Submission of evidence on the institutional framework of the UK/EU Trade and Cooperation agreement

Dr Jasem Tarawneh and Dr Nicolette Butler (The University of Manchester)

Dr Jasem Tarawneh (Lecturer in Law, The University of Manchester) – Jasem's research and teaching interest lie within the field of International Dispute Resolution and Intellectual Property Law. His main areas of research are Law and Economics, Intellectual Property Law and Globalization as well as Alternative Dispute Settlement Mechanisms with an emphasis on International Arbitration. Jasem worked and continues to work with a number of distinguished international organisations. He currently holds the position of a Legal Academic Associate at Kings Chambers.

Dr Nicolette Butler (Senior Lecturer in Law, The University of Manchester) – Nicolette's research and teaching interests lie within the sphere of International Economic Law and International Dispute Resolution. Nicolette's research focuses primarily on International Investment Law, as well as Global Trade Law and Alternative Dispute Resolution Mechanisms (especially International Arbitration). Nicolette has advised a number of different organisations on matters relating to international trade and investment, and she is currently a Scientific Advisor to the European Public Health Alliance.

This evidence is mainly directed towards providing a response to the following questions:

- What are the key features of the dispute resolution procedures provided for in the TCA and what are the likely legal and policy implications of these for the UK?
- How closely do they follow precedent in other trade agreements and do they raise any concerns with respect to the UK's regulatory autonomy?

As a point of departure, we note that the TCA dispute settlement chapter did not introduce any significant new variations on the standard followed by other international agreements. This lack of originality is compounded by the fact that the dispute settlement chapter (part six) is poorly drafted and deficient in places, which undermines the effectiveness of the agreement as a whole. This is unfortunate, given that the agreement could have been used as a platform to introduce a more comprehensive and relevant model to resolve trade and investment disputes. That said, an analysis of the dispute resolution chapter raises a number of concerns that should have been dealt with during the negotiation of the agreement itself, in order to ensure clarity for stakeholders, as well as to ensure the viability of this agreement and its status as a building block for future negotiations between the UK and the EU.

Accordingly, the issues identified are as follows:

1. Lack of institutional support for the dispute settlement mechanism – despite this being a technical observation, the lack of such support will hinder the dispute resolution process and its efficiency. Appropriate and dedicated management of any dispute resolution process, through a well-organised and funded secretariat is fundamental to the proper functioning of such

mechanisms. This is exemplified by other international agreements and mechanisms e.g. the World Trade Organisation and the International Centre for the Settlement of Investment Disputes. A number of key questions would need to be considered in this regard; of paramount importance being the location of the Secretariat (i.e. the UK or the EU). This is an issue that would need to be resolved through negotiations. Further, and more importantly, clear and well-drafted rules for the operation of the Secretariat would need to be developed. Essentially, lessons need to be learned from the issues faced by the WTO appellate mechanism, where a technicality has been utilised to hinder the proper functioning of the mechanism itself.

2. Lack of appellate/review mechanism – despite the problems recently experienced by the WTO in terms of its own appellate mechanism, the inclusion of such mechanism in international agreements is of pivotal importance in order to ensure fairness and regularity of procedure. It must be noted that the problems facing the WTO appellate mechanism are unrelated to the functioning or necessity of the mechanism itself; rather, they are a consequence of the particular political views of certain member states. Therefore, including a properly drafted, clearly defined appeal mechanism in part six of the TCA will constitute a vital addition that will add legitimacy and fairness to the dispute settlement mechanism as a whole. The precise remit of the appellate tribunal should be decided by the contracting parties themselves, but as a minimum, it certainly should include review based on abuse of procedure (as is typical in other international agreements e.g. the World Trade Organisation).
3. Investment protection -
   i) Absence of investor-state dispute settlement – the TCA only includes state-to-state dispute settlement, without the scope for investors to bring disputes against states for potential breaches of the investment protection obligations contained in the treaty itself. Although significant debate has been generated by the investor-state dispute settlement mechanism in recent times, many international agreements do still include it.[1] Despite our personal reservations about the insertion of investor-state dispute settlement[2], from a legal point of view, the inclusion of such a mechanism could make practical sense in relation to attracting foreign investment at a crucial time for the UK (which is a stated goal of the UK Government). State-to-state mechanisms create an espousal problem for foreign investors who have to petition their home state government to take up their case under the TCA mechanism in case of breach of investment obligations. Under the current dispute settlement mechanism, as detailed in part 6, investors only become directly involved in dispute resolution by applying for leave to submit an *amicus brief* which may or may not be accepted and/or have any effect on the outcome of the dispute.[3]

---

[1] N Butler and S Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017) 64 Netherlands International Law Review 1

[2] J Tarawneh and N Butler, "Global Britain: an ambitious template for international trade agreements in an uncertain era" (21 June 2021) Policy@Manchester blog http://blog.policy.manchester.ac.uk/posts/2021/06/global-britain-an-ambitious-template-for-international-trade-agreements-in-an-uncertain-era/ and J Tarawneh and N Butler, "Hiding in plain sight: why are the UK and US keeping the transatlantic trade negotiations under wraps?" (17 May 2021) Policy@Manchester blog, http://blog.policy.manchester.ac.uk/posts/2021/05/hiding-in-plain-sight-why-are-the-uk-and-us-keeping-the-transatlantic-trade-negotiations-under-wraps/

ii) Further, in terms of investment protection, the TCA does not address the status of the bilateral investment treaties (BITs) concluded between the UK and 12 EU member states (i.e. Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland (unilaterally denounced by Poland in November 2019, however the agreement contains a sunset clause which operates for 15 years after denouncement), Romania, Slovakia and Slovenia) prior to their accession to the EU. The UK was not a signatory to the agreement which terminated intra-EU BITs (signed on 5 May 2020), and although the European Commission issued a reasoned opinion to the UK calling for their termination, these BITs remain in force. Despite the potential advantages from the UK perspective of leaving these BITs in force, which could potentially be used as a bargaining tool when negotiating a more comprehensive investment agreement/chapter with the EU, this is a risky strategy which could backfire because keeping these BITs in force leaves the door ajar for certain EU member state investors to sue the UK government for breaches of investment obligations contained therein. The risk of such a scenario should not be underestimated, given that the UK has left the European Union and its regulatory framework. Further, leaving the mechanism in operation by virtue of these BITs, given the absence of an investor-state dispute settlement mechanism in the TCA, seems incongruous at best, and foolhardy at worst.

[3] N Butler, "Non-Disputing Party Participation in ICSID Disputes: Faux Amici?" (2019) 66 Netherlands International Law Review 143