Foreign Investment under the UK-EU Trade and Cooperation Agreement: Mitigating Punctuated Equilibrium in Legal Economic Dis-Integration

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ABSTRACT

While it aims to foster an economic relationship conducive to continued Foreign Direct Investment (FDI) based on shared values such as free markets, the United Kingdom (UK) – European Union (EU) Trade and Cooperation Agreement (TCA) of 2020 contains limited formal protections for FDI, focusing on the prohibition of nationality-based discrimination with a view to minimizing significant disruptions, but with extensive exceptions to market access commitments contained in Annexes. The TCA does contain an innovative non-regression mechanism, designed to maintain a regulatory Level Playing Field (LFP) through which unfair distortions in competition resulting from radical policy departures are curtailed when a material impact on investment results. This article will review the investment provisions of the TCA including the new LPF rebalancing mechanism as well as the agreement's state to state dispute settlement system. It will suggest that the TCA's treatment of investment captures the theoretical model of 'punctuated equilibrium' in public policy through which associated changes are generally gradual but marked by sudden, severe upheavals – such as Brexit itself. The limited coverage for investment coupled with a narrow re-balancing mechanism for LPF departures therefore appears to be designed primarily to discourage sudden, major policy changes by the Parties regarding environmental and labour matters which have distinct impacts on FDI. In so doing the TCA seeks to mitigate the worse effects of economic dis-integration between the UK and the EU as their respective approach to foreign investment diverges over time. Whether it manages to achieve a state of policy equilibrium between the parties which is conducive to high FDI flows is uncertain and may depend on modifications made to the treaty at a later stage, including formalization of the dispute settlement system.

I. Introduction

According to the theory of 'punctuated equilibrium' borrowed from the biological sciences, changes in public policy are thought to take place gradually supplemented sudden, major shifts resulting from exogenous interferences.[1] If the UK's departure from the EU may be thought of

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[1] F Baumgartner, 'Punctuated Equilibrium Theory and Environmental Policy' in R Repetto ed. *Punctuated Equilibrium and the Dynamics of U.S. Environmental Policy* (Yale University Press, 2006) at 24-26. Punctuated

as such an abrupt re-alignment in the economic relations between the parties[2], then the Trade and Cooperation Agreement (TCA), concluded in late 2020, may serve to moderate the ensuing policy changes associated with the unusual process of economic dis-integration in which the parties seek to establish a degree of stability as they drift apart. The agreement seeks to achieve this by asserting common goals in the promotion of trade and investment as well as social movements such as the environment and labour,[3] but also, and more relevantly for the purposes of this paper, by helping to maintain market access for foreign investment and disincentivizing the most pronounced regulatory divergences as they affect foreign investment through a mechanism of tariff retaliation supervised by international adjudication.

The capacity to facilitate investment between the agreement's parties is one of the objectives of the TCA, as set out in the preamble.[4] With this goal in mind, it should be noted that Foreign Direct Investment (FDI) into the UK from the EU amounted to £28 billion in 2019 (79 per cent of all inward investment into the UK), the third consecutive year of decline. Moreover, there was a net dis-investment of UK FDI into the EU in 2019 of almost £20 billion, reversing a two-year period of net UK investment in the EU which peaked in 2017 (the year after the Brexit referendum).[5] While FDI flows tend to fluctuate significantly from year to year due to a range of factors, there appears to be a trend of declining investment flows between the UK and the EU, suggesting that minimal barriers to entry coupled with legal protection for established foreign investors should remain a top priority for both parties.

Capturing the model of punctuated equilibrium in policy change noted above, the relationship between the UK and the EU in terms of the laws governing foreign investment appears to be characterized by rather sharp immediate disruption (in the form of the UK's departure from the Single Market and therein loss of free movement of capital[6]) which one might expect will be followed by the relative stability of readjustment due to the modest

equilibrium in public policy has been defined by Givel as: 'long-term and relatively incremental policy change followed by an exogenous shock to a policy monopoly resulting in a tipping point oriented toward sharp and explosive policy change.' Note the compatibility of biological (evolutionary) punctuated equilibrium as a descriptive model for public policy change has been challenged by commentators: M Givel, 'The Evolution of the Theoretical Foundations of Punctuated Equilibrium Theory in Public Policy' 27:2 Review of Policy Research (26 February 2010)

[2] A Krueger, *International Trade: What Everyone Needs to Know* (Oxford University Press, 2020) at 209

[3] Preamble: '[B]elieving in the benefits of a predictable commercial environment that fosters trade and investment between them and prevents distortion of trade and unfair competitive advantages, in a manner conducive to sustainable development in its economic, social and environmental dimensions.'

[4] Ibid.

[5] M Ward, 'Foreign Direct Investment Statistics' House of Commons Library Briefing Paper, Number CBP-8534, 23 December 2020

[6] Article 63 Treaty on the Functioning of the European Union (TFEU)

investment protections contained in the TCA. The TCA's Level Playing Field (LPF) obligations and associated rebalancing mechanism, designed to eliminate unfair competition between the parties based on lowering of standards in areas such as labour and environmental protections,[7] may help temper more precipitous changes by disincentivizing severe departures from social policy as they relate to investment (among other matters). The ensuing gradualism in economic disintegration between the UK and the EU in the sphere of investment may therefore be seen as a plausible end goal of the TCA – a kind of managed separation in which sharp and therefore economically distortive changes in the legal treatment of foreign investment are minimized. This is in keeping with the observation of punctuated equilibrium theory (as it applies to policy) that rule of law and robust institutions such as courts are key factors which resist periods of significant and in some cases disorienting transformation.[8] For international legal academics, it is well-recognized that systems of adjudication based on rule of law, such as those in the TCA, play a vital role in "regime maintenance" by containing existing conflicts within defined legal parameters.[9]

This article will start (in Part II) by examining the investment liberalization provisions contained in the TCA. It will then turn to an assessment of the LPF obligations as they pertain to foreign investment (in Part III), followed by a closer look at dispute settlement under the agreement (in Part IV) and how it might serve foreign investors. Part V concludes by noting that the UK - EU's relationship on foreign investment, as with other matters, is very much a work in progress but it can be expected that the TCA, in its current form, will function to mitigate some of the harsher divergences in the parties' approach to policy which may unfold in the coming years.

II. Foreign Investment in the TCA

The TCA lacks a full investment protection chapter along the lines of modern Free Trade Agreements (FTAs) such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA). It contains no guarantee against expropriation without compensation nor does it contain obligations of Fair and Equitable Treatment or Full Protection and Security, familiar to practitioners and commentators in the field of international investment law. Moreover, there

[7] Title XI
[8] Baumgarnter, above n 1
[9] S Shlomo Agon, *International Adjudication on Trial* (Oxford University Press, 2019) at 67

is no Investor-State Dispute Settlement (ISDS) in the TCA, meaning that to the extent that the TCA creates rights for foreign investors, there is no system through which these may be directly enforced against the state parties. These substantive and procedural elements were most likely omitted from the tight schedule of negotiation of the TCA because they would have required ratification by individual EU Member States – international investment is a mixed competence under EU law.[10] It may be that the parties will revisit investment protection in the future, perhaps including the EU's Investment Court System, also found in CETA or UNCITRAL's Multilateral Investment Court. Indeed, Article SERVIN.1.4:1 states that: '[w]ith a view to introducing possible improvements …, the Parties shall review their legal framework relating to trade in services and investment, including this Agreement.' Other iterations of the TCA, possibly in the form of annexes or side notes, are quite likely to appear.

In light of the omissions of conventional investment protections, UK investors have weaker protection in the EU under the TCA than Canadian ones have has under CETA, to cite but one example. This could end up making the UK a relatively unattractive place from which to base investments into Europe. Other treaties may offer some help in this regard. Pursuant to the ruling of the Court of Justice of the European Union (CJEU) in *Slovak Republic v Achmea*,[11] the Termination Agreement of 2020 ended all intra-EU Bilateral Investment Treaties (BITs).[12] It did not, however, affect BITs between Member States and the UK. For EU investors in the UK, the UK has various BITs with EU Member States which are still in force e.g. Romania, Estonia, Latvia, Lithuania, Czech, and Slovakia. Investment in the energy sector in the EU/UK is also still protected by the Energy Charter Treaty (ECT). Investors from these states in the UK in theory have access to a greater range of entitlements and remedies under these instruments before they are also terminated in favour of an EU-wide investment policy.

While the TCA lacks the protections of a traditional international investment agreement (IIA) it does contain material designed to maintain market access for foreign investors in each party's territory. Investment is covered in the Services and Investment Chapter (Title II) which opens with the encouraging statement that the parties 'affirm their commitment to establish a

[10] FDI falls within the ambit of the EU's exclusive competences as part of its Common Commercial Policy (CCP) pursuant to Article 3(1)(e) of TFEU. The UK's recent FTA with Japan, the Comprehensive Economic Partnership Agreement (CEPA) (23 October 2020), also lacked investment protection provisions, although there are some investment liberalization commitments in it, e.g. National Treatment with respect to establishment and operation (Art 8.8)

[11] Case C-284/16 (23 May 2016)

[12] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, *OJ L 169,* (5 May 2020)

favourable climate for the development of trade and investment between them.'[13] No definition for 'investment' is supplied, itself unusual for a modern IIA many of which provide comprehensive definitions of this concept.[14] The chapter does define 'investor of a Party' as 'a natural or legal person of a Party that seeks to establish, is establishing or has established an enterprise … in the territory of the other Party,'[15] a phrase which resembles that of most modern IIAs.[16] Chapter 2 of the Services and Investment section is entitled 'Investment Liberalisation' which gives some indication that this section will not resemble that of a conventional BIT, which tend to focus on protecting existing investments rather than facilitating the entry of new ones – perhaps a reflection of the TCA's goal of ensuring that FDI continues to flow between the parties in the context of economic disintegration. Accordingly, a Market Access provision is set out which prohibits quantifiable limits on foreign enterprises using language inspired by GATS' material on market access.[17] This section adds that parties may not restrict or require specific types of legal entity or joint venture through which an investor of the other Party may perform an economic activity.[18]

Article 2.3 goes on to grant National Treatment to investors of the other party including in the pre-establishment phase (unusual for many IIAs, especially classic BITs) using the familiar 'like situation' comparator:

1. Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to its own investors and to their enterprises, with respect to their establishment and operation in its territory.

Most Favoured Nation status, vital to protect foreign investment from regulatory competition as applied to investors from third stats, is extended in the next provision Article SERVIN 2.4.1:

Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to investors of a third country and to their enterprises, with respect to establishment in its territory.

[13] TITLE II: SERVICES AND INVESTMENT Chapter 1: General provisions and Article SERVIN.1.1: Objective and scope
[14] E.g. CPTPP Art 9.1 (8 March 2018)
[15] Article SERVIN.1.2.j)
[16] E.g. CPTPP Art 9.1
[17] Article SERVIN 2.2 a)
[18] Article SERVIN 2.2 b)

2.4.2 adds the word 'operation' to establishment, helpfully covering all stages of a business's lifespan. Subsection 4 clarifies that MFN treatment does not include ISDS provided in other international agreements, precluding investors bring importing it through a different instrument with a third party. The next section states that parties shall not require a covered enterprise to appoint individuals of any particular nationality as executives, managers or members of boards of directors,[19] precluding another problematic barrier to continued FDI between the parties.

The TCA rules out the requirement of a local presence as a condition for the supply of cross-border services,[20] which should encourage parties to trade rather than invest where the latter is an unnecessary cost. The agreement further prohibits the use of performance requirements as a condition of establishment or operation of an investment, as is typically for modern IIAs as well as mandated by the WTO Trade Related Investment Measures (TRIMs) Agreement. Beyond conventional performance requirements relating to the use of local content, this section expressly prohibits the requirement of technology transfer, including transfer of production process or other propriety knowledge.[21] The next section prevents parties from conditioning investment incentives on various actions by investors of the other party, notably local content usage, however the capacity of parties to condition the receipt of incentives on employment or the expansion of facilities is maintained, as are incentives related to research and development.[22] There is also a capital movements clause, allowing free movement of capital for the purposes of liberalisation of investment,[23] which is similar to that found in many BITs, including conventional limits relating to bankruptcy and fraud.[24] This clause assuages concerns that investors' money may be tied up in foreign banks – not an inconceivable outcome given the instability of the banking system in some EU Member States. Finally, the TCA's investment provisions are subject to a denial of benefits clause which enables parties to remove protections for investors in the furtherance of international peace and security, facilitating the imposition of economic sanctions.[25]

While the sections mentioned above ostensibly offer a high level of liberalization for foreign investors in each other's territory, they need to be read in conjunction with the 'non-conforming measures' scheduled by each party, including each EU Member State. This is

[19] Article SERVIN.2.5
[20] Article SERVIN.3.3
[21] Article SERVIN 2.6 f)
[22] Article SERVIN 2.6.2 and 2.6.3
[23] Article CAP.3
[24] Article CAP.4
[25] Article SERVIN 1.3

contained in Annexes SERVIN 1 (existing measures) and SERVIN 2 (future measures). It is not possible to review these derogations from the commitments made in Chapter 2 here because these annexes are lengthy and complicated, covering many sectors and running to several hundred pages each. The crucial point is that there are many instances where there are local presence and nationality requirements – restricting full market access for foreign investment in the manner that it existed while the UK was a member of the Single Market. On the other hand, this format amounts to a 'negative' list style of market access in that the basic principle is one of openness with listed derogations, rather than the other way round as with GATS itself.

It is important to recognize that the investment elements of the TCA, while limited relative to standard BITs, are rather advanced in relation to investment promotion. The TCA goes beyond the vague statements found in many IIAs by actively encouraging the promotion of FDI through the creation of contact points and enhanced information sharing regarding available opportunities.[26] This sends a positive signal to investors from each party that new investment is sought. Such initiatives could become more important in the future, especially for SMEs, as regulations between the parties continues to diverge in areas relevant to foreign investors. Finally, the TCA's general exceptions, modelled on those of the General Agreement on Tariffs and Trade (GATT) and covering maters such as the preservation of natural resources and safeguarding health, expressly apply to measures affecting both trade and investment,[27] as is typical in most modern IIAs.[28]

III. Level Playing Field (LPF) and Rebalancing for Foreign Investment

The LPF obligations of the TCA essentially require that parties remain on an equal regulatory footing with a view to preventing unfair competition for foreign investment (and trade, although trade is beyond the scope of this article). The essence of the LFP is contained in the statement in Article 1.1.4:

> The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However, the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title.

[26] Article SME.3
[27] Title XII EXC.1
[28] E.g. CETA Art 28.3 (15 February 2017)

This ethos is elaborated in Article 7.2 which states that parties shall not weaken or reduce their environmental protections, in a manner affecting investment between the parties from where the standards are at the end of the Brexit Transition Period (end 2020). This is the essence of the LPF - parties should not lower their standards in a manner that operates as an incentive to shift a firms' location into its territory either from the other party or any third jurisdiction. Such 'non-regression' clauses (also known as 'standstill' or 'ratchet' clauses) are common in modern IIAs as part of the movement towards the recognition of the role of host states in ensuring the observation by investors of corporate social responsibility principles, such as they relate to the environment as well as human rights.[29] For example, CETA's non-regression commitments in the policy areas of labour and the environment are as follows:

> The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour/environment law and standards.
>
> 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour/environment law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
>
> 3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour/environment law and standards to encourage trade or investment.[30]

The phrase 'sustained or recurring' here indicates that single, isolated examples of regression are less important than ones that are regularly repeated. Some recent BITs use a standard of 'appropriateness' to control this kind of behaviour: it is inappropriate for parties to encourage investment by relaxing domestic health, safety environmental measures,[31] and lowering labour standards.[32] In the case of the TCA, the LPF obligation is bolstered by express commitments to honour such instruments as the International Labour Organization Declaration. Generally speaking, non-regression clauses in IIAs are thought to have had provided rather limited protection in the case of the environment, at least. Indeed, the EU does not rely on non-

[29] See e.g. M Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' 18:1 Michigan State International Law Review 33 (2009)
[30] Art 23.4 (labour) and Art 24.5 (environment)
[31] E.g., Nigeria-Singapore BIT (2016); Bangladesh-Denmark BIT (2009), Bangladesh Turkey BIT (2012); Canada-Jordan BIT (2009); Canada-Kuwait BIT (2011)
[32] USA-Rwanda BIT (2008); Japan-Mongolia EPA (2015); Austria-Kyrgyzstan BIT (2016)

regression clauses to maintain a LPF within the Single Market.[33] More than 50 claims have been brought under the non-regression type clause in the ECT[34] based on the removal of renewable energy subsidies,[35] often in conjunction with breach of the Fair and Equitable Treatment standard.[36]

The TCA's LPF obligation is enforceable via a Panel of Experts for non-regression areas procedure.[37] Non-compliance with a Panel of Experts finding can lead to arbitration under the TCA's general dispute settlement system as well as the invocation by the complaining party of 'temporary remedies.'[38] These consist of the suspension of treaty obligations – essentially the imposition of tariffs on traded goods. Such suspension can become permanent if the objected-to change in law is not reversed. This novel 'rebalancing' mechanism through which the parties may retaliate in the form or removal of tariff preferences if the other lowers its standards in areas of labour, the environment or state aid, as they impact trade between the parties, is already controversial, attracting wide ranging commentary, see further below. The system is unique because, since it governs continued relations among a former member of the EU's Single Market, the TCA is an agreement designed to enable divergence rather than convergence yet at the same time it aims at facilitating FDI between the parties as well as commonality in regulatory goals in a manner which 'stands the test of time' (to use the TCA's own wording) – capturing the notion of policy equilibrium noted earlier.

The TCA envisions retaliatory tariffs as a secondary remedy (the primary remedy being the brining of the divergent measure into conformity, as under the WTO Dispute Settlement Understanding).[39] Still, since the agreement preserves the Parties' right to diverge on regulatory matters, subject to potential retaliatory tariffs, it preserves the Party's regulatory sovereignty, permitting divergence while discouraging it. In addition to the availability of tariffs for

[33] A Jordan, V Gravey, B Moore and C Reid, 'EU-UK trade relations: why environmental policy regression will undermine the level playing field and what the UK can do to limit it' Brexit and the Environment, Friends of the Earth (undated) at 8

[34] Article 19 of the ECT on environmental aspects is not framed as a non-regression clause, although it does speak of preventing distortions in investment by not upholding environmental standards – it does not mention 'no lowering' or 'no weakening' of standards.

[35] For example: Antin Infrastructure Services Luxembourg s.a.r.l. & Antin Energia Termosolar v. Spain, ICSID Case No. ARB/13/31, Award, (15 June 2018); Antaris GMBH v. Czech Republic, PCA Case No. 2014-01, Award (2 May 2018); Novenergia v. Spain, SCC Case No. 2015/063, Award (15 Feb 2018); JSW Solar, PCA Case No. 2014-03; Eiser v. Spain, ICSID Case No. ARB/13/36, Award (4 May 2017)

[36] A Mitchell and J Munro, 'No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law' 50 Georgetown Journal of International Law (2019) 625 at 638 - ff

[37] Art 9.3

[38] Art INST.24

[39] Art 22

departures from the LPF, there is also the possibility for a limited reopening of the LPF commitments, providing essentially for a long-term rebalancing system aimed at accommodating permanent regulatory divergence, again seemingly with a view to avoiding the sudden shock of rapid divergence in favour of those which are established incrementally and discussed cooperatively. Overuse of the short-term rebalancing system can trigger a review of the LPF commitments entirely[40] but the concept of over-use itself reflects an approach of gradualism to social policy as it affects investment. For example, if the UK pursued more far-reaching environmental policies it may argue that EU business had an unfair advantage. Under such circumstances, it may seek to activate the 'rebalancing' mechanism in the short term and apply tariffs accordingly. In the longer term, the UK may wish to amend the TCA to take this divergence of approach into account. This goal is achieved by ensuring that any future negotiations are focussed on the LPF only as it applies to investment and trade, stimulating a limited tariff negotiation on goods in response to any derogation from the LPF provisions.[41]

As they are phrased in the TCA, the rebalancing system overseen by the Panel of Experts is exceedingly narrow – seemingly aimed at addressing the most severe departures from shared policy goals which have distinct effects on foreign investment. In that sense it operates as a 'shock absorber' against punctuated equilibrium in policy direction. The threshold for 'materiality' to trigger the LPF rebalancing is undoubtedly to be a high one, affording limited scope for retaliation. In public international law 'material breach' of a treaty is one which violates 'a provision essential to the accomplishment of the object or purpose of the treaty.'[42] Indeed, it is a breach so serious that it allows the other party to terminate the treaty. The concept of 'object and purpose' of the treaty is itself often construed quite narrowly. Investment tribunals have been disposed towards using consequentialist arguments to reject interpretations of a treaty's object and purpose which are too subjective and expansive.[43] The phrase 'material impact' (which appears in the text of the TCA) differs from material breach calls for an interpretation based on the ordinary meaning of the words.[44] This assessment must be rooted in international law, not EU or British law. Indeed, commentators have cautioned that the international nature of the TCA will require 'a cultural shift for EU lawyers' because

[40] Art 9.4.7
[41] Art 9.4.5
[42] Vienna Convention on the Law of Treaties, Art 60(3)b (23 May 1969)
[43] E.g. Azinian v Mexico, ICSID Case No. ARB(AF)/97/2 Award, (1 November 1999) at [87], reading down the purpose of NAFTA to prevent breach of ordinary commercial contracts from being seen as breaches of international law.
[44] Vienna Convention on the Law of Treaties, Art 31(1)

it is not an instrument of EU law and it would be a category error to approach the interpretation of it as such.[45] Again, the concept of 'material' is one which contemplates a high threshold, synonymous with that which is 'important, significant, essential.'[46] Moreover, the 'strictly necessary' standard for measures taken in response to such material deviations in the LPF offers even less scope for the complainant. Under public international law the standard of 'necessity' is usually taken to mean that it is 'the only means for the State to safeguard an essential interest against a grave an immanent peril.'[47] In the field of trade, 'necessity' under GATT Article XX General Exceptions is similarly restrictive. It is understood to mean something close to indispensable; that there is no less trade restrictive way to achieve the desired goal.[48] Investment jurisprudence suggests that this is a very tough test for host states to meet.[49]

The restrictive nature of the LPF rebalancing assessment is also revealed by an understanding of the meaning of 'impact' on investment. The Collins Dictionary definition of 'impact' speaks of 'a sudden, powerful effect,' suggesting something quite significant as opposed to mundane, an outcome which is emphasized by the modifier 'material.' In this regard it is worth keeping in mind the principal of effectiveness in treaty interpretation, which essentially means that any provision is supposed to have some significance and to achieve some end – it cannot be interpreted in such a way that would render the word meaningless.[50] 'Material' is not superfluous – it a way of confining impact to the most serious cases. The room for mandatory alignment between the two parties appears even narrower in this light. It might be useful to think of 'impact' as specified in the TCA as the opposite of a 'benefit' as found in the WTO Agreement on Subsidies and Countervailing Measures.[51] Analysis of 'benefit' by WTO panels and the Appellate Body has focused on market based assessments: did the recipient receive a financial contribution on terms more favourable than would otherwise be available to it in the relevant market?[52] In the case of 'impact' surely it is the reverse of 'benefit' – the affected party suffered in a manner that it would not have done within the relevant market in the absence of the measure – in other words, a market distortion. This in turn raises

[45] P Moser, 'The TCA: New Law, Not EU Law' EU Relations Blog (29 December 2020)
[46] Collins Dictionary Online [accessed January 2021]
[47] International Law Commission Articles on State Responsibility 2001, art 25(1)
[48] Appellate Body Report, Korea Beef, WT/DS161/AB at [161] (adopted 10 January 2001)
[49] See e.g. C Galvez, '"Necessity", Investor Rights, and State Sovereignty for NAFTA Investment Arbitration' 46 Cornell International Law Journal 143 (2013)
[50] Wintershall v Argentina, ICSID/ARB/04/14 Award (8 December 2008) at [165]
[51] Art 1(1)b
[52] Appellate Body Report Canada – Aircraft, WT/DS70/AB (adopted 4 August 2000) at [154] and [157]

complicated questions regarding the nature of the market in which the injured firm operates in the first place.[53] Implicit allusions to market normality are seen in commentators' use of the word 'artificial' to characterize acquisition of a comparative advantage over the other party through the derogation from existing standards.[54] Changes in comparative advantage, suggesting long-term transformations in trade or investment flows, will not be easy to demonstrate. As noted earlier, FDI flows tend to fluctuate significantly from year to year in response to many different factors. It would accordingly be difficult to discern the signal of impacts from lower standards from the noise of movements from all other causes.

The TCA further explains that an assessment of the impacts for breach of the LPF obligations must be based on 'reliable evidence and not merely on conjecture or remote possibility.' But in most cases, establishing a counter-factual – the situation that would have occurred had there not been material regulatory divergence on the LPF – would be hard without extensive guesswork.[55] For example, in the case of a diversion in foreign investment, the complainant would need to show that an investor that would have located in its territory decided instead to establish in the other party's territory because the regulatory environment in that jurisdiction was more attractive, not to mention lower in some measurable way. Alternatively, the complainant would need to show that the lower regulation in the other Party was the reason that an investor moved from its territory into the other Party's territory. In either case, establishing an investor's strategic motivation in this way would be a difficult evidentiary burden.[56] Indeed, this is one of the reasons that investment incentives have never been formally controlled under international law.[57]

There is an additional requirement that rebalancing measures must be 'proportionate' – a concept that is familiar to international economic lawyers who note that proportionality tests

[53] D Underhalter, 'On Interpretation and Economic Analysis of Law' in M Jansen, J Pauwelyn and T Carpenter eds. *The Use of Economics and International Trade and Investment Disputes* (Cambridge University Press, 2017) at 80-81

[54] J Lebullenger, 'Specific procedures for settling labour disputes in Asia-Pacific trade partnership agreements' 5/6 International Business Law Journal 853-869 (2020) at 854

[55] D Collins and TJ Park, 'Deafening Silence or Noisy Whisper: Omission Bias and Foregone Revenue under the WTO Agreement on Subsidies and Countervailing Measures' 51:6 Journal of World Trade 1069-1088 (2017)

[56] As in this case of counterfactuals for subsidization cases at the WTO: C Lau and S Schropp, 'The Role of Economics in WTO Dispute Settlement and Choosing the Right Litigation Strategy: A Practitioner's View' in M Jansen, J Pauwelyn and T Carpenter eds. *The Use of Economics in International Trade and Investment Disputes* (Cambridge University Press, 2017) at 58

[57] See e.g. D Collins, *Performance Requirements and Investment Incentives under International Economic Law* (Elgar, 2015)

are evident in the decisions of international investment law tribunals.[58] Assessing the quantum of compensation payable in international investment arbitration is a task of much complexity and controversy, regularly occupying much of investment arbitration tribunals' time and typically incorporating the expert analysis of valuators. But in the case of LPF obligations, as articulated in the TCA, the task for the Panel of Experts would be near insurmountable. As Mitchell and Munro note: 'The more intermediary steps between the regression [of the standard] and the encouragement, the more difficult it may be to demonstrate that the regression is the mechanism through which an "encouragement" is given effect, rendered even more problematic if subjective intent to encourage is required.'[59] It is difficult enough for an investment arbitration tribunal to assess the economic harm suffered by a foreign investor as the consequence of an excessive regulation, perhaps reaching the standard of an indirect expropriation or breach of Fair and Equitable Treatment. Under the TCA's rebalancing system, the question is not how much the investor has suffered, because of course the investor has not suffered since it has merely shifted from one jurisdiction to the other one (hence the unsuitability of ISDS as a forum for such claims). The appropriate question is rather how much as the host state suffered from the investor's departure. But how would this harm be quantified? FDI flow declines, as suggested earlier? Or something else, perhaps reduced tax revenue? Unemployment data? A holistic measure incorporating tax revenue, employment, innovation and intangible social benefits might be more suitable.

Even were it feasible for the claimant to establish such a figure, it would need to be expressed not in monetary damages (as in the case of conventional remedies in international investment law) but translated into preferential tariff concessions in favour of the other party which would thereby be removed. Again, this response would need to be proportional to the deleterious effect of the investor's movement from one jurisdiction to the other, or even more problematically, its failure to establish in one party in the first place, instead choosing the other party in which case the harm would be entirely hypothetical (the counter-factual problem). A plausible guide to compensation in the latter case could be situations in which pre-

[58] V Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Elgar, 2018). Pirker notes that proportionality tests can be particularly complex when EU regulations are at issue because of its autonomous concept of public policy and the requirement to incorporate that of its individual Member States: B Pirker, "Proportionality Analysis and International Commercial Arbitration – the Example of Public Policy and Domestic Courts" in in J Jemielniak, L Neilsen and H Palmer Olsen eds. *Establishing Judicial Authority in International Economic Law* (Cambridge University Press, 2016) at 291 and 312.

[59] At 680

establishment national treatment was breached.[60] On the other hand, environmental claims, for example, tend to deal 'behind the border' measures such as those relating to water quality, environmental assessment, waste and land use planning. While such departures from the LPF may not have an impact on trade, they could be relevant to international investment, potentially affecting the location decision of a multinational enterprise.

Most commentators appear to agree that the retaliation against departures from the LPF obligations will be difficult to challenge. For example, Lester asserts: 'in practice it may not be all that easy to impose these [retaliation] measures, and if that's the case, there won't be much impact on a government's regulatory decisions.'[61] He goes on to compare the rebalancing mechanism to trade remedies under WTO law, through which claims for countervailing duties against subsidies are difficult to substantiate.[62] Although not referencing the TCA's LPF, Mitchell and Munro caution that it the assessment of what is meant by lowering of a standard in terms of an associated impact on the environment is a major problem: '[t]he difficulties and uncertainties in forecasting and measuring the effectiveness of environmental policies … as it develops over time create unanswered problems in applying non-regression clauses in practice.'[63] They proceed to suggest that non-regression provisions may be most suitable as a means of bolstering claims brought under the basis of a violation of Fair and Equitable Treatment,[64] which, as noted earlier, is missing from the TCA.

To be sure, some hold that the TCA's rebalancing tests would be easy to satisfy. For example, Chalmers believes: 'The process is startling because of … the lax test for when they may be imposed …[it] requires there to be a "material impact" before these can be imposed but it is not clear what the word "material" adds. Any impact will have material effects.'[65] The suggestion that divergences are presumptively impactful seems somewhat of an overstatement. If the qualifier 'material' did not refine the understanding of impact, surely it would not have been included at all.[66] In a similar vein, Lavranos writes that the rebalancing mechanism 'gives the parties significant room of manoeuvre to self-judge whether a certain situation justifies

[60] D Collins, 'National Treatment in Emerging Market Investment Treaties' in A Kamperman Sanders ed. *The National Treatment Principle in an EU and International Context* (Elgar, 2014) 161-182
[61] S Lester, 'Will the Post-Brexit EU-UK Trade Agreement Limit Regulatory Competition?' Cato (28 December 2020)
[62] Ibid.
[63] Mitchell and Munro, above n 36 at 625 at 630
[64] Ibid at 639
[65] D Chalmers, 'British Sovereignty Run by Europe' UK in a Changing Europe (29 December 2020)
[66] The principle of effectiveness in treaty interpretation, see above n 50

unilateral corrective measures.' He goes on to warn that the presence of the provisions in the TCA 'could be an invitation to threaten to trigger these mechanisms, which in turn could provoke numerous small-scale trade wars.'[67] The claim of 'significant room to manoeuvre' is hard to support given the clearly exceptional nature of the legal tests as discussed earlier. It is difficult to see how the test could have been framed more stringently without being omitted entirely.

Divergence may have been the main objective of this feature of the TCA because of the understanding that regulatory divergence between jurisdictions can be efficient. Convergence for its own sake is not necessarily beneficial whereas an equilibrium of regulatory competition promotes good governance that is conducive to business and which enjoys public support. Lester notes that mandated convergence can 'serve as an impediment to governments who want to revisit regulations that they believe are not serving their purpose or are excessively burdensome.'[68] Likewise, Hewson argues: 'In principle, [convergence] is undesirable, premised as it is on the idea that regulatory competition is to be discouraged; that somehow, one side or the other has alighted on the best way of legislating environmental or employment regulations and divergence is to be treated with suspicion.'[69] With this understanding in mind, it is quite likely that the TCA was constructed precisely to facilitate divergences so long as they were not sudden and extreme.

It has been suggested that the rebalancing mechanism in the TCA may not be used much because it would damage the reputation of the complainant party to do so. Applying tariffs against the other party for gaining ground in regulatory competition would effectively operate as an admission of sub-standard regulatory practice which pushed away business. Rotherham argues this applies particularly to the EU because it enjoys a reputation as a global standard-setter. 'The Commission may find it politically embarrassing at times to challenge regulatory diversion, because it would have to demonstrate the extent to which its own legislation carries considerable red tape costs.' He proceeds optimistically to suggest that the LPF provisions could actually 'encourage the EU side to reflect on regulatory burdens, and … to pursue proper cost-benefit analysis of proposed laws.'[70] The need to demonstrate counterfactuals, for example that an investor would have stayed in the EU had it not been for the UK's

[67] N Lavranos, "EU UK TCA: level playing field, disputes, energy and climate" Borderlex (29 December 2020)
[68] S Lester, "Will the Post-Brexit EU-UK Trade Agreement Limit Regulatory Competition?" Cato (28 December 2020)
[69] V Hewson, "Sovereignty is all well and good – but it's what you do with it that counts" CapX (4 January 2021)
[70] L Rotherham, "A positive deal overall – but problems lurk round the corner" CapX (29 December 2020)

abandonment of the LPF, may accordingly be thought of as a kind of losers' attempt to recast itself as the genuine jurisdiction of choice for business which was thwarted by the illegitimacy of race-to-the-bottom enticements from the 'other side.'[71]

The political economy element of non-regression provisions in international economic agreements is alluded to by Krueger who notes that trade remedies disciplines (conceptually quite similar to the TCA's LPF system) are necessary because 'without a framework within which to evaluate charges of "unfairness" against foreigners, domestic pressures to raise tariffs would often be insurmountable.' Thus, with a LPF / rebalancing type mechanism in place, 'there is at least some constraint' on the pressure to engage in protectionism[72] while preserving reputation. On the other hand, failure to use the rebalancing system to address perceived deficiencies in the regulation of foreign investment might equally be taken as a tacit admission that a party's laws were inferior from the standpoint of achieving the social goals of the environment and labour while maintaining an environment conducive to commercial activity. The TCA's LPF provides a mechanism that allows parties to diverge from existing rules where they are more of a burden than an advantage, provided that it does not result in drastic quantifiable harm to investment. It does so in a way that does not deter the parties from pursuing reforms since any retaliation by the other party is both uncertain and clearly limited.[73]

IV. Dispute Settlement for Investment

The absence of ISDS in the TCA should not be taken to indicate that there is a deficient system for the enforcement of investors' rights, such as they exist in the agreement. The TCA's state-to-state mechanism may provide adequate, if indirect, enforcement for investors in as much as the home state can raise claims based on the various protections contained in the instrument. This is notwithstanding the fact that recent studies suggest that foreign investors value access to ISDS in contrast to other mechanisms, such as domestic courts or state-to-state systems.[74] State-to-state arbitration may be especially effective for claims based on pre-establishment national treatment. This is because it is designed to achieve declaratory relief in the form of

[71] The preference for counterfactual based narratives for events is thought to be preferred by those who are on the losing side of history: E.H. Carr, *What Is History* (Penguin, 1961) at 132.
[72] A Krueger, *International Trade: What Everyone Needs to Know* (Oxford University Press, 2019) at 165-166
[73] Rotherham, above n 70
[74] '2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS May 2020' Queen Mary University of London, at 7

withdrawal of offending measures rather than monetary compensation – in other words, removing the unlawful barrier to entry.[75] State-to-state dispute settlement is also thought to be the preferable forum for non-regression or LPF style claims,[76] although in that case for the host state losing investment.

While some commentators have lamented the lack of access to justice has thus been curtailed in that the TCA only provides for state-to-state dispute settlement,[77] the inability of foreign investors to have a direct right of action against the parties is unlikely to arouse much criticism since investors, especially the larger multinationals, tend to be seen as having sufficient resources to use other systems, such as lobbying their governments to bring claims on their behalf. Moreover, the TCA provides that *amicus curiae* submissions 'from natural persons of a Party, or legal persons established in a Party … that are independent from the governments of the Parties' shall be 'considered' by the arbitration tribunal,[78] hinting that investors may have a significant role in the resolution of disputes between the parties. It is noteworthy that State-to State dispute settlement, with no availability of ISDS, was also chosen by the parties in the EU-China Comprehensive Agreement on Investment (CAI) of 30 December 2020, suggesting that the omission of ISDS from the TCA may not entirely be due to a rushed negotiation schedule and the need for EU Member State ratification, since the CAI was the product of many years of negotiation. The EU and China did commit to pursue continued negotiations on investment dispute settlement going forward taking into account UNCITRAL's work on a Multilateral Investment Court.[79] This is also missing from the TCA, perhaps conspicuously so.

Some further commentary is required on the nature of the dispute settlement for investment matters contemplated by the TCA, which, as with the other features mentioned earlier, seems to be designed to de-escalate tension with a view to maintaining long-term stability between the parties – in other words, avoiding 'punctuated equilibrium' where possible. The procedures for arbitration under the TCA are evidently yet to be fully determined. Much as seen under the WTO Dispute Settlement system and state-to-state arbitration found in

[75] M Lubambo, 'Entry Rights and Investment in Services: Adjudicatory Convergence between Regimes' in S Gáspar-Szilágyi, D Behn and M Langford eds *Adjudicating Trade and Investment Disputes: Convergence or Divergence* (Cambridge University Press, 2020) at 117-118.
[76] Mitchell and Munro, above n 36 at 635
[77] MJ Clifton, 'Arbitration tribunal decisions and rulings in the UK-EU Trade and Cooperation Agreement: an initial examination' EU Relations Blog (29 December 2020)
[78] Article INST.26(3) TCA
[79] UNCTAD Investment Policy Monitor (February 2021) at 12-13

modern FTAs, the TCA's dispute settlement process includes consultations followed by arbitration. The arbitration tribunal itself to be composed of three arbitrators,[80] similar to ISDS and WTO procedures. Of these three arbitrators, one shall sit as chairperson. The composition of the arbitration panel is established by agreement between the parties within ten days after the request for the establishment of an arbitration tribunal.[81] Sub-lists of arbitrators nominated by the EU, the UK, and chairpersons, who are not nationals of either Party shall be drawn up within 180 days of the TCA's entry into force. There shall be at least five persons on each sub-list at all times.[82] Additional lists of individuals with expertise in specific sectors may be established with separate EU and UK nominated sub-lists.[83] Individuals on the lists shall not be members, officials or other servants of the EU institutions, of the Government of a Member State, or of the Government of the UK.[84] Arbitrators 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.[85] Furthermore, arbitrators shall have demonstrated expertise in law and international trade[86] although expertise in international investment or investment treaties is not mentioned. Investment law specific expertise is perhaps less needed in this context than in ISDS, for example, given that investment-specific legal concepts such as Fair and Equitable Treatment and Full Protection and Security are absent from the TCA. Expertise in law and international trade may be derogated from "in view of the subject-matter of a particular dispute."[87] It will be interesting to see who the parties appoint to these rosters, especially given the highly politically charged nature of Brexit and the ensuing UK-EU relations, much of which has played out in publicly accessible commentary, potentially giving rise to accusations of bias.

In keeping with ISDS and adjudication by the WTO panels and Appellate Body, deliberations of the arbitration tribunal are confidential, however the arbitration tribunal's rulings and decisions shall be made publicly available by both Parties.[88] The publication of the tribunal's rulings shall also be subject to the protection of confidential information, meaning that sensitive information is to be redacted before the rulings are made public. Part X of

[80] Article INST.15(1)
[81] Article INST.15(2)
[82] Article INST.27(1)
[83] Article INST.27(2)
[84] Article INST.27(3)
[85] Article INST.16(2)
[86] Article INST.16(1)(a)
[87] Article INST.16(3)
[88] Article INST.29(5)

ANNEX INST: Rules of Procedure for Dispute Settlement lays out further rules pertaining to confidentiality:

> 34. Each Party and the arbitration tribunal shall treat as confidential any information submitted by the other Party to the arbitration tribunal that the other Party has designated as confidential. When a Party submits to the arbitration tribunal a written submission which contains confidential information, it shall also provide, within 15 days, a submission without the confidential information which shall be disclosed to the public.
>
> 35. Nothing in these Rules of Procedure shall preclude a Party from disclosing statements of its own positions to the public to the extent that, when making reference to information submitted by the other Party, it does not disclose any information designated by the other Party as confidential.
>
> 36. The arbitration tribunal shall hold the relevant parts of the session in private when the submission and arguments of a Party contain confidential information. The Parties shall maintain the confidentiality of the arbitration tribunal hearings when the hearings are held in closed session.

This detailed emphasis on confidentiality herein may be contrasted with the drive towards greater transparency observed in international investment arbitration, captured most notably by the Mauritius Convention[89] as well as the recent work by the UNCITRAL Working Group on ISDS reform.[90] It would seem as though the arguments typically marshalled in favour of greater openness (enhancing legitimacy and accountability in public perception) are even stronger in the case of state-to-state arbitration especially under the politically charged TCA than in ISDS, the latter of which is by some respects closer to commercial arbitration where confidentiality is the norm. It is not difficult to imagine a public outcry against the outcomes of the TCA's arbitration procedure on the basis of a lack of openness. This may be especially the case if there is a perception in the UK that the system has been co-opted by EU proceduralism and its attendant bureaucracy. Such apprehension has been identified, in another context, by Schnyder and Pfisterer who speak of a 'subliminal fear' of 'individuals who act as trade law adjudicators and whether they should have the power to make decisions on issues that impact national public policy and sovereignty.'[91] These problems are likely to be magnified by the fact that the TCA arbitration process does not appear to require the arbitral tribunal to disclose the reasons for its decision. This is in sharp contrast to generally accepted principles of international arbitration.[92] Reasoned decisions are necessary to ensure legitimacy in the sense of fairness and can assist with future conduct. Clifton notes that while disclosure of submissions to the public may be useful for the transparency of the proceedings, ensuring the appropriate point at which any

[89] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (10 December 2014)
[90] Working Group III: Investor-State Dispute Settlement Reform, UNCTAD (February 2021)
[91] A Schnyder and S Pfisterer, 'Features of Trade Law Adjudication and Their Impact on the Development of Legal Concepts and Precedents' in J Jemielniak, L Neilsen and H Palmer Olsen eds. *Establishing Judicial Authority in International Economic Law* (Cambridge University Press, 2016) at 190
[92] E.g. G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 2450-2451

submissions are made public is crucial. If the submissions are made public before the arbitration tribunal has issued its decision, it could expose the arbitration tribunal to improper external pressure. This would seem to be especially risky in the case of the LPF obligations because they are already so politically fraught, at least within the UK where they are seen by some as a threat to sovereignty.[93] As Lowe cautions, the 'political climate, particularly in the UK, makes the TCA uniquely unstable.'[94] Evidence supporting the theory of punctuated equilibrium in public policy suggests that the sharpness of transitions are often the consequence of the media's engagement with and magnification of the process, which in turn shapes public opinion.[95] Accordingly, the TCA's confidentiality may contribute to gradualism in the divergence of the UK and EU's economies.

With regards to the rulings themselves, the arbitration tribunal must make every effort to draft rulings and take decisions by consensus, but if this is not possible, the arbitration tribunal will decide by majority vote. In no case shall separate opinions of arbitrators be disclosed.[96] The lack of minority opinions is in contrast with the (recent) custom of the WTO and ISDS, where although dissenting opinions are rare, they are permitted. Dissenting opinions are thought to undermine the perceived legitimacy of an arbitral institution and by extension, participant country's confidence in the system.[97] Commentators have further noted that the rule against dissents is similar to that of the CJEU or the European Free Trade Association (EFTA) Court, a feature which carries the disadvantage of undermining the potential clarity of the majority decision.[98] On the other hand, the ability to issue a dissent judgment could serve to consolidate an individual arbitrators' reputation on a particular matter which could play a role in their repeat appointments, potentially assisting in the creation of 'jurisprudence' which could in turn add to the predictability and thus stability of the system.

Decisions and rulings of the arbitration tribunal shall be binding on the EU and on the UK alone. They do not create any rights or obligations with respect to natural or legal persons,[99]

[93] Rotherham, above n 70, drawing attention to the TCA's reference to the Precautionary Principle, e.g. Title XI Art 1.1.2
[94] S Lowe, "The EU-UK Trade and Co-Operation Agreement: A Platform on Which to Build" Centre for European Reform, (12 January 2021)
[95] See Givel, above n 1
[96] Article INST.29(1)
[97] E Y Kim and P C Mavroidis, RSCAS 2018/51 Robert Schuman Centre for Advanced Studies Global Governance Programme-318, 'Dissenting Opinions in the WTO Appellate Body: Drivers of their Issuance & Implications for the Institutional Jurisprudence' (2018)
[98] Clifton, above n 77
[99] Article INST.29(2)

meaning that investors themselves gain no direct enforceable legal entitlements. Since, as noted earlier, the TCA lacks provisions such as a guarantee against expropriation without compensation for which monetary compensation is suitable, this lack of access is perhaps less problematic. Evidently the primary purpose of the TCA is to address the regulatory capacity of the parties themselves helping achieve a kind of policy equilibrium which is conducive to competition, not to provide redress for injuries suffered by particular individuals. Investors' rights under the party's domestic legal systems are preserved. Article INST.29(3) and (4) TCA reads:

3. Decisions and rulings of the arbitration tribunal cannot add to or diminish the rights and obligations of the Parties under this Agreement or under any supplementing agreement.

4. For greater certainty, the arbitration tribunal shall have no jurisdiction to determine the legality of a measure alleged to constitute a breach of this Agreement or of any supplementing agreement, under the domestic law of a Party. No finding made by the arbitration tribunal when ruling on a dispute between the Parties shall bind the domestic courts or tribunals of either Party as to the meaning to be given to the domestic law of that Party.

From the above it is clear that the role of the arbitral tribunal is tightly circumscribed. Equally importantly, though, domestic courts have no role in the resolution of disputes between the parties under the TCA.[100] This provision is key because it removes the interpretation of the TCA by adjudicators through any reference to EU law, either as it currently exists or as it is developed by the CJEU, one of the key reasons behind the UK's withdrawal from the EU. Even as it impacts the rights of investors, the TCA is pure public international law.

It is not clear whether the arbitration tribunal will be *ad hoc* or more permanent in nature. The latter may be expected to provide greater stability in terms of ensuring that the regulatory dis-integration of the parties proceeds gradually through dialogue rather than as a sudden shock, potentially escalating to diplomatic crises. The formalization of the dispute settlement system may ultimately depend on the extent to which it is used. ANNEX INST: Rules of Procedure for Dispute Settlement paragraph 9a states: 'Parties may appoint a registry to assist in the organisation and conduct of specific dispute settlement proceedings…the Partnership Council shall consider no later than 180 days after the entry into force of this Agreement whether there are any necessary amendments to these Rules.' The rules of procedure for arbitration under the TCA may be amended as specified under Article INST.34A. Since the rules are rather under-developed, this may end up occurring soon.[101] The TCA further

[100] Article INST.29(4A)
[101] Clifton, above n 77

specifies that the Partnership Council may: b) adopt decisions to issue interpretations of the provisions of Part Two (covering trade and investment).[102] States normally share the task of interpreting treaties with the tribunals constituted under them. For their part, tribunals must honour the common intention of the parties as reflected in the text of the treaty, sometimes construing the meaning of vague or incomplete terms, such as 'material impact' as discussed above. This process may benefit from constructive dialogue which promotes evolutionary and sustainable interpretations,[103] again forestalling abrupt confrontations and potentially heading off withdrawal from the instrument altogether. Some commentators are surprised that states have so far been reluctant to seek joint interpretations of IIAs in cases where there is significant legal uncertainty harmful to both investors and states, both of whom prize legal stability and predictability. This is particularly so given that issuing a joint declaration is relatively easy for state parties.[104] In international investment law, the interpretive functions shared by tribunals and committees/commissions have been distributed in the latter's favour, fostering readings of investment treaties that are predictable and coherent. This reflects the incrementalism associated with courts and rule of law, countering the punctuation of sudden change, as per the theory of punctuated equilibrium in policy.[105] Others contend that joint interpretations, such as envisioned by the TCA, have weakened the depoliticized nature of disputes that is so important in international investment law.[106] As Chernykh observes:

> The inclusion of interpretive commissions/committees in the international investment law context therefore represents an attempt to limit the arbitrators' interpretive monopoly by increasing the role of states....This represents a clear ideological shift: a political element has been introduced into the non-politicized dispute resolution mechanism.[107]

The ideological shift mentioned here appears to fulfil the model of punctuated equilibrium in policy rather than mitigate it through the technical formalism of legal interpretation on a case-by-case basis.

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[102] Article OTH.8:
[103] T Gazzini, *Interpretation of International Investment Treaties* (Hart, 2016) at 338-339 at 329
[104] Ibid
[105] Contrast this with Klabbers' view that formal dispute settlement is not conducive to long-term cooperation in international organizations: J Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2012) at 253
[106] Y Chernykh, 'Assessing Convergence Between International Investment Law and International Trade Law through Interpretive Commissions/ Committees: A Case of Ambivalence' in S Gáspar-Szilágyi, D Behn and M Langford eds *Adjudicating Trade and Investment Disputes: Convergence or Divergence* (Cambridge University Press, 2020) at 212-213
[107] Ibid. at 232-233

If a more permanent arbitration system comes into being under the TCA or if even if there are repeat arbitrators, then a system of informal precedent is likely to emerge. While this could add to predictability, as many investors no doubt would seek, it raises the spectre of judicial activism and thereby exacerbate the democratic deficit associated with some dispute settlement systems in international law. As Pelc warns: 'the notion that the meaning of [international] rules, and the precise balance of rights and obligations they represent might be … affected through litigation would seem politically unpalatable.'[108] The politically fraught context of the UK's departure from the EU is likely to worsen this perception were the arbitration system used frequently. On the other hand, it may be impossible to avoid some degree of precedentialism within a legalistic dispute settlement forum given that lawyers tend to favour consistency and certainty as an aspect of rule of law. Again, this may support an objective of gradual change, as the theory of punctuated equilibrium posits.

V. Conclusion

While there is an attempt to provide support for the liberalization of investment between the TCA's parties, investment protections in the agreement are rather limited, both lacking in conventional BIT protections (both substantive and procedural) and heavily circumscribed by annexes. The TCA's unique LPF obligations, which are aimed at preventing competitive distortions in investment, appear to be designed to address only the most severe regulatory divergences. Without ISDS, the TCA is enforceable through state-to-state arbitration, forcing investors to rely on their home states to defend their interests. If the TCA's objective is to increase or even maintain current levels of FDI between the UK and the EU by providing a stable legal framework it is far from clear that it will do so.

The investment protections contained in the TCA must be viewed in light of the febrile post-Brexit era and the process of regulatory disintegration over which the agreement purports to oversee – an uncommon situation in a world of FTAs designed to bring countries closer together. Commentators have expressed their concern that, freed from the EU, the UK intends to follow a path in which its standards in areas such as labour will be weakened as a way of

[108] K Pelc, 'The Welfare Implications of Precedent in International Law' in J Jemielniak, L Neilsen and H Palmer Olsen eds. *Establishing Judicial Authority in International Economic Law* (Cambridge University Press, 2016) at 181

gaining the upper hand,[109] hence the LPF commitments which go beyond that seen in any other IIA.

Whether such policy regression actually takes place, even incrementally, remains to be seen,[110] but now appears to be unlikely given official statements from the UK assuring the opposite.[111] It may transpire that the UK's policy shift away from the EU will be one of form rather than substance, with the UK favouring a more flexible, pragmatic regulatory approach than the centralized and prescriptive nature of the EU.[112] Moreover, there is no systemic evidence that weakening environmental or labour laws operates to attract quality FDI,[113] suggesting that the EU's fears of a regulatory race to the bottom with the UK are a chimera. The fact that the EU signed an investment agreement with China subsequent to the TCA which contains no enforceable commitments on either labour or the environment illustrates that it is quite willing to countenance 'weakening' of these social norms for the sake of trade and investment when it needs to, as critics have already observed.[114] It is evident that the LPF *within* the EU has always been about more about economics than the policy goals themselves, e.g. the environment or labour – i.e. preventing one member state from unfairly gaining a competitive trade advantage by weakening its standards relative to the rest, or through an unlimited use of state aid.[115]

In the unique circumstance of two treaty partners who seek to moderate economic separation and who view one another as much as adversaries in competition for investment rather than wealth-generating allies, the TCA's limited investment provisions seek to counter the punctuated equilibrium model of public policy – it is an agreement aimed at eschewing sudden breakages in favour of a gentle drift apart. Still, given the relative legal stability in both jurisdictions, the legal framework contained in the TCA should be viewed as conducive to

[109] J Grogan, 'Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK' Public Law 2019, Oct, 683 at 697

[110] E.g. in relation to the maximum number of working hours per week, see e.g. P Foster, J Pickard, D Strauss and J Brunsden, 'UK workers' rights at risk in plans to rip up EU labour market rules' Financial Times (15 January 2021)

[111] E.g. UK PM B Johnson, Speech in Greenwich: 'We will not engage in some cut-throat race to the bottom. We are not leaving the EU to undermine European standards, we will not engage in any kind of dumping whether commercial, or social, or environmental.' (3 February 2020)

[112] See e.g. B Reynolds, 'Restoring UK Law: Freeing the UK's Global Financial Market' Politeia, February 2021

[113] 'International Investment Agreements: Key Issues, Volume II' UNCTAD, 2004 at 72

[114] E.g. B Mercurio, 'Putting the Comprehensive Agreement on Investment (CAI) into Perspective: Five Key Points' Institute for International Trade, University of Adelaide, (2 Feb 2021)

[115] A Jordan, V Gravey, B Moore and C Reid, 'EU-UK trade relations: why environmental policy regression will undermine the level playing field and what the UK can do to limit it' Brexit and the Environment, Friends of the Earth (undated) at 9

maintaining foreign investment flows between the parties which share, at a general level, common values on issues such as the environment, labour and the belief in free markets. Abrupt shocks resulting in sharp changes in public policy posited by punctuated equilibrium may yet unfold between the parties, as ongoing tension under the implementation of the Northern Ireland protocol demonstrates.[116] The notion that the TCA, at least in its current form, will truly "stand the test of time" as an instrument supportive of foreign investment through such moments, remains uncertain.

[116] 'Making the Northern Ireland Protocol Work' Financial Times, unauthored, (2 February 2021)