Dispute settlement under the EU-UK Trade and Cooperation Agreement

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Arbitration analysis: Laura Rees-Evans, counsel, and Rhys Carvosso, intern, of Fietta LLP, discuss dispute settlement under the EU-UK Trade and Cooperation Agreement (EU-UK TCA or Agreement), outlining the Agreement's scope and structure and reviewing its dispute resolution provisions.

The UK and EU (the Parties) signed the EU-UK TCA on 30 December 2020. Now provisionally in force between the Parties, this article examines the framework and procedures for dispute settlement under the Agreement.

In short, most disputes arising under the EU-UK TCA are to be resolved by binding ad hoc arbitration directly between the Parties. Private parties who have been negatively impacted by a measure that is alleged to be in contravention of the EU-UK TCA have no direct rights or remedies under the EU-UK TCA, but instead will need to rely on either the UK or the EU (as the case may be) to seek resolution of the issue according to the Agreement's provisions.

Scope and structure of the dispute settlement provisions under the EU-UK TCA

The EU-UK TCA's core dispute settlement provisions are set out in Part Six, Title I of the EU-UK TCA. These provisions apply in respect of disputes arising under most aspects of Part Two (covering trade, transport and other arrangements) and Part Five (covering UK participation in EU programmes) (as well as the general provisions set out in Parts One and Seven (Common and Institutional Provisions, and Final Provisions). They do not apply to aspects of the EU-UK TCA's level playing field provisions relating to labour, social and environmental protection standards, disputes over which are to be resolved through consultations, or failing that by non-binding recommendations of a Panel of Experts (in Articles LPFS.9.1, 9.2 and 9.3). Part Six also excludes from its scope any disputes arising under Part Three, which has its own mechanism to resolve disputes concerning law enforcement and judicial co-operation in criminal matters, and Part Four (relating to thematic co-operation).

Exclusivity of the dispute settlement mechanism under the EU-UK TCA

The EU-UK TCA's dispute settlement mechanisms are exclusively for any disputes concerning the interpretation or application of its provisions, or of any 'supplementing agreement' (ie bilateral agreements between the EU and the UK subsequent to the EU-UK TCA, under Article COMPROV.2) (Article INST.11). However, where a measure allegedly breaches an obligation under the EU-UK TCA and a 'substantially equivalent obligation' under another international agreement that binds both Parties (eg the World Trade Organization (WTO) Agreement), the Party seeking redress has a choice of forum (Article INST.12(1)). Once it has initiated a dispute settlement procedure in one forum, however, it may only subsequently engage the other forum if the first selected forum 'fails to make findings for procedural or jurisdictional reasons' (Article INST.12(2)). This operates as a 'fork in the road' clause designed to preclude the possibility of parallel proceedings without prejudicing a Party's right to access dispute settlement under other agreements. Similar clauses exist in Article 29.3 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, signed in October 2016, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed in March 2018 (in Article 28.4 of the Trans-Pacific Partnership as incorporated therein), among others.

One of the major achievements of the EU-UK TCA (from the UK perspective) is the lack of any role for the Court of Justice in resolving disputes under the Agreement. This is a marked departure from the Withdrawal Agreement, pursuant to which the Court of Justice maintains an important role both in relation to new proceedings against the UK for failure to comply with EU law before the end of the transition period (Article 87), and in relation to questions of interpretation of EU law arising in the course of any arbitration under that Agreement (Article 174). The EU's negotiating mandate for the EU-UK TCA envisaged that the arbitration panel would be required to refer any questions of EU law to

the Court of Justice (paras 158–161). Such a provision is found in certain other recent EU trade agreements (eg Article 322 of the EU-Ukraine Association Agreement). The UK's approach to negotiations with the EU stated clearly that the UK would not accept the jurisdiction of the Court of Justice in the UK (part 1, para 83).

Procedure under Part Six

Only the Parties (ie the EU and the UK) themselves have standing to invoke the dispute settlement mechanisms under the EU-UK TCA. There is no mechanism for investor-state dispute settlement, preserving the position mutually sought in both the UK's (Article 33.2) and EU's (Article INST.9) draft negotiating texts. Article COMPROV.16 also provides that nothing in the Agreement shall be construed as conferring rights or imposing obligations on persons other than those between the Parties, or as permitting the Agreement to be invoked in any domestic legal proceeding.

The dispute settlement procedure in Part Six involves two stages. In the first instance, where one Party considers the other to have breached an obligation under the EU-UK TCA, the Parties 'shall endeavour' to enter into 'consultations in good faith' for a minimum of 30 days (Article INST.13).

If a respondent Party does not respond to a request for consultation within ten days, or consultations do not take place within the required timeframe, or do not produce a 'mutually agreed solution', or the Parties agree not to have consultations, the complaining Party may refer the dispute to arbitration in accordance with Article INST.14. Arbitration was likely chosen as the primary method of dispute settlement under the Agreement because it is familiar to both Parties and it provides a neutral forum for dispute settlement, with a certain degree of party control over the procedure, and leads to a binding outcome.

Arbitration under the EU-UK TCA

The function of the arbitration tribunal includes making 'decisions and rulings'. If a ruling determines that the respondent Party has breached an obligation under the EU-UK TCA, that Party must 'take the necessary measures to comply' with the ruling immediately (Article INST.21) or, if immediate compliance is not possible, within a reasonable period of time either agreed by the Parties or determined by the tribunal (Article INST.22). The respondent party must, before the end of that period, notify the other Party of any measure taken to comply with the ruling (Article INST.23(1)). Where the Parties disagree as to whether this measure brings the respondent Party into compliance, a 'compliance review' mechanism empowers the original arbitral tribunal to decide on the matter (Article INST.23(2)).

In the event of non-compliance after this reasonable period expires, a complaining Party may seek temporary remedies under Article INST.24, including compensation or, if non-compliance persists, the temporary suspension of its own obligations under the Agreement to an extent proportionate with the impairment caused by the respondent State's ongoing violation. A respondent Party may challenge a complaining Party's proposed suspensions on proportionality grounds before the original arbitral tribunal, and the suspension must not take effect until that tribunal has delivered its decision (Article INST.24.11).

The effect of tribunal rulings

Decisions and rulings of the arbitration tribunal are binding on the Parties, but cannot create rights or obligations with respect to natural or legal persons (Article INST.29(2)). They are also final: there is no appeal mechanism in Part Six akin to the WTO Appellate Body.

Decisions and rulings of the tribunal are required to be made publicly available (Article INST.29(5)). While there is no formal provision to the effect that tribunal rulings create precedent, this may not prevent subsequent tribunals from informally relying on reasoning and interpretations from earlier rulings (as international courts and tribunals routinely do in other contexts). In addition, unlike CETA (Article 29.17) and the CPTPP (Article 28.13(3)), among others, the EU-UK TCA does not require tribunals to take into account any relevant interpretations in WTO jurisprudence.

The Parties may terminate the arbitral procedure at any stage by reaching a 'mutually agreed solution' (Article INST.31). This solution may be adopted via a decision of the Partnership Council. This reinforces the centrality of co-operation and negotiated solutions in the EU-UK TCA framework.

Comparison to other agreements

The EU-UK TCA broadly emulates the approach to dispute settlement in other recent international trade agreements. For instance, CETA introduces a similar dispute settlement procedure in Chapter 29, involving the option for consultations (and mediation), access to binding arbitration by an ad hoc panel of three, a dual stage interim and final ruling, compliance within a reasonable period, a compliance review mechanism, and entitlement to temporary remedies (including suspension of obligations) in the event of non-compliance. Similar approaches are adopted in the CPTPP (in Chapter 28 of the TPP as incorporated therein), the RCEP (Chapter 19), and especially the UK-Japan CEPA (Chapter 22). While the USMCA (Chapter 31) differs slightly in its 'roster' of arbitrators and its five-member panel, among other things, it retains a similar skeleton.

Overall takeaways

For the most part the dispute settlement regime under Part Six of the EU-UK TCA is a routine emulation of other recent free trade agreements. Perhaps its most contentious aspects are its omissions—no investor-state dispute settlement mechanism, and no role for the Court of Justice. The former may disappoint cross-border investors, especially given the uncertain status of the UK's BITs with individual EU Member States (as we have discussed here). The latter will be regarded as a major win for UK negotiators, albeit a necessary one without which the EU-UK TCA may not have been possible at all.

Interviewed by Marie-Gabrielle Williams.