

SO CLOSE, YET SO FAR: THE EU/UK TRADE AND COOPERATION AGREEMENT

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Abstract

The recent EU/UK Trade and Cooperation Agreement is a complex treaty covering a wide range of trade and criminal law cooperation issues. It raises a number of legal issues, for instance as regards its legal effect, legal basis, termination or suspension, and dispute settlement. This article examines the general legal issues relating to the Agreement, discussing in particular its attempts to draw a line under the EU membership of the UK, placing the legal relationship firmly on the basis of international law. It examines how this compares to the Withdrawal Agreement and other EU relationships with non-EU countries, looking in detail in particular at the termination and suspension, dispute settlement, and “level playing field” provisions of the treaty.

1. Introduction

In the USSR, a divorce often did not mean physical separation from an unloved former spouse – but rather awkwardly continuing to share the same apartment for some time afterwards.¹ Geography, as well as economics, explains the analogous new relationship between the European Union and its former Member State. A continued connection is necessary, yet resented; friction is inherent in the coexistence of two people – or legal entities – that share the same space, yet wish to lead separate lives.

Between the UK and the EU, this friction takes legal form. Since 1 January 2021, after the end of the transition period in the Brexit Withdrawal Agreement, relations between the UK and EU have largely been governed by the Trade and Cooperation Agreement (TCA).² A closer link, particularly

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1. Moskoff, “Divorce and the USSR”, 45 *Journal of Marriage and the Family* (1983), 419 at 423.

2. O.J. 2021, L 149.

relevant to Northern Ireland, still remains in the form of the more contentious (yet, apart from Northern Ireland, less significant) Withdrawal Agreement.³ Legally speaking, while the Withdrawal Agreement provides for a mixture of international law and EU law approaches to the UK/EU relationship,⁴ the TCA sets out a purely international law framework. Yet, like the historical Soviet ex-couples, in spite of this more distant legal relationship, a closer connection still exists – not only because of economics and geography, but also because of shared interests in security and the direct and indirect links between the TCA and the Withdrawal Agreement.

This article explores these themes by looking at the main issues concerning the TCA: legal framework (section 2, including the structure, termination and suspension, legal basis and legal effect of the TCA); the economic partnership (section 3, including free trade, the “level playing field” and other provisions); criminal law cooperation (section 4); and dispute settlement (section 5, including the scope, general rules and special rules).⁵

2. Legal framework

2.1. Basic issues

The TCA is a single treaty governing most aspects of the relationship between the UK and the EU – although the prior Withdrawal Agreement still applies, and the UK and EU did agree to separate treaties on the security information and Euratom cooperation simultaneously with the TCA.⁶ In principle, this reflects the EU’s preferences, whereas the UK had sought a suite of separate treaties between the two.⁷ Yet this (largely)

3. O.J. 2020, L 29/7.

4. Peers, “The end – or a new beginning? The EU/UK Withdrawal Agreement”, 39 YEL (2020), 122. See also Dougan, “So long, farewell, auf wiedersehen, goodbye: The UK’S withdrawal package”, 57 CML Rev. (2020), 631; Bradley, “Agreeing to disagree: The European Union and the United Kingdom after Brexit”, 16 EuConst (2020), 379; and Fabbrini, *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (OUP, 2020).

5. See also Part Four (thematic cooperation, Arts. 702–707) and Part Five (EU programmes, Arts. 708–733).

6. O.J. 2021, L 149. The EU and UK also agreed treaties on security information and Euratom: respectively O.J. 2021, L 149/2024 and O.J. 2021, L 150/1. The former treaty entered into force on the same day as the TCA (Art. 19, security information treaty); the latter treaty entered into force when the parties notified each other of its ratification (Art. 24(1) Euratom treaty). On the basic structure of the TCA, see Craig, “Brexit a drama, the endgame – Part II: Trade, sovereignty and control”, 46 EL Rev. (2021), 129 at 133–135.

7. For the UK proposals, see <www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu> (all websites last visited 29 Nov. 2021). The EU preferred to avoid replication of the so-called Swiss model.

single-treaty framework was a Pyrrhic victory for the EU, for this was a compromise: behind the Potemkin-style single framework there are multiple disconnections between several parts of the treaty, as regards dispute settlement and termination or suspension.⁸ There may, however, be further bilateral treaties,⁹ or strengthened multilateral relationships,¹⁰ between the UK and the EU in future.

The EU and UK initially agreed to apply the TCA provisionally (this is common in international law).¹¹ This was to end on 28 February 2021, but the parties agreed to use the power set out in the treaty for the Partnership Council (which is made up of representatives of both parties)¹² to extend provisional application for another two months, due to EU delays in ratification.¹³ By contrast, the UK Parliament passed the EU (Future Relationship) Act to give effect in domestic law to the treaty before the end of 2020. The initial text of the treaty was also provisional, and was replaced by a “scrubbed” version (which included renumbering the text) in April 2021.¹⁴ There was a short transition period for data protection: four months, extended by default to six months, during which the UK was fully covered by EU data protection law as long as it did not make major changes to UK law on this issue.¹⁵ This was to give the EU Commission time to consider an adequacy decision which would simplify data flows between the UK and EU, which it did before the end of this period.¹⁶

8. On termination and suspension, see *infra* in this section; on dispute settlement, see *infra* section 5.

9. For instance, see the Commission proposal for a Council mandate to negotiate a treaty in relation to Gibraltar (COM (2021)411, 20 July 2021). Art. 361(4) TCA provides for a possible separate competition law treaty; the Commission proposed a Council mandate to negotiate one on 11 May 2021. On bilateral UK/EU Member State treaties, see *infra* section 3.

10. The Commission has rejected EU approval of the UK signing up to the Lugano Convention on civil and commercial judgments in its own name (COM(2021)222, 4 May 2021). On the other hand, if the EU and the UK both sign up to the Hague Judgments Convention (see Commission proposal, COM(2021)388, 16 July 2021; there is no parallel UK plan to accede yet) there would still be *some* increase in cooperation on this issue compared to the post-Brexit status quo. See generally Poro, “Implication of Brexit on enforcement of judgments in civil and commercial matters”, 36 *Journal of International Banking Law and Regulation* (2021), 91.

11. Art .783(2). See the Council decision on signature, O.J. 2020, L 444/2.

12. Art. 7.

13. Partnership Council Decision 1/2021, O.J. 2021, L 68/227. For the Council decision on conclusion of the treaty, see O.J. 2021, L 149/2.

14. Art. 780. For the initial version, see O.J. 2020, L 444/14. The same “scrubbing process” applied to the EU/UK security treaty and Euratom treaty (Art. 21 security treaty; Art. 25 Euratom treaty). See the notice to readers, O.J. 2020, L 444/1.

15. Art. 782.

16. O.J. 2020, L 360/1 and 69.

There are a number of joint declarations to the treaty,¹⁷ which concern: financial services; harmful tax regimes; a monetary policy exemption from the subsidy control provisions; subsidy control policy generally; electricity interconnection; security exceptions; road hauliers; asylum and returns; passenger name record data; extradition; criminal records information; the security information treaty; UK participation in EU programmes; and data protection adequacy as regards the UK. Of these, the declaration on asylum and returns refers to the possibility of the UK holding bilateral talks with Member States about return of non-EU citizens, confirming implicitly that the EU was not willing to agree to the UK's proposed treaties on readmission or child asylum seekers. The joint declarations also include the agreed text of a protocol on UK participation in some EU programmes: mainly research-related, plus the peace programme relating to Northern Ireland.¹⁸

Either side can give notice to terminate the entire agreement; if so, it will end 12 months later.¹⁹ There are also many provisions on the termination or suspension of specific parts of the treaty, as regards energy,²⁰ air transport,²¹ aviation safety,²² transport of goods by road,²³ fisheries,²⁴ almost the whole of Part Two on economic cooperation,²⁵ the whole of Part Three on criminal law cooperation,²⁶ and social security.²⁷ In fact, by invoking a number of these

17. O.J. 2020, L 444/1427.

18. Joint Declaration on draft Protocol I. The Protocol had not been adopted at the time of writing. See Art. 710 TCA.

19. Art. 779.

20. Art. 331, which terminates the entire Energy Title (Arts. 299–331) automatically on 30 June 2026, although the parties can agree to yearly extensions via the Partnership Council.

21. Art. 441, which would entail termination of the entire Air Transport Title (Arts. 417–442), 9 months after notification. See Art. 440(2) on transitional rules, which would also apply (as regards air transport) in the event of termination of the entire TCA.

22. Art. 458, which would entail termination of the entire Aviation Safety Title (Arts. 443–458), 9 months after notification.

23. Art. 472, which would entail termination of the entire Title on Transport of Goods by Road (Arts. 459–472), 9 months after notification.

24. Art. 509, which technically concerns only the Heading relating to fisheries, but which would entail consequential termination of the Headings relating to trade, aviation and road transport, 9 months after notification. See Art. 509(2) on transitional rules and Art. 509(3) on exceptions to the termination.

25. Art. 521, which would apply 9 months after notification. This would apply to trade, aviation, road transport and fisheries; the exception is social security (which would also be unaffected by invoking Art. 509). Social security has a separate rule on termination, discussed *infra*.

26. Art. 692(1), which would apply 9 months after notification. This is separate from fast-track termination or suspension of this part on human rights grounds, discussed further *infra*.

27. Social security protocol, Art. SSC.69; the protocol will end 9 months after the notice of termination. Art. SSC.70 of the protocol is a “sunset clause”, providing for the protocol to

provisions simultaneously,²⁸ either the EU or UK could terminate *almost* the entire TCA within nine months, instead of the usual 12 months.²⁹

In addition to these provisions for termination on unspecified grounds, there are some provisions on fast-track termination or suspension on specific grounds. As regards the TCA as a whole, the starting point is the “common provisions” of the TCA (in Title II of Part Six). This refers to the parties’ common commitments to human rights, climate change, weapons of mass destruction (WMDs), small arms and light weapons, serious crime, counterterrorism, data protection and global cooperation.³⁰ However, only the provisions on human rights, climate change and WMDs are then described as constituting “essential elements of the partnership established by this Agreement and any supplementing agreement”.³¹

The consequence of defining an issue as an “essential element” of the TCA is that it is then subject to a special procedure, potentially leading to fast-track termination or suspension of the entire agreement, partly or wholly.³² If one party thinks that “there has been a serious and substantial failure by the other Party to fulfil any of the obligations that are described as essential elements”, it can wholly or partly unilaterally terminate or suspend the TCA or any supplementing agreement.³³ There must be prior consultations in the Partnership Council, but termination or suspension can take place as soon as 30 days after the request for those consultations.³⁴ However, these counter-measures must “respect international law and shall be proportionate”, and priority must be given to “measures which least disturb the functioning of” the TCA and supplementing agreements.³⁵ Furthermore, the threshold of “serious and substantial failure” is defined: “its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has

expire automatically in 15 years, although either side can indicate its wish to negotiate new arrangements. On the consequences of termination, see Art. SSC.71 of the protocol.

28. Namely Arts. 521, 692(1) and SSC.69 of the social security protocol.

29. Social security protocol, Art. SSC.69; the protocol will end 9 months after the notice of termination. Art. SSC.70 of the protocol is a “sunset clause”, providing for the protocol to expire automatically in 15 years, although either side can indicate its wish to negotiate new arrangements. On the consequences of termination, see Art. SSC.71 of the protocol.

30. Arts. 763–770. The human rights clause (Art. 763) does not mention the ECHR or its domestic application specifically, although it does refer to international human rights treaties in general; and see discussion *infra* as regards Part Three.

31. Art. 771.

32. Art. 772.

33. Art. 772(1).

34. Art. 772(2).

35. Art. 772(3).

international repercussions”, although “an act or omission which materially defeats the object and purpose of the Paris Agreement” will always meet this threshold.³⁶ Conversely, denouncing the ECHR, or any other human rights treaty, is not explicitly mentioned in this context, and (contrary to some reporting on the TCA) suspension or termination in the event of human rights breaches (or other breaches of “essential elements”) is not automatic (a party “may decide”). Note that although the *substance* of the “essential elements” clauses is excluded from dispute settlement,³⁷ the *procedure* for fast-track termination or suspension is not. This suggests, oddly, that a dispute settlement process could not examine one party’s appraisal that the other party has serious human rights problems, but *could* assess whether the former party’s reaction to the situation was disproportionate.

Moreover, the “essential elements” clause should be seen in context, given that (as we have seen) either party may terminate the entire treaty anyway with twelve months’ notice, or many separate segments of it with nine months’ notice. It should also be noted that similar clauses exist in other EU treaties with non-EU countries – and the EU is notably reluctant to trigger them.

Part Three of the TCA, which comprises the rules on law enforcement cooperation, contains its own variation on an “essential elements” clause:³⁸

“1. The cooperation provided for in this Part is based on the Parties’ and Member States’ long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.”

Note the explicit reference to the ECHR (unlike in the general “essential elements” clauses), and also to the “importance” of giving effect to the ECHR domestically. The concrete consequences of this provision are set out in Part Three’s own termination clause,³⁹ which provides for a variation of the general

36. Art. 722(4).

37. Art. 735(2)(h).

38. Art. 524. See also Art. 525, on the parties’ commitment to data protection standards.

39. Art. 692.

rule on the power to terminate that Part with nine months' notice:⁴⁰ if the termination follows from the UK or a Member State denouncing the ECHR or Protocols 1, 6 or 13 to the ECHR, it takes effect at the same time as the denunciation, or (if notified afterwards) only fifteen days after the notification.⁴¹

Compared to the TCA's general "essential elements" clause, there is no "serious and substantial failure" threshold (or any other threshold above and beyond denunciation of the ECHR or its listed protocols); there are no procedural requirements to discuss the issue, other than the requirement to discuss wrapping up proceedings already underway (and the denunciation of the ECHR or its protocols would likely cast a long shadow over this discussion); and there is no obligation of proportionality as regards the response. However, the fast-track termination clause makes no reference to amending or scrapping domestic law giving effect to the ECHR – although of course the general Part Three termination clause could still be invoked in that event. Again, despite some public confusion on this point, termination is *not* automatic (a party "may": Art. 692(1)).

Furthermore, Part Three also contains its own clause on *suspension*, as distinct from termination.⁴² If there are "serious and systemic deficiencies within one Party as regards the protection of fundamental rights or the principle of the rule of law", or as regards data protection, the other Party *may* suspend all of Part Three or some of its Titles.⁴³ The Titles concerned cease to apply three months later, although there is scope to backtrack from the suspension at the last minute.⁴⁴ In the event of partial suspension by one party, the other party can suspend the rest of Part Three in retaliation, again with three months' notice.⁴⁵ However, the TCA also requires efforts to be made to

40. Art. 692(1).

41. Art. 692(2). The 3 protocols are those which the UK has ratified. Note that Protocols 6 and 13 concern the death penalty. For either type of termination clause, the parties shall meet to agree on how to "wrap up" any pending criminal law cooperation, although the existing level of data protection must be maintained as regards personal data obtained before termination takes effect: Art. 692(3).

42. Art. 693. Compare with Arts. 771–772, discussed *supra*, which concern suspension or termination as regards the "essential elements" provisions of the whole TCA.

43. Art. 693(1) and (2). The data protection suspension can apply where a data protection adequacy decision has ceased to apply, but that is not the only occasion when it might apply ("including"). On the definition of an adequacy decision for these purposes, see Art. 693(3) and (4). See also Art. 525, on the parties' commitment to data protection standards.

44. Art. 693(5).

45. Art. 693(6).

negotiate a solution, including even amendments to Part Three if necessary.⁴⁶ The suspended provisions must also be reapplied on a fast-track basis “immediately after the serious and systemic deficiencies on the part of the other Party on which the suspension was based have ceased to exist”.⁴⁷

The threshold of “serious and systemic deficiencies” is similar, but not identical, to the general TCA “essential elements” clause. Again, suspension is not automatic (a party “may” suspend some or all of Part Three). There is no obligation of proportionality as regards reaction to the deficiencies. While again there is no *explicit* reference to amending or scrapping domestic law giving effect to the ECHR, it might be argued that such a development could meet the threshold of “serious and systemic deficiencies”, since this is less specific than the threshold (denunciation of the ECHR or its relevant protocols) to terminate Part Three. The delay of three months in giving effect to the suspension is longer than the general TCA “essential elements” clause – presumably to give the consultation process an opportunity to reach a negotiated solution that resolves the concerns. There is no reference to concerns about human rights, the rule of law, or data protection in one or more *individual* Member States, but only as regards the EU as a whole.

As with the general “essential elements” clause, Part Three has somewhat contradictory rules on dispute settlement on this issue, which apply in place of the main dispute settlement rules (or any other dispute settlement process).⁴⁸ On the one hand, these special dispute settlement rules do not apply to the suspension or termination clauses.⁴⁹ On the other hand, the *substantive* grounds for termination or suspension in Part Three *can* be subject to dispute settlement. So while dispute settlement for the general TCA “essential elements” clause is confusing because the *process* can be subject to dispute settlement while the *substantive* clause cannot, the Part Three dispute settlement process is confusing for precisely the *opposite* reason: the *substantive* clause can be subject to dispute settlement, while the *procedural* clause cannot.

In any event, the application of the Part Three dispute settlement rules to the substantive termination or suspension clauses gets us to essentially the same place in the end: in the event that the purely political Part Three dispute settlement process does not lead to a conclusion, one party can suspend some

46. Art. 693(7). See also Art. 693(8), which provides for discussion on how to “wrap up” pending proceedings.

47. Art. 693(9).

48. Art. 697.

49. Art. 696.

of Part Three in more or less the same way as it can under the human rights provisions.⁵⁰

Part Three also contains a number of specific provisions on human rights relating to particular forms of law enforcement cooperation, as regards extradition,⁵¹ freezing and confiscation of assets,⁵² and Europol.⁵³ None of these special human rights exceptions are excluded from the rules on dispute settlement regarding Part Three of the TCA. There are also special provisions on suspension of exchanges of passenger name records,⁵⁴ or of DNA, vehicle and fingerprint data exchanges.⁵⁵

The TCA's approach to the issue of suspension or termination is a Copernican revolution from the approach set out in the Withdrawal Agreement, which contains no provision on termination or suspension of the whole treaty, but only (highly constrained) provisions on termination of part of the protocol on Northern Ireland.⁵⁶ Yet despite this, there is more talk of opposition to the Withdrawal Agreement than the TCA from the UK Government.

As for the territorial scope of the TCA, it primarily applies only to UK territory as such, although certain parts (mainly on fisheries) apply to the Channel Islands and to the Isle of Man.⁵⁷ On the other hand, the TCA expressly does not apply to Gibraltar or to the UK's overseas territories.⁵⁸ A separate treaty as regards Gibraltar might be negotiated.⁵⁹

There is provision for the adoption of a number of further measures implementing the agreement by joint agreement of the parties, either by the Partnership Council (made up of their representatives) or by a number of committees set up by the agreement.⁶⁰ Decisions of these bodies are binding,

50. Art. 700.

51. Art. 604(c), which provides for a demand for possible additional guarantees “if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person”.

52. Art. 671, which provides for a possible request for additional information in similar circumstances to the extradition clause.

53. Art. 570, referring to information obtained in breach of human rights, or transferred where it could be used to hand down or execute a death penalty or cruel or inhuman treatment.

54. Art. 562, which can apply on any grounds.

55. Art. 541, which can apply in the event that UK law on these issues diverges from EU law.

56. In the absence of any other express basis to terminate the Withdrawal Agreement, general international law provides limited possibilities to terminate it: see further *Peers op. cit. supra* note 4.

57. Art. 774(1) and (2).

58. Art. 774(3) and (4).

59. See *supra* note 9.

60. Arts. 7 and 8. Art. 9 provides for working groups to assist the committees.

but their recommendations are not.⁶¹ In practice, a number of implementing measures have been proposed already by the EU side.⁶²

Finally, the treaty has already attracted litigation in the EU courts, which have ruled on whether the extradition provisions should have been subject to an opt-in process as regards Ireland,⁶³ and are asked to rule on whether the services provisions ignore the (arguably) retained EU citizenship of British nationals.⁶⁴ In light of many previous challenges to UK data protection law and to EU data protection adequacy decisions, there might also be litigation relating to the EU Commission's data protection adequacy decisions concerning the UK (separate from the TCA as such, but linked to it).⁶⁵

2.2. *Legal basis*

Unusually for a comprehensive treaty with a non-EU country, the EU signed and concluded the TCA not as a mixed agreement with the participation of both the EU and its Member States, but solely as a treaty binding the EU. This is explained in the recitals to the Council Decision on conclusion:⁶⁶

“In view of the exceptional and unique character of the Trade and Cooperation Agreement, which is a comprehensive agreement with a country that has withdrawn from the Union, the Council is hereby deciding to make use of the possibility for the Union to exercise its external competence with regard to the United Kingdom.”

There is a fuller explanation in the Council Legal Service opinion on the issue, which was liberated for public consumption by mysterious means.⁶⁷ In short, as regards the parts of the TCA falling within the shared competence of the EU and its Member States, the Legal Service argues that this is an exercise

61. Art. 10.

62. COM(2021)353, 29 June 2021 (fisheries); COM(2021)364, 6 July 2021 (social security); and COM(2021)495, 27 Aug. 2021 (data exchange). The latter has been adopted: Specialised Committee Decision 1/2021, O.J. 2021, L 397/32.

63. Case C-479/21 PPU, *SN and SD v. Governor of Cloverhill Prison et al.*, EU:C:2021:929, and Case T-157/21, *RG v. Council*, Order of 18 Nov 2021, EU:T:2021:829.

64. Case T-442/21, *Thomas and Julien v. Council*, pending. This issue may be resolved in the meantime by litigation on the same point concerning the Withdrawal Agreement: Case C-673/20, *Préfet du Gers and Institut National de la Statistique and des Études Économiques*; Case C-32/21, *Institut National de la Statistique and des Études Économiques et al.*; Case C-499/21 P, *Silver and others v. Council*; Case C-501/21 P, *Shindler et al. v. Council*; and Case C-502/21 P, *Price v. Council*, all pending.

65. See by analogy Case C-311/18, *Schrems II*, EU:C:2020:559.

66. O.J. 2021, L 149/2, Recital 3.

67. For the text, see <eulawanalysis.blogspot.com/2021/01/the-brexit-deal-council-legal-service.html>.

of the potential power of the EU to conclude treaties within that shared competence, without having to involve the Member States – mixity being an option (“facultative”), not an obligation, even though the opportunity for mixity is rarely passed up by Member States in practice.⁶⁸

In the Legal Service’s view, there is no “obligatory” mixity – i.e. where Member States *must* become signatories to the treaty – entailed in the text of the TCA. The provisions of the TCA fall partly within explicit exclusive EU external competences (trade and fisheries), and partly within external competences which have become exclusive by exercise in the sense of *ERTA* or Article 3(2) TEU (aviation safety and criminal cooperation). In areas of shared competence (aviation traffic rights and social security, for example), the Council made the political choice to conclude them on an EU-only basis. In light of the case law referred to by the Council Legal Service, this is a convincing argument. Any complications, insofar as the EU may be liable for botched implementation by the Member States, fall to be addressed by the long-standing principle that the Member States owe an EU law obligation to give effect to treaties concluded by the EU.

Although the TCA is not referred to explicitly as an “association agreement” – perhaps to avoid alarming Brexit supporters in the UK – it is nonetheless concluded as an association agreement as far as the EU’s legal basis is concerned. Article 217 TFEU, the legal basis for association agreements, is vague about the scope of such treaties, although the ECJ has now ruled that Article 217 is a wide legal power for the EU, sufficient to encompass at least the extradition provisions of the TCA.⁶⁹

Although association agreements are in practice almost always concluded as mixed agreements, this is not an explicit requirement in the Treaties or the ECJ case law. The Council legal service also argues that concluding the TCA on an EU-only basis does not create a binding precedent as regards other treaties with non-EU countries in future that fall partly or wholly within the EU’s shared competence.⁷⁰

Furthermore, the TCA explicitly provides for Member States to conclude additional bilateral treaties with the UK on aviation.⁷¹ The Council Decision on conclusion of the treaty sets out the internal process for approval of such

68. The legal service relies, *inter alia*, on the ECJ’s ruling in Joined Cases C-626 & 659/16, *Commission v. Council (Weddell)*, EU:C:2018:925, paras. 113 and 114 and the case law cited.

69. Case C-479/21, *SN and SD*. See e.g. Case 12/86, *Demirel*, EU:C:1987:400.

70. See Art. 10 of the Council Decision on conclusion of the agreement, cited *supra* note 13.

71. Art. 419. See also Art. 563(10) on operational police cooperation.

treaties (as well as on social security and some tax issues),⁷² and a number of such bilateral treaties have been agreed.⁷³

2.3. *Legal effect*

As regards its legal effect within the domestic law of the contracting parties, the TCA first of all points out that it is subject to the basic principles of international law.⁷⁴ Furthermore, it explicitly states that there is no obligation to interpret it in light of the domestic law of either Party – fore-stalling any argument that it must be interpreted consistently with corresponding provisions of EU law.⁷⁵ In fact, this is further forestalled by a number of provisions that expressly incorporate WTO law, and a requirement to consider relevant WTO dispute settlement rulings.⁷⁶ The rulings of the courts of one party expressly do not bind the courts of the other party.⁷⁷

Private rights for individuals to rely on the agreement in the domestic courts are also expressly ruled out – except as regards the social security and (on the EU side) the criminal law provisions.⁷⁸ Nor can either party try to circumvent this by providing in its domestic law for the capacity to sue the other party for breach of the treaty.⁷⁹ The Court of Justice has jurisdiction as regards litigation over EU programmes, but otherwise no jurisdiction as far as both

72. Arts. 6–8. As regards treaties with the UK outside the scope of the TCA, Art. 9 of the Council Decision requires Member States to “inform the Commission in due time of their intentions and of the progress of the negotiations”, “in full respect of the principle of sincere cooperation”. Cf. the similar provisions of the Council Decision concluding the Withdrawal Agreement, cited *supra* note 3.

73. The Commission register of documents refers to decisions relating to air services agreements between the UK and Luxembourg, Malta, France, Germany and Slovakia (all unpublished), presumably pursuant to Art. 8 of the Council Decision on conclusion of the TCA. See also the decision approving France negotiating with the UK on a potential France/UK treaty on railways (O.J. 2020, L 352/4), the amendment of EU law to this end (Regulation 2020/1530, O.J. 2020, L 352/1), and Regulation 2020/2222 (O.J. 2020, L 437/43; amended by Regulation 2021/1701, O.J. 2021, L 339/1).

74. Art. 4(1).

75. Art. 4(2). Cf. e.g. the case law on the EU/Turkey Association Agreement, starting with Case C-434/93, *Bozkurt*, EU:C:1995:168.

76. See *infra* section 3.1. There are also a number of references to other international treaties – e.g. labour and environmental treaties (see *infra* section 3.2) and human rights treaties (see *supra* section 2.1).

77. Art. 4(3).

78. Art. 5(1).

79. Art. 5(2).

parties to the TCA are concerned.⁸⁰ The dispute settlement provisions also explicitly limit the legal effect of dispute settlement rulings.⁸¹

On both points, the TCA is quite different in nature from the Withdrawal Agreement. Indeed, the UK Government explicitly objects to the continued jurisdiction of the Court of Justice as regards the Northern Ireland Protocol to that Agreement⁸² – even though, of course, it signed up to and is bound by the Withdrawal Agreement as long as it is not amended.

3. Economic cooperation

3.1. Free trade

Part Two of the TCA first of all establishes a free trade area for goods and services,⁸³ in accordance with the WTO – preserving some of the economic links between the parties, but falling short of participation in the single market.⁸⁴ Some provisions of the GATT are expressly incorporated into the TCA (implicitly ruling out interpreting the relevant provisions in accordance with internal EU law).⁸⁵ WTO case law must be taken into account where relevant.⁸⁶

The core rules are zero tariffs (although customs charges are possible), zero quotas, non-discrimination in tax and regulation, and freedom of transit.⁸⁷ Unlike within the EU, both sides can apply trade remedies: anti-dumping duties, anti-subsidy duties, and economic safeguards.⁸⁸ This is usual for free trade agreements.

There are lengthy provisions on rules of origin, which are necessary to show that a good originates in the EU or UK respectively, following the UK's

80. Art. 728. Of course, the EU courts have jurisdiction to interpret the agreement as far as the EU side is concerned: see the cases decided already, *supra* notes 62 and 63.

81. See *infra* section 5.

82. Command paper, “Northern Ireland Protocol: The way forward”, July 2021.

83. Art. 514.

84. Arts. 15–122 (goods); Arts. 123–195 (services and investment). See Craig, *op. cit.* *supra* note 6, 135–137.

85. Art. 19 (Art. III GATT); Art. 20 (Art. V GATT); Art. 26 (Art. XI GATT); Art. 28(4) (import licensing); Art. 30 (customs valuation); Art. 90 (technical barriers).

86. Art. 516.

87. Art. 19 (national treatment); Art. 20 (transit); Art. 21 (customs duties); Art. 23 (fees); Art. 26 (quotas and other import or export restrictions). Note that Art. 20 TCA/Art. V GATT on freedom of transit would preclude a strategy of blocking the land transport of goods across the UK between Ireland and the rest of the EU (or across the EU between the UK and other non-EU countries).

88. Art. 32.

decision to leave the customs union.⁸⁹ The UK and EU have also agreed rules on sanitary and phyto-sanitary measures, customs cooperation, and technical barriers, which do not entail alignment with EU law.⁹⁰

As for services, it is inaccurate to suggest (as some have) that the treaty provides for nothing on this issue; but again, an FTA in services falls short of participation in the single market. The services free trade provisions, which are comparable to other recent FTAs agreed by the EU, comprise: general rules;⁹¹ investment market access provisions;⁹² market access for services;⁹³ temporary stay for business visitors;⁹⁴ regulatory frameworks (including provisions on professional qualifications and some specific services).⁹⁵

3.2. *Level playing field*

A particularly contentious issue was the negotiation of the so-called “level playing field” (LPF) designed to ensure perceived fair competition between the two sides.⁹⁶ Here the negotiators agreed on different approaches to different issues. For competition law, there is an obligation to have and enforce a system, but no dispute settlement.⁹⁷ On State aid/subsidies there is a compromise:⁹⁸ less than the EU wanted (which was full application of EU law, including references to the ECJ, albeit applied by UK authorities rather than the Commission), but more than the UK wanted (which was a brief statement of basic rules). The compromise entails basic principles on subsidies,⁹⁹ which are further fleshed out.¹⁰⁰ For enforcement, there must be

89. Arts. 37–68.

90. Respectively Arts. 69–87 (SPS), Arts. 88–100 (technical barriers) and Arts. 101–22 (customs cooperation).

91. Arts. 122–126. Note the exclusion of audio-visual services (Art. 123(5)(b)).

92. Arts. 127–133.

93. Arts. 134–139.

94. Arts. 140–145.

95. Arts. 146–195. On professional qualifications, see Art. 158; for specific services, see Arts. 159–163 (delivery services), Arts. 164–181 (telecoms services); Arts. 182–189 (financial services); Arts. 190–191 (maritime transport); and Arts. 192–195 (legal services).

96. Title XI (Arts. 355–411) of Heading One of Part Two. See Craig, *op. cit. supra* note 6, 146–151.

97. Chapter 2 of Title XI of Heading One of Part Two (Arts. 358–362). Chapter 1 sets out general LPF rules (Arts. 355–357). For more on dispute settlement, see *infra* section 5.

98. Chapter 3 of Title XI of Heading One of Part Two (Arts. 363–375). See Robertson, “The new UK subsidy control regime”, 42 ECLR (2021), 230. Cf. the Withdrawal Agreement: Phedon, “The agreement on the withdrawal of the UK from the EU and Euratom and its impact on the future application of State aid rules in the UK”, 17 MJ (2020), 503.

99. Art. 366.

100. Art. 367.

access to the courts and an independent enforcement body.¹⁰¹ Remedies must include clawing back a subsidy.¹⁰² There are special dispute settlement rules: fast-track retaliation against a subsidy, fast-track arbitration on the retaliation, but limits on what the arbitrators can review.¹⁰³

Subsidy control was the main negotiation objective for the EU; by contrast there are only basic rules on State-owned enterprises,¹⁰⁴ and on taxation, there is a vague reference to international standards, a more concrete standstill, but no dispute settlement.¹⁰⁵

This brings us to the high-profile issues of employment law and environmental law, where again there is a complex compromise which is similar to other recent EU free trade agreements – but with the important distinction that the non-regression clause (discussed below) can be enforced by trade retaliation. First of all, there is a chapter on “labour and social standards”,¹⁰⁶ with a broad scope, defining “labour and social levels of protection” as: “(a) fundamental rights at work; (b) occupational health and safety standards; (c) fair working conditions and employment standards; (d) information and consultation rights at company level; or (e) restructuring of undertakings”.¹⁰⁷ A footnote confirms that this does not apply to social security or pensions. On the EU side, this applies to “labour and social levels of protection that are applicable to and in, and are common to, all Member States”.¹⁰⁸ This necessarily refers to EU law, but there may also be other employment standards that Member States have in common besides those deriving from EU law (for instance, those deriving from international treaties like the Council of Europe Social Charter and ILO Conventions).

Next, the key obligation is non-regression, defined as follows:¹⁰⁹

“A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.”

101. Arts. 371–372.

102. Art. 373.

103. Arts. 374–375. For more on dispute settlement, see *infra* section 5.

104. Chapter 4 of Title XI of Heading One of Part Two (Arts. 376–382).

105. Chapter 5 of Title XI of Heading One of Part Two (Arts. 383–385). See Lyons, “The EU-UK Trade and Cooperation Agreement: A new world with new rules”, (2021) *British Tax Review*, 23–29.

106. Chapter 6 of Title XI of Heading One of Part Two (Arts. 386–389).

107. Art. 386(1).

108. Art. 386(2).

109. Art. 387(2).

Note that for the UK this refers to national standards, not EU standards; although there was some EU law in place as regards much of the scope of this chapter, it did not harmonize every issue, and set only minimum standards. So the UK's obligation applies even where there was no EU law, or where it only set minimum standards, although not every reduction of national standards will infringe the non-regression clause in light of the threshold of "affecting trade or investment between the Parties".¹¹⁰ Although the labour law chapter is subject to a special type of dispute settlement, this still includes the possibility of retaliation (i.e. by raising tariffs) in the event of a breach.¹¹¹

Second, the environmental law LPF rules¹¹² again have a broad scope,¹¹³ with a specific definition of climate change.¹¹⁴ The non-regression rule applies the same way as for employment law;¹¹⁵ the domestic enforcement rule is vaguer,¹¹⁶ but there are some additional rules relating to carbon pricing and environment and climate principles,¹¹⁷ and the special dispute settlement rules, including the possibility of retaliation, work the same way.¹¹⁸

Third, a chapter on "sustainable development"¹¹⁹ sets out some general commitments to international labour and environmental law principles,¹²⁰ including specific rules on transparency, multilateral labour standards, multilateral environmental agreements, climate change, biological diversity, trade and forests, marine resources, trade and investment, and supply chain management.¹²¹ For instance, the clause on labour standards refers to:

"respecting, promoting and effectively implementing the internationally recognized core labour standards, as defined in the fundamental ILO Conventions, which are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child

110. See also the clarification of the enforcement part of the non-regression clause (Arts. 387(3) and 388) and the general power to change levels of protection if consistent with the labour law chapter (Art. 387(1)).

111. Art. 389: in place of the general dispute settlement rules, Arts. 408–410 apply. See further *infra* section 5.

112. Chapter 7 of Title XI of Heading One of Part Two (Arts. 390–396).

113. Art. 390(1). The definition for the EU side matches the "common for all Member States" rule applicable to labour law (Art. 390(2)); again the reference for the UK is to *national* law, encompassing any standards higher than the EU law minimum applicable in the UK at the end of the transition period.

114. Art. 390(3).

115. Art. 391(2).

116. Art. 394; see also Art. 395 on UK/EU cooperation on enforcement.

117. Arts. 392–393.

118. Art. 396.

119. Chapter 8 of Title XI of Heading One of Part Two (Arts. 397–407).

120. Art. 397.

121. Arts. 399–406.

labour; and (d) the elimination of discrimination in respect of employment and occupation.”¹²²

Each Party must also “make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so”,¹²³ and “commits to implementing all the ILO Conventions that the United Kingdom and the Member States of the Union have respectively ratified and the different provisions of the European Social Charter that, as members of the Council of Europe, the Member States of the Union and the United Kingdom have respectively accepted.”¹²⁴ A footnote clarifies the extent of these obligations:

“Each Party maintains its right to determine its priorities, policies and the allocation of resources in the effective implementation of the ILO Conventions and the relevant provisions of the European Social Charter in a manner consistent with its international commitments, including those under this Title. The Council of Europe, established in 1949, adopted the European Social Charter in 1961, which was revised in 1996. All Member States have ratified the European Social Charter in its original or revised version. For the United Kingdom, the reference to the European Social Charter in paragraph 5 refers to the original 1961 version.”

This provision was the subject of an early dispute between the UK and the EU as regards the UK’s long-term visa fees for nationals of some Member States but not others.¹²⁵ The issue is addressed by the Council of Europe Social Charter,¹²⁶ but the UK’s argument was that the Member States concerned had only signed up to the 1996 version of the Charter, therefore the UK did not have obligations to them in this respect. Subsequently the UK ended its obligations to any countries on this issue, by denouncing its relevant obligations under the Social Charter.¹²⁷ It might be arguable that this denunciation is a breach of the non-regression clause, but even if it falls within the scope of the labour law chapter, the threshold for that clause to apply (“in a manner affecting trade or investment between the Parties”) would have to be met. This is an example indicating that it might be difficult to reach the

122. Art. 399(2).

123. Art. 399(3).

124. Art. 399(5).

125. See minutes of the Partnership Council meeting of 9 June 2021, item 5.

126. Art. 18(3) of the Charter.

127. See Art. 37(2) of the Charter. For the notification, see <www.coe.int/en/web/european-social-charter/-/the-united-kingdom-denounces-article-18-paragraph-2-of-the-european-social-charter>.

threshold – although it will ultimately be up to arbitrators to determine how to interpret it.

As with the “non-regression clause”, the general dispute settlement rules do not apply, with special dispute settlement rules applying instead.¹²⁸ But there is one dispute settlement rule (retaliation for breach) that applies to the non-regression clause but *not* to the sustainable development provisions.¹²⁹ In both cases, the parties must enter into consultation, which may involve information from ILO bodies.¹³⁰ If these consultations are unsuccessful, a panel of experts (who should also seek guidance from ILO bodies) may be set up.¹³¹ Although this panel must deliver a report, the TCA explicitly confirms that this process is toothless: “For greater certainty, the Parties share the understanding that if the Panel makes recommendations in its report, the responding Party does not need to follow these recommendations in ensuring conformity with the Agreement.”¹³² Furthermore, while some parts of the dispute settlement rules apply to these panels, the parts dealing with remedies do not.¹³³ Having said that, it is possible that the panel process could have a political impact, as it might be useful for those objecting that the UK (or EU) was not upholding social rights to have a panel report in their favour that they could wave around.¹³⁴

Finally, the fourth part of the labour and environment LPF rules – which extends also to subsidies – is triggered whenever there is a divergence in *future* standards. If “material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties” in these areas, then they can take “rebalancing” measures (which can include trade retaliation), subject to a special procedure.¹³⁵ But note that this is a different threshold from the non-regression clauses (a “material impact” on trade or investment, rather than “in a manner affecting” it; also a “significant divergence” is required).¹³⁶

128. Art. 407: in place of the general dispute settlement rules, Arts. 408–409 apply.

129. Art. 410: compare Art. 389 to Art. 407.

130. Art. 408.

131. Art. 409.

132. Art. 409(9).

133. Art. 409(19). See *infra* section 5 on dispute settlement.

134. See e.g. the EU/Korea panel report of Jan 2021, which concerns the interpretation of comparable provisions of the EU/Korea FTA, available at <trade.ec.europa.eu/doclib/press/index.cfm?id=2238>.

135. Art. 411. See *infra* section 5 on dispute settlement.

136. Art. 411(2) also requires proportionate retaliation, and states that the “assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility”.

3.3. Other provisions

The trade provisions of Part Two also include titles on: digital trade;¹³⁷ capital movement;¹³⁸ intellectual property;¹³⁹ public procurement;¹⁴⁰ small and medium-sized business;¹⁴¹ energy;¹⁴² transparency;¹⁴³ good regulatory practice;¹⁴⁴ and exceptions.¹⁴⁵

On intellectual property (IP), for example, there are detailed obligations that build on WTO law (the TRIPS obligations) as regards various types of IP. But this is different from being an EU Member State, as the detailed EU laws (subject to frequent litigation at the CJEU) on many specific IP rights no longer apply to the UK.¹⁴⁶ The exceptions also refer back to or echo WTO rules on exceptions, waivers, and national security, alongside provisions on taxation and confidential information. Furthermore, the entire treaty is subject to a safeguard clause in the event of “serious economic, societal or environmental difficulties” that are “liable to persist”. Such measures are subject to procedural obligations and can be the subject of proportionate retaliation.¹⁴⁷

Part Two’s economic provisions also extend to detailed rules on air and road transport,¹⁴⁸ as well as the contentious issue of fisheries,¹⁴⁹ and a protocol on social security.¹⁵⁰

137. Title III (Arts. 196–212) of Heading One of Part Two.

138. Title IV (Arts. 213–218) of Heading One of Part Two.

139. Title V (Arts. 219–275) of Heading One of Part Two.

140. Title VI (Arts. 276–294) of Heading One of Part Two. See Henty, “Beyond Brexit: Preparations for UK Government and utilities procurement at the end of the transition period”, (2021) *Public Procurement Law Review*, NA34-NA41.

141. Title VII (Arts. 295–298) of Heading One of Part Two.

142. Title VIII (Arts. 299–331) of Heading One of Part Two.

143. Title IX (Arts. 332–329) of Heading One of Part Two.

144. Title X (Arts. 340–354) of Heading One of Part Two.

145. Title XII (Arts. 412–416) of Heading One of Part Two.

146. Lee, “United Kingdom copyright decisions and post-Brexit copyright developments 2020”, 52 *International Review of Intellectual Property and Competition Law* (2021), 319.

147. Art. 773. This provision is nearly identical to the contentious Art. 16 of the Northern Ireland protocol to the Withdrawal Agreement. Art. 773(2) and (3) incorporate the procedural rules of Annex 7 to that protocol, except for point 5 of that Annex (review of the measures). Art. 773(5) provides for fast-track resort to arbitration without prior consultation, whereas the protocol has no specific rules on arbitration and the safeguard clause. Art. 773 does not require a link between the difficulties and the TCA, while the protocol does require such a link: “[i]f the application of this Protocol leads to...”.

148. Headings Two (Arts. 417–458) and Three (Arts. 459–486) of Part Two.

149. Heading Five (Arts. 493–521) of Part Two.

150. Heading Four (Arts. 487–492) of Part Two and the attached protocol, which also includes a brief provision on visas (Art. 492), which merely provides that if the UK imposes short-term visa requirements for one Member State it must apply it to all Member States

4. Criminal law cooperation

Part Three of the TCA¹⁵¹ provides for the UK to continue its involvement with many (but not all) areas of EU law in the criminal law and policing field which it had opted into as a Member State: transfers of data on DNA, fingerprints, and vehicle registration;¹⁵² passenger name records;¹⁵³ exchange of operational information;¹⁵⁴ cooperation with Europol and Eurojust;¹⁵⁵ extradition;¹⁵⁶ transfer of evidence (i.e. mutual assistance),¹⁵⁷ criminal records information;¹⁵⁸ money laundering;¹⁵⁹ and freezing and confiscation measures.¹⁶⁰

The most notable exception is the end of partial participation in the Schengen Information System. Furthermore, to avoid any whiff of alignment with EU law, there is no express reference to the relevant EU measures, although the wording of each chapter matches the relevant EU law at least in part. For instance, as regards extradition, many of the provisions resemble the Framework Decision establishing the European Arrest Warrant,¹⁶¹ but there are exceptions (similar to under the EU treaty with Norway and Iceland on extradition)¹⁶² as regards issues such as waiving the double criminality requirement, political offences, and non-extradition of nationals.¹⁶³

As noted already, Part Three of the TCA is in effect a separate treaty, containing a severable rule on its termination or suspension, including specific provisions relating to human rights, the rule of law, and data

(except Ireland). On the social security protocol, see further Hervey, “Healthcare entitlements in the EU-UK Trade and Cooperation Agreement”, available at <eulawanalysis.blogspot.com/2020/12/analysis-1-of-brexit-deal-healthcare.html>, 29 Dec. 2020.

151. Arts. 522–701.

152. Title II (Arts. 527–541).

153. Title III (Arts. 542–562).

154. Title IV (Art. 563).

155. Titles V (Arts. 564–579) and VI (Arts. 580–595).

156. Title VII (Arts. 596–632).

157. Title VIII (Arts. 633–642).

158. Title IX (Arts. 643–651).

159. Title X (Arts. 652–655).

160. Title XI (Arts. 656–689).

161. O.J. 2002, L 190/1. Art. 632 provides that if a person was not arrested on the basis of an EAW before the end of the transition period, the rules in the TCA apply to the execution of that EAW.

162. O.J. 2006, L 292/2.

163. Arts. 599, 602 and 603. Although the ECJ has ruled that its case law on the limits on extraditing EU citizens to non-EU countries (beginning with Case C-182/15 PPU, *Petruhhin*, EU:C:2016:630) does not apply to extradition to EEA countries (see Case C-897/19 PPU, *IN*, EU:C:2020:262), that case law would still apply to the UK, as the Court’s rationale for an exception for EEA countries (the existence of free movement rules) does not apply.

protection.¹⁶⁴ There are also separate, essentially political rules on dispute settlement as compared to the main dispute settlement rules.¹⁶⁵

5. Dispute settlement

The general provisions on dispute settlement¹⁶⁶ broadly resemble the Withdrawal Agreement rules,¹⁶⁷ but with some key differences. As noted already, unlike the Withdrawal Agreement, there is no jurisdiction of the CJEU in settling disputes between the parties,¹⁶⁸ with the exception of disputes about EU programmes. This exclusion also necessarily rules out references from the arbitrators asking the Court questions about EU law. There are also exclusions from the scope of the general rules on dispute settlement, as well as some variations on these general rules.

The general provisions of the dispute settlement rules¹⁶⁹ first of all state the objective of the rules: “to establish an effective and efficient mechanism for avoiding and settling disputes between the Parties concerning the interpretation and application of this Agreement and supplementing agreements, with a view to reaching, where possible, a mutually agreed solution”.¹⁷⁰

A more complex question is the scope of the general dispute settlement rules.¹⁷¹ The general rules do not apply to disputes concerning:¹⁷² the bulk of the provision on trade remedies – i.e. anti-dumping law, anti-subsidy rules and economic safeguards, where there is a cross-reference to WTO law (so WTO dispute settlement would be available instead);¹⁷³ cultural goods;¹⁷⁴ the annex

164. Arts. 692–693. See *supra* section 2.

165. Title XII (Arts. 695–701). See *infra* section 5.

166. Title I of Part Six (Arts. 734–762).

167. On which see Peers, *op. cit. supra* note 4.

168. *Supra* section 2.3.

169. Chapter 1 of Title I of Part Six (Arts. 734–737).

170. Art. 734. This is similar, but not quite identical, to the purpose of the Withdrawal Agreement dispute settlement provisions (see Art. 167 of that agreement).

171. Art. 735. There is no equivalent rule in the Withdrawal Agreement, where the dispute settlement provisions apply to any dispute after the end of the transition period (see Art. 185(4) of that agreement).

172. Art. 735(2).

173. Art. 735(2)(a), excluding Art. 32(1) to (6). However, note that the TCA also has its own rules on two of these issues (subsidies and safeguards), which are subject to TCA dispute settlement, albeit with some different rules in the case of subsidies, discussed *infra*.

174. Art. 735(2)(a), excluding Art. 36. Note that these rules only apply to cultural goods taken after 1993 – so would not, for instance, apply to the Parthenon marbles. There is no alternative dispute settlement process here.

on medical products;¹⁷⁵ the rules on small and medium-sized business in the trade heading;¹⁷⁶ the title on regulatory cooperation, which also forms part of the trade heading;¹⁷⁷ various aspects of the LPF rules;¹⁷⁸ the whole of Part Three of the agreement, on criminal law;¹⁷⁹ the whole of Part Four of the agreement, on health security and “cyber” issues;¹⁸⁰ the list of issues on which the EU/UK relationship (the “essential elements”);¹⁸¹ the short-term transition period for data protection law (which has already expired);¹⁸² and the separate UK/EU treaty on the exchange of classified information.¹⁸³ There is no express reference to the separate UK/Euratom treaty, but it has its own simplified form of dispute settlement, including possible recourse to arbitration.¹⁸⁴

Political dispute settlement (i.e. discussions between the parties, but without any possible recourse to arbitration) is still possible as regards these excluded issues.¹⁸⁵ Moreover, the parties cannot settle their disputes about these excluded provisions in any other dispute settlement system outside the

175. Art. 735(2)(b), excluding Annex 12. Again, there is no alternative dispute settlement process here.

176. Art. 735(2)(c), excluding Title VII of Heading one of Part Two. There is no alternative dispute settlement process here.

177. Art. 735(2)(d), excluding Title X of Heading one of Part Two (“Good regulatory practices and regulatory cooperation”). There is no alternative dispute settlement process here.

178. Art. 735(2)(e), excluding Art. 355(1), (2) and (4) (Principles and objectives), Article 356(1) and (3) (Right to regulate, precautionary approach and scientific and technical information), Chapter 2 of Title XI of Heading One of Part Two (Competition policy), Arts. 371 and 372 (Independent authority or body and cooperation and Courts and tribunals) of Chapter 2 (Subsidy control), Chapter 5 of Title XI of Heading One of Part Two (Taxation – Level Playing Field), and Art. 411(4) to (9) (Rebalancing). In short, these exclusions concern some introductory rules, competition law, some parts of the subsidies rules, taxation, and the “future review” part of the rebalancing clause on future divergences on labour, environmental and subsidies law. This means that the rest of the dispute settlement clauses apply in principle to the LPF clauses – but note that there are variations from the normal dispute settlement rules for those LPF issues either in the dispute settlement part of the treaty or in the LPF part of the treaty, discussed *infra*. For the LPF issues excluded entirely from the dispute settlement rules, there is no alternative dispute settlement process.

179. Art. 735(2)(f), “including when applying in relation to situations governed by other provisions of this Agreement”. This Part has its own dispute settlement rules, which are essentially political.

180. Art. 735(2)(g). This Part does not have its own dispute settlement rules.

181. Art. 735(2)(h), excluding Title II of Part Six. This Part does not have its own dispute settlement rules. However, note that the *process* for addressing some of the issues concerned is not excluded from the dispute settlement rules: see *supra* section 2.1.

182. Art. 735(2)(i), excluding Art. 782: see *supra* section 2.1.

183. Art. 735(2)(j). Art. 18 of that agreement includes its own dispute settlement rules.

184. Art. 21 of that agreement.

185. Art. 735(3).

scope of the TCA (except where WTO dispute settlement exists),¹⁸⁶ meaning that they are limited to discussing these disputes in the Partnership Council or using the alternative dispute settlement rules that exist in the treaty itself (regarding criminal law, for instance). Also, a different form of exclusion applies as regards social security: although the social security rules as such are not outside the scope of dispute settlement, the dispute settlement system cannot be used to resolve “individual cases”.¹⁸⁷

Exclusion from the general dispute settlement rules has an effect beyond removing the relevant provisions from the scope of arbitration: as discussed below, it also means that it closes off cross-retaliation, i.e. it is not possible to retaliate for a breach of (for instance) the trade provisions by suspending criminal law obligations (or suspending any of the other obligations excluded from the scope of the dispute settlement rules).¹⁸⁸

As under the Withdrawal Agreement, the dispute settlement rules are exclusive – meaning that the parties cannot use a system of dispute settlement “other than those provided for in this Agreement”.¹⁸⁹ However, the TCA provides for dispute settlement processes other than its dispute settlement rules, such as the WTO, so the rules address the choice of forum where multiple forums for settling disputes are available. Where a dispute concerns both an alleged breach of a TCA obligation and “of a substantially equivalent obligation under another international agreement to which both Parties are party, including the WTO Agreement”, the complaining party shall select the forum.¹⁹⁰ Once it does so, the complaining party cannot initiate procedures under any other international agreement against the measure by the other party it is challenging, unless the forum it has selected refuses to rule for “procedural or jurisdictional reasons”.¹⁹¹ This Article also confirms that the TCA does not stand in the way of either side suspending its obligations after using the WTO dispute settlement process or another treaty (such as the replacement agreement for the WTO appellate body – if the UK joins the EU as a party to it). Equally, the WTO dispute settlement process (or dispute settlement under other international treaties) does not stand in the way of either side suspending its obligations pursuant to the TCA dispute settlement rules.¹⁹²

186. Art. 735(4), referring to Art. 736.

187. Art. 735(5), referring to the protocol on social security coordination.

188. See Art. 749, discussed *infra*. However, this would not rule out a *political* decision to suspend obligations under other provisions of the agreement, where provided for (as in the case of criminal law).

189. Art. 736; Cf. Art. 168 of the Withdrawal Agreement.

190. Art. 737(1); see the definitions in Art. 737(3).

191. Art. 737(2).

192. Art. 737(4).

The WTO is expressly envisaged as one example of an overlapping dispute settlement system, but the wording is not exhaustive (“including”). The most obvious example of an overlapping argument would be cases where the trade in goods provisions of the TCA expressly incorporate a WTO provision. There is no equivalent provision regarding “choice of forum” in the Withdrawal Agreement, but since the TCA and the Withdrawal Agreement have the same parties, presumably this clause is applicable when a dispute potentially falls within the scope of both treaties (perhaps a dispute relating to goods trade or State aid as regards Northern Ireland).

The procedural rules in Chapter 2 of the dispute settlement provisions¹⁹³ start with a rule on consultations,¹⁹⁴ which must be entered into “in good faith, with the aim of reaching a mutually agreed solution” as regards an alleged breach of the TCA.¹⁹⁵ The responding party must reply to a request for consultations within 10 days of the date of delivery of the request, and consultations must start and be deemed concluded (unless the parties wish to continue with them) within 30 days of that date.¹⁹⁶

The consultation phase is followed by arbitration, which can be triggered by the complaining party if there is no reply to the request for consultations before the deadline, if the consultations do not take place by the deadline, if the parties agree to skip consultations, or if the consultations get nowhere.¹⁹⁷ An arbitration tribunal will consist of three arbitrators, with a default process of appointing arbitrators to avoid either party paralysing the dispute settlement system at this point (compare the USA and the WTO dispute settlement Appellate Body).¹⁹⁸ The arbitration tribunal must make “an objective assessment of the matter before it”, including issues of fact and law, must set out its reasoning in its decision, and must consult with the parties regularly, offering opportunities for a mutually agreed solution.¹⁹⁹ It should deliver a

193. Arts. 738–745.

194. Art. 738 – which is comparable to, but more detailed than, Art. 169 of the Withdrawal Agreement.

195. Art. 738(1). On the forum for consultations, see Art. 738(7).

196. Art. 738(3) and (4). Art. 738(5) reduces these dates to 20 days for urgent requests, “including those regarding perishable goods or seasonal goods or services”. These time limits are shorter than under Art. 170 of the Withdrawal Agreement, which provides for 3 months of talks before arbitration can be triggered unilaterally.

197. Art. 739(1). Unlike the Withdrawal Agreement (Art. 170), the TCA makes no provision for the logistical support of the Permanent Court of Arbitration in the Hague.

198. Art. 740. Cf. 5 arbitrators, under Art. 171 of the Withdrawal Agreement. There are fast-track derogations in certain cases: see Art. 760, discussed *infra*. On the requirements for arbitrators, see Art. 741.

199. Art. 742. See also Art. 743, on terms of reference for the arbitrators.

final report within 160 days.²⁰⁰ In cases of urgency, the deadlines can be cut in half.²⁰¹

What about enforcing an arbitration ruling, assuming that the complaining party is at least partly successful?²⁰² The starting point is that the losing party “shall take the necessary measures to comply immediately with the ruling of the arbitration tribunal in order to bring itself in compliance” with the TCA.²⁰³ To this end, it must notify the complaining party within 30 days of measures which it has taken or will take in order to comply,²⁰⁴ but if immediate compliance is not possible, it must notify the “reasonable period of time” it will need to comply.²⁰⁵ If the parties cannot agree on what this length of time should be, the complaining party can refer the issue back to the arbitrators, who will rule on the issue within 20 days.²⁰⁶

As with WTO dispute settlement proceedings – which have much in common with the TCA dispute settlement system – there is an issue of how to enforce the ruling ultimately in the event that the losing party fails to comply with it in time, or how to interpret it in the event that the parties dispute whether the losing party has brought itself into compliance or not. Where the parties disagree, the complaining party can ask the arbitrators to rule on whether the losing party has really complied or not; the arbitrators must rule within 45 days.²⁰⁷

The parties may agree on compensation for the breach of the TCA.²⁰⁸ Failing that, in the event of a failure to comply with an arbitration ruling by the deadline (as confirmed by the arbitrators), the winning party can suspend some of its obligations under the agreement – i.e. retaliate against the breach by the losing party.²⁰⁹ However, there are limits to retaliation. Most fundamentally, like the WTO rules, retaliation must be proportionate: it “shall not exceed the level equivalent to the nullification or impairment caused by

200. Art. 745(4). Before that point, see the interim report process in Art. 745(1) to (3). This compares to a 12-month deadline in Art. 173 of the Withdrawal Agreement. Again, there are fast-track rules in Art. 760.

201. Art. 744.

202. Chapter 3 (Arts. 746–750).

203. Art. 746(1).

204. Art. 746(2). Cf. Art. 175 of the Withdrawal Agreement.

205. Art. 747(1).

206. Art. 747(2). This is nearly identical to Art. 176 of the Withdrawal Agreement, except some aspects are speeded up, notably the time limit for the arbitrators to rule (20 days, rather than 40 or 60).

207. Art. 748(2). This is identical to Art. 177 of the Withdrawal Agreement, except the process is speeded up (45 days, instead of 90). Again, there are fast-track rules in Art. 760.

208. Art. 749(1).

209. Unlike the Withdrawal Agreement (Art. 178(1)), there is no prospect of imposing fines on a losing party that has not complied with its obligation to comply with a ruling within a reasonable period of time.

the violation".²¹⁰ More specifically, as noted already, retaliation can only take place as regards those parts of the TCA within the scope of the general dispute settlement rules.²¹¹ Also, it cannot concern social security, visas (to the extent the TCA provides for them), and EU programmes;²¹² and financial services obligations cannot be suspended unless the arbitration ruling concerns financial services.²¹³

Next, if there is a breach of the TCA as regards trade or road transport, retaliation can occur in another title of the same heading of the economic part of the treaty, "in particular if the complaining party is of the view that such suspension is effective in inducing compliance".²¹⁴ This is a non-exhaustive test, and it is apparently up to the winning party to determine how to apply it. This means, for instance, that a breach relating to trade in goods or the level playing field can be sanctioned by retaliation as regards services, digital trade, capital, intellectual property, public procurement, or energy (subject to some special rules on the level playing field discussed below, and some parts of the rules on trade not being "covered provisions" for dispute settlement). For road transport, this means that there can be cross-retaliation between goods and passenger transport.

A similar rule applies to breaches regarding air transport:²¹⁵ the winning party "should first seek" to apply retaliation in the same title (the two titles are air transport and aviation safety), but may "seek" to cross-retaliate against the other aviation title if it "considers that it is not practicable or effective to suspend obligations with respect to the same Title".

Also, where the breach concerns trade, aviation, road transport or fisheries, the winning party can cross-retaliate as regards any covered provisions, "if the complaining party considers that it is not practicable or effective to suspend

210. Art. 749(5). There are more detailed rules on this issue as regards subsidies and fisheries: see Art. 761, discussed *infra*.

211. Art. 749(2); on the scope of the general rules, see Art. 735, discussed *supra*, at the start of this section. Art. 178(2) of the Withdrawal Agreement also provides for retaliation, although its rules are less complicated than those of the TCA.

212. Art. 749(3)(a); Cf. Art. 178(2)(a) of the Withdrawal Agreement, which rules out retaliation as regards the citizens' rights provisions of that agreement (which include a different set of social security rules, alongside provisions on immigration status). However, participation in EU programmes can be suspended if the dispute concerns the issue of EU programmes (Art. 749(3)(b)), and conversely retaliation where the dispute concerns EU programmes can only concern EU programmes (i.e. not on trade) (Art. 749(3)(c)). In other words, as far as retaliation is concerned, the provisions on EU programmes are self-contained.

213. Art. 749(3)(d).

214. Art. 749(6).

215. Art. 749(7).

obligations within the same Heading as that in which the arbitration tribunal has found the violation, and that the circumstances are serious enough".²¹⁶

The retaliation then goes ahead unless the losing party objects that the proportionality rule is infringed by the severity of the retaliation, or that the "principles and procedures" relating to cross-retaliation have not been followed, within ten days after the winning party's notification of its intention to retaliate.²¹⁷ This has suspensive effect, although not for long: the arbitrators must rule on the point within 30 days.²¹⁸

A key point as regards retaliation under the TCA rules is that it can also apply in the event of a breach of an "earlier agreement". This can only refer to the Withdrawal Agreement, which had foreseen this possibility.²¹⁹ In practical terms, this means that breaches of the Withdrawal Agreement (in the event of non-compliance with arbitration rulings under that agreement within a reasonable time) can be sanctioned by imposing trade or other sanctions under the TCA – making the Withdrawal Agreement potentially easier to enforce indirectly (on the assumption that retaliation, or the prospect of it, has an impact on whether a party breaches the treaty, or keeps breaching it). The details of that retaliation, and any review of it, are otherwise addressed in the Withdrawal Agreement – except that the rule against retaliating as regards social security and visa rules in the TCA also applies as regards breaches of the Withdrawal Agreement.

When might retaliation end? Under both the TCA and the Withdrawal Agreement, retaliation is "temporary" until the original ruling of breach is complied with or the parties have otherwise agreed to settle the issue.²²⁰ But there is no actual time limit so in practice "temporary" could mean a long time. In the event that the losing party claims to have complied, but the winning party is dubious about that claim, the issue goes to arbitration, with a 46-day deadline to rule on the issue.²²¹

216. Art. 749(8). Presumably the limits on cross-retaliation set out in para 3 continue to apply.

217. Art. 749(11). If the arbitrators are not seized by the losing party, the retaliation can be applied within 10 days of notifying the intention to apply it (Art. 749(10)). On the extent of the arbitrators' power to review the planned retaliation, see Art. 749(12).

218. Cf. the Withdrawal Agreement (Art. 178(3)), which is similar except that the TCA provides for a shorter deadline for the arbitrators to rule on this (30 days, compared to 60 days).

219. Art. 749(4); see Art. 178(2)(b) of the Withdrawal Agreement.

220. Arts. 749(13) and 750(1); compare to Art. 178(5) of the Withdrawal Agreement.

221. Art. 750(2); Cf. Art. 179 of the Withdrawal Agreement. The TCA has shorter deadlines: 30 days (instead of 45) to request the arbitrators to review the measure taken to comply with the ruling, and 46 days (instead of 75) for the arbitrators to rule on the issue.

After a series of common procedural provisions,²²² including the confirmation that arbitration rulings are binding (but only apply between the parties),²²³ the TCA sets out some special fast-track rules.²²⁴ In cases concerning remedies for subsidies and rebalancing, many deadlines are shorter.²²⁵ There are special rules on calculation of damage for the purposes of retaliation as regards fisheries and subsidies disputes.²²⁶ Finally, the TCA clarifies that various forms of retaliation – as regards subsidies, rebalancing, road transport and fisheries (as well as economic safeguards) – can only be applied to the “covered provisions” within the scope of the general dispute settlement rules, and are also subject to the various limits on cross-retaliation discussed above.²²⁷

There are further special rules on subsidies and rebalancing, which appear in the main part of the TCA instead of the dispute settlement rules. As regards LPF in general, the picture is complex: as noted above, for some aspects of the “level playing field”, the usual dispute settlement rules are fully excluded.²²⁸ Some LPF aspects are fully subject to the usual rules.²²⁹ Other LPF aspects are subject to a modified version of the usual rules, as discussed above.²³⁰ But a fourth set of LPF provisions are subject to various modified dispute

222. Chapter 4, Arts. 751–759, concerning: receipt of information, including possibly from experts and *amicus curiae* (Art. 751); lists of arbitrators (Art. 752; Cf. Art. 171(1) of the Withdrawal Agreement); replacement of arbitrators (Art. 753); tribunal decisions and rulings (Art. 754); suspension of proceedings (Art. 755); the possibility of mutually agreed solutions (Art. 756); calculation of time periods (Art. 757); costs (Art. 758); and rules of procedure and a code of conduct for arbitrators (Art. 759, referring to Annexes 48 and 49).

223. See Art. 754(2) (rulings “shall not create any rights or obligations with respect to natural or legal persons”); Art. 754(3) (rulings “cannot add to or diminish the rights and obligations of the Parties under this Agreement or under any supplementing agreement”); Art. 754(4) (no jurisdiction to rule on legality of a measure under domestic law; no arbitration ruling binds a domestic court as regards interpretation of domestic law); and Art. 754(5) (courts of each party “shall have no jurisdiction” in resolving disputes under the TCA), which is more obviously aimed at precluding the CJEU from having a role. Cf. Art. 180 of the Withdrawal Agreement, which contains some basic rules on the binding effect of arbitration, but none of these rules. This reiterates the general exclusion of the TCA from domestic law: see *supra* section 2.3.

224. Chapter 5, Arts. 760–762.

225. Art. 760. These are: 2 days (instead of 10) to decide on the composition of the tribunal; 7 days (instead of 20) to serve submissions; 30 days (instead of 160) to deliver a ruling; 30 days (rather than 45) to rule on whether there is compliance with a ruling that is disputed before retaliation can be authorized.

226. Art. 761.

227. Art. 762.

228. Art. 735(2)(e), discussed *supra*, concerning some of the general rules, competition, some of the subsidy rules, and taxation.

229. Art. 355(2) (precautionary approach), and the rules on State-owned bodies (Ch. 4 of the LPF rules).

230. See the discussion of Art. 760.

settlement rules set out in the LPF provisions themselves; this will not be obvious to those who read only the dispute settlement rules.

The first set of special LPF dispute settlement rules apply to: the provisions on climate objectives,²³¹ the rules on labour and environmental standards in Chapters 6 and 7 of the LPF rules (including, but not only, the non-regression rule); and the “sustainable development” rules in Chapter 8, which concern not only environmental, but also some labour standards. These special rules consist first of all of a special consultation procedure.²³² Then there is a special panel of experts in place of arbitrators.²³³ However, some of the dispute settlement rules are “switched back on” as regards these experts.²³⁴ As regards disputes on the labour and environmental chapters (as distinct from the climate change and sustainable development rules), some additional dispute settlement rules also apply, meaning that there is the possibility of retaliation where a panel report rules there is a breach of the non-regression clause, or other aspects of the labour and environment chapters, as well as a review of whether the losing party ultimately has complied with the panel report, in which case the retaliation has to end.²³⁵

The second set of LPF rules applies to subsidies. The dispute settlement system cannot rule on subsidies in individual cases (except in certain circumstances), or on the recovery of subsidies in individual cases.²³⁶

A third set of special rules, again concerning subsidies, also appears in the subsidies LPF clauses (but again, is not reflected in the main dispute settlement rules). If a subsidy has allegedly caused a “significant negative effect on trade or investment” (or there is a “serious risk” that it may do so), the complaining party, following consultations, can retaliate *without prior approval by the arbitrators*.²³⁷ However, this retaliation can then be challenged on a fast-track basis, although the arbitrators can only examine its compatibility with some of the rules in the subsidies section.²³⁸

Yet another set of modified dispute settlement rules applies as regards “rebalancing” (divergences in future labour, environment or subsidies

231. Art. 355(3), which states: “Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050.”

232. Art. 408.

233. Art. 409.

234. Art. 409(19), referring to a list of specific provisions concerning arbitration.

235. Art. 410, referring to Arts. 749 and 750.

236. This limitation is not spelled out in Art. 735 (unlike the similar limitation relating to social security disputes, mentioned *supra*), but is instead set out in Art. 375(2), in the LPF provisions.

237. Art. 374.

238. Art. 374(9).

legislation). “If material impacts on trade or investment between the Parties are arising as a result of significant divergences” in these areas, proportionate “rebalancing” retaliation can be imposed.²³⁹ The TCA provides that “assessment of these impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.” There are fast-track consultations, and if there is no agreement between the parties, the rebalancing retaliation can be imposed; but there is no prior requirement that arbitrators find a breach of the TCA, with a reasonable time to comply, before this retaliation can take place. However, within five days the other side can ask arbitrators to rule on whether the retaliation is consistent with the TCA’s rules on rebalancing, summarized above. The arbitrators must rule within 30 days. If they rule against the retaliation, it must be discontinued; if it is not, “return retaliation” is expressly possible.²⁴⁰

A final set of special dispute settlement rules concern fisheries, firstly as regards compensatory measures for withdrawal of access to waters.²⁴¹ Consultations are skipped, proceedings are urgent (see discussion above), and arbitrators are limited to assessing whether the sanctions are consistent with the special rules on fisheries.²⁴² Furthermore, if the “fishing Party” (most likely the EU) loses this case, the “host Party” (most likely the UK) can expressly impose “return retaliation” against the retaliation measures taken by the fishing Party, subject to proportionality, if the inconsistency is “significant”, subject to the arbitrators agreeing.²⁴³

Secondly, dispute settlement on fisheries is subject to a special rule, which refers to breaches of the fisheries rules in general.²⁴⁴ The complaining party may, after giving notice, suspend access to its waters, in whole or part, as well as the tariff reductions on fish; or it may go further “if it considers that” this suspension “is not commensurate to the economic and societal impact of the alleged failure”, and suspend, in whole or in part, the preferential tariff treatment of *other* goods; or go even further and, on the same grounds, suspend other trade obligations with the exception of the LPF rules, with a knock-on suspension of the road transport rules. But these dire possibilities must nonetheless “be proportionate to the alleged failure by the respondent

239. Art. 411.

240. Art. 760, discussed above, applies further special rules on composition of the tribunal, serving of submissions, and time periods for rulings.

241. Art. 501.

242. Art. 501(3).

243. Art. 501(5), which also refers to the special rule on damages calculation in Art. 761, discussed *supra*.

244. Art. 506. There is a special rule if the dispute concerns fisheries as regards the Channel Islands or Isle of Man (Art. 506(2)).

Party and the economic and societal impact thereof';²⁴⁵ there is fast-track arbitration and possibly return retaliation.²⁴⁶

6. Conclusions

The full impact of the TCA, as compared to EU membership, remains to be seen. Some aspects of membership (such as zero tariffs) are retained, but there are undoubtedly new trade barriers. Equally, some forms of criminal law cooperation are retained, but some are either not retained at all (the Schengen Information System), or retained with limits that will have an impact on at least some cases (extradition).

With the TCA, the UK's relationship with the EU moves significantly toward an international law footing, without involvement of the CJEU (leaving aside EU programmes). This essential trade-off between market access and departure from the EU integration process is at the heart of the new treaty.

Yet, there are contradictory complaints from the UK side; both about the aspects of the UK/EU relationship which still remain legally closer (the Withdrawal Agreement) and conversely about the impact of loosening links as regards trade and travel – despite such loosening being clearly the emphatic choice of the UK Government. There are ongoing tensions not only between the EU law hybrid nature of the Withdrawal Agreement and the international law nature of the TCA, but also within the TCA itself – which combines the international law references in the trade part with the unstated cross-references to EU legislation in the criminal law part: the alignment that dare not speak its name. While Part Two could be summarized as Mel Gibson yelling: "Freedom!", Part Three could be summarized as Tammy Wynette spelling out D-I-V-O-R-C-E; we are probably lucky that she did not record any songs spelling out the titles to EU legislation.

The decidedly mixed feelings of this divorced, yet cohabiting couple – their physical closeness and economic links, combined awkwardly with legal disconnection and emotional distance – are most embodied in the treaty's multiple routes to its suspension or termination. Read together, these give the impression of profound distrust, if not outright antagonism, between the parties to the TCA – exemplifying their passive-aggressive, teeth-gritting hostility thinly disguised as tolerance.

Yet although the treaty contains many off ramps leading to a further disintegration of relations – not only via means of the many suspension and

245. Art. 506(3).

246. Art. 506(4) to (7). Again the special rules on damages calculation (Art. 761) apply.

termination clauses festooned across it, but following retaliation in the dispute settlement process – it could always be amended if the UK ever sought to join the faster lanes of association with the EU. Time will tell in which direction the EU/UK dynamic will develop, and how this may affect the evolution of the legal form which this relationship takes.