# I. Introduction

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

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

# II. Overview of the TCA

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

## 1. Legal basis and nature

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

---

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

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

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

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

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

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

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

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

## 2. Interpretation

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

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

---

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

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

10 Art. 218(5) TFEU.

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

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

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

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

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

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

17 Art. COMPROV.13(1) TCA.

18 VCLT, op. cit., note 11.

19 Art. COMPROV.13(2) TCA.

20 Art. COMPROV.13(3) TCA.

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

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

## 3. Review and termination

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

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

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

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

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

---

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

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

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

24 Art. FINPROV.3 TCA.

25 Art. FINPROV.8 TCA.

26 Art. INST.35 TCA.

27 Art. COMPROV.12 TCA.

28 Art. COMPROV.4(1) TCA.

29 Art. COMPROV.5.1 TCA.

30 Art. COMPROV.6(1) TCA.

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