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CENTER FOR TRANSATLANTIC RELATIONS

WORKING PAPER N. 3 – 2018

**The New Transatlantic Trigonometry:
“Brexit” and Europe’s Treaty Relations with the United States**

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This paper is forthcoming in 40 *University of Pennsylvania Journal of International Law* __ (2018). It is jointly published by the DCU Brexit Institute and the Center for Transatlantic Relations at the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University in Washington, D.C.

Abstract

The withdrawal of the United Kingdom from the European Union is not only a source of political and legal upheaval in Europe but will prompt a recalibration of transatlantic treaty relations. The paper argues that it is a gross oversimplification to conceive of the latter as sets of old and new bilateral relationships. Instead, “Brexit” affects many existing and interdependent triangular relationships that the U.S. maintains with the EU and its Member States, which are conditioned also by the foreign relations laws of these polities. Perhaps counterintuitively, recalibration in the “high politics” area of security and defense will be easier than in the “low politics” of trade and regulation. In elaborating on these arguments, the paper delves into three levels of difficulty: First, the empirical challenge of determining the treaties in force between the EU and U.S. and by which the UK will cease to be covered; second, the transatlantic implications of available alternative models to EU membership for the UK; and third, the way forward in ensuring continuity and bringing about future agreements and cooperation in the EU-UK-U.S. triangle, seeing that the EU itself is a moving target due to ongoing reform efforts.

Keywords: Transatlantic Relations, European Union, United States, Brexit, International Agreements, Treaty-making, Continuity

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Acknowledgements

This paper was prepared while the author was a Fulbright-Schuman Fellow at the Center for Transatlantic Relations at the Paul H. Nitze School of Advanced International Studies (SAIS) of Johns Hopkins University in Washington, D.C. During this fellowship, the author conducted a range of background conversations with U.S. officials at the Department of State, the Office of the U.S. Trade Representative, the House Committee on Foreign Affairs, and Washington-based diplomats and experts. The author would like to thank in particular his hosts at the Center for Transatlantic Relations, Prof. Daniel S. Hamilton, Amb. András Simonyi, Heidi Obermeyer, and Jason Moyer, as well as Conrad Tribble, Kim Tuminaro, Dan Mullaney, Oren Adaki, Martin Caudron, Amb. David O’Sullivan, Jori Keijsper, Jérôme Larosch, Mark Bailey, David Riley, Marius Dirdal, Prof. Curtis A. Bradley, Prof. Marise Cremona, and Dr. Jacob Kirkegaard for helpful conversations, comments and advice. The author thanks, moreover, the participants in seminars and guest lectures at Dublin City University, Duke Law School, Georgetown, North Carolina at Chapel Hill, Suffolk and Tufts, where this research was presented and discussed. Any shortcomings, of course, remain the author’s own.

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I. INTRODUCTION

In the aftermath of the referendum in the United Kingdom (UK) on the country's continued membership of the European Union (EU), Timothy Garton Ash anticipated that “[a]cres of newsprint and gigabytes of web space will be devoted over the next weeks and months to the grim mechanics of disentangling the UK from the EU”.¹ Academic circles have not lagged behind in this effort, as a veritable “Library of Brexit” is emerging,² including in legal scholarship.³

Meanwhile, across the Atlantic, weary of negative repercussions of a disorderly withdrawal, the United States government urged both sides to move the withdrawal process “forward swiftly and without unnecessary acrimony”.⁴ The U.S. does so with good reasons. There is a pressing need for a better and more complete understanding of the impact of Brexit on the United States and its relations with the EU and the UK. A number of the ties that link the two sides of the Atlantic in the form of international agreements risk being untangled, as the UK will no longer be covered by agreements concluded by the EU. Moreover, as the UK will no longer be a part of EU foreign policy, making new transatlantic agreements that cover the U.S, the EU, and the UK more difficult to achieve.

In the face of this challenge, the present paper puts the focus on the transatlantic dimension of Brexit; more precisely, the treaty relations the U.S. entertains with the EU and the UK and investigates how these will be affected. In doing so, the paper delves into three levels of analysis and develops two principal arguments. The first level of analysis concerns a legal-empirical problem, i.e., treaty law as it currently stands between the U.S., EU and UK. The second level concerns the alternative models to EU membership and their transatlantic implications. The third level, lastly, concerns the way forward, i.e., the ensuring continuity of existing agreement and the parameters for future ones. Hence, the

¹ Timothy Garton Ash, *As an English European, this is the biggest defeat of my political life*, GUARDIAN (June 24, 2016), <https://www.theguardian.com/politics/commentisfree/2016/jun/24/lifelong-english-european-the-biggest-defeat-of-my-political-life-timothy-garton-ash-brexit>.

² See, for instance, GEOFFREY EVANS & ANAND MENON, *BREXIT AND BRITISH POLITICS* (2017); HAROLD D. CLARKE, MATTHEW GOODWIN & PAUL WHITELEY, *BREXIT: WHY BRITAIN VOTED TO LEAVE THE EUROPEAN UNION* (2017); and LEE MCGOWAN, *PREPARING FOR BREXIT: ACTORS, NEGOTIATIONS AND CONSEQUENCES* (2018).

³ See, e.g., *THE LAW & POLITICS OF BREXIT* (Federico Fabbrini ed., 2017); *THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES* (Michael Dougan ed., 2017); and KENNETH A. ARMSTRONG, *BREXIT TIME: LEAVING THE EU – WHY, HOW AND WHEN?* (2017).

⁴ U.S. Department of State, Remarks by Secretary of State Rex W. Tillerson, *The U.S. and Europe: Strengthening Western Alliances*, Washington, D.C. (Nov. 28, 2017), <https://www.state.gov/secretary/remarks/2017/11/276002.htm>.

paper not only provides analysis for what Garton Ash called the “grim mechanics”⁵ of disentanglement, but also addresses future re-engagement, with a view to shedding light on the prospects of a “kinder, gentler Brexit”⁶ in a wider transatlantic context.

Throughout these three levels, the first main argument put forward here is that it would be a gross oversimplification to conceive of transatlantic relations as a set of old and new *bilateral* relationships governed by public international law only. Instead, they need to be conceived as both multilevel and triangular. Multilevel, because these relationships are conditioned also by the domestic laws of the U.S., the UK, and the EU and its remaining Member States. For instance, a future U.S.-UK trade agreement will be contingent upon both what international law allows and the ability to meet constitutional hurdles each country to conclude and ratify such a deal. Consequently, the various recalibration exercises prompted by Brexit are as much considerations of international (treaty) law, as they are “comparative foreign relations law”⁷ in action. From this realization flows also the need to understand these relationships as triangular. In economic terms, the transatlantic space has already been aptly described as a “stool” with “three legs”.⁸ This triangular relationship is equally present in the legal sphere, be it explicitly in the form of EU membership affected bilateral relations with the U.S., or more implicitly through various forms of close association with the EU.

The paper’s second main argument posits different levels of difficulty in this exercise of “transatlantic trigonometry” depending on the subject matter. Ensuring continuity and crafting new forms of cooperation will be easier in the “high politics” area of security and defense than in the “low politics” of trade and regulation. This is due to the lower level of integration in the former, which makes dis- and re-entanglement a more straightforward task, and the more easily apparent trade-offs in the latter, which often make tough choices unavoidable.

In order to elaborate on these arguments, the paper proceeds as follows: Section II briefly retraces the steps leading to the current situation and summarizes the state of the political and scholarly discourse. Section III tackles the empirical challenge of determining the state of U.S.-EU treaty relations that will be affected by Brexit and reveals the existence of a multitude of triangular transatlantic relationships. Section IV homes in on the

⁵ Garton Ash, *supra* note 1.

⁶ J.H.H. Weiler, *Editorial: The Case for a Kinder, Gentler Brexit*, 28 EUR. J. INT’L L. 1 (2017).

⁷ Curtis A. Bradley, *Foreign Relations Law as a Field of Study*, 111 AJIL UNBOUND 316, 320 (2017).

⁸ DANIEL S. HAMILTON & JOSEPH P. QUINLAN, *THE TRANSATLANTIC ECONOMY 2017: ANNUAL SURVEY OF JOBS, TRADE AND INVESTMENT BETWEEN THE UNITED STATES AND EUROPE* v (2017).

transatlantic implications of existing alternative modes of association with the EU, which could serve as models—or at least points of departure—for the UK post-Brexit. Turning to the way forward, Section V addresses the ongoing reforms within the EU, making it a moving target, and the “new transatlantic trigonometry” between it, the UK and the U.S. in terms of ensuring continuity of existing treaty relationships and setting the parameters for new agreement to be explored. Section VI summarizes the paper’s findings.

II. HOW DID WE GET HERE?

In order to retrace the steps leading up to Brexit and set the scene, this section starts from the more distant past (A.), provides an overview of more recent events (B.), and culminates in the current state of negotiations and academic discourse, which exhibits an increasing realization of the external relations aspects of Brexit (C.).

A. Antecedents of an uneasy relationship

For most of their history, the UK and the EU had an uneasy relationship. As the European Parliament’s Brexit negotiator Guy Verhofstadt noted in April 2017: “perhaps it was never meant to be.”⁹ This may hark back also to Winston Churchill’s observation in 1930 that Britain was “with Europe but not of it.”¹⁰ He restated this sentiment in his famous speech made in Zurich in 1946 calling for a “United States of Europe”, for which the Brits should be “friends and sponsors”¹¹ rather than members.

Yet, today the United Kingdom can look back on 45 years of membership in the EU (and its predecessors). The UK was not a founding member of the original integration organizations—the European Coal and Steel Community, the European Atomic Energy Community or the European Economic Community (EEC). It first tried to join in 1961 under Prime Minister Macmillan, but was denied due to French opposition, in particular from President Charles de Gaulle.¹² A second attempt in 1967 under Prime Minister Wilson

⁹ Guy Verhofstadt, *Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (debate)*, Strasbourg (Apr. 5, 2017), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20170405+ITEM-006+DOC+XML+V0//EN&language=en&query=INTERV&detail=3-017-000>

¹⁰ As cited in JOHN LUKACS, CHURCHILL: VISIONARY. STATESMAN. HISTORIAN 87 (2002).

¹¹ As cited in MARTIN GILBERT, CHURCHILL AND AMERICA 380 (2005).

¹² ARMSTRONG, *supra* note 3, at 12–13.

also failed.¹³ Eventually, in 1972 the Treaty of Accession was signed which paved the way for the UK, joined by Ireland and Denmark, to become EEC members on January 1, 1973.¹⁴

Ever since, the UK has come to be seen as an “awkward”¹⁵ and “reluctant partner”.¹⁶ Only two years after joining the EEC, a referendum was held in the UK on the country’s continued membership. In this original “Brexit” referendum, the “remain” camp prevailed.¹⁷ Subsequently, to name only the most prominent sources of this awkwardness, the UK demanded a special “rebate” in terms of its contributions to the EU’s budget,¹⁸ a permanent opt-out from the common currency,¹⁹ an opt-out—though subsequently largely retracted through opting back into specific measures—from justice and home affairs policies,²⁰ and the refusal to join the Schengen zone of passport-free travel.²¹

At the same time, the UK has also been instrumental in the development of the EU’s internal market and saw itself as a leader of EU (free) trade policies.²² It did not opt out of the Common Foreign and Security Policy when it was launched with the Maastricht Treaty of 1992, but “played a central role”²³ in its development and even became a crucial factor in breathing life into the European Security and Defence Policy (now known as the Common Security and Defence Policy, CSDP) with the joint Franco-British St. Malo

¹³ *Id.*, at 13–14.

¹⁴ Treaty of Accession of Denmark, Ireland and the United Kingdom, 1972 O.J. (L 73) 5.

¹⁵ STEPHEN GEORGE, AN AWKWARD PARTNER: BRITAIN AND THE EUROPEAN COMMUNITY (3d ed., 1998).

¹⁶ Finn Laursen, Hans Mouritzen & Anders Wivel, *The institutional dynamics of Euro-Atlantic integration*, in THE GEOPOLITICS OF EURO-ATLANTIC INTEGRATION 39, 43 (Anders Wivel & Hans Mouritzen ed., 2005).

¹⁷ STEPHEN WALL, THE OFFICIAL HISTORY OF BRITAIN AND THE EUROPEAN COMMUNITY, VOLUME II: FROM REJECTION TO REFERENDUM, 1963–1975 511–90 (2013).

¹⁸ DAVID GOWLAND, BRITAIN AND THE EUROPEAN UNION 219–30 (2017).

¹⁹ *Id.*, at 133–34.

²⁰ The opt-out with an option for subsequent opt-in scheme is provided in a protocol to the EU Treaties, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, 2016 O.J. (C 202) 295; see also Steve Peers, *EU Justice and Home Affairs Law, Volume II: EU Criminal Law, Policing, and Civil Law* 41–42 (4th ed., 2016).

²¹ This opt-out, which applied to Ireland as well and with which the UK maintains a common travel area, is provided for in Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union, 2016 O.J. (C 202) 290.

²² Catherine Barnard, *Brexit and the EU Internal Market*, in THE LAW & POLITICS OF BREXIT 201, 201 (Federico Fabbrini ed., 2017) (noting that the “UK has been a champion of the single market.”); and Prime Minister David Cameron, EU speech at Bloomberg (Jan. 23, 2017), <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (“Britain is at the heart of that Single Market, and must remain so. . . . I want us to be at the forefront of transformative trade deals with the US, Japan and India as part of the drive towards global free trade.”).

²³ Laursen, Mouritzen & Wivel, *supra* note 16, at 43.

Declaration of 1998.²⁴ Hence, despite its “awkward” relationship with the EU and strong Eurosceptic sentiment,²⁵ the EU’s external policies such as trade, but also security and defense, tended to be less controversial, at least among the political leadership.

B. The Brexit referendum, notification, and withdrawal

The question of the UK’s continued membership came to a head when Prime Minister Cameron, based on an election manifesto commitment,²⁶ promised in his 2013 Bloomberg speech to hold an in-out referendum following a renegotiation of the UK’s status within the EU.²⁷ The “new settlement” that was agreed in February 2016, and focused on preserving the UK’s status of open-ended non-participation in the common currency, providing an interpretation of the “ever closer union”²⁸ principle so it could not be used for expanding the EU’s powers further, strengthening the role of national parliaments, additional safeguards to limit migrants from other EU countries to draw an social security and child benefits.²⁹

Following a referendum campaign best described as acrimonious, alarmist, and deceiving,³⁰ on June 23, 2016, with 17.4 million votes in favor of leaving and 16.1 million votes in favor of remaining,³¹ “the UK had voted to leave the EU”.³² This resulted in the resignation of Cameron, who was succeeded by Theresa May after an internal contest within the British Conservative Party.³³ Moreover, the question arose whether the Westminster Parliament would need to give its consent to the government delivering the official notification to the European Council, known as “triggering” Article 50 of the Treaty

²⁴ Alistair J.K. Shepherd, *Blair, Brown and Brussels: The European Turn in British Defence Policy*, in *THE DEVELOPMENT OF BRITISH DEFENCE POLICY: BLAIR, BROWN AND BEYOND* 39, 43 (David Brown ed., 2010).

²⁵ Chris Gifford & Karine Tournier-Sol, *Introduction: The Structure of British Euroscepticism*, in *THE UK CHALLENGE TO EUROPEANIZATION: THE PERSISTENCE OF BRITISH EUROSCEPTICISM* 1, 1 (Karine Tournier-Sol & Chris Gifford ed., 2015) (arguing that “a powerful and persistent Euroscepticism remains entrenched in UK political institution and public culture.”).

²⁶ ARMSTRONG, *supra* note 3, at 42.

²⁷ Cameron, *supra* note 22; and also ARMSTRONG, *supra* note 2, at 25.

²⁸ This idea is stipulated in the Treaty on European Union thirteenth recital of the preamble, and art. 1, para. 2, 2012 O.J. (C 326) 1 [hereinafter TEU]; and in the Consolidated Version of the Treaty on the Functioning of the European Union first recital of the preamble, 2016 O.J. (C 202) 1 [hereinafter: TFEU].

²⁹ *A New Settlement for the United Kingdom within the European Union*, Extract of the conclusions of the European Council of 18-19 February 2016, 2016 O.J. (C 69) I/1; see also ARMSTRONG, *supra* note 3, at 30–35.

³⁰ ARMSTRONG, *supra* note 3, at 65–69.

³¹ *Id.*, at 69.

³² *Id.*

³³ *Id.*, at 141.

on European Union.³⁴ In the *Miller* judgment of January 24, 2017, the UK Supreme Court ruled that such consent was indeed necessary.³⁵ Consequently, based on a parliamentary majority, Royal Assent was given to the “European Union (Notification of Withdrawal) Act 2017” on March 16, 2017.³⁶

On March 29, 2017, the UK government delivered the notification to the European Council in the form of a letter from the Prime Minister.³⁷ This started the clock for a two-year negotiation period to conclude a withdrawal agreement before the UK ceases to be an EU member.³⁸ It is legally disputed whether the UK’s notification could be revoked and Brexit be reversed.³⁹ An extension of the two-year period provided for Article 50 of the TEU is possible, but requires the unanimous decision of the European Council and the withdrawing Member State.⁴⁰

Following the notification, negotiations between the UK and the EU commenced, based on a “phased approach” starting with the withdrawal agreement, focused on the financial settlement, citizens’ rights and situation in Northern Ireland, moving on to the future partnership later on, as insisted on by the EU.⁴¹ In December 2017, it was declared that “sufficient progress” was reached during the first phase,⁴² meaning that negotiations could proceed to a possible transitional arrangement and the future relationship. In January 2018, the Council of the EU adopted additional directives regarding a transitional period.⁴³

³⁴ TEU art. 50, para. 1 states: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”

³⁵ *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union* (Appellant), [2017] U.K.S.C. 5, para. 101.

³⁶ European Union (Notification of Withdrawal) Act 2017 (c.9).

³⁷ Letter of Prime Minister Theresa May to European Council President Donald Tusk (Mar. 29, 2017).

³⁸ According to TEU art. 50, para. 3, the EU “Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification” to withdraw was issued, “unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”³⁸ See further on the details of the notification of withdrawal Federico Fabbrini, *Introduction, in THE LAW & POLITICS OF BREXIT* 1, 7–10 (Federico Fabbrini ed., 2017).

³⁹ See, e.g., Jens Dammann, *Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union*, 23 *COLUM. J. EUR. L.* 265, 304 (2017) (arguing in favor of a “right to rescind” for both legal and policy reasons). In *Miller*, [2017] UKSC 5, para. 26, the UK Supreme Court refrained from ruling on this since for the parties it was “common ground that notice under article 50(2) ... cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn.”

⁴⁰ TEU art. 50, para 3.

⁴¹ European Council, Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines, Brussels, Apr. 29, 2017, EUCO XT 20004/17, at 4.

⁴² European Council, European Council (Art. 50) meeting (15 December 2017) – Guidelines, Brussels, Dec. 15, 2017, EUCO XT 20011/17, at 1.

⁴³ Council of the European Union, Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, Brussels, Brussels, Jan. 29, 2018, XT 21004/18.

Between the adoption of the updated negotiating guidelines, adopted by the European Council in March 2018,⁴⁴ and the deadline of March 29, 2019, when the UK will presumably cease to be an EU member, only one year remains. After that point, the EU Treaties will “cease to apply”⁴⁵ to the UK. However, these are by far not the only treaties to be affected by Brexit.

C. Academic discourse and the external dimension

In the academic discourse, it has been increasingly recognized that Brexit has “two faces”, one internal and one external.⁴⁶ In other words, it entails questions of both EU and national law on the one side,⁴⁷ and international law, on the other.⁴⁸ According to Article 50 TEU, the arrangements to be made with the departing country are to take “account of the framework for its future relationship with the Union”.⁴⁹ Therefore, the external dimension of Brexit already loomed large, even before the EU deems that there has been “sufficient progress” in its negotiations with the UK in order to move to negotiating a future trade and other agreements with the EU. However, the international legal dimension goes far beyond the future EU-UK relationship. According to the *Financial Times*, the UK’s withdrawal from the EU will require the renegotiation of more than 700 international agreements with 168 different countries, from which the UK currently benefits by virtue of being an EU member.⁵⁰

Moreover, when approaching Brexit from a transatlantic angle, a dimension of U.S. foreign relations law needs to be added to the legal frameworks to be considered. After all, neither a future U.S.-UK trade deal nor a revamped Transatlantic Trade and Investment

⁴⁴ European Council, European Council (Art. 50) meeting (23 March 2018) – Guidelines, Brussels, Mar. 23, 2018, EUCO XT 20001/18. Moreover, the latest version of the Draft Withdrawal Agreement at the time of writing stems from March 2018, 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, TF50 (2018) 35, Mar. 19, 2018.

⁴⁵ TEU art. 50, para. 3.

⁴⁶ Adam Łazowski & Ramses A. Wessel, *The External Dimension of Withdrawal from the European Union*, REVUE DES AFFAIRES EUROPÉENNES 623 (4/2016).

⁴⁷ On the EU law dimension see, among others, Adam Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 EUR. L. REV. 523 (2012). The British legal dimension was expounded in *Miller*, [2017] UKSC 5.

⁴⁸ Jed Odermatt, *Brexit and International Law: Disentangling Legal Orders*, 31 EMORY INT’L L. REV. 1051, 1054 (2017).

⁴⁹ TEU art. 50, para. 2.

⁵⁰ Paul McClean, *After Brexit: the UK will need to renegotiate at least 759 treaties*, FIN. TIMES (May 30, 2017), <https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e>.

Partnership (TTIP)⁵¹ will ever see that light of day if it fails to secure the requisite approval by constitutional branches under the U.S. Constitution, in particular certain majorities in Congress, depending on the content of the agreement.⁵² Hence, Brexit's external face is an inherently multilevel problem, involving national (including from states outside the EU), EU and international law.

The transatlantic relationship should take pride of place in researching the external dimension of Brexit for both economic and political reasons. According to the Office of the U.S. Trade Representative, the "United States and the 28 Member States of the EU share the largest economic relationship in the world."⁵³ Also in strategic terms, the importance of transatlantic bonds continues to be stressed,⁵⁴ while in legal-academic circles, compelling cases has been made for a transatlantic perspective or vision.⁵⁵ In this spirit, the present paper adopts a transatlantic focus on the external dimension of Brexit.

Before delving into the empirical, legal, and political challenges that Brexit poses for transatlantic treaty relations, a preliminary point on the EU as an international actor should be made, especially in view of the paper's emphasis on trade and security as substantive focus areas. This focus is not to imply that other policy areas, such as environmental protection or development cooperation, are not important. Trade and security serve as

⁵¹ The negotiations on TTIP have been discontinued since the end of 2016, see Office of the U.S. Trade Representative, *U.S.-EU Joint Report on T-TIP: Progress to Date*, Press Release (Jan. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> (noting that "[b]etween July 2013 and October 2016, 15 Negotiating Rounds were held", but not outlining any specific future steps.).

⁵² A two-thirds Senate majority will be needed if concluded as a "treaty" (U.S. CONST. art. II, § 2, cl. 2), or a simple majority in both Houses if concluded as a "congressional-executive agreement", covering matters falling under the enumerated powers of either the President or Congress (U.S. CONST. art. I, § 8, and art. II, § 2, respectively). See further Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1274–1306 (2008) (summarizing the practice of both modes of treaty making).

⁵³ U.S. OFFICE OF THE TRADE REPRESENTATIVE, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 139 (March 2017); see also HAMILTON & QUINLAN, *supra* note 8, at v ("Despite transatlantic political turbulence, the U.S. and Europe remain each other's most important markets.").

⁵⁴ Cf. SHARED VISION, COMMON ACTION: A STRONGER EUROPE, A GLOBAL STRATEGY FOR THE EUROPEAN UNION'S FOREIGN AND SECURITY POLICY 36 (June 2016) ("A solid transatlantic partnership through NATO and with the United States and Canada helps us strengthen resilience, address conflicts, and contribute to effective global governance."); and NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 47 (Dec. 2017) ("A strong and free Europe is of vital importance to the United States. We are bound together by our shared commitment to the principles of democracy, individual liberty, and the rule of law.").

⁵⁵ A TRANSATLANTIC COMMUNITY OF LAW: LEGAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE EU AND US LEGAL ORDERS (Elaine Fahey & Deirdre Curtin ed., 2014); and earlier LAW AND INSTITUTIONS IN THE ATLANTIC AREA (Eric Stein & Peter Hay ed., 1967).

illustrations of what traditionally has been seen as respectively “low” and “high politics”,⁵⁶ and which moreover correspond to the two distinct modes of operation in EU foreign policy.

On the one hand, this concerns its trade policy (called the Common Commercial Policy, CCP),⁵⁷ which is decidedly supranational.⁵⁸ This mode is also the default of rules and decision-making procedures in the EU and is characterized by the prominent role played by the European Commission and the European Parliament,⁵⁹ voting by “qualified majority” in the Council of the EU,⁶⁰ and jurisdiction of the Court of Justice of the EU (CJEU).⁶¹

On the other, this concerns the Common Foreign and Security Policy (CFSP), which is decidedly intergovernmental,⁶² representing a delimited sub-field with its own “specific rules and procedures”.⁶³ The latter are designed to sideline the supranational institutions and guarantee that the Member States remain free to act internationally.⁶⁴ Other external policies fall between this spectrum of “bipolarity”.⁶⁵ As a matter of foreign relations law, i.e., understanding how the EU operates internally in engaging the world in general and the United States in particular,⁶⁶ it is crucial to keep the existence of these different modes in mind, something that is rather alien to the American system of foreign relations law.⁶⁷ From an American legal perspective, the CFSP might be best explained as an additional layer of

⁵⁶ For this distinction and the acknowledgement that it is not always as clear-cut, see Stanley Hoffman, *Reflections on the Nation-State in Western Europe Today*, 21 J. COMMON MKT. ST. 21, 29 (1982).

⁵⁷ TFEU art. 207, para. 1.

⁵⁸ GABRIEL SILES-BRÜGGE, *CONSTRUCTING EUROPEAN UNION TRADE POLICY: A GLOBAL IDEA OF EUROPE* 9 (2014).

⁵⁹ TFEU art. 294 (detailing what is now known as the “ordinary legislative procedure”).

⁶⁰ TFEU art. 238, para. 3 (defining a qualified majority).

⁶¹ See in particular TFEU art. 263 (on review powers over legislative acts) and TFEU arts. 285–60 (on infringements proceedings against the Member States).

⁶² STEPHAN KEUKELEIRE & TOM DELREUX, *THE FOREIGN POLICY OF THE EUROPEAN UNION* 63 (2d ed. 2014).

⁶³ TEU art 24, para 1, 2d. subpara.

⁶⁴ KEUKELEIRE & TOM DELREUX, *supra* note 62, at 72.

⁶⁵ Alan Dashwood, *The Continuing Bipolarity of EU External Action*, in *THE EUROPEAN UNION IN THE WORLD: ESSAYS IN HONOUR OF MARC MARESCAU* 1, 1 (Inge Govaere et al. ed., 2014). For instance, the EU’s development policy does not have its own “specific rules and procedures”. However, the EU Treaties make clear that the Member States retain the own national development policies (TFEU art. 4, para. 4).

⁶⁶ Bradley, *supra* note 7, at 316 (noting in a footnote that the “European Union, as a supranational institution that in some ways resembles a nation, also has a developed body of foreign relations law.”); see also Joris Larik, *EU Foreign Relations Law as a Field of Scholarship*, 111 AJIL UNBOUND 321 (2017).

⁶⁷ While different degrees of deference that apply to different contexts, no radically different sets of constitutional rules and procedures that apply depending on the policy area; see Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From “Exceptionalism”*, 128 HARV. L. REV. F. 294, 300 (2015).

“exceptionalism” within the general exceptionalism pertaining to foreign relations.⁶⁸ This distinction is crucial for the paper’s second main argument: Resolving Brexit and piecing back together the transatlantic triangle will be easier in the area of “high politics” of sovereignty-sensitive areas such as security and defense, than in the alleged “low politics” of trade and regulation, due not least to its intergovernmental character and lack of deep integration.

III. PRE-BREXIT AND THE TWENTY-EIGHT TRANSATLANTIC TRIANGLES

Political discourse likes to simplify transatlantic relations through the use of binary imagery. Prominent examples of this include the idea of the “two pillars”,⁶⁹ a “transatlantic bargain” of providing security in exchange for economic integration,⁷⁰ “the sword and shield”,⁷¹ or a phone line with America on one end and Europe on the other.⁷² In reality, however, these relationships are more complex. Legally speaking, the relations the United States entertains with the EU and its Member States can be best be understood of as a set of 28 triangles, hence making transatlantic relations and their recalibration due to Brexit an exercise of legal “trigonometry”.

To visualize these triangles, one could imagine the following: One line connects Washington, D.C., and Brussels, the “capital” of the European Union, where most of its key organs are situated, representing the bilateral relations between the U.S. and the EU as a legal person. Moreover, 28 lines extend from Washington, D.C., into each of the 28 EU Member States’ capitals, representing the legal relationships between the U.S. and the Member States as sovereign entities. Importantly, 28 lines extend also from Brussels to each of the capitals of the 28 Member States.⁷³ These represent that the latter have pooled

⁶⁸ Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999) (describing exceptionalism as “the view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.”).

⁶⁹ See Joris Larik, *Kennedy’s “Two Pillars” Revisited: Does the ESDP Make the EU and the USA Equal Partners in NATO?*, 14 EUR. FOREIGN AFF. REV. 289, 290–91 (2009).

⁷⁰ STANLEY R. SLOAN, *NATO, THE EUROPEAN UNION, AND THE ATLANTIC COMMUNITY: THE TRANSATLANTIC BARGAIN CHALLENGED I* (2d ed., 2005).

⁷¹ The “shield” denotes European conventional forces deployed against the Warsaw Pact, while the “sword” represents U.S. nuclear forces, see Kori N. Schake, *NATO Strategy and the German-American Relationship*, in *THE UNITED STATES AND GERMANY IN THE ERA OF THE COLD WAR, 1945–1990, A HANDBOOK*, VOLUME I: 1945–1968 233, 236 (Detlef Junker ed., 2011).

⁷² David Brunnstrom, *EU says it has solved the Kissinger question*, REUTERS (Nov. 20, 2009), <http://www.reuters.com/article/us-eu-president-kissinger-idUSTRE5AJ00B20091120>.

⁷³ Geometrically speaking, in the case of Belgium it would be a very flat triangle given that two of its points are located in Brussels, being the capital of Belgium and seat of most of the EU’s main institutions.

important and extensive powers at the EU level,⁷⁴ which significantly affects their ability to act on the international plane.⁷⁵ This latter aspect constitutes a stronger link since it is not one governed by public international law, but EU law, which enjoys “primacy” over national law (what Americans may call “supremacy”) and can under certain circumstances be directly invoked and enforced by Member State courts (“direct effect”)—those being the hallmarks of the EU as a supranational legal order distinct from both international and national law.⁷⁶

These different triangular relationships are the basic ingredients of the transatlantic legal relationship. It is important to recognize that even when a relationship looks two-dimensional on the surface, it is triangular nonetheless. For instance, a bilateral treaty between Ireland and the U.S. has to take into account Ireland’s obligations as an EU Member State. Vice versa, a bilateral agreement between the U.S. and the EU will have to conform to the division of competences between Union and Member States and will need to respect the “constitutional” identity of the Member States as a core constitutional principle of EU law.⁷⁷ Lastly, “mixed” relationships are more obviously triangular, since this concerns agreements involving both the EU and the Member States as parties. Such “mixed agreements” are concluded usually as between a third party “of the one part”, and the EU and its Member States “of the other”.⁷⁸ However, these agreements are not among the Member States or between the Member States and the EU. Instead, their relationships remain governed by EU law, in which international agreements rank below the EU Treaties, considered by the Court of Justice of the EU as the Union’s “constitutional

⁷⁴ See for the EU’s catalogue of powers (“competences”), TFEU arts. 3–6.

⁷⁵ See for a detailed analysis Marise Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, in *THE EVOLUTION OF EU LAW* 217 (2d ed., Paul Craig & Gráinne de Búrca ed., 2011).

⁷⁶ As noted by the CJEU in Opinion 1/91 (EEA), ECLI:EU:C:1991:490, para. 21 (“In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. . . . The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.” See also the CJEU’s seminal judgment in *C-402/05 P, Kadi and Al Barakat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 285 (“... the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, ...”). For a critique, likening the EU to the U.S. in its approach to the rank of international law within the domestic legal order see Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 *HARV. INT’L L. REV.* 1, 49 (2010).

⁷⁷ TEU art. 4, para. 2. See further on this concept Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for national identity under the Lisbon Treaty*, 48 *COMMON MKT. L. REV.* 1417 (2011).

⁷⁸ See, e.g., the heading of the Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems and related applications, signed in Newmarket-on-Fergus, June 26, 2004.

charter”.⁷⁹ In addition, there are multilateral settings in which both the U.S. and the EU and/or its Member States are present. These also create transatlantic legal triangles, though as part of a wider and denser webs of international legal relationships.

The following three sub-sections present these different relationships as they stand pre-Brexit. As a preliminary matter, the methodology for establishing the current extent of treaty relations between the EU and U.S. is explained—an exercise less straightforward than one might expect (A.). Subsequently, the content of these treaty relations is outlined from the EU’s perspective (B.), as well as from the Member States’ perspective (C.). They serve as the basis—the *status quo ante Brexit*—which provides the base line for what needs to be recalibrated.

A. The trouble of counting treaties

A logical way to begin a discussion of transatlantic treaty relations would be to give the number of the agreements actually in force between the EU and U.S., and which the UK will cease to be covered by post-Brexit. However, what this number is remains far from clear due to discrepancies in official and authoritative accounts. This empirical challenge, hence, merits a few preliminary observations on how to identify the relevant treaties.

In order to determine more precisely the EU-U.S. relationship, three authoritative sources exist, i.e., the U.S. State Department’s *Treaties in Force 2017*,⁸⁰ the EU’s Treaty Office Database,⁸¹ and the *Brexit treaty renegotiation checklist* compiled by the *Financial Times*.⁸² A closer look at them reveals that their numbers do not match up. Hence, there not even consensus as the number of treaties between the U.S. and EU in force, which is an important preliminary for delving into the recalibration of relations prompted by Brexit.

⁷⁹ *Kadi and Al Barakaat*, ECLI:EU:C:2008:461, para. 281.

⁸⁰ U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2017*, <https://www.state.gov/documents/organization/273494.pdf> (last visited Jan. 16, 2018).

⁸¹ European External Action Service, EU Treaty Office Database, <http://ec.europa.eu/world/agreements/default.home.do> (last visited Jan. 17, 2018). Note that this database has also been relied on by the UK’s House of Commons, Vaughne Miller, *Legislating for Brexit: EU external agreements*, House of Commons Library Briefing Paper No. 7850, 4 (Jan. 5, 2017).

⁸² Paul McClean, Alex Barker, Chris Campbell & Martin Stabe, *The Brexit treaty renegotiation checklist*, FIN. TIMES (Aug. 20, 2017), <https://ig.ft.com/brexit-treaty-database/>.

In terms of bilateral treaties, the U.S. State Department lists 31 treaties in force between the EU and U.S.⁸³ According to the EU’s Treaty Office Database, the number is 52,⁸⁴ and according to the FT, it is 37. This excludes treaties pending ratification or those which are being provisionally applied,⁸⁵ as well as the many administrative agreements concluded directly between U.S. and EU agencies.⁸⁶

Three main reasons for this divergence can be identified: Timing, consolidation (counting extensions and amendments) and inclusion of different sets of “soft” agreements. While the first two are methodological differences, the third one seems arbitrary from a legal point of view.

In terms of timing, *Treaties in Force* lists all treaties the U.S. considers to be in force at a particular point in time. In the current edition, this is January 1, 2017. Consequently, the U.S. list does not include agreements that entered into force after January 1, 2017.⁸⁷ Hence, the Agreement between the U.S. and EU on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, which entered into force on February 1, 2017, is absent from the 2017 version of *Treaties in Force*. In addition, it includes only those treaties that “had not expired by their own terms, been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated” by that date.⁸⁸ By contrast, the EU Treaty Office lists all agreements that entered into force at some point in the past, including those that are no longer in force. This concerns six agreements of the 52 listed by the EU, including the 2004 Agreement on the processing and transfer of PNR (Passenger Name Records) data by air carriers,⁸⁹ which was declared incompatible with the EU Treaties by the CJEU for fundamental rights

⁸³ This refers to entries under the heading “European Union”, U.S. Department of State, *supra* note 80, at 138–39, and not the European Atomic Energy Community (Euratom) or any of the Union’s agencies, which are listed separately.

⁸⁴ Using as search parameters “Bilateral”, “Entered Into Force” and “United States” in its “Advanced Search” mode.

⁸⁵ An example for such an agreement is the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance, Washington, Sept. 22, 2017, which has not yet entered into force as of January 16, 2018.

⁸⁶ See for a useful overview of such agreements the table provided in Peter Chase & Jacques Pelkmans, *This time it’s different: Turbo-charging regulatory cooperation*, in *RULE-MAKERS OR RULE-TAKERS: EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP* 17, 55–60 (Daniel Hamilton & Jacques Pelkmans ed., 2015).

⁸⁷ U.S. Department of State, *supra* note 80, at i.

⁸⁸ *Id.*

⁸⁹ Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, Washington, May 28, 2004.

reasons (privacy),⁹⁰ subsequently denounced by the Council,⁹¹ and ultimately replaced by an agreement from 2011, which entered into force in 2012.⁹²

Regarding consolidation, the U.S. and EU employ different approaches to counting extensions and amendments of pre-existing agreements. The State Department opts for a more “economical” approach by listing the main agreement, and then mentioning amendments and extensions as additional information as part of that same entry. The EU Treaty Office Database, on its part, counts amendments and extensions as separate agreements. For example, the EU-U.S. Agreement for scientific and technological cooperation from 1997, which was renewed in 2004 and renewed and amended in 2009, is counted as one by the Americans and as three by the Europeans.⁹³ From the point of view of the international law of treaties the latter approach is technically correct.⁹⁴ However, from a treaty negotiators perspective, it might be more useful to adhere to the U.S. approach of counting the “consolidated” versions of the agreements currently in force.

Thirdly, the most important difference in terms of numbers relates to the counting of “softer” agreements, such as exchanges of letters and memoranda of understanding. However, there is no clearly discernible difference in approach, for instance with one side being more generous and the other more restrictive in what it considers worthy of being included in their respective lists. According to the preface of *Treaties in Force*, it “uses the term ‘treaty’ in the generic sense as defined in the Vienna Convention on the Law of Treaties”, rather than “as a matter of U.S. constitutional law”.⁹⁵ Hence, executive and

⁹⁰ Joined Cases C-317/04 and C-318/04, *Parliament v. Council*, ECLI:EU:C:2005:190.

⁹¹ Notice concerning the denunciation of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2006 O.J. (C 219) 1.

⁹² Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, Brussels, Dec. 14, 2011, T.I.A.S. 12-701.

⁹³ U.S. Department of State, *supra* note 80, at 138.

⁹⁴ Vienna Convention on the Law of Treaties art. 39, Vienna, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“A treaty may be amended by agreement between the parties. The rules laid down in Part II [on conclusion and entry into force of treaties] apply to such an agreement except insofar as the treaty may otherwise provide.”). The United States has signed but not ratified the VCLT. Nevertheless “executive branch officials have stated on a number of occasions that they view much of the Convention as reflecting binding customary international law,” Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L. REV. 307, 314 (2007) (with further references). A similar provision is contained in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 39, para. 1, Vienna, March 21, 1986 [hereinafter VCLTIO] (not in force).

⁹⁵ U.S. Department of State, *supra* note 80, at i. The VCLT defines treaties as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (art. 2, para.

executive-congressional agreements are not excluded from the U.S. list—despite its name. Beyond that, it is not evident which criteria are applied by either side. For instance, the EU lists an exchange of letters from 2005 relating to the method of calculation of applied duties for husked rice,⁹⁶ while the U.S. does not. By contrast, the U.S. includes a memorandum of understanding from 2009 on the importation of beef from animals not treated with certain growth-promoting hormones,⁹⁷ while the EU does not. Each side includes about half a dozen of such “soft” agreements in its list that the other does not, with no legal-methodological reason readily apparent.

Regarding the list compiled by the *Financial Times*, which includes 37 U.S.-EU bilateral agreements, in addition to the issues mentioned above, some additional observations need to be made. While excluding expired and superseded treaties, it also excludes those that the journalists and researchers from the *Financial Times* considered of “little or no relevance to the UK after Brexit”,⁹⁸ while including also eight European Commission implementing decisions and two delegated regulations.⁹⁹ The authors justify this by noting that these are “EU ‘equivalence’ decisions on financial services, which provide access rights to third countries” and that “[t]rade partners would likely take them as a starting point in financial services discussions with the UK after Brexit.”¹⁰⁰ While these are indeed relevant acts in the transatlantic and Brexit contexts, they are unilateral in nature and not international agreements.

If one were to approximate the correct number of bilateral treaties currently in force between the EU and U.S. by combining these different lists and with regard to their legal content, it would be around fifty. This number takes into account only bilateral agreements which are currently in force, in their “consolidated” versions, and which despite their sometimes “soft” format at least one side deems “hard” enough to include in their list. This

1, lit. a). The VCLTIO defines it as “an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations” (art. 2, para. 1, lit. a).

⁹⁶ Agreement in the form of an Exchange of Letters between the European Community and the United States of America relating to the method of calculation of applied duties for husked rice, June 30, 2005.

⁹⁷ Memorandum of understanding regarding the importation of beef from animals not treated with certain growth-promoting hormones and increased duties applied by the United States to certain products of the European Communities, May 13, 2009, T.I.A.S. 09-513; U.S. Department of State, *supra* note 80, at 139.

⁹⁸ Paul McClean, Alex Barker, Chris Campbell & Martin Stabe, *supra* note 82.

⁹⁹ *Id.* See, e.g. see Commission Implementing Decision (EU) 2016/230 of 17 February 2016 amending Implementing Decision 2014/908/EU as regards the lists of third countries and territories whose supervisory and regulatory requirements are considered equivalent for the purposes of the treatment of exposures according to Regulation (EU) No 575/2013 of the European Parliament and of the Council, 2016 O.J. (L 41) 23.

¹⁰⁰ Paul McClean, Alex Barker, Chris Campbell & Martin Stabe, *supra* note 82.

is the substantive treaty law in force between the EU and U.S. bilaterally, which will cease to apply to the UK after Brexit and should be the subject of official discussion to ensure continuity and serve as the baseline for exploring future agreements. Whether all of them need to be replicated, or whether the term of the replacement treaties should change, will be a matter of negotiations and internal political considerations framed by domestic foreign relations law.

A discrepancy exists also when it comes to multilateral treaties. The EU Treaty Office Database lists 80 treaties that have entered into force for the EU and which the U.S. has at least signed, if not ratified.¹⁰¹ The *Financial Times* only lists seven multilateral treaties to be renegotiated with the U.S., noting that in the case like the WTO or UN, “the UK should be able to ‘plug in’ to these agreements with ease.”¹⁰² This is again a political assessment and not a legal one. The State Department’s *Treaties in Force*, does not allow for a two-way comparison, as it simply lists all multilateral treaties in force for the U.S. on January 1, 2017, ordered according to subject matter but without specifying treaty parties.¹⁰³ Of the EU’s 80 treaties, only 51 are individually listed in *Treaties in Force*. In addition to the reasons for discrepancy mentioned in the bilateral context, another factor is at play here is that the EU Database includes the signatories to multilateral treaties rather than only those that have ratified. This means that the EU’s list includes treaties which the U.S. has signed but not ratified.¹⁰⁴ At the same time the EU Treaty Office Database excludes most of the WTO agreements, to which the U.S. is a party, from a targeted search.¹⁰⁵

In sum, there is thus already a significant degree of uncertainty as to the scope of what the international treaty law in force between the EU and U.S. in the lead-up to the UK’s withdrawal from the EU. Consequently, this means also significant uncertainty as to the extent of what might need to be renegotiated post-Brexit at the empirical stage, before even getting to the legal and political dimension of this challenge.

¹⁰¹ These numbers are taken from the European External Action Service, *supra* note 81, using in the “Advanced Search” form the markers “Multilateral”, “United States”, and “Entered into Force”.

¹⁰² Paul McClean, Alex Barker, Chris Campbell & Martin Stabe, *supra* note 82.

¹⁰³ U.S. Department of State, *supra* note 80, at 494–551.

¹⁰⁴ See, e.g., WHO Framework Convention on Tobacco Control, signed in Geneva, May 21, 2003; and Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, signed in Rotterdam, Sept. 10, 1998.

¹⁰⁵ Using the parameters from *supra* note 101, for instance, neither the Marrakesh agreement establishing the World Trade Organization, signed in Marrakesh, Apr. 15, 1994, nor the plurilateral Agreement on Government Procurement, signed in Marrakesh, Apr. 15, 1994, are not listed. They appear, however, when only the markers “Multilateral” and “Entered into Force”, but not “United States” are used, even though the latter has ratified both agreements.

B. The EU-U.S. relationship

Having outlined the empirical difficulties in establishing the number of treaties in force between the EU and U.S., the following paragraphs provide a categorization of different kinds of transatlantic treaties in terms of parties, revealing also the extent of their substance, with an emphasis on trade issues and the security and defense sphere. Starting with EU-U.S. agreements, the analysis subsequently addresses the issue of agreements between the U.S. and EU Member States, though there is some overlap between them.

Both within bilateral and multilateral treaties, one must distinguish between “mixed” and “non-mixed” treaties, i.e., those where in addition to the EU also the Member States are parties, and those where only the EU is a party but not the Member States. In contrast to general EU practice,¹⁰⁶ “mixity” tends to be rare in its bilateral treaty relations which do not include a wide-ranging agreement involving issues, including sensitive ones falling out of the EU’s ambit of “exclusive” competences, such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.¹⁰⁷ With regard to the U.S., such an agreement would have been TTIP.¹⁰⁸ Nonetheless, the EU has concluded with the U.S. a number of sectoral agreements in different fields. If the EU has sufficient powers and the issues concerned are not viewed as highly sensitive by the Member States, they can agree to conclude them as EU-only (“non-mixed”) agreements nonetheless.¹⁰⁹ This is—perhaps counterintuitively—also the case for agreements in security and defense matters falling under the CFSP. Despite their “high politics” nature, if there is consensus among the Member States, such agreements are concluded by the EU alone with a third party,¹¹⁰ as is the case with the U.S. In U.S. foreign relations law, by contrast, mixity does not occur,

¹⁰⁶ Christophe Hillion & Panos Koutrakos, *Introduction, in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD xix, xix (Christophe Hillion & Panos Koutrakos ed., 2010) (“The phenomenon of mixity is still central to the conduct of EU external relations.”).

¹⁰⁷ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels, Oct. 30, 2016 [hereinafter CETA].

¹⁰⁸ FERDI DE VILLE & GABRIEL SILES-BRÜGGE, TTIP: THE TRUTH ABOUT THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP 7 (2016).

¹⁰⁹ The CJEU clarified this point in Case C-600/14, *Germany v. Council* (COTIF), ECLI:EU:C:2017:935, para. 67–68; see Marise Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, 14 EUR. CONST’L L. REV. 231, 251 (2018).

¹¹⁰ Guillaume Van der Loo & Ramses A. Wessel, *The non-ratification of mixed agreements: Legal consequences and solutions*, 54 COMMON MKT. L. REV. 735, 739 (2017) (“Perhaps ironically, an area which is not at all characterized by mixity is the Common Foreign, Security and Defence Policy...”).

despite the states' constitutionally granted limited powers to make "agreements" with "foreign powers".¹¹¹

The U.S. obviously is an important treaty partner for the EU, but not the largest in terms of absolute numbers. Based on numbers provided by the EU Treaty Office Database (though their exact numbers are to be taken with a grain of salt as explained *supra* III.A), the EU has signed 144 agreements with the U.S.¹¹² With Switzerland, by contrast, this number is 206; with Norway, it is 181.¹¹³ Twelve of the 144 agreement between the U.S. and EU have not entered into force yet. As noted above, about fifty of these are bilateral and currently in force in their consolidated version, while approximately sixty to eighty multilateral ones are in force.

1. Bilateral

The bilateral agreements in force between the EU and U.S. cover a wide range of sectors, including in the areas of trade and security and defense. In the former area, the EU and U.S. have not managed to conclude a comprehensive agreement. As noted earlier, the negotiations on TTIP, launched in in 2013, have stalled and remain on hold.¹¹⁴ Hence, trade relations between the U.S. and EU are largely covered by WTO rules (see *infra* III.A.2). Nonetheless, there are a number of sectoral or specific agreements in the area of trade between the two parties, for example regarding competition,¹¹⁵ or trade in hormone-treated beef as the result of a long-lasting WTO dispute.¹¹⁶ Some are of a strictly technical character, such as the Agreement on mutual recognition of 1998.¹¹⁷ Nonetheless, the

¹¹¹ Cf. U.S. CONST art I, § 10, cl. 3 ("No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power,") with U.S. CONST art I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation..."). See further Robert Schütze, *Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon*, in MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 57, 62–65 (Christophe Hillion & Panos Koutrakos ed., 2010); and IVAN BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 51 (1973) (noting that the "states of the American Union are not presently subjects of international law.").

¹¹² These numbers are taken from the European External Action Service, *supra* note 81, using in the "Advanced Search" form the markers "Bilateral" and "Multilateral", as well as "Entered into Force" and "Pending".

¹¹³ *Id.*

¹¹⁴ DE VILLE & SILES-BRÜGGE, *supra* note 108, at 8–9 (2015) (summarizing the negotiation process).

¹¹⁵ Agreement on the application of positive comity principles in the enforcement of their competition laws, signed in Brussels and Washington, June 3 and 4, 1998, T.I.A.S. 12958.

¹¹⁶ Memorandum of understanding regarding the importation of beef from animals not treated with certain growth-promoting hormones and increased duties applied by the United States to certain products of the European Communities, signed May 13, 2009, T.I.A.S. 09-513.

¹¹⁷ Agreement on mutual recognition between the European Community and the United States of America - Joint Declaration, signed in London, May 18, 1998.

importance of such agreements in the contemporary economy is not to be underestimated, as they “are immensely important for oiling the wheels of trade”,¹¹⁸ avoiding delays and duplication in processes were possible.

However, the U.S.-EU bilateral treaty relationship also extends into the area of security, which can be further subdivided into, on the one hand, international security, including sanctions, operations abroad, and, on the other, homeland security, including the cooperation of law enforcement agencies.

In the latter area, the U.S. and the EU have engaged in treaties concerning, for instance, the exchange of passenger name records,¹¹⁹ or on financial data to combat the financing of terrorist financing.¹²⁰ Moreover, there are agreements on extradition and mutual legal assistance,¹²¹ as well as cooperation agreements concluded with EU agencies that operate in this field, such as Europol.¹²² An agreement which straddles the areas of internal and external security is about the treatment of classified information, concluded between the U.S. and EU in 2007.¹²³ From the EU’s point of view, it has its “legal basis” both the Common Foreign and Security Policy and the Area of Freedom Security and Justice.¹²⁴

¹¹⁸ Marise Cremona, *UK Trade Policy*, in *THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES* 247, 259 (Michael Dougan ed., 2017).

¹¹⁹ Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, signed in Brussels, Dec. 14, 2011, T.I.A.S. 12-701.

¹²⁰ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, signed in Brussels, June 28, 2010, T.I.A.S. 10-801. The UK, given its opt-out from this area of EU policy (see *supra* II.A), opted into this specific agreement, see Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (TFTP), 2010 O.J. (L 195) 3 (noting in the preamble that “the United Kingdom has notified its wish to take part in the adoption and application of this Decision.”).

¹²¹ See, respectively, Agreement on extradition between the European Union and the United States of America, signed at Washington, June 25, 2003, T.I.A.S. 10-201; and Agreement on mutual legal assistance between the European Union and the United States of America, signed at Washington, June 25, 2003, T.I.A.S. 10-201.1.

¹²² Agreement to enhance cooperation in preventing, detecting, suppressing, and investigating serious forms of international crime, signed at Brussels, Dec. 6, 2001, T.I.A.S. 01-1207. Note that this agreement is not listed by the U.S. State Department as having been concluded with the EU, but with the respective EU agency.

¹²³ Agreement between the European Union and the government of the United States of America on the security of classified information, signed in Washington D.C., Apr. 30, 2007, T.I.A.S. 07-430.1.

¹²⁴ Council Decision 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information, preamble, 2007 O.J. (L 115) 29 (referring to the pre-Lisbon TEU provisions in both areas).

While the U.S. and EU have not managed to strike a deep and comprehensive agreement in the area of “low politics” trade, they did conclude a number of agreements in the area of security and defense—an area in which the EU’s “economic giant” used to be contrasted with its being a “political dwarf” and “military worm”.¹²⁵ As noted earlier, these agreements, which for the EU fall under its CFSP, are non-mixed, i.e., they do not include the Member States as parties.¹²⁶

For instance, in 2016, the U.S. and EU concluded an Acquisition and cross-servicing Agreement (ACSA), which has as its objective “to further the interoperability, readiness, and effectiveness of their respective Military Forces through increased logistic cooperation”.¹²⁷ According to the agreement, the EU “shall ensure that its Member States, directly or through Athena [the EU’s internal mechanism for financing common costs of military operations], reimburse the United States of America for all Logistic Support, Supplies, and Services provided by the United States of America pursuant to this Agreement”,¹²⁸ and vice versa.¹²⁹

Moreover, in 2011, the U.S. and EU concluded a Framework Agreement on the participation of the United States of America in European Union crisis management operations. It lays down “general conditions”¹³⁰ for the U.S. contributing to EU missions, “rather than defining these conditions on a case-by-case basis for each operation concerned”.¹³¹ However, while similar agreements with other countries include also the contribution of military assets,¹³² this agreement is restricted to “contributions of civilian personnel, units, and assets by the United States to EU crisis management operations (the ‘U.S. contingent’)”.¹³³ As with other third country participating arrangements in CSDP

¹²⁵ This description is attributed to former Belgian Foreign Minister Mark Eyskens, made in 1991, cited by Craig R. Whitney, *WAR IN THE GULF: EUROPE; Gulf Fighting Shatters Europeans’ Fragile Unity*, N.Y. TIMES (Jan. 25, 1991), <http://www.nytimes.com/1991/01/25/world/war-in-the-gulf-europe-gulf-fighting-shatters-europeans-fragile-unity.html>.

¹²⁶ See *supra* note 110 and accompanying text.

¹²⁷ Acquisition and cross-servicing Agreement between the European Union and the United States of America (ACSA), preamble, signed in Brussels, Dec. 6, 2016.

¹²⁸ *Id.* art. V, para. 1.

¹²⁹ *Id.* art. V, para. 2.

¹³⁰ Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, preamble, signed in Washington D.C., May 17, 2011, T.I.A.S. 11-601.

¹³¹ *Id.*

¹³² Agreement between the European Union and the Kingdom of Norway establishing a framework for the participation of the Kingdom of Norway to the crisis management operations led by the European Union, signed in Brussels, Dec. 3, 2004.

¹³³ Framework Agreement between the United States of America and the European Union, *supra* note 130, art. 2, para. 2.

operations, U.S. contingents would remain within the national chain of command,¹³⁴ while at the same time such participation “shall be without prejudice to the decision-making autonomy of the European Union”.¹³⁵

The framework agreement has not been made use of to date. Nevertheless, it is perhaps remarkable that it is still in force, not having been the target of any threats of the current U.S. administration to terminate it. Moreover, before the framework agreement, there was already active practice of the U.S. contributing to EU operations. Based on specific agreements for American participation in “EULEX KOSOVO”, the EU’s Rule of Law Mission in Kosovo,¹³⁶ the U.S. contributed by deploying 80 police officers and eight judges and prosecutors.¹³⁷

Lastly, and as the only case of “mixture” in a bilateral agreement in force between the U.S. and EU, the Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems and related applications was signed in 2004 and entered into force in 2011 after ratification by all parties.¹³⁸ As a “mixed agreement”, it includes as parties the U.S. on one side, and the EU and its Member States on the other. Whereas the State Department’s *Treaties in Force* lists the agreement under the thematic heading “Maritime Affairs”,¹³⁹ and whereas for the EU it falls under “Trans-European Networks”,¹⁴⁰ the agreement touches upon several policy areas, recognizing that the American Global Positioning System (GPS) is “a dual use system that provides precision

¹³⁴ *Id.*, art. 6, para. 2.

¹³⁵ *Id.*, art. 1, para. 3.

¹³⁶ Agreement between the European Union and the United States of America on the participation of the United States of America in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, signed in Brussels, Oct. 22, 2008, T.I.A.S. 08-1022.

¹³⁷ ERWAN LAGADEC, *TRANSATLANTIC RELATIONS IN THE 21ST CENTURY: EUROPE, AMERICA AND THE RISE OF THE REST* 142 (2012). See further Thierry Tardy, *CSDP: getting third states on board*, European Union Institute for Security Studies Issue Brief No. 6 (March 2014), at 2 (noting that the “United States has contributed to three operations (EULEX Kosovo, EUSEC RD Congo, EUPOL RD Congo), mainly by providing advisors and personnel to assist the work of the police, prosecution and judiciary.”).

¹³⁸ Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems and related applications, *supra* note 78. See also Peter M. Olson, *Mixity from the Outside: the Perspective of a Treaty Partner*, in *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* 331, 332 (Christophe Hillion & Panos Koutrakos ed., 2010) (noting that this was the first ever bilateral mixed agreement that the U.S. concluded).

¹³⁹ U.S. Department of State, *supra* note 80, at 138.

¹⁴⁰ Council Decision of 12 December 2011 on the conclusion of the Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems and related applications between the European Community and its Member States, of the one part, and the United States of America, of the other part, preamble, 2011 O.J. (L 348) 1 (identifying as the agreement’s substantive legal basis TFEU arts. 171 and 172).

timing, navigation, and position location signals for civil and military purposes”,¹⁴¹ and listing as one of the objectives of the agreement the desire “to promote open markets and to facilitate growth in trade with respect to commerce in global navigation and timing goods, value-added services, and augmentations”.¹⁴² This agreement is thus unusual in terms of both the width of its content, and as a result, the need to include the Member States as parties in accordance with the EU’s system of external relations law. Another factor is pressure from the U.S. to clarify responsibility and liability issues in this area, with the agreement stipulating that

If it is unclear whether an obligation under this Agreement is within the competence of either the European Community or its Member States, at the request of the United States, the European Community and its Member States shall provide the necessary information. Failure to provide this information with all due expediency or the provision of contradictory information shall result in joint and several liability.¹⁴³

As noted by Kuijper and Paasivirta, this may be due to the desire from the American side to “have the division of powers—and concomitant responsibility—between Union and Member States clearly spelled out to them,”¹⁴⁴ or failing that, accept joint and several liability.¹⁴⁵ Given the limited, and already not altogether positive experience of the U.S. with bilateral mixed agreements,¹⁴⁶ further uncertainty infused by Brexit can be expected to create an even stronger call for legal clarity from the American side.

2. Multilateral

In addition to bilateral treaties, the U.S. and EU are also parties to a range of multilateral agreements and members of certain international organizations. In multilateral settings, mixity is more common. Nevertheless, the EU is not as well represented in international fora and global conventions as one may expect given the extensive external

¹⁴¹ Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems and related applications, *supra* note 78, first recital of the preamble.

¹⁴² *Id.* eighth recital of the preamble.

¹⁴³ *Id.* art. 19, para. 2. See also *id.* art. 18, which designates as the parties on the European side “the European Community or its Member States or the European Community and its Member States, within their respective areas of competence”.

¹⁴⁴ Pieter Jan Kuijper & Esa Paasivirta, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION EUROPEAN AND INTERNATIONAL PERSPECTIVES* 45, 52 (Malcolm Evans & Panos Koutrakos ed., 2013).

¹⁴⁵ Olson, *supra* note 138, at 343–44 (stressing this issue as a contentious point in the negotiations).

¹⁴⁶ *Id.*, at 344 (noting that “[n]either side was happy with the result, however, nor is it clear that either would be prepared to accept a similar solution in other cases.”).

powers which the Member States have conferred upon it.¹⁴⁷ This is due to the fact that certain international treaties only allow states to become parties, which also limits the EU's ability to join certain international organizations.¹⁴⁸ Examples for cases where the EU would have had the internal power to conclude the agreement are conventions adopted in the framework of the International Labour Organization and the UN Charter (where it could appear alongside its Member States),¹⁴⁹ and of which the United States is (still) a member. In the case of the UN, the EU achieved "enhanced observer status" at the General Assembly in 2011.¹⁵⁰ Membership, however, remains impossible.

There has been a trend more recently to allow "regional (economic) integration organizations" to accede to treaties and to join specific international organizations. It is by virtue of these possibilities that the EU and U.S. find themselves bound in larger multilateral frameworks. Prominent examples include the WTO¹⁵¹ and the Montreal Protocol on substances that deplete the ozone layer.¹⁵² For the time being, it also includes the Paris Climate Agreement,¹⁵³ though the U.S. has notified its intention to withdraw from

¹⁴⁷ See on this tension in general Inge Govaere, Jeroen Capiu & An Vermeersch, *In-between seats: the participation of the European Union in international organizations*, 9 EUR. FOREIGN AFF. REV. 155 (2004); Jan Wouters, Jed Odermatt & Thomas Ramopoulos, *The EU in the world of international organizations: diplomatic aspirations, legal hurdles and political realities*, in *THE DIPLOMATIC SYSTEM OF THE EUROPEAN UNION: EVOLUTION, CHANGE AND CHALLENGES* 94 (Stephan Keukeleire, Michael Smith & Sophie Vanhoonacker eds., 2015).

¹⁴⁸ See, e.g., Charter of the United Nations art. 4, para. 1, signed in San Francisco, June 26, 1945 ("Membership in the United Nations is open to all other peace-loving states..."); and North Atlantic Treaty art. 10, signed in Washington, April 4, 1949, T.I.A.S. 1964 ("The Parties may, by unanimous agreement, invite any other European State...").

¹⁴⁹ See on the former Marco Ferri, *Coordination Between the European Union and its Member States*, in *THE EUROPEAN UNION IN INTERNATIONAL ORGANIZATIONS AND GLOBAL GOVERNANCE* 77, 78 (Christine Kaddous ed., 2015); and on the latter Mariangela Zappia, *The United Nations: A European Union Perspective*, in *THE EUROPEAN UNION IN INTERNATIONAL ORGANIZATIONS AND GLOBAL GOVERNANCE* 25, 27 (Christine Kaddous ed., 2015) (noting that at the UN, the EU "intervenes in all areas, ranging from environmental, to development, labour, telecommunications, humanitarian, disarmament, human rights and highly political issues").

¹⁵⁰ United Nations General Assembly, Resolution adopted on 3 May 2011, *Participation of the European Union in the work of the United Nations*, A/RES/65/276.

¹⁵¹ Marrakesh agreement establishing the World Trade Organization, *supra* note 105, art XI, para. 1 ("The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, ... shall become original Members of the WTO.")

¹⁵² Montreal Protocol on substances that deplete the ozone layer art. 14, para. 1, signed in Montreal, Sept. 16, 1987 ("This Convention and any protocol shall be open for accession by States and by regional economic integration organizations...").

¹⁵³ Paris Agreement adopted under the United Nations Framework Convention on Climate Change Type of Agreement Multilateral art. 20, para. 1, adopted in Paris, Dec. 12, 2015, T.I.A.S. 16-1104 ("This Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations...")

it.¹⁵⁴ It includes, moreover a range of technical multilateral agreements,¹⁵⁵ as well as in the area of commodities.¹⁵⁶ As an example illustrating the global presence and ambitions of both the U.S. and EU, one can point to the Treaty of Amity and Cooperation in Southeast Asia, of which both are parties since 2012.¹⁵⁷

A special case from the area of international security is the Iran Nuclear Deal, negotiated by the “P5+1”, which included also representation from the EU and is hence sometimes rendered by the latter as “E3+3” (France, Germany, and the United Kingdom as EU Members, plus China, Russia, and the United States).¹⁵⁸ The deal is not an international agreement for the purposes of international law, but instead was enshrined in the form of a “Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif”¹⁵⁹ as well as in a document published by the U.S. State Department on “Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program”.¹⁶⁰ The framework was later specified in a “Joint

¹⁵⁴ U.S. Department of State, *Communication Regarding Intent To Withdraw From Paris Agreement* (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>. According to art. 28, para. 1 of the Paris Agreement, *supra* note 153, which was signed by the U.S. on April 22, 2016, withdrawal is possible at the earliest three years from the date of entry into force of the agreement, which was on November 4, 2016.

¹⁵⁵ For instance, the Agreement concerning the establishing of global technical regulations for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles (“Parallel Agreement”) art 2, para. 1, signed in Geneva, June 25, 1998, T.I.A.S. 12967.

¹⁵⁶ For instance, the International Coffee Agreement 2007 art. 2, para. 5, signed in London, Sept. 28, 2007, T.I.A.S. 11-202 (“Contracting Party means a Government, the European Community or any intergovernmental organization referred to in paragraph (3) of Article 4. . .”).

¹⁵⁷ Treaty of Amity and Cooperation in Southeast Asia, signed in Denpasar, Bali, Feb. 24, 1976. It entered into force for the U.S. in 2009 and for the EU in 2012, after the Treaty had been amended to the effect of allowing states and regional organizations outside of Southeast Asia to join (art. 18, para. 3 of the amended version now reads: “This Treaty shall be open for accession by States outside Southeast Asia and regional organisations whose members are only sovereign States subject to the consent of all the States in Southeast Asia, namely, Brunei Darussalam, the Kingdom of Cambodia. . .”).

¹⁵⁸ See, e.g., Sebastian Harnisch, *Minilateral Cooperation and Transatlantic Coalition-Building: The E3/EU-3 Iran Initiative*, 16 EUR. SECURITY 1 (2007).

¹⁵⁹ European External Action Service, Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif Switzerland (Apr. 2, 2015), https://eeas.europa.eu/headquarters/headquarters-homepage/3477/joint-statement-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad_en.

¹⁶⁰ U.S. Department of State, Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran’s Nuclear Program, Media Note, Washington, D.C. (Apr. 2, 2015), <https://2009-2017.state.gov/r/pa/prs/ps/2015/04/240170.htm>.

Comprehensive Plan of Action” of July 2015.¹⁶¹ The U.S. thus far remains a party to this deal, though the new administration has threatened to withdraw from it.¹⁶²

In the multilateral sphere, this also means that delegations of the U.S. and EU sit together in the organs of a number of international organization, and at times face each other as litigants in international disputes. The most prominent example of the latter is litigation at the WTO. There, The U.S. and EU are very active litigants there, having faced each other in now fewer than 52 cases.¹⁶³

However, both in the bilateral and the multilateral setting, the EU’s presence does not automatically entail the absence of its Member States. Hence, some of these settings are mixed. An example for a non-mixed multilateral setting is the Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) from 2005, which includes as parties the EU, U.S., as well as Japan, South Korea and Taiwan (the latter in its capacity as a WTO member under the name “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu”).¹⁶⁴

A particularly intricate example of a mixed agreement is the so-called “Open Skies” agreement. It was signed originally in 2007 between the U.S. on the one, and the EU and its Member States, on the other side.¹⁶⁵ It has not entered into force, but has been “provisionally applied” since March 2008.¹⁶⁶ Though starting out as a bilateral agreement, it was subsequently “multilateralized” by virtue of an agreement concluded in 2011 to allow Norway and Iceland to accede to the arrangement.¹⁶⁷ However, despite the additional non-EU parties, the agreement retains a bilateral structure, due to the fact that Norway and Iceland are “fully integrated members of the single European Aviation Market through the

¹⁶¹ European External Action Service, Joint Comprehensive Plan of Action, Vienna (July 14, 2015), http://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf.

¹⁶² Mark Landler & David Sanger, *Trump Disavows Nuclear Deal, but Doesn’t Scrap it*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/us/politics/trump-iran-nuclear-deal.html>.

¹⁶³ As of early 2018, the EU has appeared as either complainant or respondent 181 times in WTO disputes; the U.S. in 249 cases; numbers taken from WORLD TRADE ORGANIZATION, FIND DISPUTES CASES, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (visited Jan. 29, 2018).

¹⁶⁴ Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs), signed in Brussels, Nov. 28, 2005.

¹⁶⁵ Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, signed in Washington, Apr. 30, 2007.

¹⁶⁶ Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, 2007 O.J. (L 134) 1.

¹⁶⁷ Air Transport Agreement, signed in Luxembourg and Oslo, June 16, 2011. This agreement is not in force but provisionally applied.

Agreement on the European Economic Area”.¹⁶⁸ An institutional consequence of this is that within the Joint Committee set up under “Open Skies”, the position of the EU and its Member States, as well as that of Iceland and Norway, “shall be presented by the Commission, except in areas within the EU that fall exclusively within Member States’ competence, in which case it shall be presented by the Presidency of the Council or by the Commission, Iceland and Norway as appropriate.”¹⁶⁹

Hence, in the multilateral sphere the Member States can continue to appear alongside the EU, and sometimes even instead of the EU, including in their treaty relations with the United States. In each instance, however, their nature as EU members should be taken into account, just as the EU’s position as a non-state that does not fully replace its members.

C. The 28 Member States as “strange subjects”

In international relations scholarship, the EU has been described as a “strange animal”,¹⁷⁰ given that it is “not quite a state but with more powers than many nation states in the international system”.¹⁷¹ This is due, politically, to its still considerable combined capacities,¹⁷² and, legally, to its supranational features. However, as De Witte rightly pointed out, not only the EU, but also its Member States have become “strange subjects” of international law.¹⁷³ This is due mainly to the tension between, on the one hand, having endowed extensive powers onto the EU to act internationally, and, on the other, the desire to remain present themselves on the international scene. In contrast to the constitutional framework of the U.S. with its “sole organ”¹⁷⁴ and “Commander in Chief”¹⁷⁵ running its foreign affairs, one could thus speak of a rather “open” version of “foreign affairs

¹⁶⁸ Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part, fourth recital of the preamble, signed in Luxembourg and Oslo, June 16, 2011.

¹⁶⁹ *Id.* art. 3, para. 2.

¹⁷⁰ FRASER CAMERON, AN INTRODUCTION TO EUROPEAN FOREIGN POLICY 6 (2d ed., 2012).

¹⁷¹ *Id.*

¹⁷² Andrew Moravcsik, *Europe Is Still a Superpower*, FOREIGN POLICY (Apr. 13, 2017), <http://foreignpolicy.com/2017/04/13/europe-is-still-a-superpower/>.

¹⁷³ Bruno De Witte, *The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects*, in THE EUROPEANISATION OF INTERNATIONAL LAW 39, 39 (Jan Wouters, André Nollkaemper & Erika de Wet ed., 2008).

¹⁷⁴ The term “sole organ” dates back to 1800, when Chief Justice Marshall used it in a speech to Congress: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,” as cited in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 41–45 (2d ed., 1996).

¹⁷⁵ U.S. CONST. art. II, § 2, cl. 1.

federalism” in the case of the EU.¹⁷⁶ As the EU’s 2016 Global Strategy for Foreign and Security Policy formulated it: “EU foreign policy is not a solo performance: it is an orchestra which plays from the same score.”¹⁷⁷

To make sure there this “orchestra” plays in harmony, EU external relations law has developed a number of principles, many of which have a constraining effect on the freedom of the Member States when acting internationally. To mention the most important ones, there is, first, the duty to respect the Union’s “exclusive competences”. These are areas which have been explicitly designated as such in the EU Treaties,¹⁷⁸ and also those where the Union has adopted “common rules” which may be affected by international actions of the Member States.¹⁷⁹ In the latter case, the Member States can become pre-empted from acting in the course of time as new EU rules as being adopted.¹⁸⁰ In those areas “only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”¹⁸¹

Where there is no a priori exclusive competence or common rules, Member States are still bound by what the EU Treaty calls the “duty of sincere cooperation”.¹⁸² The duty operates in such a way to make sure Member States do not negotiate international agreements in parallel to the EU,¹⁸³ or even set in motion procedures in international fora that disturb the “unity in the international representation” of the Union and the Member States.¹⁸⁴ In other areas, the EU and Member States can continue to act in parallel. These include the development cooperation and humanitarian aid.¹⁸⁵ Regarding the CFSP/CSDP in particular, cooperation is framed as “political solidarity”¹⁸⁶ than a rigid legally

¹⁷⁶ Schütze, *supra* note 111, at 65.

¹⁷⁷ GLOBAL STRATEGY FOR THE EUROPEAN UNION’S FOREIGN AND SECURITY POLICY, *supra* note 54, at 46.

¹⁷⁸ TFEU art. 3, para. 1.

¹⁷⁹ TFEU art 3, para. 2. The latter is also known as the “ERTA” effect after the seminal decision in Case 22/70, *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32. See in detail on the different kinds of EU external competence and the evolution of case law on this matter over time, references in *supra* note 75.

¹⁸⁰ Opinion 1/03 (Lugano Convention), ECLI:EU:C:2006:81, para. 126 (noting that it “is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis...”); also Cremona, *supra* note 75, at 249–50.

¹⁸¹ TFEU art. 2, para. 1

¹⁸² TEU art. 4, para. 3.

¹⁸³ See Case C-433/03, *Commission v. Germany (Inland Waterway)*, ECLI:EU:C:2005:462.

¹⁸⁴ Case C-246/07, *Commission v. Sweden (PFOS)*, ECLI:EU:C:2010:203. The duty is in principle reciprocal, but in practice has been applied predominantly to restrain Member State actions, see Andrés Delgado Casteleiro & Joris Larik, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations?*, 36 EUR. L. REV. 522, 533 (2011).

¹⁸⁵ TFEU art. 4, para. 4 TFEU.

¹⁸⁶ TEU art. 24, para. 3, 2d subpara.

enforceable obligation.¹⁸⁷ While sincere cooperation in all these instances applies as a legal duty, its effects and degrees of justifiability change.¹⁸⁸ In the area of security and defense in particular, the Member States retain a large degree of flexibility and freedom to act internationally.

Thus, while being the sovereign equals of other states from the point of view of international law, by being Member States of the EU, the latter are legally constrained in their foreign relations in significant ways. This is the defining feature of what is termed here “transatlantic trigonometry”: Even when entertaining international legal relations between Washington and an EU Member State, Brussels is always the third point to keep in mind—at times as obvious as being a treaty partner alongside the Member States; at other times in more subtle and implicit way, where the EU itself does not feature as a treaty party of the U.S. This applies to both bilateral and multilateral settings.

1. Bilateral

The United States maintains bilateral treaty relations with all 28 EU Member States, amounting to many hundreds of treaties currently in force between them. Among those are 170 treaties in force with the United Kingdom.¹⁸⁹ Rather than attempting to cover them all, which would be a highly repetitive exercise, a number of general patterns can be highlighted with particular regard to the relationship with the EU in the background.

Firstly, the treaties in force between the U.S. and EU Member States, which are not mixed in that they do not include the EU as a party, reflect the policy areas in which Member States retain competences. Otherwise put, this concerns powers which have not been conferred upon the EU in such a way that the Member States would be pre-empted from acting. This includes, for instance, treaties in the military domain.¹⁹⁰ At the same time, as was seen above, this does not preclude the EU from concluding bilateral treaties with the U.S. on military matters under its Common Security and Defence Policy (CSDP) with the

¹⁸⁷ TEU art. 24, para. 1, 2d subpara., which largely excludes the jurisdiction of the CJEU from this area, and notes that the “adoption of legislative acts shall be excluded”, which could produce a pre-emptive effect.

¹⁸⁸ See further on this distinction, Joris Larik, *Pars Pro Toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity*, in *STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW* 175, 184 (Marise Cremona ed., 2018).

¹⁸⁹ U.S. Department of State, *supra* note 80, at 457–68, and not counting any of the treaties the UK has with the U.S. on behalf of various overseas territories.

¹⁹⁰ See, e.g., the U.S.-Denmark Agreement concerning ballistic missile defense technology, signed in Washington, Oct. 25, 2005.

Member States as parties (*supra* III.B.1). In other cases, treaties regulate territorial matters or issues relating to the settlement of historical disputes,¹⁹¹ which are issues falling outside the scope of EU law or where Member State powers are clearly retained.¹⁹²

Secondly, at the other end of the spectrum of the impact of EU membership obligations, are those areas where the EU has exclusive competences. There, Member States are pre-empted from acting and hence barred from negotiating treaties with the U.S. This explains the absence of trade and trade-related agreements between the U.S. and individual Member States. This issue came to the fore also a phone conversation between the U.S. President and German Chancellor Merkel. According to media reports, the President asked repeatedly about bilateral trade negotiations with Germany and “[e]very time the Chancellor replied: “You can’t do a trade deal with Germany, only the EU”.”¹⁹³

In between these two extremes, there is a grey area of evolving legislation and competences.¹⁹⁴ This fluidity does not make the collective of Union and Member States an easy partner on the international stage, as could be seen already from the American concerns about liability in the GPS/Galileo agreement (*supra* III.B.1). Other examples of relevance in transatlantic relations are include air transport services and bilateral investment treaties. For example, a number of Member States, but not the UK, have concluded bilateral investment treaties (BITs) with the U.S, mostly before they became EU members.¹⁹⁵ Subsequently, the EU has acquired exclusive powers in matters relating to foreign direct investment and started developing its own investment policy.¹⁹⁶ It has not, however, acquired powers over non-direct (portfolio investments),¹⁹⁷ while the legality of BITs

¹⁹¹ E.g., Treaty on the delimitation in the Caribbean of a maritime boundary relating to the U.S. Virgin Islands and Anguilla, signed in London, Nov. 5, 1993, 1913 U.N.T.S. 5.

¹⁹² According to TEU art. 4, para. 2, the EU “shall respect [the Member States’] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.”

¹⁹³ Quoting a senior German official, Lucy Pasha-Robinson, *Angela Merkel ‘had to explain fundamentals of EU trade to Donald Trump 11 times’*, INDEPENDENT (Apr. 24, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/angela-merkel-donald-trump-explain-eu-trade-11-times-germany-chancellor-us-president-a7699591.html>.

¹⁹⁴ See further Friedrich Erlbacher, *Recent case law on external competences of the European Union: how Member States can embrace their own treaty*, CLEER Working Paper 2017/2.

¹⁹⁵ E.g., the U.S.-Latvia Treaty concerning the encouragement and reciprocal protection of investment, with annex and protocol, signed in Washington, Jan. 13, 1995, T.I.A.S. 96-1226.

¹⁹⁶ See Angelos Dimopoulos, *Creating an EU Foreign Investment Policy: Challenges for the Future*, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 401 (Paul James Cardwell ed., 2011).

¹⁹⁷ Opinion 2/15 (EU-Singapore FTA), ECLI:EU:C:2017:376, para. 238.

concluded by EU Member States (also with each other) remains in limbo.¹⁹⁸ In the area of air transport, several Member States had bilateral treaties as well, including with the United States.¹⁹⁹ Due to the provisional application of the U.S.-EU “Open Skies” agreement mentioned already above (*supra* III. B.2), 23 such agreements are suspended “for the duration of provisional application of the U.S. – E.U. Air Transport Agreement”.²⁰⁰ This is also the case for the United Kingdom, which had concluded in 1978 an agreement on “North Atlantic air fares” with the U.S.²⁰¹

Hence, if the U.S. were to engage EU Member State in treaty negotiations, depending on the subject matter and state of play, it may receive starkly different reactions. It may either proceed when a Member State is confident that this continues to fall within its powers, though remaining weary not to violate any other EU law obligations—present and future—while doing so. Or it may reject American advances, as it would be recruited into breaching existing obligations under EU law or exercising powers it conferred on the Union. In the latter scenario, the U.S. would be trying to bend what is arguably the most solid side of the legal triangular relationship.

2. Multilateral

In the multilateral sphere, a distinction needs to be made again between “mixed” and “non-mixed” settings, i.e., whether the EU is a party alongside the Member States. From a Member State’s point of view, this includes scenarios where it would face the United States among other third parties, sometimes with also the EU being present as a party, as an (enhanced) observer, or not at all. In the latter case, however, the presence of the EU may still be felt where Member States are compelled to act in its interest.

¹⁹⁸ Case C-284/16, *Slowakische Republik v. Achmea BV*, Opinion of Advocate General Wathelet, delivered on Sept. 19, 2017, ECLI:EU:C:2017:699, para. 3 (noting “the numerous arbitral procedures between investors and Member States in which the European Commission has intervened as *amicus curiae* in order to support its argument that intra-EU BITs are incompatible with the FEU Treaty...”) For BITs between Member States and third countries, a regime of authorization by the European Commission is in place, Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2012 O.J. (L 351) 40.

¹⁹⁹ See, for instance, the U.S.-German Air transport agreement and exchanges of notes, signed in Washington, July 7, 1955, T.I.A.S. 3536.

²⁰⁰ U.S. Department of State, *Treaties in Force*, *supra* note 80, at 22, 35, 53, 107, 114, 144, 152, 166, 193, 213, 224, 270, 281, 317, 366, 369, 374, 400, 411, 422, 467.

²⁰¹ Agreement relating to North Atlantic air fares, Exchange of letters at Washington, March 17, 1978, T.I.A.S. 8964.

An example where all are present is the WTO (see *supra* III.B.2). The Member States' presence there was justified given that the WTO agreements (e.g., TRIPs) covered more than the scope of the Common Commercial Policy at the time of its founding.²⁰² Today, given the expanded scope of the CCP, it is more questionable that the Member States still are legally needed in Geneva, though even with very limited shared powers, a case for mixity can still be made.²⁰³ In practice, the European Commission represents the EU and the Member States at the WTO. This includes dispute settlement, where it steps in also in cases that have been launched against individual Member States.²⁰⁴ This very limited role of the Member States in the WTO context finds its explanation in EU external relations law. Given the expanse of exclusive competence in this area, complemented by the duty of sincere cooperation, Member States have to tread very carefully lest they violate their obligations under EU law.

This principles of exclusivity and sincere cooperation apply also in settings where the Member States are represented, but EU cannot be, e.g., because the multilateral organization does not allow for non-state members (see *supra* III.B.2). But even here, though the EU is not represented by its own institutions, other countries including the U.S. have to remember the “triangular” relationship that exists nonetheless. This includes forums such as the ILO and IMO, where EU Member States are bound to act under EU law in the Union's interest to the extent that they are—vicariously—exercising EU competences.²⁰⁵

In the domains where EU membership obligations are less stringent, the EU-Member State side of the triangle is rigid. For instance, at the United Nations, all Member States are represented, but the EU cannot be a member. As far as any measures fall in the area of security and defense policy the Member States are freer to act. In principle, they remain bound by the duty of sincere cooperation, but the jurisdiction of the EU Court of Justice is excluded in this area.²⁰⁶ Moreover, the Member States added declarations to the EU Treaties affirming their independent role, especially as permanent members of the UN

²⁰² Opinion 1/94 (WTO), ECLI:EU:C:1994:384, para. 105.

²⁰³ Joris Larik, *Sincere Cooperation in the Common Commercial Policy: Lisbon, a “Joined-Up” Union, and “Brexit”*, 8 EUR. YBK. INT'L ECON. L. 83, 105–06 (2017).

²⁰⁴ Andrés Delgado Casteleiro & Joris Larik, *The “Odd Couple”: Responsibility of the EU at the WTO*, in THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES 233, 239–40 (Malcolm Evans & Panos Koutrakos ed., 2013).

²⁰⁵ Case C-45/07, *Commission v. Greece*, ECLI:EU:C:2009:81, para. 31 (“the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest”).

²⁰⁶ See *supra* note 187.

Security Council.²⁰⁷ Hence, when the United States representative faces the UK or France, she can assume that they will act and vote in their own capacity, largely unconstrained by their EU membership. Nonetheless, as the *Kadi* saga on the constitutionality targeted UN sanctions under EU law illustrates, the EU Member States may in principle be compelled to refuse to implement UN Security Council Resolutions, even if they helped adopt them in the first place.²⁰⁸

Another example from the security domain and pillar of the transatlantic relationship is NATO, of which the EU cannot become a member either.²⁰⁹ By contrast, 22 EU Member States are members of NATO. The non-NATO members in the EU are Austria, Cyprus, Finland, Ireland, Malta, and Sweden, which maintain security policies of neutrality or non-alignment.²¹⁰ A loose cooperative arrangement, “Berlin Plus”, exists between the EU and NATO since 2002, but has not been used twice, in 2003 and 2004.²¹¹ The EU Treaties make explicit that the fact that the EU has its own security and defense policy “respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organisation (NATO)”.²¹² Hence, when the U.S. deals with EU Member States in the North Atlantic Council, the EU-Member State side of the triangle is relatively weak.

Given the dichotomy of modes of operation of the EU in external relations, as well as the diversity of international treaty settings (covering different policy areas, mixed/non-mixed, bilateral treaties with the Member States), the decision of a Member State to leave the EU will affect its respective transatlantic triangles in various ways and to varying degrees.

²⁰⁷ See Declaration 14 concerning the common foreign and security policy attached to the EU Treaties (stressing that the provisions on the CFSP “will not affect the ... powers of each Member State in relation to the formulation and conduct of its foreign policy, ... and participation in international organisations, including a Member State’s membership of the Security Council of the United Nations”).

²⁰⁸ *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 285.

²⁰⁹ See *supra* note 148.

²¹⁰ See JORIS LARIK, FOREIGN POLICY OBJECTIVES IN EUROPEAN CONSTITUTIONAL LAW 192–94 (2016).

²¹¹ Steven Blockmans, *The Influence of NATO on the Development of the EU’s Common Security and Defence Policy*, in BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANIZATIONS 243, 259 (Ramses A. Wessel & Steven Blockmans ed., 2013).

²¹² TEU art. 42, para. 2, 2d subpara.

IV. ALTERNATIVE MODELS AND THEIR TRANSATLANTIC DIMENSION

As long as the United Kingdom is a member of the EU, its relationship with the United States is of the same triangular nature as that of the other 27 Member States. Most importantly, in its relations with the U.S., it is to respect its obligations under EU law, in particular internal EU legislation, its external EU competences, and the duty of sincere cooperation. This situation is fundamentally different for non-EU Member States, whose relations with both the U.S. and the EU and its Member States are governed by public international law. Nonetheless, the closer the association of a third country with the EU, the more that relationship acquires a triangular character as well. The main difference is that these are a priori legally equal relationships, both legally valid under the international law of treaties, instead of one being governed by international law and the other by EU law, which enjoys primary over domestic and international law of the Member States.²¹³

In this section, four main models of treaty relations for third countries with the EU are outlined, ranging from a closer association with the EU to looser arrangements.²¹⁴ A fifth option would be one without a particular treaty framework, governed only by multilateral fora and customary international law. The UK's Prime Minister appears to have publically dismissed the first three models (Norway, Switzerland and Turkey) in her "Lancaster House Speech" of January 2017.²¹⁵ However, this may not be the last word, and it remains useful to explore what the available options are and what they entail in terms of the freedom of action *vis-à-vis* interacting with the United States.²¹⁶

As the following models show, the difference—and difficulty—lies in the economic sphere rather than that of security and defense. As sensitive as the EU is to the sovereignty concerns of its own Member States in the area of security and defense, as unencumbered does it leave third countries closely associated with it in this regard. By contrast, in the trade sphere the legal constraints on the external maneuvering space of third countries are

²¹³ See references *supra* note 76.

²¹⁴ Hannes Hofmeister, *Splendid Isolation or Continued Cooperation? Options for a State After Withdrawal from the EU*, 21 COLUM. J. EUR. L. 249 (2015).

²¹⁵ Prime Minister's Office, *The government's negotiating objectives for exiting the EU: PM speech* (Jan. 17, 2017), <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> ("So we do not seek membership of the single market. ... I do not want Britain to be part of the Common Commercial Policy and I do not want us to be bound by the Common External Tariff. These are the elements of the Customs Union that prevent us from striking our own comprehensive trade agreements with other countries.").

²¹⁶ Another scenario of close association without EEA membership or a customs union is the "Ukraine" model, see Mitchel van der Wel & Ramses A. Wessel, *The Brexit Roadmap: Mapping the Choices and Consequences during the EU/UK withdrawal and Future Relationship Negotiations*, CLEER Working Paper 2017/5, at 73–75.

wide-ranging. For the United States, this matters in terms of what to expect in its interaction with a post-Brexit UK.

A. Norway

The closest model of association with the EU is joining the European Economic Area (EEA). The EEA, set up in 1994,²¹⁷ consists of the EU and EFTA countries minus Switzerland (see *infra* IV.B). This model is often referred to as the “Norway model” in public discourse.²¹⁸ Iceland and Liechtenstein are in a similar position regarding trade, but given that Norway is also a NATO member with an army, it makes sense to focus on it as a possibility for the United Kingdom.

As a member of the EEA, non-EU countries accept parts of the *acquis communautaire*, i.e., EU laws and regulations, without having a vote in their adoption. This arrangement is unique in that the “EEA Agreement is the only EU external agreement to employ so-called homogeneity as a means of ensuring the actual adaptation of the dynamic post-signature *acquis communautaire* into the legal orders of the European Free Trade Area (EFTA) member states.”²¹⁹ This means EEA countries retain access to the EU’s Internal Market while the EU rests assured that they comply with relevant EU rules as they continue to evolve.

EEA membership covers free movement of goods, services, capital, and persons, and competition, but excludes “the common agricultural, fisheries and transport policies, budget contributions and regional policy, taxation, as well as economic and monetary policy.”²²⁰ Norway hence has to respect the EU’s four freedoms, including free movement of persons,²²¹ and in addition takes part in the passport-free “Schengen area”.²²²

²¹⁷ Agreement on the European Economic Area, 1994 O.J. (L 1) 3 [hereinafter EEA Agreement]. See on its origins and negotiating history, Sven Norberg & Martin Johansson, *The History of the EEA Agreement and the First Twenty Years of Its Existence*, in THE HANDBOOK OF EEA LAW 3, 15–32 (Carl Baudenbacher ed., 2016).

²¹⁸ See, e.g., Charlie Cooper, *Macron to May: ‘Be my guest’ to Norway-model Brexit*, POLITICO (Jan. 18, 2018), <https://www.politico.eu/article/emmanuel-macron-theresa-may-france-uk-be-my-guest-to-norway-model-brexit/>.

²¹⁹ Roman Petrov, *Exporting the Acquis Communautaire into the Legal Systems of Third Countries*, 13 EUR. FOREIGN AFF. REV. 33, 37 (2008).

²²⁰ Sieglinde Gstöhl, *Models of external differentiation in the EU’s neighbourhood: an expanding economic community?*, 22 J. EUR. PUB. POL’Y 854, 858 (2015); also Hofmeister, *supra* note 214, 256.

²²¹ On the latter, aspect, Kjartan Bjarni Björgvinsson, *Free Movement of Persons*, in THE HANDBOOK OF EEA LAW 473 (Carl Baudenbacher ed., 2016).

²²² This is done through special agreements. See in the case of Norway and Iceland, Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the

Though EEA countries are consulted, they do not get to vote within the EU's legislative processes. Hence, under a Norway-model the UK "would be bound by many of the EU's rules, but no longer have a vote or veto on the creation of those rules."²²³ Institutionally, the "main discussions take place within the EEA Joint Committee in the so-called 'decision-shaping phase' after the [European] Commission transmits its proposals to the EU Council and the European Parliament, as well as to the EEA EFTA states."²²⁴ Subsequently, the EEA Joint Committee decides by consensus "as closely as possible in time to the adoption of the rules in the EU institutions in order to allow for a more or less simultaneous application of the *acquis*."²²⁵ Moreover, to make sure EEA countries comply, a special EFTA Surveillance Authority was created, which can take EEA countries to an EFTA Court.²²⁶ This court, in turn, aligns itself largely with the case law of the Court of Justice of the EU.²²⁷

However, all this does not make the EEA a borderless region. For instance, customs and rules of origins checks at the Norway-EU border continue to apply.²²⁸ Nonetheless, it provides a largely homogenous regulatory space and thus wide-ranging access to the EU's internal market.

In their external relations EEA countries are relatively unencumbered by the EU. They do not have to go along with the EU's Common Commercial Policy, the CFSP/CSDP, or other external policies. EEA countries hence can negotiate free trade agreements (FTAs) with other countries, which they do as a bloc of EFTA countries.²²⁹ However, the EEA countries are limited in their scope of maneuver in regulatory matters when negotiating trade agreements with other countries, as they need to maintain compliance with the relevant EU rules in order to retain access to the internal market. Neither Norway nor

association of these two states to the implementation, to application and to the development of the *acquis de Schengen* - final Act, 1999 O.J. (L 176) 36.

²²³ As noted in the UK government's report published three months before the Brexit referendum, HM GOVERNMENT, *ALTERNATIVES TO MEMBERSHIP: POSSIBLE MODELS FOR THE UNITED KINGDOM OUTSIDE THE EUROPEAN UNION* 16 (Mar. 2016).

²²⁴ Gstöhl, *supra* note 220, at 858.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ EEA Agreement art 6 only requires homogeneous interpretation with CJEU case law only dating until the signature of the EEA Agreements. The EFTA Court, however, notes that it has "consistently taken into account the relevant rulings of the CJEU given after the said date," *Joined Cases E-9/07 and E-10/07, L'Oréal Norge AS v. Aarskog Per AS and Others and Smart Club Norge*, [2008] EFTA Ct. Rep. 258, para. 28. See further H.H. Fredriksen, *Bridging the widening gap between the EU Treaties and the agreement on the European Economic Area*, 18 EUR. L. J. 868, 869–70 (2012).

²²⁸ HM GOVERNMENT, *supra* note 223, at 17.

²²⁹ See for an overview EFTA, *FREE TRADE AGREEMENTS AND TRADE RELATIONS BY COUNTRY*, <http://www.efta.int/free-trade/free-trade-agreements> (last visited Jan. 22, 2017).

EFTA have a modern trade agreement with the U.S.,²³⁰ though FTAs are in force between EFTA and, among others, Canada and South Korea.

In the area of security and defense policy, EEA countries are completely free to go their own way. Norway and Iceland are members of NATO, while Liechtenstein is not. Moreover, Norway has numerous bilateral agreements with the U.S. in the defense field.²³¹ However, this freedom does not imply hostility towards the EU's CFSP/CSDP. To the contrary, Norway has contributed to several EU military and civilian operations under a third-country arrangement.²³² Moreover, Norway officially aligns itself at times with EU positions at the United Nations.²³³

Consequently, it might be more accurate to speak of two “Norway models”: The traditionally know one for the economic and regulatory sphere, as well as on the issue of movement of persons, which is restrictive and limits Norway's international action. Here the EU side of the triangle remains strong. However, a different kind of Norway model exists for the wider foreign policy and security sphere, which is not restrictive but allows for close participation.

B. Switzerland

Unlike Norway's case of EEA membership, the Swiss model is constructed through a range of bilateral agreements.²³⁴ While Switzerland is a member of EFTA and took part in the negotiations for the EEA, but it refused to join the latter in 1992 following a negative referendum result.²³⁵ The principal starting point for the bilateral treaties was the 1972

²³⁰ U.S. Department of State, *supra* note 80, at 334.

²³¹ *Id.*, at 330–31.

²³² Agreement between the European Union and the Kingdom of Norway establishing a framework for the participation of the Kingdom of Norway to the crisis management operations led by the European Union, signed in Brussels, Dec. 3, 2004, 2005 O.J. (L 67) 8.

²³³ See, e.g., European Union, General Statement delivered by Ms. Anne Kemppainen, Minister Counsellor, Head of Political Section for Non-proliferation and Disarmament, Delegation of the European Union in Geneva, at the 72nd Session of the United Nations General Assembly First Committee before the vote on Cluster VI (Regional disarmament and security) concerning the Comprehensive Nuclear-Test-Ban Treaty (CTBT), New York, Nov. 1, 2017, EUUN17-146EN (“The ... EFTA countries Liechtenstein and Norway, members of the European Economic Area, as well as Ukraine ... , align themselves with this statement.”).

²³⁴ The complete list, including all additional protocols and amendments, is compiled in SWISS CONFEDERATION, DIRECTION DES AFFAIRES EUROPÉENNES, LISTE DES ACCORDS SUISSE–UNION EUROPÉENNE EN VIGUEUR AU 1ER JANVIER 2017, https://www.eda.admin.ch/dam/dea/fr/documents/publikationen_dea/accords-liste_fr.pdf (last visited Jan. 22, 2017).

²³⁵ Norberg & Johansson, *supra* note 217, at 31.

FTA,²³⁶ which was followed by a set of more specific bilateral treaties in 1999,²³⁷ and another set in 2004.²³⁸ Since 2004, additional agreements were concluded, including on cooperation with Europol, Eurojust, and the European Defence Agency (EDA), cooperation between competition authorities, satellite navigation, and company taxation.²³⁹

In the economic realm, Switzerland's access to the EU's internal market is limited. For instance, it has "access to a significant degree of the trade in goods but agriculture is not covered".²⁴⁰ Moreover, access in trade in services is limited, while the financial sector is excluded.²⁴¹ On the latter point, it is relevant to note that Switzerland cannot avail itself of the EU's "passporting system that minimises the regulatory, operational and legal barriers to the provision of financial services across the EU".²⁴² Instead, "Swiss banks need to establish a subsidiary in an EU/EEA country ... in order to obtain financial services passporting rights."²⁴³

Institutionally, the Swiss model "lacks an overarching structure to deal with the around 20 main agreements, most of which are on a technical level run by a consensus-based Joint Committee".²⁴⁴ There is no equivalent to the above-mentioned EFTA Surveillance Authority and EFTA Court, which would also contribute to supervising the relationship with the EU in view of evolving legislative and regulatory developments. The EU has been pushing for this for years,²⁴⁵ but thus far to no avail.²⁴⁶ However, while not institutionalized, or rather judicialized, enforcement is left entirely to the diplomatic realm.

²³⁶ Agreement between the European Economic Community and the Swiss Confederation, signed in Brussels, July 22, 1972, 1972 O.J. (L 300) 189.

²³⁷ These cover free movement of persons, technical barriers to trade, public procurement markets, agriculture, research, civil aviation, and overland transport.

²³⁸ These cover, *inter alia*, the Schengen (passport-free travel) and Dublin agreements (on asylum applications), taxation of savings, fight against fraud, processed agricultural products, the environment, pensions, education, vocational training, and youth.

²³⁹ SWISS CONFEDERATION, *supra* note 234.

²⁴⁰ van der Wel & Wessel, *supra* note 216, at 69.

²⁴¹ *Id.*

²⁴² HM GOVERNMENT, *supra* note 223, at 26.

²⁴³ *Id.*

²⁴⁴ Gstöhl, *supra* note 220, at 860.

²⁴⁵ See, e.g., Council of the European Union, Council conclusions on EU relations with EFTA countries, 3060th General Affairs Council meeting, Brussels, Dec. 14, 2010, pt. 42 (criticizing "a lack of efficient arrangements for the take-over of new EU *acquis* including ECJ case-law, and for ensuring the supervision and enforcement of the existing agreements" resulting "in legal uncertainty for authorities, operators and individual citizens.")

²⁴⁶ SABINE JENNI, SWITZERLAND'S DIFFERENTIATED EUROPEAN INTEGRATION: THE LAST GALLIC VILLAGE? 176 (2016).

In particular, the agreement contains so-called “guillotine clauses”,²⁴⁷ which means that a whole set of agreements cease to apply in case one of them is terminated or not renewed,²⁴⁸ thus cutting off Switzerland’s access to the EU’s internal market.

In this framework, Switzerland is free to conclude its own trade agreements,²⁴⁹ though it remains bound by its commitments under the bilateral agreements with the EU. Like Norway, it usually concludes trade agreements within the EFTA framework, though it concluded a bilateral agreement with China.²⁵⁰ Like Norway, furthermore, it has no modern trade agreement with the U.S., either bilaterally or through EFTA.

In the area of security and defense, similar to the Norway model, Switzerland remains unencumbered by its legal proximity to the EU. Unlike Atlanticist Norway, it pursues traditionally a strategy of neutrality.²⁵¹ Nonetheless, it too has contributed to several of the EU’s civil and military CSDP operations,²⁵² though Switzerland has not concluded a framework agreement with the EU to that effect. At the same time, it entertains a number of agreements in the field of defense with the United States.²⁵³ Unlike Norway, other EEA and EU candidate countries, Switzerland has no track record of formally aligning itself with EU statements and positions. In terms of trigonometry, the same flexibility can be seen in the security and defense field, while in the trade and regulatory domain, as “static”²⁵⁴ model exists that is out of favor with the EU and hence may not see replication elsewhere.

C. Turkey

A third model for association with the EU is embodied in the EU-Turkey relationship. Turkey is not a member of EFTA, the EEA, or has a set of bilateral agreements providing

²⁴⁷ Stephan Breitenmoser, *Sectoral agreements between the EC and Switzerland: Contents and context*, 40 COMMON MKT. L. REV. 1137, 1160 (2003).

²⁴⁸ See, e.g., Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, 2002 O.J. (L 141) 6, art. 25, para. 4.

²⁴⁹ HM GOVERNMENT, *supra* note 223, at 27 (noting that “Switzerland has 29 such agreements, covering 41 countries”).

²⁵⁰ Free Trade Agreement between the People’s Republic of China and the Swiss Confederation, signed in Beijing, July 6, 2013. The agreement entered into force in 2014.

²⁵¹ HM GOVERNMENT, *supra* note 223, at 27.

²⁵² See, e.g., Participation Agreement between the European Union and the Swiss Confederation on the participation of the Swiss Confederation in the European Union CSDP mission in Mali (EUCAP Sahel Mali), signed in Brussels, Apr. 13, 2016. See for an overview Tardy, *supra* note 137, at 3.

²⁵³ See, e.g., Agreement concerning acquisition and cross-servicing, signed in Stuttgart and Bern, Mar. 23 and Dec. 6, 2001. For an overview see U.S. Department of State, *Treaties in Force*, *supra* note 80, at 422–23.

²⁵⁴ HM GOVERNMENT, *supra* note 223, at 26.

access to the internal market as is the case with Switzerland. Instead, the EU and Turkey concluded an association agreement in 1963,²⁵⁵ which includes a partial customs union since 1995.²⁵⁶ Turkey remains a candidate country to the EU, though its path to membership appears long a full of obstacles, not least in the current political climate.²⁵⁷

It would be a misconception to think that there is only one single, all-encompassing customs union of which the UK could remain a member even after it leaves the EU. Turkey is not in the Customs Union that is the EU, but has *a* partial customs union with the EU, which includes “industrial goods and processed agricultural goods” but excludes “raw agricultural goods”.²⁵⁸

Regarding its external trade policy, the legal consequence of being in a customs union with the EU is that Turkey committed to align its tariff schedules with the EU’s Common External Tariff, as far as covered by their customs union,²⁵⁹ and to mimic EU trade agreements with third countries.²⁶⁰ The customs union is considered “outdated”.²⁶¹ Moreover, it gives Turkey little freedom, as the country “has no involvement in decisions about the [EU’s] Common External Tariff or setting the direction of the Common Commercial Policy,” and leaves it at a disadvantage, as alignment does not mean that it will automatically “secure additional market access via EU FTAs with third countries, but these third countries have access to Turkey’s market.”²⁶² As van der Wel and Wessel observe, Turkey has endeavored—unsuccessfully—to take part in negotiations between the EU and the U.S. over the TTIP.²⁶³

In the area of security and defense, as with Norway and Switzerland, Turkey remains free to conduct its own policy. It is a NATO member, has contributed to CSDP operations

²⁵⁵ Agreement creating an association between the European Economic Community and Turkey, signed in Ankara, Dec. 12, 1963.

²⁵⁶ Decision No 1/95 96/142/EC of the EC-Turkey Association Council on implementing the final phase of the Customs Union, Dec. 22, 1995, 1996 O.J. (L 35) 1.

²⁵⁷ Ece Toksabay & Tulay Karadeniz, *EU parliament calls for Turkey accession talks to be suspended*, REUTERS (July 6, 2017), <https://www.reuters.com/article/us-turkey-eu-parliament/eu-parliament-calls-for-turkey-accession-talks-to-be-suspended-idUSKBN19R194>.

²⁵⁸ van der Wel & Wessel, *supra* note 216, at 71.

²⁵⁹ Decision No 1/95 96/142/EC of the EC-Turkey Association Council, *supra* note 256, art. 13.

²⁶⁰ *Id.* art. 16, para. 1: “... Turkey will take the necessary measures and negotiate agreements on mutually advantageous basis with the countries concerned.”

²⁶¹ van der Wel & Wessel, *supra* note 216, at 71.

²⁶² House of Lords, European Union Committee, *Brexit: the options for trade*, 5th Report of Session 2016–17, HL Paper 72 (Dec. 13, 2016), at 29.

²⁶³ van der Wel & Wessel, *supra* note 216, at 72.

and has concluded a framework agreement with the EU to that effect.²⁶⁴ Turkey has a range of treaties in the defense field with the U.S. as well,²⁶⁵ but no comprehensive, modern trade agreement.²⁶⁶ As a candidate country, Turkey occasionally aligns itself with EU statement in international fora.²⁶⁷

Also in the case of Turkey, the transatlantic triangle is very flexible and has allowed the country to associate itself closely with the U.S. and the EU. In the trade and regulatory field, while the limitations only cover certain sectors, they weigh heavily due to the obligation of alignment without voting rights and without automatic economic benefits in return.

D. Canada

Deep and comprehensive trade agreements represent a more hands-off approach to association with the EU than the models outlined above. Nonetheless, they aim to provide “increased market access and regulatory convergence”.²⁶⁸ The current “gold standard”, in the EU’s eyes,²⁶⁹ of such an agreement is embodied in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), which was signed on October 30, 2016. It is not yet in force, since as a mixed agreement it requires ratification by Canada, the EU, and all of its Member States,²⁷⁰ which highlights the continued importance of the latter in this particular transatlantic triangle. CETA has been provisionally applied since September 2017.²⁷¹ Moreover, an opinion has been requested from the CJEU to determine

²⁶⁴ Agreement between the European Union and the Republic of Turkey establishing a framework for the participation of the Republic of Turkey in the European Union crisis management operations, signed in Brussels, June 29, 2006, 2006 O.J. (L 189) 17. See for an overview of missions Tardy, *supra* note 137, at 3 (listing seven CSDP missions to which Turkey contributed).

²⁶⁵ U.S. Department of State, *supra* note 80, at 439–40.

²⁶⁶ There exists an investment protection agreement from 1985, Treaty concerning the reciprocal encouragement and protection of investments, signed in Washington, Dec. 3, 1985.

²⁶⁷ European Union, *supra* note 233.

²⁶⁸ van der Wel & Wessel, *supra* note 216, at 72.

²⁶⁹ European Commission, Joint statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA), STATEMENT/16/446, Brussels, Feb. 29, 2016.

²⁷⁰ *Id.* art. 30.7, para. 2.

²⁷¹ Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 2017 O.J. (L 11) 1080. The exact date was jointly announced, see European Commission, EU and Canada agree to set a date for the provisional application of the Comprehensive Economic and Trade Agreement, STATEMENT/17/1959, Brussels (July 8, 2017).

whether CETA, in particular its chapter on investment protection, is compatible with the EU Treaties.²⁷² Hence ratification is both drawn out while legal uncertainty persists.

CETA “phases out the tariffs on 98% of all goods and addresses several other discriminatory measures such as subsidies and quotas,”²⁷³ but still maintains tariffs in some limited cases such as fishery and agricultural products.²⁷⁴ Moreover, CETA guarantees geographical indications and opens public procurement markets.²⁷⁵ It establishes, furthermore, a sophisticated institutional setup, including next to a Joint Committee also inter-party arbitration, an Investment Court System (ICS), and a Regulatory Cooperation Forum.²⁷⁶ While it is innovative in that it maintains a “negative list” approach to services, some sectors remain excluded, such as the audio-visual and public services in the areas of health, education and social services.²⁷⁷ In terms of providing market access for financial services, it is a far cry from pass porting rights as an EU member, not offering much more than exists under GATS terms already, meaning “Canadian companies have to establish a subsidiary in the EU in order to be able to sell their financial services.”²⁷⁸

Being an FTA but no customs union, Canada remains free to adjust its tariff schedules (as far as its WTO schedules allow) with the non-EU world. Moreover, it is free to conclude trade agreement with third countries. CETA and the additional Joint Interpretative Statement make stress the “right to regulate” in several instances.²⁷⁹ This implies regulatory freedom rather than restraint in Canada’s external trade policy. However, while regulatory compliance with EU standards is not a legal requirement, it remains an economic necessity if Canada wants to be able to export its goods and services to the EU.²⁸⁰ Unlike the cases of

²⁷² Opinion 1/17, Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU, 2017 O.J. (C 369) 2.

²⁷³ van der Wel & Wessel, *supra* note 216, at 72.

²⁷⁴ *Id.*

²⁷⁵ CETA ch. 19 (on government procurement) and ch. 20, Section B, sub-Section C (on geographical indications).

²⁷⁶ *Id.* art. 26.1 (on the Joint Committee), ch. 29 (on inter-party disputes), ch. 8, section F (on investment disputes), and art. 21.6 (on the Regulatory Cooperation Forum). The new investment court system is not covered by provisional application, see Council Decision (EU) 2017/38, *supra* note 271, art. 1(a), which does not include the CETA provisions which make up Section F on the “Resolution of investment disputes between investors and states”.

²⁷⁷ van der Wel & Wessel, *supra* note 216, at 72; see also Dominic Webb, *CETA: the EU-Canada free trade agreement*, UK House of Commons Library Briefing Paper No. 7492 (Sept. 12, 2017), at 11.

²⁷⁸ *Id.*

²⁷⁹ CETA art. 8.9, para. 1, art. 23.2, art. 23.4; and Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Brussels, Oct. 27, 2016, 13541/16, pts. 1(e), 3, 6(a).

²⁸⁰ van der Wel & Wessel, *supra* note 216, at 73 (“Besides compliance with EU rules and standards when exporting goods to the EU, Canada does not have to incorporate any EU legislation within its domestic legislation ...”).

Norway, Switzerland, and Turkey, Canada has a free trade agreement with the United States in the form of NAFTA, of which also Mexico is a party.²⁸¹ Thanks to CETA and NAFTA, Canada is an example of a country with wide-ranging market access covered by FTAs to both the EU and the U.S. However, NAFTA is currently being renegotiated at the request of the Trump Administration.²⁸²

In the area of security and defense, it is noteworthy that CETA is accompanied by a Strategic Partnership Agreement.²⁸³ The language of the latter is rather hortatory and leaves Canada as free as the examples above. For instance, the agreement stresses common international commitments, ranging from human rights²⁸⁴ to the International Criminal Court,²⁸⁵ and establishes a political dialogue and consultative mechanism.²⁸⁶ In addition and prior to the 2016 Strategic Partnership Agreement, Canada has concluded a framework agreement with the EU on taking part in CSDP operation,²⁸⁷ and has contributed to several over the years.²⁸⁸ Like Norway, Canada is a NATO member and has numerous bilateral treaties with the U.S. in the field of defense.²⁸⁹ Hence, also in the security and defense field Canada maintains simultaneous cooperation arrangements with the EU and U.S.

Canada's example shows legal commitments with a large degree of flexibility in both the trade and security dimensions of its relationship with both the EU and U.S. Nevertheless, in order to benefit from the market access granted by CETA, Canada needs to comply with relevant EU legislation and regulation.

E. "No Deal"

Another option—though not really a “model—is that the EU and UK will fail to agree on future agreement which would closely associate them with each other. In the trade realm, such a “no deal” scenario would lead to their trade relationship falling back onto

²⁸¹ For an overview of bilateral agreements between Canada and the U.S., see U.S. Department of State, *supra* note 80, at 72–73.

²⁸² U.S. Office of the Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017), at 2.

²⁸³ Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, signed in Brussels, Oct. 30, 2016, 2016 O.J. (L 329) 45.

²⁸⁴ *Id.* art. 2.

²⁸⁵ *Id.* art. 5.

²⁸⁶ *Id.* arts. 26 and 27.

²⁸⁷ Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, signed in Brussels, Nov. 24, 2005, 2005 O.J. (L 315) 21.

²⁸⁸ Tardy, *supra* note 136, at 3.

²⁸⁹ U.S. Department of State, *supra* note 80, at 63–66.

WTO rules, including the application of tariffs in certain areas and limits in terms of access to the internal market for services.²⁹⁰ According to economic modelling by RAND Europe, such a scenario would result in reducing the UK's "future GDP (compared to full EU membership) by about 4.9 per cent, or \$140bn, over 10 years."²⁹¹ For the EU, according to this estimate, the loss in GDP "would be relatively minor, about 0.7 per cent of GDP."²⁹² In the words of Gormley, such a scenario would be "would be a hard Brexit on the most disadvantageous terms for all parties".²⁹³

This obviously would leave the UK free to conclude trade agreements with other countries and determine its own tariffs and regulations (in accordance with WTO rules). However, the UK would still need to comply with relevant EU laws and regulations to be able to export to the EU's internal market under the WTO framework.²⁹⁴ In the field of security and defense, it would mean not following up the UK's ejection from the CFSP/CSDP with a future arrangement to contribute as a third country, such as the framework agreements of Norway and Canada discussed above. However, the UK would remain connected to 22 Member States via its continued NATO membership, and hence indirectly to the EU via EU-NATO cooperation (see *supra* III.C.2).

In addition, as these different models reveal, the way security and defense cooperation and third country participation are structured in the EU, this policy domain is far less restrictive as regards cooperation with third countries in trade and regulatory matters. For instance, neither neutrality nor NATO membership does not preclude contributing to CSDP operations conducted by the EU, nor does it preclude (parallel) cooperation on a bilateral basis with individual EU members. The EU's CFSP/CSDP hardly cloud these relationships. By contrast, close association with the EU through either a customs union or EEA membership put significant restraints on an independent trade policy. It is here that the shadow of the EU-Member States side of the triangle looms largest over its relations with third countries. In the case of deep FTAs such as CETA, the references to the "right to regulate" are a double-edged sword. They suggest leeway, but at the same time legally

²⁹⁰ van der Wel & Wessel, *supra* note 216, at 75–76.

²⁹¹ CHARLES P. RIES ET AL. (RAND EUROPE), *AFTER BREXIT ALTERNATE FORMS OF BREXIT AND THEIR IMPLICATIONS FOR THE UNITED KINGDOM, THE EUROPEAN UNION AND THE UNITED STATES* xi–xii (2017) (internal footnotes omitted). This scenario does not assume that the UK concludes an FTA with the U.S.

²⁹² *Id.*

²⁹³ Laurence W. Gormley, *Brexit – Nevermind the Whys and Wherefores: Fog in the Channel, Continent Cut off*, 40 *FORDHAM INT'L L.J.* 1175, 1206 (2017).

²⁹⁴ *Id.*, at xi (noting that under a "no deal" scenario, the "UK would be able to set its own tariffs and establish its own regulatory standards, although any divergence from EU standards would increase non-tariff barriers (NTBs).").

cements the need for compliance with EU standards to benefit from market access under such an FTA. The third country thus remains in the penumbra of the internal market. This fundamental difference between trade and security and the more rigid trade-offs that exist in the former field together form key factors in the development of the “new transatlantic trigonometry” post-Brexit.

V. NEW TRANSATLANTIC TRIGONOMETRY

While the previous sections were about the pre-Brexit present and current alternative models of association with the EU, the analysis now turns to a future in which the UK has ceased to be an EU member. In particular, it addresses what this will entail for legal relations with the U.S. The good news from a transatlantic point of view is that the vast majority of triangular treaty relations the U.S. entertains with the EU and its Member States will remain unaffected by Brexit. However, the EU itself did not freeze up in a state of paralysis after the Brexit referendum. To the contrary, it has been moving ahead in its external relations, both with internal reforms and new approaches to international agreements. This represents a double challenge: firstly, Brexit puts in question the UK’s position as regards the existing bilateral and multilateral EU-agreements with the U.S.; secondly, beyond maintaining continuity, future treaty relations between the U.S. and UK will be conditioned by the form of the future relationship the latter will have with the EU. The UK may be out of the EU, but the closer an association with the EU the UK desires, the more it will remain part of a triangular relationship when engaging with non-EU countries.

The crux will not necessarily be in the quantity of agreements to be renegotiated here, but in the qualitatively relevant ones. The lesson from the previous sections also applies here: It is the economic—“low politics”—agreements that will be most legally and politically challenging, while a transatlantic readjustment in the “high politics” of security and defense will be a lot more straightforward by comparison. To this end, the final section of the paper first catches up with the intervening developments in the EU and explains their relevance in the transatlantic context (A.) and addresses important timing issues for the way forward (B.). Subsequently, it turns to the future of the U.S.-EU-UK triangle, first from the point of view of continuity (C.) and then moving on to future agreements (D.).

A. The EU as a moving target

Trade and security not only serve as useful examples for distinguishing different modes of managing Brexit in the transatlantic relationship. They also showcase the activities undertaken within the EU to readjust its foreign relations moving forward.

That Brexit represented an existential challenge for the EU became clear in the context of the finalization of the EU's Global Strategy for Foreign and Security Policy in June 2016. The Global Strategy, which covers all areas of EU external relations, was approved only a few days after the EU membership referendum in the UK. Hence, its authors felt compelled to make a direct reference to it. In the Strategy's foreword, High Representative Federica Mogherini observed that the "purpose, even existence, of our Union is being questioned",²⁹⁵ note that this "is even more true after the British referendum."²⁹⁶

In the area of trade, the EU has continued to push ahead with bilateral negotiations with, among others, Canada, Japan, Mercosur, Mexico, and Vietnam.²⁹⁷ The above-mentioned Comprehensive Economic and Trade Agreement with Canada was signed in October 2016 and is being provisionally applied since September 2017 (*supra* IV.D). Even though CETA was being hailed as the new "gold standard" of its FTAs,²⁹⁸ the protracted ratification process and questions about the legality of its Investment Court System has prompted a fine-tuning of the EU's approach to trade agreements elsewhere.

The clearest manifestation of this new approach is the forthcoming EU-Japan Economic Partnership Agreement (EPA). Negotiations on it were finalized in December 2017. A remarkable new feature is the splitting of the originally envisaged EPA into two parts—one falling under the EU's exclusive competence; the other including "shared" elements such as investment protection, on which negotiations continue.²⁹⁹ This has an important consequence from the point of view of EU foreign relations law: For the EU-exclusive agreement, ratification by all Member States can be avoided.

From a transatlantic relations perspective, CETA and the EPA with Japan send two different signals with regard to the future prospects of a TTIP—or any successor initiative. On the one hand, if hailing CETA as the EU's new "gold standard" means that it will be the

²⁹⁵ SHARED VISION, COMMON ACTION: A STRONGER EUROPE, *supra* note 54, at 3.

²⁹⁶ *Id.*

²⁹⁷ See Jakob Hanke, *EU takes over global trade stage*, POLITICO (Dec. 8, 2017), <https://www.politico.eu/article/eu-takes-over-global-trade-stage/>

²⁹⁸ See *supra* note 270 and accompanying text.

²⁹⁹ European Commission, Joint Statement by the President of the European Commission Jean-Claude Juncker and the Prime Minister of Japan Shinzo Abe (Dec. 8, 2017), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1768>.

substantive baseline for future negotiations, this will make finding common ground with the U.S. even harder. In particular, not only the heavily institutionalized Investment Court System,³⁰⁰ but also issues such as guaranteeing geographical indications and the opening of public procurement markets will be hard to swallow for U.S. negotiators.³⁰¹

On the other hand, the “splitting” approach as seen in the FTA with Japan makes it considerably easier to ratify the EU-exclusive agreement on the EU side. Moreover, it removes the investment protection chapter and its institutional architecture, which is still politically and legally contentious,³⁰² from the immediate agenda for both sides. In any event, it is unlikely that the U.S. as an economic superpower outweighing the EU post-Brexit,³⁰³ will keenly work from any EU blueprint.

Turning to security and defense, the EU has made this a priority area of implementing its 2016 Global Strategy. Even though the UK under the Tony Blair played a crucial role in unlocking the CSDP in the late 1990s (see *supra* II.A), subsequent UK government blocked efforts for more integrated structured or common institutions such as a common operational headquarters.³⁰⁴ However, with the withdrawal process officially launched, reforms in EU defense policy started to gain traction.³⁰⁵

³⁰⁰ The U.S. administration is said to be pursuing an aggressive approach towards the WTO’s Appellate Body, see Gregory Schaffer, *The Slow Killing of the World Trade Organization*, HUFFINGTON POST (Nov. 17, 2017), https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization_us_5a0ccd1de4b03fe7403f82df, which may reflect a general skepticism towards international adjudicatory bodies with jurisdiction over the U.S.

³⁰¹ See DANIEL S. HAMILTON, CREATING A NORTH ATLANTIC MARKETPLACE FOR JOBS AND GROWTH: THREE PATHS, ONE DETOUR, A U-TURN, AND THE ROAD TO NOWHERE 14 (2018) (noting that “Washington was unwilling (and largely unable) to open public procurement, or compromise on geographical indications, two primary goals for the Europeans.”).

³⁰² Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved) Paradigm for Investor-State Adjudication*, 55 COLUM. J. TRANSNAT’L L. 178, 186–89 (2016) (on the different critiques on investor-state dispute settlement). Schwieder concludes that although “incorporating an updated and reformed ISDS system into the TTIP agreement theoretically presents the best available alternative to the current regime, only a miraculous shift in public perception would render that option practicable” (at 226). Similarly, HAMILTON, *supra* note 301, at 14.

³⁰³ Josh Zumbrum, *Brexit Will Put the U.S. Back Atop the World GDP Rankings*, WALL STREET JOURNAL (June 29, 2016), <https://blogs.wsj.com/economics/2016/06/29/brexit-will-put-the-u-s-back-atop-the-world-gdp-rankings/>.

³⁰⁴ Hajnalka Vincze, *The Transatlantic Dimension of Euroscepticism*, in THE UK CHALLENGE TO EUROPEANIZATION: THE PERSISTENCE OF BRITISH EUROSCEPTICISM 232, 240–41 (Karine Tournier-Sol & Chris Gifford ed., 2015). This opposition also continued after the Brexit referendum, see Andrew Rettmann, *UK blocks blueprint for EU military HQ*, EUOBSERVER (May 16, 2017), <https://euobserver.com/foreign/137916>.

³⁰⁵ Council conclusions on implementing the EU Global Strategy in the area of Security and Defence, Brussels, Nov. 14, 2016, 14149/16.

Three developments are illustrative of this trend. First, a “Military Planning and Conduct Capability”—an EU headquarters but only for “non-executive”, i.e. training, military missions—was established in June 2017.³⁰⁶ Second, the European Commission successfully initiated a new “European Defence Fund” to the order of 5.5 billion euros per year.³⁰⁷ This initiative is furthermore relevant in that it starts to blur the line between the supranational and intergovernmental modes of operation in EU external relations by giving defense a more prominent role in the regular EU budget,³⁰⁸ which entails more involvement of the European Parliament and Commission,³⁰⁹ which are traditionally structurally sidelined in the CFSP/CSDP (see *supra* II.C). Moreover, it moves the EU towards a closer and more active military procurement market, which should be of economic interest to U.S. defense industry, and hence also the U.S. government’s trade policy.

Third, a framework called “Permanent Structured Cooperation” (PESCO) was officially launched. Provided for in the EU Treaties following the Lisbon Treaty, which entered into force in 2009,³¹⁰ the provision has laid dormant for eight years. In late 2017, it was officially launched.³¹¹ It allows a group of Member States to work together more closely in the creating of military capabilities and their deployment in order to conduct “more demanding missions”. Among the 25 PESCO countries, which are all EU members except Denmark, Malta, and the UK,³¹² voting on certain matters moves from unanimity to qualified-majority voting.³¹³ Hence, also here, deviation—though a very slight one—from

³⁰⁶ Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA), 2018 O.J. (L 146) 133.

³⁰⁷ European Commission, *A European Defence Fund: €5.5 billion per year to boost Europe’s defence capabilities*, Press Release, Brussels (June 7, 2017).

³⁰⁸ *Id.*, (“The Fund will create incentives for Member States to cooperate on joint development and the acquisition of defence equipment and technology through co-financing from the EU budget and practical support from the Commission.”)

³⁰⁹ TFEU art. 314 (on the adoption of the annual budget involving the Commission, Council and Parliament).

³¹⁰ TEU art. 46; see also Protocol No. 10 on permanent structured cooperation established by Article 42 of the Treaty on European Union, attached to the EU Treaties.

³¹¹ Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, Nov. 13, 2017, <http://www.consilium.europa.eu/media/31511/171113-pesco-notification.pdf>.

³¹² Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, 2017 O.J. (L 331) 57, art. 2.

³¹³ This concerns the establishment of PESCO (TEU art. 46, para. 2), the admission of Member States at a later stage (TEU art. 46, para. 3), and the suspension of underperforming participating Member States (TEU art. 46, para. 4).

the intergovernmental mode of operation can be seen. Since the UK is assumed to leave the EU, it did not sign up to PESCO.³¹⁴

PESCO allows for third-country participation. However, interested third countries “would need to provide substantial added value to the project, contribute to strengthening PESCO and the CSDP and meet more demanding commitments.”³¹⁵ As is the case with contributing to CSDP operations, “will not grant decision powers to such Third States in the governance of PESCO.”³¹⁶ Admission to PESCO will be granted by the Council “in PESCO format”, after checking “if the conditions set out in the general arrangements are met.”³¹⁷ If admitted, “the participating Member States taking part in a project may enter into administrative arrangements with the third State concerned”.³¹⁸ This would suggest only rather “soft” treaty relations with the EU countries taking part in PESCO, but not with the EU itself.

From a transatlantic perspective, this would in theory allow the U.S. to take part in PESCO. However, even though the U.S. contributes to CSDP operations within a special treaty framework (*supra* III.B.1), this is unlikely. Rather, PESCO as well as the European Defence Fund, need to be put in the perspective of EU-NATO relations. Both have the potential to be seen as concrete steps towards increased and more efficient defense spending among European NATO members, a point vocally criticized by the current administration.³¹⁹ At the same time, none of these initiatives have a direct, legally relevant impact on NATO, though better EU-NATO cooperation has been exhorted as a desirable by the leadership of both organizations.³²⁰

³¹⁴ Andrea Shalal & Robert Emmott, *EU to sign joint defense pact in show of post-Brexit unity*, REUTERS (Nov. 8, 2017), <https://www.reuters.com/article/us-eu-defence/eu-to-sign-joint-defense-pact-in-show-of-post-brexit-unity-idUSKBN1D81CT> (“But it was clear that Britain, which intends to leave the bloc following the Brexit referendum of June 2016, would not participate, officials said.”).

³¹⁵ Council Decision (CFSP) 2017/2315, *supra* note 312, Annex III, pt. 2.2.1.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*, art. 9, para. 3.

³¹⁹ Peter Baker, *Trump Says NATO Allies Don't Pay Their Share. Is That True?*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/world/europe/nato-trump-spending.html>.

³²⁰ See, for instance, the Joint declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, Warsaw, July 8, 2016; and Council of the European Union, Council conclusions on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, Brussels, Dec. 5 2017, 14802/17.

B. Timing issues

Before turning to the substantive issues of (re-)negotiations of treaties with the U.S., two preliminary points need to be made concerning timing. Firstly, as long as the UK remains a member of the EU, it will be covered by, and bound by,³²¹ the treaties it concludes.

Once the UK ceases to be an EU member (*supra* II.B), it may enter a transitional phase with the EU. Such an arrangement has been flagged as desirable by the UK government.³²² Also the EU has indicated an interest for a transition period, though under the premise that “the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition”.³²³ This entails, among other things, that “it will have to continue to comply with EU trade policy” and apply the EU’s customs tariffs.³²⁴ According to the supplementary negotiating directives of January 2018, moreover, “the United Kingdom should remain bound by the obligations stemming from” EU agreements, but will “no longer participate in any bodies set up by those agreements.”³²⁵

Nevertheless, from a transatlantic treaties perspective, any transitional arrangement is an agreement between the EU and UK, and thus *res inter alios acta* as far as the U.S. is concerned. The EU and UK cannot together agree that the UK will “emerge” as a new quasi-party to existing EU treaties with third countries where the UK was not a party before (non-mixed agreements, *supra* III.B). Such “roll-over” during the transition would require the consent of the other parties,³²⁶ including the U.S., in each case, following the logic of the law of treaties discussed below. With the presumptive Brexit date of March 29, 2019 looming, this leaves relatively little time for preparing the negotiation of such consent with the United States and others. Nevertheless, assuming the transition is strictly limited in time

³²¹ TFEU art. 216, para. 2 TFEU (“Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”).

³²² Prime Minister’s Office, PM’s Florence speech: a new era of cooperation and partnership between the UK and the EU (Sept. 22, 2017), <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> (suggesting “an implementation period of around two years.”).

³²³ European Council, *supra* note 42, at 2.

³²⁴ *Id.*

³²⁵ Council of the European Union, *supra* note 43, pt. 15. The Draft Withdrawal Agreement of March 2018 includes a provision to that effect, Draft Agreement on the withdrawal of the United Kingdom, *supra* n. 44, art. 77.

³²⁶ Ramses A. Wessel, *Consequences of Brexit for International Agreements Concluded by the EU and its Member States*, 55 COMMON MKT. L. REV. __, __ (forthcoming 2018) (“the UK ... may in some cases aim at what could largely be a copy of the agreements that were concluded by the EU. This, of course, assumes that the other contracting parties would agree to such a solution.”).

and not-open ended, this is likely to raise the chances for approval from the American side, saving demands for any concessions and adaptations for the post-transition period.

The approaching Brexit deadline leads to the second preliminary point, i.e., when can the UK start negotiating new treaties with the U.S., either to replace existing ones (post-transition) or to tread new ground. Politically, it would make sense to commence as soon as possible, i.e., even while the UK is still an EU member. However, legally, the UK is barred from negotiating international agreements on its own in cases where they touch upon EU exclusive competences, where EU rules may be affected, or even where the “duty of sincere cooperation” might be violated (*supra* III.C). Here, the triangular relationship comes to the fore again, as the UK remains conditioned in its international actions up until the end of its EU membership. During a transition, this side of the triangle would change in nature from EU law to international law. Nonetheless, significant restrictions may apply then as well. According to the supplementary EU directives, the UK “may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union”.³²⁷ However, at least this opens the possibility for the UK to start negotiations during the transition. Already in October 2017, the UK government had acknowledged that it “would not bring into effect any new arrangements with third countries which were not consistent with the terms of [its transitional] agreement with the EU.”³²⁸

It would be legally possible, and politically advisable, for the EU to authorize the UK to start renegotiations with third countries even while still a member,³²⁹ and definitely during the transition—though the applicable rules and mechanisms remain to be established. While still an EU member, the UK government has been careful to brand its talks with third parties as “preliminary discussions” rather than negotiations.³³⁰ With the United States in particular, it has set up a “trade and investment working group”.³³¹ A core

³²⁷ Council of the European Union, *supra* note 43, pt. 16. See also Draft Agreement on the withdrawal of the United Kingdom, *supra* n. 44, art. 77, para. 4.

³²⁸ UK DEPARTMENT FOR INTERNATIONAL TRADE, PREPARING FOR OUR FUTURE UK TRADE POLICY, Cm 9470, 28 (Oct. 2017).

³²⁹ Thomas Streinz, *Cooperative Brexit: Giving back control over trade policy*, 15 INT’L J. CONST’L L. 271, 284–87 (2017), referring to the latter part of TFEU art. 2, para. 1 on authorizing Member States, see *supra* note 181 and accompanying text.

³³⁰ *Theresa May: UK will lead world in free trade*, BBC (Sept. 7, 2016), <http://www.bbc.com/news/uk-politics-37291832>.

³³¹ UK DEPARTMENT OF INTERNATIONAL TRADE, US-UK TRADE WORKING GROUP LAYS GROUNDWORK FOR POTENTIAL FUTURE FREE TRADE AGREEMENT (Jul. 25, 2017), <https://www.gov.uk/government/news/us-uk-trade-working-group-lays-groundwork-for-potential-future-free-trade-agreement>.

task of this group's work, and that of the respective government, will be to ensure the continuity of treaty relations and explore future agreements. As its name suggests, the focus is on economic issues rather than security and defense.

C. Ensuring continuity in treaty relationships

In view of various moving targets in the transatlantic triangle, i.e., Brexit negotiations, ongoing EU reform efforts, as well as a generally perceived unpredictability of the new U.S. administration,³³² a legal analysis on the way forward needs to start with the issue of ensuring "continuity" of existing relationships despite the potential for disruption inherent in the UK's leaving the EU. The focus will be on the post-transitional period, though it should be noted that also for the transitional continuing application of EU-agreements with the U.S., the latter's consent would be needed. A distinction between bilateral and multilateral agreements needs to be made here again.

"Continuity" of existing agreements has been noted as an objective of the UK government.³³³ As to what it means by "rolling over" existing agreements concluded by the EU beyond a transition period, domestic discussion for a new "Trade Bill" provide some clarification, which highlights also again the domestic, and hence multilevel, nature of this issue.³³⁴ According to a House of Commons briefing paper, "[i]nstead of seeking to become a party to existing EU trade agreements in the long term (sometimes called 'trilateralisation'), the Government's approach appears to be to negotiate new bilateral agreements with the third countries that are 'substantively the same or as similar as possible'."³³⁵ This may be an optimistic assessment, in particular when dealing with the United States.

In the case of the U.S., there is no existing comprehensive bilateral trade agreement given the freezing of TTIP negotiations. Nevertheless, many of the approximately 50 bilateral agreements in force between the EU and U.S., have a trade or trade-related

³³² See, e.g., Keren Yarhi-Milo, *After Credibility: American Foreign Policy in the Trump Era*, 97 FOREIGN AFF. 68, 72 (2018) ("Yet the president's track record of flip-flopping on key campaign pledges, his bizarre and inaccurate outbursts on Twitter, his exaggerated threats, and his off-the-cuff assurances have all led observers to seriously doubt his words.").

³³³ UK DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 328, at 28 ("The UK Government is committed to seeking continuity in its current trade and investment relationships, including those covered by EU third country FTAs and other EU preferential arrangements.")

³³⁴ Lorna Booth et al, *The Trade Bill*, House of Commons Library Briefing Paper No. 8073 (Jan. 8, 2018), at 25 (The new legislation is to give "the Government powers to change domestic legislation to ensure that any such 'transitioned' trade agreements can be implemented.").

³³⁵ *Id.*

dimension,³³⁶ and would hence need to be replicated.³³⁷ Moreover, there are several other agreements, beyond the scope of the “Trade Bill”, including in the field of security, where there is little clarity about whether they are to be “rolled over” or not.³³⁸ Yet in other cases, such as air transport, “suspended” agreements may reactivate themselves even though they might be outdated and inconsistent with current U.S. policy.³³⁹

While conclusion of “roll over” agreements from a UK foreign relations law point of view is fairly uncontroversial, given that the UK is already complying with them while still an EU member, and given that treaties are made by the government under the “royal prerogative”, leaving Parliament only limited powers of prior scrutiny,³⁴⁰ there are possible hurdles on the U.S. side.

The EU-only bilateral agreements in force with the U.S. would cease to apply to the UK post-Brexit.³⁴¹ Hence, “roll-over” is a somewhat euphemistic term, describing what under the international law of treaties amounts to the conclusion of a new agreement with the United States. Neither the replication of the content in the new agreement nor the other party’s consent can be presumed, the latter being regulated by American foreign relations law and involving in any event the President’s approval and,³⁴² depending on the subject matter, different forms of Congressional involvement.³⁴³ From a continuity point of view, a logical starting point is hence to check under which procedure in U.S. law relevant agreements were concluded with the EU in the first place.

Moreover, the case of dealing with the U.S. might be distinguished from most of the many dozen continuity negotiations that await the post-Brexit UK. On the one hand, there

³³⁶ Agreement between the European Community and the United States of America on trade in wine, signed in London, Oct. 10, 2006.

³³⁷ E.g., Agreement between the Government of the United States of America and the European Union on the coordination of energy-efficiency labelling programs for office equipment, signed in Brussels, Jan. 18, 2013.

³³⁸ For instance, there exists a U.S.-UK agreement in parallel to the U.S.-EU one, see Treaty on mutual legal assistance in criminal matters, signed in Washington, Jan. 6, 1994, T.I.A.S. 96-1202, which may render replication of the EU-U.S. agreement unnecessary.

³³⁹ Note that the suspended U.S.-UK agreement on North Atlantic air fares stems from 1978, *supra* note 201.

³⁴⁰ See for a summary of the UK’s dualist system, with reference to case law and convention, *Miller*, [2017] UKSC 5, para. 54–58; and CAMPBELL MCLACHLAN, *FOREIGN RELATIONS LAW* 129 (2014) (concluding that “the process of negotiation, conclusion and signature of treaties remains with the executive, as indeed does their ratification on the international place.”).

³⁴¹ Odermatt, *supra* note 48, at 1056; and Łazowski & Wessel, *supra* note 46, at 13.

³⁴² Some agreements may be, and increasingly are, concluded as executive agreements by the President alone, Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L. J.* 140, 205 (2009) (arguing that the “twentieth century saw the emergence and eventual triumph of presidential unilateralism over international lawmaking.”).

³⁴³ See text and references *supra* note 52.

is the oft-invoked “special relationship”,³⁴⁴ which may imply a degree of goodwill towards the UK, and shared interests among them. On the other, another consideration might mitigate any “special relationship” bonus: In contrast to smaller, especially developing countries, the United States has the administrative capacity, negotiating experience, and considerable economic and political leverage, to check closely whether it is in the country’s interest to simply “roll over” an agreement, or whether its content should be adapted given the new political and economic reality, i.e., the contracting party is no longer the whole EU and its internal market, but one country with an economy—though sizeable—amounting to one sixth of the EU’s gross domestic product (GDP).³⁴⁵ In particular, this would involve checking whether any concessions were given to the EU at the time, which would no longer seem merited *vis-à-vis* the UK.³⁴⁶ In addition, such an approach would be consistent with the current administration’s “America First” approach to foreign policy and treaty-making.³⁴⁷

In the mixed-bilateral setting, which only concerns one agreement in the case of the U.S., the UK’s case for continuity is somewhat stronger. Alongside the EU, it is one of the parties. This militates in favor of its continued status as a party post-Brexit. However, here it is “essential to recall that these are not just international agreements that the UK entered into individually,”³⁴⁸ but as an EU Member State. Hence, mixed agreements are still bilateral in nature, with the U.S. being a party “of the one part”, and the EU and its Member States concluding it “of the other part”.³⁴⁹ Institutionally, moreover, mixed agreements reflect this bilateral nature. For instance, in CETA, a joint committee that consists of

³⁴⁴ From the more recent political discourse, Peter Baker, *Trump, in Davos, Mends Split With Britain and Widens One With Palestinians*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/world/europe/donald-trump-davos-trade.html> (quoting Prime Minister May: “We, too, have that really special relationship between the U.K. and the United States...”); but see Jeffrey A. Stacey, *The Hollowing Out of the Special Relationship: The Bleak Future of the U.S.-British Alliance*, FOREIGN AFF. (Sept. 5, 2017), <https://www.foreignaffairs.com/articles/2017-09-05/hollowing-out-special-relationship>.

³⁴⁵ EUROPEAN COMMISSION, EUROSTAT, SHARE OF MEMBER STATES IN EU GDP (Apr. 10, 2017) <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1> (noting that the UK accounts for 16 percent of the EU’s GDP).

³⁴⁶ Wessel, *supra* note 326, at 15 (stressing that the other party’s consent to copy-paste an agreement “should not be taken as a given” and that “in some cases copy-pasting existing agreements to make them adjusted for the United Kingdom would be less easy than it sounds as many of the provisions were tailor-made for the EU-situation...”).

³⁴⁷ See the President’s preface to the NATIONAL SECURITY STRATEGY, *supra* note 54, at i (observing an “America First foreign policy in action”, which puts an emphasis on “enforcing our borders, building trade relationships based on fairness and reciprocity, and defending America’s sovereignty without apology.”).

³⁴⁸ Wessel, *supra* note 326, at 17; and Odermatt, *supra* note 48, at 1059–60.

³⁴⁹ As was also the formulation used at the outset of the Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems and related applications, *supra* note 78.

“representatives of the European Union and representatives of Canada”, will be “co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees.”³⁵⁰

Keeping the UK in “would change the nature of a bilateral agreement to a multilateral agreement.”³⁵¹ As a consequence, “trilateralizing” erstwhile bilateral mixed agreements requires renegotiation of the text, necessitating again the consent of the other parties. In the case of the 2004 Galileo/GPS agreement, its institutional setup is less complex than CETA. Nonetheless, the “bilateral” nature of the agreements is apparent. For instance, it provides that for consultations in the context of dispute settlement “[r]epresentatives of the Council of the European Union and the European Commission, of the one part, and of the United States, of the other part, shall meet as needed”.³⁵²

The agreement clarifies, moreover, that “the Parties’ shall mean the European Community or its Member States or the European Community and its Member States, within their respective areas of competence, on the one hand, and the United States, on the other.”³⁵³ It does not envisage non-EU third countries as members. Alternatively, the UK could accept ceasing to be a party to the mixed agreement by officially withdrawing from it, and instead renegotiate a bilateral agreement with the U.S. However, since the agreement concerns an EU project, administered by the European Space Agency (ESA), the UK’s stake and position remain unclear.³⁵⁴

In the multilateral setting, the distinction between mixed and non-mixed needs to be kept in mind as well. The added difficulty in maintaining continuity here stems from the possible need for consent not just from the U.S. but also the several other parties. In the non-mixed category, the 2005 Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) serves as a rare example involving both the EU and the U.S. The UK has never been a party in its own right, and hence could not lay claim to such status post-Brexit. It could either conclude a bilateral agreement with the U.S. (and possibly others) to that effect, or join the multilateral agreement. The latter is legally easy to achieve since

³⁵⁰ CETA art. 26.1.1.

³⁵¹ Wessel, *supra* note 326, at 20.

³⁵² Agreement on the promotion, provision and use of Galileo and GPS satellite-based navigation systems, *supra* note 78, art. 17, para. 2.

³⁵³ *Id.* art. 18.

³⁵⁴ ESA is not an EU agency but a separate intergovernmental organization, of which the UK is a member. In 2004, the EU concluded a framework agreement for cooperation, with the ESA, Framework Agreement between the European Community and the European Space Agency, signed in Brussels, Nov. 25, 2003.

acceptance cannot be vetoed in this particular case by the existing members.³⁵⁵ In the case of the Treaty of Amity and Cooperation in Southeast Asia, by contrast, the UK would require “the consent of all the States in Southeast Asia”³⁵⁶ in order to accede and become a party alongside the EU and U.S.

The multilateral, mixed category is legally a more complex setting. However, in terms of retaining membership, the UK’s position is much stronger here. Prominent examples include the WTO and Food and Agricultural Organization (FAO). In these two examples, the UK is a founding member, as is the U.S. Moreover, in contrast to the bilateral mixed treaties, the UK is not only a party by virtue of being an EU member, but at least partially in its own right, making continued membership the presumption. As confirmed in CJEU case law and “declarations of competence” issued in these multilateral settings, Member States also exercise their own competences in these organizations,³⁵⁷ though conditions in its freedom of action is restricted by EU law (*supra* III.C). Post-Brexit—or at least post-transition—these constraints will fall away. At the same time, “the UK will become responsible for the implementation of all provisions,” including those that used to be covered by the EU.³⁵⁸

Nevertheless, continuity of membership does not equate continuity of *terms* of membership. Consequently “the UK’s continued participation may become subject to negotiations between the EU, its Member States and third countries (including the UK in a new special position).”³⁵⁹ In the case of the WTO, negotiations with affected WTO members may be necessary for agreeing on the UK’s future schedules and for the splitting up of the tariff rate quotas between it and the EU27. Nonetheless, these will not affect the UK’s status as a WTO member as such.³⁶⁰

³⁵⁵ Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs), *supra* note 164, art. 7, lit. b: “This Agreement shall be open for acceptance by any Member of the WTO.”

³⁵⁶ Treaty of Amity and Cooperation in Southeast Asia, *supra* note 157, art. 18, para. 3.

³⁵⁷ For case law, see *Opinion 1/94 (WTO)*, ECLI:EU:C:1994:384, para. 105; and more recently Case C-240/09, *Lesoochránárske zoskupenie*, ECLI:EU:C:2011:125, para. 31. Declarations of competence has become a common practice as “an attempt to apportion the responsibilities within a multilateral agreement based on who has competence (the EU and/or its Member States) over the issue covered by the specific provisions of the multilateral agreement,” Andrés Delgado Casteleiro, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, 17 EUR. FOREIGN AFF. REV. 491, 492 (2012); with a summary and examples of this practice at 493–96.

³⁵⁸ Wessel, *supra* note 326, at 21.

³⁵⁹ *Id.*; see also Peter Ungphakorn, *Nothing Simple About UK Regaining WTO Status Post-Brexit*, INT’L CTR. FOR TRADE & SUSTAINABLE DEV. (June 27, 2016), <https://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit>.

³⁶⁰ Lorand Bartels, *The UK’s status in the WTO after Brexit*, in THE UNITED KINGDOM: ‘FEDERALISM’ WITHIN AND WITHOUT __, __ (Robert Schütze & Stephen Tierney ed., forthcoming 2018)

In should be recalled that in more security-oriented organizations such as the UN and NATO, the UK is a member but not the EU (*supra* III.C.2). Hence, Brexit’s impact on its continued status alongside the U.S. will be very limited, also because EU powers and obligations of “sincere cooperation” in the general foreign policy and security field are already less invasive while being an EU member.³⁶¹ This again reveals that the real difficulty in “transatlantic trigonometry” is in the allegedly “low politics”, not the “high politics” of security and defense, both in the bilateral and multilateral sphere.

D. Parameters for new agreements

Beyond ensuring continuity by finding replacements for EU agreements, the UK will be free post-Brexit—or in any event post-transition—to negotiate new treaties with external partners. Given the “special relationship” with the UK, the U.S. would be a logical priority in such endeavors. However, the influence of the EU may continue to be felt even after the UK ceases to be a member, contingent on the future shape of the UK-EU-side of the triangle.

From a policy perspective, going beyond continuity fits the theme of “Global Britain” as outlined in government papers, according to which the “UK intends to pursue new trade negotiations to secure greater access to overseas markets for UK goods exports”.³⁶² This appears to be indeed the primary focus of “Global Britain”, while in security and defense matters the UK seeks close alignment with the EU post-Brexit and continued reliance on NATO.³⁶³

This means that advances in post-Brexit bilateral U.S.-UK transatlantic relations are likely to focus primarily on trade issues. A new free trade agreement with the United States has been floated ever since the referendum,³⁶⁴ with one of the stated aims of the UK-US Trade and Investment Working Group being “to lay the groundwork for a potential, future free trade agreement once the UK has left the EU”.³⁶⁵ With no TTIP to “roll over”, the UK

(concluding that “other “WTO Members hold no veto over the determination of the UK’s schedules or over its legal position within the WTO in any other respect.”).

³⁶¹ See *supra* note 188 and accompanying text.

³⁶² UK DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 328, at 29.

³⁶³ HM GOVERNMENT, FOREIGN POLICY, DEFENCE AND DEVELOPMENT: A FUTURE PARTNERSHIP PAPER 19 (Sept. 12, 2017) (“NATO will continue to be the cornerstone of our security and the UK will continue to champion and drive forward greater cooperation between the EU and NATO...”).

³⁶⁴ See, e.g. Benjamin Oreskes & Victoria, *The bright side of Brexit? A U.S.-U.K. trade deal*, POLITICO (June 24, 2016), <https://www.politico.com/story/2016/06/brexit-us-britain-trade-deal-224776>.

³⁶⁵ UK DEPARTMENT OF INTERNATIONAL TRADE, *supra* note 331.

would have to negotiate a trade agreement with the U.S. from scratch. Moreover, such a new free trade agreement would be an example for the “new” nature of the transatlantic treaty triangle. The UK-EU side of it would no longer be governed by EU law with its “constitutional” features.³⁶⁶ Hence, the international legal nature of all three sides of this new trade triangle would be the same in nature, i.e., public international law, possibly specified in the form of treaties. All this may imply a large degree of free and flexibility, but several economic, political and legal constraints apply.

In principle, post-Brexit and transition, the UK could even conclude a trade agreement with the U.S. before it does so with the EU. However, there will be what could be termed a pull towards “implicit sequencing” in negotiations in the transatlantic triangle. The main reason for this is the current economic reality that the “UK exports almost half of its goods and services to the EU— twice as much as to the U.S.”³⁶⁷ According to a study conducted by RAND Europe, a scenario in which the UK and U.S. would conclude an FTA, but in which the EU would have FTAs with neither, would benefit the UK to some extent, but “still be less beneficial than an FTA with the EU”.³⁶⁸

Hence, the shape and content of the future UK-EU trade relationship will still loom over the UK-U.S. side even post-Brexit, meaning that there is an incentive for the UK to clarify first the future EU-UK trading relationship before finalizing the UK-U.S. one. Having a clearer idea of the basis for negotiating a U.S.-UK FTA makes sense also from a U.S. point of view. As noted by Hamilton, “[b]efore Washington begins to negotiate a formal bilateral deal with the UK, it will want to understand ... London’s end goals with regard to a deal with the EU.”³⁶⁹

It is at this point that the different models and their transatlantic implications come to the fore (*supra* IV.). Depending how deep and specifically regulated this relationship will be, it will have an impact on the UK’s ability to strike a trade agreement with the U.S. For instance, a Norway-type (EEA) or Swiss-type (set of bilateral agreements) arrangement will continue to hamper its freedom of maneuver to make concessions on regulatory issues that would deviate from the *acquis* of EU law even beyond any transitional period. Similarly, a Turkey-style customs union hampers its ability to provide tariff concessions (in the areas covered by the customs union), and in fact commit it to follow the EU’s lead in its trade policy.

³⁶⁶ See *supra* notes 76 and 79.

³⁶⁷ HAMILTON & QUINLAN, *supra* note 8, at 2.

³⁶⁸ CHARLES P. RIES ET AL. (RAND EUROPE), *supra* note 291, at 86.

³⁶⁹ HAMILTON, *supra* note 301, at 43.

From the British Government's official pronouncements to date, neither of these models is likely.³⁷⁰ Given its policy pronouncements to date, a customs union and Norway or Swiss-style single market access seem unlikely. Instead, a CETA-style agreement,³⁷¹ i.e., a deep and comprehensive free trade agreement, appears to be the landing zone.

With regard to the U.S., the CETA-model would leave the UK maneuvering space in terms of tariffs and regulation, at least in legal terms. A “right to regulate”³⁷² inherent in such a kind of FTA could come to be used as “right to deregulate” or a “right to diverge” from EU standards to accommodate U.S. interests. This may be necessary to make such a deal attractive to the U.S. in the first place.

In term of political economy, Britain will be the smaller economy facing an assertive “America First” approach. Since, according to RAND, the sobering assessment is that “an FTA with the UK would be of negligible macroeconomic benefit”³⁷³ to the U.S., the latter can be expected to seek additional concessions to make such a bilateral FTA worthwhile. On the one hand, “some issues may be less difficult in U.S.-UK negotiations than they were in TTIP, for instance, the EU’s insistence on ‘cultural exceptions’ or geographic indications.”³⁷⁴ On the other, important stumbling blocks remain. Agriculture, for instance, could become a sensitive issue politically, given that British farmers may not be “keen on a trade deal that would open them up to U.S. competition at the very time they are losing generous EU subsidies”.³⁷⁵ Moreover, issues that troubled already the TTIP negotiations such as food and animal standards (the infamous “chlorine chicken”) in the U.S. are likely to resurface in the context of a U.S.-UK FTA.³⁷⁶ Other likely contentious points are public procurement and sensitive domestic areas such as healthcare.³⁷⁷

The UK may want to acquiesce to some of the American demands in order to have a deal—if only for political reasons. Nevertheless, even if accommodating the U.S. (and thus

³⁷⁰ Prime Minister’s Office, *supra* note 215; Steven Swinford, *Theresa May rebukes Philip Hammond after he makes extraordinary public call for soft Brexit*, GUARDIAN (Jan. 25, 2018) (quoting a “Downing Street source” as stating that the “Government’s policy is that we are leaving the Single Market and the Customs Union.”)

³⁷¹ Christopher Hope, *Britain should sign a ‘Canada-plus plus plus’ trade deal with the EU after Brexit, David Davis says*, TELEGRAPH (Dec. 10, 2017), <http://www.telegraph.co.uk/news/2017/12/10/britain-should-sign-canada-style-trade-deal-european-union-brexit/>.

³⁷² See *supra* note 279 and accompanying text.

³⁷³ CHARLES P. RIES ET AL. (RAND EUROPE), *supra* note 291, at 86.

³⁷⁴ HAMILTON, *supra* note 301, at 44.

³⁷⁵ *Id.*

³⁷⁶ Richard Partington, *Trump adviser Ross says UK-US trade deal will mean scrapping EU rules*, GUARDIAN (Nov. 6, 2017), <https://www.theguardian.com/business/2017/nov/06/trump-ross-says-uk-us-trade-deal-eu-brexit-chlorinated-chicken>.

³⁷⁷ HAMILTON, *supra* note 301, at 45.

ensuring U.S. constitutional hurdles will be met more easily), it remains constrained by two more factors. The first is UK domestic politics and the UK’s “foreign relations law”. Given wide discretion of the government due to the “royal prerogative” in treaty-making, it is legally largely unencumbered, though unlike situations that concern “continuity” (*supra* V.C) and are covered by enabling legislation such as the “Trade Bill”, it could face fiercer political opposition and subsequent problems when it comes to implementation by Parliament.³⁷⁸

The second is EU law regulating access to the internal market, under the penumbra of which the UK remains, bringing out once again the triangular nature of the relationship post-Brexit. UK producers and service providers would still need to comply with relevant EU rules if they wanted to fully benefit from a new UK-EU FTA, in addition to undergoing customs and rules of origin checks that will have to be introduced. If British products do not meet EU safety standards or content requirements to qualify under a future CETA-style deal, they will not be able to receive the preferential treatment granted by the agreement. In such a scenario, according to the so-called “Brussels effect”, even with the UK no longer being in the EU, adapting to the latter’s generally stricter system would allow British business to trade with *both* sides of the Atlantic,³⁷⁹ rather than having to choose one over the other.

An even more ambitious model for future transatlantic trade relations is a trilateral revamped (and possibly renamed) TTIP-style agreement involving the UK, EU—and possibly the Member States—and the U.S. as parties. According to the RAND Report, this would be the economically most advantageous scenario for all sides.³⁸⁰ Legally and politically, however, such an agreement will be extremely difficult to realize. Turning already troubled TTIP talks into three-way negotiations including the UK following an acrimonious Brexit process does not create a promising starting point. Moreover, it would require, among other things, an institutional redesign of the agreement into a “trilateral” relationship. A Joint Committee would have to include members from all three sides. In addition, all three would have to have a say in appointing and selecting members of inter-party and possibly investor-state dispute settlement bodies.³⁸¹ A more realistic—though still

³⁷⁸ See *supra* note 340 and accompanying text.

³⁷⁹ Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 (2012) (“Trading with the EU requires foreign companies to adjust their conduct or production to EU standards—which often represent the most stringent standards—or else forgo the EU market entirely.”).

³⁸⁰ CHARLES P. RIES ET AL. (RAND EUROPE), *supra* note 291, at 57–58 and 67.

³⁸¹ See *supra* note 351 and accompanying text.

more long-term scenario—is that of working towards an open “North Atlantic Marketplace” in a way that avoids past pitfalls and dead ends.³⁸²

In the multilateral sphere, not much new is to be expected. In contrast to the continuity scenario, this would entail the U.S. and UK joining or creating new multilateral treaties and organizations. “Global Britain” certainly professes a multilateral dimension.³⁸³ However, this is not reciprocated by the current U.S. administration, which has shown a preference for bilateral rather than multilateral approaches.³⁸⁴ Examples include the “unsigning” of the Trans-Pacific Partnership,³⁸⁵ and withdrawal from Paris Climate Accord.³⁸⁶

In the security and defense field, the limited impetus of Brexit for new transatlantic multilateral approaches becomes most evident. The UK’s NATO membership will remain unaffected, while the British government has expressed a preference for very close association with the CSDP. It offered the EU “a future relationship that is deeper than any current third country partnership” and that should be “unprecedented in its breadth, taking in cooperation on foreign policy, defence and security, and development”.³⁸⁷ As seen above, there exist already facilities for third country contributions, contingent on EU approval, that could form the basis for such a partnership, and which are not mutually exclusive with NATO and bilateral UK-U.S. cooperation (*supra* V.A).

Third-country associations with the EU’s CSDP would also lead to a “triangulation” involving the U.S. and UK as external contributors. As noted above, the U.S. already has such an arrangement in place (*supra* III.B.1). The UK could either replicate this or seek a more enhanced form of association, as expressed in its “future partnership paper”, including third-country association with the newly activated PESCO (*supra* V.A). Consequently, the U.S. and UK could find themselves both contributing to certain EU missions in the future, where they decide to do so. However, given that third-country participation in such

³⁸² HAMILTON, *supra* note 301, at 22–24.

³⁸³ HM Government, *supra* note 363, at 2 (“The UK will also continue to ... be a champion of the UN and multilateralism, ...”); and UK DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 328, at 25 (“Already a champion of multilateral trade from within the EU, the UK is preparing to take on an even greater role in the WTO outside the EU...”).

³⁸⁴ See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT 1 (March 2017) (noting that U.S. trade policy goals “can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations...”).

³⁸⁵ Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

³⁸⁶ See *supra* note 154 and accompanying text; and Stacey, *supra* note 344 (noting that “the United States is rapidly withdrawing from numerous commitments to the international order.”).

³⁸⁷ HM Government, *supra* note 363, at 18.

missions needs to respect the “decision-making autonomy” of the EU,³⁸⁸ the triangular relationship framed by the CSDP and PESCO would be lopsided towards the latter.

Lastly, apart from new international agreements and treaty-based organizations, more flexible forms of collaboration are available. For instance, recalling the Iran Nuclear Deal and its “P5+1”/“E3+3” format,³⁸⁹ such approaches are easily adaptable to the post-Brexit world. Institutionally, it would mean that the UK continues to take part in this grouping, but henceforth in its own right completely, whereas France and Germany continue to see their participation in part, as an exercise of the Union’s Common Foreign and Security Policy. In short, “E3+3” would simply become “E2+4”.

In sum, the new treaty arrangements post-Brexit in the transatlantic triangle will be mostly focused on trade and regulation, where there exist important and visible trade-offs and costs. Adaptation in the security and defense field will be easier, at least as far as legal arrangements are concerned and as long as interests converge. In both fields, it is unlikely to see the new triangular relationship cast in the form of trilateral treaties, be it a three-way TTIP or security arrangement. Instead, from the point of view of international law, such triangles will more likely manifest themselves as sets of partially co-dependent bilateral agreements.

VI. CONCLUSION

This paper illustrates how Brexit is not only a cause for upheaval in the United Kingdom and the EU, but also for relations with the United States. Having traced the developments leading up to the UK officially negotiating its withdrawal from the bloc and having, furthermore, scrutinized the legal relations as they currently stand, the alternative models that exist, and finally the possible ways forward for the UK, U.S. and EU, three main conclusions can be drawn.

First, the transatlantic impact of Brexit is in the first place an empirical challenge. Beyond a general sense that the UK will have to renegotiate numerous international agreements with its partners, closer analysis of databases and compendia reveals that it is not always clear what is exactly at stake. However, there are two consoling factors. The existing treaty relations between the U.S. and the EU and its (remaining) Member States remain in place, as will existing bilateral U.S.-UK treaties. In addition, the number of

³⁸⁸ See *supra* note 135 and accompanying text.

³⁸⁹ See *supra* note 158 and accompanying text.

agreements to be replicated by the UK is manageable—at least for the U.S., which only has to go through this exercise once. Nevertheless, there is no time to be wasted for preparing replication and renegotiation in order to avoid unforeseen effects and protracted legal uncertainty.

Second, coping with the transatlantic fallout of Brexit requires doctrinal clarity about the nature of the relations at stake. Hence, the paper argued that transatlantic treaty relations need to be understood as both triangular and multilevel. Failing to understand the importance of how the foreign relations laws of the U.S., the UK, and the EU and its remaining Member States means failing to appreciate how the nature and content of different agreements affect their chances of successful negotiation, ratification and implementation by the different actors in the transatlantic space. These relationships, moreover, are interdependent, making their recalibration an exercise of “transatlantic trigonometry”. In particular, the close ties that EU membership exerts on its Member States, and any form of close association the UK might have with the EU in the future, will continue to loom large.

Third, achieving a “kinder, gentler Brexit”³⁹⁰ in the transatlantic context is a political challenge with many moving parts. Not only the new governments in the U.S. and UK are implementing their respective visions of “America First” and “Global Britain”, but also the EU has been propelled on a course of reform and activism. While the near-term will be about continuity, fitting the different pieces of the transatlantic space back together is neither impossible nor an inevitability. Legally, upsetting existing relationships can be minimized, though it will be a matter of negotiations and hence come with adjustments based on the shifted power relationships. In an effort to “take back control” from the EU, to use the favorite slogan of the Leave-campaign,³⁹¹ the UK is on a course of handing control over many international engagements to its external partners, whose consent will be required in many instances for continuing existing agreements and for putting in place new ones. Avoiding disruption—perhaps counterintuitively—has been shown to be easier, legally and politically, in the “sovereignty sensitive” fields of security and defense, while deeper integration and more apparent trade-offs in the trade and regulatory sphere turn the latter into the principal arena for a drawn-out struggle for the shape of future relations.

222 years ago, George Washington used his farewell address to caution his fellow citizens against “interweaving our destiny with that of any part of Europe” as this would

³⁹⁰ Weiler, *supra* note 6.

³⁹¹ ARMSTRONG, *supra* note 3, at 65.

“entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor or caprice”.³⁹² To some, Brexit may be seen as more proof of the first President’s considerable prescience. Nonetheless, in view of the many hundreds of treaties that tie the two sides of the Atlantic together, and in view of the immense trade flows, as well as enduring political and personal connections between them, entanglement is a given in law and fact. Hence, for the sake of the future of the transatlantic relationship, now is not the time—to use Washington’s words once more—to show “infidelity to existing engagements” but to recall that “[h]armony, liberal intercourse with all nations, are recommended by policy, humanity, and interest.”³⁹³

³⁹² WASHINGTON’S FAREWELL ADDRESS 1796, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/washing.asp (last visited Jan. 28, 2018).

³⁹³ *Id.*