King & Spalding
Client Alert

FEBRUARY 17, 2021

For more information, contact:

Tom Sprange
London
+44 20 7551 7529
tsprange@kslaw.com

Sajid Ahmed
London
+44 20 7551 7529
sahmed@kslaw.com

Simon Maynard
London
+44 20 7551 2145
smaynard@kslaw.com

Daniel Crosby
Geneva
+41 22 591 0801
dcrosby@kslaw.com

Rambod Behboodi
Geneva
+41 22 591 0802
rbehboodi@kslaw.com

Marie-Sophie Dibling
Brussels
+32 2 898 0201
msdibling@kslaw.com

Hervé Jouanjean
Paris
+33 1 7300 3972
hjouanjean@kslaw.com

Enforcing the Level Playing Field in the EU-UK Trade and Cooperation Agreement

In December 2020, the EU and UK announced the conclusion of a free trade agreement or 'Association Agreement', termed the Trade and Cooperation Agreement ("TCA"). The TCA has two core features. First, the TCA is a free trade agreement focused on tariff and quota-free trade in goods (with modest commitments on mutual recognition and services), which is underpinned by a general dispute resolution process providing for independent, ad-hoc State-to-State arbitration. Second, the TCA includes extensive provisions seeking to preserve the so-called level playing field ("LPF") between the EU and UK, beyond the classical use of trade remedy measures that each party can impose on each other's goods under WTO rules. It is here that the TCA really breaks new ground. The LPF provisions introduce special procedures that provide for innovative enforcement mechanisms, including the adoption of unilateral rebalancing measures. The TCA envisages enforcement of the LPF provisions not only on an inter-State basis but also by private parties. If replicated beyond the TCA, such procedures have the potential to significantly alter the landscape of international trade disputes.

REBALANCING THE LEVEL PLAYING FIELD

Part Six of the TCA details the general inter-State dispute resolution provisions that will govern the majority of the future EU-UK economic relationship, including in trade, transport and participation in EU programmes.

The LPF provisions, which are carved out from the general dispute resolution mechanism, appear at Part Two, Title XI of the TCA. The provisions stem from the unique nature of the TCA in providing for divergence from harmonised standards, in particular the EU's desire to prevent the UK from gaining an unfair competitive advantage by undercutting regulatory standards.

The first bespoke procedure is set out in Articles 9.1 (Consultations) and 9.2 (Panel of Experts) and is applicable to enforcement of the Title XI commitments corresponding to labour and social standards, and environmental standards.

The mechanism involves consultation, failing which a decision will be made by a Panel of Experts. Other than the substitution of an arbitral tribunal for an expert panel, the procedure is not radically different from the general dispute resolution provisions, nor is it unprecedented. The EU-Canada Comprehensive Economic and Trade Agreement ("CETA"), for example, contains a similar mechanism to address disputes relating to employment protection standards.

Of potentially much greater significance is the rebalancing mechanism set out at Article 9.4, which applies to subsidies, abour and social standards, and environmental or climate protection. This allows for measures to be taken to restore the LPF should there be "***material impacts*** *on trade or investment between the Parties…arising as a result of* ***significant divergences*** *between the Parties...*" Measures are required to be restricted in scope and duration to what is strictly necessary and proportionate in order to remedy the situation (Article 9.4, paragraph 2).

The key features of the procedure can be summarised as follows:

- A Party is required to assess the material impacts on the basis of "*reliable evidence and not merely on conjecture or remote possibility*".
- The concerned Party must notify the other Party without delay through the Partnership Council of the rebalancing measures it intends to take, providing all relevant information. A 14 day consultation period then follows.
- If the consultation period expires without resolution, the concerned Party may unilaterally adopt the proposed measures "no sooner than five days from the conclusion of the consultations, unless the notified Party requests within the same five day period … the establishment of an arbitration tribunal … to decide whether the notified rebalancing measures are consistent with paragraph 2 of this Article".
- The arbitration tribunal is required to deliver a final ruling within 30 days of its establishment, failing which the concerned Party "may adopt the rebalancing measures no sooner than three days after the expiry of that 30 day period". However, in such a circumstance, the other Party is entitled to adopt proportionate countermeasures pending the ruling of the tribunal.
- Parties are not permitted to "invoke the WTO Agreement or any other international agreement to preclude the other Party from taking measures pursuant to paragraphs 2 and 3".

As a practical matter, it will be extremely challenging for a tribunal, particularly without the benefit of a tried and tested procedure, to engage in a proper decision-making process within just 30 days. Even in the fastest WTO cases – the Brazil-Canada Aircraft cases – on which K&S lawyers acted, the disputes lasted five months from the composition of the panel, and the appeals a further 45 days. The potential for expiry of the period and the imposition of unilateral "rebalancing measures" and "proportionate countermeasures" therefore seems considerable.

Key terms in the LPF provisions, including the standards of "material impact", "significant divergences" and "strictly necessary and proportionate", appear to be closely connected to concepts used in the World Trade Organization ("WTO") Agreements and broader international law. Both "necessity" and "proportionality", for example, have been

litigated extensively in the WTO. It seems probable that an arbitral tribunal established under the TCA would pay close attention to such jurisprudence (notwithstanding that substantive invocation of the WTO Agreements is not permitted by the TCA). Our depth of experience in WTO and free trade litigation in general, and subsidies and environmental issues in particular, will provide unique insight to our clients in protecting and promoting their interests.

The TCA does not generally create rights for private parties and, unlike CETA, does not contain provisions for Investor-State Dispute Settlement ("ISDS"). However, the LPF provisions commit both Parties to enact legislation allowing private parties to enforce the LPF provisions through their domestic courts (albeit with certain exceptions, such as taxation). This provision for limited private sector recourse, unique to the TCA, appears to expand the potential for LPF-related disputes and means that the UK courts and those of EU Member States, as well as international arbitral tribunals established in accordance with the TCA, may play a role in developing case law in this area.

NEW FRONTIERS FOR SETTLING TRADE DISPUTES?

As the UK and EU engage in a journey of what may become slow but steady divergence, the settlement of "*significant divergences*" will be an area over which to keep a watchful eye, as case law potentially evolves in multiple (and potentially competing) fora. This may even have implications outside of Europe. The TCA appears to consolidate two recent trends: a reluctance to provide for ISDS (see, for example the elimination of ISDS between the U.S. and Canada in the United States-Mexico-Canada Agreement (USMCA)) and ongoing criticism (led primarily by recent U.S. administrations) of the WTO's dispute settlement mechanism. In this context, aspects of the LPF provisions and rebalancing mechanisms in the TCA could provide a new model for settlement of certain international trade disputes, in particular where negotiating parties share a desire to provide a measure of protection for key sectors of their domestic economies.