

STUDY

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Future trade relations between the EU and the UK: options after Brexit



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ABSTRACT

This study analyses the various options for the future trade relations between the EU and the UK, after Brexit. It examines the various models against the canvas of two distinct paradigms: market integration and trade liberalization. It finds that an intermediate model, which would allow for continued convergence and mutual recognition in some sectors/freedoms, but not others, is unavailable and cannot easily be constructed for legal, institutional, and political reasons. The stark choice is between a customs union/free trade agreement, or continued internal market membership through the EEA or an equivalent agreement. The study further analyses the effects of Brexit on the UK's continued participation in the trade agreements concluded by the EU. Notwithstanding a range of complexities, the study finds that such continued participation is not automatic but subject to negotiation.

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Table of contents

| | | |
|-------|--------------------------------------------------------------|----|
| 1 | Introduction | 4 |
| 2 | The market integration and trade liberalization paradigms | 6 |
| 2.1 | The market integration paradigm | 7 |
| 3 | Options for the future trade and economic relationship | 17 |
| 3.1 | The EEA | 17 |
| 3.2 | A customs union agreement | 18 |
| 3.3 | A deep and comprehensive FTA | 20 |
| 3.4 | The WTO option | 24 |
| 4 | The status of EU-third country trade agreements post Brexit | 27 |
| 4.1 | The legal position | 27 |
| 4.2 | Options | 29 |
| 5 | Conclusions | 32 |
| Annex | | |
| | EU Trade Agreements: definition of “parties” and “territory” | 33 |

1 Introduction

This study examines the options for the future trade relations between the EU and the UK, once the Brexit process is completed and the UK has exited the EU. It focuses on the potential relationship, as defined through negotiations projected to take place in the course of the transitional period between March 2019 and December 2020.¹

This is a subject of fierce debate, and of huge political and economic significance. The backdrop is the intense trade and economic relationship between the EU and the UK. Below are three tables which demonstrate this intensity.

Table 1 – UK trade in values and shares (2015)²

| | Exports | | Imports | |
|-------------------|-----------|-------|-----------|-------|
| | £billions | Share | £billions | Share |
| EU Countries | 222 | 44% | 291 | 53% |
| Rest of the World | 288 | 56% | 258 | 47% |
| Total | 510 | 100% | 549 | 100% |

Source: Institute for Fiscal Studies, *The EU Single Market: The Value of Membership Versus Access for the UK* (August 2016), p 5

Table 2 – UK goods and services trade shares (2015)³

| | Share of exports | | Share of imports | |
|-------------------|------------------|----------|------------------|----------|
| | Goods | Services | Goods | Services |
| EU countries | 47% | 39% | 54% | 49% |
| Rest of the world | 53% | 61% | 46% | 51% |
| Total | 100% | 100% | 100% | 100% |

Source: ONS, *UK trade: Mar 2016* (10 May 2016):

<http://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/uktrade/mar2016>; Institute for Fiscal Studies, *The EU Single Market: The Value of Membership Versus Access for the UK* (August 2016), p 7

Table 3 – Comparing the UK & the EU's Trade⁴

| | £billion | Share of total exports |
|----------------------------------------|----------|------------------------|
| UK exports to EU countries (2016) | 222 | 44% |
| EU countries' exports to the UK (2015) | 291 | 6-7% |

Source: ONS, *UK Perspectives 2016 'Trade with the EU and beyond'* (25 May 2016): <http://visual.ons.gov.uk/uk-perspectives-2016-trade-with-the-eu-and-beyond/>

¹ The Commission published a draft Withdrawal Agreement on 28 February 2018, just a few days before this study was finalized (available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf), which defines this transitional period.

² See House of Lords, European Union Committee, *Brexit: the options for trade* (5th Report of Session 2016-17), p. 8. Due to the use of this source the financial data are expressed in £, not euros.

³ Ibid.

⁴ Ibid.

It is not however the purpose of this study to analyse the future relationship from a purely economic perspective, which is not the author's expertise. The perspective is a broader one, focusing on the legal, institutional and political boundaries within which the Brexit process unfolds. In academic terms, the study draws upon law and political economy.

The bulk of this study explores the different models which could inspire the future relationship. However, in doing so, it places these models in two distinct paradigms: market integration and trade liberalization. The differences between these paradigms are not always adequately represented in public debates about the future relationship, yet they are crucial. The study therefore first explores those paradigms, followed by a more specific discussion of the various models: the EEA; a customs union; a deep and comprehensive FTA; and the WTO model. Throughout, the focus is on legal constraints and opportunities; required institutions; enforcement and dispute settlement; political determinants; and potential economic effects, described in qualitative terms.

The study also looks at the status of trade agreements concluded by the EU, *post* Brexit – in particular as regards the position of the UK in those agreements.

2 The market integration and trade liberalization paradigms

Much of the current debate about the future trade (and economic) relationship is oriented towards a series of available models, derived from existing agreements between the EU and third countries. “Norway” (EEA), “Switzerland” (a series of bilateral agreements), “Turkey” (a customs union), “Ukraine” (an association agreement), “Canada” (CETA, a free-trade agreement) and the “WTO” have become mainstream in public debates. These models/agreements represent different approaches and levels of relationship or integration, and have a range of divergent features. At a political level, the EU side broadly argues that a choice must be made between these different models, whereas the UK side advocates a tailor-made, bespoke agreement.⁵ Clearly, the fact that the EU has concluded a range of different types of agreements with third countries shows that there is scope for some creativity, and a choice of levels of intensity in the configuration of the future relationship. However, what is often missing from the debate is a deeper understanding of the basic distinction between what this study will term the **market integration** and **trade liberalization** paradigms. That distinction divides the different models, with Norway, Switzerland and Ukraine broadly on the market integration side, and Turkey, Canada and the WTO on the trade liberalization side. This is a divide which, if not unbridgeable, is deeper than is often assumed. The reasons and causes are of an economic, political, and particularly also of a legal and institutional nature (lawyers would in fact say “constitutional”).

It is therefore sensible to explore the differences between these two paradigms, and their reasons and causes, before looking at the various models as such. But before doing so, it may also be useful to make a general terminological comment. Debates about the future relationship focus on “trade” between the EU and the UK, and “trade” is also at the centre and in the denomination of the agreements representing the various models. The EU’s core external economic policy is called the common *commercial* policy, and the WTO is a trade organization. But the focus on mere trade is deceptive. Even the WTO, which represents the base level, is about much more than trade liberalization in the traditional sense: that of removing barriers specific to international trade, such as tariffs, quotas and other border measures. It includes, for example, a world-wide harmonization of intellectual property law (TRIPs); some level of harmonization and wider disciplines on all kinds of product regulations (TBT and SPS); a very crude type of competition policy (anti-dumping and anti-subsidy); a focus on all kinds of services regulation (GATS); and public procurement. Many of the FTAs which the EU concludes go beyond this, not just in terms of more intensive regulation, but also as regards subject-matter, in the sense of including for example environmental protection and social policies. And the agreements associating third countries to the EU internal market are wider still, and provide for a substantially deeper level of economic integration, which encompasses free movement of persons (immigration). “Trade” is a poor denominator for the aims and contents of these various types of agreements. They are agreements aiming to come to terms with the effects of divergent economic and market regulation, along jurisdictional lines, on all kinds of economic transactions in an ever more globalized world economy. They constitute, in a nutshell, international economic law – a much more representative term than trade.

⁵ Theresa May’s Florence speech, 22 September 2017: “One way of approaching this question is to put forward a stark and unimaginative choice between two models: either something based on European Economic Area membership; or a traditional Free Trade Agreement, such as that the EU has recently negotiated with Canada. I don’t believe either of these options would be best for the UK or best for the European Union.”

2.1 The market integration paradigm

The EU's internal market represents the market integration paradigm. The Norway/Switzerland/Ukraine models are all characterized by a high degree of participation in the EU's internal market, but with certain limitations compared to full membership. There are very few examples of the market integration paradigm in other parts of the world, at least if one focuses on international agreements. There is in fact a much closer affinity between the EU's internal market and market integration in countries with a federal-type constitution.⁶

The EU's market integration model has a number of essential features. They are not contingent and disposable, but are rather the product of many decades of reflection, negotiation, and institution-building, aimed at deeper economic integration in an age of fast developing globalization.

The EU's internal market consists of the basic freedoms, provided for by the founding Treaties, and covering the free movement of both products (goods and services) and factors of production (capital and labour). They are implemented and complemented by extensive EU legislation, aimed mostly at harmonizing domestic laws to the level required to ensure adequate convergence. The interaction between the basic freedoms and that legislation is centred around the principle of mutual recognition. Both the ECJ case law and EU legislation employ that principle, which can only work where there is sufficient convergence between the relevant domestic laws of the Member States.

Box 1 - Harmonization, convergence, divergence, alignment - what's in a name?

The Joint report of Phase 1 of the EU-UK negotiations refers to the concept of "full alignment", particularly in relation to those rules of the internal market and the customs union which support Irish North-South cooperation. There has been extensive debate about what that concept means, and particularly whether it is different from the full binding effect of EU legislation that is inherent in EU membership. The concept of alignment is not defined in the Joint report, nor is it a term of art. It is nevertheless worth pointing out that the current set-up of the internal market is one which is characterized by limited harmonization, and rarely substitutes domestic legislation with a single set of comprehensive EU rules. The EU has long abandoned the aim to produce exhaustive harmonization as a general tool. For most product regulations, and in most sectors, the EU uses optional or minimum harmonization. The latter, in particular, offers a medium way between full convergence and national diversity. Member States are allowed to complement EU legislation with further or higher requirements, but cannot impose them on imported goods or services. This means, in essence, that the internal market is based on alignment, and does not depend on a single set of rules.

For the purposes of this report there is no need to explore the interaction between Treaty freedoms and EU legislation any further. There are however a number of conditions and consequences which flow from this project to integrate the EU market.

First, it is clear that this system requires **more than mere convergence** in economic regulations. Such convergence is a necessary, but not a sufficient condition for achieving market integration. For mutual

⁶ See e.g. Michelle Egan, 'The Emergence of the US Internal Market' in Jacques Pelkmans, Dominik Hanf and Michele Chang (eds.), *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses* (College of Europe Studies No. 9, P.I.E Peter Lang, 2008); Robert Schütze, *From International to Federal Market: The Changing Structure of European Law* (1st ed, OUP 2017); Sergio Fabbrini, 'Intergovernmentalism in the European Union. A comparative federalism perspective', (2017) 24(4) *Journal of European Public Policy* 580; Wifried Swenden, 'Is the European Union in need of a Competence Catalogue? Insights from Comparative Federalism', (2004) 42(2) *Journal of Common Market Studies* 371; Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001); Geraint Howells, 'Federalism in USA and EC: The Scope for Harmonised Legislative Activity Compared', (2002) 10(5) *European Review of Private Law* 601.

recognition to work at the scale that it does in the EU internal market, there is a need for strong legal rules cementing this convergence, and for a robust system of enforcement and dispute settlement which, arguably, needs to be decentralized, in the sense that private parties (companies, traders, employees etc) have access to it. There is also a need for a strong institutional system which is capable of generating the rules that are required. The argument, often heard on the UK side, that the current convergence between EU and UK law is sufficient to maintain the current level of market integration, is therefore misconceived. It fails to recognize that such convergence has been achieved through full internal-market participation, and is predicated on such participation.

Second, this market integration paradigm is dependent on **participation in the EU's legal system**. That system ensures that the relevant EU Treaty rules and legislation are an integral part of the domestic laws of the Member States, and prevail in the case of conflict: the principles of direct effect and primacy. Indeed, these principles were to a large extent developed in the context of the EU's market integration project.⁷ The ECJ established and further articulated them in the EU's foundational period, when economic integration was the primary focus. The system has an important procedural and jurisdictional dimension, without which it could not properly function. That dimension is the jurisdiction of the ECJ to interpret EU law in a uniform way, particularly through the preliminary rulings procedure, which ensures that the domestic application of EU law is safeguarded and broadly consistent throughout the EU. The internal market is a big contract between the Member States, and such a contract requires strong and broad-based enforcement.⁸

It is true that the agreements organizing a degree of participation in the internal market by neighbouring third countries (the EEA parties, Switzerland, and Ukraine) do not provide for their full participation in the EU's legal system, or for a direct ECJ jurisdiction. They nonetheless set up systems to monitor compliance (including the incorporation of EU legislation in domestic law) and to ensure strong enforcement. The latter presupposes that the ECJ's internal market case law is, at least, taken account of. In the EEA the EFTA Court was set up to ensure homogeneity, and its case law broadly mirrors the ECJ internal market case law. In the bilateral agreements with Switzerland there is no equivalent enforcement system, but that is a matter of concern to the EU and for further negotiation in the context of a revision of the current relationship.⁹

Third, there are strong reasons for including the **free movement of persons** in this market integration paradigm. The original conception was perhaps mainly one of labour as a factor of production, whose free circulation allows for an efficient allocation of resources in the integrated EU market. There is however more. Free movement of persons (both natural and legal persons) plays a very significant role in creating an integrated market in services.¹⁰ Many services sectors require such free movement for the performance of services across borders, and free trade in services in its international understanding extends to permanent commercial presence, and thus a right of investment and establishment, and to the movement of natural persons.¹¹ Free movement of persons, particularly for economic purposes such as employment and self-employment, also ensures that the integrated market works for the benefit of individuals, and not

⁷ See e.g. Case C-26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen EU:C:1963:1; Case C-6/64 Costa v ENEL EU:C:1964:66.

⁸ According to curia.europa.eu, the Court of Justice has decided 3954 cases on internal market issues, out of a total of 20,990 cases closed (accessed 14 February 2018).

⁹ Council of the European Union: General Secretariat, Press Release: Negotiating mandate for an EU-Switzerland institutional framework agreement, PRES/14/267 (06.05.14), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/142503.pdf (accessed 14 February 2018); see also 'Swiss see no quick deal on new EU treaty', Euractiv, 1 February 2018, available at <https://www.euractiv.com/section/justice-home-affairs/news/swiss-see-no-quick-deal-on-new-eu-treaty/> (accessed 14 February 2018).

¹⁰ See e.g. Ingo Borchert, 'Services trade in the UK: What is at stake?', UK Trade Policy Observatory, Briefing Paper 6, p. 1-2.

¹¹ In addition, freedom to provide passenger transport, tourism, and education services presuppose free movement of those receiving the service.

just their national economies or companies. It adds an important social dimension, complementing the advanced level of economic integration. It further contributes to greater cohesion between the various Member States, by enabling the citizens of less advanced economies to benefit from economic opportunities throughout the internal market.

Fourth, the market integration paradigm has been shown to require a number of what could be called "**flanking**" policies, aimed at establishing a level playing field, in a number of ways. In pure economic terms, it is clear that the integrated market could not operate in the absence of a robust competition policy. That policy aims to avoid that private companies distort competition and re-create barriers to trade removed by internal market policies; and it prevents Member States from doing so by subsidizing certain industries or companies (State aid policy). A further economic policy consists of opening up public procurement, so that governmental purchases do not privilege domestic undertakings. It may be noted here that the full effectiveness of these policies, too, depends on strong enforcement. Particularly competition and State aid policy could not function without having a strong supranational institution (*in casu* the European Commission) monitoring compliance and having the capacity to take decisions that are binding in the domestic laws of the Member States.

There are further flanking policies. The EU has gradually complemented internal market integration with for example common environmental, consumer protection, and social policies. There is again a conceptual link here, in two ways. First, EU internal market legislation harmonizes domestic product and market regulations, many of which are designed to meet environmental or consumer protection objectives. That has led the EU to develop its own policies in these fields, to ensure that the internal market does not become a purely deregulatory construct. Second, these common policies are also designed to create more of a level playing field, in the sense of avoiding that Member States compete with each other by lowering standards.

Fifth, on the institutional side the market integration paradigm has over the years evolved to include greater reliance on EU **regulatory agencies**.¹² The activities and functions of those agencies are deeply embedded in the EU's institutional and legal systems. Third country participation in their work is not straightforward, which has been noted particularly in the context of the EEA.¹³

Sixth, the market integration paradigm, with its strong EU-law based enforcement and dispute resolution system, gives rise to concerns over safeguarding the **autonomy of EU law** in relations with third countries. This goes as far back as the creation of the EEA, when the originally proposed model of dispute settlement was rejected by the ECJ as interfering with its own jurisdiction and with the autonomy of EU law.¹⁴ That original model consisted of creating an EEA Court, with EU and EEA judges. The current EFTA Court was created in response to the ECJ's concerns. Its jurisdiction is confined to the non-EU EEA contracting parties, and it is instructed to ensure the homogeneity of EEA law - in other words, to coordinate its case law with that of the ECJ. The EFTA Court judgments do not bind the EU institutions or Member States, and leave the ECJ's ultimate authority to interpret EU law completely intact. Since the creation of the EEA, the ECJ has arguably become even stricter as regards safeguarding the autonomy of EU law, its case law culminating in Opinion 2/13 on EU accession to the ECHR.¹⁵ This case law is complex, yet one of its basic

¹² These include, in particular, the European Aviation Safety Agency (EASA), European Chemicals Agency (ECHA), Agency for the Cooperation of Energy Regulators (ACER), European Food Safety Authority (EFSA), European Medicines Agency (EMA), European Intellectual Property Office (EUIPO).

¹³ See Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016); H.H. Fredriksen and C.N.K. Franklin, 'Of Pragmatism and principles: The EEA Agreement 20 years on' (2015) 52(3) *Common Market Law Review* 629.

¹⁴ Opinion 1/91 re EEA Agreement EU:C:1991:490, and Opinion 1/92 re EEA Agreement EU:C:1992:189.

¹⁵ Opinion 2/13 re ECHR Accession EU:C:2014:2454.

tenets is clear: the ECJ will not accept that an international jurisdiction is given authority to interpret a body of norms and rules which are identical or closely analogous to EU law. The essential reason is that the decisions of such a jurisdiction would be binding on the EU institutions, including the Court,¹⁶ and would thereby undermine its position at the apex of the EU legal order.

The limitations which this case law imposes are reflected in the dispute settlement systems set up by the agreements creating a closer association with the internal market. The EEA works with a second pillar of enforcement and dispute settlement, confined to the non-EU contracting parties: the EFTA Surveillance Authority and the EFTA Court. The bilateral agreements with Switzerland do not have a robust dispute settlement system, and the EU is unhappy with the mere coordination of EU and Swiss case law.¹⁷ The agreement with Ukraine requires panels to refer EU law questions relating to regulatory approximation to the ECJ,¹⁸ to ensure that the Court's position is maintained. All of this is relevant to the debates about dispute settlement under a future EU-UK trade agreement. If such an agreement aims to associate the UK with the EU's internal market, and to continue, to some degree, the market integration paradigm, two consequences follow. It will be very difficult to set up an EU-UK court without violating the autonomy of EU law. And the EU will want to be reassured that the UK continues to respect, in substance if not necessarily formally, the relevant ECJ internal market case law.

These are some of the requirements and consequences of the market integration paradigm. They will no doubt shape, to varying degrees, the EU's position on how the future relationship can be constructed. Compromises can of course always be found, and the market integration paradigm is not set in stone. But the EU is unlikely to allow the compromises to jeopardize the essential features of a paradigm which has proven so successful.

Two further dimensions of the EU's market integration paradigm are worth emphasizing, before moving to the trade liberalization paradigm. The first is that, independently of any trade agreements which the EU may conclude, the institutions and laws of the EU's internal market affect all trade with the EU. This means that, although in jurisdictional terms EU internal market law is confined to the EU and to the countries to which it is formally extended (such as the EEA), it in substance reaches all corners of the globe due to the need for compliance by all companies seeking to serve the EU market, in one form or other. Anu Bradford has famously called this the **Brussels effect**.¹⁹ This effect is reinforced, not only by the size of the EU market, but also by the breadth, depth and sophistication of the EU's regulatory system. In many sectors and for many products the EU is a leading regulator, forcing businesses, and indeed regulators in third countries to adapt and follow. Moreover, EU internal market legislation often expressly requires forms of extraterritorial compliance and adherence.²⁰

The upshot for the future EU-UK trade relationship is that the EU is aware that the UK will need to maintain high levels of regulatory convergence if it does not want to undermine the current high volumes of trade with the EU. That will be the case, even in the absence of any agreement, leading to trade being conducted under WTO terms.

¹⁶ See e.g. Opinion 2/13, paras 181-184.

¹⁷ Council of the European Union: General Secretariat, Press Release: Council conclusions on EU relations with the Swiss Confederation, PRES/93/17 (28.02.17), available at <http://www.consilium.europa.eu/en/press/press-releases/2017/02/28/conclusions-eu-swiss-confederation/pdf> (accessed 14 February 2018).

¹⁸ EU-Ukraine Association Agreement, Art 322(2).

¹⁹ Anu Bradford, 'The Brussels Effect', (2012) 107(1) Northwestern University Law Review.

²⁰ See Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law', (2014) 62(1) American Journal of Comparative Law 87; Joanne Scott, 'The New EU "Extraterritoriality"', (2014) 51(5) Common Market Law Review 1343.

The second dimension is relevant, particularly to trade and economic relations between the North and South in Ireland. The history of the EU's construction of the internal market shows that the **removal of border controls** is hard work, and requires a wide-ranging effort to tackle a broad range of domestic policies and regulatory or fiscal systems that operate at borders. The Europe Without Frontiers project (part of the 1992 Single Market programme) took about a decade to be realized, and presented some near intractable problems. It has not been possible to replicate this in the agreements associating third countries to the EU internal market: there continue to be controls at the borders between for example Norway and Sweden, or Switzerland and France.²¹

Box 2 - Trade in bananas and intra-EU borders

When in 1986-1994 the EU completed the single market, this required, among many other things, a unified regime for imports of bananas from third countries. That regime introduced tariff rate quotas (TRQs) for bananas. Previously, Member States had divergent import regimes: some were supplied by ACP countries; others by Latin America. These divergent regimes required controls at intra-EU borders on so-called indirect imports (intra-EU trade in third-country bananas). It was politically difficult to obtain consensus on the new EU regime, but even more difficult to get it accepted by the supplying third countries, particularly in Latin America. The bananas regime was challenged in the GATT, and then in the new WTO, in a series of disputes which the EU lost. At some point the US adopted retaliatory sanctions against unrelated EU exports. It took little short of a decade for the disputes to be resolved, and for a settlement to be reached. The story illustrates the difficulties associated with removing all border controls. It also shows how the allocation of TRQs may lead to a protracted trade war - something of relevance to the adoption by the UK of its own tariff schedules in the WTO (see further below).

The trade liberalization paradigm stands in stark contrast to the market integration paradigm. As the name suggests, its focus is trade, and it is through the trade perspective that it aims to facilitate economic exchange. Its aim is not one of integration of markets; but rather of the liberalization of trade between distinct markets. The major difference is straightforward enough: there is no broad attempt to harmonize product and market regulations. This trade liberalization paradigm characterizes both the WTO and the large majority of trade agreements, be they concluded by the EU or by other trading nations.

What follows aims to describe and analyse some of the major features of this trade liberalization paradigm, and to contrast them with the market integration paradigm. The analysis looks separately at trade in goods and trade in services, because the contrast between them is worth exploring, particularly in light of the EU's practice not to include significant services liberalization in its FTAs and the debate about the future EU-UK relationship in the sphere of services.

2.1.1 Trade in goods

The liberalization of trade in goods generally distinguishes tariffs from non-tariff barriers (NTBs). On the **tariff** side there are some basic, straightforward distinctions.²² First, trade may take place on a most-favoured-nation (MFN) basis, in which case tariffs cannot be higher than those committed to in the relevant WTO schedule. Nor can distinctions be made between different countries of origin, as this would violate MFN. Second, trade may be governed by a preferential trade agreement (PTA) which creates either a free-trade area (FTA) or a customs union (CU). The difference between an FTA and a CU is that, in the former,

²¹ On the former, see Charlie Duxbury, 'Lessons from Norway-Sweden border for post-Brexit Britain', Politico, 10 April 2017, available at <https://www.politico.eu/article/brexit-ireland-border-customs-norway-sweden/> (accessed 14 February 2018). On the latter, see Chris Giles, 'Brexit: Watch the Swiss border for a warning on trade', Financial Times, 7 December 2017, available at <https://www.ft.com/content/2d30482c-da7e-11e7-a039-c64b1c09b482> (accessed 14 February 2018).

²² Note that the market integration paradigm does not cover tariffs at all, as it presupposes that there are none.

the parties each maintain independent trade policies with the rest of the world, but not in the latter, where the parties agree to adopt a common external tariff and trade policy. FTAs therefore require rules of origin, which determine the conditions under which goods are considered to be produced in one of the parties to the FTA, and are thus able to benefit from tariff-free trade. A customs union avoids rules of origin, and therefore allows all goods to be "in free circulation" between the parties to the customs union - whether those goods were produced in one of those parties, or were imported from a third country. A further, very important point is that both FTAs and CUs must cover "substantially all the trade" between the parties. There is not much GATT or WTO case law on that provision, but it is generally accepted that this condition precludes purely sectoral FTAs or CUs.²³ Any attempts to create such sectoral agreements would doubtless give rise to claims by non-parties to the same treatment, pursuant to the MFN principle.

Box 3 - Rules of Origin

Rules of origin are mechanisms used to identify the economic origin of goods in order to prevent trade deflection. Origin can be preferential or non-preferential, depending on whether the country in question is a party to an FTA. There are two categories of rules of origin – for goods "wholly obtained" or "sufficiently transformed". The wholly obtained goods are produced from materials originating from and processed in the countries party to the FTA. The sufficiently transformed products are obtained from goods originating in third countries, but processed in a country party to the FTA.

For the purposes of identifying origin, the EU uses three basic criteria to determine if a product has been "sufficiently transformed":

- (i) the value-added rule, according to which the value of all the non-originating materials used in manufacturing the product does not exceed a certain percentage of the value of the good;
- (ii) change of tariff classification, requiring that the final product be made of materials from a different tariff classification; and
- (iii) the production activities rule, stipulating that the product is manufactured from a particular material.

As an additional rule, cumulation allows products of one country, party to the FTA, to further process products in another country, party to the same FTA, with the resulting product being treated as originating in the latter country. Cumulation can be bilateral or diagonal/regional (operating between two or more countries that have concluded preferential trade agreements with each other).

All items traded are identified through a system of tariff classification. Together with origin, tariff classification determines the economic treatment of goods. The EU has based its tariff system on the Harmonized Commodity Description and Coding System ("HS") developed by the World Customs Organisation, in order to ensure consistency.

The EU has concluded a Regional Convention on pan-Euro-Mediterranean preferential rules of origin, signed by 23 parties. The Convention uses a cumulation system which applies between the countries part of the network of FTAs. Furthermore, CETA operates a rules of origin regime that combines the different approaches taken by Canada and the EU. Importantly, CETA leaves open the possibility of cumulation with third countries parties to future FTAs with EU or Canada.

There are, both worldwide and in the framework of the EU's trade policy, many more instances of FTAs than CUs. The main reason for this is no doubt that the requirement to adopt a common external tariff and trade policy is demanding, and requires much more significant policy coordination between the parties.

²³ Jong Bum Kim and Joongi Kim, 'The Role of Rules of Origin to Provide Discipline to the Gatt Article XXIV Exception', (2011) 14(3) Journal of International Economic Law 613.

The EU's internal market is based on a CU, and operates a completely uniform external tariff and trade policy. Leaving aside micro-States, there is only one CU between the EU and a third country, namely under the Ankara Agreement with Turkey. The EU's approach here has been to require that Turkey mimics, as it were, the EU's trade policy, including the EU's programme of negotiating and concluding FTAs. Turkey is not however invited to co-negotiate FTAs with the EU. This has given rise to a certain amount of frustration.²⁴ The effect of new FTAs concluded by the EU is often that trade between the EU's new trading partner and Turkey is deflected through the EU. This effectively opens also Turkey's market to tariff-free imports, and causes it to miss out on tariff revenue.

In the sphere of **non-tariff barriers** the trade liberalization paradigm is much less advanced than the harmonization model of the market integration paradigm. It is remarkable to see how similar the basic WTO law provisions on free trade in goods (found in GATT, and copied into nearly all FTAs) are to the TFEU provisions on free movement of goods: they essentially prohibit both discrimination against imports and any other trade restrictions. However, their interpretation is not analogous at all. The ECJ has firmly established that any Member State laws or regulations which affect intra-EU trade, discriminatory or not, are prohibited unless justified by overriding policy considerations. It has confirmed the principle of mutual recognition, a cornerstone of the market integration paradigm. GATT and WTO case law, by contrast, focuses predominantly on whether there is discrimination. It has steered clear from the mutual recognition principle. Add to this that neither the WTO nor FTAs set up law-making institutions which are capable of harmonizing divergent product and market regulations. The only attempt at harmonization is an indirect one: the TBT and SPS Agreements prescribe the use of existing international standards (even if those standards have been adopted as non-binding), unless derogation is justified. This is, in terms of scale and depth, incomparable to the EU's harmonized product and market regulations.

These differences are strongly connected to the underlying institutional (lawyers would often even say constitutional) set-up. The ECJ's case law on mutual recognition was picked up by the EU legislature, when in the Delors era it focused on the single market. Free trade in the EU's integrated market is, in legal terms, the product of a constant dialogue between courts (the ECJ, but also domestic courts) and legislatures (EU and national). Such a dialogue is required to build the necessary acceptance of convergence, and of the mutual trust which mutual recognition presupposes. It is also required for allowing harmonized product and market regulation to function in a proactive, rather than reactive way – an indispensable feature in an age of globalization and its discontents.²⁵ The WTO, by contrast, has no institutions capable of taking on a legislative role, and its dispute settlement organs (particularly its Appellate Body) therefore do not have the capacity to enter into a constitutional-type dialogue.

This institutional inadequacy of the WTO is not overcome in FTAs or CUs. Trade negotiators are very much aware that NTBs are the real barriers to trade in globalized markets, characterized by low tariffs. Both the TTIP and CETA negotiations evidenced the desire to tackle NTBs, and divergent product and market regulations. But both negotiations also evidenced the difficulties associated with establishing anything more than regulatory cooperation. Such cooperation is useful, but is not a substitute for the kind of harmonization which characterises the market integration paradigm.²⁶

2.1.2 Trade in services

In the sphere of **trade in services** the trade liberalization paradigm offers even less than for trade in goods. International trade in services is a phenomenon which is a lot more difficult to capture and define than

²⁴ Nihat Zeybekci, 'Turkey Deserves a Better EU Trade Deal', Bloomberg, 12 April 2017, available at <https://www.bloomberg.com/view/articles/2017-04-12/turkey-deserves-a-better-eu-trade-deal> (accessed 14 February 2018).

²⁵ See Joseph Stiglitz, *Globalization and its Discontents* (Penguin 2002).

²⁶ Cf. Marija Bartl, 'Making transnational markets: the institutional politics behind the TTIP' (2017) 1(1) *Europe and the World Law Review* 4.

trade in goods (see Box 4). There are no tariffs, only NTBs. Liberalizing trade in services therefore requires a response to divergent product and service market regulations. National regulatory systems in the sphere of services are predominantly sectoral, reflecting the different policy concerns associated with the various sectors. The regulation of health, education, transport, financial, and telecommunications services (to name some) is inherently very different in terms of policy goals and regulatory institutions and instruments.

Box 4 – The concept of international trade in services

The physical nature of goods is such that international trade in goods is clearly defined and demarcated: it concerns physical products crossing international borders, as a result of commercial transactions which transfer ownership. With such crossing come tariffs, different product regulations and associated checks and controls, and divergent market regulations. The liberalization project therefore has a clear focus. Services, by contrast, have no physical form, and no property rights directly attached to them. They are purely contractual, in that they are at heart the agreed performance of a particular activity, and they are consumed at the point of production. There may be an international dimension to services transactions, but it is more difficult to capture. The negotiators who produced GATS, at the time of the creation of the WTO, chose for an expansive definition of what is international trade in services. They distinguished four modes. Their approach was such as to characterize any services transaction with something of an international element to it, as constituting international trade in services – for example any foreigner enjoying local services (consumption abroad), which includes any tourists or other travellers using transport, accommodation, restaurant, and other services. Since then economists have added a 5th mode: services which are embedded in goods which are internationally traded. The wide and diffuse nature of international trade in services means that accurate statistics are harder to come by. It also means that there is overlap with international investment. Indeed, one of the modes is “commercial presence”, which covers investment by services firms in another market, and their establishment there. In international regulatory terms, the overlap means that investments by services companies may be subject to both international trade and international investment law. Investments by goods-producing companies, on the other hand, are not covered by international trade law.

EU internal market law is arguably more coherent and seamless: the free movement of goods, freedom to provide services, and right of establishment are all subject to the same basic rules and principles – as is free movement of persons.

25 years after the creation of the GATS framework, which is used also in FTAs, it is not clear whether the unified trade liberalization paradigm is working in terms of actual liberalization, or greater convergence of product and market regulations. The original commitments entered into by WTO members were largely of a stand-still nature, and they have, with some exceptions, not been updated due to the WTO’s failure to conclude the Doha Round. There are the ongoing TiSA negotiations, but it is unclear when they will produce results.²⁷ FTAs have generally not made a lot of progress, including the FTAs which the EU has negotiated.²⁸ As is regularly noted in the Brexit debate, even the arguably most advanced FTA negotiated by the EU – CETA – does not cover liberalization of trade in services to any considerable degree.²⁹ The

²⁷ Alan Beattie, ‘EU trade data flows are becoming the new GMOs’, *Financial Times*, 4 December 2017, available at <https://www.ft.com/content/9da22968-d8ee-11e7-a039-c64b1c09b482> (accessed 15 February 2018); Catherine Stupp, ‘European Commission paralysed over data flows in TiSA trade deal’, *Euractiv*, 11 October 2016, available at <https://www.euractiv.com/section/trade-society/news/european-commission-paralysed-over-data-flows-in-tisa-trade-deal/> (accessed 15 February 2018).

²⁸ Billy A. Melo Araujo, *The EU Deep Trade Agenda* (OUP 2016) ch. 4.

²⁹ Jim Brunnsden and Mehreen Khan, ‘Why the UK needs a “plus plus plus plus” version of Ceta’, *Financial Times*, 12 December 2017, available at <https://www.ft.com/content/c9f8506c-df17-11e7-a8a4-0a1e63a52f9c> (accessed 15 February 2018).

reasons for all this are connected with the limitations of the trade liberalization paradigm, as outlined above. Barriers to international trade in services are predominantly the result of divergences in domestic product and market regulations. In the absence of a system designed to achieve greater convergence, domestic regulatory preferences continue to prevail. In this context it must be noted that, in many countries, the regulation of certain services sectors – such as health, education, culture – is politically more sensitive than product regulations applying to goods. The TTIP and CETA negotiations again bore that out, as did the long gestation of the Services Directive,³⁰ and as does the debate in the UK on the NHS and the potential for liberalization of health services in the context of a UK-US trade agreement.

The above does not mean that international trade in services does not progress. What it means is that the overall trade liberalization model contributes little to the ongoing integration of services markets. The latter is largely a function of technological change, and is in some cases also helped by sectoral approaches. Civil aviation, for example, is on the whole not subject to GATS commitments,³¹ but that has not stopped the EU from liberalizing international air transport, for example through the Open Skies agreement with the US.

2.1.3 Other features

In terms of **flanking policies**, the trade liberalization paradigm is also very different, and more limited than the market integration paradigm. The WTO does not operate a world-wide competition policy. What it does is to tackle certain subsidies (in particular export subsidies), by enabling members to challenge those subsidies in the WTO, or to apply countervailing import duties. The behaviour of private undertakings is not regulated as such, but WTO members are able to adopt protective measures, particularly anti-dumping duties, in the face of certain types of price-oriented market distortions. The WTO also does not impose particular environmental or social policies.

In this respect, many FTAs go further. The EU's FTAs have significant competition policy chapters, inter alia aimed at promoting the EU's competition policy model. That model is at any rate a successful EU export product, because of its sophistication, long tradition, and the size of the EU's market. The EU, and other major trading nations, also include environmental protection and social policy provisions in their FTAs. Those provisions aim to establish minimum (or essential) standards of protection, rather than to harmonize divergent legislation. These standards are an important consideration in public debates about the advantages and drawbacks of further trade liberalization.

The last main feature of the trade liberalization paradigm, i.e. the **legal institutions** which support it, shows up arguably the greatest difference with the market integration paradigm. Trade agreements – be they WTO, other multilateral, or bilateral trade agreements – are based in international law, and are hardly ever part of domestic law in the way that EU internal market law is through the mechanisms of direct effect and primacy. This means that compliance with these commitments depends on international oversight, enforcement, and dispute settlement. The latter is purely intergovernmental in nature – at least in the trade field³² – which means that any business facing trade barriers needs governmental support to challenge them. WTO dispute settlement has been broadly successful, but it definitely does not have anywhere near the capacity of the EU's enforcement and judicial system, with its decentralized features. The current US challenge to WTO dispute settlement highlights both the political sensitivity of

³⁰ Directive 2006/123/EC; See also Tobias Buck, 'FT briefing: EU services directive', Financial Times, 8 February 2006, available at <https://www.ft.com/content/7cc08500-98c8-11da-aa99-0000779e2340> (accessed 15 February 2018).

³¹ See e.g. Marlo A Magdoza and Leo B Malagar, 'The Implications of the General Agreement on Trade in Services (GATS) on International Civil Aviation: Should We Do Away with ICAO', (1998) World Bulletin Special Issue on International Civil Aviation and the Law 116.

³² For investment law, see Box 5.

international adjudication, and the precariousness of a system whose continued functioning ultimately depends on consensus.³³ The EU's FTAs also include dispute settlement mechanisms, increasingly modelled on the WTO system. However, those mechanisms are rarely used, and the WTO route continues to be preferred for the purpose of settling disputes through recourse to some kind of system of adjudication. As a consequence, the trade liberalization paradigm has much greater difficulty in growing into a mature and evolving legal system, governing globalization.

Box 5 – The move away from “integration through law” in international trade and investment law

The contrast between how the EU legal order ensures respect for internal market rules, and how international trade and investment law are enforced, has become sharper over the last decade. The EU has further perfected the mechanisms to ensure compliance, based on the direct effect and primacy of EU law. The Commission regularly asks the ECJ to impose financial penalties on Member States which fail to comply. Private parties can also claim damages (Member State liability). Procedural obstacles have been tackled by limiting the scope for national procedural autonomy. The result is that EU internal market rules are sophisticated, well known, and that private parties have proper and wide access to justice. International trade law has not followed this trajectory. Whilst for a considerable time there were hopes in some quarters that WTO law and the WTO dispute settlement system could generate the respect and authority required to enable domestic courts in the EU and elsewhere to accept direct effect, the ECJ and other courts have not moved in that direction. This means that WTO law remains purely intergovernmental. The EU's political institutions (Council, Commission and Parliament) are opposed to the direct effect of WTO law, and increasingly also to the direct effect of FTAs concluded by the EU. In more and more cases, they do not leave that question to be settled by the ECJ, but expressly exclude direct effect in the FTA itself. Other major trading nations have similar policies. Trade agreements are at present firmly intergovernmental.

International investment law traditionally provides for a greater role for private parties: most bilateral investment treaties (BITs) confer rights on private investors, under international law, and those rights can be enforced in international arbitration (investor-state dispute settlement, or ISDS). Violation of the protections offered by BITs gives rise to claims in damages. However, that system too is under attack, particularly in the EU. The transfer of competence over FDI from the Member States to the EU (by virtue of the Lisbon Treaty), and the TTIP negotiations with the US have triggered serious civil society contestation of ISDS. This too may become a turn to intergovernmentalism, particularly if the EU's plans to create an International Investment Court do not come to fruition.

³³ See e.g. Jim Brunnsden and Alan Beattie, 'EU's top trade official warns on Trump impact on WTO', Financial Times, 16 October 2017, available at <https://www.ft.com/content/f6a7768c-b029-11e7-aab9-abaa44b1e130> (accessed 15 February 2018).

3 Options for the future trade and economic relationship

3.1 The EEA

The EEA Agreement is the most firmly established and most coherent model for extending the internal market – and with that the market integration paradigm – to third countries. Its overall concept is that the third countries concerned, i.e. EFTA countries which, for one reason or other, were not prepared to accept full EU membership at the time the EU completed its single market, could be part of that market if they were willing to sign up to the applicable free movement rules and legislation. The overall compromise reached consisted of the following basic features:

- No participation in decision-making (but some form of participation in decision-shaping);
- Contributions to the EU's cohesion fund;
- No requirement to accept the direct effect and primacy of EU law;
- No direct ECJ jurisdiction; instead the EFTA Court deals with disputes;
- A general safeguard clause.

It is further worth noting that the EEA originally covered a wider group of EFTA countries, but has shrunk as a result of the expansion of the EU to include Austria, Sweden and Finland.

What would need to be done, **legally**, for the UK to benefit from the EEA as a non-EU contracting party? ³⁴ The UK would need to join EFTA, if anything because the EFTA Court and EFTA Surveillance Authority are critical EEA institutions. Arrangements would need to be made for the UK to contribute to the work of the EFTA Court and Surveillance Authority. The EEA Agreement would need to be amended, although, conceivably, a Protocol may be sufficient to make the UK switch sides – from the EU to the non-EU side of the EEA. All of this is achievable in legal terms, but requires the consent of all EFTA/EEA and all EU Member States, plus the EU, because the EEA is a mixed agreement.

There are however a number of obvious **political** difficulties with the EEA option.

First, the UK's participation in the EEA, on the EFTA side, would create even greater imbalance between the participants. The size of the UK economy and population is many times the size of the combined economies and populations of the three other members. The UK would risk dominating EFTA and the EEA in ways which the other EFTA states may not prefer.

Second, the EEA appears to cross some of the red lines which the UK government has drawn. It requires free movement of persons, thereby interfering with the desire to control immigration. In so far as the EFTA Court ensures homogeneity with the ECJ case law, the EEA means a continued acceptance of the ECJ's jurisdiction, at least in some form. The EEA also means that the UK would be asked to continue to contribute financially. But most importantly, the EEA can hardly be described as "taking back control", which was perhaps the most successful slogan of the Leave campaign. It involves the acceptance, without representation in the decision-making process, of whole swathes of EU law and legislation.

On the plus side, if all the UK is after is a more symbolic form of sovereignty, then the EEA looks better than full EU membership. There is no direct effect and primacy of EEA law, the latter requiring domestic incorporation, piece-by-piece. There is no "direct" ECJ jurisdiction. There may be some scope for using the general safeguard clause, for example in response to a surge in immigration. The EEA would allow (indeed require) the UK to conduct its own trade policy.

In **economic** terms the EEA constitutes the most appropriate model for keeping most of the benefits of the market integration paradigm. For all intents and purposes, the UK would remain in the EU internal market.

³⁴ See for more detail Christophe Hillion, 'Brexit means Br(EEA)xit: The UK withdrawal from the EU and its implications for the EEA', (2018) 55(1) Common Market Law Review 135.

That does not mean that there are no drawbacks. It is difficult to see how the EEA option could avoid customs controls at the borders between the EU and the UK. The EEA operates with rules of origin, and given the UK's desire to strike out on its own in terms of trade policy, it is inconceivable that the EU would not be concerned about deflections of trade. Particularly for the North-South Irish border, this poses difficult questions of how to avoid the reintroduction of actual, physical border controls.

It is possible to think of a variation of the EEA model. An EU-UK agreement could be modelled after the EEA, in a way that separates it from the current, actual EEA – a **bespoke EEA**, in other words. A customs union could be added to such an agreement, ensuring that trade between the EU and the UK could continue much as before. In institutional terms, however, it is difficult to see how such an agreement could work. The principle of the autonomy of EU law would not appear to allow the enforcement of such an agreement to be overseen by a joint EU-UK court. Such a court would by definition be asked to interpret legal provisions which are in substance identical to those of EU law and legislation. Its rulings would be binding on the EU institutions, including the ECJ, and that is something the ECJ's case law does not accept. The alternative model, which characterizes the current EEA, is equally unattractive: it makes little sense for a court (and surveillance authority) to be created at international level, purely for the purpose of ensuring UK compliance. The EFTA Court and Surveillance Authority make sense because they are multilateral. In a bilateral setting – EU and UK – the two-pillar model of the EEA cannot work.

In addition, of course, an EEA plus customs union would mean that the UK would need to abandon its plans to develop its own trade policy (see further below).

The EEA option calls for a wider comment. As mentioned it is the most established and coherent model for extending the internal market – and thereby the market integration paradigm – to a third country. The approach of concluding a range of sectoral bilateral agreements, adopted for developing the relationship with Switzerland, has proven unsatisfactory on both sides. The association agreement with Ukraine is of a different order, as it is conceived with a view to building greater convergence and a closer political relationship, and as the Ukrainian economy is at a lower level of development.

Yet the EEA hardly lives up to EU constitutional principle, which includes representative democracy. The EU does not offer its close neighbours who want to participate in the market integration paradigm, *without* being full EU Member States, an attractive association with the internal market. In an age of increasingly differentiated integration, inside the EU, one wonders whether the EEA model could not be further developed in the direction of allowing the non-Member States concerned a form of greater participation. Of course, the right balance would have to be found to avoid free-rider problems, and not to make non-membership too attractive. And there are clear political obstacles to offering a revitalised EEA-type agreement to the UK, at this stage, given the current relations with EEA countries and Switzerland.

3.2 A customs union agreement

As analysed above, there are few instances of significant customs unions, and the EU's main customs union agreement is with Turkey. Both sides recognise that the current arrangements are not optimal, and work is under way to modernize it.³⁵ The extent to which progress will be made with this project is of course dependent on how the broader political relationship with Turkey evolves.

In **legal terms**, a customs union agreement could, if it was confined to customs and tariff arrangements, be negotiated and concluded by the EU acting alone, without the Member States. That would facilitate decision-making (Council QMV), and avoid the long road of ratification at a domestic level in the Member States. However, such an agreement would also sit firmly within the trade liberalization paradigm. In other

³⁵ European Commission, Press release: Commission proposes to modernise the Customs Union with Turkey, 21 December 2016, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1609> (accessed 15 February 2018).

words, all the benefits of the current market integration paradigm would be lost, unless the customs union was complemented with a form of extension of the EU internal market.

Article XXIV(8) GATT provides that a customs union must create “a single customs territory” which covers “substantially all the trade”. It further states that, in a customs union, “substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”. This means that a customs union requires a common customs tariff, and a common trade policy. The qualification “substantially the same” gives some leeway, in the sense of not requiring the kind of absolute uniformity in customs and trade policy which characterizes the EU. However, it is plain that the GATT/WTO legal framework does not tolerate partial or sectoral customs unions.³⁶ There is limited WTO case law on Article XXIV, which shows that WTO members have had little appetite in challenging preferential trade agreements.³⁷ One of the reasons for this may be that such agreements have proliferated over the last couple of decades, and that there is therefore no interest in challenging particular agreements in a world where everyone is a sinner. But that does not mean that anything goes. Existing FTAs and CUs do cover most of the trade between the territories involved, even if there may be long transitions. There are, to this author’s knowledge, no instances of genuinely partial or sectoral customs unions. Any attempt to go down that route would open up space for claims, by any and all WTO members, against both the EU and the UK, for MFN treatment. It would clearly not be in the EU’s interest to expose itself to such claims.

The first **political** difficulty with an EU-UK customs union is therefore that, in essence the UK would need to continue to implement the EU’s external trade policy. In terms of trade agreements between the EU and third countries, this would mean that the UK would either need to be a contracting party to those agreements, or would need to conclude its own agreements which would need to mimic, in substance, the EU’s agreements (the Turkey model). The first option is one which would add further institutional and political complexity to the EU’s trade policy, by effectively making all bilateral trade negotiations trilateral. Either option hardly fits the Global Britain narrative, which has it that the UK’s ability to conclude its own trade agreements is one of the major benefits of Brexit.

A second difficulty is that customs unions are limited to trade in goods, and do not cover services. As the question of how to include trade in services in an EU-UK trade agreement does not depend on whether the customs union or FTA model is chosen, this study explores the opportunities and challenges for such inclusion in the next section.

In terms of **economic effects**, it must first of all be noted that the principle of free circulation, in a customs union, does not of necessity extend to regulatory issues and controls. An EU-UK customs union would not do away with the need to manage future regulatory divergence. A customs union achieves free circulation in customs terms – no tariffs are applied to any of the goods crossing the respective borders, and therefore no customs controls are required. But the EU would need to apply the full range of its laws and regulations governing imports and exports which are *not* of a customs nature. That includes the controls on imports and exports which are required at the EU’s external borders, before bringing products onto the market. In itself, the customs union model does not obviate the need for such controls, which will involve a very significant change compared to the current, frictionless trade, characterized by the absence of any and all border controls.

In this sense it is not clear how a customs union agreement would achieve the further protection of the Good Friday Agreement, and comply with the Joint report of Phase 1 of the Brexit negotiations. Paragraph

³⁶ Joel Trachtman, ‘Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT’, SSRN, 22 April 2002.

³⁷ Md. Rizwanul Islam and Shakwat Alam, ‘Preferential trade agreements and the scope of GATT article XXIV, GATS article V and the enabling clause: An appraisal of GATT/WTO jurisprudence’, (2009) 56(1) Netherlands International Law Review 1.

43 of the Joint report recalls the UK's commitment to avoid a hard border, "including any physical infrastructure or related checks and controls". A mere customs union with free circulation will clearly be inadequate, because the EU will not be able to give up on checks and controls on imports from third countries, required by its internal market legislation.

As regards **flanking policies**, a customs union would require an effective and well-functioning competition policy (including state aids) for the EU to be guaranteed that barriers to trade are not re-introduced by private undertakings abusing a dominant position and participating in a cartel, and that a level playing field is maintained in terms of state aids and public procurement. These flanking policies would seem to constitute an indispensable protection against the risks created by regulatory divergence. A customs union cannot operate trade protection instruments (anti-dumping and anti-subsidy) at the border, and the EU will want to be reassured that it is not locked into a customs union with a major economy which could use its regulatory sovereignty to compete through deregulation ("Singapore on the Thames"). The EU may therefore seek agreement on further flanking policies, including in the social, environmental and indeed tax policy fields.

Dispute settlement in a customs union is likely to be intergovernmental, if current models are adopted. That will be a far cry from the present system of full integration of EU law in domestic law, with the ECJ ensuring uniformity of interpretation. A customs union agreement could be complemented with a bilateral investment agreement, which could have its own system of dispute settlement.

3.3 A deep and comprehensive FTA

Of all the available models, the deep and comprehensive FTA (DCFTA) is the model which appears to be preferred by the UK government. It therefore deserves a closer and more articulated analysis.

On the **legal side** it may first be noted that, as a trade agreement, a DCFTA could, in principle, come within the EU's exclusive competence under the TFEU provisions on the common commercial policy (CCP, Art 207). That would mean that the agreement could be concluded by the EU acting alone. However, this depends on how deep and comprehensive the FTA will be.

The ECJ recently further clarified the scope of the CCP, and of the EU's exclusive competence, in Opinion 2/15 on the EU-Singapore FTA (EUSFTA).³⁸ The Opinion is read by most commentators as accepting a relatively wide scope of the CCP, but it is not unlimited. Two limitations are particularly relevant.

The first concerns the inclusion of investor protection, and the related dispute settlement provisions. The ECJ found that only foreign *direct* investment comes within the scope of the CCP. Indirect investment (often referred to as portfolio investment) is not part of the CCP. That does not mean that it is not within EU competence at all: the Court established that the EU may conclude agreements on foreign indirect investment pursuant to its competences in the field of capital movements (Art 63 TFEU). Those competences are shared, however, not exclusive.³⁹ This has the effect of leaving the question whether such agreements are concluded by the EU alone, or as a mixed agreement, at a political level. The practice is of course that, when EU law allows for a mixed agreement, the Council is likely to prefer that.

There is a further limitation in the field of investor protection. The EUSFTA set up a dispute settlement system, which allows investors to bring their claims directly to the international level, thereby bypassing the domestic court system. The ECJ established that such a system, which effectively removes cases from the jurisdiction of domestic courts, requires the Member States' consent.⁴⁰ The Member States need to give their consent to a dispute settlement system which does not require the exhaustion of local remedies.

³⁸ Opinion 2/15 re EU-Singapore FTA EU:C:2017:376.

³⁹ Opinion 2/15, paras. 240-241.

⁴⁰ Opinion 2/15, paras. 285-293.

This means that an EU-UK DCFTA which includes investor protection is likely to be a mixed agreement. It would definitely be useful to consider including an investment protection chapter in such an agreement, particularly as the right of establishment and the freedom to provide services can be assumed to be lost in an agreement which comes within the trade liberalization paradigm.

The second limitation, implied by Opinion 2/15, concerns harmonization and regulatory alignment or convergence. The ECJ accepted that the EUSFTA provisions laying down respect for certain minimum standards of environmental and social protection could be included on the basis of the EU's CCP competence.⁴¹ However, the EUSFTA does not set up any regulatory harmonization or alignment system. The minimum standards it refers to do not harmonize the laws of the EU Member States. An EU-UK system to guarantee continued convergence – whether called harmonization or alignment – does in all likelihood not come within the EU's exclusive CCP competence.

The conclusion is that an EU-UK DCFTA is likely to be a mixed agreement, and will therefore require ratification by all Member States.

The next question to address is whether it is possible to construct a DCFTA which, although on the face of things coming within the trade liberalization paradigm, maintains elements of the **market integration** paradigm – or would even come mainly within that paradigm. The UK government appears to be insisting that this should be possible, with the argument that there is, at present, full convergence, and that all that is needed is to manage the gradual divergence between the EU's and the UK's regulatory frameworks. The EU's response is that the UK government's red lines preclude this.⁴²

As analysed above, mere convergence of domestic regulations is insufficient for removing barriers to trade and investment. The EU's internal market project has shown that a lot more is required. The central requirement is a system of mutual recognition. Domestic regulations may be completely convergent, if they are not mutually recognized as such, national authorities will continue to demand full compliance with domestic regulations. Moreover, product and market regulations constantly evolve, and there is therefore a need for a dynamic system to manage the continued convergence or alignment.

Could this be done, outside the internal market and its institutions? In the absence of greater clarity about how a convergence/recognition system would work, all that can be done at this stage is to reflect on what some of the basic requirements would need to be, particularly from an EU perspective.

- If the convergence is to be non-universal, but rather limited to certain parts of the trade and economic relationship, or to some but not all sectors, then the choice of what is included will need to be guided by what is in both parties' interests. To translate that into straight language, with an example: if the UK insists on including financial services, the EU should be able to have free movement of labour included.
- The convergence would largely need to be a one-way street: the UK converging with EU regulations, and not a negotiation between equals. For the EU this is clearly an imperative. As a Member State the UK has been one of 28, and has had to accept, like any other Member State, that the EU legislative process is a complex system in which no single Member State has the final say. The EU must be able to maintain the autonomy of its political and legislative system, and could not accept to negotiate about convergence with a former Member State on a basis of equality.
- There would need to be strong legal guarantees that the convergence is meaningful, and such as to allow mutual recognition to function. Those guarantees would need to extend to the enforcement of the agreement, also at a domestic level. It is difficult to see how a strong convergence/recognition system could work without the direct effect of the agreed rules.

⁴¹ Opinion 2/15, paras. 163-167.

⁴² Slide presented by Michel Barnier, European Commission Chief Negotiator, to the Heads of State and Government at the European Council (Article 50) on 15 December 2017.

- The jurisdiction of the ECJ would need to be recognized, in the sense that the ECJ has ultimate authority to interpret the product and market regulations with which the UK has agreed to converge. Any system of EU-UK dispute settlement could not affect the ECJ's jurisdiction and interpretative authority. It would also have to ensure that the UK is held to its commitments.
- There is a connection between tariff-free trade and convergence, particularly in a sector such as agriculture where there are significant tariff barriers. The EU may for example want to be guaranteed that the UK's agricultural support system does not diverge from the EU's system in such a way as to give the UK a competitive advantage in mutual trade.
- The EU will need to insist that the convergence extends to significant flanking policies, which include competition, state aid, public procurement, social and environmental policies. Given the size of the UK economy, and its competitiveness, the EU will want to be fully reassured that a level playing field is maintained. It will not want to set up a convergence/recognition system which allows the UK to gain a competitive advantage in certain industries or sectors, whilst maintaining full or even significant access to the internal market.

Some kind of convergence/recognition system would be indispensable if the DCFTA is to be meaningful as regards **trade in services**. As has been stated *ad nauseam* in the public debates about the future trade relationship, an FTA, even if it is as advanced as the one with Canada, does not offer much in terms of actual services trade liberalization. The reason is that the main barriers to trade in services result from the divergence in regulation of service products and markets – as analysed above.

It is beyond the scope of this study to explore the opportunities for setting up a convergence/recognition system in specific services sectors. Clearly the complexities are not to be underestimated. As a particularly relevant example, it may be useful to consider financial services. Proper financial regulation is obviously critical for maintaining financial stability, as the financial and Eurozone crises have exemplified. The EU's response has been to become ever more sophisticated in its financial regulatory policies – think only of the Banking Union project and the growing role of its regulatory agencies. These policies continue to be under construction, and are connected to the even more significant project of reforming Eurozone governance, so as to reduce the risks posed by future financial crises. The City of London, on the other hand, is a world financial centre, with its own long history of financial regulation, and the UK has its own currency and central bank. As Moloney has highlighted, the UK's approach towards policy-making is generally oriented towards market-making, whereas the overall EU approach focuses on market-shaping and has a stronger regulatory bias.⁴³ Once outside the EU, the UK may want to further develop its own regulatory profile and focus. The complexities of running a convergence/recognition system in such a multidimensional regulatory environment, outside the EU and the internal market with its unifying institutions, will be clear to all.

That does not mean that nothing can be done in the sphere of services, even if a meaningful convergence/recognition system is not adopted. Some barriers to trade in services are not of a regulatory nature, and it is possible to include some services sectors in a trade agreement. One example is air transport. The EU has an Open Skies agreement with the US, opening up transatlantic air transport,⁴⁴ and there is a European Common Aviation Area which associates a number of European third countries to the internal market in air transport.⁴⁵ These initiatives are aided by the fact that traffic rights are not subject to GATS, and there is therefore no MFN rule. In other sectors more care would need to be taken to ensure that the agreed liberalization does not violate GATS, and complies with its provisions on economic integration (Article V – allowing for a derogation from MFN), and on recognition (Article VII).

⁴³ Niamh Moloney, 'Brexit and EU financial governance: business as usual or institutional change?', (2017) 42 (1) European Law Review 113-114.

⁴⁴ Air Transport Agreement between the EU and its Member States and the United States of America, OJ L 134/4, 25.5.2007.

⁴⁵ Multilateral Agreement on the establishment of a European Common Aviation Area, OJ L 285/3, 16.10.2006.

All in all it remains very doubtful whether the general framework of an FTA lends itself to setting up an effective and satisfactory system of managing convergence and divergence, in the way the UK government appears to be conceiving of it. If that goal proves unattainable, the DCFTA can only be similar to agreements like CETA, which are FTAs which for regulatory matters do little more than to stimulate cooperation between regulators. Such an agreement would be completely within the trade liberalization paradigm.

The **economic effects** of what some call “Canada Dry” will no doubt be very significant. A mere FTA does not allow for “frictionless” trade, and requires border controls, not just for regulatory, but also for customs purposes. Traders will need to comply with (no doubt complex) rules of origin. That in itself risks hugely undermining many, if not most current supply chains which stretch across the Channel. That will have knock-on effects on investment, particularly in the United Kingdom, because such investment will no longer provide full and automatic access to the whole of the EU internal market. Significant public investment will be needed, both in the UK and in UK-facing Member States, to set up border controls on trade.

A Canada Dry agreement would also not guarantee a borderless Ireland, unless a special trade and economic framework were created for the island – one which does not extend to Great Britain.

It is beyond the expertise of this author to calculate the potential economic effects of a Canada Dry FTA – that must be left to economic modellers. However, whether such modellers are capable of factoring into their equations the effects of unravelling existing economic relationships, and of the degree of legal uncertainty which such unravelling creates, is open to debate. It is perhaps appropriate, in that context, to borrow from WTO language. The WTO dispute settlement system, designed to ensure the enforcement of WTO agreements, is expressly aimed at ensuring the “security and predictability” of the multilateral trading system.⁴⁶ In the absence of such security and predictability – which arguably the transition from internal-market participation to a Canada Dry FTA would threaten – there are potentially huge effects on investment and business sentiment. They would primarily affect the UK, but are also likely to be substantial for the EU itself.

There is finally the issue of **dispute settlement**. The DCFTA would benefit from a strong dispute settlement mechanism, particularly in a version which offers more than CETA in terms of addressing issues of regulatory convergence and recognition. It is one thing to conclude ambitious international agreements; it is quite another to enforce such agreements, to ensure that they become as relevant as they are intended to be, and to turn them into a living instrument which can be relied on effectively. The EU cannot at present claim that the dispute settlement mechanisms which it has included in its trade agreements with third countries are a huge success: they have simply not been used, in the sense that there are no decided, reported cases. On one view that could be defended as showing that the agreements do not raise any major issues, but such an assumption is rather unrealistic. However, this is not just an EU phenomenon. Notwithstanding the panoply of FTAs, across the globe, trade disputes are often brought before the WTO, even when they concern trade between two parties to an FTA.⁴⁷

The more recent EU practice is to mimic the WTO system, by providing for a dispute panel which has jurisdiction to hear disputes. It is questionable whether such a system would have the capacity to deal with the complexity of the DCFTA, particularly on the convergence/recognition side. Obviously, the DCFTA may also provide for investor protection, and set up an ISDS system. Such a system would enable private investors to ensure compliance with at least part of the DCFTA. Whether this is politically attractive is a different matter, as it would send a strong signal that the agreement protects the usual actors in ISDS, namely large companies, but not SMEs and individual traders who cannot afford the costs involved. The

⁴⁶ Art 3(2) Dispute Settlement Understanding.

⁴⁷ See e.g. Canada-US and US-Mexico disputes.

EU side is likely to propose different models for dispute settlement, such as an ICS (Investment Court System) as provided for in the CETA agreement, or to bring dispute settlement under the competence of a future MIC (Multilateral Investment Court).

The contrast between trade panels and investment arbitration, on the one hand, and the current system of decentralized enforcement of EU law, focused on the rights it confers on any individual or company, is enormous. Whatever the substance of an EU-UK agreement, even the mere move from the current system to one where the actual legal enforcement of the law which governs EU-UK trade and economic relations becomes rarefied international law is enormous, and would constitute a great loss. It is therefore worth exploring whether a more developed system could be conceived of.

This is first of all connected to the question of the domestic legal status of the DCFTA. If the EU (and the UK) insist that such an agreement should not have direct effect in their respective domestic legal orders, it makes little sense to reflect about a more decentralized system of enforcement which would involve domestic courts and tribunals. The incorporation of the agreement in domestic law, by contrast, would ensure that it becomes a living instrument, with real bite and effect.

The availability of the EFTA Court is also worth exploring. It should not be beyond the wit of the negotiators to find a way to enable the EFTA Court to hear cases on the EU-UK agreement, including on references from UK courts. At any rate, there is scope for further work to be done on what a well-functioning dispute settlement system could look like.

3.4 The WTO option

The UK is a member of the WTO, as are the EU and all the other EU Member States. The **legal position** is therefore that, once the UK leaves the EU, it assumes full responsibility for its own trade policy and continues to be subject to all its WTO law obligations. There are tariff schedules which apply to imports into the UK: the EU's schedule; and there are services schedules: the EU/Member States GATS schedules. There are commitments in the sphere of agricultural support policies (AMS), which again are the EU's commitments.

As long as the UK does not seek to modify any of these commitments, the transition can be relatively smooth. The main problem appears to be so-called tariff-rate quotas (TRQs), which apply in particular to certain agricultural imports. Such TRQs provide for differentiated tariffs, with a lower tariff applying to a quota-restricted annual volume of imports. TRQs are, in terms of the exporting countries benefiting from them, divided between major suppliers. The EU and the UK have in fact started the process of dividing the TRQs in an EU and a UK part, and already seem to be running into political problems with the third countries concerned.⁴⁸ How easily those problems can be resolved remains to be seen, but it may be noted that TRQ issues, even if they appear minor in the grander scheme of world trade, can lead to protracted conflict and even a trade war: the EU's 1993 banana regime essentially installed a new TRQ for Latin American bananas, and ran into huge problems in the WTO.

The TRQ issue has a legal dimension, i.e. the question whether, under WTO law, the splitting up is a mere rectification, or is in the nature of a modification of the existing schedules. In the latter case there is a multilateral process of renegotiation, governed by Art XXVIII GATT.⁴⁹ It has been argued that the correct legal analysis is that the UK could use the rectification route,⁵⁰ but this disregards the political reality of

⁴⁸ See Hans Von Der Burchard, 'US rounds on Britain over food quotas as post-Brexit trade woes deepen', Politico, 4 October 2017, available at <https://www.politico.eu/article/us-rounds-on-britain-over-food-quotas-as-post-brexit-trade-woes-deepen/> (accessed 15 February 2018).

⁴⁹ For more details see Petros Mavroidis, *The Regulation of International Trade Vol 1 – GATT* (MIT Press 2016) 174-187.

⁵⁰ Lorand Bartels, 'The UK's status in the WTO after Brexit', SSRN, 22 September 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747.

WTO decision-making. As the first reactions to the EU-UK proposals for splitting the TRQs have shown, other WTO members are likely to raise questions which will make a form of negotiation next to inevitable.

Similar questions may arise in connection with the Agreement on Agriculture, and the disciplines it installs as regards agricultural subsidies. For so-called Amber Box subsidies, WTO members agreed an Aggregate Measurement of Support (AMS), putting a cap on such subsidies. Again, the AMS would need to be divided in some way between the EU and the UK, and again it is not difficult to see scope for contestation and therefore further negotiation.

Obviously, as soon as the UK should like to modify some of its tariff and services concessions (in the sense of increasing the level of protection), there would be a wider re-negotiation, in which also the EU would no doubt need to get involved.

The UK would also need to join the Government Procurement Agreement (GPA), if it so wishes. That agreement is not a mixed agreement. The GPA does not involve the same level of market opening as EU public procurement law.

All in all, the transition to full WTO membership is in legal terms probably the lesser Brexit difficulty. The **political** difficulties revolve around the need for a wider WTO negotiation, dependent on the above parameters.

However, if no trade agreement were to be concluded between the EU and the UK for the *post* Brexit relationship, trade between them would have to be conducted on WTO terms. This would no doubt be a hard landing, on both sides, and the **economic effects** would in all likelihood be very significant indeed. Those effects would be the result of a number of changes to the trading relationship, which would include:

- Full tariffs in EU-UK trade (the weighted average for industrial goods is low, but there are of course tariff peaks; and tariffs for food and agricultural products are substantial)
- The cumulated effects of tariffs on complex supply chains
- The introduction of border controls, both for customs and regulatory purposes
- The potential application of trade protection measures (safeguard measures, and anti-dumping and anti-subsidy duties)
- The full application, to UK goods and services, of the EU's regulatory regime for trade with third countries – no mutual recognition whatsoever, not even in the sphere of conformity assessment
- The uncertainties around the UK's regulatory regime, as applied to imports from the EU
- The loss of public procurement liberalization
- The loss of internal market liberalization in the services sector (e.g. transport, telecommunications, financial services, to name but some)
- Potential interference with choice of law and enforcement of judgments

Again there can be no attempt here to model the effect of those changes, but the author should like to reiterate that economic modellers may well underestimate the potential economic damage.

In terms of **dispute settlement** the WTO option would force the EU and the UK to resolve disputes in the WTO. The paradigmatic differences between the enforcement of EU internal market law and of WTO law are set out above. In more practical terms, the contrast is huge, and includes the following differences:

- No direct access to dispute settlement by private parties
- Enormous differences in capacity. WTO dispute settlement has worked well, and deals with a large number of cases, but this on a worldwide scale. Applied to the EU-UK relationship the capacity constraints would be considerable: it is in practice impossible to take all potential disputes to the WTO.
- No independent enforcement, analogous to the Commission's role.

- No automatic enforcement of rulings: they are not binding in domestic law, and the only sanction is retaliation, which may be as costly to the winners as it is to the losers.
- The precarious nature of WTO dispute settlement in terms of political challenge: witness the Trump administration's refusal to appoint Appellate Body members, and the potential effects on the independence of panels and the AB – or even the very survival of WTO dispute settlement.

4 The status of EU-third country trade agreements post Brexit

4.1 The legal position

The UK is currently bound by the provisions of any and all trade agreements concluded by the EU, with third countries. Such agreements may have been concluded by the EU, acting alone. These agreements are binding on the Member States by virtue of Art 216(2) TFEU. However, the majority of trade agreements are concluded as mixed agreements. Such agreements are binding on the Member States, not only by virtue of Art 216(2), but also on the basis of each State's signature and ratification. The justification for mixed agreements is that it is accepted that they may contain provisions which are not within EU competence, and which could therefore not be concluded by the EU acting alone. It is therefore useful, in what follows, to distinguish first between what we will call pure EU agreements, and mixed agreements. It may be added that this is a complex area of law, and that this study does not purport to address all the different types of agreements and their permutations, or all of the legal questions to which they give rise.

Pure EU agreements will cease to bind the UK at the point in time Brexit takes place (scheduled to be 29 March 2019 – though that date may still change). This is on the understanding that Art 216(2) TFEU will no longer apply to the UK. The transition period, currently under negotiation, may provide otherwise, and that eventuality is considered below. If Art 216(2) no longer applies to the UK, there is no further legal basis for a pure EU agreement to bind the UK, pursuant to EU law; and as the UK never concluded those agreements itself, there is no basis under international law either. That position is reflected by the terms of these agreements, which as a rule provide that they apply in the territories of the Member States of the EU. Once the UK is no longer a Member State, by definition the agreement no longer applies, and the third-country contracting party will have no further obligations with respect to trade with the UK.⁵¹

For **mixed agreements** the position is more complex, as there are various types of mixed agreements.

First, there is a difference between mixed agreements which give some indication of the division of competences between the EU and the Member States, for example through a "declaration of competences",⁵² and mixed agreements which do not do so. The latter approach is the one adopted most frequently, particularly in the trade and economic field. There is academic debate about the relevance of this distinction, but in international legal practice there is in any event a generally accepted understanding that mixed agreements are binding, in their entirety, on the EU and each of the Member States.⁵³

Second, some mixed agreements, particularly of the multilateral kind, contain a so-called disconnection clause. The effect of such a clause is that the commitments entered into by the parties, which on the EU side include each Member State, do *not* apply in intra-EU relations.⁵⁴ Where such a clause is not included, a mixed agreement normally does create such intra-EU commitments. A good example is the Energy Charter Treaty (ECT), which includes investor protection provisions which are currently being litigated in several cases involving an investor from one EU Member State challenging conduct by another Member State.⁵⁵

However, and third, many mixed agreements, particularly in the trade field, do not need a disconnection clause, because they are drafted in a bilateral way, with the EU and its Member States defined as in essence

⁵¹ See the annex to this study with an overview of the EU's trade agreements, and their respective provisions on contracting party status and territorial application.

⁵² UNCLOS is an example.

⁵³ See e.g. Case C-53/96 *Hermès v FHT* EU:C:1998:292.

⁵⁴ E.g. CoE-OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Strasbourg, 25 January 1988, Article 27(2); CoE Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, Article 26(3).

⁵⁵ See Opinion of Advocate General Wathelet in Case C-284/16 *Achmea* EU:C:2017:699.

one party, and the third country or countries concerned as the other party. The usual formulation for this is to define the EU and its Member States as parties, “on the one hand”, and the other contracting parties “on the other hand”. Furthermore, the EU’s trade agreements define the territories to which they apply in an analogous way, speaking “on the one hand”, of “the territories in which the TEU and the TFEU are applied”, and “on the other hand” of “the territory of” the non-EU contracting party or parties.⁵⁶ Furthermore, it is clear from the very terms of these agreements that, in matters of trade, they are bilateral in the sense of covering imports into and exports from the EU’s unified customs territory. These agreements clearly do not purport to create obligations between the EU’s own Member States: those trade relations are governed by EU internal market law.

What is the legal fate of these mixed agreements *post* Brexit? With that we mean the legal position, of the parties concerned, in the absence of any negotiations between them, or any amendments or protocols. Here it is indispensable to make a distinction between mixed agreements – including nearly all trade agreements – which are essentially bilateral in nature, and those which are not.

Let us start with an example of the latter. UNCLOS is a mixed agreement which clearly contains provisions which are within EU competence, and provisions which are within Member State competence (for example on territorial waters and exclusive economic zones). The UK is at present bound by UNCLOS, both by virtue of Art 216(2) TFEU and by virtue of its own signature and ratification. Once it has left the EU, the latter legal basis for continuing to apply UNCLOS continues to exist. The other contracting parties to UNCLOS have not made the UK’s party status conditional on its EU membership. Going forward, instead of there being a division of competences between the EU and the UK in the matters included in UNCLOS, the UK will need to assume the full extent of its UNCLOS obligations.

However, the same conclusion cannot be reached for the large majority of the EU’s trade agreements, precisely because of their essentially bilateral nature, and the way in which they lay down their territorial field of application. If one takes for example the EU-Korea FTA, even though the UK has signed and ratified that trade agreement, its very terms suggest that it does not continue to apply *post* Brexit: the UK is then no longer a territory in which the TEU and the TFEU apply. The position would therefore seem to be that, although the UK is a signatory to the agreement, none of its provisions will continue to apply to Korea-UK trade. In practical terms, this means that Korea could deny exports from the UK the benefits of tariff-free access to Korean territory. Whether, in the real world, Korea or any other third country, party to a trade agreement with the EU, will modify its trade regime for imports from the UK is difficult to predict. But if they do, they would have strong legal arguments to defend their position. There is, furthermore, a potential legal issue for those third countries which, without any further legal steps being taken with the UK (and possibly the EU), do continue to give preferences to imports from the UK: other WTO members could claim that there is no functioning FTA any longer, and that therefore those preferences fall foul of Art XXIV GATT.

A further complexity is that a transition phase, in the context of the Art 50 withdrawal agreement between the EU and the UK, may extend to the continued application of Art 216(2) TFEU.⁵⁷ The effect of that would be that, under EU law and the withdrawal agreement, the UK would have to continue to apply the relevant trade agreements, even if the third countries concerned argue that they are no longer bound. This is clearly a state of affairs which ought to be avoided.

⁵⁶ See e.g. the EU-South Korea Free Trade Agreement, Article 15.15.

⁵⁷ See the draft Withdrawal Agreement of 28 February 2018 (available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf).

4.2 Options

4.2.1 Transition

In terms of options open to the EU and the UK to resolve the uncertain legal status of bilateral trade agreements, it is useful – even necessary – to distinguish between a transition (or implementation period) and the future relationship. The assumption here is that the EU's position on the transition period will be adopted, i.e. that the UK will continue to be bound by all of its EU law obligations, in exactly the same way as any Member State, but without representation in the EU institutions.

This would mean that also the EU customs union continues to extend to the UK, and that, as a matter of EU law, the UK continues to be bound by the EU's trade agreements. The non-EU contracting parties could, conceivably, ask questions, even in that scenario. They could point out that their agreement no longer appears to apply to the UK, as it is no longer an EU Member State. However, in trade and economic terms absolutely nothing would change for the exports and trade relationship of these third countries. The UK would continue to apply the EU's CCP; imports into the UK would continue to be treated in exactly the same way as before Brexit; and goods from the third countries concerned, once imported into the UK, would continue to benefit from free circulation in the EU internal market.

In this scenario it would be preferable for the EU and the UK to speak to the third countries concerned, and to reach an agreement (which could be done by simple exchange of letters) that in the course of the transition all parties continue to apply the trade agreements as before. The EU and the UK could point out that the transition effectively means that, in substance, the TEU and TFEU continue to apply in UK territory.

4.2.2 Beyond transition

The position becomes very different after the transition period, particularly if that leads to the UK leaving the customs union and the single market, and to trading with the EU under an FTA or under WTO rules. This could lead third countries to argue that their FTA, in so far as it applies to exports to the UK, has effectively been devalued.

Box 6 – An EU-Japan FTA, Brexit, and car manufacturing

Japanese investment in the UK – particularly in the car industry – is emblematic of the concerns that third countries and their industries have over Brexit. There is substantial investment by Japanese carmakers in the UK, particularly in the form of a number of car assembly plants, whose output supplies not just the UK but also the wider European market. That trade is currently completely frictionless. Insofar as the UK-based plants import parts and components from Japan, the EU's tariffs apply.

An EU-Japan FTA (currently under negotiation), in combination with Brexit, results in the following scenarios:

1. The UK remains in a customs union with the EU, and also benefits from the terms of the EU-Japan FTA, which is extended to its territory.
2. The UK has an FTA with the EU, and either does or does not manage to conclude its own FTA with Japan.
3. The UK trades with the EU and Japan on WTO terms.

In the first scenario, the UK-based Japanese producers benefit as much from the terms of the FTA with Japan as car producers based in the rest of the EU. Imports of car parts from Japan will become cheaper, and exports of cars to the EU are not subject to any trade restrictions. Nevertheless, supply chains may be affected if the UK is no longer in the internal market, because of divergent product regulations and the need to obtain EU type approval and conformity assessment.

In the second scenario, the Japanese UK-based manufacturers will need to comply with the EU-UK FTA's rules of origin, when exporting cars to the EU, to avoid the EU's 10% tariffs. If the UK has no FTA of its own with Japan, this will mean that a UK-based Japanese car manufacturer will a) not benefit from tariff-free imports of parts from Japan, and b) not benefit from tariff-free trade throughout the EU, without having to comply with any rules of origin. In addition, the comment on supply chains (see scenario 1), also applies. EU-based manufacturers will, by contrast, have all these benefits. If the UK does have its own FTA with Japan, UK-based manufacturers will also have benefit a), but not benefit b).

In the third scenario, UK-based Japanese manufacturers will be subject to considerable competitive disadvantages. There will be tariffs on imports of parts and components from Japan, on imports of parts and components from the EU (unless the UK liberalizes unilaterally), and on exports of assembled cars to the EU market. In addition, NTBs will apply to UK-EU trade. EU-based manufacturers will not suffer from any of these disadvantages.

Given how price-sensitive the car industry is, it is safe to conjecture that particularly the second and third scenarios will have a huge effect on future investment decisions. It may be noted that, already, investment in the UK car industry appears to have suffered from Brexit, even if there have as yet been no changes to the terms of trade whatsoever.

It is clear that the UK government's position is that it wishes to continue to apply, and benefit from the FTAs concluded by the EU. However, *post* transition it will be difficult to maintain the position that, effectively, nothing has changed. The legal position will clearly be different, as the UK will no longer be an EU Member State, and will not be able to claim that EU law continues to apply in its territory. And, depending on the terms of trade agreed between the EU and the UK in the agreement on the future trade relationship, the UK will be more or less dissociated from the EU internal market. If there is no customs union, exports to the UK will not gain free circulation throughout the EU. Exports of intermediate goods, to be incorporated in final products, may suffer from the fact that those final products may not benefit from access to the EU internal market (depending on the relevant rules of origin, in case of an FTA).

As can be seen, the effect on exports, to the UK, from third countries which benefit from a free trade agreement with the EU will depend enormously on the future terms of EU-UK trade. Third countries fully realize this, and it has been widely reported that many of them will first want to see what those terms will look like, before engaging in actual negotiations with the UK. One can assume that this applies just as much to the third countries benefiting from existing EU FTAs, as to "new" trading partners which the UK has in its sights.

For the EU, too, a lot depends on the future terms of trade. If the UK joins a customs union with the EU, the UK will of necessity need to have an external trade policy which is very similar to the EU's trade policy. One occasionally reads comments to the effect that there could be a customs union which gives the UK more freedom to conclude its own trade agreements. However, it is difficult to see how that could be reconciled with the very concept of a customs union, as defined in Art XXIV GATT.

If the, or "a" customs union is maintained, it will also be in the EU's interest to support the UK in seeking to maintain the current FTAs with third countries. However, if the future terms of trade consist of an FTA or trading on WTO terms, it is difficult to see how it would be in the EU's interest to support the UK in its quest for keeping the benefits of the trade agreements which the EU currently has. A dispassionate calculation of trade and economic advantage points in the opposite direction. FTAs clearly encourage direct investment, particularly by manufacturing companies, in the respective territories of the FTA. Competition for such investment may lead the EU not to support the UK's policy.

Would there be any risks that third countries also want to reopen the terms of their FTAs with the EU, post Brexit? That is probably less likely. It is true that the EU market becomes somewhat smaller, thereby reducing some of the FTA benefits. However, the exports from the EU are reduced correspondingly. One could expect the EU to take the position that the UK's departure does not fundamentally change the terms of the FTA.

5 Conclusions

This study has looked at the different options for the future EU-UK trade and economic relationship through the prism of two essential paradigms: market integration and trade liberalization. It is difficult to see, for a host of conceptual, legal, institutional and political reasons, to what extent any intermediate models are available. The stark choice is between a form of continued membership of the internal market, through the EEA or some comparable agreement, and a customs union or free trade agreement which abandons the integration of the UK and EU markets. That integration is characterized by full participation in the EU regulatory system, and is a comprehensive package of the four freedoms, EU trade and economic legislation, and flanking policies in the fields of competition, state aid, public procurement, and beyond (environmental, social and consumer protection policies). It requires a strong rule of law, in terms of incorporation of the relevant rules in domestic law, and their effective enforcement, subject to supranational dispute settlement.

It is particularly noteworthy that the trade liberalization paradigm offers little in the sphere of trade in services. That is not a contingent phenomenon. Rather, it is a function of the basic fact that barriers to trade in services are predominantly of a regulatory nature. The market integration paradigm is capable of overcoming the deeply embedded regulatory divergence, along jurisdictional lines, which characterizes services regulation – though as the EU internal market experience shows, not with complete success. At the wider international level the trade liberalization paradigm has largely failed in ensuring deep liberalization, which would require a high degree of harmonization/convergence/alignment. Those sceptical of trade liberalization may reply that the so-called neoliberal policies leading to privatization and liberalization of certain services sectors prove otherwise. However, these policies have not been driven by agreements coming within the trade liberalization paradigm, but are to a large extent the product of certain market and political forces.

It is clearly also in the EU's interest to promote and negotiate a deep and comprehensive trade and economic relationship with the exiting UK. There are however legal and institutional restraints which cannot be overcome without upsetting the EU's very successful current construction of an integrated market. Associated to those constraints, there are clear political imperatives, which are well known, in terms of not allowing an exiting Member State to cherry-pick and gain advantages not available to non-exiting Member States.

This study has also attempted to analyse the fate of existing trade agreements, concluded by the EU. There is a level of complexity here to which there are no easy answers.

Beyond these general conclusions, the choices are largely political. However, from the perspective of the author of this study – a legal academic – it is particularly deplorable that the Brexit phenomenon is characterized by such a strong rejection of the role of “common” law in matters of trade and economic cooperation and integration in Europe. The UK rejection of the role of the ECJ, and the desire to take back control, mean a return to intergovernmentalism and a model of international relations characterized by power politics rather than democratic deliberation resulting in shared law.

Annex

EU Trade Agreements: definition of “parties” and “territory”

According to the European Commission website,⁵⁸ there are three main types of trade agreements:

1. Customs Unions
 - eliminate customs duties in bilateral trade
 - establish a joint customs tariff for foreign importers.
2. Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements
 - remove or reduce customs tariffs in bilateral trade.
3. Partnership and Cooperation Agreements
 - provide a general framework for bilateral economic relations
 - leave customs tariffs as they are.

The table below includes the treaties negotiated by the Commission that are currently in place, or partly in place, as per the website (with minor corrections). The bilateral treaties are categorised as mixed/not mixed, and for the mixed bilateral treaties, the table contains the definitions of “parties” and “territory”.

Out of the treaties with 72 countries,⁵⁹ in force or partly in force, 33 are bilateral. Out of the bilateral treaties, 27 are mixed agreements.⁶⁰ However, a caveat should be entered with respect to the Turkey Customs Union – while the document setting up the customs union, namely a Decision of the EC-Turkey Association Council, is not mixed, the initial agreement setting up the Council is mixed. For this reason, the agreement with Turkey will be analysed separately.

Out of the 27 mixed bilateral agreements:

- Parties: The following definition, or an identical one in the relevant parts, appears in 26 agreements:⁶¹ *“the term ‘Parties’ shall mean the Community, or its Member States, or the Community and its Member States”* followed by *“in accordance with their respective powers”* or *“within their respective areas of competence”*;⁶²
- Territory: in relevant part, all 27 agreements contain definitions with the following content or similar *“territories in which the Treaties [establishing the European Community and the European Atomic Energy Community] are applied and under the conditions laid down in those Treaties”* (the portion between square brackets varies, depending on the period in which the agreement was concluded).

The situation of Turkey is different. Considering that the Decision establishing the Customs Union stems from the Ankara Agreement, the latter will be analysed. Although the definition of “parties” varies depending on the context in the treaty (as per the interpretative note), Article 1 is particularly relevant in delimiting the scope of the Agreement: *“By this Agreement an Association is established between the*

⁵⁸ http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place, accessed on 12 December 2017.

⁵⁹ The website lists treaties with 77 countries as being in force or partly in force. However, it appears that negotiations with 5 of these countries are still ongoing or the treaties are not in force any longer (i.e. Djibouti, El Salvador, Syria, Sudan, Singapore).

⁶⁰ The bilateral, not mixed, agreements are the ones signed with: Andorra, Faroe Islands, Kosovo, Palestinian Authority, Switzerland, and Turkey.

⁶¹ The only exception is the San Marino Customs Union, which does not include an express definition of “parties”.

⁶² Both these phrasings refer to the same substantive point, therefore having the same meaning.

European Economic Community and Turkey." Consequently, the purpose of the agreement is to establish a connection between the European Union as a whole and Turkey. However, the definition of "territory" complicates the interpretation: *"This Agreement shall apply to the European territories of the Kingdom of Belgium, of the Federal Republic of Germany, of the French Republic, of the Italian Republic, of the Grand Duchy of Luxembourg and of the Kingdom of the Netherlands."* An argument can be made that due to the scope of the agreement and the reference to "European territories", the ordinary meaning and purpose of the agreement would refer to the EU territory.

Agreements in place

| | Agreement | Type | Definitions (parties and territorial scope) |
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| 1. | Albania (Western Balkans) Stabilisation and Association Agreement In force since 2009 | Mixed | Article 131: For the purposes of this Agreement, the term 'Parties' shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and Albania, of the other part. Article 132: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and to the territory of Albania, on the other. |
| 2. | Algeria Association Agreement In force since 01/09/2005 | Mixed | Article 106: For the purposes of this Agreement, 'Parties' shall mean, on the one hand, the Community or the Member States, or the Community and its Member States, in accordance with their respective powers, and, on the other hand, Algeria. Article 108: This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and, on the other, to the territory of the People's Democratic Republic of Algeria. |
| 3. | Andorra Customs Union In force since 01/01/1991 | Not mixed | |
| 4. | Armenia Partnership and Cooperation Agreement In force since 09/09/1999 | Mixed | Article 92: For the purposes of this Agreement, the term "Parties" shall mean the Republic of Armenia, of the one part, and the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, of the other part. Article 98: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties and, on the |

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| | | | other hand, to the territory of the Republic of Armenia. |
| 5. | Azerbaijan Partnership and Cooperation Agreement In force since 1999 | Mixed | <p>Article 95: For the purposes of this Agreement, the term "Parties" shall mean the Republic of Azerbaijan on the one part, and the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, on the other part.</p> <p>Article 101: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the Republic of Azerbaijan.</p> |
| 6. | Bosnia and Herzegovina (Western Balkans) Stabilisation and Association Agreement In force since 01/06/2015 | Mixed | <p>Article 130: For the purposes of this Agreement, the term 'Parties' shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and Bosnia and Herzegovina, of the other part.</p> <p>Article 131: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and to the territory of Bosnia and Herzegovina on the other.</p> |
| 7. | Chile Association Agreement and Additional Protocol In force since 01/03/2005 | Mixed | <p>Article 197 Definition of the Parties: For the purposes of this Agreement, "the Parties" shall mean the Community or its Member States or the Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, on the one hand, and the Republic of Chile, on the other.</p> <p>Article 204 Territorial Application: This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Chile.</p> |
| 8. | Egypt Association Agreement In force since 01/06/2004 | Mixed | <p>Article 88: For the purpose of this Agreement the term 'Parties' shall mean Egypt on the one hand and the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, on the other hand.</p> <p>Article 90: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, and the</p> |

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| | | | European Coal and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of Egypt. |
| 9. | Faroe Islands Agreement In force since 01/01/1997 | Not Mixed | |
| 10. | Georgia Association Agreement In force since 01/07/2016 | Mixed | <p>Article 428 Definition of the Parties: For the purposes of this Agreement, the term ‘the Parties’ shall mean the EU or its Member States, or the EU and its Member States, in accordance with their respective powers as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union and, where relevant, it shall also refer to Euratom, in accordance with its powers under the Treaty establishing the European Atomic Energy Community, of the one part, and Georgia of the other part.</p> <p>Article 429 Territorial application:</p> <ol style="list-style-type: none"> 1. This Agreement shall apply, of the one part, to the territories in which the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and of the other part, to the territory of Georgia. 2. The application of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, in relation to Georgia’s regions of Abkhazia and Tskhinvali region/South Ossetia over which the Government of Georgia does not exercise effective control, shall commence once Georgia ensures the full implementation and enforcement of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, respectively, on its entire territory. 3. The Association Council shall adopt a decision on when the full implementation and enforcement of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, on the entire territory of Georgia, is ensured. 4. Should a Party consider that the full implementation and enforcement of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, respectively, is no longer ensured in the regions of Georgia referred to in paragraph 2 of this Article, that Party may request the Association Council to reconsider the continued application of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, respectively, in relation to the regions concerned. The Association Council shall examine the situation and adopt a decision on the continued application of this Agreement, or of Title IV |

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| | | | <p>(Trade and Trade-related Matters) thereof, respectively, within three months of the request. If the Association Council does not adopt a decision within three months of the request, the application of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, respectively, shall be suspended in relation to the regions concerned until the Association Council adopts a decision.</p> <p>5. Decisions of the Association Council under this Article on the application of Title IV (Trade and Trade-related Matters) of this Agreement shall cover the entirety of that Title and cannot only cover parts of that title.</p> |
| 11. | Iceland (EFTA) Economic Area Agreement In force since 1994 | | [Multilateral] |
| 12. | Israel Association Agreement In force since 01/06/2000 | Mixed | <p>Article 81: For the purpose of this Agreement the term "Parties" shall mean the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, of the one part, and Israel of the other part.</p> <p>Article 83: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the State of Israel.</p> |
| 13. | Jordan Association Agreement In force since 01/05/2002 | Mixed | <p>Article 103: For the purposes of this Agreement the term "Parties" shall mean, on the one part, the Community or the Member States, or the Community and the Member States, in accordance with their respective powers, and, on the other part, Jordan.</p> <p>Article 105: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, and the European Coal and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of Jordan.</p> |
| 14. | Kazakhstan Partnership and Cooperation Agreement In force since 1999 | Mixed | <p>Article 90: For the purposes of this Agreement, the term "Parties" shall mean the Republic of Kazakhstan on the one part, and the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, on the other part.</p> <p>Article 96: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties and, on the</p> |

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| | | | other hand, to the territory of the Republic of Kazakhstan. |
| 15. | Kosovo (UNSCR 1244) Stabilisation and Association Agreement In force since 01/04/2016 | Not mixed | |
| 16. | Lebanon Association Agreement In force since 01/04/2006 | Mixed | Article 88: For the purposes of this Agreement, 'Parties' shall mean, on the one hand, the Community, or the Member States, or the Community and its Member States, in accordance with their respective powers, and Lebanon, on the other hand. Article 90: This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and, on the other hand, to the territory of Lebanon. |
| 17. | Macedonia, Former Yugoslav Republic of (Western Balkans) Stabilisation and Association Agreement In force since 01/04/2004 | Mixed | Article 123: For the purposes of this Agreement, the term 'Parties' shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and the former Yugoslav Republic of Macedonia, of the other part. Article 124: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and to the territory of the former Yugoslav Republic of Macedonia on the other. |
| 18. | Mexico Global Agreement In force since 01/10/2000 | Mixed | Article 55 Definition of the Parties: For the purposes of this Agreement, "the Parties" shall mean, on the one hand, the Community or its Member States or the Community and its Member States, in accordance with their respective areas of competence, as derived from the Treaty establishing the European Community and, on the other hand, Mexico. Article 56 Territorial application: This Agreement shall apply to the territory in which the Treaty establishing the European Community is applied under the conditions laid down in that Treaty, on the one hand, and to the territory of the United Mexican States, on the other. |
| 19. | Moldova Association Agreement In force since 01/07/2016 | Mixed | Article 461 Definition of the Parties: For the purposes of this Agreement, the term 'the Parties' means the EU, or its Member States, or the EU and its Member States, in accordance with their respective powers as derived from the Treaty on European Union and the |

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| | | <p>Treaty on the Functioning of the European Union, and, where relevant, it also means Euratom, in accordance with its powers under the Treaty establishing the European Atomic Energy Community, of the one part, and the Republic of Moldova, of the other part.</p> <p>Article 462 Territorial application:</p> <p>1. This Agreement shall apply, of the one part, to the territories in which the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and, without prejudice to paragraph 2 of this Article, of the other part, to the territory of the Republic of Moldova.</p> <p>2. The application of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, in relation to those areas of the Republic of Moldova over which the Government of the Republic of Moldova does not exercise effective control, shall commence once the Republic of Moldova ensures the full implementation and enforcement of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, respectively, on its entire territory.</p> <p>3. The Association Council shall adopt a decision on when the full implementation and enforcement of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, on the entire territory of the Republic of Moldova is ensured.</p> <p>4. Should a Party consider that the full implementation and enforcement of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, is no longer ensured in the areas of the Republic of Moldova referred to in paragraph 2 of this Article, that Party may request the Association Council to reconsider the continued application of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, respectively, in relation to the areas concerned. The Association Council shall examine the situation and adopt a decision on the continued application of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, within three months of the request. If the Association Council does not adopt a decision within three months of the request, the application of this Agreement, or of Title V (Trade and Trade-related Matters) thereof, shall be suspended in relation to the areas concerned until the Association Council adopts a decision.</p> <p>5. Decisions of the Association Council under this Article on the application of Title V (Trade and Trade-related Matters) of this Agreement shall cover the</p> |
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| | | | entirety of that Title and cannot cover only parts thereof. |
| 20. | Montenegro (Western Balkans) Stabilisation and Association Agreement In force since 01/05/2010 | Mixed | Article 134: For the purposes of this Agreement, the term 'Parties' shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and the Republic of Montenegro, of the other part. Article 135: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and to the territory of Montenegro on the other. |
| 21. | Morocco Association Agreement In force since 01/03/2000 | Mixed | Article 92: For the purposes of this Agreement, "Parties" shall mean, on the one hand, the Community or the Member States, or the Community and its Member States, in accordance with their respective powers, and, on the other hand, Morocco. Article 94: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand to the territory of the Kingdom of Morocco. |
| 22. | Norway (EFTA) Economic Area Agreement In force since 1994 | | [Multilateral] |
| 23. | Palestinian Authority Interim Association Agreement In force since 01/07/1997 | Not mixed | |
| 24. | Russia Partnership and Cooperation Agreement In force since 01/12/1997 | Mixed | Article 104: For the purposes of this Agreement, the term 'Parties' shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and Russia, of the other part. Article 110: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of Russia. |
| 25. | San Marino Customs Union In force since 01/04/2002 | Mixed | [There is no specific provision defining the meaning of "Parties" or "Contracting Parties". However, it is apparent that the EU Member States are referred to as "Contracting Parties" and the EU – then EEC – and San |

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| | | | <p>Marino are referred to as "Parties". I draw this conclusion considering the following:</p> <p>Preamble: "Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino</p> <p>HIS MAJESTY THE KING OF THE BELGIANS, HER MAJESTY THE QUEEN OF DENMARK, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MAJESTY THE KING OF SPAIN, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF IRELAND, THE PRESIDENT OF THE ITALIAN REPUBLIC, HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE PORTUGUESE REPUBLIC, HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, whose States are Contracting Parties to the Treaty establishing the European Economic Community, and THE COUNCIL OF THE EUROPEAN COMMUNITIES, of the one part, and THE REPUBLIC OF SAN MARINO, of the other part"</p> <p>and "Article 1: The purpose of this Agreement between the European Economic Community and the Republic of San Marino is to establish a customs union between the two Parties and promote comprehensive cooperation between them with the aim of contributing to the social and economic development of the Republic of San Marino and strengthening relations between the Parties."]</p> <p>Article 29: This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty and, on the other, to the territory of the Republic of San Marino.</p> |
| 26. | Serbia (Western Balkans) Stabilisation and Association Agreement | Mixed | <p>Article 134: For the purposes of this Agreement, the term 'Parties' shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of</p> |

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| | In force since 01/09/2013 | | <p>the one part, and the Republic of Serbia, of the other part.</p> <p>Article 135: This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Atomic Energy Community are applied and under the conditions laid down in those Treaties, and to the territory of Serbia on the other.</p> <p>This Agreement shall not apply in Kosovo which is at present under international administration pursuant to United Nations Security Council Resolution 1244 of 10 June 1999. This is without prejudice to the current status of Kosovo or the determination of its final status under that Resolution.</p> |
| 27. | <p>South Korea Free Trade Agreement</p> <p>In force since 01/07/2016</p> | Mixed | <p>Article 1.2 General definitions: Throughout this Agreement, references to: the Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Korea; [...]</p> <p>Article 15.15 Territorial application:</p> <p>1. This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the territory of Korea. References to 'territory' in this Agreement shall be understood in this sense, unless explicitly stated otherwise.</p> <p>2. As regards those provisions concerning the tariff treatment of goods, this Agreement shall also apply to those areas of the EU customs territory not covered by paragraph 1.</p> |
| 28. | <p>Switzerland Agreement</p> <p>In force since 01/01/1973</p> | Not mixed | |
| 29. | <p>Syria Co-operation Agreement</p> <p>In force since 01/07/1977</p> | | [not actually in force] |
| 30. | <p>Tunisia Association Agreement</p> <p>In force since 01/03/1998</p> | Mixed | <p>Article 92: For the purposes of this Agreement, 'Parties' shall mean, on the one hand, the Community or the Member States, or the Community and its Member States, in accordance with their respective powers, and, on the other hand, Tunisia.</p> <p>Article 94: This Agreement shall apply, on the one hand, to the territories in which the Treaties</p> |

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| | | | <p>establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand to the territory of the Republic of Tunisia.</p> |
| 31. | <p>Turkey Customs Union In force since 31/12/1995</p> | <p>Not mixed</p> | <p>[Based on the Ankara Agreement, which is a mixed agreement]</p> <p>Ankara Agreement:</p> <p>[Article 1 is relevant: "By this Agreement an Association is established between the European Economic Community and Turkey."]</p> <p>[Definition of "Contracting Parties provided in an interpretative Declaration:] The Contracting Parties agree that for the purposes of the Agreement of Association 'Contracting Parties' means the Community and the Member States or alternatively the Member States alone or the Community alone on the one hand, and the Turkish Republic on the other. The meaning to be given to this expression in each particular case is to be deduced from the context of the Agreement and from the corresponding provisions of the Treaty establishing the Community. In certain circumstances 'Contracting Parties' may; during the transitional period of the Treaty establishing the Community, mean the Member States, and after the expiry of that period mean the Community.</p> <p>Article 29</p> <p>1. This Agreement shall apply to the European territories of the Kingdom of Belgium, of the Federal Republic of Germany, of the French Republic, of the Italian Republic, of the Grand Duchy of Luxembourg and of the Kingdom of the Netherlands on the one hand and to the territory of the Turkish Republic on the other.</p> <p>2. The Agreement shall also apply to the French overseas departments so far as concerns those of the fields covered by it which are listed in the first subparagraph of Article 227 (2) of the Treaty establishing the Community.</p> <p>The conditions for applying to those territories the provisions of this Agreement relating to other fields shall be decided at a later date by agreement between the Contracting Parties.</p> |

Agreements partly in place

| | Agreement | Type | Clause |
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| 1. | Antigua and Barbuda (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 2. | Bahamas (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 3. | Barbados (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 4. | Belize (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 5. | Botswana (SADC) Economic Partnership Agreement Provisionally applied since 10/10/2016 | | [Multilateral] |
| 6. | Cameroon (Central Africa) Interim Economic Partnership Agreement Provisionally applied since 2014 | Mixed | <p>[Agreement between the EU and the Central Africa Party]</p> <p>Article 95 Definition of the Parties and fulfilment of obligations:</p> <p>1. The Contracting Parties to this Agreement shall be the Republic of Cameroon [hereinafter 'Central Africa Party'], of the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community [hereinafter 'EC Party'], of the other part.</p> <p>2. For the purposes of this Agreement, the Central Africa Party agrees to act collectively.</p> <p>3. For the purposes of this Agreement, 'Party' shall refer to the Central African States acting collectively or the EC Party, as appropriate. 'Parties' shall refer to the Central African States acting collectively and the EC Party.</p> <p>4. In cases where individual action is provided for or required to exercise rights or comply with obligations under this Agreement, reference is made to the 'signatory Central African States'.</p> |

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| | | | <p>5. The Parties or the signatory Central African States, as appropriate, shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.</p> <p>Article 100 Territorial application: This Agreement shall apply to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, and to the territories of the signatory Central African States.</p> |
| 7. | <p>Canada Comprehensive Economic and Trade Agreement (CETA)</p> <p>Signed 30 October 2016, provisionally applied since 21/09/2017</p> | Mixed | <p>Article 1.1 Definitions of general application: For the purposes of this Agreement and unless otherwise specified: [...] Parties means, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Canada; [...]</p> <p>Article 1.3 Geographical scope of application: Unless otherwise specified, this Agreement applies:</p> <p>(a) for Canada, to:</p> <p>(i) the land territory, air space, internal waters, and territorial sea of Canada;</p> <p>(ii) the exclusive economic zone of Canada, as determined by its domestic law, consistent with Part V of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 ('UNCLOS'); and,</p> <p>(iii) the continental shelf of Canada, as determined by its domestic law, consistent with Part VI of UNCLOS;</p> <p>(b) for the European Union, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties. As regards the provisions concerning the tariff</p> |

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| | | | treatment of goods, this Agreement shall also apply to the areas of the European Union customs territory not covered by the first sentence of this subparagraph. |
| 8. | Colombia (with Ecuador and Peru) Trade Agreement Signed 26/07/2012, provisionally applied since 2013 | | [Multilateral] |
| 9. | Côte d'Ivoire (West Africa) Economic Partnership Agreement Provisionally applied since 03/09/2016 | Mixed | <p>Article 72 Definition of the Parties and fulfilment of obligations:</p> <p>1. The Contracting Parties of this Agreement shall be the Republic of Côte d'Ivoire, hereinafter the "Ivorian Party" or "Côte d'Ivoire", of the one part, and the European Community or its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, hereinafter the "EC Party", of the other part.</p> <p>2. For the purposes of this Agreement, the term "Party" shall refer to Côte d'Ivoire or the EC Party, as appropriate. The term "Parties" shall refer to Côte d'Ivoire and the EC Party.</p> <p>3. The Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.</p> <p>Article 76 Territorial application: This Agreement shall apply to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, on the one hand, and, to Côte d'Ivoire, on the other hand.</p> |
| 10. | Comoros (ESA) Economic Partnership Agreement Signed 08/2009, not yet provisionally applied | | [Multilateral] |
| 11. | Costa Rica (Central America) Association Agreement with a strong trade component Signed 29/06/2012, provisionally applied since 2013 | | [Multilateral] |

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| 12. | Dominica (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 13. | Djibouti (ESA) Economic Partnership Agreement Signed 08/2009, not yet provisionally applied | | [Under negotiation/Multilateral] |
| 14. | Dominican Republic (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 15. | Ecuador (with Colombia and Peru) Trade Agreement Signed 26/07/2012, provisionally applied since 2013 | | [Multilateral] |
| 16. | El Salvador (Central America) Association Agreement with a strong trade component Signed 29/06/2012, provisionally applied since 2013 | | [Under negotiation/Multilateral] |
| 17. | Fiji (with Papua New Guinea) Interim Partnership Agreement Ratified by Papua New Guinea in May 2011 | | [Multilateral] |
| 18. | Ghana (West Africa) Stepping stone Economic Partnership Agreement provisionally applied Provisionally applied since 15/12/2016 | Mixed | <p>Article 72 Definition of the Parties and fulfilment of obligations:</p> <p>1. The Contracting Parties of this Agreement shall be the Republic of Ghana, referred to as the 'Ghanaian Party' or 'Ghana', of the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, referred to as the 'EC Party' or the European Community, of the other part.</p> <p>2. For the purposes of this Agreement, the term 'Party' shall refer to the Ghanaian Party or to the EC Party as the case may be. The term 'Parties' shall refer to the Ghanaian Party and the EC Party.</p> <p>3. The Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.</p> <p>Article 76 Territorial application: This Agreement shall apply, on the one hand, to the territories in which the</p> |

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| | | | Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, and, on the other hand, to Ghana. |
| 19. | Grenada (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 20. | Guatemala (Central America) Association Agreement with a strong trade component Signed 29/06/2012, provisionally applied since 2013 | | [Multilateral] |
| 21. | Guyana (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 22. | Haiti (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 23. | Honduras (Central America) Association Agreement with a strong trade component Signed 29/06/2012, provisionally applied since 2013 | | [Multilateral] |
| 24. | Jamaica (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 25. | Lesotho (SADC) Economic Partnership Agreement Provisionally applied since 10/10/2016 | | [Multilateral] |
| 26. | Madagascar, Mauritius, the Seychelles, and Zimbabwe (ESA) Economic Partnership Agreement Signed 08/2009, provisionally applied since 2012 | | [Multilateral] |
| 27. | Mauritius (ESA) Economic Partnership Agreement Signed 08/2009, provisionally applied since 2012 | | [Multilateral] |
| 28. | Mozambique (SADC) Economic Partnership Agreement Provisionally applied since 10/10/2016 | | [Multilateral] |
| 29. | Namibia (SADC) Economic Partnership Agreement Provisionally applied since 10/10/2016 | | [Multilateral] |
| 30. | Nicaragua (Central America) Association Agreement with a strong trade component Signed 29/06/2012, provisionally applied since 2013 | | [Multilateral] |
| 31. | Panama (Central America) Association Agreement with a strong trade component Signed 29/06/2012, provisionally applied since 2013 | | [Multilateral] |

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| 32. | Papua New Guinea (with Fiji) Interim Partnership Agreement Ratified by Papua New Guinea in May 2011 | | [Multilateral] |
| 33. | Peru (with Colombia and Ecuador) Trade Agreement Signed 26/07/2012, provisionally applied since 2013 | | [Multilateral] |
| 34. | Seychelles (ESA) Economic Partnership Agreement Signed 08/2009, provisionally applied since 2012 | | [Multilateral] |
| 35. | Singapore Free Trade Agreement (Not applied) Subject to CJEU Opinion 2/15 http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 | [Mixed] | [Under negotiation][Definition of parties will change pursuant to CJEU Opinion 2/15] Article 17.19 Territorial Application: 1. This Agreement shall apply: (a) with respect to the Union, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties; and (b) with respect to Singapore, to its territory. References to "territory" in this Agreement shall be understood in this sense, except as otherwise expressly provided. 2. As regards those provisions concerning the tariff treatment of goods, this Agreement shall also apply to those areas of the Union customs territory not covered by subparagraph 1(a). |
| 36. | South Africa (SADC) Economic Partnership Agreement Provisionally applied since 10/10/2016 | | [Multilateral] |
| 37. | St Kitts and Nevis (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 38. | St Lucia (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 39. | St Vincent and the Grenadines (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 40. | Sudan (ESA) Economic Partnership Agreement Signed 08/2009, not provisionally applied yet | | [Under negotiation/Multilateral] |

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| 41. | Suriname (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 42. | Swaziland (SADC) Economic Partnership Agreement Provisionally applied since 10/10/2016 | | [Multilateral] |
| 43. | Trinidad and Tobago (CARIFORUM) Economic Partnership Agreement Provisionally applied since 2008 | | [Multilateral] |
| 44. | Ukraine Deep and Comprehensive Free Trade Agreement, Association Agreement Signed 29/05/2014, provisionally applied since 01/01/2016 | Mixed | <p>Article 482 Definition of the Parties:</p> <p>For the purposes of this Agreement, the term "Parties" shall mean the Union, or its Member States, or the Union and its Member States, in accordance with their respective powers as derived from the Treaty on the Functioning of the European Union, of the one part, and Ukraine of the other part. Where relevant, it refers to Euratom, in accordance with its powers under the Euratom Treaty.</p> <p>Article 483 Territorial application:</p> <p>This Agreement shall apply, of the one part, to the territories in which the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Treaty establishing the European Atomic Energy Community are applied, under the conditions laid down in those Treaties, and of the other part, to the territory of Ukraine.</p> |
| 45. | Zambia (ESA) Economic Partnership Agreement Signed 08/2009, not provisionally applied yet | | [Multilateral] |
| 46. | Zimbabwe (ESA) Economic Partnership Agreement Signed 08/2009, provisionally applied since 2012 | | [Multilateral] |

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