

Brexit a Drama, The Endgame -Part II: Trade, Sovereignty and Control

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Abstract

The UK and the EU concluded a Trade and Cooperation Agreement but a few days before the end of the transitional period. The dominant narrative for the UK was sovereignty and control, and the way in which this would be augmented by exit from the EU. This article considers how far this narrative is borne out in the light of the text of the TCA and the accompanying UK implementing legislation.

Keywords: Brexit; sovereignty; control; trade agreements; Parliament; choice.

Introduction

The Brexit saga concluded in a predictably dramatic manner. The Trade and Cooperation Agreement between the EU and the UK was completed at the 11th hour, just days before the end of the transition period.¹ The preceding days bore the hallmarks of discourse that verged between the stage managed and the ad hoc. We were treated to pictures of an earnest Prime Minister looking pensively at the phone on which he was speaking to the Commission President in the attempt to break the negotiating deadlock. There was the late dash to Brussels for the two on two discussion between Johnson/Frost and von der Leyen/Barnier. Outstanding differences were not resolved and news outlets were replete with talk of the likely “no deal”, coupled with comment on the relative sartorial elegance and inelegance of the EU

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¹ 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 [2020] OJ L444/14.

and UK negotiating teams respectively. Deadlines for finalization of the negotiations came and went; the two sides repeatedly pushed the clock back in the attempt to broker a deal; sentiment shifted. There was, we were told, a narrow, but perceptible, path towards a deal. The TCA was duly agreed in time to bring some festive cheer for the UK Prime Minister. He lost no time in declaring in the House of Commons that the brokered deal proved that the UK could have its cake and eat it, reinforcing his metaphor in discussion with the BBC's Laura Kuenssberg by saying that it was the "cakeist" free trade agreement imaginable. We shall return to such subtle political metaphors in due course. Suffice it to say for the present that there is, as economists well know, no such thing as a free insult.

The impulses that drove Brexit were eclectic, but the desire for the repatriation of sovereign control assumed centre-stage in the TCA negotiations. It is important to interrogate the sovereign control metaphor, more especially given its centrality in the discourse leading to the TCA. That is the purpose of this article, where the focus is on the TCA trade provisions, since space precludes consideration of other issues, such as criminal justice. It follows the same format as earlier articles. The Brexit story has been an unfolding drama, the contours of which are elaborated as acts in a play, enlivened by pertinent quotes from Shakespeare. The article follows on from three earlier publications, and picks up from the end of the third contribution, which dealt with the Withdrawal Agreement, and concluded with Act 12.²

Act 13 continues the story and deals with the negotiations that led to the TCA. The object is not to provide a detailed chronology or comprehensive coverage of discourse on each TCA provision, since that would require a lengthy article in itself. The objective is rather to explain the principal impulses that shaped the respective negotiating strategies of the UK and the EU. Act 14 provides a guide to the TCA. This is no easy task, given that it weighed in at a healthy 1246 pages. It is, nonetheless, possible to provide an "architectural overview" of its principal characteristics to inform subsequent discussion.

² P. Craig, "Brexit: A Drama in Six Acts" (2016) 41 E.L.Rev. 447; P. Craig, "Brexit a Drama: The Interregnum" (2017) 36 Y.E.L. 3; P. Craig, "Brexit a Drama: The Endgame – Part I" (2020) 45 E.L.Rev. 163.

This then sets the stage for Acts 15 and 16, which consider in depth the extent to which sovereignty and control have been repatriated through Brexit and the TCA. Act 15 considers this from an institutional perspective, examining how far the TCA delivers on giving sovereignty back to Parliament. This is analysed from three more particular perspectives: Parliamentary oversight of the TCA and trade treaties; the extent to which Parliament has input into decisions made pursuant to the TCA; and the extent to which executive power has been increased as a result of the European Union (Future Relationship) Act 2020.

Act 16 complements this analysis through consideration of sovereignty and control from a substantive perspective, by examining the extent to which the TCA imposes constraints on the UK's freedom of action post-Brexit. It is important to clarify at the outset the connotation accorded to sovereignty and control that inheres in the Brexit agenda. In conceptual terms, the decision to join the EU was an exercise of UK sovereign will, and so too was the acceptance of the rules of the game that pertained thereafter. The UK, while a Member State of the EU, benefited from such rules. They enabled it, for example, to ensure that Spain did not block UK access to its goods markets, or that France did not impede access to its services markets. Viewed from this standpoint, Brexit entailed a loss of control. However, for Brexiteers, the connection between sovereignty and control connoted the capacity to devise UK laws unilaterally as a result of leaving the EU, exemplified by the UK's ability to control its own borders.³ This is not the place for exegesis as to the rival merits of the two conceptions of sovereignty adumbrated above. Act 16 takes the form of immanent interrogation, testing the substantive assumption underlying the Brexiteer vision from five more particular perspectives. Thus, there will be analysis of the extent to which the TCA imposes *de jure* constraints through: its multiple trade provisions; the articles on the level playing field; the requirements concerning "essential provisions"; and the obligation to use international standards. This is then complemented by analysis of the *de facto* constraints on UK control, by pointing to factors that will incline the UK not to deviate markedly from EU regulatory norms.

³ However, the fact that inward EU migration was a net economic benefit for the UK of some magnitude is conveniently forgotten by Brexiteers.

Act 13 – The Negotiations

“This weighty business will not brook delay.” *Henry VI, Part II*

“My business cannot brook this dalliance.” *Comedy of Errors*

This is not the place for detailed exegesis of the TCA negotiations as they played out in relation to the many issues where the final product was honed by discursive trench warfare,⁴ although we shall touch on some salient skirmishes. It is, nonetheless, important to be mindful of the principal factors that drove negotiations on the respective sides.

The UK perspective was, not surprisingly, driven by the Prime Minister’s vision concerning Brexit. Theresa May had taken a fairly consistent position concerning post-Brexit trade relations. It emerged in the Chequers strategy,⁵ which was the culmination of her earlier policy initiatives:⁶ the UK would not be a part of the Customs Union or the Single Market, but it would seek “frictionless trade” between the UK and EU by ensuring regulatory equivalence and by complying with EU rules to ensure a level playing field between the two sides, which meant maintenance of EU rules in relation to matters such as workers’ rights, environmental standards, state aid and the like. Boris Johnson, who was Foreign Secretary, resigned because he felt that this approach would unduly constrain the UK’s regulatory autonomy after having left the EU.⁷

⁴ For detailed chronology of the negotiations, see, F. Fabbrini, “From the Withdrawal Agreement to the Trade & Cooperation Agreement: Reshaping EU-UK Relations”, DCU Brexit Institute, Working Paper No 10-2020.

⁵ The Future Relationship between the United Kingdom and the European Union, Cm 9593 (2018).

⁶ P. Craig, “Brexit a Drama: The Endgame – Part I” (2020) 45 E.L.Rev. 163, 171-172.

⁷ K. Armstrong, “Regulatory Autonomy after EU Membership: Alignment, Divergence and the Discipline of Law” (2020) 45 E.L.Rev. 207.

When Boris Johnson became Prime Minister, he made clear that his stance towards the trade negotiations was markedly different. This became readily apparent from his Greenwich speech,⁸ and from the UK's Negotiation Document.⁹ The latter document affirmed that the UK would no longer be part of the EU Customs Union or Single Market.¹⁰ It stated, moreover, that the envisaged agreement would be between sovereign equals and that the Government would not “negotiate any arrangement in which the UK does not have control of its own laws and political life”. The UK would not therefore “agree to any obligations for our laws to be aligned with the EU's, or for the EU institutions, including the Court of Justice, to have any jurisdiction in the UK”.¹¹

The EU negotiating perspective was shaped by similar considerations, which played out in the opposite direction. The Political Declaration attached to the Withdrawal Agreement attested to the centrality the EU accorded to the level playing field restrictions.¹² The greater the degree of regulatory autonomy sought by the UK, and the less that the UK was willing to commit to a level playing field, then the less would be the UK's access to the Single Market. This was readily apparent from the UKTF documentation, which was the Commission Task Force on relations with the UK.¹³ The UKTF briefings contained a wealth of material indicating Commission thinking about the nature of the future trading relationship. A central theme that appeared repeatedly was the difference between membership of the EU Single Market and a free trade deal, and the difference between membership of the EU Customs Union and a bespoke customs deal crafted for the EU and UK. The degree of difference would be

⁸ Prime Minister Boris Johnson, Greenwich Speech, February 3 2020, <https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020>

⁹ The Future Relationship with the EU, The UK's Approach to Negotiations, CP211, February 2020.

¹⁰ The Future Relationship with the EU, Introduction [2].

¹¹ The Future Relationship with the EU, Introduction [5].

¹² Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2019] OJ C384 I/02.

¹³ https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en?field_publication_type_tid_i18n=All&field_core_tags_tid_i18n=351

affected, inter alia, by the extent to which there was a level playing field between the UK and EU in relation to matters such as environmental, social and labour policy, and the costs flowing therefrom. The same message was evident in the Council Negotiating Directives, which set out the EU's position in the negotiations about future relations.¹⁴

It is, therefore, unsurprising that the central difficulties in the negotiations concerned governance and the level playing field. Fishing rights also proved problematic, although this was largely because it entailed political issues of prestige for both the UK and some EU Member States, not because of its economic significance when viewed in the light of overall GDP.

Act 14 – The Trade and Cooperation Agreement

Scene 1: The TCA – Formal and Substantive Perspectives

“Come; fear you not: good counsellors lack no clients: though you change your place, you need not change your trade.” *Measure for Measure*

“Thou having made me businesses which none without thee can sufficiently manage, must either stay to execute them thyself or take away with thee the very services thou hast done.” *Winter's Tale*

We must begin by understanding the TCA, since this is a condition precedent for drawing any conclusions therefrom. This is no easy task. The TCA in its original printed form runs to 1246 pages, including annexes that exceed 800 pages. It brings new meaning to the phrase the “devil is in the detail”, since, viewed from one perspective, the TCA is detail from start to finish, the only difference being that the detail becomes more detailed the further that one ventures into the terrain. There is, therefore, a real challenge in discerning the principal contours of the TCA, and not being swamped by the detail. Space

¹⁴ Directives for the Negotiation of a New Partnership with the United Kingdom, 5870/20, 25 February 2020.

precludes full explication, and central features of the TCA will be examined more fully in Act 15. What follows is the bare outline of a complex world.

In formal terms, the TCA has seven parts. Part One deals with Common and Institutional Provisions; Part Two with Trade, Transport, Fisheries and other Arrangements; Part Three with Law Enforcement and Judicial Cooperation in Criminal Matters; Part Four with Thematic Cooperation; Part Five with Participation in Union Programmes and Financial Issues; Part Six with Dispute Settlement and Part Seven with Final Provisions. Each Part is divided into Titles, which are further sub-divided into Chapters. This is then followed by circa 800 pages of annexes and protocols. The numbering of the TCA provisions is specific to the particular Part or Title, as exemplified by “Article INST.1: Partnership Council”, “Article COMPROV.3: Good Faith” and “Article GOODS.5: Prohibition of Customs Duties”. An initial reading of the TCA text gives the impression that there are gaps in the numbering at certain points. This is not due to error by the exhausted TCA drafters. The explanation flows from the fact that later Parts of the TCA continue the numbering nomenclature of earlier Parts, where this is in accord with the subject matter. This is exemplified by the numbering in Part Six TCA, which deals with dispute settlement, where the numbering picks up on that from the institutional provisions of Part One, such that the initial provision on dispute settlement reads “Article INST.9: Objective”, with the other provisions labelled sequentially thereafter.

In substantive terms, the TCA does what it says on the tin. It deals with trade and cooperation. This exiguous statement is accurate, but not especially helpful to the reader. We can and must press further, without thereby being lost in the thicket of detail. The way forward is to appreciate that all statutes, treaties and the like have an architecture inherent therein, and this is so notwithstanding that there may be some disagreement about the placing of particular features within the architectural frame. There may, moreover, be more than one way to depict the ordering that constitutes the statute or treaty. The fact that there may be more than one view of the cathedral does not, however, serve to deny the point of the architectural endeavour.

Viewed from this perspective, the TCA has three substantive levels. There are common and institutional provisions central to the TCA; there are general principles that apply to particular subject-matter areas, such as goods and services; there are more detailed rules that apply to each subject-matter

area, combined with exceptions and reservations that further shape the application of such rules. It would be beyond the scope of this article to explicate this architecture for the entirety of the TCA, and as noted above certain features will be considered in greater detail in Act 15. It is nonetheless necessary and possible to furnish guidance concerning the three levels at this stage.

Scene 2: The TCA – Common and Institutional Provisions

“It must be shortly known to him from England

What is the issue of the business there.” *Hamlet*

“Here’s the commission; read it at more leisure.

But wilt thou bear me how I did proceed?”. *Hamlet*

The principal common provisions are as follows. The TCA is regarded as having a unity, such that any other bilateral agreement takes effect as supplementary to it.¹⁵ There is an obligation to discharge the agreement in good faith.¹⁶ The TCA stipulates a number of issues that are regarded as the basis for cooperation.¹⁷ These are adherence to democracy, rule of law and human rights; the fight against climate change; countering proliferation of weapons of mass destruction; countering illicit manufacture and spread of small arms and light weapons and other conventional weapons; effective punishment for the most serious crimes to the international community; combating terrorism; personal data protection; and global cooperation on issues of shared economic, environmental and social interest.¹⁸ Adherence to democracy, rule of law and human rights, the fight against climate change and countering proliferation of weapons of mass destruction are regarded as essential elements of the TCA,¹⁹ with the consequence

¹⁵ Art. COMPROV.2: Supplementing Agreements.

¹⁶ Art. COMPROV.3: Good faith.

¹⁷ These are found in TCA, Part Six, Title II.

¹⁸ Arts COMPROV.4-11.

¹⁹ Art. COMPROV.12: Essential elements.

that breach of these obligations can lead to termination or suspension of the TCA, although this is itself subject to conditions and qualifications.²⁰ The TCA is to be interpreted in accord with Public International Law, including the Vienna Convention, but decisions of national courts interpreting the TCA are not binding on the courts of the other party.²¹ The TCA does not, subject to limited exceptions, have direct effect and thus does not give rise to causes of action that can be used in domestic courts.²² The TCA is subject to review by both parties five years after its entry into force, and then every five years thereafter.²³

The principal institutional architecture is as follows. There is, in effect, a hierarchy of institutions, with the Partnership Council at the apex.²⁴ It is co-chaired by a Member of the Commission and a representative of the UK at ministerial level; it meets at the behest of either party, and in any event at least one per year; it oversees attainment of the TCA as well as any supplementary agreement and facilitates their implementation. The Partnership Council has a wide array of powers. It can adopt decisions where the TCA or a supplementing agreement so provides; make recommendations concerning implementation of the TCA or any supplementing agreement; amend the TCA or a supplementary agreement where so provided; delegate power to a specialized committee; and establish new specialized committees, abolish those already existing or change their remit. It can also, subject to qualification, amend the TCA or any supplementing agreement to correct errors or deficiencies. Decisions made by the Partnership Council or committees are binding on all bodies set up under the TCA or supplementary agreement.²⁵ On the EU side, the Commission is accorded the pre-eminent

²⁰ Art INST.35: Fulfilment of obligations described as essential elements.

²¹ Art. COMPROV.13: Public International law.

²² Art. COMPROV.16: Private rights.

²³ Art. FINPROV.3: Review.

²⁴ Art. INST.1: Partnership Council.

²⁵ Art. INST.4: Decisions and recommendations.

institutional position, and is also given the principal role in exercising the EU's remedial powers under the TCA.²⁶

The TCA then makes provision for a plethora of committees.²⁷ There is a specialized committee for each principal topic regulated by the TCA. Some are termed Trade Specialized Committees, others simply as Specialized Committees. Thus, there is, for example, a Trade Specialized Committee on Goods, and a Specialized Committee on Law Enforcement and Judicial Cooperation. Nineteen such committees are specified. However, the Trade Partnership Committee is first among equals, as attested to by the fact that it assists the Partnership Council in its work, has decisional power where the TCA so provides, or where this has been delegated by the Partnership Council, and supervises the other specialized committees.²⁸ The committees are accorded a similar array of powers to the other institutions. Thus, they can, for example, take decisions where the TCA or a supplementary agreement so provides and are charged with oversight of their respective subject-matter areas.²⁹

There is a third institutional level, which consists of working groups, four of which are specified in the TCA. However, all specialized committees can create, abolish or amend the terms of working groups that fall within their ambit. Working Groups assist such committees in the performance of their tasks, prepare the work of the committees and carry out any task assigned to them by the latter.³⁰

There are further elements in the TCA institutional ordering, some of which are discretionary, others mandatory. An example of the former is the provision whereby the European Parliament and the UK Parliament may establish a Parliamentary Partnership Assembly as a forum to exchange views on the partnership.³¹ The latter is exemplified by the obligation to consult civil society about implementation of the TCA, through the medium of domestic advisory groups and the Civil Society

²⁶ Council Decision (EU) 2020/2252 [2020] OJ L444/2, Arts 2-5.

²⁷ Art. INST.2: Committees.

²⁸ Art. INST.2(2): Committees.

²⁹ Art. INST.2(3)-(4): Committees.

³⁰ Art. INST.3: Working Groups.

³¹ Art. INST.5: Parliamentary cooperation.

Forum.³² These initiatives reflect the concern that trade issues are commonly dealt with by technocrats, to the exclusion of wider societal interests, notwithstanding the fact that the decisions thereby made may be premised, directly or indirectly, on broader social or normative considerations. It remains to be seen how effective such bodies are, but experience with attempts to broaden input to standardization bodies are cause for scepticism in this regard.³³

The discussion thus far has focused on the common provisions and the core institutional mechanisms created by the TCA. It is also important at this juncture to include the institutional mechanisms for dispute settlement. This was a contentious issue, in part because of the UK's desire to exclude the CJEU from playing this role. Dispute settlement is intimately connected with disagreements flowing from the level playing field provisions. This will be examined more fully below. The present analysis sets out the basic tenets of TCA dispute settlement that are in Part 6.

The methods for dispute resolution in the TCA are exclusive, in the sense that the parties commit to using them to the exclusion of other possible methods.³⁴ The initial focus is on consultation, which may occur through the Partnership Council.³⁵ If this does not work, a system of arbitration has been established as the default mechanism for dispute resolution.³⁶ It is, however, subject to significant exceptions,³⁷ where other forms of settlement apply. Thus, in some instances the parties can use traditional trade remedies in the form of tariffs, or suspend parts of the TCA. Where arbitration is

³² Art. INST.6: Participation of civil society; Art. INST.7: Domestic advisory groups; Art. INST.8: Civil Society Forum.

³³ See, e.g., C. Joerges, H. Schepel, and E. Vos, "The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislation Processes: The Case of Standardisation", EUI Working Paper 99/9; European Association for the Coordination of Consumer Representation, ANEC, *Consumer Participation in Standardisation* (ANEC, 2000); H. Schepel, *The Constitution of Private Governance* (Hart, 2005), Ch. 2.

³⁴ Art. INST.11: Exclusivity.

³⁵ Art. INST.13: Consultations.

³⁶ Art. INST.10: Scope.

³⁷ Art. INST.10(2): Scope.

applicable, the TCA contains provisions concerning the membership, procedure and functions of the arbitral tribunal, and its remedial powers.³⁸

Scene 3: The TCA – General Principles for Particular Subject-Matter Areas

“Many a man knows no end of his goods.” *As you Like it*

“Charges she more than me?” *Measure for Measure*

The second level concerns the general principles that govern particular subject-matter areas included in the TCA. This can be exemplified by consideration of Part Two, which deals with Trade, Transport, Fisheries and Other Arrangements. It is in many respects the core of the TCA, so far as trade is concerned, with 12 titles, dealing with matters such as goods, services, intellectual property, digital trade and the like. Space precludes elaboration of the principles applicable to all such titles, but this can be illustrated through the key title dealing with trade in goods.

Title I deals with trade in goods, and contains a number of general principles. There is national treatment on internal taxation and regulation;³⁹ the general rule is that there are to be no tariffs or duties on the flow of goods between the two parties, provided that the goods comply with the requirements concerning rules of origin;⁴⁰ there are to be no export taxes or duties charged on exportation of goods to the other party;⁴¹ any fees and formalities concerned with import and export must be limited to the approximate cost of the services rendered, and shall not represent an indirect protection to domestic goods or taxation of imports or exports for fiscal purposes;⁴² import licensing procedures applicable to trade in goods must be neutral in application, and administered in a fair, equitable, non-discriminatory

³⁸ Arts INST.14-32.

³⁹ Art. GOODS.4: National treatment on internal taxation and regulation.

⁴⁰ Art. GOODS.5: Prohibition of customs duties.

⁴¹ Art. GOODS.6: Export duties, taxes or other charges.

⁴² Art. GOODS.7: Fees and formalities.

and transparent manner;⁴³ and there are provisions concerning trade remedies that draw on the GATT regime.⁴⁴

There is a separate chapter within the title on goods concerned with sanitary and phytosanitary measures, which covers animal and plant life. The general principles are made clear at the outset.⁴⁵ The objectives are to protect human, animal and plant life or health in the UK and EU while facilitating trade between them; to further the implementation of the SPS Agreement; ensure that the parties' sanitary and phytosanitary ("SPS") measures do not create unnecessary barriers to trade; promote greater transparency and understanding on the application of each Party's SPS measures; enhance cooperation in the fight against antimicrobial resistance, promotion of sustainable food systems, protection of animal welfare, and on electronic certification; enhance cooperation in the relevant international organisations to develop international standards, guidelines and recommendations on animal health, food safety and plant health; and promote implementation of international standards, guidelines and recommendations. SPS measures must be based on sound risk assessment; they must not be used to create unjustified barriers to trade; SPS procedures must not be unduly burdensome; they must not be used in an arbitrary or discriminatory manner; and they must be proportionate to the risks identified and not more trade restrictive than necessary to achieve the importing party's appropriate level of protection.⁴⁶

Chapter 4 of Title I deals with technical barriers to trade that can flow from standards, technical regulations and conformity assessment procedures. It too contains general principles. Thus, the objective is to facilitate trade in goods between the parties by preventing, identifying and eliminating unnecessary technical barriers to trade.⁴⁷ This is to be achieved, inter alia, by requiring prior publication

⁴³ Art. GOODS. 13: Import licensing procedures.

⁴⁴ Art. GOODS.17: Trade Remedies.

⁴⁵ Art. SPS.1: Objectives.

⁴⁶ Art. SPS.5: General principles.

⁴⁷ Art. TBT.1: Objective.

of proposed regulations and allowing comment thereon within a period of at least 60 days.⁴⁸ Where one party considers that a draft technical regulation or conformity assessment procedure might have a significant effect on trade between the Parties, it can request technical discussions on the matter,⁴⁹ and there is provision for cooperation in the making of such regulations and conformity assessment procedures.⁵⁰

The TCA may well embody tariff-free trade in goods, but this does not obviate the need for customs formalities. This is the rationale for Chapter Five of Title I, which is concerned with customs and trade facilitation. The general principles are readily apparent at the outset.⁵¹ They are to reinforce customs cooperation and trade facilitation between the parties and to support or maintain, where relevant, appropriate levels of compatibility of their customs legislation and practices with a view to ensuring that relevant legislation and procedures promote trade facilitation, while ensuring effective customs controls and effective enforcement of customs legislation, the proper protection of security and safety of citizens and the respect of prohibitions and restrictions and financial interests of the Parties. The customs' legislation of the respective parties must be non-discriminatory, it must embody effective controls to combat fraud and contribute to legitimate public policy objectives, such as security.

Scene 4: The TCA – Detailed Provisions for Particular Subject-Matter Areas

“At our more consider’d time we’ll read,
Answer and think upon this business.” *Hamlet*

“My commission
Is not to reason of the deed, but do it.” *Pericles*

⁴⁸ Art. TBT.7: Transparency.

⁴⁹ Art. TBT.10: Technical discussions.

⁵⁰ Art. TBT.11: Cooperation.

⁵¹ Art. CUSTMS.1: Objective.

The reader who has travelled thus far might reflect that the journey has not been as daunting as prefigured as the outset. Levels one and two, the common/institutional provisions, and the general principles applicable to particular subject matter areas, can be readily grasped. Level three is, however, akin to walking gradually into the sea, and then being faced with a sudden drop whereby one's feet no longer touch the bottom. This is all the more significant given that the great majority of TCA provisions are concerned with level three, which consists of the detailed provisions that pertain to each title and chapter of the TCA. In-depth consideration would require a lengthy book. The flavour can nonetheless be conveyed through brief consideration of the types of detailed provision that are found in the Title I concerning trade in goods.

Trade in goods is, as we have seen, predicated on the general principle of no tariffs. The application of this preferential tariff regime is, however, premised on rules of origin. The basic idea is simple: goods come within this beneficial regime only if they originate in the UK or EU, since otherwise tariff rules applicable to third countries could be circumvented by producers therein routing their goods to the UK via the EU, and vice-versa. While the basic idea is simple, its more detailed specification is highly complex. Chapter 2 of Title I is devoted to rules of origin. It has 31 dense articles that specify in considerable detail what it means to say that a particular product originates in the UK or the EU. These are complemented by 6 annexes that further elaborate on rules of origin and occupy 70 pages of text. Consider the complexities that can arise when, as is common, a product consists of components made by different manufacturers, some of whom are UK based, others not.⁵² Consider the related, albeit distinct, issues that can arise when a UK producer merely processes a product that originates elsewhere,⁵³ and the relationship between a product and accessories that are produced in different

⁵² Art. ORIG.6: Tolerances.

⁵³ Art. ORIG.7: Insufficient Production.

countries.⁵⁴ The substantive criteria concerning rules of origin must then be complemented with procedural rules for verification,⁵⁵ sanctions and the like.⁵⁶

Similar complexity is evident in relation to technical standards when one moves beyond the level of general principle to more detailed determination. Chapter 4 of Title I has 13 articles, which are complemented by 7 annexes that run to 38 pages. The annexes are principally, albeit not exclusively, concerned with the application of technical barriers to trade, TBT, in relation to product areas, such as cars, chemicals, medicinal products and wine. The TCA provisions relating to TBT impose procedural obligations, such as the need for impact assessment when introducing new standards,⁵⁷ and substantive obligations, such as that concerning use of international standards, unless they are shown to be ineffective or inappropriate.⁵⁸ There are in addition specific conditions concerning conformity assessments, which cover those instances where one of the parties wishes to test that technical standards on goods emanating from the other party have been met.⁵⁹

Act 15 – Trade, Sovereignty and Parliament

There are, as stated earlier, important aspects of the TCA in addition to those adumbrated above, which will be considered in the course of the ensuing analysis. The principal focus of this inquiry is to consider how far the TCA delivers on sovereign control to the UK. The considerations that informed Brexit were eclectic, including the desire to control borders, discontent with the workings of the EU and sovereignty. It was, however, sovereignty that became the principal consideration that informed the UK's negotiating discourse on the TCA. It played out in multiple ways, as exemplified most notably, albeit not exclusively, by the Prime Minister's push back on the idea of a level playing field, which will

⁵⁴ Art. ORIG.11: Accessories, spare parts and tools.

⁵⁵ Art. ORIG.24: Verification.

⁵⁶ Art. ORIG.28: Administrative measures and sanctions.

⁵⁷ Art. TBT.4(2): Technical regulations.

⁵⁸ Art. TBT.4(3)-(6): Technical regulations; Article TBT.5: Standards.

⁵⁹ Art. TBT.6: Conformity assessment.

be considered below. It is, therefore, important to evaluate the implications of the TCA for sovereignty. In doing so it is necessary, for the sake of analytical and normative clarity, to disaggregate two different dimensions of the sovereignty argument: sovereignty and Parliament, and sovereignty and control. The first is examined below, the second in the Act thereafter.

Scene 1: Sovereignty and Parliament – Parliamentary Oversight of Trade Treaties

“Now we call our high court of Parliament;
And let us choose such limbs of noble counsel,
That the great body of our state may go
In equal rank with the best govern’d nation.” *Henry IV, Part II.*

“How now for mitigation of this bill
Urged by the commons?” *Henry V*

The classic conception of sovereignty in the UK is parliamentary. Sovereignty in a legal sense does not reside with the people, as is commonly the case in many other polities. It resides with Parliament. It is Parliament in whom sovereignty vests, as evident in the adjectival placing of Parliament in the classic formulation of “parliamentary sovereignty”. The assumption, explicit and implicit, is that Brexit means an accretion of sovereign power compared to the status quo ante. The thinking is cast in zero-sum terms: the EU had power over certain areas that have now been repatriated to the UK, which has taken back control over its own destiny. There are, as will be seen when we reflect on sovereignty and control below, significant qualifications to this vision. The present focus is, however, on the institutional manifestation of this zero-sum thinking. The assumption is that what is repatriated will accrue to the UK Parliament. This thereby increases Parliament’s sovereignty and enhances democracy by allowing our elected representatives to signal their assent or rejection of the choices placed before them. There are three senses in which this vision must be qualified, the first of which is dealt with here, the second and third in the sections that follows.

The initial issue is the degree to which Parliament exercised sovereign choice over the TCA itself. It did so in formal terms through enactment of the legislation required to bring the TCA into UK law, in the form of the European Union (Future Relationship) Act 2020. There were, however, severe exigencies of time, flowing from the fact that the trade negotiations continued until the 11th hour, with the consequence that MPs had only a couple of days to digest 1246 pages of dense legal text. The reality is probably that most MPs did not read it, the exception being the lawyers within the European Research Group who dissected the text to ensure that it would pass muster with the Praetorian Guard of Brexiteers.

Brigid Fowler from the Hansard Society was scathing about the parliamentary process, or lack thereof.⁶⁰ Parliament was, as she notes, considering implementation of the TCA less than 48 hours before it was to be applied, with the consequence that “no-deal” was the only possible alternative. Parliament agreed to the implementing Bill in a single day, which perforce meant that there was insufficient time for the normal range of select committees to report properly on the treaty before it was applied, or before the Bill was debated. The lack of scrutiny was exacerbated by the fact that the Prime Minister agreed the future relationship treaty for the UK without the House of Commons ever having held a formal debate on the substance of the UK’s negotiating position. Fowler’s conclusion is forceful.⁶¹

“At the point at which the UK is supposed to gain greater opportunity to do things differently, the process around the future relationship treaty in the last week of 2020 will instead display some of the worst extremes of arrangements for Parliament’s role in treaty-making, and for its wider relationship with government, that long pre-date Brexit. One of the crowning moments in a process that is supposed to ensure that ‘Parliament will make our laws’ will only expose the deeply unsatisfactory way in which it does so. And, in the process, the hopelessly inadequate nature of parliamentary engagement on the TCA will increase the risk that this latest treaty with the EU will prove unstable and poorly understood.”

⁶⁰ [Parliament’s role in scrutinising the UK-EU Trade and Cooperation Agreement is a farce | Hansard Society](#), 29/12/2020.

⁶¹ [Parliament’s role in scrutinising the UK-EU Trade and Cooperation Agreement is a farce | Hansard Society](#), 29/12/2020.

This is reflective of broader concerns about the general regime for parliamentary scrutiny of treaties, including the post-Brexit free trade agreements with other countries. The current system can be traced back to the Ponsonby convention, which dates from 1924, whereby it became accepted that the government would lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty would be ratified and published and circulated in the Treaty Series.⁶² The shift from convention to statute came with the Constitutional Reform and Governance Act 2010, CRAG, section 20 of which contains the principal provisions. The minister lays a copy of the treaty before Parliament, and the onus is on Parliament to object to a treaty to prevent ratification. Parliamentary committees play a key role in scrutinising treaties.

The limitations of the existing regime were laid bare in a number of committee reports. The International Trade Select Committee concluded that while negotiation of trade treaties in a post-Brexit world was a matter for the executive pursuant to the prerogative, there should nonetheless be a meaningful role for Parliament, which should have access to relevant documentation. It took the view that the CRAG process was insufficient, that Parliament should have a final yes/no vote on the ratification of international agreements and that there should be a committee charged with the detailed scrutiny required for future trade negotiations.⁶³ These concerns were echoed by the European Union Committee. CRAG was, in its view, poorly designed to facilitate parliamentary scrutiny. Its provisions only came into play when treaties had been signed by the parties, and the timetable was too short for proper consultation. Scrutiny should begin earlier; a clear negotiating mandate should be published in draft for more significant treaties; parliamentary committees should be kept informed of major developments during negotiations; there should be a general presumption in favour of transparency

⁶² A. Lang, “Parliament and International Treaties”, in A. Horne and A. Le Sueur (eds.), *Parliament: Legislation and Accountability* (Hart/Bloomsbury 2016), pp. 241-264; P. Craig, “Engagement and Disengagement with International Institutions: The UK Perspective”, in C. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019), Ch. 22.

⁶³ House of Commons for International Trade, UK Trade Policy Transparency and Scrutiny (Sixth Report 2017-19, HC 1043).

during treaty negotiations; and committees should be able to see the text when it was initialled.⁶⁴ The House of Lords Constitution Committee was of the same mind, and recommended that a new treaty scrutiny select committee should be established.⁶⁵

This was the catalyst for the creation of the House of Lords EU International Agreements Sub-Committee.⁶⁶ It scrutinises all treaties that are laid before Parliament under the terms of CRAG and considers the Government's conduct of negotiations with states and other international partners.⁶⁷ The International Agreements Sub-Committee plays a role in holding the government to account from the negotiation to the conclusion of treaties, and is the first committee to be given explicit responsibility to scrutinise government conduct in international negotiations. It will have an important role to play in a post-Brexit world, scrutinizing new trade agreements made by the UK, although this does not alter the serious limits on scrutiny of the TCA.

Scene 2: Sovereignty and Parliament – Parliamentary Oversight of Decisions made Pursuant to such Treaties

“We will proceed no further in this business.” *Macbeth*

“The time approaches

That will with due decision make us know

What we shall say we have and what we owe”. *Macbeth*

⁶⁴ European Union Committee, Scrutiny of International Agreements: Lessons Learned (42nd Report 2017-19, HL Paper 387).

⁶⁵ Select Committee on the Constitution, Parliamentary Scrutiny of Treaties (20th Report 2017-19, HL Paper 345).

⁶⁶ [EU International Agreements Sub-Committee - Summary - Committees - UK Parliament](#) .

⁶⁷ D. Grazia and A. Horne, “Treaty Scrutiny: A New Challenge for Parliament”, UK in a Changing Europe, 20 April 2020, [Treaty scrutiny: a new challenge for Parliament | UK in a changing Europe \(ukandeu.ac.uk\)](#).

The difficulties in securing parliamentary sovereignty, in terms of meaningful oversight of binding legal instruments is, however, only part of the story. There is the less obvious, but equally important, issue as to the implications of the governance structure of the TCA for parliamentary sovereignty going forward. The zero-sum assumptions of thinking about Brexit are especially pertinent here. It is assumed that power hitherto exercised by the EU will henceforth be exercised by the UK Parliament; and it is assumed that this will perforce be a net increase in democracy, in part because of the democratic infirmities of the EU, and in part because decisions will henceforth be made by our democratic institutions through Parliament. These assumptions are beset by error and paradox in equal measure, with reality being both more complex and nuanced.

The reasoning is erroneous insofar as it assumes that the alternative to the EU means exercise of the same power by the sovereign UK Parliament. In reality, the alternative is that the issues previously regulated by the EU will henceforth be regulated through a series of bilateral treaties, such as the TCA, and that Parliament has scant if any involvement in the decisions that are made. This is readily apparent from the TCA decision-making structure set out above. The operative decisions are made by the Partnership Council, and the plethora of trade and specialized committees established by the TCA. There are broad powers to make binding decisions, recommendations, delegate functions, establish new committees, and the like. This is recognized in the EUFRA 2020, section 37(2) of which gives general domestic legislative authorization for decisions made by TCA committees that modify or supplement the TCA.

TCA provision for parliamentary involvement is cast in discretionary terms. A Parliamentary Partnership Assembly *may* be established from members of the EP and the UK Parliament.⁶⁸ If this occurs it may request information, and must be informed of decisions and recommendations. However, this latter obligation only attaches to decisions of the Partnership Council. It does not cover decisions made by the committees, and it is the frontline committees that will be making most operative decisions.

It might be argued that this limit on parliamentary sovereignty and representative democracy is offset by the TCA provisions for advisory groups/citizen forum that partake of direct democracy. These

⁶⁸ Art. INST.5: Parliamentary cooperation.

latter provisions are to be welcomed. They do not, however, counterbalance the absence of parliamentary power, more especially when the limited nature of the provision for direct consultative input is appreciated. Thus, although such consultation is mandatory, it is for each party, the UK and the EU respectively, to decide on its modality. More importantly, although the obligation to consult relates to all issues covered by TCA and supplementary agreements, there is no duty to consult on the cutting-edge issues, which are the making of binding decisions. This is reflected in the fact that the relevant provisions are framed in terms of meeting at least once a year, which does not reflect commitment to ongoing scrutiny of the detailed workings of the TCA.⁶⁹

Insofar as the UK implementing legislation is concerned, it is not entirely clear from the EUFRA 2020 whether individual decisions made by TCA committees will be transformed into UK statutory instruments. The procedural regime for statutory instruments concerning the TCA will be considered more fully below. Suffice it to say here, that even if such statutory instruments are required in relation to each binding decision of a TCA committee, they will only be subject to the UK negative resolution procedure, with the consequence that parliamentary scrutiny will be very limited.

We turn then to the paradox that underpins the sovereignty reasoning set out above. There is an extensive literature concerning the EU's democratic deficit, which contains a plethora of views.⁷⁰ This is not the place to revisit this topic, and my own views can be found elsewhere.⁷¹ The “Comitology problem” has been regarded as one facet of the democratic deficit. It speaks to the making of secondary norms, usually in the form of rules, through technocratic committee structures. Delegation of power to make regulations has been present since the inception of the EEC. There are many areas of policy, such as agriculture, which require numerous regulations, often passed quickly to cope with changing market

⁶⁹ Art. INST.7: Domestic advisory groups; Art. INST.8: Civil Society Forum.

⁷⁰ See, for an overview, P. Craig, “Integration, Democracy and Legitimacy”, in P. Craig and G. de Burca (eds.), *The Evolution of EU Law* (Oxford University Press, 3rd edn., 2021), Ch. 2.

⁷¹ P. Craig, “The EU, Democracy and Institutional Structure: Past, Present and Future”, in A. Bakardjieva Engelbrekt and X. Groussot (eds.), *The Future of Europe, Political and Legal Integration Beyond Brexit* (Hart, 2019), Ch. 2.

circumstances. If the standard methods of enacting legislation were to be applied the process would grind to a halt, since the relevant acts could not be enacted with sufficient speed. This explains why the Council, through a parent regulation, authorized the Commission to enact more specific regulations in a particular area. The Council was not, however, willing to give the Commission a blank cheque to regulate in this manner. It made the exercise of delegated power subject to institutional constraints, in the form of committees through which Member State interests could be represented. The Council's solution was to condition the exercise of delegated power on the approval of a committee composed of Member State representatives, hence the nomenclature of Comitology.⁷²

There have been perennial concerns about the lack of transparency attendant on such decision-making, and the absence of parliamentary control over the making of such norms, more especially because they would often embody value choices notwithstanding the technocratic nature of the subject matter. The problem was exacerbated by numbers, in the sense that the quantity of EU secondary norms has always exceeded by a large margin the quantity of primary legislative acts, as is the case in pretty much all political systems. The EP repeatedly railed against its exclusion from the Comitology decision-making process. This led in time to beneficial reforms within the process, and then subsequently to Treaty reform, with the Lisbon schema of legislative, delegated and implementing acts, embodied in Articles 289-291 TFEU.⁷³

⁷² C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); M. Andenas and A. Türk (eds), *Delegated Legislation and the Role of Committees in the EC* (Kluwer, 2000); C-F. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005); P. Craig, *EU Administrative Law* (Oxford University Press, 3rd edn, 2018), Ch. 5.

⁷³ See, e.g., T Christiansen and M Dobbels, "Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts" (2013) 19 E.L.J. 42; M. Chamon, "Institutional Balance and the Community Method in the Implementation of EU Legislation Following the Lisbon Treaty" (2016) 53 C.M.L.Rev. 1501; P. Craig, "Delegated and Implementing Acts", in R. Schutze and T. Tridimas (eds.), *Oxford Principles of European Union Law, Volume I: The European Union Legal Order* (Oxford University Press, 2018), Ch. 22.

The paradox is readily apparent. The TCA embodies a technocratic committee structure for the making of operative decisions. The committee structure covers all aspects of the TCA, including topics that are overtly normative, such as regulatory cooperation and the level playing field.⁷⁴ There is scant if any parliamentary involvement in any of this. It was right for concern to be expressed about the EU Comitology regime and it is not perfect by any means. However, the Comitology reforms prior to Lisbon accorded more parliamentary involvement than anything found in the TCA, and that is a fortiori the case for the regime post-Lisbon. The importance of democratic input into trade deals and decisions made pursuant thereto has been emphasized by the Trade Justice Movement.⁷⁵ The reality is that the TCA regime has diminished democratic oversight of the decisions that will be made thereunder compared to the position under EU law.

Scene 3: Sovereignty and Parliament – Increased Executive Power Post-Brexit

“Fear not my government.” *Othello*

“And pause us till these rebels now afoot

Come underneath the yoke of government.” *Henry IV, Part II*

There is a further dimension of sovereignty and Parliament post-Brexit, which is the accretion of executive power entailed by the Brexit process. The Brexit political rhetoric is repeatedly framed in terms of taking back sovereign power and control, but the political and legal reality is that a considerable amount of such power resides with the executive and not Parliament. There was much comment on this in relation to the European Union (Withdrawal) Act 2018, given that the legislation to bring the *acquis communautaire* into UK law was replete with Henry VIII clauses and the like, whereby the executive

⁷⁴ Art. INST.2.1(i),(j): Committees.

⁷⁵ [Democracy and transparency in UK trade... | Trade Justice Movement \(tjm.org.uk\)](https://tjm.org.uk) .

could alter, amend or repeal primary legislation through secondary legislation.⁷⁶ This same theme is evident in relation to the EUFRA 2020. It is particularly important given that the augmentation of executive power charted below is far-reaching. Three such dimensions should be disaggregated in this respect.

First, the EUFRA makes provision for increased executive discretion to make regulations concerning TCA implementation, which is backed up by Henry VIII clauses that enable the regulations to modify, amend or repeal legislation, including primary statute. The principal, albeit not sole, locus of this regulatory power is section 31 EUFRA. The “relevant national authority”⁷⁷ is accorded broad discretion to make regulations as are considered appropriate to implement the TCA and related agreements. Such regulations may make any provision that could be made by an Act of Parliament, including modification of the EUFRA itself.⁷⁸ There are analogous discretionary powers in relation to the coming into force of the TCA,⁷⁹ and its functioning.⁸⁰ The accretion of executive regulatory power is not, however, confined to ministers and devolved authorities. Thus, the EUFRA grants extensive regulatory powers to Customs Commissioners, and the regulations thus made can modify, amend or repeal other legislation.⁸¹

⁷⁶ House of Lords, Select Committee on the Constitution, European Union (Withdrawal) Bill (HL 69, 2018); M. Elliott and S. Tierney, “Political Pragmatism and Constitutional Principle: the European Union (Withdrawal) Act 2018” [2019] P.L. 37; P. Craig, “Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018” (2019) 82 M.L.R. 319.

⁷⁷ This is defined as a minister of the Crown, a devolved authority, or a minister of the Crown working jointly with a devolved authority, EUFRA 2020, s.37(1).

⁷⁸ This is subject to qualifications, which are mirrored on those in the European Union (Withdrawal) Act 2018. Thus, such regulations cannot impose taxes, make retrospective provisions, create criminal offences, amend the Human Rights Act 1998 or the devolution legislation, EUFRA 2020, s. 31(4).

⁷⁹ EUFRA 2020, s. 32.

⁸⁰ EUFRA 2020, s. 33.

⁸¹ EUFRA 2020, s. 21.

Secondly, there are parliamentary procedures for oversight of the proposed regulations, but they provide relatively scant comfort in this respect. The legislative requirements for the making of such regulations are complex. The core provisions that pertain to England are as follows. The affirmative procedure, whereby the draft regulation must be approved by each House of Parliament, is required for regulations made by a minister of the Crown acting alone before the implementation period completion date.⁸² This is also required for draft regulations made after the end of the implementing period if they amend, repeal or revoke primary legislation, or retained direct EU legislation, or where the regulation creates a power to legislate.⁸³ Subject to this, the default position for other draft regulations is that they are subject to the negative resolution procedure, whereby the regulation takes effect, unless it has been annulled pursuant to a resolution of either House of Parliament.⁸⁴ The affirmative resolution procedure accords more power to Parliament, but scrutiny is still very limited, because of government control over procedure and constraints on the powers of the committees that undertake such oversight. The weaker negative resolution procedure is almost never successfully invoked.⁸⁵

Thirdly, the EUFRA, section 29(1), contains a very broad interpretive clause that is problematic in rule of law terms and could further empower the executive. It provides as follows.

“Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

There is nothing untoward about an interpretive obligation whereby domestic law is read so as to comply with international obligations where this is possible. This is indeed a canon of statutory interpretation. However, section 29(1) appears on its face to go further: existing domestic law “has

⁸² EUFRA 2020, Sched. 5, para. 4(1).

⁸³ EUFRA 2020, Sched. 5, paras. 6(1)-(2).

⁸⁴ EUFRA 2020, Sched. 5, para. 6(3). There are circumstances where parliamentary oversight of such regulations can be upgraded to the affirmative procedure, EUFRA 2020, Sched. 5, para. 8.

⁸⁵ P. Craig, *Administrative Law* (Sweet and Maxwell, 9th edn, 2021), Ch. 15.

effect” with such modifications as required for the purposes of implementing the TCA and related agreements, where the agreement is not otherwise implemented and the implementation is necessary to comply with obligations thereunder.⁸⁶ It is, moreover, noteworthy that section 29 is not couched solely or exclusively as an obligation incumbent on courts. It could, on its face, allow a minister to read down an existing statute or common law rule, stating that this is necessary and warranted pursuant to section 29. It may be that the courts would reject this reading and state that section 29 could only be applied by courts. It may be that they would also conclude that even when applied judicially it could only be used to modify existing legislation, or the common law, if this were possible given the nature and wording of the pre-existing rule. The courts might do this, but it does not alter the fact that the text of section 29 is couched in broader terms.

Act 16 – Trade, Sovereignty and Control

Scene 1: Sovereignty and Control – De Jure Constraints: The EU and the TCA

“I extend my hand to him thus, quenching my familiar smile with an austere regard of control.” *Twelfth Night*

“Prepared I was not for such business.” *All’s Well that Ends Well*

It is fitting to begin discussion of trade, sovereignty and control by focusing comparatively on control via the EU as compared with the TCA. It may well be that Brexit has augmented sovereign control in varying respects, such as borders. It is nonetheless important, as stated at the outset, to interrogate more closely the differences between the status quo ante and the status quo. It is particularly important to

⁸⁶ Domestic law means the law of England and Wales, Scotland and Northern Ireland. Existing law connotes an enactment, or any other domestic law that has effect on the relevant day, which means the day when it comes into force, or the time from which it is provisionally applied, EUFRA, s. 29(4). There is an exception for hybrid bills, s. 29(4).

dispel myths and illusions, none more prevalent than the contrast between the EU as the epitome of control, and the FTA as the epitome of freedom. The myth served as a powerful metaphor for Brexiteers. It is doubly wrong, when viewed from the perspective of the EU and from that of the FTA/TCA.

Consider the EU perspective. It is undeniably true that the EU constrained choice. This is, however, the consequence of all forms of collective action.⁸⁷ Individuals and states make choices. They can remain on their own, and maximize their autonomy. They can join clubs, treaties and the like, which perforce limit their sovereign choice in various respects, the quid pro quo being membership benefits, combined with the increased power that flows from other club members. The language of control, as applied to UK membership of the EU, is, moreover, ironic. This is so for a number of reasons: the UK played an active part in shaping the very nature of the EU as it developed over time, as exemplified by its role in single market initiatives, those concerning the AFSJ and financial services; the UK disagreed with relatively little EU legislation, when viewed in terms of volume over time; the UK secured Treaty opt-outs and benefited from differentiated integration in many areas that it did not wish to participate in; and the EU tried to accommodate the special needs of the UK through the Cameron-negotiated Treaty amendments that died the death post the referendum. The idea that the UK was put upon and had to break free from chains that bound it proved terrific in terms of slogan, it just bore scant relation to reality.

Consider now the TCA perspective. The Trade and Cooperation Agreement between the UK and the EU was portrayed by the UK government as the antithesis of the EU. Language can be inherently tendentious, none more so than in the present context, where the language of “free trade” was elided with that of “freedom”, to be contrasted with the “control” associated with the EU. This was a terrific

⁸⁷ J. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962); M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965).

public relations exercise, if the objective was to leave the EU. It nonetheless concealed reality, for the very reasons powerfully articulated by Holger Hestermeyer and Federico Ortino.⁸⁸

“[M]odern trade agreements go far beyond mere tariff arrangements. They encompass a wide variety of legal areas ranging from services regulation to intellectual property and immigration and impose both substantive and procedural requirements. Crucially, as legally binding agreements they all limit a state’s sovereign choices. In this regard while they may differ from EU law in scope and enforceability, they do not in substance: the portrayal of EU law as limiting sovereignty and trade law as merely guaranteeing free trade is a fallacy. Trade agreements much like EU law contain commitments by a state to apply certain rules and refrain from passing others.”

This forceful argument is fully borne out by the text of the resultant TCA. To be sure, it contains, as we have seen, provisions concerning free trade in goods between the UK and the EU. It also contains countless substantive and procedural obligations that limit sovereign choice in a post-Brexit world. Consider any of the titles that comprise Part Two TCA. The provisions concerning services, public procurement, intellectual property, energy, aviation and road transport are shot through with binding legal obligations that constrain what the UK can do in the relevant sector. The same is true in relation to the provisions concerning Fisheries, and those relating to Law Enforcement and Criminal Matters. The same is true once again in the Protocol on Administrative Cooperation and Combating Fraud in areas such as VAT and duties. These obligations are varied, specific and numerous. To echo the words of Hestermeyer and Ortino, they repeatedly contain commitments by a state to apply certain rules and refrain from passing others. This is quite apart from the regulatory obligations that flow from the level playing field considered below.

There is a further dimension to the freedom metaphor as it pertains to the post-Brexit world. This concerns the freedom that we now possess to negotiate FTAs with other countries, with each new signing being heralded as proof positive of the absence of control that pervades the post-Brexit legal order. We should, nonetheless, be wary of the sovereign freedom/absence of control metaphor in this context. It must be qualified because these other FTAs often contain, like the TCA, multiple substantive and procedural obligations that constrain domestic sovereign choice. It must also be qualified because

⁸⁸ H Hestermeyer and F Ortino, “UK Trade Policy Post-Brexit: The Beginning of a Complex Journey”, King’s College Legal Studies Research Paper, 2017-04, 4-5.

the argument assumes, explicitly or implicitly, that FTAs thus concluded between the UK and the other country will be better than that which the UK had hitherto through EU membership. It is axiomatic that each party to a trade agreement will attempt to secure the deal that is optimal from its perspective, and its ability to do so will correlate with its bargaining power. It is not impossible that the UK will secure a better trade deal with another country than that negotiated by the EU. It is, however, empirically unlikely. The evidence thus far is that FTAs secured by the UK have been rolled over from those that pertained when the UK was in the EU.

Scene 2: Sovereignty and Control -- De Jure Constraints: Level Playing Field and Dispute Resolution

“If there be not a conscience to be used in every trade we shall never prosper.” *Pericles*

“It fits us then to be as provident

As fear may teach us out of late examples

Left by the fatal and neglected English

Upon our fields.” *Henry V*

The centrality of the level playing field to TCA negotiation was noted above. The resulting text reflects the hard-fought battles over the parties’ degree of freedom and constraint on these issues. It is evident in the very preamble to the TCA, where two paragraphs are juxtaposed, embodying respectively acceptance of the parties’ autonomy to regulate matters such as the environment, social and consumer protection and the like, which was then balanced by the need to ensure that the TCA was underpinned by a level playing field for open and fair competition. This same duality runs through the substantive TCA text. The provisions are complex and will be explicated in the subsequent analysis. The bottom line should be made clear at this juncture. The relevant provisions impose binding legal constraints on the UK, and in that sense qualify the control over these issues that is repatriated to the UK as a result of Brexit. The constraints might, as will be seen, have been greater, and there are weaknesses, but they are real nonetheless.

Regulatory Cooperation

The TCA provisions concerning the level playing field, which are located in Part Two TCA, Heading One, Title XI, need to be considered against the backdrop of Title X, which is concerned with good regulatory practices and regulatory cooperation. The text lays out a number of general principles in this regard.⁸⁹ It affirms the right of each party to determine its approach to good regulatory practices. The text must, however, be read with care, since the freedom thus accorded to the parties is qualified by the wording “nothing in this Title”. Thus, Article GRP 1.3 provides that “nothing in this Title” shall affect the right of each party to choose its own level of protection for matters such as public health, labour conditions, environment, consumer protection and the like. While Title X applies to regulatory measures issued by the parties under, inter alia, Title XI,⁹⁰ concerning the level playing field, the text of Title XI, embodies, as will be seen below, qualifications to this regulatory autonomy.

The remainder of Title X is concerned with regulatory cooperation. There are provisions to foster regulatory exchange with respect to new regulatory measures;⁹¹ early information on such measures;⁹² and retrospective evaluation of measures already in force.⁹³ There are also obligations that will be of interest more generally to public lawyers. The TCA embodies a notice and comment obligation for drafts of major regulatory measures, coupled with a duty to ensure free electronic means of communication for those proffering comments, and the provision of a summary of the comments

⁸⁹ Art. GRP.1: General principles.

⁹⁰ Art. GRP.3(1): Scope.

⁹¹ Art. GRP.4: Internal coordination.

⁹² Art. GRP.6: Early information on planned regulatory measures.

⁹³ Art. GRP.9: Retrospective evaluation.

received.⁹⁴ There are also provisions concerning impact assessments for major regulatory measures,⁹⁵ and the creation of a regulatory register that identifies regulatory measures and is publicly available online free of charge.⁹⁶ The Trade Specialised Committee on Regulatory Cooperation is charged with ensuring regulatory cooperation between the parties.⁹⁷

*Level Playing Field: General Principles*⁹⁸

The provisions concerning the level playing field follow directly from those on regulatory cooperation. Title XI begins by elaborating the general principles that govern the area.⁹⁹ The parties recognize that trade between them is dependent on a level playing field for open and fair competition. This must “stand the test of time”, and the parties commit to maintain and improve their respective high standards in the areas covered by this Title. This does not, however, constitute harmonization of the parties’ respective standards. They acknowledge that sustainable development encompasses economic development, social development and environmental protection.

The normative balancing act that characterizes Titles X and XI is apparent once again in provisions whereby the parties affirm their respective rights to determine the levels of protection they

⁹⁴ Art. GRP.7: Public consultation.

⁹⁵ Art. GRP.8: Impact assessment, provides that “each party affirms its intention to ensure that” such an impact assessment is carried out. Compare this to the subtly different wording in GRP.7, which provides that each party “shall ensure that its regulatory authority” carries out the notice and comment.

⁹⁶ Art. GRP.10: Regulatory register.

⁹⁷ Art. GRP.13: Trade Specialised Committee on Regulatory Cooperation.

⁹⁸ The TCA provisions on the level playing field do not contain an analogous prefix to all other TCA provisions. There is nothing equivalent to INST, or GRP. There is no explanation for this. I have assumed that it is a mistake, more especially because all later references to such provisions are preceded by the descriptive acronym LPFS. I have therefore, for the sake of clarity, included that acronym in the footnote references to the level playing field provisions.

⁹⁹ Art. LPFS.1(1): Principles and objectives.

deem appropriate in the areas covered by Title XI, provided however that this is consistent with international commitments and those in Title XI itself.¹⁰⁰

The subsequent TCA provisions on the level playing field are divided by subject matter, with different chapters in Title XI dealing with competition, state aids, state owned enterprises, taxation, labour and social standards, environment and climate, other instruments for trade and sustainable development, and horizontal provisions. The provisions are complex and they differ to some extent for each subject matter area. It is, therefore, not possible to provide an in-depth analysis, since this would require a lengthy article in its own right. The TCA approach can, however, be exemplified by consideration of two controversial topics, subsidies/state aids and labour/social standards. The objective is to understand how the level playing field provisions impose legal constraints on the UK and hence qualify the control over these issues in a post-Brexit world.

Level Playing Field: Subsidies

The EU was especially concerned that the UK should not be able to give subsidies to UK industry that would upset the level playing field with industrial counterparts in the EU to which no such financial provision could be given. To this end, the TCA elaborates principles to guide the grant of any such relief.¹⁰¹ Thus, subsidies must pursue a specific public policy objective to remedy an identified market failure, or address an equity rationale, such as social difficulties or distributional concerns; the subsidies must be proportionate and limited to what is necessary to achieve this objective; there must be a causal relationship between the grant of the subsidy and the attainment of the preceding objective; subsidies should be designed to bring about change in the economic behaviour of the beneficiary; and they should not be used to achieve a public policy objective, which could be attained through less distortive means.

¹⁰⁰ Art. LPFS.1.2: Right to regulate, precautionary approach and scientific and technical information.

¹⁰¹ Art. LPFS.3.4: Principles.

Certain types of subsidy are prohibited, while others are subject to conditions,¹⁰² and there are transparency obligations attendant on the grant of subsidies.¹⁰³

These substantive criteria are backed up by institutional obligations. Each party must establish an independent body that must have an “appropriate role in its subsidy control regime”.¹⁰⁴ There must, in addition, be access to courts/tribunals to review subsidy decisions to ensure compliance with the principles and conditions set out above, and hear interested parties that have standing under that party’s law. The parties must ensure that courts/tribunals have power to impose remedies, including suspension, prohibition or requirement of action by the granting authority, the award of damages, and recovery of subsidy from its beneficiary, if and to the extent that they are available under the respective laws on the date of entry into force of the TCA.¹⁰⁵ The subsequent provisions embody a complementary regime of private and public enforcement of subsidy obligations.

Private enforcement takes the form of an action brought by an interested party before the relevant UK or EU court. “Interested party” means any natural or legal person, economic actor or association of economic actors whose interest might be affected by the granting of a subsidy, in particular the beneficiary, economic actors competing with the beneficiary or relevant trade associations of the respective parties.¹⁰⁶ The TCA specifies that each party shall have in place an effective mechanism of recovery in respect of subsidies, without prejudice to other remedies that exist in that party’s law. The court must be able to order recovery where, for example, the subsidy has been granted in breach of the principles set out above, or where the grantor of the subsidy acted outside its powers,¹⁰⁷

¹⁰² Art. LPFS.3.5: Prohibited subsidies and subsidies subject to conditions.

¹⁰³ Art. LPFS.3.7: Transparency.

¹⁰⁴ Art. LPFS.3.9: Independent authority or body and cooperation.

¹⁰⁵ Art. LPFS.3.10(1): Courts and tribunals, subject to qualifications in Art. 3.10(3).

¹⁰⁶ Art. LPFS.3.7(6): Transparency.

¹⁰⁷ Art. LPFS.3.11(2): Recovery.

with exceptions for cases where the subsidy is granted on the “basis of” an act of the UK Parliament, an act of the European Parliament and Council, or an act of the Council.¹⁰⁸

Public enforcement takes the form of remedial measures imposed by the UK or EU in the light of a contested subsidy. Thus, a party may deliver to the other party a written request for information and consultations regarding a subsidy that it considers causes, or there is a serious risk that it will cause, a significant negative effect on trade or investment between the Parties.¹⁰⁹ This is followed by consultation between the parties. It is then open to the requesting party, 60 days after delivery of the initial request for information, to take unilateral remedial measures, where there is evidence that a subsidy of the requested party causes, or there is a serious risk that it will cause, a significant negative effect on trade or investment between the parties.¹¹⁰ This assessment must be based on reliable facts and “not merely on allegation, conjecture or remote possibility”, and the negative effect must “be clearly predictable”.¹¹¹ The remedial measures must be proportionate,¹¹² and there are conditions specified concerning such measures.¹¹³ It is open to the party against whom the remedial measures have been imposed to request the establishment of an arbitration tribunal to contest whether those measures were warranted. However, this does not have a suspensive effect on the remedial measures, and the arbitration tribunal cannot reassess the party’s application of Articles 3.4 (Principles) and 3.5 (prohibited subsidies and subsidies subject to conditions).¹¹⁴

¹⁰⁸ Art. LPFS.3.11(5): Recovery.

¹⁰⁹ Art. LPFS.3.12(1): Remedial measures.

¹¹⁰ Art. LPFS.3.12(3): Remedial measures. There is an obligation to notify the requested party of the possible remedial measures within 45 days, Art. 3.12(4): Remedial measures.

¹¹¹ Art. LPFS.3.12(5): Remedial measures.

¹¹² Art. LPFS.3.12(8), (14): Remedial measures.

¹¹³ Art. INST.34D: Conditions for rebalancing, remedial, compensatory and safeguard measures. See also, Art. INST.34C: Suspension of obligations for the purposes of Art. LPFS.3.12(12), Art. FISH.9(5) and Art. FISH.14(7).

¹¹⁴ Art. LPFS.3.12(9): Remedial measures.

The level playing field provisions on subsidies reflect the balance and compromise that runs through the TCA. The obligations imposed on the UK could have been more stringent, but they nonetheless contain binding legal obligations that structure and limit the extent to which the UK can grant subsidies. The relevant provisions also reveal the interplay between the three remedial mechanisms in the TCA: the TCA arbitration scheme; private actions before UK and EU courts; and unilateral remedial/rebalancing measures.

Level Playing Field: Labour and Social Standards

The level playing field provisions concerning labour and social standards impose legal constraints on the UK, but they are structured differently from those that pertain to subsidies, and provide a model for other provisions, such as those concerning the environment.

Labour and social standards encompass the following:¹¹⁵ fundamental rights at work; occupational health and safety standards; fair working conditions and employment standards; information and consultation rights at company level; and restructuring of undertakings. The EU is concerned about such standards for economic and non-economic reasons. The economic rationale is that reduction could give the UK a competitive advantage over EU competitors; the non-economic rationale is that the EU values the protections that are currently afforded. This explains their inclusion in the provisions on a level playing field.

There was considerable disagreement during the negotiations as to the extent to which the UK should be bound by EU standards post-Brexit. The hard-line EU position was that the UK should have to follow EU rules, or their equivalent, for the future; the hard-line UK position was that it should be free to adopt whatsoever rules it wished since this was a manifestation of post-Brexit sovereignty.

The outcome was something betwixt the two. The central principle is non-regression. Thus, while the parties affirm their respective rights to set policy in these areas, this must be done consistently

¹¹⁵ Art. LPFS.6.1: Definition.

with international commitments, “including those under this Chapter”.¹¹⁶ Non-regression entails an obligation not to weaken or reduce, in a manner affecting trade or investment between the parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.¹¹⁷ While the TCA is therefore predicated on non-regression from existing standards, the parties “shall continue to strive” to increase their respective labour and social levels of protection.¹¹⁸

The TCA contains obligations concerning domestic enforcement of labour and social standards.¹¹⁹ There must be a system for effective domestic enforcement, including labour inspections in accordance with its international commitments relating to working conditions and the protection of workers. Administrative and judicial proceedings must be available that allow public authorities and individuals with standing to bring actions for violation of such standards; and there must be efficacious and dissuasive sanctions.

The TCA also contains mechanisms for dispute settlement, where there is dispute between the UK and EU as to compliance with the protections dealt with by this chapter. The arbitration procedure is not, however, used here. Dispute settlement is conducted through an admixture of consultation, followed by recourse to a panel of experts if consultation does not resolve the matter.¹²⁰ If, however, a party chooses not to comply with the TCA provisions and report of the expert panel, the other party can suspend TCA obligations.¹²¹ There is, in addition, provision for rebalancing of TCA obligations where significant divergences between the parties in relation to labour and social standards can impact on trade

¹¹⁶ Art. LPFS.6.2(1): Non-regression from levels of protection.

¹¹⁷ Art. LPFS.6.2(2): Non-regression from levels of protection, subject to enforcement discretion as identified in Art. LPFS.6.2(3).

¹¹⁸ Art. LPFS.6.2(4): Non-regression from levels of protection.

¹¹⁹ Art. LPFS.6.3: Enforcement.

¹²⁰ Art. LPFS.6.4: Dispute Settlement; Art. LPFS.9.1: Consultation; Art. LPFS.9.2: Panel of Experts.

¹²¹ Art. LPFS.6.4: Dispute Settlement; Art. LPFS.9.3: Panel of Experts for non-regression areas; Art. INST.24: Temporary Remedies.

and investment between the parties that changes the basis on which the parties made the TCA.¹²² There are procedural conditions for such rebalancing, and it must be proportionate.¹²³ However, it is not limited to change in the same area: failure to preserve labour and social standards could lead, for example, to rebalancing measures that affect tariffs.

Level Playing Field: Reflections

There is doubtless room for difference of opinion as to the efficacy of the level playing field provisions, and this will only be apparent with the effluxion of time. There is no doubt that the salient provisions could have been drafted to impose more stringent obligations on the UK. Formally binding strict dynamic equivalence provisions was not, however, acceptable to the UK. This should not detract from the substantive and remedial TCA obligations.

The TCA embodies substantive obligations that limit the UK's control over these areas in a post-Brexit world. This is readily apparent from the provisions on subsidies adumbrated above. It is apparent in the binding legal commitment to non-regression that provides the regulatory core of the chapters on labour/social standards and the environment. It is apparent yet again in the substantive provisions that prevail in other areas, as exemplified by the chapter on state owned enterprises, which contains legal obligations of non-discrimination and a legal duty to ensure that when such enterprises act in a commercial capacity they do so in accord with commercial considerations.¹²⁴

There are, nonetheless, weaknesses in these substantive obligations. Thus, in relation to subsidies, neither party is required to create rights of action, remedies, procedures, or the scope or grounds of review of decisions of their respective public authorities, beyond those existing under its law when the TCA enters into force; nor are they required to broaden review of their respective

¹²² Art. LPFS.9.4: Rebalancing.

¹²³ Art. INST.34D: Conditions for rebalancing, remedial, compensatory and safeguard measures.

¹²⁴ Art. LPFS.4.5: Non-discriminatory treatment and commercial considerations.

legislatures.¹²⁵ More specifically, the duty to recover a subsidy that is not in accord with TCA provisions does not apply when it is granted “on the basis of” a UK Act of Parliament.¹²⁶ This does not render the subsidy lawful, and the other substantive duties continue to apply. However, recovery is central to any regime controlling subsidies, and UK governments may be tempted to give a broad interpretation to the words “on the basis of”, such as to preclude recovery where a minister grants aid pursuant to statutory discretionary power. There are also limitations in the substantive obligations on labour and social standards. The non-regression obligation is premised on showing that departure from the status quo ante will affect “trade and investment,”¹²⁷ and the same condition attaches to non-regression in the environmental context.¹²⁸ This criterion is framed in exclusively economic terms, thereby marginalizing the fact that such standards are commonly introduced because they are felt to be justified in terms of normative principle. It may not be easy to show that changes in such provisions satisfy this criterion, more especially if they are introduced in piecemeal fashion over time, thereby rendering it more difficult to assess their overall impact. It is, inter alia, for these reasons that some concern about the efficacy of these provisions has been expressed by those working on labour and environmental issues.¹²⁹ The empirical foundation for such concern has been reinforced by reports that the UK government is intent on reforms to labour rights, which include removal of the obligations contained in the Working Time Directive.

The TCA also embodies a complex remedial regime, the precise contours of which vary in relation to the different level playing field subject matter areas. It was clear from the outset of the negotiations that the UK would not accept the CJEU for dispute settlement. It would, nonetheless, be

¹²⁵ See also, Art. LPFS.3.10(3): Courts and tribunals.

¹²⁶ Art. LPFS.3.11(5): Recovery.

¹²⁷ Art. LPFS.6.2(2): Non-regression from levels of protection.

¹²⁸ Art. LPFS.7.2(2): Non-regression from levels of protection.

¹²⁹ See, e.g., [TUC: Brexit deal better than nothing, but not by much | TUC](#) ; [Brexit - why free ports are a race to the bottom on workers' rights | TUC](#); [Brexit and environment, risks and opportunities for the UK in an uncertain climate - LifeGate](#) ; [BrexitenvRegressionbyDefault.pdf \(brexitenviroment.co.uk\)](#) .

mistaken to dismiss the resultant system as remedially weak. It has three institutional dimensions. There is binding arbitration, the use of national and EU courts, and unilateral measures. Binding arbitration plays only a limited role in the terrain covered by the level playing field provisions. In relation to a number of these chapters, it is either excluded, or only becomes relevant after unilateral measures have been imposed. There are, however, binding legal provisions concerning national courts, as exemplified by the provisions concerning subsidies and labour/social standards. These are backed up by provisions that enable a party to take unilateral measures in the event of a breach of obligation by the other party.

It should not, moreover, be assumed, implicitly or explicitly, that such unilateral measures lack bite as compared to more formal adjudication through arbitration. To the contrary, the ability to impose unilateral measures is of considerable importance. This can be exemplified by the rules on rebalancing. There is what may be termed a micro and a macro dimension to these provisions.

The micro-dimension applies in relation to a particular instance when a party violates the substantive provisions on labour/social standards, environmental/climate protection, and subsidy control, such that significant divergences in these areas can impact trade or investment between the parties.¹³⁰ Rebalancing must be limited to what is proportionate and must be grounded in reliable evidence. The party invoking rebalancing, nonetheless, has first mover advantage. It is for the other party to contest the proportionality or evidential base for the action. The unilateral action can, moreover, be taken swiftly, thereby increasing the remedial punch. There is an obligation to notify the Partnership Council of the proposed unilateral action, followed by consultation, which must be concluded within 14 days. Where there is no acceptable solution, the unilateral measure can be imposed 5 days later, unless the other party requests arbitration. If the latter occurs the arbitration must be concluded within 30 days, and if it does not the unilateral measures can be imposed within a further 3 days. This time scale compares very favourably with arbitration when used as the principal method of dispute settlement, where a ruling must be given within 130 days after the arbitration panel has been instituted.

¹³⁰ Art. LPFS.9.4: Rebalancing.

There is also a macro-dimension to rebalancing,¹³¹ which is designed to catch the “regulatory recidivist”. It is open to a party to request, after 4 years, a review of the operation of the TCA rules on Trade, and other parts of the TCA. The review is predicated, inter alia, on the assumption that a party has taken rebalancing measures frequently. The objective of the review is to determine whether the TCA delivers an appropriate balance of rights and obligations between the parties, in particular with regard Trade, and whether, as a result, there is a need to modify the TCA. This leads to discourse in the Partnership Council, but a party might still conclude that amendment of the TCA is required, and if this does not occur within 1 year it can lead to termination of Trade provisions or other parts of the TCA.

Scene 3: Sovereignty and Control – De Jure Constraints: “Essential Elements” and “Safeguard Measures”

“We will discharge our duty.” *Cymbeline*

“Yet that is but a crush’d necessity,
Since we have locks to safeguard necessities,
And pretty traps to catch the petty thieves.” *Henry V*

We have already seen from the prior discussion that the TCA embodies provisions that are regarded as the “basis for cooperation”. There is a sub-set of such provisions that are stipulated to be “essential elements”: democracy, rule of law and human rights; the fight against climate change; and countering proliferation of weapons of mass destruction.¹³² There are specific provisions regarding fulfilment of such obligations.¹³³ Thus, if either party considers that there has been a serious and substantial failure by the other party to fulfil these obligations it can terminate or suspend the TCA or any supplementing agreement. The measures taken must be proportionate. Exercise of this power is subject to prior recourse

¹³¹ Art. LPFS.9.4(4)-(10): Rebalancing.

¹³² Art. COMPROV.12: Essential elements.

¹³³ Art. INST.35: Fulfilment of obligations described as essential elements.

to the Partnership Council, but if no solution is forthcoming the complaining party can exercise the power to terminate or suspend within 30 days from the date of the request to the Partnership Council.

There is no doubt that these are binding legal obligations. There is equally no doubt that breach thereof would require something extreme. This is readily apparent from the requirement that the breach of duty must be serious and substantial, which is then further reinforced by the stipulation that “its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions”.¹³⁴

The TCA also makes separate provision for the unilateral adoption of “safeguard measures”, which can be taken where serious economic, societal or environmental difficulties of a sectorial or regional nature that are liable to persist arise.¹³⁵ This is subject to substantive conditions limiting such measures to those that are strictly necessary to remedy the situation, and do least damage to the functioning of the TCA. There are, in addition, procedural obligations concerning prior recourse to the Partnership Council. Moreover, where a safeguard measure creates an imbalance between the rights and obligations, the other Party can take proportionate rebalancing measures as are strictly necessary to remedy the imbalance.

Scene 4: Sovereignty and Control -- De Facto and Jure Constraints: International Standardization

“Advance your standards, and upon them, lords.” *Love’s Labour’s Lost*

“Trust none; For oaths are straws, men’s faiths are wafer-cakes.” *Henry V*

The discussion thus far has focused on the way in which the TCA level playing field provisions qualify the control repatriated to the UK post-Brexit. This is not, however, the only respect in which this is so. UK regulatory autonomy is qualified de facto and de jure by international standardization.

¹³⁴ Art. INST.35(4): Fulfilment of obligations described as essential elements.

¹³⁵ Art. INST.36: Safeguard measures.

The control is qualified de facto because many EU regulatory provisions are grounded in international standards that embody the regulatory norm for the particular area. The US and the EU are the principal players in the setting of such standards, with the consequence that UK influence thereon will diminish in a post-Brexit world.¹³⁶ Tim Büthe and Walter Mattli distinguished four types of global rulemaking.¹³⁷ There is public/governmental nonmarket standard-setting, whereby traditional intergovernmental organizations function as the non-market standard-setting body, as exemplified by bodies such as the Universal Postal Union,¹³⁸ the International Labour Organization,¹³⁹ and the International Monetary Fund.¹⁴⁰ There are, secondly, public standard-setting bodies that operate in market competition, such that the standard is the result of competition between “legislatures or regulatory agencies of individual states and regional or minilateral standard-setting bodies”.¹⁴¹ This is exemplified by the competition between standards established by the US and the EU for matters such as product safety, the environment and the like. Market-based private international standard-setting constitutes the third mode of global rulemaking, the spur often being the slow pace of public initiatives, combined with the lack of technical expertise,¹⁴² as exemplified by the information and technology sector. Non-market private international standard-setting completes the typology, prominent examples being the ISO,¹⁴³ the International Organization for Standardization; the IEC, the International Electrotechnical Commission;¹⁴⁴ and the ISAB,¹⁴⁵ the International Accounting Standards Board. The

¹³⁶ A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2019).

¹³⁷ T. Büthe and W. Mattli, *The New Global Rulers, the Privatization of Regulation in the World Economy* (Princeton: Princeton University Press, 2011).

¹³⁸ <http://www.upu.int/en.html> .

¹³⁹ <http://www.ilo.org/global/lang--en/index.htm>.

¹⁴⁰ <http://www.imf.org/external/index.htm>.

¹⁴¹ Büthe and Mattli, *The New Global Rulers*, p. 23.

¹⁴² Büthe and Mattli, *The New Global Rulers*, p. 26.

¹⁴³ <http://www.iso.org/iso/home.html> .

¹⁴⁴ <http://www.iec.ch/>.

¹⁴⁵ <http://www.iasplus.com/en/resources/ifrsf/iasb-ifs-ic/iasb>.

significance of such standards is thrown into sharp relief by the output of the ISO and IEC, which account for approximately 85 per cent of all international product standards.¹⁴⁶

The UK's control in such areas is qualified de jure because TCA provisions mandate use of such standards. There are many references to international standards in the TCA. The textual reference varies, ranging from encouraging to mandating their use, with variations in between. The present focus is on formal legal obligations, which are especially prevalent in relation to technical barriers to trade, TBT. Thus, for example, Article TBT.4(3) provides that each Party shall use relevant international standards as a basis for its technical regulations, except when it can demonstrate that such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Article TBT.4(4) further specifies that the relevant standards shall be those developed by the ISO, the IEC, the International Telecommunication Union and the Codex Alimentarius Commission. This is backed up by procedural obligations to explain deviation from an international standard, the rationale for doing so and the scientific evidence on which this is based. Legal commitments grounded on international standards are further evident in the TBT Annexes, which specify with exactitude the relevant international standard to be used.¹⁴⁷ The need to comply with the TCA in this respect is, in part, the rationale for amendments to existing UK regulations in the EUFRA 2020,¹⁴⁸ but this is an ongoing commitment that applies to post-Brexit regulatory standards.

Scene 5: Sovereignty and Control – De Facto Constraints: Technical Barriers to Trade and Financial Services

“What services canst thou do?” *King Lear*

“What services wilt thou do me, if I give them?” *Henry VI, Part III*

¹⁴⁶ Bütte and Mattli, *The New Global Rulers*, pp. 29-30.

¹⁴⁷ See, e.g., Annex TBT-1: Motor Vehicles, Arts 4-5; Annex TBT-2: Medicinal Products, Art 4.

¹⁴⁸ EUFRA, Sched. 4.

The preceding discussion has focused largely on de jure constraints on the UK's freedom of action that flow from the TCA in a post-Brexit world. We should also consider more closely de facto limits on such freedom of action. Sovereignty implies choice, the absence of control and freedom of action. There are, however, important topics dealt with by the TCA where the UK's sovereign freedom of choice will be de facto constrained. To put the same point in another way, sovereignty will have been repatriated, but there are powerful considerations as to why the UK would wish to exercise this choice to remain closely aligned with the EU. This can be exemplified by technical barriers to trade and financial services.

We have already seen how TCA commitments to the use of international standards constrain UK choice for different regulatory provisions in the area of technical barriers to trade. There is, however, a more far-reaching practical reason why a rational UK government is unlikely to foster regulatory diversity in this area. The reason is stark and simple. If UK manufacturers sell principally into the EU, then they will commonly have to comply with EU safety standards and the like. If the UK enacts regulatory requirements that are different in kind, this will then increase the regulatory burden on its own firms. They will be legally obliged to comply with UK regulatory requirements. They will be practically bound to comply with EU regulatory requirements if that is the dominant market. The net effect will be an increase in costs for UK manufacturers that are forced to comply with two sets of regulatory criteria. It may be worse if the regulatory criteria are not compatible. Sovereign legal choice will then commonly incline to the view that discretion is the better part of valour, which in this context means not exercising such regulatory authority.

The same may be true in relation to financial services, which are dealt with in the TCA provisions concerning services. These provisions are complex, but the essence of the TCA schema for services in general is as follows. The parties affirm their respective rights to regulate services.¹⁴⁹ The TCA then adopts provisions based on those in the WTO. There are provisions concerning market access, which prevent a party from, inter alia, imposing limits on the number of enterprises from the other party

¹⁴⁹ Art. SERV.1.1.1: Objective and scope.

that can be established in its territory.¹⁵⁰ There are provisions concerning national treatment, which oblige the respective parties to afford treatment that is no less favourable than that accorded to its own enterprises.¹⁵¹ There is a most favoured nation clause, obliging the respective parties to grant to service providers from the other party, treatment that is no less favourable than that given to such providers from a third country.¹⁵² These general provisions, which echo WTO commitments are, however, subject to a raft of exceptions and qualifications, which are specified in the numerous annexes attached to the TCA. To put this in perspective, there are six annexes dealing with such reservations, they occupy 240 dense pages of the TCA and set out, inter alia, sector-specific reservations that deal with different kinds of services, such as professional services, and those related to areas such as construction, education, finance, law, health, tourism and business.

Financial services are part of this overall legal picture, but are subject to a specific prudential regulatory carve out, allowing the respective parties to maintain regulatory provisions protecting depositors, those to whom a fiduciary duty is owed and the like.¹⁵³ They are especially significant for the UK, given the importance of the City of London, which contributes approximately 7% to UK Gross National Product. This is not the place for a detailed exegesis on financial services in a post-Brexit world,¹⁵⁴ nor is it the point of the current inquiry, the focus of which is the reality of UK's sovereign control after exit from the EU, viewed in the light of the TCA.

¹⁵⁰ Art. SERVIN.2.2: Market access; Art. SERVIN.3.2: Market access.

¹⁵¹ Art. SERVIN.2.3: National treatment; Art. SERVIN.3.4: National treatment.

¹⁵² Art. SERVIN.2.4: Most favoured nation treatment; Art. SERVIN.3.5: Most favoured nation treatment.

¹⁵³ Art. SERVIN.5.39: Prudential carve-out.

¹⁵⁴ See, e.g., J. Armour, "Brexit and Financial Services" (2017) 33 (Supp 1) Oxford Journal of Economic Policy S54; N. Moloney, "Brexit, the EU and Its Investment Banker: Rethinking 'Equivalence' for the EU Capital Market", in E. Avgouleas, D. Busch and G. Ferrarini (eds.), *Capital Markets Union in Europe* (Oxford University Press, 2018); K. Alexander, C. Barnard, E. Ferran, A. Lang and N. Moloney, *Brexit and Financial Services. Law and Policy* (Hart, 2018); N. Moloney, "Reflections on the EU Third Country Regime for Capital Markets in the Shadow of Brexit" (2020) 1 E.C.F.R. 35.

Niamh Moloney's assessment of the TCA and financial services is stark, concluding that it is akin to a "No Deal" Brexit so far as financial services are concerned.¹⁵⁵ The UK attempted and failed to secure a bespoke deal for financial services in the trade negotiations. The consequence is that the hitherto frictionless access by the UK to the EU financial market under the single market financial services "passport" has been replaced by two access routes for UK firms: repatriation of operations to the EU; or, the securing of "equivalence" regulatory arrangements, whereby the EU decides unilaterally to accord this status to the UK. Repatriation of some operations to the EU entails significant costs for financial service providers that seek to maintain their principal base in the UK, as well as leading to losses of revenue to the UK. Equivalence lies in the unilateral gift of the EU, and it may not be in a giving mood. What can be unilaterally given can, moreover, be unilaterally taken away. If some form of equivalence is secured it will be dynamic, not static, in the sense that the regulatory alignment will have to continue into the future. Negotiations on these matters occupied the first quarter of 2021, but the outcome is unclear at the time of writing.

There have, at the same time, been indications in the press that the UK Chancellor of the Exchequer will introduce deregulatory measures for the financial service sector. Whether this transpires remains to be seen, as do the nature of any such measures. The salient point for present purposes is that choices have consequences, and this is equally true for those that are cloaked with the mantle of sovereignty. The reality is that UK deregulatory moves will, as Niamh Moloney makes clear, diminish the likelihood of the EU granting regulatory equivalency to the UK. If the UK is serious about its desire to secure this status then it will necessarily impact on the choices that are open to it. You pay your money and you make your choice.

¹⁵⁵ N. Moloney, "Financial Services under the Trade and Cooperation Agreement: Reflections on Unfinished Business for the EU and UK", forthcoming.

Conclusion

Brexit is done so far as the formal mechanisms for leaving the EU are concerned. A Withdrawal Agreement was concluded, and so too the TCA. It would, nonetheless, be wrong to conclude that it is all over. There will be a multitude of issues that require resolution under the TCA and there are likely to be further supplementary agreements. There will be high-profile issues, as attested to by the contestation attendant on the UK's reluctance to accord full diplomatic status to the EU's representative to the UK post-Brexit, even though such status has been granted to 142 such EU delegations around the world. The EU warned the UK to be very careful in this regard, thereby attesting to the aphorism that there is no such thing as a free insult, and the equally important logic of transferred reaction, whereby the payback for the insult becomes evident at some juncture and time not readily predictable in advance.

Brexit has increased the UK's sovereignty and control, when viewed from the perspective considered at the outset, the ability to proceed unilaterally. This is, however, qualified both institutionally and substantively for the reasons set out above. The UK was not able to have its cake and eat it too. There were, to be sure, compromises on both sides concerning matters such as the level playing field and governance. That was to be expected. It should, nonetheless, be remembered that the TCA provisions on services are relatively thin, they are shot through with exceptions and the UK is an 80% service economy. It should also be remembered that all such sovereign choices have consequences, which include the substantial burdens flowing from matters such as increased customs formalities and transaction costs. It remains to be seen whether the break up of the UK becomes another "casualty" of Brexit.