to bilateral trade and investment, instead of removing them.

Keywords: EU-UK Trade and Cooperation Agreement, Partnership Council, dispute settlement, remedial measures, rebalancing measures, safeguards.

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I am grateful for the comments I received from an official who wishes to remain anonymous.

1. Introduction

The relations between the European Union [EU] and the United Kingdom [UK] have deteriorated surprisingly quickly since the formal withdrawal of the UK from the EU on 31 January 2021. The primary cause has been the application of the Protocol on Ireland/Northern Ireland that is attached to the Withdrawal Agreement between the two Parties.[2] The European Commission has threatened to launch infringement proceedings which are allowed under the Withdrawal Agreement.[3]

The frictions in the bilateral relations immediately raise the broader question of how disputes can be resolved on other matters such as those covered by the Trade and Cooperation Agreement between the EU and the UK [the "Agreement"] that was signed on 30 December 2020 and entered into force on 1 May 2021 after receiving the consent of the European Parliament on 28 April 2021.[4]

Unlike the Withdrawal Agreement that is relatively short, about 180 pages, the Trade and Cooperation Agreement is very long and runs to more than 2500 pages of text. It covers many issues over which the two sides can disagree. Therefore, the purpose of this paper is to examine the robustness of the dispute-settlement arrangements in the TCA.

The TCA is accompanied by two other documents: The Agreement on the Safe and Peaceful Uses of Nuclear Energy, and the Agreement on Exchanging and Protecting Classified Information. The TCA itself is organised in seven parts, 783 articles, 49 annexes and three protocols. The annexes cover technical issues such as rules of origin, or rules concerning specific sectors such as energy, transport, etc. The three protocols regulate matters concerning VAT, customs and social security, respectively.[5]

The objective of the TCA or the Agreement is largely to re-state existing EU rules so as to ensure continuation of trade on tariff-free terms, although now exporters and importers on both sides have to cope with extra bureaucracy such as confirmation of compliance with the rules on origin and technical

[2] The text of the Withdrawal Agreement of the UK from the EU is published in OJ C 384, 12 November 2019. It can be accessed at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN

[3] See *Statement by the European Commission following the UK announcement regarding the operation of the Protocol on Ireland/Northern Ireland*, Statement/21/4586, 6 September 2021. It can be accessed at:
https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4586

[4] The Agreement was initially was published in the OJ L 444, 31 December 2020, pp. 14-1462. The definitive version of the Agreement, after the consent of the European Parliament was published in OJ L 149, 30 April 2021, pp. 10-2539. The initial version had a different method for numbering its articles. The definitive version numbers articles consecutively and it can be accessed at:
EUR-Lex - 22021A0430(01) - EN - EUR-Lex (europa.eu)
The two companion Agreements and related documents were published in OJ L 150, 30 April 2021 and OJ 149, 30 April 2021, respectively.

[5] A detailed description of the Agreement can be found in European Parliamentary Research Service, *EU-UK Trade and Cooperation Agreement: An analytical overview*, European Parliament, February 2021. It can be accessed at:
EU-UK Trade and Cooperation Agreement (europa.eu)

and phytosanitary standards.[6] Some of the EU rules copied in the Agreement are weakened as they are re-defined in an attenuated or more general form.[7] The scope of the Agreement is much narrower than that of the existing EU acquis.[8] For some sectors, the Agreement creates rather eliminates trade barriers and trade friction by defining additional conditions or exceptions from established EU rules that used to apply to the UK or simply by excluding them from the scope of the agreement [e.g. the application of rules of origin to otherwise tariff-free goods, the exception of the audio-visual sector from subsidy discipline or the exclusion of financial services from multiple provisions of the Agreement].[9] In a single sentence, the Agreement constricts and weakens the rules that applied to bilateral trade and investment until the end of 2020.[10]

By contrast, the institutional and dispute-settlement arrangements are new elements that did not exist when the UK was a member of the EU and therefore need to be studied in detail and assessed rigorously. These elements that make up what has been called the "governance" structure of the Agreement were one of the stumbling blocks that prevented the conclusion of the Agreement early enough so that it could be scrutinised by parliaments and ratified before the expiry of the transitional period on 31 December 2020.

The purpose of the paper is to review the provisions of the Agreement concerning the settlement of disputes and assess their robustness. Given the wish of the UK to "take back control" and escape from the jurisdiction of the Court of Justice of the EU, it is rather important to consider, first, how disputes can be settled and, second, whether they can be settled "definitively".

It is important to explain at the outset the meaning of the word "definitively" in the context of this article. The existence of a system to resolve disputes does not necessarily entail that every instance of a dispute resolution must satisfy both parties equally. However, an effective system should be able to bring disputes to a closure in the sense that no party persists with action that is contrary to the objectives of the agreement. For example, in the EU's legal system, regardless of whether parties are satisfied, the dispute can eventually be settled by the Court of Justice by bring it to a conclusion and terminating the action or behaviour that was contrary to primary or secondary law. This paper will argue that the

[6] Y. Ayele, G. Larbalestier, and N. Tamberi, *Post-Brexit: UK Trade in Goods*, University of Sussex, UK Trade Observatory, Briefing Paper 57, May 2021.

[7] A case in point is the chapter on subsidies. For an extensive analysis of the provisions of the Agreement on subsidies see P. Nicolaides, The UK is not bound by EU State aid rules: Subsidies in the Trade and Cooperation Agreement between the EU and the UK, *EU Law Live*, 4 January 2020. It can be accessed at: https://eulawlive.com/op-ed-the-uk-is-not-bound-by-eu-state-aid-rules-subsidies-in-the-trade-and-cooperation-agreement-between-the-eu-and-the-uk/

[8] L. Codogno and G. Galli, The real negotiation on Brexit is just at the beginning, *Domani*, 5 January 2021.

[9] S. Lowe, The Brexit deal is being celebrated as though it removes all tariffs. It doesn't, *Prospect*, 8 January 2021; P. Foster, With Brexit done, reality dawns that frictionless UK-EU trade is no more, *Financial Times*, 7 January 2021.

[10] Even before the TCA came into force, there was evidence of slowing down in bilateral trade as a result of increased uncertainty. See M. Douch, J. Du and E. Vanino, *Defying Gravity? Policy Uncertainty, Trade Destruction and Diversion*, Aston University Business School, Research Paper 3, May 2020.
More recently, a significant reduction in bilateral trade in goods has been document. This is attributed mainly to the extra checks and documents required at border crossings. See Y. Ayele, G. Larbalestier and N. Tamberi, *Post-Brexit: UK Trade in Goods*, University of Sussex, UK Trade Observatory, Briefing Paper 57, May 2021.

Agreement between the EU and the UK may not be able to settle disputes definitely because one or both Parties object to possible solutions so the disagreement continues indefinitely or because a dispute is allowed to fester without each party being willing to bring it to adjudication or because a dispute spills-over into unrelated area or issue. In these cases, the dispute remains unresolved.

The UK entered the negotiations with the EU with four main aims: Retain the same access to the EU's internal market, gain maximum flexibility to conduct its own trade affairs with third countries, define its own rules on state aid and escape from the jurisdiction of the Court of Justice. It is fair to say that it has failed on the first objective, largely succeeded on the other three objectives. However, the Agreement has substituted to a certain degree the oversight of the Court of Justice with that of arbitration tribunals. The big difference for the purposes of this article is that arbitration tribunals are unlikely to achieve effective closure of disputes or, at least, to the same extent as the Court of Justice.

The Agreement is composed of parts, annexes and protocols. The parts, seven in total, cover the following subjects:

1. Common and institutional provisions.
2. Trade, transport, fisheries and other arrangements.
3. Law enforcement and judicial cooperation in criminals matters.
4. Cooperation on health security and cyber security.
5. Participation in EU programmes and financial provisions.
6. Dispute settlement.
7. Final provisions.

This paper examines Part one and Part six of the Agreement and is structured as follows. Section 2 develops a conceptual framework for evaluating dispute resolution mechanisms. Sections 3 and 4 examine the "common and institutional provisions" in Part one of the Agreement and the rules and procedures on "dispute settlement" in Part six of the Agreement. These sections are necessarily descriptive. The main analysis of the paper is carried out in section 5 that assesses the dispute settlement arrangements of the Agreement and, in addition, compares them with the EU rules on detection and termination infringements that applied to the UK until 31 December 2020. Section 6 concludes by summarising the main findings of the article which are that the Agreement cannot ensure termination of a dispute either by bringing it to adjudication, nor by preventing the continuation of the dispute after adjudication.

Perhaps it is also prudent to spell out at the outset what the paper is not about. It does not seek to determine whether the Agreement favours either of the Parties. Nor, does it attempt to predict which Party may exploit it to its advantage. Although both of these issues are important, they can be investigated more meaningfully after the Agreement will have been implemented for a sufficient period of time. At any rate, there is no evidence to suggest that when they were negotiating the Agreement, the EU and the UK identified the likely consequences from non-compliance and that they calculated the potential losses that would result from such non-compliance. Of course, it does not mean that these

issues were not taken into account by the respective negotiating teams.[11] It is just that there is no publicly available information pointing in that direction, apart from the statements of each side either wishing to "take back control" in the case of the UK or "protect the integrity of the internal market" in the case of the EU.

2. A conceptual framework

Every agreement necessarily produces, in addition to rights, obligations that circumscribe the discretion of the parties to the agreement. It is therefore trivially true to state that the UK and the EU are not free to treat arbitrarily each other's products and investors. Furthermore, no rational actor enters into an agreement that can make it worse off than without the agreement. We assume that both the EU and the UK have acted rationally and that both expect to gain from it. So both sides have voluntarily agreed to a set of rules that will limit their freedom of action and both sides expect that this limitation will be beneficial. Therefore, the question is how binding these rules are likely to be and, in relation to the purpose of this article, how effective they will be in containing disputes. This is even more so because "traditionally, the legal enforcement of obligations was the Achilles heel of bilateral and multilateral international agreements."[12]

At this stage, it is impossible to predict how the provisions of the Agreement will be applied, nor is it easy to identify potential deviations in two and a half thousand pages of legal text covering many different sectors and policy areas. Although the friction in early 2021 with respect to trade between Britain and Northern Ireland did not auger well for the TCA, that dispute concerned the implementation of the Protocol on Ireland/Northern Ireland in the Agreement on the Withdrawal of the UK from the EU, not the TCA.[13]

Rather, it is more feasible is to ask what may happen if one of the Parties of the Agreement fails to comply with its obligations. Not only a plausible answer can be provided by examining the institutional and dispute-settlement provisions of the Agreement, but also a sense of the "bindingness" of the Agreement can be gained by comparing those provisions to the infringement procedure of the EU and the remedies afforded to Member States, which no longer apply to the UK. Although the EU infringement procedure is internal, an alternative comparison between the TCA and other international agreements is not really fruitful because TCA contains novel elements and more extensive provisions than those in other EU agreements with third countries,[14] the position of the UK is unique being a former

[11] In response to my own informal inquiries, members of the negotiating teams did not indicate that such issues shaped the negotiations. It appears that they were more concerned about the clarity and scope of the rules under discussion.

[12] E. Szyszczak, *EU Enforcement of International Trade Rules*, 2021, Briefing Paper 55, UK Trade Policy Observatory, p. 2.

[13] OJ C 354I, 12 November 2019, pp. 1-177.

[14] Indeed, it has also been noted that the TCA contains "innovative procedures for *rebalancing* the trade elements of the TCA". While other trade agreements "include different types of dispute settlement mechanisms, they do not include the possibility to impose rebalancing measures against non-compliant third countries." See E. Szyszczak, *EU Enforcement of International Trade Rules*, p. 2.

EU Member State and there is a much richer experience of what happens when Member States fail to comply with their obligations.[15]

In their investigation of what makes international agreements work, O'Brien and Gowan identify the following factors: existence of political will, the depth of the agreement (apparently there is an inverse relationship between breadth and depth), the exclusivity of the agreement in terms of number of parties (the higher the number of parties involved, the lower the common denominator in terms of common interests), and the presence of strong implementation and monitoring arrangements.[16,17]

With respect to the factors that influence the implementation and monitoring of international agreements, they find the following to have empirical significance: the attitude of domestic politics, information sharing between parties, the possibility and extent of sanctions, whether non-governmental actors have legal standing, the administrative capacity of parties and the "resilience" of the agreement in terms of being able to respond to unexpected shocks.

In this article, I too examine the provisions of the EU-UK Agreement on sanctions and the role of non-governmental actors. In addition, in the conceptual framework that is developed below I consider the ability of an agreement to end disputes and of preventing them from spilling outside the boundaries of the agreement itself.

International agreements allow for sanctions in order to incentivise compliance. However, as has been noted in the literature, it may be rational for the parties to an agreement to commit only to weak formal sanctions.[18] This is when their perceived losses from non-compliance are commensurately small or when they can use their proportionately larger power to change their behaviour of other side. Therefore, an apparently "badly" designed agreement that, for example is not sufficiently detailed, does not necessarily represent design failure. It may be a rational choice of the parties. Section 5 of this article considers the consequences of imperfect dispute-settlement and enforcement arrangements.

[15] Indeed there is not much empirical evidence on resolution of disputes in bilateral agreements. Erika Szyszczak has argued that "the Dispute Mechanism Systems (DMS) in many trade agreements have lain dormant because countries preferred to use the World Trade Organization (WTO), with its Appellate mechanisms, as the forum to resolve international disputes." See E. Szyszczak, *Dispute Resolution in EU Trade Agreements: A Preliminary Glimpse of a New World Order*, UK Trade Observatory, 26 June 2019. It can be accessed at:
Dispute Resolution in EU Trade Agreements: A Preliminary Glimpse of a New World Order « UK Trade Policy Observatory (sussex.ac.uk)

[16] E. O'Brien and R. Gowan, *What Makes International Agreements Work: Defining Factors for Success*, New York University, Center for International Cooperation, September 2012. It can be accessed at:
https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7839.pdf

[17] International agreements can take many different forms, can utilise many different instruments and can establish many different procedures. For a bird's eye view of the diversity such agreements in just one policy field, that of environmental protection, see R. Stavins et al, International Cooperation: Agreements and Instruments, in O. Edenhofer et al (eds), *Climate Change*, (Cambridge: Cambridge University Press, 2014), chapter 13.

[18] A. Guzman, The Design of International Agreements, *European Journal of International Law*, 2005, vol. 16(4), pp. 579–612.

But the essence of any agreement is to achieve compliance with whatever rules is lays down. And for this purpose, they set up procedures and/or institutions to resolve disputes. In his seminal work on institutions, the Nobel laureate Douglas North wrote that "institutions are a set of rules, compliance procedures and moral and ethical behavioural norms designed to constrain behaviour".[19] Weaver and Rockman see institutions as "important frameworks of rules, capabilities and constraints which determine (in part) the behaviour of actors".[20] Jeffrey Parker has argued that institutions affect behaviour and "the degree to which an institution accomplishes this is a measure of its potency".[21]

Therefore, institutions and their rules aim to "affect", "determine" or "constrain" behaviour. Consequently, this article seeks to assess the extent to which the new institutional arrangements for the resolution of disputes established by the Agreement can effectively prevent the two Parties from infringing the provisions of the Agreement. Since there is no ordinal measure of behavioural constraint, determinacy or bind, such an assessment can be enriched if it also carried out in a comparative fashion, not only through theoretical discussion. That is why in section 5 the dispute-settlement arrangements in the Agreement are also compared to those of the EU.

But a comparison of randomly selected institutional features is not enough. We need to determine beforehand what should be compared to what. For that purpose it is necessary to define a methodology for identifying the relevant institutional features.

Therefore, I would put it axiomatically that an ideal system of rules or the rules of an ideal governance structure have to satisfy at least three criteria:
Predictability: The rules have to be predictable in the sense that their meaning is clear so that those who have to comply with them understand what is required by the rules and how they can comply with them.
Efficiency: The remedies for infractions have to be efficient in the sense that they are capable of putting an end to the infraction without disturbing other relations between those to whom the rules apply.
Sufficiency (or *effectiveness*): The dispute-settlement rules should be sufficient (or effective) in the sense that they should be able to resolve a dispute, bring about closure and prevent the dispute from spilling-over beyond the boundaries of the rules to issues or areas not covered by those rules.

We will see that the Agreement between the EU and the UK is defective in terms of all three criteria. Since, however, no system is ideal, the magnitude of the institutional weaknesses of the Agreement can be better appreciated through a comparison with the corresponding features of the EU system.

[19] D. North, *Institutions, Institutional Change, and Economic Performance*, (Cambridge: Cambridge University Press, 1990), p.3.
[20] K. Weaver and B. Rockman, *Do Institutions Matter?* (Washington, DC: Brookings Institutions, 1993), p.9.
[21] J. Parker, *Comparative Federalism and Intergovernmental Agreements*, (London: Routledge, 2016), p.11; see also *Constructing a Theory of Intergovernmental Agreements: An Institutional Approach*, paper prepared for presentation at the annual meeting of the Canadian Political Science Association, Montreal, Quebec, 1-3 June, 2010, p.2.

At the time of writing of this article, the willingness of the two Parties to be bound by the commitments they assumed is already being tested. The European Commission announced on 15 of March 2021 that it sent "a letter of formal notice to the United Kingdom for breaching the substantive provisions of the Protocol on Ireland and Northern Ireland, as well as the good faith obligation under the Withdrawal Agreement."[22] The Commission initiated action on the basis of Article 12(4) of the Protocol, in conjunction with Article 258 of the Treaty on the Functioning of the European Union. The dispute is not about the TCA. Under Article 12(4) of the Protocol, the Court of Justice of the European Union has jurisdiction and powers to impose a lump sum or penalty payment. The dispute-settlement provisions of the TCA do not establish any role for the Court of Justice.

One may consider that the larger size of the EU and the power it confers to it would influence the propensity of each side to either seek or avoid confrontation. Indeed, this is true. The compliance of sovereign parties with an international agreement ultimately depends on relative power and the severity of sanctions they can inflict or suffer. But sanctions in the context of international agreements, unlike penalties imposed in domestic legal systems, also hurt the party that inflicts them.[23] This is because a retaliatory import or export restriction, for example, harms domestic importers or exporters, respectively. This also means that a relatively smaller party may choose to flout an international agreement if domestic politics make compliance a politically costlier option for the government of the day. Therefore, the mere fact that the UK is smaller than the EU does not in itself mean that the UK will shy away from confrontation. How it will act depends also on domestic politics and the available options at the disposal of the government. A strong domestic lobby with political influence may succeed to shape government policy at the expense of the wider economy. The same logic applies to the EU. All of the above possibilities impact on the effectiveness of the dispute-settlement provisions of the Agreement. However, notwithstanding the importance of such issues, they fall outside the scope of this article which does not examine the willingness of the two Parties to use their power but the ability of the Agreement to prevent them deviating from the letter and spirit of the Agreement.

The next section begins the analysis by reviewing the institutional provisions of the Agreement.

3. "Common and institutional provisions"

The Agreement has strong inter-governmental elements. Article 5 states that the Agreement does not confer any general rights to individuals [except in two minor instances] and that its provisions are not directly applicable in the domestic legal systems of the Parties.

Article 7 establishes a Partnership Council which is the highest decision-making body and is co-chaired by a member of the European Commission and a UK minister. The Partnership Council oversees the implementation of the Agreement and may amend or supplement the Agreement. The Partnership Council is assisted by 19 Specialised Committees [Article 8] and four Working Groups [Article 9].

[22] See Press Release IP/21/1132 of 15 March 2021. It can be accessed at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132
[23] See Guzman, The Design of International Agreements, op. cit.

Article 10 stipulates that the agenda and decisions of the Partnership Council or Specialised Committees are binding on the Parties. These decisions are adopted by mutual consent.

Parliaments and civil society do not have a formal role in the functioning of the Agreement. Article 11 provides for the creation of a Parliamentary Partnership Assembly as a forum for exchange of views. Articles 12, 13 and 14 require the Parties to consult civil society and domestic advisory groups on the implementation of the Agreement. The results of such consultation are not binding.

The conclusion that may be drawn from this review of the institutional provisions of the Agreement is that they have a strong intergovernmental basis:

1. It creates no rights for individuals [except in two instances].
2. It is not directly applicable in domestic legal systems.
3. It provides for no formal involvement of parliaments or civil society, except for exchange of views.
4. It requires decisions to be taken by mutual consent. Neither Party can be forced to act against its will.

We will see in section 5 that assesses the Agreement that the fact that the Agreement confers no rights to individuals and that it does not establish any institution that is independent of the two Parties to act in case of non-compliance diminishes the sufficiency or effectiveness of the dispute resolution as it concentrates all options in the hands of the two Parties. This concentration of options makes the Agreement more susceptible to politics and the application and compliance with its rules less predictable.

4. "Dispute settlement"

Before reviewing the provisions on resolution of disputes, it is important to note that the Agreement allows the two Parties to take unilateral measures prior to the initiation of the dispute-settlement procedure by either Party. The Agreement requires the Party that adopts such unilateral measures to notify the other Party which can request consultations and eventually the setting up of arbitration tribunal.

Such unilateral measures take several different forms:

- "Remedial measures" are allowed in relation to harmful subsidies [Article 374] and regulation of road transport [Article 469].
- "Rebalancing measures" are allowed in the event of "significant divergences" between the Parties, legally permitted by the Agreement, with respect to labour, social, environmental or climate protection or subsidy control [Article 411].
- "Compensatory measures" are allowed when fishing rights are withdrawn or suspended [Article 501].
- "Safeguard measures" are allowed in case of serious economic, societal or environmental difficulties of a sectoral or regional nature [Article 773].

Whenever such unilateral measures are implemented, the Agreement stipulates that they must be limited to what is "strictly necessary" and "proportionate" [Articles 374, 411, 773] and that priority should be given to measures that will "least disturb the functioning" of the Agreement" [Article 411]. In other words, the Agreement acknowledges that unilateral measures, even when they are eventually sanctioned by a positive ruling of an arbitration tribunal, inevitably have a restrictive effect on the trade and investment whose promotion is the very purpose of the Agreement.

More importantly, as explained in more detailed in the next section, remedial, rebalancing and safeguard actions make the behaviour of each Party less predictable to the other Party and to economic operators on either side of the English Channel. Given the possibility of these actions, there is even a greater need for an efficient and effective dispute-settlement procedure.

Dispute settlement: General principles

The specific provisions on dispute settlement are contained in Articles 734 to 762. Of particular importance for the purpose of this article are the provisions on "compliance" in Articles 746 to 750.

The two Parties have committed themselves to use exclusively the mechanism created by the Agreement to resolve disputes and not to resort to other options [Article 736]. If the dispute-settlement mechanisms were strong and effective, one could conclude that indeed this commitment is a strong evidence that the Agreement does have the capacity to bring disputes to closure. We will see that this is not the case. Moreover, even though the dispute settlement mechanism of the Agreement covers all of its provisions, there are ten groups of exception such as taxation, social security, etc. which probably weaken incentives for compliance [Article 735].

Articles 738 to 745 define the rules and procedures for consultations, time limits, provision of relevant information, establishment of arbitration tribunals, the composition, functions and decision-making rules of arbitration tribunals and the rights and obligations of the "complaining" and "respondent" Party. In addition, Articles 751 to 759 contain more specific rules on arbitration tribunals.

Compliance

Article 746 stipulates that if an arbitration tribunal finds breach of obligations under the Agreement, the respondent Party must take the necessary measures to comply immediately and to notify those measures to the complaining Party within a reasonable period of time [Article 747]. If the complaining Party is not satisfied, it may ask again the arbitration tribunal to decide on the matter [Article 748]. Any subsequent disagreements on the application of compliance measures are also subject to a decision by the arbitration tribunal [Article 750].

The nature of decisions of arbitration tribunals

Arbitration tribunals "shall make every effort to draft rulings and take decisions by consensus", otherwise they decide by majority vote [Article 754]. Decisions and rulings are binding on the EU and the UK, but not on their domestic courts which have no jurisdiction in the resolution of disputes between the Parties but are free to interpret the relevant provisions of domestic law. Nor, do decisions

and rulings create rights or obligations for natural or legal persons. This may lead to discrepancies between the interpretation of the provisions of the Agreement by a tribunal and the assessment of the implementation of the Agreement by a domestic court. The Agreement is silent on what may happen if such a discrepancy occurs. The Agreement does not empower arbitration tribunals to confirm compliance with their rulings and decisions.

At least three conclusions may be drawn from the review of the mechanism for the resolution of disputes. First, while all institutions set up by the Agreement decide only by mutual consent, arbitration tribunals may in the end rule by majority, although they too are requested to try to arrive first at a unanimous decision. This means that tribunals will be under pressure to find solutions that satisfy both Parties. This in itself is not condemnable or undesirable. But it may make it more difficult for members of arbitration tribunals to deviate from the default mode of decisions by unanimity when, in their view, a different ruling could be more effective for the long-term functioning of the Agreement.

Second, the Agreement allows the Parties to act before an arbitration tribunal is set up or before a final ruling by an arbitration tribunal. The two Parties can take remedial, rebalancing or safeguard measures if they consider that the other Party has infringed the provisions of the Agreement or if their interests are harmed. In a sense, they are allowed the "take the law into their own hands". By comparison, in the EU, aggrieved Member States would normally complain to the Commission and ask it to initiate legal action or obtain the prior permission of the Commission before they themselves implement restrictive measures [e.g. restriction of market access according to Regulation 2019/515 on mutual recognition].[24] Of course, EU Member States also breach EU law, as is evident from the many annual infringement proceedings. But in the EU there are two other important sources of action against non-compliant Member States: individuals can lodge proceedings before national courts on the basis of directly applicable provisions in the Treaties and the Commission is empowered to act against infringements.

Third, the ultimate incentive for compliance with the terms of the Agreement is harm from retaliatory action by the other Party. Arbitration tribunals have no power to impose punitive measures for non-compliance or non-conformity with a previous ruling finding non-compliance. As explained in the next section, this system is inefficient because it counters one distortion with another and introduces "power politics" in the decision to launch or not retaliatory action. In this context, "power politics" means the use of leverage in a policy area or sector outside the Agreement to achieve an objective in an area or sector covered by the Agreement. Given that the UK is economically smaller than the EU and more dependent on trade with the EU, one may argue that "power politics" will favour the EU and make it more difficult for the UK to infringe the provisions of the Agreement. But as explained in section 2, this difference in relative size does not mean that the UK will necessarily be more compliant or that the EU will be inclined to retaliate more frequently. Retaliatory action harms both sides and, therefore, whether a Party will actually seek to punish the other Party will depend on the relative importance of the sector concerned to both sides. Retaliation is more effective, the more important is the targeted sector to the

[24] Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State, OJ L 91, 29 March 2019, p. 1.

other side and the less important to the retaliator. The consequences of such action are further considered in the next section.

At this stage it is worth bearing in mind that in the EU penalties can only be imposed by the Court of Justice. The Court does not take into account the importance of a sector in the domestic economy. It only examines the merits of the case. When it imposes a financial penalty for failure to comply with a previous judgment finding infringement, the Court considers the seriousness and duration of the infringement and the country's ability to pay [as indicated by the size of its economy], rather than any economic concerns such as, for example, the contribution of the sector to the economy of the Member State or the jobs it supports.[25]

5. An assessment of the dispute settlement arrangements of the Agreement and a comparison with the EU rules on non-compliance that applied until 31 December 2020

It is instructive to begin the assessment by bearing in mind that the objective of the dispute settlement arrangements in the Agreement, as defined in Article 734, is to "establish an effective and efficient mechanism for avoiding and settling disputes". The Agreement does not really provide for any special procedure for avoiding disputes or diffusing disputes, such as raising an issue before independent experts whose positive or negative opinion, even if non-binding, may prevent escalation of a dispute. Parties may only bring issues of concern to the relevant committees and ultimately to the Partnership Council all of which, as noted earlier, can decide unanimously. But this is true of any agreement where parties mutually agree to end a dispute without any formal action.

Let us recall the three criteria of an ideal system defined in section 2: predictability, efficiency, sufficiency (or effectiveness). This article has not examined the predictability or clarity of the rules in the Agreement because that would necessitate analysis of every part of the Agreement – a task that goes far beyond the scope of this article. However, it can be noted that the Agreement introduces concepts whose meaning is not clear because they have not been interpreted in the EU's case law, such as "material effect on trade" [Article 366 on subsidies] or "significant negative effect" [Article 374 on remedial measures], or refers to concepts whose interpretation is rather subjective, such as the "public interest" [which is mentioned at multiple places in the Agreement such as, for example, Article 32 on trade remedies, Article 199 on digital trade, or Article 525 on personal data].

With respect to efficiency, the review of the dispute settlement in section 4 has shown that the ultimate remedy provided by the Agreement against non-compliance is retaliatory action. It is true that the Agreement requires the Parties to ensure that such action is "strictly proportionate" to the harm they have suffered. But it leaves it to the aggrieved Party to determine the necessity and proportionality of its remedial, rebalancing or safeguard measures. No prior assessment or confirmation by an independent entity is required. Even though the other Party can request the setting up of an arbitration

[25] For explanation of the factors that the Court of Justice takes into account to calculate the penalties it imposes on Member States see the two most recent cases: C-549/18, *Commission v Romania*, EU:C:2020:563, paragraph 72, and C-261/18, *Commission v Ireland*, EU:C:2019:955, paragraph 114.

tribunal to examine the proportionality of such a measure, the point is that the system that has been created ultimately allows action by the Parties that generates new distortions in bilateral trade or investment. Fines would have been more efficient. The absence of possibility for fines in place of punitive measures, not only creates legal uncertainty and commercial risk, but even if an arbitration tribunal rules against a restrictive measure at a later stage, damage to bilateral trade or investment is unavoidably inflicted.

With regard to sufficiency, the ultimate option for each of the Parties in case of non-compliance by the other is to retain its retaliatory measures. This does not end disputes. Rather it perpetuates them and, as noted above, it does so in a very inefficient manner. Moreover, the absence of an independent entity to initiate action to remedy infringements exposes each Party to possible exercise of leverage by the other Party whenever the latter considers it can use its power to exert pressure on or cause harm to the former. Disputes can spill-over to areas or sectors outside the Agreement.

These defects of the dispute-settlement mechanism of the Agreement can be seen more starkly when it is compared to the EU's corresponding structure. Seven significant differences can be identified. The purpose of this comparison is not to argue that the Agreement should have copied EU mechanisms. That would have been contrary to one of the UK's main negotiating objectives. Rather, the comparison highlights the nature of the defects and will inform the discussion at the end of this section on what could have been alternative mechanisms that do not necessarily copy those from which the UK wanted to escape.

First, EU institutions normally decide by simple or qualified majority whereas disputes in the Partnership Council are to be settled by mutual consent. That is, each Party holds a veto. A Party with a grievance has to raise it first in the relevant committee and then in the Partnership Council and if it is not satisfied by the response of the other Party it may proceed to initiate the dispute resolution procedure. One may ask what is wrong about this, if a dispute can be resolved with the consent of the other Party before an arbitration panel is set up. If a dispute is resolved, then, of course, that is the ideal outcome. The problem is that not all possible outcomes are ideal. If the respondent Party objects, the complaining Party will have to consider how its decision to proceed to arbitration may reflect on it in similar future situations or whether it may trigger non-cooperative behaviour by the other Party on other issues. If, for whatever reason, the complaining Party backs down because it fears retaliatory action or non-cooperative behaviour by the other Party, the dispute will be left unresolved and the rules of the Agreement will lose clarity.

This brings us to the second difference which is that, as noted earlier, the Agreement does not provide for an institution which is separate from the Parties to initiate proceedings. The Parties must do so themselves. Since this makes Parties vulnerable to possible retaliatory action within the Agreement [e.g. remedial, rebalancing or safeguard measures] or of arbitrary linkages to non-related issues outside the Agreement such as withholding a favour or concession in an area or sector which is different from the one in which the dispute arose, even when an aggrieved Party is 100% correct, its decision will be shaped by this calculus of expected consequences. Because of the absence of an independent "guardian" of the Agreement, power politics enters the calculus. In the end, whether and how a dispute

is resolved may be influenced by totally unrelated issues and concerns. Such a possibility, again, erodes the predictability of the rules of the Agreement and of its processes and does not effectively terminate disputes.

Third, given the absence of an independent "guardian" of the Agreement, the views of the two Parties are implicitly given equal value. By contrast, not only does the EU's three-stage infringement procedure manage to resolve many disagreements on the interpretation of the law before a case reaches EU courts, but it also creates a presumption in favour of the Commission.[26] If a Member State does not want to proceed to a court judgment, the Commission's view prevails. This expedites resolution of differences on the correct interpretation and application of EU law. No such mechanism or presumption exists in the Agreement. Of course, one may counter-argue that the Commission's view may not be correct or that the Commission may pursue its own agenda. This is indeed a possibility, but the evidence suggests that the vast majority of cases initiated by the Commission correctly identify infringements. When Member States reject the "reasoned opinion" of the Commission and persist in challenging it before EU courts, they succeed in only 14% of all cases. According to the data published in the annual reports of the Court of Justice, in the ten-year period 2010-2019, there were 478 judgments on alleged "failure to fulfil obligations" by Member States. In 411 cases the judgment confirmed such failure.[27] This amounts to a success rate of 86% for the Commission.

Fourth, the members of arbitration tribunals are chosen by the Parties. The Agreement explicitly requires them to act impartially. But nothing prevents the Parties from proposing those experts that each Party believes will be more receptive to its argumentation. Although eventually the experts have to be agreed by both Parties, this does not necessarily imply full impartiality by all experts. By contrast, in the EU no Member State knows which judges will deal with their case and, anyway, the judge who originates from a Member State which is a party to a case does not sit in judgment. There is a non-negligible possibility that the language that may be used in order for a tribunal to come to a decision may not be the most lucid and unambiguous.

Fifth, again as already noted, there are no provisions in the Agreement for financial penalties for non-compliance. The only consequence of non-compliance is the possibility of remedial action [i.e. retaliation] by the other Party. But such action also harms the aggrieved Party which, depending on the importance of the affected product or sector, may not pursue vigorous counter action. By contrast, in the EU penalties are financial in nature so that they do not disrupt trade or investment. More importantly, they are modulated according to the size of the Member State, the severity of the infringement and the duration of the infringement and/or the duration of the failure to put an end to

[26] According to the 2020 "Commission annual report on monitoring the application of EU law, Commission staff working document on general statistical overview, 31 July 2020, in 2019, the Commission sent to Member States 797 "letters of formal notice" [stage 1 of the procedure], only 316 "reasoned opinions" [stage 2 of the procedure] and referred to the Court only 31 cases under Article 258 TFEU and 2 cases under Article 260 TFEU [stage 3 of the procedure]. The report can be accessed at:
https://ec.europa.eu/info/sites/info/files/file_import/report-2019-commission-staff-working-document-monitoring-application-eu-law-general-statistical-overview-part1_en.pdf

[27] The annual reports of the Court of Justice can be accessed at:
https://curia.europa.eu/jcms/jcms/Jo2_7000/en/

the infringement after a judgment by EU courts.[28] This modulation appears to incentivise compliance as no Member State has persisted to pay penalties in order to perpetuate non-compliance.

Sixth, the Agreement is silent on whether arbitration tribunals can be guided by precedent or rulings of previous tribunals. This cuts both ways. On the one hand, each tribunal will be free to interpret afresh and take into account the evolving state of bilateral relations. On the other hand, however, continuity in interpretation over time provides predictability and legal certainty. As the Court of Justice has put it, uniform interpretation across Member States is the "keystone of the EU's judicial system".[29]

Seventh, in addition to non-compliance cases before EU courts, there can also be non-compliance cases brought before national courts. Certain provisions of the EU Treaties that create rights for individuals are directly applicable in national legal systems [e.g. internal market freedoms such as Article 56 TFEU or competition rules such as Article 108(3) TFEU]. There are no EU-wide statistics on such cases, but the many requests by national courts submitted each year to the Court of Justice for preliminary ruling suggest that their number is not insignificant. By contrast, the Agreement explicitly states that, with two exceptions, "nothing" in it creates rights for "persons other than those created between the Parties" and that its provisions cannot be "directly invoked in the domestic legal systems" of the Parties [see Article 5 of the Agreement]. Yet action by individuals could reduce or even eliminate the possibility of "power politics". As the Agreement stands, individuals may only request national courts to interpret the Agreement as transposed in national law. National courts will not have jurisdiction to determine whether each Party transposes correctly the Agreement in national law. The experience with preliminary rulings in the EU suggests that the Agreement by not conferring rights to individuals lacks an important safeguard of correct interpretation and implementation of its provisions in national law. Consequently, this may weaken compliance by the Parties.

The very purpose of any agreement is to constrain the discretion of the parties. Intergovernmental agreements define only the constraints that the parties are willing to accept. It is known that the EU was in favour of retaining the jurisdiction of the Court of Justice. It is also known that that was an anathema to the UK. Since one of the objectives of Brexit was for the UK to "take back control", it is understandable why the UK may not have wished for rules that would mimic the role of the Court of Justice. However, given that the two sides to the Agreement had discretion to design it as they saw fit, without duplicating EU mechanisms, they could have considered alternative arrangements of a more binding nature with the possibility of penalties. For example, at the beginning of the dispute resolution process, the Parties could have prevented the calculus of "power politics" from creeping into the Agreement by establishing an independent body to oversee the functioning of the Agreement. At the other end of the process, they could have empowered arbitration tribunals or a body separate from the tribunals to impose penalties.

[28] See the latest Communication from the Commission: Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, OJ C 309, 13 September 2019, p.1. The infringement procedure and the methodology for the calculation of penalties are explained by the European Commission here: https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

[29] Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176.

In this context, it is worth noting that the experience of the UK in judicial proceedings while it was a Member of the EU does not appear to have been especially negative in relation to that of other Member States. Moreover, its compliance record was better than those of the other large Member States [Germany, France, Italy]. So, it did not seem to have particular difficulties in complying with EU rules. During the 47-year period of its EU membership, the UK was subject to the infringement procedures laid down in Articles 258 & 260 TFEU. In the period from January 1973 to December 2020, the Commission initiated 142 such procedures against the UK that led to a judgment by EU courts. The other three large Member States were the subject of a considerably higher number of infringement proceedings.[30] There is no evidence that the UK was somehow targeted or that it failed to comply with a judgment finding infringement of primary or secondary law.[31]

As a member of the EU, the UK also had the right to launch legal proceedings against EU institutions on the basis of Articles 263 & 265 TFEU. In the same period, the UK initiated 30 such proceedings. In addition, the UK could avail itself of the possibility afforded by Article 259 TFEU to initiate action against other Member States before the Court of Justice. It never pursued such action, although there were two cases against it by France and Spain, respectively.[32]

Regardless of the motives behind the relatively weak dispute-settlement mechanism, we should expect certain consequences. The raison d'être of dispute-settlement provisions in general is not just to secure compliance but also to ensure that future, as of yet unthought of complications, can be resolved equitably and in conformity with the spirit and letter of the Agreement. Contracts and treaties are written with incomplete knowledge of how the future may unfold. Independent tribunals or enforcement institutions are established precisely because they offer the possibility of an impartial, objective and principled resolution of future disagreements on issues that are not visible at the time the contracts and treaties are signed. In the case of the Agreement between the EU and the UK, the absence of arrangements that prevent unilateral action or of restrictive measures in case of non-compliance with a decision of a tribunal and the absence of an independent "guardian" lead to the conclusion that the settlement of disputes will ultimately depend not on principles but on the political and commercial considerations of the day.

[30] By way of comparison, in the period 1973-2020, Italy was party in 631 infringement cases, France was party in 411 cases and Germany was party in 290 cases. Data obtained by the author using the search engine of the Court of Justice. It is not possible to use the search engine to identify references for preliminary ruling originating from the UK.

[31] It has been argued that the UK developed an aversion to the CJEU because the "Eurosceptics" in the Conservative Party valued sovereignty above all and because of the influence of the anti-European press. See M. Sandbu, What is sovereignty? *Financial Times*, 7 January 2021. But this explanation does not account for the absence of opposing ideas.

[32] Action by a Member State against another Member State under Article 259 TFEU is exceedingly rare. The Court of Justice has adjudicated only seven disputes between Member States in the period 1958-2020. The seven cases are: FR v UK, C-141/78, 4 October 1979: Fisheries dispute; BE v ES, C-388/95, 16 May 2000: Designation of origin of wine; ES v UK, C-145/04, 12 September 2006: Eligibility to vote in EP elections in Gibraltar; HU v SK, C-364/10, 16 October 2012: Refusal to allow entry to the President of Hungary; AT v DE, C-648/15, 12 September 2017: Application of double taxation convention; AT v DE, C-591/17, 18 June 2019: Passenger car vignette; SI v HR, C-457/18, 31 January 2020: Maritime border dispute [case information obtained by the author using the search engine of the Court of Justice].

Whatever guided the EU and the UK to design the Agreement as it is, the unavoidable conclusion is that the dispute-settlement arrangements are not likely to prove to be effective. Although the rulings and decisions of arbitration tribunals are binding on the Parties, there is no enforcement mechanism and no penalties apart from remedial action. This can undermine the predictability of the rules and weaken legal certainty.

6. Conclusions

The Trade and Cooperation Agreement between the EU and the UK has strong intergovernmental features. It does not create any general rights for individuals, it is not directly applicable in domestic legal systems, parliaments have no formal involvement and decisions are to be taken by mutual consent.

Disputes are to be resolved by arbitration tribunals whose members are chosen by the two Parties and which must strive to decide by unanimity. If unanimity proves impossible, they may decide by majority vote. Arbitration tribunals have no power to impose fines or other sanctions. Each Party may take remedial measures, safeguard measures or rebalancing measures without a prior approval by an arbitration tribunal.

But weak constraints on paper need not translate into unrestrained policy action in practice. The Agreement is symmetrical. What one Party can do, the other can do too. The fear of retaliation may induce compliance.

The UK and the EU will continue to interact also outside the Agreement. This implies that the very intergovernmental nature of the Trade and Cooperation Agreement leaves each side vulnerable to the exercise of power by the other side. Given its size, the EU may be at an advantage in this respect. However, such exercise of power has domestic repercussions on either side, which may discourage its use.

But the main point of this paper is that regardless of whether disputes break out or are contained, legal certainty is likely to suffer. “Power politics” can make it unclear whether and how the rules of the Agreement may be implemented and enforced.