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The Law of UK Trade with the EU and the World After Brexit

Filippo Fontanelli*

1. INTRODUCTION

This is the story of the legal impact that Brexit has had on UK's trade with the rest of the world, including the European Union (EU). This article explains how the rules governing UK international trade flows (incoming and outgoing) have changed with the country's exit from the EU and the subsequent conclusion of trade agreements with trade partners, most importantly the Trade and Cooperation Agreement (TCA) with the EU.

Any attempt to tell this story is inevitably incomplete and selective, and so is this article. It offers to readers without advanced knowledge in matters of trade (and trade law) an entry-point to understand what has happened in this field, without the partisan takes that have saturated the public debate in the past decade, and with the benefit of some years of hindsight.¹

I will sketch the two main scenarios in turn, to track the transformation of a changing landscape: (i) the pre-Brexit world, and (ii) the post-Brexit world (more specifically, the world emerging from the entry into effect of the TCA on 1 January 2021).² The transition period³ and the 'no deal' scenario will not be discussed in-depth, but

* School of Law, University of Edinburgh; LUISS, Rome. This article builds on, and updates, a paper for the conference 'The constitutional implications of Brexit: legacy and prospects of the withdrawal from the European Union', held at LUISS, Rome on 30 October 2021. Thanks to Avanas Turkey for his helpful comments. Email: filippo.fontanelli@ed.ac.uk. All websites accessed 28 December 2022.

¹ A good primer which presumes considerable trade knowledge is Yahannes Ayele, Ingo Borchert, Michael Gasiorek, Peter Holmes, Anna Jerzewska, Minako Morita-Jaeger, and Suzannah Walmsley, 'Not so frictionless after all: trade in goods and services in the EU-UK Trade and Cooperation Agreement' in Adam Lazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Elgar 2022) 148.

² The departure from the EU took effect on 31 January 2020, but its effects on trade between the EU and the UK remain temporarily unchanged until 1 January 2021, the same day that the TCA came into force.

some allusions will be necessary to shed a better light on the main scenarios. For purposes of brevity, the article mainly uses trade in goods to tell this story. For each scenario, I explain the essential traits of the regulation of trade between the UK and, respectively, (i) the EU, and (ii) the rest of the world (EU trade partners and third countries).

The impact on trade of Brexit and the TCA, in general terms, is not difficult to summarise:

the re-creation of trade barriers between the UK and the EU could cause a significant reduction in trade, despite the TCA being (putatively) designed to limit the damage that Brexit might do. This damage is likely to occur, despite the fact that many UK producers will seek alternative export opportunities outside EU, precisely because of the creation of barriers to UK exports to the EU introduced by Brexit.⁴

This article analyses what these ‘trade barriers’ are and how international law (or the lack thereof) can raise, shape, remove, and revive them, to understand what has happened in the past six years—legally speaking—to UK trade with the rest of the world.

Consider this account of trade in the UK after Brexit, from an article of December 2021:

Isolating the Brexit effect suggests a drop of 11–16% in the amount of UK trade, which in October came to 15.7% on imports and exports, worth £12.6bn. Food faces the most new rules outside the EU. Importers of food into the UK have not yet been hit by delays and red tape at UK customs, because implementation of the rules has been delayed, and then delayed again. Whitehall is wary: there could be a blame game if imported fresh fruit and veg prices soar, along with French cheese, Italian olive oil and pasta, and Irish dairy and beef. Scottish exporters of food have been among the firms most affected so far. They have found Brexit has been good for generating paperwork where none previously existed.⁵

In December 2022, various studies came out describing the effects of Brexit on UK trade with the EU and the rest of the world:

While economists and officials do not agree on the precise magnitude of the Brexit effect, they consider it to be large. They also agree that new trade agreements with countries such as Australia and regulatory freedoms gained from leaving the bloc do not come close to offsetting the damage ... [after a drop in 2021,] imports to the UK from the EU have largely recovered. However, she estimates that exports to

³ For the account of the years between the referendum and the TCA, see the operative account: Paul Craig, ‘Brexit: A Drama in Six Acts’ (2016) 41 *European Law Review* 447; id., ‘Brexit a Drama: The Interregnum’ (2017) 36 *Yearbook of European Law* 3; id., ‘Brexit a Drama: The Endgame—Part I’ (2020) 45 *European Law Review* 163.

⁴ Adam Bennett and David Vines, ‘The EU–UK Trade and Cooperation Agreement: Lessons Learnt’ (2022) 38 *Oxford Review of Economic Policy* 69.

⁵ Douglas Fraser, ‘Brexit: the Economic Impact a Year on’ *BBC* (London, 21 December 2021) <[bbc.com](https://www.bbc.com)>.

the bloc are now 26 per cent lower than they would have been without the new barriers to trade.⁶

This article's goal is to equip the readers with the necessary background to decode these stories about the impact of Brexit with some confidence, seeing them as the result of (among other things) changing trade rules and policies. Ideally, this article serves as a primer for those interested in assessing autonomously whether Brexit has had positive or negative effects.⁷ To this end, I employ a simple before-and-after heuristics and a generous amount of on-the-ground reporting and anecdotes, to illustrate the actual *ex post* effects of rules on real traders, consumers and manufacturers.⁸

2. UK TRADE BEFORE BREXIT

2.1. UK Trade with the EU—The Internal Market

As a member to the EU, the country of Great Britain and Northern Ireland partook in a free trade area and a customs union with the rest of the EU, established by the EU treaties (Treaty on the European Union, or **TEU**, and Treaty on the Functioning of the European Union, or **TFEU**). The relevant notion here is the EU's 'internal market':

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.⁹

In particular, the EU is a *free trade area*, that is, it forbids the application of tariffs (import charges, also known as custom duties) on goods crossing the borders between its Member States (**MS**).¹⁰ In addition to duty-free circulation of imports and exports inside the internal market, the EU has established a *customs union*, that is, it has unified its external trade measures—those applicable to goods incoming from non-EU countries at the

⁶ Chris Giles, 'Brexit and the Economy: The Hit has been "Substantially Negative"' *Financial Times* (London, 30 November 2022) <[ft.com](https://www.ft.com)>.

⁷ For the avoidance of doubts, it must be remembered that the only effects of Brexit analysed in this article are those relating to trade. I am fully aware that the overall convenience of Brexit cannot be measured solely upon these effects.

⁸ For this reason, the references to secondary sources is kept to a minimum, to increase accessibility. Instead, I favour references to primary materials and to news items, which describe objectively the course of UK trade. This approach seeks to drain the swamp of political discourse that sometimes occupies the space between the law and the world, and that is likely to confuse those who seek to form an opinion based on facts. I have previously attempted a similar exercise, with a more specific focus on the role of Scotland within the trade policies of the UK, see Filippo Fontanelli, 'How Would Independence Affect Scotland's International Trade?' in Eve Hepburn, Michael Keating, and Nicola McEwen (eds), *Scotland's New Choice: Independence after Brexit* (Centre for Constitutional Change 2021) 102.

⁹ Summarised in Article 26(2) TFEU.

¹⁰ Articles 28(1) and 30 TFEU.

border of the EU MS, tariff rates in particular.¹¹ A French bottle of wine enters into Germany duty-free (free trade area) and the tariff rate applicable to Chinese computers imported into the EU is the same, irrespective of whether they enter the EU internal market through Slovenia or Spain (customs union). The internal market does not just outlaw tariffs. It also prohibits quantitative measures, that is, any measure restricting imports or exports (whether applied at the border or in the form of domestic regulations).¹²

These trade disciplines serve the goal of *negative integration*, that is, they dictate the removal of trade barriers, but do not provide any centralised (positive) instructions to States on which national policies they should pursue, and how. This is not what makes the EU internal (single) market unique. The law of the World Trade Organisation (WTO) also prohibits quantitative restrictions and limits the use of tariffs, and free trade agreements (FTAs) between participating countries can provide for duty-free treatment on all or most trade between them.¹³

The EU, however, pursues also other more advanced goals besides negative integration, which set the EU internal market apart not just from the WTO, but also from other FTAs. The EU strives to achieve a deeper level of economic integration indirectly, trying to alleviate regulatory obstacles through harmonisation of domestic laws, regulatory convergence and mutual recognition.¹⁴ The EU MS conferred to the EU several unique powers that can be exercised to make the internal market a truly 'single' market, where trade can flow with as little hindrance as possible.

Even without border restrictions like tariffs and quotas, regulatory differences between trading economies can amount to significant non-tariff barriers to trade. For instance, it is essential for doctors to obtain the recognition of their professional qualifications to practice abroad, for an insurance company to obtain a license in the country in which it seeks to sell its products, or for a drug manufactured abroad to be approved by the pharmaceutical agency of the country of importation. Conversely, *positive integration* of different States' rules benefits trade directly: trade is made simpler by removing the costs entailed by regulatory compliance and compliance checks, for instance because the goods are not required to comply with the specific standards of each importing country, or because it is sufficient that they comply with a single standard accepted across the entire EU.

To this end, the EU can lay down unified binding rules for the functioning of the internal market, applicable in all MS across the EU (*regulatory harmonisation*), replacing itself to the domestic law-makers. Alternatively, the EU can nudge MS into adopting

¹¹ Articles 28(1) and 31 TFEU.

¹² Articles 34 and 36 TFEU.

¹³ Of course, the EU free trade area permits trade at preferential terms, that is, at more favourable terms than those that the EU must grant to the rest of the WTO members. This discriminatory aspect is expressly authorised, subject to certain requirements, by the WTO, see Article XXIV of the General Agreement on Trade and Tariffs (GATT).

¹⁴ For a restatement of the 'canon' of the EU's removal of regulatory barriers to trade, see Piet Eeckhout, 'Brexit after the Negotiation of the Trade and Cooperation Agreement: Who Takes Back Control of What?' (2021) 25 *Revista de Derecho Comunitario Europeo* 14.

similar domestic measures by setting out general goalposts (*regulatory convergence*¹⁵). In the absence of harmonisation or convergence (that is, in a scenario of legitimate regulatory diversity across the MS), the EU defuses regulatory diversity by requiring MS to grant *mutual recognition* to each other's rules and the process to demonstrate compliance with them. Even without a EU-shaped standard, products lawfully marketed in one MS enjoy the right to move freely across the EU¹⁶; mutual recognition establishes the presumption that a good that complies with the *domestic* standards of one MS can circulate anywhere in the internal market, as if it complied with the domestic regulatory standard of *all the MS*. In principle, apples lawfully marketed in France cannot be subjected to Italian safety measures, nor the costly and lengthy procedure to ascertain compliance with them, obtain certification of such compliance, and check whether each load of apples carries that certification. Italy must accept that compliance with France standards is enough, and recognise French standards as equivalent to its own for the purposes protecting consumers' safety. A German car manufacturer does not have to produce a specific car model complying with Greek safety standards to sell cars there; accordingly, Greek customs authorities do not have to verify German cars' compliance with local standards.

Thanks to the combined effect of regulatory harmonisation, regulatory convergence and mutual recognition, the trade-restrictive effect of regulatory fragmentation is minimised. Proportionate restrictions can be accepted, if they pursue a justifiable aim. For instance, if Germany cares strongly about human dignity, it can forbid laser-games, even if such measure forecloses its market to providers of laser-game services and products from other MS.¹⁷

The combination of these methods of integration also makes it easier—by a long shot—to trade services across the internal market than within any other FTA. FTAs are effective at removing border restrictions, but usually achieve only superficial liberalisation behind the border, i.e. where different rules operate and cause frictions. In the EU internal market, instead, free circulation of goods, services and workers is presumed to override regulatory barriers.

2.2. UK Trade with EU Trade Partners—Piggy-Backing on EU External Trade Policy

When it was a EU MS, the UK automatically participated in all EU international agreements, including the free trade agreements with third countries ('**EU trade partners**').

¹⁵ For instance, Directives are transposed internally: Article 288 TFEU: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

¹⁶ European Commission Notice, Guide on Articles 34–36 of the Treaty on the Functioning of the European Union (TFEU), (2021/C 100/03). See also Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State, OJ L 91, 29.3.2019, p. 1–18. For an application of mutual recognition by the Court of Justice of the EU see, for instance, Case C-525/14 *Commission v Czech Republic* [2016] ECLI:EU:C:2016:714, [34–35].

¹⁷ Court of Justice of the EU, Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609, judgment of 14 October 2004.

The EU has the most FTAs in the world, more than 50, including with Japan, Canada, Turkey, Ukraine.¹⁸ As regards trade in goods, these FTAs typically require the participating countries to eliminate substantially all tariffs on the goods traded between them (sometimes gradually, and with possible exemptions for a few specific goods, to which a WTO-recorded rate or reduced rates would continue to apply). When it comes to non-tariff barriers to trade, FTAs vary much in scope and depth, including on whether they encourage or impose regulatory recognition.

With respect to services, normally FTAs include specific concessions on a few services or modes of provision (for instance, on the provision of special permits of temporary entry to foreign professionals). FTAs most common contribution is that they simply require non-regression, i.e. that the parties ‘ratchet up’ the existing commitments, increasing regulatory certainty and shielding long-term providers from regulatory fluctuations. In other words, the participating countries commit to retain at least the market access that they grant to each other at the time of conclusion of the agreement, and refrain from future closures.

As regards regulatory (non-tariff) barriers to trade in goods, FTAs typically zoom-in on specific goods, to facilitate targeted trade flows that are important for the parties, and might have been central in their decision to reach a deal, given the modest amount of liberalisation obtained through simple tariff-cuts. In this light, it is understandable that the EU-Japan FTA contains specific rules on the mutual recognition of standards in the automotive manufacturing sector, which is Japan’s top exporting industry, and the EU–Canada FTA contains commitments on the mutual recognition of geographical indications, which are valuable for many EU exports.¹⁹

The liberalisation ensured by FTAs is much more modest than the one obtained inside the EU internal market, but it is still better than the baseline terms (that is, trading under the basic guarantee that tariffs cannot exceed a WTO-sanctioned cap). UK cheese could enter the Japanese market duty-free, while Japanese cars entered duty-free in the UK, and without incurring duplicative compliance costs with local standards.

Besides reciprocal FTAs, the EU trades with many developing and least-developed countries under a system of unilateral preferences that is permitted by WTO law (the Generalised System of Preferences, or **GSP**). Under this scheme, the EU unilaterally grants duty-free access or reduced tariffs to many poorer countries, which do not have to reciprocate the concession. The UK was part of the GSP.

¹⁸ The comprehensive ‘state of play’ of the EU’s free trade agreements is available, and constantly updated, on the Commission’s website <ec.europa.eu>.

¹⁹ Filippo Fontanelli, ‘Anatomy of Modern Free Trade Agreements—an Overview of CETA and the EU-Japan EPA’ (2019) SPICe briefing <<https://digitalpublications.parliament.scot/ResearchBriefings/Report/2019/7/26/Anatomy-of-modern-Free-Trade-Agreements>>.

2.3. UK Trade with Third Countries

Being part of the EU bloc shaped also the conditions of trade between the UK and the rest of the world (that is, with countries that do not have an FTA with the EU, or receive from the EU non-reciprocal preferential treatment). Before Brexit, for instance, the UK (and the EU at large) traded with China, India, Australia, and the US under the WTO rules. Trading at WTO terms, a formula that became quickly ubiquitous in the build-up to Brexit as it summarised effectively the 'no deal' scenario, effectively means counting only or mostly on the WTO Covered Agreements, the treaties that make up the law of the WTO.

WTO law guarantees to all WTO members (including the EU and the UK) that their goods will not face tariffs at a rate higher than the importing countries have committed to apply (the so-called Most-Favoured Nation rate, or **MFN**), which is recorded in specific documents ('Schedules') attached to the General Agreement on Tariffs and Trade (**GATT**). Furthermore, foreign goods will not face discrimination or inefficient, unreasonable or unnecessary technical and sanitary measures.²⁰ Discrimination in favour of domestic goods is allowed for goods procured directly by and for the Government, unless the country in question is also party to the Government Procurement Agreement.

On services, the benefits of WTO law are much sparser: each country has decided what concessions to make to foreign services and service providers. Their right to accede to a foreign market and the treatment afforded after entry depend on *à la carte* commitments recorded in a dedicated Schedule attached to the General Agreement on Trade in Services (**GATS**).

To trade at WTO terms is only better than two things: not trading at all, and trading subject to the unrestricted whim of the importing country—something that only non-WTO members and now Russia have to reckon with.²¹ Without WTO law, each country could increase tariffs at will, impose quotas, discriminate between trade partners, and implement protectionist, irrational, or unnecessary requirements and measures.

3. UK TRADE AFTER BREXIT

Several simplifications inform this section. I do not discuss the Withdrawal Agreement, which influenced the TCA negotiation.²² More generally, I do not describe how the

²⁰ In particular, under the rules of two WTO Covered Agreements: the agreement on Technical Barriers to Trade (TBT) and the agreement on Sanitary and Phytosanitary Measures (SPS).

²¹ See the Statement by Executive Vice-President Dombrovskis on EU Decision to Stop Treating Russia as a Most-Favoured-Nation at the WTO of 15 March 2022, on the Commission's website <ec.europa.eu>.

²² See Polly R Polak, 'Who Had Their Cake and Ate It? Lessons from the UK's Withdrawal Process and Its Impact on the Post-Brexit Trade Talks' (2021) 22 *German Law Journal* 983.

arrangements for withdrawal (under Article 50 TEU) evolved into the negotiations on the future relationship between the UK and the EU, nor narrate or assess the conduct of the negotiations themselves.²³

Likewise, I will not address the issue of Northern Ireland. The omission does not reflect its lesser importance; to the contrary, this issue has been and will be for a while the single most important point of contention between the two partners and has affected the negotiations also in areas that appear unrelated to it. However, the regulation of trade into and from Northern Ireland (including the burdensome customs procedure aimed at monitoring the risk of re-importation of goods from Great Britain (GB) into the EU), is distinctly *sui generis*. A dedicated discussion of the Northern Ireland situation would derail this article. I prefer to advise readers to check for information elsewhere,²⁴ and discuss EU-UK trade limitedly to trade between the EU and GB.

3.1. GB Trade with the EU: The Trade and Cooperation Agreement

The TCA was concluded on 24 December of 2020, just in time to enter into effect a week later, when the transition period would have ended and ‘no deal’ Brexit was otherwise scheduled to engulf EU-UK trade. However, the transition on 1 January 2021 (from EU single market to TCA) was not seamless. In fact, the change in trade law was radical, even without having to go through the ‘no deal’ contingency.

The TCA did not ‘diminish’ the UK’s privileges deriving from EU membership in any way: these privileges were automatically obliterated upon the UK’s departure. Rather, the TCA regulates trade integration between the EU and a 100 per cent non-EU country, introducing widespread but fairly superficial trade preferences. The apparent continuity between EU membership and TCA should not suggest any legal relations between the two regimes. In fact, very little in the TCA reflects the UK’s legacy as former participant in the EU internal market. This section of the article sets out the basic aspects of this disruption.

²³ See Bennet and Vines (n 4); Federico Fabbrini, ‘From the Withdrawal Agreement to the Trade & Cooperation Agreement: Reshaping EU-UK Relations’ (2020) DCU Brexit Institute, Working Paper No 10-2020; Paul Craig, ‘Brexit a Drama, The Endgame—Part II: Trade, Sovereignty and Control’ (2021) 46 *European Law Review* 129 ff.

²⁴ For instance, Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press 2022); Bennet and Vines (n 3) 76 ff; Jörg Philipp Terhechte, ‘Dead End’, cit., 99 ff. In December 2022, HMRC data demonstrated that 85% of GB goods imported into Northern Ireland did in fact stay there, and were not re-imported into Ireland. This information was published with the hopes that the EU could loosen up the requirements imposed on goods travelling from GB to Northern Ireland, which are now subject to infra-UK customs checks when they are ‘at risk’ of onward movement to the EU (typically, to Ireland). Lisa O’Carroll, ‘New HMRC Data Raises UK Hopes of End to Northern Ireland Brexit Trade Checks’ *The Guardian* (London, 5 December 2022) <[theguardian.com](https://www.theguardian.com)>.

Ultimately, as far as trade is concerned, the TCA is a 'run of the mill trade agreement',²⁵ which creates only a 'shallow trading relationship'²⁶ between the parties. GB's preference for not committing to regulatory alignment with the EU ruled out the possibilities of integration flowing from common rules or mutual recognition arrangements.²⁷ If 'seamless trade is only possible where regulations and customs are aligned',²⁸ inevitably the description of post-Brexit trade between the EU and GB requires pointing out the many seams it must traverse.

In late November 2022, a rumour spread in the news that the UK was considering improving trade relations with the EU, upgrading the TCA to a 'Swiss-style' relationship.²⁹ While the rumour was incorrectly reported and perhaps distorted by trade illiteracy,³⁰ it opened a debate on the TCA, its mixed record, and whether it could be improved. This debate implies knowledge of the TCA's features, which this section seeks to impart.

3.1.1. *The models on the table*

Several UK redlines and the EU's uncharitable stance prevented the negotiations from landing onto deeper models of trade integration. This account cannot discuss the paths not taken, but it must be remembered that, misleadingly, the UK assumed that since it used to be a EU Member State, it could aim for the *most* privileged trade relationship with the EU. For a certain period, existing EU FTAs were perused as models, on the false impression that they would be easy to replicate, and perhaps improve. A summary of these models and how they were discarded can help, by comparison, to appreciate the ultimate 'shallowness' of the TCA on trade matters.³¹

The Norwegian model (with full access to the EU single market) was discarded due to the UK's intransigence on the freedom of movement of EU citizens, the jurisdiction of the

²⁵ Eeckhout (n 14) 12. See also Jan David Bakker and others, 'Non-Tariff Barriers and Consumer Prices: Evidence from Brexit' (2022) LSE Center for Economic Performance Discussion Paper No. 1888: 'In leaving the EU the UK swapped a deep trade relationship with few impediments to trade for a shallow one where tariffs are eliminated but a wide range of checks, forms and steps are required before goods can cross the border.' It must be noted that in 2019 the UK Parliament rejected twice a draft Withdrawal Agreement calling for continued membership of the EU Customs Union.

²⁶ For a preliminary assessment of the TCA's effects on EU-UK trade, see Ilaria Fusacchia, Luca Salvatici, and L Alan Winters, 'The Consequences of the Trade and Cooperation Agreement for the UK's International Trade' (2022) 38 *Oxford Review of Economic Policy* 31.

²⁷ See above, Section 2.1.

²⁸ David Henig, 'Perspectives: Borders, Trade Barriers and Britain's Unfinished Brexit' *Borderlex* (6 April 2022) <borderlex.net>.

²⁹ Caroline Wheeler, Harry Yorke, and Tim Shipman, 'Britain Mulls Swiss-Style Ties with Brussels' *The Times* (London, 20 November) <[thetimes.co.uk](https://www.thetimes.co.uk)>; Peter Foster, 'Can the UK Improve Its Brexit Deal?' *Financial Times* (London, 22 November 2022) <[ft.com](https://www.ft.com)>.

³⁰ Most likely, reference to Switzerland as a model for future developments refers to the EU-Switzerland network of mutual recognition agreements, which the UK has tried to replicate in part so far.

³¹ Fontanelli (n 19) 13–16.

Court of Justice of the EU and the observance of EU regulations—all things that Norway accepts. The Turkish model (FTA with customs union) would have prevented the UK's much-anticipated objective of managing independently its external trade policy, and was ruled out too. The Swiss model (FTA with extensive regulatory integration through mutual recognition agreements) could not square with the UK's longing for regulatory autonomy, just like the Ukrainian model (FTA with extensive concessions on services), since Ukraine has committed to progressive regulatory alignment with EU rules.

The Ukrainian model, in particular, is a helpful benchmark. In static terms, post-Brexit UK and Ukraine appear similarly positioned: both are just a few steps away from EU membership, and their rules are currently very similar to the EU's. What matters, however, is the direction of the walk: the treaty with Ukraine is a push *towards* EU membership, and Ukraine has an interest to conform its rules to Brussels. The UK is walking *away* from the EU and has advertised its intention to travel long and far; UK rules can—and probably will—diverge from those EU ones.³²

Ultimately, the negotiation settled on using the FTA between the EU and Canada as blueprint. Accordingly, much of the debate and the posturing during the negotiations referred to concessions made by the EU in that treaty, and whether it was fair on the part of each side to demand or accept something different from CETA.

3.1.2. Tariffs and quotas

The TCA provides for the prohibition of import or export tariffs and quotas on all goods exchanged.³³ Contrary to most FTAs, which provide for a gradual elimination of tariffs with phase-in periods and allow the maintenance of some tariffs,³⁴ the TCA establish an immediate and total prohibition. This is understandable: the direct transition from the (tariff-free) EU internal market to the TCA prevented tariffs from ever coming up, so no real 'elimination' was in fact ever necessary, let alone a gradual one; the simple prohibition of future tariffs was easy to enforce.

Indeed, the most visible consequence of 'no deal' would have been the imposition of customs duties on goods traded between the UK and the EU. The EU would have certainly applied its MFN tariffs (for instance: 4.7 per cent on walking sticks and garden umbrellas). For a simple projection, no-deal tariffs would have looked like this:

in a 'No deal' Brexit the tariffs on UK-EU trade [would] be the same in each direction. These average about 4%, and ... entail peaks in meat, dairy products and sugar.

³² See below, paragraph 3.1.5.

³³ Art. GOODS.5: Prohibition of customs duties; Art. GOODS.6: Export duties, taxes or other charges; Art. GOODS.10: Import and export restrictions.

³⁴ Tariffs on some goods are permitted under WTO law, which requires that customs unions and free trade areas remove duties and other restrictions affecting 'substantially all' (but not necessarily all) the trade among them (see Article XXIV:8(a)(i) and 8(b) GATT).

The average for UK imports from the EU will be 4.9% and on EU imports from the UK 3.9%. They differ because the pattern of imports varies between the two directions.³⁵

The TCA prevented the application of tariffs, but cannot prevent other customs-related costs. Duty-free treatment under an FTA does not depend only on where the good practically comes from, but also on where it was *produced*. The origin of the good needs to be traceable in practice, and identifiable in the abstract through the so-called 'rules of origin' (ROOs).³⁶ Proving and checking compliance with ROOs is now necessary at the UK-EU customs border, with the costs that these processes entail.³⁷

ROOs clarify the conditions that a good must meet to be considered 'made in' ('originating' from) a certain country and gain preferential treatment granted by that country's FTA partners. They typically indicate the maximum level of foreign content, component or production processes that can be incorporated into a good for it to still qualify as 'made in' that country.³⁸ In this respect, the TCA ROOs allow EU and UK to count components from each other towards their own 'origin' requirement (for instance, a car can be considered originating from the UK even if it contains a German engine and Italian leather seats, and will therefore incur no duties when imported into the EU). However, the TCA ROOs do not seem to allow using components from a third country to the same effects, even if both the UK and EU have a trade agreement with it (i.e. the Japanese chips could not count towards making a phone 'made in EU' or 'made in UK', for purposes of attracting the duty-free treatment). Moreover, there are detailed rules against re-exportation from, and back to, the EU. Anecdotal evidence on cornflakes and M&S 'Percy Pigs' highlights the effects of these restrictions:

The sweets are manufactured and packaged in Germany and then shipped to the UK—no tariffs are payable because of the trade deal. They are then taken from the M&S warehouses and exported to stores in the Republic of Ireland, which is part of the EU. Now, this is the complicated bit. Because they have left the EU and not been processed enough to count as being made in the UK, it may be that a tariff needs to be paid to get them back into the EU, despite them having been made in the EU in the first place. If they had been unpacked and put on a cupcake, for example, there would be no tariff because they would have been transformed, but just storing them in the UK is not enough.³⁹

35 Ilaria Fusacchia, Luca Salvatici, and L Alan Winters, 'Brexit and Global Value Chains: "No-Deal" is Still Costly' (2019) UKTPO Briefing Paper 35.

36 For an illustration and critique of ROOs, see Khuong-Duy Dinh, 'Revisiting the Principle of Territoriality in Preferential Rules of Origin: Are Territoriality Requirements Obsolete?' (2022) 49 *Legal Issues of Economic Integration* 399.

37 A technical explanation on the TCA ROOs is provided in Ayele et al (n 1) 152 ff.

38 Usually, those conditions are expressed in a minimum amount of local components, inputs or processing.

39 Anthony Reuben, 'Rules of Origin: Why are Percy Pigs a Headache for M&S?' *BBC* (London, 15 January 2022) <[bbc.com](https://www.bbc.com)>.

Occasionally, the cost of compliance with the ROOs might be higher than the savings that it warrants.⁴⁰ It has been noted that, for this reason, almost 30 per cent of UK exports into the EU forfeited their duty-free rights under the TCA and paid tariffs instead.⁴¹

In conclusion, the TCA introduced a sweeping prohibition on tariffs that certainly promotes trade between the UK and EU. However, tracking the origin of the goods can introduce new costs—which hurt especially small and medium traders.

3.1.3. Non-tariff barriers

Tariffs aside, the shift from the EU internal market to the TCA, with regards to trade in goods, is better explained by pointing out what the TCA fails to address: regulatory (non-tariff) barriers.

Without regulatory integration between two markets, all products traded between them are subject to the production and certification costs necessary to satisfy the standards of the importing country (which can differ from those imposed in the country of origin) and pass border checks to verify compliance. In both respects, the costs of adapting production processes and deal with the paperwork and conformity-checking procedures eat away profit margins—sometimes to the point where trade is no longer convenient, and must stop. As regards services, outside the EU single market for capitals, investors, and businesses, each country's openness depends only on its carefully formulated WTO or FTA concessions—which in many economic sectors amount to no concession at all. The diversity of regulations between trade partners, in other words, is a barrier in and of itself, and trade agreements can attempt to remove or reduce some of the regulatory frictions that hamper trade.

The TCA does little to alleviate the trade costs entailed by regulatory barriers, and this omission is not an oversight. The UK took pride in rejecting the EU's warning that regulatory alignment would be necessary to maintain frictionless trade, and therefore accepted 'frictionful' trade under the TCA (at the cost of complicating immensely the resolution of the Northern Ireland issue⁴²). Namely, without arrangements on regulatory alignment or mutual recognition, goods are supposed to meet the standards of

⁴⁰ Alexander Keck and Andreas Lendle, 'New Evidence on Preference Utilization' (2012) World Trade Organization Staff Working Paper No. ERSD-2012-12.

⁴¹ Rebecca Freeman and others, 'UK Trade in the Wake of Brexit' (April 2022) LSE Centre for Economic Performance Discussion Paper No. 1847, 5, referring to Yohannes Ayele, Guillermo Larbalestier and Nicolo Tambari, 'Post Brexit: Trade in Goods and Services (II)' (2021) UK Trade Policy Observatory Briefing Paper No. 63.

⁴² In short, the need for regulatory and other customs checks on goods exported to the EU would have required building a customs border between Northern Ireland and Ireland, a prospect likely to undermine the peace process in the island of Ireland. As a result, the arrangement agreed was to permit free circulation of goods between Northern Ireland and the EU (including Ireland), at the cost of imposing customs checks on those goods crossing the Irish Sea (from GB to Northern Ireland) which are deemed 'at risk' of re-exportation to the EU.

the importing market, face the compliance checks by its customs authorities and the costs of certification⁴³ (usually carried out by providers of the importing jurisdiction, unless there is an arrangement on the equivalence or recognition of certification processes⁴⁴). These customs formalities, including relating to payment of VAT, represent a novel cost for goods traded between EU and GB, which the TCA did not address.⁴⁵ The situation for trade in services is predictably dire: trade barriers are regulatory in nature, and the TCA is thin on regulatory integration facilitating trade in services,⁴⁶ as are most FTAs.⁴⁷

For many goods that must satisfy safety standards (in particular pharmaceuticals and foodstuffs, the new costs and delays are significant); news stories have abounded since Brexit's entry into force, highlighting the drag that regulatory divergence has had on UK-EU trade almost immediately.⁴⁸ The trade-impeding effects of this change can be frustrating:

... the handling of the harvesting and export of crustaceans from the UK to the EU was exactly the same on 31 December (when paperwork was not required) as on 1 January (when it was required). The result of this paperwork has been a substantial reduction in what was supposed to be 'free trade', and in some cases (e.g. the export to the EU of langoustines) its almost complete disappearance.⁴⁹

The costs entailed by the checks and the red tape are sometimes fatal to small UK businesses.⁵⁰ Anecdotal evidence suggests that in certain cases traders were simply priced out:

⁴³ These costs include the expenses to set up border checkpoints, which the importing State might not have an interest in funding. For a story on the funding of veterinary checkpoints in France for UK meat, see James Tapper, 'British Farmers Face Paying for Border Checkpoints in EU after Brexit Halts Exports' *The Guardian* (London, 6 August 2022) <[theguardian.com](https://www.theguardian.com)>.

⁴⁴ While the UK had requested that its certification bodies be granted the power to certify compliance of UK goods with EU standards, this request was rejected by the EU, see Ayele et al (n 1) 157.

⁴⁵ Ayele et al (n 1) 151, estimating the price of customs declarations for the UK economy at £15 billion.

⁴⁶ Peter Foster, 'A Post-Brexit Reckoning for Services' *Financial Times* (London, 7 April 2022) <[ft.com](https://www.ft.com)>: 'the reality is that, relative to the freedoms that came with membership of the EU single market, Lowe finds the TCA's services provisions "offer very little at all". Is it fixable? Well, given the UK's reluctance to embrace freedom of movement or regulatory harmonisation with the EU, Lowe says the options for further liberalisation are "limited", but they are not non-existent. He cites a recent EU agreement with Canada on the mutual recognition of architectural qualifications as an example of where there are possibilities for the UK. An enhanced EU-wide labour mobility agreement would also obviously make it easier for professionals like musicians and artists to work across the EU.' For an informative overview of the TCA rules on services, see Ayele et al (n 1) 164 ff.

⁴⁷ See Section 2.2 and Fontanelli (n 19).

⁴⁸ Richard Partington, 'UK Exports to EU Fell by £20bn Last Year, New ONS Data Shows' *The Guardian* (London, 11 February 2022) <[guardian.com](https://www.guardian.com)>.

⁴⁹ Bennet and Vines (n 4) 75.

⁵⁰ Peter Foster, 'UK-EU Trade Relationships Tumble after Brexit' *Financial Times* (London, 26 April 2022) <[ft.com](https://www.ft.com)>, referring to a study showing that the number of UK businesses exporting to the UK had declined by almost 30% since the entry into force of the TCA, even if the overall value of exports had remained constant. For an informative overview of the TCA rules on services, see Ayele et al (n 1) 164 ff.

Before the transition period ended, we knew that our wholesale [cheese] shipments to the EU would need extra checks. We were aware of the requirement for a veterinary-checked Export Health Certificate (EHC) for every wholesale order, and the associated cost of £180 each time. But what we were not prepared for, or warned about, was the lack of exemption for consumer orders to this regulation, meaning even one single slice of cheese sent to an EU customer would also be liable to the charge ... By the summer of 2021, our wholesale exports to our distributors came to an end. The cost of sending a consignment became commercially unviable.⁵¹

In December 2022, a study on consumer prices of EU food sold in the UK⁵² confirmed the prediction that Brexit-caused price increases are larger for goods subject to strict regulatory barriers (like sanitary, safety, or veterinary inspections). This finding proves two things: ‘EU exporters and/or UK importers face higher costs due to the Brexit-induced rise in [non-tariff barriers], and [they] pass at least part of these costs on to consumers through higher prices.’⁵³ It is estimated that Brexit alone increased food prices of 6 per cent overall.⁵⁴

For this reason, the UK has used a light touch on the imposition of checks on goods from the EU, precisely to limit the costs and delays that these entail. As it was noted, ‘you can’t magic away the need for physical checks on meat and dairy, say. Unless, that is, you strike a deal with the EU on food and hygiene standards, which is a no-no for Brexit hardliners.’⁵⁵ So far, the prevailing UK tactic to dodge both looming costs (logistical and political) has been procrastination. In April 2022, the UK Government has delayed for the fourth time the introduction of sanitary and phytosanitary checks on incoming fresh foods from the EU, until at least the end of 2023.⁵⁶ In the same vein, the UK has so far largely accepted as equivalent EU certifications (for instance, the CE-mark certifying safety for goods,⁵⁷ in particular medical devices, the REACH authorisations and EU batch-testing for drugs), and has repeatedly postponed the launch of the UK Conformity Assessment standards.⁵⁸ Due to the difference in size,

51 Simon Spurrell, ‘I once Sold Cheese to Europe. Brexit Took My Business to the Brink of Destruction’ *The Guardian* (London, 18 November 2022) <[theguardian.com](https://www.theguardian.com)>. For similar stories, detailing the struggle of several UK exporting companies, see for instance Katie Linsell and Sabah Meddings, ‘Brexit Red Tape Stifles Exports Despite Years of Preparations Bloomberg’ (London, 16 November 2022) <[bloomberg.com](https://www.bloomberg.com)>.

52 Bakker and others (n 25).

53 *Ibid.*, 16.

54 *Ibid.*, 20.

55 Helen Thomas, ‘The UK is Still Wrestling with the Incoherence of Brexit’ *Financial Times* (London, 1 April 2022) <[ft.com](https://www.ft.com)>.

56 Cristina Gallardo, ‘UK Delays Post-Brexit Food Checks on EU Imports Until End of 2023’ *Politico* (London, 28 April 2022) <[politico.eu](https://www.politico.eu)>.

57 Peter Foster, ‘UK’s Planned Post-Brexit Quality Assurance Mark Delayed Again’ *Financial Times* (London, 14 November 2022) <[ft.com](https://www.ft.com)>, noting that ‘Industry groups have repeatedly rejected the UKCA mark as burdensome, expensive and impractical. ... Business group have consistently opposed the UKCA system. A membership survey in May by MakeUK found three-quarters of respondents wanted the UK to continue to recognise CE-marked goods.’

58 Most recently, see the two-year extension on accepting CE product marking (14 November 2022) and the three-year postponement of the deadlines to submit to the new UK REACH scheme (29 November 2022).

EU standards inevitably exercise a 'regulatory pull' over the UK industry, and self-inflicted regulatory changes entail transactional costs for producers that are difficult to swallow and unpopular to suggest.⁵⁹

The cumulative effect of ROOs and customs and regulatory checks is aptly described in the following account:

[even if the Northern Ireland issue could be resolved,] UK traders would still be outside the EU's regulatory framework, still have to prove their goods qualified for zero-tariff entry into the EU single market and still have to fill out forms showing they conformed to EU standards. The UK Treasury and the Office for Budget Responsibility, the fiscal watchdog, estimate this friction will inflict a 4 per cent hit to UK GDP in the medium term.⁶⁰

Make no mistake: these costs are inherent to international trade, and are almost impossible to circumvent through FTAs. In other words, the TCA is not to blame for failure to prevent them: no FTA can *per se*. However, traders who were used to operate within the EU internal market incur these costs for the first time, and the UK and EU's trade-based economies are shrinking accordingly.

3.1.4. *Level playing field*

Negotiations on the TCA also featured a relatively novel issue, that is, the formulation of so-called level playing field (LPP) provisions.⁶¹ Recent FTAs have often included sections on sustainable development, codifying each country's soft commitment to maintain and increase standards of environmental, labour and human rights protection, and sometimes a hard commitment not to adopt looser regulations with a view to attract trade and investments. The LPP mechanism in the TCA reaches further.

With the prospect of duty-free trade in goods across the UK and EU, commitments to progressive social standards acquired new relevance. Advanced social policies are not just noble, they are also expensive: higher standards equal higher production costs, and in turn lower the competitiveness of locally produced goods on foreign markets, where identical products are cheaper to make. Conversely, the loosening of domestic standards can boost the competitiveness of one country's products abroad.

The EU wanted to introduce in the TCA precisely the possibility to counteract this 'race to the regulatory bottom' (the dark side of the 'Singapore-on-Thames' promise⁶²), with tighter mechanisms than those of previous FTAs. The EU also wanted some

⁵⁹ Sam Lowe and Derek Hill, 'Medical Devices and the Limits of UK Regulatory Autonomy' *CER Insight* (5 August 2021).

⁶⁰ Foster (n 29).

⁶¹ TCA, Part two, Heading one, Title XI: 'Level playing field for open and fair competition and sustainable development'.

⁶² Eeckhout (n 14) 15.

rebalancing mechanism for the hypothesis that the UK would confer subsidies to its producers, achieving cost-abating and distortive effects comparable to those of looser regulatory standards.⁶³ The TCA ‘reflects the hard-fought battles over the parties’ degree of freedom and constraint on these issues’.⁶⁴ The parties’ agreement that free trade must also be *fair* trade (i.e. carried out on a level-playing-field across partners, and unaffected by distortive measures) entails a range of LPF commitments, the most important being a duty of non-regression⁶⁵ and a soft pledge to increase protection of social values over time.

To monitor compliance with this compromise, the TCA establishes a bilateral ‘Partnership Council’⁶⁶ that can adjudicate allegations that one party has undermined the other, through looser regulations or subsidies,⁶⁷ and can authorise retaliatory action, including in the form of tariff increases.⁶⁸ The enforcement regime varies considerably from one area (for instance, labour rights and environmental protection) to another (for instance, subsidies control), but in all cases it offers to provide a party alleging to have suffered trade damage recourse to an incisive process to rebalance trade relations.⁶⁹ The EU viewed this mechanism as a device to counteract regulatory divergences harming trade. For the UK, this rebalancing mechanism was celebrated as formalising its freedom to adopt new regulations, at the risk of potential retaliation from the EU:

In effect it is an insurance policy for managing risk. In the low-trust environment of these talks, it allowed the EU to take the risk of accepting zero tariffs, potentially exposing them to new competition from the UK; and it allowed us to live with some limited provisions enabling EU counter-measures.⁷⁰

⁶³ It is fair to say that the EU demands were perhaps justified, but also unprecedented, since no previous EU FTA contained rules on level-playing-field like those that the EU requested or that the TCA ultimately includes. The UK resented these LPF demands, and made it a point to regret the EU’s unwillingness to agree on a ‘Canada model’, that is, to the conclusion of an FTA similar to the Comprehensive Economic and Partnership Agreement (CETA) between EU and Canada. For instance, see Francis Elliott and others, ‘Brexit: Boris Johnson Wants Canada–Style Trade Deal with Brussels’ *Sunday Times* (London, 31 January 2020) and the EU’s position in *Remarks by Michel Barnier following Round 3 of negotiations for a new partnership between the European Union and the United Kingdom*, 15 May 2020, available on the Commission’s website <ec.europa.eu>.

⁶⁴ Craig, ‘Interregnum’ (n 3) 37.

⁶⁵ That is, the commitment not to lower standards compared to the regulatory baseline prevailing when the TCA comes into force, see Art. LPFS.6.2(1): Non-regression from levels of protection.

⁶⁶ The TCA also established a Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development under the EU-UK Trade and Cooperation Agreement, which holds annual meetings.

⁶⁷ On subsidies, see George Peretz, ‘The Subsidy Control Provisions of the UK-EU Trade and Cooperation Agreement: A Framework for a New UK Domestic Subsidy Regime’ *EU Relations Law* (28 December 2020); Craig, ‘Interregnum’ (n 3) 33–35. The enforcement process in case of subsidies is more articulate and can involve TCA arbitration, private enforcement in domestic courts and State-sanctioned trade remedies.

⁶⁸ See Paul Craig, ‘Legal Structure, Rights and Enforceability’ in McCrudden (n 24) 36 ff.

⁶⁹ Article 411.

⁷⁰ David Frost, ‘What Is Seen and What Is Not Seen: The UK, Europe, and Beyond’ (University of Zurich, Churchill Lecture, 15 March 2022) <www.eiz.uzh.ch/>.

In other words, the fact that rules across the two markets were aligned on day one, while true in fact, had no particular significance. The TCA rules do not reflect this temporary correspondence, and instead think ahead to regulate future divergence.

3.1.5. Regulatory divergence and trade

In fact, the UK has been cautious in moving away from EU regulations, at least initially. The adoption of *less stringent* UK standards, besides possibly triggering the LPF mechanisms in the TCA, would expose UK goods to heightened scrutiny at the border with the EU; conversely, the adoption of *more stringent* UK standards, which would cause no trade rebalancing from the EU, would undermine the competitiveness of UK exports, objectively a hard business case to make.

An instance of aborted *more stringent* regulation is the delayed introduction of veterinary checks. In December 2022, the UK Department of Farming and Agriculture postponed by a year the imposition of on-site veterinary visits to certify that farms are free from notifiable diseases. The agricultural industry protested the red tape associated with these veterinary attestations, without which they could not export their products. Thanks to the postponement, self-declarations complying with the EU standards remain sufficient.⁷¹ More stringent regulations have so far failed to materialise even when their estimated effects on the local industry would have been small, possibly to preserve consumers' choice. For instance, the long-discussed import bans on foie gras, furs, and animal trophies (goods that cannot be manufactured in the UK, but can be imported), premised on animal welfare considerations, have been pushed back.⁷²

Less stringent regulations are often featured in discussions on how to enhance the global competitiveness of UK goods and services. In the field of financial services, in particular, the UK industry invokes deregulation often. After losing the privileges of operating inside the internal market as EU providers, UK banks and financial firms have pressed the UK Government to get rid of regulatory constraints inherited from EU law. For instance, in December 2022 the UK Government presented a package of measures relaxing EU law-based restrictions and checks on the financial sector, with the professed goal of 'repealing retained EU law in financial services and replacing it with a new framework tailored to the UK, embracing the new opportunities presented by our position outside the EU'.⁷³ These measures would include lifting the cap on bankers' bonuses, relaxing the duty to keep retail and investment operations separate ('ring-fencing') and issuing new directions to the Bank of England's Prudential

71 FarmingUK, 'Defra Delays Controversial on-Farm Vet Rule for Exports' (London, 19 November 2022) <farminguk.com>.

72 Emilio Casalicchio, 'UK to Drop Proposed fur and foie gras import ban' *Politico* (London, 21 September 2022) <politico.eu>.

73 Jeremy Hunt, Statement UIN HCWS425 made on 9 December 2022; Katherine Griffiths, 'How the UK Plans to Get a "Big Bang" Out of Brexit' *Washington Post* (Washington, 21 November 2022) <washingtonpost.com>.

Regulatory Authority and the Financial Conduct Authority demanding a ‘greater focus’ on growth and international competitiveness.⁷⁴ Deregulation might be appealing in the field of financial services: given the loss of mutual recognition and passporting in the TCA, UK providers’ market access to the EU has been already severely affected,⁷⁵ and regulatory relaxation might at least help promoting their services to UK-based and non-EU clients.

Conversely, outside financial services, deregulation might be a problem for UK exporters used to observing EU product standards: the British Chambers of Commerce published in November 2022 the results of a survey testing the industry’s views on the prospect of shedding EU standards, noting that most businesses did not see a benefit in doing so. The survey revealed that UK businesses, in fact, are afraid that divergence from EU standards would make it ‘more difficult, costly or impossible to export their goods and services’.⁷⁶

This survey was conducted in response to the announcement of the Retained EU Law (**REUL**) Bill, introduced in September 2022. The REUL Bill proposes to make all EU retained law lapse by the end of 2023, and has been heralded as the ‘bonfire of EU laws.’ The British Chambers of Commerce, on behalf of UK businesses, requested that the Bill’s effects be postponed at least until the end of 2026. The Bill also met with objections by the Government of Scotland, on principled grounds (the fear that the abandonment of EU standards can cause a race to the bottom⁷⁷), as well as suspicions that the Bill could authorise the UK Government’s encroachment on devolved competences, in areas in which Scotland’s Ministries ‘are committed to aligning regulation in Scotland with EU regulation’.⁷⁸ The Government of Wales has expressed similar concerns.⁷⁹

74 Contrast this with the account of the PRA’s mandate described by the Authority itself in September 2022, Bank of England, Prudential Regulation Authority, *The Prudential Regulation Authority’s Approach to Policy* (September 2022) Discussion Paper DP4/22.

75 See Richard Barfield, ‘Services Trade—Mind the Gap’ (8 April 2022) UK in a Changing Europe <<https://ukandeu.ac.uk/services-trade-mind-the-gap>>, reporting that export of UK financial and professional services to the EU had dropped, and that ‘the combined export gap for [these] services is so large that it seems that the UK has little choice but to negotiate lower barriers for them with the EU.’ Clearly, the UK is now considering a different path.

76 British Chambers of Commerce, ‘Large-Scale Deregulation not a Priority for UK Businesses’ (29 November 2022) <britishchambers.org.uk>.

77 Rob Merrick, ‘Brexit: Fears for Toy Safety, Asbestos Exposure and Work Accidents in EU Laws “Bonfire”’ *The Independent* (London, 5 December 2022) <[independent.co.uk](https://www.independent.co.uk)>.

78 Scottish Government, message of the Constitution Secretary Angus Robertson to UK Secretary of State for Business, Energy and Industrial Strategy Jacob Rees-Mogg (22 September 2022) at <www.gov.scot/news/deep-concern-at-retained-eu-law-bill/>: ‘The introduction of the Retained EU Law (Revocation and Reform) Bill risks removing restrictions on the use of decontaminants on meat, such as the chlorine washes on chicken and businesses’ minimum hygiene standards. It could also jeopardise protections in relation to the safety and compositional standards of baby foods.’

79 Cabinet Statement, Written Statement: The Retained EU Law (Revocation and Reform) Bill (3 November 2022) at <<https://gov.wales/written-statement-retained-eu-law-revocation-and-reform-bill>>.

3.2. UK Trade with the Rest of the World

After Brexit, the UK has been able to decide how to pursue its external trade policy, and with which countries. Largely, the UK's strategy has been to first take care of replicating so far as possible the trade relationships with the EU trade partners, which lapsed automatically when the UK left the EU. Then, the UK started venturing into the negotiation and conclusion of genuinely new trade agreements. This section assesses both actions in turn.

3.2.1. UK trade with EU partners—rolling over and beyond

With or without a 'deal,' Brexit spelled for the UK the loss of all trade benefits enjoyed under the treaties between the EU and the EU trade partners (e.g. Canada, Japan, Switzerland, Ukraine, South Korea, Morocco, Israel). After leaving the EU, the UK would have become to these countries just a generic 'third party' WTO Member, rather than a preferential partner benefitting from the WTO-*plus* treatment associated with FTAs (see above: zero tariffs; selected arrangements on coordination and mutual recognition of regulations; limited arrangements on professional qualifications to open up trade in services).

The prospect of losing privileged access to the markets of all EU trade partners caused the UK Department of International Trade to deploy a simple but ambitious plan: hold bilateral talks with them, asking to 'roll over' their agreements with the EU. The roll over consists, effectively, in copy-pasting the content of existing agreements with the EU into novel but largely identical treaties with the UK, replacing 'EU' with 'UK,'⁸⁰ ready for application immediately after Brexit. As of December 2022, only a handful of countries out of more than 50 (Algeria, Bosnia, Greenland and Montenegro) have not rolled over their FTA with the EU into one with the UK; meaning that trade with these countries now occurs at WTO terms, and the UK applies its global MFN tariff to their goods.

Rolled-over treaties correspond largely to the FTAs they replicate, but some amendments were necessary, a few of which warrant mentioning. First, these agreements need

⁸⁰ In many cases, the 'new' treaty consists in a handful of articles, the main one stipulating that the treaty with the EU shall apply, but that all references to the EU shall be replaced with a reference to the UK. See, for instance, how the Department of International Trade described this drafting process with respect to the continuity agreement between UK and Chile, signed in February 2019: 'Many of the general changes to the EU-Chile Agreement (such as replacing "EU" with "UK") are applied mutatis mutandis, that is, with the technical changes necessary to apply the Agreement as if it had been concluded between the UK and Chile in the first instance. The interpretive mutatis mutandis principle applies to most references to EU law so that, where appropriate, such references are to be read as references to retained EU law or to EU law incorporated in the law of the territories for whose international relations the UK is responsible when relevant EU law ceases to apply to the UK, or legislation in the UK or the territories that replaces that legislation. This has avoided the need to reproduce every page and has significantly reduced the volume of text required'; from UK DIT, 'Continuing the United Kingdom's trade relationship with the Republic of Chile' (February 2019) at <gov.co.uk> [10].

to contain *ad hoc* ROOs, as the simple switch of ‘EU’ for ‘UK’ cannot work: what used to count as ‘made in the EU’ under the previous FTA may not be eligible for ‘made in UK’ status under the rolled over FTA with the UK, with the risk that goods assembled in the UK might not access the preference under it. Imagine a EU FTA requiring at least 50 per cent of EU inputs for a laptop to obtain duty-free treatment as ‘made in the EU’ in the other country party to the FTA. A computer made in the UK with a mere 51 per cent of EU components (including German microchips and Italian soundboard) would be ‘made in the EU’ and attract the preference. Under a ‘roll over’ treaty between the UK and that same third country, instead, the same laptop—while assembled in the UK—could not meet a 50 per cent threshold of *exclusively* UK inputs (the German and Italian components would not count towards that threshold) and would miss the preference. Specific negotiations were required to ‘claw-back’ as much as possible EU inputs into the new ROOs relating to ‘made in UK’⁸¹ (a process known as ‘extended cumulation’). In other words, the third country would agree to the *fictio* that EU inputs are UK inputs, in order to extend favourable treatment more easily:

... a motor vehicle made in the UK incorporating a significant proportion of components imported from the EU will be treated by Japan as entitled to the tariff preferences in Japan. The UK will give similar treatment to motor vehicles from Japan made largely from components imported from the EU.⁸²

Second, certain countries have deeper FTAs with the EU that provide also for regulatory alignment, access to the EU internal market (EFTA countries) or even a customs union arrangement with the EU (Turkey). These FTAs could not be ‘rolled over’ in full, as some of their contents reflected the commitment to follow, or stay close to, EU rules. For instance, only a handful of the around 20 mutual recognition agreements between Switzerland and the EU could be rolled-over with the UK,⁸³ and even the sparsest rules in the UK-Switzerland treaty on the movement of workers (and trade in services) needed *ad hoc* negotiation and were subject to periodic evaluation and extension.⁸⁴ Likewise, the original roll-over agreement with Norway was much shallower than the EEA agreement (between the EFTA countries and the UK), and did not cover services at all.

⁸¹ These ROOs can be found in the UK deals with Japan, Chile, Mexico, Canada, Switzerland and South Korea, for instance, and sometimes cumulation rights are time-limited, requiring specific extension after a few years (e.g. with Canada).

⁸² Lode Van den Hende and Eric White, ‘The Impact of Brexit and Origin Rules on Trade between Japan, the UK and the EU’ Herbert Smith Competition Note (9 February 2021) <[hsfnotes.com](https://www.hsfnotes.com)>.

⁸³ In November 2022 the UK and Switzerland extended the reach of their mutual recognition arrangements, adding five new sectors (electrical equipment, measuring instruments, radio equipment, transportable pressure equipment and noise emitting equipment), see on UK-Switzerland Mutual Recognition in relation to Conformity Assessment, 17 November 2022.

⁸⁴ The UK-Switzerland Services Mobility Agreement, allowing UK professionals to work in Switzerland for up to 90 days per year with no working visa, had been provisionally in force since 1 January 2021, and was extended in November 2022 until the end of 2025.

Overall, the UK government did a remarkable job in a short time, and managed to replicate virtually the entire network of EU preferential deals, accomplishing its trade-continuity goals as far as tariffs and other border restrictions on trade in goods are concerned. Towards the end of this roll-over process, the UK also started re-negotiating some of the roll-over treaties, or expanding their scope.⁸⁵ The new EPA with Japan, for instance, contains some *ad hoc* rules on digital trade and some market access concessions for UK financial services, as well as a mutual recognition protocol covering electrical products, chemicals, medicinal products, telecommunications and radio equipment. The temporary 'roll-over' treaties with Iceland, Lichtenstein and Norway were replaced by a new FTA in mid-2021.⁸⁶ The new digital trade agreement with Singapore builds on an existing rolled-over FTA, and a similar one should be ready soon with Ukraine. With respect to Canada and Israel, the UK is keen to negotiate new treaties that exceed and update the roll-over ones, to include areas such as services, data and intellectual property.

With respect to the GSP scheme,⁸⁷ the transition was much easier to execute. Since these arrangements are unilateral, the UK could roll them over without negotiating with the beneficiaries, as it did. Subsequently, the UK launched in August 2022 a new GSP scheme granting greater concessions. The rolled-over GSP provided for zero tariffs on everything but arms for least-developed countries and generous tariff-reductions for all other eligible economies, which cover roughly 80 per cent of product lines. The new UK scheme covers 85 per cent of product lines with no tariffs, increases the concessions to eight new countries, provides for more generous ROOs (tolerating higher portions of non-originating content) and removes conditionality requirements to qualify for the preferences (such as the signature of international treaties).⁸⁸

3.2.2. UK trade with third countries: WTO and new FTAs

Outside the roll-over network, UK trade with another country can take one of two shapes: the one-size-fits-all option (trade under WTO terms) or a preferential arrangement (trade under new FTAs with selected economies). The WTO baseline cannot be contracted out, so in effect the only policy decision the UK has to make has been how to shape its FTA strategy.

Since EU Member States cannot conclude trade treaties autonomously (the Commission does it for them), only after Brexit could the UK formulate and develop one

⁸⁵ Dominic Webb, 'Progress on UK Free Trade Agreement Negotiations' (19 December 2022) House of Commons Research Briefing.

⁸⁶ House of Lords, European Affairs Committee, 'Free Trade Agreement Between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland' (11 October 2021) HL Paper 69.

⁸⁷ The scheme to provide preferential treatment to developing countries, see above section 2.3.

⁸⁸ UK Department for International Trade, *Developing Countries Trading Scheme: Government Policy Response* (16 August 2022).

such strategy, and implement the wish of many Brexit advocates: leave the EU behind and forge new relations with the likes of US, India and Australia.

3.2.2.1. *Trade at WTO terms.* After Brexit, the EU and the UK needed to clarify to the other WTO members how they intended to split between them the concessions that they previously held or granted jointly. This clarification concerned chiefly whether the UK would modify the EU MFN tariffs and how the EU and UK would divide between them their Tariff-Rate Quotas (**TRQs**).

- *The UK global tariff*

The UK, detached from the EU's external trade policy, could determine autonomously its MFN tariffs, subject to two constraints. First, the bound rates of its WTO Schedules of Concessions could not plausibly increase from the rates inherited from the EU;⁸⁹ second, the MFN principle multiplied the repercussion of any decision to lower the rates unilaterally, making it very hard to 'target' imports from certain countries with a more favourable rate. In other words, the unilateral manoeuvring of one's tariffs is a very blunt tool: lower tariffs certainly open one country's market to international trade, but might be badly suited to advance more tailored economic policies.

An instance of this difficulty occurred during the TCA negotiations, when 'no deal' seemed a plausible prospect. In case of 'no deal,' trade with the EU would have fallen under the category of trade with 'third countries.' EU goods, therefore, would have faced the MFN UK tariffs, with the consequent raise in prices for UK consumers and UK industries using EU components, two undesirable and untimely blows to the UK economy. Given the size of UK's trade with the EU, the UK took steps to avert this risk by reforming (downwards) its MFN tariffs applicable in case of 'no deal'. The UK published several drafts of a general scheme of tariff cuts, which would have benefitted EU goods but also, through the MFN, all third countries' goods.⁹⁰ Many UK industries protested (the drop in tariffs would have increased the pressure from cheaper foreign goods

⁸⁹ As a pre-existing WTO member, the UK could argue to inherit the EU Schedules and that its new status made no difference to the third WTO countries, with the significant advantage that other WTO Members would have found it difficult to request a renegotiation of the UK concessions. See Michael Lux and Eric Pickett, 'The Brexit: Implications for the WTO, Free Trade Models and Customs Procedures' (2017) 12 *Global Trade and Customs Journal* 97.

⁹⁰ Filippo Fontanelli, 'Continuity of UK International Agreements' (31 March 2020) Briefing Paper for the Scottish Parliament Committee on EU and External Affairs (31 March 2020) 10: 'In the March [of 2019] scheme, tariffs on 95% of product categories were eliminated, leaving only tariffs on 469 products (and raising the share of goods imported tariff-free from 62% to 92% in value). Approximately 70% of the surviving tariffs were concentrated on certain sensitive sectors: meat, ceramics, vehicles, textiles. Around half of these tariffs replicated the current EU tariffs (replicating the status quo), while the other half entailed some reduction (for instance, pork and poultry meat incurred tariffs that were 13% and 60% lower, respectively, than the EU ones. Tariffs were reduced considerably also on meat products).'

that previously had incurred custom duties).⁹¹ On its part, Canada suspended its roll-over talks with the UK, noting that the unilateral tariff concessions would have made it so cheap for any country to trade with the UK that the marginal utility of a preferential deal could be doubted.⁹² This exercise displayed the difficulty of trying to strike a balance between two competing interests: facilitating trade with the EU (through low tariffs) and preventing non-EU goods from acquiring overnight too much market access.

With the TCA, the UK did not have to worry about tweaking its MFN tariffs to ratchet up trade with the EU, and could focus on their effects on trade with 'third countries'. Ultimately, the UK reduced its applied tariffs on foreign imports (more moderately and sparsely than it had announced it would do in case of 'no-deal'). The UK's new 'Global Tariff' scheme eliminated customs duties altogether on some 2000 goods and overall adjusted downwards many other applied rates, also to round down numbers and achieve simplification, using fewer product descriptions and tariff bands. The overall average tariff went down by an estimate 1 per cent, from 7.2/6.8 to 6.0/5.7 per cent.⁹³ With this adjustment the UK government removed protectionism that might have previously been backed by EU-wide interests but was not in the UK interest to maintain. For instance, dishwashers, garden shears and Christmas trees now enter duty-free into the UK.

- *Tariff rate quotas*

The UK and EU needed to also to agree on how to split their **TRQs**. TRQs are external trade measures by which a certain quantity of imports face a certain tariff (or none), while imports above that quota incur a higher rate. TRQs effectively determine third countries' right to export at a lower price, until the quota is filled, so other WTO members must be informed how the EU and UK apportioned between them their once unified TRQs. In 2017, UK and EU reached an agreement to split their TRQs reducing the EU TRQ by the UK average usage recorded between 2013 and 2015, and subsequently codified the agreement.⁹⁴ Still, some WTO members insisted that the change would have been detrimental, and demanded further concessions to authorise it. Negotiations within the WTO to formalise the arrangement are still ongoing, which entail

⁹¹ See, for instance, the pamphlet of the British Retail Consortium and National Farming Union, 'Unilateral Cut in Tariffs—Not the Panacea' (October 2018) <brc.org.uk>.

⁹² Sam Lowe, 'Most Favoured Nation: Trade Policy in the Metaverse' (25 March 2022) <<https://mostfavourednation.substack.com/p/most-favoured-nation-trade-policy>>: 'The rollover deal nearly didn't happen after the Canadians walked out of the negotiations following the publication of the UK's no-deal tariff schedule (The Canadians argued that the no-deal tariff schedule would have given the whole world what Canada wanted for free, so why bother giving UK exporters preferential access to the Canadian market in return).'

⁹³ L Alan Winters, Michael Gasiorek and Julia Magntorn Garrett, 'New Tariff on the Block: What is in the UK's Global Tariff?' *UKTPO* (20 May 2020) <<https://blogs.sussex.ac.uk/uktpo/>>.

⁹⁴ Commission Implementing Regulation (EU) 2019/386 of 11 March 2019 laying down rules with regard to the apportionment of tariff rate quotas for certain agricultural products included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union and with regard to import licences issued and import rights allocated under those tariff rate quotas, C/2019/1822, OJ L 70, 12.3.2019, p. 4–16.

bilateral talks. In this framework, the US has signalled its consent to the proposed solution in 2021,⁹⁵ and China did so in June 2022.

3.2.2.2. *New FTAs with third countries.* The TCA is a free trade agreement, not a customs union. Its parties, therefore, are each free to set their external trade policy: the UK can now conclude trade agreements with third countries (i.e. besides the EU and its partners). This prospect was advertised much during the Brexit referendum campaign, to convince the public that the sovereignty recouped from Brussels could also bring trade benefits that were unattainable from inside the EU.⁹⁶

- *Negotiations with the US*

During the negotiations with the EU, the UK government professed that a deal with the US was possible and quickly attainable, during the last few months of the Trump's administration. Instead, it soon became clear that the a pre-requisite for the US to take any interest in a trade deal with the UK is to extract market access concessions on agricultural foods (through looser health and safety requirements), a virtual non-starter since the UK government has repeatedly held that it would not lower standards after Brexit. On his part, President Biden has publicly declared that a deal with the UK is 'not a priority'.⁹⁷

The US, in fact, has monitored the process of the UK diverging from EU rules and adopting/enforcing its own standards. In its 2022 Report on Foreign Trade Barriers, the US Trade Representative noted with veiled disappointment the general lack of progress of the UK's emancipation from the EU. The Report pointed out GB's continuing failure to enforce border controls on EU goods (after the numerous postponements of the new customs regime, to afford businesses more time adjust) and the UK's continued and close alignment to several unwelcome EU sanitary and phytosanitary standards, such as the EU 'policy on pesticide approvals, regulation, and maximum residue levels'.⁹⁸

Minor non-FTA successes have been achieved on the US-UK front. In October 2022, the US lifted its ban on UK lamb, which had been in place since the second wave of the BSE epidemic in 1996. Moreover, the UK has started to pen Memorandums of Understanding with single US States (so far: Indiana, North Carolina, South Carolina have concluded an MoU with the UK), effectively political declarations sketching the parties' joint efforts to cut unnecessary obstacles, including by facilitating the recognition of professional qualifications.

- *The FTAs with Australia and New Zealand, and the accession to the CPTPP*

⁹⁵ European Commission, *The European Union and the United States Conclude Negotiations on Agricultural Quotas Agreement* (8 March 2021) on the Commission's website <ec.europa.eu>.

⁹⁶ Eeckhout (n 14) 12 defined this plan the 'Global Britain project, which aims to find more trade and business on more distant shores'.

⁹⁷ Laura Kuenssberg, 'Joe Biden Plays Down Chances of UK-US Trade Deal' *BBC* (London, 22 September 2021) <[bbc.com](https://www.bbc.com)>.

⁹⁸ Office of the US Trade Representative, 2022 National Trade Estimate Report on Foreign Trade Barriers (1 March 2022) 518–20.

The UK has in fact concluded two trade deals with third countries after Brexit, with Australia (December 2021) and New Zealand (February 2022). Generally, the expected benefits in terms of increased trade with these two countries are modest. On the substance, several commentators argue that the conclusion of these treaties betrays the UK's anxiety to 'perform' as an autonomous global trade actor. It appears that Australia and New Zealand might have capitalised on the UK's urgency to 'be seen' to be moving on after Brexit,⁹⁹ extracting disproportionately convenient concessions for themselves (most notably, duty-free access to the UK market for lamb, dairy and most agricultural products).¹⁰⁰ In November 2022, the former Environment Secretary made a public declaration stating that the FTA with Australia was 'not very good' for the UK, since 'the UK gave away far too much for far too little in return,' because the DIT's 'decision to set an arbitrary target to conclude it by G7' gave Australia the chance to reshape the terms of the deal, and have all its demands satisfied.¹⁰¹

The agreements with Australia and New Zealand might pave the way for the UK's accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a mega-deal involving eleven countries, including Australia, New Zealand, Canada, Japan, Singapore and Vietnam. The UK—which has already bilateral deals with most CPTPP countries—applied for accession in February 2021 and, after a preliminary screening, its application is now (December 2022) under review to assess its market access offer. After the generous concessions made to Australia and New Zealand, and the subsequent political backlash, the UK's offerings have been more cautious to the CPTPP members, among which are major agricultural exporters. Conversely, the CPTPP members (especially Canada and Mexico, which are re-negotiating their roll-over treaties with the UK) consider lesser concessions to be unsatisfactory.¹⁰² The process of UK's accession has been slower and more difficult than it was initially predicted.

- Other negotiations

The UK is negotiating a brand-new deal with India and one with the Gulf Cooperation Council, and is negotiating with Canada, Mexico, Israel and Switzerland to replace the roll-over treaties with new FTAs.

⁹⁹ Zorzeta Bakaki and Tobias Böhmelt, 'New Deals "The Second After Leaving?" IO Withdrawal and Bilateral Trade Agreements' (2022) *British Journal of Politics and International Relations* 1, 15: 'It could be that an inexperienced negotiating team that is in a hurry to rebuild its trade regulatory architecture makes concessions more readily, so that more deals do not necessarily mean the highest possible economic benefit from PTAs for the country.'

¹⁰⁰ Agriculture and Horticulture Development Board, 'The Impact of a UK-Australia Free Trade Agreement on UK Agriculture' (November 2021) Market Intelligence Report; Geoffrey Miller, 'The Geopolitics Behind the New Zealand-UK Free Trade Agreement' *The Diplomat* (Wellington, 22 October 2021) <thediplomat.com>.

¹⁰¹ Jon Craig, 'George Eustice Brands Australia Free Trade Deal a 'Failure' in Brutal Swipe at Liz Truss' *Sky News* (London, 14 November 2022) <news.sky.com>.

¹⁰² Chris Horseman, 'London's 2022 CPTPP Accession Hopes Fade' *BorderLex* (28 September 2022) <borderlex.net>.

4. CONCLUSIONS

This article portrayed the evolution of the international law governing UK trade after Brexit. This account provides the basic knowledge and analytical tools to assess the new *status quo* in two areas: trade with the EU (i) and trade with the rest of the world (ii).

- (i) Assessing the new UK-EU relation is complicated by two initial difficulties. First, each party emphasised their perspective to advance its interests during their divorce procedures. See how the UK negotiator, Lord Frost, described these different views: The EU side saw a zero tariffs FTA as a privilege for which we ought to be prepared to pay a price in terms of governance by the Court of Justice and single market-like level playing field provisions. We saw zero tariffs as something highly desirable to smooth the transition out of the EU, but certainly not something for which we would pay a long-run sovereignty price.¹⁰³

The UK would claim that it was not a big ask to seek concessions from the EU comparable to those in place beforehand and that, at least, the past relation as EU partners would have warranted VIP treatment as a FTA partner. To that view, the EU retorted that seeking FTA concessions, some of which unprecedented, was in fact already a big ask, calling for significant counter-concessions (cue to fisheries and protection of geographical indications). Second, this was the first time ever that FTA negotiations took place in which 'both parties started off with free trade and discussed what barriers to erect.'¹⁰⁴ This circumstance was remarked upon, occasionally at the price of an illustrative shortcut (that trade barriers were introduced rather than removed) that can be misleading for the non-expert,¹⁰⁵ and sheds an unfair light on the TCA, which should be assessed against the no-deal contingency, not against the EU internal market.

This article's analysis can help seeing through this contextual murk, and gauge the substance and effects of the applicable laws and policies. In light of this analysis, the vignettes at the end of the introduction, reporting on Brexit's perceived and actual effects on trade, can be understood better, and some of these effects on the ground can be more easily ascribed (or not) to the evolving body of trade rules discussed above.

While this article does not endorse one particular reading on Brexit, it supports the view that a side-to-side comparison of trade within the EU single market and under the TCA is inherently misleading. A quote by Sir Ivan Rogers summarises this view well:

When former U.K. Trade Ministers ... say things like 'we will just be discussing whether to put up any trade barriers: it's much quicker (than other trade deals)', one can only watch and marvel at what planet they inhabit: the process of exit automatically entails

¹⁰³ Frost (n 70).

¹⁰⁴ Pascal Lamy, interviewed by *The Week* in Westminster, *BBC*, 1 February 2020, cited in Bennet and Vines (n 4) 69.

¹⁰⁵ For instance, see Ayele et al (n 1) 171: 'the EU-UK TCA is highly unusual in that it is an agreement which raises barriers to trade.'

the re-erection of trade barriers which, by law, are only removed for those who live within the town walls of the Single Market. In other words, when we exit we do not return to a world free of barriers, we return to the world as it actually is, which is full of barriers, notably non-tariff ones, unless these have been removed by agreement ... Divergence is a lot more complex to manage than convergence. And vastly more unusual. Indeed, unprecedented.¹⁰⁶

This article explained the core stages of the UK's unusual journey out of the EU (single) internal market, first into a world 'full of barriers', and then onwards towards the slightly more hospitable pasture of the TCA and the Wild West of FTA-planning.

The reader might take away two notions. The TCA does not create a *diminished* single market, but a moderately enhanced free trade area. Semantics aside, this view must inform several value judgments: of the parties' past negotiating stances, the liberalisation outcomes, the general success and price of the Brexit project.¹⁰⁷

(ii) Besides the relationship with the EU, the UK's global outlook on trade results also from its new FTA policy. Here too, the UK's FTA action should be assessed on its own right, and there is no need to point out constantly that FTAs with third countries cannot make up for the economic damage done by Brexit, which the TCA can only alleviate.

These are still early times, and the practice is still quite sparse, so all judgments are premature. The impression is that the UK has burnt a considerable amount of concessions early on (specifically, market access for agricultural products), to seal the deals with Australia and New Zealand quickly, and might be running out of steam. Access to the CPTPP and the progress of the negotiations with Canada and India will be the next developments to watch, to form a better view of the UK's trajectory on this front. The success of the UK FTA strategy, perhaps, will be measured more in how these new deals will include new *ad hoc* instruments of regulatory recognition and integration, rather than sheer exchanges of market access. The trade convenience of shallow FTAs that simply undercut WTO MFN rates is declining,¹⁰⁸ and deep, tailored FTAs need new ideas and political resolve to prosper.

¹⁰⁶ Ivan Rogers, 'The Ghost of Christmas Yet to Come: Looking Ahead to the Coming Year(s) of the Brexit Process' (University of Glasgow, 25 November 2019) speech <policyscotland.gla.ac.uk/ghost-of-christmas-yet-to-come-brexite-lecture-full-text>.

¹⁰⁷ Consider again the words of Frost (n 70): 'We didn't think that leaving an economic union necessarily had to put us at loggerheads with it. We saw it as like leaving a club and paying your outstanding bills, not as a divorce.'

¹⁰⁸ Aaditya Mattoo, Alen Mulabdic, and Michele Ruta, 'Trade Creation and Trade Diversion in Deep Agreements' (2022) 55 *Canadian Journal of Economics/Revue canadienne d'économie* 1598.