ARTICLES

MIND THE FOG, STAND CLEAR OF THE CLIFF! FROM THE POLITICAL DECLARATION TO THE POST-BREXIT EU-UK LEGAL FRAMEWORK – PART I

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ABSTRACT: The Brexit saga has reached a watershed moment. The United Kingdom withdrew from the European Union on 31 January 2020 and, following the expiry of the transitional period laid down in the EU-UK Withdrawal Agreement (EU-UK WA), it ceased to be bound by EU law. By the same token, it entered unchartered waters as a former EU Member State trying to find its place in an economically integrated world. This *Article* takes stock of the legal affairs as they stood on 1 January 2021. Yet, at the same time, it puts the new EU-UK legal framework in a broader perspective. For this purpose, it treats as a point of reference the Political Declaration, which was signed alongside the EU-UK Withdrawal Agreement. A good chunk of its potential has materialised in the EU-UK Trade and Cooperation Agreement (EU-UK TCA), although in some respects the proposals laid down in the Political Declaration are yet to turn into reality. Thus, to confine it to history books would be rather premature. While it is impossible to predict the future, the time is right to put the EU-UK legal framework under the microscope and to analyse its main legal parameters. The present *Article* offers such an insight. In part I, the centre of gravity is on institutional matters.

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I. INTRODUCTION

Predicting the future is a rather risky business. Although the art of fortune telling spans centuries, experience proves that it is more intellectual and emotional roulette than anything else. In a similar fashion, making any predictions about the way in which EU-UK relations would evolve was, at the time of writing, a rather hazardous exercise. The two sides have just parted ways with the completion of the post-Brexit transitional period on 31 December 2020, followed moments later by the entry into force on 1 January 2021 of the EU-UK Trade and Cooperation Agreement.[1] Without a shadow of doubt, this was a watershed moment for bilateral relations between the EU and its former Member State. The key question remained whether it was the beginning of a beautiful friendship or the starting point for a tense and potentially acrimonious relationship between neighbours.[2] With the above in mind, the time is right to take a closer look at the key parameters of the emerging new framework for EU-UK relations. As is well-known, the main beacons for navigation were laid in the Political Declaration, which was signed alongside the EU-UK Withdrawal Agreement.[3] They served as a point of departure for negotiations on the post-Brexit framework. The talks, not without political drama, ended at the eleventh hour, facilitating the signing of the EU-UK TCA on 30 December 2020, and its provisional application as of 1 January 2021.[4] This, however, is unlikely to be the final scene of the lengthy Brexit opera, but rather a relatively swift transition between acts. Arguably, before we reach some sort of closing *crescendo*, more acts are likely to follow in the years to come.

The aim of this *Article* is to take stock of the recent developments. In particular, it endeavours to juxtapose the ambitions outlined in the Political Declaration with what was eventually agreed in the EU-UK TCA, as well as in the two flanking agreements which were

[1] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (hereinafter referred to as EU-UK TCA).

[2] See T.G. ASH, *The UK and EU Are Heading for Bad-Tempered Rivalry, Unless We Can Avert It*, The Guardian, 14 January 2021, www.theguardian.com.

[3] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom.

[4] Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information.

also signed on 30 December 2020.[5] As will be demonstrated, the Political Declaration should not yet be confined to the history books, as it has not reached its potential. To put it differently, some of the *desiderata* listed therein have not materialised in the new EU-UK framework, and thus they may remain points of departure for future talks. In order to flesh out the main contours of the future relationship laid down in the Political Declaration, and how they translated into the key parameters of the EU-UK TCA (as well as the supplementing agreements), this *Article* is divided into two parts. The first instalment covers institutional matters, and is organised in the following fashion. Section II looks at the Political Declaration, its genesis and cardinal features. It serves as the point of departure for Section III, where the analysis turns to the post-Brexit transitional period and the negotiations of the new EU-UK legal framework. In turn, sections IV and V focus on the formal shape of the new EU-UK relationship. The foundations of the newly re-designed bilateral relationship are examined in section VI. Last but not least, the EU-UK institutional setup is presented in section VII. Part II of the *Article*, which is devoted to substantive matters (trade in goods, services, movement of capital, judicial cooperation in criminal matters, fisheries, and the dispute settlement) will follow.

II. Genesis of the Political Declaration

As is well known, and by now prolifically documented in the academic literature, Art. 50 TEU governs the withdrawal procedure.[6] It gives preference for a consensual exit based on a withdrawal agreement. As a residual option it also provides for a withdrawal without any formal agreement, should a withdrawal agreement be neither desired nor possible.[7] In terms of substance, the wording of the sunset clause is vague, allowing for a

[5] Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning Security Procedures for Exchanging and Protecting Classified Information (hereinafter referred to as EU-UK SPCI); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy (hereinafter referred to as Euratom-UK SPNE).

[6] See, *inter alia*, P. Craig, *The Process: Brexit and the Anatomy of Article 50*, in F. Fabbrini (ed.), *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017, p. 49 *et seq.*; E. Jones, *The Negotiations*, in F. Fabbrini (ed.), *The Law & Politics of Brexit. Volume II. The Withdrawal Agreement*, Oxford: Oxford University Press, 2020, p. 37 *et seq.*; K.A. Armstrong, *Brexit Time. Leaving the EU – Why, How and When*, Cambridge: Cambridge University Press, 2017, p 197 *et seq.*; C. Hillion, *Accession and Withdrawal in the Law of the European Union*, in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 126 *et seq.*; M. van der Wel, R.A. Wessel, *The Brexit Roadmap: Mapping the Choices and Consequences during the EU/UK withdrawal and Future Relationship Negotiations*, CLEER Working Paper 2017/5; C. Hillion, *Withdrawal Under Article 50 TEU: An Integration-Friendly Process*, in *Common Market Law Review*, 2018, p. 29 *et seq.*; P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Market Law Review*, 2017, p. 695 *et seq*.

[7] See, *inter alia*, A. Łazowski, *Unilateral Withdrawal from the EU: Realistic Scenario or a Folly?*, in *Journal of European Public Policy*, 2016, p. 1294 *et seq*.

number of perfectly sound interpretations. Not surprisingly, the preferred reading of Art. 50 TEU was clarified in the course of the EU-UK withdrawal talks in such a fashion as to serve the EU's negotiation strategy. In many respects, the EU largely proceeded as if the interpretation of Art. 50 TEU was *fait accompli*. This applied to both the *modus operandi* for the withdrawal process and to the substance of the exit talks. In accordance with Art. 50 TEU, the aim of a withdrawal agreement should be to determine the terms of withdrawal, taking into account the future relations between the EU and the exiting country. It is the latter part that proved to be rather controversial, and left a great deal of room for manoeuvre for the European Union and its negotiation team. Arguably, at least two interpretations of Art. 50 TEU were on the cards when the Brexit proceedings commenced. The maximalist take on Art. 50 TEU would be that the negotiations should cover both the terms of exit and the future relations, with a view to achieving a smooth downgrade from EU membership to an association or partnership of sorts.[8] The minimalist interpretation was to proceed in the opposite direction, that is, to bring sequencing into the withdrawal *modus operandi*. Not surprisingly, the second option was very much preferred by the European Union for a host of legal and political reasons. It is hard to escape the conclusion that *realpolitik* prevailed, as the consecutive talks on the terms of exit and future relations gave much more bargaining power to the EU and, by the same token, gradually weakened the position of the exiting country. The prevailing school of thought held by the European Union was that an agreement concluded under Art. 50 TEU should cover merely the terms of exit, while the proper negotiations of a future framework would only start when the United Kingdom had exited the EU.[9] It was agreed that the basic contours would be determined in a non-binding document developed jointly by the EU and the UK. This, even from a formal point of view, was an interesting proposition. While a withdrawal agreement is, as per Art. 50 TEU, a treaty between the EU and a departing Member State, the future relations were to be sketched merely in a non-binding political declaration, thus any excursions therefrom would not constitute breaches of international obligations. From the point of view of Brexit, this was a blessing and a curse. On the one hand, as soon as the United Kingdom left the European Union on 31 January 2020, the two sides had a beacon for navigation. On the other hand, it gave them ample flexibility, and permitted the United Kingdom to backtrack on the inconvenient parts of the gentlemen's agreement as soon as the talks on future relations commenced.

[8] As advocated by the present Author in an earlier contribution to the debate. See A. ŁAZOWSKI, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, 2012, p. 523 *et seq*.

[9] See further on the EU-UK withdrawal negotiations, *inter alia*, A. ŁAZOWSKI, *Be Careful What You Wish for: Procedural Parameters of EU Withdrawal*, in C. CLOSA (ed.), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the European Union*, Cambridge: Cambridge University Press, 2017, p. 234 *et seq*.

The first drafts of the Political Declaration on post-Brexit EU-UK relations were made public in 2018.[10] Further updates appeared in the course of 2019, when the Brexit drama was slowly turning into an opera buffa.[11] At that stage, it became rather clear that whatever the final shape of the Political Declaration was meant to be, it would lack detail. Yet, the canvas was out, and the first strokes of the painters' brush were being made. The picture stemming from the Political Declaration was full of qualities typical of impressionism: blurry and distant, at best. Alas, when it comes to law, the prerequisite of legal certainty requires precision and shading known from the old Dutch school. One needs a Vermeer, while the impressionists, or even more so, the abstract artists, should remain confined to art galleries, and under no circumstances are they to serve as intellectual points of reference for lawmakers. So, to the disappointment of many, the Political Declaration was merely a starting point. The language employed by the drafters allowed one to identify the areas where there was consensus on the steps forward, and dossiers where the parties only managed to indicate their intentions to engage in discussions when the time was right. Hence, the Political Declaration is – in some respects – a deal in the making, and in others a wish-list. In hindsight, this is hardly surprising bearing in mind that the United Kingdom commenced its EU withdrawal negotiations without a clear idea where it was heading. In the wake of the Brexit referendum, the mediocrity of its political circles came to the surface. It was a Molotov cocktail of fantasy visions, sheer ignorance and clear-cut opportunism.[12] Most of the time, the ruling Conservative Party was busy negotiating with itself, not with the European Union.[13] Towards the end of the withdrawal proceedings, the latter showed clear signs of exacerbation with the painful lack of detail coming from London. Three consecutive extensions of EU membership, and the consequential delay of Brexit, added to the fatigue. Nevertheless, the general contours of future relations were available when the post-Brexit negotiations commenced in March 2020.

[10] See, for instance, Draft Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 22 November 2018, XT 21095/18, www.consilium.europa.eu.

[11] See further, *inter alia*, P. Craig, *Brexit, A Drama: The Interregnum*, in *Yearbook of European Law*, 2018, p. 3 *et seq*.

[12] See, for instance, D. Davis, *Trade Deals. Tax Cuts. And Taking Time before Triggering Article 50. A Brexit Economic Strategy for Britain*, Conservative Home, 11 July 2016, www.conservativehome.com.

[13] See, *inter alia*, F. Fabbrini, *The Brexit Negotiations and the May Government*, in *European Journal of Legal Studies*, Special Issue, 2019, p. 1 *et seq*.; E. Jones, *The Negotiations: Hampered by the UK's Weak Strategy*, in *European Journal of Legal Studies*, Special Issue, 2019, p. 23 *et seq*.

III. The transitional period and post-Brexit negotiations

III.1. The transitional period: *raison d'être* and the basic parameters

The United Kingdom exited the European Union on 31 January 2020. On 1 February 2020 the EU-UK Withdrawal Agreement entered into force and, by the same token, the transitional period commenced.[14] The *raison d'être* was to avoid a cliff-edge scenario by extending the application of the EU *acquis* to the United Kingdom throughout the transition and, at the same time, facilitating negotiations of the future EU-UK framework.[15] It should be noted that during the transition the UK was also permitted to negotiate its own agreements with non-EU states, under the condition that none could enter into force until EU law ceased to apply to the UK.[16] Art. 126 WA, setting the calendar for the end of the transitional period, was drafted on the premise that the United Kingdom would leave the European Union, as scheduled, on 29 March 2019. This did not happen, and one of the consequences of the three consecutive extensions of membership was that the time pencilled in for future negotiations shrank to a mere 11 months.[17] It should be added that Art. 132 WA envisaged the possibility of a jointly agreed one-off extension of the transitional period, which could have pushed the deadline to 31 December 2021, or even 31 December 2022.[18] A decision in this respect would have had to

[14] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (hereinafter referred to as the EU-UK Withdrawal Agreement or, for short, EU-UK WA).

[15] See further on the transitional period, *inter alia*, A. Łazowski, *Exercises in Legal Acrobatics: The Brexit Transitional Arrangements*, in *European Papers*, 2017, Vol. 2, No 3, www.europeanpapers.eu, p. 845 *et seq*.; K.A. Armstrong, *After EU Membership: The United Kingdom in Transition*, in *European Journal of Legal Studies*, Special Issue, 2019, p. 59 *et seq*.; K.A. Armstrong, *The Transition*, in F. Fabbrini (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 171 *et seq*.; M. Dougan, *An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-withdrawal "status quo" Transitional Regime under Article 50 TEU*, in *Common Market Law Review*, 2018, p. 57 *et seq*.; T. Lock, *In the Twilight Zone: The Transition Period in the Withdrawal Agreement*, in J. Santos Vara, R.A. Wessel, P.R. Polak (eds), *The Routledge Handbook on the International Dimension of Brexit*, London and New York: Routledge, 2021, p. 30 *et seq*.

[16] See further, *inter alia*, P. Koutrakos, *Managing Brexit. Trade Agreements Binding on the UK Pursuant to Its EU Membership*, in J. Santos Vara, R.A. Wessel, P.R. Polak (eds), *The Routledge Handbook on the International Dimension of Brexit*, cit., p. 75 et seq.; M. Cremona, *The Withdrawal Agreement and the EU's International Agreements*, in *European Law Review*, 2020, p. 237 *et seq*.; J. Larik, *Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations*, in *American Journal of International Law*, 2020, p. 443 *et seq*.; R.A. Wessel, *Consequences of Brexit for International Agreements Concluded by the EU and Its Member States*, in *Common Market Law Review*, 2018, p. 101 *et seq*.; S. Silvereke, *Withdrawal from the EU and Bilateral Free Trade Agreements. Being Divorced is Worse?*, in *International Organizations Law Review*, 2018, p. 321 *et seq*.; A. Łazowski, R.A. Wessel, *The External Dimension of Withdrawal from the European Union*, in *Revue des affaires européennes*, 2016, p. 623 *et seq*.

[17] See further, *inter alia*, F. Fabbrini, R. Schmidt, *The Extensions*, in F. Fabbrini (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 66 *et seq.*

[18] *Modus operandi* for the extension of the transitional period was provided in Art. 132 WA.

be taken before 1 July 2020. However, any extension was not only ruled out – almost *ab initio* – by HM Government, but was also written into UK law.[19] Arguably, the decision in this respect was taken on a political whim and did not seem to be a part of a thought-through strategy. Once again, the Brexit dogma prevailed. Surprisingly, even the economic mayhem caused by the Covid-19 pandemic did not make the UK government change its mind. The desire to end the transition at the earliest possibility was formally communicated to the EU during the meeting of the EU-UK Joint Committee on 12 June 2020,[20] and three days later confirmed at the High Level Meeting of the Prime Minister B. Johnson with the Presidents of the European Council and the European Commission.[21] As made clear by the Council Conclusions on EU-UK relations, the United Kingdom not only refused to ask for an extension but also would not entertain such a request should it come from the European Union.[22] All in all, the transitional period ended on 31 December 2020. Such lack of flexibility in Whitehall had a number of implications. For instance, it meant that the EU-UK negotiations had to be conducted without a moment to spare. Thus, the talks had to focus on the priority dossiers, pushing some other matters to the margins. Furthermore, it forced the EU-UK Joint Committee to intensify work on filling the gaps in the EU-UK WA, including the adoption of a highly controversial set of detailed rules governing trade between Great Britain and Northern Ireland.[23]

III.2. Political Declaration and the negotiations of the future EU-UK framework

The basic rules on the post-Brexit negotiations were laid down in Art. 184 WA. It provided that the two sides were obliged to make their best endeavours to negotiate the agreements regulating the future relationship. They were expected to do so in good faith and with respect to their legal orders. As already noted, the key parameters were laid down in the Political Declaration. The mere existence of such a bilaterally agreed

[19] European Union (Withdrawal) Act 2018, s. 15A (as introduced by European Union (Withdrawal Agreement) Act 2020, s. 33).

[20] Press statement by Vice-President Maroš Šefčovič following the second meeting of the EU-UK Joint Committee, Brussels 12 June 2020, Statement/20/1055, 1.

[21] Council of the EU, EU-UK Statement following the High Level Meeting on 15 June 2020, Brussels 15 June 2020, Statements and Remarks 401/20.

[22] Council, Conclusions on EU-UK relations, Press Release 436/20, 25 June 2020, para 1.

[23] Decision 4/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 on the determination of goods not at risk; Decision 6/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 providing for the practical working arrangements relating to the exercise of the rights of Union representatives referred to in Article 12(2) of the Protocol on Ireland/Northern Ireland.

set of priorities was one of the idiosyncrasies of the post-Brexit EU-UK negotiations, facilitating the talks and providing a jointly agreed point of departure.[24] The talks were expected to be conducted expeditiously. Further details were provided in Part V of the Political Declaration. Another idiosyncrasy of the negotiations of the future EU-UK framework was their general objective: a downgrade of existing relations from fully fledged, although with plenty of opt-outs, EU membership to a future relationship of sorts.[25] For the first time in history, the European Union and one of its neighbours were going against the stream. This phenomenon was reflected in the opening paragraphs of the Political Declaration which, on the one hand, set ambitious objectives, yet, on the other hand, highlighted contrapuntal tendencies. While the United Kingdom was expected to attempt to keep as many elements of membership as it found fit, the European Union was ready to act in such a way as to preserve the integrity and coherence of its legal order, in particular its flagship project – the internal market. Both sides agreed, however, that the future relations should be based on "an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation".[26] It should be noted that this list was non-exhaustive, thus the parties were, at least in theory, free also to venture into other territories. Either way, the general premise on which the negotiations were to be conducted was that whatever the outcome, the future EU-UK framework would be based on a balance of rights and obligations. Both sides were in unison that a downgrade was a *conditio sine qua non*, with the red lines visibly marked in para. 4 of the Political Declaration. The EU made it clear that the autonomy of its legal order would be protected, including the indivisibility of the four freedoms of the Internal Market. At the same time, the red lines drawn in Whitehall included the end of free movement of persons, combined with the freedom to develop its own trade policy towards the outside world. The combination of opening salvos in the Political Declaration was supplemented by an obvious acknowledgment that the downgrade in question put the United Kingdom in a privileged position in comparison with other neighbouring countries. It provided that: "[t]he future relationship will inevitably need to take account of this unique context".[27] This caveat was favourable for both sides. Seen from Brussels, it made it clear that the European Union would be willing to go the extra mile and offer the United Kingdom privileged relations but, at the same time, it would not be under

[24] See further, *inter alia*, P. MARIANI, G. SACERDOTI, *The Negotiations on the Future Trade Relations*, in F. FABBRINI (ed.), *The Law & Politics of Brexit. Volume II*, cit., p. 211 *et seq*.

[25] See, *inter alia*, A. ŁAZOWSKI, *Inside but Out: United Kingdom and the EU*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law. Methods against Member States' Defiance*, Oxford: Oxford University Press, 2017, p. 493 *et seq*.

[26] Para. 3 of the Political Declaration.

[27] *Ibid.*, para. 5 of the Political Declaration.

any political obligation to offer the same to any other third country expressing a desire to deepen its relations with the EU. The same sentence, read through the Westminster lens, equipped the United Kingdom with ammunition for the negotiations. To put it differently, it gave Whitehall a political mandate to demand more from the future relationship than is traditionally made available to any other third country. However, as proven by the events of 2020, it did not indulge itself very much in this opportunity. While the EU offered a far reaching and comprehensive agreement, the UK was inclined to have a "Canada style" arrangement.[28]

III.3. Post-Brexit negotiations

As soon as the United Kingdom was out of the European Union, the negotiators switched gear. On the EU side, the European Commission presented a draft of the negotiation mandate on 3 February 2020.[29] It was approved by the Council on 25 February 2020.[30] Not surprisingly, the European Union proceeded on the basis of the *modus operandi* laid down in Art. 218 TFEU, which governs the procedure for the conclusion of international treaties.[31] It was clear from the start that the negotiations with a former Member State were meant to be a standard, yet idiosyncratic, external relations exercise. The negotiation mandate – building on the Political Declaration – was painfully detailed. The United Kingdom also took its first steps towards the negotiations, and alas it did so in a fashion known from the Brexit negotiations: with a speech by the Prime Minister outlining his shopping list.[32] A formal policy document, listing the priorities in the forthcoming negotiations, followed on 27 February 2020.[33] In a matter of days, it became clear that parts of the Political Declaration, seen from Whitehall, were not worth the paper they were written on. The battleground was set for the most contentious dossiers: the level playing field, the role of the Court of Justice in the dispute settlement procedure, the future arrangements on fisheries, and the cooperation in the area of Common Foreign and Security Policy. To add to this, the UK authorities repeatedly argued that they had no wish to instal customs

[28] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (hereinafter referred to as the CETA).

[29] Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, ec.europa.eu.

[30] Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, www.consilium.europa.eu.

[31] See further, *inter alia*, J. Heliskoski, *The Procedural Law of International Agreements: A Thematic Journey Through Article 218 TFEU*, in *Common Market Law Review*, 2020, p. 79 *et seq.*; A. Dashwood, *EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements*, in M. Cremona, C. Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations*, Oxford: Oxford University Press, 2018, p. 189 *et seq*.

[32] PM speech in Greenwich, 3 February 2020, www.gov.uk.

[33] HM Government, *The Future Relationship with the EU. The UK's Approach to Negotiations*, assets.publishing.service.gov.uk.

checks between Great Britain and Northern Ireland. This clearly rang the alarm bells and raised doubts about whether the United Kingdom was ready to comply with the *desideratum* laid down in the Political Declaration that the negotiations were to be conducted in good faith. Not only was it backtracking on some elements of the gentleman's agreement, but it also signalled that it had no desire to comply with the binding obligation laid down in the Ireland/Northern Ireland Protocol to the EU-UK Withdrawal Agreement. As the talks progressed, it became clear that these dossiers were the main bones of contention and remained so until the last minute.

From the procedural point of view, the *modus operandi* was agreed by the EU and the UK in the Terms of Reference published on 28 February 2020.[34] On the EU side, the negotiations were to be conducted, in accordance with Art. 218 TFEU, by the European Commission. The Chief Negotiator was Michel Barnier, who had also been in charge of the Brexit talks. The UK Chief Negotiator was Lord Frost, who was in charge of Task Force Europe. The talks were conducted in plenary as well as in 11 negotiating groups.[35] The working language was English, with negotiations in French possible as an exception. Already at this stage it was agreed that the draft of the agreement(s) would be prepared in English, and subsequently translated into other official languages of the European Union. The latter factor, as discussed later in this *Article*, may have be of importance should discrepancies between different language versions of the EU-UK TCA become a source of dispute or litigation. The initial plan laid down in the Terms of Reference was to conduct five negotiation rounds, with locations alternating between Brussels and London. In hindsight, the post-Brexit talks were not only difficult because of their substance, and the pressures of time, but also due to the *modus operandi* imposed by the Covid-19 pandemic. Due to the pandemic, only the first round went as planned, while the next negotiating sessions had to be moved online.[36] While the worlds of Zoom or Skype are fit for purpose in many contexts, the lack of direct human interaction was not ideal during the early rounds of negotiations. Covid-19 also brought disruption to the talks as members of both teams became infected or had to go into self-isolation. It should be added that, in-between the negotiation rounds, informal talks continued. As not enough progress had been made by early June, the two sides agreed an Addendum to the Terms of Reference (12 June 2020),[37] agreeing on additional negotiation rounds throughout the summer, as well as specialised

[34] Terms of Reference on the UK-EU Future Relationship Negotiations, ec.europa.eu.

[35] 1. Trade in goods; 2. Trade in services and investment and other issues; 3. Level playing field for open and fair competition; 4. Transport; 5. Energy and civil nuclear cooperation; 6. Fisheries; 7. Mobility and social security coordination; 8. Law enforcement and judicial cooperation in criminal matters; 9. Thematic cooperation; 10. Participation in Union programmes; 11. Horizontal arrangements and governance.

[36] The negotiation rounds held on 20-24 April 2020, 11-15 May 2020 and 2-5 June 2020 took place on-line.

[37] Addendum to the Terms of Reference on the UK-EU Future Relationship Negotiations, 12 June 2020, ec.europa.eu.

sessions between the Chief Negotiators and their closest teams. A further Addendum to the Terms of Reference, scheduling more negotiations, followed on 31 July 2020.[38] As the clock was ticking, with no end of talks in sight, the Chief Negotiators on 21 October 2020 agreed on "organising principles" that would eventually take them all the way to the completion of negotiations on 24 December 2020.[39]

As soon as the post-Brexit talks commenced, it was clear that their substantive scope would have to be adjusted to the reality on the ground: a very tight time schedule and shifting desires in Whitehall. In order to give the talks a firm anchor, the European Commission had already on 12 March 2020 presented a Draft Agreement on Future Relations.[40] It was subsequently amended several times and, consequentially, revised versions were made available to the public on a regular basis.[41] As a counterattack, the United Kingdom presented its own drafts of future agreements in May 2020. Sadly, they were not original by any stretch of the imagination. The government openly admitted that the drafts were, in fact, a compilation of various EU agreements with non-EU countries.[42] To make things look even more unprofessional, parts of the text were missing. In hindsight, this was wasted effort, as the final text of the EU-UK TCA is clearly built on the EU draft with a few parts left out, others tweaked, or simply moved around.

As already noted, the negotiations were successfully completed on Christmas Eve, a formal signature followed, and the three EU-UK Agreements entered into force, albeit

[38] Addendum to the Terms of Reference on the UK-EU Future Relationship Negotiations, 31 July 2020, ec.europa.eu.

[39] Organising principles for further negotiations, ec.europa.eu.

[40] Draft text of the Agreement on the New Partnership with the United Kingdom, ec.europa.eu (hereinafter referred to as the Draft Agreement); Foreign Policy, Security and Defence part of the Draft text of the Agreement on the New Partnership with the United Kingdom, ec.europa.eu.

[41] Draft text of the Agreement on the New Partnership with the United Kingdom, cit.; Additional draft text of the Agreement on the New Partnership with the United Kingdom 15 July 2020, ec.europa.eu ; Additional draft text of the Agreement on the New Partnership with the United Kingdom 14 August 2020 (law enforcement and judicial cooperation), ec.europa.eu; Additional draft text of the Agreement on the New Partnership with the United Kingdom 18 August 2020, ec.europa.eu; Additional draft text for the Agreement on the New Partnership with the United Kingdom 19 August 2020 (Cultural objects), ec.europa.eu; Additional draft text for the Agreement on the New Partnership with the United Kingdom 7 September 2020 (recognition of professional qualifications), ec.europa.eu.

[42] Draft UK-EU Comprehensive Free Trade Agreement (CFTA), assets.publishing.service.gov.uk; Draft UK-EU CFTA Annexes, assets.publishing.service.gov.uk; Draft Fisheries Framework Agreement, assets.publishing.service.gov.uk; Draft Air Transport Agreement, assets.publishing.service.gov.uk; Draft Civil Aviation Safety Agreement, assets.publishing.service.gov.uk; Draft Energy Agreement, assets.publishing.service.gov.uk; Draft Social Security Coordination Agreement, assets.publishing.service.gov.uk; Draft Nuclear Energy Agreement, assets.publishing.service.gov.uk ; Draft Agreement on Law Enforcement and Judicial Cooperation in Criminal Matters, assets.publishing.service.gov.uk; Draft Agreement on the transfer of unaccompanied asylum-seeking children, assets.publishing.service.gov.uk; Draft Agreement on the readmission of people residing without authorisation, assets.publishing.service.gov.uk.

on a provisional basis, on 1 January 2021.[43] This permitted the European Parliament to properly scrutinise the Agreements, before giving its formal assent.[44] It should be noted that adequate privilege was not granted to the House of Commons and the House of Lords, which were forced to conduct parliamentary scrutiny in a matter of hours on 30 December 2020. This was in stark contrast to the time spent on scrutiny of the accession to the European Communities[45] or the EU-UK Withdrawal Agreement and the post-Brexit negotiations.[46] It was yet another Brexit paradox. While the EU withdrawal was meant to strengthen the sovereignty of the UK Parliament, it was deprived of a chance for meaningful debate and analysis of the post-Brexit EU-UK package.

IV. Post-Brexit legal framework: from the drawing board to the Christmas Eve deal

IV.1. Introduction

One of the variables that had to be addressed at the outset was what shape the future EU-UK framework should take. Firstly, the question was whether it would comprise a framework agreement, supplemented by flanking agreements, or whether it would follow the patchiness of the Swiss model.[47] Secondly, the issue was also if, on the EU side,

[43] See further on the provisional application of EU agreements with third countries B. Driessen, *Provisional Application of International Agreements by the EU*, in *Common Market Law Review*, 2020, p. 741 *et seq*.; J. Heliskoski, *Provisional Application of EU Free Trade Agreements*, in M. Hahn, G. Van der Loo (eds), *Law and Practice of the Common Commercial Policy. The First 10 Years after the Treaty of Lisbon*, Boston: Brill, 2021, p. 586 *et seq*.

[44] On the role of the European Parliament in conclusion of international agreements, see, *inter alia*, J. Santos Vara, *The European Parliament in the Conclusion of International Agreements post-Lisbon: Entrenched between Values and Prerogatives*, in J. Santos Vara, S. Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations Through EU Law*, London, New York: Routledge, 2019, p. 63 *et seq*.

[45] See, *inter alia*, D. Nicol, *EC Membership and the Judicialization of British Politics*, Oxford: Oxford University Press, 2001, p. 76 *et seq*.

[46] See, *inter alia*, P. Lynch, R. Whitaker, A. Cygan, *Brexit and the UK Parliament: Challenges and Opportunities*, in T. Christiansen, D. Fromage (eds), *Brexit and Democracy. The Role of Parliaments in the UK and the European Union*, Palgrave: London, 2019, p. 51 et seq.; A. Cygan, E. Żelazna, *Parliamentary Involvement in the Negotiations on the EU-UK Trade Agreement*, in J. Santos Vara, R.A. Wessel, P.R. Polak (eds), *The Routledge Handbook on the International Dimension of Brexit*, cit., p. 45 *et seq*.; A. Cygan, P. Lynch, R. Whitaker, *UK Parliamentary Scrutiny of the EU Political and Legal Space after Brexit*, in *Journal of Common Market Studies*, 2020, p. 1605 *et seq*.

[47] See further on the Swiss model, *inter alia*, M. Vahl, N. Grolimund, *Integration without Membership. Swizterland's Bilateral Agreements with the European Union*, Brussels: CEPS, 2006; C.H. Church (ed.), *Switzerland and the European Union. A Close, Contradictory and Misunderstood Relationship*, London, New York: Routledge, 2007; R. Schwok, *Switzerland – European Union. An Impossible Membership?*, Bruxelles, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien: P.I.E. Peter Lang, 2009; M. Oesch, *Switzerland and the European Union. General Framework. Bilateral Agreements. Autonomous Adaptation*, Baden-Baden: Nomos,

it should be a mixed or exclusive competence agreement.[48] In hindsight, it is clear that the decision in both respects was in the hands of the European Union, with the United Kingdom left with very little room for manoeuvre. This is further elaborated in turn.

IV.2. The big picture: the EU's relations with neighbours

The *tour de table* of EU relations with its neighbours proves that, with the notable exception of Switzerland, the preference traditionally goes to a general overarching agreement, supplemented by sectoral deals. The first are frequently organised in families of similar agreements with different countries clustered together for historical, geographical, or other reasons. This is the case in relation to the countries of the former Soviet Union,[49] including the European Neighbourhood Policy (ENP) *avant garde*: Ukraine, Moldova, and Georgia,[50] as well as the countries of the Western Balkans[51] and the Mediter-

2018; P. Dardanelli, O. Mazzoleni (eds), *Switzerland-EU Relations. Lessons for the UK after Brexit?*, London-New York: Routledge, 2021.

[48] See further, *inter alia*, A. Ott, *EU External Competence*, in R.A. Wessel, J. Larik (eds), *EU External Relations Law. Text, Cases and Materials*, Oxford, London, New York, New Delhi, Sydney: Hart, 2020, p. 61 *et seq*.; P. Eeckhout, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 11 *et seq*.; P. Koutrakos, *EU International Relations Law*, Oxford, Portland: Hart, 2015, p. 17 *et seq*.

[49] Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Kazakhstan; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part. See further, *inter alia*, C. Hillion, *Partnership and Cooperation Agreements Between the EU and the NIS of the ex-Soviet Union,* in *European Foreign Affairs Law Review*, 1998, p. 399 *et seq*.

[50] Association Agreement between the European Union and the European Atomic Energy Community and its Member States, of the one part, and Ukraine, of the other part (hereinafter referred to as EU-Ukraine AA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (hereinafter referred to as EU-Georgia AA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (hereinafter referred to as EU-Moldova AA). See further, *inter alia*, G. Van Der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration Without Membership*, Leiden-Boston, Brill, 2016.

[51] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the

ranean.[52] The latter usually include tailor-made agreements dedicated to, e.g., readmission,[53] air transport[54] or participation in EU missions to third countries.[55] For the creation of privileged relationships, the preference, at least on the EU side, goes to association agreements. It should be noted at the outset that in EU law, unlike in the case of the Council of Europe, association does not amount to partial membership of the European Union.[56] However, it symbolises enhanced levels of cooperation between the parties.[57] The rule of thumb is as follows: the closer the relationship, the more likely it will

other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part. See further, *inter alia*, D. PHINNEMORE, *Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?*, in *European Foreign Affairs Review*, 2003, p. 77 *et seq*.

[52] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, 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; 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; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part. See further, *inter alia*, K. PIETERS, *The Integration of the Mediterranean Neighbours into the EU Internal Market*, The Hague: T.M.C. Asser Press, 2010.

[53] See, *exempli gratia*, Agreement between the European Union and Georgia on the readmission of persons residing without authorisation.

[54] See, *exempli gratia*, Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part.

[55] See, *exempli gratia*, Agreement between the European Union and Ukraine on the status of the European Union Advisory Mission for Civilian Security Sector Reform Ukraine.

[56] See Art. 5a of Statute of Council of Europe, which provides: "In special circumstances, a European country which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited by the Committee of Ministers to become an associate member of the Council of Europe. Any country so invited shall become an associate member on the deposit on its behalf with the Secretary General of an instrument accepting the present Statute. An associate member shall be entitled to be represented in the Consultative Assembly only".

[57] In accordance with Art. 217 TFEU: "the Union may conclude with one more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".

be regulated in an association agreement. For instance, the treaties governing free trade areas, even with a degree of market access, have been concluded as association agreements. [58] While they may have several legal bases scattered around the EU Founding Treaties, the use of Art. 217 TFEU would be required. As far as post-Brexit EU-UK relations are concerned, association as a framework for future relations was certainly on the cards. Para. 120 of the Political Declaration provided that the institutional framework could have taken the shape of an association agreement.

As a matter of fact, the Political Declaration is silent as far as the legal nature of the post-Brexit agreements is concerned. This should come as no surprise, bearing in mind that a decision on exclusive competence or a mixed agreement is inextricably linked to its substance. As is well-known, it is not a straightforward affair, with many legal and political factors prone to collide. One thing is certain, though. For the past ten years the EU has battled through contrapuntal tendencies. On the one hand, exclusive competences in external relations were expanded *qua* the reforms introduced by the Treaty of Lisbon.[59] On the other hand, the Member States approached their self-made shift of paradigm from mixity to exclusivity with trepidation. Inevitably, this led to numerous competence battles, some of which reached the Court of Justice. Once again, the *modus operandi* laid down in Art. 218, para. 11, TFEU proved to be a vital tool for the determination of the EU's external competences.[60] The watershed moment came with Opinion 2/15 on the EU-Singapore Free Trade Agreement,[61] where the judges at Kirchberg interpreted the changes introduced by the Treaty of Lisbon in such a fashion as to reinforce the drive towards exclusivity.[62] This, perhaps, was the only time the expansion of EU

[58] More on the concept of association see, *inter alia*, P. Van Elsuwege, M. Chamon, *The Meaning of 'Association' under EU Law. A Study on the Law and Practice of EU Association Agreements*, Study for the AFCO Committee, European Parliament, 2019, PE 608.861.

[59] See, *inter alia*, M. Krajewski, *The Reform of the Common Commercial Policy*, in A. Biondi, P. Eeckhout, S. Ripley (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, p. 292 *et seq*.; R. Leal-Arcas, *The European Union's New Common Commercial Policy after the Treaty of Lisbon*, in M. Trybus, L. Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham, Northampton: Elgar, 2012, p. 262 *et seq*.; P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 379 *et seq*., J.-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 238 *et seq*.

[60] See further, *inter alia*, G. Butler, *Pre-Ratification Judicial Review of International Agreements to be Concluded by the European Union*, in M. Derlén, J. Lindholm (eds), *The Court of Justice of the European Union. Multidisciplinary Perspectives*, Oxford, Portland: Hart, 2018, p. 53 *et seq*.

[61] Court of Justice, opinion of 16 May 2017, case 2/15, *EU-Singapore FTA*.

[62] For an appraisal see, *inter alia*, M. Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, in *European Constitutional Law Review*, 2018, p. 231 *et seq*.; D. Kleimann, G. Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, in *Legal Issues of European Integration*, 2018, p. 13 *et seq*.; A. Rosas, *Mixity and the Common Commercial Policy after Opinion 2/15. An Overview*, in M. Hahn, G. Van der Loo (eds), *Law and Practice of the Common Commercial Policy*, cit., p. 27 *et seq*.; R. Quick, A. Gerhäuser, *EU Trade Policy after Opinion 2/15. Internal and External Threats to Broad and Comprehensive Free Trade Agreements*, M. Hahn, G. Van der Loo

competences was received in Whitehall with open arms. It meant that the future EU-UK framework would likely fall within the EU's exclusive competences and, by this token, ratification by all 27 Member States could be avoided. As experience with the EU-Ukraine AA and the CETA proves, it may be a time-consuming and a rocky ordeal.[63]

IV.3. Towards the post-Brexit legal framework: the Political Declaration and early proposals

Analysis of the Political Declaration proves that the parties agreed *ab initio* to conclude an overarching general agreement and a selection of sectoral agreements. For a number of reasons, this is hardly surprising. Firstly, it reflected the already discussed patterns of shaping EU relations with third countries, including their immediate neighbours. Secondly, it gave both sides some room for manoeuvre, bearing in mind the number of dossiers that were of interest, and the very tight timeline for the negotiations. Arguably, the *raison d'être* of this choice was rather straightforward: to conclude as fast as possible an agreement on the essential dossiers in order to make sure that it would enter into force at the end of the transitional period. By the same token, other subject areas would be covered in additional negotiations and, possibly, in separate agreements that would enter into force at a later date.

The Withdrawal Agreement, as well the Political Declaration, gave several hints as to the flanking agreements that could be concluded alongside the main post-Brexit deal. To begin with, the Withdrawal Agreement envisaged the conclusion of an agreement on Common Foreign and Security Policy even before the end of the transitional period.[64] The Political Declaration provided for the development of the EU-UK Comprehensive Air Transport Agreement (CATA)[65], the Euratom-UK Nuclear Cooperation Agreement[66], as well as the tailor-made EU-UK fisheries agreement[67], the Framework Participation Agreement for the UK's contribution to CSDP missions and operations[68], as well as the Security of Information Agreement.[69]

(eds), *Law and Practice of the Common Commercial Policy*, cit., p. 486 *et seq*.; C. Kaddous, *Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, delivered 16 May 2017*, in G. Butler, R.A. Wessel (eds), *EU External Relations Law: The Cases in Context*, Oxford, New York: Hart, 2021 (forthcoming).

[63] See, *inter alia*, G. Kübek, *The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States*, in *European Foreign Affairs Review*, 2018, p. 21 *et seq*.; G. Van der Loo, R.A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Options*, in *Common Market Law Review*, 2017, p. 735 *et seq*.

[64] Article 127, para. 2, EU-UK WA.

[65] Para. 58 of the Political Declaration.

[66] *Ibid.*, para. 66.

[67] *Ibid.*, para. 73.

[68] *Ibid.*, para. 99.

[69] *Ibid.*, para. 116.

The future EU-UK framework started to take shape soon after the commencement of the negotiations. As already mentioned, the European Union had already presented a draft Agreement on the New Partnership between the European Union and the United Kingdom on 12 March 2020. A simple juxtaposition of the draft with the plans sketched in the Political Declaration demonstrates that the EU negotiators opted for the consolidation of some dossiers initially pencilled in for separate agreements into one jumbo agreement. Arguably, such a move had merits at least in two respects. Firstly, it allowed the EU and the UK to avoid unnecessary fragmentation of the legal framework. Secondly, it gave the EU additional leverage in the negotiations, in particular in relation to the contentious fisheries dossier. By linking the portfolios together, the EU could easily follow its mantra that nothing was agreed until all was agreed. It also gave ground to the guillotine clause discussed in section V.2 of this *Article*.

Proposals for the future framework, which were presented by the UK Government, came rather too late to make a breakthrough. Furthermore, by proposing a selection of agreements, the UK asked for something that was not on the menu. Winning the hearts and minds of EU negotiators on such a patchy framework was simply impossible, bearing in mind the experience the EU had gained over the years in its relations with Switzerland.[70] Not surprisingly, the drafts in question became history the moment they were published. For the remainder of the post-Brexit negotiations, it was the EU's Draft Agreement that served as the point of reference.

V. The post-Brexit EU-UK legal framework: an overview

V.1. Introduction

As of 1 January 2021, the EU-UK legal framework comprises four agreements of varied scope and legal character. All are discussed in the analysis that follows. As the starting point, the EU-UK TCA is put under the microscope (section V.2). In turn, the Euratom-UK Agreement on Nuclear Energy and the EU-UK Security Procedures Agreement are presented (sections V.3 and V.4 respectively). Last but not least, a brief recap of the main features of the EU-UK Withdrawal Agreement is a fitting conclusion to the section (V.5).

[70] On the most recent episodes see, *inter alia*, R. Schwok, *Switzerland-EU Relations: The Bilateral Way in a Fragilized Position*, in *European Foreign Affairs Review*, 2020, p. 159 *et seq*.; A. Łazowski, *Draft EU-Swiss Institutional Agreement: Towards a New Institutional Paradigm?*, in A. Biondi, G. Sangiuolo (eds), *EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges*, Cheltenham, Northampton: Elgar, 2021 (forthcoming).

V.2. EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement is the core of the post-Brexit legal framework.[71] The other two agreements concluded simultaneously, as well as potential future agreements, are formally referred to as supplementing agreements.[72] In this respect, the bilateral legal framework follows the already discussed, and well-established, pattern in EU external relations. With this in mind, it comes as no surprise that the EU-UK TCA is a rather chunky legal act, spanning hundreds of pages, including protocols, annexes, appendices, all of which form part of the Agreement.[73]

To begin with, the EU-UK TCA was concluded as an exclusive competence agreement. Its parties are the EU and Euratom, on one side, and the United Kingdom, on the other side. Therefore, for its entry into force separate ratifications by each and every Member State of the European Union were not required. The legal basis for its conclusion was Art. 217 TFEU, which is not surprising bearing in mind the scope of the Agreement and the political context in which it was negotiated and signed.[74] Thus, from the point of view of EU law, it is an association agreement. Yet, this factor has not been widely noted. Furthermore, this is reflected neither in the title of the Agreement, nor in its text. Bearing in mind the disproportionate attention that is sometimes paid to the phraseology, it would not come as a surprise if the notion "association with the EU" were too much for the hardest UK Eurosceptics, whose allergy to anything EU related is well-known. The association could have been perceived as a form of subordination or asymmetry in bilateral relations. Arguably, this constitutes a fitting addition to the pantheon of Brexit paradoxes. Over the years, many countries in the EU's vicinity have become associated with the EU, or still aspire to head in that direction. One of the extreme cases was Ukraine, where more than 100 people were shot dead at Kyiv's Maidan during pro-EU protests. Yet, at the same time, one of the EU's former members did whatever possible to prove that "Europe" and "European" were the hardest words. While the formal association with the EU is the most logical way to downgrade the bilateral relations from the EU membership, the notion of "association" has gone missing, and it is nowhere to be seen in EU-UK TCA. Interestingly

[71] It merits attention that EU-UK TCA does not apply to Gibraltar, the status of which will be regulated separately.

[72] Art. COMPROV. 2 EU-UK TCA.

[73] Art. FINPROV.7 EU-UK TCA.

[74] Such an overarching legal basis permitted the EU to avoid institutional battles, which sometimes take place when multiple legal bases are employed (for instance Article 207 TFEU). It merits attention that the European Union did not use this opportunity to employ for the first time Article 8 TEU as one of the legal bases. Ever since the Treaty of Lisbon introduced the neighbourhood clause to the Treaty on European Union, it has remained a *lettre morte*, and it is likely to continue to do so. See further, *inter alia*, R. Petrov, P. Van Elsuwege, *Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?*, in *European Law Review*, 2011, p. 688 *et seq*.; A. Labedzka, *The European Union and Shaping of Its Neighbourhood: In Pursuit of Stability, Security and Prosperity*, London: City Law School, 2018, p. 117 *et seq*.

enough, in its drive towards Global Britain, the UK signed post-Brexit trade agreements with many non-EU states. Astonishingly, they largely mirror their originals, that is, the EU association or partnership agreements.[75] The copy-paste frenzy has clearly gone quite far, as some of the newly concluded agreements create a formal association between the UK and the EU's neighbours. So, as of 1 January 2021, the United Kingdom is formally in association with, for instance, Egypt.[76] This factor is reflected both in the title as well as in the text of the UK-Egypt Agreement.

Like all agreements concluded by the European Union with third countries, the EU-UK TCA has a double legal nature. On the one hand, it is an international treaty within the meaning of the Vienna Convention on the Law of Treaties. On the other hand, it is a source of EU law with all the consequences resulting from this. It is binding, in equal measure, on the European Union, Euratom and on the Member States of the EU. This, quite inevitably, brings to the fore a fundamental question about its enforcement. This is pivotal not only for the state authorities but, first and foremost, for natural and legal persons who fall within the scope of the EU-UK TCA. In this respect, Art. COMPROV.16 EU-UK TCA is of relevance. It reads as follows:

> "Article COMPROV.16: Private rights
> 1. Without prejudice to Article MOBI.SSC.67 [Protection of individual rights] and with the exception, with regard to the Union, of Part Three [Law enforcement and judicial cooperation], nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.
> 2. A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement".

It is clear from the provision in question that neither the EU-UK TCA nor the current or future supplementing agreements may, in general terms, produce direct effect.[77] The only exceptions are the Protocol on Social Security Coordination and Part Three of the EU-UK TCA, which is dedicated to law enforcement and judicial cooperation in criminal matters. The latter, however, is subject to the caveat that direct effect can only be pro-

[75] See further A. ŁAZOWSKI, *Copy-pasting or Negotiating? Post-Brexit Trade Agreements Between the UK and Non-EU countries*, in J. SANTOS VARA, R.A. WESSEL, P.R. POLAK (eds), *The Routledge Handbook on the International Dimension of Brexit*, cit., p. 117 *et seq*.

[76] Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Arab Republic of Egypt.

[77] It should be noted that this provision appeared for the first time, albeit differently phrased, already in the Draft Agreement presented by the European Union on 12 March 2020.

duced in the European Union, not the United Kingdom.[78] This provision merits closer attention for a number of reasons. Firstly, the general prohibition of direct effect heavily undermines the effectiveness of the EU-UK post-Brexit framework. It is well known that the doctrine of direct effect, which has its roots in the rich jurisprudence of the Court of Justice, is the key to the private enforcement of EU law.[79] Over the years, the judges at Kirchberg have ruled that the TFEU, the Charter of Fundamental Rights, as well as EU regulations, EU directives and EU decisions may be directly invoked by individuals in national courts.[80] Furthermore, the application of this doctrine has been extended to EU agreements with third countries, which are also capable of producing direct effect, not only vertical but also horizontal.[81] A good example of this is Case C-265/03 *Simutenkov*, where the Court of Justice ruled that Art. 23, para. 1, of the EU-Russia PCA, prohibiting discrimination on grounds of nationality at the workplace, was capable of producing direct effect.[82] Such jurisprudence, however, was not always welcomed with open arms by the Member States. Therefore, in the past years a change of paradigm has become clearly visible. To put it differently, EU agreements with third countries, and/or Council decisions on the conclusion of international agreements, started to contain clauses precluding direct effect. In this respect, the EU-UK TCA is no exception, but rather a confirmation of the new trend.[83] Still, it sits uncomfortably not only with the existing jurisprudence of the Court of Justice but also creates a rather undesired side effect: the legal environment of double standards applicable to EU neighbouring countries. While, for

[78] This caveat was not in the original draft of the provision in questions, which may suggest that it was added on the initiative of the UK negotiators.

[79] Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*. For an academic appraisal see, *inter alia*, W. Phelan, *Great Judgments of the European Court of Justice. Rethinking the Landmark Decisions of the Foundational Period*, Cambridge: Cambridge University Press, 2019, p. 31 *et seq*.

[80] See further, *inter alia*, J.M. Prinssen, A. Schrauwen (eds), *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, Groningen: European Law Publishing, 2002; B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 323 *et seq*.

[81] For a comprehensive assessment see M. Mendez, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013; P. Eeckhout, *EU External Relations Law*, cit., p. 331 *et seq*.; P. Koutrakos, *EU International Relations Law*, cit., p. 257 *et seq*.; J. Klabbers, *International Law in Community Law: The Law and Politics of Direct Effect*, in *Yearbook of European Law*, 2001, p. 263 *et seq*.; F. Martines, *Direct Effect of International Agreements of the European Union*, in *European Journal of International Law*, 2014, p. 129 *et seq*.

[82] Court of Justice, judgment of 12 April 2005, case C-265/03, *Simutenkov* [GC]. For an academic appraisal see, *inter alia*, C. Hillion, *Case C–265/03, Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol, [2005] ECR I–2579*, in *Common Market Law Review*, 2008, p. 815 *et seq*.; A. Łazowski, *Direct Effect, Non-discrimination and the Beautiful Game: case C-265/03 Simutenkov*, in G. Butler, R.A. Wessel (eds), *EU External Relations Law*, cit.

[83] See also N. Ghazaryan, *Who Are the Gatekeepers'?: In Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements*, in *Yearbook of European Law*, 2018, p. 27 *et seq*.

instance, Russian, Turkish,[84] or Tunisian citizens/companies[85] may rely directly on the respective agreements with the EU, citizens/companies from the UK (a former Member State), Ukraine, Moldova and Georgia cannot do so. The question remains, however, whether the provision in question is broad enough to preclude the application of the other enforcement doctrines: indirect effect[86] and state liability.[87] Both are well established in the jurisprudence of the Court of Justice and national courts of the EU Member States. On the one hand, it is true that Art. COMPROV.16 provides that EU-UK TCA is not "conferring rights or imposing obligations on persons other than those created between the Parties under public international law" and that its provisions may not be "directly invoked". On the other hand, legal acrobatics permitting, one could imagine attempts at an interpretation of national law in an EU-UK TCA compliant way, or even state liability claims, should the Member States act in breach of the EU-UK TCA. Firstly, in the case of indirect effect, the claims are built on national, not EU law. Thus, an EU legal act that is relied on does not *per se* create rights or impose obligations. Secondly, national judges have discretion, as the obligation to interpret domestic law in an EU law friendly way applies only as far as this is possible. Thirdly, in state liability claims, plaintiffs do not enforce their rights laid down in the EU legal acts, but claim compensation for breaches of EU law attributable to the Member States. Further, one also needs to bear in mind that the Court of Justice has the jurisdiction to interpret the EU-UK TCA as per Art. 267 TFEU. Art. COMPROV.16 EU-UK TCE will not stop domestic courts in the EU Member States from sending references for a preliminary ruling. This, in the case of courts from which there is no further remedy, is not a right, but an obligation resting on the shoulders of national judges. Should they fail to comply, state liability claims may follow.[88]

Arguably, it is only a matter of time before references start arriving at Kirchberg. One of the reasons why this may happen sooner rather than later is the linguistic ca-

[84] Court of Justice, judgment of 12 September 1990, case C-192/89, *Sevince*. See further, *inter alia*, E. SHARPSTON, *Different but (Almost) Equal – The Development of Free Movement Rights under EU Association, Co-Operation and Accession Agreements*, in M. HOSKINS, W. ROBINSON (eds), *A True European. Essays for Judge David Edward*, Oxford, Portland: Hart, 2003, p. 233 *et seq*.

[85] Court of Justice, judgment of 14 December 2006, case C-97/05, *Gattoussi*. See further, *inter alia*, F. G. JACOBS, *Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice*, in A. DASHWOOD, M, MARESCEAU (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, p. 21 *et seq*.

[86] Court of Justice, judgment of 10 April 1984, case 18/43, *Von Colson*. See further, *inter alia*, S. DRAKE, *Twenty Years after Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights*, in *European Law Review*, 2005, p. 329 *et seq*.

[87] Court of Justice, judgment of 19 November 1991, joined cases C-6/90 and C-9/90, *Francovich*. See further, *inter alia*, P. AALTO, *Public Liability in EU Law. Brasserie, Bergaderm and Beyond*, Oxford, Portland: Hart, 2011.

[88] Court of Justice, judgment of 30 September 2003, case C-224/01, *Köbler*. See further, *inter alia*, Z. VARGA, *The Effectiveness of the Köbler Liability in National Courts*, Oxford, London, New York, New Delhi, Sydney: Hart, 2020.

cophony caused by the late completion of negotiations, combined with the requirements of the EU multilingual regime. To cut a long story short, the EU translation and publication services were left with no time to polish the 24 different language versions of the EU-UK TCA. As acknowledged in the Council Decision 2020/2252 on signing and provisional application of EU-UK TCA and EU-UK SPCI, and in a separate note to readers, published in the Official Journal of the EU, the text of the EU-UK TCA published on 31 December 2020 is provisional and may contain inaccuracies/mistakes. Furthermore, neither the provisions nor the annexes or protocols are properly numbered. One should also note that hundreds of blank pages have been allocated to annexes, which have yet to be filled with actual text.[89] The final versions are due for publication in the Official Journal of the EU by 30 April 2021 at the latest. The question remains how national authorities should proceed in the case of inconsistencies between different language versions of the EU-UK TCA. As experience proves, they may remain even when the texts are finalised in due course. In the case of the EU-UK TCA, the version in English ought to prevail, even though all language versions are equally authentic.[90] This is for two main reasons. Firstly, the negotiations were conducted chiefly in the language of Shakespeare. Therefore, this particular language version should be as close as possible to the intentions of the negotiators. Secondly, in accordance with Art. FINPROV.9 EU-UK TCA, the English version was the first to be finalised, and therefore the other language versions would be checked against it.

As the final step in this general overview of the EU-UK TCA, it is worth putting under the microscope the rules governing revisions, suspension and termination of the Agreement. The *modi operandi* in relation to modifications of the EU-UK TCA may be divided into two groups. To begin with, the EU-UK TCA may be amended *qua* a formal revision treaty. For entry into force, it would require the "Rolls Royce" procedure governing the conclusion of international treaties by the EU, which – as already mentioned – is laid down in Art. 218 TFEU. Furthermore, the EU-UK TCA in several places envisages simplified procedures permitting decisions of the EU-UK joint institutions to revise the Agreement.[91] This is a pragmatic solution, although not original by any stretch of the imagination. Similar arrangements govern the regular updates of the Agreement on the European Economic Area[92] as well as several association agreements between the EU and third countries.[93]

[89] Annex SSC-8 spans from page 1276 to 1463, all pages were blank on 31 December 2020, the date of publication in the Official Journal of the European Union.

[90] Article FINPROV. 9 EU-UK TCA.

[91] See, *inter alia*, Art. OTH. 8 EU-UK TCA, which gives the competence to the EU-UK Partnership Council to amend parts of the Agreement itself, as well as several annexes.

[92] See further, *inter alia*, D.W. HOLTER, *Legislative Homogeneity*, in C. BAUDENBACHER (ed.), *The Fundamental Principles of EEA Law*, Berlin: Springer, 2017, p. 1 *et seq*.

[93] For example, updates to annexes to the EU-Georgia AA are made by decisions of the EU-Georgia Association Council or other joint bodies. See, *inter alia*, Decision 2/2019 of the EU-Georgia Association Committee in Trade Configuration of 18 October 2019 updating Annex XVI to the Association Agreement.

While the EU-UK TCA has been concluded for an indefinite period,[94] the suspension or termination of parts or of the entire EU-UK TCA is on the cards. The Agreement in several places permits either side to trigger the suspension of its application in relation to specifically listed parts. For instance, a suspension may take the form of a remedial action in the areas of air or road transport.[95] It also contains a guillotine clause in Art. FISH.17 EU-UK TCA. Should the section dedicated to fisheries be terminated, some other parts, including trade and aviation, would share the same fate. Art. INST. 35 EU-UK TCA also provides that "there has been a serious and substantial failure by the other party" to comply with the obligations referred to as essential elements (democracy, rule of law, human rights; fight against climate change; countering proliferation of weapons of mass destruction) either party may decide to suspend or terminate parts, or the entirety of EU-UK TCA or any supplementing agreement. What is more, Art. FINPROV.8 EU-UK TCA allows each party to terminate the EU-UK TCA *in toto*.[96]

V.3. Euratom-UK Agreement on Cooperation on the Safe and Peaceful Uses of Nuclear Energy

Alongside the EU-UK TCA, Euratom and the United Kingdom also concluded a tailor-made Agreement dedicated to cooperation on the use of nuclear energy. This also provisionally entered into force on 1 January 2021,[97] arguably as a logical consequence of the fact that by withdrawing from the European Union, the United Kingdom also withdrew from the European Atomic Energy Community. It had no choice in this respect, as the membership of both the EU and Euratom is inextricably linked. However, despite sharing institutions with the European Union, Euratom remains formally a separate international organisation, with legal personality in its own right. It, too, has external competences, which materialise in international agreements concluded as per Art. 101 Euratom.[98] The main aim of the Euratom-UK SPNE is to create a legal framework for cooperation between the two sides in the peaceful uses of nuclear energy. The application of this Agreement is subject to the caveat that items covered by its scope may not be

[94] As per Art. FINPROV. 3 EU-UK TCA, the EU and the UK are expected to review the implementation of the EU-UK TCA, as well as the supplementing agreements in five year intervals.

[95] See, for instance, Art. ROAD. 11 EU-UK TCA, which permits suspension of the part on road transport or Article AIRTRANS. 25 EU-UK TCA that envisages a comparable *modus operandi* applicable to the air transport.

[96] It would lose force on the first day of the twelfth month following the date of notification.

[97] See Exchange of letters on the provisional application of the Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy.

[98] See, *inter alia*, Agreement for Cooperation between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine in the field of nuclear safety; Agreement for Cooperation between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine in the field of controlled nuclear fusion.

used for any nuclear weapon or nuclear explosive device. Furthermore, they may not be used for research on or development of any nuclear weapon or other nuclear explosive device or for any military purpose. Arts 3 and 4 Euratom-UK SPNE are at the heart of the Agreement. They cover, respectively, the scope and the forms of nuclear cooperation.[99] The Agreement in question was concluded by the European Atomic Energy Community on the basis of Art. 101 Euratom, and it is subject to provisional application just like the main EU-UK TCA. As per Art. COMPROV.16 EU-UK TCA, being a supplementing agreement, it cannot produce direct effect. It is interesting to note that the Euratom-UK SPNE was concluded for 30 years, after which it is due for renewal in ten-year intervals. Arts 22 and 24 Euratom-UK SPNE also envisage suspensions and early termination of the Agreement. The linguistic cacophony discussed above has also reached the Euratom-UK SPNE. While the version in English has been finalised, the verification of the text in the remaining official languages of the European Union is yet to be completed. As regulated in Art. 25 Euratom-UK SPNE, this is expected on 30 April 2021 at the latest.

V.4. EU-UK Agreement on Security Procedures for the Exchange of Classified Information

The third Agreement concluded on 30 December 2020 deals with the exchange of classified information between the EU and the UK. It should be noted at the outset that this is inextricably linked to the EU-UK TCA. Firstly, the Council of the EU signed both Agreements by means of a single decision. Secondly, the legal basis for the EU-UK TCA and EU-UK SPCI is just the same. Thirdly, Arts 19-20 EU-UK SPCI contain a guillotine clause. The entry into force of the EU-UK SPCI was linked to the entry into force of the EU-UK TCA. Furthermore, the termination of the latter would also trigger the termination of the former. This Agreement, too, became applicable on a provisional basis on 1 January 2021. As in the case of the other two Agreements, the version in English was to be the point of reference, while the final versions in the other 23 official languages of the European Union were due for publication by 30 April 2021 at the latest.[100] In terms of substance, this

[99] For instance, the Euratom-UK SPNE covers facilitating trade and commercial cooperation; the supply of nuclear material, non-nuclear material, and equipment; transfer of technology, including supply of information; the procurement of equipment and devices; access to and use of equipment and facilities; safe management of spent fuel and radioactive waste, including geological disposal; nuclear safety and radiation protection, including emergency preparedness and monitoring of levels of radioactivity in the environment; nuclear safeguards and physical protection; use of radioisotopes and radiation in agriculture, industry, medicine and research; in particular, in order to minimise the risks of shortage of supply of medical radioisotopes, and to support the development of novel technologies and treatments involving radioisotopes, in the interest of public health; geological and geophysical exploration, development, production, further processing and use of uranium resources; regulatory aspects of the peaceful uses of nuclear energy; research and development.

[100] Art. 21 EU-UK SPCI.

Agreement is rather brief and provides a basic framework for the exchange of classified information. For instance, in accordance with Art. 5, para. 1, EU-UK SPCI, the EU and the UK should – in relation to classified information shared or provided by the other party – protect it as per domestic laws in a way that own classified information is protected. Furthermore, as per Art. 6, para. 1, EU-UK SPCI, classified information shall be disclosed or released only in accordance with the principle of originators consent.

V.5. EU-UK Withdrawal Agreement

Last but not least, one should not forget the EU-UK Withdrawal Agreement. With the new EU-UK legal framework in place, it is likely to be overshadowed. While many solutions envisaged therein were tailor-made to regulate the intertemporal issues related to exit from the EU, several sections of the EU-UK WA will remain applicable for years, if not decades, to come. This, in particular, refers to the Part 2 of the EU-UK WA, which is dedicated to the acquired rights of EU citizens in the UK, and UK citizens in the EU,[101] as well as to the Protocol on Northern Ireland.[102] Furthermore, the rules on dispute settlement are likely to remain relevant, too.[103] While the details of the EU-UK WA have been analysed in the academic literature, and deserve no detailed elaboration in the present *Article*, a number of its features merit a closer look with a view to demonstrating numerous phenomena which become visible when the EU-UK WA is juxtaposed to the EU-UK TCA.[104] First and foremost, the EU-UK WA is destined to produce direct effect. Art. 4 EU-UK WA leaves no doubts in this respect and, without calling a spade a spade, it codifies in paragraph 2 the doctrine of primacy as envisaged by the Court of Justice in

[101] See, *inter alia*, C. Barnard, E. Leinarte, *Citizens' Rights*, in F. Fabbrini (ed.), *The Law & Politics of Brexit. Volume II*, cit., p. 107 *et seq*.; M. Markakis, *Citizens' Rights after Brexit: The Withdrawal Agreement and the Future of Mobility Framework*, in F. Kainerm, R. Repasi (eds), *Trade Relations after Brexit*, Baden-Baden: Nomos, Hart, 2019, p. 293 *et seq*.; S. Smismans, *EU Citizens' Rights post Brexit: Why Direct Effect Beyond the EU is not Enoug*h, in *European Constitutional Law Review*, 2018, p. 443 *et seq*.; E. Spaventa, *The Rights of EU Citizens under the Withdrawal Agreement: A Critical Analysi*s, in *European Law Review*, 2020, p. 193 *et seq*.

[102] See further, *inter alia*, S. Weatherill, *The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's*, in *European Law Review*, 2020, p. 222 *et seq*.; C. Harvey, *The Irish Border*, in F. Fabbrini (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 148 *et seq.*

[103] On the evolution of the dispute settlement *modus operandi* see, *inter alia*, N. Fennelly, *Brexit: Legal Consequences for the EU. Dispute-settling Between the EU and the UK*, in *ERA Forum*, 2018, p. 493 *et seq*. On the final solution see, *inter alia*, A. Dashwood, *The Withdrawal Agreement: Common Provisions, Governance and Dispute Settlement*, in *European Law Review*, 2020, p. 183 *et seq*.; J. Larik, *Decision-Making and Dispute Settlement*, in F. Fabbrini (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 191 *et seq.*

[104] For a general overview of the EU-UK Withdrawal Agreement see, *inter alia*, M. Dougan, *So Long, Farewell, auf Wiedersehen, Goodbye: The UK'S Withdrawal Package*, in *Common Market Law Review*, 2020, p. 631 *et seq*.; S. Peers, *The End – or a New Beginning? The EU/UK Withdrawal Agreement*, in *Yearbook of European Law*, 2020 (forthcoming).

case 106/77 *Simmenthal*.[105] The provision in question also attends to the contentious matter of the jurisprudence of the Court of Justice. Any provisions contained in the EU-UK WA which refer to EU law or the concepts laid down therein ought to be interpreted in compliance with the judgments of the Court rendered before 31 December 2020 (that is, the end of the transitional period). However, any post-Brexit judgments should be given due regard.[106] This stands in stark contrast to the EU-UK TCA, which – in Art. COMPROV.13 para. 3 – makes it clear that "an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party". All of this proves that the assertions of leading Brexiteers that the United Kingdom is now free from the jurisdiction of the Court of Justice amount to half-truths. While this is the case in relation to the EU-UK TCA, it is certainly not so when it comes to the EU-UK Withdrawal Agreement. What is more, the Court of Justice is also at the heart of the dispute settlement procedure laid down therein.[107] Finally, when it comes to the status of Northern Ireland, the centre of gravity is on the EU-UK Withdrawal Agreement and, in all certainty, that part of the United Kingdom remains, at least with one leg, in the European Union. The decisions of the EU-UK Joint Committee, taken in December 2020, are nothing but confirmation in this respect.[108]

VI. Foundations for EU-UK cooperation

VI.1. Introduction

The foundations for post-Brexit cooperation, as well as generally determined areas of shared interest, were outlined in Part I of the Political Declaration. Bearing in mind existing EU practice in external relations, the inclusion of core values and human rights was hardly surprising. As aptly noted by E. Cannizzaro, "the incorporation of *ad hoc* clauses into the terms of agreements with non-Member States represents one of the European Union's most efficient devices with which to promote compliance with human

[105] Court of Justice, judgment of 9 March 1978, case 106/77, *Simmenthal*. For an academic appraisal see, *inter alia*, W. Phelan, *Great Judgments of the European Court of Justice*, cit., p. 171 *et seq*.

[106] Art. 4, paras 4-5, EU-UK WA.

[107] As per Art. 174 EU-UK WA, the arbitration panels dealing with EU-UK disputes shall make references to the Court of Justice when issues of interpretations of concepts anchored in EU law arise.

[108] See, *inter alia*, Decision 3/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 amending the Protocol on Ireland and Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community; Decision 6/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 providing for the practical working arrangements relating to the exercise of the rights of Union representatives referred to in Article 12(2) of the Protocol on Ireland/Northern Ireland.

rights".[109] In the case of the post-Brexit EU-UK framework, some of the solutions proposed in the Political Declaration, and later developed in the Draft Agreement of 12 March 2020, either did not survive the negotiations or have been considerably pruned.

VI.2. The future relationship based on shared values

As a starting point, it is worth putting under the microscope the notions employed to determine the character of the post-Brexit relationship between the European Union and the United Kingdom. While the term "association" is nowhere to be seen, it interesting to follow how this politically important description of relations evolved. To start with, the Political Declaration set as the main ambition the creation of "ambitious, broad, deep and flexible partnership". This was reflected in the Draft Agreement, which in Art. COMPROV.1 proclaimed that it was to establish "a comprehensive partnership between the Parties". Accordingly, the full title of the Draft Agreement was: "Draft Text of the Agreement on the New Partnership between the European Union and the United Kingdom". For reasons which were unclear at the time of writing the present *Article*, the nature of the bilateral relationship has been considerably watered down both in the title of the main agreement between the EU and the UK, but also in its opening provision. The latter merely talks about "a broad relationship between the Parties, within the area of prosperity and good neighbourliness".[110] This newly formed relationship is based on the autonomy and sovereignty of each side. One cannot escape the conclusion that such terminological peregrinations are Brexit paraphernalia translated into the language of law. Arguably, it is yet another example, if one were needed, of packaging ruling over content. In the same vein, one can interpret the final location of provisions on the foundations of the bilateral relationship. While in the Political Declaration, and in the Draft Agreement, they took a prominent position in the opening parts, in the EU-UK TCA they are sandwiched between the section dedicated to dispute settlement and the closing provisions.

As per Arts COMPROV.4-12 EU-UK TCA, the basis of cooperation includes democracy, rule of law, human rights, the fight against climate change, countering the proliferation of weapons of mass destruction, the implementation of rules on illicit manufacture, transfer and circulation of small arms, light and other conventional weapons, the fight against the most serious crimes that are of concern to the international community, cooperation in counter-terrorism, data protection and global cooperation on matters of shared economic, environmental and social interest. It beggars belief why such fundamental and systemic provisions have been relegated to remote corners of the EU-UK TCA, even though the matters in question are mentioned in the first recital of the Preamble. The truth remains

[109] E. Cannizzaro, *The Scope of EU Foreign Power. Is the EC Competent to Conclude Agreements with Third States Including Human Rights Clauses?*, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, The Hague, London, New York: Kluwer Law International, 2002, p. 297.

[110] Art. COMPROV.1 EU-UK TCA.

behind the doors of the negotiation rooms or Zoom records. However, it is hard to escape the cynical and speculative conclusion that such a move was to make sure that some less diligent readers would not spot such ambitious clauses if they were hidden in a less prominent place than the opening sections of the Agreement.

From the legal point of view, it is worth delving deeper into the provisions dealing with respect for human rights, in particular the status of the European Convention on Human Rights. Paragraph 6 of the Political Declaration made it unequivocally clear that the future relations should be based on shared values, which include the usual mantra of respect for human rights, fundamental freedoms, democratic principles, respect for the rule of law and non-proliferation. Not only was the word "should" employed by the drafters, but it also came with the caveat that "these values are an essential prerequisite for cooperation". This is not surprising for a number of reasons. Firstly, the EU is committed to shaping its external relations with the outside world on its own values listed in Art. 2 TEU.[111] Secondly, the EU is generally considered to be a leading exporter of values based on human rights and the rule of law.[112] This is against a rather precarious reality, as some countries in the EU's immediate or remote neighbourhood share these values only figuratively. Furthermore, some of the EU's own Member States have a rather idiosyncratic relationship with the rule of law, thus undermining the EU's legitimacy to pursue values-based external activities.[113] Nevertheless, the opening sections of many EU agreements with third countries are dedicated to shared values.[114] Furthermore, relations with the EU's immediate neighbours are based on strict conditionality, requiring respect for fundamental values (at least at the time when an agreement is concluded).[115] Therefore, it is hardly surprising that this general *desideratum* was reflected in the opening part of the Draft Agreement. Art. COMPROV.4 made it quite clear that the EU and the UK were to continue to uphold the shared values, the rule of law and respect for human rights, including commitment to the European Convention on

[111] Art. 21 TUE. See further, *inter alia*, S. Oeter, *Article 21. [The Principles and Objectives of the Union's External Action]*, in H.-J. Blanke, S. Mangiameli (eds), *The Treaty on European Union (TEU). A Commentary*, Heidelberg, New York, Dordrecht, London: Springer, 2013, p. 833 *et seq*.; T. Ramopoulos, *Articles 21-22*, in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaty and the Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 2019, p. 200 *et seq*.

[112] See, for instance, S. Poli (ed.), *The European Neighbourhood Policy – Values and Principles*, London and New York: Routledge, 2016.

[113] See, *inter alia*, A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, M. Schmidt (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Berlin: Springer, 2021; K. Lane Scheppele, D. Vladimirovich Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, 2021 (forthcoming).

[114] See, for instance, Arts 2-3 EU-Ukraine AA.

[115] For a comprehensive assessment see, *inter alia*, N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU. A Legal Analysis*, Oxford, Portland: Hart, 2014.

Human Rights. Alas, it belongs to the group of already mentioned provisions which have been demoted to the closing parts of the EU-UK TCA.

In the case of post-Brexit EU-UK relations, one of the issues that concerned the negotiators was the UK's on-going adherence to the European Convention on Human Rights and participation in the Strasbourg enforcement system. Such concerns have been perfectly justified on at least two grounds. Firstly, the Euroscepticism of the ruling Conservative Party is not exclusively limited to the European Union but also stretches to the Council of Europe. Secondly, the future EU-UK legal framework was already at the time of drafting of the Political Declaration destined to include arrangements for judicial cooperation in criminal matters. Arguably, the latter could only become operational if it were underpinned by respect for human rights. With the above in mind, para. 7 of the Political Declaration provided as follows: "The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention of Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR".

This proviso clearly made the continued UK participation in the European Convention on Human Rights framework a *conditio sine qua non* for the future relationship and, if one were to read the language of the Political Declaration literally, the commitment in this respect would be written down into the future agreement between the two sides. An attempt in this direction was made by the European Union in the Draft Agreement. Art. LAW.OTHER.44 conditioned cooperation in criminal matters on continued adherence to the European Convention on Human Rights and the maintenance of its effect in the United Kingdom. In respect of the latter, a reminder is fitting that the Human Rights Act 1998 transposed the European Convention on Human Rights with selected protocols to the UK legal orders.[116] With the UK being a dualist country, without such a transposition, the European Convention on Human Rights was only binding at the level of international law, with individuals being deprived of its application in national courts. Since the European Convention on Human Rights and the Human Rights Act 1998 remain in equal measure on the radars of the Brexiteers, the European Commission proposed the discussed solution and introduced two important locks. Firstly, in the event of repeal of the Human Rights Act 1998, or the lowering of levels of protection, the part of the Draft Agreement dedicated to cooperation in criminal matters would be suspended until the *status quo* were restored. Secondly, in the event of denunciation of the European Convention on Human Rights, the same section of the Draft Agreement would be disapplied. It is little wonder that these solutions did not get people dancing in Whitehall. Judging by the final shape of the EU-UK TCA, a compromise was reached and,

[116] See further, *inter alia*, J. Wadham, H. Mountfield QC, E. Prochaska, R. Desai, *Blackstone's Guide to the Human Rights Act 1998*, Oxford: Oxford University Press, 2015.

consequentially, the language employed by the drafters became vaguer. Art. LAW.OTHER.136 para. 2 EU-UK TCA provides that the European Union may terminate Part 3 of the Agreement should the United Kingdom denounce the European Convention on Human Rights. The same part of the Agreement may be suspended fully in the case of "serious and systemic deficiencies" of human rights, or, partly, if data protection standards suffer the same fate.[117] As far as the former is concerned, one could arguably claim that the repeal of the Human Rights Act 1998 could, if not followed by a legislative substitute, be potentially considered as a deficiency big enough to trigger the suspension of Part 3 EU-UK TCA. Thus, while the automatism of termination or suspension has been removed from the provision in question, the end result may still be the same. The question remains if deficiencies in the human rights protection could have a wider knock-on effect, going beyond Part 3 EU-UK TCA. Arguably, in extreme cases, they could serve as a catalyst for the termination of EU-UK TCA.

VII. Institutional set-up

VII.1. Introduction

Without exception, all association and trade agreements concluded between the European Union and its neighbouring countries provide for some institutional platforms for cooperation.[118] The types of institutions, as well as the *modi operandi* of their functioning, may, however, vary from one agreement to another. In this respect, yet another rule of thumb is detectable: the deeper the desired cooperation, the more comprehensive the institutional framework. Furthermore, for third countries engaged in enhanced bilateralism or enhanced multilateralism, the EU keeps the institutional door ajar, allowing for very modest access to EU decision-shaping,[119] and facilitates participation in selected agencies.[120] With the above in mind, there is no doubt that the European Economic Area stands out with its two-pillar institutional structure, referred to by Cremona as Byzantine.[121] It is comprised of joint EU-EFTA institutions, as well as a tailor-made EFTA Court and an EFTA Surveillance Authority on the EEA/EFTA side. Things are very much more complicated in the EU-Swiss bilateral framework, which is not only very

[117] Art. LAW.OTHER.137 EU-UK TCA.

[118] For a comprehensive analysis see, *inter alia*, S. Gstöhl, D. Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and its Neighbours*, London, New York: Routledge, 2019.

[119] See, in relation to the EEA, G. Baur, *Decision-Making Procedure and Implementation of New Law*, in C. Baudenbacher (ed.), *The Handbook of EEA Law*, Berlin: Springer, 2016, p. 45 *et seq*.; A. Łazowski, *Draft EU-Swiss Institutional Agreement*, cit.

[120] T. Bekkedal, *Third State Participation in EU Agencies: Exploring the EEA Precedent*, in *Common Market Law Review*, 2019, p. 381 *et seq*.

[121] M. Cremona, *The "Dynamic and Homogeneous" EEA: Byzantine Structures and Variable Geometry*, in *European Law Review*, 1994, p. 508 *et seq*.

patchy and fragmented, but also short of a coherent and overarching institutional arrangement. The relations between the EU and Switzerland are governed by over 120 bilateral agreements, with some of them envisaging rather standard institutional arrangements built on joint committees.[122] An overarching institutional agreement was expected to serve as a panacea. Alas, despite a successful end to the negotiations, which had been filled with twists and dramas, the agreement in question is yet to enter into force.[123] Nevertheless, it has already served as a model for the EU-UK Withdrawal Agreement, and it was expected to be employed again for the post-Brexit framework.[124] In the case of other treaties between the EU and its neighbours, the institutional arrangements are not as ambitious and generally follow the same pattern. They are comprised of bilateral councils and committees, as well as institutional outlets bringing together parliamentarians from the European Parliament and the legislatures of neigh-

[122] See, in particular, the Bilateral I and Bilateral II packages. The former comprises Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons; Agreement between the European Community and the Swiss Confederation on Air Transport; Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road; Agreement between the European Community and the Swiss Confederation on trade in agricultural products; Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment; Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement. The main components of Bilateral II are: Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or in Switzerland; Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments; Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products; Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network; Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics; Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation associating the Swiss Confederation to Horizon 2020 – the Framework Programme for Research and Innovation and the Research and Training Programme of the European Atomic Energy Community complementing Horizon 2020, and regulating the Swiss Confederation's participation in the ITER activities carried out by Fusion for Energy.

[123] See further C. KADDOUS, *Switzerland and the EU. Current Issues and New Challenges under the Draft Institutional Framework Agreement*, in S. GSTÖHL, D. PHINNEMORE (eds), *The Proliferation of Privileged Partnerships Between the European Union and Its Neighbours*, cit., p. 68 *et seq*.; R. SCHWOK, *Switzerland-EU Relations*, cit., p. 159 *et seq*.; A. ŁAZOWSKI, *Draft EU-Swiss Institutional Agreement*, cit.

[124] On lessons for Brexit from the EU-Swiss experience, see C. TOBLER, *One of Many Challenges after 'Brexit'. The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 583 *et seq*.

bouring countries.[125] In the case of some neighbours, with whom relations are particularly dynamic or strategically important, the agreements envisage the regular holding of bilateral summits at the highest political level.[126] Furthermore, the creation of bilateral platforms for NGOs is also common practice.[127] In procedural terms, it is notable that the joint authorities, which make up the institutional fabric of the EU and its neighbours, are traditionally equipped with decision-making powers as well as competences aiming at dispute settlement.[128]

All of the above is reflected in the EU-UK Withdrawal Agreement and in the post-Brexit Agreements. It is notable that as of 1 January 2021 two sets of EU-UK bilateral bodies operate in parallel. On the one hand, the joint institutions envisaged in the EU-UK WA are in charge of the Withdrawal Agreement, including the implementation of the contentious Protocol on Ireland/Northern Ireland. Furthermore, the EU-UK WA provides for complex dispute settlement *modus operandi*, with a special role reserved for the Court of Justice. On the other hand, the EU-UK TCA, EU-UK SPCI and Euratom-UK SPNE contain sets of institutional provisions and, in the case of the EU-UK TCA, general as well as sectoral variations of the dispute settlement procedures. All are presented in turn.

VII.2. Institutional framework in the EU-UK Withdrawal Agreement

As a starting point, a reminder is fitting that the United Kingdom formally ceased its participation in the EU's institutional framework on 31 January 2020. During the transitional period, it did have the hybrid status of a country which was *en route* from EU membership to a future relationship of sorts. In substantive terms, it was business as usual for the duration of the transition. To put it differently, the United Kingdom was bound by EU law in its entirety. In terms of infringement procedures and preliminary rulings, the United Kingdom was treated as if it were still an EU Member State.[129] However, as of the day of Brexit, it no longer benefited from participation in EU decision-making.[130] It is notable that the status of the United Kingdom was downgraded to levels going below what the EEA-EFTA countries and the Swiss authorities are offered. In the

[125] For instance, see in relation to the EU-Ukraine AA, G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Trade Area*, cit., p. 204 *et seq*.

[126] See, for instance, Art. 460 EU-Ukraine AA.

[127] See, for instance, Art. 469 EU-Ukraine AA.

[128] See further, *inter alia*, W. Weiß, *Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament*, in *European Constitutional Law Review*, 2018, p. 532 *et seq*.

[129] Art. 131 EU-UK WA.

[130] It is notable that HM Government has already pulled out of the Council and its preparatory bodies as of 1 September 2019. To analyse the political and legal merits of that decision would, however, goes beyond the scope of the present analysis.

latter case, participation in so-called decision-shaping is assured.[131] However, in the case of the United Kingdom, such a *modus* for participation was available merely in selected cases and, more importantly, only by invitation.[132] Furthermore, as of the date of Brexit, the United Kingdom no longer had members of the European Parliament or the advisory bodies. The terms of judges at the Court of Justice of the European Union also came to an end. The Advocate General Sharpston continued to work, however she was not permitted to serve her term to the end.[133]

With this in mind, the EU-UK WA contains provisions which, on the one hand, regulate the detachment of the UK from the EU institutions and, on the other hand, provide an institutional framework operational as of 1 February 2020. It is centred on the Joint Committee, which was established as per Art. 164 EU-UK WA.[134] It is co-chaired by both sides and convenes whenever requested, but subject to the caveat that it meets at least once a year. The political level at which the Joint Committee meets is determined *in casu.* To put it differently, it is not predetermined by the EU-UK WA. The tasks of the Joint Committee are, in general terms, to supervise the implementation, the application and the interpretation of the EU-UK WA. This multidisciplinary body is equipped, in equal measure, with powers to take decisions and make recommendations, as well as to serve as a dispute settlement body.[135] As noted earlier in the present *Article*, the Joint Committee is empowered to take decisions in politically explosive matters, including the details of trade between Great Britain and Northern Ireland. Some of its tasks may be delegated to six specialised committees envisaged by the EU-UK WA, as well as other such committees that the Joint Committee may establish depending on needs.[136] Interestingly, the EU-UK WA envisages neither the creation of a joint parliamentary body nor a platform for cooperation between NGOs. This is perplexing bearing in mind that parts of the EU-UK WA are most likely to remain relevant for years following Brexit.

The EU-UK WA also contains carefully crafted provisions governing dispute settlement. They apply as of the end of the transitional period.[137] It is notable that the *modi operandi* in this respect are the only procedural avenues available to the parties. However, as made clear in Art. 168 EU-UK WA, in cases of disputes arising from the application of the EU-UK WA the parties may not have recourse to other dispute settlement methods or outlets. At the initial stages of the dispute settlement, the institution in

[131] See further, *inter alia*, A. Łazowski, *Draft EU-Swiss Institutional Agreement*, cit.

[132] Art. 128, para. 5, EU-UK WA.

[133] For a detailed account see D. Vladimirovich Kochenov, G. Butler, *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, Jean Monnet Working Paper 2/2020, jeanmonnetprogram.org.

[134] Its Rules of Procedure are annexed to EU-UK WA.

[135] Art. 164 EU-UK WA.

[136] *Ibid.*, Art.164, para. 5.

[137] See, *inter alia*, A. Dashwood, *The Withdrawal Agreement*, cit., p. 183 *et seq*.; J. Larik, *Decision-Making and Dispute Settlement*, cit., p. 191 *et seq*.

charge is – not surprisingly – the Joint Committee. Should a solution not be available, an arbitration panel composed of EU and UK representatives may be established by the Joint Committee.[138] It merits attention that as per Art. 174 WA, in the case of disputes touching upon EU law, the arbitration panel has an obligation to proceed with references for a preliminary ruling to the Court of Justice.[139] Thus, it is clear that the claims of some representatives of the Brexit camp that withdrawal from the European Union ends the jurisdiction of the Court are clearly unfounded.

VII.3. Skeleton of the post-Brexit institutional structure envisaged in the Political Declaration

While the institutional framework envisaged in the EU-UE WA serves the application of the latter, any future relations agreements were *ab initio* expected to contain the institutional frameworks in their own right. The basic parameters of how this may look were outlined in the Political Declaration. As a general rule, the Political Declaration talked about "an overarching institutional framework", with tailor-made sectoral arrangements for selected dossiers.[140] The joint institutional outlets were planned to serve the strategic dialogue, as well as the management and supervision of the post-Brexit framework. Not surprisingly, the bilateral Joint Committee was pencilled in to be at the heart of the institutional machinery, including the dispute settlement procedure. As far as the latter was concerned, a role played by the Court of Justice of the European Union was also envisaged, along the lines of the EU-UK WA.[141]

VII.4. EU-UK joint institutions in the post-Brexit framework

A comprehensive institutional set-up was proposed by the European Union in the Draft Agreement. As per Art. INST.1, the leading role was allocated to the Partnership Council. It would be assisted by specialised committees and working groups. Furthermore, Art. INST.5 provided for the Parliamentary Partnership Assembly. As well-established in the recent treaty practice of the EU, a civil society outlet was also on the cards.[142] Not surprisingly, the proposed dispute settlement *modus operandi* largely followed the footsteps of the EU-UK WA, providing for consultations within the Partnership Council and the creation of arbitration tribunals to settle disputes. Building on what was agreed in the Political Dec-

[138] Decision 7/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 22 December 2020 establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement.

[139] Similar *modi operandi* are provided in EU-Ukraine AA, EU-Georgia AA, EU-Moldova AA.

[140] Para. 118 of the Political Declaration.

[141] *Ibid.*, para. 131.

[142] Art. INST. 8 Draft Agreement.

laration, a special role for the Court of Justice of the European Union was also envisaged in Art. INST.16 of the Draft Agreement. As already alluded to, the latter solution became one of the main bones of contention during the actual negotiations. While the Brexiteers, including Prime Minister B. Johnson, were happy to approve the WA and the Political Declaration, they opted for a reverse ferret before the ink dried.

The EU-UK TCA establishes a comprehensive bilateral institutional framework aiming at proper management of the Agreement and its implementation. While it builds on the Commission proposal made in the Draft Agreement, one feature is striking. The entire title on the institutional framework has been moved forward from the closing parts of the Draft Agreement to the opening sections of the EU-UK TCA. In terms of what it precisely covers, it is fitting to start with a feature, which, in fact, does not exist. Unlike the case with some of the EU's leading partners, the Agreement does not envisage regular bilateral summits. It goes without saying that they may be arranged *ad hoc*, yet it still amounts to a political anomaly that the European Union regularly holds annual summits, for instance with Ukraine, but this will not be the case in a similarly organised fashion with its former Member State. Instead, the highest political institution established on the basis of the EU-UK TCA is the Partnership Council, which on the EU side will be co-chaired by a member of the European Commission, while the UK will be represented by a person at ministerial level.[143] There are a number of factors that make the Partnership Council worth looking at closely. As noted earlier, the word "partnership" has disappeared from the title of the Agreement and from its opening provision outlining the aims of relations. Still, the negotiators found it fitting to keep the original name of the institution in question, just as it was proposed by the European Commission in the Draft Agreement. Labels aside, the Partnership Council is likely to play a leading role as a platform for dialogue between the European Union, its Member States, as well as the authorities in London. Meetings may be called either on the initiative of the EU, or of the United Kingdom. It is important to note that its composition is likely to vary, and it will hinge on the agenda. Although Art. INST.1 EU-UK TCA may seem to imply that only the EU and the UK would be represented, Art. 2, para. 1, of Council Decision 2020/2252 on signing and provisional application of EU-UK TCA and EU-UK SPCI makes it clear that each Member State is also allowed to send one representative.[144] The main role played by the EU-UK Partnership Council is to oversee the implementation of the EU-UK TCA. In particular, it has the competence to adopt binding decisions and soft law recommendations. This includes, whenever specified in the EU-UK TCA, revisions of the Agreement itself. It should be noted that the consequence of Art.

[143] Art. INST 1 EU-UK TCA.

[144] A similar *modus operandi* applies to the joint institutions established as per EU-UK WA. For instance, during the second meeting of the EU-UK Joint Committee a total of 15 Member States was represented. See Press statement by Vice-President Maroš Šefčovič following the second meeting of the EU-UK Joint Committee, Brussels 12 June 2020, Statement/20/1055, ec.europa.eu, p. 1.

COMPROV.16 EU-UK TCA is that, unlike in the EU-Turkey framework, the decisions of the Partnership Council may not produce direct effect.[145]

The work of the Partnership Council is supported by EU-UK committees established under Art. INST.2 EU-UK TCA.[146] They, too, are empowered to monitor the application of the EU-UK TCA and they are equipped with the power to make binding decisions. Bearing in mind their highly specialised character, they will meet at the technical level. Furthermore, the creation of bilateral working groups is also envisaged.[147] It is interesting to note that the rules on the creation of an EU-UK parliamentary framework were watered down during the negotiations. Its creation is now an option, not a *fait accompli* as per the original proposal laid down in the Draft Agreement. If created, it will serve as a platform for exchange between the European Parliament and the UK Parliament, and it will have the power to make recommendations to the Partnership Council. Finally, a Civil Society Forum is also on the cards.[148]

For the completeness of the present analysis, it should be added that no separate institutional framework is envisaged under the EU-UK SPCI. However, any matters of relevance for its implementation may be discussed by the Partnership Council.[149] In contrast, the Euratom-UK SPNE envisages the creation of a bilateral joint committee.[150]

As already noted, one of the hotly debated and negotiated matters was the dispute settlement *modi operandi*. While they are discussed in detail in the forthcoming second instalment of the present *Article*, a few phenomena are worth noting. Firstly, the system provided by the EU-UK TCA is very patchy. Apart from the general dispute settlement procedure, several tailor-made rules are provided for various parts of the EU-UK TCA.

[145] *Sevince*, cit. See further, *inter alia*, N. CAMBIEN, *Case C-192/89, S. Z. Sevince v Staatssecretaris van Justitie, ECLI:EU:C:1990:322, delivered 20 September 1990*, in G. BUTLER, R.A. WESSEL (eds), *EU External Relations Law*, cit.

[146] This includes the Trade Partnership Committee; the Trade Specialised Committee on Goods; the Trade Specialised Committee on Customs Cooperation and Rules of Origin; the Trade Specialised Committee on Sanitary and Phytosanitary Measures; the Trade Specialised Committee on Technical Barriers to Trade; the Trade Specialised Committee on Services, Investment and Digital Trade; the Trade Specialised Committee on Intellectual Property; the Trade Specialised Committee on Public Procurement; the Trade Specialised Committee on Regulatory Cooperation; the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development; the Trade Specialised Committee on Administrative Cooperation in VAT and Recovery of Taxes; the Specialised Committee on Energy; the Specialised Committee on Air Transport; the Specialised Committee on Aviation Safety; the Specialised Committee on Road Transport; the Specialised Committee on Social Security Coordination; the Specialised Committee on Fisheries; the Specialised Committee on Law Enforcement and Judicial Cooperation; the Specialised Committee on Participation in Union Programmes.

[147] Art. INST. 3 EU-UK TCA provides for creation of the Working Group on Organic Products; the Working Group on Motor Vehicles and Parts; the Working Group on Medicinal Products; the Working Group on Social Security Coordination.

[148] Art. INST. 8 EU-UK TCA provides that the parties have to facilitate its creation.

[149] Art. INST 1, para. 4e, EU-UK TCA.

[150] Art. 19 Euratom-UK SPNE.

This is the case, for instance, in relation to the politically toxic issue of the level playing field. Secondly, at the insistence of the United Kingdom, the arbitration tribunals will not have the jurisdiction to request preliminary rulings from the Court of Justice of the European Union. Thirdly, the role of the Partnership Council, which had a prominent role in the Draft Agreement, has been somewhat reduced. Fourthly, tailor-made, though very much more modest, rules on dispute settlement are also provided in the EU-UK SPCI[151] and the Euratom-UK SPNE.[152]

VIII. Conclusions

On 1 January 2021, the European Union and the United Kingdom entered a new phase of their troubled relationship. It was never a marriage of love and passion, accompanied by belief in the aims of the European integration project. In many ways, almost five decades of UK membership in the European Communities, and later in the European Union, represented a classic case of a square peg in a round hole. Now, with the transitional period over and the post-Brexit package in place, the formal framework for bilateral relations is ready. From the point of view of the European Union, relations with the United Kingdom, although idiosyncratic, have entered the path of an external relations exercise. Thus, they should be perceived accordingly. Five years from now, when the first formal review of the EU-UK TCA takes place, the story of EU membership is likely to be a distant memory. One thing is certain. Brexit or, in more general terms, withdrawal from the European Union is akin to peeling an onion. There are many layers to uncover and with every one it is impossible not to shed a tear. The first days of life outside the Internal Market are proving to be rather turbulent, overshadowed by the reality of being away from the European Union. A likely scenario is further negotiations in the hope that the dossiers left out during the post-Brexit talks may find their way back into the EU-UK bilateral framework. This theme, alongside an analysis of the substance of the EU-UK TCA and the dispute settlement *modi operandi* will follow in the next instalment of the present *Article*.

[151] Art. 18 EU-UK SPCI.

[152] Art. 21 Euratom-UK SPNE.