CROSS-BORDER TRADE IN GOODS AND SERVICES: A NEW PAGE IN EU-UK RELATIONSHIPS.

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1. *Foreword*

Brexit, as well-known, is an unprecedented historic process of leaving the structures of the European Union by a Member State. Brexit symbolizes the transformation of political thought and fundamental changes in British society, revealed as a result of the Brexit referendum of 2016. Before it has come to the British departure from the EU, the United Kingdom has played an important role in the European integration process, from Winston Churchill's idea of creating the "United States of Europe", to becoming the first Member State in history to withdraw from the European Union[1].

The aim of this essay is to examine the effects of Brexit on the new trade and economic relations between the European Union and the United Kingdom based on the new Trade and Cooperation Agreement (TCA) concluded on Christmas Eve 2020, in order to better understand which will be the future of the free trade of goods and services between Britain and Continental Europe.

Two opposing strands emerged in the long process of negotiation between the two sides that led to the formalization of the Withdrawal Agreement based on Article 50 TEU and subsequently the crystallization of the new trade relationship between the UK and the EU in the Trade and Cooperation Agreement.

On the one hand, it is highlighted that the concept of national sovereignty was undoubtedly the central theme throughout the Brexit process. "Take back control", the official slogan of Leave supporters aimed to remark a link

between sovereignty and control as if to reiterate how the increased integration that had taken place over the years had hindered economic growth and a return to nationalism was the way forward to prosper in the years to come. Throughout its membership, the UK was one of the Member States that consistently adopted a minimalist approach to reinforce supranationalism and expand EU competencies[2]. From Maastricht onwards, the UK resorted to defend sovereignty, especially regarding central state powers, by promoting differentiated forms of integration. Therefore, the Brexit result points to a fundamental clash between two different models of exercising sovereignty: the EU way and the UK way[3]. The 27 Member States of the Union are no less sovereign than the United Kingdom, but they choose to exercise their sovereignty profoundly differently. The UK's concern with regaining control demonstrates a profound hostility to the pooling and joint exercise of sovereignty that characterizes membership in the EU.

However, on the other side, the nationalist sirens clash with the reality around us of goods and services produced to be traded outside national borders[4]. The UK has become a real hub for business and trade thanks in part to European integration. Despite its particular position as a partner with reserves, also due to the fact that the UK has always remained outside the most integrated areas of Europe, in the history of the European Single Market it has played and continues to play a fundamental role. The UK is now outside structures it helped create and that were fundamental to UK efforts over six decades to avoid being economically disadvantaged in Europe.

There has long been a discussion and a debate, from 2016 to 2020, about the future shape of economic and trade relations following Brexit. The road achieving commonality of purpose has been impassable. As much as a no-deal was avoided, several barriers to trade were introduced in the Trade and Cooperation Agreement signed in late December 2020.

2. *Analysis of the Trade and Cooperation Agreement.*

The rationale for the TCA is clear from the outset: to manage divergence rather than promote convergence[5]. Generally, by removing tariffs and restrictions, free trade agreements seek to promote trade by establishing harmonization mechanisms and encouraging convergent approaches to future regulation. Overturning this logical order, the goal of the TCA depicts a fundamentally different situation: to guide how jurisdictions whose rules are largely harmonized and whose markets are deeply integrated will diverge in the future[6]. It is worth remarking on the highly unusual nature of the Brexit negotiations. As Pascal Lamy observed in January 2020, the EU-UK Trade and Cooperation Agreement (TCA), which is essentially a zero-tariff free trade agreement, resulted from "the first negotiation in history where both parties started off with free trade and discussed what barriers to erect[7]."The Chapter on trade in goods consists of 107 articles out of the 783 articles in the main body of the TCA. The TCA's Chapter on goods covers all traditional trade policy issues: tariff reductions, elimination of quantitative restrictions, trade-related issues such as avoiding technical barriers, fair and equitable domestic regulation, actions against unfair subsidies, measures concerning animal and plant health, trade facilitation in the form of customs and administrative cooperation, and government procurement. The UK and EU have agreed not to apply tariffs or quotas on goods traded between them. The decision of the UK to prioritize sovereignty and regulatory autonomy

over access to the EU market has made leaving the customs union[8] and opting for a free trade area inevitable[9].

The Chapter headings in Title I already indicate that the trade in goods chapter governed by the TCA is essentially different from the free movement of goods regime under EU law. While under EU law, tariffs and quotas on EU-UK trade are prohibited (the so-called zero-zero Agreement), unlike under EU law, regulatory restrictions (i.e., measures of equivalent effect)[10] are not. As a result, there is no free movement of goods between the UK and the EU imported goods must undergo regulatory control at the border. In addition, goods originating in third countries imported into the EU through the UK must comply with the appropriate and complex rules of origin. All goods, including those originating in the UK, must undergo a complex origin examination to verify their origin and apply the proper tariff, a zero tariff for British goods and a special tariff for foreign goods. Given that trade in goods under the TCA shows little, if any, resemblance to the free movement of goods regime under EU law[11], the question then is: how liberal is the EU-UK Agreement? Indeed, it is easy to see that the TCA is heavily modelled on the WTO framework and is not a scaled-down version of the EU's rules on the free movement of goods. From a political perspective, this shift to a "WTO plus" approach is because the UK government felt that the Brexit vote gave the green light to a complete break with EU rules. On the other hand, from a legal perspective, the movement of goods between the UK and the Union is covered by the Title on Trade, which is part of a free trade agreement, not part of the Single Market, with all the consequences that come with this shift.

As far as the legal basis of the agreements in EU law is concerned, the TCA is based on Article 217 of the Treaty on the Functioning of the European Union (TFEU)[12] which concerns association agreements and it is used as the substantive legal basis in conjunction with the procedural legal basis of Article 218, paragraphs 6, 7 and 8 TFEU. Still, on the subject of the conclusion of agreements, it should also be pointed out that the Council[13], accepting the proposal put forward by the European Commission, in line with the case-law of the Court of Justice[14], has considered that they concern matters of exclusive competence of the Union or shared competence of the Union and the Member States and do not affect the competence reserved to the latter[15]. Making, therefore, a clear political choice, it has opted for the conclusion of the Agreement at the level of the Union only, according to the "*EU only*" formula[16], excluding the mixed agreement, which would have required, instead, the ratification of the 27 Member States, subject to the authorization of the national parliaments and, in some systems, also of the regional ones, according to their respective constitutional rules.

3. *0,0 Agreement: zero tariffs, zero quotas, and rules of origin.*

3.1 Zero Tariffs.

The Trade and Cooperation Agreement prohibits customs duties on both imports (Article 21 TCA) and exports (Article 22 TCA) for goods that comply with UK and EU rules of origin (Articles 37-53 and Annex 3). The zero-tariffs treatment on all products under the TCA distinguishes it from other trade agreements – tariffs apply to trade between WTO Members (but cannot exceed "bound" rates, i.e., rates included in members' schedules). At

the same time, the CETA[17] eliminates tariffs on most, but not all, products. However, all is not as it seems. In the case of the EU-UK TCA, only goods that meet the relevant EU or UK rules of origin are eligible for preferential treatment and zero TCA tariffs. Goods that do not meet the rules of origin can still be traded and exchanged but will not qualify for preference under the TCA and may have to pay the standard "Most Favored Nation" (MFN) tariffs that the EU and UK apply to imports under World Trade Organization (WTO) rules. For exports to the EU, this will be the Union's Common External Tariff (CET); for imports into the UK, this will be the UK's global tariff. These rules are set out in the TCA and determine the origin of goods based on the origin of the products or materials (or inputs) used in their production.

The rules of origin provisions in the TCA are outlined in two parts:

- General: these rules apply to all products traded under preference; they include both primary and administrative requirements
- Product-specific rules of origin (PSRs): these are specific rules that establish, for each product according to its Harmonized System (HS) Code, what the requirements are for that product to be considered "originating".

To qualify for a preferential tariff, products must be sufficiently worked or processed within the parties to the Agreement. Non-originating materials are materials imported from a third country, but non-originating may also refer to materials whose origin is unknown or impossible to determine[18]. A product may be considered "originating" in two ways[19]:

- Wholly obtained: a product wholly obtained or produced in the territory of either country[20].
- Sufficiently processed or transformed: this is based on three basic rules, namely the Value-Added Rule, the change of tariff classification and the manufacture from a certain product or through a specific process. According to the mechanism of bilateral cumulation[21], materials originating in the EU, as well as production carried out within the EU on non-originating materials, can be considered as originating in the UK and vice versa.

Once the product has obtained originating status, it is considered 100% originating. This is very useful because if that product is incorporated into the production of another product, its total value is deemed to be originating, the non-originating materials within that product will not be considered[22].

To enjoy the preferential tariffs, the importer will have to claim the preference on his customs declaration and provide a statement showing that the goods comply with the rules of origin. The wording of the declaration is contained in the TCA. It should be included on the sales invoice or similar commercial document, including a description that identifies the goods to enable identification. A claim for preferential tariff treatment shall be based on the following elements:

1. **a)** a statement of origin issued by the exporter in which the product is declared as originating on an originating product.
2. **b)** a confirmation by the importer that the goods are of EU or UK origin, sufficient on the importer's

knowledge of the product's originating status[23].

It can now be said that even though the TCA is based on zero tariffs, for some traders proving origin to get the preferential tariff (zero tariffs) can be so demanding or burdensome that they choose to pay the UK/EU MFN tariff instead[24]. The importer is responsible for the accuracy of the application for preferential tariff treatment and for meeting the requirements of Chapter 2, Part II, Title I of the TCA. The request for preferential tariff treatment is submitted at the time of importation, and the basis for this request must be included in the customs import declaration.

The origin can also be declared based on the importer's "knowledge" of the product's originating status (importer knowledge procedure). This proof, which can be in the form of supporting documents or commercial records, must be based on information providing that the product originates and meets the required conditions. Importer knowledge is a simplification conditioned by the cooperation between seller and buyer in the exchange of information, without which the standard proof of origin included in the invoice must be used. For a claim for preferential tariff treatment, the importer's "knowledge of the originating status of the product" could be a risky but decisive way of proving origin. The customs authority of the importing party may verify whether a product is originating or whether other requirements of the Agreement are met based on risk assessment methods that may include causal selection. Suppose the importer applies for preferential treatment based on his own knowledge. In that case, he should be sure to have information showing that the product is originating and satisfies the required rules of origin under Article ORIG.21, paragraph 1 of the TCA.

3.2 Zero Quotas.

Article 26 of the TCA provides that: "*A Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its Notes and Supplementary Provisions. To that end, Article XI of GATT 1994 and its Notes and Supplementary Provisions are incorporated into and made part of this Agreement, mutatis mutandis*". Article 34 TFEU also prohibits quantitative restriction but goes further in its prohibition on measures having equivalent effect (MEEs) (i.e., non-tariffs barriers). There is a stark divergence between the TCA and EU law, in this respect.

4. *Technical barriers to trade and sanitary and phytosanitary standards.*

While the TCA provides for "zero tariff and zero quotas" trade in goods, it does not eliminate another significant barrier to interstate trade: technical regulations. Technical Barriers to Trade (TBT)[25] and Sanitary and Phytosanitary Standards (SPS)[26] are regulations and standards that manufacturers must meet to market their products in the importing State's market. TBT and SPS requirements pose a particular problem for trade liberalization, as national safety standards can be justified based on protecting the public, animal and plant health but can also be misused as disguised protectionism. Before the UK's withdrawal from the EU, the double burden of complying with divergent technical regulations was avoided either through EU harmonization or through the

principle of mutual recognition, which ensured that producers only had to comply with one set of rules, that of the State of origin. The combination of these two principles means that in most cases, manufacturers are only required to meet one set of technical requirements – EU rules or if the rules are not harmonized, the internal rules of the exporting Member State. The TCA does not provide for mutual recognition, which means that UK producers will have to meet the Technical Barriers to Trade and Sanitary and Phytosanitary Standards requirements of each EU Member State and vice versa.

While the European Union essentially eliminates TBT and SPS barriers to trade enacted by the 27 Member States through regulatory harmonization at the EU level, the new generation of Free Trade Agreements generally follow the WTO approach of allowing States to regulate almost freely. Article 90 of the TCA incorporates Articles 2-9 of the WTO Technical Barriers to Trade Agreement. These TBT provisions allow States to introduce technical regulations and standards, as well as conformity assessment procedures, including packaging, marking and labelling requirements. In other words, the WTO framework, and the TCA, which is modelled on it, follow the principle that national regulation is permitted unless prohibited. This is the opposite of the “prohibited unless permitted” approach under EU law. While the right to regulate is not absolute and must be, among other things, non-discriminatory between two similar products, State parties to FTAs may regulate as long as they do not impose “unnecessary barriers to international trade”. The direct incorporation of key provisions of the TBT Agreement into the TCA means that EU-UK trade will be subject to domestic product requirements. As a result, the principle of non-discrimination will be the primary tool for limiting the adverse effects of technical barriers in EU-UK trade. This means that domestic product requirements are, albeit conditional on equal treatment and necessity, allowed, with the result that exported products will have to meet the technical requirements of each importing market, placing a heavy burden on producers. TBT provisions cover a wide range of national standards. Annex 1 of the TBT Agreement and the TCA, by incorporating Annexes 1-3 of the TBT Agreements in Article 90, defines technical regulations as mandatory documents that establish product characteristics or related processes and methods of production. Defining the limits of the latter category has caused debate among WTO members, particularly in relation to non-product-related PPMs that do not affect the physical characteristics of the product but distinguish how they were produced (e.g., whether members can discriminate between wood products from sustainably managed forests and wood where the production method is unknown, or goods produced using child labor)[27].

The Technical Barriers to Trade Agreement does not apply to sanitary and phytosanitary measures governed by a separate SPS Agreement. The SPS Agreement covers requirements that aim to protect human or animal health from foodborne risks or diseases carried by animals or plants, as well as animals and plants from pests or diseases. As with the TBT regime, the SPS rules of the TCA are modelled on the WTO framework[28]: Article 72 of the TCA reaffirms the rights and obligations of the WTO SPS Agreement.

Under the WTO regime, members are free to choose the level of protection they deem necessary and establish measures to implement the desired level of protection (Article 2). However, national standards must be based on accepted and recommended international organizations’ standards (Article 3). Furthermore, while a scientific risk assessment may justify any stricter protection, Article 5(7) allows countries to adopt SPS measures based on “relevant available information” in cases where relevant scientific evidence is insufficient. Article 74 of the TCA says that the UK and the EU affirm their commitment under Article 5(2) of the SPS Agreement to the need

for scientific evidence in risk assessment. Thus, as with TBT, the starting point is the right of members to regulate (and therefore impose additional barriers to international trade). To reduce the adverse effects of domestic regulation on interstate trade, the WTO framework recommends that Members accept other members' measures as equivalent[40], even if those measures differ from their own, if the exporting member "objectively demonstrates" to the importing state that its measures achieve "an adequate level of sanitary and phytosanitary protection". While the SPS Agreement further encourages states to enter into bilateral agreements to recognize the equivalence of specific SPS measures (Article 4), the EU rejected the UK's request to include the equivalence regime in the TCA. The EU's rejection of equivalence under the TCA is a political choice. The absence of equivalence under the TCA means that agricultural exporters are forced to meet all EU SPS import requirements and vice versa, significantly limiting trade. In addition, as the House of Lords noted, UK negotiators failed to secure an agreement to reduce physical checks to a predetermined low level of the type found in the EU-New Zealand Veterinary Agreement.

The result is that the TCA offers little more in terms of removing technical barriers to trade than the parties would have been subject to WTO rules in the event of a "no-deal" situation. In the absence of the Union's positive harmonization instrument, the result is a zero-tariffs-and-quotas agreement only in theory, because significant barriers to trade remain.

5. *Cross-border trade in services.*

The Agreement provides for a significant level of openness for trade in services and investment, going beyond the baseline provisions of the WTO's General Agreement on Trade in Services (GATS), to which both the EU and the UK are parties, and commensurate with the commitments taken by the EU with other industrialized third countries throughout the world[29]. As in all its free trade agreements, the EU fully maintains the right to regulate its own markets. All the provisions regarding the trade in goods under the TCA apply also to the movement of services between the two Parties[30]. It is important to note that, as required by the WTO's General Agreement on Trade in Services (GATS), the Agreement has substantial sectoral coverage, including professional and business services (e.g. legal, auditing, architectural services), delivery and telecommunication services, computer-related and digital services, financial services, research and development services, most transport services and environmental services. Furthermore, the scope of the Agreement applies to investment in sectors other than services such as manufacturing, agriculture, forestry, fisheries, energy and other primary industries.

The non-discrimination obligations of the Agreement ensure that service suppliers or investors from the EU will be treated no less favourably than UK operators in the UK, and vice-versa. This entitles them to receive more favourable treatment than that granted to service suppliers or investors of third countries without similar provisions in place. Naturally, given that the UK will no longer be in the Single Market, all UK service suppliers and investors must abide by the domestic rules, procedures and authorizations applicable to their activities in the countries where they operate. For UK service suppliers, this means complying with – often varying – host-country rules of each Member State, as they will no longer benefit from the "country-of-origin" principle, mutual recognition or "passporting".

The EU-UK Agreement also includes a forward-looking "most-favoured nation" clause that would allow the EU and the UK to claim any more favourable treatment granted by the UK or the EU respectively in their future agreements on trade in services and investment with other third countries – except in the area of financial services[31]. Regarding the financial services the Agreement commits both parties to maintain their markets open for operators from the other Party seeking to supply services through establishment. The parties also commit to ensuring that internationally agreed standards in the financial services sector are implemented and applied in their territories. Both parties preserve their right to adopt or maintain measures for prudential reasons ('prudential carve-out'), including in order to preserve financial stability and the integrity of financial markets.

6. *Level playing field and disputes concerning subsidies.*

Within the trade chapters of the Trade and Cooperation Agreement, of crucial importance are the provisions that intend to maintain a level playing field[32] between the UK and the EU markets. These provisions ensure that competition is open and fair and that businesses of one party do not gain a competitive advantage and undercut their rivals in another country by avoiding the costs of more stringent regulations. Addressing this issue was justified by the magnitude of trade flows between the two parties (in absolute amounts and as a percentage of their total imports and exports) due to the geographic proximity and complementarity in supply value chains as a result of 46 years of integration of the British economy into the EU Internal Market.

During the negotiations, the EU had made it clear that the provisions ensuring a level playing field between UK and EU companies in the Internal Market were essential to maintain fair competition – especially in the absence of customs duties – since the UK would no longer be bound by the provisions of EU law on subsidies and State aids[33]. On the other hand, UK companies could benefit in the future from more generous support from UK authorities that could artificially bolster their competitiveness. Similarly, the European Union was concerned that British companies might enjoy undue advantages if the UK decided to reduce worker protections and social standards or lower environmental requirements. From the beginning of the negotiations, the UK Government clearly did not intend to remain part of the EU's Internal Market[34]. In the absence of specific provisions (which are not usually found in FTAs in this respect)[35], the only mutual protection against government support for domestic companies that distort competition would be found in the WTO's Agreement on Subsidies and Countervailing Measures. This Agreement governs two distinct but closely related topics. Multilateral disciplines governing the provisions of subsidies and the use of countervailing measures to offset the injury caused by subsidized imports. Given the importance of EU-UK trade, the limited WTO disciplines on subsidies, the complexity of this regime, and the disruption that countervailing duties by the importing country designed to offset foreign subsidies cause to trade relations, it makes reliance on WTO disciplines alone inappropriate. Substantive WTO obligations, such as the ban on export subsidies, would have provided a baseline for EU-UK conduct on subsidies without stricter bilateral rules. Coordination between the specific regime under the TCA and the overlapping WTO rules will be a challenge in the future application of the TCA in this area, despite the specific provisions on the relationship between the TCA and the WTO agreements. Given that the UK was adamantly opposed to being bound by future EU rules and principles in this regard, while the EU would not agree to subject its future domestic regulation to coordination with the UK, now a third country, the only possible solution was to establish in the TCA a tailored stand-alone regulation.

Chapter Two on competition is relatively brief. It is based on recognizing the importance of free and undistorted competition in the trade and investment relationship between the United Kingdom and the European Union. It commits the Parties to maintain competition laws that effectively address the typical anti-competitive business practices listed therein, reflecting existing EU competition law. Each Party agrees to maintain one or more operationally independent authorities responsible for effectively enforcing its competition laws. As outlined in Article 362, such authorities shall endeavour to cooperate and coordinate their enforcement actions regarding the same conduct or transactions, whenever possible and appropriate, by exchanging information and entering into a separate cooperation and coordination agreement. Chapter III of Title IX sets forth the principles to be followed in granting subsidies. First, they must pursue a specific public policy objective to remedy an identified market failure or meet an equity rationale, such as commercial pollution or distributional concern[36].

This Chapter also addresses the definition of relevant subsidies, including tax measures. It addresses subsidies granted to compensate for damage caused by natural disasters or other non-economic exceptional events. A particular focus is on the recovery of unduly granted subsidies, which in paragraph 7 of Article 373 is recognized as "an important remedial tool in any system of subsidy control".

A related issue is that such regulation requires a mutual commitment and readily available enforcement tools for the Party that considers itself harmed by the other Party's breach of commitments. In turn, there must be an independent adjudication of any resulting dispute, to negate a chain of unilateral countermeasures or retaliation. Such a mechanism must also be efficient and quick in order not to prejudice market opening and indirectly encourage or condone breaches. In this respect, the WTO system may be a model, but not in respect of promptness. The general provisions on dispute settlement between the UK and EU laid down in the TCA also represent a model, but only up to a certain point. This is because this mechanism has been devised for disputes and lacks the teeth sought in matters directly affecting traders. As such, an examination of the LPF regulation in the TCA also requires, at the same time, an analysis of the specific dispute settlement provisions adopted in this respect.

The subsidies chapter provides two separate treaty mechanisms for a Party that believes the other Party is not granting or monitoring subsidies following the above conditions. However, the primary assurance of compliance is at the national level in each Party. First, Article 371 commits each party to establish or maintain independent authorities or bodies. Parties "encourage" their respective independent authorities or bodies to cooperate on matters of common interest within their specific function. Furthermore, according to Article 371(2), "*The Parties, in their respective independent authorities or bodies, may agree on a separate framework for cooperation between these independent authorities*". Second, Article 372 commits the Parties to ensure judicial review of grant decisions with the power to impose effective remedies, including suspension, prohibition, or compulsion of action by the granting authority, award of damages, and recovery of a grant from its recipient with a right of action for interested parties.

Article 370 provides for "Consultations on subsidy control" at a bilateral level. If, after receiving the information requested, the requesting Party still considers that the subsidy granted or intended to be granted by the other Party has or could harm trade or investment between the parties, the requesting Party may call for

consultations within the "Trade Specialized Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development". The Committee shall make every attempt to arrive at a mutually satisfactory resolution of the matter within a tight timeframe. In the second place, a unique mechanism, possibly the most relevant novelty in the TCA to ensure LPF, is provided in Article 374 "*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*". The procedure evokes a ping-pong game that may result in a specific, quick arbitral mechanism. If consultation fails to resolve the issue within 60 days, the requesting Party may unilaterally take appropriate remedial measures if there is evidence of a significant adverse effect on trade or risk thereof. The requesting Party must provide to the other Party all relevant information in relation to the remedial measures that it intends to take "to enable the Parties to find a mutually acceptable solution" within fifteen days.

The TCA includes a unique rebalancing mechanism to ensure a level playing field for open and fair competition and sustainable development. This rebalancing mechanism allows each Party to unilaterally reduce market access if it assesses that the other Party's actions in areas such as labour, environmental, and social issues, as well as state aid, result in market-distorting subsidies. A joint EU-UK arbitration panel will then decide whether the imposed tariffs can remain. This mechanism may allow the UK to diverge from EU rules, while allowing the EU to protect the integrity of the Single Market[37].

7. *TCA's main concerns and the dispute settlement mechanisms.*

Over the past 30 years, the European Union has tried to avoid undeveloping bilateral relationships with neighbouring countries. As a result, there have always been joint negotiations in all enlargement processes[38]. The acceptance by the EU of global cooperation to address issues of shared interest on a bilateral basis with the UK is thus a fundamental step for the EU. Moreover, recognizing the bilateral nature of these neighbourhood relations is even explicit in the TCA[39]. Three issues have complicated the negotiations: the United Kingdom's access to the single market and the question of sovereignty, in compliance with the rules on State aid, the dispute resolution mechanism and the role of the Court of Justice, and the regulation of fishing in the North Sea. Whether the delicate compromises reached between the two Parties to the Agreement will lead to a stable and fruitful cooperation is yet to be determined. Doubts are many, starting with the thorny issue on fisheries.

6.1 The Question of Sovereignty.

It is necessary to assess the TCA from the perspective of sovereignty, as this has been the main driver of the UK's strategy in negotiations[40]. Indeed, although the UK's negotiating team presented the choice of sovereignty as a binary option – either you have it (outside the EU), or you do not (inside the EU) – in practice, it is a matter of degree[41]. All treaties between nations, or contracts between people, involve some cession of sovereignty – the freedom to act unilaterally – in exchange for specific commitments by the other Party to do the same, for a common good. The UK had initially sought an Agreement like what the EU had agreed to with Canada. This Agreement with Canada, which entered into force provisionally in 2017, eliminates tariffs on a wide range of goods and services without any obligation to align Canada's regulatory framework with that of the EU. The EU was unwilling to grant the UK a similar deal because it believed that the UK's geographic proximity to the EU would

make it a competitive threat if it was not sufficiently aligned with the EU's regulatory structure[42].

Has the UK been able to regain sovereignty in the TCA? The UK left the EU legislative space in January 2021, but it may not have left the EU's regulatory orbit. Leaving the regulatory space is the next step because the UK is no longer a Member of the Union's regulatory agencies, networks, and information systems. Also, as a third country, the UK will not be part of future regulation or dynamic alignment[43]. Post-withdrawal, the UK does not start with a clean slate because the effects of Union membership on UK policies, laws, and regulations are deeply entrenched.

The battle regarding the interconnected issues of a level playing field and governance was essentially about the UK's sovereign claim to diverge from and not be bound by the Union's rules and jurisdictional reach[44]. This posed a severe dilemma for the Union because it wanted a close economic relationship with the UK on the one hand, but not at the cost of creating an imbalance between EU market access rights and obligations on the other. The UK argued during the negotiations that this was not a problem as both sides were already converging, and the UK did not want to undermine social or environmental standards in any case. However, those arguments did not convince the EU, given the number of times UK representatives talked about the divergence and the advantages it would give the UK in its relations with its neighbours.

By pursuing a "sovereignty first" Brexit, the UK has made it significantly more difficult for its exporting companies to maintain control over their business models, supply chains, and business environment. In 2019, 43% of UK exports went to the EU, and 52% of imports originated from the EU; services accounted for 42% of UK exports to the EU[45]. Prime Minister Johnson's Brexit model has made the trade in goods and services more difficult and expensive. Although the Prime Minister claimed there would be no non-tariff barriers to trade as a result of the TCA, this is demonstrably not true: there are burdensome and time-consuming customs checks, new VAT requirements, rules of origin certification, weak access to services, and other regulatory barriers, particularly in the agri-food sector.

To preserve its freedom to manoeuvre, the UK has not accepted the requirements that accompany simplified controls for goods of plant or animal origin, nor has it accepted conformity assessment. Moreover, the desire to control free movement led the government to recast a Union offer for visa-free travel for specific categories of people. According to Sam Lowe, the British Government explicitly prioritized regaining the ability to make its own laws over "maintaining the economic benefits of EU membership[46]".

6.2 Fisheries.

The fishing regulation in the North Sea proved particularly complex, given the British desire to regain possession of its coastal waters[47]. A further complication stemmed from the fact that most UK fish was sold to EU Member States and most of the fish consumed in the UK came from the EU, thus linking it to the trade flows of the negotiations. On the politically dedicated front of regulating North Sea fisheries, Brussels explained that the EU catch in UK coastal waters will decrease by 25% over five years and a half period (until June 2026). After the transition period is over, the discussion will be annual. Initially, the British government would have wanted a 60% reduction over three years. Clearly, Britain has had to take a significant step backwards.

According to the spokeswoman, on April 30, 2021, the EU Commission received a notification from the UK authorities to grant 41 licenses to European fishing vessels to operate from May 1 in Jersey territorial waters. However, additional conditions had been attached to the licenses. Brussels indicated to London that the fisheries provisions of the post-Brexit Agreement, had not been complied with, as all additional conditions attached to the licenses must be based on clear and scientific reasons and must not be discriminatory. The request for additional conditions also had to be notified in advance to allow time for the parties to assess and respond, reiterating that full compliance with the post-Brexit Agreement for Brussels is essential.

Since the beginning of the year, the UK and France have been at loggerheads over fishing licenses in UK waters post-Brexit; dialogue is moving forward but both countries have threatened drastic action. In addition, some distortions in translations of official statements have further worsened the situation[48]. Under the post-Brexit Trade and Cooperation Agreement, French fishers can continue to fish between six and twelve miles off the British coast and off Guernsey and Jersey until 2026, as long as they have a discretionary license issued by London[78]. France claims that for the area between six and twelve miles off Guernsey and Jersey, only 210 licenses out of 454 requested have been granted; the United Kingdom instead claims to have issued 1700 licenses, approving 98% of the requests received from the European Union. But the number also includes licenses for fishing in the UK's exclusive economic zone, between 12 and 200 miles from the coast, which are issued automatically under the terms of the TCA. The crux of the matter is that the TCA determines[49] which vessels are eligible for a license based on their past activity in the disputed areas but does not provide details on the evidence required.

The situation then quickly escalated, in the last days of October 2021, two English fishing vessels were stopped by the French maritime gendarmerie during controls in the Seine Bay and one was diverted to the port of Le Havre. These usual controls "during the scallop fishing season" are also part of the tightening of controls in the English Channel, as part of licensing discussions with the UK and the European Commission. British Prime Minister Boris Johnson later personally urged French President Emmanuel Macron to tone down the post-Brexit fishing license dispute in the Channel, hoping Paris would withdraw its threats of retaliation considered unjustified by London. Boris Johnson expressed deep concern to Emmanuel Macron over recent threats attributed to some in the French government. And he warned that the detention of two British fishing boats by the Paris authorities in recent days for supposed controls represents a violation of the TCA signed by the United Kingdom with Brussels for the post-Brexit period[50]. As a final step, on December 11, 2021, the UK granted 23 additional licenses to French fishers the day after Paris set a deadline to resolve the conflict over fishing rights post-Brexit. In a note, the European Commission called London's decision "an important step in a long process aimed at the full implementation of the Trade and Cooperation Agreement".

6.3 The dispute settlement mechanisms.

The institutional and dispute settlement arrangements constitute one of the most important and central provisions in the TCA and therefore need to be assessed rigorously. These elements were one of the stumbling blocks that prevented the conclusion of the Agreement early enough so that it could be scrutinized by Parliaments and ratified before the expiry of the transition period on December 31, 2020.

Given the wish of the UK to "take back control" and escape from the jurisdiction of the Court of Justice of the EU[51], it is rather important to consider, first, how disputes can be settled and, second, whether they can be resolved "definitively[52]". The settlement process was a sensitive part of the TCA negotiations and given that the Court of Justice of the EU has ended up with no role in the process[83] (a point the UK was insistent on), it represents a significant concession on the part of the EU.

Regarding the dispute settlement mechanism envisaged by the TCA, two institutional bodies come to the fore. Firstly, a Partnership Council constituted *ad hoc* for the occasion, which comprise the representatives of the EU and UK and is co-chaired by a member of EU Commission and a ministerial level representative of UK government. It is a joint committee and oversees UK and EU implementation, application and interpretation of the TCA. It has several governing tasks within the TCA and supplementing agreements between the parties.

There are two main stages to settling a dispute: first there is a phase of consultation in good faith between the Parties with the aim of reaching a mutually agreed solution. The consultation is deemed concluded within 30 days of the date of the delivery of the written request. Secondly, recourse to arbitration is permissible if the responding party does not reply within the 10-day period; the consultations are not held within the right timeframes; the consultations are concluded without finding a mutually agreed solution or the Parties agree not to have consultations. The establishment of the arbitration tribunal may be requested by the complaining Party in the above-mentioned cases by a written request delivered to the respondent Party. In its request, the complaining Party shall explicitly identify the measure at issue and explain how that measure constitutes a breach of the covered provisions in a manner sufficient to present the legal basis for the complaint clearly. No provision of the TCA establishes a role or a form of involvement for the Partnership Council in the arbitration procedure and in the settlement of such disputes.

The arbitration tribunal decides disputes between the Parties under the TCA framework. Articles 738 through 745 outlined the rules and procedures for consultations, time, limits, provision of relevant information, the establishment of arbitral tribunals, composition, functions and decision-making rules of arbitral tribunals, and the rights and obligations of the "claimant" and "defendant" parties. Arbitration is commenced by a written request which identifies the measures at issue and explains how the measure breached the relevant provisions in a manner sufficient to present the legal basis for the complaint clearly. Tribunals will compose of three independent arbitrators one of whom shall sit as the Chairperson. Under the TCA, the tribunal has up to 160 days to issue a final ruling. It may either be a unanimous or a majority decisions and dissenting opinions will be not available.

Article 746 provides that if an arbitral tribunal finds a breach of obligations under the Agreement, the defendant party shall take the necessary measures to comply immediately and notify the plaintiff of such measures within a reasonable period of time. If the claimant is not satisfied, it may again request the tribunal to decide the matter. Any subsequent disagreement over the application of compliance measures is also subject to a decision by the arbitral tribunal. Arbitral tribunals "*shall make every effort to make rulings and decisions by consensus*", otherwise they shall decide by majority vote[97]. The decisions and awards are binding on the EU and the UK, but not on their domestic courts, which do not have jurisdiction in resolving disputes between the Parties but are free to interpret the relevant provisions of domestic law. In addition, decisions and judgments do not create

rights or obligations for natural or legal persons. This can lead to discrepancies between a court's interpretation of the provisions of the Agreement and a domestic court's assessment of the Agreement's implementation. The Agreement is silent on what can happen if such a discrepancy occurs. The Agreement does not authorize arbitral tribunals to confirm compliance with their judgements and decisions.

The dispute settlement mechanism provided in the TCA is a State-to-State mechanism, so individuals and legal entities have no standing under the TCA. They would have to undertake lobbying efforts in order to persuade the UK or the EU to bring a case[53]. However, the tribunal is entitled to accept amicus curiae submissions from private parties provided they are "*independent from the governments*" of the UK or EU and subject to the specific rules outlined in the TCA[54].

It is crucial to note that the Agreement allows the two Parties to take unilateral measures before initiating dispute resolution proceedings by either Party. The Agreement requires the Party taking such unilateral measures to notify the other Party who may request consultations and possibly establish an arbitral tribunal. In addition, the two Parties may take corrective, rebalancing, or safeguard measures[55] if they consider that the other party has violated the Agreement's provisions or if their interests are damaged. In a sense, they are authorized to "take the law into their own hands[56]".

The ultimate incentive for compliance with the terms of the Agreement is harm for retaliatory action by the other Party. The weakness of this dispute resolution system is precisely that arbitral tribunals do not have the power to impose punitive measures for non-compliance or non-compliance with a previous non-conformity award. This system is inefficient because it conflates one retaliation with another and introduces politics of power into the decision to launch or not to launch a retaliatory action.

These shortcomings in the Agreement's dispute resolution mechanism can be seen more clearly when comparing it to the corresponding EU jurisdictional structure. First, the Agreement does not provide for an institution separate from the Parties to initiate proceedings. Because of the absence of an independent "gatekeeper" to the Agreement, "politics of power" enter the calculus. Whether and how a dispute is resolved may be influenced by totally unrelated issues and concerns. Again, such a possibility erodes the predictability of the rules of the Agreement and its processes and does not effectively end disputes. Second, the Agreement has no provisions that provide penalties for failure to comply with an arbitration decision. The only consequence of non-compliance is the possibility of corrective action, i.e., retaliation by the other Party. In contrast, in the EU, sanctions are financial in nature to not disrupt trade or investment. More importantly, there are modulated according to the size of the Member State, the seriousness and the duration of the infringement. Third, the Agreement is silent about whether arbitral tribunals can be guided by precedent or prior court rulings. This cuts both ways. On the one hand, each tribunal will be free to re-interpret and consider the evolving state of bilateral relations. On the other hand, however, continuity of interpretation over time provides predictability and legal certainty. As the Court of Justice has said, uniform interpretation between the Member States is the "cornerstone of the EU judicial system[57]".

In the case of the EU-UK Agreement, the absence of provisions preventing unilateral action or restrictive

measures in the event of non-compliance with a court decision and the lack of an independent “gatekeeper” led to the conclusion that dispute resolution will ultimately depend not on principles but on the political and commercial considerations of the moment.

8. A new phase in EU-UK relations: conclusive remarks

The Trade and Cooperation Agreement was intended to mark and institutionalize the beginning of a new phase in EU-UK relations after the end of membership. This has been successful at the legal instrument level, with ratification completed in April 2021. But at the political level, the impression is much less positive.

In particular, there does not seem to be a clear trajectory for future relations, either in the implementation of the Withdrawal Agreement and the TCA, or in the use of these or other means to conduct a stable set of interactions. The negotiation process has done nothing to improve relations between the two sides, in fact it has probably made them worse because trust has been undermined and the willingness to make deals has been reduced. The UK’s perceived otherness now had a material basis, coupled with a political imperative of performative divergence.

The Trade and Cooperation Agreement has established a basic platform for EU-UK cooperation in several policy areas, but it is unlikely to represent the end of the Brexit process. Formal approval of the TCA marks the beginning of a “new normality” in EU-UK relations, and the symbolic nature of reaching a formal agreement after the said political turmoil may be the basis for concrete and tangible cooperation beyond trade. It creates a framework in which the EU and the UK are expected to continue adjusting their relationship. This is not only resulting from the obligation to “review the implementation of this Agreement and supplementing agreements and any matters related thereto five years after the entry into force of this Agreement and every five years thereafter[58]”, but also from multiple other provisions scattered throughout the TCA, which foresee continuing negotiations between the parties, for example on annual fishing quotas or regulatory cooperation – or new transitional regimes, for example in data protection.[59]

In this leap into the unknown, the European Union must have enough foresight to reaffirm the principles and values that have allowed Europeans to enjoy a model of coexistence unseen anywhere else on the planet.

Looking at the Brexit scenario from an outside perspective tells us that there will be no winners. We can only try to minimize the losses on both sides – and how heavy they will be – depends only on the parties’ future relations following the negotiations. Predicting the future is an impossible task, as the result of the 2016 Brexit referendum proved. We can only guess at what the future will bring. Arron Bank, one of the main campaigners to leave the Union, reflected on the referendum saying, ‘The Brexit was a war. We won.” The use of militaristic language touches on something true for many leavers. The vote for leave was in many ways a knee-jerk reaction, a rose-tinted desire to regain control, a nostalgia for the glory days of imperial power. An emotional appeal with which those who supported the EU could not compete. The UK was a victim of mismanagement of expectations, and it was right on cue.

After the negotiations are finalized, the reality remains that the EU and the UK will still be neighbors. But the ties

that bind them together will be that little be looser – and the extent to which they synchronize their movements remains to be seen. With few signs in early 2021 that trust-building is a priority, the relationship should be expected to get worse before it gets better[60].

[1] F. Weiss, C. Kaupa, *European Union Internal Market Law*, Cambridge, Cambridge University Press, 2017, pp. 1-17.

[2] U. Draetta, F. Bestagno, A. Santini, *Elementi di diritto dell'Unione europea – Parte Istituzionale e Parte Speciale*, Milano, Giuffrè Francis Lefebvre, 2018.

[3] R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione Europea,* Torino, G. Giappichelli Editore, 2020.

[4] C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford, Oxford University Press, 2019.

[5] The EU-UK Trade Agreement Explained – European Commission DG Trade, January 1, 2021.

[6] It is 50 years since both parties did the opposite thing. When the UK was negotiating whether to join what was then the European Economic Community (EEC), the two parties started off with barriers and then discussed how to remove them. There was much analysis of whether the trade-creation effects of the UK joining the EEC might be overwhelmed by trade diversion, lowering economic welfare in UK.

[7] Pascal Lamy, interviewed by *The Week in Westminster*, BBC, 1 February 2020.

[8] R. Schütze, *European Union Law*, Cambridge, Cambridge University Press, 2018, 2nd Edition, Ch. 13.

[9] In the traditional dichotomy of customs union/free trade area, as defined by Article XXIV of the GATT, only customs unions in which the member states adopt a common external tariff eliminate the necessity of reciprocal border controls on the origin of goods.

[10] The Trade and Cooperation Agreement does not contain a provision such as Article 34 or 35 TFEU which also prohibit measures having equivalent effect to quantitative restrictions on imports and on exports.

[11] C. Barnard, E. Leinarte, *Movement of Goods under the TCA*, April 29, 2021, Global Policy, Vol. 13, Issue No. 2, pp. 106-118.

[12] In the case of free trade agreements, such as the one with Canada, it has been referred to Article 207 TFEU.

[13] See *The Brexit Deal,* Council Legal Service Opinion, in EU Law Analysis, January 27, 2021.

[14] Court's Opinion 2/15 of 16 May 2017, on the draft Free Trade Agreement between the European Union and the Republic of Singapore, OJ C, C/239.

[15] C. Curti Gialdino, Prime Considerazioni sugli Accordi concernenti le future relazioni tra il Regno Unito e l'Unione

Europea, Federalismi.it, Vol. 4/2021, pp. VI-VIII.

[16] D. Kleimann, *The Legitimacy of "EU-only" Preferential Trade Agreements*, in M. Hann, G. Van der Loo, *Law and Practice of the Common Commercial Policy*, Brill, 2020, Studies in EU External Relations, Vol. 18, pp. 461-485.

[17] EU-Canada Comprehensive Economic and Trade Agreement, 21 September 2017.

[18] Questions about rules of origin will be important in several strategic sectors for the UK economy. The automotive industry is particularly exposed, as parts frequently cross and re-cross the English Channel multiple times for processing before being incorporated into finished vehicles. Nearly two-thirds of small and medium-sized businesses in England have suffered additional costs for imported parts since Brexit took effect, according to a survey to be released by the Southwest Manufacturing Advisory Service, in P. Goodmman, S. Castle and E. Nelson, *53 Tons of Rotting Pork and Other Brexit Nightmares*, 12 February 2021, The New York Times.

[19] Trade and Cooperation Agreement, Part Two, Heading One, Title I, Chapter Two, Section 1, Article 39, General Requirements.

[20] Shall be considered as wholly obtained within the meaning of Article 41 TCA: mineral products extracted or taken from the soil or its seabed; plants and products of the vegetable kingdom cultivated or harvested there; live animals born and raised there; products obtained from slaughtered animals born and raised there; products obtained from live animals raised there; products obtained from aquaculture if the aquatic organisms are born or raised from reproductive material; products of sea fishing(…).

[21] Cumulation is an important part of modern Free Trade Agreements. It provides a system that allows originating products from one party to be treated as if they are originating in another when deciding if a good is able to meet a product-specific rule (Article 40 TCA).

[22] Z. Kaehler, *Rules of Origin and Trade and Cooperation Agreement between the UK and the EU*, 10 February 2021, Alliots LLP.

[23] Trade and Cooperation Agreement, Part Two, Heading One, Title I, Chapter Two, Section 2, Article 54: Claim for Preferential Tariff Treatment.

[24] HM Revenue & Customs, *Introduction to Rules of Origin and Claiming Preferential Tariffs (duties)*, 29 December 2020.

[25] Regulated by Part Two, Heading One, Title I, Chapter 4 of the TCA, Articles 88-100.

[26] Regulated by Part Two, Heading One, Title I, Chapter 3 of the TCA, Articles 69-87.

[27] As an example of the EU's right to regulate, to further remove regulatory barriers to trade, the EU has introduced a CE mark required for many products and shows that the product has been assessed to meet EU safety, health, and environmental requirements. By placing the "CE mark", the manufacturer guarantees that the product complies with all EU requirements and has undergone conformity assessment. In addition, CE marking

allows the manufacturer to sell products throughout the EU, whether made in the EU or abroad, without checking compliance separately in each import market. While the UK wants to introduce its own UKCA mark, manufacturers intend to continue using the CE mark (which they can do as long as UK rules don't diverge from EU rules); they should have used the UKCA mark from January 1, 2021. However, the government has made "an important concession to UK businesses by extending the deadline for companies to adopt a new UKCA safety and quality mark for their goods after Brexit".

[28] P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge, Cambridge University Press, 2008.

[29] A. Hill, (2021) "UK's services sector starts to count the real cost of Brexit", *Financial Times*, May 10, 2021.

[30] House of Lords, European Union Committee, Beyond Brexit: trade in services, 23rd Report of Session 2019-2021, HL Paper No. 248.

[31] Sauvé, P. and Roy, M. (ed.) (2016) *Research Handbook on Trade in Services*. Cheltenham: Edward Elgar.

[32] In commercial law, a level playing field is a concept of fairness, not that every player has an equal chance of success, but that everyone plays by the same set of rules.

[33] M. Egan, *Single Market* in E. Jones, A. Menon, S. Weatherill, *The Oxford Handbook of the European Union*, Oxford, Oxford University Press, 2012.

[34] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01, OJ C 384I, 12.11.2019, p. 1-177.

[35] G. Messenger, *EU-UK Relations at the WTO: Towards Constructive Creative Competition*, in J. Santos Vara, R. A. Wessel, P. R. Polak, *The Routledge Handbook on the International Dimension of Brexit*, Routledge, 2020, pp. 135-137.

[36] Trade and Cooperation Agreement, Part Two, Title XI, Chapter 3, Article 366(1.a), Principles.

[37] According to the Trade and Cooperation Agreement, Part Two, Title XI, Chapter 3, Article 370(8), Consultation on Subsidy Control, the measures taken shall be restricted to what is strictly necessary and proportionate to remedy the significant negative effect caused or to address the serious risk of such an effect.

[38] T. C. Hartley, *European Union Law in a Global Context*, Cambridge, Cambridge University Press, 2004.

[39] Article 2 of the TCA states: "Where the Union and the United Kingdom conclude other bilateral agreements between them, such agreements shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements".

[40] See B. Laffan, *Sovereignty: Driving British Divergence*, in F. Fabbrini, *The Law and Politics of Brexit, Vol. III, The Framework of New EU-UK Relations*, Oxford, Oxford University Press, 2021, pp. 241-248. All through its membership, the UK was one of the Member States that persistently adopted a minimalist approach to

strengthening supranationalism and expanding EU competences. From Maastricht onwards, the UK resorted to defending sovereignty especially relating to core state powers by promoting forms of differentiated integration. The UK became the champion of ‘opt-outs’, notably, from Economic and Monetary Union (EMU), Schengen and Justice and Home Affairs, all policy fields that touched on national sovereignty.

[41] This “freedom of manoeuvre” concept of sovereignty is distinct from the legal one relating to the primacy of EU over national law. The latter concept of sovereignty (which only became explicitly treaty enshrined when the Lisbon Treaty was agreed in 2007) became contentious in 2021 when Poland (a member of the EU) argued that under its constitution Polish law remained supreme within Polish borders. This interpretation has been vigorously contested by the EU. This matter ceased to be an issue for the UK when that country departed the EU in 2020, and in this respect, at least, the UK can be said to have fully regained its sovereignty.

[42] P. Koutrakos, J. Snell, *Research Handbook on the Law of the EU’s Internal Market*, Edward Elgar Publishing, 2017.

[43] D. Lawrence, *Dynamic Alignment and Regulatory Cooperation between the UK and the EU after Brexit*, September 2019, Trade and Justice Movement.

[44] . Davis, *Foundations of the Future Economic Partnership*, 20 February 2018, Gov.UK.

[45] M. Ward, Statistics on UK-EU Trade, UK Parliament, House of Commons Library, 3 December 2021, Research Paper No. 7851.

[46] S. Lowe, Brexit Deal Means Freedom but at a Cost, CER Opinion, 27 December 2020.

[47] The UK’s desire to remove itself completely from the Common Fisheries Policy (CFP) clashed with the EU’s insistence on maintaining an access by establishing ad hoc provisions to be contained in the international agreement under negotiations.

[48] J. Henley, *La Guerra del pesce tra Francia e Regno Unito*, The Guardian, UK, 4 novembre 2021.

[49] Trade and Cooperation Agreement, Part Two, Heading Five, Chapter 1, Article 495(1), Definitions.

[50] Emmanuel Macron had said: “When we talk about the issue of fisheries and the issue of the Northern Irish Protocol, it is not a bilateral issue between France and the UK: it is an EU issue and compliance with the agreement, the EU Commission is on our side. I don’t want escalation; I want an agreement. But now the ball is in the British court: if they don’t make obvious moves to respect the agreements, retaliatory measures will be confirmed”. G20 in Rome 30-31 October 2021.

[51] M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998.

[52] P. Nicolaides, *The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?*, Luiss School of European Political Economy, Working Paper 15/2021, p. 7.

[53] J. Snell, *Private Parties and the Free Movement of Goods and Services*, in M. Andenas and W. H. Roth, *Services and Free Movement in EU law,* Oxford, Oxford University Press, 2003.

[54] See Rule 39 under the ANNEX-INST: RULES OF PROCEDURE FOR DISPUTE SETTLEMENT.

[55] Such unilateral measures take several forms: 1) remedial measures that are permitted in relation to harmful subsidies (Article 374) and regulation of road transport (Article 469); 2) rebalancing measures, are permitted in the event of "significant differences" between the parties in labor, social, environmental or climate protection or subsidy control (Article 411); 3) compensatory measures are permitted when fishing rights are withdrawn or suspended (Article 501); 4) safeguard measures are permitted when there are serious economic, social or environmental difficulties of a sectoral or regional nature (Article 773).

[56] P. Nicolaides, *The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?*, Luiss School of European Political Economy, Working Paper 15/2021, p. 11.

[57] Opinion 2/13 of the Court of Justice of 18 December 2014, Accession of the Union to the ECHR, EC:C:2014:2454, paragraph 176, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002.

[58] Trade and Cooperation Agreement, Part Six, Title III, Article 776, Review.

[59] Trade and Cooperation Agreement, Part Six, Title III, Article 782, Interim provision for transmission of personal data to the United Kingdom.

[60] F. Fabbrini, *The Framework of New EU-UK Relations, The Law and Politics of Brexit*, Volume III, Oxford, Oxford University Press, 2021, Chapter 5.