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SINGAPORE-UPON-THAMES:

HAS THE UNITED KINGDOM NEGOTIATED BETTER POST-BREXIT TRADE DEALS FOR ITSELF?

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TABLE OF ABBREVIATIONS

ACP – African, Caribbean and Pacific States

CARIFORUM – The Caribbean Forum

CCP – Common Commercial Policy

CETA – Comprehensive Economic and Trade Agreement

CJEU – Court of Justice of the European Union

CRAG – Constitutional Reform and Governance Act

DExEU – British Department for Exiting the European Union

DG – Directorate-General

DIT – British Department for International Trade

EEAS – European External Action Service

EEC – European Economic Community

EFTA – European Free Trade Association

EPA – Economic Partnership Agreement

ERTA – European Road Transport Agreement

ESA – Eastern and Southern Africa

FDI – Foreign Direct Investment

FTA – Free Trade Agreement

MFN – Most Favoured Nation

MRA – Mutal Recognition Agreement

OECD – Organisation for Economic Cooperation and Development

PEM – Pan-Euro-Mediterranean Convention

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

TPA – Trade and Partnership Agreement

TRQ – Tarrif Rate Quota

UK – United Kingdom of Great Britain and Northern Ireland

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

US – United States of America

WA – Withdrawal Agreement

WTO – World Trade Organisation

1. INTRODUCTION: BACKGROUND TO THE AGREEMENTS AND BREXIT

On the 1st of October 2017, the former British Secretary for International Trade, Dr. Liam Fox announced at a Conservative Party Conference that, by the planned date of the British exit from the European Union the 29th of March 2019, the United Kingdom of Great Britain and Northern Ireland ("UK") would have 40 Free Trade Agreements ("FTAs") ready to enter into force.[1] On that date the UK had nine agreements concluded. As of the 1st of May 2020 they had 20 agreements. They also had concluded three Mutual Recognition Agreements.[2]

The UK voted to leave the European Union ("EU") on the 23rd of June 2016, in a state-wide referendum. The question was "Should the United Kingdom remain a member of the European Union or leave the European Union?". The options were "Leave the European Union" or "Remain a member of the European Union".[3] The Leave option won by a vote of 52% to 48%. The neologism "Brexit", a portmanteau of "British exit" was coined to describe leaving the EU.

Neither side was clear. Remain was arguably for the status quo, but was unclear on what would happen in the future. Leave was more vague, with some groups arguing for closer relations, such as EFTA membership. Other groups argued that UK needed control over all areas of its law. This led, post-referendum, to a period of instability as the UK sought to define what Brexit would mean.

The UK triggered Article 50 of the Treaty on European Union ("TEU") on the 29th of March 2017, with a letter to the President of the European Council, Donald Tusk.[4] According to the article, this started a two year clock for a Withdrawal Agreement ("WA") to be concluded. After two years, the UK would exit the EU, unless an agreement was reached between both parties, or the UK unilaterally revoked the notification.

There was disagreement between the British and European sides over how the talks should be structured. The EU insisted on separating out the WA, settling issues arising out of the UK

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[1] C. Jones, 'Fox's 40 trade schemes to miss deadline' *The Times* (London, 29 November 2018).
[2] GOV.UK 'Signed UK trade agreements transitioned from the EU' < https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries-in-a-no-deal-brexit> accessed 9 May 2020; GOV.UK 'Existing UK trade agreements with non-EU countries' < https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries> accessed 9 May 2020.
[3] N. Watt and R. Syal, 'EU referendum: Cameron accepts advice to change wording of question' *The Guardian* (London, 1 September 2015).
[4] F. Elliot and O. Wright, 'The eyes of history are watching: May triggers Britain's EU departure' *The Times* (London, 29 March 2017).

leaving, from the post-withdrawal trade agreement or treaty that would go on to define the UK's new trading relationship with the EU. The UK had sought to do both either at the same time, or to at least start in on the post-withdrawal agreement after some progress had been reached. This argument over sequencing was quickly settled in the EU's favour.

Eventually a WA was concluded between the two sides. This agreement failed to pass through the Houses of Parliament several times within the UK. This failure will be looked at more closely in Section 3.

In late 2019 Tereasa May stepped down and was succeeded by Boris Johnson. After much internal debate and legal wrangling, an election was held. This election secured Johnson a majority in the House of Commons, and allowed him to pass a new WA, which fixed the new Brexit date as the 31st of January, 2020. This WA contained modifications to the Northern Irish Protocol which may end up affecting the application of new trade agreements to Northern Ireland, but that is outside the scope of this thesis.

On the 30th of January, the UK officially ceased being a Member State of the EU, and entered the transition period. During this period it remains in many parts of the EU's market and regulatory sphere.

As a member state of the European Union, trading agreements have been concluded by the EU as an entity on behalf of the member states. Once the UK left the EU, these treaties would by default cease to apply to the UK, at least for treaties whereto the UK was a party by virtue of its membership of the EU.

Uncertainty over whether a withdrawal agreement would be reached that would clarify the status of more existing trade agreements, and indeed what sort of terms the UK will be able to offer post-Brexit, has led to challenges in securing treaties to carry over trade agreements. Some states, like Canada, adopted a wait-and-see approach.[5] They suspect that they may be able to get better terms under Britain's no-deal tariffs or through negotiations after Brexit has occurred.

[5] J. Owen, M. T. Jack and J. Rutter, *Preparing Brexit: No Deal* (Institute for Government, July 2019) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/preparing-brexit-no-deal-final_0.pdf> accessed 9 May 2020, 3.

Another issue in securing these carry over deals has been the lack of expertise in the British state for making trade deals.[6] The British diplomatic service has not been responsible for negotiating trade deals for several decades. Institutional capacity has been lost or transferred to Brussels.

A further issue arises under the current WA. Under Article 129 of that agreement, during the stand-still transition period, third countries will be asked to treat the UK as a member state for trade purposes. Third states will be under no specific treaty obligation to do so. The UK however, will. The WA obliges the UK to conform to existing agreements. No country has yet signalled that it would refuse to treat the UK as a member state.

The new trade agreements take effect once the UK has left the EU completely, not when it enters the transition period. To what degree third states may be bound by agreements concluded with the EU, especially those that are not mixed (see Section 2), is still somewhat unclear.[7] As of the 9th of May 2020 no state has objected to treating the UK as a part of the EU for the purposes of their trade agreements with the EU.

The WA also allows the UK to negotiate new trade agreements. However these can not take effect during the transition period established by the agreement. Instead under Article 129(4), they can only take effect once the transition period has terminated.

This thesis treats of these new agreements and treaties, and will analyse what legal changes will occur in the event that the agreements enter into force. Firstly, the current legal position of trade agreements and treaties more generally in the European system will be reviewed. This will be compared to the domestic British system. An examination of the historical evolution of the accession and ratification procedures in both will follow. Where do the powers lie between the Member States and the Institutions in the EU? What effect has devolution had in the UK? Does the domestic British procedure provide enough oversight?

The structure and common features of the UK's new agreements will then be examined. These will be compared with the existing provisions of the EU's trade agreements that the UK is seeking to replace or replicate. How do these new agreements handle institutional matters? How is dispute settlement handled? Do they do enough to encourage sustainable development

[6] J. Pickard, 'Documents reveal dearth of trade experts in Fox delegation: US-UK talks' *The Financial Times* (London, 12 October 2017).
[7] European Union Committee, *Scrutiny of international agreements Treaties considered on 26 February 2019* (2017-19, HL 300) [5].

and the protection of human rights? What sort of effect will these new agreements have on UK trade going forward? Is this likely to be positive or negative?

2. TRADE AGREEMENTS IN EU LAW.

Competences are how the EU conceives of the division of powers within its system. Competences can be exclusive, shared or supporting. An exclusive competence is one that falls entirely under the remit of the EU. A shared competence is one where the EU and member states share power. A supporting competence is under the power of the Member States. There are some special categories, such as the Common Foreign and Security Policy. [8] Competences operate under the Principle of Conferral. Conferral means that the EU can only exercise the competences conferred upon it by the Member States, and for purposes intended to achieve the objectives stated in the treaties.[9]

The EU, since the Treaty of Lisbon in 2009 has had legal personality. It is therefore capable of concluding international agreements.[10] It is responsible under Article 207 of the TFEU for concluding international agreements for its members in the area of international trade. Initially the EU had more limited powers for negotiating international agreements. Distinctions were drawn between trade in different types of services. Intellectual property and foreign investment (including Foreign Direct Investment or "FDI") were treated differently from regular trade. Some aspects are complicated e.g. unanimity is required in fields such as cultural, audio-visual, social, educational and health services.

From early on the Court of Justice of the European Union ("CJEU"), the judicial organ of the EU, has sought to define the scope of the Common Commercial Policy ("CCP") broadly, in order to achieve the objectives of the Union more effectively. This can be seen in the ERTA case, where the court enumerated a doctrine of implied parallel powers that gave the Commission broader authority to conclude trade agreements.[11] This authority was narrowed when it was restated in Opinion 1/94, which defined all trade in goods as coming under the CCP. Only certain aspects related to intellectual property and the cross border provision of services came under the CCP while transport services remained a national competence.

Today the position is explicitly set out within the treaties. Article 207 of the TFEU sets out the powers included under the CCP. However Art. 207(6) provides a significant limitation on this power, stating that the CCP shall not affect the delimitation of competences between the union

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[8] P. Craig and G. De Búrca *EU Law: Text, Cases and Materials* (6th Edn, Oxford University Press 2015) 75 ("Craig and De Búrca").
[9] Art 5(2) Treaty on European Union ("TEU").
[10] Article 47 TEU, as amended by the Treaty of Lisbon.
[11] Case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263.

and the Member States. This change came about under the Lisbon Treaty. The Lisbon treaty also moved the competence for Bilateral Investment Treaties ("BITs") from a Member State competence to an exclusive EU competence.

Thanks to the Lisbon treaty, the European Parliament is now a co-legislator with the European Council for matters within the CCP. This means that its consent must be secured before the conclusion of an international agreement within the CCP.[12] In the normal course of events, the Council agrees a set of parameters for the Commission to negotiate. This is called a Commission mandate. When the treaty is ready to be ratified it comes back to the Council and its co-legislator, the parliament, where it must be voted upon and agreed to by both.

Trade agreements have grown more complex and far reaching over time. Where once agreements were concerned with tariff reductions and increasing quotas, today trade agreements tend to focus on non-Tariff barriers. Areas such as regulations around goods, dispute settlement and investor protection are all now commonly part of trade agreements. European agreements also normally contain provisions around sustainable development and human rights.

This wide scope means that modern trade agreements are often considered mixed agreements to the EU. They affect both areas that are within the exclusive competence of the EU and the exclusive competence of the Member States (supporting competences). They must be ratified both by the EU as a whole, and by individual Member States according to their own domestic constitutional procedures. These procedures can be complicated and involve referendums, multiple votes, or regional parliaments. An example of this can be seen with the CETA agreement, whereby as many as 39 member state parliamentary chambers had to have their assent sought.[13]

The precursors to the EU were focused on internal trade. Groups like the European Economic Community ("EEC") did have some agreements with non-member countries. An early goal of this extra-European trade law was to preserve the existing colonial links of member states.[14]

[12] Art 218(6) Treaty on the Functioning of the European Union; Craig and De Burca (n8) 337.
[13] J. Brunsden and D. Robinson 'National ratification issue could derail EU-Canada trade deal' (FT.com, 3 July 2016) <https://www.ft.com/content/8e9428d4-412a-11e6-9b66-0712b3873ae1> accessed 9 May 2020.
[14] Art 3 Treaty of Rome.

The EEC Common External Tariff privileged certain territories with relations to EEC members over other countries.[15] These territories had colonial links to European powers.

Current EU trade agreements, especially those with less developed countries, include matters such as development assistance in the form of aid, as well as preferential treatment for developing countries. One area of substantial development over the last few decades has been the tying of economic benefits to other development goals, especially improved human rights. See Section 5.2 below.

Today, the Commissioner for Trade is assisted by a Directorate General for Trade ("DG Trade"). This is effectively a ministry at European level for managing trade. According to the Directorate General for Trade's 2018 Annual Report, the European Union had negotiated bilateral or regional trade agreements with 71 countries. This accounted for 40% of the world's GDP. [16] In June 2019 the EU reached a political agreement with the Mercosur states for a trade agreement.[17]

The EU has several types of agreements that it has negotiated in the past and that it negotiates today. These range from Association Agreements, like that concluded with Israel that allow a level of political and administrative incorporation, to Economic Partnership Agreements with developing countries that encourage growth and sustainable development.

[15] L. Bartels, 'The trade and development policy of the European Union' (2007) EJIL 715 at 721 ("Bartels").
[16] Directorate-General for Trade, *2018 Annual Activity Report* (NG-AD-19-001-EN-N, Publications Office of the European Union 2019) 6.
[17] EU Commission Press Release 'EU and Mercosur reach agreement on trade' (28 June 2019) < https://europa.eu/rapid/press-release_IP-19-3396_en.htm> accessed 9 May 2020.

3. TREATIES AND TRADE AGREEMENTS UNDER THE LAW OF THE UK

The United Kingdom of Great Britain and Northern Ireland is a unitary state with three devolved administrations. Despite its unitary status, one cannot accurately speak of British Law, as the UK contains three legal jurisdictions: England and Wales, Northern Ireland, and Scotland. Amongst these Scots law stands most apart. The Scottish legal system includes aspects of Civil Law. The legal system in England and Wales, and the legal system in Northern Ireland both operate as common law systems. There has been talk of considering Wales as a separate jurisdiction, as it does have a devolved assembly with some law making powers. At the time of writing this has not occurred. The national legislature of the United Kingdom is known as Parliament, with a lower house: the House of Commons; and an upper house: the House of Lords.

When it comes to international affairs, and specifically treaty making, this is handled by the national government at Westminster. There is little or no input from the devolved administrations. The United Kingdom is a dualist state, so treaties are not considered part of domestic law without legislation providing for such.[18] Treaties in the UK are considered to be negotiated, ratified and signed by the government under Prerogative Powers.[19] In theory, devolved administrations should be consulted, however there is no current requirement for that to happen. Even in areas that do touch upon the powers of devolved administrations this does not happen to any real extent.

The UK lacks a single constitutional document. Instead, the UK makes use of regular legislation, precedent and convention to define its make-up and operating procedures. The procedure for treaties is set out in the Constitutional Reform and Governance Act 2010 ("CRAG Act"), in Part 2. Before this was codified this matter was governed by the Ponsonby Rule. This is a convention. Under s20 of the CRAG Act a treaty is laid before Parliament for 21 sitting days (Period A). If either house does not pass a resolution against the treaty, then it is considered to have been accepted and can be acceded to.

If a resolution against a treaty is brought, the Minister responsible for tabling the treaty may make a statement explaining why it should be passed. This triggers a second period (Period B) of 21 sitting days for the houses to either resolve again or let the treaty pass.[20] This can happen

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[18] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [55] ("*Miller*").
[19] European Union Committee, *Scrutiny of international agreements Treaties considered on 5 February 2019* (2017-19, HL 282) [7] ("HL282").
[20] Constitutional Reform and Governance Act 2010, s20(4) (UK).

multiple times.[21] Under subsection 7, even if the House of Lords has passed a resolution against the treaty within Period B, the treaty can still be ratified if the House of Commons doesn't pass such a resolution. This accords with the general UK constitution in that the House of Lords is kept from having a strong veto in most areas. Its job is to advise and critique, not legislate.

There has been criticism of this system. There is no scope under the CRAG Act for Parliament to set negotiating objectives.[22] The entire process of parliamentary scrutiny takes place after a treaty is signed. There is no requirement for the government to seek parliamentary approval before starting a negotiation. This is especially concerning as not all treaties allow for a ratification stage, some are binding immediately upon signature.[23] The accountability system for treaties in the UK is therefore practically retroactive.

A further concern arises from constitutional structure of the UK in practice. The government is formed by the largest party, or the party that can command a majority in the House of Commons. This party has a large degree of control over the running of the house. If it controls a majority then with s21(7), the treaty can be ratified, regardless of what the House of Lords says. It's also possible for debates to be shut down or obstructed, further limiting parliamentary scrutiny. The makeup of the House of Commons since the last elections in 2017 and especially since the start of Summer 2019 has put great pressure on this system. With the Conservatives having achieved a majority in the December 2019 election this pressure should ease.

Certain treaties and international legal instruments are excluded from the scope of the CRAG Act. One obvious example are United Nations ("UN") Security Council resolutions.

This set-up allows British governments sidestep the procedural protections under the CRAG when the government wishes to pass controversial treaties. An example of this can be seen with the Comprehensive Economic and Trade Agreement ("CETA"). This is a controversial mixed trade agreement between the European Union and Canada. There was no debate in the House of Commons until after the UK had authorised the conclusion of the agreement.[24]

One interesting suggestion raised in the House of Lords report referenced above, is that the reason that this process for ratifying international agreements has not come under more scrutiny is due to the UK's membership of the European Union. Many of the large controversial treaties

[21] ibid s20(6).
[22] Select Committee on the Constitution, *Parliamentary Scrutiny of Treaties* (2017-19, HL 345) [21] ("HL345").
[23] ibid [23].
[24] HL345 n22, [26].

of the last few years have been trade agreements. As such they have been negotiated by the European Union on the UK's behalf. Much of the discussion and scrutiny of these agreements has not occurred domestically, but has occurred elsewhere, either in other Member States, or through the European ratification procedures that grant more oversight to the European Parliament and the European Council.[25]

However, with the UK leaving the EU and embarking on a more independent trade policy, greater scrutiny of international treaties will become desirable, and perhaps even inevitable. However it is notable that the roll over agreements that the UK has been negotiating have not lead to any renewed calls for greater oversight, nor any real growth in public or media interest. These agreements are what this thesis aims to examine.

Despite the growing number of powers devolved to the regional assemblies in Northern Ireland, Scotland and Wales, there continues to be little official opportunity for these bodies to become involved in the treaty making process. They have no power to vote on the treaties, under the CRAG Act or otherwise.

The respective assemblies have formed committees that look at the impact of new treaties on their regions.[26] These include the Scottish Parliaments "Culture, Tourism, Europe and External Affairs Committee"[27] or the Welsh Assembly's "External Affairs and Additional Legislation Committee"[28]. Despite the existence of these committees, there is no formal or notional consultation process.

The House of Lords Committee includes a reference to consultation with these bodies (or at least the assemblies themselves). However, this consultation is not required by law.[29] Indeed the House of Lords European Union Committee noted that the British government had not been

[25] ibid [31].
[26] R. Whitman *Devolved External Affairs: The Impact of Brexit* (Chatham House: Europe Programme, Feburary 2017) <https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-09-devolved-external-affairs-brexit-whitman-final.pdf> accessed 9 May 2020.
[27] Culture, Tourism, Europe and External Affairs Committee: Remit and Responsibilities <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/european-committee.aspx> accessed 9 May 2020.
[28] External Affairs and Additional Legislation Committee <http://www.assembly.wales/en/bus-home/committees/Pages/Committee-Profile.aspx?cid=449> accessed 9 May 2020, subsection 'Remit'.
[29] HL282 n19, Figure 1.

sharing the draft texts of agreements with the devolved administrations prior to signature; a failure of which the committee was highly critical.[30]

The issue of the involvement of the devolved authorities arose in the Miller case. Representatives of the assemblies were permitted to address the UK's Supreme Court as intervening claimants. They argued that as bodies with EU law duties and obligations, they would have to be consulted or given a vote on any transfer of powers.[31] The interveners were unsuccessful in convincing the court of the merits of this argument.[32]

In order to ensure legal continuity post-Brexit, the UK has passed the European Union (Withdrawal) Act 2018. This provides for the carryover of EU legislation into the domestic British legal order, once the UK leaves the EU. As discussed above, the UK is a dualist system with parliamentary supremacy. The only laws within the country justiciable are those which parliament passes. EU law receives legal force within the UK on the basis of the European Communities Act 1972 and certain other pieces of legislation. When these acts are repealed (as one would expect when the UK leaves the EU), EU legislation will need a new basis, or it will cease to apply, leaving quite a gap in the UK's laws. This category of law, carried over by the European Union (Withdrawal) Act, is to be known as "Retained EU law".[33]

This new category of law is referred to within the new treaties, such as in the CARIFORUM EPA, which references European regulations on the definition of unregistered design.[34] CARIFORUM is the group of Caribbean states that negotiates with the EU as a block for trade purposes.

These agreements are being negotiated by the British Department for International Trade. As part of the Brexit process two new ministries were set up in the UK, a department for exiting the EU ("DExEU") and a Department of International Trade ("DIT"). This is unusual. Normally international treaties are conducted by a country's department of Foreign Affairs or similarly named body. In the UK this would be the Foreign and Commonwealth Office. This

[30] European Union Committee, *Scrutiny of international agreements Treaties considered on 26 February 2019* (2017-19, HL 300) [17].
[31] *Miller* n18 [126].
[32] *ibid* [130].
[33] J.S. Caird, V. Miller and A. Lang, *European Union (Withdrawal) Bill Briefing Paper* (No. 8079, House of Commons Library, 1 September 2017) 4.
[34] Fn 1, Article 146(B)(4) 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 (2019) CP83.

division was introduced in order to help the UK to ramp up its state capacity for concluding treaties as it left the EU.

4. Overview of the Agreements

As stated in the introduction section, as of the 9th of May 2020 the UK has concluded 20 agreements.[35] These agreements are the:

- UK-Andean Trade Agreement,[36]
- UK-CARIFORUM EPA,[37]
- UK-Central America Association Agreement,[38]
- UK-Chile Association Agreement,[39]
- UK-Eastern and Southern Africa ("ESA") EPA,[40]
- UK-Faroe Islands FTA,[41]
- UK-Georgia Strategic Partnership Agreement,[42]
- UK-Iceland and Norway Agreement,[43]
- UK-Israel Trade and Partnership Agreement ("TPA"),[44]
- UK-Jordan Association Agreement,[45]
- UK-Kosovo Partnership, Trade, and Cooperation Agreement,[46]

[35] supra 2.
[36] 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 (2019) CP122.
[37] UK-CARIFORUM EPA n34.
[38] Agreement Establishing an Association between the United Kingdom of Great Britain and Northern Ireland and Central America (2019) CP128.
[39] Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Chile (2019) CP35.
[40] Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the United Kingdom of Great Britain and Northern Ireland (2019) CP31.
[41] Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark in respect of the Faroe Islands (2019) CP32.
[42] Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia (2019) CP196.
[43] Agreement between the United Kingdom of Great Britain and Northern Ireland, Iceland and the Kingdom of Norway on Trade in Goods (2019) CP89.
[44] Trade and Partnership Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Israel (2019) CP59.
[45] Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan (2019) CP204.
[46] Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo (2019) CP201.

- UK-Liechtenstein Agreement,[47]
- UK-Lebanon Agreement,[48]
- UK-Morocco Association Agreement,[49]
- UK-Pacific states EPA,[50]
- UK-Palestinian Authority Political, Trade and Partnership Agreement,[51]
- UK-SACUM (Botswana, Eswatini, Lesotho, Mozambique, Namibia and South Africa) EPA,[52]
- UK-South Korea FTA,[53]
- UK-Switzerland Trade Agreement,[54]
- UK-Tunisia Association Agreement[55].

One of the early issues to be faced is, when may these agreements be ratified. As discussed above, these sorts of agreements are normally an EU competence. That means that the UK cannot ratify the agreements until such a time as the UK has ceased to be a member of the EU. Additionally, the powers vested in the EU through the Common Commercial Policy must have returned to the British Government, i.e. the future relationship with the EU must allow the UK to make agreements of these sorts. For this reason most agreements are set to take effect after a Brexit, of some form, has occurred.

[47] Additional Agreement between the United Kingdom of Great Britain and Northern Ireland, the Swiss Confederation and the Principality of Liechtenstein extending to the Principality of Liechtenstein certain provisions of the Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation (2019) CP65.
[48] Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon (2019) CP183.
[49] Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Tunisia (2019) CP202.
[50] Interim Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Pacific States, of the other part (2019) CP76.
[51] Interim Political, Trade and Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part (2019) CP61.
[52] Economic Partnership Agreement between the Southern African Customs Union Member States and Mozambique, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (2019) CP193.
[53] Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Korea (with Exchange of Notes) (2019) CP167.
[54] Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation (2019) CP55.
[55] Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Tunisia (2019) CP188.

Broadly speaking two new types of agreements have been concluded. These are short form agreements and long form agreements. Short form agreements merely set out the necessary changes, referencing the existing European agreements as frameworks or shortcuts. The core text of the agreement is short. As an example, the agreement between Israel and the UK is only 6 pages long (not including annexes).[56] These new agreements use the term incorporated agreement (or agreements) to refer to the existing EU treaties.[57]

Long form agreements on the other hand are new, standalone documents that do not depend on any pre-existing treaties between the EU and the third party. While they may use similar or identical wording to existing agreements, they do not need to be read in conjunction with the EU agreements. Examples of these agreements are those with the ESA states, or with CARIFORUM.

As these agreements seek to carry over existing EU trade arrangements, they have utilised the same groups of countries as the EU negotiates with. The EU uses regional groupings for negotiating with ACP partners, in part to support regional integration in these areas.[58] This makes comparisons with existing trade arrangements easy, but it is not inherently the case that these are the groups that will suit the UK. Nor is it the case that these groupings necessarily make sense in all contexts. For example, the EU-CARIFORUM EPA and the UK-CARIFORUM EPA do not include Cuba, although it is a CARIFORUM state. Conversely, there is no 'Pacific States' regional body at present of which Papua New Guinea and Fiji are members of for negotiations with the EU. Yet they are grouped together for the purpose of trade with the EU.

[56] UK-Israel Agreement n44.
[57] See for example Art 1 UK-Swiss Agreement n47, Art 2.1 UK-Chile Agreement n39, Art 2.1(b) UK-Faroe Islands Agreement n41.
[58] Bartels n15, 752.

5. Common Features of EU Trade Agreements

As discussed above the EU's trade policy has evolved over the last few decades, from trade in goods agreements focused on tariffs and quotas, to more comprehensive agreements that cover a wider variety of goods and services, as well as have provisions outside the normal scope of trade, such as human rights and development provisions.

The EU uses different terms for agreements depending on the region and economic development of the partner. For example, agreements with developing countries or rather Africa, Caribbean and Pacific states, are normally called Economic Partnership Agreements ("EPA"), to highlight that the goal is not merely trade, but economic development.[59] Some other agreements are also known as EPAs, such as the EU-Japan EPA. Agreements with many Mediterranean states come under the Euro-Mediterranean partnership. An example of such an agreement is the "Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part and the State of Israel, of the other part". An association indicates a closer level of involvement in political matters than a mere free trade agreement.

In this chapter how various heads of agreements are expressed in EU agreements and how they have developed over time shall be looked at.

5.1. Rules of Origin

Modern trade agreements generally allow for cumulation of origin.[60] That is setting out the rules under which goods are actually "from" a country, to allow customs authorities to apply the proper tariffs and rules.[61] Using terms such as cumulation is often inaccurate, as really what is being described is the method of determining an origin, rather than allowing a cumulation of such origins.[62] One thing that EU trade agreements allow for is describing goods as "Made in the EU". This simplifies the process for many traders, as whatever their supply chains look like across however many Member States, they can just call the good "Made in the EU". Alternatively, EU trade agreements generally allow for cumulation across EU member states

[59] European Commission, *Commission Factsheet on Economic Partnership Agreements* (September 2018) <http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155300.pdf> accessed 9 May 2020.
[60] Delegation of the European Union to Vietnam, *Guide To The Eu-Vietnam Trade And Investment Agreements* (March 2019) <https://eeas.europa.eu/sites/eeas/files/eu_fta_guide_final.pdf> accessed 9 May 2020, 38.
[61] P. R. Vergano and M. Djordjevic, 'Understanding rules of origin - the coffee example' (2004) International Trade Law & Regulation 96.
[62] H. Priess, 'Modification of Rules of Origin in the Europe Agreements: New Cumulation Rules' (1999) Int. T.L.R. 66 at 67.

with relatively low thresholds. For example, this could allow a trader to label a good as "Made in France" when perhaps it had only been packaged in France. This ensures that goods being traded between the parties to an agreement are actually of the parties. This is to prevent trade deflection, where goods would be routed through countries with lower customs duties or other obstacles to trade.[63]

Origin is computed based on either the product actually originating in a certain territory, or on the basis of the "last substantial working or processing test". This may take the form of threshold tests on the amount of working, whether the product has been transformed from one category of good to another, or other sufficient processing or manufacturing.[64] As these rules can act as actual barriers to trade, there is a WTO Agreement on Rules of Origin, requiring countries to use clear rules to help limit the anti-trade effects of such rules. Notably, the country of origin is not necessarily the country of exportation.[65]

Rules of origin in the European neighbourhood are generally governed under the Pan-Euro-Mediterranean ("PEM") Convention. This convention replaced a variety of bilateral rules on cumulation of origin with a common framework. This facilitates the diagonal cumulation of origin across the EU and a number of countries around the EU, such as the Balkan states, several countries in North Africa and the EFTA states.[66]

CETA deals with Rules of Origin in a protocol to the main agreement, known as the "Protocol on rules of origin and origin procedures". The agreement with South Korea similarly places these provision in a protocol "concerning the definition of 'originating products' and methods of administrative cooperation". The much older agreement (1997) with the Faroe Islands also utilises a Protocol (Protocol 3) in its FTA with the European Union.

Annex 5, containing specific rules for different classes of products, runs to over 100 pages in CETA.[67] As this shows, Rules of Origin can be quite complicated, especially with products with complex supply chains. Adhering to complicated rules of origin can even be so

[63] H. Preiss and R. Pethke, 'The Pan-European Rules of Origin: The Beginning of a New Era in European Free Trade' (1997) 34 Common Market Law Review 773.
[64] Vergano and Djordjevic n61, 98
[65] Preiss and Pethke n63, 781.
[66] 'The pan-Euro-Mediterranean cumulation and the PEM Convention' <https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/paneuromediterranean-cumulation-pem-convention_en> accessed 9 May 2020.
[67] P584-692 CETA.

complicated that some business will avoid utilising FTAs, and instead trade on inferior terms like MFN treatment, rather than try to comply with the certification requirements.[68]

In newer trade agreements cross-cumulation has become a feature. Traditionally, goods could only be cumulated when they originated from a country in an FTA with another country. Issues arise when dealing with multiple agreements with different countries or free trade areas, where goods that are considered to originate under one agreement might not count under another.[69]

To remedy this, agreements sometimes include clauses extending cumulation over certain goods. Canada provides for this in trade agreements with Peru and Columbia, where car parts from the US may be cumulated provided they meet the standards in the agreements.[70] To date there has been no challenge to these rules, even though they only apply to certain goods and as such may fall foul of WTO rules.[71] The idea that American car parts might receive preferential treatment under a Canada-Peru arrangement might well anger European car producers, especially if they have an FTA with MFN clause with Canada. However the benefits of such clauses are clear for producers, they allow them to use goods in their supply chains and still benefit from FTAs. It seems likely that this extended cumulation or cross-cumulation will appear in more agreements in the future.[72]

[68] Bartels n15, 748.
[69] A. Jerzewska 'Brexit and Origin: A Case for the Wider Use of Cross-Cumulation' (RTA Exchange, January 2019) <http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Rules-of-Origin-Jerzewska-Final-3.pdf> accessed 9 May 2020.
[70] ibid 3.
[71] HL300 n30, [22].
[72] M. D. Abreu 'Preferential Rules of Origin in Regional Trade Agreements' (Staff Working Paper ERSD-2013-05, World Trade Organization, 22 March 2013) available at <https://www.wto.org/english/res_e/reser_e/ersd201305_e.pdf> accessed 9 May 2020 at 41.

5.2. TARIFF AND TARIFF RATE QUOTAS

The traditional headline substantive clauses in any trade agreement are the tariff and quota reduction clauses. Within the EU, a hardline approach has been taken against such measures, as they are an anathema to the proper functioning of the Internal Market. Tariffs are fees placed on goods when they are being imported into a territory, to make them less competitive or attractive for local consumers. Quotas are restrictions on the amount of goods that can be imported into a country. Tariff Rate Quotas are a combination of the two, allowing a certain quantity of goods to be imported at one rate, before reverting to another rate once that quantity has been exceeded.[73]

As discussed in section 2, originally EU trade policy was focused on offering preferential access to those nations that had a colonial history with European powers. Over time that moved towards a model that saw less developed countries more generally getting preferential access under various initiatives and programmes to the EU.

With the declaration of independence of many former colonies, the Yaoundé convention was created to govern the matter between states. This was followed by later iterations of the Yaoundé conventions, such as Yaoundé II. The main difference between this and the previous arrangements with colonies was institutional, with bodies established to govern the agreement.[74] These arrangements provided for reduced tariffs for these countries.

One early issue at this point was around reciprocity or non-reciprocity of trading arrangements. Should developing countries be allowed not reciprocate in order to help build their economies, or should it be a requirement of trade going forward? For example, if the EU applied a 6% tariff on imports of cheese, should the developing states be required to apply the same tariff to EU cheese?

Eventually, non-reciprocal won the argument, with UNCTAD adopting Principle 8 in 1964, which called for developed countries to grant non-reciprocal access to developing countries.[75]

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[73] M. Clough, I. Danilov and J. W. Kim, 'Potential changes to the UK's international trade law framework if it leaves the EU' 25(3) *International Trade Law Review* 141, 143

[74] Bartels n15, 722.

[75] ibid.

Non-reciprocal arrangements were incorporated into EU agreements for the Lomé Convention and Contonau Agreement.[76]

Modern tariffs are complicated. Products may be eligible for multiple tariffs. There may be quotas on the number of goods that can be imported under a certain tariff before an alternative tariff must be used. In the EU tariffs are set at a 10 digit level.[77] This system of tariff rate quotas ("TRQs") is utilised by the EU.[78] This system allows the EU control over the volume of goods coming in to the EU. EU tariffs tend to be high on agricultural products, which will be a problem for the UK if it fails to negotiate a Free Trade Agreement with the EU before it exits, as the UK imports a large portion of its food from the EU.[79]

[76] ibid 733 citing Gruhn, 'The Lomé Convention: Inching Towards Interdependence?' (1975) 30 Int'l Org 241 at 251.
[77] L. Nilsson, 'Principles of EU Imports, Tariffs, and Tariff Regimes' (2011) *Journal of World Trade* 45(4) 821.
[78] E. Potton and D. Webb, *Brexit: Agriculture and Trade Briefing Paper* (No. 7974, House of Commons Library 2017) available at <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7974> accessed 9 May 2020 at 3.3.
[79] ibid at 3.2.

5.3. MUTUAL RECOGNITION OF STANDARDS

Mutual recognition refers to states recognising certification or qualifications from other states, normally on a reciprocal basis. This allows goods to only have to deal with one set of administrative procedures, rather than conforming to a foreign set when a company wants to export to a specific region that it has an agreement with.

Another major area in modern trade agreements provides for mutual recognition. This may be of certification for origin of goods, such as may be necessary under the rules discussed in Section 5.1 above, or of other regulatory matters. Often these are done through individual Mutual Recognition Agreements such as with the United States, although at other times they can form a part of an FTA. An example of the latter would be CETA, which in Chapter 11 goes through a variety of provisions on the Mutual Recognition of Professional Qualifications.

In some areas Mutual Recognition issues have been superseded by other treaties or changes in the commercial landscape. For example the "Agreement on Mutual Recognition of OECD principles of good laboratory practice and compliance monitoring programmes between the European Community and the State of Israel" has largely been superseded by the OECD's "Mutual Acceptance of Data Agreement", although the former agreement remains nominally in force.[80] This push towards a more international rather than bilateral recognition of standards can be seen as another example of the push towards standardisation in global trade.

[80] UK-Israel Agreement n44 [10].

5.4. Dispute Resolution and Institutions

Any agreement must contemplate a dispute arising from the interpretation of that agreement. International trade agreements are no exception, and generally include a dispute settlement process. The EU's treaties are no exception. European treaties generally set up some sort of institution or body to manage them. Such bodies often take the form of a Joint Committee, meeting yearly and alternating between the territories of the contracting parties.

Individual working groups or subcommittees may also be established to deal with particular areas or to examine the functioning of the treaty over time. An example of this would be the Working Group on Geographical Indications in the EU-South Korea trade agreement. This is established by Article 10.25 of the aforementioned agreement. Article 10.25 (2) provides for the alternating locations mentioned above, although it also allows for the meeting to be by teleconferencing. This is not the only working group in this treaty, with working groups on government procurement, motor vehicles and parts, trade remedies and cooperation and pharmaceuticals and medical devices also included.

The role of these working groups is to further develop the rules in the treaties, and to deal with issues that arise with the progressive development of law. For instance, with geographical indications above, new geographical indications may be introduced over time. Allowing one party to unilaterally introduce geographical indications would allow a substantial level of unilateral amending power. At the same time, requiring a new trade agreement for every new geographical indication would be excessive. A working group is a useful compromise.

Traditionally, disputes were settled diplomatically or through arbitration, either between the states or between investors and states. In recent years there has been a move towards more permanent dispute settlement procedures. The CETA Agreement, being a recently concluded agreement, contains a very formalised structure, with a tribunal and an appellate tribunal. The 15 members of the panel for the tribunal are split three ways, equally between EU nationals, Canadian nationals and third country nationals.[81] They are paid a retainer to ensure their availability, as well as expenses.[82] These retainers and expenses may even be transformed into a salary, if the CETA Joint Committee so decides.[83] Effectively, a permanent judiciary for an international trade court could be established, albeit one restricted to the EU and Canada.

[81] Art 8.22 and Article 8.28 CETA.
[82] Art 8.27 (12) CETA.
[83] Art 8.27 (15) CETA.

On the other hand, agreements such as the recent FTA with Vietnam still rely on arbitration or WTO procedures as the ultimate dispute settlement process.[84] Although even here there is a move towards a more institutional process, with panels and lists of arbitrators, including specialised arbitrators in certain sectors, being established, rather than ad-hoc arbitration panels.[85] This aims to streamline the process of arbitrator selection, in order to develop trust and expertise among the arbitrators. There is no provision in Chapter 15 to transition towards a more CETA like system, although there were moves to use such a system earlier in the negotiation process.

This tribunal system from CETA is a first step towards a multilateral investor tribunal system. Investor-State Dispute Settlement has been a controversial area of international trade law, with many objecting to it on the grounds that it is undemocratic for governments to have to answer to businesses, especially in areas where governments attempts to regulate areas have been frustrated.[86] It may be that a country is enacting a trade restriction under the guise of a legitimate regulatory goal, but some treaties, whether by poor drafting or a failure to anticipate the imagination of some lawyers, may not draw the right lines.

The system in CETA attempts to address some of these concerns, providing for an explicit right to regulate on the part of member states.[87] CETA gives a great deal of detail about the operation of the system it establishes, including an enumeration of the ethics it expects members of the tribunal to adhere to.[88] CETA also provides that should a multilateral system come about, the Joint Committee can decide that disputes will now come under such a systems purview, rather than that mechanism from the agreement itself.[89]

It should be noted that the dispute settlement part of CETA is firmly on the mixed side of an EU Agreement, and as such will require ratification in each member state. Therefore it may take several years before the tribunal is constituted.[90] However the system has already

[84] Chapter 15, Free Trade Agreement Between The European Union And The Socialist Republic Of Viet Nam COM(2018)691 Annex.
[85] supra n60, 65.
[86] E. Sardinha, 'The Impetus for the Creation of an Appellate Review Mechanism' (2017) 32(3) ICSID Review - Foreign Investment Law Journal 503.
[87] Preamble and Article 8.9 (1) CETA.
[88] Art 8.30 CETA.
[89] Art 8.29 CETA.
[90] E. Sardinha, 'Towards a New Horizon in Investor-State Dispute Settlement: Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)' (2016) 54 Can. Y.B. Int'l L. 311 at 318.

overcome several legal barriers, with the CJEU finding that such a system was compatible with the TFEU and TEU.[91]

As the section 2 and the aforementioned issues around CETA demonstrate, EU trade agreements have often run into issues around mixed agreements and the divisions of powers between the European level and the national level. One further example is that the CETA Joint Committee is established by executive members just at the European level, with no national representatives. In effect, Member States may end up ceding more power to the European level than they first anticipate, with no way to claw that back, by the Joint Committee and Tribunal interpreting clauses in the trade agreement more expansively.

5.5. Human Rights and other Social Clauses

This human rights conditionality finds first expression in the Uganda guidelines in 1977.[92] Lomé III included a reference to human rights in its preamble, with Lomé 4 including specific funds for human rights promotion. These clauses have not been heavily used, and when they are normally focus on the suspension of aid rather than suspension of trade benefits.[93]

The first legally actionable human rights clause can be found in the agreement with Argentina from 1990. Interestingly, this clause was included at Argentina's request. The clause read:

> *Cooperation ties between the Community and Argentina and this agreement in its entirety are based on the respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Argentina.*[94]

A failure to comply would allow the treaty to be repudiated, as it is based on the respect mentioned. Indeed this clause was in Article 1 of the treaty.

The inclusion of such clauses became official EU policy in 1995.[95] Lomé IV even made these principles an essential element of the agreement, providing that a breach of them could lead to

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[91] Opinion 1/17 *CETA* (2019).
[92] European Council, 'Council Declaration on the situation in Uganda', adopted 21 June 1977 (Bull EC 6-1977) [2.2.59].
[93] Bartels n15, 738.
[94] Article 1, Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic (26 October 1990) 67 OJL295.
[95] European Commission, *Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries* (COM(95)216, C4-0197/95).

a suspension of all rights under the trade agreement. These provision have been used sparingly, with trade provision normally not being affected, with interferences with aid being preferred.[96]

In a 2005 report the failure to standardise the sorts of clauses that the EU was including its agreements with was called out by a report by the External Action Service ("EEAS").[97] There are clear difficulties in attempting to standardise this sort of language. Diplomatically, it may be awkward to insist on stronger language with a state that the EU may have greater concerns about than a state that the EU feels is more likely respect human rights, regardless of treaty language. In effect, the EU asking for stronger language would be an insult. States have objected to such language in the past, such as Australia and New Zealand refusing to conclude agreements with the EU in the 1990s.[98]

As discussed above the EU has included human rights clauses in its international agreements. Interestingly, these clauses have not traditionally been included in agreements with developed countries. As a modern example, while the new agreement with South Korea includes some references to human rights, especially around privacy and in its preamble, there are no actionable clauses that require democracy to be preserved or human rights to be promoted. Interestingly, South Korea still claims developing status at the WTO.[99] CETA also fails to include any human rights provisions, although again it does include an acknowledgment of the Universal Declaration of Human Rights in its preamble. Being in the preamble, it is clearly an interpretative aid more than anything binding on the actions of the states.

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[96] Bartels n15, 738.

[97] Directorate General External Policies of the Union, *Human Rights And Democracy Clauses In The Eu's International Agreements* (EP/ExPol/B/2005/06, 29 September 2005).

[98] ibid [2.1.2].

[99] T. Embury-Dennis 'China refuses to give up 'developing country' status at WTO, despite Trump administration pressure' (Independent.co.uk, 10 April 2019) <https://www.independent.co.uk/news/world/asia/china-wto-developing-nation-country-trump-administration-trade-war-tariffs-a8863746.html> accessed 10 January 2020.

6. Common Features of the United Kingdom's new Trade Agreements

As is standard in most treaties and indeed legal documents generally, the UK's new trade agreements open with some definition of the objectives of the agreement. As will be discussed later, there are some potential issues here, especially with the short form agreement and the use of existing EU treaties and decisions arising from them.

The treaties being trade agreements, then go on to the various provisions on trade that they contain. As these agreements are intending on rolling over existing EU agreements, in substance if not form, they will have many of the same features as the treaties discussed above do. Firstly, the most obvious difference, the fact that the short form treaties obviously contain articles discussing how they have been adapted to be UK only. Secondly, how these treaties deal with Rules of Origin and Cumulation requirements. Finally, how dispute resolution is handled, along with the sorts of institutions and committees these treaties set up.

6.1. Carryover and Deletion of EU References

This is primarily a feature of short form agreements. As the long form agreements are a fresh start, there is no general need to address the changes as such. The agreements do acknowledge the previous basis for the relationship, the CARIFORUM EPA does this in its preamble, but there isn't a reliance on the European agreements as in the long form. One exception is in the EPA with the ESA states, which does place a reliance on the territorial application on the basis of the application of the EU-ESA EPA.[100] Strangely, this reliance is for the definition of UK territories to which the agreement will apply.

These two types of agreements generally seek to reach the same goal: keeping things as they are. This can be seen most clearly in the objectives of the short form agreements. For example, the Faroe Islands agreement states under the heading "Objective":

> *"The overriding objective of this Agreement is to preserve preferential conditions relating to trade between the Parties, which resulted from the EU-Faroe Islands Agreement, and to provide a platform for further trade liberalisation between the Parties."*[101]

[100] Art 60 UK-ESA EPA n40.
[101] Art 1 UK-Faroe Islands Agreement n41.

Similar objectives can be found in Article 1 of the Israeli agreement, and in the preamble to the Swiss agreement.

The long form agreements do include similar language. The CARIFORUM agreement includes within its preamble the clause:

> *"DESIROUS of ensuring continuity of the effects of the CARIFORUM-EU EPA and maintaining certainty and stability in their trade and investment relationship; "*

One interesting difference between the long form and the short form agreements is that while the long form agreements include language about progressively lowering trade barriers and improving access over time, and other such WTO style yay trade language, the short form agreements do not. Instead they depend on similar language to the above being in the incorporated agreements. The objectives of these agreements then somewhat differ. Where the short form agreements see preservation of existing ties i.e. the status quo as the main objective, the long form agreements see that as merely one objective or goal among many. This would seem to make the short form agreements bound to be interpreted in a stricter and indeed backward looking fashion, while the long form agreements can be interpreted more creatively to achieve general goals of international trade. This may have an effect on dispute settlement in the future.

Another potential issue, especially with the short form agreements, is the use of *mutatis mutandis* clauses.[102] These clauses allow an agreement to be read with the necessary changes for the agreement to make sense. For example, a reference to a dispute settlement chapter that deals with an EU-third party arbitration panel, could be read as a reference to an UK-third party panel, without a reproduction of the chapter with all EU references replaced. They can simplify the process of reaching an agreement, as if you're applying such a clause then you clearly aren't intending to make changes. This should make rolling over an agreement easier. However there can be differences of opinion over what those changes should be. Bodies, offices and institutions don't always have one to one comparisons or equivalent powers. To remedy this annexes of the sort of changes that the provisions foresee are included.

A further issue is that the original EU agreement or agreements on which the rollover treaty are based may not be easily found. Today this is normally not much of an issue, as current agreements are generally available online, but that may not be the case in the future. Some of

[102] HL300 n30, Box 1.

these agreements may be relied upon for decades. An obvious issue might arise where the EU-Third Country agreement is superseded. While the current treaty text may remain available, documents like decisions of Joint Committees may become unavailable from regular sources. The House of Lords committee report recommended that the British government should reproduce necessary documents to avoid this problem.[103]

Reliance on these decisions is expressly provided for in the agreements, even the long form agreements. An example of this is at Article 232A which provides for the carryover of the sorts of decisions referred to above.

6.2. Rules of Origin and Cumulation

Rules of Origin pose a problem for the UK going forward. Many supply chains for goods have become intertwined with EU Member States over the UK's previous few decades of Membership. This will create issues for businesses that wish to continue to export to territories under trade agreements which require a good to originate in a particular state to qualify, as trade agreements normally require. As noted above, in some areas businesses already don't bother complying with rules of origin requirements, instead preferring to use inferior but easier to comply with terms such as MFN status.

The general response to the issue of rules of origin has been for the UK to seek broad definitions of originating status. An example of this is in the UK-Switzerland FTA. Title II of the agreement deals with concept of originating status. Article 2 of this agreement uses a standard definition of originating status, but article 3 then goes on to broaden this under the heading of "Cumulation in the United Kingdom". Article 3 provides that it shall not be necessary for a product to have undergone sufficient working or processing in the United Kingdom to be considered as originating there, so long as the goods originate in the Switzerland, Liechtenstein, Iceland, Norway, Turkey or the European Union.

However there is a limitation on this. Article 7 sets out some procedures that if that is all that is done to them within the UK then they shall not count as originating in the UK. These include processes such as simple painting or cleaning, slaughter of animals, or simple mixing of products. If the product does not undergo anything more than Article 7 processing then it can

[103] HL300 n30 [10].

only be counted as originating in the UK if the value added there is greater than the value added in any other country.[104]

The long form agreements utilise a structure similar to the EU's agreements. That is they out the rules of origin into a protocol that is then attached to the main agreement.

Thus, the UK will be able to describe goods as originating in the UK even if the working or processing done on them is relatively minor, so long as the goods otherwise came from the EU and related countries. This will not solve all problems for British businesses. They will still have to engage in a process of proving that with appropriate certification, certification that previously they would not have needed, as they could just describe their goods as originating in the EU with nothing further said. They will have to establish some working or processing in the UK, above a minimal level, to make those goods UK goods and benefit from the trade arrangements that the UK has made or will make.

Going forward it may also be the case that other countries do not agree to treat goods this way. They may require stricter rules of origin, as is standard in other agreements. This could introduce quite a degree of complexity into UK production chains.

The inclusion of a third party (or parties) in a cumulation regime is not without precedent even within European agreements. The EU-Vietnam Agreement provides for this in relation to some goods from other ASEAN countries, as does Canada (see section 5.3.) How the UK approaches cross-cumulation when it starts to negotiate wholly new agreements remains to be seen. The UK may wish to remain in the PEM Convention.

It has been suggested that the EU may agree with countries with which it has a trade agreement to treat British inputs under a cross-cumulation arrangement. This would reduce disruption to EU27 based producers, however it would not allow the UK to trade directly with Canada, or directly benefit British end-producers.[105]

How the UK can and should treat rules of origin and cumulation in the future is an open question. The clear focus of the new trade agreements is to reduce any and all disruption to existing supply chains, and to conclude agreements as quickly as possible. With this comes obvious problems. Brexit clearly upsets the existing arrangement. The UK is only part of the

[104] Art 2(5) UK-Swiss FTA n54.
[105] Jerzewska n69.

PEM Convention as a member of the EU's Customs Union. It will have to join this convention if it wants to allow diagonal cumulation of origin as currently occurs. The UK will be eligible for this, once it has an FTA in force with a PEM Convention member.[106] This should occur shortly after Brexit, once the UK has been able to fully ratify one of its FTAs, such as with the Faroe Islands. How long it may take for Britain to be accepted is another question, as a Joint Committee has to approve the UK's bid to join. It took Moldova over two years from application to membership.[107]

6.3. TARIFFS AND TARIFF RATE QUOTAS

As above with European agreements, the UK's new agreements contain provisions governing tariffs and TRQs. Generally speaking, tariff rates themselves will be unaffected. However, as the UK is a substantially smaller jurisdiction than the whole EU, the quotas applied for TRQs are inevitably different. The UK could not simply take the European quotas and apply them both ways going forward. Nor can they simply divide the quota by 28, or through some other simple maths establish a fair quota based on European levels.

Instead, the UK has opted for a policy of setting TRQs by reference to three years of customs data and where this isn't possible by using trade flow data. Again, as always, the aim here has been to avoid disruption and maintain existing trade. Much like the agreements as a whole, continuity has been prized. Some agreements do allow a minimum volume of trade through, even in areas not significant to current UK trade, in order to allow future possibilities. This can be seen in the UK's agreement with Israel.[108]

In the event of no deal being agreed with the EU, the UK has published a list of the tariffs and TRQs it will apply to goods.[109] In general, where there are no British producers to protect the rate will be 0%. For example, citrus fruits and olive oil will have no tariffs applied to them.[110] The change in tariffs and TRQs will be easier to manage for that which is already coming from outside the EU but is likely to prove cumbersome for goods that coming from within the EU.

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[106] Article 5(1), Council Decision (EU) 2013/94 on the conclusion of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (PEM Convention) [2013] OJ L54.
[107] supra n66.
[108] Department for International Trade, *Continuing the United Kingdom's trade relationship with Israel* (ISBN:978-1-5286-1067-4 February 2019) [69].
[109] 'The Tariff of the United Kingdom' Version 1.0 (8th October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/837199/Tariff_Reference_Document_8th_October.pdf> accessed 9 May 2020.
[110] A. Walker 'Brexit: How will the new tariff system work?' (BBC News, 13 March 2019) <https://www.bbc.com/news/business-47554026> accessed 9 May 2020.

At present many business only trade within the context of the current UK-EU trade relationship, and are not familiar with or used to dealing with tariffs and related concerns. Figuring out how to apply TRQs to EU goods will also be difficult, as of course there are no current quotas for this trade.[111]

A big concern in certain industries in the UK post-Brexit, most notably farming, is that the UK will seek to liberalise trade to a great degree, by removing EU regulations and striking trade deals with third countries that have lower food standards. The most commonly cited example of this fear is that chlorinated chicken (a process used in the US by which chicken meat is washed in a chlorine solution to remove dirt and bacteria) will find its way onto British supermarket shelves. A lowering of tariffs, especially without any protections for domestic industry that may have to comply with more stringent regulation, would be destabilising for many industries, even if they could eventually adapt.[112] Abolishing tariffs with no agreement for reciprocation will damage the UK's negotiating position. Indeed, as noted above it already has, with Canada opting not to try and roll over CETA for the UK.

A question still hangs over how the UK would treat trade on the island of Ireland. It has vowed not to erect a border, despite it changing the trading landscape. It has also claimed that it will not charge tariffs on goods crossing the Irish border. The clear problem with such a proposal is that you could simply route all goods that one wished to import to the UK through Ireland. This would create opportunities for arbitrage and smuggling, dangerous in a region where smuggling has traditionally helped fund violent action against the states.

As of May 2020 this question remains open. A dispute has arisen in relation to an EU office in Belfast. This office is envisioned by the EU as being a physical presence for officials to monitor the implementation of the currently agreed deal between the UK and EU. However the UK argues that the EU should not maintain a permanent presence, instead relying on periodic inspections.[113] Clearly dealing with the anomalous situation on the island of Ireland created by the UK's Withdrawal deal will continue to be a contentious issue.

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[111] Potton and Webb n78, 14.
[112] ibid 14.
[113] D. Staunton, 'Gove rejects EU request for Belfast "mini-embassy"' *Irish Times* (Dublin, 28 April 2020), 7.

6.4. MUTUAL RECOGNITION

As mentioned in Section 1 the UK has concluded some standalone mutual recognition agreements. These standalone agreements are with the US, Australia and New Zealand. They replace European agreements that will previously have been in operation.

The UK-Switzerland agreement is one agreement that does contain a clause on mutual recognition of professional qualifications. It provides that professionals who have already had their qualifications recognised before the specified date (i.e. the date the UK leaves the EU) will keep their recognitions.[114] However this does not allow for new recognitions in the future on its own. A further agreement will be required for such workers. EU-Switzerland relations are already quite complicated due to the nature of the EU-Swiss relationship, which is governed by any agreements with little in the way of overarching frameworks. This makes transitioning the entire relationship more difficult.

What is perhaps more interesting about the Swiss example is that not all areas are transitioned. Mutual recognition has been maintained in 3 product areas from the original Mutual Recognition Agreement ("MRA"), including Motor Vehicles (Chapter 12), Good Laboratory Practice (GLP) (Chapter 14), and Medicinal products, Good Manufacturing Practice (GMP) inspection and batch inspection (Chapter 15). These chapters represent the bulk of UK trade with Switzerland, but not all, approximately 76% of exports and 84% of imports within the scope of the existing MRA.[115]

17 additional product chapters are not scheduled to be transitioned immediately. The UK has agreed a Memorandum of Understanding with Switzerland that regulatory agencies will work to agree mutual recognition over time, under the auspices of the Joint Committee, but there is no time frame provided for this.

The UK will be able to take steps to unilaterally recognise qualifications and certification post-Brexit, but if it does so it may find it difficult to negotiate mutual recognition agreements for its standards, finding itself in a similar situation as with tariffs above. The other issue is that this would only help for imports, doing nothing for British producers who wish to export completed goods, although it may help them with sourcing components for their goods. Mutual

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[114] European Union Committee, *Scrutiny of international agreements Treaties considered on 19 March 2019* (2017-19, HL 321) 8.

[115] Department for International Trade, *Continuing the United Kingdom's Trade Relationship with the Swiss Confederation* (ISBN:978-1-5286-1058-2, February 2019) at [95].

recognition of standards is an important method of simplifying international trade, and losing access to the web of EU agreements will hurt the UK.

6.5. Dispute Resolution systems and Institutional Matters

As in European agreements, the United Kingdom's new agreements provide for institutions to govern the agreements, and to address disputes. As the UK wishes to be outside the EU's general control, these institutions are separate from the existing EU-Third Country bodies. However, as most of these agreements seek to preserve existing ties, the treaties generally acknowledge that the decisions and rules that come from these committees up to the UK's date of departure will continue to bind the UK.

In most cases the changes are minor. The existing EU structures are simply replaced with a UK only structure. So the EU-CARIFORUM Joint Committee is replaced with a UK-CARIFORUM Joint Council.[116] In some agreements, it has been decided that a particular body will not be required, as the matter it would deal with is either too minor or not a factor at all in British-third country trade. An example of this is the Joint Consultative Committee from the EU-Chile agreement, which was removed on the basis that it was not immediately operable in a bilateral context, although it may be re-established in the future.[117]

Some terminological difficulties do arise. As the EU and Israel originally concluded an Association Agreement, they had formed an association council to stand over the agreement. As the UK is not forming an association with Israel, it changed the name of this institution to a joint committee.[118]

An issue here is that there is a cost to these administrative bodies. Previously this cost would have been shared throughout the EU, but now the cost of working groups or joint committees will be borne by the UK and the third country. These agreements often provide for meetings to be held yearly, with the location alternating between the two territories. This is an issue that has been highlight by the House of Lords, which notes that the impact of transitioning the dispute settlement procedure is that the UK will be liable for all relevant costs.[119]

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[116] Art 227 UK-CARIFORUM EPA n37.

[117] Department for International Trade, *Continuing the United Kingdom's trade relationship with the Republic of Chile* (ISBN:978-1-5286-1006-3, February 2019).

[118] Art 7 UK-Israel Agreement n44.

[119] Department of International Trade, *Continuing the UK's Trade Relationship with the CARIFORUM States* (ISBN:978-1-5286-1203-6, April 2019) [66].

Another issue is legal certainty. A larger jurisdiction is more likely to have issues litigated, providing certainty for businesses. Many of these British agreements are with countries with which the UK has only a small amount of trade. It is likely that most issues that would come before an EU-third country body before they will arise before a UK-third country one.

Duplication of effort is also a possibility. If you have a working group that is trying to agree on certain rules between say Viet Nam and the EU, what will the UK Viet Nam working group actually end up looking like? It will often make sense to adopt rules that are substantially the same as the EU rules. Why reinvent the wheel? Separate rules will likely increase costs for business and act a trade barrier themselves.

It may be the case that the UK, being a smaller market than the EU, will be forced to accept rules and decisions that are less beneficial to itself than the EU can negotiate. It may also be that the UK manages to achieve more bespoke arrangements that suit its economy better than the EU, which obviously does not place the British economy first.

One agreement that does not have a standalone dispute settlement process is the UK-Switzerland Agreement. The body tasked with solving disputes in this agreement is the Joint Committee. The remedy for someone who feels that they have been wronged under this agreement will therefore only be through regular national channels, such as by bringing a judicial review action.[120]

[120] European Union Committee, *Scrutiny of international agreements Treaties considered on 19 March 2019* (2017-19, HL 321) 7.

6.6. HUMAN RIGHTS AND OTHER SOCIAL CLAUSES

Much like the EU agreements that the UK have sought to use as models for relations going forward, the UK's new trade agreements also include humans rights and social clauses. A concern with many areas of post-Brexit UK trade is that the UK will prioritise British economic gain over all else. This is especially feared if the UK has experiences a disorderly exit from the EU that leaves it desperate for trading partners.

This has not been the case with the agreements that the UK has signed so far. The long form agreements with the ESA and CARIFORUM states maintain human rights clauses as in the previous EU agreements. The incorporated agreements in the short form treaties also do not remove references to human rights.

That said these new agreements do not go farther than the EU's existing agreements. Where relations are not based on human rights clauses, such as the EU-Switzerland relationship, the new short form agreement does not attempt to place them on such a basis. While in the immediate context this makes sense (the UK will obviously seek to minimise changes to these new agreements, in order to speed their ratification), it does mean that they are not availing of the opportunity that Brexit provides in this area. The UK could have sought to take a harder line as it started out, but it has clearly opted not to.

The UK is still a member of another international organisation, the Commonwealth of Nations. This body is sometimes seen as the successor of the British Empire, and is mainly made up of former British imperial subjects. Today its role is human rights promotion and development, as set out in the Singapore Declaration.[121] Some have suggested that the UK should seek to use the Commonwealth as the UK's primary international forum.[122] Whether this will be pursued or not post-Brexit remains to be seen. The Commonwealth is a much looser association of states than the European Union, and even enforcing human rights provisions within it has proved challenging in the past.

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[121] *Singapore Declaration of Commonwealth Principles* (1971) < http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf> accessed 9 May 2020.

[122] C. Westley, 'Brexit Presents an Opportunity to Reinvigorate Relations with the Anglosphere and the Commonwealth' (Brexit Central, 17 January 2019) <https://brexitcentral.com/brexit-presents-opportunity-reinvigorate-relations-anglosphere-commonwealth/> cf. J. Walsh, 'The Brexiteers need to realise that the Commonwealth is not coming to save them' (New Statesman, 9 April 2019) <https://www.newstatesman.com/politics/staggers/2019/04/brexiteers-need-realise-commonwealth-not-coming-save-them> both accessed 9 May 2020.

7. Relevance or Significance to United Kingdom trade

The UK's single largest trading entity is the EU. The most important trade agreement for the UK will therefore be the one concluded after the UK has agreed a Withdrawal Agreement and moves on to an agreement governing the future relationship that it will have with its neighbours. Seven of the UK's top 10 trading partners are EU member states, with Switzerland, in the 10th spot, trading with the UK through EU-Swiss agreements. The UK does not currently have trading agreements with the two remaining countries, the US and China.[123]

EU trade makes up 46% of UK exports and 54% of UK imports.[124] Non-EU trade therefore makes up 46% of UK imports and 54% of UK exports. 11% of trade is with countries that the UK currently has trade agreements with through the EU. This figure does not include Turkey, which is in a customs union with the EU and accounts for 1.4% of UK trade, nor does it include Japan at 2.3% with which the UK has only had an agreement since February 2019, trade instead occurring on WTO terms. The UK has completed agreements covering approximately 64% of the EU trade agreement covered trade, equating to about 7% of total trade.[125]

One issue with these figures is the potential for the Rotterdam effect. This is where trade with the Netherlands may be being inflated by goods transiting through Dutch ports, especially the Port of Rotterdam, Europe's largest port.[126] Calculating the effect this may have is difficult. UK trade with the Netherlands is high anyway, due to its proximity and high population.

As pointed out above, there are gaps in these new treaties. In certain areas the volume of trade has been dismissed as not important enough to prevent an agreement being reached on the bulk of trade, such as with the Swiss mutual recognition issues mentioned in section 6.4. There are the glaring complete gaps, where no treaty has been concluded, nor is there a treaty likely to be concluded before the next Brexit deadline of the 31st of October. As noted in section 1, countries with which the UK would like to trade would like some certainty as to what the UK's regulatory and trading arrangements will be before they commit themselves to trade agreements with it.

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[123] Figures from 2017, Department for International Trade, *UK Trade in Numbers* (February 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791972/190402_UK_Trade_in_Numbers_full_web_version.pdf> accessed 9 May 2020.

[124] M. Ward, *Statistics on UK-EU trade Briefing Paper* (No. 7851, House of Commons Library, 24 July 2019) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7851> accessed 9 May 2020, 4 ("CBP7851").

[125] supra 2.

[126] CBP7851 n124, 9.

Complicating any attempt to calculate the impact of Brexit and the new trade agreements will be the changing economic conditions in the UK. UK GDP has contracted over the first 3 months of 2019.[127] A shrinking British economy will likely mean reduced trade, regardless of how good or bad the new trade agreements prove to be. The UK has signalled that it will take drastic action in relation to tariffs in the event of no deal, which will further complicate matters. As discussed in section 5.1. traders already often forego using more preferential rates when they prove too cumbersome to comply with. If tariffs are set at zero or close to it, then many traders may opt not to use UK trade agreement rules for imports.

[127] R. Partington, 'With Britain on the cusp of recession, 'doomsters' may be proven right' <https://www.theguardian.com/business/2019/aug/09/with-britain-on-the-cusp-of-recession-doomsters-may-be-proven-right> (TheGuardian.com, 9 August 2019) accessed 9 May 2020

8. CONCLUSION

The UK's Brexit from Europe and re-entry to the world of international trade as a standalone unit will be rocky. During the creation of the treaties that are the subject of this thesis the UK was governed by a minority government of the Conservative and Unionist party, supported in a confidence and supply arrangement by 10 Democratic Unionist Party MPs. They had a majority of just one MP. With the December 2019 general election this has now changed. The UK now has a majority, led by Boris Johnson.

What the UK will be able to do in terms of negotiating after it has left the EU remains to be seen. The closer a relationship with the EU it chooses to maintain, the less room it will have in new trade agreements outside the EU. The UK could still decide to remain in the EEA, even at this late stage. This would restrict quite a lot of its scope to manoeuvre especially if paired with a customs union or even Customs Union membership.

If on the other hand the UK ends up exiting with no deal the disruption will be great. Despite the trade agreements discussed in this article only accounting for a small, they are one of the only matters that are really agreed in the case of a no-deal Brexit. They do not require a deal between the UK and the EU to become operational. It may be the case that the UK runs into issues around countries failing to ratify the agreements, or indeed enforcing the UK's rights under these agreements. After all, the UK is likely to be quite busy immediately after a break with the EU, and enforcing its trade rights might not be prioritised.

The clearest disadvantage of these new treaties is likely to be the increased administrative costs borne by the UK under them. Whereas it previously split the cost of administering these treaties with 27 other states, it will now have to bear that cost alone. The cost should not be one-to-one, after all the EU being a bigger player will have more engagement with the various institutions that the treaties would form.

Rules of Origin are another area that will produce difficulties for the UK. Despite attempts to negotiate cross-cumulation and other such arrangements, the change will have an effect on current UK trade. Increasing the administrative costs, the reworking of supply chains and relabelling goods will all add costs to British exports, with no benefit. Goods could already be labelled as British, so any reputational advantages should already be realised. Some jobs may be onshored, in order to ensure trade can be conducted under UK trade agreements, but as we currently stand there is no reason as to why those jobs should flow to the UK rather than to other European partners. It has already been reported that automotive companies, who account

for a substantial portion of UK goods exports, will seek to move production to other EU countries.[128]

The UK's new trade agreements seek to keep the status quo, often explicitly as noted in section 6.1. Where they have not done this, there is no sign that the UK has achieved anything better than what it already had. The UK has not created deeper trade agreements with these existing partners. It has changed tariff rate quotas, which may prove advantageous, but even here the aim is to keep things as they are. The UK has not sought to harmonise human rights and development clauses. It has not modernised arbitration systems across agreements. These areas have been noted as problematic within a European context, as noted above. For the UK to fail to deal with these issues is a missed opportunity.

Overall, the UK has not managed to negotiate better post-Brexit trade agreements so far. While the agreements it has concluded go a long way towards preserving existing trading relationships, they do not go further or benefit British or third country businesses more than they currently do. The UK may, once outside the EU, seek to revisit some of these agreements. As discussed in section 6.5 many of these treaties provide for the development of the relationship through joint committees and working groups. In a bilateral relationship the UK may be able to develop these agreements in a manner that does become more beneficial to that which it could have achieved in a multilateral, European lead approach.

[128] 'Fearing no-deal Brexit, UK carmakers slam brakes on investment' (France 24, 31 July 2019) <https://www.france24.com/en/20190731-fearing-no-deal-brexit-uk-carmakers-slam-brakes-investment-0> accessed 9 May 2020.

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