
Centre for International
Governance Innovation



British Institute of
International and
Comparative Law

Brexit: The International Legal Implications | Paper No. 5 – November 2017

Squaring the Circle

The Search for an Accommodation between the European Union and the United Kingdom

Armand de Mestral



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Armand de Mestral

CIGI Masthead

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Armand de Mestral has been a CIGI senior fellow since 2014. He has led a project culminating in the publication by CIGI of a book entitled *Second Thoughts: Investor-State Arbitration between Developed Democracies*.

An expert in international economic law, Armand is professor emeritus and Jean Monnet Chair in the Law of International Economic Integration at McGill University. He has taught constitutional law, law of the sea, public international law, international trade law, international arbitration, European Union law and public international air law.

Armand's principal research interest is the law of international economic integration. He has prepared books, articles and studies in English and French on international trade law, and on Canadian and comparative constitutional and international law. He has served on World Trade Organization and North American Free Trade Agreement dispute settlement tribunals, and public and private arbitration tribunals. He was made a member of the Order of Canada in December 2007. His current work for CIGI focuses on the comparison of domestic and international remedies of foreign investors against states and the impact of investor-state arbitration on developing countries.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

AFTA	Atlantic Free Trade Area
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
ASEAN	Association of Southeast Asian Nations
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CU	Customs Union
ECOWAS	Economic Community of West African States
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Agreement
FTA	free trade agreement
NAFTA	North American Free Trade Agreement
SADC	Southern African Development Community
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organization

Executive Summary

This paper examines the various options for a new economic relationship that appears to be available at the time of opening negotiations between the European Union and the United Kingdom. Canada's concerns with respect to an eventual Brexit are considered, as well as the political and economic considerations motivating the European Union and the United Kingdom. This paper argues that the United Kingdom has so far proposed largely constitutional options, but neglected the economic dimensions of the issues posed by Brexit. Various existing models are reviewed. In conclusion, the author argues that if the United Kingdom has no options beyond the free trade model, it would do the rest of Europe and North America a great service by negotiating an Atlantic free trade area.

And those behind cried "Forward!"
And those before cried "Back!"

(Thomas Babington, Lord Macaulay,
"Horatius at the Bridge")

Introduction: Why Is Canada Interested?

Is Brexit Canada's problem? Why should Canada be interested? Does Canada's national experience have anything to say about the current crisis in the relations between the United Kingdom and its 27 partners in the European Union? Clearly, it does. First, Canada is very much the product of Europe and has had long-standing relationships with all EU countries. Constitutionally, it is in large measure the product of the United Kingdom.¹ Second, Canada has very close economic ties with the European Union. After the United States, the European Union is Canada's most important trading partner.² In the European Union, the United Kingdom is Canada's second-largest trading partner and its leading EU

investor.³ Third, in 2017, Canada entered into a major trading agreement with the European Union and wants to ensure that the advantages that will flow from this agreement will not be compromised by the departure of the United Kingdom. Finally, UK government representatives have said that the United Kingdom will seek to conclude a free trade agreement (FTA) with trading partners such as Canada as soon as the United Kingdom is legally able to do so.⁴ Brexit is Canada's problem.

Does Canada have anything to offer to the resolution of the current difficulties in the negotiations between the European Union and the United Kingdom? Clearly, it does. As a result of US President Donald Trump's call to renegotiate the North American Free Trade Agreement (NAFTA),⁵ Canada is in the process of realizing the destructive potential of the unravelling of a major trade agreement and is seeking to avoid a negative outcome of the negotiations. The first reflex of the Canadian government, the Canadian business community and the Canadian people has been to take stock of the close ties binding Canada to the United States and the vital necessity of not compromising those bonds. This is a process that has yet to fully begin in the United Kingdom. It is far better to consider in a sober fashion the elements that bind countries in a highly interdependent world, rather than stressing self-assertion and abstract visions of sovereignty. The United Kingdom might well consider how the Canadian government and industry have instinctively sought allies in the United States at the national, state and municipal levels in order to ensure that trade negotiators in the United States are aware of the domestic consequences of breaking existing alliances. The trading relationship between Canada and the United States may need to be updated and adjusted to fit political realities, but this process

1 LW White & WD Hussey, *Government in Great Britain, the Empire, and the Commonwealth* (Cambridge, UK: Cambridge University Press, 2015).

2 Christian Deblock & Michèle Rioux, "From economic dialogue to CETA: Canada's trade relations with the European Union" (2011) 66:1 Intl J 39.

3 Government of Canada, "Commercial and Economic Relations", online: Trade Commissioner Service – United Kingdom <www.canadainternational.gc.ca/united_kingdom-royaume_uni/bilateral_relations_bilaterales/commercial-commerciales.aspx?lang=eng>.

4 Rachele Younglai, "Britain keen to maintain trade with Canada after Brexit: U.K. negotiator", *The Globe and Mail* (26 January 2017), online: <<https://beta.theglobeandmail.com/report-on-business/economy/britain-keen-to-maintain-trade-with-canada-after-brex-it-uk-negotiator/article33786675/?ref=http://www.theglobeandmail.com&#gt;>>.

5 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, 605 [entered into force 1 January 1994] [NAFTA].

should not destroy all that has been built up to the advantages of citizens on both sides of the border.

Canada has lived through potentially divisive referenda in 1980 and 1995, concerning the call for the separation of Quebec. Canadians are aware of the difficulties posed by referenda: the uncertain meaning of questions and the uncertain public interpretations of the result. Both Quebec referenda were advisory and called for a mandate to negotiate, with the results of negotiations to be put to a second referendum. The UK government, in its haste, has not shown such caution. However, it may not be too late to tell the people of the United Kingdom that the final result will be put to a second referendum, rather than treating the ambiguous result of the close advisory referendum of 2016 as a clear and fixed outcome. What could be more democratic?

The Political and Legal Dimensions

Until and unless the notice of withdrawal from the European Union is rescinded, the government of the United Kingdom will seek to define and negotiate its future relationship with the European Union. The central question appears to be whether it is possible to find a formula that will allow the United Kingdom to continue to enjoy close economic ties with the European Union, while ceasing to be a member and subject to the many disciplines of membership in the European Union. This is both a legal and a political question, involving a calculus of the meaning of the narrowly decided referendum, the interpretation of central concepts of EU law, and the willingness of both the UK and the EU negotiators to seek creative solutions to a highly volatile question.

A first question is strictly political and is found in the ambiguity of the referendum question and the response of voters to the question. Did voters unequivocally vote to leave both the European Union itself and the internal market? Does the referendum result require the government to seek a “hard Brexit” in the sense of abandoning essential elements of the EU internal market, as it is defined by the Treaty on the Functioning of the

European Union (TFEU),⁶ or does the government enjoy flexibility in defining the terms of a new arrangement with the European Union? Opinions continue to differ, with those concerned with the fate of the UK economy, its key financial sector, immigration and its impact on staffing in essential sectors such as the health service, pressing for the maintenance of a very high degree of integration with the European Union. Others, more concerned with asserting “sovereignty” (itself a multifaceted concept) and allowing the United Kingdom to be free in the future to chart an economic and social course different from that of continental Europe, assert the need to break ties with the European Union in many fundamental ways.

The issues can also be characterized in more strictly legal terms — in particular, EU law. Is it possible to remain in the European Union’s internal market while not being a member of the European Union? Some commentators also try to distinguish between the European Union’s internal market and the Customs Union (CU) — an interesting avenue of speculation, but, ultimately, very difficult to sustain as a matter of EU law. The internal market of the European Union has developed over time from the original “common market” of the European Economic Community “based on a customs union,” to the Single Market and, finally, the internal market complemented by a host of other policies, such as transportation, fisheries, the common commercial policy, the areas of freedom, justice and security, and a foreign policy. Successive treaties have moved the goal posts in legal, economic and political terms. The internal market today is clearly more than the sum of the right of free movement of goods, services, persons and capital. It reflects the definition of exclusive and shared competences both within and outside the European Union. A broad definition might lead to the conclusion that the internal market is the European Union itself. Does it include the area of peace, security and justice? Does it include the external policy and the common commercial policy? Is it essential that the Court of Justice of the European Union (CJEU) has the final say? Put this way, it is possible to assert a more limited and essentially economic definition of the internal market, as this paper attempts to do.

⁶ Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, [2008] OJ, C 115/47 (entered into force 1 December 2009) [TFEU], online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>>.

In the end, there are legal constraints upon the type of arrangement to which EU negotiators can commit. Negotiators will certainly feel legally constrained. The CJEU may have the final word and, thus, the legal question of whether the United Kingdom might leave the European Union but remain in the internal market is a very difficult question. Is it possible to imagine a more limited CU falling short of remaining in the full internal market? As this appears to be the preference of many in the United Kingdom, including many leading political leaders, it may be the decisive legal and political question for both the United Kingdom and the European Union.

The limited Brexit, while not yet formally defined for the purposes of negotiating the future trading relationship between the United Kingdom and the European Union, appears to be the most palatable to the current government. This position would take the United Kingdom out of the European Union, while retaining most of the principal advantages of the current trading relationship. The focus appears to be essentially on maintaining a range of economic ties, while breaking away from many of the wider range of EU rules that govern political, social and environmental issues — and even escaping from a range of disciplines broadly linked to trade, but not deemed to be of the essence. This approach seems to focus in particular on trade in goods and matters clearly related to goods, such as the abolition of tariffs, customs facilitation issues, transportation and the access of goods to the other market, including common standards, as well as maintaining open trade in services and open capital and payments markets. Apparently excluded are matters relating to the movement of people, immigrants and refugees.⁷ The agreement that might come closest to this position is the European Union-Turkey Customs Union of 1993.⁸ Whatever is included in a CU moves freely and, for obvious reasons, this provides reassurance to all those who fear the consequences of breaking existing economic ties. Most closely comparable to this approach, but by no means identical, is the European Economic Area (EEA)

7 EC, Commission, "Negotiating documents on Article 50 negotiations with the United Kingdom", online: <www.ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en?field_core_tags_tid_i18n=351&page=1>.

8 *European Union-Turkey Customs Union*, 22 December 1995, [1996] OJ, L 35 [EU-Turkey CU], online: <www.avrupa.info.tr/sites/default/files/2016-09/Custom_Union_des_ENG_0.pdf>.

Agreement⁹ between the European Union and the European Free Trade Agreement (EFTA) countries.

Another broad approach, and the one that seems to be preferred by harder Brexit supporters, is that of an FTA.¹⁰ Like a CU, FTAs are permitted by the General Agreement on Tariffs and Trade 1994, article XXIV,¹¹ on the condition that they cover substantially all trade and lead, on balance, to trade creation rather than trade diversion. The FTA leaves the parties entirely free to conclude trade agreements with other states and to maintain their own customs and trade rules, subject only to removing agreed barriers on an agreed range of goods and services and capital movements between the parties. Sovereignty is preserved, but in a context in which it is possible to remove a wide range of trade barriers with a view to maintaining a larger market and protecting supply chains between the parties. This is, in fact, the option chosen by almost all states when they negotiate trade liberalization on the bilateral and regional levels. The European Union has concluded a large number of FTAs, often under the rubric of "association" agreements.

The most recent and far-reaching FTA that may be relevant to the current situation is the Canada-European Union Comprehensive Economic and Trade Agreement (CETA),¹² approved by both parties and currently awaiting the decision to bring it into force on a provisional basis. CETA offers a model of what can be done with an FTA and is an appealing prospect for many Brexit supporters.

An analysis of the more than 600 CUs and FTAs in existence today suggests that rights of access and guarantees of respect for the terms of the agreement exist on a continuum. It is extremely difficult to maintain very strict categories in the abstract. Much can be done under either a CU or an FTA.

9 *Agreement on the European Economic Area*, 2 May 1992, [1994] OJ, L 1 (entered into force 1 January 1994) [EEA Agreement], online: <www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAgreement.pdf>.

10 Jack Maidment, "EU trade commissioner says bloc will do post-Brexit free trade deal with UK 'for sure'", *The Telegraph* (27 April 2017), online: <www.telegraph.co.uk/news/2017/04/27/eu-trade-commissioner-says-bloc-will-do-post-brexit-free-trade/>.

11 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153 art XXIV (entered into force 1 January 1995).

12 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 29 February 2016 [CETA], online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

The European Union is one of the very few genuine CUs functioning today; its economic reach and supranational institutions make it, in some ways, qualitatively different from all the others. In many respects, it is comparable to a federation; hence, it is difficult to compare the European Union to an abstract model of a CU. CUs exist that fall far short of the European Union, and FTAs exist that are designed to promote a high degree of economic integration. FTAs exist in a great variety of shapes and sizes and can be designed to cover a wide range of issues. For example, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) provides for a much higher degree of social and economic integration than the EU-Turkey CU.¹³

The Spirit of the Negotiations: Search for a *Modus Vivendi*

How should one analyze the debate over the optimum outcome to the Brexit negotiations? Can one assert that some abstract concepts (CU, internal market, FTA) are immutable and not interchangeable, or should one approach the analysis from a strictly pragmatic standpoint? It is tempting to assert that the only possible approach is the pragmatic one. Flexibility and an open mind appear to be essential on both sides if the European Union and the United Kingdom are to agree on a trading regime that suits both. Clearly, much can be done with any ideal model of economic agreement, provided that the parties are united in their objectives. As so far this is not the case, the first hurdle is purely political. The UK government does not yet know what it is trying to achieve, while the European Union has already taken a firm stance on the order of negotiations and has published papers outlining various negotiating positions on the future trading relationship.

But the issue is not only political. As noted above, there are legal constraints. Even if the European Union and the United Kingdom are willing to

approach negotiations on the future relationship in a very pragmatic fashion and to not argue as to whether the United Kingdom must adhere to some legalistic vision of the internal market or remain in a CU, the negotiators cannot forget the nature of the EU legal order and the rules and institutions that govern it. The European Union is much more than a simple CU. Unlike an FTA, in which the parties can agree to liberalize their trading relationship under a defined set of rules that do not change over time, the European Union is an evolving institution. Legislation is constantly being introduced and debated; the treaties, regulations and directives are in a constant process of interpretation and application by the European Union, EU members and their courts, as well as by the CJEU. The European Union has become a process of integration, and it is not an entity that is fixed in time.

This makes the debate over the future role of the CJEU anything but academic. The European Union, on one side, cannot agree to set aside the future rulings of the court for the purposes of its future commitments to the United Kingdom, however much the United Kingdom might wish to escape from the CJEU. The future decisions of the CJEU will always be relevant to the ongoing interpretation of the meaning of the treaties and of legislation. The United Kingdom will have to accept this fact. The role of the court is an ongoing problem for the European Union as well; it should be noted that the role of the court vis-à-vis the European Court of Human Rights remains an unsolved riddle since 2009, despite a treaty command to ratify the European Convention on Human Rights.¹⁴ Acceptance of the nature of the European Union, whether in an active or passive form, is a question that cannot be avoided by UK negotiators.

Models of Association Available to the Parties

Defining the UK Position

The position of the United Kingdom is still a work in progress. White papers were issued throughout the summer of 2017, defining the

13 Australia-New Zealand Closer Economic Relations Trade Agreement, 28 March 1983, (entered into force 1 January 1983) [ANZCERTA], online: <<http://dfat.gov.au/trade/agreements/anzcerta/pages/australia-new-zealand-closer-economic-relations-trade-agreement.aspx>>; EU-Turkey CU, *supra* note 8.

14 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, 213 UNTS 221, ETS 5 (entered into force 3 September 1953), online: <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>.

United Kingdom's position¹⁵ in partial response to the European Union's position papers,¹⁶ and the Great Repeal Bill¹⁷ was introduced and hotly debated¹⁸ in Parliament after the throne speech of June 2017. One can analyze these documents to understand their underlying premises. One can analyze the political statements of objectives by the prime minister and the responsible ministers. One can even go back to the statements made by various political figures during the referendum campaign in 2016. Overall, what emerges is a sense of unease in the United Kingdom at the direction that the European Union has taken over time, and a desire to be free of the political structures and supranational institutions of the European Union. A plan appears to be emerging at the domestic level concerning the kind of legislative framework that is intended by the current UK government. This involves putting an end to the application of the European Communities Act 1972;¹⁹ ending the supremacy of EU law in the domestic UK legal order; freezing EU law as forming part of UK law at a fixed date to be determined, but not later than the date when the United Kingdom formally leaves the European Union; putting an end to the jurisdiction of the CJEU and subjecting the determination of all legal issues in the United Kingdom to UK courts; and withdrawing from participation in all EU administrative and political bodies and, where necessary, replacing them with comparable institutions in the United Kingdom.²⁰

The current UK plan is essentially legal and constitutional. The problem with it is that the economic consequences of Brexit and the consequences for, and future direction of, the UK economy are not spelled out. There

is no economic plan for the future, only a legislative and constitutional framework.

What does the UK government want? Despite all that has passed, this is the maddening question for the European Union, as well as for the 60 million inhabitants of the United Kingdom. Citizens and other residents of the United Kingdom remain uncertain about what was decided, and remain almost equally divided as to how they wish the situation to evolve. The convinced sovereigntists who won the referendum seem to have largely disappeared. Almost half the population voted to remain and still wish to do so, even if they are resigned to leaving, and many of the other half appear to be having second thoughts about Brexit. The Conservative government is attempting to provide leadership, but in doing so, appears ever more divided within itself, with some ministers openly contradicting each other, and some parts of the Conservative parliamentary majority also taking positions that are not compatible with those of the prime minister. British commercial and industrial leaders, after having assisted or remaining largely neutral during the referendum campaign, have now become alarmed at the prospect of failed negotiations and the consequences of the United Kingdom being ejected from the European Union without a comfortable fall-back position to protect their interests. On July 7, 2017, the assembled leaders of commerce and industry called on the Brexit minister to ensure that the United Kingdom remains in the internal market for the indefinite future, until such time as negotiations are fully completed and all is certain.²¹

Perhaps most distressing of all in mid-2017 is that the nature and objectives of the negotiations remain something of a mystery — at least so far as the UK government is concerned. The European Union has published a series of papers outlining its strategy. These papers focus, in particular, on the terms of the departure from the European Union, which they insist must be fully determined before beginning the negotiations on the future economic relationship with the United Kingdom. This appears to have been accepted by the UK government, which opened negotiations with an unsatisfactory offer in late June 2017 on the future of EU citizens

15 United Kingdom, Department for Exiting the European Union, *The United Kingdom's exit from and new partnership with the European Union* (February 2017) [*Brexit White Paper*], online: <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-2>.

16 See EC, Commission, *supra* note 5 for a list of the EU position papers that were drafted.

17 *Bill 5, European Union (Withdrawal) Bill* [HC], 2017–2019 Sess, 2017 (1st reading 13 July 2017).

18 Mikey Smith & Dan Bloom, "Brexit Repeal Bill debate recap: MPs clash furiously over Theresa May's 'power grab' law", *The Mirror* (7 September 2017), online: <www.mirror.co.uk/news/politics/brexit-great-repeal-bill-debate-11127253>.

19 *European Communities Act 1972* (UK), c 68.

20 *Brexit White Paper*, *supra* note 15.

21 Christopher Williams, "CBI: UK must stay in single market until EU deal done", *The Telegraph* (6 July 2017), online: <www.telegraph.co.uk/business/2017/07/06/david-davis-faces-calls-transitional-brexit-deal-chevining-summit1/>.

in the United Kingdom.²² On the broader question of the future economic relationship, EU leaders have shown a high degree of unity, but have restricted themselves to suggesting that the United Kingdom cannot leave the European Union while expecting to retain all the advantages of membership. It has also been made clear that the United Kingdom has no legal right to negotiate free trade arrangements with other states until it has actually left the European Union.

Insofar as any coherent position had been defined by fall 2017, it appears that the UK government's position remained close to what the European Union says is impossible. No clear negotiating position has been defined by the prime minister or by the Brexit minister. The chancellor of the exchequer indicated in early July 2017 that maintenance of existing economic ties, including remaining in the internal market, must be the fundamental goal of the negotiations, putting his position closer to the position of commerce and industry and further from some of his colleagues. One might say with Lucius Cassius before Phillippi: "The storm is up, and all is on the hazard."²³

As no formal proposal has been made for the structure of future economic relations, it appears best to review the principal models currently available to both sides. Doubtless those responsible for developing the policy have been undertaking the same exercise.

The Internal Market

The internal market is a complex phenomenon not easily reduced to a unified concept separable from the rest of the treaty. Article 26 of the TFEU defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."²⁴ Article 114 grants the European Union competence to legislate "for the achievement of the objectives set out in Article 26."²⁵ The internal market is defined by the two articles of title I of part 3 of the TFEU. The substances of the various freedoms of movement are defined at greater length by the

subsequent titles of part 3, as well as by many other articles throughout the treaty, such as article 114. It is thus difficult to claim that the internal market is a legally finite concept defined as a single unit of the TFEU. This, in turn, makes it difficult to assert that there is a bloc of articles to which the United Kingdom could easily adhere, or insist that the internal market is separate from the titles of part 3 dealing with agriculture or transportation. What is the relationship of the internal market to the concept of the area of freedom, security and justice or the many articles defining EU economic competences?

Similar ambiguity exists with respect to the separation of the concepts of the internal market and the CU. Can they be separated, as some suggest, for the purposes of defining an ongoing UK relationship with the European Union? To confuse matters further, article 3(1) grants the European Union exclusive competence over the CU, along with tariffs, while competence over the internal market is described by article 4(2)(a) as being "shared."²⁶ This reflects the evolution of treaty language through several EU treaties since the Treaty of Rome,²⁷ which originally defined the European Economic Community (EEC) as "based on a customs union." At that point, the EEC was particularly focused on the free movement of goods, but, from the start, it also guaranteed the free movement of persons, services and capital. To assert that the United Kingdom must adhere to the internal market in its integrity, as the EU negotiating positions suggest, may not provide the degree of clarity necessary for a long-term renegotiation of the relationship of the parties, and it will be necessary to define the precise content of the future commitments of the United Kingdom in much greater detail.

A number of commentators and politicians have suggested that the United Kingdom should only commit to the EU CU. Like the concept of the internal market, the concept of the EU CU is not easily separated from all the other elements of the TFEU. In many respects, it has been incorporated into the broader concept of the Single Market and, subsequently, the internal market. It would seem that the only meaningful way to use the concept of the CU would be to define it as those parts of the TFEU that relate to the free movement of goods —

²² EC, Commission, *supra* note 7.

²³ William Shakespeare, *Julius Caesar*, (Oxford, UK: Oxford University Press, 2010), Act 5, Scene 1.

²⁴ TFEU, *supra* note 6, art 26.

²⁵ *Ibid*, art 114.

²⁶ *Ibid*, arts 3(1), 4(2)(a).

²⁷ EC, *Treaty Establishing the European Community*, 25 March 1957, online: <www.refworld.org/docid/3ae6b39c0.html>.

and even that would require complex negotiations to reach a mutually satisfactory definition, as the treatment of goods is subject to a wide range of EU treaty duties and legislative competences. Remaining in the internal market or in a defined CU would require the negotiation of rules of origin covering all the elements encompassed by the agreement, whether they are applicable to an internal market or to a CU. The World Trade Organization (WTO) decision in the *Turkey-Textiles* case suggests that this might be legally possible.²⁸

An equally important and perhaps very difficult issue would be the extent to which the United Kingdom might become free to conclude trade agreements with other states, as the UK government asserts it intends to do. Part of the declared strategy of leaving the European Union has been to allow the United Kingdom to conclude trade agreements with other states, such as Canada, China, Japan or the United States. Brexit supporters have asserted that these agreements would not only compensate for leaving the European Union, but would also provide even more interesting avenues for UK trade, thus making the United Kingdom again the great trading nation that it once was. President Trump has indicated support for this strategy and has suggested that a “very, very big deal” with the United States awaits a liberated United Kingdom.²⁹ Others have expressed skepticism regarding whether these FTAs could replace the advantages of EU membership.³⁰ The EU negotiating authorities have insisted that the United Kingdom must refrain from making any such trade agreements until Brexit is final, thus leaving the United Kingdom in the invidious position of being unable to pursue a new strategy to compensate for leaving the European Union until some indeterminate future date and certainly not in time to have these FTAs in place when it leaves the European Union. Equally frustrating is the uncertainty regarding the question of whether the United Kingdom could conclude FTAs while remaining in the internal market

or in a reduced CU. Two precedents, examined below, suggest an answer that is somewhat positive, although subject to onerous conditions.

The EEA

The model most frequently cited is the agreement concluded with the members of the EFTA minus Switzerland, with which the European Union has made separate parallel arrangements to be discussed below. Iceland, Liechtenstein, Norway and Switzerland (the remaining countries of the EFTA founded in 1957, which for various reasons did not wish to join the European Union) nevertheless were eager to ensure maximum access to the EU market and concluded an agreement in 1993 for this purpose. Under the EEA Agreement,³¹ EFTA goods, services, persons and capital have access to the EU internal market on terms equivalent to those of all EU members. The object of this agreement is to maintain the “privileged relationship”³² between EFTA countries and the European Union “based on proximity, long-standing common values and European identity.”³³ The EFTA countries are not members of the European Union; the EFTA and individual EFTA countries remain free to conclude agreements with third states. However, the treaty guarantees that EFTA goods and services, citizens and capital have access to the European Union under terms defined by EU law. The price of this remarkable degree of access is that EFTA countries must implement standards and rules applicable to goods, services and capital that are identical to those governing the European Union. The European Union regularly informs the EFTA states of the relevant changes that are made to EU law, and it is the duty of the EFTA governments to adopt these regulations and directives without change or discussion. The EEA Agreement also provides for the integration of relevant social and environmental policies by the parties.

The great advantage of the EEA is that there is a very high degree of economic integration between the two groups, without the necessity of membership in the European Union. Iceland and Norway are thus able to maintain somewhat separate fisheries and agriculture and resource exploitation policies, which are the essence of

28 Notification of *Mutually Acceptable Solution*, 19 July 2001, WT/D534/14, WTO, online: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm>.

29 Anushka Asthana, “Trump expects trade deal with UK to be completed ‘very, very quickly’”, *The Guardian* (8 July 2017), online: <www.theguardian.com/world/2017/jul/08/theresa-may-in-bid-to-boost-post-brex-it-trade-with-g20-meetings>.

30 Steven Brakman, Harry Garretsen & Tristan Kohl, “Options for a ‘Global Britain’ after Brexit”, *VOX* (11 May 2017), online: <<http://voxeu.org/article/options-global-britain-after-brex-it>>.

31 *EEA Agreement*, *supra* note 9.

32 *Ibid*, Preamble.

33 *Ibid*.

their economies, while obtaining the immense advantage of full access to the EU internal market. On its face, the EEA model appears to give those who wish to leave the European Union and those who wish to retain all its advantages everything they want. However, it appears that in the eyes of the supporters of a hard Brexit, the price is too high, as it requires virtually total acceptance of EU law on commerce and competition as it exists from time to time. The agreement is governed by an EEA council and a joint committee of the parties. Decisions of the EEA council are binding on both parties. Disputes are to be settled by negotiation, and the work of the EFTA court, national courts and the CJEU should proceed in harmony, but ultimately, any matter involving the interpretation of EU law is to be determined by the CJEU. EFTA members have to contribute to the EU budget, but have no say in determining the budget or its expenditure.

Is it possible to envisage the United Kingdom obtaining the same benefits by adhering to the EEA or joining the EFTA? This possibility has been raised by commentators in the United Kingdom both before and after the Brexit vote and remains a very serious hypothesis.³⁴ In July 2017, the suggestion was made that the United Kingdom might also obtain the benefits of the EEA by becoming an associate member of the EFTA,³⁵ as did Finland in the 1970s. All three options involve acceptance of the arrangement by the members of the EFTA and also of the European Union. So far, the European Union has not responded to any specific negotiating proposal on the subject. There are obvious questions to be asked. Is the EEA option, designed for a few small outlying countries, capable of application to one of the major economies of Europe? Would it suit the EFTA states to allow the United Kingdom (which was a founding member before it left to join the European Union) to rejoin and thus seriously complicate their relationship with the European Union? Would the EU negotiators not view this as an attempt to remain in the internal market while abandoning the broader responsibilities of EU membership? Perhaps not, as the EEA requires virtually complete unilateral adhesion to the European Union's internal market rules as they

exist from time to time, as well as a contribution to the EU budget set by the European Union.

The EEA option would suit many in the United Kingdom who wish to leave the European Union, but also be firmly grounded in the internal market. The greatest objections would probably come from the hard Brexit faction in the United Kingdom, which would object to the maintenance of EU law, the jurisdiction of the CJEU and payment into the EU budget. By the autumn of 2017, neither side had put this option on the table, despite its being the most attractive to those who wish to leave the European Union, but maintain maximum economic ties.

Swiss Bilateral Agreements

Following the referendum in which the Swiss electorate refused to join the EEA in 1992, Switzerland negotiated a series of agreements, first in 1999 and again in 2004 and 2010, building upon its 1972 FTA with the then EEC. These agreements, although not ensuring total elimination of tariffs and quotas, do make possible a very favourable regime of reciprocal free access to goods, services, persons and capital, as well as eliminating many border controls by allowing Switzerland to join the Schengen area. As a counterpart, Switzerland has agreed, as with the EEA, to apply all relevant EU regulations and directives and to limit bank secrecy and make the regulation of EU banking rules much more effective in Switzerland. The movement of persons according to the EU standard was the object of a further referendum in 2015, and the Swiss government has attempted to deal with the call to end even EU immigration by maintaining the rule, subject to a principle that jobs may be offered to Swiss citizens on a priority basis.

The current regime is based on more than 100 bilateral agreements, all of which are deemed to be interrelated and subject to the threat that the violation of any one agreement could bring down the whole edifice. This system may appear to Brexit supporters to be a very appealing model, as it appears to allow for the negotiation of free movement in particular sectors without having to accept the full panoply of rights and duties of the internal market. However, there have been constant tensions between Switzerland and the European Union arising out of these bilateral agreements, and it is most unlikely that the European Union would be willing to envisage a similar approach with the United Kingdom. Furthermore, the sectoral

³⁴ *Brexit White Paper*, supra note 15.

³⁵ Patrick Wintour, "UK considers potential shortcut on trade deals post-Brexit", *The Guardian* (2 July 2017), online: <www.theguardian.com/politics/2017/jul/02/uk-shortcut-free-trade-post-brexit>.

regulation of trade is banned by the law of the WTO; the current regime can only be explained by the very particular place of neutral Switzerland, surrounded by the European Union, and by the fact that the interests of no other state appear to be offended by this violation of basic WTO law.

The EU-Turkey CU

The most obvious model of a CU to be considered is the CU that was first concluded with Turkey in 1993.³⁶ This CU provides for the free movement of goods of Turkish origin into the European Union. Goods imported from third-party states, such as textiles from India, do not enjoy the benefit of this CU, unless they undergo radical change or are incorporated into new products of Turkish origin. The CU covers only goods, although there have been discussions of extending it to other factors, and Turkish citizens enjoy visa-free access to the European Union, but not a full right of free movement of persons as defined by EU law. Under this CU, Turkey must apply the EU customs tariff, as it exists from time to time, to all goods. Turkish goods moving into the European Union enjoy the benefits of EU law and are subject to any relevant rulings of the CJEU. The CU has led to the movement of a very large volume of trade in goods between the parties, and the European Union is Turkey's principal trading partner.

One conclusion to be drawn from this agreement is that Turkey must refrain from concluding any trade agreement dealing with the movement of goods, as this is strictly covered by the terms of the CU and can only be negotiated jointly with the European Union. This would suggest a serious limitation on any intention of the United Kingdom to conclude trade agreements with third-party states on any matter covered by a future agreement with the European Union, either on access to the internal market or the CU.

FTAs

If maintenance of at least some rights under EU law or replication of the Turkish, EEA or Swiss models proves impossible, the other solution is to negotiate an FTA. The great advantage of the free trade model, and the reason why it is chosen by so many countries in their bilateral or regional trade relations, is that it is much less "invasive" than a

CU; it generally focuses on goods and non-tariff barriers, and leaves the parties free to maintain different trade relations with third-party states. The supporters of limited legal ties between the United Kingdom and the European Union find this approach very appealing. The major problem with this model is that the existing degree of legal and economic integration of the United Kingdom into the European Union has gone light years beyond the requirements of the average FTA. To fall back to the FTA model is to opt for a much lower level of integration than currently exists in the European Union, resulting in the probable disruption of important trading patterns for UK goods and services and the virtually certain disruption of the movement of people in both directions. The FTA model is difficult to adapt to the presence of supranational rules and institutions and usually is characterized by limited institutional arrangements. An FTA is thus a serious step back from the degree of economic and legal integration that currently exists in the European Union and could seriously disrupt the economy of the United Kingdom. A further problem is that recreating trading rules between the United Kingdom and the European Union in the form of a new FTA, rather than building on existing systems, will require a lengthy and very complex renegotiation of many basic issues. It is virtually certain that this is impossible within the article 50 time limit. It is also true that most FTAs in the past have been static, having little capacity to adapt to changing circumstances.

Despite the disadvantages of the FTA option, it must be noted that FTAs provide a flexible model, and some examples can be cited of complex and dynamic trading relationships that have been maintained within an FTA framework. To take two examples, NAFTA and ANZCERTA both demonstrate close economic integration under an FTA model. ANZCERTA, building on a previous FTA, has expanded over the years through frequent amendments to provide for virtually total free trade in goods, even agricultural commodities, as well as services and the movement of people. Considerable efforts have been made to enable the free movement of Australian and New Zealand citizens between the parties, as well as to facilitate the harmonization of laws and allow competition tribunals to have jurisdiction in both countries.

NAFTA, while not going quite as far on all points as ANZCERTA, does provide a framework for the integration of the three economies of Canada,

³⁶ EU-Turkey CU, *supra* note 8.

Mexico and the United States.³⁷ Based on the elimination of tariffs, except on some agricultural commodities, national treatment of all goods and services, as well as unification of the key automobile industry, NAFTA has witnessed the tripling of trade among the three countries, making both Canada and Mexico the leading trading partners of the United States. NAFTA has also been the motor of a vast increase in foreign investment in the three countries. One of the principal successes of NAFTA is to ensure that the thousands of trucks and trains that cross the two borders every day do so in a matter of seconds rather than minutes or hours and, in general, NAFTA has provided a framework under which goods cross borders as expeditiously as possible.

Both these agreements are possible due to the neighbouring relationship, close pre-existing trade ties and considerable similarity of legal systems between Canada and the United States, although not with Mexico. NAFTA provides for no extraterritorial jurisdiction of courts, but does create a network of five systems of dispute settlement. On the other hand, the failure of the parties to provide methods for updating various chapters as they become outdated and the recent call by President Trump to scrap or renegotiate NAFTA highlight the fragility of the FTA model, which is subject to no supranational rules or institutions and is ultimately subject to the will of governments.

The paradoxical potential for deep integration and, at the same time, the vast difference existing between the European Union and the FTA model is displayed by the recently negotiated CETA between Canada and the European Union.³⁸ This is the most comprehensive FTA currently in existence, covering goods, services, capital and even the movement of certain persons. It deals with recognition of product standards and seeks to promote common approaches to regulation, as well as dealing with sensitive “non-trade” issues of human rights, labour and environmental standards. But to indicate the fundamental difference, CETA does not offer “free movement” in the sense of EU law, and each government remains ultimately free to take what steps it wishes. Unfortunately for the United Kingdom, the final stages of the approval of CETA have shown that it can be very difficult for the European Union to reach agreement on the

adoption of an FTA if it is characterized as a “mixed agreement,” which is how any broad agreement between the European Union and the United Kingdom would probably be legally characterized.

Thus, if the FTA model is the only one upon which the United Kingdom and the European Union can agree, it can be relied upon to provide a considerable degree of economic integration, but it will fall far short of the existing EU treaties. A great deal can be done with an FTA, should both parties be willing to put water in their wine and make sensible pragmatic compromises. The European Union has shown itself willing to make remarkable compromises with the EFTA and Switzerland, on condition that these countries make equally remarkable unilateral concessions by agreeing to apply large parts of EU law and contribute to the EU budget. This is the obvious way for the United Kingdom to remain in the internal market. Whether the United Kingdom is willing to put itself in this position is not at all clear.

Can an FTA be designed that would provide the United Kingdom with all the benefits of the internal market? Given the role of supranational rules and institutions in defining and regulating the internal market, it is difficult to imagine how this could be accomplished to the satisfaction of both parties on the basis of their current positions. Much wine would have to be poured into water before this came to pass. But it is not impossible. Speedy withdrawal of the article 50 notice is the preferable solution to this whole imbroglio.

The Atlantic Free Trade Area

Defenders of Brexit claim that they wish to make Britain the great trading nation it once was. Withdrawing from the most remarkable trade agreement in history for a much weaker level of economic integration seems a poor substitute for being a member of the European Union, even if the United Kingdom is ultimately able to negotiate a host of FTAs with other countries instead of the 50 FTAs that the European Union has already negotiated. However, there is one agreement that might be equal to achieving the objective of making Britain the great trading nation it once was. This is complete free trade between all of Europe and all of North America: in other words, an Atlantic Free Trade Area (AFTA).

We live in an age of “mega-regional” trade agreements (CETA; the Trans-Pacific Partnership

³⁷ NAFTA, *supra* note 5.

³⁸ CETA, *supra* note 12.

[TPP];³⁹ the Transatlantic Trade and Investment Partnership [TTIP];⁴⁰ the Regional Comprehensive Economic Partnership,⁴¹ consisting of the 10 member states of the Association of Southeast Asian Nations [ASEAN];⁴² Mercosur;⁴³ the Economic Community of West African States [ECOWAS];⁴⁴ the Southern African Development Community [SADC]⁴⁵ and so on). The ultimate mega-regional (short of a return to the WTO) would be an agreement providing for free trade between all the countries of Europe and North America. Rather than just pursuing an FTA with the European Union, if it is unprepared to make the sacrifice of remaining in the European Union and if the internal market is not on offer, the United Kingdom would be performing an immense service to the world in seeking to promote genuine free trade between Europe and North America. An AFTA would be the greatest trading bloc in the world. It would lead the world in opening markets and setting regulatory standards, which would then be the default standards for products and services in the global economy. Should the United Kingdom be willing to lead this charge, it would indeed be seen as capable of being the great trading nation it once was.

An AFTA should remove all tariffs on goods, including agricultural commodities. Common technical standards and the mutual recognition of standards for the regulation of safety of health and the regulatory environment could be enshrined in an AFTA, subject to a clear understanding of the right of each party to regulate these matters. Much could be done to promote the freedom to provide services throughout an AFTA, subject again to a clear understanding of the right to regulate. In particular, banking and financial services, including the non-banking sector, could be the object of standards based on the highest international standards. Movement of people would not be politically acceptable, but much could be done to promote the

mutual recognition of professional standards, as has been done in CETA. A single approach to regulation of competition matters and the promotion and protection of foreign investment and related dispute settlement could also be provided in an AFTA.

Interestingly, much of the groundwork for an AFTA has already been laid. CETA has been negotiated, considerable efforts have been made to reach agreement between the European Union and the United States in the unfinished TTIP negotiations, and, despite President Trump, the TPP has shown what can be done between a large and heterogeneous group of states. Mega-regional agreements are possible and models exist. The United Kingdom has only to use these models creatively to promote an AFTA.

At a time when there is much uncertainty about the future of the global economy, when there are many tensions arising from conflicts in the Middle East or attendant on the emergence of a strong and assertive China, the emergence of an AFTA would provide a great island of stability, both for its own members and for the rest of the world. In all likelihood, the emergence of common standards in an AFTA would lead to these standards being transposed to upgraded trade agreements under the WTO. CETA and the unfinished TTIP negotiations have prepared the way. All that remains is for a great trading nation to take the lead.

Conclusion

As it searches for an accommodation with the European Union, the United Kingdom is learning that it has a wide variety of options to consider. The best option from an economic perspective is no doubt to remain in the internal market, but this may be politically distasteful to many in the United Kingdom. None of the other options reviewed in this paper provide the same degree of integration and legal certainty that the internal market offers, but various models of CUs or FTAs can be envisaged to provide at least some of the advantages that will be given up by the United Kingdom in leaving the European Union. Arguably, the most constructive approach would be for the United Kingdom to seek to put together a vast AFTA with both the rest of Europe and the three countries of North America.

39 *Trans-Pacific Partnership Agreement*, 4 February 2016, online: Global Affairs Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text+texte/toc+tdm.aspx?lang=eng>.

40 EC, Commission, "Trans-Atlantic Trade and Investment Partnership", online: <<http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/>>.

41 ASEAN, "Regional Comprehensive Economic Partnership", online: <http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership>.

42 ASEAN, online: <<http://asean.org/>>.

43 EC, Commission, "Mercosur", online: <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/mercosur/>>.

44 ECOWAS, online: <www.ecowas.int/>.

45 SADC, online: <www.sadc.int/>.

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