

**IN THE MATTER OF THE TRANSATLANTIC TRADE AND INVESTMENT  
PARTNERSHIP (“TTIP”)  
AND ITS POTENTIAL IMPACT UPON THE NATIONAL HEALTH SERVICE**

---

---

**ADVICE**

---

**Introduction**

1. We are asked to provide a legal opinion concerning the risks that obligations imposed on the United Kingdom by TTIP may have on the ability of a future UK government (or Parliament or other legislature) from making changes to assert or reassert public sector management or responsibility for NHS functions. As a shorthand, in this advice we ignore the fact that the future UK action might be taken by government at the UK level, in any devolved administration, in Parliament or any legislature or at a more regional or local level by a specific NHS body. For convenience we simply refer to the relevant UK entity as UK Government or “UKG”.
  
2. The present position is that there are drafts of the following TTIP texts:
  - (a) TTIP “*Trade in Services, Investment and E-Commerce*” document (52 pages) which was tabled for discussion with the US in the negotiating round of 12-17 July 2015 and made public on 31 July 2015 (‘the main document’);
  
  - (b) “*Services and investment offer of the European Union*”, which was made public at the same time (‘the reservations document’); and
  
  - (c) “*Investment protection and resolution of investment disputes and investment court system*”, which is to be included in the Title to the document at (a) above.

3. In the light of the recent TTIP drafts we have in this advice considered three separate issues, which give cause for concern that TTIP could affect the freedom of action of UKG in deciding upon future NHS arrangements. All of these matters go to the nature of the threat posed by TTIP to the NHS. We consider whether these risks are in anyway mitigated by the release of the recent draft texts.
4. The three issues are:
  - (i) The new “right to regulate” and whether this right provides any comfort that were UKG in the future to cancel/take back contracts for the provision of healthcare or social care services as provided for within the NHS regime, it would be protected from additional liability under TTIP to compensate the investor party. This involves analysis of previous case law in the international tribunals, as well as analysis of the new “right” itself.
  - (ii) The extent of TTIP’s influence, as set against existing domestic law, as well as the jurisprudence arising from the European Convention on Human Rights (‘ECHR’) and EU law. In particular, does TTIP actually provide additional remedies for investors beyond what they would obtain under existing domestic and European law?
  - (iii) Matters that will not be covered by the right to regulate, or an Annex II/III exemption, which will cause uncertainty as to the future liability of UKG to suit by a private investor. The key scenario we consider arises under existing EU/UK procurement law which permits public bodies to award “in house” contracts, without those contracts having to be put out to tender in the normal way. We will also look at the issue of “mutuals” and how they may be undermined by TTIP, bearing in mind that the promotion of mutuals is something which UKG has previously promoted.

5. For the reasons set out in this advice, our conclusion is that TTIP poses a real and serious risk to future UKG decision-making in respect of the NHS. This is because:
- i. The content of the draft texts are such that they do not provide a bar to suit against UKG for substantial compensation – either domestically or within the arbitral Tribunal – for regulatory changes to the NHS. We do not consider that the new “right to regulate” changes this position.
  - ii. The circumstances in which a viable claim for compensation will arise, and the extent and level of that compensation, is inherently uncertain under a multi-lateral treaty agreement such as TTIP. This is evidenced by the case-law in the Tribunal, as referred to below. Furthermore, remedies under TTIP may exceed those available under domestic contract law, human rights law and European Union law.
  - iii. It is the uncertainty referred to in (ii) above which we consider will have a direct “chilling” effect on future action by UKG with respect to the NHS.
6. We consider that the solution to the problems which TTIP poses to the NHS - and which is likely to provide the greatest protection - is for the NHS to be excluded from the agreement, by way of a blanket exception contained within the main text of TTIP. In the event that this cannot be achieved, we consider that the NHS should be the subject of a carefully worded reservation contained within Annexes II and III of TTIP.

## Preliminary Observation

7. As a preliminary matter we note that much of the debate in this area is conducted at a rather speculative level. The concerns that are held about the impact of TTIP upon the operation of the UK and EU are often dismissed with generalities. When it is suggested that the cost of compensation under TTIP might hinder the ability of public bodies to take steps to change or cancel existing arrangements with the NHS it is often said that this is an illusory concern. This is because the consequences under TTIP would be no worse than might be provided for under the relevant contract itself and in any event the state would not wish to take any such step without compensation, as it would in due course increase the risk of investing in the UK market and work against the interests of citizen tax payers.
  
8. These are however vague responses. Little or no actual data is produced to support them and the reality is that others well placed to know by reference to detailed analysis of the situation take a very different view. The libertarian think tank in Washington DC, the Cato Institute, supports the need for TTIP because "it cuts to the very heart of the EU's political identity, as subsumed under the term 'the European Social and Economic Model'". Commentators such as these plainly would intend that TTIP should have a chilling effect on any policy that did not involve a more libertarian approach. The very fact that there are those pressing for the agreement to have this effect necessarily suggests that the assurances of the EU negotiators and the British Government need to be treated with a little more scepticism.
  
9. In any event the history of negotiated trade arrangements, including of course the EU and before them the EC treaties, is that whatever assurances are given by negotiators as to their intentions, the text once in force is often given a substantially different interpretation. Given the uncertainty as to what the final text might be and the circumstances to which it might be applied a generally stated aspiration that TTIP should not affect NHS arrangements

cannot be regarded as reliable unless it is properly copper bottomed in the text.

10. It is also unrealistic to rely upon the proposition that the outcome of disputes under any dispute resolution system provided for by TTIP will be clear, fair and certain. On the contrary in a recent academic article concerning investment treaty disputes it was stated:

*"It is largely uncontroversial today that the degree of vagueness of these standards of judicial review such as fair and equitable treatment, full protection and security and indirect expropriation 'creates an especially difficult challenge'. A strong case can be made that these standards grant virtually unfettered discretion, if not 'quasi-legislative authority' to arbitrators, who are neither bound by any precedent nor have to fear any meaningful review of their awards. Issues of consistency and predictability become all the more problematic in view of the uncertainty not only regarding the rules applied but also the methods for applying them."*<sup>1</sup>

11. Much reference is made by those dismissing the sorts of concerns identified in this opinion to previous practice in investment disputes and particularly the experience of the UK. Most recently, Francis Maude gave evidence to the House of Commons' Select Committee (16 October 2015) in which he asserted that there was *"no substance in the anxiety raised of a threat to way in which the NHS is administered from TTIP."*

12. However, the UK's experience of these matters is largely in the capacity as an investor not the state receiving the investment. Further, US investors can be expected to take a vigorous approach to exploiting opportunities under the agreement. This is the experience of US parties in using procurement legislation to open up opportunities in the NHS to commercial entities. It

---

<sup>1</sup> Kleinheistercamp, *"Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions"* (2015) 78(5) MLR 793.

must be reasonable to assume that North American investors will be, by their nature, litigious and will seek to exploit any and all opportunities. Where any attempt to state definitively the outcome of any particular situation is fraught with difficulty it is necessary to have in mind that the outcomes may be rather more adverse to the interests of the public sector than is confidently asserted.

13. Any such uncertainties necessarily act to chill policy development just as they have done in various existing situations regarding health policy. Neither of the explanations in paragraph [7] above can be reliable if in fact the true effect of the relevant agreement is so unpredictable.

#### **The recent draft texts**

14. The main document contains the parties' key obligations: liberalisation of investments; market access; national treatment; most-favoured-nation treatment and so forth.
15. Article 2-7 of the main document provides that the Articles on National Treatment; Most Favoured National Treatment; Senior Management and Board of Directors and Performance Requirements, do not apply in certain circumstances. Article 2-7 states:

“2. Articles X paragraph 1 (National Treatment), X (Most Favoured Nation Treatment), X (Performance Requirements), X (Senior Management and Board of Directors), do not apply to measures that a Party adopts or maintains with respect to sectors or subsectors as set out in its Annex II.

3. Notwithstanding paragraph 2 of Article X (National Treatment), a Party may adopt or maintain any measure affecting the operation of an enterprise that is not inconsistent with its Annex I or to Annex II [this provision relates to the obligation to afford investors no less favourable treatment it accords to its own investors].”

16. Article 3-5 provides a similar form of “reservations and exceptions” in respect of the cross border supply of services.

17. The reservations document is divided into three parts: Annex I, II and III. Annex I contains reservations for existing measures, Annex II reservations for future measures and Annex III, reservations and specific liberalisation commitments relating to Market Access.

18. In the reservations document, at Annex II, Reservation No.20 "Health and Social Services" reads as follows:

"Sector: Health and Social Services

Obligations Concerned:

National Treatment  
Most-Favoured-Nation Treatment  
Performance Requirements  
Senior Management and Boards of Directors

Description: Cross-Border Trade in Services and Investment

The EU reserves the right to adopt or maintain any measure with respect to the following:

(i) *Health services*

The EU with regard to the provision of all health services which receive public funding or State support in any form, and are therefore not considered to be privately funded...The EU reserves the right to adopt or maintain any measures with regard to all privately funded health services, other than privately funded hospital, ambulance, and residential health services other than hospital services.

.....

In...UK...with regard respect to the cross-border provision of privately funded ambulance services."

19. As to the *Investment protection and resolution of investment disputes and investment court system* text, the following is material:

i. The provisions of "investment protection" "*shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health,*

*safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.” Article 2(1);*

- ii. *“For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in the manner that may negatively affect the operation of covered investments or the investor’s expectations of profits.” Article 2(2);*
- iii. Each party is to accord to investors fair and equitable treatment and full protection and security. Article 3;
- iv. Neither Party shall nationalise or expropriate an investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation. Article 5;
- v. Where a Party has entered into any contractual written commitment with investors of the other Party or with their covered investments, the Party shall not breach the commitment through the exercise of governmental authority. Article 7.
- vi. Article 9 of Subsection 4 – “Investment Court System” provides a new Tribunal of First Instance. 15 judges are to be publicly appointed for a 6 year term – 5 EU national, 5 US nationals and 5 nationals of third countries. *“The judges would have very high technical and legal qualifications, comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body.”*<sup>2</sup> It is said that *“This is a fundamental change compared to the old ISDS system which operates on an ad hoc basis with arbitrators chosen by the disputing parties.”*<sup>3</sup>

---

<sup>2</sup> As stated in the *Reading Guide to the Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)*.

<sup>3</sup> *Ibid.*

- vii. Article 10 provides that a permanent Appeal Tribunal is to be established. It will be composed of six Members: 2 EU, 2 US and 2 from third countries. It is said that *“The members of the Appeal Tribunal would be subject to strict qualifications and ethical requirements. They would also ensure that there could be no doubt as to the legal correctness of the decision of tribunals.....Significantly, judges of Investment Tribunal and members of the Appeal Tribunal would be prohibited from taking on work as legal counsel on any investment disputes and would be subject to strict ethical rules.”*<sup>4</sup>

### **The Right to Regulate**

20. The issue here is whether the new right to regulate affords UKG greater protection were it to seek to make major structural changes, to the detriment of foreign investors, to the NHS.
21. The European Commission certainly appears to think so. In its recent “concept paper”, which preceded the draft text on “Investment protection and resolution of investment disputes and investment court system”, it said:

“CETA and the EU Singapore FTA already set a very high benchmark insofar as the protection of the right to regulate is concerned, notably when measured against the approach traditionally followed by Member States in their BITs.

In these agreements, the EU has:

- Clarified and improved the drafting of the standards of protection, in order to leave less room for unwarranted interpretations. Notably: a) the ‘fair and equitable treatment has been limited to a closed list of types of behaviour consistent with consolidated judicial views in the EU (like denial of justice, arbitrary conduct and breach of due process) and b) the notion of ‘indirect expropriation’ has been explained in an annex which clarifies that for indirect expropriation to occur there must be a substantial taking away from the investor of the attributes of property (i.e. the right to use, enjoy and dispose of the investment).”

---

<sup>4</sup> Ibid.

22. And in a EC Directorate-General for Trade's press release on 13 July 2015 – entitled *Protecting public services in TTIP and other EU trade agreements* - it was stated:

**“4 guarantees protecting public service in every EU trade deal**

So all EU trade deals provide important guarantees for public services – on monopolies, on access to the market, on subsidies and on regulation.

These ensure that EU governments remain entirely free to manage public services as they wish.

.....

Freedom to choose – and change – public service providers

If a national, regional or local government in the EU decides to procure (buy) certain public services from a private contractor, it must comply with the rules that apply to public procurement.

However, it's free at any time to reverse its decision to buy services from that private provider. It just has to respect the terms of the contract involved.

That means, when it comes to public services, there is no so called 'ratchet clause' in any EU trade deal.

A ratchet means that a government commits itself not to reintroduce a trade barrier it has previously removed autonomously, in a sector where it had made a commitment.

A ratchet clause does not apply to:

- Monopolies
- Exclusive rights
- Water or publicly-funded education, health or social services.

So a ratchet clause could never be a back-door privatisation – either in TTIP or any other EU trade deal.

**20 years of protection that works**

This approach has already protected public services in the EU for the last 20 years.

Since then, the EU has signed many other trade deals with individual countries or groups of countries. Several of these deals have opened up trade in services.

At the same time, governments across the EU have been able to run services like hospitals, schools or water distribution, in just the same way as before the EU signed these deals.

TTIP and all other free trade agreements the EU negotiates, including TiSA, will work in exactly the same way, offering the same 4 guarantees for public services.”

23. However, despite the new right and the statements from the Commission, as set out above, our view is that the new right is very unlikely to afford UKG any greater protection. This is essentially for three key reasons:

- (1) The “right to regulate” is not new. Its substance has, in effect, already been recognised in arbitral case-law. The new right in Article 2 therefore adds very little.
- (2) The Article 2 right itself is vague.
- (3) Recognition of the state’s right to regulate and to make changes in fields affecting the welfare of persons, including healthcare, is subject to the inherent uncertainty in the interpretation of that right by the proposed Tribunal.

24. In respect of points (1) and (2), the real issue is whether action taken by the UKG under its “right to regulate” will nevertheless give rise to a compensation claim because of the regulatory steps taken. Arbitral case law has considered whether measures serving a public purpose should give rise to a compensation claim. In *Azurix v Argentina* (decision of ICSD July 2006) the Tribunal explained:

“310. For the Tribunal, the issue is not so much whether the measure concerned is legitimate and serving a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim. In the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of investments without such measures giving rise to a need to compensate. The tribunal in *S.D. Myers* found the purpose of a regulatory measure a helpful criterion to distinguish measures for which a State would not be liable: “Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the

State.” This Tribunal finds the criterion insufficient and shares the concern expressed by Judge R. Higgins, who questioned whether the difference between expropriation and regulation based on public purpose was intellectually viable:

“Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be ‘for a public purpose’ (in the sense of in general, rather than for a private interest). And just compensation would be due. At the same time, interferences with property for economic and financial regulatory purposes are tolerated to a significant extent.””

25. In *ADC v Hungary* (2 October 2006 – decision of ICSD) the claimants argued that their investment in an airport project was expropriated by measures which deprived them of their rights to operate two airport terminals and to benefit from associated future business opportunities. The Tribunal accepted the claim of indirect expropriation and rejected Hungary’s argument based on its right to regulate. Under the heading “The right to regulate” the Tribunal explained:

“423. The Tribunal cannot accept the Respondent’s position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal’s understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State’s right to regulate.

424. The related point made by the Respondent that by investing in a host State, the investor assumes the “*risk*” associated with the State’s regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host State’s domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the

Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise.

425. The Respondent's contentions as to a State's right to regulate and the investor's assumption of risk are therefore rejected."

26. It follows, therefore, that the right to regulate provided for under Article 2 is unlikely to provide additional protection to UKG. Were the matter to proceed to a dispute in the future Tribunal the real issue would remain: is the effect of UKG's measures such that the investor should be compensated? The right to regulate does not provide a bar to compensation.<sup>5</sup>

27. This point may be highlighted by an example of action which a future government might wish to take. A future government might wish to repeal those sections of the Health and Social Care Act 2012 (HSCA), which brought into force the NHS (Procurement, Patient Choice and Competition (No.2) Regulations 2013, or amend the Regulations themselves<sup>6</sup>. The Regulations require clinical commissioning groups to look beyond organisations within the NHS when procuring services, i.e. private companies<sup>7</sup>. It must be

---

<sup>5</sup> In his recent evidence (16 October 2015) to the House of Commons' Select Committee, Francis Maude repeatedly states that he accepted that an investor could bring an action for compensation but no action could be taken to stop the government doing what it wanted. This misses the point that the ability of an investor to bring suit for compensation – and the level of such compensation – is exactly what may constitute a "chilling effect" upon government action. Furthermore, an investor may remain entitled to bring suit under a multi-lateral trade agreement, such as TTIP, despite the decision of a state's national court, e.g. see *Deutsche Bank AG v Sri Lanka* (2012 Award, Case No. ARB/09/02).

<sup>6</sup> The Regulations were brought into force by virtue of sections 75, 76, 77 and 304(9) and (10) of the HSCA.

<sup>7</sup> Regulation 3 "Procurement: general requirements" provides:

"(1) When procuring health care services for the purposes of the NHS (including taking a decision referred to in regulation 7(2) [which relates to the qualification of providers]), a relevant body must comply with paragraphs (2) to (4).

(2) The relevant body must –

- (a) act in a transparent and proportionate way, and
- (b) treat providers equally and in a non-discriminatory way, including by not treating a provider, or type of provider, more favourably than any other provider, in particular on the basis of ownership.

foreseeable that a future Parliament or government might wish to revisit this issue.

28. A foreign investor might invest in assets to deliver services under contract to NHS bodies. It may do so on the basis that in the long term there are a number of NHS bodies that will be putting contracts out to tender and that even though each contract will need to run its term and then be retendered, as long as all or most of these contracts have to be put out to tender under the Regulations, that investment retains value. That investor might argue that repeal of the relevant provisions of the HSCA and the Regulations had damaged its business because those changes seriously undermined the value of its investment, goodwill and long term profits.

29. The foreign investor might have no meritorious remedy in domestic law. There might be no contract that has been terminated giving rise to the right to compensation if it simply ran its course and was not retendered. Furthermore, subject to limited exceptions, namely the influence of EU and human rights law, UKG would of course be able to repeal and/or amend legislation as it wished. However, the investor could seek to rely upon TTIP to argue that UKG's changes constituted a form of indirect expropriation, or a

---

(3) The relevant body must procure the services from one or more providers that –

- (a) are most capable of delivering the objective referred to in regulation 2 [the objectives which the relevant body must act with a view to] in relation to services, and
- (b) provide best value for money in doing so.

(4) In acting with a view to improving quality and efficiency in the provision of services the relevant body must consider appropriate means of making such improvements, including through –

- (a) the services being provided in a more integrated way (including with other health care services, health-related services, or social care services),
- (b) enabling providers to compete to provide the services, and
- (c) allowing patients a choice of provider of the services.”

breach of the Fair and Equitable Treatment principle, as enshrined within the Treaty.

30. Even if the outcome of the claim were uncertain, the substantial value of any investment will mean that the prospective consequences of the claim might have a chilling effect on policy.
31. As to point (3) - and the role of the Tribunal - the proposed new system would plainly be an improvement on the existing ICSID Tribunal. If the new Tribunal comes into being then the quality of the judiciary would be substantially improved, there would be an appellate level and the system would have greater transparency. However, the problem remains that the new Tribunal would be one of many in the international setting. Beyond the ICSID there is: (i) the International Chamber of Commerce; (ii) the London Court of International Arbitration; (iii) arbitration under the UNICTRAL Rules; and (iv) the Permanent Court of Arbitration. Whilst not binding on any future reformed ICSID, the case decisions of the other tribunals may be influential. This means that there is inherent uncertainty as to how key issues, such as the right to regulate, and the levels of compensation to be paid, will be determined.
32. It is also unclear whether the new proposed Tribunal will sit in public. Most hearings under the existing ICSID system are closed to the public. In principle, only the members of the Tribunal, officers of the Tribunal, the parties and their representatives, and witnesses while giving testimony may attend.
33. For these reasons we are of the view that the new right to regulate does not provide sufficient protection to UKG to ensure that no future government or Parliament will have its ability to increase the public sector provision of services limited.

### TTIP set against domestic and European law

34. We conclude that TTIP provides investors more in terms of different bases of claim and the level of available compensation than may be available under the domestic law of contract, ECHR or EU Law. This is not a straightforward issue given the uncertainty as to what TTIP might provide for once agreed. For the reasons set out below we consider the position is uncertain but that several factors strongly indicate that there is a real risk that TTIP would provide greater protection to investors and impose greater liabilities on UKG, and limit UKG's ability to protect itself from such liabilities.

#### *Level of Compensation in Arbitration by Comparison with Domestic law*

35. As already noted there is considerable uncertainty as to the level of compensation that might be recoverable in any particular investor-state arbitration under TTIP. While the new Tribunal process makes much of the need to establish "legal correctness" that suggests a rather spurious sense of precision when it is not clear what body of law might be relied upon by the Tribunal. Even with the past experience of cases in investment disputes there are a number of key points on which there is no one clear and certain approach to be applied. A few points may be highlighted.

- a. Experience going back to the *Chorzow Factory* case (*Factory at Chorzow – Germany v Poland* 1928 PCIJ (Ser. C) No 13/1; 1928 PCIJ (Ser.A) No. 17) highlights the distinction between cases of lawful and unlawful expropriation and the very much broader range of compensation available in the latter cases. For instance, in that case compensation was contemplated for harm suffered by a range of entities other than those directly affected by the compensation.

- b. Remedies are not limited to damages for compensation. In *Enron v Argentina* (2004 – decision on jurisdiction) the Tribunal found that it had the power to order specific performance, explaining that:

“The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance of injunction of certain acts. Jurisdiction is therefore also affirmed on this ground. What kind of measures might or might not be justified, whether the acts complained of meet the standards set out in the *Rainbow Warrior*, and how the issue of implementation that the parties have also discussed would be handled, if appropriate, are all matters that belong to the merits.”

- c. Experience shows that while many Tribunals have applied fair market value as the dominant basis of value (see for example *CMS Gas Transmission Company v Argentina* (Award 2005, Case No.: ARB/01/08 at paragraph [409]), others have awarded compensation for the total of all investments made (see *Enron Corporation and Ponderosa Assets, LP v Argentina* (Award 2007, Case No. ARB/01/3 at paragraphs [363], [369]-[370] and [379]-[390])). The relative advantage of one measure or another will turn on the facts of any given case. But the key point is that the measure may well not be the same as that which an English court would award. Further, valuation of fair market value is usually taken on the basis of the investment’s “highest and best use”. This may involve much greater value than the valuation on the basis of the use which would, on the balance of probabilities, have been most likely and therefore the basis upon which an English court would approach the matter.<sup>8</sup>

---

<sup>8</sup> See for example *Santa Elena v Costa Rica* (Award 2000, at paragraph [70]) where, contrary to the state’s position, the Tribunal’s valuation decision took into account the expropriated property’s potential for touristic development.

- d. There are some cases in which tribunals have awarded compensation which would probably be regarded as “double recovery” in a contract claim in an English court.<sup>9</sup>
- e. Further, in some cases tribunals have awarded “supplemental compensation”<sup>10</sup>. Plainly government will want to avoid incurring that risk, but the fact that the risk is there is of some effect.
- f. Tribunals are not necessarily limited to that which the contract provides for. Damages may include lost profits (see for example *LETCO v Liberia*, decision of 31 March 1983). There are cases in which the Tribunal finds that the balance of power in negotiating the contract was such that the investor had little choice but to accept harsh terms which might well include harsh terms on compensation upon termination at will or for cause.<sup>11</sup> In circumstances where the terms were themselves fixed by the requirements to run a transparent tender process it may be that the investors are commonly fixed with strict exclusion and limitation clauses and they may well in those circumstances find investment treaty remedies a useful supplement to those available in the domestic court.

36. It might well be said that all these factors go to is the possibility that the compensation may be greater than provided for by an English court and that the amounts involved are so great that the policy chill factor would apply wherever the case is heard. However, any uncertainty in quantification and

---

<sup>9</sup> See the discussion on this point in *Compensation and Restitution in Investor-State Arbitration, Principles and Practice* Borzu Sabahi, OUP 2011 at 5.6.5.

<sup>10</sup> This is compensation for “moral damages”, to reflect damage to personality rights of individuals; damage to reputation and/or legal damage.

<sup>11</sup> See for example the case of *PSEG v Turkey* where the Tribunal chose not to adopt contractual breach damages but instead compensation on the basis of investment actually made (see from paragraph [305]).

any opportunity for the claimant to pick the most generous tribunal necessarily increases the amounts that the claimant might receive. Further, there are circumstances in which an English court might, in quantification, take account, perfectly properly, of the interests of the public purse. However, such considerations cannot ever be expected to be applied by whatever Tribunal is provided for under this agreement.

*Bases of Claim under Arbitration by Comparison with Domestic law*

37. As already noted an aggrieved investor may seek to remedy his economic loss, which he has suffered at the hands of UKG or a public body's actions, by way of a claim under domestic law. The most likely scenario is that the investor had entered into a contractual relationship with UKG and therefore would bring suit for breach of contract.
38. In respect of this scenario – a claim for breach of contract – we consider that TTIP does pose a threat to a future government wishing to take back control of health services, despite the fact that the investor would have a remedy in contract. This is because the circumstances under which there may have been a violation of TTIP are extensive and may extend beyond those provided by way of a particular contract.
39. For example, UKG may enter into a contract with an investor providing only for limited circumstances in which that contract will be breached. That has to be set against the relevant obligations under TTIP: fair and equitable treatment ('FET') of an investor and the remedy for expropriation, in particular indirect expropriation.
40. In respect of both FET and indirect expropriation, it is possible to conceive of circumstances in which steps taken by UKG would not breach a contractual relationship with an investor, but would be deemed under TTIP to be a breach of the FET principle and/or indirect expropriation. This is because the

scope of what constitutes a breach of the FET principle and/or indirect expropriation in international law is not set and is constantly evolving.

41. In respect of FET, several principles fall within its scope. These include the investor's legitimate expectation based on the state's legal framework and on any undertakings and representations made explicitly or implicitly by the state. A reversal of assurances by the state that have led to legitimate expectations will violate the principle of FET.

42. Tribunals have been willing to apply the concept of legitimate expectation on behalf of the investor and may do so notwithstanding that contractual rights did not afford such an expectation. In *Azurix v Argentina* (2006) the Tribunal explained - in the context of an analysis of whether there had been indirect expropriation -:

“316. The issue of whether an expropriation may take place without formally affecting the contract rights has been discussed by the parties in the context of the frustration of the investor's legitimate expectations when a State repudiates former assurances, or refuses to give assurances that it will comply with its obligations depriving the investor in whole or significant part, of the use or reasonably-to-be-expected economic benefit of its investment. *Tecmed* is a clear example in which a tribunal took into account the expectations of the investor.

.....

318. The expectations as shown in that case are not necessarily based on a contract but on assurances explicit or implicit, or on representations, made by the State which the investor took into account in making the investment.”

43. Furthermore, tribunals have increasingly accepted that expropriation must be analysed in consequential rather than formal terms (for example in *Azurix v Argentina* and *Tecmed v Mexico*, May 2003).

44. It is therefore not correct to say that because investors contracting with the government are already offered significant protections by way of contract, TTIP will not change the position of investors or the ability of UKG to alter contracting arrangements in the NHS.

*Comparison with Article 1 Protocol 1 of the European Convention on Human Rights*

45. Article 1 Protocol 1 ("A1P1") provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

46. The first distinction between A1P1 and the provisions of a multilateral trade agreement, such as TTIP, is who can bring a claim under A1P1. Whilst it is clear from the wording of A1P1 that all "*legal persons*" are entitled to protection, which would include a company, for example, whose property had been affected by action taken by UKG, it would not include shareholders in that company.

47. In *Agrotexim and others v Greece* (1996) 21 EHRR 250 the European Court of Human Rights ('ECtHR') considered a claim by applicant companies which were shareholders in a brewery. The brewery wished to develop two of its sites, but Athens Municipal Council adopted measures with a view to expropriating the land, although no formal expropriation procedures had been initiated. The council had placed signposts on the land which stated 'area to be expropriated' and the Mayor had repeatedly stated that the municipality would acquire the land. The practical effect of these steps was that the company had been prevented from making an effective use of the properties.

48. Before the ECtHR's judgment, the European Commission of Human Rights had held that it could "pierce the corporate veil" and found that there had been a violation of the application shareholders' A1P1 rights. However, when

the case reached the ECtHR the Court disagreed and held that the applicants did not have standing to make their complaint. The Court explained:

“65. It is a perfectly normal occurrence in the life of a limited company for there to be differences of opinion among its shareholders or between its shareholders and its board of directors as to the reality of an infringement of the right to the peaceful enjoyment of the company’s possessions or concerning the most appropriate way of reacting to such an infringement. Such differences of opinion may, however, be more serious where the company is in the process of liquidation because the realisation of its assets and the discharging of its liabilities are intended primarily to meet the claims of the creditors of a company whose survival is rendered impossible by its financial situation, and only as a secondary aim to satisfy the claims of the shareholders, among whom and remaining assets are divided up.

To adopt the Commission’s position would be to run the risk of creating – in view of these competing interests – difficulties in determining who is entitled to apply to the Strasbourg institutions.

The Commission’s view would also engender considerable domestic problems concerning the requirement of exhaustion of domestic remedies. It may be assumed that in the majority of national legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or an omission that is prejudicial to ‘their’ company. It would accordingly be unreasonable to require them to do so before complaining of such an act or omission before the Convention institutions. Nor could, conversely, a company be required to exhaust domestic remedies itself, because the shareholders are of course not empowered to take such proceedings on behalf of ‘their’ company.

66. Concerned to reduce such risks and difficulties the Court considers that the piercing of the ‘corporate veil’ or the disregarding of a company’s legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.”

49. There is no such limitation on “standing” in bilateral and multilateral treaties such as TTIP, and it would be possible, therefore, for an investor, standing behind a company which had suffered economic loss due to UKG action, to bring a suit against the government.<sup>12</sup>

---

<sup>12</sup> See for example the decision in *CMS v Argentina* 17 July 2003, in which the Tribunal found that there was “no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.....There is indeed no requirement that an investment, in order to qualify, must necessarily be shareholders controlling a company or owning the majority of its shares.” (see paragraphs [47 to [51]).

50. A further area where TTIP goes beyond A1P1 is in relation to definition of “property” and what constitutes loss. In the recent domestic case of *The Department of Energy, Climate Change v Beyer Group PLC and Others* [2015] EWCA Civ 408, the Court of Appeal reviewed the scope of protection offered by A1P1. Lord Justice Dyson MR explained:

“43. The well-established distinction between goodwill and future income is fundamental to the Strasbourg jurisprudence. The consistent line taken by the ECtHR is that the goodwill of a business, at any rate if it has a marketable value, may count as a possession within the meaning of A1P1, but the right to a future income stream does not. I agree with Rix LJ that the distinction is not always easy to apply and it seems that the ECtHR has not addressed the difficulties. As Moses LJ put it in *Malik* at para 83, marketable goodwill is a possession “notwithstanding that its present day value reflects a *capacity* to earn profits in the future” (emphasis added). The important distinction is between the present day value of future income (which is not treated by the ECtHR as part of goodwill and a possession) and the present day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts. That is why the applicant succeeded in a case such as *Tre Traktor* (a decision on which Mr Grodzinski relies).

44 Goodwill is not susceptible to precise definition. Like the judge, I have derived assistance from what Lord Macnaghten said (admittedly in a wholly different context) in *Commissioners of Inland Revenue v Muller and Co. Margarine Ltd* [1901] AC 217 at p 223:

“It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade...The goodwill of a business is one whole, and in a case like this it must be dealt with as such.”

45 The same idea was expressed by the ECtHR in *Van Marle* at para 41 (see para 28 above). A possession comprising the goodwill of a business is the product of past work: “by dint of their own work, the applicants had built up a clientele”. Goodwill is the present value of what has been built up. It is to be

distinguished from the value of a future income stream. From an accountants' point of view, this distinction may make little practical sense. But it is the distinction that has been clearly drawn by the ECtHR for the purposes of A1P1."

51. This – limited – scope of protection offered by A1P1 is to be distinguished by the greater protection which will be offered by TTIP. See, for example, the analysis of the UNCITRAL Arbitral Tribunal's decision in *CME Czech Republic BV (The Netherlands) v The Czech Republic* 2003, which concerned measures taken by the Czech Republic which caused economic loss to CME, which was involved in the business of television broadcasting within the Republic. The Tribunal provided a detailed analysis of compensation under bi-lateral agreements and the meaning of compensation according to "fair market value". It explained:

"497....Today these treaties are truly universal in their reach and essential provisions. They concordantly provide for payment of 'just compensation', representing the 'genuine' or 'fair market' value of the property taken. Some treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the expropriation or before the intention to embark thereon become public knowledge. Others provide that compensation shall represent the equivalent of the investment affected. These concordant provisions are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid.

498. The possibility of payment of compensation determined by the law of the host State or by the circumstances of the host State has disappeared from contemporary international law as it is expressed in investment treaties in such extraordinary numbers, and with such concordant provisions, as to have reshaped the body of customary international law itself....

....

500. The determination of compensation under the Treaty between the Netherlands and the Czech Republic on basis of the 'fair market value' finds further support in 'the most favoured nation' provision of Art 3(5) of the Treaty. That paragraph specifies that if the obligations under national law of either party in addition to the present Treaty contain rules, whether general or specific, entitling investments by investors of the other party to a treatment more favourable than provided by the present Treaty, 'such rules to the extent that they are more favourable prevail over the present Agreement.'

.....

501. International Law requires that compensation eliminates the consequences of the wrongful act. The Articles adopted by the United

Nations International Law Commission on the Responsibility of States for Internationally Wrongful Acts provides for the 'obligation to compensate for the damage caused', and specify that that compensation 'shall cover any financially assessable damage including loss of profits...' (Art.36). Paragraph 22 of the Commission's Commentary on its Articles states that: "Compensation reflecting the capital value of property taken or destroyed as a result of an internationally wrong act is generally assessed on the basis of the 'fair market value' of the property lost."

52. Furthermore, it may arguably be easier for an investor to establish a violation of TTIP than it would be a breach of A1P1. This is because embedded within A1P1 is the member state's "right" to "enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". The consequence is that if an 'interference' is found with A1P1, in order for a *breach* of the right to be established it would have to be shown that the measure: (i) was unlawful, or not "in accordance with the law"; (ii) did not pursue a legitimate aim in the general interest; and/or (iii) did not strike a "fair balance".
53. We consider it unlikely that any future measure taken by UKG in relation to the NHS would not be "in accordance with law". Additionally, any future measure would likely be in pursuit of a legitimate aim - namely the protection and improvement of the health of the British public. Therefore, the real battle ground - were a claim brought by an investor under A1P1 - would be whether UKG's measure struck a "fair balance". In this respect we note the following three points.
54. First, it has been held that A1P1 is considered not to be a strong right within the Convention (see for example *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, paragraph [163]; where it was stated such rights can "be more readily overridden in the broad public interest than the Convention's core rights").
55. Secondly, Member States have a wide margin of appreciation in assessing the fair balance to be given to the right (*Tre Traktörer* (App No 10873/84) (1991) 13 EHRR 309 at paragraph [62]).

56. And thirdly, significant interferences with the right to property have been held to be proportionate in the past under A1P1. These include, for example, the prohibition on the sale of tobacco from tobacco vending machines (*R (Sinclair Collis) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394). In similar fashion see also the recent decision of the High Court – *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture, Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28 - in relation to regulating remote gambling in the UK.

57. In summary, therefore, we consider the circumstances in which a violation could be established under TTIP, and the extent of remedies therein, to be broader than that afforded by A1P1.

*Article 17 of the EU Charter*

58. The right to property is recognised within the law of the European Union. It is set out in Article 17 of the Charter of Fundamental Rights of the EU (“CFEU”). This provides:

**“Right to property**

(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

(2) Intellectual property shall be protected.”

59. For the rights under Article 17 to be applicable the relevant decision being challenged must be within “the scope” of EU law (see *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo)* [2012] 1 WLR 3333 approving *R (Zagorski) v Secretary of State for Business, Innovation and Skills*

[2010] EWHC 3110 (Admin); [2011] HRLR 6). This may be the first stumbling block for an investor, as the measure in question which he may wish to challenge may not fall within the scope of EU law. Of course, no such bar will apply if he wishes to bring a claim under TTIP.

60. The rights in EU law find their origin in A1P1 (see *Case 44/795 Hauer* [1998] ECR 3729, paragraphs [17]-[18]). Again, therefore, a court will determine whether restrictions on the right are a disproportionate interference (see *Hauer*, paragraph [23]). Like A1P1, a wide margin of discretion is left to the decision-maker (see *Case 5/88 Wachauf* [1991] 1 CMLR 328, at paragraph [22]). For these reasons the arguments set out above in relation to A1P1 are also applicable to EU law rights.

#### **Matters not covered by the “Right to Regulate” or exemptions in TTIP**

61. At the present time the European Commission has published the negotiating text of TTIP, which covers trade in services, investment and e-commerce. As we understand it no text has been published for government procurement.

62. In the CETA text the following is provided for in the section on Government Procurement (section 21):

*“Article IV General Principles  
Non-Discrimination*

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering such goods or services, treatment no less favourable than the treatment the Party, including its procuring entities, accords to goods, services and suppliers. For greater certainty, such treatment includes:

within Canada, treatment no less favourable than that accorded by a province or territory, including its procuring entities, to goods and services of, and to suppliers located in, that province or territory; and

within the European Union, treatment no less favourable than that accorded by a Member State or a sub-central region of a Member

State, including its procuring entities, to goods and services of, and suppliers located in, that Member State or sub-central region, as the case may be.

2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

(a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or

(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party”

63. The only exception to this general principle is set out in Article III which states:

“1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war material, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures:

(a) necessary to protect public morals, order or safety;

(b) necessary to protect human, animal or plant life or health

(c) necessary to protect intellectual property; or

(d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.”

64. Were this text, or similar wording, incorporated into TTIP we are concerned that this would pose a real threat to arrangements often put in place in the NHS (and the public sector more widely) so as to keep NHS operations in the public sector. This is because part of the business of the NHS may be carried

out “in house”, in that one limb of the health service procures the supply of goods and services from another in house entity.

65. It seems that this sort of risk is one to which EU or UK negotiators are alive to, because in the published text of CETA the Notes to Annex III of the Government Procurement market access offer by the EU provide in notes 5 and 6 for an exclusion that seems to correspond to the EU law exceptions from the normal scope of the obligation to compete under procurement law. No comparable text is available for TTIP so there is no way of telling if a comparable provision can be agreed with the USA.<sup>13</sup>
66. Under the current EU procurement regime such “in house” arrangements are exempt from the need for a competitive procurement process to be conducted - if certain conditions are met. The exemption, which was confirmed by the European Court of Justice in the *Teckal* case<sup>14</sup>, has now been codified in Article 12 of Directive 2014/24/EU on Public Procurement and is to be found in Regulation 12 of the Public Contracts Regulations 2015. This provides for certain conditions to be met in order for a contract or cooperative arrangement between two contracting authorities to fall outside the requirements that a competitive procurement process be conducted, and in this way service provision by a specialist unit can sometimes be protected.
67. The 2014 Directive also promotes the growth of public section “mutuals” by exempting these from the need for a competitive procurement process. This is provided for in Regulation 77 of the same 2015 Regulations and provides that certain categories of contract (particularly covering the subject matter

---

<sup>13</sup> In his recent evidence to the House of Commons’ Select Committee (16 October 2015) Francis Maude said that there was “no substance” in the allegation that TTIP would require contracts, that would otherwise remain in house, to have to be put out to tender. No further explanation was provided for this statement.

<sup>14</sup> *Teckal Srl v Comune di Viano (Reggio Emilia)* (C-107/98) [1999] E.C.R. I-8121.

likely to be involved in delivery of NHS services) are reserved to mutuals and thereby excluded from competition.

68. The Cabinet Office defines a public service mutual as: (1) an organisation that has left the public sector (also known as 'spinning out'); (2) which continues to deliver public services; and (3) has staff control embedded within the running of the organisation.

69. The promotion of mutuals has been a particular project of government. In an article written in *The Guardian* (12 August 2010) Sir Francis Maude explained:

"Up and down the country there is an immense amount of pent up frustration among literally thousands of frontline public sector workers. Just look at the sheer number of responses to our Spending Challenge. It unleashed a torrent of comments and ideas - around 63,000 in all - from public sector employees frustrated by the difficulty of actually implementing their suggestions.

They know their patch better than anyone; they are the experts, not officials sat in government departments. And they can see how things could and should be done better, how the gaps can be filled and services integrated so they really work for the people using them. But they haven't been able to do anything about it. Well, now they can.

Today, as part of our commitment to a "big society", where people are encouraged to stand up and do something about the problems they see, we have launched our first 12 Pathfinder mutuals projects.

They are very different in ambition and range: from NHS staff wanting to launch an employee-owned social enterprise to help homeless patients, to employees from local authorities getting together to form a mutual to deliver children's services, and further education colleges coming together to see if they can set up a new awarding body.

But they do all have certain things in common. At their heart are frontline public sector entrepreneurs ready to take control of the services they run. And there's often a common focus: the desire to join up the services they know so well so that they are actually designed specifically around their communities' needs, or so they can start using potential economies of scale to generate efficiencies. In a time when we need to save money we have to be ready to explore ideas like this.

.....

I believe that the potential for mutual spin-outs is enormously exciting. Today is just the start of what will become a genuinely ground-up movement, which will lead to a different kind of relationship between the state and the citizen -

one where people feel they have the support to take more control over things that affect their families and communities.”

70. Arrangements of the type contemplated by Regulations 12 and 77 of the Public Contracts Regulations 2015 are very commonly used in the NHS and enable bodies to set up competitive subsidiaries or enter into cooperative arrangements with other authorities and thereby avoid putting one or other type of service provision out to the private sector.
71. Were TTIP to come into force without the specific exception that CETA provides for, in house arrangements and cooperative arrangements among NHS bodies would be affected. Were an NHS body either to award a contract in house or to a mutual without tender, a US healthcare company wishing to provide similar services to the NHS could claim that it had been discriminated against. Whilst that company would not have a remedy in domestic/EU law – because the 2014 Directive and the 2015 domestic regulations (transposing the Directive) allow for in house contracts/contracts to Mutuals – it might well have a remedy under TTIP.
72. Similarly, if at the end of a contract with a private entity the authority decided not to put it out for competition in future but to take the matter back in house or to cooperate with other authorities, one might well find that the entity deprived of the opportunity to re-compete would be looking to see whether that decision itself constitutes indirect expropriation.
73. As already suggested an answer to this may be that EU negotiators will insist that TTIP comprises the same exclusion for in house and cooperative arrangements referred to above. We do not know whether this will happen, but we do understand that the approach of US procurement law may not be so benign to such in house arrangements and it may not be straightforward to incorporate such a provision. Even were it to be provided, the fact that it is required illustrates the underlying problem that the overarching approach of

TTIP will be, to open up these contracts up to competition and to do so in circumstances which go beyond current interpretations of EU procurement law. The fact that such risks exist must raise concerns regarding the impact of TTIP upon UKG's freedom of choice in developing NHS arrangements.

74. Overall, we consider that in order for the NHS to be protected from TTIP, in the context of the opening of government/public sector procurement between the US and EU, an Annex I exemption would be needed to accompany the section on procurement.

### **Conclusion**

75. It may well be that many of the risks that TTIP poses for the organisation of the NHS and the freedom of action of UKG in the future are, by their very nature, at this time unknown. The fact that the precise nature of such risks cannot be known does not mean they are not serious risks.

76. As we have noted above, TTIP poses a real risk that if UKG wished to change the arrangements for delivery of NHS services and either alter existing contractual arrangements, or seek to dispense with tendering for service contracts to do so, it may be exposed to a broader range of claims than the contracts would themselves afford. The level of compensation, while no doubt already high, may be significantly higher under TTIP.

77. Further, as seen above, even current arrangements in the NHS, and those of particular interest to the current government are already exposed to serious risk of challenge under TTIP. The very fact that these risks do not seem to have been identified demonstrates how TTIP can be expected to have a range of consequences and it will not be possible to anticipate all of them. Given the

substantial risks involved we do not see why a well-advised negotiator would not seek to ensure that the position of the NHS was protected. The safest course would be for the NHS to be the subject of a specific exclusion contained within the main body of the TTIP text.

78. However, in the event that such an exclusion cannot be achieved, we note and agree with the proposal of those instructing us, that there should be reservations within Annexes II and III provided for the benefit of the UK. This might be achieved with text along the following lines.

*“The UK reserves the right to adopt or maintain any measure with regard to the organisation, the funding and the provision of the National Health Service in the UK as well as with regard to the public and/or the not for profit character of the National Health Service in the UK, where services may be provided by different companies and/or public or private entities involving competitive elements which are thus not “services carried out exclusively in the exercise of governmental authority”.*

79. We consider that without such reservations TTIP will pose a real and serious risk to the future ability of UKG to regulate the NHS.

**Michael Bowsher QC**

**Azeem Suterwalla**

**Monckton Chambers**

**1-2 Raymond Buildings**

**Gray’s Inn, London WC1R 5NR**

**chambers@monckton.com**