BREXIT – THE LEGAL INTRICACIES IN ROLLING OVER EU PTAS

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ABSTRACT

Considering the severe impact of Brexit on the United Kingdom's trade regulatory mechanism, the focus of most scholarly work has been on the structure and possibility of concluding a deal with the European Union to regulate trade once the United Kingdom leaves the European Union. Since this forms the bulk of the United Kingdom's trade, it is understandable that the primary focus has been on concluding these negotiations. However, equally important to this exercise would be the replication of the EU's existing agreements with third party countries. This exercise of rolling over EU treaties has received comparatively less scholarly attention, which is what this research attempts to remedy.

Considering the number of such agreements which need to be replicated, this Article focuses on the key treaty negotiation issues that the United Kingdom may face and suggests a structured negotiation strategy that the United Kingdom could follow while forming these roll-over arrangements. This is divided primarily into two categories of general modifications and substantive modifications. Following this exercise of studying the current strategies, the research suggests potential areas of improvement, including in the GSP regime. This exercise is crucial to achieve some of the highly publicized gains of Brexit, so that some benefits may be reaped finally from this otherwise expensive divorce.

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I. BREXIT – POLITICAL, ECONOMIC, AND LEGAL CONSIDERATIONS

A. *Introduction*

The exit of Britain from the European Union ("Brexit") has come at the time of extensive unrest within the trade regime. With the restructuring of the World Trade Organization ("WTO") Appellate Body on the one side and the withdrawal of the United Kingdom from the European Union on the other, trade lawyers are faced with a host of issues that have never been anticipated or legally analyzed. The trade debate on the latter controversial decision to leave the EU rages between naysayers who warn of economic havoc,[1] and those pointing to

1. Holly Williams, *No Deal Would Bring Economic Havoc Like Collapse of Lehman Brothers, Warns UK Fiscal Watchdog*, INDEPENDENT (Mar. 20, 2019), https://www.independent.ie/business/brexit/no-deal-would-bring-economic-havoc-like-collapse-of-lehman-brothers-warns-uk-fiscal-watchdog-37932559.html; David Goodman & Larry Meakin, *Brexit Havoc Adds to Misery for Nation Battling with Debt*, BLOOMBERG (Mar. 22, 2019), https://www.bloomberg.com/news/articles/2019-03-22/brexit-cliff-edge-is-already-real-for-some-people.

the potential gains of retaining the autonomy to strike new trade deals with the rest of the world. [2]

In the latter line of argument, which is championed by the United Kingdom's political brass, Brexit would effectively allow the conclusion of preferential trade agreements ("PTAs") with the leading economies of the world. This positive vision of Brexit has driven the discourse within the United Kingdom, which has always been a reluctant member of the EU. From the initial stages of joining the EU, the United Kingdom has remained wary of deeper integration. This is evident from its decisions to avoid adoption of the Euro,[3] to not join the Schengen free border system,[4] and to exempt itself from the application of the Charter of Fundamental Rights, 2000.[5]

This wariness finally manifested itself in the form of a movement to renegotiate the terms of the relationship between the EU and the United Kingdom and strike a more favorable compromise.[6] Though there was an agreement reached between the European Council and the United Kingdom, which sacrificed several foundational EU principles to appease the United Kingdom's requests for change,[7] a referendum was called to finally decide the issue. However, with the now infamous referendum of 2016, this renegotiation changed into a move to simply exit the EU.[8]

The Brexit story has since become a controversial process with several political parties coming into power and then stepping down as they failed to navigate the legal and political conundrums this has raised.[9] The focus of these negotiations has been on the future EU-U.K. relationship, which will effectively decide the economic future of the

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2. Liam Fox, Int'l Trade Sec'y, Free Trade Speech at Manchester Town Hall (Sept. 29, 2016), https://www.gov.uk/government/speeches/liam-foxs-free-trade-speech.

3. Protocol (15) on Certain Provisions Relating to The United Kingdom of Great Britain and Northern Ireland, June 7, 2016, O.J. 1 202/284.

4. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, May 9, 2008, O.J. C 115/290.

5. Protocol (30), June 7, 2016, on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2012, O.J. 1202/312.

6. Letter from Prime Minister David Cameron to European Council President Donald Tusk (Nov. 15, 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf.

7. Paul Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 EUR. L. REV. 231 (2012).

8. European Union Referendum Act 2015, c. 36 (Eng.).

9. Ryan Bourne, Opinion, *How Ambiguity on Brexit is Hurting Britain's Main Political Parties*, WASH. POST (May 28, 2019), https://www.washingtonpost.com/opinions/2019/05/28/how-ambiguity-brexit-is-hurting-britains-main-political-parties/?noredirect=on&utm_term=.cb108ff85300.

United Kingdom. Considering that the United Kingdom has fifty-five percent of its trade in goods with the EU, there seems to be little doubt that a "no deal" Brexit could have catastrophic results for U.K. industries.[10]

This leads to a clear priority in terms of negotiating strategy, considering that the United Kingdom's economic future depends on the terms they negotiate with the EU prior to leaving the Union. The second priority would be negotiating for a rollover of the existing EU agreements to ensure the smooth transition of all of the United Kingdom's trade commitments with non-EU countries.[11] While there has been immense focus on the first issue regarding the potential shape and structure of a future EU-U.K. relationship, comparatively little attention has been paid to the potential problems the United Kingdom will face in transitioning existing EU agreements to maintain their relationship with several important trading partners.

In the context of the United Kingdom, this would constitute over eleven percent of their total trade inflow and outflow, which, though comparatively insignificant to the EU-U.K. relationship of forty-seven percent, could have serious ramifications.[12] The complexities in concluding these "rollover agreements," as they have been termed, is made all the more evident by its slow progress.[13] The purpose of this analysis is to provide a clear map for the United Kingdom to follow in concluding these rollover agreements and the potential pitfalls that it could face while attempting to negotiate and conclude these treaties.

The remainder of this section will describe the current state of affairs with respect to this process of transitioning PTAs and the importance of these agreements for the United Kingdom. Part II of this Article will deal with the major issues that the United Kingdom would face in rolling over such treaties. Following this analysis, Part III will use the existing treaty practice to chart out the general architecture used in rolling over such treaties and the potential improvements on this current

10. Serina Sandhu, *What Is No-Deal Brexit? Consequences of the UK Leaving the EU Without a Deal*, I NEWS (Oct. 19, 2019), https://inews.co.uk/news/brexit/no-deal-brexit-what-meaning-uk-leave-uk-consequences/.

11. Steve Woolcock, *WTO Rules OK? Not Any More*, LSE (May 24, 2019), https://blogs.lse.ac.uk/brexit/2019/05/24/wto-rules-ok-not-any-more.

12. *UK Trade Agreements with non-EU Countries in a No-Deal Brexit*, DEP'T FOR INT'L TRADE (Aug. 15, 2019), https://www.gov.uk/government/publications/existing-trade-agreements-if-the-uk-leaves-the-eu-without-a-deal/existing-trade-agreements-if-the-uk-leaves-the-eu-without-a-deal#fnref:1.

13. Benjamin Fox, *UK Admits It Will Fail to Roll over EU Trade Deals*, EURACTIVE (Feb. 12, 2019), https://www.euractiv.com/section/uk-europe/news/uk-admits-it-will-fail-to-roll-over-eu-trade-deals/.

architecture. Part IV provides a brief overview of the author's analysis and the way forward in this process of transitioning EU Agreements.

B. *List of Provisionally Applied and Concluded Treaties*

The table below depicts a complete list of all the completed and provisionally applied treaties between the EU and third-party countries in the first column and in the second, compares each treaty with the progress made by the United Kingdom in concluding agreements for rolling over PTAs.

TABLE I

EU[14]	**Rolled Over Agreements – UK**[15]
Albania (Western Balkans)	
Algeria	
Andorra	
Antigua and Barbuda (Forum of the Caribbean Group of African, Caribbean and Pacific (ACP) States) (**"CARIFORUM"**)	Agreement finalized
Armenia	
The Commonwealth of the Bahamas (CARIFORUM)	Agreement finalized
Barbados (CARIFORUM)	Agreement finalized
Belize (CARIFORUM)	Agreement finalized
Bosnia and Herzegovina (Western Balkans)	
Botswana (South African Development Community) (**"SADC"**)	Agreement finalized

14. *Negotiations and Agreements –Implementing EU Agreements*, EUR. COMM'N (Oct. 27. 2020), http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_partly-in-place.

15. *UK Trade Agreements with Non-EU Countries*, DEP'T FOR INT'L TRADE (Jan. 29, 2020), https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries.

TABLE I CONTINUED

EU[14]	**Rolled Over Agreements – UK**[15]
Cameroon (Central Africa)	
Canada	
Chile	Agreement finalized
Colombia (with Ecuador and Peru)	Agreement finalized
Comoros (Eastern and Southern Africa) (**"ESA"**)	
Costa Rica (Central America)	Agreement finalized
Côte d'Ivoire (West Africa)	
Cuba	
Dominican Republic (CARIFORUM)	Agreement finalized
The Commonwealth of Dominica (CARIFORUM)	Agreement finalized
Ecuador (with Colombia and Peru)	
Egypt	
El Salvador (Central America)	Agreement finalized
Eswatini (SADC)	Agreement finalized
Faroe Islands	Agreement finalized
Fiji and Papua New Guinea	Agreement finalized
Georgia	Agreement finalized
Ghana (West Africa)	
Grenada (CARIFORUM)	Agreement finalized
Guatemala (Central America)	Agreement finalized
The Republic of Guyana (CARIFORUM)	Agreement finalized

TABLE I CONTINUED

EU[14]	Rolled Over Agreements – UK[15]
Honduras (Central America)	Agreement finalized
Iceland	Agreement finalized
Iraq	
Israel	Agreement finalized
Jamaica (CARIFORUM)	Agreement finalized
Japan	
Jordan	Agreement finalized
Kazakhstan	
Kosovo	Agreement finalized
Lebanon	Agreement finalized
Lesotho (SADC)	Agreement finalized
Liechtenstein	Agreement finalized
Madagascar (ESA)	Agreement finalized
Mauritius (ESA)	Agreement finalized
Mexico	
Moldova	
Montenegro (Western Balkans)	
Morocco	Agreement finalized
Mozambique (SADC)	Agreement finalized
Namibia (SADC)	Agreement finalized
Nicaragua (Central America)	Agreement finalized

TABLE I CONTINUED

EU[14]	Rolled Over Agreements – UK[15]
North Macedonia (Western Balkans)	
Norway	Agreement finalized
Pakistan	
Palestinian Authority	Agreement finalized
Panama (Central America)	Agreement finalized
Peru (with Colombia and Ecuador)	Agreement finalized
Samoa (Pacific)	
San Marino	
Serbia (Western Balkans)	
Seychelles (ESA)	Agreement finalized
South Africa	Agreement finalized
South Korea	Agreement finalized
Sri-Lanka	
St Kitts and Nevis (CARIFORUM)	Agreement finalized
St Lucia (CARIFORUM)	Agreement finalized
St Vincent and the Grenadines (CARIFORUM)	Agreement finalized
The Republic of Suriname (CARIFORUM)	The Republic of Suriname has agreed in principle.
Switzerland	Agreement finalized
Syria	
The Republic of Trinidad and Tobago (CARIFORUM)	Agreement finalized
Tunisia	Agreement finalized

TABLE I CONTINUED	
EU[14]	**Rolled Over Agreements – UK**[15]
Turkey	
Ukraine	
Zimbabwe (ESA)	Agreement finalized

The number of blank spaces in the second column make evident that the process of rolling over EU PTAs still requires significant effort on the part of the United Kingdom to cover all the existing EU trade relationships, and particularly those with major trading countries. This process has proved complicated and slow to proceed due to issues that must be resolved before such PTAs can be smoothly transitioned.[16]

The issues in this process relate to the method by which the United Kingdom will inherit the obligations and rights under the existing EU bilateral and regional PTAs, which include transitioning tariff rate quotas ("TRQs"), rules of origin, services commitments, and mutual recognition of standards. Considering the complexities and expenses involved in negotiating such agreements, perhaps there are alternatives to explore, such as reverting to WTO rules for trading and abandoning existing PTA arrangements.[17]

C. *Comparison of Post-Brexit Options*

Considering the immense cost required in renegotiating treaties, the question remains whether it is simply easier and better for the United Kingdom to revert to the provisions of the WTO agreements. The United Kingdom is one of the early members of the WTO[18] and would retain its membership even after leaving the EU. However, when

16. Nicolo Tamberi & L. Alan Winters CB, *The UK's Continuity Trade Agreements: Is the Roll-Over Complete?*, UK TRADE POL'Y OBSERVATORY (Mar. 29, 2019), https://blogs.sussex.ac.uk/uktpo/2019/03/29/the-uks-continuity-trade-agreements-is-the-roll-over-complete/.

17. Chris Morris, *Brexit Trade Deal: What Do WTO Rules or an Australia-Style Relationship Mean?*, BBC NEWS (Dec. 13, 2020), https://www.bbc.com/news/uk-45112872; Chris Morris, *Gatt 24: Would Obscure Trade Rule Help with No-Deal Brexit?*, BBC NEWS (June 24, 2019), https://www.bbc.com/news/uk-47216870.

18. *United Kingdom and the WTO (Member Information)*, WTO, https://www.wto.org/english/thewto_e/countries_e/united_kingdom_e.htm (last visited Oct. 20, 2020).

compared to PTAs, trading under existing WTO rules would mean the imposition of high tariffs and the removal of any preferential trading benefits to U.K. industries to which they were previously entitled under EU PTAs.

The impact of such a strategy can be better understood in the following terms. If an industry in the United Kingdom was availing itself of the benefit of a preferential tariff under the EU-South Korea Trade Agreement, this benefit would lapse once the United Kingdom left the EU. In this context, reverting back to WTO rules would mean that any tariffs South Korea would apply for the normal trading of those goods under its schedule in the WTO, will now apply to the United Kingdom as well.

The tariff rate South Korea offers in the PTA would definitely be lower than that offered in its own original WTO schedule as there is a requirement to make commitments on substantially all trade to conclude a PTA in the first place.[19] There would be a significant increase in the tariffs incurred while exporting goods, which would in turn, create barriers for trade between the United Kingdom and existing PTA partners.[20] This makes it abundantly clear that the only way for the United Kingdom to maintain the trade relations with other states with which the EU has existing trade agreements, is through the process of rolling over these agreements.

D. *Importance of PTAs after Brexit*

PTAs allow the United Kingdom access to several preferential tariff regimes that have been established by the EU over the years. These tariffs are significantly lower than the existing tariffs that the countries have in their schedules.[21] This is primarily because Article XXIV of the General Agreement on Tariffs and Trade ("GATT") allows exceptions from the normal Most Favored Nation ("MFN") rule under Article I of the GATT. This effectively allows countries to develop individually determined tariffs suitable to trade between them without having the

19. General Agreement on Tariffs and Trade 1994 art. XXIV(8)(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

20. *See* Keith Head & Thierry Mayer, HANDBOOK OF INTERNATIONAL ECONOMICS 131–95 (Vol. 4, North Holland 2014); Swati Dhingra, Rebecca Freeman & Eleonora Mavroeidi, *Beyond Tariff Reductions: What Extra Boost from Trade Agreement Provisions?* (London Sch. of Econ. Ctr. for Econ. Performance, Discussion Paper No. 1532, 2018).

21. Richard Baldwin & Dany Jaimovich, *Are Free Trade Agreements Contagious?*, 88 J. INT'L ECON. 1 (2012).

obligation to extend this benefit multilaterally to all the WTO Members.[22] This exception has allowed far deeper commitments to be made by trading partners between themselves.[23]

To understand this difference, the tariff rate for a third country without a PTA with the EU for exporting almonds would be 5.6%,[24] which under its PTA regime is currently at 0% between the EU and Korea.[25] This non-PTA tariff rate would equally apply to U.K. exporters, if they were trying to export almonds to the EU after Brexit, unless there is a PTA with the EU allowing for tariff-free imports. The EU has replicated these trade concessions with over seventy-seven countries,[26] which must be rolled over by the United Kingdom to avail itself of the benefits of tariff-free or reduced tariff trade of goods and services with these countries.

Considering that the United Kingdom would choose to rollover these agreements as opposed to rely solely on WTO rules for future trade, there are several issues that it will face while negotiating and concluding these agreements. These issues could be resolved through some measures taken in advance and by mitigating the regulatory changes from the EU regime. The need for modification arises primarily because both the United Kingdom and the EU are independently parties to these treaties, resulting in most of these regulations being applicable in the pre-existing trade relationship between the United Kingdom and third parties. This is due to the shared competency between the parties which is discussed at length below.

II. Issues in the Rollover of EU Trade Treaties

A. *Position of United Kingdom in Existing EU Treaties*

The EU has concluded several treaties over the course of its existence, establishing a strong diplomatic and trade presence. According to publicly available statistics, the EU has concluded over 1000 treaties with third parties outside of the EU, either in its independent capacity

22. GATT, *supra* note 19, art. XXIV(5).

23. Jagdish Bhagwati, A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy 290–92 (1998).

24. Eur. Comm'n, *EU-South Korea Free Trade Agreement*, Access2Markets, https://trade.ec.europa.eu/access-to-markets/en/content/eu-south-korea-free-trade-agreement#toc_1 (last visited Oct. 20, 2020).

25. 2011 O.J. (L 127) [hereinafter EU-Korea PTA].

26. *See* Table I.

(EU agreements) or jointly with its constituent Member States.[27] There are approximately sixty-three PTAs that the EU has concluded with third-party states.[28] Once the United Kingdom exits the EU, there are doubts over the applicability of these agreements to the United Kingdom.

The applicability of these agreements would be governed by several factors such as their territorial scope and whether the United Kingdom entered into these agreements in its individual capacity. This could help determine whether these agreements will continue post-Brexit or whether they would require the conclusion of a new agreement between the United Kingdom and a non-EU state. This process has already begun with the conclusion of several agreements to rollover existing PTAs.[29]

1. Types of EU PTAs

The EU, through its status as an international organization, has international legal personality.[30] This enables it to conclude treaties with other states.[31] This power to conclude treaties is usually exercised in two ways. The first occurs when the EU concludes agreements in areas where it has exclusive competence. The second occurs when this competence is shared or is exclusively the domain of the Member States. Treaties of this latter category of agreements are termed "mixed agreements"[32] and are concluded jointly by the EU and the Member States.[33]

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27. *See* Treaties Office Database, EUR. UNION EXTERNAL ACTION SERV., http://ec.europa.eu/world/agreements/AdvancedSearch.do (last visited Oct. 25, 2020).

28. Dominic Webb, *UK Progress in Rolling over EU Trade Agreements*, HOUSE OF COMMONS LIBRARY (Dec. 13, 2019), https://researchbriefings.files.parliament.uk/documents/CBP-7792/CBP-7792.pdf.

29. *See* Table I.

30. Consolidated Version of the Treaty on European Union art. 47, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TEU]; Niels Blokker, *The Macro Level: The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law*, 35 Y.B. EUR. L. 471, 483 (2016).

31. TEU, *supra* note 30; Consolidated Version of the Treaty on the Functioning of the European Union art. 216(1), May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

32. Henry G. Schermers, *A Typology of Mixed Agreements*, *in* MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES 23, 25–26 (David O'Keeffe & Henry G. Schermers eds., 1983); Allan Rosas, *Mixed Union - Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 125, 127–29 (Martti Koskenniemi ed., 1998).

33. Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, *in* 2 THE ERIK CASTRÉN INSTITUTE MONOGRAPHS ON INTERNATIONAL LAW AND HUMAN RIGHTS 1, 6–7 (Martti Koskenniemi ed., 2001).

This distinction finds importance in the context of whether these agreements will continue to bind the United Kingdom after Brexit. Agreements to which only the EU is party bind Member States indirectly through EU law.[34] In contrast, in mixed agreements, Member States themselves are Parties and are consequently bound by them under international law.[35]

Specifically, in the case of international trade agreements, the competence to conclude pure trade agreements with states outside of the EU, lies with the EU.[36] Modern PTAs, however, contain provisions that fall within the shared competencies of the EU and its Member States, or in some cases even exclusively in the Member State's competence. This is best exemplified by the instance of PTAs containing investment chapters,[37] which the European Court of Justice ("CJEU") held to be of shared competency as the EU does not have exclusive competence to conclude treaties when issues relating to non-direct foreign investment are involved.[38]

This distinction has been ignored by many commentators who believe that even mixed PTAs will be terminated as soon as the United Kingdom leaves the EU.[39] International law, to the contrary, makes it abundantly clear that the EU and the United Kingdom are distinct parties.[40] Under the Vienna Convention on the Law of Treaties ("VCLT"), a Party to a treaty is defined as any state or international organization which has consented to be bound by the treaty and for which the treaty is in force.[41] This consent can be expressed in several ways which

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34. TEU, *supra* note 30, art. 4(3); TFEU, *supra* note 31, arts. 216(2), 291(1).

35. P.J. Kuijper & E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations*, 1 INT'L ORG. L. REV. 111, 116 (2004).

36. TFEU, *supra* note 31, art. 207.

37. Jo-Ann Crawford & Barbara Kotschwar, *Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends* 15, World Trade Org. Working Paper ERSD-2018-14 (2018).

38. Case C-2/15, EU-Sing. FTA - Opinion of the Full Court, ECLI:EU:C:2017:376, ¶ 305 (May 16, 2017).

39. Katrin Fernekeß, Solveiga Palevičienė & Manu Thadikkaran, Graduate Inst. of Int'l & Dev. Stud., *The Future of the United Kingdom in Europe: Exit Scenarios and Their Implications on Trade Relations* 48 (2014); Ros Taylor, *'Trade Relations will Remain Unchanged post-Brexit,' Claims Lord Lawson. Hardly*, LSE (Apr. 12, 2016), https://blogs.lse.ac.uk/brexit/2016/04/12/trade-relations-will-remain-unchanged-post-brexit-claims-lord-lawson-hardly/.

40. Eleftheria Neframi, *International Responsibility of the European Community and of the Member States under Mixed Agreements*, *in* THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS 193, 194 (Enzo Cannizzaro ed., 2002).

41. Vienna Convention on the Law of Treaties art. 2(1)(g), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

include signature, exchange of instruments constituting a treaty, and ratification.[42] The moment a treaty enters into force, it becomes binding on all the parties. This makes the consent irrevocable, with the application of the treaty only stopped either by the consent of the parties or by termination of the treaty.[43]

In the context of Brexit, the United Kingdom consented to the existing mixed PTAs. Consequently, it is an independent Party to these agreements. Most mixed PTAs include provisions defining how a Party can consent to be bound and the date of entry into force of the treaty.[44] This procedure is followed by both the EU and each Member State and they are thus regarded as Parties under international law, until the treaties are terminated. This position has been succinctly summarized in a recent opinion of the CJEU:

> If an international agreement is signed by both the European Union and its constituent Member States, both . . . are, as a matter of international law, parties to that agreement. . . . Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union . . . .[45]

This view has also been endorsed by the CJEU previously: "[U]nder a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion."[46]

After becoming a treaty Party, an international organization or state cannot be forced to exit the treaty, due to the application of the *pacta sunt servanda* principle.[47] The VCLT provides for only limited circumstances in which the standards for treaty termination are satisfied.[48] These conditions, which are exhaustive, include, agreement of the

42. VCLT, *supra* note 41, art. 11.

43. Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, *in* QUEEN MARY STUDIES IN INTERNATIONAL LAW 125 (Malgosia Fitzmaurice & Phoebe Okowa eds., 2012).

44. EU-Korea PTA, *supra* note 25, art. 15.10; Comprehensive Economic and Trade Agreement (CETA), Canada-European Union, art. 30.7, Oct. 30, 2016, 2017 O.J. (L 11/23) [hereinafter CETA].

45. Case C-2/15, EU-Singapore FTA, EU:C:2016:992, Opinion of AG Sharpston, ¶ 76 (Nov. 8, 2019).

46. Case C-316-91, Parliament v. Council, 1994 ECR 1-625, Opinion of AG Jacobs, ¶ 69.

47. VCLT, *supra* note 41, art. 26; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 178–81 (2d ed. 2008) [hereinafter Aust].

48. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

parties, operation of rules of international law, or the terms of the treaty.[49] Treaty provisions in this regard can vary. Some provisions may even grant the parties the right to terminate the treaty or provide for its automatic denunciation on a certain event.[50]

Applying this to the situation after Brexit, mixed PTAs to which the EU and the United Kingdom are parties, will not be terminated automatically for the United Kingdom, due to the lack of any provisions in these treaties linking termination to the withdrawal from the EU. If these events were to be linked, the parties to the treaty could have made express provisions to this effect.[51]

Before further discussing the strengths and weaknesses of the above mentioned three approaches, another aspect of the application of these PTAs to the United Kingdom post-Brexit will be based on the personal and territorial scope of these treaties. If these treaties continue to apply to the United Kingdom after Brexit, as mentioned above, this would clash with any future negotiations undertaken by the United Kingdom and, in effect, could defeat the trade independence sought through Brexit in the first place.[52]

2. Personal Scope of the PTAs

The additional layer to this analysis of whether the United Kingdom is a party to a PTA takes shape from the treaty text and the analysis of its treatment under EU law. Several treaties, attempting to avoid the problem of overlap between obligations of Member States and the EU, define personal scope narrowly. This is exemplified by the EU-Korea PTA which defines the personal scope of the treaty as follows:

> 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

49. *Id.*; Laurence R. Helfer, *Flexibility in International Agreements*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: "THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

50. Annalisa Ciampi, *Invalidity and Termination of Treaties and Rules of Procedure*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION (Enzo Cannizzaro ed., 2011).

51. *Contra* EU-Korea PTA, *supra* note 25, art. 15.11; CETA, *supra* note 44, art. 30.9.

52. Samuel Lowe, *The Reality of Britain's Role in the Global Trading System After Brexit Remains Deeply Uncertain*, INDEPENDENT (Mar. 29, 2019), https://www.independent.co.uk/news/business/analysis-and-features/brexit-trade-policy-eu-northern-ireland-wto-chequers-a8845851.html.

> European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Korea.[53]

The understanding between the parties of what a Member State is in this context must be understood through making a *renvoi* to EU law, which defines what constitutes a Member State.[54] Through this reference to the understanding of member state, it is clear that the United Kingdom will no longer satisfy this definition of a Party, due to the invocation of Article 50 of the Treaty forming the European Union ("TFEU") (under EU law) to exit the EU. This leads to two distinct conclusions. The first effect of this is that the treaty would continue to bind the United Kingdom to the treaty as it cannot terminate this treaty. This is mitigated by the second effect, which is that the United Kingdom will no longer be bound by the legal effect of the provisions.

3. Territorial Scope of the PTAs

Another potential obstacle to the PTAs' applicability is the territorial scope defined in these treaties. Mixed PTAs usually provide for territorial application extending to the territories where the EU Treaties apply, provided they satisfy the conditions laid down.[55] After Brexit, those PTAs that have limited territorial scope will not apply to the United Kingdom. This is made clear by the VCLT, which expressly states that: "a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory".[56]

This territorial scope of the treaty refers only to the territories where the treaty applies and which are, consequently, affected by the obligations and rights specified in the treaty.[57] The debate between commentators hinges upon the interpretation of the intention of the parties to these treaties. On the one hand, it is argued that the intent in including these clauses which specify a territorial scope, was to limit the application of these treaties only to state parties which were specified in the EU treaties, i.e., EU Member States.[58]

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53. EU-Korea PTA, *supra* note 25, art. 1.2 (emphasis added).

54. Eirini Kikarea, *Brexit and Preferential Trade Agreements: Issues of Termination and Survival Clauses*, 46 LEGAL ISSUES ECON. INTEGRATION 53, 64 (2019).

55. EU-Korea PTA, *supra* note 25, art. 15.15; CETA, *supra* note 44, art. 1.3.

56. VCLT, *supra* note 41, art. 29.

57. Sir Humphrey Waldock (Special Rapporteur), Third Report on the Law of Treaties, ¶ 1, II Y.B. Int'l L. Comm'n 12, (Mar. 3, Jun. 9 & 12, Jul. 7, 1964).

58. Kikarea, *supra* note 54, at 53–75.

The counterargument raised against this is that these territorial clauses incorporate the provisions related to overseas territories provided in EU treaties into the mixed PTAs.[59] This argument makes reference to "conditions laid down in those [EU] Treaties"[60] as an example of the will of the treaty parties to apply the overseas territories regime under EU treaties and include their application to non-EU Member States. Another argument which is often raised is that, since these territorial clauses applied when the agreement was concluded, the withdrawal from the EU should not act as a bar to their continued application.[61]

This debate must be resolved in favor of the argument that the intention of the parties was to make EU membership a condition for concluding this agreement. This is evident from the object, purpose, and text of these treaties. This restriction in the mixed PTAs was clearly intended by the third-party states to ensure that these benefits were conditional to the trade with an integrated trading bloc which had homogenized rules.

This however still leaves two questions. The first is whether the United Kingdom continues to be bound by a treaty which is a nullity as it contains no rights and obligations. The second question is whether the survival clauses present in several PTAs would be triggered, binding the United Kingdom despite the fact that the personal or territorial scope of the treaty no longer applies to it.[62] These survival clauses extend protection provided by the treaties even after the termination of the treaty and protect investments made before the termination period.[63] This would involve an interpretation of what constitutes termination under these treaties and whether the agreement becoming a nullity will satisfy this criteria.

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59. Ulrich G. Schroeter & Heinrich Nemeczek, *The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area*, 27 EUR. BUS. L. REV. 921, 951 (2016).

60. EU-Korea PTA, *supra* note 25, art. 15.15.

61. *See* Schroeter & Nemeczek, *supra* note 59, at 936; Lorand Bartels, The UK's Status in the WTO After Brexit 12–13 (Sept. 23, 2016) (SSRN), https://www.ssrn.com/abstract=2841747.

62. *See* VCLT, *supra* note 41, art. 30, ¶ 2; *see also* Tania Voon & Andrew Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31 ICSID REV. 413 (2016).

63. United Nations Conference on Trade and Development (UNCTAD), *Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims*, IIA Issues Note No. 2 (Dec. 2, 2010), https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf.

4. Terminating the Treaty

As discussed above, there are extremely limited circumstances in which the United Kingdom can terminate these PTAs. When these treaties contain express provisions regarding termination, there cannot be any implied termination as envisaged under the VCLT.[64] This leaves only three circumstances in which a party to a PTA can terminate the treaty: by following the procedure in an express termination clause; by agreeing with all the treaty parties to terminate the treaty; or by establishing that one of the grounds for termination under general international law exists.[65]

The first scenario would involve the application of the exit procedure specified in the treaty. As discussed, the United Kingdom does not satisfy the requirements to fall within the personal or territorial scope of mixed PTAs. The United Kingdom will, however, retain the right to invoke the exit clauses to terminate these treaties. This follows the rationale that State sovereignty cannot be limited when acceding to or terminating treaties. The parties to the treaty could not have intended that a party should remain bound by a treaty whose provisions are a nullity towards that State party, especially considering that most of these mixed PTAs contain very broad exit clauses. This is further supported by the analysis above that every Member State in a PTA appears both as individuals and as members of the EU.[66] Thus, unless an express provision to the contrary exists, the right to trigger the exit clause in PTAs would belong to every party to the treaty, regardless of the treaty definitions of personal or territorial scope.

The second scenario would involve all the parties agreeing to terminate the treaty, which seems unlikely as it would require a broad consensus by treaty partners to waive their rights, even under sunset clauses, with no incentive. The third scenario, involving an interpretation of the grounds for terminating under general international law, requires further discussion as its application is unclear. The solution to the problem of terminating these agreements, if an exit clause is not triggered, would involve an interpretation of Article 62 of the VCLT. This provision provides that:

64. VCLT, *supra* note 41, art. 56.

65. VCLT, *supra* note 41, art. 62.

66. Veljko Milutinović, The Central America-EU Association Agreement: The EU's Trade Liberalization Policy and the WTO 4 (July 15, 2013) (SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293650.

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) The existence of those circumstances constituted an essential basis of the con sent of the parties to be bound by the treaty; and
>
> (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (a) If the treaty establishes a boundary; or
>
> (b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
>
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty[.][67]

The question whether Brexit could be called an unforeseen fundamental change in circumstance remains unresolved.

5. Unforeseen Change in Circumstances

The rationale of Article 62 of the VCLT is to cover circumstances in which there is a material change from the original circumstances in which the treaty was concluded, making it unduly unrealistic to expect parties to continue performing their obligations under the treaty.[68] Article 62 of the VCLT can only be invoked when the conditions under Article 62 (1) & (2) of the VCLT are cumulatively met. The threshold for meeting these conditions is extremely high.[69] This provision also

67. VCLT, *supra* note 41, art. 62.

68. The Gabcikovo-Nagymaros Project (Hung. v. Slovak.), Judgment, 1997 I.C.J. Rep. 7, ¶ 104 (Sept. 25).

69. Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. 175, ¶ 36 (July 25).

excludes the possibility of a State invoking its own wrongful conduct to justify the change in circumstances.[70] Although this principle has sought to be used to justify treaty termination and is recognized as an international law rule, courts and tribunals are extremely reluctant to apply it.[71]

Applying this principle in the context of Brexit, there is a strong case for invoking Article 62 of the VCLT. This is hinged on the fact that Article 50 of the TEU, which allows for exiting the EU, was introduced only in the Lisbon Treaty of 2009. Considering that most of the mixed PTAs were concluded based on membership in the EU, there could be an argument for an unforeseen change in circumstances for all agreements concluded before 2009.

The problem in this argument is that Article 62 of the VCLT is couched in restrictive and negative language, including terms like "may not be invoked . . . unless," and its application is limited to exceptional circumstances.[72] Considering the lack of treaty practice and the reluctance of courts and tribunals to apply this principle, unilateral termination by the parties using the treaty's exit provisions provides a better option.

Under the circumstances discussed above, it is clear that the treaty can be terminated through the use of the exit clause provided in the treaty. However, even if the treaty is not terminated, there is a possibility that the survival clauses in these agreements may be triggered.

6. Survival Clauses

Once the PTAs become inoperative, Brexit will trigger the survival clauses in the treaties. The term "termination" would clearly include de facto events which result in termination of the treaty as can be interpreted using the principles contained in the VCLT.[73] The principles dictate that the interpreter should "step into the shoes" of the party at

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70. *See* Marko Milanovic, Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances, Ejil:Talk (Mar.18, 2019), https://www.ejiltalk.org/brexit-the-northern-irish-backstop-and-fundamental-change-of-circumstances/.

71. Case C-162/96, *Racke* v. *Hauptzollamt Mainz*, 1998 E.C.R.I-3655 (the *rebus sic standibus* plea being successful in this case that arose from the suspension of a treaty between the European Communities and Yugoslavia after the outbreak of hostilities in the region).

72. Caroline Fournet & Malcolm Shaw, *1969 Vienna Convention-Article 62*, *in* COMMENTARY OF THE 1969 AND 1986 VIENNA CONVENTIONS ON THE LAW OF TREATIES 1412, 1418–19 (Olivier Corten & Pierre Klein eds., 2011).

73. RICHARD GARDINER, TREATY INTERPRETATION 175, 179, 221 (Oxford University Press 2d ed. 2017); Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 67 (1949); *Documents of the Second Part of the*

the time they were accepting the obligations under the treaty and determine what consequences could normally be expected to flow at that point.[74]

There is academic consensus that these survival clauses are envisioned with the purpose of protecting investments when there is unilateral action by one of the state parties to terminate the treaty, while excluding situations in which there is mutual consensus to terminate the treaties.[75] If the contrary approach is taken, interpreting the term "termination" strictly, only terminating in accordance with the provisions of the treaty could trigger survival clauses automatically, and cases of a treaty being rendered a nullity would be excluded. This would lead to pre-Brexit foreign investments losing their protection under these treaties, which treaty drafters could not have intended as an outcome. This makes it evident that permanent in-operation of a treaty was envisioned as part of the purpose of these survival clauses.

Thus, the United Kingdom will still be a party to mixed PTAs even after withdrawing from the EU, as every Member State is independently a party to these agreements under international law. However, the treaties will not provide the United Kingdom any rights under the treaty or the obligation to perform its undertakings under these mixed PTAs because it will fall outside their personal and territorial scopes. The only exception will be the right to terminate these treaties in accordance with the procedure specified therein. Additionally, the non-termination of these treaties will not affect the application of survival clauses, which will be automatically triggered due to the loss of EU membership, rendering the treaties inoperable.

III. Modification of Rolled-Over Treaties

Once this issue of the termination of treaties is resolved, the next step is to understand how these treaties can be rolled over so that the United Kingdom can modify its trade relationship with third-party countries. There are several problem areas that need to be resolved in this process: rules of origin, tariff rate quotas, trade in services, and mutual recognition of standards.

Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly, [1966] 2 Y.B Int'l L. Comm'n 1, 219 ¶ 6, U.N. Doc. A/CN.4/SER.A/1966/Add.l.

74. Société Ouest Africaine des Bétons Industriels v. Republic of Senegal, ICSID Case No. ARB/82/1, Decision on Jurisdiction, ¶ 393 (July 19, 1984), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/82/1&tab=PRO.

75. Catherine Titi, *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law*, 33 J. Int'l Arb. 425, 436 (2016).

The strategy adopted by the United Kingdom, in agreement with third-party countries, is to conclude a short form agreement ensuring continuity which incorporates most of the provisions of the original EU agreement by reference.[76] This approach is similar to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which incorporates the provisions of the Trans-Pacific Partnership Agreement, making these provisions a part of the CPTPP using the following language:

> The Parties hereby agree that, under the terms of this Agreement, the provisions of the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 ("the TPP") are incorporated, by reference, into and made part of this Agreement *mutatis mutandis*.[77]

This approach has been adopted because it has several advantages. This form of agreement is flexible and can easily accommodate different negotiations with different treaty partners. This flexibility would also accommodate any outcome of the future EU-U.K. relationship at the conclusion of negotiations. This format would encourage the image of stability, signaling that post-Brexit, there will be continuity in the regulatory regime. Finally, this approach provides clarity in terms of the legal obligations and rights between the trading states and reduces the burden of concluding an onerous new treaty and individually negotiating the terms of that treaty.

In this approach, there are two different types of modifications made to the original EU treaties. The first is general modifications, such as substituting the EU for the United Kingdom in these treaties as the party and modifying the temporal and territorial scope of the treaty. The second type is technical modifications, which involve substantial changes in the regulatory framework with these trading partners due to the impact of Brexit. This includes changes in the rules of origin, tariff rate quotas, regime for trade in services, and recognition of standards.

These modifications can be analyzed extensively from the perspective of one of the recently concluded rolled-over treaties, namely the

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76. DEP'T FOR INT'L TRADE, CONTINUING THE UNITED KINGDOM'S TRADE RELATIONSHIP WITH THE REPUBLIC OF COLOMBIA, THE REPUBLIC OF ECUADOR AND THE REPUBLIC OF PERU ¶ 8 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808947/UK-Andean_countries_trade_agreement_parliamentary_report.pdf.

77. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 1, Mar. 18, 2018, https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf.

U.K.-Andean Countries Trade Agreement. This Agreement replicates the effects of the existing EU-Andean Countries Trade Agreement with certain modifications suited to the change in the trade relationship.

A. *General Modifications*

This process of rolling over treaties would require several general changes to the treaty to ensure that it reflects the change in the parties to the treaty. These changes can be achieved by simple modifications to the original EU text, which would otherwise remain unchanged. The following is a list of all the general modifications required to ensure a smooth transition post-Brexit.

1. Replacing EU References

The most obvious change requires removing references to the EU and replacing them with those to the United Kingdom. Throughout the EU treaties, there are several references to EU institutions and the EU as the party to the treaty. The references to EU institutions are replaced by references to the U.K. equivalent institutions.[78] In the case of references to the "European Union," "EU," "EU Party," and "Member States," there is no explicit replacement of these terms. Instead, there is a provision that these terms are to be read, *mutatis mutandis*, as referring to the United Kingdom.

2. Territorial Scope of the Treaty

To ensure that the treaty continues to apply after Brexit, there is a need to change the definition of the territorial scope of treaties. Most previous EU treaties define territorial scope of the agreement by referring to EU legislation and treaties. The U.K.-Andean Trade Treaty limits the application of the treaty to the Republic of Colombia, Republic of Ecuador, Republic of Peru, United Kingdom, Gibraltar, Channel Islands, and the Isle of Man using the following language:

> This Agreement shall apply, on the one hand, to the territories of Colombia, Ecuador and Peru, and, on the other hand, to the territory of the United Kingdom and the following territories

78. Trade Agreement Between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part, at Modifications to Title VII ch. 3, May 15, 2019, FOREIGN & COMMONWEALTH AFFAIRS OFFICE, [hereinafter *Misc. Series No. 22*], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808914/MS_22.2019_Andean_Trade.pdf.

for whose international relations the United Kingdom is responsible, **to the extent that and under the same conditions which paragraph 1 of Article 9 of the EU-Andean Countries Trade Agreement applied immediately before it ceased to apply to the United Kingdom**:

(a) Gibraltar;

(b) the Channel Islands and the Isle of Man. [79]

3. Temporal Scope of the Treaty

Several substantive provisions in the EU treaty provide for transitional periods within which parties to the treaty must complete a certain action that has not been fulfilled under the treaty conditions within a specific timeframe. The transitional periods within which these obligations are to be fulfilled has been changed in the rolled over treaties to accommodate new time periods. If the commitment has already been completed, references to any time periods are covered by ensuring that all references to the EU are read as referring to the United Kingdom. An example of one such commitment changing temporal scope can be found in the U.K.-Andean Countries Trade Agreement:

1. A period set out in an incorporated provision that confers a right or establishes an obligation, shall be counted from the following dates:

1 January 2017, between Ecuador and the United Kingdom.

1 August 2013, between Colombia and the United Kingdom.

1 March 2013, between Peru and the United Kingdom.

2. For greater certainty, any other period set out in an incorporated provision related to a procedure or other administrative matter (such as a review, committee procedure or notification), shall be counted from the date of entry into force of this Agreement.[80]

79. *Id.* art. 3 (emphasis added).

80. *Id.* art. 4.

4. Provisions for Amendment of the Treaty

After the treaty enters into force, amendment clauses allow the parties to make modifications to the substantial obligations of the agreement. Rolled over EU treaties will continue to use the amendment provisions in the old treaties. This enables the U.K. Trade Committee to consider amendments to the treaty after the completion of the internal process of parties for such amendments. Typically, the Parties will mutually agree through written consent to amend the text of the treaty. In the context of the United Kingdom, amendments made through this procedure would require parliamentary scrutiny.[81]

B. *Substantial Modifications*

After these general modifications are made to accommodate the shift from an EU treaty to a U.K. treaty, there are substantial additional modifications required to accommodate the change in the regulatory framework. These changes are controversial as they could result in reduction of the commitments provided under the EU PTA. Such modifications would require the EU, United Kingdom, and third parties to work on a trilateral basis to resolve these issues and complete a smooth transition post-Brexit.

1. Tariff Rate Quotas

Several of the PTAs between the EU and third-party states include arrangements providing for Tariff Rate Quotas (TRQs). These preferential arrangements allow imports of a fixed quantity of goods at a lower tariff rate, and once this fixed quota is exceeded, impose a higher tariff on further imports of these goods.[82] The United Kingdom has been fairly nonchalant while addressing this issue, with the U.K. Secretary of State providing evidence acknowledging that disaggregating quotas could pose problems, but urging this was more a problem for the EU than the United Kingdom.[83] This seems quite contrary to the concerns expressed by the corporations and unions involved in import and export of goods. The National Farmers' Union in the United Kingdom, for example, has stated that it is "particularly

81. Constitutional Reform and Governance Act 2010, GBR-2010-L-88234 c. 25, §§ 20-25 (Eng.).

82. Peter Ungphakorn, *UK, EU, WTO, Brexit Primer — 2. Tariff Quotas,* TRADE BETA BLOG (Oct. 7, 2017), https://tradebetablog.wordpress.com/2017/10/07/primer-2-tariff-quotas/.

83. INTERNATIONAL TRADE COMMITTEE, ORAL EVIDENCE: UK TRADE OPTIONS BEYOND 2019 (2016-7), HC 817-vii, Q454 (UK).

concerned about the protection of its sensitive sectors,"[84] and the Food and Drink Federation has expressed concern over retaining its current exports and imports under preferential quotas with third-party states.[85]

The Secretary of State's statement, however, has some elements of truth, as the EU would have reason to renegotiate these TRQs after Brexit in order to avoid absorbing the United Kingdom's quota. This would, however, prompt third-party states to request concessions on other matters due to the reduction in quotas.[86] This problem has already raised opposition in the WTO in the context of disaggregating U.K. TRQs on goods from the EU TRQs with respect to the new U.K. Schedule of commitments at the WTO.[87] The United Kingdom and the EU have reached an agreement in the context of WTO Schedules that tariff rate quotas will be split based on three years of data on quota consumption.[88] This has raised several questions from major exporters to the EU and the United Kingdom who have objected to this formula for apportionment,[89] expressly stating this agreement is unacceptable

84. National Farmers' Union, *Written Evidence Submitted by the National Farmers' Union to the International Trade Committee on Continuing Application of EU Trade Agreements after Brexit (EUT0007)*, UK PARLIAMENT (Dec. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/written/75143.pdf; National Pig Association, *Written Evidence Submitted by the National Pig Association (EUT0013)*, UK PARLIAMENT (Dec. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/written/75164.pdf.

85. Dairy UK, *Written Submission by Dairy UK (EUT0010)*, UK PARLIAMENT (Dec. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/written/75158.pdf; Food & Drink Federation, *Written Evidence Submitted by Food & Drink Federation (FDF) (EUT0011)*, UK PARLIAMENT (Dec. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/written/75160.pdf.

86. INTERNATIONAL TRADE COMMITTEE, ORAL EVIDENCE: CONTINUING APPLICATION OF EU TRADE AGREEMENTS (2017-9), HC 520-ii, Q43 (UK) [hereinafter *HC – First Report*], http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/oral/74036.html.

87. Joanna Sopinska, *Russia Blocks UK's Post-Brexit Tariff Proposal at WTO*, MLEX MKT. INSIGHT (Oct. 24, 2018), https://mlexmarketinsight.com/insights-center/editors-picks/brexit/europe/russia-blocks-uks-post-brexit-tariff-proposal-at-wto.

88. Regulation (EU) 2019/216 of the European Parliament and of the Council of 30 January 2019 on the Apportionment of Tariff Rate Quotas Included in the WTO Schedule of the Union Following the Withdrawal of the United Kingdom from the Union, and Amending Council Regulation (EC) No 32/2000 art. 1(a), Feb 8, 2019, 2019 O.J. (L 38) 1, 2.

89. Shawn Donnan, *Trump Rejects May's Post-Brexit Agriculture Deal with EU*, FIN. TIMES (Oct. 5, 2017), https://www.ft.com/content/92bb5636-a95b-11e7-ab55-27219df83c97.

since it ultimately results in a reduction of EU quotas.[90] This logic would find equal application in the context of the United Kingdom, against which countries will complain that the TRQs are not calculated appropriately. This is clearly not an encouraging sign for this approach, as it shows that all the countries will try to use this reasoning as a negotiation tool to gain other important concessions from the United Kingdom.[91]

This can be better understood by analyzing the reasons for these objections and their bases. Prior to the letter by the EU-United Kingdom to the WTO, which expressed this formula for disaggregating TRQs, several countries expressed their concern on the methodology that was going to be adopted. This came in the form of opposition raised by Argentina, Brazil, Canada, New Zealand, Thailand, the United States, and Uruguay stating that any proposal made by the EU-United Kingdom would violate the principle of WTO law, which expressly provides that schedules cannot be rectified or modified to leave other WTO Members with lower commitments.[92] All of these countries are major exporters to the United Kingdom and the EU, and their primary concern is that any disaggregation of the EU's and United Kingdom's TRQs would result in a reduction of their market access. The basis of this opposition to the disaggregation of TRQs rests on two limbs:

1. The historical average of exports and imports is a highly volatile figure as it is subject to several market conditions and the share of TRQs taken up by consumers may vary consequently.[93] The use of such an inaccurate means for calculating TRQs could lead to undervaluation of required quotas.
2. Under the current trading regime, goods can be imported through any EU port of entry, though the goods may be destined for consumers in other parts of the EU. The reason for this could be port facilities, ease of transport, or better

90. Lydia Smith, *Trump Administration Rejects Theresa May's Post-Brexit Agriculture Deal with EU*, INDEPENDENT (Oct. 7, 2017), https://www.independent.co.uk/news/world/europe/brexit-agriculture-deal-uk-eu-donald-trump-us-reject-trade-quotas-plan-theresa-may-a7986221.html.

91. *HC – First Report*, *supra* note 86, Q36.

92. Council for Trade in Goods, *Members Call on EU and UK to Use Brexit Extension to Resolve Market Access Concerns*, WTO (Apr. 12, 2019), https://www.wto.org/english/news_e/news19_e/good_12apr19_e.htm.

93. *Joint Letter from the EU and the UK Permanent Representatives to the WTO*, EUR. COMM'N (Oct. 11, 2017), https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto_en.

> infrastructure in a certain region for global supply chains.[94] This would impair the reliability of historical data as these products, which are reported to have been imported in a particular country, would actually be consumed in another country.[95]

The legal support for this argument can be found within the GATT, under Article XIII, Article XXVIII, and in the Decision on the Procedures for Modification and Rectification of Schedules of Tariff Concessions.[96]

Article XIII of the GATT provides for the non-discriminatory administration of restrictions other than tariffs. These quantitative restrictions, as they are termed, include TRQs. According to this provision:

> In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it.[97]

This provision makes it clear that any of the tariff rate quotas cannot unduly discriminate against any trading partners with which the EU and United Kingdom currently have treaties. The formal rectifications undertaken by the United Kingdom can take effect once the Director General certifies them; this is subject to the caveat that there are no objections raised by any other WTO members within three months of the modifications.[98] These changes cannot, however, change the substantial scope of the concessions, and can only have a purely formal character. Any objections to the substantial changes follow the procedure enshrined in Article XXVIII of the GATT, which deals with renegotiation of tariffs.

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94. *See* Ungphakorn, *supra* note 82.

95. *Post-Brexit Tariff Rate Quotas – What Is the Cause for the Despondency?*, TRALAC (Oct. 27, 2017) [hereinafter TRALAC], https://www.tralac.org/discussions/article/12328-post-brexit-tariff-rate-quotas-what-is-the-cause-for-the-despondency.html.

96. *See* Brian J. Revell, *Brexit and Tariff Rate Quotas on EU Imports: A Complex Problem*, 16 EUROCHOICES 10 (2017).

97. GATT, *supra* note 19, art. XIII.

98. GATT, *supra* note 19, Interpretative Note Ad art. XXVIII, Annex I.

Article XXVIII of the GATT clarifies the principles which must be followed for the modification of tariff concessions. There are six key principles that are relevant in the context of Brexit:

(a) the modifications must be negotiated and agreed to by the country making the changes and the parties with which the original concessions were negotiated;
(b) negotiations must also take place between the country making the modifications and any party which has a "principal supplying interest";
(c) any parties which have a substantial interest in the modifications and the underlying concessions must be consulted before any changes can be made;
(d) compensation can be a part of these negotiations;
(e) the end result of the negotiations cannot be less favorable to trade between the parties than the concessions provided prior to the negotiations; and
(f) in the scenario that there is no settlement between the parties, the country is free to make the modifications. However, the opposing party can retaliate by removing or modifying previous concessions it had offered, if they deem that the settlement failed due to an unreasonable offer which could not provide adequate compensation.

In a scenario where the TRQs are divided between the United Kingdom and the EU *pro rata* post-Brexit, there would be a reduction in the present commitments of the EU TRQ tonnages. This *pro rata* allocation would further result in a significantly smaller TRQ for the United Kingdom. The resulting reduced U.K. TRQ would prove inadequate for several importers to warrant separate shipments to the United Kingdom and would prove unattractive for any exporters attempting to redirect exports through ports such as Rotterdam, especially if tariffs were applied on EU-U.K. trade of goods. For the United Kingdom, negotiating these TRQs in their PTAs would prove similarly problematic as most of the countries would oppose any reduction in their previous PTA commitments.

This could prove particularly problematic considering these types of international trade negotiations could take several years to complete. For example, the EU-MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) negotiations have taken more than twenty years to finally

conclude a preliminary agreement.[99] Whichever track the United Kingdom takes regarding future tariff rates and TRQs, it seems probable that there will be extensive negotiation and consultation with its trading partners. The only way to avoid this seems to be through providing greater market access and satisfying the WTO criteria for the same. However, this will most likely still be mired with extensive disputes and negotiations before being finally resolved.

The simplest solution would be to continue maintaining the TRQs at the same level as the existing EU TRQs. This would in effect ensure that countries will no longer have any reason for opposition to the rolling over of the PTAs. This would, however, divest all the benefits the United Kingdom would purportedly obtain from Brexit. This is illustrated by the following example: suppose one of the products that was subject to TRQ was consumed exclusively by a resident of the United Kingdom. In the scenario in which the same TRQ was maintained post-Brexit, there would be no impact on the level of imports for third-party countries. However, this assumption is flawed, as the United Kingdom would also be used for transshipment to other parts of EU, considering the benefits of passporting throughout the EU.

Thus, this solution would result in accommodating quotas meant for both the EU and the United Kingdom, within the U.K. quota. However, the disagreement on the method of determining this quota limit could cause conflict with third-party countries, making them unlikely to agree to the rolling over of PTAs. Considering that these quotas are currently applied across the EU, the negotiations on the future TRQs will need to take place on a tripartite basis involving the United Kingdom, EU, and the concerned third-party country.[100]

The United Kingdom has already readjusted the quotas in the concluded rollover agreements.[101] While these countries have in effect agreed to this distribution of quotas, there is an issue with several other future agreements which are yet to be negotiated or are in the process of negotiation. One such example would be the South African Development Committee (Angola, Botswana, Comoros, Congo,

99. Joe Leahy & Andres Shipani, *Brazil Seeks to Conclude Mercosur-EU Trade Deal After 20-Year Talks*, FIN. TIMES (Sept. 4, 2018), https://www.ft.com/content/08d20f78-afef-11e8-8d14-6f049d06439c.

100. Alan Mathews, *WTO Dimensions of a UK 'Brexit' and Agricultural Trade*, CAP REFORM (Jan. 5, 2016), http://capreform.eu/wto-dimensions-of-a-uk-brexit-and-agricultural-trade/.

101. Trade Agreement between the European Union and its Member States, of the One Part, and Colombia and Peru, of the Other Part, Dec. 12, 2012, 2012 O.J. (L 354) 3; Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part, 2008 O.J. (L 289) 3.

Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe)-EU Economic Partnership Agreement. In this agreement, though most of the TRQs were maintained from the previous Trade, Development, and Cooperation Agreement ("TDCA"), the EU further expanded volume of several previously available quotas, such as wine and frozen orange juice. The EU also added quotas for products such as sugar and skimmed milk powder.[102] These new TRQs have not been in existence for a three-year period (introduced only in November 2016)[103] and as they have recently been introduced, the historical averages do not reflect the actual industry level showing only limited exports to the EU.[104]

In this scenario, the historical average method adopted by the United Kingdom would fail to capture the actual TRQ requirements leading to a flawed distribution of the TRQ between the EU and the United Kingdom. As discussed above, this figure is likely to be skewed in several cases even with the use of accurate historical figures due to the flawed basis of this calculation. However, in this case, the level of inaccuracy would be significantly higher leading to an extremely skewed distribution.

Considering these problems, the United Kingdom should adopt a different method for calculating TRQ distribution that better addresses these issues or should do so at least when there are no reliable historical figures upon which the distribution can be based.

2. Rules of Origin and Cumulation

The basis for determining where goods originate from is governed by the specific provisions of "rules of origin," contained in most complex PTAs.[105] These rules of origin determine whether products are eligible to receive the benefits of any preferential arrangements with respect to tariff quotas and custom duties.[106] Considering that PTAs do not have a common external tariff, the parties to these agreements could set tariffs

102. *See* TRALAC, *supra* note 95.

103. *Economic Partnership Agreement Between the European Union and Southern African Development Community Group (SADC EPA) - FAQs*, TRALAC (2018), https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/3/7/UK-trade-policy-and-Brexit/SB%2018-17.pdf.

104. *See* TRALAC, *supra* note 95.

105. IAIN MCIVER, ANOUK BERTHIER & IAN WOOTON, SPICE BRIEFING: UK TRADE POLICY AND BREXIT (2018), https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/3/7/UK-trade-policy-and-Brexit/SB%2018-17.pdf.

106. International Convention on the Simplification and Harmonization of Customs Procedures, 1975 O.J. (L 100), 2–17.

that vary for different countries, which would create problems of trade deflection for the purposes of avoiding duties.[107] Rules of origin help to obviate this risk by providing for means to determine the proper place of origin.[108]

Rules of origin can be of two types. The first is non-preferential rules of origin which are applied by members across the board to all WTO members.[109] In the second type, members agree in PTAs to more narrowly defined preferential rules of origin to accommodate definitions allowing goods to qualify for access to the preferential tariffs under the PTAs.[110]

In the case that the goods are not produced or obtained wholly from a single country, there may be requirements specifying the qualifying percentage of local or domestic content at which these goods are accepted as produced in a country.[111] A frequently used method to determine the origin of a product is through the use of a substantial transformation or sufficient working/processing requirement which entails an analysis of whether the product characteristics were changed sufficiently in some country to rule that territory as its place of origin.[112] This change in the product could manifest as a change in the tariff classification, value added or a technical requirement of manufacturing/processing operations.[113]

In addition to these methods, the determination of originating status of a product can also be subject to cumulation. This essentially provides for situations in which the inputs or raw materials in a final product, provided from outside a country, can be considered as originating in

107. *Comparative Study on Preferential Rules of Origin*, WORLD CUSTOMS ORG. (June 20, 2017), http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/origin/instruments-and-tools/reference-material/170130-b_comparative-study-on-pref_roo_master-file_final-20_06_2017.pdf?db=web.

108. Jacob Viner, *The Customs Union Issue*, *in* TRADING BLOCS, ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS (Jagdish Bhagwati, Pravin Krishna & Arvind Panagariya eds., 1999).

109. *Rules of Origin*, WTO, https://www.wto.org/english/tratop_e/roi_e/roi_e.htm (last visited Sept. 22, 2020).

110. WORLD CUSTOMS ORGANIZATION, RULES OF ORIGIN – HANDBOOK [hereinafter WORLD CUSTOMS ORGANIZATION], http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/origin/overview/origin-handbook/rules-of-origin-handbook.pdf .

111. *Technical Information on Rules of Origin*, WTO, https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm (last visited Oct. 22, 2020).

112. George R. Tuttle, *Substantially Transformed or Not, That is the Question: Understanding U.S. Origin Rules in Uncertain Times*, TUTTLE LAW NEWSLETTER (Oct. 18, 2018), https://www.tuttlelaw.com/newsletters/2018/10-18-18_country_of_origin.html.

113. *See* WORLD CUSTOMS ORGANIZATION, *supra* note 110.

the other country for the application of rules of origin. This cumulation provision can manifest in several different forms, which affect the way in which the cumulation works.

The first method is bilateral cumulation, in which the goods from country A are considered to originate in country B, based on a bilateral arrangement between the countries. An illustration of this would be in the treaty between the European Free Trade Association ("EFTA") and the Republic of Korea which uses the language: ". . . materials originating in another Party within the meaning of this Annex shall be considered to be materials originating in the Party concerned . . . ."[114]

The second method is through diagonal cumulation. An example of treaty language accommodating this would be the Regional Convention on Pan-Euro-Mediterranean preferential rules of origin ("PEM Convention"):

> [P]roducts shall be considered as originating in the exporting Contracting Party if they are obtained there, incorporating materials originating in the Faroe Islands, any participant in the Barcelona Process other than Turkey, or any Contracting Party other than those referred to in paragraph 1 . . . .[115]

This is accompanied by language ensuring that the standards for rules of origin are identical to each of the other states participating in the diagonal cumulation. This uses the following treaty language: ". . . the cumulation provided for in this Article may be applied only provided that . . . materials and products have acquired originating status by the application of rules of origin identical to those given in this Protocol . . . ."[116]

The difference between these methods lies in the reach of cumulation. In bilateral cumulation, the provision only allows for cumulation across two regions bilaterally, whereas in diagonal cumulation the effect is significantly broader. This in effect allows for global supply chains to set up their operations, allowing them cumulation of products across territories without having to worry about the rules of origin effects of such an operation.

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114. EU-Korea PTA, *supra* note 25; Free Trade Agreement between the EFTA States and the Republic of Korea, Annex I, art. 3(1), (Dec. 15, 2005), THE EUROPEAN FREE TRADE ASS'N [hereinafter EFTA], https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/republic-of-korea/annexes-rou-jd/Korea-FTA-Annex-I-Rules-of-Origin.pdf.

115. Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, Appendix I, art. 3(2), 2013 O.J. (L 54) 3 [hereinafter PEM Convention].

116. *Id.*, art. 3(5).

In the context of Brexit, this poses a unique problem as the United Kingdom was previously a member of the EU and global supply chains could cumulate their goods across the EU for the purposes of availing themselves of PTA beneficial tariff rates. Essentially, manufacturers could produce goods in one territory and export them from other countries within the EU, without having any effect on the final tariff they had to pay. With the withdrawal of the United Kingdom, global supply chains can no longer avail themselves of these benefits while exporting from the United Kingdom. This has been explained by industry representatives of the United Kingdom as follows:

> [M]ost free trade agreements tend to have a minimum [domestic content] threshold of 55% to 60%" for automotive goods. Therefore, merely copying and pasting the EU-South Korea PTA "would not benefit us because we would not qualify for the preferential trading arrangements [. . .] unless you could agree cumulation with the European content, which is what we currently enjoy.[117]

This problem is further exasperated considering that the United Kingdom does not have the ability to satisfy these origin requirements through its own industries. This leaves only two options. The first is to renegotiate these origin requirements to have a lower origin requirement in their PTAs with third-party states. This renegotiation would again require significant expenses and time to be concluded and could also involve the United Kingdom having to make compensatory concessions in other areas to convince third parties to agree to reducing the origin requirements.[118]

Considering that this option seems unlikely to succeed and comes at a great cost to the United Kingdom, the second option could be preferable. This would involve the United Kingdom participating in diagonal cumulation with the EU in order to match the origin requirements of PTAs with third countries. This can be achieved through re-joining the

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117. Jan. 31, 2018, Parl. Deb. HC (2017-2019), INT'L TRADE COMM., ORAL EVIDENCE, 481-v, Q. 273, 281, 282; National Farmers' Union, *Written Evidence Submitted by the National Farmers' Union to the International Trade Committee on Continuing Application of EU Trade Agreements After Brexit (EUT0007)*, UK PARLIAMENT (Dec. 2017), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/written/75143.pdf.

118. David Blake, How Bright Are the Prospects for UK Trade and Prosperity Post-Brexit? (May 2018) (SSRN), https://www.researchgate.net/publication/325441487_How_Bright_are_the_Prospects_for_UK_Trade_and_Prosperity_Post-Brexit.

PEM Convention after Brexit. Currently, the United Kingdom, as a member of the EU, obtains the benefits of cumulation arrangements under the PEM Convention, as the EU is a Contracting Party. The result of such cumulation would be that inputs and raw materials from the United Kingdom, EU, or a third party which is a member of the PEM Convention would count towards the required quota of originating content specified in PTAs.[119]

Under the PEM Convention, the requirements to join are considerably easy for the United Kingdom to satisfy even post-Brexit.[120] The Convention provides that a third party may become a Contracting Party to the Convention, provided that the candidate country or territory has a free trade agreement in force, providing for preferential rules of origin, with at least one of the Contracting Parties.[121] The Convention further requires that a joining party submit a written request for accession to the depositary of the Convention which, in turn, has to submit the request to the Joint Committee established by the Convention for its consideration.[122] This Joint Committee adopts a decision, inviting parties to accede to the Convention.[123] The only stumbling block for the United Kingdom would be that the joining party must agree to adopt the PEM Convention Rules of Origin in each PTA it concludes and apply the same between all the parties to the Convention. The PEM Convention proves advantageous through its promulgation in several free trade agreements and the pool for diagonal cumulation is

119. *See HC – First Report*, *supra* note 86, at 21 n.81; British Retail Consortium, *Written Evidence Submitted by British Retail Consortium (EUT0012)*, UK PARLIAMENT (Dec. 2017), https://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/International%20Trade/Continuing%20application%20of%20EU%20trade%20agreements/written/75161.html; The UK Trade Policy Observatory, *Written Evidence Submitted by The UK Trade Policy Observatory (UKTPO) (EUT0009)*, UK PARLIAMENT (Dec. 2017), http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/International%20Trade/Continuing%20application%20of%20EU%20trade%20agreements/written/75156.html [hereinafter UKTPO Evidence].

120. *Cf. Proposal for a Council Decision on the Position to be Adopted, on Behalf of the European Union, Within the Joint Committee Established by the Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin as Regards the Request of Ukraine to Become a Contracting Party to that Convention*, at 4, COM (2017) 72 final (Apr. 6, 2017).

121. PEM Convention, *supra* note 115, art. 5(1).

122. PEM Convention, *supra* note 115, art. 5(2) & (3).

123. PEM Convention, *supra* note 115, art. 4(3)(b).

enlarged.[124] This would require the United Kingdom to conclude roll-over agreements with several of the PEM Convention Members to properly avail itself of the benefits of diagonal cumulation.

After this stumbling block is surmounted, there is another problem which would be caused by the decline in relations between the EU and the United Kingdom due to Brexit. This problem arises from the nature of decision-making by the Joint Committee of the PEM Convention and the attitude of the EU towards the inclusion of new members in the PEM Convention. Under the PEM Convention, decisions on new members are made unanimously,[125] with the exception that the process cannot be stalled by one single member.[126] The EU, being the dominant member, with more than one representative on the Joint Committee, can block the United Kingdom's application.[127] The reason, apart from animosity, is also grounded on the EU's past policy to only agree to diagonal cumulation when "all the countries involved [. . .] have free trade agreements among themselves, and all apply the EU's rules of origin," as embodied in the PEM Convention.[128]

Thus, the United Kingdom must conclude PTAs with all the members of the PEM Convention for there to be a possibility of the EU agreeing to its membership and, consequently, obtaining the benefits of diagonal cumulation. Considering these requirements, even diagonal cumulation could prove troublesome for the United Kingdom to acquire, though it is essential to ensuring future trade with its PTA trading partners.

The only proposed alternative to diagonal cumulation could be the United Kingdom and EU agreeing in their currently negotiated future PTA, to only apply rules of origin where the external tariffs differ. This could be combined with a preferential partner agreement, which would function by allowing a preferential partner to use intermediate materials of another preferential partner, with the provision that for each such input, the supplying partners rules of origin are used.[129] This proposal would also, however, require assent from the EU.

This broadly leaves three options from which the United Kingdom can choose for addressing the rules of origin problem. The solution in every case would involve negotiations with the EU to agree for

124. *HC – First Report, supra* note 86, Q121.
125. PEM Convention, *supra* note 115, art. 3(2).
126. PEM Convention, *supra* note 115, art. 5(4).
127. PEM Convention, *supra* note 115, art. 1(3).
128. *See* UKTPO Evidence, *supra* note 119.
129. *Id.*

cumulation on varying terms. The U.K. Government approach has been divided on this issue with the Department of International Trade ("DIT") officials stating that "we need to make sure that when it comes to a rule of origin, the rule of origin is as close to what would reasonably be expected for a single arrangement between us and the third country as opposed to an EU one."[130] This suggests that the U.K. Government supports the first approach of lowering the origin threshold in rolled-over PTAs. Alternatively, other members of the Government have stated that they are still pursuing the option to join the PEM Convention.[131] The combination of both of these strategies seems like the best approach. In the short term, it is better to attempt lowering of the origin requirements under PTAs, consider that joining the PEM Convention and the diagonal cumulation option could take considerable time.

This makes it evident that the provision regulating rules of origin in PTAs between the EU and third parties must be modified and cannot simply be copied.[132] To maintain the status quo, the United Kingdom will have to either negotiate reduction in the domestic content threshold or arrange for diagonal cumulation agreements. The only major difference between these options is that the reduction of domestic content threshold can be negotiated bilaterally while the diagonal cumulation would require trilateral negotiations between the United Kingdom, EU, and the party to the PTA. Regardless of the option chosen, the third party is likely to seek concessions from the United Kingdom in return for accommodating these origin amendments.

3. Mutual Recognition of Standards and Conformity Assessment

Another potential trade restrictive barrier would be in the form of the standards for mutual recognition. While discussing this issue, there are two similar concepts that are interchangeably used, namely, mutual recognition of conformity assessment and mutual recognition of mandatory regulatory standards, which must be differentiated to clearly understand the issue.[133]

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130. Nov. 2017, Parl. Deb. HC (2017-2019), INTERNATIONAL TRADE COMMITTEE, ORAL EVIDENCE: THE WORK OF THE DEPARTMENT FOR INTERNATIONAL TRADE, 436-ii, Q163, Q164; *HC – First Report*, *supra* note 86, Q191.

131. *HC – First Report*, *supra* note 86, Q280.

132. Peter Holmes & Michael Gasiorek, *Grandfathering Free Trade Agreements and Rules of Origin: What Might Appear Bilateral Is in Fact Trilateral!*, UK TRADE POL'Y OBSERVATORY (Sept. 27, 2017), https://blogs.sussex.ac.uk/uktpo/2017/09/27/grandfathering-ftas-and-roos/.

133. Peter Holmes & Michael Gasiorek, *Grandfathering: What Appears Bilateral is Trilateral*, UK TRADE POL'Y OBSERVATORY (Dec. 2017), http://blogs.sussex.ac.uk/uktpo/publications/grandfathering-what-appears-bilateral-is-trilateral/#couldbp13.

The distinction between these concepts lies in their application and effects. Conformity assessment refers to the process through which applicable standards are deemed to be satisfied, which includes the process of certification and inspection of goods. These tests are required to decide whether the particular goods satisfy the standards decided by a particular country to allow goods to enter its territory.[134] The standards that apply while assessing whether a good is allowed to enter the market are based on the Technical Barriers to Trade ("TBT") or Sanitary and Phytosanitary Standards ("SPS") of a country and constitute the mandatory regulatory standards.

The linkage between these concepts arises when there are mutual recognition agreements for conformity procedures, but the respective countries have different standards.[135] For example, in a scenario in which two WTO Members have a mutual recognition agreement which states that they recognize the conformity assessment procedures of the other party—for producers in one market to sell in the other market, they must show that they satisfy the standards for products in that other market. The mutual recognition agreement facilitates this by allowing the producer to simply show instead that they have performed a testing in a certified lab in their country as the mutual recognition agreement legitimizes this testing as equivalent to testing in the other country, despite having a different standard to which goods must conform. Thus, any product exported from Germany to Mexico would usually have to meet Mexican standards and be tested for the same, but a mutual recognition agreement would render this testing unnecessary, requiring the German company to merely prove that it tested the products in Germany before exporting.

The extent to which conformity assessment is mutually recognized has been quite limited as the EU has managed to conclude free trade agreements containing such provisions only with the EFTA to form the European Economic Area ("EEA").[136] In addition to these agreements there are several free-standing mutual recognition agreements (called Conformity Assessment and Acceptance Agreements ("ACAAs")) which have been concluded between the EU on one side and Australia, Canada, Israel, Japan, New Zealand, Switzerland, and the United States

134. *Conformity Assessment*, EUR. COMM'N, https://ec.europa.eu/growth/single-market/goods/building-blocks/conformity-assessment_en (last visited Oct. 21, 2020).

135. *Mutual Recognition Agreements*, EUR. COMM'N, https://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements_en (last visited Oct. 22, 2020) [hereinafter *Mutual Recognition Agreements*].

136. *EEA Agreement*, EUR. FREE TRADE ASS'N, https://www.efta.int/eea/eea-agreement (last visited Nov. 7, 2020).

on the other.[137] The only other agreement that contains such provisions is the EU-South Korea PTA, which includes mutual recognition of testing and certification for limited sectors such as vehicles and consumer electronics.[138]

In their recent policy statements, the EU has set clear standards which must be adhered to for the signing of any future mutual recognition agreements.[139] The standard that has to be conformed with is that the third country must adopt the EU regulations and standards for all its exports and its domestic production as well. This has been stated as follows:

> An ACAA requires the prior full alignment of the partner country's legal framework with EU legislation and standards and the upgrading of the implementing infrastructure in line with the model of the EU system, in relation to standardisation, accreditation, conformity assessment, metrology and market surveillance.[140]

The problem that the United Kingdom would face post-Brexit would be that this mutual recognition arrangement assumes that parties use either mandatory standards of either Korea or the EU. In this illustration, even if the United Kingdom rolled over the EU-Korea PTA, it would effectively be accepting the mutual recognition of conformity assessment for electronic goods. The corollary consequence of this acceptance would be that the United Kingdom will have to align its domestic regulations to that of the EU.[141]

As is evident from the stance adopted by the EU, the requirement for full alignment with EU standards and regulations is essential for them to agree to any mutual recognition of conformity assessment. In effect, even post-Brexit, if the United Kingdom wants to agree to a Mutual Recognition Agreement ("MRA") with the EU, whether as a part of a future EU PTA or as a standalone agreement, it will have to undertake compliance with the EU standards and regulations. This would apply even when the United Kingdom is simply rolling over its other PTAs with third parties because their recognition is based on the EU

137. *Mutual Recognition Agreements*, *supra* note 135.

138. EU-Korea PTA, *supra* note 25, Annex 2-B, art. 3.

139. Huileng Tan, *The EU Is Reportedly Stripping 5 Countries of Some Market Access Rights — that May Impact the UK After Brexit*, CNBC (July 29, 2019), https://www.cnbc.com/2019/07/29/eu-to-strip-canada-brazil-singapore-of-market-access-rights-ft.html.

140. The 'Blue Guide' on the Implementation of EU Products Rules 2016, 2016 O.J. (C 272) 1.

141. *See* Holmes, *supra* note 133, at 110.

standards. This creates a significant problem for the United Kingdom moving forward as the EU standard for mutual recognition requires that both the conformity assessment procedure and the standard for the product are adhered to strictly.

The only potential alternative solution to this has been suggested by the Legatum Institute in the United Kingdom. This proposal tries to find a way around conforming with the EU standards by shifting the United Kingdom's focus to concluding multiple mutual recognition agreements with all the countries already recognized by the EU. Through this method, assuming the United Kingdom concludes an agreement with the United States, and the EU in turn recognizes the U.S. standards and conformity assessment, the EU should recognize the U.K. products based on their conformity with U.S. standards.[142] This position is, however, flawed as this proposal can only work if all the parties involved recognize each other's standards.[143] The problem of formulating these many agreements over all sectors could also prove extremely difficult to practically apply, considering that the EU, with its significant trade negotiation resources, has been unable to conclude more than a handful of such agreements.

Additionally, the primary concern of the EU seems to be that the United Kingdom could be attempting to gain a competitive trade advantage through the relaxation of regulations.[144] This concern would remain unaddressed if this alternate proposal was accepted and the United Kingdom attempted to circumvent the EU standards. This problem would thus require the United Kingdom to conform to the EU standards on products, which would effectively defeat some of the major claims of the regulatory freedom that the Brexit campaigners have often cited as the reason for leaving the EU.[145]

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142. SHANKER SINGHAM, RADOMIR TYLECOTE & VICTORIA HEWSON, LEGATUM INSTITUTE: SPECIAL TRADE COMMISSION, THE BREXIT INFLECTION POINT: THE PATHWAYS FROM POVERTY TO PROSPERITY (2017), https://www.li.com/activities/publications/the-brexit-inflection-point-the-pathway-to-prosperity.

143. For a pro-Brexit critique of the flaws in their argument, in particular the failure to understand the relationship between MR of mandatory standards and conformity assessment, see Richard North, *Brexit: Legatum's amateur time,* EU REFERENDUM.COM (Nov. 6, 2017), http://eureferendum.com/blogview.aspx?blogno=86660.

144. THOMAS SAMPSON, SWATI DHINGRA, GIANMARCO OTTAVIANO & JOHN VAN REENEN, LSE: CENTRE FOR ECONOMIC PERFORMANCE, ECONOMISTS FOR BREXIT: A CRITIQUE, http://cep.lse.ac.uk/pubs/download/brexit06.pdf (last visited Oct. 27, 2020).

145. Anu Bradford, *Why Brexit Will Not Deliver the UK Regulatory Freedom*, HARV. L. REV. BLOG (Mar. 15, 2019), https://blog.harvardlawreview.org/why-brexit-will-not-deliver-the-uk-regulatory-freedom/.

4. Trade in Services

The United Kingdom relies heavily on the services sector, which accounts for over two-thirds of its economy.[146] Additionally, nearly half of all their cross-border exports are in the trade of services.[147] While the focus has been primarily on the impact that Brexit will have on the trade of goods due to the relatively fewer commitments in the services sector, there are significant regulatory changes in the services context as well that cannot be ignored. The U.K. government has been optimistic of improving the services sector post-Brexit through the rollover of the existing trade deals and conclusion of new services PTAs with countries outside the EU.[148] This raises the pertinent question of what exactly the United Kingdom can achieve through rolling over its existing agreements in services and whether ensuring these commitments is essential or presents any hurdles.

a. Benefits of Services Chapters in PTAs

The primary focus of services negotiations, as opposed to tariff reduction in goods negotiations, is the reduction of regulatory oversight and the freer flow of services.[149] The rationale for this approach was set through the Uruguay Round and codified in the General Agreement of Trade in Services ("GATS"), which provided clarity to businesses by enshrining WTO Member's commitments towards liberalization in market access and national treatment.[150]

The major issue in services negotiations is the fear of infringement of the policy and regulatory space of countries. This leads to treaty parties of trade agreements, which include services commitments, reticent to make deep commitments towards liberalizing trade.[151] On the contrary,

146. Emily Cadman, *Services Close to 80% of UK Economy*, FIN. TIMES (Mar. 31, 2016), https://www.ft.com/content/2ce78f36-ed2e-11e5-888e-2eadd5fbc4a4.

147. Daniel Robinson, *International Trade in Services, UK: 2017*, OFF. FOR NAT'L STAT. (Jan. 31, 2019), https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/bulletins/internationaltradeinservices/2017.

148. Julia Magntorn, *Most Favoured Nation Clauses in EU Trade Agreements: One More Hurdle for UK Negotiators,* UK TRADE POL'Y OBSERVATORY (Nov. 2018), http://blogs.sussex.ac.uk/uktpo/files/2018/11/Briefing-paper-25-interactive1.pdf.

149. Alejandro Jara & M. del Carmen Domínguez, *Liberalization of Trade in Services and Trade Negotiations*, 40 J. WORLD TRADE 113, 119–20 (2006).

150. Aaditya Mattoo, *Economics and Law of Trade in Services*, (World Bank, Working Paper, 2005), https://openknowledge.worldbank.org/bitstream/handle/10986/25928/111781-WP-PUBLIC-ECONOMIC.pdf?sequence=1&isAllowed=y (last visited Oct. 22, 2020).

151. Aaditya Mattoo & Carsten Fink, *Regional Agreements and Trade in Services: Policy Issues*, 19 J. ECON. INTEGRATION 742, 765–70 (2004).

the applied regulatory regime for services is often far more liberal than the commitments made either in the GATS or in PTAs.[152] This leads to a situation in which the reserved policy space (referred to as "water"), is maintained for future situations in which regulation may be required. This creates a system in which the level of commitment in the GATS is the least, followed by additional liberalization in PTAs and further liberalization in the actual applied trade policy.[153] This situation has even led to multilateral discussions on services being rendered meaningless due to the reticence of WTO members to make any additional commitments.[154]

In this context, the conclusion of PTAs becomes essential to further develop the services disciplines and encourage more liberalization in the services sector. Countries, on average, are far more open to making commitments in PTAs rather than liberalizing under the GATS as these commitments only bind them towards specific members. Most countries make commitments which are 'GATS+' in their PTAs. This trend towards further liberalization has grown with the development of the services sector, with more recent PTAs such as the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"), CPTPP and the EU-Japan PTA providing for far deeper and comprehensive commitments than in previous PTAs.[155] However, there is still significant scope for improvement.[156]

Considering these issues, it becomes essential that the United Kingdom maintain all the existing EU PTAs by rolling over the commitments to create U.K. PTAs providing for services liberalization. This

152. Sébastien Miroudot & Kätlin Pertel, *Water in the GATS: Methodology and Results* (OECD, Trade Policy Paper No. 185, 2015), https://www.oecd-ilibrary.org/docserver/5jrs6k35nnf1-en.pdf?expires=1605031809&id=id&accname=guest&checksum=7BD8FA8F64F26AAC07742A3E463CA288 (last visited Oct. 22, 2020).

153. Martin Roy, *Services Commitments in Preferential Trade Agreements: An Expanded Dataset* (WTO, Staff Working Paper ERSD-2011-18, 2011), https://www.wto.org/english/res_e/reser_e/ersd201118_e.pdf (last visited Nov. 12, 2020).

154. Ingo Borchert, Batshur Gootiiz & Aaditya Mattoo, *Services in Doha: What's on the Table?*, *in* UNFINISHED BUSINESS? THE WTO'S DOHA AGENDA 115 (Will Martin & Aaditya Mattoo eds., 2011), https://voxeu.org/sites/default/files/file/unfinished_business_web.pdf.

155. Martin Roy, *Services Commitments in Preferential Trade Agreements: Surveying the Empirical Landscape*, (NCCR Trade Regulation, Working Paper 2012/02, 2012), https://www.wti.org/media/filer_public/10/ab/10ab502c-9f82-428b-8735-c862a16a0838/roy_chapter-servicescommitmentsinptas-dataupload.pdf (last visited Oct. 21, 2020).

156. Julia Magntorn & L. Alan Winters, *European Union Services Liberalisation in CETA*, (Dep't of Econ., Univ. of Sussex, Working Paper Series No. 08-2018, 2018), https://www.sussex.ac.uk/webteam/gateway/file.php?name=wps-08-2018.pdf&site=24.

would, however, face certain problems due to the presence of Most Favored Nation ("MFN") clauses in several of the EU PTAs.

b. MFN Clauses

The presence of MFN clauses in existing PTAs creates a unique problem as it erodes a country's motivation to make significant commitments to any future PTA partner. This is achieved because the effect of an MFN clause's presence in a PTA is that the parties to the treaty are required to automatically extend any benefits of future deals with PTA partners to the original parties.[157] These clauses are a common feature in most PTAs concluded between developed countries.[158] The scope and depth of these MFN clauses may, however, vary depending on the development level of the parties. An illustration of this would be the United States-Mexico-Canada Agreement ("USMCA"), which covers the cross-border supply of services and the financial services sector.[159] Similarly, the EU's PTAs include MFN clauses in particular modes or sectors.[160] One illustration of this is the CETA, which has coverage similar to that of the USMCA.[161]

These EU PTAs usually contain MFN clauses that cover both investment and services liberalization.[162] Some of the notable agreements featuring this include the EU-Korea PTA, CETA, and the EU-Caribbean Forum (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago) ("CARIFORUM") PTA. The MFN provision in the EU-Korea, which is mirrored in several of these PTAs, states that:

> [E]ach Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it

157. *See* Magntorn, *supra* note 148.

158. *Negotiating Services Free Trade Agreements (FTAs) with the European Union: Some Issues for Developing Countries to Consider*, SOUTH CTR. (June 2009), https://www.southcentre.int/wp-content/uploads/2013/08/AN_EPA21_Negotiating-Services-FTAs-with-EU_EN.pdf.

159. *See* The United States-Mexico-Canada Agreement arts. 14.5, 15.4, 17.4, 20, Oct.1, 2018, 134 Stat. 11 [hereinafter USMCA]; s*ee also* The North American Free Trade Agreement art. 1203, Dec. 8, 1993, 107 Stat. 2057 [hereinafter NAFTA].

160. *See* Magntorn, *supra* note 148.

161. *See* Magntorn & Winters, *supra* note 156.

162. Ingo Borchert & Nicolò Tamberi, *The Engagement of UK Regions in Mode 5 Services Exports*, UK TRADE POL'Y OBSERVATORY (Sept. 2018), http://blogs.sussex.ac.uk/uktpo/files/2018/09/Briefing-Paper-22a-1.pdf.

> accords to like services and service suppliers of any third country in the context of an economic integration agreement signed after the entry into force of this Agreement.[163]

This can be interpreted as a classic MFN provision providing that if either party offers more favorable access to any other country in a future PTA, then this more favorable degree of access must be extended to the partner as well. The issue in the Brexit context arises when the United Kingdom attempts to conclude a PTA with the EU covering both investment and services, making comprehensive commitments, and then rolls over the existing EU PTAs containing MFN provisions. In this scenario, the United Kingdom would be obligated to provide the same level of access to the PTA partners as it would offer to the EU. Additionally, if the United Kingdom further liberalized or provided for deeper integration in services with any other party, during the course of its Brexit negotiations for rolling over agreements or while concluding new agreements, these would be subject to the MFN commitments.

Considering that the United Kingdom has already rolled over the EU-CARIFORUM agreement,[164] which includes an MFN provision,[165] any benefits of the future EU-United Kingdom PTA would have to be extended to the CARIFORUM countries as well if the latter PTA provides for deeper commitment in services. This trilateral dimension of the negotiations is quite likely to impact the ability and timing of other negotiations and the willingness of parties to make deep commitments in the services sector. This would effectively lead to an issue of timing for both the EU and the United Kingdom while creating a future relationship through the EU-United Kingdom PTA.

Thus, for the United Kingdom to avoid this issue, the best possible approach would be to first conclude the EU-United Kingdom PTA, which would most likely contain deeper services commitments to continue the existing single market relationship, and then to rollover the remaining agreements. This could help the United Kingdom avoid the issue of extending any additional benefits to PTA partners such as Korea or Canada. However, the issue would be that the EU, which

163. EU-Korea PTA, *supra* note 25, art. 7.8 (1).

164. *Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part,* Mar. 22, 2019, FOREIGN & COMMONWEALTH AFFAIRS OFFICE, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803413/1._CARIFORUM_Command_Paper_Part_One.pdf.

165. *Id.* art. 19.

already has agreements with countries containing this MFN clause, would not be able to avoid this issue of extending similar benefits of any future EU-United Kingdom agreement to its PTA partners.[166] This would restrain the EU from providing any meaningful commitments in services.[167] Thus, the negotiations for any solution would have to be trilateral.

Another possible solution to this problem is through the use of opt-out clauses, which are a feature of the CETA[168] and the EU-Korea PTA.[169] In the EU-Korea PTA, the MFN exception applies when the new PTA being concluded "stipulates a significantly higher level of obligations" than those undertaken by the EU-Korea PTA. [170] The term 'significantly higher' is further clarified to mean "creation of an internal market on services and establishment".[171] Alternatively, this exception will also apply if the PTA contains the right of establishment and the "alignment of the legislation of one or more of the parties to the regional economic integration agreement with the legislation of the other party or parties to that agreement."[172]

However, even in the case of this solution, the only options for the United Kingdom would be to agree to single market access to the EU for services or to align its regulatory regime to the current EU regime. Considering the open status of the negotiations,[173] the invocation of the MFN clauses could potentially play a big role in determining the level of commitments that become a part of the future EU-United Kingdom PTA.

From the EU perspective, the United Kingdom falling short of the requirement of "aligning legislation" would trigger the application of the MFN clause contained in its PTAs. Thus, if the United Kingdom

166. Minako Morita-Jaeger & L. Alan Winters, *The UK's Future Services Trade Deals with Non-EU Countries: A Reality Check*, UK TRADE POL'Y OBSERVATORY (Nov. 2018), http://blogs.sussex.ac.uk/uktpo/publications/the-uks-future-services-trade-deals-with-non-eu-countries-a-reality-check/.

167. Christophe Bondy, *Prospects for a UK-EU Trade Deal: The Challenge of MFN in Existing EU Trade Agreements*, LEXOLOGY (Apr. 11, 2018), https://www.lexology.com/library/detail.aspx?g=06068944-fcb7-4320-94f6-343d24311ff3.

168. CETA, *supra* note 44, art. 9.5(3).

169. Mark Simpson, *The MFN Clause as a Challenge to a Bold and Ambitious UK-EU FTA*, NORTON ROSE FULBRIGHT (May 20, 2017), https://www.insidebrexitlaw.com/blog/the-mfn-clause-as-a-challenge-to-a-bold-and-ambitious-uk-eu-fta.

170. EU-Korea PTA, *supra* note 25, art. 7.14(2).

171. *See* MCIVER, BERTHIER & WOOTON, *supra* note 105, at 33.

172. EU-Korea PTA, *supra* note 25, Annex 7-B.

173. Anna Mikhailova, *Boris Johnson Says UK Could Stay in EU Customs Union and Single Market for Two Years After Brexit Deadline*, THE TELEGRAPH (Sept. 30, 2019), https://www.telegraph.co.uk/politics/2019/07/30/boris-johnson-says-uk-could-stay-eu-customs-union-single-market/.

does not agree to full alignment, the EU may be unwilling to offer any additional undertakings over and above its existing agreements. This would ultimately result in rendering a purely bilateral issue, in addition to the timing and order of future negotiations, as discussed above, having potential trilateral ramifications.

5. Generalized System of Preferences – Opportunities to Improve

From the perspective of third countries that are trading with the United Kingdom, there are some significant problems that can arise due to the change in the regulatory regime after Brexit. One area of major concern for developing economies will be the validity of the Generalized System of Preferences Scheme ("GSP"), which allows for tariff-free trade with developed countries.[174] As discussed previously, after the United Kingdom formally exits the EU, all the rights and obligations contained in the EU's various agreements would cease to bind the United Kingdom. This effectively ensures that the United Kingdom will have to devise its own trade policy, which could impact third parties significantly.[175]

The legal basis for this GSP scheme can be found in the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries."[176] Under this provision, developed countries offer preferential treatment to goods originating from developing countries on a non-reciprocal basis (including zero rate imports or low duties on imports).[177] This scheme is based on the rationale that allowing developed countries to provide such tariff-free goods trade would allow developing countries to achieve economic growth quicker, while also aiding developed countries obtain goods at lower cost compared to their domestic markets.[178] The WTO Members

174. *See* Decision of 25 June 1971 on Generalized System of Preferences, WTO Doc. No. L/3545 (June 28, 1971), https://www.wto.org/gatt_docs/English/SULPDF/90840258.pdf; *see also* Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, WTO Doc. No. L/4903, BISD 26S/203 (1979) [hereinafter Enabling Clause], https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.

175. ROYAL AFRICAN SOCIETY, THE FUTURE OF AFRICA-UK TRADE AND DEVELOPMENT COOPERATION RELATIONS IN THE TRANSITIONAL AND POST-BREXIT PERIOD 59 (2017) [hereinafter *The Future of Africa*], https://royalafricansociety.org/wp-content/uploads/2019/10/APPG-for-Africa_Future-of-Africa-UK-Relations-Post-Brexit.pdf.

176. Enabling Clause, *supra* note 174, ¶ 2(a).

177. *Id.*

178. Stephan Klasen, Inmaculada Martínez-Zarzoso, Felicitas Nowak-Lehmann & Matthias Bruckner, *Trade Preferences for Least Developed Countries. Are they Effective? Preliminary Econometric Evidence*, *in* CDP POLICY REVIEW SERIES OCTOBER 2016 1, 2–3 (United Nations Comm. for Dev.

providing these schemes can also determine which countries and products to include within their schemes as this is purely voluntary,[179] with the only caveat being that these schemes cannot discriminate between similarly situated countries.[180]

The issue arises, however, that when the United Kingdom exits the EU, the EU's GSP Schemes will no longer apply to the United Kingdom.[181] Taking the example of the East African Community ("EAC"), the trade impact of this change is easily evident. A majority of the exports from the EAC to the United Kingdom have been possible due to the two preferential arrangements created by the EU.[182] These programs are called the EU standard GSP Program, GSP+, and the EU GSP-based Everything But Arms ("GSP-EBA") initiative.[183] If this treatment is withdrawn due to the withdrawal of the United Kingdom from the EU, all products from the EAC would immediately become subject to the MFN duties on entering the U.K. market. Though the MFN duties currently applied by the United Kingdom on products imported from the EAC are low, there are several products for which the EAC has significant export interest which have high tariffs levied on them.[184] Some of these products include goods such as meat, vegetables, clothing, and seafood, which are essential exports from the EAC and contribute significantly to their economy.[185] These new tariff rates could consequently severely impact the EAC exporters' competitiveness and

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Pol'y, Policy Review Series, 2016), https://www.un.org/en/development/desa/policy/cdp/cdp_news_archive/2016_Member_Trade_Preferences_Klasen.pdf.

179. *See* EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION 276 (2d ed. 1986); *see also* JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1171 (4th ed. 2002).

180. Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 184–88, WTO Doc. WT/DS246/AB/R (adopted Apr. 7, 2004) [hereinafter *EC-Tariff Preferences*].

181. Matt Grady, *Unilateral Preferences: Options for improved market access*, *in* MAKING UK TRADE WORK FOR DEVELOPMENT POST-BREXIT WORKSHOP REPORT 23 (Emily Jones & Conrad Copeland eds., 2017).

182. *See* DANIEL HANNAN & MIKE ROTICH, THE FUTURE OF UK-EAST AFRICA TRADE, http://ifreetrade.org/pdfs/IFT-UK-EAC-preview%28low-res%29.pdf (last visited Oct. 23, 2020).

183. *Report on the Generalized Scheme of Preferences Covering the Period 2018-2019*, EUR. COMM'N, at 3 (Feb. 10, 2020), https://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156536.pdf.

184. Marcus Gustafsson, Aakanksha Mishra, Hiram Jackson Kisamo & Robert Ssuuna, *The EAC-EU EPA and Brexit: Legal and Economic Implications for EAC LDCs*, TRADELAB 21–22 (May 13, 2017), https://georgetown.app.box.com/s/bovxnx9c4qb9xk768k3yw50ejwn1xl73.

185. *See* Mohammad Razzaque & Brendan Vickers, *Post-Brexit UK-ACP Trading Arrangements: Some Reflections*, 137 THE COMMONWEALTH: TRADE HOT TOPICS 1, 2-3, 6 (2016), https://thecommonwealth.org/sites/default/files/news-items/documents/5jln9q109bmr-en.pdf.

create a disparity in prices between their goods and those available in the U.K. market.[186]

The tariff and non-tariff regulatory measures that grant the EAC exporters' preferences are inseparable from the EU's agricultural policy. The future United Kingdom's domestic agricultural policy and trade policy in agriculture could severely impact the value of the EAC trade preferences and would make this an issue of considerable importance to the EAC.[187] Such a disruption in the trading relations between the United Kingdom and the EAC could create a significant imbalance and deeply impact the economies of both trading parties.[188] This would be especially true for the EAC states which rely heavily on the benefits of the GSP schemes to trade profitably with the United Kingdom. For example, amongst the EAC members, Kenya and Rwanda rely disproportionately on the U.K. market, exporting 27.8% and 17% of their total exports to the United Kingdom, respectively.[189]

The only method to avoid the adverse effects would be if the U.K. government offered the EAC States a non-reciprocal GSP and EBA scheme, which would provide equivalent or at least comparable market access to that guaranteed under the current EU GSP regime. The requirements to provide such a GSP Scheme are provided in the WTO under the Enabling Clause, which are broadly worded[190] and should accommodate a suitable scheme.

Due to the nature of EAC parties, which includes Kenya, a developing country as opposed to the rest of the EAC, which are categorized as least developed countries ("LDCs"), the United Kingdom would need to request waivers at the WTO to accommodate these schemes. There are several precedents for such arrangements, such as the African Growth and Opportunity Act ("AGOA"), where the United States obtained waivers from the WTO Members for its trade initiatives.[191]

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186. *The Future of Africa*, *supra* note 175, at 59; see also HANNAN & ROTICH, *supra* note 182, at 77–78 for a discussion on Higher MFN tariffs.

187. EDWIN LAURENT, LORAND BARTELS, PAUL GOODISON, PAULA HIPPOLYTE & SINDRA SHARMA, AFTER BREXIT… SECURING ACP ECONOMIC INTERESTS 34, 43, 44 (2017) [hereinafter *Securing ACP Interests*], https://api.ramphalinstitute.org/wp-content/uploads/2020/08/brexit_book_ramphalinst.pdf.

188. *The Future of Africa*, *supra* note 175, at 49–51.

189. *See Securing ACP Interests*, *supra* note 187, at 41.

190. *Generalized System of Preferences*, UNCTAD, https://unctad.org/topic/trade-agreements/generalized-system-of-preferences (last visited Oct. 21, 2020).

191. Council for Trade in Goods, *Goods Council Approves AGOA Waiver, Hears Call for Talks on Illicit Trade,* WTO (Nov. 10, 2015), https://www.wto.org/english/news_e/news15_e/good_10nov15_e.htm.

The issue arises due to the opposition of the EU to any such waiver, which may lead to the EU blocking any attempt to seek such a waiver.[192] Thus, in the case of LDCs there will not be much problem in obtaining preferential access to the U.K. market on a similar basis as the GSP-EBA scheme allowing for duty-free and quota-free access. In the case of Kenya there could be significant problems due to higher tariff barriers.[193] The benefit of these preferences could be extended to LDCs easily as the duty-free and quota-free access is a unilateral measure under WTO rules, but, as with most of these negotiations, there is a significant trilateral element required to be able to extend these benefits immediately after Brexit.[194]

This leaves the United Kingdom with two options essentially. The first is to develop a GSP program to accommodate the requirements of both developing countries and LDCs after obtaining a waiver at the WTO. This may be problematic due to the EU's opposition. The other option is to negotiate these GSP commitments as a part of PTA negotiations or the rolling over of EU agreements, which would require significant time and expenditure to accommodate all the previous benefits of GSP into the PTAs. The flaw in this model of renegotiating PTAs is that it would require substantial commitment on the part of developing and LDC economies to satisfy the requirement for substantial coverage in Article XXIV of the GATT. This seems quite unlikely as the governments of these countries would be unlikely to agree to liberalize their economy to this degree.[195]

While developing its own GSP regime, the United Kingdom also has the option of making improvements to the previous EU regime by providing for additional benefits. The United Kingdom could go further than the current schemes to provide deeper commitment in terms of tariff preferences. This new scheme could be based on different principles than the EU scheme, making it more tailor-made to the domestic industry concerns of the United Kingdom. In this context, the United

192. *See* Victoria Hewson, *Does the EU Help or Hinder Farmers and Manufacturers in Developing Countries?*, BREXITCENTRAL (May 16, 2018), https://brexitcentral.com/eu-help-hinder-farmer-manufacturers-developing-countries/.

193. *Cf.* INTERNATIONAL TRADE COMMITTEE, UK TRADE OPTIONS BEYOND 2019, FIRST REPORT OF SESSION (2016-2017), HC 817, at 58, https://www.publications.parliament.uk/pa/cm201617/cmselect/cmintrade/817/817.pdf.

194. *See Securing ACP Interests*, *supra* note 187, at 56, 58–59.

195. *Post-Brexit Trade Report: Options for Continued and Improved Market Access Arrangements for Developing Countries*, TRAIDCRAFT 11 (Feb. 27, 2017), https://www.traidcraft.co.uk/Search?keywords=brexit.

Kingdom may also use this to provide political favors to some developing countries to foster better trade relations in the future.[196]

Trade preferences are an important mechanism to address challenges faced by goods exported from developing countries.[197] Some of the improvements the United Kingdom could consider, to better foster trade and enable smoother rolling over of the EU PTAs, would be to introduce improvements in the EU GSP Scheme. The silver lining in Brexit may be that the United Kingdom could use this opportunity to create a GSP scheme based purely on its domestic industry concerns and build on the existing scheme's most effective elements to create the new gold standard of GSP schemes. This could be achieved by incorporating improved rules of origin and extending zero duty and quota preferences to a broader range of countries.[198] There are several methods by which the United Kingdom could expand existing schemes and improve the preferences granted.

a. Extended Product Coverage

The EU GSP scheme covers a wide variety of products and offers one of the broadest schemes of preferential market access. However, the GSP scheme has a few limitations when it is applied in the U.K. context. This is evident from how, though the EU GSP scheme applies to over 66% of all the product lines, only 28% of products that have an MFN tariff higher than zero, imported into the United Kingdom from developing countries, receive duty-free access.[199] This figure increases exponentially to around 88% in the case of the GSP+ scheme, which targets extremely low-income countries. Even this scheme fails to completely address the coverage gaps. For example, the GSP+ scheme fails to

196. Alice Tidey, *UK Outlines Post-Brexit Trading Vision, Prepares to Shift to the East*, EURONEWS (Feb. 1, 2019), https://www.euronews.com/2019/02/01/uk-outlines-post-brexit-trading-vision-prepares-to-shift-to-the-east.

197. KIMBERLY ANN ELLIOTT, TRADE PREFERENCES FOR THE LEAST DEVELOPED COUNTRIES: OPPORTUNITIES NOT PANACEAS 1–3 (2015), http://e15initiative.org/wp-content/uploads/2015/09/E15-Finance-Elliott-final.pdf.

198. *See* Lee Crawfurd, Ian Mitchell & Michael Anderson, *Beyond Brexit: Four Steps To Make Britain A Global Leader On Trade For Development*, Ctr. for Glob. Dev., Policy Paper No. 100, 2017, https://www.cgdev.org/sites/default/files/beyond-brexit-britain-global-leader-trade.pdf.

199. Derived from data from Eurostat COMEXT and UNCTAD TRAINS databases; *see also* MAXIMILIANO MENDEZ-PARRA, DIRK WILLEM TE VELDE & JANE KENNAN, POST-BREXIT TRADE POLICY AND DEVELOPMENT: CURRENT DEVELOPMENTS; NEW DIRECTIONS? (2017), https://odi.org/en/publications/post-brexit-trade-policy-and-development-current-developments-new-directions/.

cover bananas, which is a key export for Belize and Ghana, and sugar, which is a key export for Jamaica, Mauritius, and Swaziland.[200]

This problem is made considerably worse by the limitations of the products covered as they usually only involve unprocessed goods. The key for any country to increase its development is to create industries that are capable of processing and selling a higher quality of goods in the market.[201] These higher tariffs on processed goods significantly inhibit the capability of LDCs and developing countries that are trying to increase their processing capability. An illustration of this under the GSP scheme is the case of roasted and unroasted coffee. Under the GSP scheme, unroasted coffee beans are tariff-free, however, the tariff applied to roasted coffee is 2.6% *ad valorem*.[202] In contrast to the GSP scheme, the GSP EBA provides approximately 99% coverage of goods on a duty- and quota-free basis, with the only caveat being that this scheme is limited to LDCs.[203] The United Kingdom could combine both these schemes to provide a GSP EBA product coverage and a GSP country coverage.

b. Improved Eligibility Criteria for Countries

To provide this scheme, the United Kingdom could take advantage of the lack of any universally accepted or adopted method to identify categories of countries. The only requirement under GATT and the Enabling Clause is for the GSP scheme to be based on an objective criterion for distinguishing levels of development.[204] The current classification of countries into lower income, LDCs, and middle-income countries fails to completely assess the level of development of countries as it is based exclusively on income assessment.[205] The better

200. *See* Peg Murray-Evans, *Myths of Commonwealth Betrayal: UK–Africa Trade Before and After Brexit*, 105 COMMONWEALTH J. INT. AFF. 489, 489–98 (2016). The author notes that Swaziland has been renamed Eswatini recently.

201. Allan Rae & Tim Josling, *Processed Food Trade and Developing Countries: Protection and Trade Liberalization*, 28 FOOD POL'Y 147, 148 (2003).

202. *See* UNCTAD, *Generalized System of Preferences: Handbook on The Scheme of The European Union*, U.N. Doc. UNCTAD/ITCD/TSB/Misc.25/Rev.4 (2015).

203. See Gustaffson, Mishra, Kisamo & Ssuuna, *supra* note 184.

204. *EC-Tariff Preferences*, *supra* note 180.

205. Henry Gao, *The Development Debate in the WTO,* INT'L ECON. L. & POL'Y BLOG (Mar. 1, 2019), https://worldtradelaw.typepad.com/ielpblog/2019/03/the-development-debate-in-the-wto.html; *see* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14, art. 8.2(b), AnnexVII; *see also An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance-Communication from the United States*, TRALAC (Jan. 17, 2019), https://www.tralac.org/

approach to determine level of development would be through the use of economic vulnerability criteria.

This method, which is used by the EU while administering the GSP+ scheme, employs criteria such as size of an economy, diversity, health, literacy, domestic infrastructure, and susceptibility to natural disasters to identify structurally vulnerable small economies.[206] This allows a wider range of countries to be categorized as developing, including land-locked developing countries and island states which would otherwise have been excluded based on an income classification.

While this proposal seems to primarily benefit developing countries, which the United Kingdom would be reticent to spend political and economic capital on, especially in a time of recession due to Brexit, there is an underlying policy reason for it as well. Matching the EU GSP scheme would help the United Kingdom roll over several agreements without any complaints being raised regarding the withdrawal of benefits post-Brexit as the regulatory regime would be effectively the same.

However, under this pretext of improving development for countries, the United Kingdom could effectively provide developing countries with additional tariff-free benefits and potentially signal that it is a new and far better market for trade. Considering the deep impact that Brexit could have on countries trading with the United Kingdom, providing such a positive signal could significantly boost trade with the United Kingdom and increase its chances of securing several new trade deals in the future.

c. Improving Rules of Origin in GSP Schemes

One other area where the United Kingdom could significantly improve on the EU GSP scheme is by providing for more flexible rules on cumulation. The AGOA allows for cumulation by providing that goods should be either grown, produced, or manufactured in an AGOA beneficiary country.[207] This is supplemented by a provision allowing materials from any non-beneficiary country to be used in goods, with a caveat that 35% of the final product value must originate from an AGOA beneficiary. The current EU GSP adopts a far more complex approach by providing for different thresholds based on the

news/article/13839-an-undifferentiated-wto-self-declared-development-status-risks-institutional-irrelevance.html.

206. Lorand Bartels, *The WTO Legality of the EU's GSP+ Arrangement,* 10 J. INT'L ECON. L. 869, 871 (2007).

207. *AGOA's General Rules of Origin*, AGOA.INFO, https://agoa.info/about-agoa/rules-of-origin.html (last visited Oct. 22, 2020).

Harmonized System of Nomenclature chapter of the product.[208] For this issue, adopting a more flexible approach that allows better access to the EU market for products made in developing countries would be an improvement on the EU GSP scheme.

This could also work to the benefit of the United Kingdom in the long term because by agreeing to such arrangements in the GSP scheme, these flexible rules can also be made part of the Rules of Origin in their rolling over of PTAs, which, as highlighted previously, is a significant problem. For example, in the rolling over of the EU-CARIFORUM PTA, the grant of flexible rules of origin in the U.K. GSP scheme could convince the CARIFORUM to allow for flexible rules of origin when modifying the rollover agreement.

IV. The Way Forward for the UK

PTAs are the modern trade regime's primary mode for expansion.[209] With multilateral efforts at the WTO failing to provide any concrete increase in commitments,[210] the trade agenda continues to expand under bilateral and multilateral arrangements between Member States. WTO rules and regulations primarily provide for disciplines relating to dispute settlement, intellectual property, and trade in goods and services. However, modern PTAs go well beyond these disciplines to liberalize commitments further, especially in areas such as services and intellectual property rights, where the WTO commitments are minimal.[211] This has further shown immense development in investment, competition policy regulation, and regulatory harmonization.[212]

This could indeed prove beneficial to the United Kingdom, considering that after its exit from the EU, it can decide unilaterally on these issues and create a new trade policy far better suited to its business environment. However, as the CETA and the TTIP have shown, this comes

208. *See* Rae & Josling, *supra* note 201.

209. Nelnan Koumtingué, *Proliferation of Preferential Trade Agreements: An Empirical Analysis*, MPRA Paper No. 68917, 2010, https://mpra.ub.uni-muenchen.de/68917/1/MPRA_paper_68917.pdf.

210. *See* Christophe Bellmann, Jonathan Hepburn & Marie Wilke, *The Challenges Facing the Multilateral Trading System in Addressing Global Public Policy Objectives*, 3 Int'l Dev. Pol'y (2012), https://journals.openedition.org/poldev/1012.

211. Andreas Dür & Manfred Elsig, *Introduction: The Purpose, Design and Effects of Preferential Trade Agreements*, *in* Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements 1, 2 (Andreas Dür & Manfred Elsig eds. 2015).

212. Jean-Pierre Chauffour & David Kleimann, *The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design*, (Soc'y of Int'l Econ. L., Working Paper No. 57, 2012), https://ssrn.com/abstract=2104183.

at the cost of strong domestic opposition from the industry,[213] which the U.K. Government will have to face. The responsibility for these decisions, which were previously taken at the supranational level by EU policy makers, and thus evaded by the U.K. Parliament, will now fall squarely within the competency of the U.K. Parliament, raising more severe opposition from domestic industries.

The costs of Brexit and the economic implications on the U.K. economy are in a constant state of flux with wildly varying estimates.[214] In this legal myriad, even a seemingly simple process such as copying previous EU commitments and ensuring that they continue after the United Kingdom's exit from the EU could give rise to a plethora of complex issues. Several of the problems faced in this process of rolling over the existing PTAs need to be properly analyzed and tackled, keeping in mind the long-term impact of these changes.

The first problem highlighted in this analysis is the position of the United Kingdom as a party to the existing PTAs and the implications this could have on the rolling over of these treaties if they are unattended. The implications of triggering the survival clauses, with their impact on possible future investment arbitration claims being initiated against the United Kingdom cannot be ignored. Regardless of whether the treaty is terminated or rendered permanently inoperable due to the United Kingdom leaving the EU, which would exclude it from the personal and territorial scope of the treaty, the survival clauses would be triggered. The only method to alleviate these concerns would be through agreement by the contracting parties to waive the survival clause, which seems unlikely. The solution to this issue can only be achieved through trilateral negotiations between the EU, United Kingdom, and the concerned PTA partner.

While the general modifications to the PTA do not pose any significant threats to the process of rolling over EU PTAs, due attention must

213. Laurie Buonanno & Carolyn Marie Dudek, *Opposition to the TTIP in the EU and the US: Implications for the EU's "Democratic Deficit,"* Presented at the European Union Studies Association Fourteenth Biennial Conference (2015), http://aei.pitt.edu/78895/1/Buonanno.Dudek.pdf (last visited Oct. 21, 2020); *see also* IRISH CONGRESS OF TRADE UNIONS, NO DEAL: WHY UNIONS OPPOSE TTIP & CETA- BRIEFING ON THE TRANSATLANTIC TRADE & INVESTMENT PARTNERSHIP (TTIP) & CANADA EUROPE TRADE AGREEMENT (CETA) (2016), https://nipsa.org.uk/attachments/article/109/no_deal.pdf.

214. Adam Samson, *Brexit Costs UK £600m Per Week, Says Goldman Study*, FIN. TIMES (Apr. 1, 2019), https://www.ft.com/content/fb6285a4-5460-11e9-a3db-1fe89bedc16e; Ben Chapman, *Brexit Has Cost UK Economy £66bn So Far, Study Finds,* INDEPENDENT (Apr. 4, 2019), https://www.independent.co.uk/news/business/news/brexit-cost-how-much-uk-economy-money-spent-a8854726.html.

be given to changing the scope of the treaties and accommodate new temporal periods which reflect the requirements of the new U.K. PTA. The second major concern would thus be the substantial modifications required in these treaties, such as modification of TRQs, Rules of Origin, Services Commitments, and Mutual Recognition of Standards and Conformity Measures.

In the case of TRQs, the calculation method adopted by the United Kingdom and EU, which focuses on historical averages over a three-year period could potentially lead to opposition from several WTO Members. It suffers from several flaws as it cannot calculate for products that lack historical data and cannot account for changes in the demand of certain goods which could be affected in the three-year period. The United Kingdom and EU should consider a more accommodating and transparent method of disaggregating TRQs. Regardless of the method chosen for this process, there will be sustained opposition to the reduction of TRQs as the economic impact on some countries will be adverse.

Rules of origin pose another significant problem, due to the lack of cumulation between EU and U.K. products. This would leave the United Kingdom with the option of either negotiating for the lowering of the origin requirements or joining the PEM Convention. Both of these options provide their own set of challenges which must be surmounted to avoid paying high tariffs on U.K. goods. In the context of the mutual recognition of conformity standards, this means the United Kingdom would thus be required to conform to the EU standards on products, which would effectively defeat some of the major claims of regulatory freedom that the Brexit campaigners have often cited as the reason for leaving the EU.

Trade in services provides a unique set of problems which the United Kingdom has been unable to alleviate. On the one hand, there is the issue of timing the negotiations between rolling over PTAs and the ongoing PTA negotiations with the EU to avoid extending similar benefits under the MFN provision. On the other hand, the only way the United Kingdom could achieve any meaningful additional undertakings in the EU-United Kingdom PTA would be through full alignment of its regulations with the EU regulations. This would once again result in a seemingly bilateral issue having potential trilateral ramifications.

In the GSP context, the reliance of developing countries on the duty-free and tariff-free access to the U.K. market under the EU GSP scheme could jeopardize any future negotiations, unless the United Kingdom agrees to provide similar benefits under a new GSP scheme. In rolling over prior EU PTAs, these developing countries would make demands

of additional benefits under PTAs, unless these tariff-free quotas are granted. Considering this problem, the United Kingdom may be well advised to use this opportunity to even extend additional benefits under the GSP scheme by improving on the flaws in the EU GSP scheme. This could be used as a signal to developing countries to increase their trade with the United Kingdom and become a powerful reinvigorating force for the U.K. trade regime.

The Brexit supporters often present the exit from the EU as an opportunity for extensive renegotiation of trade deals on more favorable terms, which could offset the losses suffered by the United Kingdom in foregoing the access to the EU single market. However, this position is contrary to the present-day trade governance regime, which is primarily focused on power dynamics between trading economies. While the option of negotiating deals individually with each country could be attractive to powerful economies, this may not be the situation for the United Kingdom. The rollover of EU PTAs could provide an important step towards the required stability to pursue future trade deals with powerful economies. This inescapable step must be finalized at the earliest for the United Kingdom to achieve its Brexit aspirations.