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Índice

I. Introduction

The terms of the Trade and Cooperation Agreement (hereinafter TCA)[1] were finally announced on 24 December 2020 and it entered into provisional force on 1 January 2021.[2] In view of the extent of their trading and other links, established during some 35 years' partnership in the European Union (hereinafter EU), Spain is one of the Member States most negatively impacted by the withdrawal of the United Kingdom (hereinafter UK). Within the parameters set, this study attempts to examine the main implications of the TCA for Spain and its businesses and to suggest ways in which they both may use the new opportunities presented.

The study starts by looking at the basic structure, nature, interpretation and institutional governance of the TCA (Section II). It then briefly examines the sectors in which the operation of the TCA has particular implications for Spain (Section III), before turning to look at its dispute settlement systems (Section IV). The focus will then move beyond the Union context in order to examine bilateral issues between Spain and the UK that are linked to the TCA but fall outside its remit (Section V). Lastly, the study will conclude with a review of the main issues raised in the study (Section VI). In addition, the study also provides an annex that comprises reflections and proposals for Spanish foreign policy vis-à-vis the TCA (Annex).

II. Overview of the TCA

The TCA was designed to manage a paradox: rather than promoting convergence between the parties to other free trade agreements, it manages (progressive) divergence between the EU and the UK, as the latter separates itself from the common customs union and single market, while seeking to promote stability in their relations.

1. Legal basis and nature

The present TCA itself is somewhat of a special case. Its nature is that of an international trade treaty – created in the image of the EU-Canada Comprehensive Economic and Trade Agreement (hereinafter CETA)[3] – but concluded on the basis of Article 217 Treaty on the Functioning of the European Union (hereinafter TFEU) that provides for the establishment of an association agreement with a third country. Such agreements are traditionally concluded as mixed agreements[4] because they include provisions concerning areas in which the EU shares competence with its Member States and so require ratification by all 27 States. However, "[i]n view of the exceptional and unique character" of the TCA, the Council of the EU exercised its power to classify it as an "EU-only" association agreement.[5] In this way, the Council exceptionally allowed itself to exercise shared EU competences for certain provisions of the TCA (e.g., social security coordination and aviation traffic rights) and so conclude it[6] with EP consent.[7]

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1 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 444, 31.12.2020, p. 14).

2 For a discussion on its provisional nature, see below at Section II.1.

3 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23).

4 Christine KADDOUS, "Les accords mixtes", en Niki ALOUPI *et al.*, *Les accords internationaux de l'Union européenne*, 3º ed., Editions de l'Université de Bruxelles, Bruselas, 2019, pp. 301-343, pp. 302-303, pp. 306-308.

5 As long as an international agreement does not cover areas coming under exclusive Member State competence, it could then be concluded as an EU-only agreement. For this to happen, the Council of the EU (bringing together the Member States) would have to decide to exercise the EU's shared competences, thereby pre-empting the Member States: Arts. 2(2) and 3(2) TFEU.

6 Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 444, 31.12.2020, p. 2).

7 Art. 218(6)(a)(i) TFEU. Association agreements require unanimity in the Council: Art. 218(8), second paragraph.

Due to the lack of time to organise this consent vote before the end of the transition period on 31 December 2020,[8] the European Commission[9] regarded it as "a matter of special urgency" that the TCA be in place from 1 January 2021, thereby avoiding a legal lacuna. Thus, with the Council's agreement,[10] the TCA entered into provisional effect,[11] pending the EP's democratic scrutiny and ratification. The EP had intended to grant its consent by the end of February[12] but the EU-UK Partnership Council (the highest TCA body) postponed it to the end of April.[13] Even this scheduling may now be in jeopardy because of the UK's unilateral extension of the grace period for adaptation to the new customs rules and border controls between Great Britain and Northern Ireland.[14] In retaliation, the EP announced on 4 March 2021 its refusal to grant any consent until this matter is resolved, thereby potentially pushing the deadline beyond the end of April.[15]

2. Interpretation

British negotiating demands[16] to exclude the jurisdiction of the Court of Justice of the European Union (hereinafter CJEU) from reviewing, interpreting or applying the TCA have been met. As a result,[17] the provisions of the TCA and any supplementing agreement are to be interpreted in good faith, in accordance with their ordinary meaning in their context, as well as in light of the object and purpose of the relevant agreement, in accordance with customary rules of interpretation of public international law. These latter rules include those codified in the Vienna Convention on the Law of Treaties 1969.[18]

Neither do the TCA nor its supplementing agreements create an obligation to interpret their provisions in accordance with the domestic law of either party[19] nor does it mean that an interpretation of such agreement given by the courts in the EU (including the CJEU) bind the UK courts or vice versa.[20] Moreover, the direct

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8 Art. 126, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ C 384 I, 12.11.2019, p. 1) (hereinafter WA).

9 The European Commission had previously said it would not seek provisional application of agreements prior to EP consent except for urgent or technical reasons: Andrei SUSE; Jan WOUTERS, "The Provisional Application of the EU's Mixed Trade and Investment Agreements", *Working Paper Leuven Centre for Global Governance Studies*, num. 201, 2018, pp 10-11, available at https://ghum.kuleuven.be/ggs/publications/working_papers/2018/201suse, (last accessed on 13.3.2021).

10 Art. 218(5) TFEU.

11 Under international law, treaties can be provisionally applied: Art. 25, Vienna Convention on the Law of Treaties, 23 May 1969 (U.N.T.S., vol. 1155, p. 331). In fact, the EU has previously done so on a number of occasions: Merijn CHAMON, "Provisional Application of Treaties: The EU's Contribution to the Development of International Law", *EJIL*, 31/3, 2020, pp. 883-915.

12 The Commission foresaw TCA application on a provisional basis "for a limited period of time until 28 February 2021" and thereby implied EP consent by 28 February: EUROPEAN COMMISSION, "Questions & Answers: EU-UK Trade and Cooperation Agreement", 24.12.2020, p. 2, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532, (last accessed 14.3.2021). However, on 28 December, the EP's Conference of Presidents (Political Group leaders) indicated that this might not take place until during the March plenary session: EP, "European Parliament to scrutinise deal on future EU-UK relations", *Press Release*, 28.12.2020, available at https://www.europarl.europa.eu/news/en/press-room/20201228IPR94701/european-parliament-to-scrutinise-deal-on-future-eu-uk-relations, (last accessed 14.3.2021).

13 On 23 February 2021, the EU-UK Partnership Council decided, at the EU's request, to extend the provisional application until 30 April 2021 to allow sufficient time to complete the legal-linguistic revision of the agreements in all 24 languages: COUNCIL OF THE EU, "EU-UK trade and cooperation agreement: Council requests European Parliament's consent", *Press Release*, 26.2.2021, available at https://www.consilium.europa.eu/en/press/press-releases/2021/02/26/eu-uk-trade-and-cooperation-agreement-council-requests-european-parliament-s-consent/, (last accessed 14.3.21).

14 Shawn POGATCHNIK, "Soiled deal: UK defies EU ban on British dirt on plants shipped to Northern Ireland", *politico.eu website*, 5.3.2021, available at https://www.politico.eu/article/soiled-deal-uk-defies-eu-ban-on-british-dirt-on-plants-shipped-to-northern-ireland/, (last accessed 14.3.2021).

15 Hans VON DER BURCHARD, "MEPs postpone setting date to ratify Brexit deal amid Northern Ireland row", *politico.eu website*, 4.3.2021, available at https://www.politico.eu/article/meps-postpone-setting-date-for-brexit-deal-ratification/, (last accessed 14.3.2021).

16 Even before the negotiations for the WA began back in 2017, the UK insisted that, whatever trade agreement were eventually to be concluded, the CJEU would have no jurisdiction to review or interpret it: Allan F. TATHAM, "El largo y sinuoso camino: un análisis de la negociación del Brexit desde la perspectiva británica", *El Cronista del Estado Social y Democrático de Derecho*, núm. 84-85, 2020, pp. 28-39, pp. 31-32.

17 Art. COMPROV.13(1) TCA.

18 VCLT, op. cit., note 11.

19 Art. COMPROV.13(2) TCA.

20 Art. COMPROV.13(3) TCA.

effect of the TCA and the supplementing agreements is expressly excluded.[21] Individuals and companies are consequently excluded from gaining directly effective rights under the TCA that could be litigated in their national courts.

The interpretation of the TCA may be more nuanced in practice. The EU's other new generation trade agreements expressly refer to the use of the decisions of the WTO panels and Appellate Body (hereinafter AB) to assist in their interpretation.[22] In the TCA, however, there is no actual prohibition from using and no requirement to use interpretations made by those WTO bodies or even by the CJEU, in order to determine the meaning of the TCA. Due to their close drafting alignment with EU and WTO provisions, some TCA clauses lend themselves to being interpreted in line with previous rulings of the CJEU or WTO panels and AB, e.g., on competition policy and state aids (subsidies). In practice,[23] then, national courts and TCA arbitration panels – conscious of maintaining legal certainty and mindful of the dynamic nature of the evolving relations under the Agreement – are likely to receive guidance from WTO and CJEU decisions as inspiration for interpreting the same or similarly worded TCA provisions.

3. Review and termination

Lastly, the parties are to conduct a joint review every five years of the implementation of the TCA and its supplementing agreements.[24] Moreover, either party may terminate it with twelve months' written notice.[25]

However, other bases exist for terminating the TCA more swiftly, in whole or in part (or merely suspending it).[26] These include the circumstance where there has been a serious and substantial failure by a party to fulfil any of the obligations described as "essential elements,"[27] viz., the provisions relating to democracy, rule of law and human rights;[28] the fight against climate change;[29] and countering proliferation of weapons of mass destruction.[30] Before terminating (or suspending) the TCA, the party invoking this power must request an immediate meeting of the Partnership Council (hereinafter PC), with a view to seeking a timely and mutually agreeable solution. If such a solution cannot be found within 30 days, then the party may take the termination (or suspension) measures referred to.

In addition, every four years, either party can trigger reviews of the entire trade part of the TCA[31] that could result in the suspension or termination of that part. Such review can be initiated where a party considers that the arrangement between them has become unbalanced or, more frequently, if:

> "measures [on subsidies, labour or environment standards] … have been taken frequently by either or both Parties, or if a measure that has a material impact on the trade or investment between the Parties has been applied for a period of 12 months."

In the review, a party can propose amendments to the TCA, aimed at creating a different balance of rights and obligations between the parties. If the ensuing negotiations have not resolved the situation after a year, then

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21 Art. COMPROV.16.1 TCA. Art. COMPROV.16.2 TCA also precludes either party from establishing, under domestic law, a right of action against the other party in case that party has allegedly breached the TCA or any future supplementing agreement.

22 For example, Art. 29.17 CETA, loc. cit., note 3; and Art. 21.16 Agreement between the European Union and Japan for an Economic Partnership (OJ L 330, 27.12.2018, p. 3) (hereinafter JEPA).

23 Allan F. TATHAM, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland*, Martinus Nijhoff, Leiden, 2009, pp. 32-40.

24 Art. FINPROV.3 TCA.

25 Art. FINPROV.8 TCA.

26 Art. INST.35 TCA.

27 Art. COMPROV.12 TCA.

28 Art. COMPROV.4(1) TCA.

29 Art. COMPROV.5.1 TCA.

30 Art. COMPROV.6(1) TCA.

31 Art. [LPE] 9.4.4-9, Title 11 TCA.

suspension or even termination of the trade part of the TCA can ensue and thus force the EU and the UK to revert to trading on WTO terms.[32]

4. Overall structure

The body of the TCA consists of seven parts. The first part deals with common rules and the institutional set-up of the TCA. The main substantive parts of the TCA concern: (i) trade and other arrangements (including intellectual property, public procurement, aviation, road transport, energy, fisheries, social security and visas for short-term visits);[33] (ii) law enforcement and judicial cooperation in criminal matters;[34] (iii) thematic cooperation (including health and cyber security);[35] and (iv) participation in Union programmes, sound financial management and financial provisions.[36] The sixth part establishes a dispute settlement system and sets out a series of horizontal provisions, while the seventh deals with various final provisions.

In addition, there are three attached protocols that cover: (i) administrative co-operation and combatting fraud in the VAT field and mutual assistance in tax recovery; (ii) mutual administrative assistance in customs matters; and (iii) social security co-ordination.

Lastly, the EU and the UK can conclude further bilateral agreements that supplement the TCA's provisions.[37] Concluded at the same time as the terms of the TCA are a number of instruments: (i) the Nuclear Cooperation Agreement signed between the European Atomic Energy Community and the UK;[38] (ii) the Security of Information Agreement between the EU and the UK;[39] and (iii) a series of Joint Declarations on a range of important issues where further cooperation is foreseen, e.g., financial services regulatory cooperation, subsidies, and the declaration of adequacy decisions.

5. Institutional framework

5.1. Context

Since their inception, the EU has sought to provide common governance structures and joint bodies in its agreements with third countries, whether association or trade agreements, in order to ensure supervision of their operation and to empower such treaty-established bodies to make decisions binding on both parties. In this way, the EU provides for the dynamic evolution of the relevant agreement without need for constant recourse to the Member States to secure a treaty revision. The present TCA follows the structures provided for in the Union's new generation trade agreements,[40] themselves reflecting the influence of WTO governance structures.[41] This underlines again the inter-party, executive nature of the TCA, free from judicial control by the CJEU and subject to very light parliamentary oversight.

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32 INSTITUTE FOR GOVERNMENT, *UK-EU Future Relationship: the deal: Level playing Field*, 16.12.2020, available at https://www.instituteforgovernment.org.uk/explainers/future-relationship-level-playing-field, (last accessed 14.3.2021).

33 Part Two TCA.

34 Part Three TCA.

35 Part Four TCA.

36 Part Five TCA.

37 Art. COMPROV.2.1 TCA.

38 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and the Peaceful Uses of Nuclear Energy (OJ L 445, 31.12.2020, p. 5).

39 Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning Security Procedures for Exchanging and Protecting Classified Information (OJ L 444, 31.12.2020, p. 1463).

40 For example, CETA, loc. cit., note 3; and JEPA, loc. cit., note 22.

41 In the WTO, the Ministerial Conference is assisted by the General Council and by a network of committees and working groups.

5.2. TCA bodies

For its implementation and administration, the Agreement establishes a hierarchy of bodies, each co-chaired by an EU and a UK representative. Decisions of these bodies are taken by mutual consent and bind the parties. Although the European Commission is to represent the EU side in all the TCA bodies,[42] each Member State will still be allowed to send one representative to accompany the Commission representative (as part of the EU delegation) in meetings.

Like any large Member State with a cadre of expert officials, Spain will be in a strong position to follow the extensive and complex work of the TCA bodies. Although the European Commission side will retain exclusive charge in the TCA bodies, Spain will still be able to exert a degree of soft diplomacy in these matters. In this respect, it will be able to draw upon the expertise it has already built up with regard to the implementation other new generation trade agreements. Moreover, in those areas of shared competence under the TCA, articulation of Spanish interests (in common with fellow EU Member States) will ensure national concerns are articulated in the TCA bodies.

a. Partnership Council

At the apex of this hierarchy is the PC. This body will supervise the attainment of the TCA's objectives (and any supplementing agreement[43]) and facilitate its implementation at a senior political level, providing strategic direction. The PC is composed of representatives of the EU and the UK[44] and, similarly to the Joint Committee set up by the UK-EU Withdrawal Agreement,[45] is to meet at least annually and be co-chaired by a member of the European Commission and a representative of the UK government at ministerial level.

Either party can refer any issue relating to the implementation, application or interpretation of the TCA to the PC that then has the power to adopt (binding) decisions and (non-binding) recommendations in relation to the Agreement. Moreover, the PC can also delegate some of its powers to the Trade Partnership Committee or specialised committees detailed below[46] and, where provided, can amend some of the substantive (but not the institutional) provisions of the TCA itself.[47]

b. Network of committees and working groups

A network of technical committees and working groups supports the PC in its work. Chief among these is the Trade Partnership Committee (hereinafter TPC) that assists the PC and supervises the work of the ten Trade Specialised Committees (hereinafter TSCs) with specific areas of competence, e.g., goods; customs cooperation and rules of origin; sanitary and phytosanitary; technical barriers to trade; intellectual property; public procurement; and the level playing field. The TPC also possesses the power to dissolve TSCs or establish other ones.

In addition, eight (non-trade) specialised committees are planned in relation to other chapters of the TCA and deal directly with the PC, which retains the right to dissolve any of them or create new ones. These committees deal with, e.g., energy; aviation safety; transport; law enforcement and judicial cooperation; and participation in Union programmes.

All committees, irrespective of their designation, monitor the implementation of the TCA and assist the PC in its work, meeting at least once a year. However, in order to render the operation of the TCA much smoother, it is likely that the committees will meet more often. The committees (like the PC) also have the power to adopt decisions or make recommendations within their field of competence.

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42 Article 2 of the Council Decision on the signing of the TCA stipulates that the Commission will represent the EU within the Partnership Council, Trade Partnership Committee, Trade Specialised Committees and Specialised Committees.

43 The common provisions refer to supplementing agreements to the TCA that "shall be an integral part of the overall bilateral relations as governed by [the TCA] and shall form part of the overall framework": Art. COMPROV.2 TCA.

44 Art. INST.1 TCA.

45 Art. 164 WA, op. cit., note 8.

46 Arts. INST.1.4 and 2.1 TCA. See also Art. INST.4.1 TCA and TCA Annex INST: Rules of Procedure of the Partnership Council and Committees.

47 For example, Art. CUSTMS.21.1 TCA authorises the PC to amend TCA Annex CUSTMS-1 on Authorised Economic Operators.

Lastly, the TCA establishes four working groups. The Trade Specialised Committee on Technical Barriers to Trade supervises three of them, viz., those on organic products; on motor vehicles and parts; and on medicinal products.[48] The Specialised Committee on Social Security Coordination supervises the working group in that field. Further working groups may be established when necessary.

The powers given to these TCA bodies ought to allow the EU and UK to adjust the TCA and how it operates on the basis of an ongoing, positive trade relationship. Yet the TCA model of decision-making through mutual consent could become a hostage to circumstances if trade tensions begin to rise, leading to gridlock between the parties in the TCA bodies.

c. Parliamentary cooperation

The EP and the UK Parliament may establish a Parliamentary Partnership Assembly (hereinafter PPA)[49] consisting of members of both parliaments, as a forum to exchange views on the partnership. There is no limit put on the number of members from each party: typically, with similar institutions under association agreements and as joint delegations, there can be between 16 and 24 MEPs (with usually an equal number of substitute members) and a similar number of MPs from the third country on such a body. The PPA can request information from the PC on the implementation of the TCA and any supplementing agreement. It is also to be informed of the PC's decisions and recommendations and may make its own recommendations to the PC. These are limited powers compared to such parliamentary committees established under other EU association agreements, e.g., the 1961 EEC-Turkey Association Agreement[50] or the more recent EU-Ukraine Deep and Comprehensive Free Trade Agreement.[51]

There are several points here with which Spanish Members of the European Parliament (hereinafter MEPs) might be able to progress development of the parliamentary aspects of the new EU-UK relations. At the outset, Spanish MEPs would provide links back to the *Congreso* and *Senado* through the EU mixed parliamentary committee in Madrid. It might be useful to consider transforming the relevant Spanish parliamentary subcommittee on Brexit into one dealing with relations with the UK, given the complex legal and institutional links occasioned by the TCA. The subcommittee could also reaffirm its links with the relevant committees of the UK Parliament, thereby providing it with a free flow of information and an early warning of any potential legislative problems.

First, in order to organise its practical oversight of the TCA's decision-making bodies, the PPA will need a secretariat and it would be incumbent on the head of that secretariat to be able to call on a reliable group of experts drawn from across the EU and the UK to support its work. That group would necessarily include Spanish international trade lawyers or academics, working outside the administration.

Secondly, MEPs are currently delaying ratification of the TCA, partly as a bargaining chip to reinforce the EP's supervision of the use of executive powers by the TCA bodies.[52] Among the actions proposed is the creation of a structured dialogue between the EP and the European Commission in matters concerning the implementation of the TCA. In this matter, like the already functioning "monetary dialogue" between the EP and the European Central Bank,[53] the Commission would be required to inform the EP of all discussions and developments in the TCA bodies, with sufficient safeguards balancing the needs of confidentiality and transparency. In this matter, Spanish MEPs might consider actively aligning themselves with such initiatives

48 Art. INST.3 TCA.

49 Art. INST.5 TCA.

50 Allan F. TATHAM, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn, 2009, pp. 142-144.

51 Allan F. TATHAM, "Ampliación y Política Europea de Vecindad de la UE", en José Maria BENEYTO PÉREZ (dir.); Jerónimo MAILLO GONZÁLEZ-ORÚS; Belén BECERRIL ATIENZA (coords.), *Acción exterior de la UE, Tratado de Derecho y Políticas de la Unión Europea*, Tomo IX, chap. 9, pp. 501-568, pp. 548-549.

52 René REPASSI, "Options for a Stronger Parliamentary Involvement in the Implementation of the Trade and Cooperation Agreement with the UK", *Policy Paper*, German Bundestag parliamentary group Bündnis90/Die Grünen (Alliance90/The Greens) and the Greens/EFA group in the European Parliament, 11.2.2021, available at https://www.annacavazzini.eu/wp-content/uploads/Options-for-a-Stronger-Parliamentary-Involvement-in-the-Implementation-of-the-TCA.pdf (accessed 4.3.2021).

53 Stefan COLLIGNON; Sebastian DIESSNER, "The ECB's Monetary Dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?", *Journal of Common Market Studies*, 54/6, 2016, pp. 1296-1312.

and so work together with other groups or coalitions of MEPs to enhance the EP's democratic controls over the TCA bodies.

Under the TCA and (future) supplementing agreements, certain matters fall within the competence of the devolved nations of the UK (Northern Ireland, Scotland and Wales) and their parliaments, as well as such institutions like the London Assembly. The Spanish MEPs might therefore consider initiating or sponsoring the formation of a subcommittee of the PPA – which action is not prohibited by the terms of the TCA – to link representatives of these devolved parliaments with their opposite numbers in the Committee of the Regions. This would allow for the transfer of local knowledge and experience of the workings of the TCA and for those devolved parliaments to receive relevant information directly (through the good offices of the PPA) rather than depend on such information being relayed to them through the UK government and the devolved executives.

In fact, the need to such regional level cooperation would be vital. Not only will Northern Ireland be bound by EU law in areas linked to the customs union and free movement of goods,[54] in January 2021, the parliament in Edinburgh passed the EU Continuity Act to give Scottish ministers the powers to continue to align with EU rules.[55] While the Scottish government will need to decide how to manage this process and use these powers, it is a firm indication that Scotland plans to continue to enact EU rules in certain areas and parliamentary cooperation through the PPA would be of great assistance.

Another aspect of the Spanish MEPs' approach could be to propose observer status for the UK Parliament in COSAC. Such opportunity would permit the retention of longstanding links with the committees in the UK Parliament, charged with examining British legislation as it seeks to diverge from EU retained law or creates new systems in the UK. It could also form part of an early-warning system for the PPA and its subcommittees in their work.

d. Civil society participation

The EU and UK are required to consult civil society on the implementation of the TCA and any (future) supplementing agreement,[56] through interaction with their "domestic advisory groups" and with the "Civil Society Forum." The membership of these bodies is drawn from, *inter alia*, non-governmental organisations, business and employer organisations as well as trade unions. The EU and UK have to "promote interaction between their respective domestic advisory groups, including by exchanging, where possible, the contact details of members of their domestic advisory groups." Since these groups are also established under CETA and JEPA, best practices could clearly be exchanged between partners on the EU side with those setting up these groups under the TCA.

In order to render effective civil society participation in the TCA's operation, a secretariat for the Civil Society Forum would need to be established and its members made responsible for liaising with the domestic advisory groups thereby making communications more efficient between them, coordinating their activities and keeping financing costs down.

Within this area, Spain can tap into an active civil society sector as well as well-established structures dealing with business organisations and trade unions. The years of experience of participation in the European Economic and Social Committee (hereinafter EESC) and its input into EU law-making, will stand Spanish members in good stead in helping to evolve these new TCA bodies. As with the PPA, the Civil Society Forum secretariat could include a section dedicated to links with the EESC. Moreover, excellent use could be made of the British Chamber of Commerce in Spain and the *Cámara Oficial de Comercio de España* in the UK as pivotal members in EU-UK relations, together with the larger expatriate associations for UK and Spanish citizens established in each other's countries. Representation would also need to reflect the interests of the regions and devolved nations in the UK as well as similar sub-national entities in Spain, particularly those with large expatriate communities from either party to the TCA.

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54 Arts. 4-10, WA Protocol on Ireland/Northern Ireland, op. cit., note 8.

55 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, 2021 *Acts of the Scottish Parliament* 4.

56 Arts. INST.6, 7 and 8 TCA.

e. Informal EU business fora and support

Lastly, it might be possible to consider establishing informal fora in order to deal more particularly with businesses interests between the EU and the UK. In this respect, the parties could use the example and best practices of the groups and support that have been established outside the framework but within the broader context of JEPA.[57] These are the EU-Japan Business Roundtable and the EU-Japan Centre for Industrial Cooperation as well as the EU Gateway Programme and the Executive Training Programme that help companies to penetrate the Japanese market and give them assistance. Granted the UK enjoys a different relationship with the EU, nevertheless such informal bodies and programmes – adapted to the needs related to the TCA – could provide opportunities for transfer of best practices and for discussions of common problems in working within the framework of bilateral trade and commercial relations.

57 JEPA, loc. cit., note 22. For links to these bodies and programmes, EUROPEAN COMMISSION, "Japan – Trade", available at https://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/, (last accessed 1 March 2021).

III. Substantive Provisions of the TCA

1. Trade

The field of trade under the TCA covers twelve titles including trade in goods; services and investment; digital trade; capital movements; intellectual property; public procurement; energy; and the so-called level playing field.[58] The present section will concentrate more fully on those aspects that have particular resonance for Spanish exporters and importers.

Of importance to note is the fact that the provisions of the TCA do not apply to trade in goods between the EU and Northern Ireland or between Great Britain and Northern Ireland where instead special rules apply that are contained in the Protocol on Ireland and Northern Ireland to the Withdrawal Agreement.[59] Northern Ireland remains part of the customs territory of the Union and therefore applies all its trade rules, set out in this section, to goods arriving from the island of Great Britain.

The possibility exists that the long delays and tailbacks of lorries, seen at ports in Great Britain waiting to carry goods to the continent and Northern Ireland, will be repeated this side of the Channel once the UK imposes the same types of checks on imports of EU products. In order to minimise such disruptions, Spanish trade associations would be well advised to continue their campaigns and technical support to assist companies doing business with the UK, to prepare for the new rules and practices. In some cases, transporting goods directly to the island of Ireland through the northern French ports may need to be considered as an easier alternative than using the land bridge of Great Britain. In other cases, establishing bases in Britain may become more economically feasible in the future as new taxes, substantial documentation and border checks add to the costs of doing business. Alternatively, with increased costs and interruptions in supply chains, Spanish companies may decide to make life easier for themselves by finding new partners in the EU and replace their links with companies in the UK.

2. Trade in goods

2.1. Elimination of tariffs and quotas

The TCA establishes a free trade area between the EU and the UK[60] without any import tariffs or other customs duties or quotas on goods,[61] provided they meet the TCA's rules of origin. In addition, neither party may impose charges on exports of goods to the other party, irrespective of whether they have preferential origin under the TCA.[62] Nor can a party impose an internal tax or other charge on a good exported to the other party, in excess of the tax imposed on like goods destined for domestic consumption.[63]

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58 For further detail, Issam HALLAK (ed.), "EU-UK Trade and Cooperation Agreement: An analytical overview", *European Parliamentary Research Service*, February 2021, available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282021%29679071 (last accessed 12.3.2021); Ilze JOZEPA; Dominic WEBB, "End of Brexit transition: trade", *House of Commons Library Briefing Paper*, No. 9083, 18.12.2020, available at https://commonslibrary.parliament.uk/research-briefings/cbp-9083/, (accessed 12.3.2021).

59 The rules necessary for implementing this Protocol were endorsed by the Joint Committee on 17 December 2020 and should be consulted for movements of goods with Northern Ireland.

60 Art. OTH.3 TCA.

61 Art. GOODS.5 TCA. Other EU trade agreements have eliminated the vast majority of tariffs, e.g., CETA removes tariffs on 99% of trade.

62 Art. GOODS.6.1 TCA.

63 Art. GOODS.6.1 TCA. To determine the customs value, WTO rules apply: Art. GOODS.15 TCA.

2.2. Continuing barriers to trade

a. Tariff barriers

Although the TCA has gone some way to preserving the flow of goods between the EU and the UK, it does not amount to fulfilling the promise of "frictionless trade." For example, the TCA does not provide for the elimination of all tariff barriers to trade. As a consequence, the levying of import VAT by the EU and by Great Britain means that anyone selling goods to consumers or businesses has to comply with these rules by obtaining a UK or EU VAT registration in order to declare the VAT and to claim it back.

b. Non-tariff barriers to trade

The TCA does not remove all "non-tariff barriers" either. However, while the EU introduced non-tariff barriers from 1 January on all goods being imported from Great Britain,[64] a grace period for their implementation as regards food and parcels until 31 March 2021 was agreed by the Joint Committee under the terms of the Ireland/Northern Ireland Protocol of the WA.[65] Earlier in summer 2020, the UK had decided to maintain a temporary light touch regime, to ease in its own rules and border checks, until April-July 2021.[66] The volatility of the arrangements has become clear for all to see with the problems of border checks in Northern Ireland on goods coming from Great Britain. As a result, on 3 March 2021, the UK government unilaterally extended the grace period until October,[67] thereby provoking the EU to threaten legal action before the CJEU in view of the UK's violation of the WA.[68] In the same week, the UK government also extended its own grace period to the end of 2021, justifying its action in this case on the continued impact of the pandemic but in reality an acknowledgement of its lack of border facilities being in place.[69]

i. Rules of origin

This complex set of rules aims to establish the "economic nationality" of a product and generally mirrors those contained in other EU preferential trade agreements, such as CETA and JEPA. Under the TCA, goods originate from a party in case:[70] (i) products are wholly obtained in that party; (ii) products produced in that party are exclusively made from originating materials in that party; or (iii) goods produced in a party incorporate non-originating materials satisfying the product-specific rules of origin.[71]

As with all previous EU preferential trade agreements, the TCA provides for bilateral cumulation between the parties[72] for both materials and processing ("value added"). In other words, materials originating in the EU that are then incorporated into a UK product, are deemed to be UK-origin materials and vice versa.[73] In this way, production carried out in the other party on a non-originating material may be taken into consideration even if such processing is insufficient to confer origin on the non-originating material being processed.

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64 Northern Ireland, as will be recalled, remains part of the EU customs territory and single market in goods.

65 Cabinet Office, "Northern Ireland Protocol", *Command Paper*, No. 346, 10.12.2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950601/Northern_Ireland_Protocol_-_Command_Paper.pdf (last accessed 15.3.2021).

66 Iain WATSON, "Brexit: Checks on EU imports to be phased-in amid coronavirus crisis", BBC News online, 12.6.2020, available at https://www.bbc.com/news/uk-53018020, (last accessed 15.3.2021).

67 POGATCHNIK, loc. cit., note 14.

68 Jacopo BARIGAZZI; Hans VON DER BURCHARD, "EU countries back legal action against UK over post-Brexit grace period extension", *politico.eu website*, 9.3.2021, available at https://www.politico.eu/article/eu-countries-back-legal-action-against-uk-over-post-brexit-grace-period-extension/, (last accessed 14.3.2021).

69 Joanna PARTRIDGE, "UK forced to delay checks on imports from EU by six months", *The Guardian online*, 11.3.2021, available at https://www.theguardian.com/politics/2021/mar/11/uk-forced-to-delay-import-checks-on-eu-goods-by-six-months-2022-border-post-not-ready, (last accessed 14.3.2021).

70 Art. ORIG.3 TCA.

71 Set out in TCA Annex ORIG-2. These product-specific rules usually require that any non-originating materials are classified under a different tariff heading from the final product; or that the value or weight of non-originating materials does not exceed a certain percentage of the ex-works value or weight of the product; or that the non-originating materials used undergo certain specific processing operations: TCA Annex ORIG-1, Note 2.3; Arts. ORIG.3.3 and 6 TCA.

72 Art. ORIG.4 TCA.

73 Arts. ORIG.4 and 7 TCA.

However, under the TCA, goods cannot benefit from zero-tariff trade under diagonal cumulation rules.[74] Such cumulation permits a much greater degree of flexibility in the use of materials from third countries while, at the same time, maintaining the UK origin for the end product. This exclusion is particularly significant for industries, such as car manufacturing and aviation production, where components are sourced from a number of countries. For example, even though both the EU and the UK have concluded a free trade agreement with Japan,[75] Japanese components are considered as non-originating material value when applying the TCA's specific origin rules to the products in which they have been incorporated.

The TCA also does not confer the preferential rule of origin status where insufficient processing has occurred in one party. For example, it has been observed[76] that: "cane sugar imported from the Caribbean and refined in the UK will not qualify for access to the EU tariff-free, nor will basmati rice imported from India and milled in the UK."

Even in cases where the intermediate material originates from the other party, this may not even be enough to ensure preferential rule of origin status. For example, where EU goods are redistributed from Great Britain to the EU (i.e., re-exported to the EU or Northern Ireland), any processing such as repackaging in Great Britain would be "insufficient" and the good in question would therefore not be regarded as being subject to tariff-free trade. Goods that are shipped back and forth between the EU and the UK for manufacturing are also subject to the same risks. This is has significant implications for trade and value chains between the EU and UK.

ii. Sanitary and Phyosanitary Measures

The TCA states that the EU and the UK can maintain separate regulatory regimes on sanitary and phyosanitary (SPS) matters, thereby allowing them to set their own standards and subjecting imports from the other party to strict conditions including border checks[77] and making products subject to trade-related SPS procedures and approvals. The TCA in this respect uses the WTO Agreement on the Application of Sanitary and Phytosanitary Measures[78] as its starting point.[79]

For a Spanish company seeking to export its agricultural products to the UK, the EU has to ensure that those products meet the UK's SPS requirements.[80] In fact, the UK can require that certain products require an authorisation to be imported into the country.[81] It can also perform audits and verifications on any products to check compliance with its SPS import requirements[82] and charge a fee to cover the costs of specific SPS frontier checks.[83] Whenever justified for an animal product for which they were required at the end of the transition period, the UK may maintain a list of approved establishments meeting its import requirements.[84] These rules equally apply to British exports to the EU.

iii. Technical Barriers to Trade

The TCA does not provide either for mutual recognition of technical regulations and standards or of conformity assessment procedures. It again leaves each party able to decide on and enforce such measures

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74 Diagonal cumulation typically operates between more than two countries provided they have FTAs containing identical origin rules and provision for cumulation between them.

75 JEPA, loc. cit. note 22; and UK-Japan Comprehensive Economic Partnership Agreement (23.10.2020, *Country Series Japan* 1/2020, CP 311). The CEPA basically reproduces the wording of the JEPA.

76 INSTITUTE FOR GOVERNMENT, *UK-EU Future Relationship: the deal: Goods*, available at https://www.instituteforgovernment.org.uk/publication/future-relationship-trade-deal/goods, (last accessed 14.3.2021).

77 Although either party may unilaterally reduce border checks to simplify the process of SPS imports.

78 Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994 (U.N.T.S., vol. 1867, p. 493).

79 Arts. SPS.1-5 TCA.

80 Art. SPS.7.2 TCA.

81 Art. SPS.7.3 TCA.

82 Art. SPS 7.13 TCA.

83 Art. SPS 7.12 TCA.

84 Art. SPS.8.1 TCA.

with the baseline for these measures provided by the WTO Agreement on Technical Barriers to Trade,[85] including its standards of non-discrimination and the requirement that unnecessary obstacles to trade have to be avoided.

In order to access the British market, then, Spanish products need to comply with UK rules and complete the necessary separate testing or other conformity assessment procedures, thereby demonstrating that they adhere to British standards.[86] In general, Spanish products will have to be subject to two separate processes so that they can be legally placed on both the EU and UK markets. Several annexes set out more simplified arrangements for specific categories of products, e.g., motor vehicles;[87] medicinal products;[88] chemicals;[89] organic products;[90] and wine.[91]

The TCA further seeks to facilitate market access in some respects. Each party must accept a supplier's declaration of conformity (meaning self-certification) as proof of compliance with its technical regulations in those product areas where such declarations were accepted at the end of the transition period[92] although, even in those circumstances, mandatory third party testing or certification of the product areas may still be imposed.[93]

Since 1 January 2021, each party has been free to set its own mandatory marking and labelling requirements.[94] In this respect, EU product-related rules no longer apply to the UK market,[95] e.g., for toys, electronics, lifts, machinery and medical devices.[96] Instead, the UK Conformity Assessed (hereinafter UKCA) marking has replaced the CE marking for those products placed on the UK market.[97]

The new UKCA marking now has to be used on a product from the EU if it fulfils all the relevant criteria: it is to be placed on the UK market; it is covered by legislation that requires the UKCA marking; it requires mandatory third-party conformity assessment; and conformity assessment has been carried out by a UK conformity assessment body. When selling in the EU or the European Economic Area (hereinafter EEA), the CE marking remains mandatory since the UKCA marking is not recognised on the EU/EEA market.

iv. Customs and trade facilitation

From 1 January 2021, the EU Uniform Customs Code and the equivalent British customs legislation have applied to imports and exports between them, irrespective of the TCA. The EU has applied substantially the same customs rules –customs checks, other formalities such as export and import declarations and customs decisions– on goods traded between Great Britain and the EU as it applies to goods traded with a third country under WTO terms. For its part, the UK has applied its customs rules although it unilaterally adopted transitional provisions that will now continue to apply until the end of 2021. Once that deadline is past, goods will be subject to border checks that have so far not been conducted on EU products entering the UK – this is likely to result in delays at the border and the rejection of products for having non-compliant

85 Agreement on Technical Barriers to Trade, 15 April 1994 (U.N.T.S., vol. 1868, p. 120). The TCA imposes certain obligations going beyond the TBT Agreement, linked to international standards developed by certain independent bodies: Arts. TBT.3.1 and 4.5 TCA.

86 Arts. TBT.5 and 6 TCA.

87 TCA Annex TBT-1

88 TCA Annex TBT-2

89 TCA Annex TBT-3

90 TCA Annex TBT-4

91 TCA Annex TBT-5

92 Art. TBT.5.6 TCA.

93 Art. TBT 6.7 TCA.

94 Art. TBT.8 TCA.

95 The CE marking will only be valid in the UK for areas where the UK and EU rules remain the same. Thus, if the EU changes its rules and a product is CE marked based on those new rules, the CE marking can no longer be used to sell that product in the UK.

96 Exceptionally, the UK will continue to accept CE marked medical devices until 30 June 2023.

97 Although CE marking, based on self-declaration of conformity by the manufacturer, is still possible until 31 December 2021 for the UK market.

documentation. Similar problems were experienced by companies in Great Britain earlier in 2021, seeking to export to the Union customs territory, either in Northern Ireland or the continent.

In order to ease the burden on companies, the TCA contains measures on customs and trade facilitation aimed at increasing the smoother flow of goods between the UK and the EU. In this respect, Spanish companies should look at the possibility of mutual recognition under "trusted trader" schemes. The TCA provides for recognition of each party's Authorised Economic Operators[98] that will face fewer checks when moving goods, thereby enabling these registered traders to have their products subjected to more streamlined customs processes at the border.[99] Other measures build on the WTO Trade Facilitation Agreement, allowing for different types of cooperation in customs matters[100] and the simplification of customs procedures.[101] The TCA details further examples of trade facilitation measures,[102] including cooperation in VAT and mutual assistance for the recovery of taxes and duties.[103]

3. Trade in Services

The TCA's provisions on services are rather meagre and in line with those of CETA and JEPA and consistent with GATS.[104] It offers reciprocal commitments on national treatment and standard market access for both cross-border services trade providers and investors, especially important considering the high levels of investments Spain and the UK make in each other's economy.[105]

Thus, on the one hand, Spanish suppliers and investors will be treated no less favourably than their UK counterparts. On the other hand, if the UK were to offer investors or firms from another country outside the EU more favourable terms as regards establishment than those offered in the TCA, then those terms have also to be extended to EU investors and businesses. These terms came as a relief to the large Spanish listed companies of the Ibex 35 that have notable interests in the UK – such as Telefónica, Iberdrola, Ferrovial and Banco Santander – that guarantees continuation of their operating in the UK on equal terms to local companies.

Two more reciprocal concessions are of interest. The first, on local presence, means that a Spanish-based services provider cannot be required to establish itself in the UK in that party as a condition of provision of a cross-border service. The second, on reciprocal visa-free entry rights, is more limited than initially appears and broadly reflects what has already been agreed with Japan and Canada. Consequently, Spanish (and EU) service suppliers will enjoy such entry rights to the UK for up to 90 days in any six-month period but the types of activities in which they can participate are circumscribed. As Lowe has indicated:[106] "Crudely speaking, the list of permitted activities shows that while meetings, trade exhibitions and conferences, consultations and research are fine, anything that involves selling goods or services directly to the public requires an actual work visa."

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98 TCA Annex CUSTMS-1 sets out the conditions under which both parties shall recognise their respective programmes for Authorised Economic Operators (AEO): Art. CUSTMS.9.2 TCA.

99 HM GOVERNMENT, *UK-EU Trade and Cooperation Agreement: Summary*, December 2020, para. 35, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf, (last accessed 14.3.2021).

100 Art. CUSTMS.2 TCA.

101 Arts. CUSTMS.4 and 5 TCA.

102 Arts. CUSTMS.7, 8, 11, 12, 17 and 18 TCA.

103 Art. CUSTMS.19 TCA.

104 General Agreement on Trade in Services, 15 April 1994 (U.N.T.S., vol. 1869, p. 183).

105 Salvador LLAUDES *et al.*, "Spain and the prospect of Brexit", *Elcano Policy Paper*, May 2018, pp. 16-20, available at http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/Policy-Paper-2018-Spain-prospect-Brexit, (last accessed 14.3.2021).

106 Sam LOWE, "Navigating accidental illegality", *Centre for European Reform Bulletin*, 30.11.2020, available at https://www.cer.eu/publications/archive/bulletin-article/2020/navigating-accidental-illegality, (last accessed 14.3.2021).

As for the liberalisation commitments on cross-border services supply and investment, the TCA in principle follows a negative list approach. This calls for complete liberalisation subject to a list of reservations (i.e., existing or future measures that do not conform to the liberalising obligations in the TCA) in two Annexes. These set out, respectively, existing and future non-conforming measures that are inconsistent with the TCA's obligations regarding market access, national treatment, and a range of other general obligations.

One ramification of the recent changes is that, since investment provisions are generally liberal in the TCA, service suppliers could fall back on the option of creating a commercial presence in the UK to serve that market. In other words, substituting commercial presence for cross-border supply of services is likely to be one of the consequences of the TCA in many service sectors that have significant impacts on Spanish companies and the Spanish economy. This may be the case especially for airlines, banks and insurance as well as for providers of broadcasting and audio-visual services whose services are excluded from the remit of the TCA as in other EU trade agreements.

In any case, Spanish firms may now need seriously to consider whether it makes more economic sense to establish a business (a subsidiary) in the UK for the purpose of continuing to provide their services.[107] As a result, they will have to follow UK rules but this may be easier to fulfil, especially as the rules between the parties may progressively diverge in the future. Yet the costs involved, while affordable for large concerns, may prove prohibitive for small and medium-sized enterprises (SMEs) and effectively cut them out of the British market.

In order to help such enterprises, the TCA requires both parties to share information and create contact points that are designed specifically for and address the interests of SMEs. In this context, Spain and its trade associations could complement these services, and help Spanish SMEs tap into additional resources, e.g., a pool of local experts dedicated to advising these enterprises on a range of matters (laws, investments, etc.) in order to maintain or gain access to the UK market.

3.1. Mutual Recognition of Professional Qualifications

Mutual recognition of professional qualifications (hereinafter MRPQ) is another disappointing feature of the TCA. The UK government sought a path to requalification for all regulated professions but the EU successfully insisted on the CETA model, with competent authorities and professional bodies invited to submit mutual recognition agreement (hereinafter MRA) proposals for approval by the PC.[108]

The commitments in the TCA are limited and, in fact, there is no MRPQ. Instead, broadly speaking, Spanish nationals with qualifications acquired in Spain will have to have them recognised in the UK on the basis of British rules, while Spanish nationals with qualifications acquired in the UK will be treated like UK citizens and must subject their British qualifications to recognition individually in Spain or in Germany, on the basis of relevant Spanish or German rules.

In practice, then, the ability to provide services (or invest) in a certain sector will depend on specific exceptions listed in the annexes to the TCA that vary from one EU Member State to another. Accordingly, Spanish firms and professionals may very well intensify their lobbying efforts, both at the national and at the European level, in order to "encourage" the parties to enter into bilateral negotiations on sectors in the British economy in which Spain has a distinct interest or that have a specific impact on the Spanish economy. Alternatively, there may be the opportunity to explore the conclusion of Spanish-UK bilateral MRAs on a profession-by-profession basis.

3.2. Financial services

Financial services received no special protection under the TCA. EU-based banks and other financial services providers thus lost their "passporting" rights to operate out of the EU, without needing to satisfy the

107 EUROPEAN COMMISSION, op. cit., note 12, p. 9.

108 Despite the opportunity, this institutional set-up is yet to deliver a single MRA between the EU and Canada more than three years after CETA entered into force.

UK prudential supervision requirements.[109] This has already led to UK financial service providers setting up branches in the EU – Amsterdam, Dublin, Paris and Frankfurt being the most popular options. Movement of trading volumes and monetary transactions has already notably shifted away from the City of London.

Beyond the TCA, the financial services sector is subject to unilateral equivalence decisions[110] whereby either party determines whether the other party's regulatory and supervisory standards match its own in respect of a particular species of financial transaction.[111] These equivalency decisions can be revoked with only short notice and they thus add to instability to the sector.

In parallel with the TCA, the EU and the UK adopted a Joint Declaration on Financial Services Regulatory Cooperation, including transparency and dialogue on equivalence decisions. A framework for this is currently under negotiation and was due to be agreed by March 2021 in a Memorandum of Understanding (MOU). This broad, non-binding commitment to regulatory cooperation nevertheless represents another giant step back from the previous single market regime.

Nevertheless, EU-based financial services firms, intending to continue to provide their services to UK-based clients, have not waited for such official joint action by the two parties and have instead established bases in the last few months in the UK. According to media reports, some 1000 firms (including banks and insurance firms from Ireland, France and Germany) plan to move to the UK or to boost their presence there.[112]

4. Fisheries

Although the TCA allows for the UK to receive higher quotas for some fish stocks over a five-year adjustment period, in essence, EU and UK vessels will not immediately experience any great changes in their fishing patterns. In fact, the increase in quotas for the UK is not uniform across all fish species and, in some cases, British fishermen will see no change or even reductions in their existing quotas.[113]

4.1. Present and mid-term situation

Although the UK regains its regulatory autonomy to make decisions on the management of its fishing resources in its own waters,[114] the effect of this is delayed for some five and a half years[115] in order to allow the respective fishing fleets and the communities that they serve, to reorient their existing fishing patterns. The TCA provides for the continuation of reciprocal access to the other party's waters until 30 June 2026, gradually phasing in a 25% reduction in catches by EU vessels.[116] It also guarantees the continuation of EU vessels' existing historical rights to fish in UK territorial waters between 6 and 12 nautical miles off the coast of southern England.[117]

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109 To avoid "cliff-edge" effects, the UK government adopted a Temporary Permissions Regime allowing relevant EEA financial firms and funds that had formerly operated through an EU passport in the UK, to continue operating for up to three years once the passporting regime has ceased, while they seek UK authorisation.

110 Regarding equivalence decisions to access its market –for which the UK is now responsible rather than the EU– it has adopted an outcomes-based approach, something it proposed during the 2020 trade negotiations but was rejected by the EU. This means that a third-country regulatory framework can be considered equivalent to UK standards even if specific regulations differ, as far as they achieve a similar outcome. This represents a more flexible interpretation of equivalence than that adopted by the EU

111 The UK and the EU have agreed in a non-binding declaration to establish a framework for cooperation on matters of financial regulation.

112 BBC, "Brexit: 1,000 EU finance firms 'set to open UK offices'", *BBC News online*, 22.2.2021, available at https://www.bbc.com/news/business-56155531, (last accessed 14.3.2021).

113 Yohannes AYELE *et al.*, "Taking stock of the UK-EU Trade and Cooperation Agreement: Trade in Goods", *UK Trade Policy Observatory Briefing Paper*, No. 52, January 2021, pp. 8-10, available at https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-trade-in-goods/, (last accessed 15.3.2021).

114 Arts. FISH.1-2 and 4-5 TCA.

115 Art. 1 TCA Annex FISH.4: Protocol on Access to Waters.

116 In agreeing concessions, the EU focused on those species less affected by coastal fishing in order to try to reduce the effect on fishing communities, especially in Ireland, France and Spain.

117 Vessels which have regularly fished in these areas between 2012 and 2016: Art. FISH 8.4 TCA.

Over half of all fish landed in the UK and much of the fresh shellfish harvested from UK waters is exported to the EU, either as fresh or chilled products.[118] Unlike their Norwegian counterparts under the EEA Agreement,[119] British fisheries have maintained tariff-free access for these exports.[120] Yet the TCA does not exempt such British exports from additional non-tariff trade barriers that increase friction at the EU border, such as the need to complete catch certificates and export health certificates together with clearing the necessary customs processes.

In this respect, British fisheries have been badly hit since 1 January 2021 by a variety of issues concerning exports to the Union. For example, the EU has imposed an indefinite ban on British shellfish for failing to comply with Union health standards.[121] In addition, the price of some fish has fallen through the floor as UK companies face the need to provide health certificates and undergo border inspections in order to sell to the EU, thereby delaying (and ultimately denying) delivery of fish.[122] British trawlers have also stopped landing catch or gone to Denmark or just do not put out to sea.[123] In response, the UK government has been forced to provide economic support of some £23 million for the fishing industry.[124] These problems are likely to already have had a knock-on effect in Spain, the final destination of a significant proportion of the UK catch in this area, with both wholesalers and retailers trying to find alternatives sources and supply chains in order to continue to meet local demand. The long-term effect on the UK sector, particularly shellfish, is nevertheless likely to prove an extremely high cost for "regaining control of British waters."

4.2. Long-term situation

The future of fishing in UK waters looks set to become increasingly turbulent in the long-term. Once the phasing-in period of the new regime finishes in 2026, the parties will then negotiate annually and conduct a review of the quotas, the total allowable catches (hereinafter TAC) for shared stocks and access to each other's waters.[125] Setting the TAC – and subsequently dividing the TAC between the parties on the basis of agreed quota shares – is crucial for the sustainability of fisheries.[126] In these annual negotiations, Spanish fishing interests – in partnership with other EU Member States and Norway – will need to be articulated and defended.

Even though the UK could reduce (or even eliminate) the TCA-agreed level of access to its waters and fish stocks, the exercise of such powers would carry with it heavy financial costs. In reply to such reduction (or elimination), the EU would be able to suspend reciprocal access as well as to apply tariffs to UK fisheries products and other goods if it considered it as necessary in order to compensate for the economic and societal impact suffered from the loss of access.[127] Such disputes are subject to (retrospective) arbitration. The British

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118 Anand MENON (ed.), "Fisheries and Brexit," *UK in a Changing Europe Report*, 11.6.2020, available at https://ukandeu.ac.uk/wp-content/uploads/2020/06/Fisheries-and-Brexit.pdf, (last accessed 15.3.2021).

119 Fisheries products are excluded from tariff-free access under the European Economic Area (EEA) agreement. However, the fish quota sharing arrangements that Norway has with the EU are based on quantities of each stock that occur in each party's zone (zonal attachment), something that the TCA falls short of.

120 In the negotiations, the UK had faced the threat of tariffs of up to 25% on fisheries.

121 Justin PARKINSON, "EU shellfish import ban indefinite, UK fishing industry told", *BBC News online*, 2.2.21, available at https://www.bbc.com/news/uk-politics-55903599, (last accessed 15.3.2021).

122 Julia KOLLEWE, "Brexit problems halt some Scottish seafood exports to EU", *The Guardian online*, 14.1.2021, available at https://www.theguardian.com/politics/2021/jan/13/fresh-seafood-exports-scotland-eu-halted-fishing-brexit, (last accessed 15.3.2021).

123 Tim BARSOE, "Scottish fishermen land fish in Denmark to avoid post-Brexit red tape", *Reuters online*, 15.1.2021, available at https://www.reuters.com/article/uk-britain-eu-scotland-fishing-idUSKBN29K2D2, (last accessed 15.3.2021).

124 DEFRA, "New financial support for the UK's fishing businesses that export to the EU", Press Release, 19.1.2021, available at https://www.gov.uk/government/news/new-financial-support-for-the-uks-fishing-businesses-that-export-to-the-eu, (last accessed 15.3.2021).

125 Art. FISH.6 TCA.

126 A detailed process is also established for setting provisional TACs if there is no agreement for some stocks: Art. FISH.7 TCA. This is an important step to sustainability and will help avoid the situation often seen for international stocks where a TAC may be agreed, but the total quota shares set by individual coastal states exceed the overall TAC.

127 Art. FISH.14 TCA. Furthermore, it allows for obligations relating to trade and road transport (with the exception of the level playing field) to be suspended.

boast of its now being an independent coastal state thus rings hollow when set against the present and long-term reality created under the TCA.

In order to avoid the need to resort to such extreme measures and to help ensure the proper functioning of the sector for the EU and the UK, the TCA establishes a Specialised Committee on Fisheries to provide a forum for both parties to discuss and collaborate on various fisheries matters.[128] Its remit includes cooperation ahead of annual fisheries consultations; multi-year strategies; data collection and sharing; monitoring and compliance; designation of landing ports; and guidelines for access conditions. Starting in 2030, the fisheries agreement under the TCA will be subject to a quadrennial review,[129] in order to assess the operation of arrangements such as access to waters, shares of TACs and quota transfers. Needless to say, given its interests as the major fishing power in Europe, Spain should ensure that one of its expert officials "shadows" the workings of this committee and attends its meetings, as permitted under the TCA.

Lastly, the impact of the new TCA fisheries regime is set to be supported by €600 million from the new EU fund, the Brexit Adjustment Reserve.[130] The EU support is targeted at offsetting the negative impact of fleets having to redirect or reduce their catches in UK waters. While primarily concerned with those fishing vessels and communities from across the Channel and the Irish Sea that are set to lose significant access in the mid term, their Spanish counterparts should usefully receive official guidance and assistance in applying for support from the funds made available to Spain.

5. Level playing field for open and fair competition

Normally speaking, as tariffs and quotas are reduced and eliminated between parties to a free trade agreement, competition between the affected companies noticeably starts to increase. In order to maintain the conditions of fair competition, level playing field (hereinafter LPF) clauses may be introduced dealing with state subsidies as well as furthering the convergence of standards, as the NAFTA Agreement did with respect to the effective maintenance and enforcement of the labour and environmental standards of the three contracting parties.[131]

However, the TCA instead provides for the separation of the UK from the EU's customs union and single market and thus opens up the possibility of divergence from previous common standards and norms. The danger of distortions of competition was particularly evident to the EU, given the parties' intention to continue interlocking their two economic areas, especially by eliminating tariffs and quotas in their cross-border trade. Recognising the adverse effects this potential divergence could have on fair competition between such economically interdependent and geographically proximate parties, their October 2019 Political Declaration had already recognised that:[132]

> "[T]he Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters."

The LPF provisions manage to strike a balance between, on the one hand, the UK's objective of leaving the ambit of EU law and CJEU control and, on the other, the EU's aim of ensuring that the UK would not be able to undercut its businesses, e.g., by providing import subsidies or lower compliance standards for products or labour.

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128 Art. FISH.16 TCA.

129 Art. FISH.18 TCA.

130 EUROPEAN COMMISSION, "Annexes to the Proposal for a Regulation of the European Parliament and of the Council on the Brexit Adjustment Reserve", COM (2020) 854 final, 25.12.2020.

131 Kevin W. PATTON, "Dispute Resolution under the North American Commission on Environmental Cooperation", vol. 5, 1994-1995, *Duke Journal of Comparative and International Law*, pp. 87-116; and Leonard BIERMAN; Rafael GELY, "The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations", vol. 10, 1995, *Connecticut Journal of International Law*, pp. 533-569.

132 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (OJ C 384 I, 17.11.2019, p. 2), para. 77.

5.1. General provisions

The general provisions in this Title[133] recognise the "common understanding" between the EU and the UK of the mutual benefits of the LPF that will prevent distortion of "trade or investment." Each party is accordingly able to set its own policies and priorities in the fields covered by the LPF and to determine the levels of protection each deems appropriate "to maintain and improve their respective high standards" rather than requiring to "harmonise" them.[134] In addition, provided they comply with their commitments under the TCA and other international treaties, the EU and the UK may adopt or modify their laws and policies.

5.2. Competition and subsidies

The TCA provisions on competition and state aids (subsidies) owe much of their content to the corresponding provisions of EU law in both sectors as well as the WTO Agreement of Subsidies and Countervailing Measures 1995.[135] The TCA uses the language of this WTO Agreement in order "to avoid the semblance that the UK was adopting the EU state aid regime."[136]

Subsidy control (or State aid) is the largest and most detailed part of the LPF Title. It includes general principles but also provisions on specific sectors such as air carriers and energy. Exceptions to state subsidies prohibition include "national or global economic emergency"[137] and subsidies in relation to energy and environment aimed at promoting sustainability of the energy system or increasing the level of environmental protection.[138] Subsidies may also be granted in the context of large cross-border or international cooperation for, e.g., transport, energy, research and development, and deployment of new technologies.[139]

5.3. Labour and environmental standards

For provisions on labour and social protection, and the environment and climate change, the TCA allows for both the UK and EU to establish their own levels of protection. At the same time, a form of non-regression approach is used which requires that the level of protection is not lowered below the level in place at the end of the transition period:[140]

> "A Party shall not weaken or reduce, in a manner affecting trade or investment between Parties, its labour and social protection below the levels in place at the end of the transition period, including by failing to effectively enforce its laws and standards."

A similar non-regression clause is provided for protection of the environment and of the climate.[141] LPF provisions have their own mechanisms of dispute settlement and related countermeasures where one party regresses below the standards existing at the end of the transition.[142]

In the TCA, the EU can therefore intervene in order to protect the Union economy and the integrity of the single market from unfair competition caused by reductions on the other side of the Channel in standards already in place at the end of the transition period. This means, in reality, that the UK and British businesses will remain bound by current EU standards in the relevant fields. Moreover, in the future, if the EU moves

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133 Part Two, Heading One, Title XI, Arts. [LPF.] 1-9.4 TCA

134 Arts. [LPF.] 1.1.4 and 1.2 TCA.

135 Agreement of Subsidies and Countervailing Measures 1995, 14 April 1994 (U.N.T.S., vol. 1869, p. 14).

136 Emily LYDGATE *et al.*, "Taking Stock of the UK-EU Trade and Cooperation Agreement: Governance, State Subsidies and the Level Playing Field," *UK Trade Policy Observatory Report*, available at https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/, (last accessed 15.3.2021).

137 Art. [LPF.] 3.2 TCA.

138 Art. [LPF.] 3.5.14 TCA.

139 Art. [LPF.] 3.5.13 TCA.

140 Art. [LPF.] 6.2.2 TCA.

141 Art. [LPF.] 7.2.2 TCA.

142 See Section IV.2.1 below.

noticeably to increase its own standards and the UK does not shadow these changes in its laws, then it may be subject to action under the TCA.

6. Law enforcement and judicial cooperation in criminal matters

The protections and levels of cooperation espoused in this field are markedly reduced compared to those that exist within the EU.[143] No attempt has been made to take the main matters of that intra-Union policy and transfer it to the TCA: this has serious implications for the continued fight against terrorism as well as serious and organised crime.

The main provisions concern:[144] exchange of DNA, fingerprint and vehicle registration data; transfer of passenger name record data; cooperation with Europol and Eurojust; surrender and replacement arrangements for the European Arrest Warrant; mutual cooperation and assistance between judicial authorities; and exchange of criminal records.

The surrender arrangements that replace the European Arrest Warrant are in fact "no replacement" but are better than to have to deal with the byzantine complexities that existed through the many exclusions and delays permitted under the European Convention on Extradition 1957.[145] The latter's revival would have led to the spectre of the return of "safe havens" for criminals, and the less than rosy image from the British media of the "Costa del Crime" in 1970s-1980s Spain.[146] Nevertheless, should the UK exit the ECHR, the surrender arrangements will come to an end since there are no separate safeguards provided for them under the TCA.

The British police will now find the effectiveness of their cross-border work seriously hampered by their loss of access to the Schengen Information System II on law enforcement aspects, which access was only opened to the UK in spring 2015.[147] Nothing comparable is set to replace it.

Cooperation agreements with Europol[148] and Eurojust[149] will nevertheless maintain links between the UK and national police forces, prosecutors and judges in the EU. For example, Eurojust in The Hague, responsible for the coordination of the prosecution of serious cross-border crime involving more than one country, will see the UK national members replaced by liaison members.[150] Institutionally, the TCA also establishes a joint committee to monitor the functioning of the new arrangements.[151] Quite how successful the new working relations between the UK and the EU in this area will be, depends largely on the mutual trust and confidence that police and prosecutors of both parties can preserve between themselves.

In order to counteract the negatives already caused by UK withdrawal, Spain would do well to reinforce its bilateral links and cooperative structures that it already has in place. This strengthened relationship could be based on the system of international liaison officers in the UK National Crime Agency.[152] In addition,

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143 Chloé BRIÈRE, "The future of judicial cooperation in criminal matters between the EU and the UK", in Juan SANTOS VARA; Ramses A. WESSEL (eds.), Polly R. POLLAK (assoc. ed.), *The Routledge Handbook on the International Dimension of Brexit*, Routledge, Abingdon, 2021, pp. 284-299.

144 Part Three TCA.

145 European Convention on Extradition, 13 December 1957 (E.T.S., No. 24).

146 Rob Horgan; Tom POWELL, "Gangsters' Paradise: A Look at the Key Figures Past and Present of the Costa del Crime", *The Olive Press online*, 18.10.2015, available at https://www.theolivepress.es/spain-news/2015/10/18/gangsters-paradise-a-look-at-the-key-figures-past-and-present-of-the-costa-del-crime/, (last accessed 15.3.2021).

147 Home Office, *Second generation Schengen Information System (SISII): General Information*, 13.4.2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421540/SISII_General_Information_document.pdf, (last accessed 15.3.2021).

148 Arts. LAW.EUROPOL.46-61 TCA.

149 Arts. LAW.EUROJUST.61-76 TCA.

150 Arts. LAW.EUROJUST.66-67 TCA.

151 Specialised Committee on Law Enforcement and Judicial Cooperation, Art. INST.1.1(r) TCA.

152 National Crime Agency, "International network: NCA international liaison officers", *NCA website*, available at https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/international-network, (last accessed 15.3.2021).

Spain could promote broader-based organised (though informal) fora outside the TCA framework that could promote best practices, e.g., language training; speedier and more efficient communications between British police and their counterparts in other EU Member States; and the offer of deeper cooperation in all aspects of their investigations.

Lastly, the strong levels of practical cooperation between the police and security forces in Spain and in the UK in respect of counter-terrorism measures will need to be maintained, complemented and reinforced where the provisions of the TCA – although extensive – are either silent or minimal in content. Otherwise, the TCA could prove to be for both parties an unintended "terrorists' charter."

IV. Dispute settlement mechanisms of the TCA

The TCA sets out several inter-party dispute settlement mechanisms that owe much to similar mechanisms and remedies under CETA and the WTO DSU.[153] It therefore excludes actions by individuals and companies as well as the jurisdiction of the CJEU, the latter satisfying one of the strict negotiating demands of the British government.[154]

1. General dispute settlement system

Subject to particular exceptions,[155] the general system deals with any dispute about the interpretation or application of the TCA.[156] Where one party feels that the other is in breach of the TCA,[157] the EU and the UK must enter into "good faith" consultations, usually within the framework of a specialised committee or the PC. If the parties have not resolved the matter within 30 days,[158] then they can decide to extend the consultations or, instead, the complaining party can refer the dispute to an arbitration panel. Such panel consists of three independent arbitrators (including a chairperson) agreed upon by the parties[159] and has up to 160 days to make a ruling. While its deliberations are private, its decisions are public and legally binding.[160]

An arbitral tribunal has no jurisdiction to rule on the legality of a measure alleged to constitute a breach of the TCA or any supplementing agreement[161] under the domestic law of either party. Moreover, its ruling cannot bind the domestic courts or tribunals of either party as to the meaning to be given to the domestic law of that party. Unlike the EU-Ukraine association agreement,[162] the arbitrators have no right to refer questions on interpretation of the TCA to the CJEU, a similar position in the other new generation trade agreements. Nevertheless, these attempts to limit the binding impact of the tribunals' decisions do not prevent national courts from looking at them and taking them into account in their own judgements. Despite the best efforts of the negotiating parties, then, the use of TCA arbitral decisions is not excluded either and would necessarily assist domestic courts in their understanding of the TCA.

The proposal and selection of the experts to sit as arbitrators may give Spain the opportunity to ensure one of its candidates is chosen. The PC is to establish a list of 15 experts to serve as members for arbitration tribunals set up *ad hoc* under the TCA.[163] This list is composed of two sub-lists of five individuals appointed by each party, respectively, and one sub-list of five experts, nationals of neither the EU nor the UK (non-nationals sub-list), members of which latter group shall serve as chairperson to the arbitration tribunal. The inclusion of non-nationals as chairpersons further reinforces the degree of independence and impartiality in the tribunal's operation and decision-making.

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153 Understanding on the Rules and Procedures Governing the Settlement of Disputes, 15 April 1994 (U.N.T.S., vol. 1869, p. 401) (DSU). However, unlike the WTO DSU, there is no appellate review provided for under the TCA.

154 To that effect, Art. COMPROV.13(2) TCA states that neither the TCA nor any future supplementing agreements requires that the provisions of those agreements are interpreted in accordance with the domestic law of either party.

155 Art. INST.12 TCA.

156 Art. INST.11 TCA.

157 Detailed rules of procedures are found in TCA Annex INST: Rules of Procedure for Dispute Settlement.

158 Art. INST.13.3 TCA. This time limit is reduced to 20 days in matters of urgency, including those related to perishable goods or seasonal goods or services.

159 In case the EU and the UK cannot agree on the composition of the tribunal, the co-chair of the PC from the complaining party is empowered to select the third arbitrator from the sub-list of non-nationals to serve as chair of the arbitration tribunal: Art. INST.15.4 TCA.

160 Art. INST.29.1-2 TCA.

161 Art. INST.29.4 TCA.

162 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ L 161, 29.5.2014, p. 3), Art. 322.

163 Within 180 days after the TCA has entered into force: Art. INST.27.1 TCA.

Prospective arbitrators, who cannot be officials employed by the EU or the UK, are required to possess a series of skills and experiences, including "a demonstrated expertise in law and international trade" and the typical requirements of judges of the General Court of the EU under Article 254 TFEU. Accordingly, they must be persons "whose independence is beyond doubt, who possess the qualifications required for appointment to high judicial office in their respective countries or who are jurisconsults of recognised competence." The independence of the arbitrators is further underlined by their all being bound by a common code of conduct under the TCA.[164]

In this respect, as a large EU Member State, Spain would be in a good position to lobby for one of its own international trade specialists to be included in the EU sub-list of five experts. At the same time, it might also be able to deploy its diplomacy to support the candidacy of such a specialist from a Latin American country for inclusion in the non-nationals' sub-list of experts.

2. Specific dispute settlement mechanisms

There are a number of partial or total exceptions to the general dispute mechanism to which attention should be drawn.

2.1. Non-regression areas of the level-playing field

Of interest is the specific dispute settlement system to be employed for resolving disputes concerning the so-called "non-regression" areas of the level playing field, viz., labour and social standards, environment and climate and other instruments for trade and sustainable development.[165] Following unsuccessful consultations, the resolution of such disputes involves the convening of a Panel of Experts, appointed to examine the matter and deliver a report on whether the party in question has conformed with the relevant obligations under the TCA.[166] The Panel may also make recommendations but these are not binding on the parties (unlike the decisions of the arbitral tribunals). Where disagreement on compliance with the final ruling persists, a party may ask the original Panel of Experts to reconsider the matter. Moreover, where the Panel of Experts' report is not acted upon, temporary remedies (e.g., temporary tariffs) are available to induce compliance.[167]

The Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development[168] is charged with drawing up a list of a minimum of 15 individuals who are willing and able to serve as panellists. As with the sub-lists of arbitrators, the EU and the UK are each to name at least five individuals to the list to serve as panellists. Then the EU and the UK together must name at least another five non-nationals of either who are willing and able to serve as chairperson of a panel of experts.

The proposed experts must have specialised knowledge or expertise in labour or environmental law, other issues addressed in the relevant Chapter or Chapters of the TCA, or in the resolution of disputes arising under international agreements. They must serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute neither can they be government officials or civil servants of either party.

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164 TCA Annex INST: Code of conduct for arbitrators.

165 Arts. [LPE.] 6.4.2, 7.7.2 and 8.11.2 TCA.

166 Art. [LPE.] 9.2 TCA.

167 Art. [LPE.] 9.3.2 TCA.

168 Art. INST.2.1(j) TCA.

As with the advice already proposed with regard to arbitrators, the possibility of Spain contributing a number of experts to the EU list as well as proposing non-national experts should be further examined. In fact, as the number of experts is set a minimum of 15, it might be possible to use extensive domestic expertise to nominate a team of experts, each with the requisite knowledge of and/or experience in one of the non-regression areas.

2.2. The novel procedure for applying (unilateral) rebalancing measures

One of the particularly sensitive matters during the TCA negotiations concerned the way to deal with future divergences between the EU and the UK in their policies and laws in the non-regression areas of the level playing field, viz., labour and environmental standards as well as state aids.

In response, the TCA has introduced a rebalancing clause to deal with such potential circumstances and this is a novel concept for EU preferential trade agreements.[169] Consequently, where serious divergences in the areas of labour or environmental standards (or subsidies) create material impacts on trade or investment, then either party can take action to rebalance the TCA by exercising their right "to take countermeasures if they believe they are being damaged by measures taken by the other Party," subject to arbitration.[170]

This would mean that the EU could take necessary and proportionate measures (e.g., the introduction of tariffs) in response, provided that it satisfied strict criteria:[171] viz., any assessment of the impacts of divergence have to be based on "reliable evidence" and not on "conjecture or remote possibility."

The other party may challenge any such measures before an arbitral tribunal: in this case, rebalancing measures may be adopted and the other party may in turn adopt countermeasures proportionate to those adopted rebalancing measures, if that tribunal does not deliver its final ruling within 30 days and until the final ruling is delivered. [172]

2.3. Subsidies

Proceedings with respect to subsidies allow for both national and TCA solutions. Under national rules, in addition to the requirement that each party must establish an independent enforcement body, the subsidy control system requires that domestic courts of each party must be able to hear claims from interested parties, review compliance with the new subsidy principles by subsidy-granting authorities and subsidy decisions of the independent authority. Domestic courts must also grant effective remedies, in accordance with each party's domestic law, that include injunctions and orders to recover illegal subsidies. A unique feature is:[173] "either side can intervene in each either's domestic court proceedings if the court permits it to do so. That means a case can be brought through the domestic legal system of each side rather than through arbitration of an expert panel." This means[174] the EU can appear as an intervening party in any court action in the UK concerning the TCA subsidy rules (and vice versa).

In addition, where consultations under the TCA are unsuccessful, then either party may unilaterally take remedial measures[175] in case a subsidy of the other party causes (or there is a serious risk that it will cause) a significant negative impact on trade or investment between the UK and the EU.[176] This remedial action has to

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169 Art. [LPF.] 9.4 TCA.

170 HM GOVERNMENT, op. cit., note 99, para. 81.

171 Art. [LPF.] 3.12.6 TCA.

172 This means that rebalancing measures are only likely to be used in a rare number of scenarios.

173 INSTITUTE FOR GOVERNMENT, *Level playing Field*, loc. cit., note 32.

174 Art. [LPF.] 3.10.2 TCA.

175 Art. [LPF.] 3.12 TCA. The provisions on subsidies in the TCA do not amend the state aid provisions of the WA Protocol on Ireland/Northern Ireland, op. cit., note 8, Art. 10. This means that EU state aid rules apply to subsidies affecting trade in goods and wholesale electricity between Northern Ireland and the EU.

176 Where a party resorts to that procedure, the other party may not invoke the WTO agreements or any other international agreement to preclude that party from taking those remedial measures: Art. [LPF.] 3.12.13 TCA. This type of remedial measure may not be applied

be limited to what is strictly necessary and proportionate to remedy the significant effect.[177] These measures can then be challenged through an arbitration tribunal that assesses whether there was a breach as well as if the remedial action is alleged to be excessive. If the panel finds there was a breach, then it can authorise the complainant to suspend parts of the TCA.

2.4. Involvement of natural and legal persons in inter-party dispute settlements under the TCA

At first sight, the TCA appears to have completely closed off any direct role of natural and legal persons in the resolution of the inter-party disputes. Individuals, companies and NGOs (including trade unions and industry associations) have no standing to bring actions neither are they granted any rights that they could conceivably enforce before the relevant arbitration tribunals or domestic courts or tribunals.[178] Nevertheless, within the context of the WTO this exclusion from direct actions is somewhat mitigated by the possibility that these actors can be given a voice in EU-UK trade disputes.

Two methods exist that will allow for a limited participation of such persons in TCA dispute resolution. The use of these indirect opportunities flows originally from WTO experience but this has been substantially reinforced by the provisions and the emerging practice of the new generation of EU trade agreements. In this respect, Spain would be in a strong position to be able to encourage and support use of these methods by developing linkages to the Civic Society Forum and the domestic advisory groups. These linkages would at least give the commercial and business sectors as well as civil society, the understanding of their being stakeholders in the TCA policy universe and a capacity (admittedly circumscribed) to provide limited input into inter-party disputes under the TCA. However, it may be possible over time and through the review mechanism of the Agreement to enhance further the role and rights of natural and legal persons in TCA dispute resolution.

a. EU Trade Barriers Regulation

In the first case is the possibility of using the EU Trade Barriers Regulation from 2015[179] with respect to the TCA. If one looks at the extensive practice in the WTO, many (if not most) of the disputes heard by the WTO panels and AB are disputes that have been brought by governments at the instigation of an industry or a company.[180] For example, Kodak masterminded and actively supported the US claims against Japan in the *Japan – Film* dispute,[181] while Chiquita played a central role in the involvement of the USA in *EC – Bananas III*.[182] Not only do they lobby their governments to bring dispute settlement cases before the WTO, companies or industry associations can play important "behind-the-scenes" roles in planning the legal strategy and drafting the submissions.

In fact, industry associations and/or companies in the EU can gain indirect access to the WTO dispute settlement system because they can bring a violation of WTO obligations (by another WTO Member) to the attention of their government and "induce" their government to start WTO proceedings.[183] In this respect, EU-based companies and industry associations can employ the 2015 Regulation whose use is not limited to WTO matters but covers all bilateral and multilateral trade issues involving the EU, including the TCA. Thus, according to the Regulation, any EU person, company or association that claims to have suffered injury or

simultaneously with rebalancing measures under Art. [LPF.] 9.4 TCA to remedy the impact on trade or investment caused directly by the same subsidy: Art. [LPF.] 3.12.15 TCA.

177 Art. [LPF.] 13.12.8 TCA.

178 Peter VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization*, 2º ed., Cambridge University Press, Cambridge, 2008, p. 191.

179 Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) (OJ L 272, 16.10.2015, pp. 1-13).

180 VAN DEN BOSSCHE, op. cit., note 178, p. 197.

181 Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22.4.1998, DSR 1998:IV, 1179.

182 AB Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25.9.1997, DSR 1997:II, 591.

183 VAN DEN BOSSCHE, op. cit., note 178, pp. 197-198.

adverse trade effects due to trade obstacles, can submit a written complaint to the EU.[184] EU Member States are likewise permitted to use the procedure under the Regulation. All parties must show sufficient evidence of the existence of the trade barriers put in place by the UK vis-à-vis the TCA and of the resulting injury or adverse trade effects.

In order to make effective use of this in helping the Commission to identify violations of the TCA by the UK, Spanish companies would do well to organise themselves to use this Regulation more often. This can be done in possibly "bilateral" cases of concern where Spanish companies are exclusively being affected by UK behaviour or "multilateral" situations where companies in Member States other than Spain are also likewise affected. In either situation, the relevant national industry / manufacturers / producers association or labour union would be encouraged to liaise with the central Spanish authorities in order to coordinate their action. As will be recalled, under the Regulation, Spain also has the right to approach the Commission with its own complaint. Bringing it to the attention of the European confederation, to which the Spanish association or union belongs, would also (potentially) permit use of the Regulation. Such links already exist in respect of the WTO and are emerging as regards CETA. In this case, putting those already existing/developing structures at the disposal of companies vis-à-vis the TCA would greatly increase the more rapid resolution of trade disputes rather than if they are allowed to sit and fester at a localised level.

b. *Amicus curiae* submissions

In the second case, according to the rules of procedure of the TCA, arbitral tribunals have the authority to accept and consider written submissions by individuals (often academics), companies or organisations.[185] While acceptance of these *amicus curiae* submissions ("friend of the court" submissions) is considered controversial by most members of the WTO,[186] in EU trade agreements by contrast they are expressly an integral part of the process in the new generation agreements such as CETA and JEPA. The criteria under the TCA are certainly more permissive than those developed on a dispute-by-dispute basis by the WTO AB.[187] Unless the EU and the UK decide otherwise, then, the arbitration tribunal can receive unsolicited written submissions from natural or legal persons from either party, who are independent from their governments, provided such submissions:[188]

> "(a) are received by the arbitration tribunal within 10 days of the date of the establishment of the arbitration tribunal;
>
> (b) are concise and in no case longer than 15 pages, including any annexes, typed at double space;
>
> (c) are directly relevant to a factual or a legal issue under consideration by the arbitration tribunal;
>
> (d) contain a description of the person making the submission, including for a natural person his or her nationality and for a legal person its place of establishment, the nature of its activities, its legal status, general objectives and its source of financing;
>
> (e) specify the nature of the interest that the person has in the arbitration proceedings; and
>
> (f) are drafted in English."

The parties can submit their comments on these submissions to the tribunal.[189] In its reports, the tribunal must list these submissions received according to the above criteria but need not address the arguments made in them. Nevertheless, where is does so, the tribunal must also take into account any comments made by the parties in respect of those arguments.[190]

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184 EU Member States may also submit one.

185 Art. INST.26.3 TCA.

186 WTO, *A Handbook on the WTO Dispute Settlement System*, 2º ed., Cambridge University Press, Cambridge, 2017, pp. 163-166.

187 VAN DEN BOSSCHE, op. cit., note 178, pp. 191-197.

188 TCA Annex INST-X [Rules of Procedure], rule 39.

189 Ibid., rule 40.

190 Ibid., rule 41.

In this respect, Spain could start to organise itself with drawing up a list of possible experts able to assist the composition of such briefs at short notice within the temporal parameters set by the TCA. These people would be international trade specialists and could provide their submissions on their own initiative or on that of an NGO, trade union or industry association. Advance notice of the probable setting-up of an arbitral tribunal would give such specialists more time in which to work.

V. Beyond the TCA

Although the focus of the present work has been on the implications of the TCA, some consideration needs to be had of those implications outside the TCA framework. This section will therefore look at a number of issues that, though linked to the TCA, raise issues for Spain beyond the framework of that Agreement.

1. Gibraltar

Having won the right to refuse unilaterally the extension of the terms of any eventual post-Brexit arrangement between the EU and the UK, the Spanish government used some deft diplomatic manoeuvres in order to wring some last-minute concessions from the UK and to put bilateral relations between both nations onto a new and better footing for the future.

Already the British and Spanish governments – together with that of Gibraltar – had concluded in November 2018 a series of four memoranda of understanding[191] that were to underpin the Protocol on Gibraltar set out in the eventual Withdrawal Agreement, and had thereby begun to reset their relations concerning the territory. These memoranda covered citizens' rights; cooperation on environmental matters; cooperation in police and customs matters; and tobacco and other products.

Perhaps the most far-reaching agreements came, though, at the very end of 2020 with the deadline for the end of the transition period fast approaching. Having agreed to the terms of the TCA, the UK was mindful of Spain's veto as regards its territorial application to Gibraltar, which right Spain had already secured from the EU.[192] After a period of intense negotiations with his opposite number in Spain, the British Foreign Secretary, Dominic Raab, released a statement on 31 December 2020,[193] confirming their successful conclusion of a new deal, "a political framework to form the basis of a separate treaty between the UK and the EU regarding Gibraltar." The parties agreed to forward the deal to the European Commission in order to initiate negotiations on a formal treaty that will reflect the deal's contents.

According to the terms of this preliminary deal,[194] Gibraltar will join both the Schengen area and have a "bespoke solution" as part of the EU's customs union and single market.[195] In effect, Gibraltar will become more fully integrated into the EU than it had been when the UK had been a Member State. The deal can only be regarded as a success for the Spanish strategy of removing the sensitive issue of sovereignty from the foreground[196] and rather allowing economic and social factors to take centre stage, thereby underlining the importance of cooperation in furtherance of these factors which has very broad support both sides of the present border.

Gibraltar's association with the Schengen passport-free area under the auspices of Spain means that its international border will move from the physical barrier to its airport and seaport, removing the need for the barrier. The eventual symbolic demolition of the border posts between Gibraltar and Spain, the closure of which in 1969 became such a pointed issue of defiance for previous generations of inhabitants of the Rock, will prove to be an important milestone for the territory. Even the joint initial use of officers of Frontex, the European border agency, at the new external borders (Gibraltar airport and port, the proposed Schengen

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191 Juan SANTOS VARA, "The implications of the Withdrawal Agreement for Gibraltar: Is Spain taking back control?", in SANTOS VARA & WESSEL, op. cit., note 143, pp. 303-315, pp. 306-309.

192 Ibid. 309-311.

193 Dominic RAAB, "UK-Gibraltar-Spain agreement: statement from the Foreign Secretary", *Press Release*, 31.12.2020, available at https://www.gov.uk/government/news/uk-gibraltar-spain-agreement-statement-from-the-foreign-secretary, (last accessed 15.3.2021).

194 Maria MARTIN; Miguel GONZÁLEZ, "Deal between Spain and UK plans to eliminate Gibraltar border checkpoint", *El País in English online*, 11.1.2021, available at https://english.elpais.com/brexit/2021-01-11/deal-between-spain-and-uk-plans-to-eliminate-gibraltar-border-checkpoint.html (last accessed 15.3.2021).

195 Northern Ireland, in comparison, remains in the customs union and is only bound by the free movement of goods provisions of the TFEU and related provisions.

196 Articles 1 and 3 underscore that the framework is "without prejudice to the issue of sovereignty and jurisdiction" of Gibraltar, and that the future treaty will safeguard the respective positions of Spain and the UK on this matter.

entry points) during a "reasonable period of implementation" lasting four years rather than Spanish police or border guards alone,[197] has managed to assuage the fears of the Gibraltarian government and population, at least for now.[198] By asking for less in the short term, Spain stands to gain much more in the long term.

Such bilateral agreement necessarily involves confidence-building measures and support from EU Cohesion Funds, a way to see the ring of prosperity for Gibraltar extended to the Campo de Gibraltar which area suffers high levels of unemployment and poverty. The sharing of prosperity would at least go some way to readdressing the economic and social imbalances between the two places.

2. Defence and security cooperation

The 2019 Political Declaration had envisaged the establishment of a unique strategic partnership between the EU and the UK, across a range of fields:[199] "In that spirit, this declaration establishes the parameters of an ambitious, broad, deep and flexible partnership across (…) foreign policy, security and defence and wider areas of cooperation." These fields though are missing from the TCA although there may be the possibility to negotiate a supplementing agreement on them in the future.[200]

In the meantime, practical defence cooperation with the UK could be based on its conclusion of an administrative agreement with the European Defence Agency,[201] as originally proposed in the Political Declaration,[202] and which already exist with Canada, Norway and the USA. In this respect, Spain could burnish its credentials as an "honest broker" in such matters for the Union by pursuing efforts to persuade the UK to engage with the EU in these matters on a more structured and formal basis (as explored in the Political Declaration[203]) rather than allowing practice alone to determine the slow evolution of such partnership. Although there are indications that British foreign policy practice is taking steps in this direction, the creation of a clearer basis for consultations, etc. between the parties should be regarded as a priority for both sides. The urgency is all the greater considering the common threats still facing them and the need to pursue a common approach to their resolution.

Outside any new strategic partnership, Spanish and UK military cooperation would have been limited to matters governed by their membership of NATO. Yet both countries have seised the present opportunities to deepen their bilateral military cooperation,[204] beyond the rather sparse agreements already made.[205] The proposed Hispano-British security and defence agreement is set to cover issues such as the fight against jihadism, cyber-defence and joint military missions and additionally contains trust-building measures regarding the UK base in Gibraltar.

Given their Atlantic orientation and common interests in the Mediterranean, Spain and the UK might forge ahead with a parallel cooperation in naval matters. It could eventually become normal to see Spanish and

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197 Gibraltar will be the first to decide whether to allow or deny entry to a traveller, using its own database. After that, Spain will decide whether it allows or denies entry into the Schengen area (which Gibraltar will be a part of), using the Schengen database. "Both decisions will be cumulative," reads the text, meaning that both authorizations will be required to enter Gibraltar

198 The proposed agreement will be subject to review in four years.

199 Political Declaration, op. cit., note 132, para. 3.

200 Ramses A. WESSEL, "Post-Brexit participation of the UK in EU foreign, security and defence policy", in SANTOS VARA & WESSEL, op. cit. note 143, pp. 199-212.

201 Trevor TAYLOR, "Brexit's Implications for UK Defence Industrial Cooperation with Europe", *Royal United Services Institute Commentary*, 5.11.2020, available at https://www.rusi.org/commentary/brexit-implications-uk-defence-industrial-cooperation-europe, (last accessed 15.3.2021).

202 Political Declaration, op. cit., note 132, para. 102.

203 Ibid., paras. 90-107.

204 The present lack of bilateral military cooperation is not reflected in their commercial links. For example, BAE Systems, the British company, is a key partner in the Eurofighter aircraft programme in which Spain also participates.

205 In 1985, there was an exchange of notes on cooperation and defence equipment, and, in 2015, there was an agreement to exchange classified information: Miguel GONZÁLEZ; Jesús A. CAÑAS, "Spain and UK in talks for post-Brexit military cooperation deal", *El País in English online*, 4.1.2021, available at https://english.elpais.com/spanish_news/2021-01-04/spain-and-uk-in-talks-for-post-brexit-military-cooperation-deal.html, (last accessed 15.3.2021).

British warships using each other's facilities as partners in NATO and under new bilateral arrangements, perhaps similar to the two that the UK concluded with France at Lancaster House in 2010.[206] These were designed to tighten their defence and security cooperation and have led to the creation of a Combined Joint Expeditionary Force that is capable of deploying a joint brigade-level force with air and naval assets and conducting high-intensity combat operations. Such rapprochement could also lead, e.g., to British cooperation in the European Maritime Force between Spain, France, Italy and Portugal.[207]

3. Lugano Convention

Another important issue that needs perhaps further support and encouragement, among all other signatories, is for the speedy accession of the UK to the 2007 Lugano Convention.[208] Its effects are materially the same as the 2001 Brussels Regulation and it governs issues of jurisdiction and enforcement of judgments between the EU Member States and three European Free Trade Association (EFTA) countries –Iceland, Switzerland and Norway– while excluding Liechtenstein.

While to some extent police and judicial cooperation in criminal matters and criminal law enforcement are dealt with under the TCA, the recognition and enforcement of civil and commercial judgments is much more important for many businesses. In leaving the EU, the UK lost its participation in a network of common laws that facilitate judicial cooperation in civil matters across the Union. The UK has already applied to join the Lugano Convention and Spain could use its good offices, possibly in coalition with other current signatories, to ensure ratification of UK membership of this Convention is conducted expeditiously. The present gap throws the UK and the EU courts back into the position that existed before the 1968 Brussels Convention entered into force, which is clearly not ideal. The step down from the Brussels Regulations and other linked EU private international rules is already deep and leaves a large hole in the effective protection of companies' and individuals' interests within the TCA context.

4. Erasmus

One of the main victims of the TCA is the end of the UK's participation in the Erasmus+ programme. On the one hand, British students are set to lose out in exchanges and a relatively inexpensive way to pursue studies at a school or university or to take on an apprenticeship or voluntary work in an EU Member State since all programme participants have their student fees waived. On the other hand, incoming students from Spain and other Erasmus countries will no longer benefit from the opportunities in the other direction. While Erasmus Mundus opportunities do exist, that programme covers the vast majority of states in the world and competition will be fierce in seeking to gain support from it.

The replacement £100 million scheme, named after the British scientist Alan Turing,[209] aims at providing only UK students (some 35,000 annually compared with 100,000 on Erasmus+) with the opportunities of studying or training abroad. There is thus no exchange component in the scheme and only UK-based universities, schools, etc., can apply for funding. This specific reorientation away from Europe in general and the EU in particular is apparently intentional and reflects the present UK government's championing of a "Global Britain." The UK's International Education Strategy was recently updated to reflect this new orientation and now promotes opportunities[210] with extra-European partners (India, Indonesia, Saudi Arabia, Vietnam and

206 Lord RICKETTS, "France and the UK: A Decade of the Lancaster House Treaties", *Royal United Services Institute Commentary*, 2.11.2020, available at https://rusi.org/commentary/france-and-uk-decade-lancaster-house-treaties (last accessed 15.3.2021).

207 Dorian ARCHUS, "EUROMARFOR supports NATO efforts in the Mediterranean", Naval Post online, 29.5.2020, available at https://navalpost.com/euromarfor-supports-nato-efforts-in-the-mediterranean/ (last accessed 15.3.2021).

208 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 30.10.2007 (OJ L 339, 21.12.2007, p. 3).

209 Ben HORTON; Max FRAS, "Turing Scheme: Erasmus Holds Lessons for Global Britain", *Chatham House Expert Comment*, 13.1.2021, available at https://www.chathamhouse.org/2021/01/turing-scheme-erasmus-holds-lessons-global-britain (last accessed 15.3.2021).

210 Department for Education; Department for International Trade, "International Education Strategy: 2021 update. Supporting recovery, driving growth", *Policy Paper*, 6.2.2021, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958990/International-Education-Strategy-_2021-Update.pdf (last accessed 15.3.2021), p. 9.

Nigeria are priority education markets by UK government) with Europe relegated to the next level down, together with Brazil, Mexico, Pakistan, China and Hong Kong. Maintaining or deepening ties with universities, colleges, etc. on the continent has been clearly relegated to a lower tier.

While Ireland has already promised to pay the Erasmus grant of Northern Irish students wishing to travel to the EU for part of their studies, universities in Great Britain are now scrambling to find the funds to support the continuation of exchange programme opportunities for their students. This is particularly important for those studying foreign languages as either a stand-alone degree or as part of a joint honours degree (e.g., with law). Since Spanish is now the most popular European language to study in the UK, this may be a great opportunity for Spanish universities to design – with central and regional government support – a structured programme for bilateral agreements between Spanish and English, Welsh and Scottish universities.[211]

The programme could complement the activities of other potential actors in this field, e.g., the British Chamber of Commerce in Spain and the *Cámara Oficial de Comercio de España* in the UK; the British Council and *Instituto Cervantes*; the British Hispanic Foundation; the British Spanish Society, etc.

In taking the lead on this, the Spanish government and its private sector collaborators would be making excellent use of Spain's soft power through employing its cultural diplomacy in the education field. It would feed back into continuing and strengthening the popularity of learning Spanish in the UK and underline Spain's commitment to the European destiny of Britain's young people.

5. Practitioner development

Lastly, and related to education, will be the need to train and maintain in Spain a cadre of public servants in ministries and regional authorities together with those working in major law firms, trade associations, multinationals and civil organisations who are specialists in the new (legal) field of EU-UK relations. Their knowledge and practice would extend to cover all aspects of these relations, including the WA, the TCA and the issue of retained EU law in the UK as well as the gradual divergences between the two systems.

The aim would be to provide a part-time, executive course (partially taught online where thought feasible), with a postgraduate diploma accredited by an independent university research institute with a track record in the provision of such courses (e.g., the *Real Instituto Universitario de Estudios Europeos*, at the Faculty of Law, Universidad San Pablo-CEU). The lecturers would be drawn from the international trade and EU legal spheres and include ministry officials, academics and specialist legal practitioners in Spain and the UK.

211 Since Scotland and Wales have control over education so that their governments might want to be involved.

VI. Conclusion

The present study has sought to examine the main institutional and substantial provisions of the TCA from the perspective of its potential implications for and impacts on Spain and Spanish business concerns.

The TCA is itself a paradox, even more, a hybrid. This observation is supported by the fact that a trade agreement (even more so an association agreement) with the EU promotes convergence between the negotiating parties, in terms of trade and a range of other sectors. The TCA is rather designed to manage divergence, providing for the gradual and unremitting separation of a former EU Member State from the Union. That contradiction lies at the very foundations of its architecture.

Indeed, although the Council decided to conclude the TCA as an association agreement under Article 217 TFEU, the process regulated by its provisions is rather one of "dissociation" of the UK from the Union. Consequently, compared to recent examples of such treaties, like the EU-Ukraine DCFTA, the TCA is certainly deficient in many respects. The TCA is institutionally weaker, with little proper parliamentary oversight that runs against the current flow of enhancing the EP's powers and involvement in EU external relations, thereby underlining the evident executive-to-executive basis of the relationship. This understanding is further reinforced by the exclusion of its judicial review and interpretation from the jurisdiction of the CJEU and so confirms the parties' intention to reduce any possibility of judicialisation of EU trade policy under the TCA.[212] The executive control over the ratification was further enhanced by the Council declaring the TCA as an EU-only agreement in contradistinction to previous association agreements, concluded as mixed agreements and so needing EU Member State parliamentary ratification. Absent this scrutiny and provision of democratic legitimacy at the national level, the EP has become the repository of these matters for domestic parliaments and has played the same role in processing consent for the TCA as it did with the JEPA.

Yet put the TCA into another context and it appears to represent a marked development on recent EU trade treaties. The TCA thus bears all the hallmarks of a new generation trade agreement and can be presented as a "CETA+" or a "WTO++" – zero tariffs, zero quotas plus a series of add-ons, e.g., law enforcement, social security and digital trade. While this may give a positive spin to the TCA, it ultimately cannot hide from the fact that it is, in terms of content, a thin agreement. It leaves out many important fields from its ambit compared with the original expectations of the May government at the start of the WA negotiations. Financial services, defence and security, foreign policy cooperation, etc., have all been jettisoned. What has been left is, in many respects, a fig leaf of an agreement covering what is largely WTO law and greatly watered-down EU policy linkages. In other words, the TCA actually confirms that this is a hard Brexit deal, with terms just shy of a no-deal Brexit, and amounts to an enormous retreat from the extensive benefits inherent in the UK's membership of Union's customs union and the single market.

Even what is included within its interstices and how the TCA intends to regulate (trade) relations between the EU and the UK, give no reason to think of calmer waters ahead. The provisions of the TCA confirm an understanding that it is designed to promote a constant state of negotiation[213] between the parties in many fields, with a sword of Damocles for partial or total suspension (or termination) hanging over them. This understanding does not augur well for stability in their relations.

While the TCA follows many of the provisions found in CETA and the JEPA, the context here is radically different. The immediacy of a trade dispute – in temporal, geographic and economic terms – is infinitely more proximate and more complex with the UK under the TCA. Into this mix can be poured the operating complexities of the Northern Ireland Protocol under the WA: EU trade matters will thus impinge permanently

212 Allan F. TATHAM, "Judicialisation of trade policy and the impact on national constitutional rights of EU free trade agreements with partner countries in Europe", *ELJ*, vol. 20, 2014, pp. 763-778.

213 In this respect, the long history of trade and other links between the EU and Switzerland provide a sobering example of the complications inherent in bilateral relations contained in a series of distinct but interrelated bilateral treaties and the instability that they may cause: TATHAM, Enlargement, op. cit., note 50, pp. 185-191.

on the UK's internal political agenda. Dealing with these matters requires mutual trust and goodwill between the parties to make the agreements operate smoothly.

Unfortunately, this has not happened so far. The story of the last few months, although dominated by the pandemic, has severely curtailed any positive expectations about the roll-out of the TCA and experiences during this time are merely a taste of things to come. The current ill feeling and mistrust between the parties will not dissipate overnight.

Moreover, the continuing influence of Conservative backbenchers in the UK Parliament who still harbour a desire for a no-deal Brexit,[214] could push sympathetic British government ministers in the direction of provoking a dispute with the EU or goading the EU into reacting to unilateral UK action contrary to the terms under the NI Protocol or the TCA. One could envisage a situation in which the EU would need to take action and end up suspending or even terminating part or all of the TCA: this action would amount to a de facto no-deal Brexit beloved of the Brexiteers.

Given this continued volatility in trade and other relations with the UK and its negative impacts on the Spanish economy and businesses, Spain needs to continue with its present policy of constructive engagement and making the most of opportunities for pragmatic cooperation with the UK. In this context, Spain's approach to solving problems – even bilateral ones with the UK – must continue to be firmly secured under the EU umbrella. This positioning is not only for the benefit of the country as a whole but also as a guarantee for the many Spanish businesses and entrepreneurs that will still seek to do business with the UK and UK-based clients and collaborators. Spain has already received dividends in following this course of action, the most apparent being the deal reached between the UK and Spain over Gibraltar as well as the potential cooperation agreement on defence. Irrespective of the political hues of the governments in Madrid and London, both nations will still need to rely on each other not just for tourism and educational experiences but also for the export of a broad range of products and services as well as investments. That understanding will remain key for the future.

214 Together with their allies in the Democratic Unionist Party from Northern Ireland.

Bibliography

AYELE, Yohannes, *et al.*, "Taking stock of the UK-EU Trade and Cooperation Agreement: Trade in Goods", *UK Trade Policy Observatory Briefing Paper*, No. 52, January 2021, available at https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-trade-in-goods/

HALLAK, Issam (ed.), "EU-UK Trade and Cooperation Agreement: An analytical overview", *European Parliamentary Research Service*, February 2021, available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282021%29679071

HM GOVERNMENT, *UK-EU Trade and Cooperation Agreement: Summary*, December 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf

INSTITUTE FOR GOVERNMENT, *UK-EU Future Relationship: the deal,* available at https://www.instituteforgovernment.org.uk/publication/future-relationship-trade-deal

JOZEPA, Ilze; Dominic WEBB, "End of Brexit transition: trade", *House of Commons Library Briefing Paper*, No. 9083, 18.12.2020, available at https://commonslibrary.parliament.uk/research-briefings/cbp-9083/.

LLAUDES, Salvador, *et al.*, "Spain and the prospect of Brexit", *Elcano Policy Paper*, May 2018, available at http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/Policy-Paper-2018-Spain-prospect-Brexit

LYDGATE, Emily, *et al.*, "Taking Stock of the UK-EU Trade and Cooperation Agreement: Governance, State Subsidies and the Level Playing Field," *UK Trade Policy Observatory Report*, available at https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/

MENON, Anand (ed.), "Fisheries and Brexit," *UK in a Changing Europe Report*, 11.6.2020, available at https://ukandeu.ac.uk/wp-content/uploads/2020/06/Fisheries-and-Brexit.pdf

SANTOS VARA, Juan; Ramses A. WESSEL (eds.), Polly R. POLLAK (assoc. ed.), *The Routledge Handbook on the International Dimension of Brexit*, Routledge, Abingdon, 2021.

TATHAM, Allan F., *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn, 2009.

Annex: Reflections and proposals for Spanish foreign policy

The purpose of this Annex is to provide reflections on and proposals for Spanish foreign policy with respect to the operation of the TCA and the agreements linked to it.

1. Throughout the negotiations for the WA and then for the TCA, Spain has adopted a measured approach to the protection and promotion of its interests. Its position as one of the five large EU Member States, together with its ability to work within the Union framework with its partners and articulate these interests at the most auspicious moment, allowed Spain to obtain a veto over the application of the TCA to Gibraltar. With that in hand, Spain's negotiating position with the UK as regards the Rock was noticeably enhanced and this, coupled with the positive atmosphere generated during the bilateral talks that ended in late December 2021, eventually led to an historic agreement on Gibraltar's becoming part of the EU customs union and the Schengen area. In doing this, it could be argued that Spain actually protected the interests of Gibraltarian businesses and nationals since the territory had voted overwhelmingly to remain in the EU in the 2016 Brexit referendum. Spain therefore needs to maintain this approach and build on it, as it is doing with regards to further defence cooperation.

2. Although the European Commission remains in the driving seat as regards the implementation and enforcement of the TCA, Member States are allowed to have one of their officials shadow the work of the various TCA bodies. Spain, with its cadre of expert trade officials, will be in a strong position to follow the extensive and complex work of the TCA bodies (whether political or technical) and can draw upon experience already built up with regard to other new generation trade agreements like CETA and JEPA. In these matters, Spain will be able to exert a degree of informal soft diplomacy. In those areas of shared competence, Spain (in common with fellow EU Member States) will ensure national concerns are articulated in the relevant TCA bodies.

3. Spain could consider forwarding papers on how to evolve the parliamentary and civil society dimensions of the TCA. While the EP is currently seeking to improve its oversight of the Commission's work in the TCA bodies, Spanish MEPs are, no doubt, already engaged in support of this action. For the future, Spanish MEPs sitting on the PPA would no doubt maintain links with their national colleagues in the *Congreso* and *Senado*. To that end, it would be sensible to propose that the EU mixed parliamentary committee in Madrid transform its subcommittee on Brexit into one dealing with relations with the UK, given the complex legal and institutional issues that will continue in the coming years. The subcommittee could also reaffirm its links with the relevant committees in the UK Parliament in order to ensure a free flow of information and an early warning of any potential problems.

4. Since the PPA will need a secretariat, its head would need to be able to rely on a group of experts drawn from across the EU and the UK to support its work. Spanish international trade specialists should form part of that group.

5. Spanish MEPs could propose: (a) a subcommittee for the PPA, linked to the Committee of the Regions and dealing with the parliaments of the devolved nations in the UK which have competence in fields covered by the TCA; and (b) observer status for the UK Parliament in COSAC.

6. Like the PPA, the Civil Society Forum and the domestic advisory groups would need a (joint) secretariat. In the organisation of these fora, Spain could take a lead role as it possesses has an active civil society sector and well-established structures dealing with business organisations and trade unions. The years of experience of participation in the European Economic and Social Committee (EESC) and its input into EU law-making, will stand Spanish members in good stead in helping to evolve these new TCA bodies. The proposed Civil Society Forum secretariat could establish a liaison group with the EESC. Moreover, excellent use could be made of the British Chamber of Commerce in Spain and the *Cámara*

Oficial de Comercio de España in the UK as pivotal members in EU-UK relations, together with the larger expatriate associations for UK and Spanish citizens set up in each other's countries.

7. Spain could propose the use of best practices from experience in the operation of CETA and the JEPA, to establish informal groups at the EU level (outside the TCA but linked to it) and EU programmes for companies, naturally re-oriented towards the particularities of the UK economy. The examples from the JEPA experience include the Business Roundtable and the Centre for Industrial Cooperation as well as the EU Gateway and the Executive Training Programmes that help companies to penetrate the Japanese market.

8. In view of the future impacts of the introduction of UK border controls, Spain and Spanish trade associations must continue their public information campaigns and technical support to assist companies doing business with the UK, to prepare for the new rules and practices (e.g., paperwork, SPS measures, conformity assessments, the end of the CE mark recognition in the UK). In addition, companies (especially SMEs) would benefit from a range of information and support already required under the terms of the TCA. Businesses would also benefit from independent advice on whether or not continued trade with the UK would be feasible for them and how to achieve savings in terms of time and costs either by establishing a presence in the UK or by altering their supply chains to firms in other EU Member States.

9. Spanish professional associations may wish to pursue agreements with their counterparts in the UK in order to overcome the loss of mutual recognition of professional qualifications.

10. Spain needs to ensure its fishing industry and the associated communities are properly prepared for the reduction in certain catches over the medium term and the consequent changes in fishing practices. Terms and conditions attached the relevant funding from the EU should be provided where appropriate.

11. Civil society groups (NGOs), trade unions and business associations should be encouraged to develop links through pre-existing structures nationally and under the TCA to report possible infringements of the level playing fields requirements of competition, state aids, labour and the environment.

12. Where the TCA allows, Spain should enhance its links with the UK in police and criminal investigation matters, through a deepening and widening of already-existing forms of cooperation. Particular focus needs to be given to collaboration in matters concerning terrorism and serious and organised crime.

13. Under the TCA dispute settlement mechanisms, both arbitrators and experts are to be appointed for sub-lists of, *inter alia*, EU and non-party nationals. Spain is in a strong position to ensure that one its citizens sits as an arbitrator and also to support the candidacy of a Spanish-speaking arbitrator from outside the EU/UK. The same holds true for the experts although the numbers in that case might allow for a team of Spanish experts, well versed in each sector in the level playing field, to be represented.

14. As regards the indirect participation of individuals and companies in the resolution of disputes under the TCA, attention may be drawn to the use of the EU Trade Barriers Regulation and *amicus curiae* submissions. In both circumstances, Spain might consider organising a group of experts charged with advising on these instruments and preparing the necessary submissions for individuals, companies or associations so that they can benefit from the limited opportunities on offer. This is well-established practice under the WTO dispute settlement mechanism.

15. Spain should build up the defence and security cooperation with the UK, perhaps designing a local version of the Franco-British Lancaster House Agreements, and so explore military cooperation across the full spectrum of activities. Such cooperation could focus on naval matters and allow for full British participation in missions intended to protect the southern flank of NATO.

16. Spain should use it good offices to encourage its EU Member State partners and other signatories, to provide a speedy ratification of the UK's application to join the Lugano Convention.

17. In view of UK withdrawal from the Erasmus+ programme, Spain may wish to explore a range of options of a bilateral nature to ensure at least some continuity in inter-university relations between Spain and the UK.

18. Given the complexities of the law emerging under the WA and the TCA, as well as the issue of the divergence of formerly EU conform-law in UK, the creation of a special, part-time/executive diploma programme – aimed at training trade specialists and lawyers, in both public and private practice – should be considered as a priority. This course, based on a particular learning centre, would form the nucleus of a body of experts upon which both the state and the private sector could draw with confidence.

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Resumen: La entrada en vigor el 1 de enero de 2021 del Acuerdo de Comercio y Cooperación (ACC) y sus acuerdos relacionados marca un paso más en el proceso del Brexit en curso, que comenzó el 23 de junio de 2016, cuando Reino Unido (RU) votó en referéndum para abandonar la Unión Europea (UE). El ACC constituye ahora el pilar central de las futuras relaciones entre las dos partes. Si bien se describen las principales disposiciones institucionales y sustantivas del ACC, el enfoque de este estudio es el examen de sus implicaciones para España, así como para su sector empresarial. Para lograrlo, el estudio sitúa al ACC dentro del contexto más amplio de las relaciones post-Brexit entre RU y España y las oportunidades que presenta. Por lo tanto, examina las implicaciones tanto dentro del ámbito del ACC como en aquellas áreas que quedan fuera de él pero íntimamente vinculadas. Concluye con un debate sobre los problemas actuales y futuros entre la UE y Reino Unido y los posibles caminos a seguir para España.

Abstract: The entry into force of the Trade and Cooperation Agreement (TCA) and its related agreements on 1 January 2021 marks another step in the continuing Brexit process that began on 23 June 2016, when the United Kingdom (UK) voted in a referendum to leave the European Union (EU). The TCA now forms the central pillar for future relations between the two parties. While outlining the main institutional and substantive provisions of the TCA, the focus of this study is the examination of its implications for Spain as well as its business sector. In order to achieve this, the study places the TCA within the broader context of post-Brexit relations between the UK and Spain and the opportunities thereby presented. It therefore looks at the implications both within the scope of the TCA as well as in those areas falling outside it but still intimately linked to it. It concludes with a discussion of the current and potential future problems between the EU and the UK and the possible ways forward for Spain.

Palabras clave: Retirada de la UE –Acuerdo de comercio y cooperación– Modelos de gobernanza de los tratados comerciales internacionales –Mecanismos de solución de controversias– comercio bilateral post-Brexit

Keywords: EU withdrawal –Trade and Cooperation Agreement– governance models of international trade treaties –dispute settlement mechanisms– bilateral post-Brexit trade

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