Twitter Thread by Anton Spisak



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Having now taken a few days to digest the detail of the UK-EU agreement, here's a couple of observations from me on the deal, what it means, how we got here, & where it might take future UK-EU relations.

(A long thread)

First, let's be clear that negotiating a deal in 9 months, against the odds, and in the middle of a pandemic, is an achievement. It's too easy to underestimate the difficulty of negotiating over the screen for 4 months, from Mar-June, and under enormous pressure. /2

Both @DavidGHFrost & @MichelBarnier and their teams, deserve a lot of credit for sticking up with it in hard circumstances, often with lacking political clarity, & high stakes.

This shouldn't preclude us, or MPs and MEPs, from looking critically at the deal on the table. /3

That we have a deal is a result of the UK & EU having found a way to protect their core defensive interests.

From the EU's view, integrity of the single market is preserved with level-playing field obligations which go virtually beyond any other 3rd-country (even the Swiss). /4

For its part, the UK has negotiated down EU ask on dynamic alignment on state aid; eliminated any references to EU law; removed any role for the ECJ (NB not in the whole future relationship, due to EU law in NI Protocol); and preserved its right to control access to waters. /5

If you look at the deal through the lens of defensive interests, you'll see a victory no matter on which side you stand.

This negotiation was about defensiveness: protecting "sovereignty" on the UK side and "integrity of the single market" on the EU side, and at any price. /6

The compromise on LPF is, in my view, reasonable. On state aid, it includes a commitment to domestic regimes on both sides, with enforcement. Domestic courts should be allowed to review subsidy decisions.

This is far more than UK initial position, but less than the EU's ask. /7

The non-regression on environmental, labour and social rules is less binding than expected (no arbitration), but it includes commitment to domestic enforcement.

Again, a reasonable compromise, but closer to the EU position than the UK's. /8

What is novel is the "rebalancing mechanism": what happens if there're "significant divergences" across the LPF in a way that materially affect bilateral trade or investment.

The scope is wide: it applies to any future subsidies, or labour/social, or envi/climate protections. /9

If such divergences are found, either party can take unilateral temporary "rebalancing measures" (eg tariffs), based on "reliable evidence" rather than "conjecture".

Importantly, the right to impose rebalancing measures is symmetrical (both sides can use it), and /10

subject to the proportionality test before arbitration. If rebalancing measures are deemed unjustified, the other party can take countermeasures.

The two principles are just what I proposed several weeks ago as a way to break the deadlock. /11
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> There's a compromise here if the UK and EU can agree on 2 principles:
>
> (1) the unilateral right to retaliate must be symmetrical (which the EU seems to accept now), and
>
> (2) the proportionality of any tariffs can be challenged before independent arbitration.
>
> (4/n)
>
> — Anton Spisak (@AntonSpisak) December 12, 2020

I think the compromise is reasonable, and I'm glad that sensible minds prevailed in the negotiating room, though I'm a bit doubtful about its functionality, since it could escalate into a tit-for-tat conflict.

Fortunately, there's a review clause after 4 yrs. /12

On governance, the UK secured a concession over removing concepts of EU law from the treaty, as well as role for the ECJ in dispute resolution.

Otherwise, it has folded completely. It accepted a single legal treaty that it had vehemently opposed at the outset; /13

a single governance system; a horizontal dispute settlement mechanism, with possibility of cross-retaliation (restricted to the trade parts of the deal); and robust enforcement provisions on LPF; and provisions on ongoing compliance with the ECHR.

/14

On fisheries, there're others more qualified to assess the deal (see John's excellent take below).

I'd note one aspect where the UK has conceded: dispute resolution & cross-retaliation (there can be tariffs if there's no future agreement on quotas). /15

https://t.co/knd9FDO0gf

> Fish thread.
> Having read the Brexit deal, I believe B. Johnson misled the nation on Thurs when he said Britain could catch \u201call the fish that it wants \u201d in UK waters in 5 years\u2019 time. The clear presumption in the text is that EU fleets will have similar access after 2026.1/12
>
> — John Lichfield (@john_lichfield) December 26, 2020

It's too easy to look at the deal through the lens of defensive interests and conclude it's the best we could get.

In my view, what matters in assessing the quality of a deal is not only the obligations, but also the rights it gives and the balance btwn rights & obligations. /16

If we look at the rights, the deal doesn't bode that well.

True, it provides access without tariffs and quotas (fow now, and s.t. goods qualifying for zero tariffs).

Plus, helpful provisions on air and road transport & energy; which are all a function of UK-EU proximity. /17

But my biggest concern with this deal is that the substantive provisions in the trade part fall even below the standard of recent EU FTAs. It's disappointing and, what's more, makes the overall deal look pretty unbalanced.

Here're several notable examples. /18

1. Mutual recognition of conformity assessment.

The EU agreed it (in limited way) with Canada, US, Switzerland, etc. The UK asked for It in its initial offer (see below).

With the exception of a handful of sectoral annexes, you won’t find it in the final deal. /19

ARTICLE 5.5

Conformity assessment procedures

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1. Subparagraphs 1(a)(i), 1(a)(ii) and 1(b) of Article 5.4 also apply, mutatis mutandis, to conformity assessment procedures.

2. In conformity with paragraph 1.2 of Article 5 of the TBT Agreement, each Party shall ensure that conformity assessment procedures are not stricter or are not applied more strictly than is necessary to give the importing Party adequate confidence that products conform with the applicable technical regulations or standards, taking into account the risks associated with products, including the risks that non-conformity would create.

3. The Parties shall cooperate in the field of mutual recognition in accordance with the Annex on Mutual Acceptance of the Results of Conformity Assessment and the Annex on the Mutual Recognition of Certificates of Conformity for Marine Equipment. The Parties may also decide, in accordance with relevant provisions of those Agreements, to extend the coverage with regards to the products, the applicable regulatory requirements and the recognised conformity assessment bodies.

4. The Parties recognise that a broad range of additional mechanisms also exist to facilitate the acceptance of the results of conformity assessment procedures. Such mechanisms may include:

   (a) cooperative and voluntary arrangements between conformity assessment bodies located in the territories of the Parties;

   (b) plurilateral and multilateral recognition agreements or arrangements to which both Parties are participants;

   (c) the use of accreditation to qualify conformity assessment bodies, where appropriate;

   (d) government designation of conformity assessment bodies, including conformity assessment bodies located in the other Party;

   (e) recognition by a Party of results of conformity assessment procedures conducted in the territory of the other Party; and

2. A mechanism for recognising equivalence for sanitary and phytosanitary measures (SPS).

The same. The EU agreed with Canada, Japan, and proposed it to AUS/NZ.

Search for it in the deal, but you won’t find it. With implications for trade between GB and NI. /20

ARTICLE 6.12

Equivalence

1. The importing Party shall accept an SPS measure of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection. The final determination of equivalence rests with the importing Party and shall take into account the respective international standards, guidelines and recommendations of the IPPC, the OIE and the Codex.

2. When determining the equivalence of phytosanitary measures, the Parties shall apply the principles laid down in the FAO ISPM No. 24 "Guidelines for the determination and recognition of equivalence of phytosanitary measures".

3. The Parties shall follow the guidelines to determine and recognise equivalence set out in Part A of Annex 6-F.

4. Each Party shall accept the measures listed in Part B of Annex 6-G as equivalent to its own under the terms set out therein, including:

   (a) the area for which the importing Party recognises that an SPS measure of the exporting Party is equivalent to its own;

   (b) the area for which the importing Party recognises that the fulfilment of the specified special condition, combined with the exporting Party's SPS measure, achieves the importing Party's appropriate level of protection; and

   (c) the area for which the Parties apply different SPS measures and have not yet concluded the relevant equivalence determination process.

5. The Parties shall follow the guidelines set out in Part B of Annex 6-F to adopt, modify or repeal the terms under which an SPS measure is listed in Part B of Annex 6-G.

6. Annex 6-G specifies any appropriate risk based special conditions or any agreed disease status the exporting Party will need to meet in the case of commodity types and/or official controls where the importing Party does not recognise equivalence of SPS measures.

3. Provisions for services. Significantly watered down from initial texts.

The final offer on temporary movement of business visitors (Mode 4) is less generous than EU-Japan.

Also, forget about accompanying spouses, children, etc, that the UK had proposed initially. /21

ARTICLE 11.9

Accompanying spouse and children

1. Each Party shall allow the temporary entry and stay of the partner and dependant children accompanying an intra-corporate transferee of the other Party who has been granted temporary entry and stay pursuant to this Chapter, for the same period as the period of temporary stay granted to the intra-corporate transferee.

2. A partner who has been granted entry and temporary stay pursuant to this Article shall have the right to work in an employed or self-employed capacity for the duration of their visa and shall not be required to obtain a work permit.

3. For the purposes of this Article, "partner" means any spouse or civil partner, including under a marriage, civil partnership or equivalent union or partnership, recognised as such in accordance with the laws and regulations of either Party.

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4. For the purposes of the Article, "partner" also means any unmarried or same-sex partner who, when accompanying an intra-corporate transferee, may be granted temporary entry and stay under the immigration rules of the host Party.

5. For the purposes of this Article, "dependant children" means children who are dependant on the intra-corporate transferee and who are recognised as children in accordance with the laws and regulations of either Party where:

   (a) The intra-corporate transferee has sole responsibility for the children; or

   (b) both of the children's parents are being granted entry and stay in accordance with this Chapter.

4. No regulatory provisions for financial services.

This isn't about equivalence, but about ongoing cooperation. It can be found in EU-Japan. Forget about it here.

There'll be a non-binding MoU next year.

(Btw, this, from Sunak, is embarrassing) /22
https://t.co/pjQFi0oEyq