The Law & Politics of Brexit
VOLUME V

The Trade and Cooperation Agreement

Edited by Federico Fabbrini

OXFORD

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Foreword

by David McAllister

On 31 January 2020, the Withdrawal Agreement concluded between the United Kingdom and the European Union made Brexit a reality. An integral part of this agreement was the Protocol on Ireland and Northern Ireland, which set out to guarantee stability and peace on the island of Ireland after the United Kingdom had left the EU.

Although both sides had agreed to this arrangement, the EU had to experience the UK side repeatedly calling the agreement into question, failing to implement the mutually accepted rules, and even introducing legislation that would allow the United Kingdom to terminate the Protocol unilaterally.

Three years after Brexit, open questions about the Protocol were still putting a strain on the relationship between Brussels and London. Trust on both sides—which is so critically important to our close partnership—was at a low point.

For this reason, it was high time that, after months of talks, a new compromise between the United Kingdom and the EU—the Windsor Framework—was finally reached, after Prime Minister Rishi Sunak took office. This framework presents our long-standing commitment to find compromise for the benefit of people and businesses in Northern Ireland, as well as our commitment to the protection of the Good Friday/Belfast Agreement in all its parts.

The Windsor Framework settles four key points.

First, it makes a clear distinction between goods that are at risk of entering the EU internal market and goods that are not at risk of doing so. Both sides have been in broad agreement about this conceptual approach for some time. However, previous 'green lane' proposals had focused primarily on reducing the quantity of information required in customs forms, rather than reducing the number of customs forms altogether.

Secondly, the United Kingdom will again set Northern Ireland Value Added Tax (VAT).

Thirdly, the European Court of Justice remains the final arbiter in trade disputes. For a long time, this question hampered progress in the negotiations. The interests of London and Brussels seemed incompatible.

Fourthly, through the 'Stormont Brake', the Northern Ireland Assembly will have a say in the application of individual EU laws.

The compromise that has been reached with the Windsor Framework may not be perfect, but it is workable—unlike the previous provisions of the Protocol. Nevertheless, these adjustments do not constitute a new agreement. Rather, it is an adapted way of implementation. Nothing has changed in the validity of the Withdrawal Agreement or the Protocol.

Finally, the Windsor Framework was a fundamental precondition for the proper application of the Trade and Cooperation Agreement. The United Kingdom and the European Union are now better equipped than at any other point since Brexit to cooperate closely and with a clear focus on our common future. We managed to put our relationship back on a more solid foundation, and, in the spirit of Winston Churchill's famous words: 'Success is the ability to go from failure to failure without loss of enthusiasm.'

Much remains to be done until the Windsor Framework is fully implemented. It is important that both sides make every effort to establish the necessary security guarantees within the mutually agreed period. We also have to continue to expand the scope of the Trade and Cooperation Agreement's application to additional sectors, like financial services. This is the only way that people and businesses in the EU and the entire United Kingdom will get the long-term stability that is so urgently needed.

This is why I commend this book edited by Professor Federico Fabbrini and the work of the Brexit Institute for shedding light on this important treaty and its legal and political implications to academics and policy-makers alike.

Acknowledgements

This book is the latest output of the Brexit Institute, which I founded and I direct at Dublin City University (DCU). Since its establishment in June 2017—a year after the Brexit referendum—the Institute has become a leading forum to debate from a research and policy perspective the consequences of the United Kingdom (UK)'s withdrawal from the European Union (EU). In the past seven years, moreover, the Brexit Institute has largely expanded its remit, running an increasing number of projects on the future of European integrationfunded by either the EU or the Irish Government. In fact, the Institute has been housing a Jean Monnet network called BRIDGE, a Jean Monnet Centre of Excellence called REBUILD, two Jean Monnet modules, and several communicating Europe initiatives, while being the Irish partner of two Horizon Europe programmes, called REGROUP and EXPRESS. Brexit, however, has remained one of the core businesses of the Institute, which regularly hosts events exploring the latest twists and turns in this historic process. In fact, by now the Brexit Institute has been organizing events in a dozen cities across Europe and the United States—including lately in Dublin, Brussels, Princeton, and Florence, as well as online.

With the expansion of its activities, the Brexit Institute has enlarged its team too, and it now counts a highly international and interdisciplinary group of roughly twenty people, including PhD researchers, post-docs, project coordinators, and assistant professors who are involved in a variety of its initiatives. This would not have been possible without the support of my University, Faculty, and School—so, I want to thank President Daire Keogh, Dean Derek Hand, and the Head of the School of Law and Government Ken McDonagh. Moreover, I want to express gratitude to the leaders of the Brexit Institute's core corporate sponsors, AIB and GSK Stockmann, namely Colin Hunt, Andreas Heinzmann, Valerio Scollo, and Mary Whitelaw, for their enduring trust. Finally, I want to thank my deputies Christy Ann Petit and Niall Moran, who have assisted me in directing the Brexit Institute during academic year 2022–23, when I was on sabbatical as a Fellow in Law, Ethics, and Public Policy at Princeton University, and then as a Fernand Braudel Fellow at the European University Institute. Princeton University Library Open Access Fund generously contributed to covering a part of the cost of making this book freely

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Draft contributions of this book were originally presented at a Conference held at the Brexit Institute on 28–29 September 2023. And I am very grateful that David McAllister MEP, the Chairman of the European Parliament Foreign Affairs Committee, has kindly agreed to write a preface to this volume, continuing a tradition that goes back to the start of the book series of having a senior policy-maker open these edited collections with a high-level foreword.

This book appears while Europe is mired in the first large-scale military conflict since the end of the Second World War. Russia's invasion of Ukraine has brought unspeakable suffering to the civilian population there, but also caused a *Zeitenwende* for both the EU and the UK. In fact, the war in Ukraine has made clear to Western democracies based on the rule of law that they ultimately stand on the same side against autocracies, and that *l'union fait la force*. While this book is dedicated to those who have been most affected by the brutal war of aggression, its hope is that the new geo-political reality will lead to a deepening of the EU-UK relationship, also beyond the terms of the existing Trade and Cooperation Agreement.

List of Abbreviations

AA	Association Agreement
ACER	Agency for the Cooperation of Energy Regulators
AML	anti-money laundering
ASAP	Act in Support of Ammunition Production
ASCM	Agreement on Subsidies and Countervailing Measures
AUKUS	Australia, the United Kingdon, and the United States
BCBS	Basel Committee for Banking Supervision
BITs	bilateral investment treaties
CAAA	Common Aviation Area Agreement
CAP	Common Agricultural Policy
CAT	Competition Appeal Tribunal
CBRN	chemical, biological, radiological, and nuclear
CCP	Common Commercial Policy
CEPA	Comprehensive Economic Partnership Agreement
CERT	Computer Emergency Response Team
CETA	Comprehensive Economic Trade Agreement
CFP	Common Fisheries Policy
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMA	Competition Market Authority
CoE	Council of Europe
COST	Cooperation in Science and Technology
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRAG	Constitutional Reform and Administrative Governance Act 2010
CSDP	Common Security and Defence Policy
CSR	corporate social responsibility
CTA	Common Travel Area
DCFTA	Deep and Comprehensive Free Trade Agreement
DG FISMA	Directorate-General for Financial Stability, Financial Services and Capital Markets Union
DUP	Democratic Unionist Party
EASA	European Union Aviation Safety Agency
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEA	European Economic Area

EEC	European Economic Community
eFP	enhanced Forward Presence
ENISA	European Union Agency for Cybersecurity
EPA	Economic Partnership Agreement
EPC	European Political Community
EPF	European Peace Facility
EPRS	European Parliament Research Service
ERIC	European Research Infrastructure Consortiums
ERTA	European Road Transport Agreement
EUCSS	EU Cyber Security Strategy
EUFRA	EU (Future Relationship) Act 2020
EUMAM Ukraine	EU Military Assistance Mission in support of Ukraine
Euratom	European Atomic Energy Community
EVs	electric vehicles
FSB	Financial Stability Board
FTAs	free trade agreements
GATT	Global Agreement on Trade and Tariffs
GB	Great Britain
GCAP	Global Combat Air Programme
GDP	gross domestic product
GIs	geographical indications
GPA	Government Procurement Agreement
HPAI	highly pathogenic avian influenza
ICAO	International Civil Aviation Organization
ICE	internal combustion engine
ICES	International Council for the Exploration of the Sea
ICSID	International Centre for Settlement of Investment Disputes
IMA	Independent Monitoring Authority
IMF	International Monetary Fund
IP	intellectual property
IPA	Investment Protection Agreement
IPRs	intellectual property rights
IR	Integrated Review
IRA	Inflation Reduction Act
ISDS	investor–state dispute settlement
JC	Joint Committee
JCWG	Joint Consultative Working Group
JEF	Joint Expeditionary Force
MFN	most favoured nation
MHRA	Medicines and Healthcare Regulatory Agency
MIC	multilateral investment court
MFF	Multiannual Financial Framework
MoU	memorandum of understanding

MPs	Members of Parliament
MSY	maximum sustainable yield
NATO	North Atlantic Treaty Organization
NGEU	Next Generation EU
NHS	National Health Service
NSEC	North Sea Energy Cooperation
OECD	Organisation for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
PEM Convention	Pan-Euro-Mediterranean Convention
PESCO	Permanent Structured Cooperation
PNRs	Passenger Name Records
PTAs	preferential trade agreements
QMV	qualified majority voting
REPO	Russian Elites, Proxies, and Oligarchs
SAU	Subsidies Advice Unit
SCA	Subsidy Control Act
SCE	Specialised Committee on Energy
SCF	Specialised Committee on Fisheries
SFPAs	sustainable fisheries partnership agreements
SNP	Scottish National Party
SPS	sanitary and phytosanitary
TAC	total allowable catch
TCA	Trade and Cooperation Agreement
TEU	Treaty on Economic UnionTFEU Treaty on the Functioning of the European Union
TRQs	tariff rate quotas
UK	United Kingdom
UKCA	UK Conformity Assessment
UNCLOS	UN Convention on the Law of the Sea
WMDs	weapons of mass destruction
WTO	World Trade Organization

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1
Introduction

Federico Fabbrini

1 Introduction

The purpose of this book is to offer a comprehensive analysis of the Trade and Cooperation Agreement (TCA),[1] a treaty concluded between the European Union (EU) and the United Kingdom (UK) on Christmas Eve 2020, which officially entered into force on 1 May 2021. The book builds on a number of prior volumes, which have examined in detail the law and politics of the Brexit referendum,[2] and then especially the UK's Withdrawal Agreement (WA) from the EU[3] and its Protocol on Ireland/Northern Ireland (NI).[4] In this respect, this book complements another volume mapping the new framework of EU-UK relations,[5] but goes beyond that by considering exclusively, and in greater depth, those areas of EU-UK cooperation which are included in the TCA: ie free movement of goods, customs, rules of origin, subsidies, services, investment, public procurement, digital trade, capital movement, intellectual property (IP), transport, aviation, fisheries, health, energy, cyber, climate, regulatory cooperation, social security coordination, and UK participation in EU programmes. In contrast to that earlier book, instead, this volume does not consider those policies, such as financial services, free movement of persons, or defence cooperation, which fell outside the purview of the TCA, and where therefore Brexit resulted in a break of EU-UK cooperation.

This book, however, does not provide a technical legal analysis of core provisions of the TCA only. Rather, consistent with the ethos of all prior volumes,

[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 [2021] OJ L149/10.

[2] Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017).

[3] Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume II. The Withdrawal Agreement* (OUP 2020).

[4] Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022).

[5] Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021).

Federico Fabbrini, *Introduction* In: *The Law & Politics of Brexit*, Volume V. Edited by: Federico Fabbrini, Oxford University Press. © Federico Fabbrini 2024. DOI: 10.1093/oso/9780198908289.003.0001

it takes an interdisciplinary and policy perspective. On the one hand, it contextualizes the TCA in the geo-political and economic reality in which the treaty operates. This comprises the interplay between the TCA and the WA,[6] including the Protocol on Ireland/Northern Ireland (NI).[7] As is well known, in order to deal with the unique circumstances of the island of Ireland, the Protocol extended the application of several EU internal market and customs union rules to NI, but this caused political tensions within NI and diplomatic contestations between the EU and the UK. Yet, in March 2023, the European Commission and the UK Government agreed to a major deal, known as the Windsor Framework, which helped to resolve the problems around the Protocol:[8] through a set of limited technical changes and a new political commitment, the Windsor Framework rebuilt trust between the EU and the UK, thus paving the way towards more cooperative relations also on trade and other matters.

On the other hand, this book explores the TCA for what it is, but without assuming that this must be the inevitable end-zone of EU-UK cooperation. Rather, in line with the policy-attentive analysis of prior volumes, the book reflects on what the possible prospects may be to further develop EU-UK relations going forward. The TCA itself foresees in Article 776 that: 'The Parties shall jointly review the implementation of this Agreement and supplementing agreements and any matters related thereto five years after the entry into force of this Agreement'—hence by 2026. Furthermore, as confirmed by Articles 2 and 775 TCA, the EU and the UK remain free to conclude new bilateral agreements, supplementing the TCA and going beyond it. In fact, as this book suggests, several developments push for a deepening of EU-UK relations: the war in Ukraine has strengthened transatlantic and European unity against the Russian invasion; changes in UK politics and popular opinion shifts have softened the British stance vis-à-vis the EU; and the Windsor Framework has now removed a stumbling block against expanding EU-UK relations.

This chapter therefore takes a chronological and thematic approach. Chronologically, it picks up at the end of 2021, where the latest volume of this book series left off, and summarizes some relevant events that occurred in EU-UK relations in 2022 and 2023. Thematically, the chapter overviews the main features of the TCA and then considers the key *global*, *national*, and

[6] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/07.

[7] ibid 102.

[8] Windsor Political Declaration by the European Commission and the Government of the United Kingdom, 27 February 2027.

local developments that have occurred since its entry into force, reflecting how these may shape future EU-UK cooperation. First, the chapter discusses the impact of Covid-19 and the war in Ukraine on the EU, the UK, and their bilateral relationship. Secondly, it maps changes in UK politics, economy, and society, highlighting both continuing instability in the political party system and a growing shift in public opinion against Brexit, also due to its ever more visible negative economic consequences. Thirdly, the chapter summarizes the searing tensions between the EU and the UK over NI, and explains how these were resolved with the approval of the Windsor Framework in March 2023, which constitutes a positive turning point for EU-UK relations and their future.

As such, this chapter is structured as follows. Section 2 introduces the TCA, presenting its core legal features and emphasizing how this treaty constitutes overall a rather thin deal. Subsequently, section 3 maps the global developments which today serve as a background to the TCA's operation, especially the war in Ukraine. Sections 4 and 5 consider the national developments that have occurred in the UK since the approval of the TCA, namely changes in politics, societal preferences, and institutional structures, including the role of UK courts. Section 6, instead, focuses on local developments in NI, surveying the tensions over the application of the Protocol, and their resolution via the Windsor Framework, which is examined in detail in section 7. Section 8 reflects on the Windsor Framework's dividends for the future of EU-UK relations, while section 9 ends by summarizing the structure of this book and the content of the next chapters.

2 The TCA

The TCA is an international treaty concluded between the UK, on the one hand, and the EU, on the other. As such, in EU trade law parlance, the TCA is an EU-exclusive agreement, rather than a mixed one, since it did not require the separate approval of the twenty-seven EU Member States' parliaments to enter into force. From this point of view, therefore, the TCA differs from most other major EU free trade agreements (FTAs), such as the EU-Canada Comprehensive Economic Trade Agreement (CETA)[9] or the EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA).[10] In fact, while the TCA constitutes a FTA within the meaning of Article XXIV(8) of the Global

[9] [2017] OJ L11/23.
[10] [2014] OJ L161/3.

Agreement on Tariffs and Trade (GATT),[11] it is in many ways a unique international treaty since it is not designed to increase cooperation between the parties, but rather to reduce it, following Brexit. As a result, the TCA—despite being extremely long: 2,530 pages in the EU official journal—is actually a rather thin deal: content-wise, the TCA establishes a limited FTA for goods between the parties and foresees cooperation in only a handful of additional economic and non-economic domains.

The TCA—which is complemented also by a Securities of Information Agreement[12] and a Civil Nuclear Cooperation treaty[13]—is structured in seven parts, with a number of annexes and protocols which are integral to it. Part I frames common institutional provisions and rules on the interpretation of the agreement. Part II comprises all the economic elements of the new EU-UK relationship, including trade in goods and services, investments, digital trade, capital movements, IP, public procurement, subsidies, and energy, as well as transport, aviation, social security coordination, and fisheries. Part III sets out provisions for law enforcement and judicial cooperation in criminal matters. Part IV includes specific clauses on thematic cooperation on health and cyber security. Part V, in turn, deals with UK participation in EU programmes such as research, foreseeing a corresponding financial contribution. Finally, Part VI includes dispute settlement and horizontal provisions, while Part VII introduces final treaty provisions, including a rendezvous clause and a right of unilateral termination of the treaty.

The TCA is legally binding on the EU and the UK under international law. Pursuant to Article 4 TCA: 'The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith', in accordance with the principles of public international law. However, contrary to the WA, which enjoys direct effect and supremacy in UK law, the TCA has no special status. According to Article 5 TCA, in particular, 'nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the

[11] GATT 1947 (allowing the formation of free trade areas or customs union facilitating trade between the participating states).

[12] Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information [2021] OJ L149/2540.

[13] Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for cooperation on the safe and peaceful uses of nuclear energy [2021] OJ L150/1.

Parties'. Moreover, for the avoidance of doubt, Article 4(3) TCA states that 'an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party'.

In fact, from a governance and adjudication viewpoint, the TCA reflects the features of a traditional international treaty. In terms of institutional framework, Article 7 TCA establishes a Partnership Council, co-chaired by the EU and the UK, empowered to take binding decisions and tasked to oversee the attainment of the objectives of the treaty, to discuss any matter related to the areas covered by the treaty, and to amend it in the cases provided for in the agreement itself. The Partnership Council is supported by nineteen specialized committees and four technical working groups, listed in Articles 8 and 9 TCA. In terms of dispute settlement, Articles 734 to 762 TCA set up a typical international arbitration system, mostly modelled on the World Trade Organization (WTO) Dispute Settlement Understanding. In fact, pursuant to Article 754(4) TCA: 'For greater certainty, the courts of each Party shall have no jurisdiction in the resolution of disputes between the Parties under this Agreement.' According to the same provision, the arbitration tribunal is vested with the power to deliver rulings which are binding. Failure by one party to comply with the arbitration ruling may justify the other taking unilateral rebalancing measures. In any case, the jurisdiction of the arbitration tribunal does not include all aspects of the TCA—for instance those on security cooperation—which is why the parties also enshrined a right to unilateral termination.

All in all, therefore, the TCA establishes a rather thin international framework for EU-UK cooperation, limited to a selected number of policy areas. This reflected a sovereigntist desire by the UK at the time of the TCA negotiations to reduce its linkages with the EU. This is, however, increasingly at odds with global, national, and local developments.

3 Global Developments: The Covid-19 Pandemic and the War in Ukraine

When British citizens voted in June 2016 to leave the EU, few could have imagined that a global pandemic would ravage the world and that war would return on the European continent. Yet, the explosion of Covid-19 in late February 2020 and the Russian large-scale invasion of Ukraine in late February 2022 have not undone Brexit or its consequences. Rather, they have intersected with the UK's withdrawal from the EU and amplified its economic, legal, and political implications. As such, a meaningful analysis of the state of Brexit over seven

years after that fateful referendum must depart from a contextual assessment of the conditions in which EU-UK relations are playing out today. From this point of view, while Covid-19 had already impacted the TCA negotiations,[14] the war in Ukraine profoundly affected the geo-political and economic context in which the TCA operates. In fact, the illegal Russian military invasion of Ukraine and the return of land warfare in Eastern Europe profoundly influenced both the EU and the UK, as well as their cooperation.

The war in Ukraine had important political consequences. The UK, together with the United States (US), was from the beginning one of the first countries of the international community to support the Ukrainian Government, including by providing it with weapons and financial support.[15] However, the EU also responded strongly to the Russian illegal invasion of Ukraine, and while the pandemic spurred the EU to establish a fiscal capacity, the war in Ukraine prompted it to consolidate it.[16] Moreover, the war led to a major decision by the EU to revive its enlargement process: in June 2022, the European Council granted to Ukraine the status of EU candidate country.[17] As a bridging solution during the time-consuming accession process, the EU promoted the creation of a new forum—the European Political Community (EPC)—including forty-four European states, among which are all 27 EU Member States and the UK, which met for the first time in Prague in October 2022.[18]

At the same time, the war in Ukraine changed the geo-political priorities of both the EU and the UK, absorbing most of their foreign policy attention and increasing the need for cooperation among like-minded democracies in the fight against an imperialist Russia disregarding international law. In fact, the war pushed the UK to refocus its defence strategy, away from a global allure,[19] and thanks to the leadership of US President Biden, transatlantic cooperation and European unity greatly improved. In coordination with the North Atlantic Treaty Organization (NATO), both the EU and the UK adopted several major packages of financial sanctions targeting Russian individuals and businesses which were associated with Russian President Vladimir Putin and his decision

[14] See Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 1, 5.

[15] See Claire Mills, 'Military Assistance to Ukraine Since the Russian Invasion', House of Commons Library Research Briefing, 30 March 2023.

[16] See Federico Fabbrini, *EU Fiscal Capacity: Legal Integration after Covid-19 and the War in Ukraine* (OUP 2022).

[17] European Council conclusions, 24 June 2022, EUCO 24/22, para 11.

[18] Press release, 'The European Political Community Meets for the First Time in Prague to Discuss Energy and Security', 6 October 2022.

[19] See HM Government, Integrated Review Refresh 2023, 16 May 2023 (revising the 2021 Integrated Review of Security, Defence, Development and Foreign Policy, which developed a strategy for Global Britain).

to wage war. Moreover, while NATO's role as the centre-piece of European security consolidated during the war with the accession of Finland and Sweden to the alliance, the EU also took relevant steps in developing its Common Security and Defence Policy (CSDP). In this context, in autumn 2022 the UK asked to join the EU Permanent Structured Cooperation (PESCO) project on military mobility as a third country, which the Council of the EU readily accepted.[20]

However, the war in Ukraine also had important economic consequences across Europe, and indeed the world. On the one hand, the war worsened the disruption in global supply chains caused by the pandemic and accelerated a process towards selective globalization, with friend-shoring and efforts by Western countries to de-risk supply chains and reduce dependences on critical materials. On the other hand, beside the costs of supporting the Ukrainian Government, increasing defence budgets, and assisting a major influx of war refugees, the war caused an energy and food crisis. In particular, the decision to phase out Russian fossil fuels, reducing European dependences on oil and gas, led in 2022 to a spike in energy costs. This combined with, and aggravated, an inflationary trend that had also been fuelled by the post-pandemic economic recovery, with the result that central banks in both England and the Eurozone had to tighten their monetary policies rapidly, raising interest rates to levels unseen in decades.

Yet, the economic hit for the UK was much greater than for the EU—attributable entirely to Brexit. As the independent UK Office for Budget Responsibility pointed out, Brexit had an impact on the UK economy equivalent to that of Covid-19, as trade restrictions and lack of workforce hampered the British economy.[21] As a result, despite the touted economic benefits of leaving the EU,[22] by 2022 the UK was the only major world economy which had not regained its pre-pandemic level.[23] With the explosion of the war and the resulting energy crisis, moreover, the UK suffered further economic malaise: the UK Government rolled out an energy bill support scheme to assist families, but also made major policy missteps, as will be explained in the next section, with the consequences that inflation reached double digits and the public debt surpassed 100 per cent of gross domestic product (GDP).[24] This

[20] Council of the EU press release, 'PESCO: The UK Will Be Invited to Participate in Military Mobility Project', 15 November 2022.

[21] See Adam Forrester, 'Brexit Damage as Big as Covid, Says OBR, Predicting Five Years before Incomes Recover' *The Independent* (26 March 2023).

[22] See House of Lords European Affairs Committee, 'The UK-EU Relationship in Financial Services', 23 June 2022, HL paper 21 (claiming Brexit benefited the City of London).

[23] See House of Commons Business, Energy and Industrial Strategy Committee, 'Post-Pandemic Economic Growth', 25 October 2022, HC 759.

[24] See 'Economic Indicators' House of Commons Library, 28 June 2023.

has resulted since 2022 in significant disruptions and social unrest in the UK, with a rise in poverty rates, widely reported lack of food supplies in stores, and large labour strikes in pursuance of higher wages.

4 National Developments: UK Politics

Moving from the global to the national, since the entry into force of the TCA the UK political system has experienced a remarkable degree of instability, and the British political class has struggled to define what country the UK has become. As political scientists have pointed out, because support for Brexit cut through the traditional political divide of Labour versus Conservative, the two main UK political parties have had a hard time in developing a narrative, let alone a policy stance, on what the future is for the UK outside the EU.[25] Moreover, conflicting visions on the benefits of Brexit have been particularly evident within the governing Conservative Party: while support for Brexit brought together blue-collar voters in the North of England who were disgruntled with globalization, and wealthy Conservatives in the South who favoured even more economic liberalization, the interests of these two constituencies have hardly aligned post-Brexit, creating challenges for decision-makers torn between making the UK a neo-protectionist welfare state or an emergent champion of free trade.

At the same time, societal attitudes towards Brexit have evolved too—and, as the economic costs of leaving the EU have become ever more visible, UK citizens have increasingly regretted their choice. In fact, if the Covid-19 pandemic exploding in February 2020 largely concealed the immediate consequences of Brexit—as ultimately trade and mobility of persons had come to a halt worldwide—the divergence in the post-pandemic recovery of the UK and its European partners vividly exposed to the larger British public the damage of leaving the EU. Otherwise, as previously mentioned, the impact of the war in Ukraine on energy costs and the rapid rise of inflation posed further challenges for the British economy. In this context, starting in spring 2023, opinion polls have, for the first time since 2016, consistently revealed that a majority of British people today would vote against Brexit—a trend the media called 'Bregret'.[26]

[25] See Tim Bale, *The Conservative Party after Brexit: Turmoil and Transformation* (Polity Press 2023).
[26] See Archie Mitchell, 'Brexit Regret among Leave Voters Hits Record High, Poll Finds' *The Independent* (23 May 2023).

This has created turmoil in UK politics.[27] In early 2022, Prime Minister Boris Johnson still enthusiastically hailed the benefits of Brexit.[28] In particular, the Johnson Government aggressively pushed to maximize the alleged dividends of diverging from the EU, while also levelling up the economic conditions of the whole UK,[29] with a sensitivity towards the interests and expectations of the post-industrial constituencies of the north of England which were key for its landslide electoral success in 2019. This policy mix was then supported by an aggressive ideological agenda, aimed at highlighting the burning of bridges with the EU. This agenda included the NI Protocol Bill—which I will discuss later in section 5; the NI Troubles Legacy and Reconciliation bill, tabled on 17 May 2022—designed to put an end to judicial inquiries about human rights violations that occurred during the NI Troubles; the British Bill of Rights bill, tabled on 22 June 2022—designed to replace the European Convention on Human Rights (ECHR) with a domestic bill of rights; and the Retained EU Law bill, tabled on 22 September 2022—designed to end the application of EU laws retained in the UK after 31 December 2023.

Each of these bills was a cause for national and international concern. The Council of Europe Parliamentary Assembly expressed deep worries in October 2022 for both the NI Troubles Legacy and Reconciliation Bill and the British Bill of Rights Bill.[30] And the House of Lords voted down the original Retained EU Law Bill, asking for more time to assess what EU laws had to be kept in the UK legal system. Nevertheless, from a political viewpoint, this legislative agenda and the confrontational stance against the EU (and the ECHR) helped to boost the popularity of a Conservative premier with the pro-Brexit camp. And they appeared to help the standing of Prime Minister Johnson, who was facing strong political criticism, and ultimately legal charges, for his behaviour during the pandemic, with the accusation of hosting parties at 10 Downing Street in breach of Covid-19 restrictions. On 6 June 2022, in fact, Prime Minister Johnson was subject to an internal party challenge which he survived, albeit with one-third of Tory MPs voting against him.

Nevertheless, during the summer of 2022 further evidence emerged that Johnson had repeatedly breached Covid-19 lockdown rules and lied to

[27] Additional turmoil also occurred at the UK sub-national level. In Scotland, in particular, First Minister and Scottish National Party (SNP) leader Nicola Sturgeon resigned from her roles on 28 March 2023—only to be arrested three months later and charged with misspending party donations. The Scottish government, however, has remained committed to a new independence referendum to rejoin the EU. See Scottish Government, 'An Independent Scotland in the EU', November 2023.

[28] See HM Government, 'The Benefits of Brexit: How the UK Is Taking Advantage of Leaving the EU', 31 January 2022.

[29] See HM Government, 'Levelling UP the United Kingdom' CP 604, 2 February 2022.

[30] Council of Europe Parliamentary Assembly Resolution 2464 (2022), 13 October 2022.

Parliament about it. Combined with several other political scandals and sleaze accusations, this eventually led to a massive ministerial resignation from the UK Government: as a result, on 7 July 2022 Johnson was forced out of office, resigning as leader of the Conservative Party, only remaining as caretaker Prime Minister until the appointment of his successor.[31] While the departure of the men who had been elected to 'get Brexit done' may have signalled the end of an era, in reality what followed was a period of unprecedented political instability.[32] Members of Parliament (MPs) shortlisted two candidates to replace Johnson—Liz Truss, the then Foreign Secretary, and Rishi Sunak, the then Chancellor of the Exchequer—and registered Conservative Party voters chose the former, who consequently became Tory leader and Prime Minister on 6 September 2022, two days before the death of Queen Elizabeth II.

However, Prime Minister Truss immediately embraced a reckless economic policy, which made her premiership the shortest in UK history. Truss sought to define the outlook of the UK post-Brexit by embracing an ultra-libertarian economic vision, based on aggressive tax cuts and deregulation, aimed at making Britain a kind of Singapore-on-Thames. Yet, this policy clashed with the reality of rising inflation and an energy crisis, fuelled by the war in Ukraine, and both post-Brexit and post-Covid-19 trade bottlenecks. Thus, when Truss' Chancellor of the Exchequer Kwasi Kwarteng presented a budget bill with large tax reductions and new unfunded public debt, at a time when the Bank of England was tightening its monetary policy, the financial markets quickly tumbled, sterling plunged, and yields of UK government bonds skyrocketed. To calm the financial markets, Truss sacked her Chancellor, although this did not eventually save her: after forty-five days in office she was forced to leave, presenting her resignation to the new King Charles III on 20 October 2022.

The disastrous experience of the Truss Government prompted Conservative MPs to avoid a new electoral contest to select a party leader and prime minister. Despite political manoeuvres by Boris Johnson to return to his job, on 25 October 2022 the Tory parliamentary caucus chose Rishi Sunak as party leader and prime minister in an uncontested vote. The formation of the Sunak Government certainly constituted an historical moment, as he is the first ever premier of Indian descent to lead the UK. Moreover, Prime Minister Sunak, a technocrat by temperament, embraced a more conciliatory approach towards the EU and sought to reduce tensions, particularly around the NI Protocol. At

[31] See 'Clownfall' *Economist* (9 July 2022) 9.

[32] See Federico Fabbrini, 'We Need London to Return to Being a Boring Capital' *The Irish Times* (31 October 2022).

the same time, the Sunak Government silently abandoned most of the Johnson Government legislative agenda, including by changing what was to become the Retained EU Law Act 2023.[33]

Nevertheless, the Sunak Government continued to face important political pressures, owing to the unruly nature of the Conservative Party. To appease the pro-Brexit wing of his party, Prime Minister Sunak pushed forward controversial policies to curb illegal migration.[34] Yet, in his first year in office the premier had to reshuffle his cabinet repeatedly and, in November 2023, he took the surprising decision to call back as Foreign Secretary David Cameron, the former premier who had decided to hold a Brexit referendum and then resigned after losing it. The challenges faced by the Conservative Party unsurprisingly benefited the opposition Labour Party, led since April 2020 by Sir Keir Starmer, which in the polls has consistently seen a major, double-digit lead. In fact, when in June 2023 former Prime Minister Boris Johnson and some of his closest allies resigned from their seats at Westminster following a damning report by the House of Commons,[35] the Conservative Party lost most of the by-election contests, suggesting rough seas ahead of them.

Since the last general election in the UK happened in December 2019, a new vote must be held before early 2025. Yet, an important legal development that occurred in 2022 is the approval by the UK Parliament of the Dissolution and Calling of Parliament Act 2022.[36] This piece of legislation repealed the Fixed Term Parliament Act 2011,[37] approved during the coalition government between the Conservatives and the Lib-Dems, which restricted the ability of a prime minister to call for an early election, before the natural end of the five-year parliamentary term, unless two-thirds of MPs agreed to it. With the Dissolution and Calling of Parliament Act 2022, instead, UK premiers have been given the authority to call snap elections at will again, including when it may be more politically convenient for them. While given current opinion polls it may be unlikely for Prime Minister Sunak to dissolve Parliament before the end of 2024, uncertainties remain as to both the exact date of the new UK general election, and on their outcome. Yet, the party winning the next UK

[33] Retained EU Law (Revocation and Reform) Act 2023, c 28.
[34] See especially Illegal Migration Act 2023.
[35] House of Commons Committee of Privileges, 'Matter Referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report', 15 June 2023, HC 564 (finding that Prime Minister Johnson misled Parliament regarding the parties he hosted at 10 Downing Street during the pandemic in breach of Covid-19 rules).
[36] Dissolution and Calling of Parliament Act 2022, c 11.
[37] Fixed Term Parliament Act 2011, c 14.

general election will be in charge of handling the TCA revision, which is foreseen in 2026.

5 National Developments: UK Courts

While the UK political system has been characterized by ongoing instability since Brexit, UK courts have increasingly become a centripetal force, guaranteeing institutional stability and acting as a forum of reason for the resolution of politically contentious issues. This development is somehow ironic, considering that Brexit was motivated by the desire to take back control, and that the UK constitution still formally abides by the principle of parliamentary sovereignty, with a limited role for the courts.[38] Yet, in various rulings delivered in 2022 and 2023 UK lower courts and the Supreme Court have settled important legal matters, confirming that the judiciary plays an ever more important role in preserving not only the rule of law but also the constitutional principles and the international legal commitments of the UK, particularly at a time when the UK union is under strain.[39]

To begin with, on 23 November 2022 the UK Supreme Court ruled in a major case that Scotland could not organize a new independence referendum without Westminster approval.[40] The case, which had been raised by the Lord Advocate, the senior law officer of the Scottish Government, revolved around the question of whether the Scotland Act 1998, as amended, gave the Scottish Parliament the authority to legislate an independence referendum, autonomously and without the consent of the UK Government. In a unanimous five-judge ruling, the UK Supreme Court held that it had jurisdiction to hear the case, and ruled that 'a Bill which makes provision for a referendum on independence—on ending the Union—has more than a loose or consequential connection with the Union of Scotland and England',[41] and as such fell within the list of powers reserved to the UK Parliament. The Supreme Court acknowledged that it 'has been demonstrated in practice by the history of referendums in this country' that ballot initiatives have profound political consequences[42]

[38] See Mark Elliot and others (eds), *The UK Constitution after Miller* (Hart Publishing 2018).

[39] House of Lords Select Committee on the Constitution, 'Respect and Co-Operation: Building a Stronger Union for the 21st Century', 20 January 2022, HL Paper 142 (emphasizing strains in the UK union).

[40] *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31.

[41] ibid para 82.

[42] ibid para 79.

and, citing comparative law precedents,[43] suggested that a process of secession required a negotiated agreement with the central UK government.

Moreover, on 8 February 2023 the UK Supreme Court delivered its ruling on the legality of the Protocol on Ireland/NI, judging on the appeals that Unionist leaders had brought against prior judgments of inferior courts.[44] In a unanimous opinion, a five-judge panel of the Supreme Court rejected all complaints and upheld the lower courts. In particular, after recalling 'the intense and protracted parliamentary involvement'[45] in the negotiations and ratification of the WA and the Protocol, the Supreme Court underscored how Westminster had deliberately decided—with the approval of the Withdrawal Act 2018, as amended by the Withdrawal Agreement Act 2020—to impose restrictions on trade from NI to the rest of the UK. Because 'the most fundamental rule of UK constitutional law is that the Parliament, or more precisely, the Crown in Parliament, is sovereign, and that legislation enacted by Parliament is supreme',[46] the Court rejected the claim that the Protocol was made in contravention of the Act of Union of 1800.[47] Moreover, citing *Miller*, the Supreme Court also held that the Protocol was not in conflict with the Northern Ireland Act 1998,[48] while also holding that the Withdrawal Act 2018 had lawfully amended the Northern Ireland Act 1998 in establishing a consent mechanism, as foreseen by Article 18 of the Protocol.

Beyond the UK Supreme Court, moreover, lower courts have also delivered consequential judgments, both related to the implementation of the WA and on the international legal commitments of the UK. In particular, on 21 December 2022 the UK High Court ruled on a case brought by the Independent Monitoring Authority (IMA) against the UK government's implementation of the WA provisions on citizens' rights.[49] The IMA had complained that the 'settled status' provided by UK authorities to EU citizens who had been resident in the UK before the end of the Brexit transition period was in breach of its WA obligations. The High Court upheld the legal challenge and stated that the settled status scheme was unlawful as it purported to abrogate rights of residence arising under the WA. Moreover, on 29 June 2023 the UK Court of Appeal

[43] See especially Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[44] *In the matter of an application by Hugh Allister and others for Judicial Review (Appellants) (Northern Ireland)* [2023] UKSC 5.
[45] ibid para 28.
[46] ibid para 66.
[47] ibid para 79.
[48] ibid para 84.
[49] *The King, on the application of the Independent Monitoring Authority for the Citizens' Rights Agreement*, Case No CO/4193/2021, 21 December 2022.

ruled that the UK Government plan to deport asylum seekers to Rwanda was illegal as it breached the *non-refoulement* principle enshrined in the ECHR.[50]

In a major judgment delivered on 15 November 2023 the UK Supreme Court confirmed the decision of the Court of Appeal and ruled that the Rwanda policy was unlawful.[51] In a unanimous five-judge ruling, the UK Supreme Court held that both a number of international treaties—including the ECHR, the United Nations Convention relating to the Status of Refugees, and the United Nations Convention against Torture—and domestic UK law enshrined the principle of *non-refoulement*, thus prohibiting UK authorities from transferring an asylum seeker to a third country where there might be a risk of *refoulement*. However, as the Supreme Court also pointed out in light of the evidence provided by the United Nations High Commissioner for Refugees, 'the evidence establishes substantial grounds for believing that there is a risk that asylum claims will not be determined properly [by Rwanda], and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin'.[52] As a result, the UK Supreme Court invalidated one of the Conservatives' core migration policies, reaffirming the importance of UK compliance with human rights obligations—although the Government seems to be insisting on its stance through the Safety of Rwanda bill 2023.

6 Local Developments: The Northern Ireland Problem

Aside from the global and national developments discussed above, a significant factor in shaping EU-UK relations since the entry into force of the TCA has been NI. As explained in a prior volume, to deal with the unique circumstances of the island of Ireland, the Protocol on Ireland/NI attached to the WA had tailored a special arrangement for NI, keeping it effectively in the EU internal market and customs union.[53] As is well known, however, the Protocol created both internal political controversy—as the NI Unionist community mobilized against the treaty—and international diplomatic confrontations—as the UK Government and the European Commission sabre-rattled around its application.[54] Since 2022, moreover, the tensions over NI have been aggravated

[50] *AAA v Secretary of State for the Home Department* [2023] EWCA Civ 745.
[51] *R (on the application of AAA) v Secretary of State for the Home Department* [2023] UKSC 42.
[52] ibid para 105.
[53] See Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022) 1.
[54] See Dagmar Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP

further as a result of two other developments. On the one hand, elections in NI revealed that Unionism is politically in decline, complicating efforts towards local reconciliation around the Protocol. On the other hand, legislative efforts by the Johnson and Truss Governments to renege on the Protocol have further ignited tensions with the EU.

On 5 May 2022, the elections for the devolved NI Assembly produced a tectonic shift, revealing profound sociological, demographic, and ideological transformations within NI. For the first time since the establishment of devolved governance in NI pursuant to the Belfast Good Friday Agreement, Sinn Féin, the nationalist party seeking reunification with Ireland, secured the largest number of votes and seats and thus gained the right to nominate the First Minister in the NI Executive. At the same time, unionist parties supporting remaining with Great Britain (GB) lost their edge in an election which also revealed a strong performance of the non-aligned Alliance Party, a political force representing voters who identify as neither nationalist nor unionist. Nevertheless, the Democratic Unionist Party (DUP), the largest unionist party in NI, refused to enter into a power-sharing government with Sinn Féin, as required by the Belfast Good Friday Agreement, stating that it wanted the Protocol removed before nominating a deputy first minister. This created a political stalemate which continues to this date. In late 2022, in fact, the UK Government decided to pass ad hoc legislation,[55] effectively postponing new elections for the NI Assembly indefinitely, although votes for local councillors' elections on 21 May 2023 again revealed a strong showing for Sinn Féin, which was once more the party most voted for in NI.

The political conundrum of NI, furthermore, has interacted with UK politics.[56] Both the Johnson and Truss Governments, in fact, leveraged the dispute over the Protocol to score political points with their pro-Brexit electorate. The centrepiece of this strategy is the NI Protocol bill,[57] a piece of legislation proposed by the UK Government on 13 June 2022 and designed to provide unilateral solutions to the alleged problems in the application of the Protocol.[58] The bill, however, violated the terms of the Protocol on its face, as clearly stated

2021) 49; and Niall Moran, 'Customs and Movement of Goods' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022) 145.

[55] See Northern Ireland (Executive Formation etc.) Act 2022.

[56] See also House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland', 22 March 2022, HL Paper 77 (reporting number of new EU legislation of relevance for NI).

[57] NI Protocol Bill, 13 June 2022.

[58] See also UK Foreign, Commonwealth & Development Office, NI Protocol: The UK's solution, 13 June 2022.

in section 1, according to which: 'This Act provides that certain specific provision of the Northern Ireland Protocol does not have effect in the United Kingdom.' In particular, the bill removed customs checks on the movement of goods from GB to NI, creating green lanes for intra-UK movement only, as opposed to red lanes for goods destined for the EU. The bill also introduced a dual regulatory model for goods marketed in NI, with the possibility for producers to abide either by EU or UK regulations. In addition, the bill suspended the operation of the Protocol rules on state aid and taxation. And crucially, it removed the European Court of Justice (ECJ) from adjudicating cases related to the Protocol, while also excluding the application of the Protocol's provisions on the presence and powers of EU representatives in NI ports.

All in all, therefore, the NI Protocol bill rendered inapplicable in the UK almost the entirety of the Protocol negotiated with the EU. Indeed, while section 5(3) of the bill made clear that Articles 2, 3, and 11 of the Protocol (on individual rights and non-discrimination, the Common Travel Area, and cross-border cooperation) would remain untouched, the draft legislation practically affected every single other provision of the Protocol which had been painstakingly negotiated with the EU. Moreover, the bill amended section 7A of the EU Withdrawal Act 2018—the clause giving direct effect and supremacy to the WA in UK law—to state that such provision 'does not apply to (a) any rights, powers, liabilities, obligations or restrictions from time to time created or arising by or under excluded provision of— (i) the NI Protocol, or (ii) any other part of the EU withdrawal agreement'. At the same time, although the bill introduced a guarantee to prevent the return of a hard border on the island of Ireland—with section 22(3) explicitly stating that 'Regulations under this Act may not create or facilitate border arrangements between Northern Ireland and the Republic of Ireland'—the bill gave broad discretionary power to government ministers to set aside all other provisions of the Protocol, as well as to replace them in case of 'new agreement amending or replacing the Northern Ireland Protocol', as foreseen in section 19.

The bluntly illegal action by the UK Government prompted a strong response by the European Commission,[59] which immediately started infringement proceedings against the UK for violating the Protocol.[60] In particular, the Commission both reactivated the case regarding certification requirements on agri-food it had started in March 2021, but suspended in September 2021 to

[59] See European Commission Vice President Maroš Šefčovič, statement, 13 June 2022, STATEMENT/22/3698.

[60] See European Commission Vice President Maroš Šefčovič, remarks, 15 June 2022, SPEECH/22/3758.

give space to the further negotiations. Moreover, the Commission also started two new infringement cases against the UK for failure to execute its obligations regarding sanitary and phytosanitary (SPS) rules, including by not carrying out necessary controls at border control posts in NI and failing to ensure adequate staffing; and for failure to provide the EU with trade statistics data.[61] At the same time, the Commission also published on the same day several papers providing further details on the possible solutions it had put forward in October 2021 to facilitate the movement of goods between GB and NI, thus seeking to keep a negotiating door open with the UK.

Yet—as a reflection that 'the situation has deteriorated still further', as noted by the UK House of Lords[62]—in summer 2022 the passage of the NI Protocol Bill continued to advance through the UK Parliament. Therefore, on 22 July 2022 the Commission launched four additional infringement actions against the UK for failure to implement the Protocol. Taking into account 'the continued passage of the Northern Ireland Protocol Bill through the UK Parliament [which] go directly against [the] spirit'[63] of the Protocol, the Commission took the UK before the ECJ, notably for failing to comply with the applicable customs requirement, supervisory requirements, and risk controls on the movement of goods from NI to GB. In addition, the Commission also lamented the failure by the UK to transpose technical EU rules on excise duties and value added tax for e-commerce with respect to NI, emphasizing how this conflicted with the provisions of the Protocol.

The fate of the dispute over NI, however, increasingly interplayed with the national and global developments discussed in the prior sections. While the 2023 ruling of the UK Supreme Court removed any UK constitutional law question on the legality of the Protocol, under the Sunak Government a changed political mood emerged in the diplomatic relations between the EU and the UK. In fact, when taking over as prime minister after the short, disastrous stint of Liz Truss, Sunak faced a diminished British economy, with runaway inflation, labour-management unrest, and fiscal challenges. Charting a more moderate path, he quickly realized that the key way out of this situation was to reconnect with the EU—which after all, despite Brexit, remains the UK's main economic partner, accounting for roughly half of its imports and exports.

[61] See European Commission press release, 'Commission Launches Infringement Proceedings against the UK for Breaking International Law and Provides Further Details on Possible Solutions to Facilitate the Movement of Goods between Great Britain and Northern Ireland', 15 June 2022.

[62] House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'Follow up Report', 27 July 2022, HL Paper 57, para 300.

[63] See European Commission press release, 'Protocol on Ireland/Northern Ireland: Commission Launches Four New Infringement Procedures against the UK', 22 July 2022, IP/22/4663.

Resolving the Irish Protocol was therefore essential to rebuilding a positive relationship with the EU. At the same time, with the twenty-fifth anniversary of the Belfast Good Friday Agreement approaching in April 2023, US President Biden, who made no secret of his Irish roots, increasingly pressured the UK to resolve its discords with the EU over NI, particularly in the midst of a war in Europe. This facilitated a breakthrough in the ongoing negotiations between the parties.[64]

7 The Windsor Framework

On 27 February 2023, UK Prime Minister Rishi Sunak and European Commission President Ursula von der Leyen announced a deal on the Protocol—known as the Winsor Framework.[65] In a joint Political Declaration, the European Commission and the UK Government 'recognize[d] their respective legitimate interests and [the] difficulties in the operation of the Protocol'[66] and agreed to chart a 'new way forward [a]s a tangible manifestation of the shared desire for a positive bilateral relationship'.[67] To this end, the parties agreed to a number of substantive and institutional adjustments to the Protocol,[68] which they emphatically agreed to rename the Windsor Framework. From a substantive point of view, the EU and the UK accepted the facilitation of movement of goods from GB to NI, relaxing checks for goods destined for NI only, in exchange for greater market surveillance by the UK and greater data sharing between EU and UK authorities. Moreover, the parties agreed on the adoption of ad hoc rules on access to medicines in NI, and enhanced the flexibility of UK authorities in the application of EU state aid and VAT laws in NI.

From an institutional view point, moreover, the EU committed to increase its engagement with NI stakeholders,[69] while the two parties also agreed to establish jointly new sub-groups in the Joint Consultative Working Group (JCWG) foreseen by Article 15 of the Protocol to discuss aspects of relevance. Crucially, then, in the most significant amendment to the existing Protocol, the

[64] See Joint Statement by European Commission President Ursula von der Leyen and UK Prime Minister Rishi Sunak, 26 February 2023, STATEMENT/23/1242.
[65] Windsor Political Declaration (n 8).
[66] ibid 1.
[67] ibid.
[68] See also HM Government, 'The Windsor Framework: A New Way Forward', CP 806, 27 February 2023.
[69] See also European Commission statement, 'Enhanced Engagement with Northern Ireland Stakeholders', 27 February 2023.

EU and the UK agreed to create a so-called 'Stormont Brake', named after the building hosting the NI Legislative Assembly. This brake would enable the UK, at the request of thirty members of the NI Legislative Assembly, from at least two parties, to stop the application in NI of amended or replacing EU legal provisions that significantly differ from the EU act applicable until then, and may have a significant and lasting impact specific to the everyday life of communities in NI. This exceptional mechanism, designed to address an alleged democratic deficit in the Protocol, applies, however, in the unique circumstance of the Framework and only concerns future EU internal market laws. Moreover, it is conditional on the operation of the NI Executive, and subject to judicial review. In fact, while the parties committed to resolving their disputes peacefully through arbitration, the Windsor Framework did not affect the role of the ECJ, which remained untouched.

From a legal viewpoint, the Windsor Framework did not constitute a wholesale revision of the original Protocol. On the contrary, the Framework resulted in only a few specific amendments to the Protocol's text—notably the introduction of a new Article 13(3a) on the 'Stormont Brake', plus the addition of a programmatic sentence in Article 6(2). Moreover, the parties committed to approve these amendments via the institutions of the Protocol itself—namely the Joint Committee (JC), as specifically foreseen by Article 164(5)(d) WA, which empowers the JC to amend the WA in some circumstances. Together with the Political Declaration, both the EU and the UK released a series of legal documents—although the UK government presented them as draft decisions, while more politely the Commission published them as proposals to the Council of the EU.[70] Such documents included a draft decision to be approved by the JC laying down arrangements related to the Windsor Framework,[71] as well as draft JC recommendations,[72] several draft joint EU-UK declarations,

[70] See European Commission proposal for a Council decision on the position to be taken on behalf of the European Union in the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards a decision to be adopted, and recommendations and joint and unilateral declarations to be made, 27 February 2023, COM(2023) 123 final and Annexes; European Commission proposal for a Council decision on the position to be taken on behalf of the European Union in the Joint Consultative Working Group established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the amendment of its rules of procedure, 27 February 2023, COM(2023) 120 final.

[71] See HM Government, Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework, 27 February 2023.

[72] See HM Government, Draft Recommendation of the Withdrawal Agreement Joint Committee on Article 13(3)(a), 27 February 2023; HM Government, Draft Recommendation of the Withdrawal Agreement Joint Committee on market surveillance and enforcement, 27 February 2023.

including on state aid and value added tax (VAT),[73] and a draft decision on the amendment of the rules of procedure of the JCWG.[74] At the same time, the EU also put forward proposals for EU legislation, eg on specific rules for medical products and on the movement of certain goods,[75] while the UK issued a number of unilateral declarations, to be recorded in the JC, on inter alia market surveillance and export procedures.[76]

Beyond the technicalities, however, the Windsor Framework—which also cleverly exploited the name of the British monarchy to give an aura or echo of royal support to the deal—achieved the political objective of defusing tensions around the Protocol, and therefore rebuilding trust between the EU and the UK.[77] As a result, the UK Government abandoned its illegal NI Protocol bill, and conversely the Commission suspended infringement proceedings against

[73] See HM Government, Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the VAT regime for goods not being at risk for the Union's internal market and on the VAT arrangements for cross border refunds, 27 February 2023 (on VAT); HM Government, Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the application of Article 10(1) (on state aid). But see also HM Government, Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the Windsor Framework, 27 February 2023 (allowing the parties to refer to the Protocol as amended as the Windsor Framework); HM Government, Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on Article 13(3)(a), 27 February 2023 (on good faith); HM Government, Draft joint declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on dialogue and goods, 27 February 2023.

[74] See HM Government, Draft Decision of the Joint Consultative Working Group on amending its rules of procedures, 27 February 2023.

[75] See European Commission proposal for a Regulation of the European Parliament and the Council on specific rules relating to medicinal products for human use intended to be placed on the market of Northern Ireland, 27 February 2023, COM(2023) 122 final; European Commission proposal for a Regulation of the European Parliament and the Council on specific rules relating to the entry in Northern Ireland from other parts of the United Kingdom of certain consignment of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movement of certain pet animals into Northern Ireland, 27 February 2023, COM(2023) 124 final. But see also European Commission proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2020/2170 as regards the application of Union tariff rate quotas on other import quotas to certain products transferred to Northern Ireland, 27 February 2023, COM(2023) 125 final.

[76] See HM Government, Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on market surveillance and enforcement, 27 February 2023; HM Government, Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on export procedures for goods moving from Northern Ireland to other parts of the United Kingdom, 27 February 2023. But see also HM Government, Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on the democratic consent mechanism in Article 18, 27 February 2023; and HM Government, Draft unilateral declaration by the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on strengthening enforcement action for goods moved in parcels from another part of the United Kingdom to Northern Ireland, 27 February 2023.

[77] See also House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'The Windsor Framework', 25 July 2023, HL Paper 237.

the UK.[78] In fact, in a legal opinion attached to the Windsor Framework, the Sunak Government underlined how the negotiated deal with the EU, an international arrangement governed by the Vienna Convention on the Law of the Treaties and consistent with the Belfast Good Friday Agreement, removed any legal justification for the NI Protocol bill.[79] As has previously been the case in the Brexit process, however, approval of the Windsor Framework in the UK rested more on political persuasion than on legal argumentation. On the EU side, the Council approved the deal on 21 March 2023,[80] and the European Council also endorsed it on 23 March 2023.[81] On the UK side, instead, the DUP expressed reservations and, in the Westminster vote promised by Prime Minister Sunak, it ultimately decided—with former Premiers Johnson and Truss—to vote against the 'Stormont Brake'. This notwithstanding, also thanks to the support by the Labour Opposition, on 22 March 2023 the UK Parliament massively backed the deal with a 515-to-29 majority.[82]

8 The Future of EU-UK Relations

In view of their approval both in the EU and in the UK, on 24 March 2023 the EU-UK JC formally adopted the arrangements of the Windsor Framework, modifying the Protocol in the limited above-mentioned terms to allow for the institution of the 'Stormont Brake', enacting the new determinations on the movement of goods considered not to be at risk of entering the EU single market, and clarifying the scope of application of EU VAT law in NI.[83] On the same occasion, the EU and the UK met in the TCA Partnership Council (the second ever meeting of this body), and drew immediate benefits from their reconciliation by reaffirming their desire to exploit their trade partnership fully.[84] On the same day, the EU and the UK also concluded, with Ireland as a signatory too, a Peace Plus Programme 2021–2027 Financing Agreement,

[78] Windsor Political Declaration (n 8) 3–4.

[79] See HM Government, 'Legal Position: The Windsor Framework', 27 February 2023.

[80] Council of the EU, press release, 'New Way Forward on the Protocol on Ireland/Northern Ireland: Council Greenlights Main Elements of the Windsor Framework', 21 March 2023, 209/23.

[81] European Council conclusions, 23 March 2023, EUCO 4/23, para 27.

[82] House of Commons, Votes and Proceedings No 139, 22 March 2023 https://commonsbusiness.parliament.uk/Document/77888/Html?subType=Standard.

[83] See Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

[84] European Commission press release, 'EU-UK relations: Joint Committee Adopts New Windsor Framework arrangements and Partnership Council looks to the future', 24 March 2023, IP/23/1841.

securing over £1 billion of funding (75 per cent of which contributed from the UK) to support peace projects in NI.[85]

The dividends of a more positive EU-UK relationship, however, quickly spilled over to areas beyond those related to the Protocol on Ireland/NI.[86] In particular, on 17 May 2023 the European Commission finally published the draft memorandum of understanding (MoU) establishing a framework for financial services regulatory cooperation with the UK[87]—which had been negotiated in March 2021 and agreed at a technical level but then suspended and never formally approved owing to the quarrel over NI.[88] Moreover, on 30 May 2023 the European Parliament and the Council approved the unilateral EU legislation on agri-food, medicines, and tariff rate quotas (TRQs).[89] Finally, on 6 September 2023 the EU and the UK reached an agreement to allow the UK to rejoin both the EU research framework Horizon Europe and the EU space programme Copernicus[90]—hence expanding the UK's participation in EU programmes envisaged by the Part V TCA.

Furthermore, dividends of better EU-UK relations were visible in rapprochement between the UK and France, which on 10 March 2023 held their first bilateral summit in five years.[91] In a joint declaration, the two countries agreed to deepen their cooperation inter alia on defence and security, and on stemming illegal migration flows, with a commitment to working towards an EU-UK cooperation agreement on migration and a shared intention to enhance the role of the EPC. In addition, France also invited the UK to join fourteen Member States of the EU for meetings of a nuclear alliance, marking the sixty-fifth anniversary of the Euratom Treaty (from which the UK had withdrawn in 2020, when leaving the EU), and planning greater cooperation in the development of nuclear energy as a core component of the green transition, and the response to the war in Ukraine.[92] Finally, better relations between

[85] See House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'Scrutiny of International Agreements: PEACE PLUS Programme 2021-2027 Financing Agreement', 16 May 2023, HL Paper 196.

[86] See House of Lords European Affairs Committee, 'The Future EU-UK relationship', 29 April 2023, HL Paper 184.

[87] See European Commission draft Memorandum of Understanding establishing a framework for financial services regulatory cooperation between the European Union and the United Kingdom of Great Britain and Northern Ireland, 17 May 2023.

[88] See Niamh Moloney, 'Financial Services' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 129.

[89] Council of the EU press release 'EU-UK Relations: EU Takes Further Steps to Implement the Windsor Framework', 30 May 2023.

[90] European Commission press release, 'EU-UK Relations: Commission and UK Reach Political Agreement on UK Participation in Horizon Europe and Copernicus', 7 September 2023, IP/23/4374.

[91] See Déclaration conjointe—36ème Sommet franco-britannique, 10 March 2023.

[92] See Déclaration commune, 'Reunion de pays de l'Alliance nucléaire' Paris, 16 May 2023.

the EU and the UK facilitated the conclusion of the Atlantic Declaration with the US.[93] While falling short of the FTA much craved by the Brexiteers, the Atlantic Declaration strengthened UK-US cooperation on technology, clean energy, and supply chains, along the lines of the deal that the US now has with the EU too.[94]

This state of affairs opens a window of opportunity in the near future to deepen EU-UK relations further beyond the TCA. In fact, while the option of the UK re-joining the EU would appear to be politically taboo, voices are growing in favour of going beyond the TCA. In this respect, several proposals have been advanced in policy circles, ranging from the conclusion of new EU-UK supplemental agreements on SPS, an enhanced partnership on financial services, a new energy security treaty, or even a dedicated new agreement on security and defence co-operation.[95] These options interact also with broader transformations in the EU constitutional architecture, including enlargement, and the role of the EPC. Yet, any of these options would require a deep knowledge of what the TCA does at the moment. Hence the purpose of this book.

9 The Structure of This Volume: What Is in This Book (and What Is Not)

This volume endeavours to provide a comprehensive analysis of the TCA, shedding light on its complex content. At the same time, this volume is part of a book series: as such, a decision was made not to include here topics which were explicitly covered in prior volumes. In particular, the issue of law enforcement and judicial cooperation in criminal matters—which constitutes Part III of the TCA—was analysed in detail by Oliver Garner in *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations*,[96] which also included studies on specific TCA provisions on short-term visas,[97] data protection,[98]

[93] See Atlantic Declaration: A Framework for a Twenty-First Century U.S.-UK Economic Partnership, 9 June 2023.

[94] See European Commission press release, 'EU Moves Forward with Critical Minerals Agreement Negotiations with the US', 14 June 2023, IP/23/3214.

[95] See eg Anton Spisak and Christos Tsoukalis, 'Moving Forward: The Path to a Better Post-Brexit Relationship between the UK and the EU' Tony Blair Institute for Global Change (June 2023).

[96] See Oliver Garner, 'Justice and Home Affairs' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 157.

[97] See Catherine Barnard and Emilija Leinarte, 'Mobility of Persons' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 134.

[98] See Edoardo Celeste, 'Data Protection' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 197.

and governance.[99] As such, readers interested in these issues should check those chapters in that volume. For its part, this book—which includes contributions by leading legal scholars, political scientists, economic historians, and trade experts from across the EU, the UK, and the US—covers almost all of the remaining contents of the TCA, and is structured as follows. Part I outlines the geo-political context and the economic challenges that form the background to the TCA. Part II focuses on the FTA provisions of the TCA. Part III examines the other economic cooperation provisions of the TCA. Part IV, finally, reflects on the process and prospects of both implementing the TCA and reforming it going forward.

In Chapter 2, Harold James sketches a fascinating fresco of how globalization has been changing in the last few years, and how this affects the post-Brexit UK economically. As he points out, globalization has not ended since Covid-19 and the war in Ukraine, but three developments have profoundly changed it, namely: the emergence of regional blocs, a new industrial policy, and advanced technological disruption. As James highlights, the UK, a relatively small country, is ill-placed to thrive on its own, which explains why the British economy has largely suffered since Brexit. In Chapter 3, Daniela Schwarzer considers how another historical event—the war in Ukraine—has affected European security, and impacted both EU-UK cooperation and transatlantic relations. As she explains, the emergence of a major geo-security threat in the European continent for the first time in decades has pushed the EU and the UK to work together, for example on sanctions against Russia and in coordinating financial support to Ukraine. Yet, new questions linger, both regarding the scope of this cooperation and the future of US involvement in European affairs. In Chapter 4, Billy Melo Araujo examines the Windsor Framework, shedding light on a tool that has helped rebuild trust between the EU and the UK. Taking a legal approach, Melo highlights both the advances and the unexpected consequences of the Windsor Framework.

In Chapter 5, Niall Moran opens the analysis of the most extensive and significant part of the TCA, that creating an EU-UK FTA. In particular, Moran examines the TCA provisions on trade in goods, discussing rules of origin and custom facilitation arrangements, and shedding light on the rules on market access and the impact of technical and non-technical barriers to trade. As Moran points out, the TCA constitutes a significant worsening of the conditions of EU-UK trade, and further challenges lie ahead as some transitional

[99] See Nicolas Levrat, 'Governance' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 219.

periods are due to expire. In Chapter 6, Pinar Artiran continues the analysis of the FTA's provisions, focusing in particular on services, investment, and public procurement. As she points out, contrary to what occurs for goods, the TCA has not set up a real FTA for services, as multiple exceptions hinder trade between the parties. Similarly, the TCA provisions on investment appear more analogous to those of the WTO, rather than the EU—hence Pinar's conclusion is that the TCA reflects a lack of ambition in this area. In Chapter 7, Mariela de Amstalden looks instead at the TCA's provisions on digital trade, free movement of capital, and IP. Here again, the TCA appears to be setting up only a very limited framework for bilateral trade.

In Chapter 8, Elaine Fahey analyses a variety of transnational topics which are partially covered in scattered parts of the TCA, namely energy, the environment, health, and cyber-security. As Fahey explains, the above-mentioned policy areas are by definition transnational, because no country can successfully manage them on its own—a reality painfully exposed by the pandemic, climate change, and cyber-threats. Yet, the TCA has only set up a partial, and uneven, framework for EU-UK cooperation in these areas, leaving much scope for further improvement. In Chapter 9, Graham Butler studies how the TCA regulates fisheries—a policy area which has caused heightened political tension during the EU-UK negotiations, despite its negligible significance for the GDP of both economies. Butler explains the regulatory logic of EU internal and external fisheries policies and the complex normative framework set up by the TCA, including several long transition periods that effectively push back in time the real moment of change for UK fisheries. A more abrupt change in the regulatory framework is instead emerging in the field of aviation and road transport, which is the topic analysed by Adam Lazowski in Chapter 10. Lazowski considers the specific TCA sections dedicated to EU-UK cooperation in aviation and transport from a legal perspective, and underlines the disruption that Brexit brought about despite the TCA.

The issue of EU-UK cooperation in other economic sectors is also at the heart of Chapter 11, by Christy Petit, which focuses on regulatory cooperation, social security coordination, and participation by the UK in EU programmes. Here, however, Petit takes a prospective look at the relevant TCA provisions, highlighting the ongoing process by which the parties can endeavour to go beyond the current law. Specifically, Petit examines the recent approval of an EU-UK MoU on regulatory cooperation in financial services, and the accession of the UK to the EU Horizon Europe research programme, as examples of the dynamic, albeit constrained, nature of the partnership. In Chapter 12, Andrea Biondi also takes a kinetic perspective, exploring how the TCA regulates the

controversial topic of state subsidies, and how the relevant provisions have been enforced thus far. As Biondi underlines, the rules on subsidies are designed to secure a level playing field between the EU and the UK, but the *mise en ouvre* of the TCA depends also on effective enforcement—and multiple mechanisms appear to be at play in this domain. Finally, in Chapter 13, Federico Fabbrini analyses the TCA rendezvous provision, which compels the parties to take stock of the deal by 2026, and reflects on other possible options to deepen EU-UK cooperation in a renewing Europe. As he points out, as a result of the war in Ukraine important institutional adjustments are currently taking place, both in the wider European governance framework and in the EU itself. As such, the debate on the future of Europe also has consequences on the future of EU-UK relations and, as with Brexit, these trends will need to be monitored from a law and politics perspective.

PART I
CONTEXT AND CHALLENGES

2

The New Globalization and the Economic Consequences of Brexit

Harold James

1 Introduction

The United Kingdom (UK) and the United Stated (US) are frequently presented as the forerunners of today's deglobalization, largely because of the 'sovereignist' tone of the two major political shocks of 2016, the Brexit referendum of 23 June and the Trump victory in the US presidential elections. Both produced major and continuing political upheavals and also a lasting legacy: both profoundly reshaped the world. The major political parties in the UK today are still convinced of the irreversibility of Brexit, even in the face of opinion polls which show a large and increasing public support for the view that Brexit was a mistake. Joe Biden's administration kept in place the Trump era tariffs, the most straightforwardly anti-globalist policy legacy of its predecessor.

There is a large difference between the US and the UK, however, which is best simply summarized by the word 'large'. While the US is a large country—a superpower—and is capable of resetting the terms of globalization, the UK is not large and can no longer change the rules of the game. Its vision—or rather the vision of its increasingly dysfunctional elites—corresponds to an old, outdated, anachronistic vision of what globalization is about. The US has offered a template of a new globalization; the UK a template of how not to do it.

2 The New Globalization Paradigm

The world today is not moving in the direction of deglobalization, despite the hopes of some anti-globalists and the fears of some investors, such as Blackrock's Larry Fink, who see increasing barriers to international financial

Harold James, *The New Globalization and the Economic Consequences of Brexit* In: *The Law & Politics of Brexit*, Volume V. Edited by: Federico Fabbrini, Oxford University Press. © Harold James 2024.
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flows. There is, however, increased worry about interdependence and a new focus on resilience.[1] In his widely quoted letter to investors of 2022, Fink stated: 'Russia's aggression in Ukraine and its subsequent decoupling from the global economy is going to prompt companies and governments worldwide to re-evaluate their dependencies and re-reanalyze their manufacturing and assembly footprints—something that Covid had already spurred many to start doing.'[2]

A better description of the world's current direction of travel is a new variant of globalization, characterized by the following features: first, movement towards large trading zones (sometimes termed 'bloc formation'); secondly, large public investments and subsidies (a 'new industrial policy'); and, thirdly, technologically driven transformation, as a result of rapid developments in artificial intelligence and biotechnology/medicine.

These developments have been pushed by a reaction to specific supply shocks, in particular the shortages arising in the aftermath of Covid-19, and the Russian attack on Ukraine. They are then shaped by policy responses, in a world which is demanding increasing effectiveness in government performance.[3] Unfortunately, the aftermath of Brexit has driven the UK in the opposite direction, towards inchoate and incoherent policies.

A landmark in the transition to a new global economy is provided by the climate-related tax credits in the 2022 US Inflation Reduction Act (IRA). Part of the power of the measure lies in the ambiguity of the financial extent and impact. The cost was estimated by the Congressional Budget Office as giving a figure of US$271 billion, but substantial uncertainty about the eventual sum prevails as some of the tax credits will not lapse, and the extent of the take-up is thus unclear. Current estimates range from a lower figure of US$244 billion to US$1.2 trillion.[4] The European Union (EU) is developing a parallel and analogous scheme in order to avoid investments by European firms moving to the US as a consequence of the IRA. The projects look like replications of what the US is doing: the European Commission has proposed, for instance, a European Chips Act and the Critical Raw Materials Act, which aim to boost European production of key components in the global technology supply chain, which France strongly endorses.[5] The template for this kind of transformation was

[1] Markus K Brunnermeier, *The Resilient Society* (Endeavor Literary Press 2021).
[2] Andrew Ross Sorkin and others 'Wall Street Warns About the End of Globalization' *New York Times* (24 March 2022).
[3] Harold James, *Seven Crashes: The Economic Crises That Shaped Globalization* (Yale UP 2023).
[4] Simon J Evenett and Gary C Hufbauer, 'Are the IRA Climate-Related Tax Credits a Trillion-Dollar Problem?' *Bing.com* (24 July 2023) https://www.globaltradealert.org/reports/115.
[5] Laurence Boone, 'Economic Statecraft for the Green Transition' *Project Syndicate* (20 July 2023).

already given some time ago by China, which proceeded with an ambitious programme of economic transformation announced in 2018, 'Made in China 2025'.[6] Its goals include a focus on green technology, Smart Technology in robotics and digitalization, and an increase in the Chinese-domestic content of core materials to 70 per cent by 2025. In 2008–2009, the fiscal stimulus programme mounted by the Chinese Communist Party rescued world capitalism by injecting demand; fifteen years later, the Chinese government is reshaping world capitalism.

The UK is vulnerable in the altered environment of a new globalization. Mark Malloch Brown, a former deputy secretary general of the United Nations, argued that: 'One consequence of a postglobalization world is that people will start to think in a defensive way about blocs. Britain is adrift without a bloc. That is going to be challenging.'[7] The question of the relationship of globalization to the quest for Brexit is problematical. Adherents of Brexit included both anti-globalization groups, who were convinced that some aspects of globalization, especially higher volumes of migration and trade, were hurting especially the most vulnerable UK citizens; and radical pro-globalizers, often associated with the City of London and financial services, who saw the EU as a shackle and an impediment, a source of harmful and unnecessary regulation.

3 British Vulnerabilities

The Brexit campaign gave many indicators of the strains in British society.[8] Globalization had become the focal point of malaise about inadequate economic performance, poor productivity, and stagnating incomes.

Migration played a large part in the Brexit campaign. Migration and cultural difference were at the centre of the emotional drive to Brexit, but not really at the core of the political debate. There is a clear statistical inference, which was down-played for a long time, but perhaps has been up-played too much recently, that unskilled migration depresses working class incomes. Migrants offer a direct competition for low-skilled jobs. But there is a complication. The argument misses the way in which technical change makes some jobs obsolete

[6] Max J Zenglein and Anna Holzmann, 'Evolving Made in China 2025: China's Industrial Policy in the Quest For Global Tech Leadership' (July 2019) Mercator Institute for China Studies Paper No 8.

[7] Quoted in Mark Landler, 'Boris Johnson's "Global Britain": Inspired Vision or Wishful Thinking?' *New York Times* (3 July 2020) https://www.nytimes.com/2020/07/03/world/europe/johnson-brexit-hong-kong.html.

[8] See European Economic Advisory Group, *Report on the European Economy 2018: What Now, With Whom, Where To—The Future of the EU* (CESifo Group 2018).

or a location uncompetitive—coal-mining has disappeared, and now a great part of the British steel industry has followed. Workers who lose their employment are often relatively skilled, and should not really be expected to fit easily into much less skilled and less attractive service sector jobs. And some of those jobs—in hospitality, in care—demand an enthusiasm and an attention to personality that younger people (and immigrants) often find easier that their older competitors.[9]

The migration case is also about cultural identity, and bizarrely paradoxical examples remind us how identity is challenged and then defended. Working class (traditionally of Irish origin) Catholic communities complained that an inflow of Poles into their churches was bringing disorientation.[10] The descendents of previous generations of immigrants also sometimes think that enough is enough, that after them the drawbridge should be raised.

Because migration is so complex and its consequences so divisive, Remain advocates made a poor case in dealing with the arguments. It was not that they did not realize what was happening, but they found it difficult to confront the victims of economic displacement or of cultural change. An indicative, although perhaps not decisive moment, was the final defence of Remain by Prime Minister David Cameron in front of a television studio audience on the last Sunday before the vote. The audience was visibly agitated, even angered, by the patrician and chummily superior manner, but also by the specific character of the government's position. A health service worker asked about whether the demand for health benefits by migrants was overburdening the National Health Service (NHS). Cameron could have replied that the NHS depended on immigrants at all levels, doctors from Germany and Poland, technicians, nurses, cleaning staff. But he did not make that case, because it has an obvious implication for the labour bargaining position of existing NHS workers. Deprived of the most powerful argument, his defence of continued openness to the free movement of people in the EU inevitably looked unconvincing.

Migration threw up a particular policy dilemma. Politicians had made pledges on limiting immigration that they could or would not keep. David Cameron had repeatedly pledged to keep down migration: before his first election victory, in 2010, he told a television interviewer that net migration would

[9] James Dennison and Andrew Geddes, 'Brexit and the Perils of "Europeanised" Migration' (2018) 25(8) *Journal of European Public Policy* 1137, doi: 10.1080/13501763.2018.1467953.

[10] See Marta Trzebiatowska, 'The Advent of the "EasyJet Priest": Dilemmas of Polish Catholic Integration in the UK' (2010) 44(6) *Sociology* 1055; 'Catholics from Abroad' *Deutsche Welle* (15 September 2010) https://www.dw.com/en/polish-influx-changing-the-face-of-uk-catholic-church/a-6005169.

be reduced to the 'tens of thousands'.[11] Boris Johnson in his 2019 manifesto (which provided the backdrop to a landslide Conservative victory) promised 'overall numbers will come down'. In practice, governments—including Johnson's—found it impossible to deliver on these promises. While Brexit limited migration from the EU, migration from outside surged, with the consequence that levels of migration hit record levels. One of Boris Johnson's key advisers later wrote: 'According to senior figures from the Tory election campaign, Johnson agreed the policy under pressure from his advisers, and when the manifesto was published he called ministers telling them not to repeat the promise because he disagreed with it.'[12]

Trade was less frequently discussed during the referendum, but appeared subsequently in analyses that tried to explain the Brexit vote. In a study that replicated interpretations of political radicalization (and support from Trump) in the US, as well as of populist movements within the EU, Italo Colantone and Piero Stanig demonstrated that the shock of surging imports from China, especially since China's WTO accession in 2001, had been a structural driver of divergence in economic performance across regions of the UK. Voters then responded to the general conditions of their locality in a manner which Colantone and Stanig describe as 'sociotropic':

> [t]he impact of import competition is not restricted to a specific category of voters, for example, the unemployed, who might be most directly affected by the shock. Rather, the effect is not statistically different from the average even for service workers, whose jobs are not directly affected by manufacturing imports from China. By and large, this evidence is consistent with a sociotropic reaction of voters to the globalization shock, rather than a purely pocketbook one. In other words, individuals seem to respond broadly to the general economic situation of their region, regardless of their specific condition.[13]

The leaders of Brexit framed their message of 'taking back control' in a very different way. They saw the UK as playing a leading role in globalizing the world—pushing more not less globalization. In this interpretation, the EU was

[11] 'Tories Would Limit Immigration to "Tens of Thousands" a Year, Says Cameron' *Guardian* (11 January 2010).

[12] Nick Timothy, 'Britain Must Take Back Control and Kick Its Addiction to Immigration' *Daily Telegraph* (21 May 2023).

[13] Italo Colantone and Piero Stanig, 'Global Competition and Brexit' (2018) 112(2) *American Political Science Review* 201 doi:10.1017/S0003055417000685.

a discredited and dysfunctional protectionist system that stood in the way of global opening.

The final trigger for the British Brexit debate came from the European debt crisis, or Eurocrisis, that emerged in Greece in 2010. To many British observers—not just those fundamentally critical of the EU—the Euro appeared on the verge of collapse. The UK, like the US, was an outsider in the euro drama, both distanced by a different tradition of thinking about economics as well as by competing interests and the range of their geopolitical calculations. With differences of interest, there can always be trade-offs and bargains: indeed, that is the essence of diplomatic negotiation. The same kind of compromising does not work with fundamental differences of view, and discussion often produces escalation rather than solution. Suspicions on both sides of the intellectual divide grew. In the increasingly acrimonious debate, Europeans detected what they held to be a fundamental lack of UK understanding of the European project, as well as a self-oriented defence of a different interest. Americans wanted the Europeans to have more fiscal stimulus, more capacity to deal with problem banks, more currency flexibility, and more debt forgiveness—in short, a rather conventional old-style Keynesian solution. Europeans—and especially Germans—denounced this approach as hyper Keynesianism.[14]

The British approach was the consequence not simply of a long history of separation from European power dynamics but also from a central paradox of political economy: the recognition that monetary unions need fiscal unions to work, but at the same time a profound conviction that the UK did not want to participate in further European integration. So the UK alternately pushed Europe to do more and then stood back and opposed integration initiatives. Consequently, British policy seemed to combine preachiness ('simple steps to solve the euro crisis') with 'I told you so' arrogance ('it was never going to work'). On occasions, the UK re-enacted an old British sitcom (*Dad's Army*) set during the Second World War in which a gloomy Scotsman shuffled around repeating, 'We're all doomed'. The effects of the British stance were amplified because it was not just a matter of the government's position, but of beliefs deeply held by almost all the thinking and commenting classes, from left to right.

The modern obstacles to a coordinated European response to the debt and financial crisis, along Keynesian lines, were in part organizational and institutional: to act decisively, Europe needed some capacity for effectively coordinated state action. The fundamental difference of vision from across the

[14] See Markus Brunnermeier, Harold James, and Jean-Pierre Landau, *The Euro and the Battle of Ideas* (Princeton University Press 2016).

Atlantic, or across the English Channel, can be boiled down to Europe's lack of 'statiness': Europeans had often liked to present their achievement as the practical realization of postmodern politics, in which the traditional idea of national sovereignty (which they thought had produced so much trouble in the European past) was dissipated and diffused. 'Europe' as a framework was designed to supplant and not simply reproduce the traditional nation state. A state as traditionally conceived, on the other hand, had sovereignty in economic policy: it could control a currency, adjust an exchange rate, deliver a fiscal stimulus, or recapitalize banks. The EU could do none of these things, and as a result, it was hopelessly stuck. The Europeans seemed obsessed with rules that had been deliberately devised to restrain national sovereignty by 'tying their hands' (in the metaphor that many European economists frequently deployed). British politicians dreamed of freeing themselves.

Some of the architects of Brexit, most notably Boris Johnson, consistently pushed for an unshackled nation state that might then create a 'Global Britain'. There was thus from the beginning a profound contradiction in the Brexit campaign—a contradiction that led to the unravelling of government after 2016: globalization was not the enemy for that elite in the way that it was to many voters.

As Foreign Secretary in the administration of Teresa May, in the immediate aftermath of Brexit, Johnson set out his vision in an address to Chatham House:

> Yes—a country taking back control of its democratic institutions. But not a nation hauling up the drawbridge or slamming the door. A nation that is now on its mettle. A nation that refuses to be defined by this decision. A country galvanised by new possibilities and a country that is politically and economically and morally fated. To be more outward-looking and more engaged with the world than ever before … We are not some bit part or spear-carrier on the world stage. We are a protagonist—a global Britain running a truly global foreign policy.[15]

In February 2020, as Prime Minister, he explained:

> 'Leaving our chrysalis … the United Kingdom will go out into the world. We in the global community are in danger of forgetting the key insight of those great Scottish thinkers, the invisible hand of Adam Smith, and of course

[15] Boris Johnson, 'Beyond Brexit: A Global Britain, Chatham House Speech' 2 December 2016 https://www.gov.uk/government/speeches/beyond-brexit-a-global-britain.

> David Ricardo's more subtle but indispensable principle of comparative advantage, which teaches that if countries learn to specialise and exchange then overall wealth will increase and productivity will increase, leading Cobden to conclude that free trade is God's diplomacy—the only certain way of uniting people in the bonds of peace since the more freely goods cross borders the less likely it is that troops will ever cross borders'.[16]

The euphoric vision was sometimes cast as Singapore-on-Thames, a phrase no longer used by the UK Government.

Since leaving the EU, the UK did negotiate a few trade agreements, with Japan, New Zealand, and Australia, as well as with the EU itself—the Trade and Cooperation Agreement. In 2020, Johnson formally applied to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership; by 2023 the UK had concluded that agreement. The humiliating part of the UK trade agenda was that it could not leverage its 'special relationship' with the US into a new trade pact: despite the rhetorical closeness and claims about personal friendship between Trump and Johnson.

In practice, the idea of the UK's soft power global leadership evaporated. Johnson dismantled parts of the policy framework that might have made for a Global Britain. It reduced foreign aid from 0.7 per cent of gross domestic product (GDP) to 0.5 per cent. Instead, the weakness of the UK became increasingly apparent. The cost of deglobalization for the UK is greater because of existing vulnerabilities. The 2008 Global Financial Crisis left a profound scar on a country that had grown on the basis of an outsized financial services economy. Real GDP per capita in the UK rose by only 6 per cent between 2008 and 2022, in the worst performance in the G7 apart from Italy's.[17] Covid-19 scarred the UK more than other major industrial economies. Higher rates of inflation followed from the combination of a terms of trade shock as import prices soared with a work force that was less adaptable, sicker, and more inclined to join in the 'great resignation' and leave the workforce. Poor performance cannot be blamed on Brexit alone. But it was enhanced by the disintegration of British politics, the fracturing of the political class in the Brexit debates, the rapid rotation of governments, prime ministers, and ministers, and the open campaign against expertise in the civil service.[18] Administrative

[16] PM speech in Greenwich: 3 February 2020 https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020.

[17] Martin Wolf, 'The UK's Future Depends on Improving Economic Performance' *Financial Times* (16 April 2023) https://www.ft.com/content/55f6af78-4b0c-4944-a626-dbba109474ef.

[18] Tim Shipman, *All Out War: The Full Story of How Brexit Sank Britain's Political Class* (William Collins 2016); Tim Shipman, *Fall Out: A Year of Political Mayhem* (William Collins 2017).

competence is a key in responding to shocks in the global system; it is this that the Brexit debate effectively destroyed.

4 Explaining the UK's Brexit Choice

Johnson's description of a country 'politically and economically and morally fated' is significant, and contains a deep truth: the roots of the failure to respond to the globalization shocks lie deep in British political and economic culture.

4.1 Politically Fated

The first explanation is concerned with the political psychology of the European process. It is also historical, but it relates to the catastrophes of the twentieth century. The EU, and especially its French-German core, was at its deepest level a mechanism for dealing with the legacy of the collapse of democracy in the mid-twentieth century, in both countries and in most of continental Europe. In Germany, the failure is that of the fragile democracy of the Weimar Republic, destroyed by a radicalization of the far right and the far left, mobilized by opposition to liberal economics (capitalism), but also to the international system of the postwar treaties. In France, there was a military failure in 1940, but then the self-abnegation of the Third Republic.

For some, especially a few generations ago, Europe was a metaphysical concept that dissolves and resolves the problems of the past: a dispenser of forgiveness and redemption. Charles de Gaulle saw Europe as focused on a French-German psychodrama. He depicted the relations of the two countries in a narrative of betrayal and decadence. He thought that in the path of constructing Europe, France needed to make the first step because

> [i]n western Europe, France suffered most … France suffered most because France was more betrayed than the others. That is why it is she who must make the gesture of pardon. Germany is a great people that triumphed, and then was crushed. France is a great people that was crushed and then associated itself [in Vichy] with the triumph of another. It is only I can reconcile France and Germany, because only I can raise Germany from her decadence.[19]

[19] Alain Peyrefitte, *C'était de Gaulle* (Gallimard 2002) 76–77.

The UK finds the continental psychology of trying to find a way of accommodating Germany bewildering and utterly alien. The UK, like Switzerland (outside the EU) or Sweden (in the EU but not in the eurozone), was not defeated and occupied in the 1940s. There was no fundamental compromise of the old elites (although the Swiss and Swedish governing class did make such a compact as part of the exercise of maintaining neutrality). Hence, in the British case there is no need for the dialectic of reconciliation that de Gaulle laid out.

4.2 Economically Fated

Historians and political scientists often understand the EU as an extension of a particular kind of national politics. Alan Milward famously described the beginnings of the European Economic Community (EEC) as the 'rescue of the nation state'. Andrew Moravcsik has amplified this argument and made the claim that the EU has from the beginning been consistently about finding a framework—a rather limited one—for satisfying domestic constituents by using a supranational framework. In particular, the most important of these mechanisms was the management of the decline of agriculture.[20] Globalization and technical change together mean the erosion of the living standards of whole groups of people—classes, to use an old-fashioned term. In the interwar period, farmers suffered across the world from a collapse of their incomes as new areas started to produce. Food prices, and then farm prices, collapsed. Overindebted farmers lost their farms, and the banks to whom they owed money cut credits. The answers of the interwar period—trade protection through tariffs and quotas—were not effective. Instead, the EEC's prime fiscal mechanism, the Common Agricultural Policy (CAP), set prices for farmers and offered an elaborate system of subsidies. Managing rural decline proved the most important political pay-off of the European integration process.

For France, agriculture accounted for 42.2 per cent of employment in 1900, and was still, at the beginning of the EEC in 1958, 22.0 per cent. By 2020, it had fallen to 2.8 per cent. For Germany, the equivalent figures are 33.8, 16.1, and 1.6; and for Italy, 58.7, 32.9, and 4.0. But the UK did not really need this system of management of the peasant class, with only 9.2 per cent of employment in

[20] Alan S Milward, with the assistance of George Brennan and Federico Romero, *The European Rescue of the Nation-State* (Routledge 1992); Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998).

agriculture in 1900 and 4.1 in 1958.[21] 'Peasant' is a term that does not really have a meaning for most parts of the modern UK (it does for Ireland, and that fact explains a great deal of the constitutional history of the nineteenth century, up to Irish independence).

A similar argument applies to the idea of formal institutions that made for greater social peace, a political demand that also came very much out of the interwar era and the sharp polarization driven by redistributional conflict in continental Europe. That provision has—like agricultural policy—been Europeanized, in this case in the 1996 Social Charter, which provided not only for objectives guaranteed by existing British law (employment protection; prohibition of gender discrimination) but also some areas which no one in the UK (until recently) considered desirable, such as rights of workers' representatives in enterprises. As in the case of the CAP, the UK saw no logic why such provisions should be needed.

The UK consequently never felt the need, arising out of national politics, for a European mechanism for compensating the losers of economic modernization.

4.3 Morally Fated

The third explanation of Britain's semi-detached status vis-à-vis the EU is even more deeply historical. The heart of the problem is a long-standing issue of how Britain—and, more particularly, England—conceptualizes its relationship with continental Europe. It is a fundamental exercise in the grammar of prepositions, a language that is deeply embedded in the human psyche. Language is very peculiar. One of the sources of constant misunderstanding in Europe has been that words and concepts do not translate easily. And prepositions are the worst. Generations of English-language philosophers have struggled with Kant's and Hegel's usage of '*an und für sich*'. But British political language has its own rather mysterious rhetoric, with deep historical roots in the mental world of Tudor England.

For Britain and Europe the key prepositions that are at the centre of the contemporary conflict are 'in,' 'with', and 'of'. In the modern language of politics as applied in Britain of the twenty-first century, 'in' is bad and 'with' is good. 'In'

[21] Asger Moll Wingender, 'Structural Transformation in the 20th Century: A New Database on Agricultural Employment Around the World' Discussion Papers Department of Economics, University of Copenhagen No 14-28 (2014)

seems the simplest because it might be reduced to geographical fact. 'Of' raises deep problems as it carries the implication of belonging or even ownership, in a world in which sovereignty is divided. And 'and'—as in 'Britain and Europe'—does not mean 'in' but rather 'out'.

The fundamental problem is that Britain is obviously in a geographic sense a part of Europe. But even pro-European politicians such as David Cameron, the Prime Minister who called the referendum and then led the 'yes' campaign in 2016, found it impossible to think this thought straightforwardly and consequently had to make the point that he was also campaigning against ever-closer union and for distinctive British rights. Johnson prefaced his delayed statement in favour of Brexit with the comment that Europe is 'the home of the greatest and richest culture in the world, to which Britain is and will be an eternal contributor'. He proposed to borrow from Winston Churchill: 'interested, associated, but not absorbed; with Europe—but not comprised'.

This was a reference to Churchill's House of Commons speech of 11 May 1953, when Britain's greatest twentieth century politician (and the man Johnson explicitly took as his model) stated:

> Where do we stand? We are not members of the European Defence Community, nor do we intend to be merged in a Federal European system. We feel we have a special relation to both. This can be expressed by prepositions, by the preposition 'with' but not 'of'—we are with them, but not of them. We have our own Commonwealth and Empire.

Churchill was a masterly politician, by instinct, but also by his command of the English language. He was drawing on the deepest roots of English identity—Shakespeare and the early seventeenth-century English translation of the Bible.

First, Shakespeare. The discussion of 'of' and 'in' comes from one of Shakespeare's very last and most peculiar plays. Imogen in *Cymbeline* is often regarded as Shakespeare's noblest heroine. Romantics loved the play, but rationalists hated it. The poet Alfred Lord Tennyson insisted on being buried with a copy of the play. Dr Johnson, the embodiment of the English Enlightenment, by contrast called the play 'unresisting imbecility'. The play is fundamentally about the relationship of England (more accurately, Ancient Britain) and Europe (more accurately, Rome).

The King of Britain, Cymbeline, urged on by his evil queen and her idiotically posturing son, defy the Roman demand for tribute. The Romans are shown as behaving with thorough dastardy. A wily Italian sneaks into Imogen's

bedroom and steals a peek at the sleeping heroine that convinces her banished husband that he has seduced the wife, and she then questions his loyalty: 'That drug-damn'd Italy hath out-craftied him, and he's at some hard point.' A Roman army is sent to invade Britain, and is defeated by the heroic Britons—including Imogen's banished husband. But then, at the happy ending, there is a surprise turn and the British give in to Rome and pay the tribute.

It was easy—indeed, politically tempting—to imagine a contemporary updating of the play in which King David Cameron defied the Roman emissary or that European Commission President Jean-Claude Juncker appeared to win but then gives in. Imogen is clearly for Shakespeare the incarnation of the best British virtues. She is Britannia. And she announces it, and starts Britain on the prepositional of/in distinction, but in a surprising way, the opposite of Churchill's insistence that Britain was not 'of' (owned by) Europe.

> I' the world's volume
> Our Britain seems as of it, but not in 't;
> In a great pool a swan's nest.

A swan's nest is a symbol of eternity. Hans Christian Andersen used it in the same way, in one of his most poetic fairy tales, as a place somewhere between the Baltic and the North Sea, where 'swans are born and have been born that shall never die'.

Shakespeare's heroine is clearly drawing on the Bible, where other-worldly transcendence is opposed to this-worldly politics. Religion is definitely not 'of'. In particular, St John's gospel repeatedly emphasizes how Christ is not 'of the world', in the sense that he does not belong to it (is not subsumed by its values), although as incarnate man he is clearly in it. The point is most explicit in John 8:23: 'And he said unto them, Ye are from beneath; I am from above: ye are of this world; I am not of this world.'

The 'in' and 'of' discussion that Shakespeare's heroine is putting forward also comes from the world of medieval diplomacy. In the long-standing disputes and wars between England and France, the English king for long periods of time held territory on the continent, in France. But what was France? The French king wanted to assert the superiority of the French claim by arguing that Gascony in the south-west was 'of' and 'in' France, and that term was inserted into the Treaty of Paris in 1259 that ended over fifty years of fighting by leaving the English in Gascony but subject to a loosely defined 'of' claim about French suzerainty that derived from being 'in'—but the treaty then gave rise to the Hundred Years' War.

The modern version of 'of' but not 'in' also rests on a concept of a Britain that holds the balance of power in Europe. 'Of' also means holding a fulcrum position, arbitrating differences and gaining from the ability to tip the balance of power. That belief also has its early modern origins, when England balanced precariously between Spanish Habsburgs and French Valois. It is encapsulated in the famous preamble to the 1533 Act in Restraint of Appeals, the original Brexit, which forbade an appeal to courts outside England (with the specific goal of preventing a papal court dealing with Henry VIII's divorce from Catherine of Aragon). Here was the most comprehensive declaration of the principle of sovereignty:

> Where by divers sundry old authentic histories and chronicles, it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people, divided in terms, and by names of spiritualty and temporalty, be bounden and ought to bear, next to God, a natural and humble obedience.[22]

The idea of the fulcrum position reached its highpoint in the formulation of nineteenth-century diplomacy, when Lord Palmerston defined the fundamental objective of British policy as avoiding permanent entanglements. As he famously put it in a speech to the House of Commons on 1 March 1848, as the continent was engulfed in revolution: 'We have no eternal allies, and we have no perpetual enemies.'[23]

That thought is still at the heart of the Westminster calculus. In modern EU politics, the idea of a European equilibrium means permanently balancing France against Germany, alternately appealing to Merkel and then to Hollande, or running between Macron and Scholz. That is the world of rational deal-making politics. It exacerbated tensions in the French-German dialogue. But it sent peculiar and confusing signals to other Europeans.

The UK replicated this European strategy at an international or global level, alternately trying to work more with China or more with the US. The China play was a large part of the David Cameron and George Osborne era, with Osborne after a week of deals worth more than £30 billion and a state visit by Chinese President Xi Jinping, proclaiming the UK to be 'China's best

[22] Act in Restraint of Appeals 1533.
[23] House of Common Debates 1 March 1848 vol 97 cols 66–123.

partner in the West'.[24] Osborne explained in 2015 that 'the world still needs China's help. We need China to power our economy forward. That's why I have come to China again and again in this job'.[25] When the UK joined the Asia Infrastructure Investment Bank, Cameron explained: 'We see no conflict with having that very special relationship, with wanting to be a strong partner for China as the Chinese economy continues to grow and China emerges as an enormous world power.'[26] Theresa May continued this strategy, with a three-day trip to China in 2018, when she conspicuously failed to mention Hong Kong or human rights in her press conference with Prime Minister Li Keqiang. By 2020, after Covid-19, and with Trump in power in the United States, the UK position had shifted. The government banned Huawei equipment and services, with a former minister in the Cameron administration explaining the action came 'because the Americans told us we should do it'.[27]

The balancing strategy might have had some appeal in a world working on the principles that underpinned late twentieth-century globalization. It looked inadequate—a confession of failure—in the new globalization of the twenty-first century. It was an attempt to deal with modern geopolitics, the rise of a new imperial power (China), the death throes of an old imperial power (Russia), with the mentality and the methods of Henry VIII.

[24] 'George Osborne on UK's "Golden Era"' *BBC* (23 October 2015) https://www.bbc.com/news/av/uk-34621254.

[25] Oliver Yule-Smith, 'The Gambler's Code: Reassessing the UK–China Golden Age' Royal United Services Institution (13 October 2020) https://rusi.org/explore-our-research/publications/commentary/gamblers-code-reassessing-uk-china-golden-age.

[26] 'David Cameron Dismisses Risk of Rift with US over China' *Guardian* (18 October 2015).

[27] Benjamin Fox, 'UK Banned Huawei Because US Told Us To: Former Minister' EURACTIV (11 January 2022).

3

The War in Ukraine and Its Challenges to European Security, Transatlantic Relations, and EU-UK Cooperation

Daniela Schwarzer

1 Introduction

Russia's large-scale war against Ukraine, which started on 24 February 2022, is so far the most consequential event on the European continent in this decade. It marks a historic turning point for Europe and upends earlier assumptions about the security order and stability on the continent. It has certainly pushed security and defence policies far up on European countries' political agendas, it has underscored the importance of the North Atlantic Treaty Organization (NATO), and it has provoked a quick and radical shift in energy policies of several European countries driven by the decision to cut dependency on fossil energy imports from Russia. Moreover, the conflict carries wide-ranging ramifications well beyond our continent at a time when the international order is in the process of being reshaped. Russia's brutal invasion has thus amplified uncertainty on the global stage and it can be assumed that, whatever the outcome of the war, it will have a lasting impact beyond Europe.

Despite significant disagreement during the Brexit negotiations and the subsequent failure to strike a deal on foreign affairs and defence within the framework of the Trade and Cooperation Agreement (TCA), the United Kingdom (UK) and the European Union (EU), as part of transatlantic cooperation within NATO, have been closely aligned in terms of financial and military support for Ukraine, intelligence sharing, and sanctions policy. The political West more generally appears united, and cooperation across the Atlantic and within the G7 has been efficient and effective in supporting

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Ukraine in fighting back the Russian invasion. US intelligence services thus warned that Russian troop movements were not, as Moscow claimed, a military exercise[1] and, in early December 2021, the US launched an unprecedented public communications campaign publishing intelligence on Russia's preparations of a major invasion.[2] British intelligence followed suit, with its Twitter channel becoming a widely used source of information in Europe.[3] On 24 February 2022, the most massive military aggression in Europe since the Second World War began.

Against the backdrop of these fundamental shifts in the European security order, this chapter focuses on the broader geopolitical implications of the war in Europe. Section 2 looks at the EU and UK responses to the war, outlining both bilateral and joint efforts to support Ukraine and stop the aggressor. Section 3 examines how the EU's relationship with its neighbourhood and, more specifically, plans to enlarge the EU have been affected by Russia's large-scale invasion. Section 4 explores the war's impact on transatlantic relations and the difficult position of European countries between China and the US. Section 5 concludes with reflections on potential future cooperation between the UK and EU countries.

2 Policy Responses in the EU and the UK: Strategy, Energy, Arms Deliveries

In 2022 and 2023, in response to Russia's large-scale invasion of Ukraine, both the EU and the UK respectively took unprecedented measures in terms of economic, military, and humanitarian support for the Eastern European country. For both, the war and the ensuing collapse of the cooperative post-Cold War security order, which had already featured deep and visible cracks at least since the Russian annexation of Crimea and the intervention in the Donbas in 2014, represent today's greatest security threat. This has pushed both the EU and the UK to adapt their strategic outlooks.

[1] Jessica Brandt, 'Preempting Putin: Washington's Campaign of Intelligence Disclosures Is Complicating Moscow's Plans for Ukraine' *Brookings* (18 February 2022) https://www.brookings.edu/articles/preempting-putin-washingtons-campaign-of-intelligence-disclosures-is-complicating-moscows-plans-for-ukraine/ (accessed 15 September 2023).

[2] ibid.

[3] ibid.

2.1 Adapting Strategies to New Continental Realities

Russia's aggression prompted EU Member States to change their thinking on security, stability, and cooperation on a continental scale. The adoption of the EU's 'Strategic Compass',[4] the first shared threat assessment among EU Member States, is reflective of this development. Published in March 2022, the Strategic Compass lists Russia as the top threat to European security, a statement that would not have been shared by all Member States before the start of the war. EU Member States had in fact been divided in the assessment of the threat that Russia represents and over the question of how to best deal with Moscow. The criticism that the Baltic states and Poland voiced with regard to Germany's deep energy ties with Russia, most notably with the Nord Stream 2 pipeline, illustrates this point.

Meanwhile, the UK updated its security strategy, the 'Integrated Review', in order to adjust its geographical priorities in response to the war in Ukraine. The UK government had just published a global strategy in March 2021[5] that set out the British perspective on its international role after Brexit. Less than two years later, with the post-Cold War European security order shattered, an update was needed. The Integrated Review of March 2021 focused on the vision of a 'Global Britain' and put special emphasis on the UK's 'tilt to the Indo-Pacific'.[6] While the UK government had already identified Russia as the greatest threat in 2021,[7] the Integrated Review refresh of March 2023 goes beyond that assessment by highlighting 'that our collective security is intrinsically linked to the outcome of the conflict in Ukraine'.[8] Consequently, the Euro-Atlantic region, particularly northern Europe, is defined as a 'core priority'.[9] Notwithstanding this desire to position the UK as a key European security actor, a strong commitment to the Indo-Pacific region, for instance in the form of AUKUS with the US and Australia and the Global Combat Air Programme (GCAP) with Italy and Japan, also remains an important pillar of the UK's international policy in 2023.[10]

[4] Council of the European Union, *Strategic Compass for Security and Defence* (21 March 2022).
[5] HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (CP 403, 2021) 60.
[6] ibid 60.
[7] ibid 18.
[8] HM Government, 'Integrated Review Refresh: Responding to a More Contested and Volatile World' (CP 811, 2023) 8
[9] ibid 3, 20.
[10] ibid 9.

In addition, the war caused a massive shock to the global economy as it tightened supply and drove up prices.[11] It exacerbated the economic crisis that Europe was still struggling with due to the Covid-19 pandemic and hit the UK as it was dealing with the new reality of being outside of the EU. Owing to their economic openness and the resulting vulnerability to global market developments and value-chain disruptions, the EU economy and the eurozone were particularly hard hit. The EU's heavy dependence on energy imports led to strong and persistent inflationary pressures in the EU. In 2020, the EU imported 58 per cent of its energy needs, as its own production met only 42 per cent of demand.[12] Consumer prices, especially for energy and food, surged, accounting for more than two-thirds of record high euro area inflation in 2022.[13] Diversification of energy supply became one of the most urgent fields of action for Member States and the EU. In some cases, however, the EU could only extricate itself from its energy dependence on Russia by turning to new suppliers with a similarly poor record on human rights, geopolitical stability, or democracy. For the UK, one of the most important economic impacts of the war in Ukraine is the increase in energy and food prices, which caused an unprecedented cost of living crisis with enormous political repercussions, exacerbated by Brexit. This is even though the UK is less dependent on Russian energy imports than many EU Member States, as Table 1 shows.

In 2021, imports from Russia accounted for 4 per cent of gas, 9 per cent of oil, and 27 per cent of coal consumption in the UK. Against this backdrop, British policy-makers, compared to their EU counterparts, experienced significantly less pressure to diversify energy suppliers. The UK's main energy suppliers in 2023 included Norway, the US, Australia, and Qatar.[14] Nevertheless, the UK could not escape the global surge in energy prices. Gas prices rose to record levels after Russia launched its full-scale invasion of Ukraine and continued to rise throughout much of 2022 owing to cuts in Russian supplies. Annual inflation reached a forty-one-year high of 11.1 per cent in October 2022, before declining in subsequent months.[15]

[11] For an in-depth examination of the state of the world economy see the chapter by Harold James in this volume.

[12] Eurostat, 'The EU Imported 58% of Its Energy in 2020' (28 March 2022) https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220328-2 (accessed 15 September 2023).

[13] European Central Bank, 'ECB Economic Bulletin, Issue 8/2022' (2023) 48 https://www.ecb.europa.eu/pub/pdf/ecbu/eb202208.en.pdf (accessed 15 September 2023).

[14] Department for Energy Security & Net Zero, 'Energy Trends: UK, January to March 2023' (29 June 2023) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165986/Energy_Trends_June_2023.pdf (accessed 15 September 2023).

[15] Daniel Harari and others, 'Rising Costs of Living in the UK' House of Commons Library Research Briefing No 9428 (17 August 2023) https://researchbriefings.files.parliament.uk/documents/CBP-9428/CBP-9428.pdf (accessed 15 September 2023).

Table 1: Energy imports from Russia: UK, Germany, France, Italy, EU average in 2021

Share of imports from Russia	UK[a] %	EU[b] %	Germany[c] %	France[d] %	Italy[e] %
Oil and petroleum products	9	28	29.3	14.6	11.7
Natural gas	4[f]	44	66.4	22.1	40
Solid fossil fuels	27	52	50.1	30.0	58.4

[a] Paul Bolton, 'Imports of Fossil Fuels from Russia' House of Commons Library Research Briefing Number 9523 (13 March 2023) 1 https://researchbriefings.files.parliament.uk/documents/CBP-9523/CBP-9523.pdf (accessed 15 September 2023).

[b] Eurostat, 'Shedding Light on Energy: 2023 Edition' (2023) https://ec.europa.eu/eurostat/web/interactive-publications/energy-2023 (accessed 15 September 2023); Eurostat, 'Energy Trade 2021' https://ec.europa.eu/eurostat/cache/infographs/energy_trade/entrade.html?lang=en (accessed 15 September 2023).

[c] Eurostat, 'Energy Trade 2021' (n 15).

[d] ibid.

[e] ibid.

[f] The UK figure includes liquefied natural gas (LNG).

2.2 Military and Financial Assistance for Ukraine

The UK has been one of the biggest supporters of Ukraine. From the onset of the full-scale invasion until October 2023, UK aid pledges to Ukraine have amounted to €13.27 billion.[16] By individual country, the UK has long been Ukraine's second largest supporter behind the US. It was not until mid-2023 that Germany overtook the UK with a pledged support of €20.96 billion.[17] Zooming into UK assistance, support is mostly of the military (€6.57 billion) and financial (€6.10 billion) kind.[18] In fact, the UK had supplied weapons and trained Ukrainian armed forces even before 24 February 2022.[19] After the Russian invasion, then Prime Minister Johnson was among the first heads of state and government to travel to Kyiv to demonstrate the UK's 'unwavering support for the people of Ukraine'.[20] By September 2023, the UK had provided

[16] Kiel Institute for the World Economy, 'Ukraine Support Tracker' (09/2023) https://www.ifw-kiel.de/publications/ukraine-support-tracker-data-20758/ (accessed 12 January 2024).

[17] ibid.

[18] ibid.

[19] Claire Mills, 'Military Assistance to Ukraine 2014-2021' House of Commons Library Research Briefing No 7135 (4 March 2022) 2 https://researchbriefings.files.parliament.uk/documents/SN07135/SN07135.pdf (accessed 15 September 2023).

[20] Boris Johnson *Twitter/X* (9 April 2022) https://twitter.com/BorisJohnson/status/1512818337415372802?lang=de (accessed 15 September 2023).

far-reaching lethal support involving the delivery of more than 12,000 anti-tank weapons, 300,000 rounds of artillery shells, and, most decisively, fourteen Challenger II main battle tanks.[21] Additionally, the British government had supplied over 200,000 items of non-lethal kind and led a multinational training programme, Operation Interflex, completed by more than 30,000 Ukrainians by November 2023.[22] Moreover, the UK committed to train Ukrainian fighter jet pilots.[23] Besides miliary aid, the UK has been an important supporter in terms of financial and humanitarian aid. According to the Ukraine Support Tracker,[24] the UK has committed €6.1 billion to Ukraine up to October 2023 in the form of grants, loans, and loan guarantees. For 2023, the UK committed US$1 billion of budget support to Ukraine to 'ensure that the country has the financing to keep the lights on, hospitals running and schools open'.[25] On the humanitarian front, the UK has made pledges of £347 million up to July 2023, focusing on life-saving assistance for Ukrainian civilians.[26]

In the meantime, EU Member States and institutions have pledged €133.5 billion in assistance to Ukraine up to 31 October 2023.[27] EU commitments now clearly exceed pledged US bilateral support of €71.4 billion.[28] A key reason for this is the 'Ukraine Facility', a multi-year support package proposed by the European Commission, which would double the EU's total commitments.[29] It

[21] Ministry of Defence, 'Defence Secretary pledges tens of thousands of more artillery shells for Ukraine' (19 September 2023) https://www.gov.uk/government/news/defence-secretary-pledges-tens-of-thousands-of-more-artillery-shells-for-ukraine#:~:text=range%20strike%20capabilities.-,The%20UK%20has%20delivered%20over%20300%2C000%20artillery%20shells%20to%20Ukraine,delivering%20mil. (accessed 12 January 2024).

[22] Ministry of Defence, 'The UK bolsters Ukraine's air defence after Putin's latest air strikes' (29 December 2023) https://www.gov.uk/government/news/the-uk-bolsters-ukraines-air-defence-after-putins-latest-air-strikes (accessed 12 January 2024).

[23] ibid 4.

[24] Kiel Institute for the World Economy, 'Ukraine Support Tracker' (09/2023) https://www.ifw-kiel.de/publications/ukraine-support-tracker-data-20758/ (accessed 15 September 2023)..

[25] HM Treasury, 'UK Bolsters Support for Ukraine and Low-income Countries (13 April 2023) https://www.gov.uk/government/news/uk-bolsters-support-for-ukraine-and-low-income-countries#:~:text=Today%2C%20Jeremy%20Hunt%2C%20Chancellor%20of,Ukraine%20to%20%C2%A36.5%20billion (accessed 15 September 2023).

[26] Foreign, Commonwealth & Development Office, 'UK Government's Humanitarian Response to Russia's Invasion of Ukraine' (6 July 2023) https://www.gov.uk/government/publications/uk-governments-humanitarian-response-to-russias-invasion-of-ukraine-facts-and-figures/uk-governments-humanitarian-response-to-russias-invasion-of-ukraine-facts-and-figures#:~:text=The%20UK%27s%20initial%20funding%20of,largest%20ever%20aid%2Dmatch%20contribution (accessed 15 September 2023).

[27] Kiel Institute for the World Economy (n 22).

[28] Please note: The Kiel Institute for the World Economy compares European multi-year commitments to single-year US commitments.

[29] European Commission, 'A New Ukraine Facility: Recovery, Reconstruction, Modernisation of Ukraine' (June 2023) https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-06/Ukraine-facility-11.pdf (accessed 15 September 2023).

is part of the EU budget plans until 2027, demonstrating a lasting commitment to support Ukraine. Of the EU assistance, the large majority of pledges relates to military and financial support.[30] Under the European Peace Facility (EPF), a financing instrument separate from the regular EU budget, the EU has mobilized €5.6 billion to provide the Ukrainian Armed Forces with lethal equipment and non-lethal support.[31] In addition, the EU operates a Military Assistance Mission in support of Ukraine (EUMAM Ukraine), which is open to participation by non-EU countries.[32] The mission aims to strengthen the capacity of the Ukrainian Armed Forces by providing training at various levels and in various areas such as medical assistance, demining, or chemical, biological, radiological, and nuclear (CBRN) defence. So far, a total of twenty-four European Member States are involved in the mission, whose activities take place on EU soil. The equipment required for the training is provided by EU countries and jointly financed through the EPF. By the end of 2023, EUMAM Ukraine had trained more than 34,000 soldiers.[33] Another concrete support measure is the Act in Support of Ammunition Production (ASAP), which aims to supply ammunition and missiles to Ukraine urgently and help EU Member States replenish their stocks. The Act seeks to increase the EU's production capacity and address the current shortage of ammunition and missiles and their components. In terms of financial commitments, as mentioned earlier, in June 2023 the EU Commission proposed to establish the 'Ukraine Facility' to support Ukraine's recovery, reconstruction, and modernization with up to €50 billion from 2024 to 2027, which would be provided both as grants and as loans.[34] In the area of humanitarian assistance, by December 2023 the EU Commission had allocated €785 million to be spent, for instance, on shelters, health care, food assistance, and sanitation.[35]

[30] Kiel Institute for the World Economy (n 22).

[31] European Commission, 'Defending European Peace: United Support to Ukraine' (2023) https://state-of-the-union.ec.europa.eu/defending-european-peace_en (accessed 15 September 2023).

[32] European External Action Service, 'About EU Military Assistance Mission in Support of Ukraine (EUMAM Ukraine)' (8 December 2022) https://www.eeas.europa.eu/eumam-ukraine/about-eu-military-assistance-mission-support-ukraine-eumam-ukraine_en?s=410260 (accessed 15 September 2023).

[33] Council of the EU, 'European Peace Facility: Council greenlights further funding for training of the Ukrainian Armed Forces under EUMAM Ukraine' (28 November 2023) https://www.consilium.europa.eu/en/press/press-releases/2023/11/28/european-peace-facility-council-greenlights-further-funding-for-training-of-the-ukrainian-armed-forces-under-eumam-ukraine/#:~:text=To%20date%2C%20more%20than%2034,the%20launch%20of%20the. (accessed 12 January 2024).

[34] European Commission, 'Ukraine: Commission Proposes to Set Up a Dedicated Facility to Support Ukraine's Recovery, Reconstruction and Modernisation' (20 June 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3355 (accessed 15 September 2023).

[35] European Commission, 'EU Assistance to Ukraine' (2023) https://eu-solidarity-ukraine.ec.europa.eu/eu-assistance-ukraine_en (accessed 12 January 2024).

2.3 Coordinated Steps: Sanctions and Military Assistance beyond Bilateral Efforts

In addition to military, financial, and humanitarian assistance to Ukraine, sanctions against Russia complete the West's strategy to end Russia's military aggression in Ukraine. Since the TCA does not cover foreign policy and defence cooperation, the EU and the UK lack a legal dedicated framework for coordinating and implementing sanctions.[36] Despite these circumstances, Russia's invasion of Ukraine prompted the EU and the UK to work together more closely. Owing to Russia's veto powers, international organizations like the UN or the Organization for Security and Cooperation in Europe (OSCE), which previously coordinated sanctions successfully, are effectively paralysed. Therefore, since the early days of the Russian invasion, sanctions policy has mainly been coordinated in the G7. The EU and the UK are part of the G7's 'Russian Elites, Proxies, and Oligarchs' (REPO) task force, which also includes Australia. By March 2023, REPO task force members have successfully blocked or frozen more than US$58 billion worth of assets of sanctioned Russians, traced assets of sanctioned individuals and entities, and severely restricted sanctioned Russians' access to the global financial system.[37] Additionally, to prevent evasion of sanctions and bolster compliance, the G7 formed an 'Enforcement Coordination Mechanism'.[38]

By the end of 2023, 1,681 Russian individuals and 269 entities were subject to UK sanctions,[39] while the EU has so far imposed sanctions on more than 1,600 individuals and 331 entities.[40] The lists overlap on many accounts; however, they are not completely identical. Besides travel bans on individuals and asset freezes on individuals and entities, the EU and the UK, together with the US and other allied partners, have enacted economic sanctions. The removal of Russian banks from clearing houses and the SWIFT

[36] For further analysis see the chapter by Ben Tonra in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021).

[37] US Department of the Treasury, 'Joint Statement from the REPO Task Force' (9 March 2023) https://home.treasury.gov/news/press-releases/jy1329 (accessed 15 September 2023).

[38] US Department of the Treasury, 'G7 Enforcement Coordination Mechanism Deputies Meeting' (27 April 2023) https://home.treasury.gov/news/press-releases/jy1450#:~:text=WASHINGTON%20%E2%80%93%20Treasury%20Deputy%20Secretary%20Wally,aimed%20at%20denying%20Russia%20the (accessed 15 September 2023).

[39] Claire Mills, 'Sanctions against Russia' House of Commons Library Research Briefing Number 9481 (21 July 2023) 5 https://researchbriefings.files.parliament.uk/documents/CBP-9481/CBP-9481.pdf (accessed 12 January 2024).

[40] Council of the EU, 'EU restrictive measures against Russia over Ukraine (since 2014)' (8 January 2024) https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/ (accessed 12 January 2023).

international financial transaction system, the freezing of foreign assets, the ban on transactions with the Russian central bank or restricted access to primary and secondary capital markets for Russian banks and companies serve to target the Russian financial sector. In addition to the financial sector, sanctions also affect energy, transport, defence, raw materials, and other goods and services.

While military assistance to Ukraine has mostly been provided on a bilateral basis, there are some frameworks and initiatives which have allowed for EU-UK cooperation or collaboration between the UK and specific EU countries on military support. First and most obviously, working through NATO, the UK and its European partners have enhanced deterrence against Russia by reinforcing their military presence on NATO's eastern flank. Besides thousands of extra troops for NATO battle groups, combat aircraft to support NATO air-policing missions, enhanced naval forces in the Baltic Sea and the Mediterranean and stepping up troop readiness, allies deployed, for the first time, high-readiness elements of the NATO Response Force to Romania.[41] Back in 2016, at the NATO summit in Warsaw, the alliance decided on an 'enhanced Forward Presence' (eFP), ie the deployment of four multinational battle groups in Poland and the Baltic states of Estonia, Latvia, and Lithuania to improve allies' deterrence against Russia. At the extraordinary NATO summit in Brussels on 24 March 2022, NATO leaders decided on four additional multinational battlegroups in Bulgaria, Hungary, Romania, and Slovakia.[42] The Armed Forces of the UK, France, Italy, Germany, Hungary, the Czech Republic, Canada, and the US play a leading role in NATO's forward presence, each leading a multinational battle group.[43] In addition, several minilateral groupings operating outside NATO and EU structures are engaged in European security. For example, 19 European countries, including the UK, are participating in the 'European Sky Shield Initiative', a NATO-affiliated project coordinated by Germany aimed at delivering an extended European missile defence system.[44] Furthermore, the UK leads the 'Joint Expeditionary Force' (JEF), a multinational defence force directed at increasing interoperability between military forces that was established at the 2014 NATO summit in Wales and includes Denmark, Estonia, Finland,

[41] NATO, 'NATO's Military Presence in the East of the Alliance' (28 July 2023) https://www.nato.int/cps/en/natohq/topics_136388.htm (accessed 15 September 2023).
[42] ibid.
[43] ibid.
[44] Bundesministerium der Verteidigung, 'European Sky Shield - die Initiative im Überblick' https://www.bmvg.de/de/aktuelles/european-sky-shield-die-initiative-im-ueberblick-5511066 (accessed 12 January 2024).

Iceland, Latvia, Lithuania, the Netherlands, Norway, and Sweden.[45] Focusing on security in 'the High North, North Atlantic and the Baltic Sea region',[46] the JEF serves to provide a forum for joint exercises and training, to discuss regional security, and share intelligence. Since Russia's full-scale invasion of Ukraine, JEF defence ministers have met on a frequent basis. At their meeting in June 2023, for instance, they agreed on intensifying cooperation on 'threats against our critical undersea and offshore infrastructure'.[47] At the same time, JEF ministers also made clear that all JEF activities take place in full compliance with NATO. A senior British military official described the JEF as a 'force of friends, filling a hole in the security architecture of northern Europe between a national force and a NATO force'.[48]

Thirdly, the UK and EU institutions, most notably the European Commission, the Council, and the European External Action Service, have intensified their communication. In March 2022, then British Foreign Secretary Truss, along with US Secretary of State Blinken and Canadian Minister of Foreign Affairs Joly, attended an extraordinary meeting of EU foreign ministers in Brussels.[49] More significantly, however, the UK has increased its engagement with EU defence initiatives. For example, following Canada and the US, the UK has joined a military mobility project within the context of the EU's Permanent Structured Cooperation (PESCO), a European enhanced military cooperation pact open to third-country participation.[50] Historically a strong opponent of EU defence integration, the UK's decision to join post-Brexit is noteworthy.

Fourthly, since Brexit, the UK has deepened its bilateral relations with almost all EU Member States. The Integrated Review refresh of 2023 identifies France as a key partner in European foreign and security policy.[51] In practice, the British–French relationship had been particularly conflictual since the

[45] The British Army, 'Joint Expeditionary Force: A New Era of Military Cooperation' (29 March 2023) https://www.army.mod.uk/news-and-events/news/2023/03/joint-expeditionary-force-a-new-era-of-military-cooperation/ (accessed 15 September 2023).

[46] ibid.

[47] HM Government, 'Joint Statement by Joint Expeditionary Force Ministers, June 2023' (13 June 2023) https://www.gov.uk/government/news/joint-statement-by-joint-expeditionary-force-ministers-june-2023 (accessed 15 September 2023).

[48] Ministry of Defence, 'Defence in the Media: Monday 1 July 2019' *Defence in the media Blog* (1 July 2019) https://modmedia.blog.gov.uk/2019/07/01/defence-in-the-media-monday-1-july-2019/ (accessed 15 September 2023).

[49] Council of the EU, 'Extraordinary Foreign Affairs Council, 4 March 2023: Main Results' (4 March 2023) https://www.consilium.europa.eu/en/meetings/fac/2022/03/04/ (accessed 15 September 2023).

[50] Council of the EU, 'PESCO: The UK Will Be Invited to Participate in Military Mobility Project' (15 November 2022) https://www.consilium.europa.eu/en/press/press-releases/2022/11/15/pesco-the-uk-will-be-invited-to-participate-in-military-mobility-project/ (accessed 15 September 2023).

[51] HM Government (n 8) 40.

Brexit negotiations and the dispute that ignited in the context of the AUKUS submarine deal between the UK, the US, and Australia, which undermined French efforts to provide Australia with its submarine technology. In March 2023, for the first time in five years, a British–French summit was held in Paris. UK Prime Minister Sunak and French President Macron used the summit to re-connect and subsequently committed to deepening their bilateral cooperation, especially in the foreign and security policy domains.[52] In parallel, owing to its consistent and decisive support for Ukraine, the UK has gained in political influence and moved closer to some central European and Baltic states.[53] To keep the UK on NATO's eastern flank, Poland was already working towards a Polish–British treaty in 2017 after the Brexit referendum.[54] In fact, post-Brexit, many central and eastern EU states feared UK disengagement. As a result of the war in Ukraine, the UK has stepped up its pre-existing cooperations with Baltic, Nordic, and Central East European countries, including, for example, a new Polish–British '2030 Partnership'.[55] Bilateral relations between the UK and Germany have developed less dynamically.[56] In June 2021, Germany and the UK signed their first bilateral agreement on foreign and security policy issues.[57] In January 2023, UK Foreign Secretary Cleverly hosted German Foreign Minister Baerbock in London for the inauguration of an annual UK-German strategic dialogue.[58] In the 2023 Integrated Review refresh, however, British-German cooperation is brought up only within the framework of wider

[52] Prime Minister's Office, 'UK-France Joint Leaders' Declaration' (10 March 2023) https://www.gov.uk/government/publications/uk-france-joint-leaders-declaration/uk-france-joint-leaders-declaration (accessed 15 September 2023).

[53] Nicolai von Ondarza and Dominik Rehbaum, 'From "Global Britain" to Realpolitik: The Updated Integrated Review' SWP Comment (24 April 2023) 4 https://www.swp-berlin.org/publications/products/comments/2023C24_UpdatedIntegratedReview.pdf (accessed 15 September 2023).

[54] Treaty between the United Kingdom of Great Britain and Northern Ireland and the Republic of Poland on Defence and Security Cooperation (signed 21 December 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728126/TS_3.2018_Poland_Defence_Cm_9673.pdf (accessed 15 September 2023).

[55] Ministry of Defence, 'UK and Poland Strengthen Foreign Policy, Security and Defence Cooperation' (5 July 2023) https://www.gov.uk/government/news/uk-and-poland-strengthen-foreign-policy-security-and-defence-cooperation#:~:text=Our%202030%20Partnership%20commits%20the,of%20the%20Euro%2DAtlantic%20area (accessed 15 September 2023).

[56] Nicolai von Ondarza and Dominik Rehbaum, 'From "Global Britain" to Realpolitik: The Updated Integrated Review' SWP Comment (24 April 2023) 6 https://www.swp-berlin.org/publications/products/comments/2023C24_UpdatedIntegratedReview.pdf (accessed 15 September 2023).

[57] Foreign, Commonwealth & Development Office, 'UK-Germany Joint Declaration, June 2021' (30 June 2021) https://www.gov.uk/government/publications/uk-germany-joint-declaration-june-2021/uk-germany-joint-declaration-june-2021 (accessed 15 September 2023).

[58] Foreign, Commonwealth & Development Office, 'UK and Germany Agree Closer Cooperation in First Ever UK-Germany Annual Dialogue (5 January 2023) https://www.gov.uk/government/news/uk-and-germany-agree-closer-cooperation-in-first-ever-uk-germany-annual-dialogue (accessed 15 September 2023).

multilateral efforts, for instance in the G7.[59] There are no concrete bilateral initiatives on security and defence policy comparable to the British–French or British–Polish agreements.

Finally, the latest format for European–British cooperation is offered by the European Political Community (EPC).[60] Proposed by French President Macron and initially greeted with resistance by some countries, including the UK,[61] the EPC serves as a new intergovernmental forum for high-level discussions about continental challenges, so far mostly in the fields of energy and security. Additionally, the forum offers the possibility of holding smaller bilateral meetings for conflict resolution. As of September 2023, the EPC has met twice, its biannual meetings rotate between EU and non-EU countries. The UK is set to host the EPC's more than forty heads of state and government for the fourth meeting in the second half of 2024 (see below).[62]

3 The European Neighbourhood

Russia's war on Ukraine and its intervention and destabilization efforts on other non-EU and EU countries through hybrid means have caused the EU to rethink its ties with eastern and south-eastern European countries. The most notable development is the revival of the enlargement process, which has been extended to Ukraine and Moldova, while the future role of the newly created EPC is also under discussion.

3.1 Enlargement Revived

Within a year of the start of the war, the debate on institutionalizing relations with eastern and south-eastern European countries has picked up steam and EU enlargement is officially back on the agenda. The renewed political commitment of EU members and institutions to supporting the

[59] HM Government (n 8).

[60] For an in-depth examination of the EPC as a framework for closer EU-UK cooperation see the final chapter by Federico Fabbrini in this volume.

[61] Beatriz Rios, Rick Noack, and Marisa Bellack, 'Macron's European Political Community Brings in Skeptical Ukraine and U.K.' *Washington Post* (6 October 2022) https://www.washingtonpost.com/world/2022/10/06/european-political-community-macron-zelensky/ (accessed 15 September 2023).

[62] HM Government (n 8) 13.

accession of the Western Balkan countries and, most notably, the opening of accession negotiations with Ukraine and Moldova in December 2023 exemplify significant policy shifts that would have been hard to imagine before February 2022. With its landmark decision to launch membership talks with Ukraine and Moldova and recognize Georgia's candidate status,[63] the European Council not only rejected the Russian idea of a sphere of influence including those three countries but also revived EU enlargement as an instrument to enhance stability on the European continent beyond the EU.

3.2 EU Enlargement, Reform, and the Need for Flexibility

While the geopolitical situation provides strong arguments for swift enlargement, the EU's capacity to enlarge needs to be improved. Without internal reforms, an EU with more than thirty members risks undermining its own functioning and legitimacy, and EU policies and their funding need to be reviewed. The two largest Member States, Germany and France, have made further enlargement conditional on internal reform and tasked an expert group to develop proposals for EU reform before enlargement, which were presented to the EU General Affairs Council in September 2023 to kickstart the process of defining reform priorities and paths forward.[64] The most pressing internal challenges facing the EU with a view to enlargement can be grouped into at least three broad categories: institutional set-up (including rule of law and democratic legitimacy), policy reform, and budgetary and financial issues.

The more diverse the EU grows, the more likely it will need to embrace flexibility and internal and external differentiation.[65] External differentiation may apply to both candidate countries which, in the course of accession can already be integrated into EU policies and can obtain a certain status in EU institutions. But it can go even beyond this approach.

[63] European Council, 'European Council conclusions on Ukraine, enlargement and reforms' (14 December 2023) https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/european-council-conclusions-on-ukraine-enlargement-and-reforms/ (accessed 12 January 2024)..

[64] Franco-German Working Group on EU Institutional Reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century' (18 September 2023) https://www.auswaertiges-amt.de/blob/2617322/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf (accessed 15 September 2023).

[65] ibid 33.

3.3 The European Political Community as a Framework for Cooperation

There is a growing awareness that a fundamental redesign of security in its broadest sense is needed on a continental scale to supplement what NATO provides. The EPC in that regard has interesting potential, bringing together over forty heads of state and government on a continental scale. If developed further, it can indeed turn into an important strategic forum and it can run initiatives that allow stabilization and help counter an increasing role of Russia, China, Iran, or Turkey in the eastern and southern neighbourhood at the expense of the EU.[66] Beyond performing a stabilizing role in the EU neighbourhood, the EPC can also contribute to reconnect the EU and the UK. According to the vision of French President Macron, the EPC will serve as 'a new space for political and security cooperation, cooperation in the energy sector, in transport, investments, infrastructures, the free movement of persons and in particular of our youth'.[67] While the EPC is, of course, still far from this, the scope of proposed areas of cooperation is wide and clearly extends what the EU and the UK currently have with the TCA. However, the initial reaction of the UK government to the EPC was reserved. When asked about the UK's interest in joining the EPC in June 2022, then Foreign Secretary Truss denied that the UK had agreed to join, emphasizing that NATO and the G7 are 'key alliances as far as the United Kingdom is concerned'.[68] Among the major concerns of the British Government were the role of the European Commission and the degree of organizational formalization of the EPC.[69] In order to distinguish the new forum from the EU's predecessor organization, the European Community, London demanded a name change into 'European Political Forum'.[70] While the UK could not prevail with the name change, the decision against a permanent EPC secretariat, for instance led by the European Commission, reflects the UK

[66] This report provides conceptual ideas for the future development of the EPC. See Franz Mayer and others, 'Enlarging and Deepening: Giving Substance to the European Political Community' (22 September 2022) https://www.bruegel.org/policy-brief/enlarging-and-deepening-giving-substance-european-political-community (accessed 15 September 2023).

[67] Ambassade de France au Royaume-Uni, 'Speech by M. Emmanuel Macron, President of the Republic, at the Closing of the Conference on the Future of Europe' (9 May 2022) (accessed 15 September 2023).

[68] House of Commons, 'Foreign Affairs Committee: Oral Evidence: Work of the Foreign, Commonwealth and Development Office (28 June 2022) HC 171 https://committees.parliament.uk/oralevidence/10496/pdf/ (accessed 15 September 2023).

[69] Cristina Gallardo, 'Liz Truss Seeks Her Own Path Back to Europe' *Politico* (4 October 2022) https://www.politico.eu/article/liz-truss-uk-seeks-her-own-path-back-to-europe/ (accessed 15 September 2023).

[70] Jessica Parker, 'Liz Truss to Attend First Meeting of European Nations Club' *BBC* (30 September 2022) https://www.bbc.com/news/uk-politics-63080165 (accessed 15 September 2023).

desire for an informal forum that operates according to an intergovernmental logic rather than creating new structures. Together with the overall limited role for both the European Council and the European Commission, this contributed to a shift in the British attitude towards the EPC.[71] These concessions show how crucial it was for the credibility and attractiveness of the EPC that the UK, as a major European economic and security actor, was involved from the beginning. As the British government saw its major concerns addressed, less than four months after her critical remarks, Truss attended the inaugural meeting of the EPC as Prime Minister and even offered for the second meeting to take place in London.[72] This open attitude is also reflected in the British security strategy of 2023, which describes the EPC as a 'notable and welcome new forum for continent-wide cooperation',[73] mentioning also the UK's role as a host for the fourth summit in 2024.[74] Ultimately, the EPC offers the UK a new form of political cooperation in Europe that is so distinctly different from the EU that it has enabled the government to push through British participation even in the face of loud scepticism from hardline Brexit supporters.[75] The EPC does not impose any binding institutional constraints on the UK and provides the British leadership with a great deal of leeway in deciding in which areas it wishes to enter into closer cooperation. In this regard, the EPC could also serve as an important forum for a possible future government led by the Labour Party and can serve the British interest to have access to EU decision-makers on strategic matters in particular.

4 Transatlantic Relations

4.1 Reasserting the Transatlantic Relationship

After years of uncertainty during Donald Trump's presidency, US support now plays a central role in Europe's response to Russia's attack and the centrality of the US as a security guarantor for Europe has been underscored. The early anticipation of war by US intelligence agencies and the decisive responses of

[71] Mujtaba Rahman, 'The European Political Community Is a Big deal – for EU-UK relations' *Politico* (5 October 2022) https://www.politico.eu/article/european-political-community-eu-uk-relations/ (accessed 15 September 2023).
[72] Gallardo (n 75).
[73] HM Government (n 8) 9.
[74] ibid 13.
[75] Mujtaba Rahman, 'The European Political Community Is a Big Deal: For EU-UK Relations' *Politico* (5 October 2022) https://www.politico.eu/article/european-political-community-eu-uk-relations/ (accessed 15 September 2023).

the US government have enabled Ukraine to withstand the Russian invasion. European states would not have been able to provide comprehensive and rapid enough military and financial support on their own at the onset of the Russian attack. US support will also be extremely relevant in the longer term to support Ukraine militarily and when it comes to reconstruction, which requires some sustainable security framework for Ukraine.

So while transatlantic relations have been revived as a consequence of the war, for the UK, its traditional special relationship with the US has become even more unequal. British leverage vis-à-vis the US has declined post-Brexit. The UK no longer serves as an intermediary between the US and the EU, its appeal to the US remains limited to the defence sphere. From an EU perspective, the UK can be expected to increase its efforts to be kept in the loop and remain relevant as the EU tries to deepen ties with the US.

Neither the EU nor the UK can rely on this significant US support in the medium term. A taste of what deteriorating transatlantic relations could look like if America scales back its engagement was provided by the Trump administration from 2017 to 2021.[76] Given Trump's aggressive rhetoric and the economic pressure he exerted on Europe, some observers saw transatlantic relations on the brink of collapse. However, by the end of his term, while hard disagreements had surfaced, President Trump had not destroyed NATO.[77] In fact, during his term, the US strengthened troop presence in Europe[78] and NATO expanded to include North Macedonia in 2020.[79] So despite Trump's threatening gestures, the US did not cease all transtatlantic cooperation. Nevertheless, a second term of Trump would probably do great damage in this regard.

In any case, it is unlikely that after President Biden another US President will take the transatlantic relationship and the American commitment to European security so seriously. For the past decade, the US has viewed China, not Russia, as the most relevant strategic challenge.[80] For the foreseeable future, the US will shift its focus from Europe's eastern neighbours to Asia and become more

[76] For further analysis see the chapter by Michael Cox in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021).

[77] For a more extensive argument see Daniela Schwarzer, *Krisenzeit: Sicherheit, Energie und Zusammenhalt: Was Deutschland jetzt tun muss* (PIPER 2023).

[78] US Department of Defense, 'Factsheet – US Defense Contribitions to Europe' (29 June 2022) https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf (accessed 15 September 2023).

[79] NATO, 'North Macedonia joins NATO as 30th Ally' (27 March 2020) https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf (accessed 15 September 2023).

[80] The White House, 'National Security Strategy' (October 2022) 11 https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf (accessed 15 September 2023).

involved in the Indo-Pacific region.[81] US policy towards Europe is likely to become increasingly transactional. Even under the Biden administration, US foreign, trade and industrial policy has become more oriented towards immediate national gross domestic product and job gains rather than strategic development of the transatlantic marketplace.

4.2 Competing Industrial Policies

Despite China's rapid growth and the rise of other Asian economies, the transatlantic economic area has not yet lost its role as the world's most prosperous and integrated intercontinental marketplace. The fact that North America and Europe have grown together economically is no surprise. For foreign investors, stability and reliability are important factors in deciding which country to invest in. However, the Trump Presidency showed how quickly a new US administration could build up pressure in a short period of time, even against its closest and longest-standing partners. In Washington, open economies and free world trade are no longer clearly seen as guarantees of success. Not only the economic slump in the wake of the financial crisis and the growing social inequality in the US, but also the work of strong interest groups has changed the position. The weakness of the US social security system, which cannot cushion the painful effects of technological change and open trade for more and more workers, reinforces this effect. Finally, US scepticism about open trade and too much competition is fuelled by the rise of China, which under the tough leadership of President Xi Jinping wants to knock the US off the top spot among world powers. All in all, these factors provide a rich breeding ground for protectionist ideas.[82] As a consequence, both Democrats and Republicans have shifted to trade-sceptical, national-protectionist positions. US trade policy has become tougher, and not just towards China. Europe is also feeling the effects. For example, the US Inflation Reduction Act (IRA), a US$370 billion support package for industry, is putting Europe under enormous pressure. French President Macron warned that such decisions will 'fragment the West'.[83] In fact, this law, which is domestically motivated with an eye to the

[81] The White House, 'Indo-Pacific Strategy of the United States' (February 2022) https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf (accessed 15 September 2023).

[82] For a more extensive argument see Schwarzer (n 83).

[83] Leila Abboud, 'Emmanuel Macron Says US Climate Law Risks 'fragmenting the West' *Financial Times* (1 December 2022) https://www.ft.com/content/a1a03af2-831a-433c-8984-b99c84018a13 (accessed 15 September 2023).

2024 presidential elections, thwarts efforts to bring Western countries closer together in the shadow of the Ukraine war and the economic crisis. Owing to the potentially wide-ranging ramifications of the IRA, both the EU and the UK were and continue to be under pressure to respond to the American industrial policy package. The European Commission answered in February 2023 with the 'Green Deal Industrial Plan' aimed at enhancing the competitiveness of the EU's net-zero industry.[84] Most prominently, the EU provides for a temporary relaxation of state aid rules for renewable energy deployments and for the decarbonization of industrial processes. The reaction of the UK government, on the other hand, was more muted. In March 2023, Chancellor Hunt argued that the UK is 'not going toe-to-toe with our friends and allies in some distortive global subsidy race'.[85] Similarly, the Treasury's Autum Statement of November 2023 expressed a clear preference for investment incentives over subsidies, arguing that 'the UK will take a different approach, continuing to build a positive environment for investment'.[86] While the government announced £4.5 billion to foster investment in green technologies and clean energy, the measures have been considered widely as failing to match the scale and ambition of the US and EU green industrial strategies.[87]

The transatlantic economic area remains by far the largest and most integrated intercontinental market in the world,[88] notwithstanding globalization, the rise of China, the US financial crisis of 2007/2008, and the eurozone crisis that immediately followed. It is important that economic nationalism, which is becoming increasingly strong, does not undermine this joint achievement. Especially now, it is important that transatlantic economic relations, which have deepened since the end of the Cold War, are further strengthened. Benign competition through subsidy races against each other but strengthening joint competitiveness through intelligent market integration and joint investment in

[84] European Commission, 'Net-Zero Industry Act: Making the EU the Home of Clean Technologies Manufacturing and Green Jobs' (16 March 2023) https://ec.europa.eu/commission/presscorner/detail/%20en/ip_23_1665 (accessed 15 September 2023).

[85] Matt Honeycombe-Foster, 'UK Chancellor Swipes at Biden's "Massively Distortive" Inflation Reduction Act' *Politico* (30 March 2023) https://www.politico.eu/article/jeremy-hunt-joe-biden-uk-chancellor-swipes-at-bidens-massively-distortive-inflation-reduction-act/ (accessed 15 September 2023).

[86] 'Autumn Statement 2023' (30 November 2023) 70 https://www.gov.uk/government/publications/autumn-statement-2023/autumn-statement-2023-html (accessed 12 January 2024).

[87] London School of Economics and Political Science, 'Response to the Autumn Statement 2023' (22 November 2023) https://www.lse.ac.uk/granthaminstitute/news/grantham-research-institute-response-to-the-autumn-statement/ (accessed 12 January 2024).

[88] Daniel Hamilton and Joseph Quinlan, 'The Transatlantic Economy 2023: Annual Survey of Jobs, Trade and Investment between the United States and Europe' (2023) https://transatlanticrelations.org/wp-content/uploads/2023/03/Transatlantic-Economy-Report-2023.pdf (accessed 15 September 2023).

future technologies and the green transformation are the right answers to the challenges the world currently holds.

4.3 Europe between China and the US

Today, the most dangerous rivalry in the world exists between the US and China. Europe is in a middle position, normatively clearly in the Western camp with the US and European and non-European allies such as Japan and Australia.[89] But in terms of its economic ties and commodity dependencies, owing to its geographic proximity to Russia and its increasing competition with Moscow and Beijing for influence in Eastern Europe, Central Asia, and even Africa, Europe is in an entirely different position than the US. If a conflict were to escalate between the world powers China and the US, for example over Taiwan, this would have a particularly high price for Europe. Because of economic dependencies, European countries would come under enormous diplomatic pressure.[90] Both the EU and the UK are trying to address this complex challenge, and to this end have adjusted their approaches to China.

On the part of the EU, the most important developments in this regard are to be found in the EU Economic Security Strategy, which was presented by Commission President von der Leyen on 20 June 2023.[91] Von der Leyen coined the term 'de-risking' in January 2023, when she stated that the EU and Member States 'need to focus on de-risking rather than decoupling'.[92] Acknowledging that 'Europe is today 98 per cent dependent on one country—China', von der Leyen argued that Europeans 'still need to work and trade with China'. However, to achieve greater economic security, according to the Economic Security Strategy, the EU is seeking to reduce dependencies on individual countries, both by finding new and diverse suppliers and by increasing local production of particularly critical raw materials. The recent EU Chips Act, Net Zero Industry Act, and Critical Raw Materials Act are reflective of this approach. Moreover, during her speech on the state of the Union in September 2023, Commission President von der Leyen announced that the Commission

[89] For a more detailed examination see Daniela Schwarzer, *Final Call: Wie Europa sich zwischen China und den USA behaupten kann* (Campus 2021).

[90] For a more extensive argument see Schwarzer (n 83).

[91] European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy" ' (20 June 2023) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023JC0020 (accessed 15 September 2023).

[92] European Commission, 'Special Address by President von der Leyen at the World Economic Forum' (17 January 2023) https://ec.europa.eu/commission/presscorner/detail/en/speech_23_232 (accessed 15 September 2023).

would initiate an anti-subsidy investigation into Chinese electric vehicle subsidies.[93] If substantiated, the Commission can levy countervailing duties that are based on, and shall not exceed, the amount of countervailable subsidies found.[94] It is almost certain that China would retaliate, which could lead to a full-blown trade war—a scenario which the EU and China almost experienced in 2013 when the EU imposed anti-dumping and anti-subsidy measures on Chinese solar cells and modules. In fact, European measures have done little to achieve the desired goal: in 2022, more than 90 per cent of European solar modules were imported from China.[95] This example illustrates how difficult the economic negotiation situation with China is from the EU's perspective.

The UK's relationship with China is also one of dependence and competition. In November 2022, during his first speech on foreign policy, Prime Minister Sunak declared that the 'golden era' of Chinese–British relations and the 'naive idea that trade would automatically lead to social and political reform' were over.[96] Over the past five years, the British government had already moved to a more confrontational stance towards China, partly in line with the US. The Integrated Review of 2021 classifies China as 'the biggest state-based threat to the UK's economic security'.[97] The security strategy update of 2023 builds on this assessment but goes further, describing China as 'an epoch-defining and systemic challenge' to most areas of government policy and also to the daily lives of UK citizens.[98] At the same time, the UK faces the same challenge as the EU, with China ranking fourth among the UK's top ten trading partners in 2022.[99] Just like the EU, the UK seeks to become more resilient. On the one hand, the entire government is to acquire knowledge and skills in dealing with China.[100] Immediate measures included the establishment of the National Protective Security Authority and new economic security measures aimed at

[93] European Commission, '2023 State of the Union Address by President von der Leyen' (13 September 2023) https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4426 (accessed 15 September 2023).

[94] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176.

[95] Rystad Energy, 'Europe Hoarding Chinese Solar Panels as Imports Outpace Installations' (20 July 2023) https://www.rystadenergy.com/news/europe-chinese-solar-panels-imports-installations-storage (accessed 15 September 2023).

[96] Prime Minister's Office, 'PM Speech to the Lord Mayor's Banquet' (28 November 2022) https://www.bloomberg.com/news/articles/2023-01-20/iran-s-oil-exports-are-surging-and-much-of-the-crude-is-going-to-china#xj4y7vzkg (accessed 15 September 2023).

[97] HM Government (n 5) 62.

[98] HM Government (n 8) 30.

[99] Department for Business & Trade, 'Official statistics: Trade and Investment Core Statistics Book' (18 August 2023) https://www.gov.uk/government/statistics/trade-and-investment-core-statistics-book/trade-and-investment-core-statistics-book (accessed 15 September 2023).

[100] HM Government (n 8) 31.

protecting critical supply chains from dependencies. On the other hand, the UK wants to work directly with China both bilaterally and in international institutions to foster open and constructive relations. In contrast to the 2021 strategy, the 2023 refresh also addresses Taiwan and promotes a peaceful resolution through dialogue.

5 Conclusion

The UK and the EU, in the framework of the transatlantic alliance, bilateral, and new multilateral formats, have managed to respond forcefully to Russia's large-scale invasion of Ukraine, despite the TCA's lack of a formal mechanism for EU-UK cooperation on foreign and defence policy. In military, financial, humanitarian, and diplomatic support both stand out clearly along with the US. However, beyond short-term efforts of mobilizing support for Ukraine and crisis management, the UK and the EU face similar challenges in addressing undeniably great pressure from global problems such as the consequences of climate change, humanitarian crises and growing migration movements, instabilities in the financial system, or possible further pandemics. Moreover, the shock waves emanating from the war in Europe are fomenting worldwide questioning of the Western liberal paradigm. The fact that many states have not sided with the political West, which for instance UN General Assembly votes show, demonstrate how much it has lost in political leadership. At the same time, authoritarian states have long since allied to reshape the world order according to their own standards. China is at the forefront of this, and the Chinese-driven expansion of the BRICS group underscores a clear desire to break away from Western dominance over international institutions, particularly in the economic and financial spheres.

The new order is likely to be less rule-based and therefore more politically volatile.[101] Political balancing within and among states will become more difficult, in part because everyone will have to spend more on their own protection and security. Moreover, the overall pie of what needs to be distributed could become smaller: A decline of the division of labour in the global economy will probably have negative wealth effects. The conditions that lead Vladimir Putin and Xi Jinping to think they can challenge the West will continue to exist: the domestic political situation in the US and some other democracies is difficult;

[101] For a more extensive argument see Schwarzer (n 83).

the relative decline of Western power will continue; between 2000 and 2023, the G7 countries' share of world production declined from 44 to 30 per cent.[102]

Against the background of this global power shift, both the EU and the UK have recognized that bilateral cooperation and networks are beneficial, and they consequently join forces in multilateral alliances to ensure some influence on the reshaping of the global order. On their own, both are less and less able to wield influence and power. This realization is clearly reflected in the key strategic foreign policy documents of both.

The UK's Integrated Review stresses the importance of 'working with like-minded partners around the world and also with those who do not necessarily share our values and our perspective'.[103] Similarly, the 'Strategic Compass' of the EU acknowledges that 'the capacity of individual Member States to cope is insufficient and declining'.[104] Thus, the EU sets out to 'cooperate with like-minded partners around the world, on a reciprocal basis'.[105] Both the UK and the EU are counting on increased cooperation with the US and in their attempts to bolster resilience against China increasingly look to strengthen ties with selected countries in other world regions. At the same time, however, the EU especially is struggling with its positioning between the US and China in their intensifying geopolitical competition. But again, it is also not clear whether the US will remain a firm and reliable partner. The risk that the presidential election will be won by a candidate who terminates crucial US support for Ukraine and once again turns his back on Europe looms large.

This makes it even more important for the EU and UK to forge a closer and mutually beneficial foreign and defence policy relationship, also above and beyond the opportunities offered by the EPC. A concrete and tangible next step could be the extension of British participation in PESCO projects. If a more ambitious path, namely a higher degree of formalization appears politically feasible, the UK and the EU could expand their cooperation by taking advantage of the TCA's rendezvous provision, which requires the parties to take stock in 2026.[106] In fact, in 2018, the UK itself put forward ambitious proposals for a UK-EU security partnership.[107] Accordingly, 'UK-EU external cooperation

[102] Martin Wolf, 'The G7 Must Accept that It Cannot Run the World' *Financial Times* (23 May 2023) https://www.ft.com/content/c8cf024d-87b7-4e18-8fa2-1b8a3f3fbba1 (accessed 15 September 2023).

[103] HM Government (n 8) 3.

[104] Council of the European Union (n 4) 7.

[105] ibid 49.

[106] For an in-depth analysis of the TCA's rendezvous provision see the final chapter by Federico Fabbrini in this volume.

[107] HM Government, 'Framework for the UK-EU Security Partnership' (May 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides__SI__FINAL.pdf (accessed 15 September 2023).

should go beyond foreign, security and defence policy, and include development, capability collaboration, defence research and industrial development and space security'.[108] While the EU's security and defence policy has developed further since 2018, it might be worthwhile picking up on these proposals, which eventually failed in the TCA negotiation process. Others have recommended that the UK and the EU establish a dedicated UK-EU defence and security dialogue, as well as an 'administrative arrangement' between the European Defence Agency (EDA) and the UK, which is required for third party participation in EDA projects and programmes.[109] Such arrangements currently exist with Norway, Ukraine, Serbia, Switzerland, and the US.[110] Additionally, the UK and EU could consider closer UK cooperation with the EPF for future joint procurement projects along the lines of the EU's joint ammunition purchase. In the longer term, a closer association of the UK with the European Defence Fund (EDF) could also be an option. However, if the UK continues to decline economically, the TCA could emerge as an incoherent obstacle to closer strategic cooperation, which is all the more important if the security situation remains difficult.

Whether deeper cooperation including a possible review of the TCA is politically possible depends largely on the outcome of the UK general election, which is scheduled to take place before the start of 2025, and the European elections in June 2024, as well as developments in EU Member States. In any case, the Russian war of aggression against Ukraine has led to fruitful cooperation between the UK and the EU in foreign and defence policy, based on shared values and geographical realities on our continent, as well as on sanctions which can serve as a base for even further cooperation.

[108] ibid 29.

[109] Luigi Scazzieri, 'EU-UK Cooperation in Defence Capabilities after the War in Ukraine' (2023) https://www.cer.eu/sites/default/files/pb_LS_militarycap_8.8.23.pdf (accessed 15 September 2023).

[110] European Defence Agency, 'Third Parties' https://eda.europa.eu/who-we-are/third-parties (accessed 15 September 2023).

4

The Windsor Framework and Its Impact for Northern Ireland and EU-UK Relations

Billy Melo Araujo[1]

1 Introduction

The Ireland-Northern Ireland Protocol (Protocol) annexed to the 2020 EU-UK Withdrawal Agreement (WA) governs the status of Northern Ireland (NI) post-Brexit.[2] From a trade perspective, its central aim is to avoid a hard border—that is, any physical infrastructure marking the border between the UK and the Republic of Ireland (RoI)—within the island of Ireland. It does so by requiring the UK, in relation to NI, to comply with EU customs and internal market rules on trade in goods.[3]

The Protocol, however, has been contested since its entry into force. Much of the criticism has focused on the fact that, because NI is subject to a separate customs and regulatory regime to the rest of the UK, goods moved from Great Britain (GB) into NI are subject to customs and regulatory compliance checks. This 'Irish Sea Border' has increased costs for businesses involved in GB-NI trade[4] and is viewed by some within the unionist communities of NI as an affront to their sense of identity and belonging to the UK.[5] Further concerns have also been voiced regarding, for example, the application of EU state aid and value added tax (VAT) law, the continued role of the European Court of Justice

[1] Co-Investigator on Economic and Social Research Council (ESRC) funded project 'Governance for "a place between": the Multileveled Dynamics of Implementing the Protocol on Ireland/Northern Ireland' (Grant: ES/V004646/1).

[2] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 [2019] OJ C384I/1, 12 November 2019.

[3] Niall Moran, 'Customs and Movement of Goods' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022) 145–62.

[4] Michael Gasiorek and Nicolo Tamberi, 'The Impact on Northern Ireland Arising from the UK's Exit from the EU: Partial Equilibrium Modelling' (26 July 2021) InterAnalysis and UKTPO Report.

[5] Katy Hayward, 'Northern Ireland' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022) 48–67.

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regarding the application and interpretation of EU law under the Protocol, and a perceived lack of democratic legitimacy.

In a speech delivered on 27 February 2023,[6] UK Prime Mister Rishi Sunak announced the conclusion of the Windsor Framework. The Windsor Framework, he explained, would 'change the Protocol'[7] by delivering smooth flowing trade 'within the whole United Kingdom',[8] protecting 'Northern Ireland's place in our Union',[9] and safeguarding the 'sovereignty for the people of Northern Ireland'.[10] He then added that whilst the 'United Kingdom and the European Union may have had our differences in the past, but we are allies, trading partners, and friends … [t]his is the beginning of a new chapter in our relationship'. On the EU side, the President of the European Commission, Ursula von der Leyden, stopped short of claiming that the Windsor Framework would solve the Irish Sea Border issue but did echo PM Sunak's hope that these reforms would herald the start of a 'new chapter'[11] in the relationship between the EU and the UK.

The mood music around the Windsor Framework is one of optimism and a renewed sense of hope that the contestation of the NI's post-Brexit trade regime may be at an end. The aim of this chapter is to look beyond such rhetoric and examine the nature of the reforms under the Windsor Framework package and the extent to which it represents a significant departure from the rules of the Protocol. It also highlights some of the potential pitfalls associated with these reforms and shows that, by seeking to address certain difficulties, the Windsor Framework creates entirely new ones that undermine the central aims of the Protocol and have the potential to threaten the sense of optimism and trust between the parties.

This chapter is structured as follows. Section 2 sets the scene by providing a brief overview of the main criticisms aimed at the Protocol and establishes a distinction between three types of criticisms: those that address concerns voiced by NI stakeholders regarding the checks imposed on GB goods moved into NI; those that reflect sovereignty/ideological preferences of the current UK government; and those relating to perceived lack of democratic legitimacy of the Protocol. Section 3 examines the manner in which the EU and

[6] PM Speech on the Windsor Framework, February 2023 https://www.gov.uk/government/speeches/pm-speech-on-the-windsor-framework-february-2023.
[7] ibid.
[8] ibid.
[9] ibid.
[10] ibid.
[11] Statement by President von der Leyen at the joint press conference with UK Prime Minister Sunak, 27 February 2023 https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1270.

the UK sought to revise the Protocol through the Windsor Framework and argues that these do not represent a radical transformation of the Protocol but rather modify some aspects of the Protocol's operation without affecting the fundamental principles that underpin it. It is also shown how the Windsor Framework focuses on largely practical concerns associated with the operation of the Protocol, whilst largely ignoring the ideologically driven criticisms. Sections 4 and 5 focus on the main trade-related reforms, as well as the Windsor Framework's attempts to address the perceived lack of democratic legitimacy. It explains how, whilst these reforms may present certain benefits, they also potentially create entirely new problems which may be the source of future friction between the EU and the UK. Section 6, finally, concludes.

2 The Protocol: A Short History of Contestation

A number of criticisms have been raised in relation to the Protocol since its entry into force.[12] These can be subdivided into three broad categories: those that pertain to the increase of barriers to trade on goods moved between GB and NI; those that can be grouped under sovereignty/ideological concerns from the UK side; and, finally, those that relate to the governance of the Protocol and, more specifically, the view that the application of EU laws in NI create democratic legitimacy concerns.

The trade-related concerns were in evidence from the outset. Even before the Protocol became operational there was an understanding from both parties that its full implementation would lead to the application of problematic checks at the Irish Sea Border. This was reflected in the agreement to apply a number of grace periods allowing the parties temporarily to suspend the application of certain trade-related obligations in the Protocol.[13] Such grace periods included a three-month temporary suspension of regulatory compliance checks on retail agri-food products imported by supermarkets and their suppliers,[14] a six-month suspension of checks on certain types of chilled meats

[12] Dagmar Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 49–70.

[13] John Curtis, 'Joint Committee Decisions on the Northern Ireland Protocol' House of Commons Library Briefing Paper No 09102, 23 December 2023.

[14] Unilateral declarations by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on official certifications, 17 December 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946284/Unilateral_declarations_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_official_certification.pdf.

imported by supermarkets,[15] and a one-year grace period for implementing in full the EU's rules on testing and selling human and veterinary medicines.[16] The temporary suspensions of these obligations reflected a recognition of the disruption that would arise from the barriers imposed on GB goods moved to NI and were, initially, primarily intended to give businesses involved in such trade time to adapt to the new regime and/or locate alternative sources of supply where possible.

The contestation of trade-related aspects of the Protocol manifested themselves very early on in the operation of the Protocol when the UK, on the one hand, opted unilaterally to extend the grace periods relating to agri-food imports. The UK argued that the continued suspension of checks on such goods was needed to allow businesses more time to adapt to the new requirements under the Protocol.[17] The EU, on the other hand, argued that the unilateral extension of grace periods amounted to a substantive violation of the WA and proceeded to challenge such measures in the context of the WA's arbitration mechanism and by initiating infringement proceedings against the UK before the European Court of Justice (ECJ).[18] Contestation of trade-related aspects of the Protocol also occurred in the domestic sphere. In the UK, a number of judicial challenges against the Protocol were brought before the UK courts concerning the Protocol. For example, the UK Supreme Court ruled on the legality of the barriers to trade imposed on GB goods moving to NI as a result of the Protocol,[19] and rejected the challenge. Equally, legal challenges were brought against decisions adopted by UK authorities not to implement trade-related obligations under the Protocol.[20]

[15] Unilateral declarations by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on meat products, 17 December 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946283/Unilateral_declarations_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_meat_products.pdf.

[16] Unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on human and veterinary medicines, 17 December 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946659/Unilateral_declarations_by_the_European_Union_and_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_in_the_Withdrawal_Agreement_Joint_Committee_on_human_and_veterinary_medicines.pdf.

[17] Daniel Boffey and Rory Carroll, 'Brussels Says Plan to Extend Brexit Grace Period Breaks International Law' *The Guardian* (3 March 2021) https://www.theguardian.com/uk-news/2021/mar/03/supermarkets-may-get-more-time-to-adapt-to-northern-ireland-trading-rules-brexit.

[18] European Commission, Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland, 15 March 2021 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132.

[19] *In the matter of an application by Clifford Peeples for Judicial Review (Appellant) (Northern Ireland)*, Case ID 2022/0089.

[20] *In the matter of Edward Rooney, JR181(3), Belfast City Council v Defra* [2022] NIKB 34.

The criticisms anchored in concerns on sovereignty are intrinsically connected to the arguments put forward by the Leave campaign during the referendum.[21] The 'take back control' slogan of the pro-Brexit campaign conceptualized sovereignty as entailing absolute regulatory autonomy and required the UK to extricate itself completely from the EU regulatory and institutional apparatus.[22] In other words, for many of those who advocated the UK's departure from the EU, Brexit would only be meaningfully achieved if the UK was able to set its own domestic regulations, sign its own international agreements and not be subject to the jurisdiction of the EU adjudicatory bodies.

The Protocol undermines this particular conceptualization of sovereignty. It requires NI, a constituent part of the UK, to comply with EU law[23] and, in some instances the application of EU law under the Protocol is not geographically limited to NI. For example, Article l0 of the Protocol provides that EU state aid law applies to UK measures 'which affect that trade between Northern Ireland and the Union which is subject to this Protocol'. EU state aid law applies not only to measures adopted in NI but also to measures adopted by any UK authorities which have to potential to 'affect trade' between the UK and NI.[24]

Not only does the UK have to apply EU law it must also give such law the same effect in NI as it would have within the EU.[25] In practice, this means that EU law prevails over domestic and law, that individuals can invoke their rights before domestic courts and that the ECJ retains its jurisdiction over matters pertaining to EU law listed in the Protocol.[26] This qualm was spelled out in the UK government's Command Paper on the NI Protocol where, discussing the role of the CJEU, the UK government contended that it was 'highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other, all the more so when the arrangements concerned are designed to mediate the sui generis relationship between the EU and its Member States'.[27] For the UK government, a state-to-state- dispute settlement mechanism akin to the one found

[21] Kalypso Nicolaïdis, 'The Political Mantra: Brexit, Control and the Transformation of the European Order' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 25–48.

[22] For an analysis on conceptualization of the sovereignty by the Leave Campaign see Clair Gammage and Philip Syrpis, 'Sovereignty Fictions in the United Kingdom's Trade Agenda' (2022) 71 ICLQ 563

[23] See Protocol, arts 5, 7–10.

[24] Graham Butler, 'State Aid' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022) 185–210.

[25] Protocol art 12(5).

[26] ibid art 12(3)(7).

[27] HM Government, 'Northern Ireland: The Way Forward' (July 2021) 14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf.

in the EU-UK Trade and Cooperation Agreement (TCA) would have been preferable.[28]

The final set of concerns, regarding the governance/democratic deficit of the Protocol, focus on the lack of involvement of UK authorities (including NI devolved authorities) in the decision-making process that leads to the adoptions and application of EU law in NI. This argument is particularly relevant with respect to the amendment of EU acts already listed in the annexes of the Protocol. Under Article 12.3 of the Protocol, EU acts listed in the Protocol must be read as amended or replaced, meaning that such acts automatically apply to the NI. This is in contrast to the incorporation of new EU legislation into the Protocol, which requires a joint decision from the EU and the UK. Concerns were also voiced regarding the absence of mechanisms within the Protocol allowing NI stakeholders to feed voice their views regarding the application and implementation of the Protocol.

Several proposals were made to address these strands of criticisms. Some of them would have required a significant shift away from the regime established under the Protocol. This is the case, for example, for the UK's suggestion to do away with the ECJ's jurisdiction and replace it with state-to-state-dispute settlement mechanism. Similarly, proposals made by NI business groups (and welcomed by the European Commission) for the EU-UK to sign an agreement on mutual recognition of sanitary and phytosanitary (SPS) rules would also be a significant departure from the current regime as it would tie the entirety of the UK to commit to regulatory alignment with EU rules.[29] But by far the most comprehensive attempt to reshape the NI post-Brexit governance regime came in the form of the NI Protocol Bill,[30] a legislative proposal from the UK government which was abandoned following the successful conclusion of the Windsor Framework[31]. If enacted, the bill would have enabled government ministers to exclude the application of most of the core components of the Protocol, from provisions governing the movement of goods and customs,[32] the regulation of goods,[33] state aid,[34] and the jurisdiction of the ECJ.[35] The bill

[28] ibid.
[29] N Walker and J Curtis, 'Securing a veterinary agreement in the Northern Ireland Protocol' House of Commons Library Research Briefing, 13 December 2021) https://commonslibrary.parliament.uk/research-briefings/cdp-2021-0214/.
[30] Northern Ireland Protocol Bill (13 June 2022).
[31] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law and Politics of Brexit V. The Trade and Cooperation Agreement* (OUP 2023).
[32] NI Protocol Bill, s 4.
[33] ibid s 5.
[34] ibid s12.
[35] ibid s 15.

also set out the parameters of a new trade regime which would include the establishment of a green lane/red lane system where goods originating from GB would be subject to EU customs checks or not depending on their final destination,[36] and a dual regulatory regime where NI economic operators could choose whether to place their goods in the NI market under either EU or UK rules.[37] The NI Protocol Bill effectively would have gutted the Protocol in almost its entirety and unilaterally replaced it with a very different regime.

Besides the radical reform proposals outline above, a number of proposals were made which sought to mitigate some of the problematic consequences of the Protocol without requiring a shift away from it. In late 2021, the European Commission published a series of non-papers which proposed changes to certain operational aspects of the Protocol.[38] With respect to tariffs, the main criticism levelled at the Protocol concerned the at-risk regime which meant that GB goods moved into NI would be subject to EU tariffs unless it could be shown that such goods were not 'at risk' of subsequently being moved on to the EU.[39] NI businesses argued that the regime, as it was then being applied, meant that too many goods brought in from GB were incorrectly classified as being 'at risk' and therefore subject to EU tariffs.[40] The European Commission's proposal to address this problem was to revisit and widen the definition of a goods 'not at risk' to ensure that more GB imported goods could access NI tariff-free.[41] With respect to regulatory compliance checks imposed on SPS goods from GB moved into NI, the Commission proposed revising its own legislation to reduce the regulatory burden imposed on GB goods.[42] A similar approach was followed in relation to trade in medicines where the Commission proposed amending its legislative framework to allow UK authorities to grant market authorization for drugs to be released in NI.[43] Finally, the Commission also proposed increasing the transparency of the operation of the Protocol's various

[36] ibid s 6.

[37] ibid s 7.

[38] European Commission, 'Protocol on Ireland/Northern Ireland: Commission Proposes Bespoke arrangements to Benefit Northern Ireland', 13 October 2021 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5215>

[39] Protocol, art 5(1) and (2).

[40] Northern Ireland Business Brexit Working Group—Written evidence submitted to the House of Lords Northern Ireland Protocol Sub-Committee No IIO0036, 15 June 2021. https://committees.parliament.uk/writtenevidence/113364/pdf/.

[41] European Commission, Protocol on Ireland/Northern Ireland Non- Paper on Customs, 13 October 2021 https://commission.europa.eu/system/files/2021-10/attachment_iii_customs_non-paper.pdf.

[42] European Commission, Protocol on Ireland/Northern Ireland Non-Paper on Sanitary and Phytosanitary Issues, 13 October 2021 https://commission.europa.eu/system/files/2021-10/attachment_ii_sps_non_paper.pdf.

[43] European Commission, Protocol on Ireland/Northern Ireland Non-Paper on SPS issues, 13 October 2021 https://commission.europa.eu/system/files/2021-10/attachment_ii_sps_non_paper.pdf.

committees and establishing structured fora for increased stakeholder engagement as a means to address some of the democratic legitimacy concerns.[44]

These three proposals all had a number of features in common. Firstly, none of them required replacing or even amending the Protocol. The amendment of the criteria used to determine whether an imported good is deemed 'at risk' could be achieved by a joint decision adopted in the context of the Protocol's Joint Committee (JC) and the reduction of customs and regulatory compliance checks on SPS goods and medicines would be achieved via EU legislative amendments. In this way, the proposals sought to mitigate obstacles faced by businesses at the Irish Sea Border without challenging any of the fundamental pillars upon which the Protocol trade regime is built, namely the requirements to comply with EU law, to give such law the same effect as it would produce under the EU legal order and the jurisdiction of the ECJ. Secondly, barring the stakeholder engagement proposal, the proposals were highly conditional in the sense that the EU's commitment to reduce trade obstacles is predicated on the UK's own commitment to comply with additional regulatory requirements and implement enhanced monitoring systems. In other words, if the EU was to agree to reduce checks on GB goods moving to NI, the UK would have to put in place measures that would mitigate the risk of goods accessing the EU territory in a manner that would undermine the integrity of the EU customs union and internal market.

The NI Protocol Bill and the European Commission's series of non-papers represented two very different approaches to 'fixing' the Protocol. The bill sought a radical reconfiguration of NI's post-Brexit governance regime whilst the non-papers envisaged reforms that could be carried out within the existing legal framework provided by the Protocol. As will be discussed in the following sections, the Windsor Framework package is far closer to the approach followed in the latter than the former.

3 The Windsor Framework: Transformation or Repackaging of the Protocol?

When the Windsor Framework was first announced, much effort was placed into weaving a narrative that the Windsor Framework marked a

[44] European Commission, Protocol on Ireland Northern Ireland Non-Paper on Engagement with NI stakeholders and Authorities, 13 October 2023 https://commission.europa.eu/system/files/2021-10/attachment_iv_ni_participation_non-paper.pdf.

significant departure from the Protocol. According to this narrative, the Windsor Framework would not only address the problems associated with the Protocol but also 'fundamentally amend'[45] the Protocol. This attempt at narrative setting was ingrained in the text of the proposals itself. The decision to name the reform package after Windsor, the town in which the final agreement was reached, can be understood as part of this narrative setting exercise. The choice of Windsor, a place closely associated with the British royal family (as well as the fact that the negotiators met the UK monarch once the negotiations were concluded)[46] was perhaps not coincidental. As a branding exercise, it may have served the purpose of reinforcing the notion that this was an entirely separate arrangement to the Protocol, one which was more reflective of the UK government's priorities and interests.

This raises the question whether the changes brought about by the Windsor Framework are merely cosmetic or whether they represent a significant shift from the regime established in the Protocol. There is no doubt that Windsor Framework package is fairly comprehensive in its scope, addressing a variety of issues, such as the tariff regime, the treatment of SPS goods, taxation and the democratic scrutiny of EU laws applied in NI. However, whilst the breadth of the Windsor Framework is considerable, none of the proposals fundamentally disrupt the principal features that characterize the Protocol.[47]

Indeed, it is notable that only two of the many issues covered by the Windsor Framework actually required amendments to the text of the Protocol itself. Firstly, with respect to VAT and excise, the Decision of the EU-UK JC of 24 March 2023 (JC Decision) amends Annex 3 of the Protocol to provide NI more regulatory autonomy in setting tax rates.[48] For example, NI is now subject to fewer constrains when setting VAT rates on goods consumed in NI and can set lower duty rates on drinks produced by small producers. Secondly, the Windsor Framework amends the Protocol by establishing the so-called 'Stormont brake', a mechanism through which the NI assembly can, under strict conditions, object to the amendment or replacement of a particular EU law listed under the Protocol or the introduction of new EU law into the annexes of the Protocol.[49]

[45] See Hayward (n 4) 3.

[46] Sean O'Grady, 'How Monarchs Get Dragged into Politics' *The Independent* (27 February 2023) https://www.independent.co.uk/voices/windsor-framework-monarch-charles-sunak-brexit-b2290577.html.

[47] Fabbrini (n 30).

[48] Articles 3 and 4 of the Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework, 24 March 2023.

[49] Article 2 of the Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework, 24 March 2023.

The other reforms, however, do not alter the text of the Protocol whatsoever. Instead, they aim to affect the operation of the Protocol by working within the parameters established within the text of the Protocol. In some cases, the Windsor Framework employs the interpretative flexibility within the Protocol to mitigate some of the difficulties associated with its application. For example, the JC Decision expands the circumstances under which GB goods imported into NI will be considered 'not at risk' of being moved on to the EU and, in doing so, ensures that a wider category of GB goods can be moved to NI without being subject to EU tariffs.[50] The reform does not do away with the concept of goods at risk, nor does it remove the application of EU tariffs on imports that could potentially make their way to the EU internal market.

In addition to the reinterpretation of the 'at risk regime', the EU agreed to amend its own legislation so that goods originating from GB that are not deemed at risk of being moved to the EU are not only absolved from paying tariffs but also subject to fewer customs requirements.[51] Again, the aim here is to facilitate GB-NI trade but, in this instance, this is achieved through a unilateral amendment of EU law. This method is employed in other areas covered by the Windsor Framework. For instance, with respect to retail agri-food imports from GB into N, the EU has adopted a regulation (EU SPS Regulation) which exempts such goods from complying with a number (but not all) of EU laws listed under Annex 2 of the Protocol.[52] Besides the addition of this EU legislation into the annexes of the Protocol, the text of the Protocol is unchanged—the evidence of this is that agri-food goods produced in NI remain subject to all EU laws listed in the Protocol. But, as with the customs treatment of goods at risk, the EU has opted to waive the application of certain EU law requirements to reduce the regulatory burden on GB goods imported into NI. A similar approach is followed in the area of trade in medicines where the EU has legislated to allow, under certain conditions, medicines that are authorized by relevant UK authorities to access the NI market (EU Medicinal Products Regulation).[53]

[50] JC Decision, arts 5–13.

[51] Commission Delegated Regulation (EU) 2023/1128 of 24 March 2023 amending Delegated Regulation (EU) 2015/2446 to provide for simplified customs formalities for trusted traders and for sending parcels into Northern Ireland from another part of the United Kingdom [2023] OJ L149/26, 9 June 2023.

[52] Article 1 of Regulation (EU) 2023/1231 of 14 June 2023 on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland [2023] OJ L165/103, 29 June2023.

[53] Regulation (EU) 2023/1182 of 14 June 2023 on specific rules relating to medicinal products for human use intended to be placed on the market in Northern Ireland and amending Directive 2001/83/EC.

The reinterpretation of concepts enshrined in the Protocol and the amendment of EU legislation are the primary methods used in the Windsor Framework to reform the operation of the Protocol. These methods are largely in line with the EU's preferred approach to addressing the operational difficulties of the Protocol and so it should come as no surprise that they do not challenge the core principles of the Protocol. On the contrary, none of the trade-related reform proposals undermines the notion that, in order to participate in the EU internal market for goods, NI must remain subject to relevant EU customs and internal market rules and such laws must be given the same effect as if NI was part of the EU. Indeed, even where GB imported goods are exempted from complying with a subset of EU rules this is done via EU legislative amendments.

As far as the governance dimension of the Protocol is concerned, all the Windsor Framework proposals are aimed at improving the legitimacy of the Protocol by conferring to the NI assembly and NI stakeholders a role in the decision-making processes that underpin either application or implementation of EU law in NI. By contrast, the more ideologically driven demands for governance reforms focused on the role of the ECJ are completely absent from the Windsor Framework. None of the reforms envisaged under the Windsor Framework affect the continued application of EU law in NI, the legal effect of such laws produce in NI, or the continued jurisdiction of the ECJ. In short, rather than an attempt to challenge or replace the Protocol, the Windsor Framework can be viewed as a reaffirmation of the regime it establishes and is testament to its durability and flexibility.

4 The Windsor Framework and the Irish Sea Border

On the basis of the Protocol, NI is required to comply with EU customs and internal market laws in relation to goods to avoid the application of border checks within the island of Ireland. The Protocol reflects a choice made by its drafters to place NI, a constituent part of the UK, within the customs and regulatory sphere of the EU. Unrestricted trade in the island of Ireland was prioritized over unrestricted trade between GB and NI. It is an arrangement which has led to certain difficulties, notably by placing new barriers to GB-NI trade, but it is also one which has the benefit of simplicity. Under the original Protocol, the regulatory regime applicable to goods placed in NI is clear. There is, for instance, no doubt that goods can only lawfully be placed and marketed if it is shown that they comply with EU rules. Those that do not comply with

such rules are denied access to ensure the protection of the integrity of the EU internal market.

The Windsor Framework, in an attempt to reduce these trade barriers, removes some of the simplicity by lowering the customs and regulatory requirements applied to some GB imports into NI. One problematic consequence of this approach is that it will lead to a softening of the Irish sea border. And this softening has the effect of increasing the potential threats to the integrity of the EU customs union and internal market. For example, by relaxing the criteria used to determine whether a GB good is at risk of being moved on to the EU, the EU is accepting an increased risk that GB goods that do not fall under the scope of the EU-UK TCA are able to circumvent the payment of EU tariffs. Similarly, the lowering of the regulatory burden placed on retail agri-food and medicines imports from GB raises the possibility of GB goods making their way into the EU internal market despite not fully complying with EU regulatory standards.

The increased threat to the integrity and cohesion of the EU internal market is the sacrifice the EU agreed to make to facilitate trade between GB and NI. But to mitigate this risk, the concessions come with strings attached. The lowering of customs and regulatory compliance requirements are made conditional upon the implementation of enhanced monitoring, surveillance, data-sharing, and labelling requirements. With respect to the new 'at-risk' regime set out in the JC Decision, the UK is required to provide detailed monthly data to the EU volume and value of GB-NI and give the EU access to networks of information systems and databases.[54] If the UK fails to grant such access to the relevant data and network systems or seriously fails to manage the implementation, the EU has the right unilaterally to cease the application of the new at-risk regime established in the Windsor Framework.[55] In the context of the EU SPS Regulation, the UK is required to put in place a number of safeguards to ensure that agri-food imports that are exempted from fully complying with EU law are only placed on the market in NI for final consumers and do not infiltrate the EU internal market. To this end, such goods are to be prepacked and bear a marking 'Not for the EU'.[56] Furthermore, such goods must be dispatched from listed establishments in the UK and presented for official controls at specifically identified SPS inspection facilities in NI which must operate in compliance with EU law. The EU can suspend this new regime where there

[54] JC Decision, art 15.
[55] ibid art 15(2).
[56] ibid art 6; EU SPS Regulation, Annex 4.

is evidence that the UK is not fully complying with the conditions outlined above. For example, the EU's commitment to reduce inspection checks on agri-food goods from GB progressively is conditional upon the UK demonstrating that it has complied with the marking requirements.[57] More generally, if the UK fails to take measures to address serious and repeated infringements of its obligations under the SPS Regulation, the European Commission has the right to reimpose restrictions on GB-NI trade.[58]

A similar approach is followed in the EU Medicinal Products Regulation. Medicinal products which have been authorized by the competent UK authority can be lawfully placed in NI provided they bear an individual label attached to the packaging stating 'UK only'.[59] The UK is required to provide written guarantees that the placing of UK-authorized medicinal products does not increase the risk to public health in the internal market and that the labelling requirements are being complied with.[60] And, subject to prior consultation, the EU has the right to suspend this regime where there is evidence that the UK has not taken measures to address serious and repeated infringements of the Medicinal Products Regulation.[61]

The three examples above illustrate not only the conditional nature of the Windsor Framework package but also its inherent fragility. The reduction of barriers to GB-NI trade by the EU comes hand in hand with an increased onus on the UK to put in place multiple safeguards to protect the integrity of the internal market. Thus, the trade-off for the potential reduction of costs for businesses involved in GB-NI trade is an additional burden on the UK to implement and maintain mechanisms which mitigate the risks taken on by the EU. Because the trade concessions are unilaterally granted by the EU, the removal of these concessions is also a unilateral matter for the EU. Where the EU is unconvinced by the UK's efforts to safeguard the integrity of the internal market, the EU can unilaterally reimpose trade restrictions. The trade-related reforms under the Windsor Framework are therefore built on rather shaky ground: the continued relevance of the Windsor Framework reforms and its potential to herald a new chapter in EU-UK relationships will depend, to a large extent, on the UK's ability continuously to satisfy the EU that it has established and is adequately maintaining this complex network of safeguard mechanisms.

[57] EU SPS Regulation, art 4(3).
[58] ibid art 4(4).
[59] EU Medicinal Products Regulation, art 5.
[60] ibid art 8.
[61] ibid art 9.

The second problematic consequence of the softening of the Irish Sea Border is the knock-on effect it produces on trade within the island of Ireland. By permitting certain GB-originating goods which do not fully comply with EU law (eg retail agri-food goods and medicines) to be lawfully placed in the NI market, the Windsor Framework weakens the operation of the internal market within the island of Ireland. The Windsor Framework in fact creates a regime where certain goods can access NI but are precluded from making their way into the Republic of Ireland. Whilst this does not create a border marked by physical infrastructure, it is a regulatory border which increases the separation between the north and south of the island of Ireland post-Brexit. In short, by trying to solve an old problem the Windsor Framework has arguably created a new one.

5 Enhancing the Democratic Legitimacy of the Protocol

The Protocol creates a system of dynamic regulatory alignment whereby the UK (in relation to NI) is required to comply with EU law on trade in goods as it evolves over time. This system is governed, specifically, by two key provisions. First, Article 13(3) of the Protocol provides that EU laws listed in the annexes of the Protocol 'shall be read as amended or replaced'. This means that where the EU amends or replaces an EU law falling under the scope of the Protocol, such amendments or replacements apply automatically in NI. The UK and NI do not have the power to block the application of such legislation. Further, there is no procedure in place allowing NI to influence the decision-making process leading up to the amendment or replacement of EU laws. Secondly, Article 13(4) of the Protocol regulates the addition of new EU laws into the annexes of the Protocol. Unlike amendments or replacements, new EU laws will not apply automatically in NI. The provision stipulates that when the EU adopts a new EU act which falls under the scope of the Protocol, it must inform the UK of the adoption of the act. The parties can then request the holding of a JC meeting where the parties can discuss the impact of the new EU law on the operation of the Protocol. The JC then has two available options: (i) it can decide to adopt a decision adding the new EU act into the Protocol; or (ii) if no agreement is reached between the parties, it must examine all further possibilities to maintain the good functioning of the Protocol. Unlike amended or replaced EU legislation, Article 13(4) of the Protocol establishes a procedure which allows the UK to reject the application of new EU law in NI. However, there is still no role

for NI in the process and no formal process through which the UK (or NI) can influence the decision-making process for the adoption of the EU act.

The lack of input of NI authorities in the decision-making process underpinning the application of EU laws in NI has led to the criticisms relating to the democratic legitimacy of the Protocol. The Windsor Framework introduced two changes that are intended to address these concerns. The first, which will only apply if and once the NI executive and assembly are restored,[62] confers to the NI Assembly a gatekeeping role in the decision-making process by allowing it, under certain conditions, to object to the application of an amended or replaced EU law under the Protocol. The second is aimed at enhancing the 'input legitimacy' of EU laws applied in NI by establishing structures through which key NI actors can be consulted by the EU.

The gatekeeping function of the NI Assembly is addressed in the 'Stormont Brake',[63] arguably the one piece of the Windsor Framework reform package which received the most attention.[64] The Stormont Brake focuses on the procedure relating to the amendment and replacement of EU laws. It provides that, within two months from the official publication of the amendment or replacement of applicable EU law, a petition of concern can be sent to the UK government provided that it is supported by at least thirty Members of the Legislative Assembly (MLAs) of NI.[65] The Stormont Brake incorporates a number of requirements intended to avoid frivolous petitions. The petition of concern must demonstrate that: (i) the request not to apply the amended or replaced EU law is a measure of last resort, and a matter of exceptional circumstance; and (ii) the supporters of the petition carried out prior consultations with the UK and the NI executive, and sought to engage with the EU and other relevant parties before requesting to apply the brake.[66]

If the UK government is satisfied that these conditions are met it must examine whether: (i) the content or scope of the EU act as amended or replaced by the specific EU act significantly differs, in whole or in part, from the content or scope of the EU act as applicable before being amended or replaced; and (ii) the application in NI of the EU act as amended or replaced would have a significant impact specific to the everyday life of communities in NI in a way

[62] JC Decision, Annex 1 para 1.
[63] Colin Murray and Niall Robb, 'From the Protocol to the Windsor Framework' (2023) 74(2) NILQ 389.
[64] Fabbrini (n 30).
[65] JC Decision, art 2 and Annex I.
[66] ibid Annex I para 2.

that is liable to persist.[67] If so, the UK government has the discretion to decide whether or not to apply the amended or replaced EU law.

The parties have placed the threshold for the application of the brake at an extremely high level. The substantive requirements that apply to the MLA notification of concern are intend to ensure the notification cannot be made unless all available alternatives have been explored in the context of discussions held with the relevant stakeholders. The aim here is to avoid the frivolous overuse of this new procedural right by MLAs and create frameworks that would allow genuine concerns to be voiced and resolved without resorting to the non-application of EU law. The substantive requirements imposed by the UK government are even more stringent and create a formidable barrier to the use of the Stormont Brake. A recent review of EU acts falling under the Protocol that have been amended or replaced so far shows that such amendments tend to be technical exercises rather than transformative pieces of EU legislation.[68] Moreover, many of the amendments relate to EU acts that seek to ease customs and regulatory compliance checks on GB-NI trade.[69] From a practical perspective, then, it is difficult to imagine many scenarios where the amendment or replacement of an EU act will both significantly depart from the EU regulatory framework enshrined in the Protocol and impact the everyday lives of communities in NI in a manner that is liable to persist.

In tandem with these reforms, the UK decided to enact domestic legislation which requires the UK government to secure cross-community support before it can agree to the addition of new EU law under the Protocol.[70] Under this procedure, the UK government is required to notify the NI Assembly whenever the Protocol's Joint Committee is considering the addition of a new EU act into the annexes of the Protocol.[71] Within two weeks from the receipt of the notification, NI's First Minister and deputy First Minister may take an 'applicability motion' and, if the motion is approved by cross-community consent, the UK government can agree to the addition of the new EU act.[72] Where no cross-community consent is secured, the UK government is precluded from

[67] ibid art 2.

[68] Lisa Claire Whitten, 'Dynamic Regulatory Alignment and the Protocol/Windsor Framework: 30 Month Review' (July 2023) Post-Brexit Governance NI Explainer No 11 https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProjectPublications/Explainers/DynamicRegulatoryAlignmentandtheProtocolonIrelandNorthernIreland-TwoYearand6MonthReview/.

[69] ibid 10–11.

[70] The Windsor Framework (Democratic Scrutiny) Regulations 2023, Draft Regulations laid before Parliament under paragraph 8F(1) of Schedule 7 to the European Union (Withdrawal) Act 2018, for approval by resolution of each House of Parliament.

[71] ibid para 7.

[72] ibid para 19(6)

agreeing to the addition of the new EU act into the annexes of the Protocol unless it can show that exceptional circumstances apply (eg no fully functioning NI Assembly) or that the new EU act would not create a new regulatory border between GB and NI.[73]

Because the devolved authorities in NI are currently not functioning, this so-called 'Westminster Brake'[74] will not have an impact on the operation of the Protocol in the short to medium term. However, compared to the Stormont Brake, the conditions that have to be complied with in order to object to the application of new EU laws are relatively easy to satisfy. Not only does it allow one community to object validly to application of new EU law, but there is no requirement to demonstrate the existence of exceptional circumstances or that the new EU law significantly impacts on the daily lives of communities in NI. There is a risk then that those opposed to the Protocol may abuse this mechanism by persistently objecting to the addition of EU law as a matter of principle.

The question then becomes what happens if the UK refuses to apply amended/replaced EU law or add new EU acts to the Protocol. In such circumstances, under the conditions set out in Article 13(4) of the Protocol, the EU can take 'appropriate remedial measures'. No guidance is provided in the Protocol as to what such measures may consist of, although the term 'appropriate' and the fact that a measure is intended to 'remediate' a harm indicates that any EU measure must be proportionate.[75] Presumably, this would require that there be a direct connection between the decision not to apply the EU law and the remedial measure and that the latter must not go further than what is necessary to address the harm caused to the EU. However, in many instances, the failure to align with EU law will create concerns regarding the integrity of the EU internal market meaning that the appropriate remedial response would lead to the suspension or termination of the TCA.[76]

It is worth noting, however, that the mere decision to opt out from EU legislation would be problematic, on its own, irrespective of whether the EU chose to pursue the remedial measures route. If, for example, the UK decides to not incorporate EU law amendments or new EU acts into the Protocol, such decision may create an additional regulatory barrier to trade with the RoI. The

[73] ibid para 18(2).

[74] Steve Peers, 'Just Say No? The New 'Stormont Brake' in the Windsor Framework' *EU Law Analysis* (5 March 2023) http://eulawanalysis.blogspot.com/2023/03/just-say-no-new-stormont-brake-in.html.

[75] See Joris Larik, 'Supervision and Dispute Resolution' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022) 211–30.

[76] WA art 178(2).

brake mechanisms are, therefore, a potential source of regulatory disparities—other than those already established by the Windsor Framework in relation to GB-sourced retail agri-food and medical products—between the north and the south of the island of Ireland. This regulatory border could be problematic not only from a political perspective but also, given how highly integrated supply chains in the island of Ireland are,[77] from an economic perspective. This is another example of how by trying to address some of the criticisms levelled at the Protocol, the Windsor Framework creates new ones.

The risks associated with the refusal to apply new or amended EU laws means the second set of governance reforms—that is, those aimed at giving NI authorities an opportunity to be consulted on and influence the EU decision-making process—take on an increased importance. If the parties are to avoid situations where EU laws are consistently being blocked from being applied in NI, securing buy-in from NI authorities before they enter into force becomes paramount. Prior to the conclusion of the Windsor Framework, the UK had already committed to ensuring that representatives of the NI executives were part of the UK delegation in meetings of the Protocol Specialised Committee.[78] In addition to this, the Windsor Framework includes a Joint Declaration where the EU and the UK outline their commitment to 'organise meetings of the relevant joint bodies on a regular basis in order to foster dialogue and engagement'.[79] Such meetings will provide a forum for 'exchanges of views on any future United Kingdom legislation regarding goods of relevance to the operation of the Windsor Framework'[80] and 'allow the United Kingdom and the Union to assess the potential impact of that future legislation in Northern Ireland, anticipate and discuss any practical difficulties at stake'.[81]

Beyond the involvement of NI authorities, the Joint Declaration also envisages the regular engagement of NI stakeholders (businesses and civic society groups) in Specialised Committee meetings, as well as in expert sub-groups.[82] The European Commission has also separately committed to ensure enhanced

[77] Martina Lawless, 'Firms and Trade on the Island of Ireland' (2019) XLVIII Journal of the Statistical and Social Inquiry Society of Ireland 211.

[78] UK Government, 'The New Decade, New Approach Deal' (January 2020) 47 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf. See also David Phinnemore, 'The Specialized Committee on the Protocol on Ireland/Northern Ireland' *UK in a Changing Europe* (28 April 2020) https://ukandeu.ac.uk/the-specialised-committee-on-the-protocol-on-ireland-northern-ireland/.

[79] Joint Declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on dialogue and goods, 24 March 2023.

[80] ibid.

[81] ibid.

[82] ibid.

engagement with NI stakeholders.[83] This is to be achieved by: (i) delivering an annual presentation of upcoming policy and legislative proposals; (ii) holding information sessions on new EU initiatives and additional workshops; (iii) organizing public consultations involving NI stakeholders; and (iv) providing overviews of Northern Ireland stakeholders' input into consultations.

These proposals show a commitment from both parties to establish and maintain fora through which NI actors can be meaningfully engaged on a continuous basis regarding the implementation of the Protocol. The commitments are, however, mostly political at this stage and are yet to be fully fleshed out. For example, there is no clear definition of what constitutes a stakeholder and it is unclear how often and regularly committee meetings and other engagement activities are to be held. Providing clarity on such questions is crucial as, in the absence of formal cooperation structures where key stakeholders are allowed to feed in their views and expertise regularly in the decision-making processes relating to the implementation of the Protocol and application of EU laws, the likelihood is that the operation of the Protocol will remain a highly contested and fragmented space.

6 Conclusion

The announcement of the Windsor Framework reform package was an important moment in EU-UK post-Brexit relations.[84] It signalled a willingness from both sides to turn a page on what has hitherto been the most fractious and contested aspect of that relationship: NI's post-Brexit trade and governance regime. Viewed from that perspective, there is little doubt that the Windsor Framework is a potentially significant achievement. There is also little doubt that the reforms stand to make a potentially significant difference for businesses involved in GB-NI trade, as well as the operation of the governance structures of the Protocol.

But, as this chapter has sought to demonstrate, there are also risks attached to many of the Windsor Framework reforms. These reforms can be placed as part of a continuum, stretching back to the adoption of the original grace

[83] European Commission, Commission statement on Enhanced engagement with Northern Ireland stakeholders, 27 February 2023 https://commission.europa.eu/system/files/2023-02/statement%20stakeholders%20engagement.pdf.

[84] House of Lords European Affairs Committee, 'Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: The Windsor Framework', 7th Report of Session 2022-23, 25 July 2023 https://publications.parliament.uk/pa/ld5803/ldselect/ldeuaff/237/23702.htm.

periods, whereby the parties have sought to reduce barriers at the Irish Sea Border by opting not to apply EU law obligations derived from the Protocol. The Windsor Framework formalizes this practice. This is achieved through the amendment of EU rules that reduce the customs and regulatory burden on some GB goods moved to NI and through the adoption of several safeguard mechanisms which are intended to ensure that such GB goods do not make their way onto the EU internal market. The success of the Windsor Framework will depend on the ability of the UK to satisfy the EU that the safeguard mechanisms are being implemented and are protecting the integrity of the EU internal market. Unfortunately, the successful implementation of the Windsor Framework may itself raise new challenges, most notably the establishment of a regulatory border within the island of Ireland. Some of the frictions placed on East–West trade seem to have been moved to North–South trade. The Windsor Framework is, therefore, unlikely to mark the end of the controversy surrounding the Protocol. One can hope, however, that the more positive dynamic that led to the conclusion of the Windsor Framework translates into a more constructive approach by the parties to the management and implementation of the Protocol.

PART II
FREE TRADE AGREEMENT

5

Goods, Customs, and Rules of Origin

Niall Moran

1 Introduction

This chapter focuses on trade in goods, the backbone of the Trade and Cooperation Agreement (TCA) between the European Union (EU) and the United Kingdom (UK), and indeed any trade agreement.[1] While the TCA provides for tariff and quota-free trade, other requirements take the gloss off this label to some extent. Two of the main areas where producers face hurdles include compliance with non-tariff barriers and rules of origin. This chapter examines the status quo in these areas, what can be done to deepen cooperation, and whether or not this is likely to happen. The UK has left the EU Single Market; however, as it explores its newfound 'independent' trade policy, policymakers must balance the pursuit of new opportunities with maintaining a deep trading relationship with the EU, its most significant neighbour and trading partner.[2]

EU-UK cooperation and a close trading relationship is extremely important to both parties. It is hoped that recent trends in the direction of increased EU-UK cooperation will continue and this chapter explores possibilities in the area of trade in goods.

Part Two, Heading 1, Title 1 of the TCA, entitled 'Trade in Goods', is composed of five chapters on: (1) national treatment and market access; (2) rules of origin (RoOs); (3) sanitary and phytosanitary (SPS) measures; (4) technical barriers to trade (TBT); and (5) customs and trade facilitation. This chapter examines the above-mentioned provisions, and is structured as follows. Section 2 sketches the background and gives some context to this chapter;

[1] Trade in goods comes under Title 1 of the TCA's 'Trade' Heading. Title 1 makes up 108 out of 783 provisions. Despite its understated location in Part 2 (of 6), Heading 1 (of 6), Title 1 (of 12) of the TCA, Title 1 actually makes up about 14% of the entirety of the TCA's provisions and this belies its importance.

[2] See Giorgio Sacerdoti and Paola Mariani, 'The Negotiations on the Future Trade Relations' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume II. The Withdrawal Agreement* (OUP 2020) 211–34, 219–22.

Niall Moran, *Goods, Customs, and Rules of Origin* In: *The Law & Politics of Brexit*, Volume V. Edited by: Federico Fabbrini, Oxford University Press. © Niall Moran 2024. DOI: 10.1093/oso/9780198908289.003.0005

section 3 examines RoOs, discussing cumulation and how the current rules affect the place of UK manufacturers in EU supply chains, in particular in relation to electric vehicles. Section 4 examines non-tariff barriers (NTBs), the implementation of current rules, and the prospects for an EU-UK veterinary agreement. Finally, section 5 concludes.

2 Background

Brexit and the election of Trump were dual blows to globalization in 2016, as both signalled a turn towards deglobalization.[3] For the Trump administration, the primary antagonist was China; for Brexiteers, the EU was the focus of their ire. In examining the trajectories of these concurrent phenomena, it is perhaps a minor miracle that EU-UK trade in goods has remained as deep and stable as it has.

Trump was elected on a protectionist agenda and, starting in January 2018, the Trump administration enacted a wide range of tariffs against China, as well as against other countries. By late 2019, US tariffs against Chinese imports totalled roughly US$350 billion, while Chinese tariffs against US exports totalled around US$100 billion.[4] The tariffs against China were maintained by Trump's successor, Joe Biden, and there are now calls for far more radical tariffs. Trump, the clear front-runner for the Republican nomination for 2024, has called for a 'ring around the collar' of the US economy with tariffs set at 10 per cent 'automatically' for all countries.[5] Set against this backdrop of the US-China trade war, discussions of whether or not the UK will join the Pan-Euro-Mediterranean (PEM) Convention seem welcomingly prosaic.

After years of brinkmanship over a 'no-deal' Brexit, followed by threats of triggering Article 16 of the Northern Ireland Protocol,[6] EU-UK trade is in a relatively good position. The TCA parties trade on the basis of a zero-tariff, zero-quota trade agreement.[7] Relations are also at a recent high following the

[3] See Michael Cox, 'Brexit and the Crisis of the Transatlantic Relationship' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 31–48

[4] Pablo D Fajgelbaum and Amit K Khandelwal, 'The Economic Impacts of the US–China Trade War' (2022) 14 Annual Review of Economics 205 https://www.annualreviews.org/doi/pdf/10.1146/annurev-economics-051420-110410 (accessed 31 August 2023).

[5] Jeff Stein, 'Trump Vows Massive New Tariffs if Elected, Risking Global Economic War' *Washington Post* (22 August 2023) https://www.washingtonpost.com/business/2023/08/22/trump-trade-tariffs/ (accessed 31 August 2023).

[6] See Robert Howse, 'Safeguards: 'This Is Not an Exit'—Article 16 in the Ireland/Northern Ireland Protocol' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV* (OUP 2022) 252–70.

[7] It is worth noting that US-China trade also hit record highs in 2022, demonstrating the robustness of the international trading system. See Arendse Huld, 'US-China Trade in Goods Hits New Record in 2022' *China Briefing* (15 February 2023) https://www.china-briefing.com/news/

conclusion of the Windsor Agreement, which saw the UK government scrap the NI Protocol bill, and the Commission suspend infringement proceedings against the UK.[8]

Conservative Party rhetoric is also less hostile towards the EU and there is reason to believe a Labour government would herald a further thawing in the EU-UK relationship. Although the Labour Party's rhetoric is cautious for now, there are promising indications that if elected it would use the 2026 TCA review to reduce trade barriers with the EU.[9]

This chapter examines in some depth the regression in EU-UK trade in goods that the TCA represents compared to the status quo ante; it does this mainly with reference to NTBs and RoOs by examining possible paths towards increased cooperation. While there has been a regression in the level of EU-UK economic integration in these areas, it must always be borne in mind that things could have been much worse had the TCA not been concluded.

3 Rules of Origin

This section considers the current RoOs under the TCA and how they may be reformed.

3.1 The Current Provisions on Rules of Origin under the TCA

The TCA contains general RoOs, which are covered in Part Two, Title 1, Chapter 2, under Articles 37–68, as well as product-specific RoOs, which are discussed below. While the TCA provides for tariff-free trade between the EU and UK,[10] to benefit from this is contingent upon compliance with rules of

us-china-trade-in-goods-hits-new-record-in-2022-what-does-it-mean-for-bilateral-ties/#:~:text=relations%20and%20trade.-,US%2DChina%20trade%20in%20goods%20hit%20a%20new%20record%20in,%24658.8%20billion%20set%20in%202018 (accessed 31 August 2023). That said, the impact of the UK leaving the Single Market at the end of 2020 has been very difficult to determine given other factors such as Covid-19 and the Russo-Ukrainian war. The EU Commission's implementation reports on the EU-UK TCA for 2021 and 2022 both state that it is too early to determine the long-term economic impact of Brexit. See Isabelle Ioannides, 'Trade and Cooperation Agreement Two Years on: Unpacking Early Evidence' (August 2023) European Parliament Research Service PE 747.433, 33.

[8] See Federico Fabbrini, 'Introduction' in this volume.

[9] David Lammy Speech to Chatham House, 24 January 2023 https://labour.org.uk/press/david-lammy-speech-to-chatham-house/ (accessed 31 August 2023).

[10] See section 4 of this chapter for a detailed discussion on the TCA's provisions relating to tariff-free trade. The relevant provisions are found in Part Two, Heading 1, Title 1, Chapter 1 of the TCA (arts

origin requirements. Goods being exported must be deemed to originate in either the EU or the UK. In determining the 'economic nationality' of a good, trade agreements like the TCA set out RoOs which stipulate the maximum value of materials originating outside the two parties a good can contain while still claiming EU or UK origin. Under the TCA, the permitted value for materials originating outside the EU or UK varies from 30 per cent to 70 per cent for exporters looking to benefit from tariff-free trade. The former percentage applies to goods like battery packs (from 2027), while the latter applies to articles of cement, plaster etc. If a UK producer is exporting cement to the EU, it will only be considered to be of UK origin if a maximum of 70 per cent of its value originates outside the UK or EU.

For a good to benefit from preferential tariff treatment under a trade agreement, the good must originate in the country of one of the parties to the trade agreement.[11] There are a number of ways of calculating origin and 'cumulation' defines the extent to which inputs from other countries can be counted as originating in the producer's country for the purpose of obtaining originating status and benefiting from preferential tariff treatment. There are three main varieties of cumulation—full, diagonal, and bilateral—in descending order of economic integration. Bilateral cumulation (the type provided for under the TCA) only allows producers to use materials originating in either the EU or the UK as if they originated in their own country. Diagonal and full cumulation allow for material inputs to goods from third countries with whom both parties have a free trade agreement (FTA) and operate the same rules of origin to be treated as originating in the country of the producer and thus to be eligible for preferential market access.[12] Full cumulation is distinct from diagonal cumulation in that it allows the inclusion of inputs from any territory.

During TCA negotiations, the UK sought diagonal cumulation but the EU rejected this. EU FTAs only provide for diagonal cumulation in respect of

15–36). Article 21 TCA for example states that 'customs duties on all goods originating in the other Party shall be prohibited [except as otherwise provided for in this Agreement]'.

[11] To take the example of a UK fashion company exporting shirts, it must determine whether its products qualify for preferential treatment under the TCA based on whether its products meet certain criteria. These include whether a certain percentage of the value of the product originates from the UK or the EU, taking into account the source of the fabric and other materials, where the manufacturing of the shirt takes place, where it is designed etc. The more inputs there are in a product, the more difficult it is to track the origin of each input in the process and there is a risk that smaller traders will export under non-preferential rates if qualifying for preferential treatment is overly complex.

[12] See European Commission, 'A User's Handbook to the Rules of Preferential Origin used in trade between the European Community, other European Countries and the countries participating to the Euro-Mediterranean Partnership', 10 http://aei.pitt.edu/67559/1/handbook_pref.origin.pdf (accessed 22 August 2023).

Pan-Euro-Mediterranean (PEM) Convention signatories.[13] While the TCA only provides for bilateral cumulation,[14] the EU operates full cumulation across the European Economic Area (EEA) and diagonal cumulation for all contracting parties of the PEM Convention. This Convention includes twenty-five other countries in the Euro-Mediterranean region, ranging from Morocco to Israel, Georgia to Ukraine. Post-Brexit, the UK is no longer bound by the PEM Convention. This decision to provide only for limited cumulation will impact EU and UK industries that are particularly exposed to changes in rules on cumulation of origin.

This question of RoOs and the value of materials originating outside the parties has been the subject of considerable media coverage in relation to electric vehicles (EVs).[15] Annex 5 of the TCA sets out changes to rules of origin relevant to EVs that are due to be phased in from the end of 2023 until 2027.

EVs are just one area affected by post-Brexit changes to rules of origin. The TCA contains general rules of origin, which are covered in Part Two, Title 1, Chapter 2, under Articles 37–68. The TCA also contains product-specific RoOs in Annex 3, as can be seen in the above example. The new status quo for RoOs has had a significant impact on a whole host of other areas in these two areas. The next section delves into this impact and the macro picture in light of these newly applicable RoOs, and options for amending the TCA.

3.2 Options for Amending the Current Rules

On 21 December 2023, the EU and the UK agreed to a three-year extension to the TCA's RoOs for EVs and batteries. This agreement was important for a number of reasons. First, an extension to the transitional rules in this area was the simplest solution for avoiding the looming cliff edge and 10 per cent tariffs

[13] See European Commission, Customs, International affairs, Origin of the Goods, General aspects of preferential origin, Arrangements list https://taxation-customs.ec.europa.eu/customs-4/international-affairs/origin-goods/general-aspects-preferential-origin/arrangements-list_en (accessed 22 August 2023).

[14] TCA, art 40 on 'Cumulation of origin'.

[15] See eg 'Brussels Urges UK to Join Trade pact to ease risk of post-Brexit car Tariffs' *Financial Times* (1 June 2023) https://www.ft.com/content/465b8ee1-7d32-4c62-bbbc-de6a3ed9d185; 'VW Is on a Hunt for Resources to Remove China From Its EV Batteries' *Wall Street Journal* (4 June 2023) https://www.wsj.com/articles/vw-is-on-a-hunt-for-resources-to-remove-china-from-its-ev-batteries-663ee99; 'UK manufacturers warn Brexit is undermining Their place in EU supply chains' *Financial Times* (27 June 2023) https://www.ft.com/content/2f99a9c3-5077-4c31-ada4-1987a1ad6921; 'Brussels to Stick with Plan for Post-Brexit Tariffs on UK EU Imports from 2024' *Financial Times* (5 July 2023) https://www.ft.com/content/71fab292-2944-4521-a4db-7a1390903325; 'Brexit Cliff-edge Has Electric Carmakers Spooked as Talks Falter' *Politico* (3 July 2023) https://www.politico.eu/article/brexit-europe-carmakers-spooked-as-discussions-over-ev-rules-falter/ (accessed 30 September 2023).

Table 1: Changes to the maximum value of non-originating materials for EV-related products under Annex 5 of the TCA

	From entry into force of TCA until 31/12/2023 %	1/1/2024 to 31/12/2026 %	From 1/1/2027 %
Battery packs	70	40	30
Battery cells	70	50	35
Electric/hybrid vehicles	60	55	45

that were due to commence on 1 January 2024. Annex 5 of the TCA sets out changes to RoOs relevant to EVs that were due to be phased in from the end of 2023 to 2027. The extension[16] essentially removed the third column, as illustrated in Table 1 below, with the values in column 2 remaining in place until 2027. The UK had been clear about its desire to maintain the transitional rules of phase one and this stance was supported by industry.[17] The Commission had stated that it had no intention of revisiting these rules[18] and the EU preference appears to have been for the UK to join the PEM Convention.[19]

EVs are an emerging market that is unusually exposed to RoOs as the price of the battery in an EV is a significant proportion of its overall value and at least 30 per cent of its value.[20] If this second phase had begun to apply in January 2024, the permissible level of non-originating materials for EVs and batteries would have decreased significantly. The changes that were due to come in would have

[16] Annex to the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Partnership Council established by 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 as regards the transitional product-specific rules for electric accumulators and electrified vehicles <https://commission.europa.eu/system/files/2023-12/Annex.pdf?utm_source=substack&utm_medium=email (accessed 22 December 2023

[17] See ACEA letter to the European Commission on battery rules of origin, 8 June 2023 <https://www.acea.auto/news/acea-letter-to-the-european-commission-on-battery-rules-of-origin/ (accessed 20 August 2023.

[18] European Commission, Report from the Commission to the European Parliament and the Council on the implementation and application of the Trade and Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland, 1 January–31 December 2022, COM(2023) 118 final, 15 March 2023, 4 https://commission.europa.eu/system/files/2023-03/COM_2023_118_en.PDF (accessed 1 September 2023).

[19] Andy Bounds and Alice Hancock, 'Brussels Urges UK to Join Trade Pact to Ease Risk of Post-Brexit Car Tariffs' *Financial Times* (1 June 2023) https://www.ft.com/content/465b8ee1-7d32-4c62-bbbc-de6a3ed9d185 (accessed 1 September 2023).

[20] ACEA recently claimed that for passenger cars, the battery makes up between 35 per cent and 45 per cent of the cost of the vehicle, while for a heavy duty truck it is between 45 per cent and 50 per cent of the cost. See 'EU Exports of Electric Cars to UK Put at Risk by Brexit Trade Deal' *Guardian* (18 June

served neither industry nor the parties to the TCA in any real sense, not to mention the contradictory message that would be sent by introducing tariffs for EVs but not internal combustion engine (ICE) vehicles. Failure to reach an agreement would have been harmful to both EU and UK car makers given the current shortage of battery production in Europe. The tariffs that would have resulted in this area would have resulted in significant trade diversion and billions in additional costs that would have mainly been passed on to the consumer. This section now considers the options for amending the TCA's RoOs in relation to EVs.

While the changes planned for 2027 may not necessarily serve either party, this does not mean a further extension should be expected. Such is the reality after Brexit and a consequence of the UK no longer being bound by the PEM Convention. Indeed, the current extension is complemented by a 'lock-in mechanism', 'which ensures that the full regime for local content requirements … will apply as from 2027 … [and] no changes will be possible before 2032'.[21] To date, car makers have tended to source these batteries from outside the EU or the UK. China currently dominates global production of refined battery materials used in EV batteries.[22] The aim of the changes in these rules is to 'gradually force' car producers to sources batteries locally.[23] Consequently, if by 2027, EU and UK car producers cannot source batteries locally, their exports will face tariffs of 10 per cent in the absence of a further EU-UK agreement in this area. It is estimated that the UK EV market will be worth close to €30 billion annually by 2026.[24] While the TCA was hailed as a trade agreement of 'unprecedented ambition',[25] in this area at least, its terms will leave EU automakers behind their counterparts in Japan and other countries unless a deal is reached due to differences in domestic battery production. While maintaining the current transitional rules provides a temporary solution for automakers, the question arises as to the options for a longer term solution.

2023) https://www.theguardian.com/politics/2023/jun/18/eu-exports-of-electric-cars-to-uk-put-at-risk-by-brexit-trade-deal (accessed 21 August 2023).

[21] Council of the EU Press Release, 'EU-UK relations: Council Greenlights Extension of Current Rules of Origin for Electric Vehicles Until the End of 2026' <https://www.consilium.europa.eu/en/press/press-releases/2023/12/21/eu-uk-relations-council-greenlights-extension-of-current-rules-of-origin-for-electric-vehicles-until-the-end-of-2026/ (accessed 22 December 2023

[22] William Boston, 'VW Is on a Hunt for Resources to Remove China From Its EV Batteries' (Wall Street Journal, 4 June 2023) <https://www.wsj.com/articles/vw-is-on-a-hunt-for-resources-to-remove-china-from-its-ev-batteries-663ee99 (accessed 21 August 2023.

[23] Sam Lowe, 'Most Favoured Nation: PEM to the Rescue?' *Edition 95* (2 June 2023) https://mostfavourednation.substack.com/p/most-favoured-nation-pem-to-the-rescue (accessed 23 August 2023).

[24] See 'EU Exports of Electric Cars to UK Put at Risk by Brexit Trade Deal' (n 20).

[25] European Commission, 'EU-UK Trade and Cooperation Agreement: A new relationship, with big changes—Brochure' 24 December 2020 https://commission.europa.eu/publications/

There seem to be three options for reforming the TCA's RoOs beyond 2027: (1) allowing the final phase of the TCA to occur, whereby the permissible level of non-originating materials for EVs and batteries decreases significantly; (2) the UK joins the PEM Convention; or (3) an attempt to extend rules further whereby the level of non-originating materials remain at a higher level. Option 1 is the default if no agreement can be reached. On the second option, the UK has not ruled out joining the PEM Convention with Minister for International Trade Ranil Jayawardena stating in 2021 that 'HM Government has not sought to accede to the PEM Convention at this time'.[26] The primary issue with joining the PEM Convention is that it does not appear to solve the problem at hand. Even if the UK were to join, China remains the primary source for refined chemicals. On option 3, the 'lock-in mechanism' makes the possibility of further changes to these rules before 2032 more difficult, although this may have to be re-examined at a later date.

If or when battery production takes place at scale in the EU or UK, this issue will be greatly alleviated for EU-UK trade in EVs. While the EU is wary of anything that resembles cakeism or cherry-picking, the current extension is a good example of an area where EU-UK cooperation can occur and reap mutual benefits. Both sides have shown a willingness to listen to industry and build on recent momentum in EU-UK relations.

There is a strong case to be made for integrating EU and UK supply chains in this area. While the inclusion of the UK in European supply chains had been a given for decades, the reality of Boris Johnson's Brexit deal is that there are now significant challenges for UK companies wishing to remain part of such arrangements.

3.3 EU-UK Supply Chains Post-divorce

The EU Single Market represents the deepest level of economic integration among nations in history, certainly at such a scale. The TCA was an

eu-uk-trade-and-cooperation-agreement-new-relationship-big-changes-brochure_en (accessed 20 August 2023).

[26] Letter from Minister for International Trade Ranil Jayawardena MP to Sir William Cash MP, Pan-Euro-Mediterranean Convention on Rules of Origin (13169/19) and Proposed Council Decisions to Amend Rules of Origin in Trade Agreements between the EU and PEM Partner Countries COM(20) 389–98, 406, 412–19 and 425–26) 3 November 2021 https://webarchive.nationalarchives.gov.uk/ukgwa/20220322085221/https://europeanmemoranda.cabinetoffice.gov.uk//files/2021/11/DIT-Jayawardena-Cash-13169-19-PEMConvention-response-3Nov2021_(2).pdf (accessed 21 August 2023).

unprecedented divorce agreement between major economies that had been so interlinked. For trade in goods, while this was the first zero-tariff, zero-quota trade agreement the EU has agreed to, the outcome was not particularly ambitious in that it represented a significant regression from the status quo ante, eg in areas such as RoOs and NTBs.

Geopolitics and geoeconomics are trending towards increased cooperation with like-minded allies and, in this sense, Brexit was poorly timed and increasingly appears anachronistic.[27]

The UK must balance the pursuit of new opportunities post-Brexit with the potential losses that may result from loosening its close ties to the EU. On RoOs, the UK must be careful about undermining the ability of UK manufacturers in particular to remain deeply interwoven in EU supply chains.

Brexit forced firms to reconsider the carrying out of certain processes in the UK/EU, where processes were deemed 'insufficient' under Article 43 TCA to prevent goods qualifying for a zero tariff. Such goods have lost their EU/UK status under the TCA's RoOs. Preserving a fish through freezing is deemed 'insufficient production', whereas smoking a fish is deemed to give it special or different characteristics. If there is insufficient processing, for example, goods of EU origin imported tariff-free cannot be re-exported back to the EU tariff-free and there is an incentive to onshore these processes. An exception to this is where goods merely transit through the UK, for instance on their way to Ireland, in which case they are not deemed to have left the EU. Article 20 TCA provides for freedom of transit for goods. Article 107 TCA applies the principles of the Common Travel Convention, whereby goods merely passing through the territory of the other party are not subject to tariffs. The House of Lords called for a 'negotiated exemption with the EU' that would allow non-processed goods originating in the EU to be re-exported tariff-free.[28] While permitting such practices could be deemed 'common sense', the fact remains that the UK is a third country that is not even a contracting party to the PEM Convention.

For the UK to be integrated into EU supply chains, components must be able to move back and forth seamlessly. Nearly 50 per cent of UK manufacturing exports to the EU are 'intermediate' in nature and these products feed into

[27] See the chapter by Harold James in this volume.

[28] House of Lords European Union Committee, 'Beyond Brexit: Trade in Goods', 25 March 2021, HL Paper 249, para 75.

EU supply chains.[29] The risk is that supply chains will shift away from the UK due to friction at the border and regulatory uncertainty. The position of UK companies in EU supply chains will become increasingly precarious as the UK diverges from EU rules in areas like chemicals. As underlined by leading figures in UK manufacturing, high-value sectors such as machinery, chemicals, and computer equipment manufacturing make multi-decade investments and there is a question as to whether the UK would win such investments today.[30]

3.4 The Pan-Euro-Mediterranean (PEM) Convention

As mentioned in section 3.1 above, the UK sought diagonal cumulation during TCA negotiations, but the EU rejected this. EU FTAs only provide for diagonal cumulation in respect of PEM Convention signatories[31] and the UK is no longer bound by the PEM Convention. As the TCA only provides for bilateral cumulation, this will give rise to issues for UK companies that wish to be embedded in EU supply chains, in particular supply chains involving non-EU contracting parties of the PEM Convention.

What benefit is there for the EU to having the UK in the PEM Convention? The Convention integrates participants into its system of cumulation of origin creating a single zone where diagonal cumulation applies. The EU appears not to want to make an exception to its current position of only providing for diagonal cumulation in respect of PEM Convention signatories.

Extending liberal cumulation rules to the UK raises concerns of free-riding,[32] which would arise when imports from a non-TCA party enjoy preferential trade terms.[33]

Benefits for the UK of joining the PEM Convention include simplification of the transportation of goods. With the UK outside the PEM Convention, groupage problems arise for hauliers whereby if one consignment of goods

[29] Peter Foster 'UK Manufacturers Warn Brexit Is Undermining Their Place in EU Supply Chains' *Financial Times* (27 June 2023) https://www.ft.com/content/2f99a9c3-5077-4c31-ada4-1987a1ad6921 (accessed 23 August 2023).

[30] Peter Foster, 'UK Manufacturers Warn Brexit Is Undermining Their Place in EU Supply Chains' *Financial Times* (27 June 2023) https://www.ft.com/content/2f99a9c3-5077-4c31-ada4-1987a1ad6921 (accessed 23 August 2023).

[31] See European Commission, Customs, International affairs, Origin of the Goods, General aspects of preferential origin, Arrangements list https://taxation-customs.ec.europa.eu/customs-4/international-affairs/origin-goods/general-aspects-preferential-origin/arrangements-list_en (accessed 22 August 2023).

[32] Issam Hallak, 'EU-UK Trade and Cooperation Agreement: An Analytical Overview' European Parliament PE 679.071 (2021) 8.

[33] On the maintenance of a level playing field in the TCA see the chapter by Andrea Biondi in this volume.

does not have the correct paperwork, an entire lorry may have to be returned. All of this paperwork is of course time-consuming.

Another reason relates to the PEM Convention's rules on direct transport. These rules apply to UK goods in transit through the EU, eg goods on their way by land to Norway. According to Article 12 of the Convention:

> [P]roducts constituting one single consignment may be transported through other territories with … trans-shipment or temporary warehousing in such territories, provided that they remain under the surveillance of the customs authorities in the country of transit or warehousing and do not undergo operations other than unloading, reloading or any operation designed to preserve them in good condition.

Consignments in transit may be split provided they remain under the surveillance of the customs authorities in the Member State of transit.[34] These restrictions would be lifted by UK accession to the PEM Convention.

A final major benefit of joining the PEM Convention for the UK is that it would mean taking a significant step towards securing the future of UK manufacturers in European supply chains, as outlined above.

In terms of the reasons why the UK has not sought to join the PEM Convention, these are not very clear. The PEM Convention covers twenty-three contracting parties, counting the EU as a single party. The UK may not want harmonized rules of origin with all of these parties as: (1) signing up to the PEM Convention, where the EU has a leadership role, might feel more like the act of a rule-taker rather than a country reaping the benefits of a newly acquired 'independent' trade policy; (2) it would restrict the UK's ability to amend the rules of origin applicable to its relations with each of the contracting parties; and (3) it would restrict the UK's ability to negotiate FTA terms freely with each party.

The UK may be of the view that it can negotiate arrangements more suited to the needs of UK manufacturers dealing with individual parties to the PEM Convention. UK industry representatives have suggested a mechanism providing for diagonal cumulation between 'the UK, Switzerland and other shared preferential trade partners'.[35] A UK led alternative rules

[34] Norwegian Customs Service, 'Brexit : Updated Information for Business', 23 February 2021 https://www.toll.no/en/services/regulations/news-from-norwegian-customs/brexit---updated-information-for-business/ (accessed 31 August 2023).

[35] UK Food and Drink Federation, 'Switzerland Trade Priorities', 2 https://www.fdf.org.uk/globalassets/our-focus/trade/trade-negotiations/switzerland-trade-priorities.pdf (accessed 31 August 2023).

of origin Convention is an interesting suggestion, but practically the gains of this would have to be weighed against the simplicity of joining the PEM Convention and whether the vision for this is sufficiently compelling to pursue and sell to third countries.

In brief, none of these arguments against joining the PEM Convention is overly convincing and UK accession to it may only be a matter of time if reason and self-interest (as well as mutual interest) triumph over ideology. A final point is that if the UK were to join the PEM Convention, investment would have to be made in training customs officials and helping traders understand how to take advantage of its terms. There is a risk that smaller traders will export under non-preferential rates if qualifying for preferential treatment is overly complex.

If the UK were to apply to join the PEM Convention, its Article 5 provides that a third country may become a contracting party where it has a free trade agreement in force 'providing for preferential rules of origin with at least one of the Contracting Parties'. This would not be an issue for the UK as the TCA is one example of such an agreement. Obstacles to the UK joining the PEM Convention include its Article 5(4), which provides that 'One single Contracting Party may not oppose that decision [inviting a third party to accede]'. Although it may seem unlikely, there is a possibility that more than one of the contracting parties from such a broad group may oppose UK accession. A further complication is the ongoing revision of the Pan-Euro Mediterranean Convention.[36] UK accession might be treated favourably given its previous place within the Convention and the fact that the PEM Convention continues to apply in part of its territory; the Convention applies under the Northern Ireland Protocol, which provides for the application of the EU's customs code in Northern Ireland.[37]

4 Market Access for Goods and Non-tariff Barriers

This section examines market access rules and barriers to trade under the TCA. It considers the content of the current rules and options for an EU-UK agreement on SPS that would reduce the frequency of border checks.

[36] See Council of the European Union, List of working papers (WK) distributed in the Working Party on Customs Union in the period January–June 2023, WK 6119 2023 INIT https://data.consilium.europa.eu/doc/document/ST-11462-2023-INIT/en/pdf (accessed 31 August 2023).

[37] See Northern Ireland Protocol, Annex 2, Pt 1.

4.1 The Current Rules under the TCA

Articles 15 to 36 of the TCA concern 'National Treatment and Market Access for Goods'.[38] This chapter includes standard market access provisions on freedom of transit, export restrictions, etc. Other provisions include classification of goods (Article 18), freedom of transit (Article 20), prohibition of customs duties (Article 21), import and export restrictions (Article 26), import and export licensing procedures (Articles 28 and 29), customs valuation (Article 30), tariff rate quotas (Article 33), and cooperation on circumvention of customs legislation (Article 34). Article 21 TCA, however, contains a novel and important provision, which plainly states that 'customs duties on all goods originating in the other Party shall be prohibited [except as otherwise provided for in this Agreement]'. National treatment[39] and trade remedies are covered under Articles 19 and 32 of the TCA, respectively. As is commonplace in free or preferential trade agreements, many of these provisions more or less incorporate the language of the WTO agreements. An example of this is found in Article 19 TCA on national treatment, which provides:

> Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994 including its Notes and Supplementary Provisions. To that end, Article III of GATT 1994 and its Notes and Supplementary Provisions are incorporated into and made part of this Agreement, *mutatis mutandis*.

As is apparent from this provision, interpreters of Article 19 would be required to have recourse to the text of GATT Article III and the jurisprudence under it. While disputes under preferential trade agreements such as the TCA have been uncommon in recent decades,[40] this trend appears to be changing. *Ukraine—Wood Products*[41] was initiated in 2019 and concerned an export ban, which the EU challenged under Article 35 of the EU-Ukraine Association

[38] These provisions are found in Pt 2, Heading 1, Title 1, ch 1 of the TCA.

[39] The national treatment principle ensures goods are treated no less favourably than their domestic counterparts once they have entered the importer's market. As concerns the treatment of goods in the domestic market, it does not strictly speaking come under market access. For the purposes of this chapter, however, it is treated as part of this market access category.

[40] See Niall Moran, *Engagement between Trade and Investment Law: The Role of PTIAs* (Springer 2021)ch 1.

[41] Final Report, Restrictions applied by Ukraine on exports of certain wood products to the European Union, 11 December 2020.

Agreement (AA).[42] Article 35 AA incorporates GATT Article XI and makes it 'an integral part' of the agreement. The Panel found that Article 35 of the AA incorporates Article XI of the GATT 1994 'as a whole'[43] and that the two Articles 'impose identical obligations'.[44] The Panel recalled that Article 320 of the AA required that Article 35 be interpreted in a way that is 'consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body'.[45]

Other provisions of the TCA on market access that incorporate the GATT or another WTO text *mutatis mutandis* include Articles 20, 26, 28, and 30 TCA concerning freedom of transit, import and export restrictions, import licensing procedures, and customs valuation, respectively. While these provisions provide for tariff and quota-free trade, NTBs remain a significant obstacle to trade compared to pre-Brexit arrangements.

4.2 SPS and TBT Requirements

SPS measures and TBT are the two main areas that come under the heading 'non-tariff barriers' in trade agreements. Chapters 3 and 4 of the TCA's 'Trade in Goods' title concern SPS measures and TBT, respectively. SPS standards are set out from TCA Articles 69–87 and concern areas such as food safety and animal welfare. This has been one of the trickiest areas to manage in EU-UK relations since 2016. Technical barriers to trade are set out from TCA Articles 88–100 and refer to legal requirements that products must comply with to ensure that they are sufficiently safe, environmentally friendly, etc. to be placed on the market. This sub-section examines the status quo in relation to these NTBs and the direction EU-UK relations may go in this area.

New SPS requirements have represented a barrier to trade for producers since the TCA came into effect at the end of 2020. The need to comply with EU SPS standards is a significant obstacle, particularly for smaller UK producers in the agrifood sector.

[42] Article 35 (Import and Export Restrictions) of the EU-Ukraine Association Agreement, along with Article 34 (National Treatment), make up section 3 of the Agreement on Non-Tariff Measures. The two Articles incorporate GATT Article XI and III, respectively, and make them 'an integral part of the Agreement'.

[43] Final Report, Restrictions applied by Ukraine on exports of certain wood products to the European Union (n 41) paras 185–91.

[44] ibid para 204.

[45] ibid.

While there have been signs of positive collaboration in this area,[46] the EU Commission Report on the implementation of the TCA for 2022 expressed frustration in terms of:

(1) the 'limited progress' on the acceptance of paperless certificates by the UK;[47] and
(2) a series of postponements by the UK on the implementation of SPS checks on imports from the EU, which were due to commence on 1 July 2022.[48] SPS checks on imports from the UK into the EU have been in place since the end of 2020.

In April 2023, UK ministers announced a new model for a gradual roll-out of controls from October 2023 to October 2024.[49] In August 2023, a fifth postponement was announced pushing back the start of the roll-out to January 2024 in what Liberal Democrat Sarah Olney described as a 'humiliating U-turn'.[50] The EU has emphasized the importance of the details of new procedures and conditions affecting SPS imports being published as early as possible to enable businesses and authorities to meet them.[51]

Issues raised by the UK at the 2021 and 2022 meetings of the Trade Specialised Committee on SPS include restrictions on imports of bivalve molluscs (mussels, oysters, etc.) and seed potatoes, recognition of pet passports, and dog imports from Great Britain being subject to unnecessary medical treatment.[52]

[46] eg in relation to exchange of information and recognition of each other's regionalization measures in response to the impact of highly pathogenic avian influenza (HPAI) outbreaks on mutual trade. See minutes of the second meeting of the Trade Specialised Committee on Sanitary and Phytosanitary Measures under the EU-UK Trade and Cooperation Agreement, 19 October 2022 https://www.gov.uk/government/publications/trade-specialised-committee-on-sanitary-and-phytosanitary-measures/second-meeting-of-the-trade-specialised-committee-on-sanitary-and-phytosanitary-measures-under-the-eu-uk-trade-and-cooperation-agreement-19-october-2 (accessed 2 September 2023).

[47] European Commission (n 22) 4.

[48] ibid 4–5.

[49] Statement from Minister of State, Baroness Neville-Rolfe DBE CMG, 17 April 2023 https://questions-statements.parliament.uk/written-statements/detail/2023-04-17/hcws713 (accessed 1 September 2023).

[50] '"Humiliating U-turn": Post-Brexit Import Checks Delayed for Fifth Time' *Sky News* (29 August 2023) https://news.sky.com/story/humiliating-u-turn-post-brexit-import-checks-delayed-for-fifth-time-12950204 (accessed 1 September 2023).

[51] See Minutes of the second meeting of the Trade Specialised Committee on Sanitary and Phytosanitary Measures (n 46).

[52] UK government, Transparency data, Trade Specialised Committee on Sanitary and Phytosanitary Measures, 24 November 2022 https://www.gov.uk/government/publications/trade-specialised-committee-on-sanitary-and-phytosanitary-measures (accessed 2 September 2023).

On technical barriers to trade, the UK bowed to industry pressure and in August 2023 scrapped plans to introduce UK Conformity Assessment (UKCA) marking as an alternative to 'CE' marking, used by the EU. UKCA became part of UK law at the end of 2020 but its introduction was delayed. After extending the deadline for its introduction three times, the UK government announced that it will indefinitely recognize CE marking for placing most goods on the market in Great Britain.[53] The UK Department for Business and Trade guidance specifies that this recognition applies for *most* goods as 'there are different rules for medical devices, construction products, cableways, transportable pressure equipment, unmanned aircraft systems, rail products, marine equipment and ecodesign'. These goods are in sectors covered by other government departments who 'will communicate their plans in due course'.[54] It is unclear which direction the UK Medicines and Healthcare Regulatory Agency (MHRA) will go in but there is at least a case not to align with EU standards in this area and to preserve the UK's regulatory autonomy in areas such as public health.[55]

The announcement that CE marking will be indefinitely recognized will allay long-standing concerns from EU industry. It is also a blow to UKCA marking, which was planned to be introduced from 2025,[56] and was envisaged as a rival to the EU's 'CE' quality mark. The UK had hoped for mutual recognition whereby UKCA marking would be recognized in the EU, but this did not transpire and a CE marking is required for placing goods on the EU market.[57] The UK was willing to listen to industry as divergence from EU labelling standards presents few opportunities for businesses.[58] Rather, testing for two sets of regulations would lead to unnecessary duplication and significant costs.[59]

[53] UK Department for Business and Trade & Department for Energy Security and Net Zero 'UKCA Marking: Conformity Assessment and Documentation', 1 August 2023 https://www.gov.uk/guidance/ukca-marking-conformity-assessment-and-documentation (accessed 1 September 2023).

[54] ibid.

[55] See Anton Spisak and Christos Tsoukalis, 'Moving Forward: The Path to a Better Post-Brexit Relationship between the UK and the EU' (June 2023) Tony Blair Institute, 29. Prior to the UK Department for Business and Trade's announcement, it was suggested in this paper that the UK government should align with CE marking but preserve regulatory autonomy in areas such as medical devices.

[56] 'UK Government Climbs Down on Post-Brexit Product Mark' *Financial Times* (1 August 2023) https://www.ft.com/content/69783fa0-4f84-4d0a-8776-4e976e20bed8 (accessed 1 September 2023

[57] UK Department for Business and Trade 'UKCA Marking: Conformity Assessment and Documentation', 1 August 2023 https://www.gov.uk/guidance/ukca-marking-conformity-assessment-and-documentation (accessed 1 September 2023).

[58] House of Lords European Union Committee, 'Beyond Brexit: Trade in Goods', 25 March 2021, HL Paper 249, ch 1, para 93.

[59] ibid, Summary of Conclusions and Recommendations, para 15.

4.3 Options for Amending the Current Rules on NTBs

This sub-section mainly focuses on changes that would be desirable in terms of the current rules on SPS requirements for EU-UK trade and the likelihood that these changes will be brought about. A key question here concerns the extent to which the UK will diverge from EU SPS standards. Brexit negotiations on SPS centred around the UK desire for equivalence and the EU desire for dynamic alignment. If the UK's conclusion of new trade agreements brings about significant divergence from EU SPS standards, assuming the new standards are not higher, it takes discussions of regulatory alignment with the EU and equivalence off the table. UK policy-makers must balance the pursuit of new opportunities with minimizing disruption to UK exports to the EU and the place of UK businesses in EU supply chains. It has been said that the impact of the UK's new trade agreements on regulatory alignment with the EU may only be of 'academic' interest given the UK government's current position on this matter.[60] However, the impact of potentially locking sectors out of the possibility of an equivalence arrangement should not be understated. Easing certain SPS checks may facilitate the conclusion of a new trade agreement, but it may also effectively lock affected products out of the EU market.

Post-Brexit, the UK has concluded trade agreements with Australia and New Zealand and it signed the Protocol of Accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 16 July 2023. From the EU-UK perspective, the main question surrounding the SPS chapters of the UK's new trade agreements is whether, or to what extent, they will oblige the UK to diverge from EU SPS standards.

The UK government has described the agreement to join CPTPP as upholding 'our high animal welfare and food safety standards'.[61] This will soon be tested as the UK has reportedly assured CPTPP members that it will fully comply with its CPTPP SPS obligations.[62] Canadian beef and pork industries had called for the blocking of UK accession to the CPTPP on the basis of the

[60] CPTPP and Agri-Food Regulation: Crossing the EU-Exit Rubicon? 6 https://blogs.sussex.ac.uk/uktpo/files/2021/07/Briefing-paper-60.pdf (accessed 25 August 2023).

[61] UK Government press release, 'UK Strikes Biggest Trade Deal Since Brexit to Join Major Free Trade Bloc in Indo-Pacific', 31 March 2023 https://www.gov.uk/government/news/uk-strikes-biggest-trade-deal-since-brexit-to-join-major-free-trade-bloc-in-indo-pacific (accessed 31 August 2023).

[62] See Agriculture Canada (Government of Canada) spokesperson Samantha Seary, 'Canada Expects Britain to "Uphold" CPTPP Standards' *The Western Producer* (8 August 2023) https://www.producer.com/news/canada-expects-britain-to-uphold-cptpp-standards/ (accessed 31 August 2023).

UK's import restrictions.[63] In line with its obligations under Article 7.9 CPTPP, regulations on the import of Canadian beef and pork should be based on science and risk analysis. There is concern that new arrangements such as these may weaken UK SPS standards and lower food standards. The precautionary principle is not referred to in the CPTPP's SPS chapter and joining this agreement could truly mark the UK's departure from EU standards. While there is a provision for emergency measures necessary to protect human health (Article 7.14), there is no general exception provision for measures taken to protect public health. A provision such as Article 7.14 could not be invoked lightly and is subject to various conditions.[64] The UK's July 2023 Impact Assessment of joining CPTPP does not discuss the UK's ban on hormone-treated meat. The impact assessment makes no reference to the possible impact of the UK signing up to CPTPP and the extent to which this will entail diverging from EU SPS standards. The assessment merely discusses the impact signing up will have among CPTPP members.[65] The same is true for the impact assessments for the Australia and New Zealand trade agreements, which also do not discuss the potential impact on UK divergence from EU SPS standards.[66]

New Zealand has a veterinary agreement with the EU and is also a member of CPTPP.[67] However, its veterinary agreement is a pale imitation of the Swiss-style veterinary agreement to which some in the UK aspire.[68] To give some examples, for imports of dairy and fish products from New Zealand, there is simplified certification, but the identity and documents of products must be checked, and a physical inspection is required 1–10 per cent of the time.[69] For

[63] Canadian Meat Council, 'Canadian Beef and Pork Industries Strongly Opposed to UK Accession to CPTPP Outcomes for Canadian Meat', 15 July 2023 https://cmc-cvc.com/canadian-beef-and-pork-industries-strongly-opposed-to-uk-accession-to-cptpp-outcomes-for-canadian-meat/ (accessed 1 September 2023).

[64] Article 7.14 sets out that the parties shall notify such measures promptly and shall review such measures 'within six months'. If maintained after a review, the measure should be reviewed 'periodically'.

[65] UK Department for Business and Trade 'CPTPP: Impact Assessment', 17 July 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1170930/cptpp_impact_assessment.pdf (accessed 25 August 2023).

[66] See Department for International Trade, 'Impact assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia', 16 December 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073969/impact-assessment-of-the-free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia.pdf. See also Department for International Trade 'Impact assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand', 28 February 2022 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1057311/uk-new-zealand-free-trade-agreement-impact-assessment.pdf (accessed 2 September 2023).

[67] CPTPP and Agri-Food Regulation: Crossing the EU-Exit Rubicon? 6 https://blogs.sussex.ac.uk/uktpo/files/2021/07/Briefing-paper-60.pdf (accessed 25 August 2023).

[68] See European Commission, DG Santé, 'EU import requirements, authorisations and prohibitions for animal products: comparison between different categories of third countries' https://food.ec.europa.eu/system/files/2021-06/comm_oc_20210618_pres-02.pdf (accessed 2 September 2023).

[69] ibid.

Swiss products, border checks are abolished. These arrangements are replicated for live animal imports except physical inspections of New Zealand imports must take place 100 per cent of the time. For live bivalve molluscs, there is an outright ban on imports from the UK, while there are no checks on imports for freshwater molluscs from Switzerland.

Divergence from EU standards in joining CPTPP would underline the independence of UK trade policy post-Brexit. However, the gains of streamlining food export procedures or relaxing the frequency of checks for food products would probably be outweighed by complications arising elsewhere in UK trade policy. Eliminating the possibility of reaching a Swiss-style veterinary agreement with the EU may of course be the point of such divergence, but the UK should keep both sides of the ledger in mind.

Remaining mostly aligned with EU standards comes with strategic advantages for the UK. First, it keeps the possibility of a Swiss-style veterinary agreement with the EU alive, as well as the possibility of an equivalence arrangement. Secondly, UK divergence from EU standards reduces UK flexibility in implementing the NI Protocol in the short to medium term.[70] Finally, diverging from EU SPS standards in a way that would put increased strain on the NI Protocol it appears would further undermine the prospects of a United States (US)-UK trade deal, the big prize of an independent UK trade policy.[71]

One of the reasons the EU has found it difficult to conclude a free trade agreement with the US has been its SPS regime, which for example prohibits hormones in meat production. The UK's ability to set its own standards and diverge from the EU's SPS regime has long been touted as potentially providing the leeway to conclude a US-UK trade deal. However, the benefits of this divergence would again have to be weighed against the strain it would put on the implementation of the NI Protocol.

The UK has sought the easing of restrictions on imports of live bivalve molluscs and seed potatoes at meetings of the Trade Specialised Committee on SPS.[72] The UK has stated that these import restrictions on food items are

[70] See Niall Moran, 'Customs and Free Movement of Goods' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume 4* (OUP 2022) 156.

[71] On 3 June 2021, the US issued a démarche, or formal diplomatic memo, to the UK stressing its concern about the stalemate on implementing the NI Protocol. Yael Lempert, the most senior US diplomat in the UK, said that if Britain accepted demands to follow EU rules on agricultural standards, President Biden would ensure that the matter 'wouldn't negatively affect the chances of reaching a US/UK free trade deal'. Agriculture is typically the most difficult area of any trade negotiation and such an assurance is significant. See 'G7 Summit 2021: Joe Biden Accuses Boris Johnson of "Inflaming" Irish Tensions' *The Times* (10 June 2021) https://www.thetimes.co.uk/article/g7-summit-2021-joe-biden-accuses-boris-johnson-of-inflaming-irish-tensions-r88lcv6cg (accessed 1 September 2023).

[72] UK Government, Transparency data, Trade Specialised Committee on Sanitary and Phytosanitary Measures, 24 November 2022 https://www.gov.uk/government/publications/trade-specialised-committee-on-sanitary-and-phytosanitary-measures (accessed 2 September 2023).

not proportionate to the risk posed by them and that they do not comply with Article 73 TCA.[73] The EU response is that these restrictions were introduced pre-Brexit and apply to all third countries that do not observe dynamic alignment with the EU SPS regime.[74] Any potential movement by the EU on these issues would depend on the UK remaining in lockstep with the EU's SPS regime in the area concerned.

In a 2023 report, the House of Lords European Affairs Committee called for an SPS agreement with the EU as 'an urgent priority'.[75] Unlike Switzerland and New Zealand, the UK does not have a veterinary agreement in place.[76] Such an agreement is urgently needed to reduce EU-UK border checks and to reduce friction affecting food trade. However, there are large differences between the Swiss and New Zealand veterinary agreements.[77]

Given the shared regulatory backgrounds of the EU and UK, the UK should aim to obtain a bespoke veterinary agreement with at least the level of ambition of the EU-New Zealand veterinary agreement. Indeed, it should aim to move much closer to the provisions of the Swiss agreement in certain areas. An agreement along these lines would depend on the parties working together to manage future divergence and agreeing to checks in a pragmatic and proportionate manner.

This topic should be raised at the Trade Specialised Committee on SPS Measures. If the UK government seriously wishes to pursue such an agreement, it could commit to alignment with EU standards in the areas where it wishes to have the same levels of access as the EU-Switzerland veterinary agreement.

An agreement on SPS should also certainly be on the agenda during the 2026 TCA review.

One development that would put the wind behind the sails of a new SPS agreement would be the election of a Labour government in 2025. It has been reported that Labour leader Sir Keir Starmer wants to lower trade barriers with the EU and reach new agreements to make it easier to trade food, medicines,

[73] TCA, art 73(3) states that 'each Party shall ensure that those procedures and related SPS measures: … (d) are proportionate to the risks identified and not more trade restrictive than necessary to achieve the importing Party's appropriate level of protection'.

[74] Minutes of the second meeting of the Trade Specialised Committee on Sanitary and Phytosanitary Measures (n 46).

[75] House of Lords, European Affairs Committee, 'Trade in Goods between Great Britain and the EU: European Affairs Committee Report', 27 January 2023, section 1 https://lordslibrary.parliament.uk/trade-in-goods-between-great-britain-and-the-eu-european-affairs-committee-report/ (accessed 1 September 2023).

[76] UK in a Changing Europe, 'What Does the Brexit Deal Mean?' 20 January 2021 https://ukandeu.ac.uk/explainers/what-does-the-brexit-deal-mean/ (accessed 2 September 2023).

[77] European Commission, DG Santé (n 68).

and animals.[78] David Lammy MP, Labour's Shadow Foreign Secretary, has also described Labour's focus as being on fixing the TCA by 'reducing friction on food, agricultural, medical and veterinary goods'.[79]

5 Conclusion

The TCA's chapter on movement of goods has been well-described as the centrepiece of the TCA.[80] Trade in goods is critical between such closely linked trading partners. About 48 per cent of total UK imports come from the EU[81] and nearly 60 per cent of UK food imports come from the EU.[82] The TCA's terms for trade in goods are of course a step back from the UK's previous position in the Single Market. Brexit has had consequences, such as the customs controls faced by UK exporters, as well as the long-term consequences of the uncertainty surrounding the position of UK manufacturers in EU supply chains. Nonetheless, the TCA provides a baseline for EU-UK trade in goods that can be improved upon if the will is there to do so.

The UK will continuously face a choice between divergence and increased cooperation with the EU. Concluding a Swiss or even a New Zealand-style veterinary agreement should be a priority for the UK and divergence from EU SPS rules would undercut this. Impact assessments for new UK FTAs do not currently analyse the impact changes to SPS rules will have on EU-UK trading relations. Such an assessment is a necessity where SPS rules are introduced that could not easily be reversed. Where changes to SPS rules would impact the prospect of an agreement with the EU, this needs to be made clear. It is one thing if such changes are introduced as part of a comprehensive trade strategy; however, if they are introduced without clearly and publicly deliberating on these effects, the UK risks stumbling into sub-optimal and damaging trading arrangements.

[78] Ben Riley-Smith, 'Keir Starmer to Relax EU Trade Barriers within 18 months of Becoming PM' *The Telegraph* (18 May 2023) https://www.telegraph.co.uk/politics/2023/05/18/keir-starmer-labour-eu-trade-brexit-election/ (accessed 1 September 2023).

[79] David Lammy Speech to Chatham House (n 9).

[80] See Chapter 13 by Federico Fabbrini in this volume

[81] House of Commons Library, Research Briefing, 'Statistics on UK-EU Trade', 11 May 2023 https://commonslibrary.parliament.uk/research-briefings/cbp-7851/#:~:text=The%20UK%20imported%20%C2%A3432,in%20both%202020%20and%202021 (accessed 4 September 2023).

[82] House of Lords, European Union Committee, 'Brexit: Food Prices and Availability' 14th Report of Session 2017–19, HL Paper 129, 10 May 2018 https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/129/129.pdf (accessed 4 September 2023).

Recent compromises point to a more pragmatic, rational, and cooperation-based approach to EU-UK relations. The conclusion of the Windsor Framework and indefinite recognition of CE marking are important evidence of the type of cooperation and pragmatism that is needed to mitigate the friction to trade in goods brought about by Brexit. The deal reached on EVs in December 2023 to extend the transitional rules of origin for a three-year period is a further sign of this. The next important questions for EU-UK rapprochement in this area include whether an SPS agreement can be concluded and whether the UK will join the PEM Convention.

Sir Keir Starmer has committed to pursuing a major rewrite of the TCA if elected and the Labour Party has described its focus as being on using the 2026 TCA review 'to reduce barriers to trade'.[83] The current *détente* in relations must not be taken for granted and those that have pushed for maintaining as close an EU-UK relationship as possible must build on the current momentum.[84]

[83] 'Labour Will Seek Major Rewrite of Brexit Deal, Keir Starmer Pledges' *Guardian* (17 September 2023) https://www.theguardian.com/politics/2023/sep/17/keir-starmer-commits-to-rewriting-brexit-deal-if-labour-wins-election (accessed 30 September 2023). David Lammy Speech to Chatham House (n 9).

[84] For a discussion of the paths toward furthering political integration in the EU see Federico Fabbrini, Chapter 13 in this volume.

6

Services, Investment, and Public Procurement

Pinar Artiran

1 Introduction

As a result of ten months of intense negotiations and following the United Kingdom's (UK) separation from the European Union (EU), the Trade and Cooperation Agreement (TCA) between the UK of Great Britain and Northern Ireland and the EU was signed on 30 December 2020. It formally entered into force following the completion of the ratification processes in the EU and the UK on 1 May 2021 even if it had already taken provisional effect on 1 January 2021.[1] Although various economic integration models had been considered, the TCA was finally negotiated and notified to the World Trade Organization (WTO) as both a free trade agreement (FTA) and an economic integration agreement.[2] Consequently, the TCA includes a range of issues that might be considered as the broadest within the context of an international trade agreement at the time it was negotiated. As such, the TCA currently regulates the relationship between the EU and UK following the latter's exit from the customs union and serves as the basis for any future modification revision that may be brought to the framework as decided by the parties.[3]

This chapter aims at outlining the main changes to trade in services, investment protection, and public procurement that the TCA brought along, in terms of scope and depth within the UK-EU bilateral relationship. Accordingly, the chapter examines the provisions of TCA, Part II, Heading One, Titles II on Services and Investment and VI on Public Procurement; and is structured as

[1] See in general for negotiations Federico Fabbrini (ed), *The Law and Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021).

[2] Since goods and services trade are governed by separate agreements in the WTO, the TCA has been notified to the WTO as a free trade agreement under art XXIV of the General Agreement on Tariffs and Trade (GATT) and as an economic integration agreement under art V of the General Agreement on Trade in Services (GATS).

[3] TCA, arts 123, 774, and 776.

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follows. Section 2 examines the provisions on trade in services by introducing first the general principles applicable to both services and investment and then focusing on trade in services regulation by laying down the parties' general obligations and specific commitments; section 3 analyses the provisions on substantive standards and principles applicable to investment protection and deals with investment arbitration and the state of bilateral investment treaties; section 4 provides for an analysis of the structure, objective, and scope of public procurement through the parties' commitments compared to the WTO Government Procurement Agreement; section 5 concludes by taking stock of the TCA's deliverables and shortcomings so far and offers possible avenues for improvements that will further liberalize economic relations between the parties.

2 Trade in Services

Following Brexit, the economic integration arrangement that liberalizes the services trade between the EU Member States no longer governs this type of trade between the UK and the EU.[4] Consequently, both the service suppliers from the UK and those from the EU no longer enjoy the automatic right to offer their services within the EU and UK territories, respectively. Nonetheless, various obligations have been inserted in the TCA to ensure continuity of market access in various sectors.[5]

In accordance with the obligations laid down in TCA, the parties are required to ensure that: 1. The service suppliers will not be subject to limitations (Article 135); 2. A treatment based on absolute non-discrimination between the service suppliers and investors from the UK and EU will be the norm (Article 137); 3. There will be no establishment requirement having character of restricting cross-border trade (Article 136); 4. The imposition of restrictions based on nationality of senior personnel will not be allowed (Article 131); 5. The Agreement will keep track of the future trade agreements that the parties will enter into and be in line with them (Article 126).

[4] See Niamh Moloney, 'Trade in Services' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relationships* (OUP 2021).

[5] See UK-EU Trade and Cooperation Agreement implementation report (1 January 2021 to 31 December 2022), 29 June 2023 https://www.gov.uk/government/publications/trade-and-cooperation-agreement-implementation-report-january-2021-to-december-2022/uk-eu-trade-and-cooperation-agreement-implementation-report-1-january-2021-to-31-december-2022#intellectual-property-public-procurement-regulatory-cooperation-and-small-and-medium-sized-enterprises (accessed 15 September 2023).

Notwithstanding these principles on liberalzation, the parties also agreed to incorporate various reservations which may affect service providers that supply their services in the other party's territory. In particular, in Article 123(2) reads:

> 2. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as: the protection of public health; social services; public education; safety; the environment, including climate change; public morals; social or consumer protection; privacy and data protection or the promotion and protection of cultural diversity.[6]

Many areas that are applicable to international services regulation such as mutual recognition of professional qualifications, delivery services, international maritime transportation services, telecommunications, and financial and legal services are also integrated into the TCA.

Being one of the most important services sectors for the UK, the way in which financial services are covered in the TCA shows a great deal of similarity with the EU's other trade arrangements with third countries. This said, the TCA does not include provisions related to equivalence framework applicable to financial services since any decision for equivalence needed to be made in a unilateral fashion and the EU had not completed the assessment related to the equivalence that would be applicable in twenty-eight areas in the UK.[7]

Both parties committed to ensure that their respective markets will be kept open for the supply of services to be delivered by each other's operators. Moreover, the parties undertook the commitment related to the future revision of services and investment provisions so as to bring some potential improvements into the TCA in the future. In fact, Title II on services and investment makes an explicit reference to the review of the agreement, which provides for a review possibility five years after the entry into force of the agreement and every five years thereafter.[8] This review possibility is extended to the provisions of Title II itself and also to the parties' reservations for standing and potential non-conforming measures and the list of activities for short-term business

[6] TCA, art 123(2).

[7] For a detailed analysis of the equivalence regime within the EU-UK relationship see Moloney (n 4). See also Emil Nästegård, 'Equivalence Decisions in the EU and UK Financial Services Sectors Post-Brexit' (2022) 33(3) European Business Law Review 463. See further the chapter by Christy Petit in this volume.

[8] See further on the TCA's review clause the final chapter by Federico Fabbrini in this volume.

visitors.[9] As an important exclusion, financial services are not covered by this review possibility.[10]

2.1 Structure of the Services and Investment Provisions in the TCA

Services and investment are covered in Title II of Heading One of Part Two of the TCA. Heading One, Title II of the TCA is entitled 'Services and Investment' and is found in Part Two, which in turn is titled as 'Trade, Transport, Fisheries and Other Arrangements'.

Whilst Chapter 1 of Title II comprises general provisions, Chapters 2 and 3 deal with the liberalization of investment and cross-border trade in services. For scheduling the commitments related to investment in every economic sector as well as trade in services, the TCA adopts a 'negative list' approach. On one hand, this approach provides for a total liberalization; on the other hand, it brings along a list of reservations related to standing or potential measures that are incompatible with the liberalization obligations stemming from the agreement, such as national treatment, market access, and other provisions that create obligations for the parties.

In essence, Chapter 2 regulates the liberalization of investments[11] and governs a party's measures that may affect the formation of an enterprise to execute economic activities and its operation by investors of the other party; the enterprises that are covered; and also in relation to the rules on requirements of performance, any enterprise in the territory of the party that adopts or retains the measure. Instead, Chapter 3, which regulates cross-border trade in services,[12] covers a party's measures that may affect cross-border trade in services provided by service suppliers of the other party.

Regarding cross-border trade in services, trade liberalization principles such as most favoured nation (MFN) treatment, national treatment, market access, and local presence, various exceptions, as well as non-conforming measures can be found in Annexes 19 and 20 of the TCA. According to Annex 10, the parties are allowed to keep their existing non-conforming measures.[13] Besides

[9] Those are found in Annexes 19, 20, and 21 to the TCA.

[10] See ibid art 126: Review.

[11] In terms of GATS structure, 'investment' covers services provided under mode 3.

[12] In terms of the GATS structure, 'cross-border trade in services' would correspond to services that are provided under modes 1 or 2.

[13] For such measures, a standstill provision precluding amendments that decrease the conformity of a non-conforming measure, as it existed immediately before the amendment, is incorporated into the TCA.

the existing ones, the parties are also permitted to keep or adopt some new non-conforming measures in sectors or activities that are identified in Annex 20 of the TCA.

When it comes to investment provisions, similarly to cross-border trade in services, non-conforming measures related to commitments in MFN and national treatment, market access, performance requirements, and the treatment of boards of directors and senior management are enumerated in Annexes 19 and 20.[14]

Chapter 4 of the TCA relates to the disciplines on entry and temporary stay of natural persons for business purposes and as such governs a party's measures that affect the delivery of economic activities through the entry and temporary stay in its territory of those natural persons of the other party.[15] The regulatory framework of the services and investment is found in Chapter 5, which in return is accompanied by Annex 24. Under Chapter 5, specific disciplines are established for delivery services, telecommunications services, financial services, international maritime transport services, and legal services.

There are certain services sectors that are not governed by the provisions of Title II. Accordingly, air transport services or related services in support of air services,[16] audio-visual services, national maritime cabotage, and inland waterways transport are excluded and regulated by other particular provisions.[17] Before Brexit, these four excluded sectors were governed by the EU treaties and the relevant legislation and as such were subject to free movement and liberalization between the parties. Among all of these excluded sectors, the exclusion of the audio-visual services, although a standard approach in the EU's FTAs, may arguably be considered as a setback for the UK, assuming its robust global standing in broadcasting and media sectors.

Title II of Heading Two (services and investment) and Title III of Heading One (digital trade) of Part Two do not apply to audiovisual services (Articles 123 and 197, respectively). According to Article 8(f) and in terms of institutional framework that is foreseen for matters related to services, they fall within the authority of the Trade Specialised Committee on Services, Investment and Digital Trade.[18]

[14] Annex 21 of the TCA contains reservations.

[15] Chapter 4 is supplemented with Annexes 21–23.

[16] Other than aircraft repair and maintenance services; computer reservation system services; ground handling services; specialty air services; and selling and marketing of air transports services.

[17] See the chapter by Adam Lazowski in this volume.

[18] In addition, for specific types of services, other specialized committees are foreseen in the TCA. See for Air Transport in art 8(m); for Aviation Safety in art 8(n); for Energy in art 8(l); for Road Transport in art 8(o). According to the UK government's reporting, the Trade Specialised Committee on Services, Investment and Digital Trade gathered twice on 11 October 2021 and 20 October 2022 https://www.

Before Brexit, the UK was naturally part of the EU's public procurement regime related to services, which was totally liberalized among the Member States. However, now, similarly to the GATS, Title II does not govern the measures to be taken within the context of public procurement of a good or service. Public procurement in this context is understood to be a good or a service that is purchased for governmental purposes, and not for commercial resale or in order to use in the supply of a good or service for commercial sale.[19] The way in which rules on public procurement in services are regulated within the TCA also contains certain exceptions.[20]

2.2 Coverage and General Obligations of the Parties

As stated above, cross-border trade in services[21] is essentially regulated in Chapter 3 and governs parties' measures that may affect cross-border trade in services provided by service suppliers. Similarly to the GATS, the TCA includes both general obligations and specific commitments for the parties.

2.2.1 General obligation

The MFN treatment as a basic principle is explicitly laid down for both trade in services and investment. In particular, Article 138 TCA requires a party to grant this treatment to services and service suppliers of the other party, except for taxation and recognition agreements. As such, the parties are expected to extend immediately and unconditionally to services or services suppliers a 'treatment no less favourable than that accorded to like services and services suppliers of the other countries'. The obligations provided for the MFN treatment are also subject to the non-conforming measures found in Annexes 19

gov.uk/government/publications/trade-and-cooperation-agreement-implementation-report-january-2021-to-december-2022/uk-eu-trade-and-cooperation-agreement-implementation-report-1-january-2021-to-31-december-2022#annex-a-meetings-of-the-tca-specialised-committees (accessed 15 September 2023).

[19] The TCA also states that whether that procurement is a 'covered procurement' within the meaning of art 277 is irrelevant.

[20] These exceptions relate to the prohibition on the transfer of the source code in the case of public procurement, single information point for SMEs, exclusion of government procurement entities from the chapter on state-owned enterprises, enterprises granted with special rights or privileges and designated monopolies, and Annex 25 on the parties' government procurement commitments.

[21] Within the GATS structure, 'cross-border trade in services' would correspond to services that are provided under modes 1 or 2.

and 20. It should be noted that no MFN provision is foreseen for the movement of natural persons.[22]

2.2.2 Specific commitments of the parties

2.2.2.1 National treatment

As for cross-border trade and the national treatment principle, a party will have to grant services and service suppliers of the other party treatment that is no less favourable than that which it grants, in like situations, to its own services and service suppliers. As such, Article 137 TCA can be considered as a mirror provision of Articles XVII.2 and XVII.3 GATS. To undertake a commitment to national treatment requires a party not to employ discriminatory measures profiting domestic services or service suppliers to the detriment of another party's service providers. One essential condition is not to alter, in law or in fact, the ways in which the services suppliers compete in the market in favour of the party's own service industry. Similarly to the MFN obligation, the national treatment obligation of the parties is also in play for non-conforming measures that are found in Annexes 19 on Existing Measures and 20 on Future Measures. In terms of Mode 4, ie the movement of natural persons, TCA includes provisions on national treatment for intra-corporate transferee and business visitors for establishment purposes, short term business visitors; and contractual services suppliers and independent professionals.[23] Unlike the MFN obligation, the TCA also contains non-conforming measures that are both standing and potential in Annexes 19 and 20, respectively, and those measures are applicable to the movement of natural persons provided that the relevant measures affect the temporary stay of natural persons for business purposes.

2.2.2.2 Market access

The TCA has a similar approach to the GATS in the sense that the market access norms for liberalizing investment between the parties are subject to the same restrictions. Article 128 TCA lists the same restrictions as in Article XVI.2 (a) GATS, while that for cross-border trade (Article 135 TCA) omits references to restrictions on the participation of foreign capital and on the total number of persons that may be employed, as these do not apply to cross-border trade and are only relevant for investment and for the movement of natural persons.

[22] See Catherine Barnard and Emilija Leinarte, 'Mobility of Persons' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relationships* (OUP 2021).

[23] See TCA, arts 141.1(c), 142.3, and 143(c).

The market access obligations are subject to the non-conforming measures in Annexes 19 and 20. Market access for natural persons covered by Chapter 4 is set out in point (b) of Article 141(1) and point (b) of Article 143(1) TCA.

2.2.2.3 Commercial presence

Within the meaning of GATS mode 3,[24] commercial (local) presence would imply that a service supplier of one party establishes a territorial presence, including through ownership or lease of premises, in the other party's territory to provide a service. Comparably, the TCA lays down the obligation that for cross-border trade, a party shall not require a service supplier of the other party to establish or maintain an enterprise or to be resident in its territory as a condition for the cross-border supply of a service.[25]

2.2.2.4 Movement of natural persons

Chapter 4 of Title II of Heading One of Part Two covers the rules administer the entry and temporary stay of natural persons that benefit from free movement for business purposes.[26] Even though each party remains competent to regulate the requirements and procedures for immigration obligations and measures related to work and social security, the TCA lays down requirements concerning parties' measures that may affect the performance of economic activities undertaken by business visitors through entry and temporary stay for establishment purposes in their territories.[27] Various obligations related to measures that may affect the temporary stay of natural persons' free movement for business purposes are subject to non-conforming measures that are laid down in Annexes 19 and 20 to the TCA.[28]

2.2.2.5 Liberalization

Unlike the GATS, the parties' commitments on cross-border trade in services and investment liberalization are scheduled in Articles 133 and 139 TCA on a negative list basis. As such, the obligations on (a) national treatment, (b) MFN

[24] GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.

[25] TCA, art 136. Non-conforming measures related to commercial (local) presence obligations are found in Annexes 19 and 20.

[26] See Barnard and Leinarte (n 22).

[27] These business visitors include contractual service suppliers, independent professionals, intra-corporate transferees, and short-term business visitors from the other party.

[28] Those non-conforming measures are in particular observed in the case of business visitors who move for establishment purposes or maintaining or adopting limitations for ICTs and CSS in the form of numerical quotas or economic needs tests, as well as granting national treatment; and granting national treatment for business visitors of a party engaged in the supply of a service to a consumer in the territory of the party where they are staying temporarily.

treatment, (c) market access, (d) local presence, (e) performance requirements, and (f) senior management and boards of directors apply to a sector, sub-sector, or activity, unless otherwise specified in the parties' existing and future non-conforming measures that are listed in Annexes 19 and 20, respectively. Reservations on national treatment and market access in these Annexes also apply to designated legal services (Article 195). These Annexes govern standing and potential non-conforming measures that are incompatible with specific obligations such as market access, national treatment, and a range of other general obligations under the TCA. It is explicitly spelled out that the reservations inserted in Annexes 19 and 20 are to be without prejudice to the rights and obligations of the parties under the GATS. Nonetheless, the parties have committed in the TCA to liberalize in both services and investment at a level higher compared to their liberalization commitments under the GATS. That said, the commitments are obviously lower in comparison to the parties' liberalization levels through the EU Single Market that is based on a freedom to establish and freedom to provide or receive services cross-border. This no longer being the case, the service providers of a party will need to observe the other party's commitments in a specific sector. In particular, the UK service providers will also have to take into account the locally applied rules that may still be subject to reservations by individual EU Member States.[29]

2.2.3 Sector-specific commitments in financial services

Among the sectors that appear to be most affected at EU level are financial services (including insurance and real estate activities[30]). A recent report by the EU Parliament takes the view that 'the TCA has had moderate effects on administrative services, ICT, professional services and transport. These effects further vary depending on the region within the country'.[31]

Apart from the application of the MFN treatment, free movement of capital, and cooperation on cybersecurity in financial services, the TCA lacks ambition in liberalization. The ability of financial service providers in taking business actions in relation to financial products and cross-border services have been left subject to further discussions and decisions of the parties.

[29] While all services and modes of supply fall within the scope of liberalization under the TFEU, the TCA does exclude some sectors and also lays down conditionalities for the liberalization of some other sectors.

[30] See for further discussion on financial services the chapter by Christy Petit in this volume.

[31] See Isabelle Ioannides, 'The EU-UK Trade and Cooperation Agreement Two Years on: Unpacking Early Evidence, European Implementation Assessment' (August 2023) European Parliamentary Research Service, 26.

One of the most critical outcomes of the TCA is the fact that passporting rights no longer exist.[32] EU passport rights permit financial service providers in Member States access to the single market for financial services. A company that provides financial services, if authorized by its domestic regulator, is entitled to provide services or establish a branch in any other EU Member State without being required to receive any further authorization or licence in that Member State. One of the shortcomings of 'equivalence' compared to 'passporting' is that there is no single definition of equivalence. This possibility will exist only if third-country equivalence provisions are incorporated in the respective EU legislative acts. However, those equivalence provisions are absent in many EU acts and, even if they are included, they tend to be mainly technical and narrow in scope and do not match the market access facility that passporting provides. Since equivalence does not offer the same level of predictability and certainty in a business environment as passporting does, one of the most important tasks in the field of financial services would be for the parties to review equivalence decisions.[33]

2.2.4 Mutual recognition

One of the important aspects of cross-border international trade in services is the possibility of granting recognition to the service providers of another country. Even though the mutual recognition is also used for trade in goods, the matter becomes even more important for service providers since sovereign states may have different criteria for service provision, including the education and formation that are needed while performing those services. Mindful of the strong services sectors in both the UK and the EU, the TCA contains a framework in Article 158 whereby the EU and the UK may agree at a point in time, on a case-by-case basis, and for specific professions, some further arrangements in order to ensure the recognition of certain professional qualifications.[34]

[32] See Moloney (n 4).

[33] In fact, reportedly, the Partnership Council has met twice since the start of the EU-UK TCA's application: in June 2021 and in March 2023. Members of the Partnership Council discussed the regulatory cooperation and progress that can be made by signing a memorandum of understanding on financial services. That said, the meetings also shed light on the difficulties in implementing the Withdrawal Agreement and the Protocol. See for further details Ioannides (n 31) 19.

[34] According to art 158, some mechanisms can be employed in order to allow the recognition of professional qualifications. To that end, the Article provides for the possibility for professional bodies or authorities to lay down and offer joint recommendations to the Partnership Council in their appropriate sectors for the recognition of professional qualifications. The Article explicitly spells out that as far as professional qualifications are concerned the parties will not be barred from requiring that natural persons possess the necessary professional qualifications specified in the territory where the activity is performed, for the sector of activity concerned. However, there is no automaticity between those arrangements and the recognition of qualifications. Nonetheless, they are expected to lay down the conditions for relevant authorities that are tasked with granting recognition.

2.2.5 General assessment of trade in services

Compared to EU Single Market, the TCA offers a rather modest coverage for trade liberalization in services. While the regulation of financial services falls short of an ambitious framework despite the sector's importance for both parties, telecommunications for instance responds better to the calls for liberalization. In order to overcome this shortcoming, the service suppliers can potentially have recourse to mode 3 of the GATS, ie establishing a commercial presence in the other party's territory. This may prove to be particularly useful for all UK service providers who could benefit from setting up commercial presence in EU Member States.[35] Moreover, considering the trade-reducing effect of varying standards and qualifications that exist in different countries for important service sectors such as air transportation, financial services, and others, mutual recognition arrangements become all the more important and the parties will need to make swift progress on the rules applicable to those qualifications.

3 Investment Protection

This section dissects the investment-related articles from the general services and investment parts of the TCA and analyses the essential provisions in the investment provisions of the TCA, pointing out the specific policy choices made by the parties for disciplining investment flows. While doing this, it will be important to take note of the negotiation priorities that the parties had pursued. It may be equally sensible to make a projection into the future and discuss the possible implications of this preference by the parties for both domestic investment protection mechanisms and their future trade agreements with third countries.

Within the international trade and WTO jargon, the term 'investment' would include services that are provided under mode 3 of the GATS. It is worth pointing out from the outset that the investment protection chapter of the TCA is somewhat limited compared to other new generation trade agreements or

[35] Sarah Hall and Martin Heneghan 'Brexit and "Missing" Financial Services Jobs in the United Kingdom' (2023) 18(2) Contemporary Social Science 235. See also Sarah Hall and Martin Heneghan, 'Interlocking Corporate and Policy Networks in Financial Services: Paris-London Relations Post Brexit' (2023) 67(2–3) ZFW Advances in Economic Geography 92. The authors found that banks in the City have shifted mid-tier jobs to places like Poland and Lisbon, which has hit places like Birmingham, Cardiff, Edinburgh, and Glasgow harder than London, where higher-end jobs have been protected. Their analysis of the Paris financial services sector post-Brexit also indicates that, while job growth is flatlining in London, it is growing in Paris' Île de France—adding 60,000 new jobs between 2018 and 2020 as finance institutions began their Brexit relocation plans.

bilateral investment treaties, since it lays down a narrow set of substantive investment protections. Moreover, the TCA does not include an investor–state dispute settlement (ISDS) and enforcement mechanism. Consequently, the non-insertion of an ISDS mechanism into the TCA can arguably be regarded as an untapped opportunity considering that both the EU and the UK have opted for and included extremely advanced investment provisions in their FTAs with other countries.[36] Moreover, the TCA cannot be directly invoked before the domestic courts of the parties, and as such the TCA's form of settling disputes appears to be similar to the state-to-state dispute settlement system that prevails in the WTO.[37]

Compared with other trade agreements and in particular investment chapters or investment treaties by the EU with third countries, the TCA takes a very different approach. This difference is already evident from the choice that the parties made while naming the relevant section of the TCA. In fact, even though Title II of Part Two, Heading One (Trade) of the TCA is designed also to cover investment alongside services, the TCA stands out mainly as a FTA and does not really include a specific investment chapter, unlike other new generation FTAs that the EU had signed in the recent past. The models adopted in those agreements open the door for future modifications, revisions, and negotiations towards ISDS and in fact they provide for ISDS mechanisms in the form of an investment court system. In fact, one should be mindful of the EU's keen interest in the establishment of a multilateral investment court (MIC) that would also require an expansive approach to investment protection and arbitration to be eventually taken between the parties.[38] Similarly, the UK may revisit its position in the TCA mindful of changing dynamics of the ISDS systems. In an earlier trade agreement that the UK had negotiated with Japan, ie the Comprehensive Economic Partnership Agreement (CEPA), which is

[36] In July 2023, the UK formally agreed to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes ISDS provisions. See the Research Briefing by the UK House of Commons on the CPTPP, 21 July 2023 https://commonslibrary.parliament.uk/research-briefings/cbp-9121/ (accessed 29 September 2023). The EU-Vietnam Investment Protection Agreement, art 3.38 incorporates a two-tier permanent dispute settlement mechanism called 'Investment Tribunal System'. Similarly, EU-Singapore Investment Protection Agreement, art 3.12: 'Multilateral Dispute Settlement Mechanism' provides for the parties to engage in further discussions with each other and other interested parties towards the establishment of a multilateral investment tribunal and appellate mechanism.

[37] See Nicolas Levrat, 'Governance' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relationships* (OUP 2021).

[38] It is worth noting the Court of Justice of the European Union (CJEU) Opinion 1/17 of 30 April 2019, where the Court distinguished this type of investment court system from the views it set out in Case C-284/16 *Achmea* in relation to arbitral tribunals that are formed under intra-EU bilateral investment treaties (BITs), and found that the CETA's investment court system would be consistent with EU law.

similar to the EU-Japan Economic Partnership Agreement (EPA), there are no provisions on investment protection and ISDS. Nevertheless, in case one of the parties signs an agreement that includes this type of provision with a third party, the mechanism provided in the CEPA permits the other party to request a review of the investment provisions in the agreement towards possible inclusion of such provisions. However, and for the time being, it is clear from the text of the TCA that this was not the intention of the parties, at least for the initial framework. That said, one might expect further negotiations on investment-related dispute settlement, once the parties advance in further implementation of the TCA.[39]

3.1 Structure

The TCA's Title II of Part Two, Heading One (Trade) contains, as mentioned above, rules concerning both services and investment. Although the disciplines related to services are laid down expansively, the provisions on investment are rather limited and they basically tackle issues such as market access, establishment, non-discriminatory treatment, operation, and investment liberalization. Owing to its limited approach, the investment protection provided in the TCA would inevitably necessitate the analysis of what is not included in the TCA, compared to other contemporary investment protection agreements.

The TCA defines clearly the category of investors that are to be protected. According to Article 124(j) TCA, ' "investor of a Party" means a natural or legal person of a Party that seeks to establish, is establishing or has established an enterprise in accordance with point (h) in the territory of the other Party'. Since legal persons must be engaged in 'substantive business operations' in their home state, simple shell companies are excluded from this definition. The

[39] The EU is currently engaged in inter-governmental talks at UNCITRAL aimed at reforming the UNCITRAL ISDS mechanism that might lead to the establishment of a multilateral investment court. The establishment of an MIC is already provided for in the EU's international investment agreements. See eg art 8.29 of the Canada-EU CETA, art 3.38 of the EU-Vietnam Investment Protection Agreement (IPA), or art 3.12 of the EU-Singapore IPA). As for the UK, the CPTPP Treaty which the UK has signed on 16 July 2023 provides for the ISDS mechanism in Section B of Chapter 9 on Investment. (https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf. Last accessed 30 September 2023)

See 'The Accession of the United Kingdom of Great Britain and Northern Ireland to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership: Agreement Summary' for the UK government's view on the ISDS mechanism in CPTPP: 'ISDS is an effective means of resolving investment disputes and it continues to play an important role protecting British investors abroad. The UK has investment agreements containing ISDS provisions with over 90 trading partners.' (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178187/cptpp-agreement-summary.pdf. Last accessed 30 September 2023)

narrow definition included in the TCA for 'investors' brings the requirement to have considerable business operations in the investor's home state and, as such, gives rise to a jurisdictional impediment that the investors will have to overcome. Consequently, the TCA's substantive protection provisions are not only limited in scope, but they also fall short of serving the interests of all potential investors.

Article 123(5) TCA excludes certain types of services from the application of the standard provided in TCA towards investment protection: air transportation,[40] audiovisual, national maritime cabotage, and inland waterways transport. Similarly, the standard does not apply either to the measures related to public procurement and subsidies.[41]

3.2 Investment Protection Principles and Standards

The underpinnings of the investment protection found in the TCA are structured similarly to the basic principles of the WTO. Accordingly, principles such as MFN treatment, national treatment, and market access are duly incorporated into the TCA.

In terms of MFN treatment, according to Articles 130(1) TCA this principle is applicable to third-country investors and their enterprises in like situations. Moreover, probably mindful of the implications related to the insertion of a MFN clause in bilateral investment treaties (BITs), which have subsequently given rise to certain controversial interpretations in older International Centre for Settlement of Investment Disputes (ICSID) cases,[42] Article 130(4) explicitly stipulates that the MFN principle in the TCA cannot be utilized by the investors to bring ISDS procedures that are found in other international agreements into the TCA. Accordingly, there is no possibility of invoking the TCA MFN clause at any dispute before international arbitration tribunals.[43]

Although the standards of protection provided by the TCA are not very different from those that exist in the WTO system, they diverge from the

[40] Air services are defined as follows: 'Air services or related services in support of air services which include: air transportation; services provided by using an aircraft whose primary purpose is not the transportation of goods or passengers, such as aerial fire-fighting, flight training, sightseeing, spraying, surveying, mapping, photography, parachute jumping, glider towing, helicopter-lift for logging and construction, and other airborne agricultural, industrial and inspection services; the rental of aircraft with crew; and airport operation services.'

[41] See TCA, art 123(7).

[42] See *Emilio Augustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7 http://icsidfiles.worldbank.org/icsid/icsidblobs/onlineawards/C163/DC563.pdf (accessed 15 September 2023).

[43] Additional limitations brought to the MFN clause are stipulated in TCA, art 130(3).

protection that investors can benefit from within the EU's prior trade agreements with Canada, Singapore, and Vietnam, among others.

On the one hand, the substantive protection coverage in the TCA mainly consists of a typical twofold non-discrimination principle. First, Article 129(1) TCA lays down national treatment principle whereby the parties undertake the commitment to treat another party's investors no less favourably than their own investors. Secondly, Article 130(1) TCA provides for the MFN treatment which would require the parties not to treat investors of the other party less favourably than how they would treat investors of a third country. In addition, the TCA also includes market access as a standard of protection in Article 128, whereby this protection is restricted to the prohibition of some limitations in relation to the number of enterprises that can undertake a specific economic activity, the participation of foreign capital, or the types of legal entity that enable the investor to perform an economic activity. Furthermore, although not specifically designed with investment protection in mind, the TCA lays down various provisions to prevent the application of nationality restrictions for senior personnel,[44] listed trade performance requirements,[45] or a local presence requirement to be fulfilled by the service supplier in order to be entitled to benefit from the cross-border supply of a service.[46]

On the other hand, some of the classical and important protection standards provided in the majority of investment agreements by advanced economies, such as expropriation, fair and equitable treatment, full protection, and security and umbrella clause are not included in the TCA. Consequently, when faced with expropriation, for instance, investors from both parties would have to turn to customary international law principles for the recognition of their rights. On a different note, the TCA does not impede the application of the European Convention on Human Rights[47] that safeguards the right to property, among other rights.

Similarly to the application in services trade, the parties agreed that the standards of protection will not be applicable to non-conforming measures and their listed exceptions.[48]

[44] See ibid art 131.

[45] See ibid art 132. These performance requirements may be related to the exportation of a given level or percentage of goods or services or to the purchase, use or granting a preference to goods that are produced, or services provided in its territory.

[46] See TCA, art 136.

[47] See on this note TCA, art 524 and art 1 of Protocol No 1 to the ECHR.

[48] See TCA, art 133. For instance, national treatment requirement would not oblige the EU to replicate for UK investors the treatment that it provides to EU Member State natural or legal persons under the TFEU.

The TCA also includes a denial of benefits clause whereby a party may deny the benefits of the provisions of the TCA on services and investment (Title II of Heading One of Part Two), as well as on capital movements, payments, and temporary safeguards measures (Title IV of Heading One of Part Two) to an investor or service supplier of the other party, or to a covered enterprise, if the denying party adopts or maintains measures for the maintenance of international peace and security, including the protection of human rights, which: (a) prohibit transactions with that investor, service supplier, or covered enterprise; or (b) would be violated or circumvented if the benefits of Titles II and IV were accorded to that investor, service supplier, or covered enterprise.[49]

3.3 Investment Arbitration

Although the TCA does not lay down a specific form of ISDS mechanism, investment-related disputes can be settled through a state-to-state arbitration system that is found in Part Six of the TCA entitled 'Dispute Settlement and Horizontal Provisions'. Consequently, this system does not provide investors with the right to invoke claims through arbitration or a type of permanent investment court system. Moreover, the parties' domestic courts do not enjoy jurisdiction to resolve the disputes arising from the TCA.[50] In fact, this preference for the lack of jurisdiction within the TCA can be interpreted as a response to the UK's long-standing unease with the authority of the Court of Justice of the European Union (CJEU).[51] At the same time, Article 4.3 TCA also prevents any interpretation of the Agreement made by one of the parties' courts from becoming binding on the other party's courts.[52] In a similar approach, the TCA does not provide the investors with the possibility of invoking TCA provisions directly before national courts within the parties' domestic legal systems since, unlike the EU law, the TCA does not have direct effect.[53] Consequently, those investors whose interests are damaged by the host state can only request the parties to initiate the ad-hoc state-to-state arbitration between the EU and the

[49] TCA, art 125.
[50] ibid art 754.5.
[51] The TCA in this sense is different from the dispute settlement framework that was foreseen in the Withdrawal Agreement, where the CJEU still enjoyed jurisdiction. According to art 174 of the Withdrawal Agreement, the arbitration panel had been designed not to decide on issues of EU law. Instead, it was required to seek recourse to the CJEU for a ruling on EU law-related matters. art 174(1) of the Withdrawal Agreement provides as follows: 'The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel.'
[52] See TCA, art 4.3. See also Federico Fabbrini, 'Introduction' in this volume.
[53] See TCA, art 5(1).

UK. In that sense, investors have no legal standing before the arbitral tribunal. As such, rulings of an arbitral tribunal produce binding legal effects only on the parties (the UK and the EU) and they do not create rights and obligations for private investors.[54]

The procedural rules that are applicable to arbitration are found in Part Six and Annex 1 of the TCA,[55] which foresee at the initial stage of arbitration a thirty-day consultation between the parties. This period can either be extended by a decision of the parties or, in case of failure to find an amicable solution, the dispute can be brought before the arbitral tribunal. The Partnership Council is given a considerable role in engaging to resolve any issue that the parties may have with regard to the ways in which the TCA norms can be interpreted.[56]

3.4 State of the Bilateral Investment Treaties

One of the problems that the TCA generates in relation to investment protection and investment-related dispute settlement is that it leaves unregulated the treatment of the bilateral investment treaties (BITs) that were previously concluded between various EU Member States and the UK before those Member States joined the EU. Even though some of these BITs have been terminated, those with Bulgaria, Croatia, Lithuania, and Slovenia remain in force.[57] This brings a difficult legal question considering the CJEU's judgment in *Achmea,*[58] where it held that intra-EU BITs were not consistent with EU law. In order to correct this inconsistency, some EU Member States entered into plurilateral agreement in May 2020 which put an end to the intra-EU BITs that were in force between them. Since the UK did not agree to become a signatory to this 'plurilateral agreement', the UK was invited by the EU to terminate these BITs or, alternatively, if the UK failed to cooperate in this regard, the matter could be brought to the review of the CJEU in accordance with Article 87 of the Withdrawal Agreement.[59]

[54] See ibid art 754(2).

[55] TCA, art Article 759(2) provides for the possibility of amending these rules by the Partnership Council.

[56] According to TCA, art 7, the Partnership Council is also doted with the authority of adopting decisions that both the parties and the arbitral tribunal will be bound by.

[57] For the relevant information on UNCTAD Investment Policy Hub see https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom (accessed 15 September 2023).

[58] Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* ECLI:EU:C:2018:158.

[59] For further discussion on the analysis of the TCA's investment provisions and its silence on BITs between the UK and EU Member States see Noah A Barr, 'The EU-UK Investment Regime after Brexit: In Search of an Equilibrium?' 17(4) Global Trade and Customs Journal 146.

3.5 General Assessment on Investment

Overall, compared to the parties' other FTAs and BITs, the TCA is distinct with its rather limited scope, equally limited substantive protection standards that are applicable to foreign investors, and also the absence of a powerful ISDS mechanism. Moreover, the TCA also falls short of providing the procedural remedies that are needed to enforce the substantive investment protection standards that investors would expect to benefit from. Finally, even though the UK had concluded BITs with various EU Member States well before their accession to the EU, the TCA falls short of clarifying the fate of those treaties, and therefore their future treatment requires further assessment and negotiation. Similarly, there is no clarification yet as to the recognition and enforcement of any award that is given in relation to a dispute settlement matter within intra-EU BITs.

4 Public Procurement

This section turns to a brief overview of the TCA's chapter on government public procurement, and looks at both the rules governing the procurement between the parties and potential areas for further negotiations.

On the one hand, since FTAs for goods and economic integration agreements for services essentially derive from the GATT/WTO legal framework, it is essential first to state the parties' positions within the WTO in relation to government procurement. The WTO Government Procurement Agreement (the GPA)[60] is a plurilateral agreement and is binding on those WTO members that signed it or that have become members of the CTA following relevant procedures. When the UK was still an EU Member State, both the UK and all other Member States of the EU were parties to the GPA. The UK became a party to the GPA in its own right on 1 January 2021. The TCA, on the other hand, now lays down a transparent and non-discriminatory framework that governs the parties' trade relations within the field of public procurement.

[60] At present, the CTA has 21 parties comprising 48 WTO members. Thirty-five WTO members/observers participate in the Committee on Government Procurement as observers. Out of these, 11 members are in the process of acceding to the CTA. The GPA is composed mainly of two parts: the text of the agreement and parties' market access schedules of commitments. For further information on GPA and the parties' coverage schedules see https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (accessed 29 September 2023).

4.1 Structure

Public procurement is regulated through the TCA in two essential set of rules: first, Title VI on public procurement; and, secondly, a separate annex, Annex 25 on public procurement. The first set of rules in the TCA is found under Title VI of Heading One of Part Two and is rather similar to the existing procurement systems in both parties. The TCA defines covered procurement as procurement to which Article II of the GPA applies[61] and, in addition, procurement listed in section B of Annex 25 to the TCA. According to Article 277 TCA, various articles[62] of the GPA and the Annexes of each party to Appendix I to the GPA were made part and parcel of the TCA by incorporation and thus are applicable, mutatis mutandis, to goods or services suppliers of the other party. As for the parties' commitments under the GPA, they have not been amended following the conclusion of the TCA.

In terms of the institutional efficiency and a successful implementation and similarly to cross-border trade in services and investment regulation, the TCA also establishes a Trade Specialised Committee on Public Procurement to tackle issues governed by Title VI of Heading One of Part Two.[63]

4.2 Objective and Scope of Public Procurement Provisions in the TCA

The general objective of the TCA is defined in Article 276 as securing the reciprocal access of the parties' suppliers to increased and transparent opportunities to participate in public procurement opportunities in each other's

[61] The TCA lays down in ch 2 some additional rules for covered procurement: For instance art 279 on electronic publication requires documents for covered procurements, all procurement notices including notices of intended procurement, summary notices, notices of planned procurement and contract award notices to be directly accessible by electronic means, free of charge and through a single point of access on the internet. In another additional rule, art 281 on conditions for participation stipulates that where a party's procuring entities require the demonstration of prior experience by a supplier in order to be able to participate in a covered procurement, those procuring entities should not require the supplier to have such experience as obtained in the territory of the respective party.

[62] WTO Government Procurement Agreement, arts I–III, IV.1.a, IV.2–IV.7, VI–XV, XVI.1–XVI.3, XVII, and XVIII.

[63] According to the UK government's reporting, the Trade Specialised Committee on Public Procurement gathered twice on 12 October 2021 and 27 October 2022. See https://www.gov.uk/government/publications/trade-and-cooperation-agreement-implementation-report-january-2021-to-december-2022/uk-eu-trade-and-cooperation-agreement-implementation-report-1-january-2021-to-31-december-2022#annex-a-meetings-of-the-tca-specialised-committees (accessed 15 September 2023).

market. As there is a tendency in many procuring authorities around the world to discriminate in favour of domestic bidders, this provision is aimed primarily at limiting this inclination. Consequently, reciprocity being the key and irrespective of coverage obligations, the parties assume a broad obligation in their territories to treat each other's suppliers no less favourably than their own suppliers.

In terms of the scope of the TCA's public procurement provisions, Article 277 lays down the procurements that will be governed by the TCA. Accordingly, a procurement will fall within the scope of application of the TCA provided that it is covered by the parties' relevant GPA Annexes (or coverage schedules), or is listed in Annex 25 to the TCA. Within the WTO, the coverage schedules of parties form an integral part of the GPA and are found in Appendix I to the agreement. The schedule of the parties contains various annexes that define the concerned party's commitment with respect to four dimensions of coverage: the procuring entities covered by the agreement; the goods, services, and construction services overed by the agreement; the threshold values above which procurement activities are covered by the agreement, and exceptions to the coverage.[64]

Since its exit from the EU, the UK is no longer subject to the EU's coverage schedules as it became a separate member of the WTO GPA, and thus has listed its own GPA coverage schedules.[65] These schedules lay down the scope of the covered procurements in the UK territory. Article 288 TCA provides for the national treatment beyond covered procurement of locally established suppliers. An obligation of national treatment of 'non-covered' procurements for both parties is also regulated in Article 288 TCA. The national treatment principle is an obligation for the parties and yet security and general exceptions that are stipulated in Article III of the GPA form the limitation of this obligation, even in cases where the procurement may not necessarily be covered in conformity with Title VI.

Some areas that are not currently governed by the GPA are actually covered by the TCA and can be found in Annex 25. Since the TCA is based on the parties' commitments for procurement access under the GPA, they also reached an agreement on the extension of market access rules beyond the GPA, which may include private-sector utilities that function as

[64] Currently, the schedule of each GPA party contains seven annexes: Annex 1: central government entities; Annex 2: sub-central government entities; Annex 3: other entities; Annex 4: goods; Annex 5: services; Annex 6: construction services; Annex 7: general notes.

[65] See https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm (accessed 15 September 2023).

a monopoly, the gas and heat distribution sectors, and an array of further services.[66]

Public procurement contracts that fall outside the scope of application of the GPA and the TCA concern those that are related to defence and healthcare services. As such, the parties' suppliers cannot benefit from and thus do not have automatic or guaranteed access to those types of contracts in the TCA host party.

In a digitalized world, the use of electronic means in procurement also takes central stage in the TCA. Article 278 TCA requires the parties to ascertain that, to the largest extent possible, the procuring authorities on both sides will undertake the covered procurement operations through electronic means.[67] Even though certain exceptional circumstances are foreseen, those electronic means have to be provided in a non-discriminatory, accessible, and interoperable manner with the Information and Communication Technology products that exist globally in general use and should not become a barrier to procurement procedures. Another provision that instils the usage of electronic means is Article 279 TCA, which requires the electronic publication on the internet of all procurement notices including those that are related to intended procurement or planned procurement, summary notices, and notices of contract award, via a single point of access.

The TCA also contains some provisions that concern the conditions for participation, systems related to registration, procedures for qualifications, supporting evidence, selective tendering, and also abnormally low prices.[68] A matter of increasing salience, environmental, social, and labour considerations are also incorporated in Article 285 TCA. In a further clarification, the parties bear the responsibility and assume the obligation that their relevant contracting authorities will be in position to be mindful of those considerations within the entire procurement process. The TCA requires those considerations to conform to the rules and principles that are laid down in Chapters 1 and 2 and also for greater transparency purposes, to be explicitly spelled out in the tender documents.

[66] Among others, hotel and restaurant services, food servicing services, real estate services on a fee or contract basis, telecommunication related services, utilities procurements, other business services, and education services are such areas that fall within the TCA's scope of application.

[67] According to art 278(2), a covered procurement will be deemed to be conducted by electronic means if the procurement authority makes use of electronic means in the publication of notices and tender documentation in procurement procedures, as well as in the submission of requests to participate and of tenders.

[68] See TCA, arts 280–86.

4.3 General Assessment of Public Procurement

The TCA provides a larger scope for covered procurement than the WTO GPA. Moreover, the TCA also covers a considerable array of services that fall at present outside the scope of application of the EU's own GPA annexes. In this sense, the parties committed a significant market opening even though this is less than that which the UK enjoyed as a Member State: as such, there is always room for further improvement, in particular as far as the legal reforms that the UK will need to undertake, are concerned. Notwithstanding this, the TCA includes certain important public procurement principles that are found in the UK's existing legal framework that is in fact based on EU legislation. In that sense, a certain convergence exists between the parties' commitments in this field which is likely to ease the cooperation and facilitate future negotiations. However, the UK government's recent Procurement Bill that will reform the existing Procurement Rules is also expected to bring some novelties that will need to be assessed separately.[69]

5 Conclusion

Freedom of establishment and freedom to provide services that the deep economic integration under the EU Single Market offers is no longer the binding force between the UK and the EU. The parties' economic operators no longer enjoy these vital freedoms and are now subject to rules that prevail in the host country. Despite avoiding a no-deal scenario, the British Chambers of Commerce still reports that the TCA includes more than 1,000 restrictions in cross-border trade in services,[70] either at the EU or Member State level. In the case of UK service providers and investors in the EU market, trade liberalization in services is proving to be more problematic since the individual Member States may have placed reservations that will need to be factored in. This is partly due to the overwhelming complexity of national EU regimes across sectors despite the long-standing harmonization efforts. Liberalization

[69] See the UK Government's ongoing work including public consultations on 'Transforming Public Procurement' at: https://www.gov.uk/government/collections/transforming-public-procurement (last accessed 15 September 2023)

[70] Peter Foster, 'A Post-Brexit Reckoning for Services' *Financial Times* (7 April 2022), referring to the British Chambers of Commerce at https://www.ft.com/content/ef77abc4-5d30-4c4b-93f3-62b0164bec8f (accessed 29 September 2023). Peter Foster, 'UK Small Businesses Struggle with Bureaucratic Quagmire after Brexit' *Financial Times* (27 March 2022) https://www.ft.com/content/e5432184-7109-449a-8b10-cb3a701e2226 (accessed 29 September 2023).

commitments in the TCA's public procurement provisions, although more ambitious compared to the parties' WTO GPA schedules, do not really match the market access advantages that the Single Market provides for. Exiting the EU single and customs union market opened the gates for intrinsic costs. However, it is crucial to reduce the frictions and this can be done in a relatively speedy timeframe when the five-year review arrives in 2026. Accelerating the conclusion of mutual recognition arrangements and the introduction of facilitating mobility agreements for economic operators and professionals could unlock meaningful trade gains. Finally, despite the TCA's trade liberalization being rather modest compared to the EU Single Market on many fronts, the enactment of this agreement should still be assessed as a prelude to a much larger negotiation canvas—if there is the political will to do so.[71] Brexit is far from being completed and, given the partners' common heritage on one hand and their competitive ambitions on the other, it is an ever-evolving journey.

[71] See the chapter by Harold James in this volume.

7

Capital Movements, Digital Trade, and Intellectual Property

Mariela de Amstalden

1 Introduction

The purpose of this chapter is to analyse key features of the European Union (EU)-United Kingdom (UK) Trade and Cooperation Agreement (TCA) relating to capital movements, digital trade, and intellectual property rights (IPRs). It first identifies the relevant legal provisions of the TCA, mapping their structure, to highlight the minimum standard of protection they afford. It also examines the operationalization of selected applicable provisions, taking into account the social, political, and economic realities they are situated in, including limits and opportunities.

As such, the chapter is structured as follows. Section 2 examines the TCA provisions on capital movements, first mapping the legal architecture applicable to the free flow of capital, and then identifying two key principles underlying the objectives of such provisions—regulatory autonomy and non-discrimination. Section 3 is concerned with provisions on digital trade and their resilience in view of rapidly advancing digital future(s). It questions whether the many carve-outs in the TCA are conducive to regulation by exception as a rule, while also considering data flows and personal data. Section 4 focuses on IPRs, discussing first what constitutes the minimum standard for IP protection, the not uncontroversial compromise reached on exhaustion of IPRs, and the application of national treatment as an underlying principle. This section subsequently attempts to explain the operationalization of these IPR-related principles by examining three distinct rights conferred by intellectual property protection: copyright, trademarks, and patents. The final part of this section is devoted to selected IPR provisions under the TCA dealing with

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overarching rules for cooperation and their significance within the broader context of EU-UK relations. It also pays attention to the inclusion of voluntary stakeholder initiatives as an additional governance tool, while also considering geographical indications and their continuous shifting regime. Section 5 briefly concludes.

2 Capital Movements

2.1 Mapping the Legal Architecture of Capital Movements under the TCA

There are five key provisions related to capital movements in Part Two, Heading One, Title IV, Articles 213–17 TCA. The underlying rationale for protection is the free movement of capital and payments, as established under Article 213 TCA.[1] This is a distinct change from the status quo ante in the EU internal market, where the UK enjoyed a significantly higher level of economic integration, with its accompanying freedoms. Under the new regime, payments and transfers related to transactions on current accounts are allowed, under Article 214 TCA, on the proviso that their freely convertible currency complies with the articles of agreement of the International Monetary Fund (IMF),[2] a source of international law dating back to the Bretton Woods Agreement.[3] Reference to international provisions predating the constitution of the EU might lead to the conclusion, at first sight, that a rather shallow integration between the UK and the EU is primarily sought, at least with reference to capital movements. On closer examination, however, it becomes clear that an additional, key objective of the agreed provisions is the liberalization of investment.[4] Moreover, the overarching importance of this objective is further emphasized by the obligation to consult each other in a designated forum, the Trade Specialised Committee on Services, Investment and Digital Trade, with the aim of facilitating capital movements to promote trade and investment.[5] Overall, provisions on capital movements under the TCA are guided by non-discrimination and regulatory

[1] Provided it relates to liberalized transactions under the TCA; see TCA, art 213.
[2] International Monetary Fund, Articles of Agreement, 27 December 1947, UNTS 2, 39.
[3] ibid.
[4] TCA, art 215(1).
[5] ibid art 215(2).

autonomy imperatives—two of the key principles under the rules of the World Trade Organization (WTO). In doing so, the TCA appears to reject an 'EU law minus'[6] approach based on mutual recognition, clearly opting instead to favour a 'WTO plus' one, and resulting in a loose but in principle sufficient set of rules that ensure international commitments related to trade in services are met.

2.2 Key Features: Regulatory Autonomy and Non-discrimination

The rights and obligations derived from Articles 213 to 215 TCA are not intended to encumber the parties' regulatory autonomy as it relates to a number of key features in capital movement, such as bankruptcy, insolvency, or the protection of the rights of creditors;[7] securities, futures, and options;[8] financial reporting;[9] criminal or penal offences;[10] compliance with orders or judgments in judicial or administrative proceedings;[11] and social security, public retirement, and compulsory savings schemes.[12] Freedom of capital movements, as agreed under the TCA, is also underpinned by the non-discrimination principle,[13] stating in clear terms that the exercise of regulatory autonomy shall not constitute a disguised barrier to this freedom.[14]

In addition, the legal basis for temporary safeguard measures is provided in Article 217 TCA, according to which the EU retains the ability to adopt temporary measures for no longer than six months,[15] and to the extent that they are strictly necessary,[16] clearly signalling that the legal threshold is more stringent for exceptional circumstances. Provisions dealing with restrictions in case of balance of payments and external financial difficulties are specified in Article 218 TCA.

[6] Catherine Barnard and Emilija Leinarte, 'Movement of Goods under the TCA' (2022) 13 Global Policy 105.
[7] TCA, art 216(1)(a).
[8] ibid art 216(1)(b).
[9] ibid art 216(1)(c).
[10] ibid art 216(1)(d).
[11] ibid art 216(1)(e).
[12] ibid art 216(1)(f).
[13] Among others see Nicholas DiMascio and Joost Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) The American Journal of International Law 48; Nicolas Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 International and Comparative Law Quarterly 831.
[14] TCA, art 216(2).
[15] ibid art 217(1).
[16] ibid art 217(2).

3 Digital Trade

Title III, Chapter I of the TCA is dedicated to digital trade. This area has received considerable scholarly attention in recent years, evidencing the significance of its increasing importance for international trade.[17] The TCA is no exception. Here, the choice of shallow economic integration is once again evidenced by the rather sparse number of provisions—Articles 196 to 212—addressing an area of increasing strategic geopolitical and socio-economic relevance.

3.1 Designing an Effective Regulatory Framework for Digital Futures: Protection by Exception?

Under Article 196, there are three main objectives connected to digital trade: the facilitation of digital trade, the mitigation of unjustified trade barriers originating in electronic means, and the creation of an online environment that is open, secure, and trustworthy for businesses and consumers. These three purposes, while seemingly disparate, align well with similar considerations seen in other titles of the TCA. In particular, it makes explicit reference to the importance of avoiding digital non-tariff barriers, while being attentive to online safety and the trustworthiness of systems. The latter two are a relative novelty in free trade agreements, and a particularly welcome inclusion in view of rapid developments in generative artificial intelligence (AI).[18]

A caveat is found in the scope of application under Article 197, whereby audio-visual services are excluded. This carve-out is not surprising given the considerable cultural and economic importance of this sector, as well as the litigation legacy that preceded the TCA—even if primarily under WTO rules.[19] As with the previous section, a dedicated provision on the right to regulate ensures

[17] See eg Elaine Fahey, *The EU as a Global Digital Actor* (Hart Publishing 2022); Joshua P Meltzer, 'Governing Digital Trade' (2019) 18(S1) World Trade Review 23; Mira Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51 UC Davis Law Review 65.

[18] For example, issues of trustworthiness are frequently debated in the context of autonomous systems, like uncrewed terrestrial and aerial vehicles, less so within the context of digital trade. See eg Georg Borges, 'A Legal Framework for Autonomous Systems' in Georg Borges and Christoph Sorge (eds), *Law and Technology in a Global Digital Society* (Springer 2022) 3–26.

[19] See WTO Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (adopted 19 January 2010) WT/DS363/AB/R.

that both parties prioritize the adoption of measures as deemed appropriate to achieve legitimate public policy objectives, and provides a non-exhaustive list: the protection of public health, social services, public education, privacy and data protection, and the promotion and protection of cultural diversity. While it is not surprising to see exceptions agreed on public health, the remaining grounds are not features usually encountered in free trade agreements to date—although there is evidence of an increasing preference to include such considerations in the latest generation of free trade agreements entered into by the EU, in particular.[20]

3.2 On Data Flows and Personal Data Protection

Special attention is paid to data flows and personal data protection in Articles 201 and 202 TCA, respectively.[21] Here, the emphasis is on ensuring the free flow of data across borders and mitigating any arising future incompatibilities.[22] It is notable that the TCA imposes on the parties a notification duty in case of regulatory modifications to the existing corresponding regimes for the protection of personal data and privacy, a provision with potential human rights implications, too.

The remainder of the title addresses specific provisions as they relate to customs duties on electronic transmissions (or lack thereof as they are considered services),[23] the no-prior authorization requirement—including measures having an equivalent effect,[24] electronic contract formation,[25] electronic authentication and electronic trust services,[26] transfer of or access to source code,[27] online consumer trust,[28] unsolicited direct marketing

[20] For example, the EU approach to address tensions between cultural diversity and trade has evolved in recent years. See Lilian Richieri Hanania, 'Trade, Culture and the European Union Cultural Exception' (2019) 25(5) International Journal of Cultural Policy 568. For a discussion on data privacy and free trade agreements see Svetlana Yakovleva and Kristina Irion, 'Pitching Trade against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10(3) International Data Privacy Law 201.

[21] See also Edoardo Celeste, 'Data Protection' in Federico Fabbrini, *The Law & Politics of Brexit*, *Vol. III* (OUP 2021) 197–216.

[22] For a detailed discussion on EU data protection after 2020 see Anastasia Choromidou, 'EU Data Protection under the TCA: The UK Adequacy Decision and the Twin GDPRS' (2021) 11(4) International Data Privacy Law. 388.

[23] TCA, art 203.

[24] ibid art 204.

[25] ibid art 205.

[26] ibid art 206.

[27] ibid art 207.

[28] ibid art 208.

communications,[29] open government data,[30] regulatory cooperation (excluding personal data and privacy),[31] and computer services.[32]

In providing a selected set of specific rules addressing some of the most salient challenges in digital trade—including digitally enabled trading of goods and services as well as data-based services like social media platforms—the TCA is attentive to the borderless nature in new ways of trading and the jurisdictional limitations faced by new technologies. Unlike in other chapters, the TCA shows a limited ambition in this increasingly important area, largely reflecting the EU's digital trade policy.

4 Intellectual Property under the TCA

4.1 Minimum Standard of Protection, Exhaustion, and National Treatment

Title V of Heading One of Part II addresses the protection of intellectual property. The objectives of such protection are twofold. First, the TCA aims at facilitating innovation and creativity in goods and services, while reducing their trade distortions and contributing to a sustainable and inclusive economy.[33] Secondly, it aims at establishing a minimum standard of protection and enforcement of IPRs between the parties.[34]

This mix of objectives is not unusual in international intellectual property agreements, and yet some elements display a forward-looking character. While the promotion of innovation and creativity through the granting of exclusive rights has been at the core of intellectual property protection since its inception—for example, in the Paris Convention for the Protection of Industrial Property (Paris Convention)[35] or the Berne Convention[36]—the reduction of commercial barriers (tariff and non-tariff barriers) is arguably a result of the adoption of the WTO Agreement on Trade-related Aspects of

[29] ibid art 209.
[30] ibid art 210.
[31] ibid art 211.
[32] ibid art 212.
[33] ibid art 219 (a).
[34] ibid art 219 (b).
[35] Paris Convention on the Protection of Industrial Property, UNTS 828, 305 (20 March 1883) (Paris Convention).
[36] Berne Convention for the Protection of Literary and Artistic Works, UNTS 828, 221 (9 September 1886) (Berne Convention).

Intellectual Property Rights (TRIPs Agreement).[37] Importantly, the TCA makes explicit reference to the link between intellectual property protection and a sustainable and inclusive economy—a provision not often seen in intellectual property chapters.[38] As a result, the TCA can be seen as a pioneer in its attentiveness to the United Nations (UN) 2030 Agenda for Sustainable Development (Sustainable Development Goals)[39] and the role intellectual property can play in creating and maintaining an inclusive economy.[40]

The scope of application is primarily delimited by the rights and obligations as provided for by the TRIPs Agreement and other relevant intellectual property treaties to which the EU and the UK are parties,[41] providing in turn a robust and familiar legal basis for intellectual property. Notably, it is understood that such sources provide a minimum standard of protection for IPRs.[42] Similar to the operation of the TRIPs Agreement, under the TCA both parties are entitled to adopt higher levels of protection and enforcement to the extent that they do not contravene other provisions under the same title.[43]

The provision related to exhaustion of IPRs as established under Article 223 TCA is significant, as it maintains the right of the parties to determine whether and under what conditions the exhaustion of IPRs applies. The doctrine of exhaustion is a distinct feature of intellectual property law, according to which an IP owner is prevented from exercising some of his or her exclusive IP rights if certain conditions are met.[44] It plays a predominant role in selected IPRs, such as patents[45] and copyright,[46] within the context of parallel trade,[47] and its

[37] Agreement on Trade-related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 (15 April 1994) (TRIPs Agreement).

[38] Ahmed Abdel-Latif and Pedro Roffe, 'The Interface between Intellectual Property and Sustainable Development' in Irene Calboli and Maria Lillà Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (OUP 2021) 615–39.

[39] UN General Assembly, 'Transforming our World: the 2030 Agenda for Sustainable Development, A/RES/70/1 (21 October 2015) https://www.refworld.org/docid/57b6e3e44.html (accessed 15 September 2023).

[40] See also Mariela de Amstalden, 'Seafood Without the Sea: Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, the 'Justifiability Test' and Innovative Technologies in a Sustainable Blue Economy' (2022) 23(1) The Journal of World Investment & Trade 68.

[41] TCA, art 220(1) in conjunction with art 222.

[42] ibid art 220(2).

[43] ibid.

[44] cf Shubha Ghosh and Irene Calboli, *Exhausting Intellectual Property Rights A Comparative Law and Policy Analysis* (CUP 2018).

[45] cf Santanu Mukherjee, *Patent Exhaustion and International Trade Regulation* (Brill 2023).

[46] cf Poorna Mysoor, 'Exhaustion, Non-exhaustion and Implied Licence' (2018) 49 International Review of Intellectual Property and Competition Law 656.

[47] See among others Irene Calboli, 'Intellectual Property Exhaustion and Parallel Imports of Pharmaceuticals: A Comparative and Critical Review' in Carlos Correa and Reto Hilty (eds), *Access to Medicines and Vaccines Implementing Flexibilities Under Intellectual Property Law* (Springer 2022) 31–71; Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar Publishing 2016).

interpretation is far from settled, with continuing debates across jurisdictional divides.[48]

National treatment is another pillar of IP protection under the TCA. According to its Article 224, parties are obliged mutually to accord no less favourable treatment than that accorded to their own nationals, under the proviso of exceptions already provided for in the Paris Convention, the Berne Convention, the Rome Convention,[49] and the Washington Treaty.[50] The application of exceptions to national treatment for IP protection will need to meet a two-prong test, namely: (1) the exception is necessary to secure compliance with domestic law that is consistent with the provisions of the TCA;[51] and (2) the exception is applied in a manner that does not constitute a disguised restriction to trade.[52]

4.2 Operationalizing IPRs under the TCA

This section examines core IPRs under the TCA, with a particular focus on copyright, trademarks, and patents. While a detailed analysis is beyond the scope of this section, it will primarily study the objectives, scope of application, and exceptions of IPRs under the TCA, being mindful of the numerous international treaties from which the TCA derives and establishes a legal basis for IP protection, as well as of the various UK statutory instruments[53] enacted to operationalize these legal commitments. At the onset, IP provisions under the TCA 'complement and further specify'[54] provisions under the TRIPs Agreement and other international IP international treaties.

4.2.1 Copyright

Substantive copyright protection is provided for in Articles 225 to 235 TCA. These provisions largely implement existing copyright law prior to

[48] For common law approaches see eg Shuji Sumi, 'A Common Law Doctrine of Exhaustion Based on an Implied Licence: A Canadian Perspective' (2021) 16(7) Journal of Intellectual Property Law & Practice 712. For civil law approaches to exhaustion see eg Reto Hilty, 'Legal Concept of "Exhaustion": Exhausted? From A—Intellectual "Property" and Its Limits' in Niklas Bruun and others (eds), *Transition and Coherence in Intellectual Property Law* (CUP 2020) 272.

[49] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, UNTS 496, 43 (26 October 1961) (Rome Convention).

[50] WIPO, Washington Treaty on Intellectual Property in Respect of Integrated Circuits, TRT/WASHINGTON/001 (26 May 1989).

[51] TCA, art 235(3)(a).

[52] ibid art 235(3)(b).

[53] Notably, the numerous guidance documents from the UK Intellectual Property Office (IPO).

[54] TCA, art 220(1).

the adoption of the TCA, setting minimum standards of protection and, in selected cases, mutual recognition. Rules relates to cross-border copyright arrangements, such as clearance for satellite broadcast, reciprocal protection for sui generis database rights[55] and orphan works exceptions, are not part of the TCA. Instead, they have been addressed in the UK through a number of statutory instruments and guidance notes published by the UK Intellectual Property Office (IPO).[56]

Copyright under the TCA lasts for the life of the author and seventy years after the author's death, irrespective of the date the work has been lawfully made available to the public.[57] This is a *de minimis* clause, as both parties may provide longer terms of protection than those provided under the TCA.[58] Exceptions and limitations to copyright are confined to 'certain special cases' that meet a double criteria, namely, that they do not conflict with the normal exploitation of the work and that they do not unreasonably prejudice the legitimate interests of the copyright holders.[59] Notably, the TCA provides for the legal protection of technological measures used to prevent the copyright infringement, with a specific provision dedicated to the protection of computer programs.[60] Parties have the right to adopt measures as deemed necessary to ensure adequate legal copyright protection, to the extent that beneficiaries of exceptions or limitations are not prevented from the enjoyment of their legal rights, as provided for in Article 233 TCA.[61]

4.2.2 Trademarks

As with copyright protection, a large section of the TCA's substantive trademark provisions reflects those in the EU Trade Marks Directive.[62] Trademark capability under Article 237 TCA can be constituted by any sign that displays distinctiveness and can be represented graphically on the parties' trademark

[55] For example, UK copyright law has been amended to provide a new specific database right for UK citizens and residents. See Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019/605).

[56] UK Intellectual Property Office (IPO), Guidance: Copyright Clearance for UK Satellite Broadcasting (30 January 2020) https://www.gov.uk/guidance/copyright-clearance-for-uk-satellite-broadcasting (last accessed 15 September 2023); UK IPO, 'Guidance: Sui Generis Database Rights' (30 January 2020) https://www.gov.uk/guidance/sui-generis-database-rights (last accessed 15 September 2023); UK IPO, 'Guidance: Copyright—Orphan Works (11 September 2023) https://www.gov.uk/guidance/copyright-orphan-works (last accessed 15 September 2023).

[57] TCA, art 230(1).

[58] ibid art 230(8).

[59] ibid art 233.

[60] ibid art 234 (1).

[61] ibid art 234 (4).

[62] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1, 23 December 2015.

registers. Rights conferred by registered trademarks are exclusive and negative in nature. They entitle the trademark holder to prevent third parties from using identical[63] or similar[64] signs in the course of trade. Protection of well-known trademarks under the TCA[65] is provided for with reference to the Paris Convention and the TRIPs Agreement, as well as the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.[66] This is in stark contrast to previous rules about trademark dilution,[67] for those signs with a reputation.

Trademark exceptions under the TCA largely mirror those under the Article 17 of the TRIPs Agreement, with one notable difference: the inclusion of geographical indications (GIs) as an example of fair use of descriptive terms. Historically, 'limited exceptions' to rights conferred on trademark owners under international agreements has been an open-ended concept, with fair use of descriptive terms often referred to as only one of the possible exceptions.[68] While the reconceptualization of GIs as fair use is far from uncontroversial,[69] Article 241 (3) TCA might shed some light on the matter. This provision establishes that rights conferred to registered trademark owners do not include the ability to prevent third parties from using an earlier right applicable to a specific locality in the course of trade, to the extent that the earlier right is recognized by law and used within its territorial limits.

Grounds for revocation -particularly due to non-use- and invalidation of trademarks are also provided under Articles 242 and 245 TCA respectively, albeit with a distinct lack of specificity.[70]

[63] TCA, art 238(1)(a).
[64] ibid art 238(1)(b).
[65] ibid art 240.
[66] See also Frederick Mostert, 'The Protection of Well-Known Marks under International Intellectual Property Law' in Irene Calboli and Jane Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 84–102.
[67] See eg Anselm Kamperman Sanders, 'Dilution and Damage beyond Confusion in the European Union' in Irene Calboli and Jane Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 499–510.
[68] Mariela de Amstalden, 'Article 17 TRIPS: Exceptions' in Peter-Tobias Stoll and Holger Hestermeyer (eds), *Commentaries on World Trade Law: Agreement on Trade-Related Aspects of Intellectual Property Rights* (Brill Nijhoff 2023) http://dx.doi.org/10.1163/2666-4941_WTCO_COM_6022 (accessed 15 September 2023).
[69] Xinzhe Song and Xiaoyan Wang, 'Fair Use of Geographical Indications: Another Look at the Spirited Debate on the Level of Protection' (2022) 21(5) World Trade Review 597; Alberto Ribeiro de Almeida and Suelen Carls, 'The Criteria to Qualify a Geographical Term as Generic: Are We Moving from a European to a US Perspective?' (2021) 52 International Review of Intellectual Property and Competition Law 444.
[70] For example, there is no established differentiation between relative and absolute grounds for revocation.

4.2.3 Patents

It is noteworthy that the section dedicated to patent protection under the TCA starts with reference to the nexus between patents and public health.[71] The emphasis is on medicinal and plant protection products and their patents.[72] In particular, the TCA explicitly refers to the Declaration on the TRIPS Agreement and Public Health (Doha Declaration),[73] and the need to ensure consistency in the interpretation and implementation of patent rights.[74] While this inclusion may be attributed to the mere passage of time, its rationale could also be found in the desire of the parties to maintain recourse to so-called 'TRIPS flexibilities',[75] ie regulatory autonomy and/or policy space left to WTO members to adopt measures as deemed necessary to protect its population, without infringing in their international obligations under the WTO Agreements.

As mentioned above, treaty text under the TCA acknowledges the peculiarities faced by medicinal products and plant protection patents, in particular.[76] It does so by recognizing a potential shorter period of effective patent protection due to time lapsed between the filling of an application for a patent and the market authorization. In this spirit, and akin to the provisions under Article 33 of the TRIPs Agreement,[77] the TCA allows the parties to compensate the patent holder by providing them with further protections in accordance to the holder's own laws and regulations.

4.3 Cooperation, Voluntary Stakeholder Initiatives, and Geographical Indications

In times where international cooperation is no longer taken for granted,[78] the TCA makes explicit provision, under its Article 273, for cooperation—instead

[71] TCA, art 250.

[72] On health cooperation under the TCA see the chapter by Elaine Fahey in this volume.

[73] WTO Ministerial Declaration on the TRIPS Agreement and Public Health, 14 November 2001, WT/MIN(01)/DEC/2 (Doha Declaration).

[74] For a study on the juridification process of the Doha Declaration see Andrew Law, *Patents and Public Health: Legalising the Policy Thoughts in the Doha TRIPS Declaration of 14 November 2001* (Nomos 2008).

[75] See Carlos Correa, 'Interpreting the Flexibilities under the TRIPS Agreement' in Carlos Correa and Reto Hilty (eds), *Access to Medicines and Vaccines* (Springer 2022) 1–30; see also Andrew Mitchell, 'The Right to Regulate and the Interpretation of the WTO Agreement' (2023) 26(3) Journal of International Economic Law 1.

[76] TCA, art 251.

[77] For an analysis of these provisions see Mariela de Amstalden, Andreas Naef, and Katrin Arend, 'Article 33 TRIPS: Terms of Protection (Patents)' in Peter-Tobias Stoll and Holger Hestermeyer (eds), *Commentaries on World Trade Law, Agreement on Trade-Related Aspects of Intellectual Property Rights* http://dx.doi.org/10.1163/2666-4941_WTCO_COM_6045 (accessed 15 September 2023).

[78] See eg Ian Hurd, 'The Case Against International Cooperation' (2022) 14(2) International Theory 263.

of equivalence or harmonization[79]—in support of the implementation of IP rights and obligations. It further provides a non-exhaustive list of activities that fall under the umbrella of 'cooperation',[80] including information exchange on IP legal frameworks, experience exchange on legislative progress as it pertains to IPRs and their domestic enforcement, coordinated efforts to prevent the exports of counterfeit goods, and a range of activities geared towards public awareness and engagement.

Voluntary stakeholder initiatives to reduce IPRs infringement also have a legal basis under Article 274 TCA. While a continuation of already established practice,[81] there is evidence supporting that these initiatives are effective in reducing the severity of IPR infringements.[82] As such, Article 274 TCA recognizes the importance of alternative, supplementary, and forward-looking ways to prevent IPR infringement that are commensurate with technological advances,[83] arguably elevating the role played by non-state actors in complying with treaty law.

GIs are seemingly a contentious matter. The TCA remains silent on substantive provisions for the protection of geographical indications as collective marks, which is telling of the sensitivity in the matter as it relates to international trade. Crucially, the only provision under the TCA with reference to GIs makes reference to a 'review' only. Article 275 TCA acknowledges previous agreements in place between the parties, and imposes a 'soft' obligation (as implied by the use of 'may') jointly to use reasonable efforts to reach agreement on rules for the protection and enforcement of GIs. While this provision is welcome in that it recognizes the importance of agreed rules for GIs, it also

[79] These terms carry distinct functionalities and yet are often disputed in scholarship due to a lack conceptual clarity. See in particular Jasper Bongers, Lynn Hillary, and Guus Wieman, 'Aligning Rulesets: Understanding Cooperation in the European Union' (2021) 3(1) Political Research Exchange 1.

[80] TCA, art 273(2).

[81] The European Commission has engaged in a series of initiatives, including the facilitation and signature of memoranda of understanding (MoUs) with key stakeholders to limit IPRs infringements. See eg Memorandum of Understanding on Online Advertising and IPR (20 June 2018) https://ec.europa.eu/docsroom/documents/30226; Memorandum of Understanding on the Sale of Counterfeit Goods on the Internet (21 June 2016) https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-sale-counterfeit-goods-internet_en (accessed 15 September 2023).

[82] See eg WIPO Advisory Committee on Enforcement, 'The Role of Intermediaries in IP Enforcement: Contributions prepared by the United Kingdom, AIM—the European Brands Association, the International Federation of the Phonographic Industry, DHL Express and Mastercard' WIPO/ACE/15/8 (3 August 2022).

[83] Relatedly, the role of voluntary agreements and stakeholders in the context of IPRs has recently been brought forward by the UK at the WTO. See WTO Council for Trade-Related Aspects of Intellectual Property Rights, 'Intellectual Property, Voluntary Licensing and Technology Transfer: Communication from the United Kingdom', 14 July 2023, IP/C/W/74.

demonstrates the level of complexity inherently encountered in the design of effective legal protection for rights with a strong territoriality component and considerable significance for international trade.[84] The UK has introduced its own GI scheme for the protection of geographical names of food, drink, and agricultural products in England, Scotland, and Wales,[85] to ensure protection after the end of the transition period on 31 December 2020. Likewise, those GIs protected under the UK scheme will benefit from continuity in protection with those jurisdictions with which the UK has signed free trade agreements, provided they are explicitly mentioned in the treaty text.

Very recent developments on the EU protection for non-agricultural GIs (the NAGI scheme)[86] may have wide implications for the operation of the TCA and the Windsor Framework,[87] as the EU entertains the idea of applying the new EU GI scheme to goods sold in Northern Ireland.[88] Crucially, under the NAGI scheme, manufactured goods that are similar to those protected with reference to a geographical origin (ie Murano glass), but that lack a geographic connection, would be prevented from using or 'evoking' that geography when marketing within the EU. If the EU indeed intends to extend the NAGI scheme to Northern Ireland, which is based on new law, it would need formally to place a request with the UK to that effect.[89] More generally, an extension of the NAGI scheme would potentially also benefit UK manufacturers of non-agricultural products beyond Northern Ireland, as they could also secure protection—provided their products have a quality, reputation, or other characteristic linked to a particular geographical origin (like Harris Tweed,[90] for example). In the absence of a formal request from the EU to the UK at the time of writing, it is plausible yet unclear whether its legal operationalization would result in legal tensions arising out of the TCA.

[84] The lack of agreement as to the form of protection for GIs under the TCA is arguably due to a need for regulatory flexibility as the UK negotiates new trade agreements with other potential partners with a preference for trademark law as a means to protect GIs, as is the case with the United States (US). See eg Craig Prescott, Manuela Pilato, and Claudia Bellia, 'Geographical Indications in the UK after Brexit: An Uncertain Future?' (2020) *Food Policy* 90 https://doi.org/10.1016/j.foodpol.2019.101808.

[85] UK Department for the Environment, Food and Rural Affairs (Defra), 'Guidance: Protected Geographical Food and Drink Names' UK GI Schemes, 4 January 2021 https://www.gov.uk/guidance/protected-geographical-food-and-drink-names-uk-gi-schemes (accessed 15 September 2023).

[86] European Parliament press release, 'Deal on Geographical Protection for Local Craft and Industrial Products', 5 May 2023 https://www.europarl.europa.eu/news/en/press-room/20230502IPR84003/deal-on-geographical-protection-for-local-craft-and-industrial-products (accessed 15 September 2023).

[87] UK House of Commons, European Scrutiny Committee, 22nd Report of Session 2022-23, 6 September 2023 https://committees.parliament.uk/publications/41359/documents/203350/default/ (accessed 15 September 2023).

[88] On the Windsor Framework see the chapter by Billy Melo Araujo in this volume.

[89] The formal request under art 13(4) of the Windsor Framework continues to be outstanding at the time of writing (15 September 2023).

[90] UK Harris Tweed Act 1993, c xi.

5 Conclusion

This chapter has examined key features in the TCA applicable to capital movements, digital trade, and IPR protection. It did so by identifying relevant legal provisions, mapping their structure, and highlighting the minimum standard of protection they afford. This examination highlighted specific aspects applicable to the free flow of capital, digital trade, and the legal protections available for innovation and creativity. The analysis showed that regulatory autonomy, coupled with greater deference to rules under the WTO system and its underlying principles of non-discrimination and national treatment are consistently infusing the text of the TCA, suggesting that a rules-based approach to international cooperation continues to be relevant, in spite of growing pressures towards geopolitical and economic fragmentation.

Relatedly, digital trade provisions seem to be primarily concerned with establishing a minimum level of protection to ensure data flows and electronic commerce, emphasizing the right to regulate with a non-exhaustive list of numerous exceptions. In the same vein, cooperation—particularly as it relates to novel forms of public-private governance in IPRs—suggests a willingness to conserve iterative engagement between the EU and the UK, even if in less integrated ways than was previously the case. Relatedly, we have also seen that the legal regime applicable to GIs under the TCA, as a special category of IPRs, may well provide a testing ground for the operationalization of the Windsor Framework. It remains to be seen whether this particular example will prove robust enough to display the dynamism needed to take account of the social, political, and economic realities in which the TCA is situated.

PART III

OTHER ECONOMIC COOPERATION PROVISIONS

8

Health, Climate, Energy, and Cyber

Transnational Areas, Limited Cooperation Ambitions?

*Elaine Fahey**

1 Introduction

The TCA makes provision for a variety of cooperation, amidst an agreement providing for rules on trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation, and participation in Union programmes. For many, it is not an agreement that has excited much interest or attracts much for its significance. It is, instead, known for its lack of ambition and notably its highly esoteric stance as to external relations and international matters.[1] UK International trade is currently in a difficult place and, at the time of writing, relations with the EU continue to be complex, unambitious, and underwhelming on foreign affairs.[2]

There are arguably few genuine multilateral engagements in the TCA, with foreign policy entirely omitted from the relationship.[3] On the one hand, there are limited commitments to international regulatory cooperation in the TCA also, unusually for an EU trade agreement in contrast with many other major economies. As a result, it is difficult to see the TCA as a model for the transnational in any sense. The general lack of ambition is in fact a key feature of the TCA. On the other hand, the TCA is clearly a modern and contemporary

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[1] See eg Piet Eeckhout, 'Brexit Sovereignty and Its Dead Ends' (2022) 13 Global Policy 98; Clair Gammage and Philip Syrpis, 'Sovereignty Fictions in the United Kingdom's Trade Agenda' (2022) 71 International & Comparative Law Quarterly 563.

[2] Jun Du and Oleksandr Shepotylo, 'The Impact of the Trade and Cooperation Agreement on UK Trade' *UK in a Changing Europe* (14 June 2023) https://ukandeu.ac.uk/the-impact-of-the-trade-and-cooperation-agreement-on-uk-trade/ (accessed 3 October 2023).

[3] See the chapter by Christy Petit in this volume.

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agreement that deploys a contemporary lexicon as to trade, even if concluded in a rushed and highly politicized environment and where its aims and objectives need to be viewed in such a light. Some are very critical of the way the TCA was concluded, particularly as to external competences and Member States' powers and a dramatically rushed conclusion to the process.[4] As a result, it can be said that it is hardly an example of best or 'leading' practice in EU external or international relations. Van Elsuwege notes how unprecedented the nature of the withdrawal process was to justify the exceptional practices such as the preference for a facultative EU only agreement and recourse to prior involvement without the role of the European Parliament, clarified by the Member States to be without prejudice to future agreements.[5] This is particularly so as to the competence issue and the EU-only conclusion of the TCA.[6]

While there are hundreds of references to the word 'international' in the TCA, there is only one reference to the word 'transnational' in the TCA in Article 85, on 'Cooperation on antimicrobial resistance'. Moreover, there are thirty-six mentions of the word global, although not necessarily about global cooperation, more so standards. It arguably reflects well the lack of ambition of the agreement but paradoxically also the contemporary nature of the TCA to include the term. The idea of the 'transnational' is a complex one in trade agreements. It is not a term that is commonly found in EU trade agreements, despite the EU being an emerging yet eminent global governance actor.[7] Instead, the term 'international' tends to be more common in EU trade agreements, far less so 'global' or 'transnational'. These differences reflect the contestability of the term transnational and its complex relationship in international economic law, itself a subject mired in much complexity. Other modern and recent EU trade agreements place international cooperation more centrally in core cooperation and make provision for a broad range of dialogues with international and

[4] Christina Eckes and Päivi Leino-Sandberg, 'The EU-UK Trade and Cooperation Agreement: Exceptional Circumstances or a New Paradigm for EU External Relations?' (2022) 85 Modern Law Review 164.

[5] Peter Van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) 6 European Papers 785.

[6] See Eckes and Leino-Sandberg (n 4): 'In the final days of 2020, the European Union and the United Kingdom concluded a Trade and Cooperation Agreement (TCA) covering a broad range of policy areas, including cooperation of law enforcement authorities and social security systems. The EU-UK TCA is unique as concerns the circumstances of its negotiation and adoption, as well as its substance. However, contrary to the argument of the EU institutions, the agreement will have broad implications for the understanding of the EU's external competence and Member States' ability to act in areas that are national competence and rely on national budgets. We are critical of the legitimacy of the TCA's conclusion process, consider that the lack of a deep constitutional analysis of the consequences of EU-only conclusion of the TCA, and of the TCA itself, are problematic, and believe that the choices made are likely to create difficulties for the implementation and enforcement of the agreement.'

[7] Elaine Fahey, *Introduction to Law and Global Governance* (Edward Elgar Publishing 2018) ch 1.

bilateral cooperation at their core.[8] The most contemporary or newest of the EU's trade agreements in 2023 also makes no reference to the transnational, although making many references to 'international'.[9] The relative differences or absences of such provision is argued here to make for a further and important reflection point.

It is important to say that these issues matter. The EU is a long-standing 'internationalist' in the global legal order in an era of shifts away from internationalization in recent times.[10] The EU is explicitly committed in its treaties to being even more than 'an internationalist' in so far as it is a 'globalist' as a matter of law and to being obliged to pursue multilateral solutions and to be a good global actor.[11] The effects of EU law externally are now widely studied and noted.[12] Many leading EU policy documents have an explicitly global dimension and span ranges of EU international relations, in the pre- and post-Lisbon period.[13] Until recently, the EU's vision of the global, to hold a rules-based global order with multilateralism as its key principle, contrasted sharply with other administrations, eg the Trump administration. While it consistently advocates internationalization as part of its multilateralism-first agenda, the development of the EU as a global actor continues to have multiple facets to it across disciplines.[14]

Certain trade and economics scholars have accused the EU of advocating multilateralism vociferously but practising routine bilateralism.[15] However, there are many nuances to the EU internationalization in trade agreements. The absence of multilateralism as an agenda in a trade agreement can also

[8] European Union-Mercosur Free Trade Agreement in principle (28 June 2019); Free Trade Agreement between the European Union and New Zealand (EU-New Zealand FTA) (9 July 2023).

[9] EU-New Zealand FTA (n 8).

[10] See Karen Smith, 'The European Union in an Illiberal World' (2017) 116 Current History 83.

[11] cf Consolidated Version of the Treaty of Functioning of the European Union (TFEU) [2012] OJ C326/47, art 21.

[12] See eg Anu Bradford, *The Brussels Effect* (OUP 2020).

[13] See eg European Council, 'European Security Strategy' (2009) https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf (accessed 8 December 2023); European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (2014) https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (accessed 3 October 2023); 'Shared Vision, Common Action: A Stronger Europe—A Global Strategy for the European Union's Foreign and Security Policy' (2016) https://eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (accessed 3 October 2023); European Commission, 'Joint Framework on countering hybrid threats: a European Union response' JOIN (2016)018 final; European Commission, 'Communication from the Commission: The European Agenda on Security' COM(2015) 185 final; European Council, 'Conclusions on the Action Plan on Human Rights and Democracy 2015: 2019' (2015) 10897/15.

[14] See Elaine Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Bloomsbury 2020).

[15] Katharina Meissner, 'The EU and World Regions: Multilateralism, Bilateralism, and Commercial Realism' in San Bilal and Bernard Hoekman (eds), *Perspectives on the Soft Power of EU Trade Policy* (CEPR 2019).

signify broader underlying tensions and this chapter proceeds on the basis that the TCA arguably showcases this.

This chapter considers four areas of the TCA with 'transnational' character, defining the transnational loosely as international or global ambition, either expressly or impliedly as provided for in the TCA. Two of the topics, health and cyber, are to be found in Part IV thematic cooperation, in Titles I and II, respectively. The other two, energy and climate, instead, arise in Part II, Title VIII as to energy, while climate is a more cross-cutting element of the TCA. Some suggest that energy and climate are dominated by geopolitics and international issues and it is hard to avoid their evolving character in this light.[16] The placement of cyber and health in the thematic cooperation section was arguably intended to reflect their lower order of focus in the negotiations, albeit emerging as critical topics over time. The chapter is structured as follows: section 2 considers energy, section 3 reflects upon climate, then health in section 4, followed by cybersecurity in section 5.

2 Energy

2.1 Overview

After fifty years of EU membership, the EU-27 and UK energy markets have been heavily interlinked, on account of electricity interconnectors and gas pipelines running between Great Britain and Northern Ireland on the one hand and France, the Netherlands, Belgium, and Ireland on the other. In fact, the UK has been a net importer of energy.[17] As Cameron states, Brexit still implied a growing disconnect between the energy policy of the EU and that of the UK. Even if key laws and regulations remain in place in both, divergence was foreseeable.[18] The UK and EU included a not inconsiderable number of energy-related commitments in the TCA's trade provisions, which can be

[16] Andreas Goldthau and Richard Youngs, 'The EU Energy Crisis and a New Geopolitics of Climate Transition' (2023) JCMS 1.

[17] Ana Stanič and Silke Goldberg (eds), *Brexit and Energy Law: Implications and Opportunities* (Routledge 2023); See also Peter Cameron and Raphael Heffron (eds), *Legal Aspects of EU Energy Regulation* (2nd edn, OUP 2016); Nicola McEwen and Alexandra Remond, 'The Repatriation of Competences: Implications for Devolution' (2019) Centre on Constitutional Change Paper <https://ukandeu.ac.uk/wp-content/uploads/2019/01/Climate-and-energy-policy-after-Brexit.pdf (accessed 3 October 2023).

[18] Peter Cameron, 'Cooperation over UK and EU Energy Policy Is a Must' (2023) The Royal Society of Edinburgh https://rse.org.uk/resources/resource/blog/cooperation-over-uk-and-eu-energy-policy-is-a-must/ (accessed 3 October 2023).

found in Title VIII of Heading One of Part Two. Title VIII provides for UK-EU trade and investment in four related annexes as to energy and raw materials and security of supply; electricity and gas; safe and sustainable energy; and energy goods and raw materials. Title VIII applies until 30 June 2026 but can be extended until 31 March 2027 and until 31 March of each subsequent year. Article 299 provide that the objectives of Title VIII are: (1) to facilitate UK-EU trade and investment in energy and raw materials; and (2) to support security of supply and environmental sustainability, notably in contributing to the fight against climate change in those areas. A separate agreement between Euratom and the UK, which complements the TCA, covers cooperation on the safe and peaceful uses of nuclear energy. The UK is not able to participate in EU bodies such as the Agency for the Cooperation of Energy Regulators (ACER), the European networks of transmission system operators for electricity (ENTSO-E) and for gas (ENTSOG).

The agreement contains provisions for cooperation in the development of offshore renewable energy, with a clear focus on the North Sea and Irish Sea. The EU and the UK will be able to continue to cooperate in this area, building on the North Seas Energy Cooperation, a platform developed by the EU, a number of Member States, and Norway to develop the use of renewables in this region. The scope of the cooperation in this field envisaged by the agreement reflects the EU's strategy on offshore renewable energy, in which the Commission proposes to increase the EU's offshore wind capacity to at least 60 GW by 2030 and to 300 GW by 2050.

2.2 International Cooperation and Standards: The TCA and Energy

As well as the horizontal level-playing field provisions relevant for the energy sector, for example on social and environmental issues, the agreement includes certain specific provisions and place energy prominently.[19] These relate to energy sector subsidies, non-discriminatory promotion of energy from renewable sources, prohibition on export restrictions (including export monopolies and export licences), and on dual pricing of energy goods. International standards cooperation is also provided for to a small degree. Article 321 of the TCA

[19] See European Parliament Research Service (EPRS) 'Post-Brexit EU-UK relations on Energy and Climate' (June 2023) https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749801/EPRS_BRI(2023)749801_EN.pdf (accessed 3 October 2023).

provides that the parties shall cooperate on the development of offshore renewable energy, as noted above. A UK-EU Parliamentary Partnership Assembly established in Article 11 by the TCA has called for cooperation to promote renewable energy through the promotion of joint projects between the UK and the EU, which would allow for cost-efficient deployment of the clean energy transition but based upon international cooperation.[20] The TCA establishes the Specialised Committee on Energy (SCE) as the main UK-EU forum for energy cooperation and has also had some international focuses. It has discussed energy security at both of the meetings (on 30 March 2022 and 28 September 2022) since Russia's war of aggression against Ukraine. The meetings are notable for their extensive efforts to collaborate internationally in the domain of energy security in light of the Russian war of aggression. A very high level of international solidarity is evident between the EU and the UK describing their efforts as significant cooperation, eg the parties praised the ongoing coordination within the International Energy Agency and G7, and the ongoing senior and technical cooperation between the UK and the EU.[21] However, it is hard to avoid the obvious limits of the TCA for cooperation in this field otherwise.

3 Climate

3.1 Overview: The Context of the TCA and EU and UK Climate Law

There are complex perspectives to consider as to the benefits of Brexit for UK environmental policy, reflecting the fractured nature of Brexit on public policy.[22] The Climate Change Act was passed in the UK in November 2008

[20] UK Parliament, 'UK-EU Parliamentary Partnership Assembly "Recommendation Concerning UK-EU Energy Cooperation"' https://www.parliament.uk/mps-lords-and-offices/offices/delegations/uk-eu-parliamentary-partnership-assembly-delegation/uk-parliament-to-host-session-of-uk-eu-parliamentary-partnership-assembly/recommendation-concerning-uk-eu-energy-cooperation/#_ftn1 (accessed 3 October 2023). It noted that the North Sea Energy Cooperation grouping (NSEC), involving eight EU Member States and Norway, is a forum for such cooperation and welcomed the commitment to relaunch cooperation within NSEC and the progress made on engagement between the UK, the Commission and NSEC countries, as reflected in the successful negotiation of a draft memorandum of understanding (MOU) on offshore renewable energy cooperation.

[21] The EU highlighted its plan to make the EU independent from Russian fossil fuels well before 2030. The UK has highlighted its commitment to phase out Russian oil imports, and stated that it would set out an energy strategy to explain the UK's long-term plans for greater energy security.

[22] Maria Lee, 'Environmental Pasts and Futures: The European Union and the "British Way"' (2019) 31 Journal of Environmental Law 559, considering how Pontin argues that 'the British way' of environmental protection is superior to European Union (EU) environmental law, and that when we return to the British way after Brexit, the environment will be better served. He relies on four central

with an overwhelming majority across political parties, the first global legally binding climate change mitigation target set by a country. The post-Brexit UK Environmental Bill has been highly controversial, rushed, and the subject of much piecemeal reform.[23] The EU's climate policy originated in its external relations activities, where it has been at the vanguard of international law-making, from the United Nations Framework Convention on Climate Change (UNFCCC) to the Kyoto Protocol and now the Paris Climate Agreement. In November 2019, the EU began to develop its iconic European Green Deal, setting out plans to 'transform' the European economy sustainably.[24] An EU Climate Law has been passed in 2021, as have a sweeping package of legislative reforms, commonly referred to as the 'Fit for 55 package', in reference to the European Climate Law's objective of reducing emissions by 55 per cent compared with 1990 levels by 2030.[25] Domestically, the UK political environment is still convulsed with the uncertainty of Brexit. Its Environment Act 2021 makes provision for post-Brexit environmental law in the UK, yet was created on the basis that retained EU law would continue to exist. The Retained EU Law (Revocation and Reform) Bill is a major new piece of legislation in the UK as to EU law and was considered to have profound implications for environmental law.

3.2 TCA Provisions and International Standards

Climate is a much more significant area of the TCA in theory underpinned by mutual commitments to ensure a level playing field for open and fair competition and to sustainable development. There is a EU/UK joint ambition to achieve economy-wide climate neutrality by 2050. Despite the Political Declaration mandating no more than a discussion about climate cooperation,

case studies: waste, water (revealingly entitled 'rivers', consistent with the focus of 'the British way'), air quality, and habitat conservation.

[23] Maria Lee, 'Brexit and the Environment Bill: The Future of Environmental Accountability' (2022) 13(S2) Global Policy 119.

[24] For example, the Commission in its Green Deal communication included a heading on 'The EU as a global leader'. See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal' COM(2019) 640 final, 20.

[25] Catherine Higham and others, 'Climate Change Law in Europe: What Do New EU Climate Laws Mean for the Courts?' (2023) Centre for Climate Change Economics and Policy and Grantham Research Institute on Climate Change and the Environment Policy Report https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/03/Climate-change-law-in-Europe-what-do-new-EU-climate-laws-mean-for-the-courts.pdf (accessed 3 October 2023).

the resulting set of TCA provisions is said by Gehring to be innovative in that it constitutes the first trade agreement to make the climate crisis a 'make-or-break issue', providing for the challenges of climate change as one of the bases for cooperation in Article 764, alongside democracy, the rule of law, human rights, and the non-proliferation of weapons of mass destruction (WMDs) as an 'essential element' of the partnership. The TCA Article 401 requires each party to respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement, an important first act in which climate change is an 'essential element' of a trade agreement, referencing the Paris Agreement nine times. It represents a key step in this area.

The level playing-field provisions of the TCA seek to safeguard fair competition between the parties and evolve the 'trade and sustainable development' chapters in other free trade agreements in Article 722.[26] The TCA includes tools and mechanisms for the enforcement of the level-playing field commitments, including the ability of either party to impose duties unilaterally, subject to review by an arbitration panel, where a change creates a significant negative effect on trade or investment between the EU and the UK. It requires that parties do not weaken or reduce their levels of social, labour, and environmental protection below those in place at the end of 2020 (non-regression). In addition, the TCA introduces a mechanism whereby a party can take appropriate rebalancing measures to offset any (adverse) 'material impacts on trade or investment' arising from 'significant divergences' between parties.[27]

The TCA level playing-field provisions represent a notable innovation with their rebalancing and review provisions, with some international elements.[28] The TCA thus provides, for the first time, a strong mechanism for parties to

[26] See Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III: The Framework of New EU-UK Relationships* (OUP 2021).

[27] Issam Hallak, 'The Level Playing-field for Labour and Environment in EU-UK Relations' (2021) European Parliamentary Research Service PE 690.576.

[28] ibid; Article 9.4 Title XI: Level Playing field for open and fair competition and sustainable development allows the EU or the UK to impose rebalancing measures when significant divergences regarding their policies and priorities with respect to labour, social, environmental or climate protection, or with respect to subsidy control, arise and cause material impacts on trade and investment between them. If no agreement is reached, after five days from the conclusion of the consultations, the party can adopt necessary and proportionate rebalancing measures to remedy the situation, providing that the other party has not requested the establishment of an arbitration tribunal. If an arbitration tribunal is established, but does not deliver its final ruling after 30 days, the party is allowed to adopt rebalancing measures. In return, the other party can also take proportionate counter-measures until the tribunal delivers its ruling. In enacting measures, the aim is to craft something so that disruption to the trading relationship is minimized Markus Gehring, 'The EU-UK Agreement Is the First to Make Climate a Make-or-break Issue' *UK in a Changing Europe* (25 January 2021) https://ukandeu.ac.uk/the-eu-uk-agreement-is-the-first-to-make-climate-a-make-or-break-issue/ (accessed 3 October 2023).

implement sustainable development obligations. However, it remains to be seen how enforcement of this chapter will work in practice, as the TCA does not provide a definition for 'significant divergences', and neither does it specify examples of appropriate 'rebalancing measures'.[29] Secondly, the EU and the UK pledge to support adherence to and implementation of relevant international instruments of the fair competition and sustainable development chapter of the TCA in Article 406, which states that the parties recognize the importance of responsible supply chain management and corporate social responsibility (CSR) practices and international standards here are at the heart of good and best practices.[30]

Gehring has noted that the title is a slight misnomer as the obligations in these fields are more akin to non-regression obligations rather than any form of dynamic alignment, or indeed a level playing field.[31] Thus, still similar to other EU international treaties, the TCA does not provide for direct effect in order to permit challenge a party's non-compliance. Nonetheless, the agreement contains one of the strictest formulations of a non-regression provision by adopting mandatory language prohibiting the weakening or reduction of levels of environmental or climate protection', including 'by failing to effectively enforce', with the sole caveat that this regression should not occur 'in a manner affecting trade or investment'.

Minutes of the EU-UK TCA Partnership Council published in July 2023 indicated UK concern with the EU Green Deal Industrial Plan and its compliance with the TCA—albeit with a refusal by the EU to accept that it posed any difficulty.[32]

4 Health

4.1 Overview

Prior to Brexit and Covid-19 pandemic as key crises of EU law, it was said that the various subsections of Article 168 TFEU demonstrated that while EU

[29] Ann-Evelyn Luyten, 'The EU-UK TCA: A Front-runner in Trade and Sustainable Development' *Trade Experettes* (30 December 2020) https://www.tradeexperettes.org/blog/articles/the-eu-uk-tca-a-front-runner-in-trade-and-sustainable-development (accessed 3 October 2023).

[30] See eg OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights.

[31] Gehring (n 28).

[32] Minutes of the second meeting of the Trade and Cooperation Agreement Partnership Council 24 March 2023.

competence in the field of public health might be expanding, there were undoubtedly limits to its scope.[33] Guy has argued that the history of EU health law demonstrated less the emergence of a unified EU policy than a complex system of partial overlapping national and EU competences that at various points both come into conflict and complement each other. Overall, the net effect is an increasing impact of EU policies on healthcare even in what for the foreseeable future will be the absence of an EU policy on health. Limited provision is made in the TCA as to health in Part VI Thematic Cooperation of the TCA. Overall, the TCA introduces significant barriers that did not previously exist, notably a customs border and the exclusion of the UK from the Single Market.[34] In the area of health, the trade for all products, including medicines and medical devices, remains at zero tariff, and both parties maintain reciprocal healthcare and the intention to cooperate on addressing health research.[35] However, it is said that the TCA creates parallel regulatory processes on medicines, medical devices, and clinical trials, enabling the UK to diverge from the EU on medicines policy, with possibly international consequences eg in international organizations.[36] The short 'vaccines war' resulting from the EU triggering Article 16 of the Northern Ireland (NI) Protocol in 2021 indicates the depth of the complexity of this area.

Fahy and others note how internally the Withdrawal Agreement (WA) with its Protocol on Ireland/Northern Ireland, and the EU–UK Trade and Cooperation Agreement (TCA) and Common Travel Area (CTA), entails that having such arrangements in itself has meant that the UK's relations with the EU have avoided some of the worst consequences for health and the National Health Service (NHS).[37] Overall, the EU-UK TCA is said by health law researchers to be a net loss for public health, particularly in the UK, but also in the EU whereby a trade-focused bilateral relationship may hamper public health cooperation going forward.[38] It is argued that the institutional framework of

[33] Mary Guy and Wolf Sauter, 'The History and Scope of EU Health Law and Policy' (2016) CCP Working Paper No 16-02; Tamara Hervey and Jean McHale, *European Union Health Law: Themes and Implications* (CUP 2015); Scott Greer and others, 'Everything You Always Wanted to Know about European Union Health Policies But Were Afraid to Ask' (2019) Health Policy Series No 52; European Observatory on Health Systems and Policies, Brussels 2014; Scott Greer and others, 'Health Law and Policy in the European Union' (2013) 381(9872) The Lancet 1135.

[34] Nick Fahy and others, 'Impact on the NHS and Health of the UK's Trade and Cooperation Relationship with the EU, and Beyond' (2022) 17(4) Health Economics, Policy and Law 471; Nick Fahy and others, 'How Will Brexit Affect Health Services in the UK? An Updated Evaluation' (2019) 393(10174) The Lancet 949.

[35] ibid.

[36] Mark Dayan and others, 'Parallel, Divergent or Drifting? Regulating Healthcare Products in a Post-Brexit UK' (2023) 30 Journal of European Public Policy 1.

[37] Fahy and others (n 34).

[38] ibid.

the deal does offer the potential for increased cooperation on these issues, albeit necessitating that governments prioritize health in the EU-UK relationship. The development of a 'European Health Union' was announced by Commission President von der Leyen in September 2020 as a response to the Covid-19 pandemic, and the timing of the TCA in this respect is important to emphasize.[39] Although the leadership of the Commission was welcomed initially in the context of the global pandemic, it inevitably invites longer-term questions of how the EU and national levels will interact within this Union, and how the relationship between the Commission and Member States constrains or facilitates its development internally as much as externally with third partners. Thus far, there has been limited explicit EU-level competence: health is seen fundamentally as a national competence.[40]

4.2 Health and International Issues in the TCA

Health is a complex legal field as regards the discussion of the transnational. With the exception of the citizens' rights provisions in the WA, legal texts and instruments as to Brexit are primarily trade agreements. Health occupies a complex peripheral place in legal texts—despite all trade agreements generally having important consequences for health.[41] The TCA includes only very limited references to global public health standards, eg a weak commitment to 'dialogue and cooperation' on antimicrobial resistance in Article 85. There is an intention to cooperate, including optionally through exchange of information using the European Early Warning Response System, on 'health security' in Article 702. There is a commitment to maintain 'environmental levels of protection', defined as national rules 'which have the purpose of protecting the environment, including the prevention of danger to human life or health from environmental impacts'. Yet there might be reasonable concerns as to what these rules will mean in practice. Much of the key international support that

[39] Elizabeth Kuiper and Mary Guy, 'Forging a European Health Union: Between Subsidiarity and Sovereignty?' (2022) 28(3) EuroHealth 50. It is plausible to say that there was an entrenchment of health as a national competence in the context of EHU discussions. For a while Treaty change had been mooted, and this had gone beyond the 'crisis' response of Covid-19 to the Conference on the Future of Europe in 2022 with citizens calling for 'more EU' in health to the point that the European Parliament recognized the Conference's recommendation for health to be 'upgraded' to shared competence, but appears less likely now. I am grateful to Mary Guy for discussions on this point.

[40] ibid; Mary Guy and Wolf Sauter, 'The History and Scope of EU Health Law and Policy' in Tamara Hervey, Calum Alasdair Young, and Louise L Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing 2017).

[41] Fahy and others, 'Impact on the NHS (n 34).

the TCA could enable is possibly also understood to be indirect: for instance, the TCA provides for the UK and EU to collaborate and share information in the event of a global health crisis, enabling the UK to request access to the EU's Early Warning and Response System and to participate in the EU Health Security Committee.

In general, the TCA's provisions on global public health standards arguably demonstrate well the lack of ambition of the TCA, particularly considering that this treaty was negotiated in the midst of a global pandemic: health is conceptualized in the TCA mostly as a potential obstacle to trade.[42] As such, public health standards in a range of areas are permitted as exceptions to the implied benefits of the free trade consequent upon the TCA. The UK is no longer tied into EU standards, which increases domestic policy scope for regulation, and so impacts on health will depend on how those powers are deployed. The WA and TCA mitigated some immediate problems, such as access to health care for migrants and visitors, and a 'solution' for the island of Ireland that is untested as the relevant rules are yet to be fully implemented.[43] The transnational dimension of health in the TCA is thus arguably weak and unambitious, but not surprisingly so. Regulation of pharmaceuticals, medical devices, and equipment represents another example where the TCA does not enable trade or cooperation, but prioritizes the ability to diverge from the EU in domestic law and policy, with international consequences.[44] As Tansey and others state, Brexit has changed the UK's relationship with fora where it was previously represented by the EU as a whole eg bringing together regulatory authorities and the pharmaceutical industry to produce global bioethics standards that are de facto binding through the law of members. Brexit might mean international organizations could lose valuable UK experience, and the UK could lose out on engaging with regulatory processes in key markets for UK products, but it could also mean that the UK will forge its own membership. The devolved nations also continue to examine the relationship between the global and Brexit going forward eg Wales.[45] Whether this results in stronger transnational or

[42] ibid.

[43] Mark Dayan and others, 'Going It alone: Health and Brexit in the UK' (2021) Nuffield Trust Research Report https://www.nuffieldtrust.org.uk/sites/default/files/2021-12/1639914471_nuffield-trust-health-and-brexit-in-the-uk-web.pdf (accessed 8 December 2023). The UK's legislation for scrutiny of international agreements gives Parliament limited powers to be consulted or to stop ratification.

[44] Fahy and others, 'Impact on the NHS (n 34) 482.

[45] Welsh Parliament, 'Has Brexit Changed How Wales Participates in Global Infectious Disease Prevention, Preparedness and Response?' (2022) https://phw.nhs.wales/publications/publications1/has-brexit-changed-how-wales-participates-in-global-infectious-disease-prevention-preparedness-and-response-briefing-note/ (accessed 3 October 2023). It notes how international collaboration is important to three main areas of infectious disease: preparedness, prevention and response. See also Sue Tansey, Mark Flear, and Siobhán O'Sullivan, 'What Might Brexit Mean for UK and International

international alliances remains to be seen.[46] To similar effect, there are several ethical fora within the EU in which the UK can continue to be involved. The degree of involvement is unclear and evolving and depends as much on UK as EU willingness.

5 Cyber

5.1 Overview

The EU is the world's second-most active user of restrictive measures after the US, with four thematic sanctions regimes including recently cyber sanctions.[47] Cyber is one of the EU's most significant policy fields in recent times, however new, and increasingly externalized despites its initially internal focus, making it a highly prominent and active site of external relations.[48] As a result, the EU also increasingly appears to nudge international cybersecurity developments. It has been a core proponent of the Council of Europe Budapest Convention forum for global law-making.[49] It also has an increasingly broad range of cyber partnerships linked explicitly to both trade and multilateralism. The EU Cyber Security Strategy (EUCSS) expressly advocates that the EU have a coherent international cyberspace policy in order to be able to promote EU values.[50] Cybersecurity is a highly complex regulatory phenomenon not suited to a trade agreement: it is heavily dependent upon incomplete international law, private power, soft law, and practical cooperation. Cyber security provisions were increasingly included in EU strategic partnership agreements, ie soft law alongside trade provisions with partners. The EU is well represented in

Bioethics?' *Nuffield Council on Bioethics Blog* (29 September 2021) https://www.nuffieldbioethics.org/blog/what-might-brexit-mean-for-uk-and-international-bioethics (accessed 3 October 2023)

[46] See Tansey and others (n 45).

[47] Ramses Wessel, 'Cybersecurity in the European Union: Resilience through Regulation?' in E Conde, Zhaklin Yaneva, and Marzia Scopelliti, *The Routledge Handbook of European Security Law and Policy* (Routledge 2019). Elaine Fahey, 'Developing EU Cybercrime and Cybersecurity: On Legal Challenges of EU Institutionalisation of Cyber Law-making' in Thomas Hoerber, Gabriel Weber, and Ignazio Cabras (eds), *The Routledge Handbook of European Integrations* (Routledge 2022).

[48] Wessel (n 47) 507.

[49] Jörg Polakiewicz, 'The Emperor's New Clothes – Data Privacy and Cybersecurity from a European Perspective' in Elaine Fahey and Isabella Mancini, *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar Publishing 2022).

[50] European Commission, 'EU Cybersecurity plan to protect open internet and online freedom and opportunity' (2013) https://ec.europa.eu/commission/presscorner/detail/en/IP_13_94 (accessed 3 October 2023).

all international forums on cyber law-making, which is reflected in the global elements of its cyber law-making.

In this regard, cyber security provisions have been found increasingly in EU international relations but mainly in EU strategic partnership agreements, ie soft law agreements, negotiated, signed and ratified alongside trade provisions with partners. A good example of until recently the EU's most robust and broad-ranging set of cybersecurity provisions for a key developed economy trade partner operating as a template for multilevel cooperation is the EU-Japan SPA with provisions in Article 36 thereof on cybersecurity. Multilateralism and international law forms a key plank of this cooperation and there is a significant effort to learn to collaborate.

The provisions on cybersecurity here mirror to a degree provisions in the EU-Japan EPA in the ecommerce chapters with respect to regulatory cooperation, where cyber security cooperation are also referenced. The provisions of EU-Japan Economic Partnership Agreement (EPA) in Article 8.80 as to regulatory cooperation in digital trade explicitly mention cyber security, particularly in Article 8.80.2(b), and signifies its place as a next generation agreement of data matters. Here, dialogues are a notable and important form of engagement here when seen against this backdrop of the SPA grounded in multilateralism. The soft law provisions of the SPA thus interact and complement the EPA through using dual-faceted institutionalization, bilaterally and multilaterally. The EU-Japan provisions are of note and may been seen as a high-water mark thereof in contrast to its earlier predecessor, the EU-Canada Strategic Partnership Agreement (SPA) of 2016, which makes provision for a shorter and lighter form of cyber-based cooperation.

It reflects the significantly more prominent role played by Japan in multilateral fora as to cyber issues.[51] The EU-Canada SPA 2016 makes provision in an agreement alongside its partnership trade agreement, in 'Article 22 Cybercrime' that the 'Parties recognise that cybercrime is a global problem requiring global responses'.[52] Similar to the earlier EU-Canada agreement, the EU-Korea SPA, also one of the EU's earliest next generation agreements, made similar provision with respect to breadth, depth, and scope. The EU-Korea Framework Agreement, Article 37 combating cybercrime states: 'The Parties will strengthen cooperation to prevent and combat high technology, cyber and electronic crimes and the distribution of terrorist content via the Internet

[51] See ch 5.

[52] Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L329/45.

through exchanging information and practical experiences in compliance with their national legislation within the limits of their responsibility.'[53]

5.2 Cyber and International Issues in the TCA

The provisions of the TCA mark a highly significant shift in EU trade agreements as to cybersecurity. Cybersecurity occupies a highly central position in this TCA unlike in its predecessors. Title II of the TCA makes significant provision for thematic cooperation in Part Four thereof, alongside health cooperation. In a trade agreement devoid of more recent provisions on regulatory cooperation and dialogues based upon multilateralism, the cybersecurity provisions of the TCA are noticeable for their exceptional commitments to multilateralism. Although mostly voluntary, they are also very noticeable for the breadth of the institutionalized cooperation. The TCA includes voluntary arrangements for the UK to work with expert bodies including the European Union Agency for Cybersecurity (ENISA) and the EU's Computer Emergency Response Team (CERT-EU).[54] These provisions are striking also for their detail, their length, and their breadth, despite ultimately being strictly speaking voluntary in nature. The provisions also reflect well the 'global challenges' dimension of cybersecurity but ultimately are not well linked to the digital trade chapter of the TCA and, despite its depth and breath, ultimately appears as a form of missed opportunity. They reflect well the 'global challenges' dimension of cybersecurity yet are poorly linked to other key chapters of the agreement, eg the digital trade chapter of the TCA. Given the relative strengths of the UK in cybersecurity and its efforts to evolve EU cybersecurity policy successfully as a member, the TCA is still a missed opportunity, however novel or innovative.

6 Conclusions

The chapter has contrasted international qua transnational cooperation objectives provided for in the TCA as to cyber, health, energy, and climate, embodying areas presenting significant global challenges. This chapter has

[53] Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (EU-Korea Framework Agreement) [2013] OJ L20/2, art 37: 'Combating cyber crime'.

[54] Article 707: Cooperation with the EU Agency for Cybersecurity (ENISA); Article 705 Cooperation with the Computer Emergency Response Team—European Union.

specifically considered four areas of the TCA with 'transnational' character, although there are no doubt many more, defining the transnational loosely as international or global ambition, either expressly or impliedly as provided for in the TCA. Two of the topics, health and cyber, are to be found in Part IV thematic cooperation, in Titles I and II respectively and in Part II, Title VIII as to energy, with climate as a more cross-cutting element of the TCA. This division reflects various issues explored here, namely the tensions of the TCA dynamic itself and the constraints of the negotiation timeframe for grander ambitions and relations. The absence of multilateralism as an agenda in a trade agreement can signify broader underlying tensions and this chapter has shown that the TCA arguably showcases this. The TCA is justifiably not an agreement that has excited much interest or attracts much for its significance; instead, it is correctly reputed for its lack of ambition and also its highly esoteric stance as to international matters. However, the TCA still retains some dimensions of international openness for the future, however modest in the grander scheme of things.

9

Fisheries

The Cod's Pollocks or a Damp Squid

Graham Butler

1 Introduction

Fisheries might be considered a front-page dispute that makes for good headlines as a 'wet' issue. The details of the legal aspects of fisheries in the post-Brexit world are, however, much drier. With the withdrawal of the United Kingdom (UK) from the European Union (EU), the UK became a third state vis-à-vis the EU and, thus, ended the UK's membership of the internal market. The parties, however, negotiated the EU-UK Trade and Cooperation Agreement (TCA), which contains several provisions relating to fisheries.

Fisheries is an unloved area of EU law. It is typically omitted from major studies. The more specialized studies occasionally see it as one area of agricultural law.[1] Whatever one's view on where EU fisheries law should be situated, there is little doubt that it ought to be studied more than it is, with Brexit the prime example of how fisheries is regulated, and moreover, how it is regulated as a matter of EU law with third states through international agreements, as a form of EU external relations law. This is because fisheries concerns 'not only the organization of a market for goods, but also the resolution of questions of territorial competence and external relations'.[2] It is no wonder that despite fisheries being a negligible part of the modern economy, it has major legal and political ramifications, thus necessitating examination of any study on the law and politics of Brexit.

[1] There are some exceptions, naturally, with some monographs on the topic. See eg Robin Churchill, *EEC Fisheries Law* (Martinus Nijhoff Publishers 1987); Till Markus, *European Fisheries Law: From Promotion to Management* (Europa Law Publishing 2009); Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (OUP 2010); Jill Wakefield, *Reforming the Common Fisheries Policy* (Edward Elgar Publishing 2016); Jonatan Echebarria Fernández and others (eds), *Fisheries and the Law in Europe: Regulation After Brexit* (Routledge 2022).

[2] See eg John A Usher, *Legal Aspects of Agriculture of the European Community* (Clarendon Press 1988) 91. It did not feature at all in Francis Snyder, *Law of the Common Agricultural Policy* (Sweet & Maxwell 1985).

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Various issues come within the scope of fisheries. Just by way of examples, there is the issue of access to waters, that of fishable stocks, and then the division of catches of fish stocks, also known as allocation. Each one raises their own peculiarities in terms of history, tradition, and evolution. What binds them all together, through legal regulation, however, is the fact that no party can remove itself from the reality that the world has an over-fishing problem from a scientific perspective.[3] Fisheries, as an industry, is inherently extractive, and thus, without legal regulation, would result in the depletion (and eventual extinction) of fish species, to the benefit of absolutely no-one. In other words, legal regulation, in whatever form it takes, must strike the appropriate balance between conservation (leaving species in the seas and oceans) and exploitation (making species available for human consumption).

This chapter addresses the purely legal dynamics of fisheries, and is structured as follows. Section 2 introduces the *acquis* of EU fisheries law, considering the Common Fisheries Policy applied internally within the EU, before considering the Common Commercial Policy and how the EU externally engages in fisheries regulation. Section 3 then analyses the fisheries provisions of the TCA that are of particular importance, on the guarantee of no tariff barriers, yet the imposition of non-tariff barriers through EU (and UK) standards for each other's products. It then considers the issues of quotas, stocks, and waters, as well as the adjustment period for the short term. By way of conclusion, and considering whether the fisheries provisions of the TCA are the cod's pollocks or a damp squid, section 4 opines on how the reality of what was agreed to by the parties will only manifest itself post-2026, when the adjustment period is brought to an end.

2 EU Fisheries Law

2.1 The Necessity of Regulating Fisheries

Natural resources are of utmost importance for human civilization. Historically, fish have been one of these resources upon which humans have survived and are highly dependent on. If fish are extracted from the seas and oceans at sustainable levels, fish stocks can naturally replenish. In other words, fish stocks

[3] See the evaluation of the first half-decade of EU fisheries management to combat the overfishing issue in Robin Churchill, 'The EEC's Fisheries Management System: A Review of the First Five Years of Its Operation' (1988) 25 Common Market Law Review 369.

are not endless. If fishers were left alone, without any form of regulation of fisheries, there is little doubt that such economic operators, no matter their jurisdiction, would empty the seas and oceans. This is even though fishing fleets are very diverse, from small boats to factory-size trawlers. After all, the fisheries sector includes those seeking economically to exploit natural resources that belong to everyone, given the seas and oceans where fishing takes place is not private property. Consequently, fishing opportunities vary because of the need to balance commercial opportunities and biological considerations.

Fisheries issues concern access to waters (fishing areas), types of fish (fishing stock), and catch (fishing quotas). There is also, beyond that of mere catch, that of fish processing, and fish trading. Collectively, the entire fisheries sector is an abundance of different types of economic operators. In other words, the marine resources that are extractable can have immense commercial value, and catches obtained by fishers will often reflect economic opportunity, to the detriment of biological considerations. With all these interests at stake seeking maximum economic opportunity, this necessitates legal limits put on the fisheries sector. The sector left untouched by legal limits would see fish stocks harvested to unsustainable levels, and prioritize the commerciality of fish over the sustainability and conservation of natural resources.

Fisheries, with its limited resources, is also different from other forms of resources that are land-based. That is because fisheries resources move, and thus have no regard to human-made boundaries or jurisdictions that divide up the various legal orders that humans are acquainted with. Geographical boundaries mean nothing for fish in the seas and oceans. Thus, where fish mate, live, grow, and swim is always subject to change, meaning that certain fish stocks are transboundary, or straddling stocks. As migratory species, especially for interested parties that are geographically approximate to one another, consensus must be found to accommodate the imperative to limit fishing opportunities for the greater good. In the context of the UK's withdrawal from the EU, many fish stocks around UK waters are 'shared' fish stocks, in that they are indeed migratory species that move between different maritime areas within the EU, as well as third states. For the sustainable management of fish stocks, international arrangements are needed to achieve their collective aim.

Historically, fishing has undergone a complete transformation in a short period of time. Gone are the days of unregulated and unreported fishing. Instead, what is now international consensus is that fishing must be done on some basic principles of good governance, including accountancies for sustainable fishing, marine resources management strategies, and precautionary principles. Impositions of laws and rules governing maximum sustainable yield (MSY)

ensures that fish have a reproduction capacity over the longer-term. Moreover, other regulated measures beyond hard quantitative restrictions like quotas include limiting fishing grounds, seasonable permits, equipment approval, and like measures. Consequently, today, fisheries law sits at the intersection of preservation and trade.

2.2 Internally: The Common Fisheries Policy

Fisheries was only given brief mention in the initial Treaty of Rome,[4] and left it vague as to the way in which fisheries were to be regulated—either as an open market sector, or as a heavily-regulated sector—to the EU legislature. It was extra-EU developments that came first, however. The Fisheries Convention 1964, with anticipated fisheries regulation coming into the EU,[5] permitted states to extend their maritime jurisdiction to twelve miles. Two early regulations laid the basis for what became EU fisheries law.[6] The effect of these was that fishers within the EU would have equal access to the waters of *all* Member States, and not just their own Member State.[7]

Whilst fisheries are a 'good' in a consumptive sense, they do not come in within the ordinary free movement of goods provisions of the EU Treaties. Instead, fisheries are treated, along with agriculture, as lex specialis.[8] That said, fisheries are connected to goods.[9] The Common Fisheries Policy (CFP) came about in 1983, when a fisheries management system was first agreed to.[10] It was to account for balancing the interests at stake: the consumer, by securing fisheries products at acceptable prices; whilst for the fishers, stabilizing the

[4] EEC, art 38(1).

[5] Fisheries Convention 1964, art 10,: 'Nothing in the present Convention shall prevent the maintenance or establishment of a special régime in matters of fisheries: (a) as between States Members and Associated States of the European Economic Community, (b) as between States Members of the Benelux Economic Union, (c) as between Denmark, Norway and Sweden, (d) as between France and the United Kingdom of Great Britain and Northern Ireland in respect of Granville Bay and the Minquiers and the Ecrehos, (e) as between Spain, Portugal and their respective neighbouring countries in Africa, (f) in the Skagerrak and the Kattegat.'

[6] Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry [1970] OJ L236/1; Regulation (EEC) No 2142/70 of the Council of 20 October 1970 on the common organisation of the market in fishery products [1970] OJ L236/5.

[7] There were exceptions, however. For example, as a transitional measure, fishing communities who were highly dependent on in-shore fishing who see their access to in-shores kept for themselves.

[8] On this history and development see Kai P Purnhagen, 'The Increasing Overlap of Agricultural, Free Movement and Competition Law in the EU' (2021) 46 European Law Review 20.

[9] Joined Cases 80/77 and 81/77 *Société Les Commissionnaires Réunis SARL v Receveur des douanes*; *SARL Les fils de Henri Ramel v Receveur des douanes* ECLI:EU:C:1978:87, paras 14–38.

[10] Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources [1983] OJ L24/1.

fisheries product market by ensuring a fair standard of living, and making optimal use of resources that were to be limited on the premise of sustainable fishing. More concretely, the CFP ensured the possibility for appropriate fisheries management, structural funding, market intervention, and international agreements. Part of the rationale for creating the CFP was coastal states unilaterally extending their maritime boundaries within the confines of the UN Convention on the Law of the Sea (UNCLOS)—which had been only recently agreed to in 1982—which in turn made the possibility of over-exploitation of sea and ocean resources a real probability unless a common basis at EU level was agreed to.

EU fisheries law thus manifests itself, beyond the framework regulation of the CFP, in technical (and complex) EU secondary law regarding fishing quotas, fishing stocks, fishing waters, and related matters. There are often adopted regulations that further provide for the Commission to have delegated powers for further technical and implementing measures. Whether the CFP is a successful policy of the EU (or not[11]) is not a legal matter, but given the very premise of sustainability—that is, an agreed international norm—it is never a policy that openly pleases economic operators.

Within the domain of fisheries, Member States can only legislate to the extent that competence has not been conferred upon the EU, or where that competence lies with the EU, when it has been re-delegated to the Member States. It has long been the case that the EU has exclusive competence on fisheries in as far as 'measures relating to the conservation of the resources of the sea'.[12] Moreover, as held in *Kramer*,[13] from the internal competence of the EU on certain fisheries matters flows an implied external competence of the EU. In other words, internal competence on fisheries can be of little use without the corresponding external competence.

In textual terms, today's EU Treaties provide that 'the conservation of marine biological resources under the common fisheries policy' is exclusive competence of the EU,[14] whereas 'fisheries, excluding the conservation of marine biological resources' is a shared competence of the EU and its Member States.[15] There is even aspects whereby matters may fall outside of EU law altogether,

[11] For a critical account see Jill Wakefield, 'The Common Fisheries Policy: An Exercise in Marine Exploitation' (2017) 36 Yearbook of European Law 496.

[12] Case C-804/79 *Commission v UK* ECLI:EU:C:1981:93 *(Sea Fisheries)*, para 17.

[13] Joined Cases 3/76, 4/76, and 6/76 *Cornelis Kramer and Others* ECLI:EU:C:1976:114. See Tobias Lock, 'Refining and Expanding Implied Powers of the Union: Kramer' in Graham Butler and Ramses A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022).

[14] TFEU, art 3(1)(d).

[15] ibid art 4(2)(d).

even though most will not.[16] In other words, depending on which aspects of fisheries are being considered, different competence applies. When it comes to deciding upon annual fishing quotas for specific fishing stocks, a decision-making procedure applies which vests extraordinary powers in the Council, whereby on a proposal from the Commission, the Council 'shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'.[17] This simplified decision-making procedure excludes the European Parliament from negotiations and any decision-making on quota-setting.

2.3 Externally: The Common Commercial Policy

There is, naturally, building upon the EU's internal competence to regulate fisheries, a hugely important aspect of the external dimension to the CFP, whereby the EU engages in extensive international fisheries relations with third states and third parties. As a global actor in fisheries organizations,[18] the EU endeavours to maximize the available fishing opportunities for it and its Member States in both the high seas and oceans, as well as in the waters of third states. These types of relations range from mere input into the progressive development of international conventions and norms on a multilateral basis, all the way to the conclusion of international agreements with third states and third parties, which seek to impose legally binding resolutions to common problems of international fisheries.

The external dimension of fisheries and international agreements like the TCA means that fisheries are a part of the EU's Common Commercial Policy (CCP). There are two main types of international agreements on fisheries that the EU typically enters. First are international agreements with third states that are coastal states in the *developing* world, whereby the EU, on the one hand, seeks for its vessels to be allowed access to and fish in the waters of third states; and on the other hand, make necessary payments to those states in order to

[16] For example, Member States still have extensive competence in determining their maritime boundaries in accordance with international law. Ronán Long, 'Stepping over Maritime Boundaries to Apply New Normative Tools in EU Law and Policy' in Myron H Nordquist and John Norton Moore (eds), *Maritime Border Diplomacy* (Brill Nijhoff 2012) 225–26. See also Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65.

[17] TFEU, art 43(3).

[18] See eg Paul Heckler, 'Regional Fisheries Management Organisations: Defining the EU and Member State Roles' in Ramses A Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019).

build up their own capacity to manage fisheries within those waters.[19] These types of agreements are numerous.[20] Second are international agreements with third states that are coastal states in the *developed* world, whereby the EU and the third states in question with allow for the possibility of fishing opportunities in each other's waters, and even to allow for the possibility to engage in quota exchanges. Such agreements were first concluded in the 1970s, starting with Canada.[21]

The UK undoubtedly fell into the latter of these two categories. As a new third state to the EU, not forgetting that it still shares a land border with one Member State,[22] an international agreement on fisheries, whether separate or part of a much larger comprehensive international agreement was all but inevitable given that many fish stocks of commercial interest are found in both the waters of the EU *and* the UK. As a former Member State, the UK had to self-empower itself with the necessary authority to set out fishing opportunities in its waters, along the same lines on which the EU exercises such authority for fishing opportunities within its jurisdiction. This came in the form of the Fisheries Act 2020.[23] It was almost akin to turning the clock back to 1972, pre-accession, whereby the UK exercised full authority over fisheries management within the confines of international law.

3 EU-UK Trade and Cooperation Agreement

3.1 Provisions, Objectives, and Barriers

The initial EU-UK Withdrawal Agreement (WA), which set out preliminary issues of the withdrawal, only referred to fisheries as regarding the measures applying during the transition period,[24] the Protocol on Northern

[19] EU secondary law can act as guidance for such international agreements. See eg 'Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, Amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and Repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L354/22, art 4(37).

[20] They are known as 'sustainable fisheries partnership agreements' (SFPAs), and have expiry dates, unless they (and/or their protocols) are renegotiated.

[21] See Colleen Swords, 'The External Competence of the European Economic Community in Relation to International Fisheries Agreements' (1979) 6 Legal Issues of Economic Integration 31.

[22] See Graham Butler, 'The EU Customs Union, Free Movement of Goods, and Enforcement Mechanisms in the Protocol on Northern Ireland: A Legal Appraisal' in Adam Łazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022).

[23] Fisheries Act 2020, c 22.

[24] WA, art 130.

Ireland,[25] and matters related to Gibraltar and Sovereign Airbases on Cyprus. Therefore, it was to be the future relations agreement, what became the TCA, that was to regulate all future fisheries matters between the parties.

The fisheries parts of the TCA are of immense technicality. They sit within Part Two (Trade, Transport, Fisheries and Other Arrangements) of the Agreement in Heading Five, spanning Articles 493 to 511 TCA. Within this Heading Five are four chapters:

Chapter 1, Initial provisions, Articles 493-495 TCA;
Chapter 2, Conservation and Sustainable Exploitation, Articles 496-497 TCA;
Chapter 3, Arrangements on Access to Waters and Resources, Articles 498-505 TCA; and,
Chapter 4, Arrangements on Governance, Articles 506-511 TCA.

Furthermore, the TCA includes additional provisions, namely:

Annex 35 on shared stocks;
Annex 36 on the name of fish stocks and allocations, (Annex 36(A), UK-EU-NO trilateral stocks;
Annex 36(B), Coastal states stocks;
Annex 36(C), ICCAT stocks;
Annex 36(D), NAFO stocks;
Annex 36(E), Special cases;
Annex 36(F), Stocks that are only present on one party's waters);
Annex 38 on access to waters.

The premise on which the TCA plans fisheries arrangements is that the parties 'affirm that sovereign rights of coastal States exercised by the [p]arties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including [UNCLOS]'.[26] In other words, it seeks to ensure that fisheries are properly managed according to a pre-set process, and in light of the given norms that applied before withdrawal, to balance economic opportunity and sustainable extraction, all-the-whilst accounting for regional considerations.

[25] For full consideration see Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume IV: Protocol on Ireland/Northern Ireland* (OUP 2022).
[26] TCA, art 493.

The UK catch of fish had access to the EU market, unimpeded, fiscally and non-fiscally, prior to withdrawal. But the TCA changed this, at least in part. It was agreed between the parties that no tariffs (fiscal measures) would apply to fish and fisheries products between the two parties, as was the case when the UK was a Member State. Post-withdrawal, however, non-tariff measures would now be in place, given that the UK moved from being part of the (internal) CFP to being a third party to the EU's (external) CCP. For example, the export of fish from the UK into the EU means that EU standards have to be met. In more technical terms, this meant EU sanitary and phytosanitary (SPS) regulations have to be met, and that fish exports to the EU must not be caught illegally, be unreported, or unregulated.

Institutionally, whilst there is the EU-UK Partnership Council established under the TCA,[27] there is also, under Article 8 TCA, a Specialised Committee on Fisheries (SCF).[28] This is important, given the technical nature of the field, which meets every two to four months.

3.2 Quotas, Stocks, and Waters

The TCA sets out, as the title of Article 498 TCA suggests, the 'fishing opportunities' for the parties. Allowable catches (quotas) were first introduced in the EU in the 1980s.[29] Setting the total allowable catch (TAC) for individual fish stocks had to first be established, before in later steps dividing out of the quotas between the Member States. There are some non-quota species, which are generally not within the CFP, and thus not within the CCP either. Article 495(1)(e) TCA defines these as 'stocks which are not managed through TACs'.[30]

TAC of quota stocks has always been determined by weight, and not the economic value of fish extracted from waters. EU decision-making on the TCAs is decided upon annually, and is even subject to a special procedure.[31] The International Council for the Exploration of the Sea (ICES), based in Copenhagen, and a non-EU body, provides scientific advice that feeds into such decision-making. Quota transfers between the parties to the TCA is possible,[32] accounting for both operational needs and to ensure that both

[27] ibid art 7.
[28] ibid art 8(1)(q).
[29] The first such setting was in Council Regulation (EEC) No 170/83 (n 10).
[30] One example of a non-quota stock is sardines.
[31] See section 2.2 of this chapter.
[32] TCA, art 498(4)(a).

parties fulfil their obligations under UNCLOS, which demands that neighbouring fisheries jurisdictions engage in relations regarding surplus catch.

This method of setting out TACs, not only within the EU, also applies to neighbouring jurisdictions with the EU, as has long been the case with, for example, Norway.[33] The TCA requires annual negotiations by the UK with the EU on fisheries matters. More specifically, it envisages that the TAC for specific fish stocks is to be agreed on either an annual or a multi-annual basis.[34] Given that Annex 35 to the TCA sets out the shared fishing stocks of both parties, it is one of the annexes that can be amended by them within the scope of the TCA on the setting on TACs. This is called the joint management of quotas. Furthermore, there is a difference between shared stocks and other stocks. Given the geographic location of the EU and the UK, however, there are also other third states that need to be considered. For example, there are joint stocks that they together share with Norway, which necessitates trilateral negotiations. Accordingly, Annex 36 to the TCA provides for this also.

When it comes to waters, according to international law, coastal states have the rights 'for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil'.[35] It is on this basis that coastal states therefore regulate who can engage in fisheries in their waters. From the establishment of the CFP and up until the UK's withdrawal from the EU, it was the case that UK waters were EU waters.

However, the issue of boundaries of coastal states, as a matter of jurisdiction, conflicts with how ICES statistics on fish stocks are gathered, which are set by areas that do not reflect the jurisdictions of coastal states, but instead, by boundaries reflective of the natural habitat, known as 'statistical areas' or 'sub areas'. Consequently, quota holders for particular fish stocks are assigned on the basis of statistical areas, and not national jurisdictions, given the commonality of European waters, and the principle of equal access.[36] This principle from the CFP has been carried over to the TCA.[37]

[33] 'Agreement on fisheries between the European Economic Community and the Kingdom of Norway. Official Journal of the European Communities [1980] OJ L226/48.

[34] TCA, art 498.

[35] UNCLOS, art 56.

[36] The only general exception in this regard is the territorial waters of states, defined as within twelve nautical miles of the coast.

[37] TCA, art 500.

3.3 Adjustment Period, Post-adjustment Period, and Regular Review

The EU's starting position in the negotiations with the UK on fisheries, that ultimately led to the adoption of the TCA, was that it wanted the status quo to remain in place *as if* the UK was a Member State when it came to quotas, stocks, and waters (although not necessarily non-tariff barriers) in the short-term. However, from the medium-term onwards, it wanted a way continuously to manage the relations on a bilateral basis.

The EU got exactly this. In Annex 38 to the TCA in the protocol on access to waters, it provides that '[a]n adjustment period is hereby established. The adjustment period shall last … until 30 June 2026'.[38] In other words, full reciprocity is offered in the short term, meaning there was no cliff-edge for those in the fishing industry. It is only from 1 July 2026 onwards that negotiations between the EU and the UK will be put in place on quotas, stocks, and waters.

This naturally raises the question of what EU-UK fisheries arrangements will look like from the latter half of 2026. The parties to the TCA will obviously endeavour to reach agreement, but not only that: they also envisage smooth negotiations, and have even inserted a 'no surprises' clause,[39] whereby the objectives of the TCA should continuously be met, and that proposed measures are put by the other party in consultation before adaption in their own respective legal orders. This is related to (but different from) the concept of relative stability that applies internally within the CFP.

Prior to Brexit, both the UK and Ireland within the CFP benefited from what were known as 'The Hague preferences', which guaranteed preferential opportunities to both states in the form of higher quotas for both as part of the TACs. This scheme has long been reluctantly accepted by other Member States historically because it would be at the expense of other Member States' allocated share of the TACs. It was first done to safeguard vulnerable regions heavily reliant upon the fisheries industry in both Member States,[40] but post-withdrawal of the UK, only Ireland now benefits from the preferential treatment. In other words, the UK's withdrawal from the EU reduced the preferential treatment it

[38] TCA, Annex 38 (Protocol on Access to Waters), art 1. There are, however, technicalities for certain aspects in art 2.

[39] ibid art 496(3): 'Each Party shall notify the other Party of new measures as referred to in paragraph 1 that are likely to affect the vessels of the other Party before those measures are applied, allowing sufficient time for the other Party to provide comments or seek clarification.'

[40] The Court previously green-lit the use of The Hague preferences by the Council. See Case C-4/96 *Northern Ireland Fish Producers' Organisation Ltd (NIFPO) and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland* ECLI:EU:C:1998:67.

might have received like it had when it was a Member State, and this will most likely affect post-2026 negotiations on quotas, stocks, and waters, whereby the UK is now no longer covered by the possibility of preferential treatment. Over and above annual negotiations from 2026 onwards, Article 510(1) TCA provides for regular review of the fisheries provisions of the TCA in 2030, and every four years thereafter.

Moreover, there will inevitably be increased focus on the sustainability of the fisheries sector as a whole, which will limit the discretion of the EU.[41] In the event of no agreement being found between the parties after the adjustment period, there is a catch mechanism, whereby each party must unilaterally set TACs based upon scientific advice only, as provided for by the ICES.[42]

3.4 Remedial Measures and Dispute Resolution, (Permanent) Termination, and (Temporary) Safeguard Measures

Parties not fulfilling agreed commitments under international law can result in retaliation. Thus, Article 506 TCA lays the basis for parties notifying each other of their view that the other party is breaching the TCA,[43] and that either party may suspend, in whole or in part, the preferential tariff treatment that each other have granted in the TCA, and/or access to waters. Any such remedial measures of that kind must not be taken sooner than one week after the notification, and the SCF is responsible for finding a bilateral arrangement during this time-period.[44] Should no diplomatic solution be found, the matter can be urgently referred to an arbitration tribunal established under the TCA,[45] as the dispute resolution mechanism.

As regards terminating the fisheries provisions, Article 509(1) TCA provides for an extraordinary point, in that, 'each [p]arty may at any moment terminate … [the fisheries provisions of Articles 493-511 TCA] … by written notification through diplomatic channels'. In other words, either the EU or UK may at any point decide that fisheries are no longer part of the TCA. This extraordinary point, however, is not without consequence. In the very next breath, the same Article 509(1) TCA states that: 'Heading One [Trade], Heading Two

[41] See eg Opinion of Advocate General Ćapeta in Case C-330/22 *Friends of the Irish Environment* ECLI:EU:C:2023:487 *(Total allowable catch above zero)*.
[42] TCA, art 499(2).
[43] ibid art 506(1).
[44] ibid art 506(4).
[45] ibid art 744.

[Aviation], Heading Three [Transport] and this Heading [Fisheries] shall cease to be in force on the first day of the ninth month following the date of notification.' Put another way, the termination of the fisheries provisions of the TCA would also terminate all other parts of the free trade agreement.[46]

Fisheries, whilst one sector, have to be understood in the context of other EU policies. By bundling fisheries with other provisions, it seeks to ensure that fisheries are not treated separately from select other areas of the TCA,[47] in that overall trade in goods and services were not disconnected from fisheries.[48] This is very much in line with the EU's absolute insistence throughout the negotiations, that fisheries were not to be part of a separate international agreement,[49] but were to be an integral part of a comprehensive international agreement, which the TCA came to be.[50] This form of potential countermeasure has precedent, although with distinction.[51] If the UK ever invoked the termination clause, notwithstanding the more widespread effects on EU-UK trade, the UK, as a contracting party to UNCLOS, would be under an obligation to set unilateral TACs within its waters,[52] to ensure sustainability of fish stocks.

Elsewhere, Article 773 TCA provides for safeguard measures for the parties on fisheries matters, in that it allows for unilateral action by one of the parties under certain circumstances.[53] Article 773(1) TCA states:

> If serious economic, societal or environmental difficulties of a sectorial or regional nature, including in relation to fishing activities and their dependent communities, that are liable to persist arise, the Party concerned may

[46] See also the chapters by Adam Łazowski, Niall Moran, and Pinar Artiran in this volume.

[47] However, Heading Four on social security coordination and visas for short-term visits, are unaffected by this termination clause in TCA, art 509.

[48] See further Adam Łazowski, 'Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework: Part I' (2021) 5 European Papers 1105, 1127.

[49] This is not new. Even back in the 1970s, it was noted that '[t]he Commission stresses that when negotiating … arrangements … [with third states] … the [EU] should not hesitate to be tough or refrain from linking the question of fishing rights with questions of trade'. Robin Churchill, 'The EEC Fisheries Policy: Towards a Revision' (1977) 1 Marine Policy 26, 29.

[50] On the negotiations leading to the adoption of the TCA see Paola Mariani and Giorgio Sacerdoti, 'The Negotiations on the Future Trade Relations' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (OUP 2020) 227–32.

[51] Compare, by way of example, Protocol (No 34) of the EU Treaties on special arrangements for Greenland, which concerns reciprocity, and allows for unilateral EU measures if no agreement is reached with the EU.

[52] UNCLOS, art 61.

[53] TCA, art 773(1): 'If serious economic, societal or environmental difficulties of a sectorial or regional nature, including in relation to fishing activities and their dependent communities, that are liable to persist arise, the Party concerned may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to those measures which will least disturb the functioning of this Agreement.'

> unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to those measures which will least disturb the functioning of this Agreement.

If this occurs, it is up to the EU-UK Partnership Council to bring about consultations to bring any unilateral action to an end. This is different to the termination provision, in that termination under Article 509 TCA would be permanent, whereas this safeguard measure under Article 773 TCA would be temporary.

4 Conclusion

Whilst it is said that 'no discussion of the [Union]'s commercial policy would be complete without consideration of the external effects of the [CAP]',[54] it can also be claimed that the same applies as regards the CFP, and the external dimension to it through the CCP. Accordingly, the TCA is the latest manifestation of the EU agreeing on the basic terms and conditions for how its shared interests on fisheries matters can be managed in an orderly manner with third states. Consequently, whether the TCA is the cod's pollocks in this regard, or instead, a damp squid, is very much a matter on the position one holds. Surely, fishers will welcome the short-term stability in few changes occurring in the immediate aftermath of withdrawal, despite the medium- and long-term uncertainty that that might bring. On the other hand, parties interested in the greater sustainability of Europe's seas and oceans would most certainly have another view, given that quotas and stocks are to be designed, in the future, on the mere promise of socio-economic considerations in Article 498(2)(a) TCA, which means potential deviation by both parties from scientific advice.

Economically, the fisheries sector is quite an insignificant component of the EU and UK economies. For some more than others, the legal aspects of fisheries are largely symbolic, and reminiscent of the idea of authority and control, rather than accounting for true reality. As put during negotiations of the TCA, '[f]ishing rights … proved problematic, although this was largely because it entailed political issues of prestige for both the UK and some EU Member States,

[54] John A Usher, 'The Common Agricultural Policy and Commercial Policy' in Marc Maresceau (ed), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martinus Nijhoff Publishers 1993), 137.

not because of its economic significance when viewed in the light of overall GDP'.[55] Despite the low economic significance, however, sight should not be lost that fish is an important source of food for humankind.

Fishing is a commercial enterprise, and a private activity taking place in public places, and thus, subject to public regulation. In Europe, this means through the EU Treaties, or other forms of international agreements. Whilst the TCA recognizes the 'sovereign' rights of the parties to regulate fisheries as part of their own legal orders, the TCA has imposed significant constraints on the UK. Any autonomy that the UK has, perceived or actual, is considerably curtailed by the UK's international relations with the EU. Thus, any claim by the UK that 'we have our fish back: they are now British fish, and they are better and happier fish for it', as claimed by a one-time Leader of the House of Commons,[56] is an untruth.[57]

EU fisheries law exists to prevent the absolute collapse of fish stocks because of past overfishing. That same rationale today guides the EU's external action and, through it, international agreements like the TCA. Fishing is about living within limits, which both parties agree. But the precise way to apportion their respective limits remains the basis for negotiation post-2026, and future first review of the fisheries provisions of the TCA in 2030.

[55] Paul Craig, 'Brexit a Drama, the Endgame, Part II: Trade, Sovereignty and Control' (2021) 46 European Law Review 129, 132.

[56] UK Parliament: House of Commons, Business of the House, Volume 687: debated on Thursday 14 January 2021. Remarks by the Leader of the House of Commons, Jacob Rees-Mogg MP.

[57] Indeed, the Speaker of the Commons, Lindsay Hoyle MP, quipped, in immediate response, 'Obviously, there is no overwhelming evidence for that'.

10

Aviation and Road Transport

Exercises in Damage Control

Adam Łazowski

1 Introduction

For decades, countless EU citizens and third-country nationals residing in the EU Member States, just like their fellow travellers in all other corners of the planet, have been suffering from a severe and—arguably—incurable disease called *travelitis furiosus*. According to George Mikes, the main symptom of this medical condition is an unstoppable urge to travel. Thanks to a germ called prosperity, it has spread like wildfire, inspiring technological advances, keeping engineers, businessmen, policy-makers, economists, and lawyers busy.[1] The European Union (EU) and the United Kingdom (UK) have been no exception. As for the EU, over the years sways of EU *acquis* touching upon different aspects of transport have gone through the Brussels decision-making machinery. These legal acts regulate, inter alia, liberalization of transport services, licencing and technical requirements as well as consumer protection.[2] Furthermore, the EU has concluded many horizontal bilateral international agreements with non-EU states,[3] tailor-made transport agreements,[4] and became a party to multilateral treaties covering a variety of modes of transport.[5] The end result is a patchwork

[1] George Mikes, *How to Be a Brit* (Penguin 1986) 105.

[2] See, inter alia, Luis Ortiz Blanco and Ben Van Houtte, *EU Regulation and Competition Law in the Transport Sector* (OUP 2016); Massimiliano Grimaldi, *Inland Waterway Transport: The European Legal Framework* (Routledge 2023); Henning Jessen and Michael J Werner, *EU Maritime Transport Law* (CH Beck, Hart Publishing, Nomos Verlag 2016).

[3] This includes many association agreements with EU's immediate neighbours. See, inter alia, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3; Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/116.

[4] See, inter alia, Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part [2012] OJ L321/3.

[5] Some of them have had constitutional implications, with accession to the European Road Transport Agreement (ERTA) being a prime example. See Case 22/70 *Commission of the European Communities*

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of EU, international, and domestic legal acts, which—at first sight—is difficult to navigate, especially for those who are anything but transport *afficionados*. The technical idiosyncrasies of transport legislation are hardly front cover material, therefore, during the Brexit referendum campaign, transport related issues, and potential consequences of a withdrawal from the European Union, were not in the mainstream of academic[6] or political debate.[7] This was even though, just like in many other areas of EU law, the economic and legal consequences of Brexit have proven to be profound. As this chapter argues, moving forward from the EU membership environment to the post-Brexit arrangement of sorts has amounted to exercises in damage control. Transport services have been particularly hit by Brexit. This is not only a matter of new arrangements laid down in EU-UK Trade and Cooperation Agreement (TCA)[8] but also, more broadly, the departure from the Internal Market and the Customs Union.

The aim of this chapter is to sketch the main contours of the legal regime governing transport which is envisaged by the TCA. This means that the exegesis will be limited to aviation and road transport, the only two modes of transport which are included in the tailor-made rules laid down in the TCA.[9] The chapter is structured as follows. Section 2 presents the big picture of how aviation and road transport are regulated in the TCA, shedding also a light on the background of the TCA negotiations. Section 3 and 4, in turn, focus on the main provisions of the TCA containing bespoke provisions of these two modes of transport. Sections 5 and 6 discuss the institutional dimension, as well as suspension and termination of post-Brexit transport arrangements. Section 7 concludes.

2 The Big Picture

From the start of the Brexit process, the EU made one thing clear: the withdrawal had at its heart a downgrade of bilateral relations between the EU and

v Council of the European Communities ECLI:EU:C:1971:32. For an academic appraisal see inter alia Inge Govaere, 'Implied Powers of the EU, Limits to Political Expediency and Internationally Inspired Pragmatism: Commission v Council (ERTA)' in Graham Butler and Ramses A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022) 9.

[6] See, however, Jan Waliuk, *Brexit and Aviation Law* (Routledge 2019); Wybe T Douma, 'Come Fly with Me? Brexit and Air Transport' in Juan S Vara, Ramses A Wessel, and Polly R Polak, *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 90.

[7] The UK Parliament looked into consequences of Brexit for transport only after the referendum. See House of Lords, 'Brexit: Road, Rail and Maritime Transport' (21 May 2019) HL Paper 355..

[8] 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 [2021] OJ L149/10 (TCA).

[9] Other modes of transport, while not regulated in tailor-made provisions of TCA, are subject to rules on trade in services. See further the chapter by Pinar Artiran in this volume.

the UK. With the proverbial 'cakeism' off the menu, the question was how far such de-integration should go.[10] As the UK was the first country to embark on a withdrawal from the EU, the teams of negotiators—at both sides of the table—were operating in unchartered waters.[11] While numerous factors have contributed to the final outcome, the beacons for navigation were not only the EU's strict stance but also the UK's desire to leave the Internal Market, the Customs Union, and to 'take control of its laws'. This had, at least, threefold implications as to the direction of travel of future EU-UK framework on transport. First, by definition, it had to translate into a looser cooperation in a post-Brexit world and—consequentially—reintroduction of various barriers which, over the years, have been abolished in the EU. Secondly, it meant that—with the expiry of transition period—some of the EU legal acts covering different modes of transport have become redundant, as their application is inextricably linked to EU membership.[12] Regardless of that, they were all turned into EU retained law by means of the European Union (Withdrawal) Act 2018 and rebranded into assimilated laws by the Retained EU Law (Revocation and Reform) Act 2023.[13] While several pieces of EU retained law have been repealed since, many remain in force, as Whitehall proceeds on the path to regulatory divergence. Thirdly, the UK—following the expiry of the transition period—is no longer a party to all agreements concluded by the EU with third countries, both general framework agreements containing provisions on transport as well as sectoral treaties, including—in particular—a plethora of agreements on air transport.[14] Consequently, the UK authorities had to focus not only on negotiation of post-Brexit transport arrangements with the EU but also with countries around the world. All of this took place against the ticking clock of Brexit, and in the shadow of the Covid-19 pandemic. It was hardly an ideal combination, indeed.

[10] See further Federico Fabbrini (ed), *The Law & Politics of Brexit. Vol II. The Withdrawal Agreement* (OUP 2020); Michael Dougan, *The UK's Withdrawal from the EU. A Legal Analysis* (OUP 2021) chs 4–9.

[11] Memoirs of two members of the EU negotiating team shed light on how the talks looked in practice. See Michel Barnier, *My Secret Brexit Diary* (Polity 2021); Stefaan De Rynck, *Inside the Deal: How the EU Got Brexit Done* (Agenda Publishing 2023).

[12] For instance, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency [2018] OJ L212/1.

[13] See further Catherine Barnard, 'Retained EU Law in the UK Legal Orders: Continuity between the Old and the New' in Adam Łazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022) 98.

[14] See further Panos Koutrakos, 'Three narratives on the United Kingdom's trade agreements post-Brexit' in Adam Łazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022) 403.

The Political Declaration, approved alongside the EU-UK Withdrawal Agreement, outlined the contours of future relationship.[15] When it comes to transport, it was relatively vague, leaving the negotiators ample room for manoeuvre. Looking closer at paragraphs 58 to 63 of the Political Declaration, two points merit attention. First, the two sides envisaged the conclusion of a tailor-made agreement on air transport, presumably in parallel to the framework trade agreement. This was hardly surprising bearing in mind a well-established practice of the EU to regulate matters of air transport with third countries in such bespoke treaties.[16] Secondly, it was clear that while air and road transport would be regulated in the future EU-UK legal framework, matters of rail transport would be left to bilateral arrangements between the UK and the Member States (which, for geographical reasons, means Ireland and France). Furthermore, in matters of maritime transport, the aim was to anchor future cooperation in established international legal framework. Consequently, negotiations of a new EU-UK framework would focus only on two areas: air and road transport, while the other modes of transport would potentially fall under the general framework for trade in services. Not surprisingly, further details as to what the future may hold were provided in the EU Negotiation Framework.[17] Its adoption was shortly followed by publication of a Draft Agreement on new Partnership with the United Kingdom.[18] At this point, it became clear that air transport would not be regulated in a separate treaty but rather it would become a part and parcel of new comprehensive framework for post-Brexit relations. This can be interpreted at least in two ways. Dettling-Ott suggests, for example, that inclusion of aviation in a comprehensive trade agreement is 'a remarkable step forward'.[19] The present author is more inclined to argue that the determining factors behind this decision were more of a pragmatic nature and fit better in the EU overall strategy. Grouping all negotiation dossiers lock, stock, and barrel in the framework of future the TCA ring-fenced the EU and the UK from crashing out without a deal from the EU liberalised arrangements, should the negotiations of

[15] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] OJ C34/1.

[16] An exception is European Economic Area, which covers the EU *acquis* on transport. See Agreement on the European Economic Area [1994] OJ L1/1. See further Finn Arnesen and others (eds), *Agreement on The European Economic Area: A Commentary* (CH Beck, Hart Publishing, Nomos Verlag 2018).

[17] Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, Brussels, 25 February 2020, 5870/20.

[18] European Commission, 'Draft text of the Agreement on the New Partnership with the United Kingdom' UKTF (2020) 14.

[19] Regula Dettling-Ott, 'The Air Transport Agreement between the EU and the UK: A New Approach' (2021) 46 (SI) Air & Space Law 3, 10.

separate agreement(s) on aviation fail. Making aviation a part of the package also gave the EU an upper hand in the negotiations as the overall focus of talks remained on other matters, in particular the dispute settlement procedures and the level playing field.[20] Aviation was 'merely' one of many dossiers. As this point in time, it was certain that both, in terms of aviation and road transport, the objective was to find a balance between a downgrade of cooperation and keeping a working relationship in place. For instance, the EU Negotiation Framework promised to keep arrangements in the area of air transport comparable to existing relations with third countries. It provided that: 'The envisaged partnership should address comprehensively the aviation relationship with the

United Kingdom and consider arrangements typically included in Union bilateral aviation agreements.'[21] In relation to road transport, the Negotiation Framework envisaged:

> As third country operators, United Kingdom road haulage operators should not be granted the same level of rights and benefits as those enjoyed by Union road haulage operators in respect of road freight transport operations from one Union Member State to another ('grand cabotage') and road freight transport operations within the territory of one Union Member State ('cabotage').[22]

Following presentation of the Draft Agreement by the European Commission, the UK presented its own vision of the future relationship in a batch of draft agreements, including a Draft of the Comprehensive Free Trade Agreement containing a comprehensive section on road transport (Articles 20.1–20.17).[23] Furthermore, a Draft of the Comprehensive Agreement on Air Services[24] and a Draft of the Agreement on Civil Aviation Safety were also put on the table by the UK government.[25] None of the UK drafts, however, played a

[20] See, inter alia, Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Vol III. The Framework of New EU-UK Relations* (OUP 2021).

[21] EU Negotiation Framework, para 61.

[22] ibid para 73.

[23] Draft Working Text for a Comprehensive Free Trade Agreement between the United Kingdom and the European Union https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf.

[24] Draft Working Text for a Comprehensive Air Transport Agreement between the United Kingdom and the European Union https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886011/DRAFT_Air_Transport_Agreement.pdf.

[25] Draft Working Text for an Agreement on Civil Aviation Safety between the United Kingdom and the European Union https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886022/DRAFT_Civil_Aviation_Safety_Agreement.pdf.

role during the negotiations, which focused primarily on the text prepared by the European Commission. It was yet further proof, if proof were needed, that departure from the EU is an exercise, where it is the EU that benefits from the upper hand.

Provisions on aviation and road transport found their main home in Part Two of the TCA (trade, transport, fisheries, and other arrangements). Heading Two, which is dedicated to aviation, is divided into two titles: air transport (Title I, Articles 417–442) and aviation safety (Title II, Articles 443–458). Furthermore, some other provisions covering aviation can be found in other parts of the TCA. Good examples are Article 367 paragraph 15 TCA, which prohibits subsidies to air carriers for operation of the routes, Article 392 paragraphs 2 and 4 TCA dedicated to carbon pricing, or Articles 542 to 562 TCA dealing with Passenger Name Records (PNRs).[26] Provisions on road transport are divided into two titles. Title I (Articles 459–472 TCA) regulates transport of goods, while Title II (Articles 473–487 TCA) governs transport of passengers. Previsions contained in the main body of the TCA are supplemented by annexes.

The fact that both the modes of transport discussed are regulated in the TCA has pivotal consequences. To begin with, key general principles laid down in Articles 3 to 5 TCA apply accordingly. According to Article 3 TCA, the EU and the UK have the obligation to act in good faith in order to implement the TCA. Articles 4 to 5 TCA make it clear that one of the tenets of EU law—the doctrine of direct effect, subject to two exceptions—does not generally apply. Furthermore, in application of the TCA, neither of the sides is bound by interpretation provided by respective courts. This is of particular importance for the UK as its domestic courts are not bound by, at least as far as the TCA itself is concerned, by case law of the Court of Justice of the EU. As will be presented further in section 3 of this chapter, the situation is much more nuanced when it comes to requirements imposed on national judges by UK internal legislation. Another consequence of inclusion of both modes of transport in the TCA is that all general institutional provisions as well as various locks, suspension, and termination clauses apply accordingly.

[26] See further Elaine Fahey, Elspeth Guild, and Elif Kuskonmaz, 'The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU-UK Trade and Cooperation Agreement PNR Provisions' (2023) 8 European Papers 273.

3 Aviation

3.1 Introduction

As already noted, the EU has a plethora of bilateral and multilateral agreements on aviation with its geographical neighbours as well as countries afar. Articles 417 to 458 TCA fit into that picture perfectly, symbolically emphasizing that, after Brexit, the UK is treated as a par excellence third country. One would be profoundly mistaken, if one assumed that high levels of integration within the EU meant that post-Brexit arrangements secure at least some benefits of EU membership. Quite to the contrary, in this respect the TCA is anything but extraordinary. As noted by Dettling-Ott, the air transport provisions of the TCA look 'familiar to an aviation lawyer: the provisions of this part [Articles 417–442 TCA] correspond very much to the International Civil Aviation Organization (ICAO) template'.[27] Also, provisions on air safety mirror standard agreements concluded with other countries.[28] The scale of de-integration is plainly visible if one contrasts the discussed provisions with some of the advanced aviation agreements concluded by the EU with selected non-EU countries. A recently signed Common Aviation Area Agreement (CAAA) between the EU and Ukraine may be a case point in this respect.[29] It provides a much more favourable arrangement for Ukraine than the TCA does for the EU former Member State. This, however, should not come as a surprise. The *desideratum* underpinning EU-Ukraine CAAA is that liberalization comes at the price of extensive law approximation.[30] Thus, a similar large-scale regulatory alignment could not be a plausible solution for the UK, especially bearing in mind the *raison d'être* of Brexit: 'taking back control of our laws'. This is reflected not only in the selection of matters covered by the TCA, but also the level of detail and nature of commitments undertaken by the EU and the UK. The latter vary, from strictly formulated rights and obligations to mere best endeavours clauses or even vague declarations of intent.

[27] Dettling-Ott (n 18) 7–8.
[28] ibid 9.
[29] Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2021] OJ L387/3 (CAAA).
[30] Annexes to the CAAA contain a long list of EU *acquis* that Ukraine is required to turn to domestic law and to apply. See further Tetyana Komarova and Adam Łazowski, 'Switching Gear: Law Approximation in Ukraine after Application for EU Membership' (2023) 19 Croatian Yearbook of European Law and Policy 105.

3.2 Air Transport

Title I dedicated to air transport starts with a list of twenty-two statutory definitions, including the notion 'air transport' which determines the scope of this part of the TCA. According to Article 417(g) TCA, air transport extends to 'carriage by aircraft of passengers, baggage, cargo, and mail, separately or in combination, held out to the public for remuneration or hire'.

Articles 418 and 419 TCA contain fundamental provisions on route schedule and traffic rights. This is where the downgrade of bilateral relations comes to the fore, and it is difficult to find any dividends of Brexit for either UK or EU registered carriers. The EU internal arrangements, which give benefits of many aviation freedoms, including the right to operate scheduled flights from any point in the EU to another point in the EU, are replaced merely with the third and the fourth aviation freedoms.[31] Consequently, UK and EU carriers are allowed to fly across, respectively, the EU and the UK territory without landing, to make stops for non-traffic purposes (defined as 'landing for any purpose than taking on board or discharging passengers, baggage, cargo and/or mail in air transport'),[32] to make stops in, respectively, the EU and the UK territory to provide both scheduled and non-scheduled air transport services between any point in the UK/EU and any point situated in the EU/UK.[33]

Article 419 paragraph 7 TCA further specifies that: 'Nothing in this Title shall be deemed to confer on the United Kingdom the right for its air carriers to take on board, in the territory of a Member State, passengers, baggage, cargo or mail carried for compensation and destined for another point in the territory of that member State or any other Member State.'

Article 419 paragraph 4 TCA, which appears to have been added during the TCA negotiations,[34] contains an authorization for the Member States and for the UK to envisage the fifth aviation freedom in respect of cargo flights in bilateral agreements.[35] This option has been utilized heavily. According to the

[31] See further Pablo Mendes de Leon, 'The Operation of Traffic Rights in the Post- Brexit Era: A Cost-Benefit Analysis' (2021) 46 (SI) Air & Space Law 11.

[32] TCA, art 417(t).

[33] See also ibid art 421, which deals with operational flexibility which clarifies that the rights envisaged in art 419 paras 2–4 includes, inter alia, the right to operate flights in both directions, to combine different flight numbers in one aircraft operation, as well as to carry transit traffic.

[34] While remaining parts of art 419 TCA are carbon copies of provisions included by the European Commission in Draft Agreement, art 419 para 4 TCA was not envisaged therein.

[35] The fifth aviation freedom envisages the rights of air carriers to fly from the country of registration to another foreign country with a stop in another foreign country en route.

data made available to the EU-UK Specialized Committee on Air Transport, by June 2022, such all-cargo agreements have been concluded with twenty-one EU Member States, while talks were ongoing with the remaining ones.[36] Furthermore, non-scheduled services going beyond the options explicitly envisaged by Article 419 TCA may be authorized by the domestic authorities in accordance with Article 419 paragraph 9 TCA, as long as they do not amount to scheduled services in disguise. It is notable that Article 420 TCA takes into account the commercial reality of contemporary aviation; that is, the widespread use of codeshare and blocked space arrangements. Not surprisingly, large parts of the substantive provisions of the TCA deal with authorizations and permissions. Article 422 TCA is fundamental in this respect as it imposes crucial ownership requirements. Mainly, for an authorization to be granted in the EU, a carrier must be 'owned, directly or through majority ownership' and be effectively controlled by the UK and/or its nationals. Furthermore, such an air carrier must have its principal place of business in the UK. Equivalent requirements are applied in the UK, subject to a proviso that air carriers must be owned, directly or through majority ownership, and controlled by one or more EU Member States, or EEA EFTA countries, or Switzerland or/and one of their nationals.[37] This differs from EU internal legislation, primarily the conditions set by Regulation 1008/2008.[38] Article 425 TCA provides that the rules on ownership and control of air carriers may be liberalized, subject to a decision of the Specialised Committee on Air Transport. Thus far, this option has not been utilized. A prohibition of discrimination is envisaged in Article 427 TCA. While its wording is clear, precise, unambiguous, and thus ideal to be relied on in national courts, it is unlikely to happen due to the already mentioned blanket exclusion of direct effect. However, Article 427 (2-7) TCA envisages a modus operandi which may be employed should discrimination occur. The prohibition of discrimination is supplemented by lex specialis covering a crucial aspect of air transport operations: allocation of slots at airports. According to Article 429 paragraph 4 TCA, this must be done 'in a transparent, effective, non-discriminatory and timely manner'. Furthermore, any user charges imposed on air carriers for air navigation and air traffic control

[36] Specialised Committee on Air Transport—Minutes of the Meeting, 28 June 2022 https://commission.europa.eu/publications/second-meeting-specialised-committee-air-transport-under-eu-uk-trade-and-cooperation-agreement-0_en; Specialised Committee on Air Transport-Minutes of the Meeting, 1 June 2023, https://assets.publishing.service.gov.uk/media/65841bc7ed3c3400133bfd07/specialised-committee-on-air-transport-meeting-minutes-01-june-2023.pdf.

[37] This has had practical consequences for the likes of International Airlines Group or Easyjet. See further Douma (n 6) 91–92.

[38] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L293/3.

must be non-discriminatory and cost-related.[39] To the disappointment of the UK negotiators, Article 436 TCA provides only a general commitment of co-operation in another crucial area for aviation: air traffic management. This is where the effects of Brexit have been causing trouble for UK carriers, something that the UK has been unsuccessfully raising during meetings of the Specialised Committee on Transport. UK requests for additional arrangements in this respect have, so far, triggered opposition from the EU along the lines of the famous mantra 'Brexit means Brexit'.[40] Going beyond the technical details of air transport operations, Articles 437 to 438 TCA deal in a general fashion with liability of air carriers and consumer protection. The former is governed by the Montreal Convention,[41] while in relation to the latter, the parties declare their commitment to a high level of consumer protection. On the EU side, this takes us directly to Regulation 261/2004 and case law of the Court of Justice of the European Union (CJEU).[42] A closer look at the UK statute book uncovers a paradox. On the one hand, the TCA is a vehicle for de-integration and, as already alluded to, ring-fences the UK from CJEU jurisprudence. On the other hand, by means of its own legislation—the European Union (Withdrawal) Act 2018—the UK has not only converted Regulation 261/2004 into retained EU law (now assimilated law) but also requires its domestic courts to follow CJEU jurisprudence predating the end of the transition period, and to take due regard of subsequent judicial developments.[43] The judgment of the Court of Appeal in *Lipton v British Airways* demonstrates how this operates in practice, and how 'taking back control' is easier said than done.[44] Judges of the Court of Appeal, having explained the reasons for doing so, followed the interpretation of Regulation 261/2004 established in the case law of the CJEU. While the EU Retained EU Law (Revocation and Reform Act) 2023 allows the UK courts to depart more freely from CJEU case law, it will not stop them from voluntarily following the footsteps of the Court at Kirchberg. Interestingly, some of the

[39] TCA, art 431 para 1.

[40] Specialised Committee on Air Transport—Minutes of the Meeting, 28 June 2022 (n 40) 2–3.

[41] Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [2001] OJ L 194/39.

[42] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1. See further Michal Bobek and Jeremias Prassl, *Air Passenger Rights: Ten Years On* (Hart Publishing 2016).

[43] See further Robert Lawson, 'Air Passenger Rights in the UK Post-Brexit: The Position so Far' (2021) 46 (SI) Air & Space Law 45.

[44] *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454. See further Adam Łazowski, 'The Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?' (2022) 47 European Law Review 666, 683–84.

CJEU judgments have now been codified in the United Kingdom by means of the Aviation (Consumers) (Amendment) Regulations 2023.

3.3 Aviation Safety

Title II of Heading Two provides a set of provisions dealing with aviation safety. Interestingly, these matters are also regulated in Articles 434 to 435 TCA, which belong to the already discussed Title I. To begin with, certificates of airworthiness and competency, as well as licences are subject to mutual recognition in accordance with Article 434 paragraph 2 TCA. Annex 30 to the TCA contains detailed requirements on airworthiness and environment certification, including rules on design certification (Articles 8–20), production certification (Articles 21–23), and qualification requirements for competent authorities (Articles 28–29).[45] Furthermore, Article 435 paragraph 1 TCA envisages the obligation to provide assistance in case of threats to security of civil aviation. While the parties retain the regulatory autonomy to determine levels of protection, the TCA envisages a procedural framework for transfer of information and cooperation in this respect. For instance, any significant proposals for legislation on licences, approvals, or other certificates is subject to notification to the other party and possible discussion at the bilateral fora. Article 450 paragraph 3 TCA goes as far as to allow for participation as observers in oversight activities.[46]

4 Road Transport

4.1 Introduction

The sector of economy where the impact of Brexit has been most visible is the haulage of goods by road. Media outlets are full of photographs and short clips of endless queues of lorries stuck in Dover, awaiting customs clearance, or empty shelves in shops due to slow deliveries resulting from, among others, a shortage of qualified drivers. This is a direct consequence of exit from the internal market and the EU Customs Union. What escapes the news coverage is

[45] Competent authorities are the European Union Aviation Safety Agency and the Civil Aviation Authority of the United Kingdom (art 5 of Annex 30).

[46] See Annex to Title II.

how this vital sector for the entire economy is regulated in the TCA and how the wings of UK and EU-based road haulage operators have been clipped. As already mentioned, this mode of transport is regulated *in extenso* in the TCA (Heading Three). The rules governing transport of passengers by road offer a temporal solution as they will be largely replaced by the Protocol on the Interbus Agreement[47] when it enters into force in relation to the UK (or six months after its entry into force for the EU, whichever comes first).[48] General provisions laid down in the main body of the TCA are supplemented by 135 pages of Annex 31 with appendices containing detailed rules.

4.2 Carriage of Goods by Road

Provisions grouped in Title I apply only to the transport of goods for commercial purposes.[49] Article 459 paragraph 2 TCA makes it clear that discriminatory measures within the scope of Title I are prohibited. Again, as in the case of similar provisions laid down in the section on aviation, direct effect is precluded by Article 5 paragraph 1 TCA. Furthermore, the general rules on market access and national treatment, which are provided in Articles 135 and 137 TCA in relation to services, apply to the carriage of goods by road.[50] If one were to look for Brexit dividends, then the basic rules laid down in Article 462 TCA will certainly not serve as a good example. As envisaged in the EU negotiation framework, it provides for a considerable downgrade when it comes to the rights of road haulage operators active in the EU and in the UK.[51] First and foremost, it permits laden journeys with vehicles from the UK to the EU (and vice versa) with or without transit. At the same time, the provision in question imposes restrictions on the right of UK haulage operators who, following the journey from the UK, wish to conduct laden journeys between the EU Member States or within a single Member State. The former is limited to up to two journeys; the latter is capped at one laden journey, upon which road hauliers have to return to the UK. Furthermore, a tailor-made rule applies to

[47] Protocol to the Agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement) regarding the international regular and special regular carriage of passengers by coach and bus [2023] OJ L122/3.

[48] TCA, art 485.

[49] ibid art 460.

[50] ibid art 471.

[51] For the rules applicable on the internal market see Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (recast) [2009] OJ L300/72.

haulage operators established in Northern Ireland as to their rights to provide road haulage services in the Republic of Ireland. According to Article 462 paragraph 5 TCA, such laden journeys are capped at two, providing they are performed within seven days of unloading goods in Ireland. The same rule applies to EU-based road haulage companies wishing to provide services in the UK.[52]

Provision of road haulage services is subject to compliance with requirements applicable to operators, drivers, and vehicles (respectively Articles 463–466 TCA). This includes, inter alia, an obligation for road haulage operators to have a licence,[53] for the drivers the obligation to hold a certificate of professional competence, and to comply with rules on driving time and rest periods, as well as the use of tachographs.[54] A very comprehensive legal regime in this respect is laid down in Annex 31 to the TCA, in particular in Appendix 31-B-1-2, which is filled with EU *acquis*-inspired provisions applicable to drivers. Bearing in mind the level of detail of those provisions and the level of regulatory alignment required, it is not surprising that Article 468 TCA envisages modus operandi for updates consequential to new regulatory measures in the UK and the EU.[55] In a nutshell, it looks as follows. In case of proposals for new measures affecting the areas regulated in Annex 31 to the TCA, the UK and the EU are under the obligation to notify each other and keep updated as to progress in the adoption of new legislation, and supply the text when drafts turn into laws.[56] Each party may request consultations in the Specialised Committee on Road Transport. Irrespective of whether such talks are held or not, upon adoption of new regulatory measures the Committee may, should that be required, amend Annex 31. When this chapter was completed, such a first decision was in the making in order to reflect adoption of Regulation 2021/1228 on smart tachographs[57] (which was also reflected in the UK legislation).[58]

[52] TCA, art 462 para 7.

[53] For a list of exceptions see ibid art 464.

[54] See ibid art 465.

[55] The notion 'regulatory measures' is defined in ibid art 461 (g) and includes, on the EU side, legislative and non-legislative acts and, on the UK side, primary and secondary legislation (Acts of Parliament and statutory instruments).

[56] This proviso has been quickly turned into practice. See Specialised Committee on Road Transport—Minutes of the Meeting, 21 November 2022 https://commission.europa.eu/system/files/2023-02/Minutes%20-%20Second%20Meeting%20of%20SC%20on%20Road%20Transport.pdf.

[57] Commission Implementing Regulation (EU) 2021/1228 of 16 July 2021 amending Implementing Regulation (EU) 2016/799 as regards the requirements for the construction, testing, installation, operation and repair of smart tachographs and their components [2021] OJ L273/1.

[58] The Drivers' Hours and Tachographs (Amendment) Regulations 2023.

4.3 Carriage of Persons by Road

Articles 473 to 487 TCA regulate the carriage of persons by road, including occasional, regular, and special regular transport by coaches and buses.[59] They are supplemented by Annexes 32 to 34 containing, respectively, a model of authorization for an international regular and special regular service, a model of application for an authorization for an international regular and special regular service, and a model of journey form for occasional services. As in the case of road haulage transport, in respect of transport of passengers the EU and the UK also agreed to refrain from taking discriminatory measures. Also in this respect, the general rules on market access and national treatment, which are provided in Articles 135 and 137 TCA in relation to services, apply to carriage of persons by the road.[60] In case of passenger road transport, the downgrade of relations is even more far reaching than in relation to transport of goods. While Article 475 paragraph 1 TCA guarantees the right of operators to provide services between the UK and the EU, Article 475 paragraph 3 TCA precludes the right to operate regular and special regular services by UK operators in the EU and vice versa. Articles 476 to 481 TCA contain a set of rules governing authorizations required for provision of regular and special regular services, as well as modus operandi for their acquiring.

5 Institutional Framework and Dispute Settlement

With its departure from the EU, the UK has, of course, left the EU institutional structures. This not only includes the key decision-making institutions but also specialized agencies. In the realm of transport, this meant departure from the European Maritime Safety Agency, the European Union Agency for Railways, and the European Union Aviation Safety Agency (EASA). While various forms of cooperation with EU agencies exist, thus far not much has happened in terms of UK post-Brexit involvement.[61] While at the initial stages of Brexit the UK expressed a desire to remain on board with the EASA, this has proven to be futile. The basic character of bilateral cooperation envisaged by the already

[59] TCA, art 473 para 1. Special regular services are defined in art 474(f) TCA and include, inter alia, transport of workers between home and place of work.

[60] TCA, art 486.

[61] See further Andrea Ott, 'Brexit and EU Agencies: Opting-in from the Outside?' in Juan S Vara, Ramses A Wessel, and Polly R Polak, *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 255.

discussed provisions of the TCA, preclude membership of EASA along the lines of EEA/EFTA countries or Switzerland.[62] With all this in mind, the main institutional framework for EU-UK relations in the realm of transport is governed by the TCA. Thus, the institutional provisions laid down in Articles 7 to 14 TCA apply accordingly. Apart from the Partnership Council, which takes decisions at the highest level, most of the technical work is delegated to special committees. In this area, the leading role is taken by the Specialised Committee on Air Transport, the Specialised Committee on Aviation Safety,[63] and the Specialised Committee on Road Transport. Furthermore, in other areas covered by the TCA which apply to transport services, for instance provisions on subsidies or PNRs, other specialized committees may also have an important role to play. Apart from generic powers defined in Article 8 paragraph 3 TCA, the three committees which are of our interest also have specific tasks given in the sections of the TCA dedicated to transport. For instance, the Specialised Committee on Air Transport is a forum for exchange of statistical data on air transport.[64] Furthermore, the same committee is tasked with monitoring progress in the removal of obstacles to air transport business.[65] More importantly, the three specialized committees have decision-making powers. For instance, the Specialised Committee on Road Transport has the competence to amend the already discussed Annexes 31 to 34 TCA.[66]

In respect of the TCA provisions on transport, the standard dispute settlement modus operandi laid down in the TCA applies (Articles 734–763 TCA).[67] However, selected provisions on transport envisage bespoke rules which complement the general regime. The three specialized committees also have a role to play in this respect. While they are not always explicitly mentioned as fora for consultations, it is assumed that bearing in mind their overall functions, they would serve as the first choice in terms of a platform for solving disputes. For instance, in case of refusal, revocation, suspension, or limitation of operating air transport authorizations, consultations between the parties need to be conducted as specified in Article 424 paragraph 4 TCA. Should they fail, recourse

[62] It is notable that the UK and EASA concluded a working arrangement on the collection and exchange of information on the safety of aircraft under the EU ramp inspection programme. See https://www.easa.europa.eu/sites/default/files/dfu/uk-easa_safa_wa.pdf.

[63] It should be noted that Annex 30 serves as the legal basis for the creation of the Certification Oversight Board (arts 3–4).

[64] TCA, art 433.

[65] ibid art 428.

[66] ibid arts 468, 487.

[67] See the chapter by Andrea Biondi in this volume. See also Jan Larik and Ramses A Wessel, 'The EU-UK Trade and Cooperation Agreement: Forging Partnership or Managing Rivalry?' in Adam Łazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022) 122, 143–46.

may be had to arbitration under Article 739 TCA. Another example is a procedure which may be invoked in case of discrimination adversely affecting fair and equal opportunity of air carriers. Again, consultations conducted under Article 427 TCA may lead to triggering the general arbitration clause.[68] Similar rules are also envisaged, inter alia, in relation to aviation safety[69] and aviation security standards.[70]

6 Suspension and Termination

Despite its overall importance and political drama that was associated with its negotiations and conclusions, the TCA is characterized by high volumes of vulnerability and potential for fragmentation of the post-Brexit EU-UK legal framework. First, Article 779 TCA contains a general termination clause. Furthermore, all four sections of the TCA dealing with transport, provide modi operandi for suspension or termination of respective parts. Pursuant to Article 441 TCA, the UK and the EU may terminate Title I on Air Transport. The same applies to Title II on Aviation Safety, where apart from a clause permitting for termination,[71] one can find a proviso allowing for suspension of general safety obligations under Article 446 paragraph 1 TCA, when the other party acts in their breach.[72] Equally worded termination clauses are also included in Article 472 TCA in relation to road haulage. Furthermore, the TCA provisions on transport may be victims of ricochets. For instance, should Heading Five on fisheries be terminated, it would have a knock-on effect on the entire Part II TCA, including the provisions on aviation and road transport.[73] Put differently, all provisions on trade would be terminated in such a circumstance.[74] While it does not give cast iron guarantees that neither of the sides would act in breach of the TCA, this arrangement somewhat ring-fences the TCA from unnecessary legal vandalism. For instance, the far-reaching consequences of termination of the politically sensitive fisheries section could—perhaps—if not stop, then make UK authorities at least think twice before making such a step.

[68] An important caveat is added in art 427 para 7 TCA. Should such a dispute fall within the scope of TCA provisions on level playing field on open and fair competition and sustainable development, then the relevant dispute settlement procedure for this part of the TCA will apply.
[69] TCA, art 434 paras 3–4.
[70] ibid art 435 para 2.
[71] ibid art 458.
[72] ibid art 457.
[73] See further the chapter by Graham Butler in this volume.
[74] See, however, the exception in TCA, art 509 para 3.

7 Conclusions

Leaving the EU was not meant to be easy and without consequences. From the very start of the Brexit process, the EU made it clear that the withdrawal had to lead to a downgrade of bilateral relations, as well as to lower levels and intensity of cooperation. The TCA provisions on transport are a very good laboratory to analyse how this *desideratum* translated into practice. Taken out of context, the rules on aviation and road transport could be perceived as a basic, yet satisfactory framework, should the point of departure be a wall of restrictions. Yet, this was a downgrade from the EU membership legal environment. Hence, for those who were hoping that things would stay the same, the end result must be a disappointment. This is exacerbated by the fact that the transport sector was also affected by Brexit in more general terms. The reintroduction of customs controls and the end of free movement of workers have had their wider consequences, too. Alas, with the Brexit mantra of 'Taking back control of the laws', leaving the internal market and the Customs Union, ending the jurisdiction of the Court of Justice, there was only one trajectory on which the EU and the UK could have travelled. It was called exercises in damage control. While the post-Brexit framework is not, perhaps, what the UK authorities had wanted to achieve, it still offers more than a potential no-deal Brexit would have done. While the UK cannot both have its cake and eat it, an old Polish and Ukrainian saying may come in handy: 'when there is no fish, crab is a fish'.[75] After all, Brexit means Brexit.

[75] Respectively, 'Na bezrybiu, rak ryba'/'На безриб'ї і рак риба'.

PART IV
PROCESS AND PROSPECTS

11

Regulatory Cooperation, Social Security Coordination, and Participation in Union Programmes

Christy Ann Petit

1 Introduction

2023 has been a year of transformations in the UK-EU relationships, which have been reactivated and have paved the way for regulatory cooperation in financial services, cooperation in research, and social security coordination. The logic for voluntary regulatory cooperation is supported by the political declaration attached to the Withdrawal Agreement (WA). This foresees the establishment of frameworks for 'voluntary regulatory cooperation in areas of mutual interest, including exchange of information and sharing of best practice'.[1] The area of financial services is important considering the size of the industry in the UK, the systemic risks, and the number of retained EU laws in this sector, and hence a choice to focus on this area.

The Trade and Cooperation Agreement (TCA) provides for some continuity in keeping UK participation in some programmes: this is possible through Protocols to be agreed later by the competent specialized committee. In contrast, the TCA does not include a fully-fledged financial services chapter, but instead contains only a few provisions including the annexed Joint Declaration on Financial Services Regulatory Cooperation,[2] which refers to a future memorandum of understanding (MoU).[3] In the Joint Declaration, the EU

[1] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2019] OJ C384 I/02, point 33.

[2] Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948105/EU-UK_Declarations_24.12.2020.pdf (accessed 27 January 2023); Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom [2020] OJ L444/1475.

[3] Christy Ann Petit and Thorsten Beck, 'Recent Trends in UK Financial Sector Regulation and Possible Implications for the EU, Including Its Approach to Equivalence' (European Parliament

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and the UK agreed to 'establish structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship between autonomous jurisdictions'.[4] However, the political stand-off in the implementation of the Northern Ireland/Ireland Protocol[5] delayed the adoption and implementation of concrete arrangements for financial services cooperation, as well as the UK's access to various Union programmes.[6]

The impact of this delay is yet to be identified. However, UK-based universities exited from EU programmes and networks such as Horizon Europe, and the competitiveness in EU grants and the proportion of EU researchers among the UK academic community both declined.[7] In financial services, the relocation of firms to the multi-cities networked EU financial centre already happened and 'missing' financial services opportunities could be substantial in the UK, in particular in terms of jobs.[8]

Although the EU and the UK committed to agree the MoU to establish a Framework for Financial Services Regulatory Cooperation by March 2021, the technical negotiations of the draft MoU were completed[9] but remained inert until its political sign-off in May and signatures in June 2023.[10] This was facilitated by the overcoming of tensions on Northern Ireland through the approval

2023) Publication for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies PE 740.067; Niamh Moloney, 'Financial Services' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) http://academic.oup.com/book/39204 (accessed 5 August 2022).

[4] Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom' (n 2) point 1.

[5] Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume IV. The Protocol on Ireland/Northern Ireland* (OUP 2022).

[6] Stefano Fella, Elizabeth Rough, and Matthew Keep, 'The UK and EU Programmes: Participation Delayed' House of Commons Library (2022) 9664 6 https://researchbriefings.files.parliament.uk/documents/CBP-9664/CBP-9664.pdf (accessed 11 September 2023).

[7] Ludovic Highman, Simon Marginson, and Vassiliki Papatsiba, 'Higher Education and Research: Multiple Negative Effects and No New Opportunities after Brexit' (2023) 18 Contemporary Social Science 216.

[8] Shawn Donnelly, 'Post-Brexit Financial Services in the EU' (2022) 30 Journal of European Public Policy 1; Robert Panitz and Johannes Glückler, 'Relocation Decisions in Uncertain Times: Brexit and Financial Services' (2022) 98 Economic Geography 119; Sarah Hall and Martin Heneghan, 'Brexit and "Missing" Financial Services Jobs in the United Kingdom' (2023) 18 Contemporary Social Science 235.

[9] HM Treasury, 'Technical Negotiations Concluded on UK–EU Memorandum of Understanding' *GOV.UK* (26 March 2021) https://www.gov.uk/government/news/technical-negotiations-concluded-on-uk-eu-memorandum-of-understanding (accessed 27 January 2023).

[10] European Commission press release, 'Daily News 17/05/2023 Financial Services: Commission Adopts Draft Memorandum of Understanding with the United Kingdom' (17 May 2023) https://ec.europa.eu/commission/presscorner/detail/en/mex_23_2805 (accessed 17 August 2023); Mairead McGuinness and Jeremy Hunt, 'Memorandum of Understanding Establishing a Framework for Financial Services Regulatory Cooperation between the European Union and the United Kingdom of Great Britain and Northern Ireland (hereinafter 'MoU') https://finance.ec.europa.eu/system/files/2023-09/230627-memorandum-understanding-financial-services-eu-uk_en.pdf (accessed 27 June 2023).

of the Windsor Framework earlier in 2023.[11] On 7 September 2023, the EU and the UK reached a political agreement on the association of the UK to Horizon Europe and Copernicus,[12] which are both EU flagship programmes.

In the fields of financial services, education, research, and social security coordination, the TCA governs UK-EU relations post-Brexit with looser requirements as they were inserted in draft protocols yet-to-be-adopted and an MoU yet-to-be implemented. This requires strong political will to put the commitments into concrete actions. This chapter is structured as follows. Section 2 examines regulatory cooperation for financial services; section 3 considers the UK's participation in EU programmes; and section 4 looks at the provisions for social security coordination. Finally, section 5 concludes.

2 UK-EU Regulatory Cooperation in Financial Services

Regulatory cooperation would compensate for, and to some extent reduce, the adverse effects of regulatory barriers existing or erected among third countries. In concrete terms, regulatory cooperation relies not only on bilateral and multilateral frameworks and agreements but also on their effective implementation. They are important to build a mutual understanding and develop a trustworthy relationship. Between the EU and the UK, we are facing a special case of bilateral revitalized relationships, after a disaggregation of the UK from the EU polity and legal order.

Following Brexit, UK regulatory divergence from EU regulation is an outcome which started with the loss of passporting rights with the UK exit from the EU Single Market.[13] The first UK governments handling Brexit have emphasized initially the advantages of de-regulation, but the mood and rhetoric have slightly shifted since then. Politicians now stress more voluntarily that the UK's objective is not de-regulation per se.[14] In any event this will lead de facto

[11] European Commission, 'The Windsor Framework: A New Way Forward for the Protocol on Ireland/Northern Ireland'; Federico Fabbrini, 'The Windsor Framework: Or the Law & Politics of Reconnecting the UK to Europe' (28 February 2023) https://dcubrexitinstitute.eu/2023/02/the-windsor-framework-or-the-law-and-politics-of-reconnecting-the-uk-to-europe/ (accessed 28 February 2023).

[12] European Commission press release, 'Joint Statement European Commission and the UK Government on the UK's Association to Horizon Europe and Copernicus' ((7 September 2023) https://ec.europa.eu/commission/presscorner/detail/en/statement_23_4375 (accessed 11 September 2023); Cleo Davies, 'The UK Finally Joins Horizon Europe: Better Late than Never—Brexit Institute' (8 September 2023) https://dcubrexitinstitute.eu/2023/09/uk-finally-joins-horizon-europe/ (accessed 11 September 2023).

[13] Petit and Beck (n 3); Moloney (n 3).

[14] 'Chancellor Jeremy Hunt's Mansion House Speech' *GOV.UK* (10 July 2023) https://www.gov.uk/government/speeches/chancellor-jeremy-hunts-mansion-house-speech (accessed 17 August 2023).

to some divergence between the two jurisdictions. The EU and the UK find their own merits in using a different approach to regulation: less risk-based and more principles-based in the UK common law, moving rules under the regulators' hands, all of which is supposed to give more flexibility and agility to the UK financial sector in a reach for 'smarter regulation'.[15] Moreover, the MoU provides that regulatory cooperation should not restrict the UK and EU's ability 'to implement regulatory, supervisory or other legal measures that it considers appropriate'.[16] This safeguard for regulatory autonomy is significant, but it leaves room for both stricter and more lenient measures than the common denominator that may stem from closer EU-UK regulatory cooperation.

More specifically, regulatory cooperation will help monitoring, checking, and representing such regulatory divergence, its effects, and how to overcome harmful hindrance for trade, the UK internal market, and the EU Single Market. In this regard, the implementation of the MoU and the meetings of the Joint Regulatory Forum will be essential. This section examines the sources for regulatory cooperation in financial services from the TCA, its extension in the Joint Declaration on Financial Services, as well as the newly adopted MoU. The last subsection focuses on the expectations towards the forthcoming meetings of the Joint Regulatory Forum.

2.1 The TCA and Financial Services: The General Basis for Regulatory Cooperation

The scope of regulatory cooperation, when specific to the financial services area, contributes to common objectives across the Channel, namely to preserving financial stability, market integrity, investor and consumer protection, and fair competition. However, UK-EU regulatory cooperation takes place only with respect to the respective jurisdictions' regulatory and decision-making autonomy, and their ability to take equivalence decisions.[17] The TCA provides for regulatory cooperation activities in Article 351, which is in Part II 'Trade, Transport, Fisheries and Other Arrangements' under Title X 'Good Regulatory Practices and Regulatory Cooperation'. In essence, the UK and

[15] Department for Business and Trade, 'Smarter Regulation to Grow the Economy' (2023) Position Paper GOV.UK https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy (accessed 21 May 2023).

[16] McGuinness and Hunt (n 10) point 3.

[17] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (n 1) point 35.

the EU '*may* engage in regulatory cooperation activities on a voluntary basis, without prejudice to the autonomy of their own decision-making and their respective legal orders' (emphasis added). Therefore, such regulatory cooperation is an option, and the provision even expressly envisages a scenario of refusal or withdrawal from such regulatory cooperation. In such case, the party refusing or withdrawing will need to explain the reason for a refusal or withdrawal to the other party.

2.2 The Joint Declaration on Financial Services and the MoU

I examine first the Joint Declaration on Financial Services Regulatory Cooperation (Joint Declaration) annexed to the TCA[18] before focusing on the MoU for Financial Services Regulatory Cooperation. In the Joint Declaration, the UK and the EU agreed to 'establish structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship between autonomous jurisdictions'. The declaration emphasized that the general cooperation arrangements will allow for:

- bilateral exchanges of views and analysis relating to regulatory initiatives and other issues of interest;
- transparency and appropriate dialogue in the process of adoption, suspension, and withdrawal of equivalence decisions; and
- enhanced cooperation and coordination including in international bodies as appropriate.

The substantive scope of the future EU and UK discussions, reiterated under the second (and last) point of the Joint Declaration, focuses on the inclusion inter alia of the developments of equivalence determinations between the EU and the UK 'without prejudice to [their] unilateral and autonomous decision-making process'. The autonomy in decision-making for equivalence echoes the wording of the above-mentioned Article 351 TCA. When the MoU was published, EU partners emphasized that it does not predetermine the adoption of equivalence decisions. Hence, the access of UK-based firms to the Single Market and EU firms' access to the UK internal market are outside the scope of the MoU.[19]

[18] Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom (n 2).
[19] European Commission press release (n 10).

As mentioned in the introduction, the MoU should have established the EU-UK regulatory cooperation framework in the financial services sector by March 2021. Instead, it was politically agreed in May and finally adopted in June 2023. The general cooperation arrangements under the MoU are mostly similar to the Joint Declaration, except that it adds to the three points above 'the bilateral exchanges of views and analysis relating to market developments and financial stability issues' (under a new point c). This addition has some significance from a substantive viewpoint because it steers regulatory cooperation in a certain direction, ie the particular observation of macroeconomics trends and developments. Given the importance of financial stability since the last financial crisis and how it impacted regulatory and supervisory frameworks, it is not surprising that the MoU general scope stresses financial stability together with market developments.

Furthermore, it is worth noting that the reference to the process of adoption, suspension, and withdrawal of equivalence decisions—under letter b—appears right before this concern for financial stability issues and markets developments—under letter c. Nothing in the MoU's explicit wording gives a ranking or a degree of importance across these issues. Yet, this list may inform about which elements could be more disruptive to the newly established regulatory cooperation per se; that is, the respective equivalence frameworks.

2.3 The MoU Structured Regulatory Cooperation in Financial Services

The MoU establishes a framework for structured regulatory cooperation in financial services between the EU and the UK—represented respectively by the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) and the UK Government Treasury. The MoU is more detailed and extends the Joint Declaration on which it is based. It frames the technical regulatory cooperation between the EU and the UK, but remains of a non-binding legal nature.

The MoU sets out a framework for *technical* cooperation in financial services—composed of only sixteen paragraphs. At a substantive level, in line with the general cooperation arrangements envisaged by the Joint Declaration, the MoU provides for exchanges of views and information sharing specifically on regulatory developments and issues of common interest, as well as market

developments and financial stability issues, dialogue on equivalence decisions, and enhanced cooperation and coordination at the international level.

Beyond these general arrangements, the 'general operational objectives' of the Joint Regulatory Forum include seven types of objectives. These are, according to point 2 of the MoU, to

> (a) improve transparency; (b) reduce uncertainty; (c) identify potential cross-border implementation issues, including concerns linked to potential regulatory arbitrage by firms; (d) as appropriate, consider working towards compatibility of each other's standards; (e) when relevant, promote domestic implementation consistent with international standards; (f) share knowledge to facilitate a common understanding of the EU and UK's regulatory frameworks; and (g) exchange information and views on other issues of common interest within the scope of these regulatory cooperation arrangements.

Overall, beyond the requirements of transparency and certainty, these objectives would ensure that the EU and UK are aware of cross-border issues raised by the implementation of respective regulatory developments, that they develop compatible standards at bilateral level, and implement international standards consistently in their respective jurisdictions. This list of objectives remains broad and potentially all-encompassing. Furthermore, the MoU leaves the possibility to the parties to 'discuss any issue relevant to regulatory cooperation in the area of financial services' (point 9).

Regarding its legal nature, the MoU is of a non-binding nature, as is also the case for other MoUs or cooperation frameworks. It does not contain legal obligations but shared commitments that are of a voluntary nature. The MoU even clarifies in point 14 that it 'does not create rights or obligations under international or domestic law, nor will there be financial obligations resulting from its implementation' and that there is no interference with other types of cooperation, including those established with supervisory and resolution bodies.

At operational level, normally, since the TCA entered into force, the EU and the UK respectively should have designated a contact point to facilitate the exchange of information, as stated in Article 353 TCA. This is reiterated in the MoU, but the latter did not identify the organizational location or staff representative assuming such a function.

2.4 The Practice: The Upcoming Joint Financial Regulatory Forum Outside the TCA Structures

The MoU creates an 'administrative framework'[20] for voluntary regulatory cooperation, outside the TCA structures. Indeed, the Joint Regulatory Forum is outside the TCA committees, whereas a specialized committee for trade regulatory cooperation has been provided for under Article 352, which met twice, in 2021 and in 2022.[21] The practical implementation of regulatory cooperation is yet to be seen. Considering what is done with other third countries, the latest developments in banking, insurance, digital, sustainable finance, and other matters are expected to be covered.[22] However, we can draw some observations from the foreseeable future activities of the Joint Regulatory Forum, and from the synergies between functioning UK-EU regulatory cooperation and other channels of regulatory and supervisory cooperation in the financial sector.

The Joint Forum is expected to take place twice a year and met for the first time on 29 October 2023 in London.[23] Its aim is to serve as a platform for structured regulatory cooperation and hence regular dialogues. It will be used for mutual updates on regulatory developments and changes, similar to a stocktaking exercise, and helping the EU and the UK to identify emerging and future risks to markets. The MoU lists eleven types of forum activities (point 11), which partly overlap with the general operational objectives examined previously. It suffices here to stress additional subject matters, as a complement to the above-mentioned objectives, namely: activities related to international cooperation and implementation of internationally agreed standards; explicit considerations for EU and UK Supervisory and Resolution Authorities; tools other than equivalence envisaged for a deference regime (left undetermined, however); not only financial stability but

[20] ibid.

[21] European Commission, 'Trade Specialised Committee on Regulatory Cooperation under the EU-UK Trade and Cooperation Agreement' (13 December 2022) https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement/trade-specialised-committee-regulatory_en (accessed 11 September 2023).

[22] Paulina Dejmek-Hack, 'Exchange of Views with the European Commission: Memorandum of Understanding Establishing a Framework for Financial Services Regulatory Cooperation between the European Union and the United Kingdom of Great Britain and Northern Ireland' ECON Committee Meeting, European Parliament, Brussels (18 July 2023) https://emeeting.europarl.europa.eu/emeeting/committee/en/agenda/202307/ECON?meeting=ECON-2023-0718_1&session=07-18-08-00 (accessed 17 August 2023).

[23] The analysis does not take account of the statement available here: European Commission, 'Joint EU-UK Financial Regulatory Forum' (19 October 2023), https://finance.ec.europa.eu/publications/joint-eu-uk-financial-regulatory-forum-october-2023_en (accessed 10 January 2024).

also issues for market fragmentation, in light of the EU-UK economies' interconnectedness, macro-prudential implications of regulatory developments, and anti-money laundry (AML).

Furthermore, international cooperation is very closely connected to what will happen bilaterally in the UK-EU Joint Regulatory Forum. This is so due to international standards, also envisaged in the TCA, as well as the MoU inviting to coordinate positions ahead of international meetings. Regulatory cooperation is indeed essential for enhancing the parallel channels of international regulatory and supervisory cooperation, eg in the Basel Committee for Banking Supervision (BCBS), the Financial Stability Board (FSB) at the multilateral level, but also the bilateral cooperation frameworks between supervisory and regulatory authorities. In this regard, the TCA also mandates the EU and the UK to 'make their best endeavours to ensure that internationally agreed standards in the financial services sector for regulation and supervision, for the fight against money laundering and terrorist financing and for the fight against tax evasion and avoidance, are implemented and applied in their territory' in accordance with Article 186 TCA. Therefore, EU-UK regulatory cooperation not only benefits from bilateral channels of supervisory cooperation but also the forums that are particularly active at the global level. Beyond the BCBS and the FSB, Article 186 also references the International Association of Insurance Supervisors, the International Organization of Securities Commissions, the Financial Action Task Force, and the Global Forum on Transparency and Exchange of Information for Tax Purposes of the Organisation for Economic Cooperation and Development (OECD).

3 UK Participation in Union Programmes

Part V of the TCA enables the UK to continue to participate in EU programmes subject to certain conditions. This was complemented by two draft protocols, as well as by the institution of a specialized committee to manage its finalization and implementation. Article 710 of the TCA stipulates that the UK 'shall participate' in EU programmes. Part V of the TCA details the rules and conditions of the UK participation, including through its financial contribution. However, the TCA did not envisage the list of programmes eligible for the UK participation. For this purpose, a draft protocol I on participation was developed and published at the same time as the TCA but remained unfinalized for some time. Such draft protocol included Copernicus, Horizon Europe, the European Atomic Energy Community (Euratom) research and training programme, and

the European side of International Thermonuclear Experimental Reactor and the Development of Fusion Energy.

3.1 UK Participation Blocked by the Stand-off on the Implementation of the Northern Ireland Protocol

A joint declaration on participation in Union programmes and access to programme services was published alongside the TCA, and referred to the yet-to-be-adopted Protocols I and II.[24] In that declaration, the UK and the EU further stressed their commitments to explore a number of research programmes: the European Research Infrastructure Consortiums (ERIC), the PEACE PLUS programme which includes Northern Ireland,[25] as well as the above mentioned Euratom research and training programmes.[26] As regards the adoption of the draft protocols, the Joint Declaration anticipated the submission of the draft protocols to the joint UK-EU Specialised Committee on Participation in EU Programmes for adoption.

The two protocols were not finalized initially because of the pending adoption of some of the legal instruments underpinning the Union Programmes and the Multiannual Financial Framework (MFF) 2021–2027 (until spring 2021). While the joint UK-EU Specialised Committee met in December 2021,[27] the UK participation in Union Programmes remained frozen due to the difficulties in the implementation of the Protocol on Ireland/NI. The tying of these two issues led to legal proceedings initiated by both parties. On the one hand, the EU initiated a legal challenge over the alleged breach of UK obligations under the NI Protocol. On the other hand, the UK triggered the dispute settlement mechanism as regards the blockage to finalize the participation of the UK in the EU programmes.[28]

[24] Protocol I on programmes and activities in which the UK participates, and Protocol II on access of the UK to certain services provided under Union programmes and activities.

[25] It is the only Interreg programme that is still applicable to the UK. See Irene McMaster and Heidi Vironen, 'Gone but Not Forgotten (yet): Interreg in Post-Brexit UK' (2023) 18 Contemporary Social Science 197.

[26] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (n 1) points 12, 13, and 66.

[27] Specialised Committee on Participation in Union Programmes https://commission.europa.eu/system/files/2022-02/first-meeting-of-sc-on-participation-in-union-programmes-minutes_en.pdf (accessed 11 September 2023).

[28] 'Government Requests Consultations with EU on Participation in EU Science Programmes' *GOV.UK*, (17 August 2022) https://www.gov.uk/government/news/government-requests-consultations-with-eu-on-participation-in-eu-science-programmes (accessed 11 September 2023).

Until the association of the UK in September 2023, the UK could only benefit from a limited set of EU programmes that work independently from Horizon Europe programmes. Indeed, the UK-based institutions remained eligible for the European Cooperation in Science and Technology (COST) actions, as partner or as lead actor. Moreover, as a non-associated/non-EU country the UK was eligible for its participation in Horizon Europe projects but without any EU funding (in accordance with Horizon Europe Regulation EU 2021/695).[29] This is why the UK adopted interim funding programmes. It decided to back successful applicants to Horizon Europe funding with a funding guarantee Horizon Europe Guarantee in November 2021,[30] extended several times as a 'Horizon Europe financial safety net'.[31] Moreover, the UK Turing Scheme replaced the UK participation in Erasmus+, and supported study programmes and programme exchanges worldwide. However, the replacing scheme supports outward UK students' mobility, and not inward mobility.[32] From January 2021, the UK participated in the PEACE PLUS programme.[33]

3.2 Restarting the Bilateral Scientific and Space Cooperation within the TCA Framework

In February 2023, the adoption of the Windsor Framework raised hopes in concluding the association of the UK to Union programmes, in particular for Horizon Europe. The European Commission's President, Ursula von der Leyen, stressed her readiness to 'begin the negotiations over Horizon Europe "immediately" after the Windsor framework was implemented'.[34] However, the negotiations were uneasy, primarily for financial reasons. In April 2023, when it feared not being able to join Horizon Europe, the UK revealed a pioneer

[29] Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe—the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 [2021] OJ L170/1 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0695&from=EN.

[30] Department for Business, Energy & Industrial Strategy, 'Horizon Europe Guarantee Announcement for the UK's R&D Sector' (30 November 2021).

[31] 'Government Extends Horizon Europe Financial Safety Net' *GOV.UK* (1 September 2022) https://www.gov.uk/government/news/government-extends-horizon-europe-financial-safety-net (accessed 11 September 2023).

[32] Highman, Marginson, and Papatsiba (n 7) 219.

[33] 'Getting EU Funding' *GOV.UK* (31 December 2020) https://www.gov.uk/guidance/getting-eu-funding (accessed 11 September 2023).

[34] 'Windsor Deal Opens Door for Progress on Post-Brexit Financial Regulation' *Financial Times* (1 March 2023) https://www.ft.com/content/7c1d2ed0-d1f5-4685-b15d-6fdb632f6405 (accessed 1 March 2023).

prospectus[35] to support 'global science for global good' and protect and support the UK research and innovation sector. The UK wanted to negotiate a 'truncated participation'[36] to account for the partial coverage of the seven-year programme under the ongoing MFF.

According to Article 714 TCA, the UK financial contributions are composed of a participation fee and an operational contribution (based on UK GDP over EU GDP, both at market prices). The fee covers administrative costs in the Union programmes and is calculated as a percentage of the operational contribution: it will reach 4 per cent in 2027, according to Articles 733 and 714(4) TCA. The latter contribution covers each programme the UK will participate in and will be added to the spending of the programmes. Moreover, the TCA and the draft protocol include an automatic correction mechanism for the UK financial contribution in specific Union programmes (according to Article 716 TCA), namely Horizon Europe, the idea being to balance the UK's contribution with its gain from the programme. Importantly, the UK can ask the specialized committee for a financial increase review in case the net contribution to a programme is too high (according to Article 722 TCA). In the end, the scope of UK participation in Union programmes is slightly reduced in comparison with the draft protocols as it has dropped the Euratom programme arbitrating in favour of new UK alternatives in nuclear research and development (R&D) under the 'UK Fusion Strategy'.[37]

3.3 Open Avenues for Union Programmes: Horizon Europe and Space Programmes

The most encompassing EU programme to which the UK now participates is Horizon Europe (successor of Horizon 2020), with a budget of €95.5 billion until 2027. As the UK associated itself again with the programme as of September 2023, it means that UK research institutions can be involved in the remaining years from 2024 to 2027 of Horizon Europe funding, ie consortia

[35] 'UK Publishes Prospectus for Opportunities beyond Horizon Europe' *GOV.UK* (6 April 2023) https://www.gov.uk/government/news/uk-publishes-prospectus-for-opportunities-beyond-horizon-europe (accessed 1 September 2023).

[36] Peter Foster and others, 'Rishi Sunak to Push Back Decision on UK Rejoining Horizon until after Summer' *Financial Times* (19 July 2023) https://www.ft.com/content/88618dcc-bdef-49e6-84dd-ec78539540d9 (accessed 11 September 2023).

[37] 'Government Announces up to £650 Million for UK Alternatives to Euratom R&T' *GOV.UK* (7 September 2023) https://www.gov.uk/government/news/government-announces-up-to-650-million-for-uk-alternatives-to-euratom-rt (accessed 11 September 2023).

such as ERC, funding schemes such as Marie Skłodowska-Curie Actions, and the European Innovation Council accelerator, on equal terms with other associated countries.[38]

Copernicus and the EU Space Surveillance and Tracking services are part of the Union programmes now open to the UK too. Copernicus gives access to a capacity for monitoring the Earth, while the EU Space Surveillance and Tracking provides further services to monitor and track space. They are part of the EU Space Programme, which is broader in scope in the EU with Galileo and the European Geostationary Navigation Overlay Service (EGNOS). However, the possibility of the UK joining the international ITER fusion project has not been activated.

Now that the UK has its participation reactivated, it will contribute to the governance of EU programmes or activities (according to Article 713 TCA) as an 'associated country' in most programmes, which means involvement but no formal decision-making powers.[39] The UK has the status of close observer, without any voting rights but knowledge of the result of the vote. This close observer status involves presence in the committees, expert group meetings, or other similar meetings which assist the European Commission in the implementation and management of the programmes. UK experts and evaluators can also be appointed.

Participation will come with the UK being subject to some auditing and reviewing. The EU institutions, ie the European Commission, the European Court of Auditors, and the European Anti-Fraud Office have some powers in reviewing, auditing, and inspecting activities related to the financial management of Union programmes in the UK (according to Articles 725 and 728 TCA). The UK participation in Union programmes will be reviewed in four years from the date of ratification of the protocols.

The developments in 2023 make a suspension or termination of participation unlikely any time soon. Should it happen, Articles 718 to 720 provide the conditions for such suspension or termination. A suspension may happen in one or more programmes or even a sub-part of programmes, in case of lack of financial contribution or breach of the conditions. A yearly suspension can transform into a termination of UK participation in an EU programme. Finally, a substantial modification to an EU programme allows the UK to terminate its participation.

[38] As defined in art 22(5) of Regulation (EU) 2021/695 (Horizon Europe Regulation).
[39] Fella, Rough, and Keep (n 6) 24.

4 Social Security Coordination

The TCA finally contains provisions in Articles 489 and 490 TCA to protect some social security rights of persons legally residing in a Member State or in the UK, and cross-border situations after 1 January 2021.[40] This covers EU citizens who work in, travel, or move to the UK and UK nationals who work in, travel, or move to the EU. The Protocol allows them to pay social security in only one jurisdiction (the 'sending' state). However, in accordance with Article 491 TCA, this is without prejudice to the right of a Member State or the UK to charge a health fee under national legislation (eg in connection with an application for a work or residence permit in that state). In the political declaration, the parties had declared that they will 'consider addressing social security coordination in the light of future movement of persons'.[41]

A Protocol on Social Security Coordination attached to the TCA provides for the coordination of benefits derived from social security. It applies to the several branches of social security, including the benefits for sickness; maternity and equivalent paternity; invalidity; old age; survivors' benefits; and in respect of accidents at work and occupational diseases; death grants; unemployment; pre-retirement (according to Article SSC.3 (1) of the Protocol). Its scope is rather broader: it applies to general and special social security schemes, whether contributory or non-contributory (according to Article SSC.3 (2) of the Protocol). The Specialised Committee on Social Security Coordination, which had already met three times, amended the annexes of the Protocol in October 2021 to ensure that Member States continued to cover workers moving to or from the UK under the social security legislation of the Member State of origin.[42] However, those workers who are 'detached' do not benefit from unlimited social security rights. A detached worker can benefit from her home state legislation, and social security rights, provided that the duration of work in the host state does not exceed twenty-four months and

[40] Catherine Barnard and Emilija Leinarte, 'Mobility of Persons' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021).

[41] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (n 1) point 52.

[42] 'Report from the Commission to the European Parliament and the Council on the Implementation and Application of the Trade and Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland, 1 January-31 December 2022' (European Commission 2023) COM(2023) 118 final 18 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0126 (accessed 11 September 2023); Decision No 1/2021 of the Specialised Committee established by Article 8(1)(p) 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, of 29 October 2021 as regards the amendment of the Annexes to the Protocol on Social Security Coordination [2021] OJ L149/10.

that the worker does not replace another detached worker (in accordance with Article SSC.11 of the Protocol).

As regards regulatory cooperation, the EU and the UK agreed to notify on an annual basis the changes to their national legislation falling within the scope of the protocol, during the first meeting of the relevant specialized committee on 6 July 2021. The minutes of the three meetings of the Committee show a good level of cooperation.[43] The Joint Secretariat testifies to a 'constructive' collaboration to find solutions for specific issues arising, eg some Member States had required the mandatory proof of private sickness insurance by UK nationals applying for visas (between June 2022 and August 2023).

Finally, in the termination of the matters covered by Part II of the TCA, the Protocol on Social Security Coordination is explicitly excluded from the scope of such termination.

5 Conclusion

This chapter has examined EU-UK regulatory cooperation for financial services, UK participation in EU programmes, and social security coordination.

In the fields of financial services, education and research programmes, and social security coordination, the TCA governs UK-EU relations post-Brexit with somewhat looser requirements. Indeed, they were inserted in the draft protocols yet-to-be-adopted and, for financial services, referred to a future MoU which was negotiated in a timely manner at the technical level, but remained yet-to-be implemented, until its actual signature in June 2023. This situation may have stemmed from a 'rushed' agreement and perhaps a lack of ambition,[44] or some voluntarily constrained ambition. The EU had a 'tailor-made "institutional ecology" for handling Brexit',[45] which gave it a strong and united negotiating position before the TCA adoption. In a standstill to the TCA framework, the issues in the implementation of the Northern Ireland/Ireland Protocol have delayed the adoption of concrete arrangements for financial services cooperation, as well as the UK's access to various Union programmes.

[43] European Commission, 'Specialised Committee on Social Security Coordination' (1 August 2023) https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement/specialised-committee-social-security_en (accessed 9 October 2023).

[44] See the chapter by Elaine Fahey in this volume.

[45] Brigid Laffan and Stefan Telle, *The EU's Response to Brexit: United and Effective* (Springer International Publishing 2023) 57 https://link.springer.com/10.1007/978-3-031-26263-0 (accessed 16 August 2023).

However, in 2023, the reactivation of EU-UK relations after the Windsor Framework favoured the transition from technical work to adopting measures at a political level, in both financial services and research programmes.

For financial services, the Joint Forum might be more of a discussion group and collective brainstorming than a collective action, considering the higher importance of preserving the autonomy of each jurisdiction. It will be the core of EU-UK regulatory cooperation in this field, even though its impact on regulation is uncertain. The Joint Forum meetings will not always feed into the respective UK and EU regulatory processes at the same moment of the respective legislative processes (eg initiative, consultation, impact assessment, committees/parliamentary debates, etc.). In any event, this forum for bilateral cooperation will be critical for the coordination of potential common positions ahead of international forums, as the MoU invites the parties to do so.

For Union programmes, while the legal instruments are yet to be adopted by the Specialised Committee on Participation in Union Programme and is subject to the Council's prior approval, these changes are instrumental to restore dialogue, scientific and space collaboration, and UK active participation and contribution in such programmes. The UK's access to these programmes is envisaged for a certain period (eg 2024 until 2027 for Horizon Europe). Hence, there is still relative uncertainty for long-term partnerships, which may be at odds with the time horizon of research and programme developments.

For social security, the TCA obliges the Member States and the EU to coordinate their social security systems in accordance with the Protocol on Social Security Coordination. This Protocol attached to the TCA provides for the coordination of benefits derived from social security. The Specialised Committee on Social Security Coordination amended the annexes of the Protocol in October 2021 to ensure that Member States continue to cover workers moving to or from the UK under the social security legislation of the Member State of origin. Furthermore, the three meetings of the Specialised Committee, which took place between July 2021 and August 2023, showed a very constructive collaboration between the parties and a structure that also favours regulatory cooperation—albeit taking place only on an annual basis.

The EU position seems still forceful in the areas of financial services and Union research programmes notwithstanding the 2023 developments, while social security coordination seems more balanced and has already worked at a technical level for a while within the dedicated specialized committee. Financial services fuel the real economy, R&D constitutes a fundamental basis for education, innovation, and informed policy-making in our societies, and the coordination of social security rights is crucial to protect (and accompany)

mobile citizens in a new reality of two separated blocs. It is important to preserve cooperation and coordination in these areas, and not to fall into a protectionism trap and mere unilateralism. The UK and the EU will need to show strong political will to put the commitments in these areas into concrete implementation and sustain them in the medium and longer term in order to maintain continuity and stability.

12

Subsidies Control and Enforcement

Andrea Biondi

1 Introduction

Knole is one of England's largest country houses, built by Thomas Bourchier, Archbishop of Canterbury, between 1456 and 1486, and later acquired by the cousin of Queen Elizabeth I, Thomas Sackville. On its acres, gentlemen and lords used to play cricket against the villagers. The cricket pitch was not level; lords and gentlemen always bowled from the higher end. They always won.

Nobody knows if cricket was ever discussed during the Brexit negotiations between the European Union (EU) and the United Kingdom (UK). However, how to maintain a level playing field most certainly was.[1]

No state or organization would come to the negotiating table of an international trade agreement with the stated intention to promote distortive policies in the other party's market. However, in the midst of the post-Brexit referendum hysteria and despair, stories of possible foul play, of traps and ambushes, had been rife. In this contribution, it will be attempted to show whether the EU-UK Trade and Cooperation Agreement (TCA) managed to keep the playing field levelled and how to assess this. Our 'case study' is the regulation of subsidies. State aid/subsidies control has been one of the most controversial issues throughout the EU-UK negotiations. Moreover, the TCA chapter devoted to subsidies—namely Part II, Heading One, Title XI—is one of the longest and most comprehensive of the whole TCA. Finally, subsidies control is to date the only true example of, at least on paper, a full implementation of the TCA requirements into UK law.

As such, the chapter is structured as follows. Section 2 briefly recalls what the initial positions of the two parties at the beginning of the negotiations were; section 3 assesses whether the TCA chapter on subsidies goes further than any

[1] See Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Vol III. The Framework of New EU-UK Relations* (OUP 2021) 93.

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other trade agreement in terms of preservation of the level playing field; section 4 gives an account of the process of implementation of the TCA requirements into UK law; whilst section 5 discusses the possible remedies available to enforce the TCA's provisions. Some tentative conclusions are finally offered.

2 Level Playing Field, State Aid, and Early Squabbles

The shape of the concept of the level playing field, over the years, has changed in response to changes in politics, values, ideologies, and, of course, economics. In general, the term refers to the obligation to be enshrined in international trade agreements of preventing unfair advantages or disadvantages for participating countries. This implies also the positive commitment of creating an equal opportunity to participate and flourish in global markets without facing discriminatory practices or unfair barriers. Other concerns have gradually emerged, ranging from the emphasis on ensuring transparency of clear and accessible information, both during negotiation and at the implementation stage; of ensuring more efficient and effective resolution mechanisms to settle possible disputes; and so on. Especially at the bequest of the EU, the level playing field concept gradually embraced other considerations as to balance trade liberalization with the needs of less developed countries and it has been used as a tool to protect high value-related standards such as environmental protection and labour protections.[2] The result was to overburden the level playing field concept with perhaps too many and possibly conflicting aims.

For the purpose of this chapter, the level playing field is narrowed down to the primary need of ensuring that a trade partner does not gain a competitive advantage and undercut the others.[3] This can be done by either providing financial support to your own side's producers and investors and/or by avoiding the costs of more stringent regulations; in short, more money and a failure to regulate (or a process of deregulation).[4] Both scenarios are of course related to the question of the possible use of the public purse and/or of general regulatory powers to favour domestic undertakings against the other international competitors.

[2] Matilda Gillis. 'Lets Play! An examination of the "Level Playing Field" Provisions in EU Free Trade Agreements' (2021) 55(5) Journal of World Trade 715.

[3] See for a 'contemporary' take on the topic Oisin Suttle, 'The Puzzle of Competitive Fairness' (2022) 21(2) Politics, Philosophy & Economics 190.

[4] See the interesting discussion before the EU Security Committee of 11 January 2023 '*Regulating after Brexit*' https://committees.parliament.uk/event/16962/formal-meeting-oral-evidence-session/.

Within the Brexit negotiation, the general rules on the level playing field and state aid control were agreed upon by the EU and the UK seemingly rather quickly.[5] In the Political Declaration attached to the Withdrawal Agreement (WA) of 2020, the EU and the UK stated their commitments to include in their future wide ranging economic partnership an obligation to 'a level playing field' based on 'an open and fair' competition.[6] This would be ensured by 'robust commitments' upholding the common high standards applicable in the areas of 'state aid, competition, social and employment standards, environment, climate change, and relevant tax matters'. The snag was in a short sentence that related the definition of the precise nature of such commitments to 'the scope and depth of the future relationship'. Scope and depth were subject to different interpretations. Whilst the EU insisted for the whole negotiations that, given the geographic proximity and economic interdependence with the EU-27, the UK should have accepted to stick to the existing regulatory framework (and thus not to diverge) to prevent unfair competitive advantages that the UK could enjoy through undercutting of levels of regulatory standards. In particular, the EU demanded the general system of EU state aid law to be preserved.[7] The UK government command paper of 2020 did not even utter the words 'level playing field', indicating its preference to have general chapters on different areas based on reciprocal commitments broadly speaking in line with international the trade practice/WTO model. On the specific issues of state aid, a reference was made to the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM). Further, in the UK negotiating mandate the UK simply spoke of a 'reciprocal notification of possible subsidies measures' every two years.[8] The two starting positions could not have been further apart.

[5] EU state aid law continues to apply in the UK 'in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'. Many of the issues—at least politically—seem to be on course to be solved by the so-called Windsor Framework (Joint Declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on the application of Article 10(1) 9 June 2023). The Windsor Framework simply restates that 'for a measure to be considered to have a genuine and direct link to Northern Ireland and thus to have an effect on the trade between Northern Ireland and the Union that is subject to the Windsor Framework, that measure needs to have real foreseeable effects on that trade. The relevant real foreseeable effects should be material, and not merely hypothetical or presumed'. On the specific issues related to NI see the chapter by Billy Melo Araujo in this volume.

[6] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, Brussels, 22 November 2018 (OR. en) XT 21095/18 BXT 111 CO EUR-PREP 54, para 79.

[7] See eg European Council, 'Guidelines on the framework for the future EU-UK relationship', 23 March 2018, EUCO XT 20001/18.

[8] HM Government, 'Our approach to the Future Relationship with the EU. The UK's Approach to Negotiations' CP 211 (2020) https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu.

3 The TCA Subsidy Control Commitments: Checking Each Other's Side of the Field

The solutions endorsed in the final text of the TCA especially for the most contentious issues are a mix of compromises (victories or defeats in the propaganda of the two parties).[9] The outcome, in particular as far as the level playing field section of the TCA is concerned, is rather peculiar and not an easy one to 'generalize', as very different rules are applicable to different issues. First, the big divide is between those more traditional areas of free trade/level playing field (competition, taxes, state-owned enterprises, subsidies) and those values/standards-related ones (environmental and labour standards) to which the non-regression principle is applicable. However, each chapter is also sui generis and subject to various rules and principles. For instance, Title XI TCA, despite recognizing the importance of the 'level playing field' provisions for open and fair competition and the need to maintain and improving high standards, leaves a door open for regulatory autonomy. Article 359(3) TCA recognizes that each party can pursue legitimate public policy objectives, which may not be confined to purely economic efficiencies, provided they are transparent and proportionate. The Chapter on taxes is also perplexing as despite being inserted in the level playing field title it provides explicitly that its purpose is not to create any harmonizing standards between the parties. There is instead a rather laconic reference to the parties' commitment to respect international standards, namely the Organisation for Economic Cooperation and Development (OECD) provisions on fair taxation and prevention of tax avoidance.[10] The TCA benchmark here is thus effectively the many conventions to which the UK and the EU are a party. Furthermore, in terms of enforcement, possible disputes arising from TCA provisions on competition and taxes are not subject to dispute settling provisions contained in Title I of Part Six of the TCA.[11] No other alternative mechanism is provided by the TCA, leaving the parties with no other options to raise the issue either at the political level or via one of the specialized partnership committees set up under the TCA.

The Subsidy Control Chapter, which constitutes Chapter 3 of Title XI of Part II, stands out in its grandiosity: thirteen articles, covering well over ten pages, apparently the most comprehensive regulatory instrument in international trade on the topic. Considering how acrimonious the negotiations on this

[9] See further Mariani and Sacerdoti (n 1).
[10] TCA, ch 5, arts 383, 384.
[11] ibid arts 357, 362, and 385, respectively. See further below section 5 in this chapter.

issue have been, such an outcome is rather remarkable: the thirteen articles are in a nutshell a fully fledged system of control of public spending: definition of subsidies, scope of application, exceptions, special areas, monitoring, transparency, and enforcement.[12] The specific provisions can all be linked to well-known standards and rules, a mixture of international ones such as those contained in the WTO ASCM, subsidy control commitments in more recent EU preferential trade agreements (PTAs),[13] and of course the EU state aid rules that the UK itself defined as a system 'good for taxpayers and consumers, that ensures an efficient allocation of resources'.[14]

However, the interesting question is not related to the various paternities of the different provisions but to the kind of regulatory framework they set up. The new system does not only apply to straight financial subsidies on products as within the WTO model. 'Subsidy' is instead defined in Article 363(1)(b) TCA as 'any "financial assistance" which arises from the resources of the Parties; that confers a specific economic advantage on one or more economic actors; and has, or could have, an effect on trade or investment between the Parties'; in short, to either subsidization or to regulatory choices. Hence, here lies one of the peculiarities of the TCA. The EU unique system is per se aimed at regulating supranationally those areas that could impede the attainment of the internal market. Further, it imposes a long series of obligations on the Member States. The general prohibition imposed on the EU Member States do not favour national producers, undertakings, and so on to the disadvantage of undertakings from other Member States, translates into a positive obligation to take into account in the formulation of their economic policies the out of state impact of these policies as to avoid falling foul of the EU obligations. The impact of international trade agreements on domestic regulatory policies has been instead somehow circumscribed, mostly on issues of tariffs and fiscal measures. Already the new generation of EU trade agreements such as those with Singapore or Vietnam have emphasized the importance of targeting those measures that may *negatively* affect or are *likely* to affect competition and trade. In these agreements, domestic regulation can be caught if its effect could negatively affect competition and cause

[12] For a full discussion see Andrea Biondi and Anneli Howard KC, 'Levelling up a Level Playing Field: Competition and Subsidies in post-Brexit Britain' in Adam Lazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022) 383.

[13] See eg Free Trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3.

[14] 'The Future Relationship between the United Kingdom and the European Union' GOV.UK (July 2018).

a 'distortion across the border'.[15] For instance, the EU Vietnam FTA actually requires parties to use their best endeavours to remedy or remove 'through the application of their competition laws' such distortions and to prevent their occurrence.[16]

The TCA subsidies chapter is directly targeting domestic regulations by setting the parameters of their lawfulness under the agreement itself. So although not every divergence in regulatory choices would be considered as an automatic violation; it will become so if it breaches the common framework as laid down in the TCA. One example may suffice. Article 366 TCA spells out the criteria and requirements (the 'Subsidies Principles') that the parties must apply under their respective domestic laws in order to be able to demonstrate compliance with the TCA. It states:

> (a) Subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns; (b) Subsidies are proportionate and limited to what is necessary to achieve the objective; (c) Subsidies are designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective, and that would not be achieved in the absence of subsidies being provided; (d) Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy; (e) Subsidies are an appropriate policy instrument to achieve the objective and that objective cannot be achieved through other less distortive means; (f) Subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.

If all these principles are cumulatively satisfied, a domestic regulatory choice (be it a direct subsidy or any other measure having the same effect) will be deemed not to have material effect on trade or investment between the parties. Yet, the semantics and the concepts upon which these six principles are based are none other than the general principles of compatibility of aid as developed over sixty years by the European Commission in relation to the interpretation of Article 107(3) TFEU. The impact on domestic regulatory choices could not be clearer: the Commission practice on compatibility of EU Member States

[15] John Jackson, '*The World Trading System*' (2nd edn, MIT Press 1997, 298–99, cited by Leonardo Borlini and Claudio Dordi, 'Deepening International Systems of Subsidy Control in EU Preferential Trade Agreements' (2017) 23(3) Columbia Journal of European Law 551.

[16] Free Trade Agreement between the EU and Vietnam [2020] OJ L186/3, 2 June 2020, art 18.8(2).

has oriented and decisively shaped the spending decisions and the policies of Member States becoming a sort of hard legislation benchmark.[17] Likewise, in transplanting the whole machinery of compatibility in the TCA the parties, and most notably the UK, have accepted these principles as outer limits to their sovereign decisions on regulation and subsidization.

The intention to promote a 'normative competition framework',[18] that is, the attempt to regulate in ways that are the least damaging to competition is also evident if some of the specific provisions of the TCA are taken into account. A good example is the question of fiscal subsidies, which is actually particularly relevant for the UK. Despite the generally benign attitude towards EU state aid law , UK governments have always displayed a strong irritation to any form of control on national fiscal policies. Fiscal aid has also been the only true confrontation that the UK has ever had with the EU state aid machinery. For instance, the rules that exempted from taxation for a very high percentage (75 per cent) or a full exemption on the financing income received by an offshore subsidiary from another company have been a fiercely disputed issue between the Commission and the UK. The exemption applied regardless of whether the offshore FinCo was equity funded from the UK or if the income of the FinCo was derived from 'UK activities'. However, the Commission, backed up by the EU General Court, found that the regime constituted illegal state aid as its central objective was to protect the UK tax base by taxing profits arising from UK activities and assets that have been artificially diverted from the UK to a controlled foreign company.[19]

As mentioned, the TCA chapter directly dealing with taxation is extremely thin, as it simply reiterates the parties' commitment to OECD minimum anti-tax avoidance standards. Significantly, one of the very first decisions taken by the UK government after the entry into force of the TCA was to cut back on the implementation of Directive 2018/822.[20] The so-called 'DAC 6' is one of the most ambitious measures of EU tax policy as it imposes a series of mandatory reporting of potentially aggressive tax planning and requires automatic

[17] See Mariolina Eliantonio, Emilia Korkea-aho, and Oana Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart Publishing 2021).

[18] See for an extensive discussion Shanker Singham and Alden F Abbott, *Trade, Competition and Domestic Regulatory Policy: Trade Liberalisation, Competitive Markets and Property Rights Protection* (Routledge 2023) esp ch 5.

[19] Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption [2019] OJ L216/11, now upheld in Joined Cases T-363/19 and T-456/19 *UK, ITV and Others v Commission* ECLI:EU:T:2022:349.

[20] Council Directive (EU) 2018/822 of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [2018] OJ L139,1, 5 June 2018.

exchange of information among the Member States. The UK promptly clarified that it would no longer be bound by the DAC 6 and would simply conform to the OECD disclosure standards, which are much less stringent.[21]

Taxes, however, figure prominently in the subsidies chapter. This is so as an 'absence of regulation' (either by conferring a specific tax break to specific undertakings or by not imposing a supposedly general tax) can result in conferring an unfair advantage and distort the level playing field. Article 363(2) TCA therefore provides a very detailed description of when a fiscal subsidy may actually be considered as an impediment to trade and a distortion to competition. It affirms first the principle that the regulatory character of a tax (supposedly a national competence) does not shelter it from the application of the TCA; and, secondly, that the fact that one of the party tax regulations is of a general nature does not mean that it cannot be distortive. This is the case in cases of derogation from the normal tax systems, which can be ascertained by taking into account any possible discriminatory effects and differences in treatment between undertakings. These are well-known principles in EU state aid law,[22] but are not so well-known in an international agreement context.[23] Therefore, such a detailed qualification and delimitation of fiscal subsidies acts as a reminder that the two parties are indeed free to decide on their respective fiscal policies, although these must fall within the strict parameters laid down by the TCA. It would, however, be naïve not to acknowledge that these rules are very much directed to the UK and its ambition to promote forms of aggressive deregulatory tax policies. The impact on the EU side would be after all negligible but for the simple fact that there are very few EU taxes around. On the contrary, although Article 373(5) TCA excludes from the obligation of recovery of unlawful subsidies, acts of the UK Parliament, thus providing an extra layer of protection for tax schemes included in UK primary legislation, most of the tax benefits, exemptions, and bonuses are still contained in secondary instruments which are likely to be 'caught' by the TCA.[24]

[21] The International Tax Enforcement (Disclosable Arrangements) (No 2) (EU Exit) Regulations 2020 SI 2020 No 1649.

[22] See eg Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, point 5.4. See also Case C-374/17 *Finanzamt B v A-Brauerei* EU: C: 2018:1024; Case C-203/16 P *Dirk Andres v European Commission Andres (Insolvenz Heitkamp BauHolding)* v *Commission* ECLI:EU:C:2018:505.

[23] See eg Appellate Body Report, *United States—Tax Treatment for 'Foreign Sales Corporations'*, WT/DS108/AB/R, adopted 20 May 2000, para 179: 'A Member of the WTO may choose any kind of tax system it wishes—so long as, in so choosing, that Member applies that system in a way that is consistent with its WTO obligations.'

[24] Not by chance one of the first possible tensions between the EU and the UK is on taxation. The government's decision to extend tax reliefs already available in freeport sites to investment zones was specifically discussed at the EU-UK Trade Specialised Committee on the Level Playing Field for Open and Fair Competition meeting of 12 October 2022. The UK government went ahead anyway. See ss 331

4 The TCA Subsidies Chapter and Its 'Domestication' in the UK

It remains to be seen how the TCA general framework sketched above will really work in practice and how effective the system will be.

Generally, the UK gave effect to the TCA through the adoption of specific legislation, the EU (Future Relationship) Act 2020 (EUFRA). Article 366 TCA imposes a further specific obligation for both parties to set up an effective domestic regime of subsidies control. This mostly applies to the UK only, as the European Commission already performs this task in the EU.

The Subsidy Control Act (SCA) received royal assent on 28 April 2022 and entered into full force on 3 January 2023,[25] the very first 'domestication' of the TCA. The detailed analysis of the ninety plus articles of the SCA is not within the scope of this chapter; suffice it to make some observations. The SCA tends to adhere rather strictly to the letter of the TCA and replicates its structure, scope, monitoring, and enforcement. Interestingly, Schedule 1 reproduces *verbatim* Article 366 TCA principles but with a twist: a seventh principle is now applicable as 'subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the UK'. Further, the cost-benefit analysis on whether certain subsidies can achieve their specific policy objective should be carried out also in terms of effects on competition or/and investment within the UK, and not only with reference to international trade or investment. The addition of an extra principle not only makes sense as to provide for some consistencies between effects on international trade and domestic market, but also once again reaffirms the choice (or the duty) to align domestic regulatory policies with TCA benchmarks.

There are, however, lingering doubts on whether the SCA has done enough to ensure full compliance with the TCA's requirements. The UK government's declared ambition was to create a new 'dynamic and less bureaucratic system', allowing an efficient allocation of public resources so as to enable public authorities, including devolved administrations and local authorities, to 'deliver subsidies tailored to local needs; to support government priorities such as driving economic growth and to reach net zero'.[26] The SCA machinery is in

and 332 of the Finance (No 2) Act 2023 (F (No 2) A 2023) on tax reliefs available in freeport sites and investment zones.

[25] Subsidy Control Act 2022 (c 23).

[26] Policy Paper, Overview of the Subsidy Control Regime, 30 June 2021 https://www.gov.uk › subsidy-control-bill-policy-paper.

reality particularly complex and cumbersome. Public authorities are subject to many obligations, for instance in terms of transparency, as they are now required to 'enter' their decision in a publicly accessible subsidy database with information on the amount of the subsidy, the identity of the beneficiary, the subsidy's legal basis, and the policy objective which it pursues. The truly sticky point is, however, that it is now up to each and every single public authority to assess whether their spending decisions may have a distortive effect on both the domestic and the international markets. Distortions of competition—even in a post-Brexit scenario—are usually to be assessed by the Competition Market Authority (CMA) that possesses wide investigative and enforcement powers, not to mention the necessary legal and economic expertise. Under the SCA, any public authority is obliged to carry out a full analysis, for instance, on how to calculate whether the likely benefits of a certain subsidy outweigh the risks to fairness of competition law. Likewise, other complex operations, which may be routine for national competition authorities such as an analysis of market characteristics, the extent of market concentrations, and above all the definition of a relevant market, are instead not going to be easy to perform for a public authority. The statutory guidance to the SCA goes as far as to suggest that public authorities should use decisions in the fields of antitrust and merger control that have considered the product or services in question.[27] This is all well and good, but taking into account merger control tools would still require a public authority to gather a huge amount of evidence and information, collecting data, and so on.[28]

In theory, such a heavy burden[29] could be alleviated, as it is possible for public authorities to seek an opinion from a specialized unit at the CMA, the Subsidies Advice Unit (SAU). Such a possibility is provided for certain kinds of subsidies only ('subsidy of particular interest' or SOPIs).[30] So far, the SAU has already published thirteen reports, and thus there is no doubt

[27] See UK Subsidy Control Statutory Guidance, s 3.58 (30 June 2023). It should be noted that the SCA, under s 79(6), compels all relevant stakeholders to have regard to the guidance,

[28] This point is cogently made by Andreas Stephan, 'Will the New UK Subsidy Control Regime Help Level Up the Economy?' (2024) 87 MLR 172.).

[29] Another route is the setting up of the so-called 'streamlined subsidy schemes' with a view to allowing 'lower-risk subsidies to be given by public authorities more quickly and easily, without their needing to assess compliance with the principles or other subsidy control requirements'. So far, the government has identified small and medium-sized enterprises, research and development,, and energy usage as the first three routes.

[30] The difference between a subsidy of interest and a SOPI is based on a financial threshold: a general threshold of £10 million for SOPIs and of £5 million for subsidies of interest. Subsidies in excess of £10 million would be subject to mandatory referral to the CMA, while subsidies between £5 million and £10 million would be subject to voluntary referral.

that it is taking its job seriously. The main problem is that its actual job is only to provide non-binding advice. The SAU's practice confirms that such advisory reports do not directly assess whether the subsidy scheme referred to complies 'with the subsidy control requirements, nor is its purpose to make a recommendation on whether the scheme should continue to be implemented'.[31]

The SCA model therefore radically departs from the EU state aid control one, whereby the lawfulness of a certain aid measure was remanded to a supranational independent regulator, the European Commission. This is a legitimate policy choice but it should be recalled that the TCA in its Article 371 requires the parties to 'establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime' and there are legitimate concerns on whether the SAU can be considered as a true independent regulator, mostly because of the scarcity of its powers.

Another concern in terms of TCA compliance is that the SCA may be rather too 'domestic'. The SCA is indeed somewhat shy in this respect, limiting the references to the TCA to the minimum. Although, as mentioned, one of the subsidy control principles is that a public authority needs to check if the beneficial effects of a measure outweigh its negative effects having regard to 'international trade or investment', in most cases the main statutory focus seems to be exclusively on the impact on competition or investment within the UK. For instance, the Act allows the secretary of state to *direct* public authorities to request a CMA report in relation to a proposed subsidy or scheme where the secretary of state considers that there is a risk of non-compliance or of 'negative effects' on competition or investment arising only within the UK.[32] Arguably, a truly independent regulator would have been given the powers of both assessing the legality of subsidy principles and whether there was a real risk that it would have a significant negative effect on trade (or investment) within both EU and international law.

In conclusion, despite the fact that the TCA leaves the two parties 'to determine how its obligations are implemented in the design of its subsidy control system in its own domestic law',[33] it is also very clear in requiring that those obligations are implemented in its law in an effective way.

[31] Subsidy Advice Unit Report on Contracts for Difference (AR5), para 2.6 (22 February 2023).
[32] SCA, ss 55, 58.
[33] TCA, art 366(1).

5 Remedies for Enforcement: Even Too Many?

One of the particularities of the TCA subsidies chapter is the number of different remedies available in case of non-enforcement. These range from the 'classic' state-to-state remedies, to private enfacement, to a sui generis one (the re balancing clause). As for standard practice in international agreements, the very first step is consultation. This can be initiated when a party thinks that a subsidy (or there is 'clear evidence' that it will grant such a subsidy) 'has or could have a negative effect' on UK-EU trade or investments. A relevant joint committee is tasked to attempt to find a mutually satisfactory resolution.[34] Lacking such a solution, the injured party is left with several options.

First, the umbrella provisions applicable to the level playing field section of the TCA are also applicable to subsidies, and thus either party can request the establishment of an arbitration panel.[35] However, the arbitration panel jurisdiction is somewhat limited, as it cannot rule on specific subsidies. Thus, an arbitration panel cannot be used to litigate the question of whether a specific measure adopted by one of the parties has breached one of the subsidies principles listed in Article 366 TCA, with limited exceptions—mostly related to the kinds of subsidies traditionally prohibited by any other international agreement such as export subsidies or unlimited state guarantee.

Secondly, the TCA provides for a sort of 'urgent' procedure whereby the injured party can adopt unilateral retaliatory measures without any prior approval from an arbitration panel. This challenge can be brought when there is evidence that the grant of a subsidy allegedly caused a 'significant negative effect on trade or investment', or there is 'a serious risk that it will cause a significant negative effect' on UK-EU trade or investment.[36] Such a challenge is thus subject to several constraints, as the burden of proof imposed is likely to be very high. According to Article 374 TCA, it will be for the injured party to show that the significant negative effect, or serious risk of this arising, is based on facts 'and not merely on allegation, conjecture or remote possibility', whilst, in addition, the realization of the alleged risk must be 'clearly predictable'.[37] The evidence that needs to be submitted needs to be solid and not merely based on conjecture or a remote possibility.

Thirdly, a party also has the right to apply appropriate and proportionate 're-balancing' measures in cases where there are significant divergences in, among

[34] ibid art 370.
[35] ibid Part Six, Title I.
[36] ibid art 374(1).
[37] ibid art 374(5), (6).

other things, the subsidy control policies of the parties, which give rise to 'material impacts' on trade or investment between them.[38] The so-called *rebalancing clause* is actually applicable across the level playing field part of the TCA and seems particularly designed to ensure that there will not be substantial divergences in those areas where the obligations of non-regression apply (environmental and labour standards). The evidentiary standard is again very high, as the injured party will have to show 'a material impact' and a 'significant divergence' between the two regulatory regimes.[39]

With particular reference to subsidies, the rebalancing cannot operate against an individual subsidy, but can be triggered only if the whole system proves to be ineffective. Thus, for instance, the EU would be entitled to trigger a unilateral balancing measure in a situation where the UK would have in place a system of subsidy control that 'systematically fails to prevent the adoption of trade distorting subsidies, which would then provide a competitive advantage for that Party'.[40] The Subsidies Control Act, with all its possible shortcomings, may not be so inadequate as to fit such a scenario.

The most innovative remedy is the fourth one, which is provided by Article 372 TCA. This commits the parties to confer on their courts and tribunals the power to review any decisions either of the authority in charge of controlling subsidies or any granting public authority as to verify the lawfulness of the subsidies granted in relation to the general principles of Article 366 TCA. Courts and tribunals are given the jurisdiction to grant any appropriate remedy including the suspension, prohibition, or requirement of action by the granting authority, the award of damages, and the recovery of a subsidy from its beneficiary. Very significantly, Article 372(2) allows either party to intervene in the domestic judicial process.

The UK has devised an entirely new jurisdiction whereby interested parties can bring a judicial review action before the Competition Appeal Tribunal (CAT).[41] The CAT usually hears appeals on the merits in respect of decisions made under the Competition Act 1998 by the CMA and the regulators in the telecommunications, electricity, gas, water, railways, air traffic services, payment systems, healthcare services, and financial services sectors. The CAT will now be entitled to review a stand-alone subsidy and a scheme, including those

[38] ibid art 411.

[39] On this point see David Collins, 'Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement (TCA)' (2021) 12 Journal of International Dispute Settlement 617.

[40] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532.

[41] SCA, pt 5 s 70.

falling within the scope of one of the streamlined routes. In terms of the scope and extent of review, the CAT will apply the standard rules of judicial review.

Without getting involved in the technicalities of the new judicial review action, a general consideration can be made; the TCA, despite its emphasis on being a true blue international agreement not intended to confer rights on individuals,[42] does allow, within the subsidies control, a form of private enforcement, a sort of vertical direct effect whereby businesses and other interested parties are able to challenge subsidy awards in the domestic courts of the jurisdiction of the granting authority. Apart from possible theoretical ruminations, a system of private enforcement may lead to the creation of a very attractive forum in terms of efficiency and speed, especially if compared with the complex machinery of inter-party dispute resolution mechanisms.[43] It is, of course, too early to make predictions; as of today, the CAT has handed down one judgment only. However, there may be some useful early indications. The case—a dispute concerning waste disposal activities carried out by Durham Council—was brought by a competitor, Max Recycle, on 3 February 2023, and the hearing was held on 3 and 4 July 2023. The judgment was delivered on 27 July—a very expeditious proceeding. As the tribunal noted, it was imperative for reviews of subsidy decisions 'to be conducted quickly and with a light touch and with cost commensurate to these objectives'.[44]

In terms of scope of review, the Government Guidance requires that the CAT should not have to assess whether the decision is correct, but only whether it is lawful, hinting that the extent of the tribunal review should be limited and that the CAT should refrain from second guessing the public authorities' policy decisions.[45] In its first decision, the CAT concluded that the Council complied with the subsidies principles, but its review was extensive and on the merits. If the CAT is going to embrace a full review standard, this new head of jurisdiction may eventually balance the inadequacies of the SCA framework. For instance, it would be possible, on the basis of the SCA, for the CAT to assess if a certain subsidy has a distortive effect on international trade and investments.

Arguably, there may even be another route available. As mentioned above, the UK gave effect to the TCA via the EU (Future Relationship) Act 2020. Section 29 gives immediate effect to all the TCA's provisions.[46] This means

[42] ibid art 5.
[43] See Totis Kotsonis, 'The Squaring of the Circle: Subsidy Control under the UK-EU Trade and Cooperation Agreement' (2021) 1 European State Aid Law Quarterly 15.
[44] *Max Recycle v Durham County Council* [2023] CAT 50.
[45] Subsidy Control Statutory Guidance (n 27) s 13.15.
[46] See European Union (Future Relationship) Act 2020, s 29(1).

that, in theory, the several TCA chapters—to the extent that the UK is obliged to implement them—are applicable in domestic law. In particular, section 29(1) states: 'Existing domestic law has effect … with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement … so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.' As clarified by the UK Court of Appeal, section 29(1) 'is more fundamental and amounts to a blanket, generic, mechanism to achieve full implementation, without the need for any further parliamentary or other executive intervention'.[47] Thus, arguments directly based on the TCA and in particular on the subsidies chapter can be raised either in a straight judicial review action[48] or via special jurisdiction action before the CAT.

To complicate things even further, there is a fifth possibility: parties can still use the WTO dispute settlement proceedings. Actually, the very first case on a subsidies dispute has been brought outside the remit of the TCA. The EU has complained that the UK breached WTO commitments by applying discriminatory criteria in the context of a scheme to support renewable energy, in particular support granted to national offshore wind farms.[49] Although the case was settled even before it reached the panel stage, it was perhaps curious that the choice was not to rely on the remedy/dispute resolution mechanism offered by the TCA, which is equally if not more effective. Many explanations have been offered mostly based on the idea that a challenge in a multi-jurisdiction context would have provided enhanced visibility for the EU claim, rather than a bilateral context.[50] Arguably, the WTO pathway may also have provided a less strident and less confrontational forum, especially as the case was brought in a very delicate political climate in Europe and at a time when the most ideological phase in the EU-UK relationship seems to be on the wane.

In terms of enforcement, the options are thus even too many. As far as the consequences of a breach of the subsidies level playing field rules, implications may instead vary. Indeed, a finding that one of the parties has breached the TCA provisions will bring about a trade sanction. Thus, the guilty party will

[47] *Heathrow Airport Ltd v HM Treasury* [2021] EWCA Civ 783.

[48] See *R (British Gas & Others) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin), where the Divisional Court first confirmed that the TCA via s 29 WAFEU is arguable before domestic courts. Secondly, it discussed the application of various TCA articles including art 366.

[49] Request for Consultations by the European Union, *United Kingdom—Measures Relating to the Allocation of Contracts for Difference in Low Carbon Energy Generation*, WTO Doc WT/DS612 (28 March 2022).

[50] Mandy Meng Fang, 'When Decarbonization Meets Industrialization: The First WTO Dispute between the EU and UK' (2023) 63(2) Virginia Journal of International Law 165.

lose some of the benefits of the trade agreement and the specific penalty would have to be shouldered. Losing a case before your own judge via the SCA or judicial review is a rather different proposition as it is tangible evidence of the impact of supranational norms on domestic regulatory policies. It is the legacy of direct effect after all.[51]

6 Conclusions

The TCA subsidies chapter on the whole delineates a general framework directed not unduly to restrict the autonomy of the parties, but to find a shared goal to promote regulation in ways that are the least damaging to competition. Is this enough to dispel suspicions that one of the parties may be up to no good? Certainly, in terms of subsidies regulation the TCA is in line with contemporary global trade. There is indeed an emerging consensus that rules on controlling subsidies play a pivotal role in establishing the level playing field and that some essential 'updates' need to be included in any forms of international cooperation; for instance, broadening the application of the rules also to services defining the more troublesome subsidies that should be prohibited, while also introducing exceptions for those forms of public support apt to achieve important public policy goals, and so on. Further, it confirms a general view that considers susbsidies regulation as a useful tool in ensuring that public spending should become more efficient, effective, and targeted at growth-promoting economic policies. Finally, in terms of enforcement, the TCA goes further than the classic trade remedies such as anti-dumping and counterveiling duties and sanctions. However, it is not so easy to predict what real impact all the various level playing field provisions will eventually have. Each of them, including the new private enforcement route, are very much untested. Finally, this is an historical moment in which the idea of a shared control on public spending is particularly controversial and complicated by the many crises that the global economy has experienced in recent years.[52] Initiatives such as the United States Inflation Reduction Act or the entry into force of the EU Regulation on Foreign Subsidies with their unilateral implant are eliciting many negative reactions. Suspicions that the other party may want

[51] The TCA dispute settlement mechanisms are strongly rooted within the international law framework. Thus, art 754(4) specifically provides that 'no finding made by the arbitration tribunal when ruling on a dispute between the Parties shall bind the domestic courts or tribunals of either Party as to the meaning to be given to the domestic law of that Party'.

[52] See the chapters in this volume by Harold James and Daniela Schwarzer.

to bowl from the higher end of the pitch are ripe again. How the TCA will succeed in ensuring that will not happen will depend on many factors, but the EU and the UK should be reminded that suspicions are 'to be repressed or at least well guarded: for they cloud the mind; they leese[53] friends; and they check with business, whereby business cannot go on currently and constantly'.[54]

[53] This means 'lose'.
[54] See *The Essays of Sir Francis Bacon* (1597) Essay 31.

13

Review and Reform Options for Deepening EU-UK Cooperation in a Renewing Europe

Federico Fabbrini

1 Introduction

The decision of the United Kingdom (UK) to leave the European Union (EU)—Brexit—represents a unique phenomenon. No Member State of the EU had previously withdrawn from what constitutes arguably the most successful project of regional integration worldwide. And ceteris paribus, it is unlikely that other Member States will follow the British example. Not only did the UK have to navigate very rough seas to exit the EU, through a process that took almost four years and at times proved embarrassing for a country with high administrative capacity, but the destination reached by the UK after exit appears also highly sub-optimal, both from an economic and a political standpoint. In fact, the main treaty governing EU-UK relations post-Brexit—the Trade and Cooperation Agreement (TCA), concluded on Christmas Eve 2020 and entered into force on 1 May 2021—established only a rather limited framework for bilateral trade in goods and cooperation in a finite set of policies. As a result, the UK today is largely cut off from the Single Market of the EU, its closest trading partner, and outside the EU governance structures, with no influence on its decisions and direction.

Yet, this state of affairs need not be the inevitable end-point of EU-UK relations. To begin with, from a legal viewpoint, the TCA explicitly enshrines a review mechanism, by which the parties can periodically take stock of their relationship, and potentially enhance it—also by going beyond the TCA as it currently is. Moreover, from a political viewpoint, since 2016 Brexit has proved to be not only an historical event, but also a highly dynamic process. Shifts and turns have repeatedly happened since the referendum, and it is likely that new developments will take place in the near future. In fact, a number of major transformations have recently taken place across Europe too—mostly as a result

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of the outbreak of the war in Ukraine. On the one hand, the war in Ukraine has led to strengthening pre-existing pan-European and transatlantic organizations, such as the Council of Europe (CoE) and the North Atlantic Treaty Organization (NATO), and to creating a new entity, the European Political Community (EPC). On the other hand, the war in Ukraine has also fostered a constitutional evolution within the EU, with the revival of the enlargement process and the debate on treaty reforms. This inevitably has a bearing on EU-UK relations and their future.

The purpose of this chapter, therefore, is to analyse what the options are for deepening EU-UK relations in light of the ongoing institutional adjustments in the wider Europe. As such, the chapter examines three aspects. First, it considers how EU-UK cooperation can be expanded within the framework of the TCA, looking at the rendezvous provision of the treaty and its process. Secondly, the chapter summarizes the changing governance landscape on the European continent—with the renewed centrality of the CoE and NATO, and the launch of the EPC—and reflects on how these forums allow the UK to reconnect more closely with the EU. Thirdly, the chapter assesses the constitutional evolution of the EU itself, pointing out how the war and the prospect of a major eastward enlargement, including Ukraine's accession to the EU, have forced the EU to address difficult questions of decision-making and treaty changes—as also recommended by the recently concluded Conference on the Future of Europe—and what this means for the UK.

As the chapter argues, the project of European integration is currently going through a lively and experimental moment. To the chagrin of nationalist populist forces, the barbaric Russian invasion of Ukraine has strengthened the bonds that keep Member States together—whether in the EU, or in the CoE, or in NATO, or the new EPC. In fact, the war in Ukraine has pushed new countries either to join NATO, or to seek EU membership, or to relaunch their bilateral partnership.[1] This impacts EU-UK relations, and creates opportunities for the two parties to revisit their cooperation, and readjust it in light of the new geo-political reality. In fact, with general elections forthcoming in the UK before 2025, and a TCA review foreseen in 2026, there is soon a window to do so. Brexit has proved to be a major act of self-harm for the UK. But—short of rejoining the EU—there are multiple options the UK and the EU could explore to strengthen their cooperation in order to regain some of what was lost with

[1] See eg Swiss Confederation press release, 'Federal Council Approves Parameters for EU Negotiating Mandate', 21 June 2023 (calling for a reopening of negotiation with the EU for an institutional framework agreement).

Brexit. As such, the chapter is structured as follows. Section 2 considers possible adjustments within the TCA. Section 3 maps Europe's changing governance landscape. Section 4 overviews the EU constitutional evolution. Section 5 concludes.

2 The Possible Adjustments within the TCA

This section examines the possibilities of adjusting EU-UK relations within the framework of the TCA. It highlights the limitations of the current treaty partnership, the possibilities offered by its review clause, and the process that would have to be followed to deepen bilateral cooperation further.

2.1 Limits

The EU-UK TCA is a peculiar international deal. Contrary to all other free trade agreements (FTAs) which are concluded between countries that want to integrate their economies, thus removing barriers to trade, the TCA has been negotiated between the EU and a former Member State with the aim of managing a process of disintegration, mitigating the economic effects of the UK's withdrawal from the EU. As this book has pointed out, the TCA is a complex and lengthy legal document. However, content-wise, it remains a rather thin deal, covering only a limited number of policy areas. In particular, the centrepiece of the TCA is the chapter on movement of goods, with the removal of custom duties, and rules of origin.[2] Moreover, the TCA also has provisions on services and investments, procurement, and capital movement, as well as other economic cooperation provisions in the areas of aviation, transport, and fisheries. Finally, the TCA also created a framework for EU-UK partnership on some health and cyber matters, internal security, and criminal justice,[3] as well social security coordination and participation in EU programmes.

Nevertheless, the scope of the TCA is limited—especially compared to what the UK enjoyed for almost fifty years as a Member State of the EU. To begin with, the TCA does not cover most of what constitutes the core of the EU internal market, including free movement of people and free movement

[2] See the chapter by Niall Moran in this volume.

[3] See Oliver Garner, 'Justice and Home Affairs' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 157.

of services—namely financial services, which are only mentioned in terms of regulatory cooperation for financial stability.[4] Moreover, the TCA has only scattered provisions on digital technology, data protection, artificial intelligence, green energy, and the fight against climate change—thus failing to regulate some of the most cutting-edge policy areas, which increasingly require transnational cooperation to address global challenges. Lastly, the TCA establishes only a partial EU-UK partnership on internal security matters and the fight against international crime—but leaves out entirely cooperation on foreign affairs and defence. As such, the EU and the UK do not at present have a treaty framework for coordinating sanctions policies against rogue countries or international actors, for discussing common positions on international affairs, or for providing mutual defence assistance in case of external military threats.

Needless to say, the limited remit of the TCA is entirely deliberate. As Giovanni Zaccaroni and I have explained elsewhere,[5] in the negotiations of the TCA the UK explicitly pushed for a maximum sovereignty position, clearly seeking to distance itself from the EU. In doing so, the UK Government reneged on the political commitments it had agreed to in October 2019 in the Political Declaration attached to the Withdrawal Agreement (WA),[6] which envisaged a much deeper partnership with the EU. In fact, in pushing for a rather thin TCA the UK also frustrated the hopes of the EU, which had consistently expressed through European Council negotiating guidelines and European Parliament recommendations an interest in maintaining an ambitious and all-encompassing partnership with its former Member State. As Brigid Laffan has pointed out, however, under the Johnson Government the UK pursued a sovereignty-first Brexit, and its 'preoccupation with sovereignty, which dominated its discourse, demands and action, dramatically narrowed what the UK could agree to and what the EU could offer'.[7] In the end, therefore, rather than the association agreement which the European Parliament envisaged concluding with the UK under Article 217 of the Treaty on the Functioning of the European Union (TFEU),[8] the TCA turned out to be rather a dissociation treaty.

[4] See the chapter by Christy Ann Petit in this volume.

[5] Federico Fabbrini and Giovanni Zaccaroni, 'The Future EU-UK Relationship: The Ambitions for a Comprehensive Partnership' (2021) 27 European Public Law 265.

[6] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, [2020] OJ C34/01.

[7] Brigid Laffan, 'Sovereignty' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (OUP 2021) 240, 250.

[8] See European Parliament resolution of 18 September 2019 on the state of play of the UK's withdrawal from the European Union, P9_TA(2019)0016.

2.2 Review

The limited scope of the TCA, however, is increasingly at odds with national, international, and even local developments which have augmented the demand, and need for, EU-UK cooperation. As I highlighted in the Introduction to this volume, continuing political instability and the ever more visible negative economic consequences of Brexit have resulted in a significant public opinion shift in the UK, with a growing majority of British society now regretting leaving the EU. Moreover, the war in Ukraine has created incentives for democracies based on the rule of law to partner against common enemies, with the EU and the UK jointly facing along with the United States (US) and other Western countries an imperialist Russia violating international law in Ukraine.[9] At the same time, the war and the pandemic have accelerated a trend towards a new form of globalization, based on blocs, a new industrial policy, and technological friendshoring.[10] Finally, the approval of the Windsor Framework in March 2023 has removed a stumbling block for EU-UK cooperation by settling the controversy on the application of the Protocol on Ireland/NI, which had tainted bilateral relations since the entry into force of the WA on 1 February 2020.[11]

Moreover, the TCA as it currently is does not prevent an expansion of EU-UK cooperation towards new domains. As subjects of international law endowed with legal personality, the EU and the UK remain free to conclude new treaties between themselves—if need be, through mixed agreements which also require ratification by EU Member States.[12] In fact, the TCA explicitly allows the EU and the UK to conclude supplemental agreements, going beyond the TCA itself. As stated in Article 2 TCA: 'Where the [EU] and the [UK] conclude other bilateral agreements between them, such agreements shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements. Such supplementing agreements shall be an integral part of the overall bilateral relations as governed by this Agreement and shall form part of the overall framework'. According to Article 775 TCA, moreover: 'This Agreement and any supplementing agreement apply without prejudice to any earlier bilateral agreement between the United Kingdom of the one part and the Union and the European Atomic Energy Community of the other part. The Parties reaffirm their obligations to implement any such Agreement.'

[9] See the chapter by Daniela Schwarzer in this volume.
[10] See the chapter by Harold James in this volume.
[11] See the chapter by Billy Melo Araujo in this volume.
[12] See Ramses A Wessel and Joris Larik (eds), *EU External Relations Law* (Hart Publishing 2020).

Crucially, moreover, the TCA has enshrined a review clause. According to Article 776 TCA: 'The Parties shall jointly review the implementation of this Agreement and supplementing agreements and any matters related thereto five years after the entry into force of this Agreement and every five years thereafter.' Article 776 TCA introduces a rendezvous obligation, committing the EU and the UK to take stock of the TCA five years after its entry into force—hence by 2026. The existence of a review clause in an international treaty is in itself not unique. But in the context of the TCA, the review clause provides a window of opportunity for the parties to reassess the state of their relationship. This is particularly salient from a political viewpoint because the UK must hold a general election before the start of 2025, while in 2024 the EU will also go through new European Parliament elections and begin a new institutional cycle in the Commission and the European Council. At the time of the TCA-mandated rendezvous, the EU, and especially the UK, may have a new leadership ready to take advantage of this moment to expand the bilateral partnership still further.

2.3 Process

In terms of process, a review of the TCA would be likely to follow a traditional international negotiation. While Article 776 TCA is silent on the matter, it is to be expected that the EU and the UK, if they agree to reconsider and expand the scope of their cooperation, would initially take up the matter in the institutions created by the TCA itself, namely the Partnership Council. From a governance viewpoint, in fact, the TCA established a relatively lean institutional structure. Besides a number of specialized committees and technical working groups, according to Article 7 TCA the main governance body is the Partnership Council, which comprises representatives of the parties on an equal basis, and is co-chaired by the EU Commission and the UK Government. The Partnership Council has a broad remit, as under Article 7(3) TCA it 'shall oversee the attainment of the objectives of this Agreement and any supplementing agreement. It shall supervise and facilitate the implementation and application of this Agreement and of any supplementing agreement. Each Party may refer to the Partnership Council any issue relating to the implementation, application and interpretation of this Agreement or of any supplementing agreement'.

Moreover, pursuant to Article 7(4), the Partnership Council can inter alia 'adopt decisions in respect of all matters where this Agreement or any

supplementing agreement so provides'; 'make recommendations to the Parties regarding the implementation and application of this Agreement or of any supplementing agreement'; and 'adopt, by decision, amendments to this Agreement or to any supplementing agreement in the cases provided for in this Agreement or in any supplementing agreement'. According to Article 10 TCA, the decisions of the Partnership Council are taken by mutual consent and 'shall be binding on the Parties'. As such, most likely the Partnership Council could directly approve a number of amendments to the TCA. Moreover, it could lay out a further set of changes for the parties to adopt in the form of supplemental agreements. In the EU case, this would require a Council decision authorizing the Commission to enter negotiations, in accordance with Article 218(2) TFEU. At the same time, in performing its task, the Partnership Council could also draw input from the mechanisms of inter-parliamentary cooperation and civil society participation envisaged in Articles 11 and 12 TCA. These set up a parliamentary partnership assembly between the European and UK Parliaments, as well as domestic advisory groups and a civil society forum with consultative functions on bilateral relations.

If new agreements supplementing the TCA were to be negotiated and concluded between the parties, their approval would have to follow standard constitutional rules on treaty ratification. In the UK, the approval of international treaties is governed by the Constitutional Reform and Administrative Governance Act (CRAG) 2010—although this statute was suspended both for the approval of the WA in 2019 and of the TCA in 2020, as ad hoc legislation was passed by Parliament on both occasions.[13] Since the making of treaties is a prerogative power, the CRAG only requires the government to lay a treaty before Parliament, which has twenty-one sitting days to consider it, after which the agreement may be ratified. In the EU, instead, the approval of international treaties is regulated by Article 218(6) TFEU. According to this provision, the Council shall adopt a decision concluding the agreement. Except where the agreement relates exclusively to EU Common Foreign and Security Policy (CFSP), however, the Council must obtain the consent of the European Parliament for the most important treaties, including association agreements, agreements establishing a specific institutional framework or carrying important budgetary implications for the EU, or agreements covering fields that are subject to the ordinary legislative procedure within the EU. Since the

[13] See European Union Withdrawal Agreement Act 2020, c 1; and European Union Future Relationship Act 2020, c 29.

European Parliament approved the TCA it is all but certain it would have a vote on any amendment.

3 The Changing Governance Landscape of the European Continent

This section examines broader changes in the European governance landscape triggered by the war in Ukraine, and their impact on EU-UK cooperation. It maps the revival of the CoE and NATO, and the set-up of the EPC—three forums in which the UK is a party, together with EU Member States.

3.1 Council of Europe

In the aftermath of the war in Ukraine, the CoE has acquired a renewed significance. Originally established in 1949 by a treaty concluded in London, as the first post-Second World War forum for pan-European cooperation, the CoE focuses on the protection of fundamental rights and the promotion of democracy and the rule of law, and constitutes the institutional framework of the European Convention on Human Rights (ECHR) and its court:[14] the European Court of Human Rights (ECtHR), which since the approval of Protocol 11 in 1998 acts as the court of last instance on judicial review of human rights claims raised against any of the contracting parties.[15] The CoE had become the organization with the widest membership in the European continent and, as of early 2022, it included forty-seven member states: all twenty-seven EU Member States, and twenty other countries, including Russia. Following the illegal military invasion of Ukraine, however, the CoE decided to suspend Russia,[16] which eventually withdrew from the CoE—a step that had occurred only once in the past, when Greece temporarily exited the ECHR in the 1960s, during the Colonels' dictatorship.

The UK has traditionally had both an important and an ambiguous relationship with the CoE, and especially the ECHR. On the one hand, the UK championed the establishment of the CoE, of which it was a founding member;

[14] See Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: Its Law & Policies* (OUP 2017)

[15] See Federico Fabbrini, *Fundamental Rights in Europe* (OUP 2014).

[16] Council of Europe Newsroom, 'The Russian Federation Is Excluded from the Council of Europe', 16 March 2022.

and it originally played a key role in drafting the ECHR, which was largely inspired by the long-time British experience of protecting civil and political rights. On the other hand, however, over the years the UK became more wary of the ECtHR, especially following the approval of the Human Rights Act 1998, which domesticated the ECHR in UK law. Conservative governments, in particular, complained that the ECtHR was limiting the ability of UK political branches of government to deal with salient domestic issues, like the fight against terrorism, or prisoner voting. In fact, before Brexit, several Tory leaders had argued in favour of leaving the ECHR, rather than the EU. In this context, during the 2010s, the UK was at the forefront of diplomatic efforts to limit the ECtHR[17]—a process which started with the Brighton Declaration and concluded with the approval of Protocols 15 and 16 to the ECHR, enshrining the principle of subsidiarity and the margin of appreciation in the ECHR's preamble and a preliminary reference system by which national courts can request advisory opinions from the ECtHR.

Nevertheless, following the bluntly illegal Russian aggression of Ukraine, the other members of the CoE have rallied around the organization established to promote democracy, human rights, and the rule of law. In particular, in a major summit held in Reykjavik on 16 and 17 May 2023 the heads of state and government of the now forty-six Member States of the CoE reaffirmed their unity around the common values of freedom and democracy.[18] In what constituted only the fourth summit of heads of state and government since the establishment of the CoE, the contracting parties adopted a declaration expressing unwavering support for liberal-constitutional principles and 'recommitting to the convention system as the cornerstone of the Council of Europe's protection of human rights'.[19] Needless to say, whether this high-level commitment will result in UK domestic political changes remains to be seen. Indeed, the ECHR has remained contentious in some UK political quarters, especially as it limits the draconian immigration policies pursued by the Sunak Government.[20] Yet, the geo-political context has made the UK more likely to collaborate with like-minded democracies in the CoE, which also has close cooperation with the EU, including ongoing work to secure the EU's accession to the ECHR.[21]

[17] See Jonas Christoffersen and Michael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011).

[18] Reykjavik Summit of the Council of Europe, Reykjavik Declaration, 'United around Our Values', 16–17 May 2023.

[19] ibid Appendix IV.

[20] *R (on the application of AAA) v Secretary of State for the Home Department* [2023] UKSC 42.

[21] See Council of the EU, Conclusions on EU priorities for cooperation with the Council of Europe 2023-2024, 30 January 2023, 53/23.

3.2 North Atlantic Treaty Organization

Another European—and transatlantic—organization which has experienced a new burst of life following the war in Ukraine is NATO. NATO was originally established in 1949, with the Washington Treaty, by the US, with Canada and ten Western European countries, among which of course the UK was a founding member. As a defensive military alliance set up in the aftermath of the Second World War, NATO had progressively expanded during the Cold War, incorporating West Germany in 1955, and eventually enlarged to most of Central and Eastern Europe after the fall of the Berlin wall.[22] In fact, NATO had also played a role during the so-called war on terrorism, with its core provision Article V—which enshrines a mutual defence pledge by all members—triggered for the first time ever after 11 September 2001. Yet, the function of NATO had been increasingly questioned in recent years, also due to recurrent quarrels among its members—which by early 2022 included thirty member states. Most famously, French President Emmanuel Macron had called the alliance 'brain dead',[23] and despite diplomatic attempts to redefine its purpose,[24] its role had become less clear at a time when Russia seemed more like a partner than a threat.

Russia's illegal aggression in Ukraine, however, represented a turning point. The return of war on the European continent has revitalized NATO, which quickly became the main institutional framework to coordinate military assistance to Ukraine, including war matériel and intelligence. Moreover, the Russian invasion, which had often been presented in the regime propaganda as an attempt to prevent a NATO encirclement, produced exactly the opposite effect. Most strikingly, Finland and Sweden—two EU Member States which had historically embraced the principle of neutrality—jointly applied to enter NATO in 2022; Finland was admitted in April 2023 and Sweden's membership is pending after Turkey removed its veto in exchange for several concessions, including on EU enlargement.[25] While NATO also promised to Ukraine that its future is in the alliance—but only 'when Allies agree and conditions are met'[26]—the accession of Finland and Sweden is highly significant, not only because it increases NATO member states to thirty-two, but also because it

[22] See Wade Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe* (CUP 2004).
[23] See 'Emmanuel Macron Warns Europe: NATO Is Becoming Brain-Dead' *Economist* (7 November 2019).
[24] See NATO 2023: 'United for a New Era', 25 November 2020.
[25] See section 4.2 below.
[26] NATO Vilnius Summit Communiqué, 11 July 2023, para 11.

reduces the number of EU Member States who are not in NATO to just four relatively small countries, namely Austria, Cyprus, Ireland, and Malta.

This also has implications for EU-UK security cooperation. Traditionally, the UK opposed expanding the defence role of the EU by preferring NATO as the centrepiece of the European security architecture and a bridge to transatlantic relations. In fact, the main developments in the Common Security and Defence Policy (CSDP) only occurred after the Brexit referendum, when the UK stopped vetoing projects such as the Permanent Structured Cooperation (PESCO).[27] Otherwise, while the EU has significantly scaled up its capacity in CSDP since the start of the war in Ukraine, inter alia by deploying a brand new European Peace Facility (EPF) to fund the provision of weapons to Ukraine, and by passing an Act in Support of Ammunition Production (ASAP) to beef up common defence procurements,[28] clearly NATO has emerged from the war as the primary organization for European security. This implies that the UK can reconnect with the EU through NATO, both because twenty-three EU Member States are party to the alliance, and because the EU itself is increasingly a key institutional partner to NATO on a plurality of war-related and post-conflict tasks.[29]

3.3 European Political Community

In addition to a renewal of the CoE and NATO, the war in Ukraine has also led to the establishment of a new entity: the EPC, which at this stage is more a forum than an organization. The EPC is the brainchild of French President Emmanuel Macron, who launched the idea to create it on 9 May 2022[30]—at the concluding event of the Conference on the Future of Europe.[31] According to Macron : 'Cette organisation européenne nouvelle permettrait aux nations européennes démocratiques adhérant à notre socle de valeurs de trouver un nouvel espace de coopération politique, de sécurité, de coopération en matière énergétique, de transport, d'investissements, d'infrastructures, de circulation des personnes et en particulier de nos jeunesses.'[32] From this viewpoint, the

[27] Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States [2017] OJ L331/57.

[28] See further Federico Fabbrini, 'Funding the War in Ukraine: The European Peace Facility, the Macro-Financial Assistance Instrument and the Slow Rise of an EU Fiscal Capacity' (2023) 11 Politics & Governance 52.

[29] See also Joint Declaration on EU-NATO Cooperation, 10 January 2023.

[30] See French President Emmanuel Macron, Speech, 9 May 2022.

[31] See section 4.1 below.

[32] See Macron (n 30).

EPC would serve as a larger forum connecting both states which, like Ukraine, aimed at joining the EU—but also states, like the UK, which had just left it. As Macron stated, joining the EPC 'ne préjugerait pas d'adhésions futures à l'Union européenne, forcément, comme elle ne serait pas non plus fermée à ceux qui ont quitté cette dernière'.[33]

President Macron's idea—which was further developed in a non-paper by the French Government, and admittedly drew on older proposals in favour of a European Confederation[34]—was quickly endorsed by the European Council on 23 and 24 June 2022.[35] Consequently, the first meeting of the EPC was held in Prague, the Czech Republic—the EU Member State then holding the rotating presidency of the Council of the EU—on 6 October 2022. The second and third meetings of the EPC occurred in Chisinau, Moldova, on 1 June 2023, and Granada, Spain, on 5 October 2023. The next EPC meeting, then, will be hosted in spring 2024 in the UK. So far, forty-four European states have participated to the first EPC meeting[36]—all twenty-seven EU Member States and the leaders of the EU institutions, plus the UK, Ukraine, and fifteen other countries—while forty-five states attended the second meeting (with Andorra and Monaco joining too, but Turkey absent).[37] Essentially, members of the EPC match almost pari passu the members of the CoE, with minor exceptions—eg Kosovo, which is part of the EPC but not the CoE, and San Marino, which is part of the CoE but not the EPC. There is instead ambiguity with regard to Turkey, a CoE member which attended the first EPC meeting, but not the second and third.

At this stage, the EPC remains fairly underdeveloped. As Bruno de Witte has perceptively pointed out, the EPC founding summit 'did not adopt any formal written document apart from press releases by various participants, nor did it create a secretariat or other organ for the EPC'.[38] From this point of view, 'the EPC is not an organization, nor a structure, nor even a process'.[39] However, the use of the term *Community* to define the EPC is not meaningless. The EU emerged out of the European Coal and Steel Community and the European Economic Community, and indeed a European Political Community was

[33] ibid.

[34] See 'Le project du President Macron: Retrouver le sense de la communauté au sein du continent', 16 June 2022. See also former Italian Prime Minister Enrico Letta, 'A European Confederation: A Common Political Platform for Peace' *Le Grand Continent* (25 April 2022).

[35] European Council conclusions, 23-24 June 2022, EUCO 24/22, para 1.

[36] See https://www.consilium.europa.eu/en/meetings/international-summit/2022/10/06/.

[37] See https://www.consilium.europa.eu/en/meetings/international-summit/2023/06/01/.

[38] Bruno de Witte, 'The European Political Community and the Future of the EU', 1 (paper on file with author).

[39] ibid.

negotiated in 1954 in conjunction with the European Defence Community—which ultimately failed. As such, while the concrete achievements of the EPC are so far limited, the forum holds potential. The EPC can serve not only as an ante-chamber for EU membership—which is admittedly the primary driver for this initiative, born out of the awareness that the accession of Ukraine to the EU will take some time.[40] The EPC can also become a platform to enlarge co-operation between the EU and the UK.

4 The Constitutional Evolution of the EU

This section considers how the constitutional evolution of the EU also affects EU-UK relations. To this end, it surveys policy calls for treaty change, the re-launch of the enlargement process, and their consequences for the EU's future outlook.

4.1 Conference on the Future of Europe

The Conference on the Future of Europe—originally envisaged by French President Emmanuel Macron in March 2019[41] as a way to relaunch the project of European integration in the aftermath of Brexit[42]—took off, after delays due to the Covid-19 pandemic, on 9 May 2021, and came to a close a year later on 9 May 2022, when the war in Ukraine was already raging.[43] The Conference was organized as a citizen-focused, bottom-up exercise designed to gain input from European citizens on the key questions facing the EU. This innovative participatory process unfolded through a multilayered structure. The core of the Conference was represented by four European citizens' panels of 200 participants each, selected randomly to reflect the socio-demographic reality of the EU, which met both in person and remotely over several months. The input from the European citizens' panels—together with that resulting from analogous national processes—were then reported to the Plenary of the Conference on the Future of Europe, which deliberated on it. Ultimately, the Plenary

[40] See also Roman Petrov and Christophe Hillion, '"Accession through War": Ukraine's Road to the EU' (2022) 59 Common Market Law Review 1289.

[41] French President Emmanuel Macron, Lettre Pour Une Renaissance Européenne, 4 March 2019.

[42] Federico Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (OUP 2020).

[43] See also Conference on the Future of Europe digital platform https://futureu.europa.eu/.

endorsed forty-nine proposals with a list of 326 detailed recommendations, which were submitted to the executive board and released in a final report published on Europe Day 2022.[44]

The Conference on the Future of Europe's final report explicitly identified a number of shortcomings in the current EU's constitutional structure and made the case for several substantive and institutional amendments to the EU treaties. The Conference, in particular, called for a strengthening of EU powers, with the expansion of EU competences among others in the fields of health, energy, digital technology, migration, and foreign affairs. Moreover, the Conference requested an overhaul of the EU decision-making system, with the overcoming of the unanimity rule, particularly in the field of foreign affairs and defence, and a clarification of the roles of the EU institutions. Finally, the Conference also underlined the importance of endowing the EU with the financial means to back up its actions, including by reproducing the 'Next Generation EU' (NGEU) funding model beyond the Covid-19 pandemic. At the same time, the Conference pleaded for 'reopening the discussion about the [EU] constitution'[45] on the understanding that '[a] constitution may help to be more precise as well as involve citizens and agree on the rules of the decision-making process'.[46] All in all, therefore, the Conference called for a more sovereign federal EU.

In fact, a number of policy-makers immediately embraced the ambitious outcome of the Conference on the Future of Europe. Both French President Emmanuel Macron and then Italian Prime Minister Mario Draghi endorsed the idea of amending the EU treaties;[47] European Commission President Ursula von der Leyen voiced support for this prospect;[48] and the European Parliament called for a comprehensive follow-up to the Conference's outcome, including via treaty changes.[49] Nevertheless, in a joint non-paper, thirteen Member States from Northern and Eastern Europe cooled this enthusiasm down, indicating that they did 'not support unconsidered and premature attempts to launch a process towards Treaty change'.[50] As a result, the implementation of the Conference's outcome has stalled: while some of its recommendations have been implemented within the current EU treaty framework,

[44] Conference on the Future of Europe, Report on the Final Outcome, 9 May 2022.
[45] ibid Proposal 39, recommendation 7.
[46] ibid.
[47] Italian Prime Minister Mario Draghi, Speech at the European Parliament, 3 May 2022 .
[48] Commission President Ursula Von der Leyen, speech, Strasbourg, 9 May 2022, SPEECH/22/2944.
[49] European Parliament resolution of 4 May 2022 on the follow-up to the conclusions of the Conference on the Future of Europe, P9_TA(2022)0141.
[50] Government of Sweden press release, 9 May 2022.

a year and a half after the Conference's end its most ground-breaking proposals remain on hold.

4.2 Enlargement

Yet, the debate about EU constitutional reforms has increasingly interplayed with that of EU enlargement—which the war in Ukraine has brought back to the forefront. As is well known, following Croatia's accession to the EU in 2013, the enlargement process had stalled. Former European Commission President Jean-Claude Juncker had clarified in 2014 that no new state would join the EU under his watch.[51] Moreover, a major row erupted among Member States in 2019 on whether to authorize accession talks with Albania and North Macedonia.[52] In particular, France—with the backing of Denmark and the Netherlands—objected to any bureaucratic automaticity in the accession process, and called for greater political steering on decisions about enlargement.[53] In the absence of the necessary unanimity within the European Council, the issue was referred back to the European Commission, which in February 2020 put forward a new methodology for accession negotiations, confirming a credible EU membership perspective for the Western Balkans, but also subjecting the enlargement talks to further conditionality, with negotiations on the fundamentals, including the rule of law, to be opened first and closed last, and with the possibility of suspending *tout court* the accession talks.[54] In the end, however, no real progress occurred.

Yet, circumstances changed with the war in Ukraine. Reacting to the brutal Russian war of aggression, the EU reactivated its enlargement process. On 23 and 24 June 2022—just six weeks after the conclusions of the Conference on the Future of Europe[55]—the European Council granted to Ukraine and Moldova the status of EU candidate country, while also recognizing the European perspective of Georgia.[56] At the same time, as mentioned, in the awareness that the process of enlargement may take some time, on the same occasion the European Council also endorsed the idea to create an EPC as a forum to engage

[51] European Commission President-elect Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission', 15 July 2014, 12.

[52] European Council Conclusions, 18 October 2019, EUCO 23/19, para 5.

[53] See French non-paper, 'Reforming the European Union Accession Process', November 2019.

[54] European Commission Communication 'Enhancing the Accession Process: A Credible EU Perspective for the Western Balkans', 5 February 2020, COM(2020) 57 final, 2–3.

[55] See section 4.1 above.

[56] European Council Conclusions, 23-24 June 2022, EUCO 24/22, para 10.

with the wider Europe.[57] Otherwise, EU enlargement also interplayed with the expansion of NATO.[58] Ahead of the NATO summit in Vilnius, on 11 July 2023, Turkey agreed to remove its veto on Sweden's accession to NATO in view of political reassurances offered by European Council President Charles Michel that the EU would re-energize its ties with Turkey, whose EU membership application has been pending since 1987.[59] Whether this will result in new momentum towards Turkey's accession to the EU, or more modestly in an upgrade of the EU-Turkey customs union, remains to be seen.

All in all, however, it seems that the EU is increasingly projected towards a new eastward expansion. Yet this raises profound internal constitutional challenges for the EU. On the one hand, the experience of prior enlargements has revealed that pre-accession conditionality has not always worked, particularly as a number of new Member States such as Hungary and Poland have increasingly experienced democratic back-sliding, known as the rule of law crisis. On the other hand, future enlargements would further strain the governance structures of the EU, which heavily depend on unanimous decision-making in the Council and the European Council. Yet, if taking decisions as twenty-seven has proved daunting, especially in areas related to CFSP, CSDP, and financial matters, increasing the number of Member States to possibly thirty-five (including the Western Balkans) will only make things worse. In this context, growing calls have been made for the EU to adjust its institutional structures to be ready for enlargement.

4.3 Options

Among the constitutional options more recently debated in the EU to prepare for a larger union is changes to the decision-making rules through the use of *passerelle* clauses, particularly on CFSP.[60] *Passerelles* allow for a shift from unanimity voting to qualified majority voting (QMV) in the Council of the EU, *à traité constant*. Article 48(7) of the Treaty on Economic Union (TEU) foresees generally that when the EU treaties provide 'for the Council to act by unanimity in a given area or case, the European Council may adopt a decision

[57] ibid para 1.
[58] See section 3.2 above.
[59] See Matina Stevis-Gridneff, 'Will Turkey Become a Member of the E.U. Now?' *The New York Times* (11 July 2023).
[60] See Ramses A Wessel and Viktor Szép, 'The Implementation of Article 31 of the TEU and the Use of Qualified Majority Voting' Study commissioned by the European Parliament Constitutional Affairs Committee (November 2022).

authorising the Council to act by a qualified majority in that area or in that case'. Moreover, specific *passerelle* clauses are scattered across the treaties. Building on this, on 4 May 2023, nine Member States—Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Slovenia, and Spain: all but one from Western Europe—released a joint statement launching the group of friends of QMV in CFSP.[61] This was followed by a supportive resolution of the European Parliament on 11 July 2023, which called for using *passerelle* at the earliest opportunity.[62]

Yet, the strategy to leverage *passerelle* clauses has its hurdles. On the one hand, triggering a *passerelle* would still require unanimity in the European Council, which is not a given, due to the hold-out position of several Member States. Furthermore, Article 48(7) TEU empowers a single national parliament to block the use of a *passerelle*, even if approved by heads of state and government in the European Council, within six months. Lastly, the same provision explicitly prohibits applying the *passerelle* 'to decisions with military implications or those in the area of defence'. On the other hand, there is no escaping that the *passerelle* can achieve only so much. As I have argued elsewhere, the EU governance structure suffers a number of shortcomings, and enhancing the legitimacy and effectiveness of the EU requires adjustments which can only be addressed through proper treaty changes.[63] For example, a greater role for the European Parliament in fiscal and budgetary matters is a democratic need, especially after the establishment of the NGEU, but this can be achieved only through revisions of several treaty provisions.

As such, a more courageous embrace of constitutional amendment seems to be necessary—as stated by the European Parliament, which has called for the establishment of a convention under Article 48(3) TEU, and now officially proposed a set of treaty changes.[64] Otherwise, institutional adjustments to the EU and its functioning can also be achieved in the framework of new accession treaties, as envisaged by Article 49 TEU. Yet, more drastic options are also on the cards, particularly if the states dragging their feet on treaty changes are those experiencing rule of law back-sliding.[65] If this were to happen, it may

[61] Joint Statement of the Foreign Ministries on the Launch of the Group of Friends on Qualified Majority Voting in EU Common Foreign and Security Policy, 4 May 2023.

[62] European Parliament resolution of 11 July 2023 on the implementation of the passerelle clauses in the EU Treaties, P9_TA(2023)0269.

[63] Federico Fabbrini, *EU Fiscal Capacity: Legal Integration after Covid-19 and the War in Ukraine* (OUP 2022) 141.

[64] See European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties, P9_TA(2022)0244 and European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, P9_TA(2023)0427.

[65] See also Report of the Franco-German working group on EU institutional reform, 19 September 2023.

create an incentive for groups of vanguard Member States to conclude a separate inter-se intergovernmental agreement, on the side of the EU. Along this line, a proposal which I have outlined in the past would be to adopt a Political Compact among willing Member States.[66] In sum, it seems that multiple paths exist towards furthering political integration in the EU. And this has consequences also for a former Member State like the UK. If the EU were to reform and restructure around a more integrated core, and a periphery, this would impact on the position of the UK.

5 Conclusion

When Brexit happened, many were concerned that this would be the end of European integration. Instead, seven years after the referendum, and three years after the UK's effective exit from the EU, Europe is as lively as ever and going through a dynamic experimental moment. As this chapter has pointed out, the war in Ukraine has had profound consequences for transnational cooperation and sovereignty-sharing across the continent. The CoE has regained centrality. NATO has expanded. A new EPC has been created. And the EU has reopened the enlargement process, and with it, the construction site of constitutional reforms. All of that matters for EU-UK relations. Following its withdrawal from the EU, the parties negotiated a very limited FTA—the TCA. This reflected the UK's desire to achieve the holy grail of national sovereignty, unshackled from the EU. The reality, however, has proved to be different. Brexit has made the UK worse off, severing it from its closest trading partner, and depriving it of a voice in its decision-making system. In fact, polls reveal that increasingly the British population is regretting its choice.

As this chapter has pointed out, however, the UK and the EU must not limit themselves to the TCA. They can go beyond it—if there is the political will to do so. In particular, a number of legal options are available for them to expand their partnership in a dramatically transformed geo-political environment. First, the UK and the EU can exploit the opportunities offered by the TCA's rendezvous clause. As foreseen in Article 776 TCA, a review of the treaty is due by 2026, and this offers an opportunity to enrich the treaty's scope and content. Secondly, the parties can also explore the opportunities offered by the changing European governance landscape. In their own ways, and through

[66] See further Federico Fabbrini, 'Possible Avenues towards Further Political Integration', Study commissioned by the European Parliament Constitutional Affairs Committee (June 2020).

mechanisms of pooling sovereignty which are different from those of the EU, the CoE, NATO, and the EPC constitute young or rejuvenated platforms in which the UK and the EU or its Member States can re-engage. Thirdly, constitutional evolutions within the EU also represent developments which the UK should monitor closely. The Conference on the Future of Europe recommended treaty changes. The enlargement process and the prospect of an EU of thirty-five Member States, including Ukraine, strengthen this case. But EU constitutional changes remain challenging and no option—including differentiated integration at the core—can be ruled out.

In conclusion, the framework of EU-UK cooperation remains in flux. The TCA, on which this book has focused, is currently the international treaty governing post-Brexit bilateral relations. It is a limited deal, covering a finite set of policies, and establishing a light institutional structure. Yet, the TCA foresees mechanisms for review—which the parties should pursue as early as 2026. Beyond the TCA, moreover, there are broader transformations in the wider Europe that can, and should, affect EU-UK relations in a more positive direction. In fact, the large-scale Russian invasion of Ukraine—which started in February 2022, roughly a year after the TCA's entry into force—has contributed to strengthening the bonds that tie European states together, and reminded everyone of how *l'union fait la force*. In this context, the TCA, as the output of a 'sovereignty first' Brexit, designed to sever as many ties as possible with the EU, appears to be increasingly anachronistic. Recent developments, including the approval of the Windsor Framework, settling lingering discords between the EU and the UK on Northern Ireland, have contributed to rebuilding trust between the parties. This should provide the momentum to deepen EU-UK cooperation further, and several options exist to do so in a renewing Europe.

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