
Centre for International
Governance Innovation



British Institute of
International and
Comparative Law

Brexit: The International Legal Implications | Paper No. 2 – November 2017

Renegotiating the EU-UK Trade Relationship

Lessons from NAFTA

David A. Gantz



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CIGI Masthead

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For publications enquiries, please contact publications@cigionline.org.

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Centre for International
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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

Charles Clore House
17 Russell Square, London WC1B 5JP
www.biicl.org

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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

David A. Gantz is a CIGI senior fellow who contributes to a project addressing central policy issues of contemporary international investment protection law and international trade law.

David is the Samuel M. Fegtly Professor of Law at the University of Arizona's James E. Rogers College of Law. He teaches courses on international business transactions, international trade law, international investment law and regional trade agreements. Previously, David was a visiting professor of law at American University and George Washington University Law School, a lecturer in law at the University of Pennsylvania and a visiting assistant professor of law at the University of Costa Rica. David has also taught at Georgetown University, Loyola University, the University of San Diego Law School and Universidad Rafael Landívar.

David was a law clerk to the US Court of Appeals for the Ninth Circuit, an attorney-adviser and assistant legal adviser with the US Department of State, and has been a partner at various law firms in Washington, DC. David is a member of the American Society of International Law and its international economic law interest group. He has held several public service roles, including as a NAFTA Chapter 11, Chapter 19 and Chapter 20 arbitrator; consultant to the World Bank, United States Agency for International Development and United Nations Development Programme; and US judge to the Administrative Tribunal of the Organization of American States.

David has received several honours, including the Arthur Andrews Distinguished Teaching/Mentoring Award (2006) and the US Department of State Superior Honor Award (1974). He holds a J.S.M. and J.D. from Stanford Law School and an A.B. from Harvard College.

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

AD/CVD	antidumping and countervailing duties
C-TPAT	Customs-Trade Partnership Against Terrorism
CET	common external tariff
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
EEA	European Economic Area
EU27	remaining 27 member states of the European Union
FAST	Free and Secure Trade
FCAs	future customs arrangements
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
GMOs	genetically modified organisms
HTS	harmonized tariff system
ISDS	investor-state dispute settlement
MFN	Most Favoured Nation
MNEs	multinational enterprises
NAFTA	North American Free Trade Agreement
ROO	rules of origin
SMEs	small and medium-sized enterprises
TPP	Trans-Pacific Partnership
WTO	World Trade Organization

Executive Summary

British Prime Minister Theresa May first proposed a “bold and ambitious free trade agreement” (FTA) to govern future trade arrangements between the European Union and the United Kingdom in a speech on January 17, 2017. More recently, on September 22, 2017, the prime minister suggested that the negotiators could do better than an “advanced free trade agreement,” such as the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, but offered little indication as to what form such an arrangement might take.

Is it possible for the United Kingdom to achieve a new trade relationship to replace continued membership in the European Union’s Single Market and/or Customs Union, which currently provides unrestricted trade? An FTA is probably the only legally feasible form of preferential trade relationship that would generally permit the duty-free, quota-free exchange of goods between the United Kingdom and the member states of the European Union. None of the other options are feasible, given the prime minister’s priorities: complete UK control over immigration from the other members of the European Union; operation under the United Kingdom’s own regulatory framework rather than under regulations and directives imposed by the European Union; the flexibility to conclude trade agreements with third countries; and avoidance of the jurisdiction of the Court of Justice of the European Union (CJEU).

If, despite May’s expressed hopes that an FTA becomes the best route forward, given these constraints, this article suggests that the North American Free Trade Agreement (NAFTA), in particular, NAFTA’s customs regulations and its rules of origin (ROO), provide useful lessons for the UK (and EU) negotiators.

Introduction

British Prime Minister Theresa May first proposed a “bold and ambitious free trade agreement” in a speech on January 17, 2017.¹ That objective was repeated in the United Kingdom’s formal notice of the invocation of article 50 of the Treaty on European Union on March 29, beginning the two-year “Brexit” period until withdrawal.² In August, the UK government outlined what it hopes to achieve in a future customs arrangements (FCAs) paper with the European Union.³ This arrangement, a “customs partnership” that is still lacking detail, is both bold and ambitious. It envisions a future trade relationship that has elements of a customs union mixed with elements of an FTA, as discussed more fully below, beginning after a two- to three-year transitional period during which the United Kingdom would continue to participate in the EU Customs Union (and be subject to EU budget contributions and to the jurisdiction of EU regulations and court decisions). More recently, on September 22, 2017, in Florence, Italy, May called for concluding something better and more creative than an “advanced free trade agreement” such as CETA⁴ between the European Union and Canada, but offered little indication as to what form such an arrangement might take.⁵

The evolution from continued UK membership in the EU Customs Union for the transitional period to permanent customs relations under a hybrid agreement is not fully explained in the

1 Letter from Prime Minister Theresa May to European Council President Donald Tusk (29 March 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf>. For a detailed discussion of the options, see “The six flavours of Brexit”, *The Economist* (22 July 2017), online: <www.economist.com/news/britain/21725335-eu-offers-many-menus-norwegian-turkish-there-no-la-carte-option-six>. The article shows why the more trade-friendly options such as the Single Market and the Customs Union are not attainable.

2 May, *supra* note 1.

3 HM Government, *Future Customs Arrangements: A Future Partnership Paper* (15 August 2017) [FCA], online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf>.

4 *Comprehensive Economic and Trade Agreement*, European Union and Canada, 30 October 2016, (entered into provisional force 21 September 2017) [CETA], online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

5 Theresa May, “Theresa May’s Florence speech on Brexit, full text”, *The Spectator* (22 September 2017), online: <<https://blogs.spectator.co.uk/2017/09/theresa-mays-brexit-speech-full-text/>>.

FCA⁶ paper (let alone in the Florence speech), but UK officials appear to recognize that under the future relationship, traders may be “required to demonstrate the origin of goods, as may be required under a future trade agreement between the UK and the EU,”⁷ and will very likely have to deal with customs declarations and border inspections that are unnecessary at the present time. In other words, there is no assurance that the system proposed in August would provide less encumbered trade than a straight FTA with streamlined border procedures, as long as the United Kingdom insists on “taking back its borders,” with legal structures, standards, immigration laws, trade policies and court review that are no longer part of the EU system.⁸

Why will the United Kingdom withdraw from membership in the EU’s Single Market and Customs Union, either of which would provide many fewer obstacles to future UK-EU trade than an FTA or even a hybrid agreement? As discussed more fully in this article, an FTA is the only legally and politically feasible form of preferential trade relationship that could generally assure duty-free, quota-free exchange of goods between the United Kingdom and members of the European Union, given the prime minister’s earlier articulated priorities: full UK control over immigration from the remaining 27 member states of the European Union (EU27), operation under the United Kingdom’s own regulatory framework rather than under regulations and directives imposed by the European Union, the flexibility to conclude trade agreements with third countries and avoidance of the jurisdiction of the CJEU.⁹ It remains to be seen how a hybrid combination of an FTA and Customs Union would be made legal under international trading rules, politically acceptable to both parties, operationally feasible and, perhaps most important, acceptable to both the European Union and the United Kingdom after any transition period.

6 FCA paper, *supra* note 3 at 11–12, paras 48, 52.

7 *Ibid* at 7, para 28.

8 See Joe Owen, Marcus Shephard & Alex Stojanovic, *Implementing Brexit: Customs* (11 September 2017), online: <www.instituteforgovernment.org.uk/sites/default/files/publications/IFG_Brexit_customs_WEB_0.pdf> (detailing the “significant changes in the way the UK border operates” when the United Kingdom leaves the jurisdiction of the CJEU, takes control over immigration and pursues an independent trade policy).

9 Presumably, the FTA would be combined with an “economic integration agreement” under article V of the World Trade Organization’s (WTO) General Agreement on Trade in Services; services are discussed in a separate paper in this series.

It would be misleading to suggest that the UK government has created a consistent, comprehensive plan for negotiating the withdrawal of the United Kingdom and the creation of a new bilateral trade relationship. Rather, the period since the UK vote for Brexit on June 23, 2016, has been marked by confusion, uncertainty and general UK government incompetence, including historic miscalculations by then Prime Minister David Cameron in holding the referendum; internal conflicts among May, Boris Johnson, Liam Fox, David Davis and other members of the Conservative government; and repetition for months of two misleading and unhelpful slogans, “Brexit means Brexit” and “no agreement is better than a bad agreement.”¹⁰ Add to these the false promises (now mostly abandoned) by persons such as Johnson in October 2016 that the United Kingdom can “have its cake and eat it too”;¹¹ May’s decision on April 18, 2017, to call a snap election for June 8, resulting in the government’s loss of a parliamentary majority; and the mistaken belief that the United Kingdom can leave the Customs Union and Single Market but retain virtually all its benefits, or build a customs union to achieve “frictionless trade,” which are misconceptions that EU negotiator Michael Barnier has been quick to point out.¹²

As of October 2017, the uncertainty continues, even though the United Kingdom and the European Union formally began their Brexit discussions on June 19, and in August, provided a general view of objectives for the future trade relationship in

10 Theresa May, (Speech delivered at Lancaster House, London, UK, 17 January 2017), online: <www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/>. (No agreement would be a disaster for the United Kingdom because it would mean reversion to WTO Most Favoured Nation (MFN) duties, which, even if they were the same as current MFN duties, would require the consensus of all other members of the WTO, and among other costs, would subject UK auto imports to the European Union’s (the United Kingdom’s largest auto export market with 56 percent of total exports) 10 percent MFN duties on autos and 4.5 percent duties on most auto parts. See “17 year high for British car manufacturing as global demand hits record levels”, Society of Motor Manufacturers and Traders (26 January 2016), online: <www.smmmt.co.uk/2017/01/17-year-high-british-car-manufacturing-global-demand-hits-record-levels/>. See “Trade in goods and customs duties in TTIP”, online: European Commission, <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_152998.1%20Trade%20in%20goods%20and%20customs%20tariffs.pdf>.

11 See Rowena Mason & Anushka Asthana, “Philip Hammond on leaving EU: ‘We can’t have our cake and eat it’” *The Guardian* (29 March 2017), online: <www.theguardian.com/politics/2017/mar/29/philip-hammond-on-leaving-eu-we-cant-have-our-cake-and-eat-it> (referring to both Hammond and Johnson).

12 Alex Barker, “Britain yet to face facts on Brexit, EU’s Barnier Warns”, *Financial Times* (6 July 2017), online: <www.ft.com/content/8404d08a-6221-11e7-91a7-502f7ee26895?mhq5j=e1>.

the FCA paper. The FCA paper suggests that those favouring a “softer” Brexit, such as UK Chancellor Philip Hammond, long a proponent of a “jobs-first Brexit,” have gained greater influence.¹³

Only recently has the prime minister indicated that she understands the impact of a “hard” Brexit on the UK business community, despite a vague pledge that she “will not let companies fall over a Brexit ‘cliff edge’” and instead will seek an “implementation phase” that would provide a transition period of two to three years after March 2019.¹⁴ There finally appears to be some appreciation by the UK government of data that suggests a soft Brexit (such as an FTA) would still reduce future UK-EU trade by 20 to 25 percent, while a hard Brexit (such as reversion to WTO tariffs and other rules) could reduce trade by 40 percent.¹⁵

In October 2017, it seemed probable that the transition period advocated by the United Kingdom would continue until 2021 or 2022, the latter being the longest possible time before another UK election must be held.¹⁶ Such a period might allow for the creation of a hybrid trade system along the lines proposed in the FCA for use post-2022, assuming of course that the European Union is prepared to accept a hybrid agreement in some form, which most likely will be far more similar to an FTA, as May foresaw in January 2017, than to the existing EU Customs Union.

An FTA or hybrid Customs Union and FTA would appear to be within the exclusive competence of the European Commission, European Council and European Parliament and thus would not require member parliamentary approval (risking a veto by any one of the approximately 38 national or regional parliaments). With CETA, for example,

the agreement was subject to significant delays, largely because it contained investor-state dispute settlement (ISDS) provisions.¹⁷ Fortunately for the future of EU trade agreements, including one with the United Kingdom, a recent CJEU decision relating to the EU-Singapore FTA states that with the exception of ISDS provisions, other chapters of modern FTAs are within the exclusive competence of the European Union, so that approval of individual parliaments is *not* required (assuming the agreement contains no ISDS provisions).¹⁸

The breadth and complexity of the Brexit issues could fill this and many other articles. It is also much too early in the Brexit process to predict the detailed content of a future customs agreement or even whether one can be negotiated. That being said, the UK and EU negotiators have much to learn from the experience of Canada, Mexico and the United States operating under NAFTA for nearly 24 years.¹⁹ In terms of the actual text of an agreement establishing a future customs relationship, the parties can be expected to look first and foremost to CETA,²⁰ since the European Commission, Council and Parliament have all provisionally approved this modern, “wide and deep” FTA. Still, CETA is different in at least two major respects:

13 See Jim Brunsten, “Hammond refuses to confirm UK will leave EU single market”, *Financial Times* (17 June 2017), online: <www.ft.com/content/bb16efbc-5291-11e7-bfb8-997009366969> (noting that Hammond’s influence is likely to increase post-election).

14 See George Parker & Caroline Binham, “Theresa May pledges no Brexit ‘cliff edge’ for companies”, *Financial Times* (20 July 2017), online: <www.ft.com/content/1afeb7aa-6d33-11e7-bfeb-33fe0c5b7eaa?segmentId=a7371401-027d-d8bf-8a7f-2a746e767d56> (reporting on a meeting with May’s business council).

15 See “The six flavours of Brexit,” *supra* note 1.

16 See George Parker & Alex Barker, “‘Status quo’ Brexit transition plan reflects cabinet power grab”, *Financial Times* (28 July 2017), online: <www.ft.com/content/df460e26-72b3-11e7-93ff-99f383b09ff9> (suggesting a growing consensus within the Cabinet for a transition period during which the United Kingdom would continue to be bound by the EU requirements on immigration and remain a member of the Customs Union).

17 See e.g. David A Gantz, “The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?”, (2017) 49 *Loy U Chicago L Rev* 361.

18 See Arthur Beesley, “EU Singapore ruling charts possible Brexit path”, *Financial Times* (17 May 2017), online: <www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexit-full-text.html> (suggesting that the opinion means a UK-EU FTA could be approved by a qualified majority of the EU members if certain provisions are left out). This also bodes well for the recent conclusion in principle of the outlines of an “economic partnership agreement” between the European Union and Japan, even though final agreement on a text and entry into force are undoubtedly two or more years in the future.

19 *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA], online: <www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement>.

20 CETA, *supra* note 4. As summarized by the European Commission, the comprehensive CETA will: remove customs duties; help make European firms more competitive in Canada; make it easier for EU firms to bid for Canadian public contracts (and vice versa); open up the Canadian services market to EU companies; open up markets for European food and drink exports; protect traditional European food and drink products (known as geographical indications) from being copied; cut EU exporters’ costs without cutting standards; benefit small and medium-sized EU firms; benefit EU consumers; make it easier for European professionals to work in Canada; allow for the mutual recognition of some qualifications; create predictable conditions for both EU and Canadian investors; make it easier for European firms to invest in Canada; help Europe’s creative industries, innovators and artists; support people’s rights at work; and protect the environment. With CETA, the European Union and Canada pledge to ensure that economic growth, social issues and environmental protection go hand in hand. See European Commission, “CETA explained” (April 2017), online: <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>>.

- Canada and the EU nations are more than 3,000 miles apart, so trade will move exclusively by ship or aircraft (reducing the disruption of customs entry procedures) rather than by truck across a land or narrow (North Sea) border; and
- no experience exists with regard to how CETA will function in practice, given that it entered into force provisionally only on September 21, 2017.²¹

Thus, the lessons of NAFTA (including some unfortunate aspects that could be avoided in a future UK-EU agreement), where goods primarily move by truck, and where the United States and Canada, and the United States and Mexico share common land borders of approximately 3,000 miles and 2,000 miles, respectively, are the focus of the balance of this article. While it seems unlikely, it could also be hoped that if negotiators for the European Union and the United Kingdom both understood the disadvantages of an FTA with its ROO, they might be encouraged to develop a less potentially harmful arrangement, or at least to adopt many of the innovative approaches that the United States has implemented for trade with Canada and Mexico over the years, such as the Free and Secure Trade (FAST) for commercial vehicles and the Customs-Trade Partnership Against Terrorism (C-TPAT) mechanisms²² for speeding up cross-border trade, as discussed later.

At the time of this writing, the United States is effectively forcing Mexico and Canada to engage in the renegotiation of NAFTA.²³ It is unclear whether the negotiations will ultimately result in a modernized NAFTA, a continuation of the

status quo or the termination of NAFTA by the United States with regard to Mexico, Canada or both. Nor is it evident when the negotiations might be concluded.²⁴ There is more than a little irony in the fact that both the United Kingdom and the United States appear determined to risk damaging or destroying the two most successful regional trade agreements in history: the European Union and NAFTA, respectively. The assumption for the purposes of this article is that the NAFTA experience is relevant for the United Kingdom and the European Union, even if NAFTA disappears in the future, despite the enormous risks such elimination would run for businesses that trade and invest within North America.²⁵

This discussion of future negotiations between the European Union and the United Kingdom is limited to certain aspects of trade in goods. It does not consider trade in agriculture or services, immigration, efforts to incorporate EU laws and regulations into UK law (no longer subject to the jurisdiction of the CJEU), or any of the other trade-related issues that will be subject to discussion and debate between the European Union and the United Kingdom over the next two to five years. The paper is divided into five additional parts. The second part summarizes the legal constraints facing the United Kingdom's conflicting desires regarding a much higher level of national sovereignty over applicable laws, controls over EU immigration and the jurisdiction of the CJEU on the one hand, and duty-free, quota-free movement of goods and open trade in services, including financial services, on the other. The third section discusses the challenges of shifting from a common market/ Customs Union to an FTA, a reverse process that has not been attempted before. The fourth part focuses on several of the key lessons to be learned by both the United Kingdom and the European Union from the NAFTA experience. The fifth section discusses a key industrial sector in North America and in the European Union, the auto and auto parts industry, one that in both jurisdictions has benefited from duty-free trade, seamless supply chains and relatively open movement of auto

21 See Bengt Ljung, "Last-Minute Snag Threatens to Postpone EU-Canada Deal", (6 July 2017) 34 Int'l Trade Rep (BBNA) 962 (reporting that the July 1 deadline was to be missed because of a disagreement over trade in cheese and generic pharmaceutical products); see "EU, Canada agree start of free trade agreement", *Reuters* (8 July 2017), online: <www.reuters.com/article/us-canada-eu-trade/eu-canada-agree-start-of-free-trade-agreement-idUSKBN19TOPC>; see "The free trade agreement EU-Canada applied 'temporarily' on September 21", *The Siver Times* (8 July 2017), online: <<https://sivertimes.com/the-free-trade-agreement-eu-canada-applied-temporarily-on-september-21/49321>> (reporting on a joint statement by Canadian Prime Minister Justin Trudeau and European Commission President Jean-Claude Juncker that CETA would enter into force on September 21).

22 US Customs and Border Protection, "FAST: Free and Secure Trade for Commercial Vehicles", (21 July 2017) [FAST], online: <www.cbp.gov/travel/trusted-traveler-programs/fast>.

23 See letter from US Trade Representative Robert E Lighthizer to Congress (18 May 2017), notifying the administration's intent to initiate negotiations on the "modernization" of NAFTA, online: <<https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf>>.

24 See Andrew Mayeda, "Trump's Trade Chief Says U.S. Won't Force Quick Deal on NAFTA", *Bloomberg* (22 June 2017), online: <www.bloomberg.com/news/articles/2017-06-21/trump-s-trade-chief-says-u-s-won-t-force-quick-deal-on-nafta> (quoting Lighthizer as saying that there is no deadline to reach a deal on NAFTA).

25 See Shawn Donna, "Renegotiating NAFTA: 5 Points to Keep in Mind", *Financial Times* (23 January 2017), online: <www.ft.com/content/4c1594c6-e18d-11e6-8405-9e5580d6e5fb?mhq5j=e1>.

parts, as well as finished vehicles. The sixth part provides commentary and conclusions, including a discussion of possible alternatives to an FTA and of the much-discussed FTA with the United States.

Constraints on Maintaining a Favourable UK-EU Trade Relationship

Continued Single Market Membership

Continued membership in the single market, as May confirmed again in the Florence speech,²⁶ is precluded unless the United Kingdom is willing to accept the jurisdiction of the Commission and the CJEU, continued financial support for the European Union's budget and open immigration (the "Fourth Freedom") from the remaining EU member countries.²⁷ Membership in the existing or a new Customs Union (as with Turkey) with all external UK tariffs determined by the European Union's common external tariff (CET) is not possible if the United Kingdom wishes to be able to negotiate its own trade agreements (including tariff elimination) with the United States, other third parties and the more than 50 nations with which the European Union currently has trade agreements in force.²⁸ Secretary of State for International Trade Liam Fox is currently tasked with negotiating such new bilateral agreements — even though the United Kingdom will not legally be free to do so until Brexit is complete and any transitional arrangements from March 2019 onward have been completed — and is not likely to be enthusiastic about negotiating himself out of a job. A divorce without a trade deal would leave the United Kingdom at the mercy of negotiation of tariff rates (including those relating to agricultural trade) with the WTO

26 May, *supra* note 4.

27 See Chris Giles & Alex Barker, "Hard or soft Brexit? The six scenarios for Britain", *Financial Times* (23 June 2017), online: <www.ft.com/content/52fb4998-573f-11e7-9fed-c19e2700005f?mhq5j=e1> (outlining the options, ranging from remaining in the Single Market to a "divorce" with no new trade relationship).

28 *Ibid* at 9–11.

and its consensus requirements,²⁹ applicable to both third-party trade and trade with the EU27.

Replicating the Norwegian or Swiss Relationships

It does not appear that the Norwegian or Swiss relationships with the European Union could be replicated for the United Kingdom. Norway, as a member of the European Economic Area (EEA), along with Iceland and Liechtenstein, has agreed to follow EU single-market rules and to accept free movement of workers, as well as the other elements of the "Four Freedoms." As the commission notes, "the EEA agreement provides for a high degree of economic integration, common competition rules, rules for state aid and government procurement."³⁰ When changes are made in EU law, Norway and other EEA members must accept and implement them, even though Norway has no input or control over those changes. Norway was also required to become a member of the Schengen area to avoid passport controls with neighbouring Sweden, and to agree to cooperation with EU research, defence and anti-terrorism mechanisms. It is also subject, to some degree, to EU anti-competition laws.³¹ For the United Kingdom, the attractions of membership in the EEA in order to maintain the equivalent of the single market with a different label would appear to pale in comparison with putting the United Kingdom in the position of having to accept EU regulation without any significant participation in the process, and the requirement to accept free movement of workers from the EU27. In other words, it is a complete non-starter, as the prime minister confirmed on September 22.³²

The Swiss relationship with the European Union reflects similar disadvantages for a UK government determined to enhance its "sovereignty," in particular with regard to regulation of immigration. After Switzerland rejected EEA membership in 1992, Switzerland and the European Union agreed on a package of agreements (more than 100 to date)

29 *Agreement Establishing the World Trade Organization*, 15 April 1994, art IX (entered into force 1 January 1995) (calling for decision making by consensus).

30 European Commission, "Countries and Regions: Norway", online: <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/norway/>>.

31 "Norway's deal with the EU still holds lessons for Britain", *Financial Times* (2 February 2017), online: <www.economist.com/news/europe/21716039-sooner-or-later-britain-will-face-trade-offs-between-sovereignty-and-access-norways-deal>.

32 May, *supra* note 5.

covering, *inter alia*, free movement of persons, technical trade barriers, public procurement, agriculture, air and land transport, participation in Schengen, and Swiss financial contributions to economic and social objectives.³³ It is also worth noting that the EU-Swiss relationship may well be altered as a result of a referendum in 2014 in which the Swiss population voted to strictly limit immigration from EU nations. The Swiss Parliament enacted a compromise immigration law at the end of 2016, but it is unclear whether the new law will permit Switzerland to maintain its current access to the Single Market for the longer term.³⁴

Focusing on “Equivalence” under FCAs

In some other sectors, such as financial services, discussion has occurred as to whether “equivalence” in the regulatory structure could be substituted for the current financial regulation of UK financial institutions by the Commission,³⁵ which might provide a basis for maintaining the status quo in future financial services relations, as long as UK banking regulations were considered equivalent to the EU regulations. A similar approach could apply to trade in goods through efforts to maintain equivalent product and safety standards in such sectors as automobiles, chemicals and pharmaceutical products, among others. Thus, for example, the safety standards for autos manufactured in the United Kingdom would be kept identical to those required in the European Union (and any future changes in EU regulations would be promptly incorporated into the separate UK regulations). Unfortunately, common regulatory requirements are only one part of the challenges facing traders between the European Union and the United Kingdom if the relationship is an FTA. The others, as discussed more fully later in the fourth section of this paper, include compliance with ROO, various additional entry documents not required for trade within the Single Market and Customs Union, and the need for border inspections to prevent abuses.

33 European Commission, “Countries and Regions: Switzerland”, online: <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/>>.

34 “Switzerland makes U-turn over EU worker quotas to keep single market access”, *The Guardian* (16 December 2016), online: <www.theguardian.com/world/2016/dec/16/switzerland-u-turn-quotas-on-eu-workers-immigration>.

35 See British Bankers’ Association, “Brexit Quick Brief #4: What is ‘equivalence’ and how does it work?” (2016), online: <www.bba.org.uk/wp-content/uploads/2016/12/webversion-BQB-4-1.pdf>.

That documentation would presumably include certification that the regulatory requirements for goods produced in the United Kingdom and being exported to the European Union were being met.

The FCA paper appears to be an attempt to maintain some aspects of the equivalency of the single market for trade between the United Kingdom and the European Union after the transition period, including participation in the European Union’s CET for goods that enter the United Kingdom and are destined for re-export to the EU27, presumably including parts and components used in UK auto manufacturing. The idea is to accept the European Union’s existing system for such goods, including equivalent border arrangements and expanded security and data sharing,³⁶ and common regulatory requirements such as those relating to auto, chemical and pharmaceutical safety. The United Kingdom would seek, and the European Union would grant, a continued waiver for submission of entry and exit documentation for UK-EU and EU-UK trade. As the FCA paper summarizes:

By mirroring the EU’s customs approach at its external border, we could ensure that all goods entering the EU via the UK have paid the correct EU duties. This would remove the need for the UK and the EU to introduce customs processes between us, so that goods moving between the UK and the EU would be treated as they are now for customs purposes. The UK would also be able to apply its own tariffs and trade policy to UK exports and imports from other countries destined for the UK market, in line with our aspiration for an independent trade policy. We would need to explore with the EU how such an approach would fit with the other elements of our deep and special partnership.³⁷

Goods entering the United Kingdom for consumption in the United Kingdom would thus be treated separately. The advantage of this approach is to permit the United Kingdom to negotiate separate FTAs with third countries, such as the United States, and agree to set tariffs on such trade that are not consistent with the European Union’s CET. However, several potential problems exist with this proposal. First, for the 40 percent of UK exports

36 FCA, *supra* note 3 at 8–9, paras 30, 32, 34.

37 *Ibid* at 10, para 40.

destined for the other EU member states, the regime would not have changed at all; the European Union would still determine tariff levels and standards, just as is the situation today, but without any formal UK input in the process, presumably with all the domestic political sensitivities that affect the alleged loss of sovereignty more broadly. Second, a massive tracing and potential circumvention risk would be created, whereby, for example, an automobile transmission imported into the United Kingdom (duty free), from a third country (duty free), under an FTA would, instead of being used by Nissan to assemble into a vehicle to be sold in the United Kingdom, be incorporated in a vehicle exported to Germany (without paying the CET of about 4.5 percent).

For those complying (UK producers, UK importers and foreign exporters under FTAs), the record-keeping would be complex and costly even if extensively automated.³⁸ ROO might be avoided on UK-EU trade, but the record-keeping requirements to assure no circumvention takes place might well be as onerous as dealing with traditional ROO. And ROO would be required for any FTAs between the United Kingdom and third countries. For all these reasons, it appears that while maintenance of equivalence of UK product standards with current and future EU standards would greatly facilitate the movement of goods from the United Kingdom to the European Union, it would not resolve the need for border documentation and customs inspections. Ultimately, the permanent FTA is much more likely to resemble an FTA than a hybrid FTA and Customs Union, hopefully with an agreed mechanism for speeding border crossings for commercial vehicles, as with FAST and C-TPAT, but without the open border that characterizes intra-EU trade today.

It is also evident from the FCA paper that UK authorities realize their proposals may not be accepted, entirely or even in large part. Thus, it is asserted in the FCA, “The Government believes that the UK and the EU should also jointly consider innovative approaches that could support UK-EU trade outside of a customs union arrangement, while still removing the need for customs processes

at the border.”³⁹ In other words, even if the hybrid Customs Union and FTA approach suggested by the United Kingdom is not accepted, the parties should find a way to avoid (or at least minimize) customs oversight at the border. This statement recognizes the extreme desirability of avoiding the high cost of customs documentations for stakeholders, even if realistically, it may be difficult or impossible to achieve. It also suggests implicitly that there may be other variations. For example, under a permanent trade agreement, the parties might agree to maintain operations under the EU Customs Union for the auto and auto parts sector alone, using that sector as a test that could be broadened in a future agreement.

Costs and Complexities of an FTA Relationship

Even assuming that a successful FTA can be negotiated and concluded by the United Kingdom and the European Union, importing and exporting will be significantly changed. While manufactured goods should still trade duty free and tariff free, the documentary and logistical requirements for such trade are likely to become more time consuming and complex, including entry delays at Le Havre at least initially, even if the United Kingdom and the European Union are able to agree on innovative mechanisms for streamlining the clearance process. Also, despite the FCA proposal, it is difficult to envision such an arrangement without the United Kingdom being subject to some sort of common legal jurisdiction shared by Brussels and the United Kingdom over standards and perhaps more broadly.⁴⁰

If an FTA can be achieved in the negotiations, major aspects include the following:

- Burdensome but necessary ROO, other documentary requirements such as customs declarations, border controls and delays for traders and vehicles, even for goods that may be subject to a hybrid Customs Union, may threaten regional supply chains. The burden will fall most heavily on SMEs, since large multinational enterprises (MNEs) have the internal staff to deal with such demands.

³⁸ The FCA paper argues, perhaps over-optimistically, that a new Customs Declaration Service being implemented before Brexit “will be compliant with The EU’s Union Customs Code to ensure continuity for business and will provide modern, digital customs technology, which will ensure HMRC [Her Majesty’s Revenue & Customs] has the flexibility needed to deal with the outcome of the negotiations with the EU.” See FCA, *supra* note 3 at 7, para 26.

³⁹ *Ibid* at 9, para 38.

⁴⁰ James Blitz, “Theresa May’s cabinet starts to split over Brexit”, *Financial Times* (28 June 2017), online: <www.ft.com/content/db64f4ba-5b49-11e7-9bc8-8055f264aa8b>.

- The desirability of a system similar to FAST and C-TPAT, “a commercial clearance program for known low-risk shipments entering the United States from Canada and Mexico. Initiated after 9/11, this innovative trusted traveler/trusted shipper program allows expedited processing for commercial carriers who have completed background checks and fulfill certain eligibility requirements.”⁴¹
 - Potential difficulties faced by UK exports because of diverging product standards, in particular for autos, drugs and chemicals, because such standards will need to be addressed in the future under UK legislation rather than on the basis of common EU regulations and directives, unless the United Kingdom creates a system whereby new EU regulations are automatically incorporated into UK domestic law (without any formal UK participation in the drafting process in Brussels).
 - The withdrawal of the United Kingdom from the Single Market and Customs Union (even with a hybrid system in place) means loss of free trade benefits with the more than 60 countries covered by existing EU FTAs, until they are replaced by new bilateral or multilateral FTAs or their equivalent (which, by some estimates, could take 10 to 20 years to put into place).
 - UK manufacturers face a loss of protection currently afforded by dozens of EU antidumping and countervailing (AD/CVD) orders, unless and until new UK AD/CVD orders are implemented after WTO-compliant investigations are initiated and concluded under new UK laws and regulations. This, in turn, will require the creation of a new expert administrative unit with dozens or hundreds of expert government lawyers and investigators.
 - Coverage of trade in services will almost certainly be less comprehensive than membership in the EU Single Market, leading to loss of “passporting” and potential difficulties
- in maintaining London as the principal clearing house for Euro-denominated transactions, and the almost certain loss of some financial services jobs to Amsterdam, Dublin, Frankfurt, Luxembourg or Paris.⁴² Free movement of professionals, as well as students, may also be restricted, with the former disadvantaging MNEs based in the European Union, and the latter adversely affecting the United Kingdom’s many universities that encourage international students and engage in joint research with EU institutions of higher education.
- Shifting administration of thousands of laws and regulations from the European Commission in Brussels to the United Kingdom will require a dramatic increase in the necessary UK bureaucracy in regulatory areas now covered by the European Union, including a need for several hundred experienced trade agreement negotiators, not only for Brexit, but for future UK bilateral agreements with current EU FTA partners, as well as possible new ones, such as the United States and Japan.⁴³

41 US Customs and Border Protection, “FAST: Free and Secure Trade for Commercial Vehicles” (21 July 2017), online: <www.cbp.gov/travel/trusted-traveler-programs/fast>. The European Union is in the process of streamlining trade transactions through a “new computerized transit system,” designed for movement of goods within the European Union, which could conceivably be used in trade between the European Union and the United Kingdom, even if the latter is no longer part of the Single Market and the Customs Union. See Langdon Systems, “New Computerised Transit System”, online: <www.langdonsystems.com/ncts_overview.asp>. See FAST, *supra* note 22.

42 See “Goldman Sachs to Move Hundreds of Staff Out of London Due to Brexit”, *The Guardian* (21 March 2017), online: <www.theguardian.com/business/2017/mar/21/goldman-sachs-staff-london-brexit-frankfurt-paris>. See also Claire Jones & Katie Martin, “ECB in drive to control post-Brexit euro clearing”, *Financial Times* (23 June 2017), online: <www.ft.com/content/8888e560-57e5-11e7-9fed-c19e2700005f>.

43 See e.g. Stefan Wagstyl & George Parker, “Cabinet Tension on Brexit Breaks Out into the Open”, *Financial Times* (27 June 2017), online: <www.ft.com/content/db64f4ba-5b49-11e7-9bc8-8055f264aa8b>.

GATT Rules on Customs Unions and FTAs

Perhaps the most significant exception to the MFN principle of the General Agreement on Tariffs and Trade (GATT) is for FTAs and Customs Unions. Those arrangements that meet the strict (but poorly enforced) requirements of GATT article XXIV may deviate from MFN (non-discriminatory) treatment and apply preferential tariffs (usually zero) to other members of the FTA or Customs Union. In both FTAs and Customs Unions, the parties are required to eliminate internal tariffs on substantially all trade within a reasonable time (usually 10 years), to notify the GATT's Committee on Regional Trade Agreements of the negotiations and their results, and to assure that in the process of forming a Customs Union or FTA, "the duties and other regulations of commerce" not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area.⁴⁴

The major difference between a Customs Union, such as the European Union, and an FTA, such as NAFTA, is that the Customs Union applies a CET to all imports of a product from outside the region, regardless of which member country makes the importation, whereas in NAFTA, each of the three parties is permitted to maintain its own tariff levels on imports from third countries. Without the CET, a good could be imported into a low-tariff member country (for example, an auto imported into the United States paying a 2.5 percent tariff) and transshipped to a higher-tariff country (for example, Mexico, with a tariff of six percent or higher). The only widely accepted method of discouraging transshipment among member countries in the absence of a common external tariff is to impose ROO, so that the export of a foreign auto imported into the United States from outside the region and transshipped to Mexico would be subject to payment of MFN tariffs upon entering Mexico.

It can also be seen that the idea of one member of a traditional common market negotiating a trade agreement with a third country is not feasible, unless the bifurcated FCA approach is adopted. For

example, if the United Kingdom were to remain in the existing Customs Union, it could not negotiate a bilateral FTA with the United States because the United Kingdom, still bound by the CET, could not lower tariffs on imports from the United States, such as automobiles, which are currently subject to the European Union's 10 percent CET. In other words, in the area of tariffs, the United Kingdom would be legally incapable of agreeing to reductions in FTA negotiations. Even if the hybrid system were to be accepted and implemented by the European Union, the United Kingdom could offer its own lower tariffs to FTA partners only for goods destined for the United Kingdom, with a prohibition against transshipment and the need to trace separately components to be used in assembling finished products destined for the UK market and those destined for EU countries.

Whether third countries would be willing to conclude FTAs with the United Kingdom that provided clear access only to the UK market, with requirements for re-export of parts and components used for UK manufacturing being subject to various and possibly onerous non-circumvention requirements, remains to be seen.

All this being said, FTAs and Customs Unions have historically provided the opportunity (although not necessarily success in the execution) of eliminating tariff and non-tariff barriers among willing parties, with FTAs accounting for about 80 percent of preferential trade agreements under GATT article XXIV, Customs Unions for about 10 percent⁴⁵ and 10 percent under special rules for agreements solely among developing nations.⁴⁶ Thus, for the European Union and the United Kingdom, the challenge is both in the unwinding of the current relationship and moving in a sensible manner toward the creation of a new relationship that, in principle, is within the scope of that permitted in GATT article XXIV, along with a focus on simplifying customs and regulatory documentation.

⁴⁴ *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, art XXIV:5 (entered into force 1 January 1948) [GATT 1947].

⁴⁵ WTO, "List of all RTAs [regional trade agreements]" (27 June 2017), online: <<http://rtais.wto.org/UI/PublicAllRTAList.aspx>>.

⁴⁶ WTO, "Differential and more favourable treatment reciprocity and fuller participation of developing countries" (28 November 1979), online: <www.wto.org/english/docs_e/legal_e/enabling1979_e.htm>.

Key Lessons from NAFTA Free Trade without Open Borders

NAFTA is one of the most successful FTAs ever negotiated in terms of the trade generated and the development of supply chains in North America that permit manufacturers there to compete with the European Union and Asia, where developed-country producers have easy access to lower labour-cost manufacturing for labour-intensive operations in neighbouring countries. Despite much criticism, NAFTA has led to significant advantages for all three parties, including:

- total goods and services trade approaches US\$1.3 trillion annually;
- North America has one of the most efficient automotive production sectors in the world;
- extensive trade in agricultural products is conducted among the parties, with Canada (US\$21.8 billion) and Mexico (US\$18.3 billion) representing the United States' first and third most important export destinations, respectively; and
- exports to Mexico alone are estimated to be responsible for 4.9 million US jobs.⁴⁷

The areas of legal and practical experience in NAFTA that are most relevant to a UK-EU FTA are in ROO and other customs laws and procedures, including the common customs regulations required under Chapter 5 of NAFTA, and the practical simplifications for cross-border transit, such as the FAST and C-TPAT programs implemented by US Customs and Border Protection in close cooperation with Mexico and Canada.⁴⁸ Under NAFTA, such rules⁴⁹ have been adopted, along with the elimination of tariffs and

non-tariff barriers on all originating goods.⁵⁰ All manufactured goods have traded duty free since January 1, 2008 (and most well before that date), whereas in the past, many of them were subject to each party's MFN tariffs, currently averaging approximately 3.5 percent for the United States, 4.2 percent for Canada and 7.5 percent applied rate for Mexico (more than 30 percent for bound tariffs).⁵¹ However, such trade is subject to border inspection, even where such inspections are streamlined through the use of the latest technology.

This situation is in direct contrast to current trade relations between the European Union and the United Kingdom, with duty-free, tariff-free trade, without ROO and with free physical movement of goods within the Single Market. This will most likely be replaced with a trade relationship that requires ROO and border inspections of many or most shipments, even if those border requirements can be reduced by innovative electronic mechanisms agreed by the European Union and the United Kingdom, and by UK adoption of EU product standards for exports to the European Union.

Under NAFTA article 401, goods are considered to possess NAFTA origin in four ways:

- goods wholly obtained or produced in the NAFTA region;
- goods produced in the NAFTA region wholly from originating materials;
- goods meeting the Annex 401 origin rules; and
- unassembled goods and goods classified with their parts that do not meet Annex 401 ROO, but that contain 60 percent regional value content using the transaction method, or 50 percent regional value using the net cost method.

Typically, the rules provide either for a change in tariff heading from a harmonized tariff

47 See Melina Kolb & Cathleen Cimino-Isaacs, "A Guide to Renegotiating NAFTA" (19 June 2017), online: Peterson Institute for International Economics <<https://piie.com/blogs/trade-investment-policy-watch/guide-renegotiating-nafta>> (providing statistics on trade volumes, employment and other factors).

48 FAST, *supra* note 22.

49 See NAFTA, *supra* note 19, c 4–5, especially art 401.

50 *Ibid*, art 302, Annex 302.

51 See Mary Amiti & Carolyn Freund, "US Exporters Could Face High Tariffs without NAFTA" (18 April 2017), online: Peterson Institute for International Economics <<https://piie.com/blogs/trade-investment-policy-watch/us-exporters-could-face-high-tariffs-without-nafta>> (reporting that Mexican WTO-bound tariff rates average 35 percent, with applied rates averaging 7.4 percent compared to the US average of 3.7 percent).

system (HTS)⁵² category applicable to parts and components to one applicable to the finished product, or to regional value content (usually but not always 60 percent using the “top-down” transaction value method, or 50 percent using the “bottom up” net cost method).⁵³ However, the only means to determine reliably the actual ROO applicable to each of the more than 6,000 individual goods listed in the HTS is to consult the voluminous NAFTA Annex 401, because the actual ROO vary considerably.

These calculations, usually focusing on the value of the non-originating goods that are part of the value of the product (for example, non-originating goods may be no more than 40 percent of the transaction value of the good), are complicated by the fact that component prices may vary from time to time because of cost increases or decreases and exchange rate fluctuations. In the Eurozone, this problem is minimized, but in trade among the EU member countries, the exchange rates between the euro, other EU currencies such as the Czech crown and the British pound sterling will in some circumstances complicate ROO calculations, in particular where the aggregate originating parts and components are just above or just below the regional value content requirement, whether 50 percent, 60 percent, 62.5 percent (as in NAFTA for autos) or some other benchmark.

The enforcement of the ROO is governed in detail in Chapter 5 of NAFTA, including certificate of origin requirements; entry declarations based on the certificate of origin; the exporter’s obligations relating to preparation of certificates of origin; retention of records relating to origin; and verification procedures for confirming that certificates of origin justifying duty-free importation are accurate.⁵⁴ Each party is also required to provide advance rulings to exporters and importers as to whether a particular good will meet NAFTA ROO requirements for duty-free trade.⁵⁵ It is also significant that at the time

of its negotiation (1994), NAFTA provided that “the Parties shall establish, and implement through their respective laws or regulations by January 1, 1994, Uniform Regulations regarding the interpretation, application and administration of Chapter Four, this Chapter and other matters as may be agreed by the Parties.”⁵⁶

This system is similar in many respects to that incorporated into CETA,⁵⁷ which is said to follow standard EU product-specific origin rules, except for autos, textiles, fish and some agricultural products.⁵⁸ (Such product sectors are also subject to special treatment under NAFTA.)⁵⁹ In contrast to NAFTA’s regional value content calculations, CETA substitutes the concept of “sufficient production” occurring in the country alleging origin, but conceptually the approaches seem similar, and both are subject to product-by-product ROO as the basis for actual determinations.⁶⁰

NAFTA experience indicates that trade that is subject to the requirements of ROO can be managed economically, particularly for the major manufacturers that can systematically complete the required analyses and documentation, qualify for FAST and C-TPAT and have funds available for retaining customs lawyers and consultants, a process that adds an estimated two to three percent to landed product costs. One study alleges that NAFTA zero-tariff benefits for Mexico have been largely offset by the costs of complying with the NAFTA ROO.⁶¹ With the average US MFN tariffs only three to four percent *ad valorem*, this conclusion does not seem unreasonable, even if a hybrid program, such as what the FCA paper advocates, might reduce these costs somewhat through self-calculation of customs duties by the exporter, as is the case in the United States, as well as greater automation and better use

52 World Customs Organization, “HS Convention”, online: <www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx>. The harmonized system (HS) provides a uniform product classification system used by almost all the world’s trading nations, including the 164 members of the WTO.

53 NAFTA, *supra* note 19, art 401; see also United States International Trade Commission, “Rules of Origin: Basic Principles,” online: <www.usitc.gov/elearning/hts/media/2017/RulesofOrigina.pdf>.

54 *Ibid*, arts 501, 502, 504, 505, 506.

55 *Ibid*, art 509.

56 *Ibid*, art 511.

57 Global Affairs Canada, “Protocol on rules of origin and origin procedures”, online: <www.international.gc.ca/trade-commerce/assets/pdfs/ceta-rm-04-eng.pdf>.

58 European Commission, “CETA: Summary of the final negotiating results” at 6–7, online: <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf>.

59 See e.g. NAFTA, *supra* note 19, Annexes 300-A (autos), 300-B (textiles and clothing).

60 Global Affairs Canada, *supra* note 57, Annex 5.

61 Olivier Cadot et al, “Assessing the Effect of NAFTA’s Rules of Origin” (June 2002) at 20, online: <http://web.worldbank.org/archive/website00955A/WEB/PDF/CADOT_RU.PDF>.

of data, but with a more extensive mechanism to enforce anti-circumvention rules.⁶²

Still, where preferences are sought and ROO must be complied with, these costs will be passed on to customers, or where competition precludes this, will reduce profitability or even force producers to close. The burdens of ROO are most significant for SMEs, which often lack the resources for expert lawyers and consultants, and for start-up firms that are not subject to FAST and C-TPAT (or their UK equivalent, if available). In both situations, the additional costs of exporting resulting from ROO compliance may discourage such enterprises from exporting.⁶³ Experience under NAFTA also suggests that where US tariffs are under three percent or so, small importers are likely to forego duty-free treatment because the costs of complying are greater than the benefits of the tariff reductions.⁶⁴

The demands of annually producing certificates of origin (legally required under NAFTA by the manufacturer),⁶⁵ and the various other documentation demanded for international trade transactions for presentation at the border crossing or retention by the importer, along with the record-keeping costs, may also contribute to border delays under NAFTA for people and goods. These have generally been avoided in the European Union under the Single Market rules (goods) and the Schengen Agreement (people),⁶⁶ whereby borders have been abolished (although not fully for the United Kingdom and Ireland), avoiding a significant cost and inconvenience for traders. Preserving this openness as much as possible is the objective of the FCA hybrid approach, but as discussed throughout this article, anything approaching the status quo will be very difficult to achieve. Of course, additional challenges exist and have caused delays on the US-Mexico border, including illegal immigration and drug

trade, along with inadequate staffing of customs ports of entry.⁶⁷ Since the 9/11 attacks, terrorism concerns have further delayed border crossings, not only between Mexico and the United States, but between the United States and Canada as well.⁶⁸

It may be hoped that the future UK-EU trade arrangements could avoid some of the excesses of NAFTA ROO, which cover more than 150 pages of text.⁶⁹ As noted earlier, complex rules impose a disproportionate burden on SME exporters and importers, who may be encouraged to forego the benefits of duty-free trade — benefits that they currently enjoy while the United Kingdom is a member of the European Union — with the likely results of lower volumes of exports and imports and reduced employment. It may be that the more modern CETA rules can be adapted to UK-EU trade under an FTA. However, the fact that the CETA rules protocol comprises 229 pages, including the product-specific Annex 5, is an indication of the additional complications to which trade between the EU27 and the United Kingdom will be subject under an FTA.

Some experts on the NAFTA ROO have urged that in the context of the NAFTA renegotiation, the existing rules be greatly simplified, with the current complex product-by-product rules abandoned in favour of a 40 or 50 percent regional value content approach.⁷⁰ Incorporating a *de minimis* threshold, whereby low-tariff products do not have to be certified for ROO compliance, would also reduce compliance costs, in particular for SME importers and exporters.⁷¹ It would be productive for both UK and EU traders to simplify ROO where they are required, and to focus efforts to streamline the clearance process with common electronic customs procedures throughout the region. Border congestion is, after all, not solely

62 FCA, *supra* note 3 at 9–10, paras 35, 41.

63 See Caroline Freund, “Streamlining Rules of Origin in NAFTA” in C Fred Bergsten & Monica de Bolle, eds, *A Path Forward for NAFTA*, online: Peterson Institute for International Economics <<https://piiie.com/publications/piie-briefings/path-forward-nafta>> at 113, 119.

64 Cadot et al, *supra* note 61 at 2. Inaccurate claims for duty-free treatment could subject the importer of record after audit to payment of the additional duties, interest on the duties since the time of original importation, and negligence or more severe penalties for failing to submit accurate entry documentation. See 19 USC § 1592.

65 NAFTA, *supra* note 19, art 501.

66 See EUR-Lex, “The Schengen Area and Cooperation”, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133020>>.

67 See Sandra Dibble, “For regular crossers of the U.S.-Mexico border, waiting is part of the routine”, *Los Angeles Times* (16 July 2016), online: <www.latimes.com/local/lanow/la-me-border-wait-20160714-snap-story.html> (reporting on border delays and a needed expansion of the San Ysidro crossing to be completed in 2019).

68 *Ibid.* Dibble writes, “since its creation in 2003 under the Department of Homeland Security, the agency’s No. 1 task has been securing the U.S. border from potential terrorists.”

69 See Harmonized Tariff Schedule of the United States (2017), online: United States International Trade Commission <<https://hts.usitc.gov/current/>> (incorporating NAFTA and other FTA ROO).

70 See Freund, *supra* note 63 at 123 (suggesting desired improvements in the current NAFTA rules).

71 *Ibid.*

a product of complex regulations. Transit times can be reduced through maintaining additional customs officials on duty and conducting security inspections electronically, as at the NAFTA member countries' borders.⁷² It remains unclear why the US authorities have been reluctant to build and equip border crossings that would further reduce wait times. This objective is primarily a function of personnel and funds.

Most major EU and UK exporters and importers are already coping with ROO in much of their trade with non-EU member states, since such rules are applicable in the majority of FTAs between the European Union and other nations,⁷³ as they will be under CETA as discussed above. As the EU Commission notes, "If you are intending to import under a preferential regime into the EU a product from a beneficiary or partner country, it is not enough that the product is exported from that country. The product needs to be originating in that country. The rules of origin will tell you if indeed your product may be considered originating in that concrete country and therefore receive the preference."⁷⁴

Thus, many traders in the other EU countries and the United Kingdom already have some, perhaps considerable, experience in meeting ROO requirements, even if currently, those rules are not applicable to the largest volume of their trade, for example, UK trade with the European Union. The problem may be one of magnitude, rather than meeting new and different legal concepts, and UK exporters that sell entirely in other EU member nations will not have dealt with ROO in the past. As well, these skills should be relatively easy to adapt to any new and streamlined procedures that arise from UK-EU negotiations.

72 See FAST, *supra* note 22.

73 See European Commission, "Rules of Origin," *Export Helpdesk*, online: <http://exporthelp.europa.eu/thdapp/display.htm?page=cd/cd_RulesOfOrigin.html&docType=main&languageId=EN>.

74 *Ibid.*

A Key Example: The Automotive Industry

The automotive industry (finished vehicles and parts) is the single most important manufacturing industry in North America, accounting for an estimated 25 percent of total merchandise trade within NAFTA.⁷⁵ The large volume is partially explained by the fact that major parts and subassemblies may cross a national border as many as eight times before they are finally assembled into a finished automobile.⁷⁶ As well, automobiles produced in Mexico typically incorporate a US value content of about 40 percent.⁷⁷

In the United Kingdom, the automotive industry and automotive trade are also economically significant, with an estimated 77 percent of the vehicles produced in the United Kingdom exported, and a net positive trade balance (exports over imports) of £70 million, with at least 33 vehicle and engine manufacturing facilities located in the United Kingdom.⁷⁸ In 2013, Nissan produced more than 500,000 cars in its Sutherland plant, of which 71 percent were exported to Europe (including Russia).⁷⁹ UK automakers directly source about 35 percent of components from the European Union, not counting the parts suppliers' sourcing,⁸⁰ but may seek to obtain more parts at home after Brexit,⁸¹ in particular if components from the other EU members do not enter the United Kingdom duty free.

75 United States Census Bureau, "U.S. Trade in Motor Vehicles and Parts by Selected Countries" (2016), online: <www.census.gov/foreign-trade/Press-Release/2016pr/12/exh18.pdf> (showing total motor vehicle trade between Canada and the United States, and Mexico and the United States at approximately US\$263 billion).

76 Center for Automotive Research, "NAFTA Briefing: Trade benefits to the automotive industry and potential consequences of withdrawal from the agreement" (January 2017), online: <www.cargroup.org/wp-content/uploads/2017/01/nafta_briefing_january_2017_public_version-final.pdf>.

77 *Ibid* at 7-8.

78 KPMG, "The UK Automotive Industry and the EU" (April 2014), online: <www.smmf.co.uk/wp-content/uploads/sites/2/SMMT-KPMG-EU-Report.pdf> at 1 (2013 data).

79 *Ibid* at 5.

80 *Ibid* at 6.

81 See Peter Campbell & Michael Pooler, "Brexit triggers a great car parts race for UK auto industry", *Financial Times* (30 July 2017), online: <www.ft.com/content/b56d0936-6ae0-11e7-bfeb-33fe0c5b7eaa>.

In both jurisdictions, trade in autos and auto parts is integrated, with well-established supply chains that typically permit some version of “just in time” manufacturing, despite border delays in North America. NAFTA replaced a situation whereby, in 1994, almost all auto and auto parts trade was already duty free between the United States and Canada under the 1965 United States-Canada Automotive Products Agreement,⁸² but was minimal between Canada and the United States with Mexico, because of Mexico’s prohibitively high tariffs; the current five to six percent applied Mexican MFN tariff is relatively recent. (Canada’s MFN duties on autos are 6.1 percent.)

NAFTA achieved growth in its auto and auto parts industry in significant part through strict ROO, where duty-free trade in finished autos occurs only when the North American (regional value) content is 62.5 percent, based on calculations relating to the net cost of the vehicle. Parts and components of major assemblies, such as engines and transmissions, are subject to further tracing with respect to subassembly origin.⁸³ These rules have strongly encouraged the sourcing of parts and components within North America, as noted above, even when they are available at lower cost elsewhere, to meet the 62.5 percent regional value content rule, as well as to facilitate shorter supply chains than those that are possible with more extensive reliance on Asian sources. However, studies have shown that because of generally low tariffs for US imports of components for transportation equipment, an estimated 23 percent of such trade is conducted under US MFN tariffs rather than NAFTA preferential tariffs,⁸⁴ presumably because the benefits from duty-free treatment under NAFTA are more than offset by the administrative costs of ROO compliance.

A UK-EU FTA would likely provide for duty-free, quota-free trade in autos and auto parts, based on an ROO that requires a significant percentage of total vehicle value to be regional (UK plus EU origin), even if the costs of complying with ROO are added. Otherwise, UK-EU trade in autos would be subject to the current prohibitive 10 percent *ad valorem* duty (approximately 4.5 percent for components).⁸⁵ The precise regional content would have to be agreed upon; in CETA, 50 percent regional content (increasing to 55 percent after seven years) is the established rule,⁸⁶ which could provide some guidance for a UK-EU negotiation. A more stringent rule of origin, such as the NAFTA 62.5 percent standard, would not likely be favoured by auto manufacturers in either the EU27 or the United Kingdom. It seems reasonable to assume that the negotiations would aim for preservation of the existing regional content of autos traded within the European Union as resulting from current MFN tariffs, so that autos assembled in the United Kingdom for export to the European Union would not be able to rely more extensively on less expensive Asian parts than has been the case pre-Brexit.

Clearly, the best solution, if the parties can agree, would be to maintain the equivalent of a Customs Union between the other EU members and the United Kingdom for auto and auto component trade, even if it means that the United Kingdom will continue to be governed by EU standards and CJEU jurisdiction in that sector (and even if other sectors are subject to traditional FTA ROO). It may be that even if the hybrid approach is unacceptable for all originating trade between the EU27 and the United Kingdom, the mutual interest in the European auto and auto parts sector would make special Customs Union treatment of this sector politically acceptable and worth the complexities of dealing with potential circumvention problems.

82 *United States-Canada Automotive Products Agreement*, 16 January 1965, HR 6960 at 34, online: <www.stewartlaw.com/Content/Documents/HR%20-%20United%20States-Canada%20Automotive%20Products%20Agreement.pdf>.

83 *NAFTA*, *supra* note 19, Annex 300-A.

84 Freund, *supra* note 63 at 121.

85 Campbell & Pooler, *supra* note 81 at 1.

86 See Livingston, “A Closer Look at CETA, Part 2: Automotive Sector to Feel CETA’s Impact”, online: <www.livingstonintl.com/our-experts-speak/closer-look-ceta-part-2-automotive-sector-feel-cetas-impact/> (discussing the operation of automotive ROO in CETA).

Whether the status quo in the sector would be supported by central European auto producing members such as the Czech Republic, Hungary, Poland and Slovakia (where a new Jaguar/Land Rover plant is expected to open in Bratislava in 2018) is uncertain. Their governments may welcome any new trading relationship with the United Kingdom that makes it more expensive for multinational auto companies to produce in and export from the United Kingdom, as such restrictions (along with the lower wages in Eastern Europe) could encourage transfer of manufacturing facilities from the United Kingdom to central Europe.⁸⁷

Commentary, Conclusions and Recommendations

The Most Probable Option: A UK-EU FTA

For the reasons discussed earlier, unless there is a major shift in UK negotiating objectives toward more concern for preserving businesses and away from immigration control and greater sovereignty that independence from the CJEU would bring, regardless of cost, neither the Norway/EEA approach nor a Customs Union is feasible under these circumstances. Thus, the only remaining option for a future permanent UK-EU trading relationship is an FTA. An FTA would provide a continuation of duty-free, quota-free trade in almost all manufactured goods that are considered to originate in the European Union or the United Kingdom, but with the additional requirements (compared to the Single Market) of an FTA, including ROO, customs declarations and other border controls, even if some streamlining of border procedures is achievable as advocated in the FCA paper.⁸⁸

The concept of future customs arrangements combining a new Customs Union for EU-UK trade and an FTA for UK trade with third countries is, on the surface, very attractive, but implementation in such a manner as to avoid border controls and circumvention seems highly problematic. The extent of damage an FTA would do to trade in goods compared to current UK membership in the Single Market and Customs Union depends on the terms, in particular the agreed ROO and documentary requirements, and the extent to which the United Kingdom and European Union can agree on adequate border inspection facilities, and a very high level of automation, maintenance of common product standards through equivalency and day-to-day cooperation.

Even a favourable agreement would entail considerable costs compared to current trade within the Single Market and the Customs Union. As discussed earlier, unless the EU Customs Union is extended indefinitely, goods will be required to demonstrate that the traded goods meet the applicable ROO, with accompanying costs of analysis and document production, as has been the case for intra-NAFTA trade since 1994. These requirements would be accompanied by rules and regulations to enforce and monitor compliance, including border inspections upon entry of goods and periodic audits by the various customs services.⁸⁹ These burdens are probably similar to those that are currently applicable for goods entering from countries that are parties to FTAs with the European Union.

Such rules are manageable, and both governments and businesses that trade outside the European Union are familiar with them; the difference is that they would apply to virtually all trade between the EU27 and the United Kingdom, while at present, they apply to almost none of it. Since approximately 44 percent of the United Kingdom's trade is with the EU nations, and eight to 18 percent of the European Union's trade is with the United Kingdom,⁹⁰ the added administrative burdens, no doubt amounting to billions of euros and pounds sterling in the aggregate, would be mostly passed on to consumers in both jurisdictions.

87 See Neil Buckley, "Opportunities and risks for investors in central and east Europe", *Financial Times* (7 May 2017) at 4, 7, 8, 9, online: <www.ft.com/content/4248a712-07da-11e7-ac5a-903b21361b43> (reviewing the attractiveness of Eastern European EU members for investment, in particular in the auto industry).

88 FCA, *supra* note 3 at 7, para 27.

89 See NAFTA, *supra* note 19, arts 505 (record keeping), 506 (origin verifications).

90 Full Fact, "Everything you might want to know about the UK's trade with the EU" (15 August 2017), online: <<https://fullfact.org/europe/uk-eu-trade/>>.

The significance of the additional costs will likely vary considerably among sectors and enterprises. Yet, it is reasonable to assume that some enterprises will either decide it is no longer feasible to produce goods for the EU market in the United Kingdom (and move some of their operations to EU member countries or forego such trade completely), or cease operations. The scope of such changes cannot be predicted now. It will likely take at least several years after the new trading relationships are in place to gauge the impact of the shift from Single Market/Customs Union to FTA, but in some sectors, such as autos, it will be anything but negligible.

Benefits and Costs of Remaining in the Customs Union

Even though it was rejected again by May in her Florence speech,⁹¹ the possibility exists that during the initial two years of divorce negotiations, where the future trade relationship will also be on the table, UK officials will decide — perhaps under strong pressure from members of Parliament and an energized business lobby — that the adverse economic impact on enterprises and workers is simply too much to bear.⁹² (Some EU members, in particular those who trade extensively with the United Kingdom, such as Germany, Spain, Belgium, the Netherlands and Ireland,⁹³ may well agree.) The FCA is clearly the first formal recognition by the UK government of the magnitude of the problem that would be created by UK withdrawal from the EU Customs Union, even if the hybrid system proposed may not be acceptable to the European Union, and in any event, might not significantly reduce the additional costs of UK-EU trade.

Should the European Union reject the FCA proposals, or should both parties decide that they are unworkable, UK participation in the EU Customs Union (but not the Single Market) is likely to be reconsidered, even though the FCA paper asserts, “As we leave the EU we will also leave the EU Customs Union.”⁹⁴ Customs Union participation (probably along the lines of the EU-Turkish Customs

Union⁹⁵) would have the advantages of *not* requiring the United Kingdom to accept the European Union’s four freedoms (including freedom of intra-regional immigration) or the full jurisdiction of the CJEU, and would greatly facilitate limited document export and import transactions. Issues of continued major financial contributions to the European Union, and continued operation under EU regulations and directives (including those relating to product standards) would have to be negotiated in a context where it is increasingly obvious that the failure of UK laws to mirror EU legislation could jeopardize some trade. For the United Kingdom, the only major downside to maintaining membership in the EU Customs Union would be the inability of the United Kingdom to attempt to conclude bilateral FTAs with third countries in the future.

Politically, the legal authority of the United Kingdom to conclude separate FTAs is considered significant. Fox would be principally responsible for negotiating such agreements; he would be out of a job if the future UK-EU relationship is a Customs Union rather than an FTA. Providing Fox with a different portfolio would seem a much better solution than insisting on a 10- to 20-year odyssey of negotiating bilateral FTAs with dozens of countries. Still, while such negotiations could not formally begin until Brexit is complete, it appears that Fox has informally discussed a future FTA with US officials and perhaps others as well.⁹⁶ The next subsection assesses the practical benefits (or lack thereof) of such third-party FTAs.

Negotiation of New FTAs with Current EU Partners and with the United States

If the result of the UK-EU negotiations is a permanent FTA, or a hybrid agreement that leaves the United Kingdom free to negotiate FTAs governing trade between itself and other countries, the United Kingdom will be required, on an urgent basis, to negotiate FTAs with the more than 50

91 May, *supra* note 4.

92 See Giles & Barker, *supra* note 27 at 4–14 (setting out the various hard and soft Brexit choices, from the most to the least disruptive).

93 Full Fact, *supra* note 90.

94 FCA, *supra* note 3 at 6, para 22.

95 *Agreement establishing an Association between the European Economic Community and Turkey*, 12 September 1963, No L 361/29 (entered into force 1 December 1964), online: <http://eur-lex.europa.eu/resource.html?uri=cellar:f8e2f9f4-75c8-4f62-ae3f-b86ca5842eee.0008.02/DOC_2&format=PDF>.

96 See Darren Hunt, “Liam Fox laughs off allegations he’s ‘breaking the law’ discussing future trade in the US”, *Express* (20 June 2017), online: <www.express.co.uk/news/uk/818916/Brexit-latest-news-Liam-Fox-future-trade-US-Donald-Trump-European-Union-David-Davis> (where Fox defends his informal discussions).

countries that have current agreements with the European Union. Until those agreements can be concluded, MFN tariffs will be applicable to British exports in place of the lower or zero tariffs applicable under EU FTAs, putting British exporters at a significant disadvantage, given that MFN tariffs applied by developing nations are generally higher than those among developed nations.⁹⁷

Still, much attention has focused instead on a new agreement with the United States.⁹⁸ Politically, there are incentives on both sides to move quickly. May and Fox both seem eager to demonstrate that the United Kingdom, after detachment from the European Union, can successfully chart its own international economic policy through FTAs. In the United States, President Donald Trump is strongly committed to bilateral rather than multilateral FTAs, and “better” ones that are more beneficial to US interests.⁹⁹ After more than two centuries, the close British-US political, cultural and historical relationship remains almost sacred for many American and British citizens. However, while no one in the United States reasonably fears that a US-UK FTA would result in a significant shift of jobs, there are still many in both jurisdictions who resist all new trade liberalization.

As an example of the complexities of such negotiations, Fox appears to have been blindsided on his visit to Washington in July 2017. There, the principal topic of discussion was whether the United Kingdom, under an FTA with the United States, would be prepared to accept US chicken that had been subjected to a chlorinated wash process, currently banned by the European Union. While Fox suggested that the United Kingdom would be open to the prospect of allowing the entry of such chicken, Secretary of State for

Environment, Food and Rural Affairs Michael Gove quickly dismissed the possibility.¹⁰⁰

Fox and others who are strongly interested in the prospects of a future US-UK FTA should be paying close attention to the NAFTA renegotiation that began in August. It may provide signals as to what a Trump administration is seeking with regard to restricting current and future US investment in Mexico and, in particular, treatment of automotive trade within North America. As well, many suspect that US negotiators will try to expand already strong opportunities for US agricultural trade with Mexico (which is already relatively open) and Canada (which is restricted in such sectors as dairy and wheat), as well as different rules on sanitary and phytosanitary measures.¹⁰¹ Similar efforts should be expected in a future US-UK FTA negotiation.

Unrelated factors could also complicate the possibility of early negotiations. Potential political complications exist for May in establishing closer US-UK relations, given concerns regarding US policies that are considered to weaken NATO¹⁰² and the Trump administration’s rejection of the Paris Agreement on climate change,¹⁰³ as well as the president’s general unpopularity in the United Kingdom, as evidenced by the indefinite postponement of his state visit.¹⁰⁴

97 The WTO reports that average tariffs applied by developing countries are approximately nine percent, while developed countries’ applied tariffs average less than five percent. Developing country-bound tariffs average more than 40 percent. See WTO, “Trade and Tariffs: Trade Grows as Tariffs Decline” (2015), online: <www.wto.org/english/thewto_e/20y_e/wto_20_brochure_e.pdf>.

98 Hunt, *supra* note 96.

99 Don Lee, “Trump wants to cut bilateral trade deals, but what if nobody comes to the table?”, *Los Angeles Times* (26 May 2017), online: <www.latimes.com/business/la-fi-trump-trade-strategy-20170526-story.html> (discussing the president’s preference for bilateral agreements because he believes the United States has greater bargaining leverage).

100 See Kevin Rawlinson, “US-UK trade deal would not allow chlorinated chicken imports – Gove”, *The Guardian* (25 July 2017), online: <www.theguardian.com/politics/2017/jul/26/uk-us-trade-deal-chlorinated-chicken-michael-gove-liam-fox> (noting that the disagreement “overshadowed Fox’s trip to America”).

101 See draft letter from Stephen Vaughn, United States Trade Representative, to United States Senate/United States House of Representatives (18 March 2017) at 3, online: KPMG <<https://home.kpmg.com/content/dam/kpmg/us/pdf/2017/03/tmf-draft-nafta-letter.pdf>> (on NAFTA negotiating objectives for Congress).

102 The president of the United States has equivocated with regard to providing a firm endorsement of the article 5 “attack against one is an attack against all” principle. See Rosie Gray, “Trump Declines to Affirm NATO’s Article 5”, *The Atlantic* (25 May 2017), online: <www.theatlantic.com/international/archive/2017/05/trump-declines-to-affirm-natos-article-5/528129/> (discussing Trump’s continued refusal and the effect on European allies).

103 Michael D Shear, “Trump Will Withdraw U.S. From Paris Agreement”, *New York Times* (1 June 2017), online: <www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html?_r=0>.

104 Patrick Wintour, “Trump’s state visit to Britain put on hold”, *The Guardian* (12 June 2017), online: <www.theguardian.com/us-news/2017/jun/11/donald-trump-state-visit-to-britain-put-on-hold>.

Such an agreement would require careful legal structuring, as well as political sensitivity in the negotiations, regardless of the professed high level of interest in both the UK and US governments, even though bilateral trade is already substantial under WTO MFN duties (about US\$109 billion), with the United States running a slight trade surplus.¹⁰⁵ The agreement probably would not be concluded until after the future UK-EU trade relationship were established, hopefully by the end of the transition period (2022). It would be unwise for the United States, even with the best of intentions, to conclude an FTA until the US government knows the scope of a post-Brexit UK-EU trade relationship, in particular if bilateral trade were to be complicated by aspects of the hybrid system advocated in the FCA paper.

A US-UK FTA might not be difficult to negotiate in some areas, given the mutual interest in such a relationship (an interest that likely would continue, regardless of who the US president is by then). Among other factors, the United States and the United Kingdom could:

- dispense with the controversies relating to ISDS, given the strength of both legal systems;
- use Trans-Pacific Partnership (TPP) language, any agreed provisions from a revised NAFTA, or what Transatlantic Trade and Investment Partnership language is available from those separate negotiations as the starting points on intellectual property, financial and other services, e-commerce, anti-competition, state-owned enterprises, SMEs, and possibly labour and environment; and
- limit immigration to the relatively non-controversial temporary visitors for business and professionals.

Areas of potential difficulty nevertheless exist. These include:

- Automotive trade, given the Trump administration's attacks on auto imports from Canada, Mexico, Korea, Japan and Germany,¹⁰⁶ even though auto trade has not been a large portion of bilateral US-UK trade in the past. Only 14.5 percent of UK auto exports are to the United States, despite the United States' MFN duty of only 2.5 percent, in contrast to 46 percent currently exported to the European Union duty free.¹⁰⁷ One can also speculate that even if the United States were reluctant to reduce its 2.5 percent MFN duty on autos, except over an extended period of time, as with Japan in the TPP,¹⁰⁸ the United States would demand substantial reduction or elimination of the current EU-UK 10 percent tariff on imported autos and 4.5 percent on auto parts for exports to the United Kingdom.
- Agriculture, where US farmers (following whatever success or failure they achieve in a new NAFTA) will demand improved access to the British agricultural markets than is currently the case. This will be a sensitive issue for British farmers, who by then may have lost some or most of their generous EU subsidies, and the United States would likely seek UK acquiescence to imports of beef raised with hormones and products containing genetically modified organisms (GMOs), both long banned or heavily restricted under EU rules, along with chlorine-washed chicken.¹⁰⁹

106 See e.g. Karen Gilchrist, "Trump reportedly calls Germans 'very bad,' threatens to end German car sales", CNBC (26 May 2017), online: <www.cnbc.com/2017/05/26/trump-calls-germans-very-bad-threatens-to-end-german-car-sales-reports.html> (detailing threats to block exports to the United States).

107 SMMT, *supra* note 10 at 3.

108 Under Chapter 3 of the TPP, Japanese autos would have entered the United States totally free of the United States' 2.5 percent MFN import duty only after 25 years.

109 See EU Commission, "GMO legislation", online: <https://ec.europa.eu/food/plant/gmo/legislation_en> (discussing EU restrictions on GMOs); EU Commission, "Hormones in Meat," online: <https://ec.europa.eu/food/safety/chemical_safety/meat_hormones_en> (discussing the EU prohibition on imports of meat raised with hormones). A three-month stay in Cambridge during the fall 2014 term convinced the author that British consumer reluctance to purchase GMO products or hormone-fed beef is as strong in the United Kingdom as in other EU nations.

105 United States Census Bureau, "Trade in Goods with United Kingdom" (2016), online: <www.census.gov/foreign-trade/balance/c4120.html>.

- The need to assure that any discussion of climate change initiatives be indirect, making it difficult to deal with environmental issues in the FTA, even though they are important to both national constituencies.
- The ever-present ROO, which would not necessarily be the same as those applicable to UK-EU trade in an FTA or to EU-Canada trade under CETA.

Many other FTA options are feasible with sufficient time for complex negotiations and proper UK government staffing, but whether the long-term future potential of such agreements outweighs the considerable costs of insisting on an FTA with the European Union, rather than maintaining membership in the Customs Union, is a decision the British government should carefully consider.

Conclusion

The UK government's choices for a permanent trade relationship with the remaining EU members range from the very adverse (reversion to WTO rules), to the less damaging (an FTA), to the more favourable but much less realistic (a hybrid system), to the even less politically likely (remain in the EU Customs Union). Any closer relationship than a Customs Union is impossible to achieve without a major change in UK policy, such as the willingness to agree to open EU immigration, EU rules on product standards (direct or through "equivalence") and the continued jurisdiction of the CJEU on a permanent basis. Given the constraints, NAFTA's approach to customs regulations and ROO in that FTA could provide useful lessons for the UK-EU negotiations. Still, given the continuing disarray of the UK government over Brexit policy, the possibility of major policy shifts may not be as far-fetched in October 2017 as they would have seemed prior to May's political weakening in June.¹¹⁰

¹¹⁰ See George Parker & Alex Barker, "UK government concedes transitional role for ECJ after Brexit", *Financial Times* (10 July 2017), online: <www.ft.com/content/815f56e4-655e-11e7-8526-7b38dcaef614>.

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**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

