

Written evidence submitted by Dr Kamal Dawar (FRE0009)

Question: What impact has the COVID-19 pandemic had on the negotiations?

1. To date, the UK Government has opted not to extend the negotiating deadline on the future relationship with the EU. The UK maintains that there should be a “broad outline of an agreement” in time for the high level conference in June 2020, which is “capable of being rapidly finalized by September”. This is despite the diversion of governmental resources to address the Covid-19 pandemic and the overwhelming task of negotiating the agreement before December 31 2020. The EU negotiators have viewed this as deliberately running down the clock,² forcing a no-deal. The UK government has indicated that a no-deal is preferable to a long drawn out and politically controversial UK-EU comprehensive FTA negotiation, involving sovereignty trade-offs that the Government is not prepared to make on ‘level playing field’ issues such as State aid, competition and public procurement.
2. Further evidence of the UK government’s approach to de-coupling future UK-EU relations was its’ choice not to exercise its’ legal right to join the EU’s joint procurement programme for Covid-19. This decision was made although production is dispersed across the single market, with the result that the UK as a single country does not possess the critical mass of expertise and industrial strength to stand alone against Covid-19.
3. Despite obtaining an extension until 27 February 2020, the UK government has still not deposited its’ accession instruments to the WTO Government Procurement Agreement. As a result, the UK’s independent public procurement market access commitments at the WTO GPA remain publicly unavailable to serve as a base line for FTA negotiations. However, neither the WTO GPA nor public procurement chapters in FTAs include a most favoured nation (MFN) obligation, consequently the UK and EU are able to calibrate their market access offers without reference to other FTAs’ commitments – past or future.

Question: Why does the EU want a single UK-EU trade agreement?

4. The EU does not want Brexit and aims for the most comprehensive economic and security partnership possible with the UK. The Commission's intention is to negotiate a complete package that comprises three main components: i) general governance arrangements; ii) economic arrangements including: provisions on trade, services, investment, intellectual property and public procurement, level playing field guarantees and fisheries; iii) security arrangements.

¹ Senior Lecturer Law, University of Sussex; Fellow UK Trade Policy Observatory (contact: kd263@sussex.ac.uk) ² www.euractiv.com/section/uk-europe/news/covid-crisis-should-concentrate-eu-minds-on-brexit-deal-says-uk-minister/

5. The EU position is that a comprehensive FTA is more efficient and coherent than multiple specific sectoral agreements, negotiated on a case by case basis.³ Horizontal governance implements the agreement more effectively, avoiding unnecessary institutional duplication and multiple ratification procedures. This would offer more legal certainty to stakeholders such as businesses, consumers and citizens. It would also provide the framework and capacity for future cooperation and coordination on issues such as health pandemics and climate change mitigation measures.
6. For the EU, a single comprehensive agreement allows for the horizontal governance and cooperation in safeguarding the level playing field between both jurisdictions after Brexit. This involves removing both tariff and non-tariff measures, such as maintaining similar competition, public procurement and state aid rules in both the EU and UK. Avoiding erecting new obstacles to UK-EU trade is a priority for the EU. This is due to economic efficiency concerns, but also because it does not want the UK to undercut EU competitiveness or divert trade away from the EU through providing greater subsidies, increasing short term export credit support, and buy-national and local content requirement policies. Or by imposing different standards and remedies for anti-competitive practices that negatively affect both UK and EU markets.
7. In negotiating terms, a single agreement also allows for cross-cutting deals, such as committing to market access in mode 3 in services in exchange for access to UK fishing waters or manufacturing goods. It is the model the EU is experienced in negotiating with its' other trading partners, and has developed alongside Union objectives and obligations. The Court of Justice of the EU would continue to ensure that the interpretation and application of the EU law is observed.⁴

Question: why does the UK want several separate agreements?

8. The UK Government wants a Comprehensive Free Trade Agreement (CFTA) on the lines of the recent EU FTAs, but supplemented by a range of other international agreements covering, principally, fisheries, law enforcement and judicial cooperation in criminal matters, transport, and energy.⁵ The current EU competition, State aid and public procurement regime is excluded in the UK negotiating position. This sectoral approach is a component of the UK's government aim to regain control over its' trade policy. It allows the UK to negotiate bespoke agreements using specialist teams that follow a narrow agenda. It prevents a holistic 'level playing field' approach to governing UK-EU trade relations, facilitating greater separation of the two jurisdictions.
9. The UK wants all sector specific agreements to incorporate their own appropriate and precedented governance arrangements and that the Court of Justice of the EU will no longer have general jurisdiction over the UK in relation to any acts that take place on or after 1 January 2021.⁶ The UK government has stated that legislation will provide courts lower than the Supreme Court the ability to overturn rulings made by the Court of Justice of the EU.⁷ The Political Declaration agreed by the UK and the EU, only makes clear that insofar as the 'future

³ Negotiations with the UK: Michel Barnier, the European Commission's Chief Negotiator, sets out points of

convergence and divergence following the first round of negotiations Brussels, 5 March 2020.

⁴ Article 19 para 1 Treaty of the European Union.

⁵ The Future Relationship with the EU. The UK's Approach to

Negotiations. Para 6. ⁶ *Ibid.* Para 5

⁷ www.reuters.com/article/us-britain-eu-courts/lesser-uk-courts-will-be-able-to-overturn-ecj-rulings-after-brexit-pms-spokesman-idUSKBN1YM1FK

relationship' contains concepts of EU law, disputes about those concepts will have to be referred to the Court of Justice of the EU.⁸

10. In de-coupling the UK from the EU, the UK government wants to avoid deep integration frameworks, which involve maintaining collective governance mechanisms and a competitive playing field with the EU27 countries. The UK wants to establish its' own competition regime, public procurement and subsidy control regime, so that it can provide support and preferences to UK firms that may not be permitted under EU competition rules, in order to strengthen UK small businesses and create new national champions post Brexit.

11. This sectoral negotiating approach still needs to cover substantially all trade to fulfil the conditions set for regional trade agreements under the GATT Article XXIV. If these negotiations are not able to meet these requirements before the deadline and no extension has been requested, the UK will fall back on WTO MFN terms in its' trading relations with the EU. Without a substantial agreement, the UK would be trading with the EU along the lines of the EU-Australia model, that has been referred to by the UK government. This would entail a 'cliff-edge' for British businesses that many have been trying to avoid.

12. There is also the option for the EU or another WTO Member to retaliate, for example with trade remedies, or through litigation under the WTO dispute settlement mechanism (DSM).

Question: What form of dispute resolution procedures are both parties seeking in this agreement? How do these differ from those set out in the Withdrawal Agreement?

13. The European Commission emphasizes the inclusion of DSMs in every EU FTA as an essential aspect of the EU trade strategy. EU FTAs with Canada, South Korea and Japan represent the EU's current approach of having general horizontal application over the agreement and display many similarities with the WTO DSM. A similar DSM is likely to be a negotiating priority for the EU in a future UK-EU FTA negotiation, having increased their significance in light of the broadening scope of FTAs vis-à-vis the WTO Agreements and the on-going crisis within the WTO Appellate Body.

14. The UK Government is less clear, in seeking "a new approach to interpretation and

dispute resolution with the EU”, which “respect[s] UK sovereignty, protect[s] the role of our courts and maximise[s] legal certainty”. While mindful of existing examples of EU FTA dispute settlement mechanisms, it is also stated that the UK should not be constrained by precedent”.⁹

Question: Are precedents such as CETA and the EU-Japan FTA useful as templates for an agreement between the UK and EU? Based on both sides’ mandates, how would an UK-EU FTA differ from those precedents?

15. The CETA general dispute settlement mechanism is provided in Chapter 29 and some sector- specific dispute settlement rules are also provided in each relevant Chapter. Significantly, in Chapter 26 CETA’s signatories establish a CETA Joint Committee comprising representatives of the

⁸ <https://commonslibrary.parliament.uk/brexit/the-eu/brexit-next-steps-the-court-of-justice-of-the-eu-and-the-uk/>

⁹ <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/135/13512.htm#footnote-008>

European Union, on the one hand, and representatives of Canada, on the other.¹⁰ The Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of the CETA. A Party may refer to the CETA Joint Committee any issue relating to the implementation and interpretation of the Agreement, or any other issue concerning trade and investment between the Parties.¹¹ As a result of political role of the Joint Committee, the EU-Canada CETA dispute settlement mechanism follows a quasi-judicial model. The Joint Committee is the supreme administrative and judicial body in the CETA framework. Nevertheless, it is a political body where decisions are taken by consensus.

16. The CETA Chapter 29 panel system, on the other hand, is an ad hoc tribunal where the decision process is not political but based on law. Chapter 29 allows for an automatic right of access to a third-party adjudication system. The parties may choose whether resolve a dispute by consultation and mediation, but if a matter submitted for consultation has not been resolved within a reasonable period of time, the requesting party may refer the matter to a dispute settlement panel by providing written notice to the responding party. The party found in breach of the CETA obligations has to comply with the ruling of the arbitration panel in a reasonable period of time. Otherwise, the successful party is entitled to suspend obligations or receive compensation.

17. The UK government has stated it does not favour an FTA dispute settlement mechanism that serves as a general governance framework for a multisectoral agreement that preserves the level playing field. However, if this dispute resolution model was applied to each sectoral agreement, the UK government may favour such a quasi-judicial model. The political input of the Joint Committee can play a decisive role at the consultation stage of a dispute. It holds the power to adopt decisions and recommendations on the matters covered by the agreement, as well as to adopt decisions as to the interpretation of the same.

18. Of further relevance is the CETA investor-state dispute settlement system, which applies only to investment disputes and does not apply to the entirety of the CETA agreement. It establishes a permanent Tribunal of fifteen Members to hear claims for violation of the investment protection standards established in the agreement. The updated CETA text establishes an Appellate Tribunal. The revised CETA text confirms that the Tribunal shall only apply the agreement, in accordance with the principles of international law, when adjudicating upon claims submitted by investors. It cannot decide on matters of EU or Member State law. It can only look at EU or Member State law as a matter of fact, for example to make sure that the property rights in question are in fact held by the investor. It will not interpret EU or Member States law in a manner binding on EU courts or EU governments.
19. As with other 'mixed' trade and investment agreements signed by the EU, the exclusive competencies or powers of both the EU and the Member States are involved. If the UK-EU FTA agreed to such an investor-state dispute settlement mechanism, the agreement would be provisionally implemented pending the time-consuming and politically driven approval by all EU Member States. This usually involves votes by national, and sometimes regional, parliaments.
20. The UK government may favour aspects of this more judicialized dispute settlement mechanism for investment disputes, due to the lack of transparency, legal certainty and narrow public interest overrides in many traditional bilateral investment treaties (BITs). Including investment and this

¹⁰ The Joint Committee is co-chaired by the Minister for International Trade of Canada and the Member of the

European Commission responsible for trade, or their respective designees.

¹¹ CETA Chapter 26, Article 26.1(3):

approach for resolving UK-EU investment disputes, would likely further prevent the UK from negotiating BITs with individual EU Member States in the future. On 5 May 2020, 23 Member States signed an agreement for the termination of intra-EU BITs. This implements a Court of Justice of the EU ruling that investor-State arbitration clauses in intra-EU BITs are incompatible with the EU Treaties.¹²

21. While the UK chose not to be a signatory party to this recent agreement, it is unlikely that individual EU Member States would sign a BIT with the UK after Brexit - for legal reasons, if not political. An EU Member State seeking to enter into BIT negotiations with the UK after Brexit (any third country) must notify its' intention in writing to the Commission.¹³ The Commission can refuse the authorization on four alternative grounds, *inter alia*, the negotiations would be superfluous because the Commission has submitted or has decided to submit a recommendation to open negotiations with the UK as a third country; or the negotiations would constitute a serious obstacle to the negotiation or conclusion of an international investment agreement with the UK as a third country by the EU.¹⁴

22. The EU-Korea FTA dispute settlement mechanism. As with the CETA template, in the Korea-EU FTA a general dispute settlement mechanism is provided in Chapter 14 and some sector-specific dispute settlement rules are also provided in each relevant Chapter. The Agreement provides detailed rules of procedure and codes of conduct for members of the arbitration panels and mediators, and very detailed procedures on

the implementation of the panel decision and contains various provisions for the purpose of preventing any conflict between the WTO Agreement and the Korea-EU FTA in the interpretation of trade laws. The EU-Korea dispute settlement mechanism also provides a mediation mechanism for non-tariff issues as an alternative to the normal dispute settlement mechanism, which usually takes a long time.

23. The general DSM does not apply to sanitary and phytosanitary (SPS) provisions, competition, anti-dumping or subsidy issues, and provides for special rules for automobiles, labour and environment. Further, the Korea-EU FTA does not include:
- "non-violation" complaints: when one government can show that it has been deprived of an expected benefit because of another government's action, or because of any other situation that exists (unlike WTO DSM)
 - ISD (Investor States Dispute) provisions (Unlike CETA)
 - "snap back" provision: to discourage backsliding a "snapback" provision allows a party to restore its' tariff if the other party is found to have violated the FTA in the dispute settlement process (unlike US-Korea FTA)
 - "monetary assessment" as an alternative to suspending obligations (unlike US-Korea; WTO)
24. Disputes under the EU-Korea FTA: in December 2018, the EU requested consultations with Korea pursuant to Article 13.14(1) of the EU-Korea FTA concerning Korea's breach of Article 13.4(3) of the EU-Korea FTA, where the Parties committed to respect, promote and realise the ILO Declaration on Fundamental Principles and Rights at Work and its' Follow-up, in its' laws and practices, including the freedom of association. When consultations failed, the EU requested that a Panel of Experts be convened, pursuant to Article 13.15(1) of the EU-Korea FTA, on 4 July 2019. This Panel is on-going.

¹² Case 284/16 Slovak Republic v. Achmea EU:C:2018:158. Retrieved 08/05/2020 at: <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TEXT&ancre>.

¹³ Regulation 1219/2012: rules on the required authorization and grounds for refusal. Art. 8, para. 1 ¹⁴ Ibid. Art. 9, para. 1.

25. Under the EU-Japan EPA, as with the EU-Korea FTA, the majority of the agreement's provisions are legally enforceable under the general dispute settlement mechanism, set out in Chapter 21. This provides a unified framework of governance and cooperation over a range of different and expanding issues. Again, as with the EU-Korea FTA, SPS, anti-dumping and countervailing measures, competition and government subsidies are not subject to the general dispute settlement procedure.

26. Although the UK government position does not favour the general application of either the EU- Korea or EU-Japan FTA DSM approach, it is instructive for the UK in that they both explicitly exclude similar issues from the general DSM as the UK proposal. The EU-Korea FTA also excludes with non-violation complaints, which are more intrusive in domestic policy making. However, the ability to make monetary assessments may be a useful political option for the UK government post Brexit.

What would be the possible implications of those differences with respect to, for

example, level playing field provisions?

27. Maintaining the level playing field for the EU goes beyond tariff measures to include equivalence in State aid Commitments, competition and public procurement laws and policies. These are areas that the UK government wishes to exclude from the future agreement.
28. Subsidies: The EU-Japan EPA and Korea-EU FTA prohibit government subsidies that guarantee the debts or liabilities of an enterprise without imposing limits on the amount and duration. It is also forbidden to restructure an insolvent enterprise without requiring it to prepare a credible restructuring plan.
29. While none of these EU FTAs include state subsidies within the ambit of the dispute settlement mechanism, in case a state subsidy is considered to have a significant negative impact on trade and investment interests, parties can request a consultation in both the EU-Japan EPA and CETA. In the EU-Japan EPA each party is requested to notify the other of the legal basis, form, amount and, if possible, name of the recipient of subsidies, every two years from entry into force. Such transparency provisions are similar in CETA, The notification procedures are slightly different in Korea-EU FTA, with parties having to report annually on subsidies that might affect international trade.
30. Competition: The competition policy chapters are excluded from the ambit of these FTAs' general dispute settlement chapter. The provisions sets out principles and commitments on fair and free competition in trade and investment relations between the parties. Each party is required to maintain domestic competition law to address collusion, potential abuse of dominant market position, and merger control. The agreement includes cooperation between competition authorities for the development of policies and their effective enforcement.
31. Regardless of whether or not the UK departs from the current EU competition framework, cooperation between competition agencies and DG Competition will be important for the UK competition authority after Brexit because of the proximity and existing integration of the single market with the UK economy. EU subsidy control remains the strictest model available and this lessens the potential for increased negative effects in the UK from subsidies in EU under the current rules.
32. Public Procurement: all of the EU's latest comprehensive FTAs include dedicated chapters on public procurement market access commitments. With other WTO GPA parties these commitments extend beyond those set out in the WTO GPA schedules. These FTA procurement provisions are legally enforceable under the dispute settlement procedures of the agreements.
33. The UK government wishes to maintain considerable discretion in its public procurement policies and exclude a public procurement chapter in its proposed FTA with the EU. The UK has not yet deposited its instruments of accession to the WTO GPA. While there have been reports of introducing UK Buy-National policies, it remains unclear what the UK's final WTO GPA market access commitments will be; whether it has negotiated significantly different carve outs to its existing schedules under the EU; or whether it will extend these commitments in a future UK-EU FTA. The existing FTAs with public procurement chapters do not include an MFN obligation.

34. The EU negotiating position on public procurement provisions in FTAs is directly in opposition to the UK. The EU has long aimed at creating a level playing field in public procurement markets both within and outside the WTO GPA. In addition to negotiating WTO+ public procurement provisions in FTAs, since 2012 a Commission proposal to establish an International Procurement Instrument has been gaining greater support. The proposed legislation would allow the EU to impose barriers to firms from third countries entering the EU procurement market if they do not provide reciprocal treatment to EU firms. The UK government should be mindful that alongside Germany, the UK was the main EU Member State opposing this proposal - on the grounds of encouraging competition rather than foreclosing it. Legislative progress now appears more likely in the context of EU-China relations and the UK's unwillingness to negotiate a procurement chapter in a future FTA. Germany has changed its position to support the legislation, alongside France and Spain; while the UK is leaving the bloc.

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Committee on the Future Relationship with the European Union

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24 April 2020

Dr. Kamala Dawar
Senior Lecturer in Commercial
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Dear Dr. Dawar,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Such submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- What impact has the COVID-19 pandemic had on the negotiations? Have the UK and EU been affected differently? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future relationship?
- How would you characterise the approach the UK and EU are taking to the future relationship negotiations? In which ways, if any, do these approaches differ from the withdrawal negotiations? What new challenges might both parties face?
- What is your assessment of the likelihood of an agreement given both sides' negotiating mandates? Has this assessment changed since the talks began? If so, why?
- What progress would you expect to have been made by the end of June? How do you think talks might progress over the coming year? How long would you expect the UK and EU's respective ratification processes to take?
- Given the time constraint imposed by the Transition Period, what sort of agreement do you believe is possible between the UK and the EU? What issues should each side be prioritising? To what extent do the priorities set out in each side's negotiating mandates match your assessment of what they should be seeking? On which areas does each side have the most negotiating leverage?
- What would be the main differences between a UK/EU relationship as roughly set out by both sides' mandates and a no-deal scenario? If only a limited deal is agreed what are the possible consequences for areas that are not covered? What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally.
- Our previous witnesses have outlined four key areas of initial disagreement:
 - Governance;
 - Level Playing Field;
 - Fish; and
 - Co-operation in Criminal Matters.

Have there been any recent developments in these areas? Could you sketch out possible compromises? Which other issues do you foresee emerging as sources of disagreement as the negotiations progress?

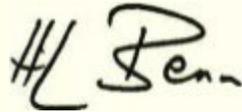
- Why does the EU want a single agreement and why does the UK want several separate agreements? How would these different governance arrangements affect how any future relationship between the UK and the EU would operate? What are the standard forms of dispute resolution contained in

FTAs? To what extent do these differ based on the scope of an FTA? What form of dispute resolution procedures are both parties seeking in this agreement? How do these differ from those set out in the Withdrawal Agreement?

- Are precedents such as CETA and the EU-Japan FTA useful as templates for an agreement between the UK and EU? Based on both sides' mandates, how would an UK-EU FTA differ from those precedents? What would be the possible implications of those differences with respect to, for example, level playing field provisions?
- Is it normal for only one side of a negotiation to publish draft legal texts? Are there any benefits or drawbacks, for either side, from doing so? What are the UK's main areas of contention going to be in the draft EU legal text? What proportion of the contents do you believe are acceptable to both sides and where will attention be focused? Because draft legal texts have been published at this stage, is an agreement more likely by the end of 2020?
- How likely is a transition period extension? Does an extension request from one party place any obligations on the other side? What steps would the UK and EU need to take for an extension to be agreed? What practical matters would need to be decided? What role would the UK Parliament and EU institutions play in this process? How might an extension affect the dynamics of the negotiations and the scope of any future agreement?
- What actions does the UK Government believe it is legally required to take by 31 December 2020 to fulfil its obligations under the Withdrawal Agreement? Would a failure to implement the Withdrawal Agreement by either side prevent agreement on a future relationship from being reached? What areas of implementation are likely to prove most controversial? How might they be resolved?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freu@parliament.uk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hilary Benn'.

Hilary Benn
Chair of the Committee