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**Citation:** Koutrakos, P. (2022). Three Narratives on the United Kingdom's Trade Agreements post-Brexit. In: Lazowski, A. & Cygan, A. (Eds.), Research Handbook on Legal Aspects of Brexit. (pp. 403-422). Cheltenham, UK: E Elgar Publishing. ISBN 9781800373136

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# 18. THREE NARRATIVES ON THE UNITED KINGDOM'S TRADE AGREEMENTS POST-BREXIT

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## 1. INTRODUCTION

Trade agreements do not normally set the pulse racing. They come about following a process that takes time and energy, involves painstaking negotiations about technical and complex issues most of which are rarely known to audiences other than the industries affected by them. Brexit, however, has brought trade agreements to the centre of public discourse.<sup>1</sup> This is due to the central role that the UK's international stature took both during the campaign that led to the referendum of 23 June 2016 and the post-referendum period. It has been claimed, in particular, that Brexit would unshackle the UK from the heavy-handed and inflexible trade policy imposed by the European Union and would unleash the potential of the country as an effective and lithe actor so as to allow it to negotiate ambitious trade deals with many third countries.

This chapter will analyse the law and practice of trade agreements in the context of Brexit, covering the period after the 2016 referendum, the transition period as well as the period after 1 January 2021. In doing so, it will identify and explore three main narratives that have dominated the debate in the area: the first was about cakeism, based on the assumption that the pre-Brexit trade agreements would continue to apply to the UK while the latter would enjoy all the benefits of an independent trade actor; the second was about continuity and was based on the claim that all pre-existing trade agreements would be extended; the third is about Global Britain and draws on the understanding that the UK is now unshackled from the heavy-handed and inflexible trade policy imposed by the EU and free to pursue its own trade policy. The analysis unpacks these narratives, reflects on their implications, and shows how the claims they advance have been misguided in law, misleading in fact, and vacuous in substance.

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\* This chapter draws on and develops the chapter by this author entitled 'Managing Brexit: trade agreements binding on the UK pursuant to its EU membership' in Juan Santos Vara and Ramses A Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 75-89

<sup>1</sup> See also Adam Łazowski and Ramses Wessel, 'The External Dimension of Withdrawal from the European Union' [2016] *Revue des affaires européennes* 623; Guillaume Van der Loo, Steven Blockmans, 'The impact of Brexit on the EU's international agreements' (*CEPS Commentary*, 15 July 2016) <<https://www.ceps.eu/ceps-publications/impact-brexit-eus-international-agreements/>> accessed 3 October 2021; Marise Cremona, 'UK Trade Policy' in Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017); Jed Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 *Emory International Law Review* 1051; Ramses Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU its Member States' (2018) 55 *CMLRev* 101; Marise Cremona, 'The Withdrawal Agreement and the EU's International Agreements' (2020) 45 *ELRev* 237. In a more specific context, see Joris Larik, 'The New Transatlantic Trigonometry: Brexit and Europe's Treaty Relations with the United States' (2018) 40 *University of Pennsylvania Journal of International Law* 1 and Billy A. Melo Araujo, 'UK post-Brexit trade agreements and devolution' (2019) 39 *Legal Studies* 555.

## 2. THE NARRATIVE OF NO CAKEISM: THE POST-BREXIT STATUS OF THE EU'S TRADE AGREEMENTS

Trade agreements have been at the centre of the rhetoric about the UK's global role since the start of the referendum campaign. Before, however, the British Government had to decide formally how to approach the trade agreements that were binding on the UK pursuant to its EU membership, the rhetoric from the Brexiter side was characterised by well-known principle of the UK having its cake and eating it. This narrative of cakeism, based on Boris Johnson's quote about Brexit that Britain would have its cake and eat it,<sup>2</sup> dominated the debate about the country's trade policy. It was argued originally that withdrawal from the EU would not change the application of the existing trade agreements as the latter would apply automatically post-Brexit. This position then morphed into the argument that the UK would be in a position to renegotiate all existing agreements or at least to have them all replicated automatically.

Whether ignorant, delusional or disingenuous, this approach to the post-Brexit status of the EU's trade agreements did not cease to be bombastic well after the referendum. In a Conservative Party fringe event in 2017, the then International Trade Secretary, Liam Fox, stated that '[w]e're going to replicate the 40 EU free trade agreements that exist before we leave the European Union so we've got no disruption of trade'.<sup>3</sup> He added, 'I hear people saying 'oh we won't have any [free trade agreements] before we leave'. Well believe me we'll have up to 40 ready for one second after midnight in March 2019'.<sup>4</sup> This was entirely consistent with the tone of the broader narrative about the negotiating power of the UK, as the following infamous statement by the then International Trade Secretary bears out: 'the free trade agreement that we will have to do with the European Union should be one of the easiest in human history'.<sup>5</sup>

This bombastic rhetoric notwithstanding, it became apparent that there was nothing straightforward about the post-Brexit status of trade agreements that had governed the UK's trade relations with non-EU countries. The remaining of this section will explain why this was the case. The pre-Brexit trade relations between the UK and third countries were governed by two types of international agreements. The first consisted of agreements concluded by the EU alone the content of which falls within the EU's exclusive competence.<sup>6</sup> These agreements only bound the UK as a matter of EU law pursuant to Article 216(2) TFEU and, therefore, would not be applicable once EU law ceased to be the law of the land in the UK. The second category covered trade agreements which were mixed,

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<sup>2</sup> Boris Johnson is reported to have said that his policy on 'cake' policy on cake is 'pro having it and pro eating it too'. See 'Can Boris Johnson have his cake and eat it? The Times 9 September 2019. Available at <https://www.thetimes.co.uk/article/can-johnson-have-his-cake-and-eat-it-8wb6hkmfx>

<sup>3</sup> Adam Payne and Adam Bienkov, 'Liam Fox promises to sign 40 free trade deals the 'second after' Brexit' (*Business Insider*, 2 October 2017) <<http://www.businessinsider.com/liam-fox-promises-to-sign-40-free-trade-deals-the-second-after-brexit-2017-10?r=UK>> accessed 3 October 2021.

<sup>4</sup> Ibid.

<sup>5</sup> He said that in a radio interview in July 2017, as reported in Matthew Weaver, 'Liam Fox: EU trade deal after Brexit should be 'easiest in history' to get' (*The Guardian*, 20 July 2017) <[http://www.theguardian.com/politics/2017/jul/20/liam-fox-uk-eu-trade-deal-after-brexit-easiest-human-history?CMP=aff\\_1432&utm\\_content=ESI+Media+-+The+Independent&awc=5795\\_1551746545\\_44ca227b447fddf3cc411cf20b5cb513](http://www.theguardian.com/politics/2017/jul/20/liam-fox-uk-eu-trade-deal-after-brexit-easiest-human-history?CMP=aff_1432&utm_content=ESI+Media+-+The+Independent&awc=5795_1551746545_44ca227b447fddf3cc411cf20b5cb513)> accessed 3 October 2021.

<sup>6</sup> See, for instance, Agreement between the European Community and the Republic of South Africa on trade in wine [2002] OJ L28/4.

concluded by both the EU and the UK (along with the other Member States) and a third country, given that parts of them fall within the scope of national competence.<sup>7</sup> Such trade agreements are, in essence, of a bilateral character. They are concluded ‘of the one part’ by the EU and its Member States and, ‘of the other part’, by the third country and refer to the UK in its status as a Member State of the EU. The Free Trade Agreement with South Korea, for instance, defines the parties to it in Article 1(2) as ‘the European Union or the Member States or the European Union and the Member States’. This is further borne out by the wording of these agreements, as reference is made to Member States as ‘Contracting Parties to the Treaty on the European Union and the Treaty on the Functioning of the European Union, hereinafter referred to as the "Member States of the European Union"’. This is in contrast to other agreements with groups of countries where each country is referred to separately. For instance, the Association Agreement between the EU and Central American States defines its parties as ‘the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, referred to as the "Republics of the Central American Party”’.<sup>8</sup>

It follows from the above that, once the UK left the EU and lost its status as a Member State, and in the absence of an agreed legal formula about extending the application of such agreements, it had to cease to be a party to them.<sup>9</sup> This conclusion is also borne out by a clause in a large number of mixed agreements on their territorial application. Article 360 of the EU-Central America Association Agreement, for instance, makes it clear that it applies only, as far as the EU is concerned, ‘to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties’. In any case, the requirement that such mixed agreements be renegotiated would follow from their context. These are package deals, and part of the package is the status of the UK as a Member State of the EU. Third contracting States could have well argued that the withdrawal of the UK amounted to a fundamental change of circumstances pursuant to Article 62 of the Vienna Convention on the Law of Treaties.

Things were different when it came to the UK’s participation in mixed agreements of a multilateral nature in the context of which continuity was easier to achieve. A case in point are multilateral environmental agreements (MEAs)<sup>10</sup> which, according to the British Government, were to continue to bind the UK after its withdrawal from the EU.<sup>11</sup> One would

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<sup>7</sup> See, for instance, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6. On mixed agreements, see Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World* (Hart Publishing 2010).

<sup>8</sup> Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other [2012] OJ L 346/3, Article 352.

<sup>9</sup> Cremona suggested that the UK needed to withdraw formally from the agreement in question or renegotiate its participation pursuant to an amending protocol: Cremona [REDACTED]

<sup>10</sup> See UK Environmental Law Association, ‘Brexit and Environmental Law – The UK and International Environmental Law After Brexit’ (*UKELA*, September 2017) <<https://www.ukela.org/common/Uploaded%20files/brexit%20docs/international%20env%20law%202017.pdf>> accessed 3 October 2021.

<sup>11</sup> See, for instance, Written statement to the House of Commons by Thérèse Coffey, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, 18 September 2017 in response to written questions from Caroline Lucas, MP: ‘The UK will continue to be bound by international Multilateral Environmental Agreements (MEAs) to which it is party. We are committed to upholding our international obligations under these agreements and will continue to play an active role internationally following our departure from the EU. We will give due consideration to the ratification of MEAs in the future

need to enquire whether the agreement in question pursues certain common objectives without striking a bargain of the type we find in bilateral trade agreements. In other words, when it comes to agreements which do not impose a collective set of obligations on the EU and its Member States and which would not require the consent of the parties in order to achieve the disentanglement of the EU's from the UK's obligations, there is no legal and policy interest in whether this objective is carried out on the basis of the UK as part of the EU or on its own. It follows that Brexit has not affected the status of the UK as a party to such agreements. It would, then, be a question of the legal formula that would clarify this state of continuity. For instance, a declaration could be adopted which would notify the other contracting parties of the separation of the UK from the EU as far as the aspects of the agreements that fall within EU's competence are concerned and the UK would, then, be ensuring compliance with the agreement pursuant to domestic legislation. In this case, it would be difficult to envisage a situation where the EU's interlocutors would be able to invoke a fundamental change of circumstances.

Given the range of mixed agreements of a multilateral nature, the above may entail an adjustment the scope of which would vary. For instance, in the context of the Paris Agreement on climate change,<sup>12</sup> while the UK had been submitting a joint Nationally Determined Contribution together with other EU Member States, it has now submitted its own.<sup>13</sup> Once we step away from the MEAs context, the adjustment that is required is of a more serious and complex nature. In relation to the World Trade Organisation Agreements,<sup>14</sup> the adjustment of the UK's membership has not been uncontroversial, as illustrated by the apportionment of tariff rate quotas on agricultural products proposed jointly by the EU and the UK and the strong objections of third countries.<sup>15</sup> It became

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to which the UK is not currently party in its own right, (recognising that some risks have no relevance to the UK.)'

<sup>12</sup> Paris Agreement adopted under the United Nations Framework Convention on Climate Change [2016] OJ L282/4.

<sup>13</sup> Department for Business, Energy & Industrial Strategy, 'The UK's Nationally Determined Contribution communication to the UNFCCC' <<https://www.gov.uk/government/publications/the-uks-nationally-determined-contribution-communication-to-the-unfccc>> accessed 3 October 2021. On the same date, the UK also submitted an Adaptation Communication to the United Nations Framework Convention on Climate Change (UNFCCC) 2020 (UK Government, 'United Kingdom of Great Britain and Northern Ireland's Adaptation Communication to the United Nations Framework Convention on Climate Change' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/943713/uk-adaptation-communication-to-unfccc.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943713/uk-adaptation-communication-to-unfccc.pdf)> accessed 3 October 2021) and its first Biennial Finance Communication (HM Government, 'Finance Communication to the United Nations Framework Convention on Climate Change submitted in accordance with Article 9, Paragraph 5 of the Paris Agreement' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/943566/UK\\_Biennial\\_Finance\\_Communication\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943566/UK_Biennial_Finance_Communication_2020.pdf)> accessed 3 October 2021).

<sup>14</sup> Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L336/1.

<sup>15</sup> See the letter of 11 October 2017 of the EU Permanent Representative to the WTO and the UK Permanent Representative to the international organisations in Geneva (<[https://ec.europa.eu/info/publications/joint-letter-eu-and-uk-permanent-representatives-wto\\_en](https://ec.europa.eu/info/publications/joint-letter-eu-and-uk-permanent-representatives-wto_en)> accessed 3 October 2021) and the position of 26 September 2017 by the representatives of a number of countries including the USA, New Zealand, Canada, Brazil, and Argentina, <<https://tradebetablog.files.wordpress.com/2017/10/us-et-al-letter-on-trqs.pdf>> accessed 3 October 2021. For the EU's unilateral apportionment, see Regulation (EU) 2019/216 of the European Parliament and of the Council of 30 January 2019 on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union, and amending Council Regulation (EC) No 32/2000 [2019] OJ L38/1. For the UK's position during the transition period, see UK Government, 'Communication to WTO members following the UK's withdrawal from the EU'

apparent, therefore, that even in the context of agreements to which the UK was a party in its own right, the transition to the post-Brexit state required negotiation, and that no negotiation is without its complexities or surprises. This is all the more so in the case of package deals such as the one underpinning the WTO Agreements.

It follows from the above that the cakeism narrative during the referendum campaign and in the early months after June 2016 about the application of existing trade agreements was unencumbered by either logic or legal and policy concerns. For all its problems, it was not any less effective. After all, the legal rules governing the status of international treaties and the realities of international trade negotiations are neither as attractive nor easy to follow as a slogan that aims to reassure and inspire. Once, however, withdrawal from the EU became a reality and specific issues about its timing and ensuing policies emerged, the question of the status of existing trade agreements **arose**. At that juncture, the narrative of no change was abandoned and replaced with that of continuity.

### 3. THE NARRATIVE OF CONTINUITY IN THE WITHDRAWAL AGREEMENT: THE STATUS OF TRADE AGREEMENTS DURING THE TRANSITION PERIOD

#### 3.1 Introduction

This second narrative emerged in the light of three main considerations. The first was legal: it was acknowledged that, once the UK would withdraw from the EU, the trade agreements that were binding under EU law would cease to apply unless either they were replaced by new agreements or other arrangements had been agreed upon. However, the UK was not in a position to negotiate new agreements with third countries: the legal issue of continuing EU law obligations pending withdrawal notwithstanding, it needed time not only to reach agreements but also to formulate its own autonomous trade policy. These are the practical considerations in the light of which continuity emerged as a policy imperative. Their significance becomes all the more acute given, on the one hand, the herculean task of negotiating the UK-EU arrangements in which the British administration was engaged at that time and, on the other hand, the need to avoid sudden disruption in legal relationships. Put differently, it became imperative that the UK should be given time both to formulate its trade policy and negotiate its own trade arrangements with third countries.

The narrative of continuity played out in two parallel contexts. The first context was conventional, and was agreed upon between the UK and the EU and provided for in the EU-UK Withdrawal Agreement.<sup>16</sup> The second context was autonomous and was about the negotiation and conclusion of rollover agreements between the UK and third countries with which the EU had already concluded trade agreements. These two contexts will be examined in turn.

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<sup>16</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7. Hereinafter referred to as EU-UK WA.



### 3.2. The narrative of continuity in the EU-UK Withdrawal Agreement: the status of trade agreements during the transition period

The Withdrawal Agreement (WA) provided in Article 126 for a transitional period that concluded on 31 December 2020.<sup>17</sup> During this period, the EU-UK WA introduced, for all intents and purposes, the principle of continuity regarding the application of EU law in the UK legal order and the UK-EU relations. This principle applied to international agreements too, as the EU-UK WA confirmed that the term EU law covers the international agreements to which the Union is a party and the international agreements concluded by the Member States acting on behalf of the Union.<sup>18</sup>

This principle was further elaborated upon in Article 129 of the Agreement. Entitled ‘Specific arrangements relating to the Union's external action’, it provided as follows in its first paragraph:<sup>19</sup>

‘Without prejudice to Article 127(2), during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly, as referred to in point (a)(iv) of Article 2.’

The underlying rationale for the principle of continuity was spelled out in the preamble to the Agreement:

‘[I]t is in the interest of both the Union and the United Kingdom to determine a transition or implementation period during which – notwithstanding all consequences of the United Kingdom's withdrawal from the Union as regards the United Kingdom's participation in the institutions, bodies, offices and agencies of the Union, in particular the end, on the date of entry into force of this Agreement, of the mandates of all members of institutions, bodies and agencies of the Union nominated, appointed or elected in relation to the United Kingdom's membership of the Union – Union law, including international agreements, should be applicable to and in the United Kingdom, and, as a general rule, with the same effect as regards the Member States, in order to avoid disruption in the period during which the agreement(s) on the future relationship will be negotiated ...’<sup>20</sup>

The main objective of ensuring the continuity of trade relations with third countries did not emerge in the WA in a policy vacuum. In fact, it had been set out by the EU early on. In its Article 50 TEU Negotiating Guidelines of April 2017, the European Council pointed out that it:

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<sup>17</sup> [EDITORS: CROSS REFERENCE TO CHAPTER 4]

<sup>18</sup> Article 2(a)(iv) EU-UK WA.

<sup>19</sup> The reference to Article 127(2) in Article 129(1) of the EU-UK WA is about the EU’s Common Foreign and Security Policy (CFSP). The former provision read as follows: ‘In the event that the Union and the United Kingdom reach an agreement governing their future relationship in the areas of the Common Foreign and Security Policy and the Common Security and Defence Policy which becomes applicable during the transition period, Chapter 2 of Title V of the TEU and the acts adopted on the basis of those provisions shall cease to apply to the United Kingdom from the date of application of that agreement’.

<sup>20</sup> 8<sup>th</sup> recital EU-UK WA.



‘expects the United Kingdom to honour its share of all international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners, international organisations and conventions concerned should be engaged’.<sup>21</sup>

This point was taken up by the Council which, in its May 2017 negotiating directives, stated the following:

‘... , in line with the European Council guidelines, a constructive dialogue should be engaged as early as practicable with the United Kingdom during the first phase of the negotiation on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, by which the United Kingdom remains bound, as well as on the method to ensure that the United Kingdom honours these commitments’.<sup>22</sup>

This theme of continuity was carried over in the second round of negotiations, about the transitional period. In its Article 50 TEU Guidelines of December 2017, the European Council stated that, given the British position to leave the customs union, it would:

‘calibrate its approach as regards trade and economic cooperation in the light of this position so as to ensure a balance of rights and obligations, preserve a level playing field, *avoid upsetting existing relations with other third countries*, and to respect all other principles set out in its guidelines of 29 April 2017, in particular the need to preserve the integrity and proper functioning of the Single Market’.<sup>23</sup>

It was in the light of the above that the Council’s Negotiating Directives of January 2018 also provided for the continuing application of existing international agreements concluded by the EU.<sup>24</sup>

Continuity as a matter of international law, however, is not a unilateral issue. This dimension is acknowledged in the WA itself, as Article 129(1) EU-UK WA is accompanied by an asterisked footnote which provides as follows: ‘The Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements’.

From a policy point of view, given the scope and depth of the EU-UK WA, it was difficult to envisage third States raising obstacles to this course of action. Two main reasons support this view. First, the EU-UK WA is of such broad scope that it may be argued that, in functional terms, and the UK’s formal withdrawal from the EU notwithstanding, nothing changed during the transition period as far as the application of EU law to the UK was

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<sup>21</sup> European Council, ‘Guidelines following the United Kingdom’s Notification under Article 50 TEU’, EUCO XT 20004/17, para 13.

<sup>22</sup> Council of the European Union, ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, XT 21016/17 ADD 1 REV 2, para 18.

<sup>23</sup> European Council, ‘Guidelines of the European Council’, EUCO XT 20011/17, para 4 (emphasis added).

<sup>24</sup> Council of the European Union, ‘Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, XT 21004/18 ADD 1 REV 2, para 15.

concerned. Given that EU law covers international agreements binding on the EU, including the UK,<sup>25</sup> it was reasonable to assume that the continuing application of international agreements would not raise policy concerns for the EU's contracting parties. Second, the transition period was of limited duration and, therefore, any concerns that the EU's interlocutors may have about the unfolding uncertainty regarding their post-Brexit trade relations with the UK were bound to be time-limited.

From a legal point of view, however, the arrangement envisaged in Article 129 EU-UK WA required the consent of the third parties which are the Union's interlocutors in the context of each and every agreement concluded under Article 218 TFEU. To that effect, in January 2020, the Member States, including the UK, endorsed a note verbale which was sent by the relevant Head of Mission to the EU's partners.<sup>26</sup> This short document set out the EU-UK WA arrangements and provided that the EU and Euratom 'notify' the contracting parties of agreements referred to in Article 129(1) EU-UK WA that 'the United Kingdom is treated as a Member State of the Union and of Euratom for the purposes of these international agreements'.<sup>27</sup> The above document referred to how the UK was treated by the EU under the EU-UK WA agreements, as the Union did not have the power to state how third countries would treat the UK under international law. In this vein, the note verbale did not suggest that the EU's and UK's contracting parties act in a specific manner in response. It merely informed them of the internal EU arrangement which was about 'business as usual' for a limited period of time.

The remaining of Article 129 WA set out the main parameters within which the UK was deemed to be a party to EU agreements whilst not an EU Member State.<sup>28</sup> In particular, it was about three issues. The first may be summarised as the 'present but not really' principle: the continuing binding effect of international agreements on the UK notwithstanding, during the transition period no UK representatives were present at meetings of bodies set up under agreements, unless the UK participated in its own right (that is, not pursuant to its prior EU membership) or was invited by the EU to attend as part of the EU's delegation on an *ad hoc* basis required, in particular, for the effective implementation of the EU-UK WA.<sup>29</sup>

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<sup>25</sup> Article 216(2) TFEU. See Case 181/73 *R. & V. Haegeman v Belgian State* ECLI:EU:C:1974:41, para 5. More on this, see Panos Koutrakos, *EU International Relations Law* (2<sup>nd</sup> ed., Hart 2015) 209 ff.

<sup>26</sup> Cover letter and Note verbale on the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, COM (2018) 841 final.

<sup>27</sup> *ibid* 5, para 5.

<sup>28</sup> There were also some CFSP-specific provisions in Article 129(6)-(7) EU-UK WA:

'6. Following a decision of the Council falling under Chapter 2 of Title V TEU, the United Kingdom may make a formal declaration to the High Representative of the Union for Foreign Affairs and Security Policy, indicating that, for vital and stated reasons of national policy, in those exceptional cases it will not apply the decision. In a spirit of mutual solidarity, the United Kingdom shall refrain from any action likely to conflict with or impede Union action based on that decision, and the Member States shall respect the position of the United Kingdom. 7. During the transition period, the United Kingdom shall not provide commanders of civilian operations, heads of mission, operation commanders or force commanders for missions or operations conducted under Articles 42, 43 and 44 TEU, nor shall it provide the operational headquarters for such missions or operations, or serve as framework nation for Union battlegroups. During the transition period, the United Kingdom shall not provide the head of any operational actions under Article 28 TEU'.

<sup>29</sup> Article 129(2) EU-UK WA.

The second issue was about the duty of cooperation. This hallmark of the EU's legal order<sup>30</sup> in general, and EU external relations law in particular,<sup>31</sup> was adjusted to the specific context set out by the EU-UK WA. On the one hand, in order to reflect the principle of continuity, the duty of cooperation applied during the transition period and imposed a duty on the UK:

‘to refrain from any action or initiative which is likely to be prejudicial to the Union's interests, in particular in the framework of any international organisation, agency, conference or forum of which the United Kingdom is a party in its own right’.<sup>32</sup>

On the other hand, the application of the duty was not extended in an uncompromising manner. It reflected, instead, the transitional nature of the time-limited period set out in the EU-UK WA by enabling the UK to:

‘negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union’.<sup>33</sup>

The third issue, finally, was the provision of *ad hoc* cooperation ‘whenever there is a need for coordination, the United Kingdom may be consulted, on a case-by-case basis’.<sup>34</sup>

### **3.3 Continuity as a matter of UK policy: the rollover agreements**

Having ensured that pre-existing trade agreements would continue to apply during the transition period, the UK was given more time to formulate its trade policy. Given the realities of trade negotiations, however, it was decided that the policy of continuity should be formalised and pursued in a more tangible manner, namely by rolling over the provisions of the existing trade agreements which the EU had negotiated with third countries until the UK concluded its own.

Considerable energy has been spent in this process, as it became apparent quite early on that rolling over the existing trade agreements would be neither automatic nor easy. After all, trade treaties are the outcome of long and complex negotiations and of package deals

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<sup>30</sup> Article 4(3) TEU.

<sup>31</sup> See amongst others Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg* ECLI:EU:C:2005:341; Case C-459/03 *Commission of the European Communities v Ireland (re: MOX Plant)* ECLI:EU:C:2006:345; Case C-247/07 *European Commission v Federal Republic of Germany (PFOs)* ECLI:EU:C:2010:203. See also Marise Cremona, ‘Defending the Community Interest: The Duties of Cooperation and Compliance’ in Marise Cremona, Bruno De Witte (eds), *EU Foreign Relations Law* (Hart 2008); Christophe Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the “Duty of cooperation”’ in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World* (Hart 2010); Eleftheria Neframi, ‘The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations’ (2010) 47 CML Rev 323.

<sup>32</sup> Article 129(3) EU-UK WA.

<sup>33</sup> Article 129(4) EU-UK WA.

<sup>34</sup> Article 129(5) EU-UK WA. This provision was without prejudice to Article 127(2) EU-UK WA which read as follows: ‘In the event that the Union and the United Kingdom reach an agreement governing their future relationship in the areas of the Common Foreign and Security Policy and the Common Security and Defence Policy which becomes applicable during the transition period, Chapter 2 of Title V of the TEU and the acts adopted on the basis of those provisions shall cease to apply to the United Kingdom from the date of application of that agreement’. **EDITORS: CROSS REFERENCE TO CHAPTER BY BLOCKMANS!**

and compromises reached in a very specific policy context. Once the UK relied on the good will of a third country to extend these deals in a completely new context, it could not be certain that the latter party would resist the temptation to unravel specific aspects of the deal. Even if third countries felt no need to amend the substantive provisions of an existing agreement, the UK was asking, in effect, to be bound by obligations previously negotiated by the EU in a completely different policy context.

The process of rolling over prior to the formal withdrawal of the UK from the EU led to the negotiation of agreements with the following countries:<sup>35</sup>

- Andean Countries (Colombia, Ecuador, Peru);<sup>36</sup>
- Cariforum (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Jamaica, St Kitts and Nevis, Saint Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago) Economic Partnership Agreement;<sup>37</sup>
- Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) Association Agreement;<sup>38</sup>
- Chile Association Agreement;<sup>39</sup>
- Eastern and Southern Africa (ESA) (Madagascar, Mauritius, Seychelles, Zimbabwe) Economic Partnership Agreement;<sup>40</sup>
- Faroe Islands (Free Trade Agreement);<sup>41</sup>
- Georgia (Strategic Partnership and Cooperation Agreement);<sup>42</sup>
- Norway and Iceland on trade in goods;<sup>43</sup>
- Israel (Trade and Partnership Agreement);<sup>44</sup>
- Jordan (Association Agreement);<sup>45</sup>

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<sup>35</sup> In addition to these trade agreements, the UK also concluded mutual recognition agreements with Australia, New Zealand and the United States.

<sup>36</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/808914/MS\\_22.2019\\_Andean\\_Trade.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808914/MS_22.2019_Andean_Trade.pdf)> accessed 3 October 2021.

<sup>37</sup> Cariforum comprises Antigua and Barbuda, Barbados, Belize, the Bahamas, Dominica, the Dominican Republic, Grenada, Guyana, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803413/1\\_CARIFORUM\\_Command\\_Paper\\_Part\\_One.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803413/1_CARIFORUM_Command_Paper_Part_One.pdf)> accessed 3 October 2021.

<sup>38</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/823557/MS\\_32.2019\\_Agreement\\_establishing\\_an\\_association\\_between\\_the\\_UK\\_and\\_Central\\_America.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823557/MS_32.2019_Agreement_establishing_an_association_between_the_UK_and_Central_America.pdf)> accessed 3 October 2021.

<sup>39</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/776912/CS\\_Chile\\_2.2019\\_Association.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776912/CS_Chile_2.2019_Association.pdf)> accessed 3 October 2021.

<sup>40</sup> <<http://www.gov.uk/government/publications/ms-no42019-agreement-establishing-an-economic-partnership-agreement-between-the-eastern-and-southern-africa-states-and-the-uk>> accessed 3 October 2021.

<sup>41</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/780113/CS\\_Denmark\\_1.2019\\_FTA.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780113/CS_Denmark_1.2019_FTA.pdf)> accessed 3 October 2021.

<sup>42</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/844167/CS\\_Georgia\\_1.2019\\_UK\\_Georgia\\_Strategic\\_Partnership\\_and\\_Cooperation\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844167/CS_Georgia_1.2019_UK_Georgia_Strategic_Partnership_and_Cooperation_Agreement.pdf)> accessed 3 October 2021.

<sup>43</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/795291/MS\\_17.2019\\_Iceland\\_Norway\\_Trade.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795291/MS_17.2019_Iceland_Norway_Trade.pdf)> accessed 3 October 2021.

<sup>44</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781440/CS\\_Israel\\_1.2019\\_Trade.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781440/CS_Israel_1.2019_Trade.pdf)> accessed 3 October 2021.

<sup>45</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854391/CS\\_Jordan\\_1.2019\\_UK\\_Jordan\\_Agreement\\_establishing\\_an\\_Association.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854391/CS_Jordan_1.2019_UK_Jordan_Agreement_establishing_an_Association.pdf)> accessed 5 March 2020

- Kosovo (Partnership, Trade and Cooperation Agreement);<sup>46</sup>
- Lebanon (Association Agreement);<sup>47</sup>
- Liechtenstein (Additional Agreement extending to Liechtenstein certain provisions of the UK-Switzerland Trade Agreement);<sup>48</sup>
- Morocco (Association);<sup>49</sup>
- Pacific States (Fiji, Papua New Guinea) Economic Partnership Agreement;<sup>50</sup>
- Palestinian Authority (Political, Trade and Partnership Agreement);<sup>51</sup>
- Southern African Customs Union (Botswana, Eswatini, Lesotho, Namibia, South Africa) and Mozambique Economic Partnership Agreement;<sup>52</sup>
- South Korea (Free Trade Agreement);<sup>53</sup>
- Switzerland (Trade Agreement);<sup>54</sup>
- Tunisia (Association Agreement);<sup>55</sup>
- Canada (Agreement on Trade Continuity);<sup>56</sup>
- Cote d'Ivoire (Stepping Stone Economic Partnership Agreement);<sup>57</sup>
- Egypt (Association Agreement);<sup>58</sup>
- Kenya (Economic Partnership Agreement);<sup>59</sup>
- Mexico (Trade Continuity Agreement);<sup>60</sup>
- North Macedonia (Partnership, Trade and Cooperation Agreement);<sup>61</sup>

<sup>46</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854384/CS\\_Kosovo\\_1.2019\\_UK\\_Kosovo\\_Partnership\\_Trade\\_and\\_Cooperation\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854384/CS_Kosovo_1.2019_UK_Kosovo_Partnership_Trade_and_Cooperation_Agreement.pdf)> accessed 5 March 2020

<sup>47</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840961/CS\\_Lebanon\\_1.2019\\_Agreement\\_establishing\\_an\\_Association\\_between\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_and\\_the\\_Republic\\_of\\_Lebanon.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840961/CS_Lebanon_1.2019_Agreement_establishing_an_Association_between_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_Republic_of_Lebanon.pdf)> accessed 3 October 2021.

<sup>48</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/782493/CS\\_Liechtenstein\\_1.2019\\_Trade.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782493/CS_Liechtenstein_1.2019_Trade.pdf)> accessed 3 October 2021.

<sup>49</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854581/CS\\_Morocco\\_2.2019\\_UK\\_Morocco\\_Agreement\\_establishing\\_an\\_Association.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854581/CS_Morocco_2.2019_UK_Morocco_Agreement_establishing_an_Association.pdf)> accessed 3 October 2021.

<sup>50</sup> <<https://www.gov.uk/government/collections/uk-pacific-economic-partnership-agreement>> accessed 3 October 2021.

<sup>51</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781389/MS\\_14.2019\\_IPTP\\_PLO.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781389/MS_14.2019_IPTP_PLO.pdf)> accessed 3 October 2021.

<sup>52</sup><<http://www.gov.uk/government/publications/uksacu-and-mozambique-economic-partnership-agreement-ms-no342019>> accessed 3 October 2021.

<sup>53</sup><<http://www.gov.uk/government/publications/ukkorea-free-trade-agreement-with-exchange-of-notes-cs-korea-no12019>> accessed 3 October 2021.

<sup>54</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/780200/CS\\_Swiss\\_4.2019\\_FTA.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780200/CS_Swiss_4.2019_FTA.pdf)> accessed 3 October 2021.

<sup>55</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/842050/CS\\_Tunisia\\_1.2019\\_UK\\_Tunisia\\_Agreement\\_establishing\\_an\\_Association.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842050/CS_Tunisia_1.2019_UK_Tunisia_Agreement_establishing_an_Association.pdf)> accessed 3 October 2021.

<sup>56</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/942941/CS\\_Canada\\_1.2020\\_Agreement\\_on\\_Trade\\_Continuity\\_UK\\_Canada.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942941/CS_Canada_1.2020_Agreement_on_Trade_Continuity_UK_Canada.pdf)> accessed 3 October 2021.

<sup>57</sup> <<https://www.gov.uk/government/publications/ukcote-divoire-stepping-stone-economic-partnership-agreement-cs-cote-divoire-no12020>> accessed 3 October 2021.

<sup>58</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/943572/CS\\_Egypt\\_1.2020\\_Agreement\\_establishing\\_an\\_Association\\_with\\_Egypt.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943572/CS_Egypt_1.2020_Agreement_establishing_an_Association_with_Egypt.pdf)> accessed 3 October 2021.

<sup>59</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/945516/MS\\_9.2020\\_Economic\\_Partnership\\_Agreement\\_UK\\_Kenya\\_Member\\_of\\_East\\_Africa\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf)> accessed 3 October 2021.

<sup>60</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/965130/CS\\_Mexico\\_1.2021\\_UK\\_Mexico\\_Trade\\_Continuity\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965130/CS_Mexico_1.2021_UK_Mexico_Trade_Continuity_Agreement.pdf)> accessed 3 October 2021.

<sup>61</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/942963/CS\\_N\\_Macedonia\\_1.2020\\_Partnership\\_Trade\\_and\\_Cooperation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942963/CS_N_Macedonia_1.2020_Partnership_Trade_and_Cooperation.pdf)> accessed 3 October 2021.

- Singapore (Free Trade Agreement);<sup>62</sup>
- Southern African Customs Union and Mozambique (SACUM) trade bloc (Botswana, Eswatini, Lesotho, Namibia, South Africa, Mozambique) (Economic Partnership Agreement);<sup>63</sup>
- Ukraine (Political, Free Trade and Strategic Partnership Agreement);<sup>64</sup>
- Japan (Agreement for a Comprehensive Economic Partnership);<sup>65</sup>
- Albania (Partnership, Trade and Cooperation Agreement);<sup>66</sup>
- Cameroon (Interim Agreement establishing an Economic Partnership);<sup>67</sup>
- Vietnam (Free Trade Agreement).<sup>68</sup>
- Ghana (Interim Trade Partnership Agreement);<sup>69</sup>
- Moldova (Strategic Partnership, Trade and Cooperation Agreement);<sup>70</sup>
- Serbia (Partnership, Trade and Cooperation Agreement);<sup>71</sup>
- Turkey (Free Trade Agreement).<sup>72</sup>

As the above agreements were negotiated by the UK at a time when it was still a Member State, the question may be raised whether the British authorities had acted in accordance with their EU law duty of sincere cooperation.<sup>73</sup> After all, not only does the power to negotiate and conclude agreements with third countries in broad areas of economic activity fall with the EU's exclusive competence, but even in areas of shared competence the power of Member States to act on their own is constrained considerably.<sup>74</sup> It would be unduly formalistic, however, to construe the duty of sincere cooperation so broadly as to prevent

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<sup>62</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944339/CS\\_Singapore\\_1.2020\\_Free\\_Trade\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944339/CS_Singapore_1.2020_Free_Trade_Agreement.pdf)> accessed 3 October 2021.

<sup>63</sup><<https://www.gov.uk/government/publications/uksacu-and-mozambique-economic-partnership-agreement-ms-no342019>> accessed 3 October 2021.

<sup>64</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/934935/CS\\_Ukraine\\_1.2020\\_UK\\_Ukraine\\_Political\\_Free\\_Trade\\_Strat\\_Partner\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934935/CS_Ukraine_1.2020_UK_Ukraine_Political_Free_Trade_Strat_Partner_Agreement.pdf)> accessed 3 October 2021.

<sup>65</sup><<https://www.gov.uk/government/publications/ukjapan-agreement-for-a-comprehensive-economic-partnership-cs-japan-no12020>> accessed 3 October 2021.

<sup>66</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/962903/CS\\_Albania\\_1.2021\\_UK\\_Albania\\_Partnership\\_Trade\\_and\\_Cooperation\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962903/CS_Albania_1.2021_UK_Albania_Partnership_Trade_and_Cooperation_Agreement.pdf)> accessed 3 October 2021.

<sup>67</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/978691/MS\\_2.2021\\_UK\\_Cameroon\\_Interim\\_Agreement\\_Economic\\_Partnership.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978691/MS_2.2021_UK_Cameroon_Interim_Agreement_Economic_Partnership.pdf)> accessed 3 October 2021.

<sup>68</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/950585/CS\\_Viet\\_Nam\\_1.2021\\_Free\\_Trade\\_Agreement\\_UK\\_Vietnam.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950585/CS_Viet_Nam_1.2021_Free_Trade_Agreement_UK_Vietnam.pdf)> accessed 3 October 2021.

<sup>69</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/978684/CS\\_Ghana\\_1.2021\\_UK\\_Ghana\\_Interim\\_Trade\\_Partnership\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978684/CS_Ghana_1.2021_UK_Ghana_Interim_Trade_Partnership_Agreement.pdf)> accessed 3 October 2021.

<sup>70</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/953190/CS\\_Moldova\\_1.2021\\_Strategic\\_Partnership\\_Trade\\_and\\_Cooperation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953190/CS_Moldova_1.2021_Strategic_Partnership_Trade_and_Cooperation.pdf)> accessed 3 October 2021.

<sup>71</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/984929/CS\\_Serbia\\_1.2021\\_UK\\_Serbia\\_Partnership\\_Trade\\_and\\_Cooperation\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/984929/CS_Serbia_1.2021_UK_Serbia_Partnership_Trade_and_Cooperation_Agreement.pdf)> accessed 3 October 2021.

<sup>72</sup><[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/963851/CS\\_Turkey\\_1.2021\\_UK\\_Turkey\\_Free\\_Trade\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/963851/CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.pdf)> accessed 3 October 2021.

<sup>73</sup> The duty of cooperation may appear pertinent in other pre-Brexit contexts too: for instance, an informal British-Australian working group was meeting since mid-2017 to prepare for a possible trade deal, see Jamie Smyth, 'Australia aims for rapid post-Brexit trade deal with Britain' *Financial Times* (London, 26 July 2019). Similarly, a UK-US Trade and Investment Working Group was launched in July 2017 (UK Department for International Trade, 25 July 2017 <<http://www.gov.uk/government/news/us-uk-trade-working-group-lays-groundwork-for-potential-future-free-trade-agreement>> accessed 3 October 2021).

<sup>74</sup> For a strict view on the implications of the duty of cooperation following notification and prior to withdrawal, see Wessel (n 7) 108 *et seq.*



the UK from preparing in any way for its post-Brexit relations. The logic of the roll-over agreements was about extending the status quo. As the latter had been secured pursuant to EU law and given that the theme of continuity regarding international agreements emerges in the Union's own Article 50 TEU negotiating documents, seeking to extend the application of existing agreements was not problematic in terms of EU law. On the one hand, extending the status quo did not have the potential of undermining either the EU's negotiating position or the effectiveness of the relevant agreements. This would not have been the case if the British Government had sought to negotiate new agreements with third countries whilst the UK were still a Member State. On the other hand, the duty of sincere cooperation also binds the EU which should not be in a position to raise obstacles to prudent action aiming to prepare a Member State for an event envisaged in the Treaties, that is, withdrawal from the EU, without interfering with EU policies. In this respect, it is worth considering that Article 129(4) EU-UK WA itself provided for a flexible reading of the duty of sincere cooperation during the transition period: as the UK was permitted to conclude new trade agreements with third countries during that period, it was by no means apparent why it should not be free, whilst a Member State, to negotiate the extension of the existing agreements.

The number of rollover agreements negotiated by the UK is considerable. The overall assessment of their negotiation, however, suggests that the narrative of continuity has not been fully confirmed in practice. A case in point is their substantive content. These agreements were presented as duplicating the existing agreements between the EU and its trading partners. A closer look, however, reveals a more nuanced picture<sup>75</sup>. Take, for instance, the Agreement with Switzerland. The EU-Switzerland Mutual Recognition Agreement applies to twenty sectors.<sup>76</sup> The rolled-over Agreement between UK and Switzerland, however, applies only to three sectors (motor vehicles, good laboratory practice, medical products, good manufacturing practice inspection and batch inspection), whereas the remaining (including medical devices and construction materials) are not covered. The reason given in the UK-Switzerland Agreement has to do with the 'interdependencies with EU laws and systems'.<sup>77</sup> In other words, as Switzerland is committed to legislative equivalence with the EU, it cannot simultaneously commit to mutual recognition of UK practices, unless the latter also conform to the EU rules. The ensuing gap would entail additional cost, due to further testing and certification requirements, for exporters, unless a decision taken by the Joint Committee<sup>78</sup> to apply the Agreement to the additional product sectors. Such a decision would follow an assessment of the level of divergence or alignment of the applicable technical regulations between Switzerland and the UK which, given the harmonisation between the EU and Swiss technical regulations, would be based on an assessment of the alignment between the UK and EU rules over the product sectors currently not covered by the UK-Switzerland Agreement. This is a tangible, and by no means isolated, example of how intrinsically linked

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<sup>75</sup> See the analysis in Adam Łazowski, 'Copy-pasting or negotiating? Post-Brexit Trade Agreements between the UK and non-EU countries', in Juan Santos Vara and Ramses A Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 117-132 where he examines 'long form' and 'short form' agreements.

<sup>76</sup> Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment [2002] OJ L114/369.

<sup>77</sup> Department for International Trade, *Continuing the United Kingdom's Trade Relationship with the Swiss Confederation* (February 2019), para 96 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/830644/Continuing-the-UKs-trade-relationship-with-the-Swiss-Confederation-parliamentary-report\\_4\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830644/Continuing-the-UKs-trade-relationship-with-the-Swiss-Confederation-parliamentary-report_4_1_.pdf)> accessed 3 October 2021.

<sup>78</sup> In accordance with Article 1(2)(b) of the UK-Switzerland Agreement.



the negotiations between the UK and third countries are with the negotiations between the UK and the EU.

There are other examples of the differing scope between the roll-over agreements and the existing agreements that the EU has concluded and which the former were designed to replicate. Consider, for instance, the context of customs, as the UK Authorised Economic Operators no longer qualify for expedited treatment on the Swiss border, until the UK has adopted a scheme considered equivalent by the EU to its own scheme. The field of agriculture further illustrates the point. The UK-Switzerland Trade Agreement is designed to extend the application of, amongst others, the EU-Switzerland Agreement on trade in agricultural products.<sup>79</sup> A range of areas, however, which are covered by the latter (organic products regarding certification, labelling, and sale of products as organic, sanitary and phytosanitary measures in relation to plant health, animal feed, seeds, and animal health and trade in animals and animal products) are excluded from the former. In practical terms, this suggests that the Swiss authorities are only able to accept imports of animals and animal products from the UK once the UK was listed by the European Commission as a third country for animal health purposes.<sup>80</sup>

The difficulty the UK faced when it sought to translate the narrative of continuity into practice may have to do with the weaker post-Brexit negotiating position of the country. An area where the UK has negotiated successfully, namely the principle of bilateral cumulation of origin, is a case in point. Rollover agreements provide that EU inputs would continue to be accounted for as being from the UK, and vice versa, for the purpose of meeting the local content requirements necessary to qualify for the zero-tariff treatment. On the one hand, this is an example of an approach that provides UK companies with time to adjust their supply chains until the UK has negotiated without having to draw on the EU's trade policy. On the other hand, the application of the principle of cumulation is not uniform. The UK-South Korea Agreement, for instance, limits this rule to three years after the entry into force of the Agreement,<sup>81</sup> hence providing companies just enough time to adjust their supply chains in the post-Brexit environment. Compared to the other countries with which the UK has negotiated a trade agreement, South Korea is the most important economy and had, therefore, the weight to negotiate with the UK the narrower application of the rules laid down in its original agreement with the EU.

A remarkable feature of the roll-over agreements is the lack of transparency that characterised their negotiation. This was a point that was picked up quite early on in the Parliament. For instance, the Chairman of the House of Lords EU Committee wrote to the Brexit Secretary of State for Exiting the EU enquiring about various aspects of these agreements: what were the criteria for including certain agreements but not others? What was the rationale for the sequencing of the Government's programme of rollover agreements?<sup>82</sup> These were in addition to questions about some broad statements the Government had made regarding the continuing application of some agreements or the

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<sup>79</sup> Agreement between the European Community and the Swiss Confederation on trade in agricultural products [2002] OJ L114/132.

<sup>80</sup> Swiss Federal Department of Foreign Affairs <<https://www.eda.admin.ch/eda/en/fdfa/foreign-policy.html>> accessed 3 October 2021.

<sup>81</sup> See UK – Korea FTA, Protocol Concerning the Definition of ‘Originating Products’ and Methods of Administrative Cooperation, footnote to Article 3.1 which also provides for a review of the principle by the Parties to begin no later than two years after the entry into force of the Agreement.

<sup>82</sup> Letter of 6 February <<http://www.parliament.uk/documents/lords-committees/eu-select/scrutiny-brexit-related-treaties/treaty-scrutiny-letter-6Feb.pdf>> accessed 3 October 2021.

possibility that some rolled over agreements might not be laid in Parliament for ratification.<sup>83</sup> The British Government was also criticised in Parliament for lack of or insufficient consultation with the devolved administration.<sup>84</sup> The lack of consultation was not confined to public authorities but was extended to industry.<sup>85</sup> Given the constant criticism levelled against the EU for its lack of transparency in its trade negotiations, the shadow in which the rollover agreements were approached by the British Government was nothing short of staggering. This is particularly so given the considerable progress that the EU has made over the last few years in negotiating in a more transparent manner.<sup>86</sup>

#### 4 THE NARRATIVE OF GLOBAL BRITAIN

The narrative of continuity describes only part of the UK's post-Brexit role as a trade actor. Another part is described by the ever present narrative of Global Britain. This became all the more pronounced soon after the Brexit referendum, as the Department for International Trade was established and the project 'Global Britain' became the hallmark of the difference that, according to the British Government, Brexit would make. Quite what this difference would entail has not yet become clearer by the triteness which the Government of the day heaped upon it. The then Prime Minister Theresa May stated that Brexit:

‘should make us think of global Britain, a country with the self-confidence and the freedom to look beyond the continent of Europe and to the economic and diplomatic opportunities of the wider world’.<sup>87</sup>

The then Foreign Secretary, and current Prime Minister, Boris Johnson said that:

‘whether we like it or not we are not some bit part or spear carrier on the world stage. We are a protagonist—a global Britain running a truly global foreign policy’.<sup>88</sup>

As time went by, the Government's explanations were not burdened by any further clarity. While he was still Foreign Secretary, Boris Johnson declared:

‘We are big enough to do amazing things. We have the ability to project force 7,000 miles, to use our permanent membership of the UN security council to mobilise a collective response to the crisis in North Korea. We

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<sup>83</sup> Ibid.

<sup>84</sup> See European Union Committee, *Scrutiny of international agreements – Treaties considered on 12 February 2019* (HL 2017-19, 287) paras 5-6. See also International Trade Committee, *UK Trade Policy - Transparency and Scrutiny* (HC 2017-19, 1043). For an official response to the latter, see UK Trade Policy - Transparency and Scrutiny: Government Response of the Committee's Sixth Report (Sixth Special Report of Session 2017/19, HC 2027). See, more generally, Araujo (n).

<sup>85</sup> See, for instance, Sarah Gordon 'Business expresses fury at UK failure to roll over EU trade deals' *Financial Times* (London, 6 February 2019).

<sup>86</sup> See, for instance, the recent practice of publishing the negotiating directives adopted by the Council. See European Commission, 'Factsheet on the transparency policy in EU trade' <[https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157486.pdf](https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157486.pdf)> accessed 3 October 2021. For a challenging account, see Eugénia C. Heldt, 'Contested EU trade governance: transparency conundrums in TTIP negotiations' (2020) 18 *Comparative European Politics* 215.

<sup>87</sup> Speech at the Conservative Party Conference, 2 October 2016 <<https://www.conservativehome.com/parliament/2016/10/britain-after-brexit-a-vision-of-a-global-britain-theresa-mays-conservative-conference-speech-full-text.html>> accessed 3 October 2021.

<sup>88</sup> Speech at Chatham House, 2 December 2016 <<http://www.gov.uk/government/speeches/beyond-brexit-a-global-britain>> accessed 3 October 2021.

contribute 25 per cent of European aid spending and yet no one seriously complains that we have a sinister national agenda and that is why the phrase global Britain makes sense because if you said Global China or Global Russia or even alas Global America it would not have quite the same flavour'.<sup>89</sup>

With delicious succinctness, the House of Commons Foreign Affairs concluded its inquiry into Global Britain by stating that '[n]o minister during our inquiry was able to give the Committee a definitive explanation of 'Global Britain'.<sup>90</sup>

The vacuous concept of Global Britain notwithstanding, there was no doubt even early on that negotiating trade agreements would be a significant part of the UK's post-Brexit foreign policy. In 2017, the then Secretary of State for International Trade, Liam Fox, said that:

'[t]he UK government's ambition is to build a Global Britain—a nation that is outward-looking and internationalist, rejecting insularity and continuing to play a prominent role in global affairs. Trade is central to this ambition. We want Britain to become a global champion of free trade, a nation at the heart of world commerce, working with our international allies and partners to remove barriers and liberalise trading practices'.<sup>91</sup>

Over the years, the definition of the concept Global Britain has not become any less elusive. In whichever terms it is couched, however, the official policy is about 'putting trade at [its] heart'.<sup>92</sup> And, at the level of semantics, the narratives of continuity and Global Britain are interrelated. In fact, the former has been manipulated so that it plays into the latter. The negotiation and conclusion of rollover agreements was presented by the British Government as evidence of a successful and active world player, omitting conveniently any reference to their origins. The above agreements are promoted as new and the application of the provisions of the original EU agreements is left to be pointed out only by independent trade lawyers.

It is recalled that rollover agreements were not only intended to prevent UK business from the shock of the abrupt removal of the protection afforded to them by existing EU trade agreements. They were also designed to give the UK time to develop its own trade policy. While central to the narrative of Global Britain, however, the omni-present imperative of trade negotiations is not matched by a specific approach to trade policy. In fact, there seems to be confusion regarding the UK's own policy. For all its bluster about the need to unshackle itself from what the Union has been doing as a world trade actor, the UK has not been in a position to develop a clear sense of direction for its own trade policy. And this time, neither legal constraints, such as the EU's competence and the strict implications of the duty of sincere cooperation, nor the all-consuming negotiation of the EU-UK WA could provide an excuse.

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<sup>89</sup> Speech at the Conservative Party Conference, 3 October 2017 <<https://blogs.spectator.co.uk/2017/10/boris-johnsons-conservative-conference-speech-full-text/>> accessed 3 October 2021.

<sup>90</sup> Foreign Affairs Committee, *Global Britain* (HC 2017-9, 780) para 5.

<sup>91</sup> Speech in Malaysia, 6 April 2017 <<http://www.gov.uk/government/speeches/malaysia-and-britain-partners-in-a-post-brexit-world>> accessed 3 October 2021.

<sup>92</sup> HM Government, *Global Britain in a competitive age – The Integrated Review of Security, Defence, Development and Foreign Policy* (March 2021) 54.

Early on, an absence of consensus emerged as to what the objectives of the UK's trade policy should be<sup>93</sup> which over time has morphed into an absence of debate and strategic thinking about policy objectives. This lack of direction is illustrated by negotiation of new agreements, that is agreements which do not merely roll over, in one way or another, those that were applicable to the UK pursuant to the latter's EU membership. In February 2021, the UK applied formally to accede to the Comprehensive and Progressive Trans-Pacific Partnership while in June 2021 an agreement in principle between the UK and Australia was signed. The latter Agreement has attracted considerable attention, and not only for being the first new trade agreement negotiated by Britain. The repercussions of lifting tariffs and quotas for agricultural imports from Australia have caused disquiet amongst British farmers who are concerned that they would have to compete with substantially higher volume of imported products that had been subject to rules and practices that would not meet UK standards.<sup>94</sup> Viewed from this angle, the trade agreement with Australia will be noteworthy not only for its content and repercussions for UK-Australia trade but also for its implications for the future agreements that the UK wishes to negotiate with meat producing countries such as the United States and Brazil. In fact, there are reports of a divergence of views in the British Cabinet about the desirability of opening up trade under such terms and the potential political fallout.<sup>95</sup> The controversy notwithstanding, the British Government considered the conclusion of the negotiations so important that it announced that it would 'enter a sprint' to finalise the terms of the agreement in only two months.<sup>96</sup>

In the case of the negotiations with Australia, there is a disconnect between the enthusiasm for increased competition that would enable farmers to become more productive and the reassurance that Britain's environmental and animal welfare standards would be protected, if not increased. How to strike the balance between these interests is by no means clear while the absence of detail in the relevant policy documents is striking.<sup>97</sup> The emphasis on the significance of the agreement with Australia is also not justified by the fact that, according to the British Government's own assessment, the long term economic benefit of an ambitious trade agreement with Australia and New Zealand is extremely small.<sup>98</sup>

A paradox emerges from the above: while the British Government considers trade agreements central to the country's international role and post-Brexit stature, it negotiates them without having articulated clearly enough the kind of trade policy it wishes to pursue. Put differently, while it fought hard and paid a high cost to acquire this power, the UK does

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<sup>93</sup> See, for instance, in the context of the introduction of the UK's trade tariffs, the well-reported tension within the previous British Government about whether tariffs should be eliminated in order to open competition or set high in order to protect domestic industries: see, for instance, James Blitz 'The big Cabinet row over no deal tariffs' *Financial Times* (London, 20 February 2019).

<sup>94</sup> Judith Evans and Sebastian Payne, 'UK livestock farmers fear Australia trade deal will threaten way of life' *Financial Times* (London, 8 June 2021).

<sup>95</sup> Peter Foster and George Parker, 'UK Government split over Australia trade deal' *Financial Times* (London, 17 May 2021).

<sup>96</sup> Department for International Trade, *Joint Statement on UK-Australia trade talks* (23 April 2021). The envisaged end date was no coincidence: it was when the Australian Prime Minister visited Britain in order to attend the G7 summit.

<sup>97</sup> It is noteworthy, in this context, that the Trade and Agriculture Commission, an independent advisory board established in order to advise on the Government's trade policies, has expressly recommended the articulation of an agrifood strategy that ought to inform trade negotiations (Trade and Agriculture Commission, 'Final Report', March 2021, 16 and 47 et seq). There has been no response.

<sup>98</sup> It is estimated to be 0.02% at best: Department for International Trade, *UK-Australia Free Trade Agreement – The UK's Strategic Approach* (2020), Table 1 at 109.

not deem to have a plan as to what do to with it and, instead, it uses it in an ad hoc and somewhat haphazard manner. What we see, therefore, is the negotiation of trade agreements as a slogan rather than a component of a carefully thought out trade strategy. Viewed from this angle, the narrative of Global Britain is in dire need of content.

## 5 CONCLUSIONS

This chapter reflected on the three main narratives that have dominated the UK's approach to trade agreements in the context of Brexit. It argued that all three have proved to be flawed. The narrative of cakeism was ignorant at best and disingenuous and cynical at worst and was abandoned impliedly when the realities of international law and trade negotiations could no longer be ignored. The narrative of continuity was instrumentalised in order to present the UK as an effective and lithe trade power whilst omitting the EU origins of the of the rollover agreements and underplaying the differences between the original and the rollover agreements. As for the narrative of Global Britain, it is still in search of a definition, just as the UK's trade approach is in search of a policy.