

# *Some lessons that might be learnt from Brexit Britain's trade negotiations with the European Union*

Article

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# Some lessons that might be learnt from Brexit Britain's trade negotiations with the European Union

Alan Swinbank<sup>1</sup>

## Abstract

The UK-EU negotiations for new arrangements to cover trade in goods, following the UK's decision to leave the EU, were long and complex. What lessons might politicians, trade negotiators, and academics learn from this long-drawn-out saga? This article focuses on five of the ways in which the UK misplayed, misunderstood, or misrepresented the consequences of Brexit. First, there was no plan for Brexit. Second, the implications for the Irish border and peace progress were not appreciated. Third, WTO rules were not understood. Fourth, by threatening to break international law the UK undermined its credibility as a negotiating partner and increased the EU's resolve to protect its market. Fifth, Boris Johnson's unwillingness to acknowledge that leaving the EU's customs union and Single Market would result in UK-EU trade barriers, distorted debate and raised unfulfilled expectations.

**Keywords:** Brexit, Ireland, EU, WTO, rules of origin, free trade area, customs union

## 1. Introduction

At 11pm (midnight in Brussels) on 31 January 2020 the United Kingdom of Great Britain and Northern Ireland (UK, GB, NI) left the European Union (EU), after 47-years of membership of the European project, although for an implementation period extending to 31 December 2020 the UK remained within the EU's customs union and Single Market, and still applied EU law. From 1 January 2021, however, EU-UK trading relations have been governed by a *Trade and Cooperation Agreement (TCA)*<sup>2</sup> and the *Protocol on Ireland/Northern Ireland* that had been

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<sup>2</sup> *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, 24 December 2020:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data)

annexed to the Withdrawal Agreement concluded earlier (in January 2020).<sup>3</sup> These trading provisions are briefly outlined in the next section.

Following the referendum on 23 June 2016, when 51.9 per cent of those voting opted to leave the EU, the UK had held two General Elections and changed its Prime Minister twice: first, when David Cameron who had initiated the 2016 referendum was replaced by Theresa May. She, in turn, was displaced by Boris Johnson in July 2019.

Meantime, world events had moved on. In particular, Donald Trump —who enthusiastically supported Brexit, and was highly critical of the EU— had been elected US President, but failed to secure a second term in 2020. The incoming President, Joe Biden, with his Irish roots, had been a critic of Brexit, and of Johnson, and was thought to be less likely than his predecessor to favour an ambitious UK-USA trade deal. And throughout 2020 a new disease —COVID-19— blighted people’s lives, disrupting economies and social interaction, and distracting Johnson’s Government from focussing on other concerns, such as Brexit. By the close of the year the UK’s death toll (those dying within 28 days of their first positive test) had reached 76 thousand;<sup>4</sup> and a new variant of COVID sweeping the country, more infectious than previous strains, had resulted in a tighter lockdown.

Article 184 of the Withdrawal Agreement had committed the EU and the UK to ‘use their best endeavours, ... to take the necessary steps to negotiate expeditiously the agreements governing their future relationship ... with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.’ Whether the drama and delay were the inevitable consequence of the difficulties the negotiators faced or were in part engineered by

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[a/file/948119/EU-UK Trade and Cooperation Agreement 24.12.2020.pdf](#). Although ratified by the UK’s Parliament, the agreement is being applied on a provisional basis as, at the time of writing, the European Parliament’s approval is awaited. The article citations later in this paper follow the provisional citations given in this UK version of the text. The text was also published in the *Official Journal of the European Union*, Vol 63, L444, 31 December 2020.

<sup>3</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’, *Official Journal of the European Union*, Vol 63, L29, 31 January 2020.

<sup>4</sup> GOV.UK. Coronavirus (COVID-19) in the UK: Deaths within 28 days of positive test by date of death: <https://coronavirus.data.gov.uk/details/deaths> (accessed 11 January 2021).

one or both of the parties as negotiating tactics, is a question that lies beyond the scope of the present article. Similarly, whether or not both parties did in fact, in good faith, use their best endeavours is not discussed, but it is an issue that will no doubt occupy scholars —and colour political debate— for decades to come.

With Brexit (seemingly) done, what might politicians, trade negotiators, and academics learn from this long-drawn-out saga? This article focuses on trade in goods (thus ignoring other aspects of the EU-UK's future relationship), and the UK's negotiating stance, and suggests that the UK committed five fundamental errors. Other analysts may well suggest more.<sup>5</sup> First there was no consensus on Brexit among the Brexiteers, and this was compounded by the refusal of David Cameron's government to engage in contingency planning for a Brexit outcome. Consequently, when Theresa May came to office there was no agreed strategy that the cabinet could pursue, or parliament endorse. Second, there was a myopic failure to acknowledge that the border between the Republic of Ireland and Northern Ireland could prove problematic. Third, the trading rules of the World Trade Organization (WTO), particularly those relating to most-favoured-nation treatment and the formation of Free Trade Areas (FTAs), were misrepresented or misunderstood. Fourth, the government's threat to repudiate a key element of the Ireland/Northern Ireland agreement weakened its credibility as a trusted international negotiator. Finally, Boris Johnson was unwilling to acknowledge that rules of origin would apply within the FTA, or that regulatory provisions would impede access to the EU's single market, particularly for livestock products. These issues are discussed sequentially in the following sections. A final section briefly speculates on how events might evolve through 2021 and subsequent years.

## **2. In brief: the new UK-EU arrangements for trade in goods**

The European Economic Community (EEC), which has since evolved into today's EU, was a customs union, though the European project had other, and wider, aspirations. Over time, and with British support, the Single Market emerged, ensuring that regulatory barriers did not impede trade between Member States.

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<sup>5</sup> See for example Ivan Rogers, *9 Lessons in Brexit* (London: Short Books, 2019).

EU-wide VAT (value-added tax) provisions were developed, covering shipments of goods and services between Member States.

The TCA, which applied from 1 January 2021, was only concluded on Christmas Eve 2020, leaving neither traders, nor officials, much time to prepare for its implementation. The TCA creates an FTA between the UK and the EU, with the British government trumpeting this to be ‘the first time the EU has agreed a zero tariff zero quota deal with any other trading partner.’<sup>6</sup> Despite the rhetoric, this FTA is more limited than the arrangements in place when the UK was part of the EU’s customs union, for it only relates to *originating products*, meaning complex rules of origin have to be applied, as illustrated further below. Furthermore, both parties are entitled to apply WTO-sanctioned trade remedies (including antidumping charges and countervailing levies) against one-another.

The arrangements for VAT are complex. Although NI is subject to the UK’s VAT regime, HM Revenue & Customs explains that it ‘maintains alignment with the EU VAT rules for goods, including on goods moving to, from and within Northern Ireland’.<sup>7</sup> This means that EU-NI transactions are VAT-regulated more-or-less as before. However, ‘existing flexibilities within the EU VAT rules have been used’ to minimise the impact on goods moving backwards and forwards between NI and GB.

The Irish Protocol is designed to ensure that there is no border —physical or virtual— dividing the island of Ireland. It does this in two ways. First, NI retains in essence its membership of the EU’s Single Market for goods by applying the EU’s regulatory provisions that likely impact on trade in goods. This is particularly relevant for sanitary and phytosanitary (SPS) measures impacting the farm, fish

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<sup>6</sup> UK Government, *UK-EU trade and cooperation agreement. Summary*, December 2020, p. 6: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/962125/TCA\\_SUMMARY\\_PDF\\_V1-.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf)

<sup>7</sup> HM Revenue & Customs, *Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021*, updated 29 January 2021: <https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021> (last accessed 19 February 2021).

and food industries on the island. These regulatory provisions are to be applied when products are shipped from GB to NI although, as outlined later, time-limited periods of grace were agreed for shipments to NI supermarkets.

Second, despite Article 4 of the Protocol declaring Northern Ireland to be ‘part of the customs territory of the United Kingdom,’ when NI imports goods from the rest of the world, *or from GB*, it must apply the EU’s tariffs and border measures if ‘that good is at risk of subsequently being moved into the *[European]* Union, whether by itself or forming part of another good following processing’ (Article 5 of the Protocol).

The consequence is that, in order to avoid a border bisecting the island of Ireland, which would have been problematic for the nationalist community, instead a border has in effect been created in the Irish Sea, dividing GB from NI, which in turn has proved politically problematic for NI’s loyalist community. However, exports from NI to ‘to other parts of the United Kingdom’s internal market’ (i.e. to GB) are guaranteed ‘unfettered market access’ (Article 6 of the Protocol).

A schematic —and grossly simplified— overview of the arrangements governing these trade flows is given in Table 1. Whether these arrangements involving NI are compatible with the UK’s most-favoured nation commitments within the WTO is not an issue discussed here.

**Table 1: Schematic overview of barriers to UK-EU trade in goods implicit in the Irish Protocol and the TCA**

| <i>Trade flow:</i>   | <i>Barriers to be surmounted:</i>                       |            |          |
|--|---|------------|----------|
|  | Customs   | Regulatory | VAT      |
| From GB to EU & from EU to GB                                | √   | √          | √        |
| From NI to Ireland (and hence to the EU)                     | <b>X</b>  | <b>X</b>   | <b>X</b> |
| From Ireland (and hence the EU) to NI (but <i>not</i> to GB) | <b>X</b>  | <b>X</b>   | <b>X</b> |
| From GB to NI  | <i>X, unless at risk of a subsequent move to the EU</i> | √          | <b>X</b> |
| From NI to GB  | 'unfettered market access'                              |            |          |

Author's formulation.

### 3. There was no plan for Brexit

Euro-scepticism has a long history in the UK (as indeed in other EU member states), but the starting-gun for the Brexit saga was fired by a speech by the then Prime Minister, David Cameron, on 23 January 2013 at the London offices of Bloomberg.<sup>8</sup> In that speech Cameron —then head of a coalition government with the Liberal Democrats— said that in the 2015 General Election the Conservative Party would seek a mandate 'to negotiate a new settlement with our European partners ... with the Single Market at its heart.' He then added: 'And when we have negotiated that new settlement, we will give the British people a referendum with a very simple in or out choice. To stay in the EU on these new terms; or come out altogether.' He promised the electorate a 'real choice between leaving or being part of a new settlement'.<sup>9</sup> This led me to suggest that if there was to be a real

<sup>8</sup> Anand Menon & John-Paul Salter, 'Brexit: initial reflections', *International Affairs*, 92(6), 2016.

<sup>9</sup> David Cameron, EU speech at Bloomberg, Wednesday 23 January 2013 (as written not as spoken): <http://www.number10.gov.uk/news/eu-speech-at-bloomberg> (accessed 24 January 2014).



choice it would be ‘incumbent upon the government of the day to explain to the electorate what “out” implies’.<sup>10</sup> In July 2012 the Coalition government had already launched a *Review of the Balance of Competences* —‘an audit of what the EU does and how it affects the UK’<sup>11</sup>— which produced a large volume of evidence, but which had seeming little impact on government policies, Cameron’s quest for a new settlement with the EU after the Conservatives won the 2015 General Election, or the subsequent referendum campaign.

The Bank of England and the Treasury made ‘extensive’ plans for dealing with a potential crash in the value of sterling in the event of a No vote,<sup>12</sup> but otherwise there was little contingency planning. After the referendum, Sir Jeremy Heywood —Cabinet Secretary and Head of the Civil Service— told the Public Administration & Constitutional Affairs Committee of the House of Commons that the Prime Minister, David Cameron, ‘did not want us talking to the Leave campaign and working out elaborate plans for what would happen in the event of a Leave ... . But did we use the time usefully to prepare facts, analysis, options that would subsequently become useful? Yes, of course we did’.<sup>13</sup>

Heywood went on to claim that ‘it would not have been possible for the Civil Service to come up with “the plan” for Brexit. ... (T)here are many different strands of opinion, even within those people who were campaigning for a Leave. Therefore, we did not have a set of propositions that we could then do a serious plan for ...’ (Q.53). Sir Ivan Rogers, the UK’s Permanent Representative to the EU until January 2017, was blunt in suggesting that the Brexiteers ‘had not the

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<sup>10</sup> Alan Swinbank, ‘How will a UK exit from the EU impact food and farming?’, *Agra Europe*, No. 2551, 5 February 2013, p. 9.

<sup>11</sup> Foreign & Commonwealth Office, Review of the balance of competences, 12 December 2012, last updated 18 December 2014: <https://www.gov.uk/guidance/review-of-the-balance-of-competences> (last accessed 23 November 2020).

<sup>12</sup> Mark Carney, ‘Statement from the Governor of the Bank of England following the EU referendum result’, 24 June 2016, Bank of England: <https://www.bankofengland.co.uk/news/2016/june/statement-from-the-governor-of-the-boe-following-the-eu-referendum-result> (accessed 23 November 2020).

<sup>13</sup> Jeremy Heywood, minutes of evidence to the Public Administration & Constitutional Affairs Committee of the House of Commons, 14 September 2016, Q.50: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/lessons-learned-from-the-eu-referendum/oral/38389.html> (accessed 6 November 2020).

slightest fag packet plan on what they were going to try and do and in which order'.<sup>14</sup>

It is probably fair to claim that the varied individuals and organisations that are rather crassly lumped together under the heading 'Brexiters' in this article did not have a single coherent view on what sort of trade relationship the UK should seek with its erstwhile EU neighbours, and the rest of the world, in the event of a vote to leave.

*Vote Leave*, designated by the Electoral Commission as the Brexiters' official campaign body, had relatively little to say on trade policy in its referendum brochure, other than to claim that the UK would 'negotiate a new UK-EU deal based on free trade and friendly cooperation;' and that 'EU institutions should stop blocking Britain from making trade deals outside Europe'.<sup>15</sup> In a more detailed briefing paper issued just before the referendum it was more explicit, saying:

It will be possible to negotiate a new settlement with the EU by the next general election in May 2020. This is because all the main stumbling blocks to negotiating a trade agreement will be absent:

There is already tariff-free trade between the UK and the EU. The parties will not need to negotiate the tariff lines on which duties will be abolished, only to continue the existing, status quo of tariff-free trade. ...

There is already regulatory equivalence. Detailed negotiations about the mutual recognition of product standards will be not be necessary, since at present, regulations are identical. Since there are currently few non-tariff barriers, there will be no need to negotiate their abolition.<sup>16</sup>

Boris Johnson —a leading campaigner in Vote Leave, and Prime Minister from 2019— wrote in *The Daily Telegraph* immediately after the referendum that 'there will continue to be free trade, and access to the single market;' and that: 'The only change ... is that the UK will extricate itself from the EU's extraordinary

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<sup>14</sup> Rogers, *9 Lessons*, p. 33. A cigarette is referred to as a fag in colloquial British English.

<sup>15</sup> Vote Leave, *Vote Leave, take control* (London: Vote Leave, 2016), pp. 3, 5.

<sup>16</sup> Vote Leave, *A framework for taking back control and establishing a new UK-EU deal after 23 June*, Briefing Room, 15 June 2016: [http://www.voteleavetakecontrol.org/a\\_framework\\_for\\_taking\\_back\\_control\\_and\\_establishing\\_a\\_new\\_uk\\_eu\\_deal\\_after\\_23\\_june.html](http://www.voteleavetakecontrol.org/a_framework_for_taking_back_control_and_establishing_a_new_uk_eu_deal_after_23_june.html) (last accessed 23 November 2020).

and opaque system of legislation.’<sup>17</sup> Quite what Johnson meant by the phrase ‘free trade’, or ‘access to the single market’, is unclear. The statement —‘the only change’— is however unequivocal. This might be characterised as the have-your-cake-and-eat-it school of thought, which became known as cakeism.<sup>18</sup>

Other Brexiteers, however, were willing to forsake access and pursue a rather different version of ‘free trade’. In rather tetchy evidence before a House of Commons Committee, Professor Patrick Minford suggested that a trade agreement with the EU would not be desirable. He argued that for a relatively small country like the UK

these trade agreements are totally irrelevant. They will not make any difference to anything. We do not need any trade agreements. We need to get out of a protectionist trade arrangement —namely, the EU customs union. Everyone says how wonderful it is to be in the EU but they forget that it is a highly protectionist organisation, not just in agriculture, but also in manufacturing. It is infinitely preferable to be in the global market under conditions of free trade. That will give us huge gains. The trade issue, far from being a great negative in terms of leaving the EU, is a huge positive.<sup>19</sup>

Cameron immediately announced his resignation following the referendum, and was quickly succeeded by Theresa May, who had not been known for having strong views on Brexit before her elevation to the Premiership. In launching her campaign for the post she came out with a rather fatuous tautology —‘Brexit means Brexit’— which soon became her catchphrase.<sup>20</sup> In forming her Cabinet she tried to secure a balance between ministers from both sides of the Brexit divide. In particular she appointed three prominent Brexiteers to (seemingly) important portfolios: David Davis to the newly created Department for Exiting the

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<sup>17</sup> Boris Johnson, ‘I cannot stress too much that Britain is part of Europe - and always will be’, *The Daily Telegraph*, 27 June 2016, p. 18.

<sup>18</sup> Jonathan Charteris-Black, *Metaphors of Brexit: No Cherries on the Cake?* (Springer International Publishing, 2019).

<sup>19</sup> Patrick Minford, Oral Evidence to the House of Commons Foreign Affairs Committee, 3 November 2015, *Costs and benefits of EU membership for the UK's role in the world*, HC 545 (London: House of Commons, 2015), Q.101.

<sup>20</sup> Theresa May, ‘Theresa May’s launch statement: full text’, 30 June 2016: <https://www.conservativehome.com/parliament/2016/06/theresa-mays-launch-statement-full-text.html> (last accessed 24 November 2020). Anthony Seldon with Raymond Newell, *May at 10* (London: Biteback Publishing, 2019), p. 34.

European Union, Liam Fox to the similarly new Department for International Trade, and Boris Johnson as Foreign and Commonwealth Secretary, but with his department shorn of responsibility for negotiating EU exit or of concluding new trade deals around the world.

But the lack of planning and of a clear vision for the future, the raised expectation that the UK could have its cake and eat it, and a divided cabinet and parliament, meant that little progress had been made by the time the Prime Minister invoked Article 50 of the *Treaty on European Union* —the formal launch of the exit process— on 29 March 2017. Others were better prepared, notably the European Commission and the Irish Government. The latter apparently had already drawn-up a 130-page contingency plan.<sup>21</sup>

The European Commission had appointed Michel Barnier to be the EU's negotiator.<sup>22</sup> Expectations that Angela Merkel (Chancellor of Germany) and German car manufacturers would intercede on the UK's behalf were dashed. The EU insisted that there would be no negotiations with the UK before Article 50 had been invoked, and that bilateral negotiations between the UK and individual EU member states would not take place. But Michel Barnier and his team in the European Commission had been busy. Two days after the UK invoked Article 50, Barnier's team circulated the EU's Draft Negotiating Guidelines.<sup>23</sup>

In her letter of 29 March 2017 to Donald Tusk, President of the European Council, invoking Article 50, Theresa May wrote: 'The United Kingdom wants to agree with the European Union a deep and special partnership that takes in both economic and security cooperation. To achieve this, we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU'.<sup>24</sup>

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<sup>21</sup> Tony Connelly, *Brexit and Ireland. The Dangers, the Opportunities, and the Inside Story of the Irish Response*, updated edition (UK: Penguin Books, 2018), p. 30.

<sup>22</sup> Leonard August Schuette, 'Forging Unity: European Commission Leadership in the Brexit Negotiations', *Journal of Common Market Studies*, Early View DOI: 10.1111/jcms.13171, 2021.

<sup>23</sup> Connelly, *Brexit and Ireland*, p. 288.

<sup>24</sup> Letter from the Prime Minister, 10 Downing Street, to Donald Tusk, 29 March 2017: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604079/Prime\\_Ministers\\_letter\\_to\\_European\\_Council\\_President\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf) (last accessed 24 November 2020)

But the EU was unwilling to accept *concurrent* discussions, insisting instead that the terms of withdrawal had to be agreed *before* negotiations on the future partnership could begin.

The situation in 1975 had been rather different. When Harold Wilson's Government held a referendum to determine whether the British public wished to remain in, or leave, the forerunner of today's EU, just over two years from joining, civil servants in the full knowledge of ministers did engage in extensive contingency planning. Two points might be noted about those deliberations. First, that officials were rather sceptical that a withdrawal could speedily be agreed with the Common Market, despite the instance of the anti-Marketees that this should be the outcome in the event of a vote to withdraw.<sup>25</sup> Second, 'from the very beginning ..., officials were aware that Anglo-Irish relations would be compromised if the UK left the EC. ... [W]hen contingency planning began, Bloody Sunday, the 1973 referendum on Northern Irish independence and the Sunningdale Agreement were all recent memory'.<sup>26</sup>

#### **4. Brexiteers failed to appreciate the complexities of the Irish border**

One serious consequence of this lack of forethought was that British politicians were slow to acknowledge that Brexit would result in a land border between the UK and the EU, bisecting the island of Ireland, and potentially destabilising the peace process.<sup>27</sup> For Brexiteers of the have-your-cake-and-eat-it school of thought, the issue did not really arise as they believed that, in trade terms, the *status quo* would simply roll-over; and to the extent that any new customs controls were required, this could be implemented by strategically placing cameras, implementing Automated Number Plate Recognition (ANPR) technology, to monitor movements of goods across the border that had received prior approval from the customs authorities.

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<sup>25</sup> Adam Evans, 'Planning for Brexit: the Case of the 1975 Referendum', *The Political Quarterly*, 89(1), 2018.

<sup>26</sup> Lindsay Aqai, *Contingency Planning. The 1975 and 2016 Referendums* (Cambridge: Bennett Institute for Public Policy, University of Cambridge, 2018), p. 7.

<sup>27</sup> Schuette, *Forging Unity*.

There were, however, a number of problems with this view. First the Irish authorities were concerned that the simple act of placing *security* cameras to monitor vehicle movements across the border could be provocative.

Second, for the UK to negotiate its own FTA agreements with countries around the world, which is what many Brexiteers sought, it would have to withdraw from the EU's customs union. *Ipsa facto*, a customs border would be created between the two entities. Along this border both parties would have to apply their most-favoured-nation (mfn) tariffs, as notified to the WTO, unless the mfn clause had been overridden, in accordance with GATT Article XXIV, as a result of the UK and the EU forming a FTA. But in this latter case, customs controls (in particular rules of origin) would still be required to ensure that only those goods deemed to originate in the UK-EU FTA could benefit from its free trade provisions.

Third, the UK wanted to determine its own regulatory standards (on employment, food safety, biosecurity and the environment for example) and was not willing to accept other key aspects of the EU's Single Market, on freedom of movement of persons in particular. Many of these regulatory checks, particularly SPS on livestock products, are undertaken at the border.

In one of her rare comments about Brexit *before* the referendum —indeed two days before, during a trip to Northern Ireland— Theresa May apparently said that it was ‘inconceivable’ that there would not be changes in border arrangements with the Republic of Ireland, should the UK leave the EU.<sup>28</sup> Nonetheless, once in office, her stance shifted. In a major speech at Lancaster House in January 2017 she ruled-out ‘partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out.’ Thus, she specifically rejected ‘membership of the single market’, and of being ‘bound by the [EU’s] Common External Tariff.’ But she did want ‘to have a customs agreement with the EU’, and —with regard to the Irish border— declared: ‘Nobody wants to

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<sup>28</sup> BBC News, ‘EU Referendum: Theresa May predicts Irish border controls if UK pulls out of European Union’, 21 June 2016: <https://www.bbc.co.uk/news/uk-northern-ireland-politics-36587809> (last accessed 26 November 2020).

return to the borders of the past, so we will make it a priority to deliver a practical solution as soon as we can'.<sup>29</sup> Seldon and Newell comment that

her speeches, above all Lancaster House, left many ambiguities, including ... the post-Brexit customs union relationship, and the future of Northern Ireland. She showed no understanding, because she didn't understand, that it was the EU's customs union and the single market which made possible the dismantling of the hard border.<sup>30</sup>

From 29 March 2017, and the invocation of Article 50, the clock was ticking. With continuing discord in her cabinet and the House of Commons the Prime Minister, wanting to shore-up her authority and parliamentary majority, gambled on an early General Election. This did not produce the outcome she hoped for, and to continue in power she accepted a 'confidence-and-supply' agreement, with the ten MPs of the Democratic Unionist Party (DUP), under which they would support the Government on key votes. As Connelly notes: 'Throughout the post-election discussions, the DUP insisted they were fully in favour of Brexit, and of leaving the customs union, but would qualify that by saying they wanted a soft border. Such sentiments confirmed to Dublin that the DUP were in cake-and-eat-it mode'.<sup>31</sup>

In December 2017, after difficult discussions with the DUP, Theresa May's Government and the European Commission's Brexit Task Force agreed a *Joint Report* setting out progress on three key issues that the EU wanted settled before embarking on a consideration of future UK-EU relations: i) the rights of EU citizens in the UK, and *vice versa*; ii) the financial bill that the UK would incur; and iii) 'the framework for addressing the unique circumstances in Northern Ireland'.<sup>32</sup> The Prime Minister's statement to the House of Commons claimed that the 'Joint Report reaffirms our guarantee that there will be no hard border between Northern Ireland and Ireland'. She also went on to say (although not in this order):

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<sup>29</sup> Theresa May, 'The government's negotiating objectives for exiting the EU: PM speech', Lancaster House; London, 17 January 2017 (Transcript of the speech, exactly as it was delivered): <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> (last accessed 24 February 2021).

<sup>30</sup> Seldon and Newell, *May at 10*, p. 141.

<sup>31</sup> Connelly, *Brexit and Ireland*, p. 324.

<sup>32</sup> *Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union*, 8 December 2017: [https://ec.europa.eu/info/sites/info/files/joint\\_report.pdf](https://ec.europa.eu/info/sites/info/files/joint_report.pdf)

‘the whole of the United Kingdom, including Northern Ireland, will leave the EU customs union and the EU single market’; ‘there will be no new borders within the United Kingdom’; and ‘Northern Ireland’s goods and services ... will continue to have full and unfettered access’ to ‘the single market of the United Kingdom’.<sup>33</sup> Quite how these conflicting objectives were to be reconciled was unclear.

The Joint Report was quickly followed by a draft Withdrawal Agreement tabled by the European Commission at the end of February 2018. It included a draft Protocol on Ireland/Northern Ireland, which ‘addresses the unique circumstances on the island of Ireland, ... avoiding a hard border and protecting the 1998 [*Good Friday/Belfast*] Agreement in all its dimensions’.<sup>34</sup> This so-called ‘Irish backstop’ challenged the UK’s policy stance. It would have created a ‘common regulatory area’ comprising the EU and Northern Ireland: ‘an area without internal borders in which the free movement of goods is ensured’ (Protocol Article 3). Northern Ireland would ‘be considered to be part of the customs territory of the Union’ (Protocol, Article 4:2). Many ‘provisions of Union law on sanitary and phytosanitary rules’ and ‘on the production and marketing of agricultural and fisheries products’ would continue to apply (Protocol, Article 5).

Consequently, a trade barrier would have been erected between NI and GB. Moreover, it could have applied indefinitely. In her speech at the Mansion House on 2 March 2018 Theresa May refuted the Backstop, saying: ‘Just as it would be unacceptable to go back to a hard border between Northern Ireland and Ireland, it would also be unacceptable to break up the United Kingdom’s own common market by creating a customs and regulatory border down the Irish Sea’.<sup>35</sup>

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<sup>33</sup> Theresa May, ‘PM statement on EU negotiations: 11 December 2017, House of Commons’: <https://www.gov.uk/government/speeches/pm-statement-on-eu-negotiations-11-december-2017> (last accessed 24 February 2021)

<sup>34</sup> European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 28 February 2018: [https://ec.europa.eu/info/sites/info/files/draft\\_withdrawal\\_agreement.pdf](https://ec.europa.eu/info/sites/info/files/draft_withdrawal_agreement.pdf) (last accessed 24 February 2021)

<sup>35</sup> Theresa May, ‘PM speech on our future economic partnership with the European Union’, 2 March 2018, Mansion House, London (Transcript of the speech, exactly as it was delivered):



After several months of further negotiation, and a rather fraught meeting of the cabinet at Chequers in July 2018, a rather different version of the Irish Backstop appeared in the November 2018 *Draft Agreement* to which both the EU and the UK were now committed.<sup>36</sup> This version of the Ireland/Northern Ireland Protocol was ‘intended to apply only temporarily, ... until ... superseded, in whole or in part, by a subsequent agreement’ (Protocol Article 1). But until then, the new text did away with a customs and regulatory border down the Irish Sea by incorporating the *whole* of the UK within a ‘single customs territory’ with the EU (Protocol Article 6).

Mrs. May’s attempts to cajole her cabinet and parliament to accept this Draft Agreement came to nought, and in July 2019 she was displaced as Premier by Boris Johnson. In October 2019 a thoroughly revised Ireland/Northern Ireland Protocol was initialled, reverting to a customs and regulatory border down the Irish Sea. Following the British General Election in December 2019, as noted in the Introduction, parliamentary approval was speedily secured, enabling the Withdrawal Agreement with the Ireland/Northern Ireland Protocol to be concluded.

##### **5. ‘Cakeism’, and the failure to recognise GATT Article XXIV as an *exception to the rules rather than a right to be invoked***

Another consequence of the lack of planning was that the May and Johnson governments, and many Brexiteers consistently misunderstood or, worse, were able to misrepresent WTO rules providing for most-favoured-nation treatment, and the negotiation of FTAs.

Just before the referendum David Frost published an article that set out the challenges that he believed the UK would face in negotiating new trading relations with the EU should the electorate vote to leave. He argued that there would be a

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<https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union> (last accessed 24 February 2021).

<sup>36</sup> Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018: [https://ec.europa.eu/info/sites/info/files/draft\\_withdrawal\\_agreement\\_0.pdf](https://ec.europa.eu/info/sites/info/files/draft_withdrawal_agreement_0.pdf) (last accessed 24 February 2021).

‘fundamental trade-off’: ‘the more independent your national trade policy is, the more difficult it is to negotiate completely barrier-free access to any other country’. He went on to write: ‘if, as in the case of the UK, a country is already part of a customs union and has already adapted its trading arrangements to it, the case for change has to be overwhelming. It isn’t.’ He pointed out that even if a UK-EU FTA ‘eliminated all tariffs on every product (and that has never happened in an FTA), it would still leave UK exporters facing customs administrative barriers and rules of origin enforcement ...’ Moreover, ‘Britain will be demandeur and so it will be Britain that has to make the concessions to get the deal’.<sup>37</sup>

This is the same David Frost who went on to become Boris Johnson’s chief negotiator and interlocutor with the EU. In a lecture at the Université libre de Bruxelles (ULB) in February 2020, Frost revealed that he had for some time been a Brexiteer: ‘Returning [*to government*] ... to lead the Brexit negotiations in 2019, it was a relief to be able to be clear about what I thought and to have a government that was aligned to it —and for me, to help finally take the UK out of the EU too’.<sup>38</sup> In 2016 he had seemingly stressed the economic costs of Brexit, but he was now rather dismissive of the ‘many economic studies of Brexit in the last few years’. Although he claimed that the UK would wish to maintain regulatory standards, he nonetheless said, in somewhat threatening comments: ‘I think looking forward, we are going to have a huge advantage over the EU —the ability to set regulations for new sectors, the new ideas, and new conditions— quicker than the EU can, and based on sound science not fear of the future.’

In his ULB speech Frost had suggested that the UK wanted to take advantage of the precedents that had been established by early FTAs that the EU had negotiated. In rather curious circumstances some months later, 10 Downing Street released a petulant letter that Frost had sent to Michel Barnier. He wrote: ‘we find it hard to see what makes the UK, uniquely among your trading partners, so

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<sup>37</sup> David Frost, ‘Can the UK secure free trade outside the EU?’, in *Britain Votes Leave: What Happens Next?* (London: Portland, 2016), pp. 34, 35, 38, 40.

<sup>38</sup> David Frost, ‘Reflections on the revolutions in Europe’, Université libre de Bruxelles, 17 February 2020: <https://no10media.blog.gov.uk/category/academic-lecture/> (last accessed 4 December 2020).

unworthy of being offered the kind of well-precedented arrangements commonplace in modern FTAs'.<sup>39</sup> And: 'at this moment in negotiations, what is on offer is not a *fair* free trade relationship between close economic partners, but a relatively low-quality trade agreement coming with unprecedented EU oversight of our laws and institutions' (my emphasis).

Two problems arise from this stance. First, it should be noted that the WTO's provisions (in particular GATT Article XXIV) see the formation of FTAs as a *derogation* from the overarching most-favoured-nation clause. Article XXIV sets out criteria that an FTA must meet (e.g. tariff-free access on substantially all trade for goods originating within the FTA), but it does not give a country the right to demand formation of an FTA, or in other respects unilaterally determine the FTA's scope. Thus, Michel Barnier's sharp response was perhaps justified: 'Regardless of what your letter suggests, there is no automatic entitlement to any benefits that the EU may have offered or granted in other contexts and circumstances to other, often very different, partners. ... we also do not accept cherry picking from our past agreements'.<sup>40</sup> As David Frost had recognised in 2016, the UK was the supplicant in these negotiations.

Second, there is nothing 'fair' about trade negotiations. Wider geopolitical considerations, group solidarity, and even altruism (particularly to developing countries) might moderate the approach, but ultimately each side tries to maximise its advantages. That would have been just as true for any FTA the UK might have sought to negotiate with the US, had Donald Trump retained the presidency. Whether or not the EU and the UK, in good faith, used their best endeavours in this regard is not the question at issue in this article.

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<sup>39</sup> David Frost, 'UK Draft Legal Texts', letter to Michael Barnier, 19 May 2020, 10 Downing Street:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886168/Letter\\_to\\_Michel\\_Barnier\\_19.05.20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886168/Letter_to_Michel_Barnier_19.05.20.pdf) (last accessed 4 December 2020).

<sup>40</sup> Michel Barnier, letter to David Frost, European Commission Task Force for Relations with the United Kingdom, undated 2020:  
[https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/uktf20203060790\\_-\\_mb\\_-\\_reply\\_to\\_df.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/uktf20203060790_-_mb_-_reply_to_df.pdf) (last accessed 4 December 2020).

In the UK's policy debate there has also been a tendency to confuse 'free trade' with FTAs. Free trade and FTAs are not synonyms, despite the word free appearing in both. Liam Fox, then the UK's Secretary of State for International Trade, seemed to equate the two during an important speech at the American Enterprise Institute in Washington in July 2017. Referencing David Ricardo and the theory of comparative advantage he advocated 'global free trade.' But he also suggested that this involved the UK seeking 'a full and comprehensive trading relationship with our European neighbours, retaining the ties of commerce, standards and shared interests that have long united us,' and 'a comprehensive free trade agreement between our 2 nations [*i.e. UK and USA*] post-Brexit'.<sup>41</sup>

Trade in most FTAs is far from 'free', as rules of origin to determine a particular consignment's eligibility to benefit from the free trade provision, product exclusions, and tariff rate quotas frequently apply.

Conceivably the formation of FTAs, freeing trade between the FTA members, could lead to *freer* world trade: this is a debate that has occupied economists and political scientists for many years. Free trade, to an economist, implies the removal of *all* trade barriers: if this cannot be achieved on a multilateral basis (in the WTO for example), then theorists suggest it could be undertaken unilaterally. But if a country unilaterally removes its trade barriers, allowing free access to its markets, it forgoes its ability to negotiate improved access for its exporters to overseas markets, either in the context of multilateral or bilateral negotiations.

## **6. The threat to 'disapply or modify' the Protocol's provisions**

In September 2020 Johnson's Government introduced the Internal Market Bill in the House of Commons. Certain parts of this, it was claimed, were 'particularly controversial, as they explicitly contravene the Protocol on Ireland/Northern Ireland'. Despite the provisions of the Protocol, if enacted the new legislation would have allowed the Government 'to "disapply or modify" rules on export declarations to goods moving from NI to Great Britain'; it could 'disapply or

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<sup>41</sup> Liam Fox, 'Liam Fox champions global free trade', American Enterprise Institute, Washington D.C., 24 July 2017: <https://www.gov.uk/government/speeches/liam-fox-champions-global-free-trade> (last accessed 4 December 2020).

modify' the Protocol's provisions on State Aid; and Clause 45 explicitly said that it could override international law, including the provisions of the Protocol.<sup>42</sup> The EU reacted furiously.

In the event, the UK backed down. As reported by the European Commission, the UK subsequently 'agreed to withdraw the contentious clauses of the UK Internal Market Bill, and will not introduce any similar provisions in the Taxation Bill'.<sup>43</sup> However, relations had been soured, and the UK's international standing diminished. And the episode had doubtless increased the EU's resolve to ensure that its Single Market was fully protected from British incursions.

## **7. Did Boris Johnson sufficiently appreciate that rules of origin would apply within the FTA, or that regulatory provisions would impede access to the EU's single market?**

Boris Johnson was reluctant to concede that new barriers to UK-EU trade would be the consequence of the UK leaving the EU's customs union and Single Market. Whether this was because he was badly briefed, he failed to understand his experts' explanations, or he wilfully chose to espouse 'fake news', is difficult to determine and will not be attempted here.

This cognitive dissonance was vividly illustrated by the Prime Minister's statement on Christmas Eve, immediately after the TCA was concluded, that 'there will be no palisade of tariffs ... there will be no non-tariff barriers to trade. ... instead there will be a giant free trade zone of which we will at once be a member'.<sup>44</sup> Despite protests that this was not true, that there would indeed be non-tariff barriers, the Prime Minister persisted in making the claim. For example, in an interview posted on the BBC News website on 30 December 2020, the BBC's

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<sup>42</sup> Issam Hallak, *UK Internal Market Bill and the Withdrawal Agreement*, European Parliamentary Research Service PE 659.359 (Brussels: European Parliament, 2020).

<sup>43</sup> European Commission, *EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest*, Press Release 24 December 2020: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2531](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531) (last accessed 24 February 2021).

<sup>44</sup> Johnson, Boris, 'Prime Minister's statement on EU negotiations: 24 December 2020', Transcript of the speech, exactly as it was delivered: <https://www.gov.uk/government/speeches/prime-ministers-statement-on-eu-negotiations-24-december-2020> (last accessed 16 February 2021).



products'.<sup>47</sup> Needless to say the EU intended to apply its full complement of customs, SPS, and VAT controls against UK imports from 1 January 2021.

As already noted, FTAs necessarily include rules of origin to determine whether or not a good is an originating product and is thus entitled to benefit from the FTA's provisions. Moreover, traders need to claim this dispensation; and to substantiate their claim they will need documentary proof. In some instances, particularly when the EU tariff is low, traders will not invoke the free trade provisions of the FTA, having weighed-up the costs and tariff savings involved in doing so. However, given the very high EU tariffs on sugar, dairy products, and meats, there will be a strong financial incentive for manufacturers using these goods to seek to benefit from the TCA's provisions.

The TCA 'provides for full bilateral cumulation (cumulation of both materials and processing) between the UK and the EU, allowing EU inputs and processing to be counted as UK input in UK products exported to the EU and vice versa'.<sup>48</sup> Thus, diagonal cumulation is specifically precluded, even if both parties (the UK and the EU) have nearly identical FTAs with a third country, each providing for bilateral cumulation.

Moreover, the rules are complex, and product specific. This can be illustrated by taking sugar as an example. The UK's sugar supplies in recent years have come from three main sources: sugar beet, grown by British farmers, and refined into white sugar (and other preparations) in the UK; imports of white (refined) sugar from the EU; and imports of raw cane sugars (mainly from developing countries) for refining in the UK. Whilst some sugar is sold as such to consumers, the bulk is sold to the food and drink industries for incorporation into processed products, some of which will be exported. Under the TCA's rules of origin, white sugar obtained from the refining of imported raw cane sugar, from non-EU sources,

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<sup>47</sup> Withdrawal Agreement Joint Committee, Fifth Regular Meeting, 17 December 2020, Summary Minutes, and texts of the UK's unilateral statements, all available at: [https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement\\_en](https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/meetings-eu-uk-joint-and-specialised-committees-under-withdrawal-agreement_en) (last accessed 23 February 2021).

<sup>48</sup> UK Government, *UK-EU Trade and Cooperation Agreement. Summary*, December 2020: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957694/TCA\\_SUMMARY\\_PDF\\_V1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957694/TCA_SUMMARY_PDF_V1.pdf) (last accessed 12 February 2021).

would not acquire originating status, as it would still be classified at the same 4-digit level of the Harmonised System of tariff nomenclature. Thus, it could not be sold in retail packs, or to food and drink manufacturers in the EU, as an originating product. Moreover, its incorporation into the processed products that UK food and drink manufacturers might wish to export to the EU would be constrained. In manufacturing sugar confectionery (heading 17.04) for example, the TCA's rules of origin would not be met unless all of the dairy produce, eggs and honey incorporated into the product themselves met their own rules of origin ('wholly obtained'), and that 'total weight of non-originating materials of [*sugars*] used does not exceed 40% of the weight of the product'. Furthermore, in accounting for its use of originating and non-originating sugar, the manufacturer would not be entitled to use an 'accounting segregation method', which would be the case for cereals for example, but instead the sugar would have to 'be physically segregated during storage in order to maintain ... originating and non-originating status'.<sup>49</sup> In short, the rules incentivise UK-based manufacturers wishing to export their product to NI or EU markets, to use sugar manufactured from British or EU grown sugar beet, rather than sugar refined from imported raw cane sugar.

Through January and February 2021 there was a cacophony of complaints that the new arrangements were impeding trade. It is too soon to determine whether these were just 'teething problems,' which could and would be sorted once operators and civil servants learnt how to apply the new rules, and less onerous procedures had been negotiated and applied, or rather were systemic consequences of Brexit which will continue to restrict trade in the longer term. The issue will not be addressed here.

## **8. In conclusion: what now?**

Although Brexit is done, in that the UK has left the EU's customs union and Single Market, it is not hard to imagine that divisive debates will continue to reverberate within the UK, and between the UK and the EU, for years to come.<sup>50</sup> Expectations

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<sup>49</sup> *Trade and Cooperation Agreement*, Article ORIG.14.

<sup>50</sup> Anand Menon, 'Brexit is far from done —this deal is no "game, set and match"', *The Guardian* online, 30 December 2020:



about what could be, and was, achieved were over exaggerated by the British government. Brexiteers did not have a clear vision for their Brexit goals, and seemingly still do not.

Irish border issues —both between the two jurisdictions on the island, and across the Irish Sea between NI and GB— remain problematic. Although the European Commission quickly responded, these tensions had been inflamed when it was suggested that the EU might invoke Article 16 of the Irish Protocol to *restrict* exports of COVID-19 vaccines to the UK.<sup>51</sup> This was countered by suggestions that the UK should in retaliation use the same provisions to *liberalise* trade between GB and NI. The Protocol itself is due for review in 2014 when the Northern Ireland Assembly will be asked for its ‘democratic assent’ for the continued application of the Protocol’s trade provisions.<sup>52</sup> What would happen if the Assembly withheld its consent? Implementation and application of the Protocol is subject to oversight by a Specialised Committee which has already been called upon to act on a number of occasions as noted above.

The TCA is itself subject to the oversight of a Partnership Council, and a whole array of specialist committees; it is subject to a 5-yearly review by the two parties; and either party may terminate the agreement on giving twelve months’ notice.<sup>53</sup> Will the TCA last, and the EU-UK trade relationship thrive; and, if not, what then? Only time will tell.

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[https://www.theguardian.com/commentisfree/2020/dec/30/brexit-far-from-done?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/commentisfree/2020/dec/30/brexit-far-from-done?CMP=Share_iOSApp_Other)

<sup>51</sup> European Commission, ‘Commission statement on the vaccine export authorisation scheme’, 29 January 2021: [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_314](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_314) (last accessed 24 February 2021).

<sup>52</sup> *Agreement on the withdrawal ...*, Protocol Article 18.

<sup>53</sup> *Trade and Cooperation Agreement*, Articles INST.1, FINPROV.3, FINPROV.8.