

**THE NEW TRANSATLANTIC TRIGONOMETRY:  
BREXIT AND EUROPE'S TREATY RELATIONS WITH THE  
UNITED STATES**

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ABSTRACT

The withdrawal of the United Kingdom from the European Union (Brexit) is not only a source of political and legal upheaval in Europe but will also prompt a recalibration of transatlantic treaty relations. This Article argues that it is a gross oversimplification to conceive of the latter as sets of old and new bilateral relationships. Instead, Brexit affects many existing and interdependent triangular relationships that the United States maintains with the EU and its Member States, which are conditioned also by the foreign relations laws of these polities. Perhaps counterintuitively, recalibration in the “high politics” area of security and defense will be easier than in the “low politics” of trade and regulation. In elaborating on these arguments, this Article delves into three levels of complexity: First, the empirical challenge of determining the treaties in force

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between the EU and United States and by which the UK will cease to be covered; second, the transatlantic implications of available alternative models to EU membership for the UK; and third, the way forward in ensuring continuity and bringing about future agreements and cooperation in the EU-UK-U.S. triangle, seeing that the EU itself is a moving target due to ongoing reform efforts.

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## 1. INTRODUCTION

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

Meanwhile, across the Atlantic, weary of negative repercussions of a disorderly withdrawal, the United States (“U.S.”) government urged both sides to move the withdrawal process “forward swiftly and without unnecessary acrimony.”<sup>4</sup> The U.S. does so with good reasons. There is a pressing need for a better and more complete understanding of the impact of Brexit on the U.S.

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<sup>1</sup> Timothy Garton Ash, *As an English European, This Is the Biggest Defeat of My Political Life*, *GUARDIAN* (June 24, 2016), <https://www.theguardian.com/politics/commentisfree/2016/jun/24/lifelong-english-european-the-biggest-defeat-of-my-political-life-timothy-garton-ash-brexit> [<https://perma.cc/RM52-KZ3E>].

<sup>2</sup> See generally GEOFFREY EVANS & ANAND MENON, *BREXIT AND BRITISH POLITICS* (2017) (exploring how the changing nature of British politics and the lasting evolution of Britain’s relations with the EU shaped the outcome of the referendum and what that outcome itself might mean for the future form of UK politics); HAROLD D. CLARKE ET AL., *BREXIT: WHY BRITAIN VOTED TO LEAVE THE EUROPEAN UNION* (2017) (drawing upon ten years of survey data to explain why a majority of UK voters decided to ignore the national and international community and vote for Brexit); LEE MCGOWAN, *PREPARING FOR BREXIT: ACTORS, NEGOTIATIONS AND CONSEQUENCES* (2018) (contextualizing Brexit’s negotiation process by analyzing the internal regional dimension with a specific focus on Northern Ireland).

<sup>3</sup> See generally *THE LAW & POLITICS OF BREXIT* (Federico Fabbrini ed., 2017) (discussing the constitutional implications of Brexit for the UK and EU); *THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES* (Michael Dougan ed., 2017) (analyzing the effects of de-Europeanisation on the UK legal system); KENNETH A. ARMSTRONG, *BREXIT TIME: LEAVING THE EU – WHY, HOW AND WHEN?* (2017) (providing an objective presentation of data and arguments to track decisions that shaped Brexit up to the point of the UK’s notification of its intention to withdraw from the EU); *GETTING TO BREXIT: LEGAL ASPECTS OF THE PROCESS OF THE UK’S WITHDRAWAL FROM THE EU* (Jennifer A. Hillman & Gary Horlick eds., 2017) (providing an overview of salient legal issues raised by the UK’s decision to withdraw from the EU, with a particular focus on international trade).

<sup>4</sup> See U.S. Sec’y of State Rex W. Tillerson, *The U.S. and Europe: Strengthening Western Alliances*, (Nov. 28, 2017), <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/276002.htm> [<https://perma.cc/H25B-HURY>] (discussing then current foreign policy issues for the U.S., such as its relationships with the EU and UK).

and its relations with the EU and the UK. A number of the ties that link the two sides of the Atlantic in the form of international agreements risk being untangled, as the UK will no longer be covered by agreements concluded by the EU. Moreover, as the UK will no longer be on the inside of EU foreign policy, new transatlantic agreements that cover the U.S., the EU, and the UK will become more difficult to achieve.

In the face of this challenge, this Article puts the focus on the transatlantic dimension of Brexit; more precisely, it investigates how the treaty relations that the U.S. entertains with the EU and the UK will be affected. In doing so, the Article delves into three levels of analysis and develops a two-pronged argument. The first level of analysis concerns a legal-empirical problem, i.e., treaty law as it currently stands between the U.S., EU and UK. The second level concerns the transatlantic implications and trade-offs of the different models for post-Brexit UK-EU relations. Lastly, the third level concerns the way forward, i.e., ensuring continuity of existing agreements and the shifting parameters for future ones. Hence, the Article not only provides analysis for what Garton Ash called the “grim mechanics”<sup>5</sup> of disentanglement. It also addresses future re-engagement to shed light on the prospects of a “kinder, gentler Brexit”<sup>6</sup> in a wider transatlantic context, both in the immediate aftermath of withdrawal as well as in the longer term.

Throughout these three levels, the first prong of the argument put forward here is that it would be a gross oversimplification to conceive of transatlantic relations as a set of old and new bilateral relationships governed by public international law only. Instead, they need to be conceived as both multilevel and triangular. They are multilevel because these relationships are conditioned also by the domestic laws of the U.S., the UK, and the EU and its remaining Member States. For instance, a future U.S.-UK trade agreement will be contingent upon both what international law allows and the ability to meet constitutional hurdles within each country to conclude and ratify such an agreement as a deal. Consequently, the various recalibration exercises prompted by Brexit are as much considerations of international (treaty) law as they are “compara-

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<sup>5</sup> Ash, *supra* note 1.

<sup>6</sup> See Joseph H. H. Weiler, *Editorial: The Case for a Kinder, Gentler Brexit*, 28 EUR. J. INT'L L. 1, 1-4 (2017) (rebutting policy rationale in support of the EU's belligerence towards a post-Brexit UK, arguing instead that it would be in the Union's best interest to extend the same privileges accorded to third parties).

tive foreign relations law<sup>7</sup> in action. From this realization flows also the need to understand these relationships as triangular. In economic terms, the transatlantic space has already been aptly described as a “stool” with “three legs.”<sup>8</sup> This triangular relationship is equally present in the legal sphere. This applies to the constraints that both EU membership puts on Member States’ bilateral relations with the U.S. as well as the constraints it puts on non-EU members that maintain various forms of close association with the EU.

The second prong of the Article’s argument posits different levels of difficulty that the U.S., UK and EU will face in this exercise of “transatlantic trigonometry,” which will depend on the subject matter. Ensuring continuity and crafting new forms of cooperation in the future will be easier in the “high politics” area of security and defense than in the “low politics” of trade and regulation. This relative ease is due to the lower level of integration in the former, which makes disentanglement and reengagement a more straightforward task. In the latter, the trade-offs are more readily apparent, which often make tough choices unavoidable.

In order to elaborate on these points, the Article proceeds as follows: Section 2 briefly retraces the steps leading to the current situation and summarizes the state of the political and scholarly discourse. Section 3 tackles the empirical challenge of determining the state of U.S.-EU treaty relations that will be affected by Brexit and reveals the existence of a multitude of triangular transatlantic relationships. Section 4 focuses on the transatlantic implications of existing alternative modes of association with the EU, which could serve as models—or at least points of departure—for the UK post-Brexit. Turning to the way forward, Section 5 addresses the ongoing reforms within the EU, which make it a moving target, and the “new transatlantic trigonometry” between it, the UK and the U.S. in terms of ensuring continuity of existing treaty relationships and setting the parameters for new agreements to be explored. Section

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<sup>7</sup> See Curtis A. Bradley, *Foreign Relations Law as a Field of Study*, 111 AJIL UNBOUND 316, 320 (2017), *expanded version reprinted in* Curtis A. Bradley, *What is Foreign Relations Law?*, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* (Curtis A. Bradley ed., forthcoming 2018) (observing how federalism and a country’s foreign relations law are increasingly recognized as playing an important role in international affairs).

<sup>8</sup> See DANIEL S. HAMILTON & JOSEPH P. QUINLAN, *THE TRANSATLANTIC ECONOMY 2017: ANNUAL SURVEY OF JOBS, TRADE AND INVESTMENT BETWEEN THE UNITED STATES AND EUROPE 2* (2017) (describing the UK, EU, and U.S. as three legs of a stool given their extensive economic relationships).

6 summarizes the Article's findings.

## 2. HOW DID WE GET HERE?

To most non-European observers, the political spectacle that is the Brexit negotiations between the UK and the EU must seem strange if not utterly bizarre. Hence, it is appropriate to first retrace the steps leading up to Brexit. In order to set the scene, this Section starts in the more distant past (2.1.), then provides an overview of more recent events (2.2.), and culminates in the current state of negotiations and academic discourse, which exhibits an increasing realization of the external relations aspects of Brexit (2.3.).

### 2.1. *Antecedents of an Uneasy Relationship*

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

Yet, today the UK can look back on four decades of membership in the EU (and its predecessors). The UK was not a founding member of the original integration organizations: the European

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<sup>9</sup> EUR. PARL. DEB. (RC-B8-0237) 6 (Apr. 5, 2017) (remarks of Mr. Verhofstadt), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20170405+ITEM-006+DOC+XML+V0//EN&language=en&query=INTERV&detail=3-017-000> [<https://perms.cc/R7NJ-4W9X>] (arguing that although Brexit was an unfortunate outcome of domestic politics, the relationship between the UK and Europe was always uneasy and perhaps "never meant to be").

<sup>10</sup> See JOHN LUKACS, CHURCHILL: VISIONARY. STATESMAN. HISTORIAN 87 (2002) (citing Winston Churchill, SATURDAY EVENING POST, February 15, 1930) (noting that although Churchill supported the idea of a united Europe, he considered the UK to be somewhat apart).

<sup>11</sup> See MARTIN GILBERT, CHURCHILL AND AMERICA 380 (2005) (citing Winston Churchill, Speech in Zurich (September 19, 1946) (on file with BBC Written Archives Centre) (describing Churchill's expressed support for a more united Europe).

Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community ("EEC"). It first tried to join in 1961 under Prime Minister Macmillan, but was denied due to French opposition, in particular from President Charles de Gaulle.<sup>12</sup> A second attempt in 1967 under Prime Minister Wilson also failed.<sup>13</sup> Eventually, in 1972 the Treaty of Accession was signed, which paved the way for the UK, joined by Ireland and Denmark, to become EEC members on January 1, 1973.<sup>14</sup>

Ever since, the UK has come to be seen as an "awkward"<sup>15</sup> and "reluctant partner."<sup>16</sup> Only two years after the UK joined the EEC, a first referendum was held in the UK on the country's continued membership of the bloc. In this original "Brexit" referendum, the "remain" camp prevailed.<sup>17</sup> Subsequently, to name only the most prominent sources of this awkward relationship, the UK demanded a special "rebate" in terms of its contributions to the EU's budget,<sup>18</sup> a permanent opt-out from the common currency,<sup>19</sup> an opt-out from justice and home affairs policies (though subsequently largely retracted through opting back into specific measures),<sup>20</sup> and re-

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<sup>12</sup> See ARMSTRONG, *supra* note 3, at 12–13 (providing the history of the UK's applications to join the EEC).

<sup>13</sup> See *id.* at 13–14 (explaining Member States' position on UK membership and the reasons for opposition by France).

<sup>14</sup> Treaty of Accession of Denmark, Ireland and the United Kingdom, Jan. 22, 1972, 1972 O.J. (L 73) 5.

<sup>15</sup> See generally STEPHEN GEORGE, AN AWKWARD PARTNER: BRITAIN IN THE EUROPEAN COMMUNITY (3d ed., 1998) (explaining the history and context of the UK's membership of the "European Communities" and how the UK, even as a member, continued to have an awkward relationship due to various circumstances).

<sup>16</sup> See Finn Laursen et al., *The Institutional Dynamics of Euro-Atlantic Integration*, in THE GEOPOLITICS OF EURO-ATLANTIC INTEGRATION 39, 44 (Anders Wivel & Hans Mouritzen eds., 2005) (observing that the UK has not established itself as an EU leader due to being a "reluctant partner" by opting out of several elements of EU membership such as a common currency and Schengen cooperation).

<sup>17</sup> See STEPHEN WALL, THE OFFICIAL HISTORY OF BRITAIN AND THE EUROPEAN COMMUNITY, VOLUME II: FROM REJECTION TO REFERENDUM, 1963–1975 511–90 (2013) (providing a history of the events leading up to and result of the UK referendum on its European Communities membership in 1975).

<sup>18</sup> See DAVID GOWLAND, BRITAIN AND THE EUROPEAN UNION 219–30 (2017) (discussing the history and resolution of the controversy surrounding UK contributions to the EU budget).

<sup>19</sup> See *id.* at 133–34 (describing the UK's opting-out of various EU agreements, including the common currency).

<sup>20</sup> See Protocol (No 21) On the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, 2016 O.J. (C 202) 295 (providing the opt-out with an option for subsequent opt-in scheme). See also STEVE



fused to join the Schengen zone of passport-free travel.<sup>21</sup>

At the same time, the UK has been instrumental in the development of the EU's internal market and saw itself as a leader of EU (free) trade policies.<sup>22</sup> It did not opt out of the Common Foreign and Security Policy when it was launched with the Maastricht Treaty of 1992, but "played a central role"<sup>23</sup> in its development and even became a crucial factor in breathing life into the European Security and Defence Policy (now known as the Common Security and Defence Policy, "CSDP") with the pivotal joint Franco-British St. Malo Declaration of 1998.<sup>24</sup> Hence, despite the UK's uneasy relationship with the EU and strong Eurosceptic sentiment,<sup>25</sup> the EU's external policies such as trade, but also security and defense, tended to be less controversial, at least among the UK political leadership.

## 2.2. The Brexit Referendum, Notification, and Withdrawal

The question of the UK's continued EU membership came to a head when Prime Minister Cameron, based on an election manifes-

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PEERS, EU JUSTICE AND HOME AFFAIRS LAW, VOLUME II: EU CRIMINAL LAW, POLICING, AND CIVIL LAW 41–42 (4th ed., 2016).

<sup>21</sup> See Protocol (No 19) On the Schengen Acquis Integrated into the Framework of the European Union, 2016 O.J. (C 202) 290 (providing the opt-out, which applied to Ireland as well, and with which the UK maintains a common travel area).

<sup>22</sup> See Catherine Barnard, *Brexit and the EU Internal Market*, in THE LAW & POLITICS OF BREXIT 201, 201 (Federico Fabbrini ed., 2017) (noting that the "UK has been a champion of the single market"); see also Prime Minister David Cameron, EU speech at Bloomberg (Jan. 23, 2017), <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> [<https://perma.cc/3K69-PB22>] ("Britain is at the heart of that Single Market, and must remain so ... I want us to be at the forefront of transformative trade deals with the US, Japan and India as part of the drive towards global free trade.").

<sup>23</sup> See Laursen et al., *supra* note 16, at 44 ("Only in the development of the CFSP has the UK played a central role.").

<sup>24</sup> See Alistair J.K. Shepherd, *Blair, Brown and Brussels: The European Turn in British Defence Policy*, in THE DEVELOPMENT OF BRITISH DEFENCE POLICY: BLAIR, BROWN AND BEYOND 39, 43 (David Brown ed., 2010) (describing the drivers and importance of the St. Malo Declaration of 1998 with respect to the UK's integration with Europe).

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

to commitment,<sup>26</sup> promised in his 2013 Bloomberg speech to hold an in-out referendum following a renegotiation of the UK's status within the EU.<sup>27</sup> The new settlement was agreed upon in February 2016. It would preserve the UK's status of open-ended non-participation in the euro, provide an interpretation of the "ever closer union"<sup>28</sup> principle so it could not be used for expanding the EU's powers further, strengthen the role of national parliaments, and bring about additional safeguards to inhibit migrants from other EU countries from drawing social security and child benefits.<sup>29</sup>

Following a referendum campaign best described as acrimonious, alarmist, and deceiving,<sup>30</sup> on June 23, 2016, with 17.4 million votes in favor of leaving and 16.1 million in favor of remaining,<sup>31</sup> "the UK had voted to leave the EU."<sup>32</sup> This outcome resulted in the resignation of Cameron, who was succeeded by Theresa May after an internal contest within the British Conservative Party.<sup>33</sup>

The question arose whether the Westminster Parliament would need to give its consent to the government in order to deliver the official withdrawal notification letter to the European Council, known as "triggering" Article 50 of the Treaty on European Un-

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<sup>26</sup> See ARMSTRONG, *supra* note 3, at 42 (discussing the logic behind the Conservative Party's making the election manifesto in terms of obtaining a positive election result and wanted reforms to its EU membership).

<sup>27</sup> Cameron, *supra* note 22. See also ARMSTRONG, *supra* note 3, at 25 (describing the tension in the Conservative Party over offering a referendum and David Cameron's ultimate "bow[ing] to pressure" to agree to it).

<sup>28</sup> See Treaty on European Union art. 1, ¶ 2, 2012 O.J. (C 326) 1 [hereinafter TEU] (stipulating this idea of a closer union in the thirteenth recital of the preamble as well); see also Consolidated Version of the Treaty on the Functioning of the European Union, 2016 O.J. (C 202) 1 [hereinafter TFEU] (stipulating a closer union in the first recital of the preamble).

<sup>29</sup> See *A New Settlement for the United Kingdom within the European Union*, Extract of the Conclusions of the European Council of 18–19 February 2016, 2016 O.J. (C 69) I/1 (recording the decisions made by the European Council to address the UK's concerns over EU membership if the UK were to vote to remain); see also ARMSTRONG, *supra* note 3, at 30–35 (outlining various areas for which the UK sought reforms with respect to its EU membership).

<sup>30</sup> See ARMSTRONG, *supra* note 3, at 65–69 (describing the tensions between the Leave and Remain campaigns, including examples of posters suggested by some to have "incited racial hatred," of information quality described as "post-truth," and of fear-mongering by both sides).

<sup>31</sup> *Id.* at 69.

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* at 141 (discussing the "leadership gap" and "policy vacuum" following the result and Cameron's subsequent resignation).

ion.<sup>34</sup> In the *Miller* judgment of January 24, 2017, the UK Supreme Court ruled that such consent was indeed necessary given the special nature of the EU law within the UK legal system.<sup>35</sup> Consequently, based on a parliamentary majority, Royal Assent was given to the “European Union (Notification of Withdrawal) Act 2017” on March 16, 2017.<sup>36</sup>

On March 29, 2017, the UK government delivered the notification to the European Council.<sup>37</sup> This started the clock for a two-year negotiation period to conclude a withdrawal agreement before the UK would cease to be an EU member.<sup>38</sup> It is disputed whether the UK’s notification could be revoked unilaterally by the British government and Brexit thus be reversed, though some legal scholars argue that this would be permissible.<sup>39</sup> An extension of the two-year period provided for Article 50 of the Treaty on European Union (“TEU”) is possible, but requires the unanimous decision of the European Council and the withdrawing Member State.<sup>40</sup>

Following the notification, negotiations between the UK and the EU commenced. Based on a “sequenced” approach starting

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<sup>34</sup> See TEU, *supra* note 28, at art. 50, ¶ 1 (“Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”).

<sup>35</sup> See *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union* (Appellant), [2017] UKSC 5, ¶ 101 (appeal taken from N. Ir.) (concluding that UK parliamentary approval was required in order to give notice to leave the EU given the terms and effect of the European Communities Act of 1972).

<sup>36</sup> European Union (Notification of Withdrawal) Act 2017, c.9 (UK).

<sup>37</sup> Letter from Theresa May, Prime Minister, U.K., to Donald Tusk, President, European Council (Mar. 29, 2017).

<sup>38</sup> See TEU, *supra* note 28, at art. 50, ¶ 3 (stating the EU “Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification” to withdraw was issued, “unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”); see also Federico Fabbrini, *Introduction*, in *THE LAW & POLITICS OF BREXIT* 1, 7–10 (Federico Fabbrini ed., 2017) (discussing the details of the notification for withdrawal).

<sup>39</sup> See, e.g., Jens Dammann, *Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union*, 23 COLUM. J. EUR. L. 265, 304 (2017) (arguing in favor of a “right to rescind” for both legal and policy reasons); see also Aurel Sari, *Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change Its Mind*, 42 EUR. L. REV. 451 (Mar. 16, 2017) (discussing how Article 50 notification can be revoked). In *Miller*, *supra* note 35, at ¶ 26, the UK Supreme Court refrained from ruling on this since for the parties, for the purposes of the case, it was “common ground that notice under article 50(2) [TEU] ... cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn.”

<sup>40</sup> TEU, *supra* note 28, at art. 50, ¶ 3.

with the withdrawal agreement, the first phase of negotiations focused on the financial settlement, citizens' rights, and the situation in Northern Ireland. Only once these issues are addressed, negotiations shall move on to the future partnership, as insisted on by the EU.<sup>41</sup> In December 2017, it was declared that sufficient progress was reached regarding the first phase,<sup>42</sup> meaning that negotiations could turn to a possible transitional arrangement and the future relationship. However, the issue of the border between the Republic of Ireland and Northern Ireland, which will become part of the EU's external border after Brexit, remained a difficult subject in the negotiations, and is likely to continue to cause tensions for Ireland and the EU-UK relationship.<sup>43</sup>

In early 2018, the Council of the EU adopted additional directives regarding a transitional period, while the European Council agreed on a set of updated negotiating guidelines.<sup>44</sup> In mid-November 2018, the texts of a Draft Withdrawal Agreement negotiated between the European Commission and the British Government and a Political Declaration regarding the framework for the future relationship between the EU and the UK were published.<sup>45</sup> This was a mere four and a half months before the presumptive deadline of March 29, 2019, after which the EU Treaties would "cease to apply"<sup>46</sup> to the UK. However, these are not the only treaties to be affected by Brexit.

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<sup>41</sup> Special meeting of the European Council (Art. 50) (29 April 2017), EUCO XT 20004/17.

<sup>42</sup> European Council (Art. 50) meeting (15 Dec. 2017), EUCO XT 20011/17.

<sup>43</sup> See John Doyle and Eileen Connolly, *Brexit and the Northern Ireland Question*, in *THE LAW & POLITICS OF BREXIT* 140 (Federico Fabbrini ed., 2017) (analyzing the political impact of different outcomes of the Brexit negotiations on Northern Ireland, including those of a 'hard border' on the island of Ireland and the alternative of a border between Ireland and the UK running through the Irish Sea).

<sup>44</sup> Council of the European Union (29 Jan. 2018), Supplementary Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting out the Arrangements for its Withdrawal from the European Union, XT 21004/18 ADD 1 REV 2; European Council (Art. 50) (23 Mar. 2018), EUCO XT 20001/18.

<sup>45</sup> Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level, TF50 55, Nov. 14, 2018; Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom (22 Nov. 2018).

<sup>46</sup> TEU, *supra* note 28, at art. 50, ¶ 3.

### 2.3. Academic Discourse and the External Dimension

In the academic discourse, it has been increasingly recognized that Brexit has “two faces”, one internal and one external.<sup>47</sup> In other words, it entails questions of both EU and national law on the one side,<sup>48</sup> and international law, on the other.<sup>49</sup> According to Article 50 TEU, the arrangements to be made with the departing country are to take “account of the framework for its future relationship with the Union.”<sup>50</sup> Therefore, the external dimension of Brexit already loomed large even before the EU concluded that there had been “sufficient progress” in its negotiations with the UK so as to move to negotiating a future trade and other agreements with the EU. However, the international legal dimension goes far beyond the future EU-UK relationship. According to research conducted by the *Financial Times*, the UK’s withdrawal from the EU will require the renegotiation of more than 750 international agreements with 168 different countries, from which the UK currently benefits by virtue of being an EU member.<sup>51</sup>

Moreover, when approaching Brexit from a transatlantic angle, U.S. foreign relations law needs to be added to the considered legal frameworks. After all, neither a future U.S.-UK trade deal nor a revamped Transatlantic Trade and Investment Partnership (TTIP)<sup>52</sup> with the EU will ever see the light of day if either fails to secure the approval by the relevant constitutional branches under the U.S. Constitution. This concerns, in particular, certain majorities in Congress, depending on the content of the agreement.<sup>53</sup> Hence,

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<sup>47</sup> Adam Łazowski & Ramses A. Wessel, *The External Dimension of Withdrawal from the European Union*, *REVUE DES AFFAIRES EUROPÉENNES* 623 (Apr. 2016).

<sup>48</sup> See Adam Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 *EUR. L. REV.* 523 (2012) (discussing how high levels of legal integration within the EU make it difficult to withdraw from the EU). The British legal dimension was expounded in Miller, *supra* note 35.

<sup>49</sup> Jed Odermatt, *Brexit and International Law: Disentangling Legal Orders*, 31 *EMORY INT’L L. REV.* 1051, 1054 (2017).

<sup>50</sup> TEU, *supra* note 28, at art. 50, ¶ 2.

<sup>51</sup> Paul McClean, *After Brexit: the UK will need to renegotiate at least 759 treaties*, *FIN. TIMES* (May 30, 2017), <https://www.ft.com/content/f1435a83-372b-11e7-bce4-9023f8c0fd2e> [<https://perma.cc/5NZU-TAM9>].

<sup>52</sup> The negotiations on TTIP have been discontinued since the end of 2016, see Press Release, Office of the U.S. Trade Representative, U.S.-EU Joint Report on TTIP: Progress to Date, (Jan. 17, 2017) (noting that “[b]etween July 2013 and October 2016, 15 Negotiating Rounds were held”, but not outlining any specific future steps).

<sup>53</sup> A two-thirds Senate majority will be needed if concluded as a “treaty”

Brexit's external face is an inherently multilevel problem, involving national (including from non-EU members), EU, and international law.

The transatlantic relationship should take pride of place in researching the external dimension of Brexit for both economic and political reasons. According to the Office of the U.S. Trade Representative, the "United States and the 28 Member States of the EU share the largest economic relationship in the world."<sup>54</sup> Moreover, the wider strategic importance of transatlantic bonds and shared values needs to be stressed.<sup>55</sup> In legal-academic circles, compelling cases have been made for a transatlantic perspective or vision.<sup>56</sup> In this spirit, the present Article adopts a distinctly transatlantic focus on the external dimension of Brexit.

Before delving into the empirical, legal, and political challenges that Brexit poses for transatlantic treaty relations, a preliminary point on the EU as an international actor should be made, especially in view of this Article's emphasis on trade and security as substantive focus areas. This focus is not to imply that other policy areas, such as environmental protection, are not important. Trade and security serve as illustrations of what traditionally have been seen as respectively "low" and "high politics."<sup>57</sup> Moreover, they

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

<sup>54</sup> U.S. OFFICE OF THE TRADE REPRESENTATIVE, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 139 (Mar. 2017); see also HAMILTON & QUINLAN, *supra* note 8, at v ("Despite transatlantic political turbulence, the U.S. and Europe remain each other's most important markets.").

<sup>55</sup> Cf. SHARED VISION, COMMON ACTION: A STRONGER EUROPE, A GLOBAL STRATEGY FOR THE EUROPEAN UNION'S FOREIGN AND SECURITY POLICY 36 (June 2016) (stating that "a solid transatlantic partnership through NATO and with the United States and Canada helps us strengthen resilience, address conflicts, and contribute to effective global governance."); and NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 47 (Dec. 2017) (stating that "a strong and free Europe is of vital importance to the United States. We are bound together by our shared commitment to the principles of democracy, individual liberty, and the rule of law.").

<sup>56</sup> A TRANSATLANTIC COMMUNITY OF LAW: LEGAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE EU AND US LEGAL ORDERS (Elaine Fahey & Deirdre Curtin eds., 2014); and LAW AND INSTITUTIONS IN THE ATLANTIC AREA (Eric Stein & Peter Hay eds., 1967).

<sup>57</sup> For this distinction, see generally Stanley Hoffman, *Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe*, 95 DAEDALUS (1966) (arguing that while European states were more willing to integrate in areas of "low

correspond to the two distinct modes of operation in EU foreign policy.

On the one hand, this concerns EU trade policy (called the “Common Commercial Policy”, CCP),<sup>58</sup> which is decidedly supranational.<sup>59</sup> This supranational mode of operation is also the default of rules and decision-making procedures in the EU and is characterized by the prominent roles played by the European Commission and the European Parliament,<sup>60</sup> voting by “qualified majority” in the Council of the EU,<sup>61</sup> according to which a minority of Member States can be outvoted, and jurisdiction of the Court of Justice of the EU (CJEU).<sup>62</sup>

On the other hand, this concerns the Common Foreign and Security Policy (CFSP), which is decidedly intergovernmental.<sup>63</sup> It represents a delimited policy field with its own “specific rules and procedures.”<sup>64</sup> The latter is designed to sideline the supranational institutions and guarantee that the Member States remain free to act internationally.<sup>65</sup> Other external policies fall between this spectrum of “bipolarity.”<sup>66</sup> As a matter of foreign relations law, i.e., understanding how the EU operates internally when engaging the

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politics” such as trade, in the “high politics” of foreign and security policy they carefully guarded their national sovereignty); see also Stanley Hoffman, *Reflections on the Nation-State in Western Europe Today*, 21 J. COMMON MKT. ST. 21, 29 (1982) (acknowledging the difficulty to clearly delimiting “low” and “high” politics and proposing instead a distinction between politics of “strict reciprocity” and politics which aims “for the maximization of the common good”).

<sup>58</sup> TFEU, *supra* note 28, at art. 207, ¶ 1.

<sup>59</sup> GABRIEL SILES-BRÜGGE, *CONSTRUCTING EUROPEAN UNION TRADE POLICY: A GLOBAL IDEA OF EUROPE* 9 (2014).

<sup>60</sup> TFEU, *supra* note 28, at art. 294 (detailing what is now known as the “ordinary legislative procedure”).

<sup>61</sup> *Id.*, art. 238, ¶ 3 (defining a qualified majority).

<sup>62</sup> See *id.*, at art. 263 (on review powers in actions for annulment of legislative and certain other acts) and *id.*, arts. 258–60 (on infringements proceedings against the Member States).

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

<sup>64</sup> TEU, *supra* note 28, at art 24, ¶ 1.

<sup>65</sup> KEUKELEIRE & DELREUX, *supra* note 63, at 72 (noting that “the Commission is largely sidelined in the CFSP and CSDP”).

<sup>66</sup> Alan Dashwood, *The Continuing Bipolarity of EU External Action*, in *THE EUROPEAN UNION IN THE WORLD: ESSAYS IN HONOUR OF MARC MARESCEAU* 3, 3 (Inge Govaere et al. eds., 2014). For instance, the EU’s development policy does not have its own “specific rules and procedures.” However, the EU Treaties make clear that the Member States retain their own national development policies. TFEU, *supra* note 28, at art. 4, ¶ 4.

world in general and the United States in particular,<sup>67</sup> it is crucial to keep the existence of these different modes in mind, something that is rather alien to the American system of foreign relations law.<sup>68</sup> From an American legal perspective, the CFSP might be best explained as an additional layer of “exceptionalism” within the general exceptionalism pertaining to foreign relations.<sup>69</sup> This distinction is crucial for the second prong of the Article’s argument: resolving Brexit and piecing back together the transatlantic triangle will be easier in the area of “high politics” of sovereignty-sensitive areas such as security and defense than in the allegedly “low politics” of trade and regulation, due not in the least to its intergovernmental character and lack of deep integration.

### 3. PRE-BREXIT AND THE TWENTY-EIGHT TRANSATLANTIC TRIANGLES

Political discourse likes to simplify transatlantic relations through the use of binary imagery. Prominent examples of this include the idea of the “two pillars,”<sup>70</sup> a “transatlantic bargain” of providing security in exchange for economic integration,<sup>71</sup> “the sword and shield,”<sup>72</sup> or a phone line with America on one end and

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<sup>67</sup> Bradley, *supra* note 7, at 316 n.1 (noting that the “European Union, as a *supranational* institution that in some ways resembles a nation, also has a developed body of foreign relations law.”); see also Joris Larik, *EU Foreign Relations Law as a Field of Scholarship*, 111 AJIL UNBOUND 321 (2017) (discussing the development of EU foreign relations law and predicting that it will become a “pillar and important driver” of foreign relations legal scholarship).

<sup>68</sup> While different degrees of deference apply to different contexts, no radically different sets of constitutional rules and procedures apply depending on the policy area; see Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From “Exceptionalism”*, 128 HARV. L. REV. F. 294, 300 (2015) (examining the degrees of deference given by the U.S. Supreme Court to the Bush Administration’s interpretation of treaties).

<sup>69</sup> Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999) (describing exceptionalism as “the view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers”).

<sup>70</sup> See Joris Larik, *Kennedy’s “Two Pillars” Revisited: Does the ESDP Make the EU and the USA Equal Partners in NATO?*, 14 EUR. FOREIGN AFF. REV. 289, 290–91 (2009) (describing the EU and the U.S. as the “two pillars” of NATO).

<sup>71</sup> STANLEY R. SLOAN, *NATO, THE EUROPEAN UNION, AND THE ATLANTIC COMMUNITY: THE TRANSATLANTIC BARGAIN CHALLENGED* 1 (2d ed., 2005).

<sup>72</sup> The “shield” denotes European conventional forces deployed against the Warsaw Pact, while the “sword” represents U.S. nuclear forces. See Kori N. Schake, *NATO Strategy and the German-American Relationship, in THE UNITED STATES AND GERMANY IN THE ERA OF THE COLD WAR, 1945–1990, A HANDBOOK, VOLUME I:*



Europe on the other end.<sup>73</sup> In reality, however, these relationships are more complex. Legally speaking, the relations that the United States entertains with the EU and its Member States can be best understood as a set of triangles, hence making transatlantic relations and their recalibration due to Brexit an exercise of legal ‘trigonometry.’

To visualize these triangles, one could imagine the following: one line connects Washington, D.C., and Brussels, the “capital” of the European Union where most of its key organs are situated. This line represents the bilateral relations between the U.S. and the EU as a legal person. Moreover, 28 lines extend from Washington, D.C., into each of the EU Member States’ capitals, representing the legal relationships between the U.S. and the Member States as sovereign entities. In addition, 28 lines extend from Brussels to each Member State capital.<sup>74</sup> These signify that the EU Member States have pooled important and extensive powers at the EU level,<sup>75</sup> which affects their ability to act on the international plane.<sup>76</sup> This latter aspect constitutes a special link since it is not one governed by public international law but by EU law, which enjoys “primacy” over national law (what American lawyers may call “supremacy”) and under certain circumstances can be directly invoked by individuals and enforced by Member State courts (what EU lawyers call “direct effect”)—those being the hallmarks of the EU as a supranational legal order distinct from both international and national law.<sup>77</sup>

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1945–1968 233, 236 (Detlef Junker ed., 2011) (discussing the sometimes uneasy relationship between European and U.S. approaches to defense during the Cold War).

<sup>73</sup> David Brunnstrom, *EU Says it has Solved the Kissinger Question*, REUTERS (Nov. 20, 2009), <http://www.reuters.com/article/us-eu-president-kissinger-idUSTRE5AJ00B20091120> [<https://perma.cc/YA5W-8AV8>].

<sup>74</sup> Geometrically speaking, in the case of Belgium it would be a very flat triangle given that two of its points are located in Brussels, being the capital of Belgium and the seat of most of the EU’s main institutions.

<sup>75</sup> For the EU’s catalogue of powers (“competences”), see TFEU, *supra* note 28, at arts. 3–6 (establishing the different types of European Union competence for different policy areas).

<sup>76</sup> For a detailed analysis, see Marise Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, in *THE EVOLUTION OF EU LAW* 217 (Paul Craig & Gráinne de Búrca eds., 2d ed., 2011) (examining the development of the European Union and the relationship between its internal and external dimensions).

<sup>77</sup> As noted by the CJEU in Opinion 1/91 (EEA), 1991 E.C.R. I-06079, ¶ 21 (“In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community

These different legal triangles are the basic ingredients of the transatlantic legal relationship. It is important to recognize that even when a relationship looks one-dimensional on the surface, it is nonetheless triangular. For instance, a bilateral treaty between Ireland and the U.S. has to take into account Ireland's obligations as an EU Member State. Vice versa, a bilateral agreement between the U.S. and the EU will have to conform to the division of competences between the Union and Member States and will need to respect the "constitutional" identity of the Member States as a core constitutional principle of EU law.<sup>78</sup> Lastly, "mixed" relationships are more obviously triangular, since this concerns agreements that involve both the EU and the Member States as parties. Such "mixed agreements" are concluded between a third party "of the one part," and the EU and its Member States "of the other."<sup>79</sup> Hence, these agreements are not among the Member States or between the Member States and the EU. Instead, these relationships remain governed by EU law, in which international agreements rank below the EU Treaties, considered by the Court of Justice of the EU as the Union's "constitutional charter."<sup>80</sup> In addition, there are multilateral settings in which both the U.S. and the EU and/or its Member States are present. These also create transatlantic legal triangles, albeit as part of a wider and denser web of international legal relationships.

The following three sub-sections present these different rela-

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based on the rule of law ... The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves."). See also Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-06351, ¶ 285 [hereinafter *Kadi v. Council*] ("[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty ..."). For a critique that likens the EU to the U.S. in its approach to the rank of international law within the domestic legal order, see Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L. REV. 1, 49 (2010) (examining the response of European courts to the U.N. Security Council's anti-terrorist sanctions regime).

<sup>78</sup> TEU, *supra* note 28, at art. 4, ¶ 2. See Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011) (proposing that article 4, paragraph 2, of the Treaty on European Union strengthens Member States' constitutional identity against EU law).

<sup>79</sup> See, e.g., Agreement on the Promotion, Provision and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications, pmbL., June 26, 2004, U.N.T.S. 52728.

<sup>80</sup> *Kadi v. Council*, *supra* note 77, at ¶ 281.

tionships as they stand pre-Brexit with data on the status of treaty relations as of August 14, 2018. As a preliminary matter, the methodology for establishing the current extent of treaty relations between the EU and U.S. is explained, which is an exercise less straightforward than one might expect (3.1.). Subsequently, the content of these treaty relations is outlined from the EU's perspective (3.2.), as well as from the Member States' perspective (3.3.). They serve as the basis – the *status quo ante Brexit*, if you will – that provides the base line for what needs to be recalibrated.

### 3.1. The Trouble of Counting Treaties

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

In order to determine more precisely the EU-U.S. relationship, three authoritative sources exist, i.e., the U.S. State Department's *Treaties in Force 2018*,<sup>81</sup> the EU's Treaty Office Database,<sup>82</sup> and the *Brexit treaty renegotiation checklist* compiled by the *Financial Times*.<sup>83</sup> A closer look at them reveals that their numbers do not match up. Hence, there is not even a consensus as to the number of treaties between the U.S. and EU in force, which is an important preliminary for delving into the recalibration of relations prompted by Brexit.

In terms of bilateral treaties, the U.S. State Department lists 32 agreements in force between the EU and U.S.<sup>84</sup> According to the

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<sup>81</sup> U.S. Dep't of St., *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2018*, (January 1, 2018) <https://www.state.gov/documents/organization/282222.pdf> [<https://perma.cc/S29S-YBXC>] (last visited Aug. 15, 2018).

<sup>82</sup> Eur. External Action Serv., *EU Treaty Office Database*, <http://ec.europa.eu/world/agreements/default.home.do> [<https://perma.cc/9G9Q-BV2Q>] (last updated Sept. 3, 2018).

<sup>83</sup> Paul McClean et al., *The Brexit Treaty Renegotiation Checklist*, FIN. TIMES (Aug. 20, 2017), <https://ig.ft.com/brexit-treaty-database/> [<https://perma.cc/HA8Y-MSD2>].

<sup>84</sup> See U.S. Dep't of St., *supra* note 81, at 146–47 (referring to entries under the heading “European Union”, and not the European Atomic Energy Community

EU's Treaty Office Database, the number is 54,<sup>85</sup> and according to the FT, it is 37.<sup>86</sup> This excludes treaties pending ratification or those which are being provisionally applied, as well as the many administrative agreements concluded directly between U.S. and EU agencies.<sup>87</sup>

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

In terms of timing, *Treaties in Force* lists all treaties the U.S. considers to be in force at a particular point in time. In the current edition, this is January 1, 2018. Consequently, the U.S. list does not include agreements that entered into force after that date.<sup>88</sup> Hence, the Bilateral Agreement between the European Union and the United States of America on Prudential Measures Regarding Insurance and Reinsurance, which entered into force on April 4, 2018, is absent from the 2018 version of *Treaties in Force*. In addition, the latter source includes only those treaties that "had not expired by their own terms, been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated" by that date.<sup>89</sup> By contrast, the EU Treaty Office lists all agreements that entered into force at some point in the past, including those that are no longer in force. This concerns six agreements of the 54 listed by the EU, including the 2004 Agreement on the processing and transfer of passenger name records data by air carriers,<sup>90</sup> which was declared incompatible with the EU Treaties

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(Euratom) or any of the Union's agencies, which are listed separately).

<sup>85</sup> *Id.* Using as search parameters "Bilateral," "Entered into Force," and "United States" in its "Advanced Search" mode.

<sup>86</sup> McClean et. al, *supra* note 83.

<sup>87</sup> See Peter Chase & Jacques Pelkmans, *This Time it's Different: Turbo-Charging Regulatory Cooperation*, in *RULE-MAKERS OR RULE-TAKERS: EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP* 17, 55-60 (Daniel Hamilton & Jacques Pelkmans eds., 2015) (overviewing such agreements in a useful tabular form).

<sup>88</sup> U.S. Dep't of St., *supra* note 81, at i.

<sup>89</sup> *Id.*

<sup>90</sup> See Council Decision 2004/496 of May 28, 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004 O.J. (L 183) 83 (including the text of the 2004 Agreement).

by the CJEU for fundamental rights concerns (privacy),<sup>91</sup> subsequently denounced by the Council,<sup>92</sup> and ultimately replaced by an agreement from 2011, which entered into force in 2012.<sup>93</sup>

Regarding consolidation, the U.S. and EU employ different approaches to counting extensions and amendments of pre-existing agreements. The State Department opts for a more “economical” approach by listing the main agreement, and then mentioning amendments and extensions as additional information as part of that same entry. The EU Treaty Office Database, on its part, counts amendments and extensions as separate agreements. For example, the EU-U.S. Agreement for scientific and technological cooperation from 1997, which was renewed in 2004 and renewed and amended in 2009, is counted as one by the Americans and as three by the Europeans.<sup>94</sup> From the point of view of the international law of treaties the latter approach is technically correct.<sup>95</sup> However, from a treaty negotiator’s perspective, it might be more useful to adhere to the U.S. approach of counting the consolidated, up-to-date versions of the agreements currently in force.

Thirdly, the most important difference in terms of numbers relates to the counting of “softer” agreements, such as exchanges of letters and memoranda of understanding. However, there is no clearly discernible difference in approach, for instance with one

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<sup>91</sup> Jointed Cases C-317/04 and C-318/04, *Parliament v. Council & Comm’n*, 2006 E.C.R. I-04721.

<sup>92</sup> Council Communication Notice concerning the denunciation of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2006 O.J. (C 219) 1.

<sup>93</sup> Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, EU-U.S., Dec. 14, 2011, T.I.A.S. 12-701.

<sup>94</sup> U.S. Dep’t of St., *supra* note 81, at 147.

<sup>95</sup> See Vienna Convention on the Law of Treaties, art. 39, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“A treaty may be amended by agreement between the parties. The rules laid down in Part II [on conclusion and entry into force of treaties] apply to such an agreement except insofar as the treaty may otherwise provide.”). The United States has signed but not ratified the VCLT. *But see* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L. REV. 307, 314 (2007) (noting that nevertheless, “executive branch officials have stated on a number of occasions that they view much of the Convention as reflecting binding customary international law,” with further references). See also Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 39, ¶ 1, Mar. 21, 1986 [hereinafter VCLTIO] (containing a similar provision to the VCLT, though not in force).

side being generally more generous and the other more restrictive in terms of what it considers worthy of being included in their respective lists. According to the preface of *Treaties in Force*, it “uses the term ‘treaty’ in the generic sense as defined in the Vienna Convention on the Law of Treaties,” rather than “as a matter of U.S. constitutional law”.<sup>96</sup> Hence, executive and executive-congressional agreements are not excluded from the U.S. compendium on “treaties” – despite its name.

Beyond that, it is not evident which criteria are applied by either side. For instance, the EU lists an exchange of letters from 2005 relating to the method of calculation of applied duties for husked rice,<sup>97</sup> while the U.S. does not. By contrast, the U.S. includes a memorandum of understanding from 2009 on the importation of beef from animals not treated with certain growth-promoting hormones,<sup>98</sup> while the EU does not. Each side includes a number of such “soft” agreements in its list that the other does not, with no legal-methodological reason readily apparent.

Regarding the list compiled by the *Financial Times*, which includes 37 U.S.-EU bilateral agreements, in addition to the issues mentioned above, some additional observations need to be made. While excluding expired and superseded treaties, it also excludes those that the journalists and researchers from the *Financial Times* considered of “little or no relevance to the UK after Brexit,”<sup>99</sup> while including also eight European Commission implementing decisions and two delegated regulations.<sup>100</sup> The authors justify this by

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<sup>96</sup> U.S. Dep’t of St., *supra* note 81, at i. The VCLT defines treaties as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” VCLT, *supra* note 95, at art. 2, ¶ 1, lit. a. The VCLTIO defines it as “an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations.” VCLTIO, *supra* note 95, at art. 2, ¶ 1, lit. a.

<sup>97</sup> Agreement in the form of an Exchange of Letters between the European Community and the United States of America relating to the method of calculation of applied duties for husked rice, June 30, 2005.

<sup>98</sup> Memorandum of understanding regarding the importation of beef from animals not treated with certain growth-promoting hormones and increased duties applied by the United States to certain products of the European Communities, May 13, 2009, T.I.A.S. 09-513; U.S. Dep’t of St., *supra* note 81, at 139.

<sup>99</sup> McClean et. al., *supra* note 83.

<sup>100</sup> *Id.*; See, e.g. Commission Implementing Decision (EU) 2016/230 of 17 Feb. 2016 (amending Implementing Decision 2014/908/EU as regards the lists of third countries and territories whose supervisory and regulatory requirements are considered equivalent for the purposes of the treatment of exposures according to

noting that these are “EU ‘equivalence’ decisions on financial services, which provide access rights to third countries” and that “[t]rade partners would likely take them as a starting point in financial services discussions with the UK after Brexit.”<sup>101</sup> While these are indeed relevant acts in the transatlantic and Brexit contexts, they are unilateral in nature and not international agreements.

If one were to approximate the correct number of bilateral treaties currently in force between the EU and U.S. by combining these different lists and with regard to their legal content, it would be around fifty. This number takes into account only bilateral agreements which are currently in force, in their “consolidated” versions, and which despite their sometimes “soft” format at least one side deems “hard” enough to include in their list. This set of agreements represents the substantive treaty law in force between the EU and U.S. bilaterally, which will cease to apply to the UK after Brexit and should be the subject of official discussion to ensure continuity and serve as the baseline for exploring future agreements. Whether all of them need to be replicated, or whether the terms of the replacement treaties should change, will be a matter of negotiations and internal political considerations framed by domestic foreign relations law.

A discrepancy exists also when it comes to multilateral treaties. The EU Treaty Office Database lists 80 multilateral agreements that have entered into force for the EU and which the U.S. has at least signed, if not ratified.<sup>102</sup> The *Financial Times* only lists seven multilateral treaties to be renegotiated with the U.S., noting that in cases such as the WTO or UN, “the UK should be able to ‘plug in’ to these agreements with ease.”<sup>103</sup> This is again a political assessment and not a legal one. The State Department’s *Treaties in Force*, does not allow for a direct two-way comparison, as it simply lists all multilateral treaties in force for the U.S. on January 1, 2018, ordered according to subject matter but without specifying treaty parties.<sup>104</sup>

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Regulation (EU) No 575/2013 of the European Parliament and of the Council, 2016 O.J. (L 41) 23).

<sup>101</sup> McClean et. al., *supra* note 83.

<sup>102</sup> These numbers are taken from the European External Action Service, *supra* note 82, using the markers “Multilateral”, “United States”, and “Entered into Force” in the “Advanced Search” form.

<sup>103</sup> McClean et. al., *supra* note 83.

<sup>104</sup> U.S. Dep’t of St., *supra* note 81, at 497–555 (“Section 2: Multilateral Treaties and Other Agreements”).

Not all of the 80 multilateral agreements from the EU's database that also include the U.S. are listed in *Treaties in Force*. In addition to the reasons for discrepancy mentioned in the bilateral context, another factor at play here is that the EU database includes the signatories to multilateral treaties rather than only those that have ratified. This means that the EU's list includes treaties that the U.S. has signed but not ratified.<sup>105</sup> At the same time the EU Treaty Office Database excludes most of the WTO Agreements, to which the U.S. is a party, from a targeted search.<sup>106</sup>

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

### 3.2. *The EU-U.S. Relationship*

Having outlined the empirical difficulties in establishing the number of treaties in force between the EU and U.S., the following paragraphs provide a categorization of different kinds of transatlantic treaties based on the parties involved, which also reveals the extent of their substance. Starting with EU-U.S. agreements, the analysis subsequently addresses the issue of agreements between the U.S. and EU Member States.

Both within bilateral and multilateral treaties, one must distinguish between "mixed" and "non-mixed" treaties, i.e., those where in addition to the EU, its Member States are also parties, and those

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<sup>105</sup> See generally World Health Org. Framework Convention on Tobacco Control, (May 21, 2003), [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf) [https://perma.cc/2SZW-R7MM]; Conference on Plenipotentiaries, Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, Sept. 11, 1998 U.N.T.C. 39973.

<sup>106</sup> Using the European External Action Service data and search parameters from *supra* note 102, for instance, neither the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Apr. 15, 1994, nor the plurilateral Agreement on Government Procurement, signed in Marrakesh, Apr. 15, 1994, are listed. They appear, however, when only the markers "Multilateral" and "Entered into Force", but not "United States" are used, even though the latter has ratified both agreements.



where only the EU is a party but not the Member States. In contrast to general EU practice,<sup>107</sup> “mixture” tends to be rare in its bilateral treaty relations that do not include a wide-ranging agreement involving sensitive issues, especially those falling out of the EU’s ambit of “exclusive competences”. A prime example of such a mixed agreement is the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.<sup>108</sup> With regard to the U.S., such an agreement would have been TTIP.<sup>109</sup>

Nonetheless, the EU has concluded with the U.S. a number of sectoral agreements in different fields. If the EU has sufficient powers and the issues concerned are not viewed as highly sensitive by the Member States, they can agree to conclude them as EU-only (“non-mixed”) agreements.<sup>110</sup> This is—perhaps counterintuitively—also the case for agreements in security and defense matters falling under the CFSP. Despite their “high politics” nature, if there is consensus among the Member States, such agreements are concluded by the EU alone with a third party.<sup>111</sup> The U.S. is no exception in that respect. In U.S. foreign relations law, by contrast, ‘mixture’ does not occur, despite the states’ constitutionally granted—though limited—powers to make “agreements” with “foreign powers.”<sup>112</sup>

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<sup>107</sup> Christophe Hillion & Panos Koutrakos, *Introduction, in MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* xix, xix (Christophe Hillion & Panos Koutrakos eds., 2010) (“The phenomenon of mixture is still central to the conduct of EU external relations.”).

<sup>108</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, EU-Can., Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA].

<sup>109</sup> FERDI DE VILLE & GABRIEL SILES-BRÜGGE, *TTIP: THE TRUTH ABOUT THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP* 7 (2016).

<sup>110</sup> See Case C-600/14, *Federal Republic of Germany v. Council (COTIF)*, ECLI:EU:C:2017:935, ¶¶ 67–68 (clarifying the EU’s ability to conclude international agreements without the Member States as parties); see also Marise Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, 14 EUR. CONST’L L. REV. 231, 251 (2018).

<sup>111</sup> Guillaume Van der Loo & Ramses A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 54 COMMON MKT. L. REV. 735, 739 (2017) (“Perhaps ironically, an area which is not at all characterized by mixture is the Common Foreign, Security and Defence Policy ...”).

<sup>112</sup> Cf. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power, ...”) with U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation ...”). See Robert Schütze, *Federalism and Foreign Affairs: Mixture as an (Inter)national Phenomenon, in MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* 57, 62–65 (Christophe Hillion & Panos Koutrakos eds., 2010) (summarizing the history of U.S. constitutional

The U.S. obviously is an important treaty partner for the EU, but not the largest in terms of absolute numbers. Based on numbers provided by the EU Treaty Office Database (though their exact numbers are to be taken with a grain of salt as explained, *supra* 3.1.), the EU has signed 147 agreements with the U.S.<sup>113</sup> With Switzerland, this number is 206; with Norway, it is 182.<sup>114</sup> Thirteen of the 147 agreements between the U.S. and EU have not entered into force yet.<sup>115</sup> About fifty of these are bilateral and currently in force in their consolidated versions, while approximately sixty to eighty multilateral ones are in force.<sup>116</sup>

### 3.2.1. *Bilateral*

The bilateral agreements in force between the EU and U.S. cover a wide range of sectors, including the areas of trade and security. In the former area, the EU and U.S. have not managed to conclude a comprehensive agreement. The negotiations on TTIP, launched in 2013,<sup>117</sup> have stalled and remain on hold. Hence, trade relations between the U.S. and EU are largely covered by WTO rules (see *infra* 3.1.2.). Nonetheless, there are a number of sectoral or specific agreements in the area of trade between the two parties. These are in the areas of, among others, competition<sup>118</sup> or trade in hormone-treated beef as the result of a long-lasting WTO dispute.<sup>119</sup> Some are of a technical character, such as the Agreement

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law with regard to constraining the external treaty-making powers of the States); see also IVAN BERNIER, *INTERNATIONAL LEGAL ASPECTS OF FEDERALISM* 51 (1973) (noting that the "states of the American Union are not presently subjects of international law.").

<sup>113</sup> These numbers are taken from the European External Action Service, *supra* note 82, using the markers "Bilateral" and "Multilateral," as well as "Entered into Force" and "Pending" in the "Advanced Search" form.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See DE VILLE & SILES-BRÜGGE, *supra* note 109, at 8–9 (summarizing the negotiation process).

<sup>118</sup> See U.S.-EU, June 3–4, 1998, T.I.A.S. No. 12958 (agreeing on the application of positive comity principles in the enforcement of their competition laws).

<sup>119</sup> See Memorandum of Understanding between the United States of America and the European Commission Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Communities, U.S.-EU, May 13, 2009, T.I.A.S. No. 09-513.

on Mutual Recognition of 1998.<sup>120</sup> The importance of such agreements in the contemporary economy is not to be underestimated, as they “are immensely important for oiling the wheels of trade”<sup>121</sup> and avoiding delays and duplication in processes where possible.

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

In the latter area, the U.S. and the EU have engaged in treaties concerning, for instance, the exchange of passenger name records<sup>122</sup> or on financial data to combat terrorist financing.<sup>123</sup> Moreover, there are agreements on extradition and mutual legal assistance,<sup>124</sup> as well as cooperation agreements concluded with EU agencies that operate in this field, such as Europol.<sup>125</sup> An agree-

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<sup>120</sup> See Agreement on Mutual Recognition between the European Community and the United States of America, EU-U.S., May 18, 1998, E.T.S. No. 31 (setting out various specific standards to which both the U.S. and European Community will conform in order to facilitate trade).

<sup>121</sup> Marise Cremona, *UK Trade Policy*, in *THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES* 247, 259 (Michael Dougan ed., 2017).

<sup>122</sup> Agreement between the United States of America and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security, U.S.-EU, Dec. 14, 2011, T.I.A.S. No. 12-701.

<sup>123</sup> Agreement between the United States of America and the European Union on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of the Terrorist Finance Tracking Program, U.S.-EU, June 28, 2010, T.I.A.S. No. 10-801. The UK, given its opt-out from this area of EU policy (*supra* 2.1), opted back into this specific agreement. See Council Decision on the Conclusion of the Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, 2010 O.J. (L 195) 3 [herein after TFTP] (noting in the preamble that “the United Kingdom has notified its wish to take part in the adoption and application of this Decision.”).

<sup>124</sup> See Agreement on Extradition between the European Union and the United States of America, EU-U.S., pmbl., June 25, 2003, T.I.A.S. 10-201 (setting forth that the parties desire to cooperate on extradition in order to “combat crime in a more effective way as a means of protecting their respective democratic societies and common values”); see also Agreement on Mutual Legal Assistance between the United States of America and the European Union, U.S.-E.U., June 25, 2003, T.I.A.S. 10-201.1 (outlining various ways in which the parties will share information or provide assistance for criminal prosecutions and investigations).

<sup>125</sup> See Agreement to Enhance Cooperation in Preventing, Detecting, Suppressing, and Investigating Serious Forms of International Crime, EU-U.S., art. 1, Dec. 6, 2001, T.I.A.S. 01-1207 (setting forth that the EU, through Europol, and the U.S. will cooperate with respect to combating international crime by exchanging “strategic and technical information”). Note that this agreement is not listed by

ment which straddles the areas of internal and external security is about the treatment of classified information, concluded between the U.S. and EU in 2007.<sup>126</sup> From the EU's point of view, it has its "legal basis" in both the Common Foreign and Security Policy and the Area of Freedom Security and Justice.<sup>127</sup>

While the U.S. and EU have not managed to strike a deep and comprehensive agreement in the area of "low politics" trade, they did conclude a number of agreements in the area of security and defense—an area in which the EU's "economic giant" tends to be contrasted with its being a "political dwarf" and "military worm."<sup>128</sup> As noted earlier, these agreements in the area of the EU's CFSP are non-mixed, i.e., they do not include the Member States as parties.<sup>129</sup>

For instance, in 2016, the U.S. and EU concluded an Acquisition and Cross-servicing Agreement, which has as its objective "to further the interoperability, readiness, and effectiveness of their respective Military Forces through increased logistic cooperation."<sup>130</sup> According to the agreement, the EU "shall ensure that its Member States, directly or through Athena [the EU's internal mechanism for financing common costs of military operations], reimburse the United States of America for all Logistic Support, Supplies, and Services provided by the United States of America pursuant to this Agreement,"<sup>131</sup> and vice versa.<sup>132</sup>

Moreover, in 2011, the U.S. and EU concluded a Framework

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the U.S. State Department as having been concluded with the EU, but with the respective EU agency.

<sup>126</sup> See Agreement between the government of the United States of America and the European Union on the security of classified information, U.S.-EU, Apr. 30, 2007, T.I.A.S. 07-430.1 (establishing security measures regarding the exchange of classified information to further the common interest of security).

<sup>127</sup> See Council Decision 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information, pmbl., 2007 O.J. (L 115) 29 (referring to the pre-Lisbon TEU provisions in both areas).

<sup>128</sup> This description is attributed to former Belgian Foreign Minister Mark Eyskens, made in 1991, cited by Craig R. Whitney, *WAR IN THE GULF: EUROPE; Gulf Fighting Shatters Europeans' Fragile Unity*, N.Y. TIMES (Jan. 25, 1991), <http://www.nytimes.com/1991/01/25/world/war-in-the-gulf-europe-gulf-fighting-shatters-europeans-fragile-unity.html> [<https://perma.cc/PSN8-77R8>].

<sup>129</sup> See Van der Loo & Wessel, *supra* note 111, at 793.

<sup>130</sup> Acquisition and Cross-Servicing Agreement between the European Union and the United States of America (ACSA), EU-U.S., pmbl., Dec. 6, 2016, 2016 O.J. (L 350) 3.

<sup>131</sup> *Id.* at art. V, ¶ 1.

<sup>132</sup> *Id.* at art. V, ¶ 2.

Agreement on the Participation of the United States of America in European Union Crisis Management Operations.<sup>133</sup> It lays down “general conditions” for the U.S. contributing to EU missions, “rather than defining these conditions on a case-by-case basis for each operation concerned.”<sup>134</sup> However, while similar agreements with other countries include also the contribution of military assets,<sup>135</sup> this agreement is restricted to “contributions of civilian personnel, units, and assets by the U.S. to EU crisis management operations (the ‘U.S. contingent’).”<sup>136</sup> As with other third country participating arrangements in CSDP operations, U.S. contingents would remain within the national chain of command,<sup>137</sup> while at the same time such participation “shall be without prejudice to the decision-making autonomy of the European Union.”<sup>138</sup>

The framework agreement has not been made use of to date. Nevertheless, before the framework agreement, there was already an active practice of the U.S. contributing to EU operations. Based on specific agreements for American participation in “EULEX KOSOVO,” the EU’s Rule of Law Mission in Kosovo,<sup>139</sup> the U.S. contributed by deploying eighty police officers and eight judges and prosecutors.<sup>140</sup>

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<sup>133</sup> Framework Agreement between the United States of America and the European Union on the Participation of the United States of America in European Union Crisis Management Operations, EU-U.S., pmbl., May 17, 2011, T.I.A.S. 11-601.

<sup>134</sup> *Id.*

<sup>135</sup> See Agreement between the European Union and the Kingdom of Norway Establishing a Framework for the Participation of the Kingdom of Norway in the European Union Crisis-Management Operations, EU-Nor., Dec. 3, 2004, 2005 O.J. (L67) 8 (setting out the terms of Norway’s contributions to EU crisis-management operations).

<sup>136</sup> Framework Agreement between the United States of America and the European Union, *supra* note 133, at art. 2, ¶ 2.

<sup>137</sup> *Id.* at art. 6, ¶ 2.

<sup>138</sup> *Id.* at art. 1, ¶ 3.

<sup>139</sup> See Agreement between the United States of America and the European Union on the Participation of the United States of America in the European Union Rule of Law Mission in Kosovo, U.S.-EU, EULEX KOSOVO, pmbl., Oct. 22, 2008, T.I.A.S. 08-1022 (furthering “the shared desire of the United States and the European Union to collaborate closely in supporting the development of Kosovo’s democratic standards”).

<sup>140</sup> See ERWAN LAGADEC, *TRANSATLANTIC RELATIONS IN THE 21ST CENTURY: EUROPE, AMERICA AND THE RISE OF THE REST* 142 (2012) (describing the U.S. contribution to operations); see also Thierry Tardy, *CSDP: Getting Third States on Board*, European Union Institute for Security Studies Issue Brief No. 6 (Mar. 2014), at 2 (noting that the “United States has contributed to three operations (EULEX Kosovo, EUSEC RD Congo, EUPOL RD Congo), mainly by providing advisors and

Lastly, and as the only case of “mixture” in a bilateral agreement in force between the U.S. and EU, the Agreement on the Promotion, Provision and Use of Galileo and Global Positioning System (“GPS”) Satellite-Based Navigation Systems and Related Applications was signed in 2004 and entered into force in 2011 after ratification by all parties.<sup>141</sup> As a “mixed agreement,” it includes as parties the U.S. on one side, and the EU and its Member States on the other. The State Department’s *Treaties in Force* lists the agreement under the thematic heading “Maritime Affairs,”<sup>142</sup> whereas for the EU it falls under “Trans-European Networks.”<sup>143</sup> However, the agreement touches upon several policy areas. It notes in the preamble that the American GPS is “a dual use system that provides precision timing, navigation, and position location signals for civil and military purposes”<sup>144</sup> and lists as one of the objectives of the agreement the desire “to promote open markets and to facilitate growth in trade with respect to commerce in global navigation and timing goods.”<sup>145</sup>

This agreement is therefore unusual in terms of the width of its content. As a result, there was a need to include the Member States as parties in accordance with the EU’s system of external relations law. Another factor prompting its “mixed” character was pressure from the U.S. to clarify responsibility and liability issues. Hence, the agreement stipulates:

If it is unclear whether an obligation under this Agreement is within the competence of either the European Community or its Member States, at the request of the United States,

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personnel to assist the work of the police, prosecution and judiciary.”).

<sup>141</sup> See Agreement on the Promotion, Provision and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications, *supra* note 79. See also Peter M. Olson, *Mixture from the Outside: The Perspective of a Treaty Partner*, in MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 331, 332 (Christophe Hillion & Panos Koutrakos eds., 2010) (noting that this was the first ever bilateral mixed agreement that the U.S. concluded).

<sup>142</sup> U.S. Dep’t of St., *supra* note 81, at 146.

<sup>143</sup> See Council Decision of 12 December 2011 on the Conclusion of the Agreement on the Promotion, Provision and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications between the European Community and its Member States, of the one part, and the United States of America, of the other part, EU-U.S., pmb., 2011 O.J. (L 348) 1 (identifying as the agreement’s substantive legal basis TFEU arts. 171 and 172).

<sup>144</sup> Agreement on the Promotion, Provision and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications, *supra* note 79, at first recital of the pmb.

<sup>145</sup> *Id.* at eighth recital of the preamble.

the European Community and its Member States shall provide the necessary information. Failure to provide this information with all due expediency or the provision of contradictory information shall result in joint and several liability.<sup>146</sup>

This may be due to the desire from the American side to “have the division of powers – and concomitant responsibility – between Union and Member States clearly spelled out to them”<sup>147</sup> or, failing that, accept joint and several liability.<sup>148</sup> Given this limited, and already not altogether positive experience of the U.S. with bilateral mixed agreements,<sup>149</sup> further uncertainty infused by Brexit can be expected to create an even stronger call for legal clarity from the American side.

### 3.2.2. *Multilateral*

In addition to bilateral treaties, the U.S. and EU are members of international organizations and parties to a range of multilateral agreements. In multilateral settings, “mixity” is more common for the EU. Nevertheless, the EU is not as well represented in international fora and global conventions as one might expect given the extensive external powers the Member States have conferred upon it.<sup>150</sup> This is due to the fact that certain international treaties only

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<sup>146</sup> *Id.* at art. 19, ¶ 2. *See also id.* at art. 18, (designating as the parties on the European side “the European Community or its Member States or the European Community and its Member States, within their respective areas of competence”).

<sup>147</sup> Pieter Jan Kuijper & Esa Paasivirta, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION EUROPEAN AND INTERNATIONAL PERSPECTIVES* 45, 52 (Malcolm Evans & Panos Koutrakos eds., 2013).

<sup>148</sup> *See Olson, supra* note 141, at 343–44 (stressing that this issue was a contentious point in the negotiations).

<sup>149</sup> *Id.* at 344 (noting that “[n]either side was happy with the result, however, nor is it clear that either would be prepared to accept a similar solution in other cases.”).

<sup>150</sup> *See generally* Inge Govaere et. al., *In-Between Seats: The Participation of the European Union in International Organizations*, 9 *EUR. FOREIGN AFF. REV.* 155 (2004) (discussing issues concerning the EU’s limited role in international organizations); Jan Wouters et. al., *The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities*, in *THE DIPLOMATIC SYSTEM OF THE EUROPEAN UNION: EVOLUTION, CHANGE AND CHALLENGES* 94 (Stephan Keukeleire et. al. eds., 2015) (noting the discrepancy between the ambitions enshrined in the EU Treaties after the Lisbon reform for the EU’s engagement with international or-

allow states to become parties, which also limits the EU's ability to join certain international organizations.<sup>151</sup> Examples of cases where the EU would have had the internal power to conclude the agreement include conventions adopted in the framework of the International Labor Organization and the UN Charter (where it could appear alongside its Member States).<sup>152</sup> In the case of the UN, the EU achieved "enhanced observer status" at the General Assembly in 2011.<sup>153</sup> Membership, however, remains impossible.

There has been a trend more recently to allow "regional (economic) integration organizations" to accede to treaties and to join specific international organizations. It is by virtue of these possibilities that the EU and U.S. find themselves bound in larger multilateral frameworks. Prominent examples include the WTO<sup>154</sup> and the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>155</sup> For the time being, it also includes the Paris Climate Agreement,<sup>156</sup> from which, however, the U.S. has signaled its intention to withdraw.<sup>157</sup> It includes, moreover, a range of technical multilat-

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gations and the reality where the EU faces numerous legal and political obstacles).

<sup>151</sup> See, e.g., U.N. Charter art. 4, ¶ 1 ("Membership in the United Nations is open to all other peace-loving states ..."); North Atlantic Treaty art. 10, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 ("The Parties may, by unanimous agreement, invite any other European State ...").

<sup>152</sup> On the former, see Marco Ferri, *Coordination Between the European Union and its Member States*, in *THE EUROPEAN UNION IN INTERNATIONAL ORGANIZATIONS AND GLOBAL GOVERNANCE* 77, 78 (Christine Kaddous ed., 2015); on the latter, see Mariangela Zappia, *The United Nations: A European Union Perspective*, in *THE EUROPEAN UNION IN INTERNATIONAL ORGANIZATIONS AND GLOBAL GOVERNANCE* 25, 27 (Christine Kaddous ed., 2015) (noting that at the UN, the EU "intervenes in all areas, ranging from environmental, to development, labour, telecommunications, humanitarian, disarmament, human rights and highly political issues").

<sup>153</sup> G.A. Res. 65/276 (May 3, 2011).

<sup>154</sup> Marrakesh Agreement, *supra* note 106, at art XI, ¶ 1 ("The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, ... shall become original Members of the WTO").

<sup>155</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, art. 14, ¶ 1, Sept. 16, 1987, 1522 U.N.T.S. 29 ("This Convention and any protocol shall be open for accession by States and by regional economic integration organizations ...").

<sup>156</sup> Paris Agreement, art. 20, ¶ 1, Dec. 12, 2015, T.I.A.S. 16-1104 ("This Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations ...").

<sup>157</sup> Media Note, U.S. Dep't of St., Communication Regarding Intent to Withdraw from Paris Agreement (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm> [<https://perma.cc/UB2S-HZSA>]. According to art. 28, ¶ 1 of the Paris Agreement, *supra* note 156, which the U.S. signed on April 22, 2016, withdrawal is pos-



eral agreements,<sup>158</sup> as well as in the area of commodities.<sup>159</sup> In order to illustrate the global presence and ambitions of both the U.S. and EU, one can point to the Treaty of Amity and Cooperation in Southeast Asia, of which both are parties.<sup>160</sup>

A special case from the area of international security is the Iran Nuclear Deal, negotiated by the “P5+1”, which included representation from the EU and is hence sometimes rendered by the latter as “E3+3” (France, Germany, and the UK as EU Members, plus China, Russia, and the U.S.).<sup>161</sup> The deal is not an international agreement for the purposes of international law, but instead was enshrined in the form of a “Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif”<sup>162</sup> as well as in a document published by the U.S. State Department on “Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran’s Nuclear Program”.<sup>163</sup> The

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sible at the earliest three years from the date of entry into force of the agreement, which was on Nov. 4, 2016.

<sup>158</sup> See, e.g., Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts Which can be Fitted and/or be Used on Wheeled Vehicles, art. 2, ¶ 1, June 25, 1998, 2119 U.N.T.S. 129 (“regional economic integration organizations ... may become Contracting Parties to this Agreement”).

<sup>159</sup> See, e.g., International Coffee Agreement, art. 2, ¶ 5, Sept. 28, 2007, T.I.A.S. 11-202 (“Contracting Party means a Government, the European Community or any intergovernmental organization referred to in paragraph (3) of Article 4 ...”).

<sup>160</sup> Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1025 U.N.T.S. 297. It entered into force for the U.S. in 2009 and for the UK and EU in 2012, after the Treaty had been amended to allow states and regional organizations outside of Southeast Asia to join. See Third Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, art. 18, ¶ 3, July 23, 2010, Cm. 8294 (“This Treaty shall be open for accession by States outside Southeast Asia and regional organisations whose members are only sovereign States subject to the consent of all the States in Southeast Asia, namely, Brunei Darussalam, the Kingdom of Cambodia ...”).

<sup>161</sup> See, e.g., Sebastian Harnisch, *Minilateral Cooperation and Transatlantic Coalition-Building: The E3/EU-3 Iran Initiative*, 16 EUR. SECURITY 1 (2007) (making frequent use of the “E3/EU-3” acronym).

<sup>162</sup> Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif Switzerland, European External Action Service (Apr. 2, 2015), [https://eeas.europa.eu/headquarters/headquarters-homepage/3477/joint-statement-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/3477/joint-statement-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad_en) [<https://perma.cc/P7E2-5QFK>].

<sup>163</sup> Media Note, U.S. Dep’t of State, Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran’s Nuclear Program, (Apr. 2, 2015), <https://2009-2017.state.gov/r/pa/prs/ps/2015/04/240170.htm> [<https://perma.cc/MG3R-H8ZK>].

framework was later specified in the “Joint Comprehensive Plan of Action” of July 2015.<sup>164</sup> In May 2018, the U.S. withdrew from the Iran Deal,<sup>165</sup> thus making it no longer an EU-U.S. transatlantic commitment.

In the multilateral sphere, this also means that delegations of the U.S. and EU sit together in the organs of a number of international organizations and at times face each other as litigants in international disputes. The most prominent example of the latter is litigation at the WTO. The U.S. and EU are both very active litigants in this forum, having faced each other in more than fifty cases.<sup>166</sup>

It should be noted that, both in the bilateral and the multilateral setting, the EU's presence does not automatically entail the absence of its Member States. Some of these settings are mixed. An example for a non-mixed multilateral setting is the Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) from 2005, which includes as parties the EU and the U.S., as well as Japan, South Korea and Taiwan (the latter in its capacity as a WTO member under the name “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu”).<sup>167</sup>

A particularly intricate example of a mixed agreement is the so-called “Open Skies” agreement. It was signed originally in 2007 between the U.S. on the one, and the EU and its Member States on the other side.<sup>168</sup> It has not entered into force, but has been “provisionally applied” since March 2008.<sup>169</sup> Though starting out as a bi-

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<sup>164</sup> Joint Comprehensive Plan of Action, European External Action Service (July 14, 2015), [http://eeas.europa.eu/archives/docs/statements-eeas/docs/iran\\_agreement/iran\\_joint-comprehensive-plan-of-action\\_en.pdf](http://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf) [<https://perma.cc/M7DH-GWZT>].

<sup>165</sup> Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES, May 8, 2018, <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html> [<https://perma.cc/4YGR-WK5Z>].

<sup>166</sup> WORLD TRADE ORGANIZATION, FIND DISPUTES CASES (2018), [https://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm) [<https://perma.cc/9E8S-XGTP>] (which shows that as of August 2018, the EU has appeared as either complainant or respondent 184 times in WTO disputes; the U.S. in 269 cases).

<sup>167</sup> Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs), Nov. 28, 2005, T.I.A.S. 06-401.

<sup>168</sup> Air Transport Agreement, Apr. 30, 2007, 2007 O.J. (L 134) 4.

<sup>169</sup> Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States,

lateral agreement, it was subsequently “multilateralized” by virtue of an agreement concluded in 2011 to allow Norway and Iceland to accede to the arrangement.<sup>170</sup> However, despite the additional non-EU parties, the agreement retains a largely bilateral structure, due to the fact that Norway and Iceland are “fully integrated members of the single European Aviation Market through the Agreement on the European Economic Area,”<sup>171</sup> An institutional consequence of this is that within the Joint Committee set up under ‘Open Skies,’ the position of the EU and its Member States, as well as that of Iceland and Norway, “shall be presented by the Commission, except in areas within the EU that fall exclusively within Member States’ competence, in which case it shall be presented by the Presidency of the Council or by the Commission, Iceland and Norway as appropriate.”<sup>172</sup>

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

### 3.3. *The 28 Member States as “Strange Subjects”*

In international relations scholarship, the EU has been described as a “strange animal,”<sup>173</sup> given that it is “not quite a state but with more powers than many nation states in the international system.”<sup>174</sup> This is due, politically, to its still considerable combined capacities,<sup>175</sup> and, legally, to its supranational features. However, as De Witte rightly pointed out, not only the EU, but al-

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on the one hand, and the United States of America, on the other hand, 2007 O.J. (L 134) 1.

<sup>170</sup> Air Transport Agreement, U.S.-EU (Iceland, Norway), June 21, 2011, <https://www.state.gov/documents/organization/170897.pdf>. This agreement is not in force but provisionally applied.

<sup>171</sup> Ancillary Agreement, June 21, 2011, 2011 O.J. (L 283) 16.

<sup>172</sup> *Id.* at art. 3, ¶ 2.

<sup>173</sup> FRASER CAMERON, AN INTRODUCTION TO EUROPEAN FOREIGN POLICY 6 (2d ed., 2012).

<sup>174</sup> *Id.*

<sup>175</sup> Andrew Moravcsik, *Europe Is Still a Superpower*, FOREIGN POLICY (Apr. 13, 2017), <http://foreignpolicy.com/2017/04/13/35europa-is-still-a-superpower/> [<https://perma.cc/DC4E-SA9K>].

so its Member States have become strange subjects of international law.<sup>176</sup> This is due mainly to the tension between, on the one hand, having conferred extensive powers upon the EU to act internationally, and, on the other, the desire to remain present themselves on the international scene. In contrast to the constitutional framework of the U.S. with its “sole organ”<sup>177</sup> and “Commander in Chief”<sup>178</sup> running the nation’s foreign affairs, one could thus speak of a rather “open” version of “foreign affairs federalism” in the case of the EU.<sup>179</sup> As the EU’s 2016 Global Strategy for Foreign and Security Policy formulated it: “EU foreign policy is not a solo performance: it is an orchestra which plays from the same score.”<sup>180</sup>

To make sure that this “orchestra” plays in harmony, EU external relations law has developed a number of principles, many of which have a constraining effect on the freedom of the Member States when acting internationally. To mention the most important ones, there is, first, the duty to respect the Union’s “exclusive competences.” These are areas which have been explicitly designated as such in the EU Treaties,<sup>181</sup> but also those where the Union has adopted “common rules” which may be affected by international actions of the Member States.<sup>182</sup> This means that Member States can become pre-empted from acting as new EU rules are being adopted.<sup>183</sup> In those areas “only the Union may legislate and adopt legally binding acts, the Member States being able to do so them-

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<sup>176</sup> Bruno De Witte, *The Emergence of a European System of Public International Law: The EU and its Member States as Strange Subjects*, in *THE EUROPEANISATION OF INTERNATIONAL LAW* 39 (Jan Wouters et. Al. eds., 2008).

<sup>177</sup> The term “sole organ” dates back to 1800, when Chief Justice Marshall used it in a speech to Congress: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,” as cited in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 41-45 (2d ed., 1996).

<sup>178</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>179</sup> Schütze, *supra* note 112, at 65.

<sup>180</sup> SHARED VISION COMMON ACTION: A STRONGER EUROPE, *supra* note 55, at 46.

<sup>181</sup> TFEU, *supra* note 28, at art. 3, ¶ 1.

<sup>182</sup> The latter is also known as the “ERTA” effect after the seminal decision in *Case 22/70, Commission v. Council*, 1971 E.C.R. 263. See Cremona, *supra* note 76 (discussing the different kinds of EU external competence and the evolution of case law on this matter over time).

<sup>183</sup> Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 2006 E.C.R. I-01145, ¶ 126 (noting that it “is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis ...”); see also Cremona, *supra* note 76, at 249-50.

selves only if so empowered by the Union or for the implementation of Union acts.”<sup>184</sup>

Where there is no EU Treaty-based exclusive competence or common rules, Member States are still bound by what the Treaty on European Union calls the “principle of sincere cooperation.”<sup>185</sup> The principle operates in such a way to ensure that Member States do not negotiate international agreements in parallel to the EU,<sup>186</sup> or even set in motion procedures in international fora that disturb the “unity in the international representation of the Union and its Member States.”<sup>187</sup> In other areas, the EU and Member States can continue to act in parallel. These include development cooperation and humanitarian aid.<sup>188</sup> Regarding the CFSP/CSDP in particular, cooperation is framed as “political solidarity”<sup>189</sup> rather than as a rigid legally enforceable obligation.<sup>190</sup> While sincere cooperation in all these instances applies as a legal duty, its effects and degrees of justiciability change.<sup>191</sup> In the area of security and defense in particular, the Member States retain a large degree of flexibility and freedom to act internationally.

Thus, the Member States of the EU, while being the sovereign equals of other states from the point of view of international law, are legally constrained in their foreign relations in significant ways. This is the defining feature of ‘transatlantic trigonometry’: Even

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<sup>184</sup> TFEU, *supra* note 28, at art. 2, ¶ 1.

<sup>185</sup> TEU, *supra* note 28, at art. 4, ¶ 3.

<sup>186</sup> See Case C-433/03, *Commission v. Federal Republic of Germany*, 2005 E.C.R. I-06985 (holding that Germany had violated EU regulations by forming bilateral agreements with Romania, Poland, and Ukraine).

<sup>187</sup> See Case C-246/07, *Commission v. Kingdom of Sweden*, 2010 E.C.R. I-03317, ¶ 104 (stating that Sweden, by unilaterally adding to a list of pollutants, would likely compromise the “principle of unity in the international representation of the Union and its Member States”); see also Andrés Delgado Casteleiro & Joris Larik, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations?*, 36 EUR. L. REV. 522, 533 (2011) (discussing that the duty is in principle reciprocal, but in practice has been applied predominantly to restrain Member State actions).

<sup>188</sup> TFEU, *supra* note 28, at art. 4, ¶ 4.

<sup>189</sup> TEU, *supra* note 28, at art. 24, ¶ 3, subpara. 2.

<sup>190</sup> *Id.* at art. 24, ¶ 1, subpara. 2 (excluding largely the jurisdiction of the CJEU from this area and noting that the “adoption of legislative acts shall be excluded,” which could produce a preemptive effect).

<sup>191</sup> See Joris Larik, *Pars Pro Toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity*, in STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW 175, 183–84 (Marise Cremona ed., 2018) (“... [Q]uestions remain, first, to what extent these legal duties incumbent on the Member States fall under the jurisdiction of the CJEU, and if so, to what extent they are justiciable and with what consequences.”).

when international legal relations between Washington and an EU Member State are at stake, Brussels is always the third point to keep in mind. At times, this is as obvious as being a treaty partner alongside the Member States, while at other times it is in more subtle and implicit ways, where the EU itself does not feature as a treaty party of the U.S. This applies to both bilateral and multilateral settings.

### 3.3.1. *Bilateral*

The U.S. maintains bilateral treaty relations with all EU Member States, amounting to many hundreds of treaties currently in force between them. Among those are 160 treaties in force with the UK.<sup>192</sup> Rather than attempting to cover them all, which would be a highly repetitive exercise, a number of general patterns can be highlighted with particular regard to the relationship with the EU in the background.

First, the treaties in force between the U.S. and EU Member States, which are not mixed in that they do not include the EU as a party, reflect the policy areas in which Member States retain competences of their own. Otherwise put, this concerns powers which have not been conferred upon the EU in such a way that the Member States would be preempted from acting. This includes, for instance, treaties in the military domain.<sup>193</sup> At the same time, as was seen above, this does not preclude the EU from concluding bilateral treaties with the U.S. on military matters under its Common Security and Defence Policy without the Member States as parties (*supra* 3.2.1). In other cases, treaties regulate territorial matters or issues relating to the settlement of historical disputes,<sup>194</sup> which are issues that fall outside the scope of EU law or where Member State powers are clearly retained.<sup>195</sup>

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<sup>192</sup> U.S. Dep't of St., *supra* note 81, at 485-95, and not counting any of the treaties the UK has with the U.S. on behalf of various overseas territories.

<sup>193</sup> See, e.g., Agreement between the Department of Defense of the United States of America and the Ministry of Defense of the Kingdom of Denmark Concerning Ballistic Missile Defense Technology, U.S.-Den., Oct. 25, 2005 (extending United States Ballistic Missile Defense System protection to Denmark).

<sup>194</sup> See, e.g., Treaty on the delimitation in the Caribbean of a maritime boundary relating to the U.S. Virgin Islands and Anguilla, Anguilla-U.S., Nov. 5, 1993, 1913 U.N.T.S. 5.

<sup>195</sup> See TEU, *supra* note 28, at art. 4, ¶ 2 (stating that the EU "shall respect [the Member States'] essential State functions, including ensuring the territorial integ-

Second, at the other end of the spectrum of the impact of EU membership obligations, are those areas where the EU has exclusive competences. There, Member States are preempted from acting and hence are barred from negotiating treaties with the U.S. This explains the absence of trade and trade-related agreements between the U.S. and individual Member States. This issue came clearly to the fore in a phone conversation between the U.S. President and German Chancellor Merkel in 2017. According to media reports, the President asked repeatedly about bilateral trade negotiations with Germany and “[e]very time the Chancellor replied: ‘You can’t do a trade deal with Germany, only the EU.’”<sup>196</sup>

In between these two extremes, there is a grey area of evolving legislation and policy.<sup>197</sup> This fluidity does not make the collective of the Union and Member States an easy partner on the international stage, as could be seen already from the American concerns about liability in the GPS/Galileo Agreement (*supra* 3.2.1). Other examples of relevance in transatlantic relations include air transport services and bilateral investment treaties. For example, a number of Member States, but not the UK, have concluded bilateral investment treaties (BITs) with the U.S., mostly from before they became EU members.<sup>198</sup> Subsequently, the EU has acquired exclusive powers in matters relating to foreign direct investment and started developing its own investment policy.<sup>199</sup> It has not,

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riety of the State, maintaining law and order and safeguarding national security.”).

<sup>196</sup> Lucy Pasha-Robinson, *Angela Merkel “had to Explain Fundamentals of EU Trade to Donald Trump 11 Times”*, INDEPENDENT (Apr. 24, 2017), <http://www.independent.co.uk/news/world/39uopa3939/us-politics/angela-merkel-donald-trump-explain-eu-trade-11-times-germany-chancellor-us-president-a7699591.html> [<https://perma.cc/J8RY-EHJV>].

<sup>197</sup> See Friedrich Erlbacher, *Recent Case Law on the External Competences of the European Union: How Member States can Embrace their own Treaty* (Ctr. For the Law of EU External Rel., Working Paper No. 43, 2017) [http://www.asser.nl/media/3485/cleer17-2\\_web.pdf](http://www.asser.nl/media/3485/cleer17-2_web.pdf), [<https://perma.cc/7XSW-KGKB>] (arguing, among other things, that situations where Member State action becomes pre-empted by the EU’s international agreements is rare and that reducing mixity will not lead to the disappearance of the Member States from the international stage).

<sup>198</sup> See e.g., Treaty between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, U.S.-Lat., Jan. 13, 1995, T.I.A.S. 96-1226.

<sup>199</sup> See Angelos Dimopoulos, *Creating an EU Foreign Investment Policy: Challenges for the Future*, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 401 (Paul James Cardwell ed., 2011) (discussing challenges related to the development of EU foreign investment policy).

however, acquired powers over non-direct (portfolio) investments,<sup>200</sup> while the legality of BITs concluded by EU Member States remains in limbo.<sup>201</sup>

In the area of air transport, several Member States had bilateral treaties as well, including with the U.S.<sup>202</sup> Due to the provisional application of the U.S.-EU “Open Skies” Agreement mentioned above (*supra* 3.2.2), 23 such agreements are suspended “for the duration of provisional application” of the U.S.-EU Air Transport Agreement.<sup>203</sup> This is also the case for the UK, whose agreement on “North Atlantic air fares” with the U.S. entered into force in 1978.<sup>204</sup>

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

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<sup>200</sup> See Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, 2017, ¶ 238, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62015CV0002%2801%29> [<https://perma.cc/V6A4-KS99>].

<sup>201</sup> See Case C-284/16, *Slowakische Republik v. Achmea BV*, judgement of Mar. 6, 2018 (not yet reported) (holding that the arbitration clauses contained in BITs between EU Member States are incompatible with EU law). For BITs between Member States and third countries, a regime of authorization by the European Commission is in place. See also Regulation (EU) 1219/2012 of the European Parliament and of the Council, 2012 O.J. (L 351) 40 (establishing transitional arrangements for bilateral investment agreements between Member States and third countries).

<sup>202</sup> See, e.g., Air Transport Agreement between the United States of America and the Federal Republic of Germany, U.S.-Ger., July 7, 1955, 7 U.S.T. 527, T.I.A.S. 3536 (establishing mutual rights for aircraft of either party and specifying how flights between the two countries can operate).

<sup>203</sup> See, U.S. Dep’t of St., *supra* note 81, at 22, 35, 55, 114, 121, 153, 162, 177, 205, 226, 238, 239, 289, 301, 338, 390, 393, 398, 425, 439, 450, and 495.

<sup>204</sup> Agreement on Air Transport Services, U.K.-U.S., Mar. 17, 1978, 29 U.S.T. 2676, T.I.A.S. 8964.



### 3.3.2. Multilateral

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

An example where all are present is the WTO (see *supra* 3.2.2). The Member States’ presence there was justified given that the WTO Agreements covered more than the scope of the Common Commercial Policy (“CCP”) at the time of its founding, for instance, with regard to intellectual property rights.<sup>205</sup> Today, given the expanded scope of the CCP, it is more questionable that the Member States are still legally required in Geneva, though even with very limited shared powers, a case for “mixity” can still be made.<sup>206</sup> In practice, the European Commission represents the EU and the Member States at the WTO. This includes dispute settlement and cases that have been launched against individual Member States.<sup>207</sup> The Member States’ very limited role in the WTO is justified in EU external relations law. Given the expanse of exclusive competence in this area, complemented by the duty of sincere cooperation, Member States must tread very carefully lest they violate their obligations under EU law.

Moreover, the principles of exclusivity and sincere cooperation apply in international settings where the Member States are represented, but the EU cannot be despite having been conferred powers in the area at hand. Such situations arise because certain multilateral organizations do not allow for non-state entities to become

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<sup>205</sup> See Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, 1994 E.C.R. I-05267, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CV0001> [<https://perma.cc/6GDZ-N7UZ>].

<sup>206</sup> See Joris Larik, *Sincere Cooperation in the Common Commercial Policy: Lisbon, a “Joined-Up” Union, and “Brexit”*, 8 EUR. YBK. INT’L ECON. L. 83, 105-06 (2017).

<sup>207</sup> See Andrés Delgado Casteleiro & Joris Larik, *The “Odd Couple”: Responsibility of the EU at the WTO*, in THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES 233, 239-40 (Malcolm Evans & Panos Koutrakos eds., 2013) (summarizing the practice of the EU stepping in to defend its Member States in WTO disputes).

members (see *supra* 3.2.2). But even here, though the EU is not represented by its own institutions, other countries, including the U.S., have to remember the “triangular” relationship nonetheless. This includes forums such as the ILO and IMO, where EU Member States are bound to act under EU law in the Union’s interest to the extent that they are – vicariously – exercising EU competences.<sup>208</sup>

In the domains where EU membership obligations are less stringent, the EU-Member State side of the triangle is less rigid. For instance, at the United Nations, all Member States are represented, but the EU cannot be a member. When measures fall in the area of security and defense policy, the Member States are freer to act. In principle, they remain bound by the duty of sincere cooperation, but the jurisdiction of the EU Court of Justice is excluded from this area.<sup>209</sup> Moreover, the Member States added declarations to the EU Treaties affirming their independent role, especially as permanent members of the UN Security Council.<sup>210</sup> Hence, when U.S. representatives face their French counterparts, they can assume that they will act and vote on behalf of their country, largely unconstrained by EU membership. Nonetheless, as the *Kadi* saga on the constitutionality of targeted UN sanctions under EU law illustrates, the EU Member States may in principle be compelled to refuse implementation of UN Security Council Resolutions, even if they helped adopt them in the first place.<sup>211</sup>

Another example from the security domain and pillar of the transatlantic relationship is NATO, of which the EU itself cannot become a member either.<sup>212</sup> By contrast, 22 EU Member States are members of NATO. The non-NATO members in the EU are: Austria, Cyprus, Finland, Ireland, Malta, and Sweden, which maintain security policies of neutrality or non-alignment.<sup>213</sup> A loose cooper-

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<sup>208</sup> See Case C-45/07, *Comm’n v. Hellenic Republic*, 2009 E.C.R. 81, ¶ 31 (“the fact that the Community is not a member of an international organization does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community’s interest.”).

<sup>209</sup> TEU, *supra* note 28, at art. 24, ¶ 3, subpara. 2.

<sup>210</sup> See Declarations Annexed to the Final act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on Dec. 13, 2007, 2012 O.J. (C326) 345 (concerning the common foreign and security policy, stressing that the provisions on the CFSP “will not affect the ... powers of each Member State in relation to the formulation and conduct of its foreign policy, ... and participation in international organisations, including a Member State’s membership of the Security Council of the United Nations”).

<sup>211</sup> See *Kadi v. Council*, *supra* note 77, at ¶ 285.

<sup>212</sup> See *supra* note 151.

<sup>213</sup> See JORIS LARIK, FOREIGN POLICY OBJECTIVES IN EUROPEAN CONSTITUTIONAL

ative arrangement, “Berlin Plus”, exists between the EU and NATO since 2002, but has been used only twice, in 2003 and 2004.<sup>214</sup> Whereas the TEU explicitly notes that the EU has its own security and defense policy, it also states that the EU “shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organisation (NATO).”<sup>215</sup> Hence, when the U.S. deals with EU Member States in the North Atlantic Council, the EU-Member State side of the triangle is relatively weak.

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

#### 4. ALTERNATIVE MODELS AND THEIR TRANSATLANTIC DIMENSION

As long as the UK is a member of the EU, its relationship with the U.S. is of the same triangular nature as that of the other 27 Member States. Most importantly, the UK’s relations with the U.S. require it to respect its obligations under EU law, particularly internal EU legislation, the EU’s external competences, and the duty of sincere cooperation. This situation is fundamentally different for non-EU Member States, whose relations with both the U.S. and the EU and its Member States are governed by public international law. Nonetheless, the closer the association of a third country with the EU, the more that relationship acquires a triangular character. The main difference is that these are *a priori* legally equal relationships within the framework of international law, instead of one being governed by international law and the other by EU law, which enjoys primacy over domestic law of the Member States, including their respective international legal commitments.<sup>216</sup>

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LAW 192-94 (2016) (summarizing the security policies of the non-NATO EU Member States).

<sup>214</sup> See Steven Blockmans, *The Influence of NATO on the Development of the EU’s Common Security and Defence Policy*, in BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANIZATIONS 243, 259 (Ramses A. Wessel & Steven Blockmans eds., 2013).

<sup>215</sup> See TEU, *supra* note 28, at art. 42, ¶ 2, subpara 2.

<sup>216</sup> See *supra* note 77.

In this section, four main models of treaty relations for third countries with the EU are outlined, ranging from a closer association with the EU to looser arrangements. A fifth option would be one without a particular bilateral treaty framework, governed only by multilateral treaty frameworks and customary international law. The UK's Prime Minister appears strongly opposed to the first three models (Norway, Switzerland and Turkey) in her Lancaster House Speech of January 2017 and subsequent key policy statements.<sup>217</sup> However, this may not be the last word and even after Brexit, the relationship between the UK and EU is not necessarily set in stone. A "hard" Brexit can be "softened" over time, and vice versa. In any event, it remains useful to explore the available options and what they entail in terms of the UK's freedom of action for interacting with the U.S.<sup>218</sup>

As the following models show, the difference – and difficulty – lies in the economic sphere rather than that of security and defense. The more sensitive the EU is to the sovereignty concerns of its own Member States in the area of security and defense, the more unencumbered third countries closely associated with it are. By contrast, in the trade and regulatory sphere, the legal constraints on the external maneuvering space of third countries are wide-ranging. For the U.S., this matters in terms of what to expect in its interaction with a post-Brexit UK.

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<sup>217</sup> See Prime Minister Theresa May, Prime Minister's Office, The government's negotiating objectives for exiting the EU: PM speech 8-9 (Jan. 17, 2017), <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [<https://perma.cc/6S2L-VT9X>] ("So we do not seek membership of the single market. . . . I do not want Britain to be part of the Common Commercial Policy and I do not want us to be bound by the Common External Tariff. These are the elements of the Customs Union that prevent us from striking our own comprehensive trade agreements with other countries."). See also HM GOVERNMENT, *THE FUTURE RELATIONSHIP BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION*, 2018, Cm. 9593, at 6 (UK) (in the foreword to this White Paper, which followed the British cabinet talks at Chequers (the "Chequers Plan"), the Prime Minister reiterated that the UK will be "leaving the Single Market and the Customs Union, ending free movement and the jurisdiction of the European Court of Justice in this country").

<sup>218</sup> See Mitchel van der Wel & Ramses A. Wessel, *The Brexit Roadmap: Mapping the Choices and Consequences during the EU/UK withdrawal and Future Relationship Negotiations* 73-75 (Ctr. For the Law of EU External Rel., Working Paper No. 5, 2017), [http://www.asser.nl/media/4140/cleer17-5\\_web.pdf](http://www.asser.nl/media/4140/cleer17-5_web.pdf), [<https://perma.cc/28J7-84XT>] (noting the "Ukraine model" of an association agreement as another variation on these main models that does not include EEA membership or a customs union).

#### 4.1. Norway

The closest model of association with the EU is joining the European Economic Area (“EEA”). The EEA, set up in 1994,<sup>219</sup> consists of the EU and European Free Trade Area (EFTA) countries minus Switzerland (see *infra* 4.2.). This model is often referred to as the “Norway model” in public discourse.<sup>220</sup> Iceland and Liechtenstein are in a similar position regarding trade, but given that Norway is also a NATO member with an army, it makes sense to focus on it as a possibility for the United Kingdom.

As a member of the EEA, non-EU countries accept parts of the *acquis communautaire*, i.e., EU laws and regulations, without having a vote in their adoption. This arrangement is unique in that the “EEA Agreement is the only EU external agreement to employ so-called homogeneity as a means of ensuring the actual adaptation of the dynamic post-signature *acquis communautaire* into the legal orders of the EFTA member states.”<sup>221</sup> This means EEA countries retain access to the EU’s internal market while the EU rests assured that they comply with relevant EU rules as they continue to evolve.

EEA membership covers free movement of goods, services, capital, and persons, as well as competition policy, but excludes “the common agricultural, fisheries and transport policies, [direct EU] budget contributions and regional policy, taxation, as well as economic and monetary policy.”<sup>222</sup> Norway hence has to respect

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<sup>219</sup> See Agreement on the European Economic Area, Mar. 17, 1993, 1994 O.J. (L 1) 3, [https://www.jus.uio.no/english/services/library/treaties/09/9-01/eea\\_agreement.xml](https://www.jus.uio.no/english/services/library/treaties/09/9-01/eea_agreement.xml) [<https://perma.cc/4YG6-RQAN>] [hereinafter EEA Agreement] (founding the EEA, which brings together the EU Member States and Iceland, Liechtenstein, and Norway). See also Sven Norberg & Martin Johansson, *The History of the EEA Agreement and the First Twenty Years of Its Existence*, in THE HANDBOOK OF EEA LAW 3, 15–32 (Carl Baudenbacher ed., 2016) (discussing the origins and negotiating history of the EEA Agreement).

<sup>220</sup> See Charlie Cooper, *Macron to May: ‘Be my Guest’ to Norway-model Brexit*, POLITICO (Jan. 18, 2018), <https://www.politico.eu/article/45uropa4545-macron-theresa-may-france-uk-be-my-guest-to-norway-model-brexit/> [<https://perma.cc/DXZ8-VZDX>] (arguing that maintaining Britain’s financial services industry’s access to the EU single market will require the UK to adopt the Norway model).

<sup>221</sup> Roman Petrov, *Exporting the Acquis Communautaire into the Legal Systems of Third Countries*, 13 EUR. FOREIGN AFF. REV. 33, 37 (2008).

<sup>222</sup> Sieglinde Gstöhl, *Models of External Differentiation in the EU’s Neighbourhood: An Expanding Economic Community?*, 22 J. EUR. PUB. POL’Y 854, 858 (2015). See also Hannes Hofmeister, *Splendid Isolation or Continued Cooperation? Options for a State After Withdrawal from the EU*, 21 COLUM. J. EUR. L. 249, 256 (2015) (discussing the scope and content of EEA membership).

the EU's four freedoms, including free movement of persons,<sup>223</sup> and in addition takes part in the passport-free "Schengen area."<sup>224</sup>

Though EEA countries are consulted, they do not get to vote within the EU's legislative processes. Hence, under a Norway-model the UK "would be bound by many of the EU's rules, but no longer have a vote or veto on the creation of those rules."<sup>225</sup> Institutionally, the "main discussions take place within the EEA Joint Committee in the so-called 'decision-shaping phase' after the [European] Commission transmits its proposals to the EU Council and the European Parliament, as well as to the EEA EFTA states."<sup>226</sup> Subsequently, the EEA Joint Committee decides by consensus "as closely as possible in time to the adoption of the rules in the EU institutions in order to allow for a more or less simultaneous application of the *acquis*."<sup>227</sup> Moreover, to make sure EEA countries comply, a special EFTA Surveillance Authority was created, which can take EEA countries to an EFTA Court.<sup>228</sup> This court, in turn, aligns itself largely with the case law of the Court of Justice of the EU.<sup>229</sup>

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<sup>223</sup> See Kjartan Bjarni Björgvinsson, *Free Movement of Persons*, in THE HANDBOOK OF EEA LAW 473 (Carl Baudenbacher ed., 2016) (stating that the EU's four freedoms are binding on non-EU countries that are members of the EEA).

<sup>224</sup> Norway and Iceland assume these obligations by entering special agreements. See e.g., Agreement Concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway Concerning the Latters' Association with the Implementation, Application, and Development of the Schengen Acquis, May 18, 1999, 1999 O.J. (L 176) 36, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21999A0710%2802%29> [<https://perma.cc/FTB7-AGRY>] (exemplifying a special agreement whereby Norway and Iceland consent to adopt the Schengen protocols).

<sup>225</sup> HM GOVERNMENT, ALTERNATIVES TO MEMBERSHIP: POSSIBLE MODELS FOR THE UNITED KINGDOM OUTSIDE THE EUROPEAN UNION 16 (Mar. 2016), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504604/Alternatives\\_to\\_membership\\_-\\_possible\\_models\\_for\\_the\\_UK\\_outside\\_the\\_EU.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504604/Alternatives_to_membership_-_possible_models_for_the_UK_outside_the_EU.pdf) [<https://perma.cc/5D9N-EVUJ>] (acknowledging the UK's loss of voting rights three months before the Brexit referendum).

<sup>226</sup> Gstöhl, *supra* note 222, at 858.

<sup>227</sup> *Id.*

<sup>228</sup> See *id.* (explaining EFTA's enforcement power).

<sup>229</sup> See EEA Agreement, *supra* note 219, at art. 6 (requiring homogeneous interpretation with CJEU case law only dating until the signature of the EEA Agreements). But see, Joined Cases E-9/07 and E-10/07, *L'Oréal Norge AS v. Aarskog Per AS & Others & Smart Club Norge*, 2008 EFTA Ct. Rep. 258, ¶ 28 ("In its interpretation of EEA rules, the Court has consistently taken into account the relevant rulings of the [CJEU] after the said date."). See generally H.H. Fredriksen, *Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area*, 18 EUR. L. J. 868, 869-70 (2012) (discussing how the legislative homogeneity between EU and EEA law is complemented by the homogenous inter-

However, all this does not make the EEA a borderless region. For instance, customs and rules of origins checks at the Norway-EU border continue to apply.<sup>230</sup> Nonetheless, it provides a largely homogenous regulatory space and thus wide-ranging access to the EU's internal market.

In their external relations EEA countries are relatively unencumbered by the EU. They do not have to go along with the EU's Common Commercial Policy, the CFSP/CSDP, or other external policies. EEA countries hence can negotiate free trade agreements ("FTAs") with other countries, which they do as a bloc of EFTA countries.<sup>231</sup> However, the EEA countries are limited in their scope of maneuver in regulatory matters when negotiating trade agreements with other countries, as they need to maintain compliance with the relevant EU rules in order to retain access to the internal market. Neither Norway nor EFTA have a modern trade agreement with the U.S.,<sup>232</sup> though FTAs are in force between EFTA and, among others, Canada and South Korea.

In the area of security and defense policy, EEA countries are completely free to go their own way. Norway and Iceland are members of NATO, while Liechtenstein is not. Moreover, Norway has numerous bilateral agreements with the U.S. in the defense field.<sup>233</sup> However, this freedom does not imply hostility towards the EU's CFSP/CSDP. To the contrary, Norway has contributed to several EU military and civilian operations under a third-country arrangement.<sup>234</sup> Moreover, Norway officially aligns itself at times with EU positions at the United Nations.<sup>235</sup>

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pretations of the EFTA Court and CJEU).

<sup>230</sup> HM GOVERNMENT, *supra* note 225, at 17.

<sup>231</sup> See EFTA, FREE TRADE AGREEMENTS AND TRADE RELATIONS BY COUNTRY, <http://www.efta.int/free-trade/free-trade-agreements> [<https://perma.cc/KP7Z-F3DK>] (last visited Jan. 22, 2017) (overviewing how EEA countries negotiate free trade agreements).

<sup>232</sup> See U.S. Dep't of St., *supra* note 81, at 334.

<sup>233</sup> *Id.* at 330-31.

<sup>234</sup> See Agreement between the European Union and the Kingdom of Norway Establishing a Framework for the Participation of the Kingdom of Norway to the Crisis Management Operations Led by the European Union, Dec. 3, 2004, 2005 O.J. (L 67) 8, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=55> [<https://perma.cc/FTB7-AGRY>] (defining Norway's right to contribute armed forces to assist the EU in crisis management operations).

<sup>235</sup> See, e.g., Anne Kemppainen, Minister Counsellor, Eur. Union, EU General Statement delivered at the 72<sup>nd</sup> Session of the United Nations General Assembly 1<sup>st</sup> Committee: Vote on Cluster VII (Regional disarmament and security) concern-

Consequently, it would be more accurate to speak of two “Norway models.” First, there is the traditionally known model for the economic and regulatory sphere, including free movement of persons, which is restrictive and limits Norway’s international action. Here, the EU side of the triangle remains strong. However, a different kind of Norway model exists for the wider foreign policy and security sphere, which is not restrictive but allows for close cooperation.

#### 4.2. Switzerland

Unlike Norway’s case of EEA membership, the Swiss model is constructed through a range of bilateral agreements.<sup>236</sup> While Switzerland is a member of EFTA and took part in the negotiations for the EEA, it refused to join the latter in 1992 following a negative domestic referendum result.<sup>237</sup> The principal starting point for the bilateral treaties was the 1972 FTA,<sup>238</sup> which was followed by two sets of more specific bilateral treaties in 1999<sup>239</sup> and 2004,<sup>240</sup> respectively. Since 2004, additional agreements have been concluded, including on cooperation with Europol, Eurojust, and the European Defence Agency (EDA), cooperation between competition authori-

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ing the Comprehensive Nuclear-Test-Ban Treaty (Nov. 1, 2017) (transcript *available at* [https://eeas.europa.eu/delegations/un-geneva/36634/eu-general-statement--united-nations-1st-committee-vote-cluster-vi-comprehensive-nuclear-test\\_en](https://eeas.europa.eu/delegations/un-geneva/36634/eu-general-statement--united-nations-1st-committee-vote-cluster-vi-comprehensive-nuclear-test_en)) [<https://perma.cc/96HE-DBPP>] (“[t]he EFTA countries Liechtenstein and Norway, members of the European Economic Area, as well as Ukraine . . . align themselves with this statement.”).

<sup>236</sup> See SWISS CONFEDERATION, DIRECTION DES AFFAIRES EUROPEENNES, LISTE DES ACCORDS SUISSE-UNION EUROPEENNE EN VIGUEUR AU 1<sup>ER</sup> JANVIER 2017, [https://www.eda.admin.ch/dam/dea/fr/documents/publikationen\\_dea/accords-liste\\_fr.pdf](https://www.eda.admin.ch/dam/dea/fr/documents/publikationen_dea/accords-liste_fr.pdf) [<https://perma.cc/C7MN-89NU>] (last visited Jan. 22, 2017) (compiling a complete list of bilateral agreements, including all additional protocols and amendments).

<sup>237</sup> Norberg & Johansson, *supra* note 219, at 31.

<sup>238</sup> Agreement between the European Economic Community and the Swiss Confederation, July 22, 1972, 1972 O.J. (L 300) 189 (agreeing to promote the harmonious development of economic relations through the expansion of reciprocal trade between the European Economic Community and Switzerland).

<sup>239</sup> These cover free movement of persons, technical barriers to trade, public procurement markets, agriculture, research, civil aviation, and overland transport.

<sup>240</sup> These cover, *inter alia*, the Schengen (passport-free travel) and Dublin Agreements (on asylum applications), taxation of savings, fight against fraud, processed agricultural products, the environment, pensions, education, vocational training, and youth.



ties, satellite navigation, and company taxation.<sup>241</sup>

In the economic realm, Switzerland's access to the EU's internal market is limited. For instance, it has "access to a significant degree of the trade in goods but agriculture is not covered".<sup>242</sup> Moreover, access in trade in services is limited, while the financial sector is excluded.<sup>243</sup> On the latter point, it is relevant to note that Switzerland cannot avail itself of the EU's "passporting system that minimises the regulatory, operational and legal barriers to the provision of financial services across the EU."<sup>244</sup> Instead, "Swiss banks need to establish a subsidiary in an EU/EEA country ... in order to obtain financial services passporting rights."<sup>245</sup>

Institutionally, the Swiss model "lacks an overarching structure to deal with the around 20 main agreements, most of which are on a technical level run by a consensus-based Joint Committee."<sup>246</sup> There is no equivalent to the above-mentioned EFTA Surveillance Authority and EFTA Court, which would also contribute to supervising the relationship with the EU in view of ongoing legislative and regulatory developments. The EU has been pushing for an institutionalized relationship for years,<sup>247</sup> but thus far to no avail.<sup>248</sup> Without institutionalization, enforcement is left entirely to the diplomatic realm. In particular, the agreement contains so-called

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<sup>241</sup> See SWISS CONFEDERATION, *supra* note 236 (listing the bilateral agreements the Swiss Confederation has entered into with the EU).

<sup>242</sup> Van der Wel & Wessel, *supra* note 218, at 69.

<sup>243</sup> See *Id.* (noting that without the necessary passporting rights for financial services, Swiss banks wanting to operate in EU countries are required to open a subsidiary in an EU or EEA country).

<sup>244</sup> HM GOVERNMENT, *supra* note 225, at 26.

<sup>245</sup> *Id.*

<sup>246</sup> Gstöhl, *supra* note 222, at 860.

<sup>247</sup> See, e.g., Council of the European Union, Council Conclusions on EU Relations with EFTA Countries, 3060<sup>th</sup> General Affairs Council meeting, Brussels, Dec. 14, 2010, ¶ 42, [https://eeas.europa.eu/sites/eeas/files/council\\_iceland.pdf](https://eeas.europa.eu/sites/eeas/files/council_iceland.pdf) [<https://perma.cc/W55X-34JV>] (criticizing Switzerland's approach for "a lack of efficient arrangements for the take-over of new EU *acquis* including [CJEU] case-law, and for ensuring the supervision and enforcement of the existing agreements ... [resulting] in legal uncertainty for authorities, operators and individual citizens.").

<sup>248</sup> See SABINE JENNI, SWITZERLAND'S DIFFERENTIATED EUROPEAN INTEGRATION: THE LAST GALLIC VILLAGE? 176 (2016) (observing that forming an institutional framework agreement between Switzerland and the EU is so controversial—with the latter requesting a common monitoring and enforcement structure as well as obliging Switzerland to adopt EU legislation—that the parties have not even managed to set the terms of negotiation since 2012).

“guillotine clauses”,<sup>249</sup> which means that a whole set of agreements cease to apply in case one of them is terminated or not renewed,<sup>250</sup> which can result in Switzerland’s access to the EU’s internal market being cut off.

In this framework, Switzerland is free to conclude its own trade agreements,<sup>251</sup> though it remains bound by its commitments under the bilateral agreements with the EU. Like Norway, it usually concludes trade agreements within the EFTA framework, though it concluded a bilateral agreement with China.<sup>252</sup> Like Norway, furthermore, it has no modern trade agreement with the U.S., either bilaterally or through EFTA.

In the area of security and defense, similar to the Norway model, Switzerland remains unencumbered by its legal proximity to the EU. Unlike Atlanticist Norway, it pursues traditionally a strategy of neutrality.<sup>253</sup> Nonetheless, it too has contributed to several of the EU’s civil and military CSDP operations,<sup>254</sup> though Switzerland has not concluded a framework agreement with the EU to that effect. At the same time, it entertains a number of agreements in the

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<sup>249</sup> Stephan Breitenmoser, *Sectoral Agreements between the EC and Switzerland: Contents and Context*, 40 COMMON MKT. L. REV. 1137, 1160 (2003).

<sup>250</sup> See, e.g., Agreement between the European Community and its Member States, of the One Part, and the Swiss Confederation, of the Other, on the Free Movement of Persons art. 25 ¶ 4, June 21, 1999, 2002 O.J. (L 141) 6, [https://eur-lex.europa.eu/resource.html?uri=cellar:29b7e319-1314-4fbd-b1df-c0c0be226feb.0004.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:29b7e319-1314-4fbd-b1df-c0c0be226feb.0004.02/DOC_1&format=PDF) [<https://perma.cc/52DT-TCX8>] (“The seven Agreements referred to in paragraph 1 shall cease to apply six months after receipt of notification of non-renewal referred to in paragraph 2 or termination referred to in paragraph 3.”).

<sup>251</sup> See HM GOVERNMENT, *supra* note 225, at 27 ¶ 3.31 (noting that Switzerland has 29 of its own trade agreements covering 41 countries).

<sup>252</sup> See Freihandelsabkommen zwischen der Schweizerischen Eidgenossenschaft und der Volksrepublik China [Free Trade Agreement between the People’s Republic of China and the Swiss Confederation], July 6, 2013 Switz.-China., <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2751> [<https://perma.cc/KUK2-3V5J>] (entered into force in 2014, establishing a free trade area between China and Switzerland).

<sup>253</sup> See HM GOVERNMENT, *supra* note 225, at 27 (“In foreign policy, Switzerland has a tradition of neutrality.”).

<sup>254</sup> See, e.g., Participation Agreement between the European Union and the Swiss Confederation on the Participation of the Swiss Confederation in the European Union CSDP Mission in Mali (EUCAP Sahel Mali), Apr. 13, 2016, 2016 O.J. (L 105) 3, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0421\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0421(01)&from=EN) [<https://perma.cc/AYZ7-VAJT>] (agreeing to participate in the EU’s capacity building mission in Mali). See also Tardy, *supra* note 140, at 3 (providing overview of third countries’ contributions to CSDP operations).

field of defense with the United States.<sup>255</sup> Unlike Norway, other EEA and EU candidate countries, Switzerland has no track record of formally aligning itself with EU statements and positions. In terms of trigonometry in treaty relations, the same flexibility can be seen in the security and defense field. In the trade and regulatory domain, by contrast, the EU-Swiss relationship is a “static”<sup>256</sup> model that is out of favor with the EU and hence may not see replication elsewhere.

### 4.3. Turkey

A third model for association with the EU is embodied in the EU-Turkey relationship. Turkey is not a member of EFTA or the EEA, and it does not have a set of bilateral agreements providing access to the internal market as is the case with Switzerland. Instead, the EU and Turkey concluded an association agreement in 1963,<sup>257</sup> which has included a partial customs union since 1995.<sup>258</sup> Turkey remains a candidate country to the EU, though its path to membership appears long and full of obstacles in the current political climate.<sup>259</sup>

It would be a misconception to think that there is a single, all-encompassing customs union of which the UK could remain a

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<sup>255</sup> See, e.g., Acquisition and Cross-Servicing Agreement, Switz.-U.S., art. 3, ¶ 2, Mar. 23–Dec. 6, 2001 (agreeing to provide “logistic support, supplies and services to the military forces of one Party by the other in return for either cash payment or the reciprocal provision of support ... to the military forces of the other Party.”). See also U.S. Dep’t of St., *supra* note 81, at 450–52 (listing bilateral treaties in force between the U.S. and Switzerland as of January 1, 2018).

<sup>256</sup> See HM GOVERNMENT, *supra* note 225, at 26 (maintaining that the EU’s agreements with Switzerland are static in nature because while it does not have Norway’s direct obligation to ensure its domestic law complies with certain EU rules, the EU can still block it from accessing parts of the market if it fails to implement domestic legislation reflecting those rules).

<sup>257</sup> See Agreement Creating an Association between the European Economic Community and Turkey, Eur. Econ. Cmty.-Turk., Dec. 12, 1963, 96 U.N.T.S. 142.

<sup>258</sup> See Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, Dec. 22, 1995, 1996 O.J. (L 35) 1.

<sup>259</sup> See Ece Toksabay & Tulay Karadeniz, *EU Parliament Calls for Turkey Accession Talks to be Suspended*, REUTERS (July 6, 2017), <https://www.reuters.com/article/us-turkey-eu-parliament/eu-parliament-calls-for-turkey-accession-talks-to-be-suspended-idUSKBN19R194> [https://perma.cc/79L2-2DHR] (discussing the tensions between the EU and Turkey in light of the current political climate in Turkey).

member even after it leaves the EU. Turkey is not in *the* customs union that is the EU, but has *a* partial customs union with the EU, which includes “industrial goods and processed agricultural goods” but excludes “raw agricultural goods.”<sup>260</sup>

Regarding its external trade policy, the legal consequence of being in a customs union with the EU is that Turkey is committed to aligning its tariff schedules with the EU’s common external tariff, as far as is covered by their customs union,<sup>261</sup> and to mimicking EU trade agreements with third countries.<sup>262</sup> The EU-Turkish customs union, now considered “outdated,”<sup>263</sup> gives Turkey little freedom, as the country “has no involvement in decisions about the [EU’s] Common External Tariff or setting the direction of the Common Commercial Policy.”<sup>264</sup> Moreover, it leaves Turkey disadvantaged, as alignment does not mean that it will automatically “secure additional market access via EU FTAs with third countries, but these third countries have access to Turkey’s market.”<sup>265</sup> For instance, Turkey has endeavored—unsuccessfully—to take part in negotiations between the EU and the U.S. over the TTIP.<sup>266</sup>

A proposed variation on a partial customs union is the so-called “Jersey model,” named after the British crown dependency which entertains such a special arrangement with the EU. Under such a model, “the UK remains in a comprehensive customs union with the EU and the single market, but only for goods.”<sup>267</sup> On the one hand, such a model would avoid border checks and in doing so provide a solution for avoiding a hard border on the island of Ireland. On the other hand, it would severely restrict the scope of maneuver of the UK’s post-Brexit trade policy, essentially limiting it to services-only trade agreements with third countries.

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<sup>260</sup> See van der Wel & Wessel, *supra* note 218, at 71.

<sup>261</sup> See Decision No 1/95 96/142/EC of the EC-Turkey Association Council, *supra* note 258, at art. 13.

<sup>262</sup> *Id.* at art. 16, ¶ 1 (“... Turkey will take the necessary measures and negotiate agreements on mutually advantageous basis with the countries concerned.”).

<sup>263</sup> See Van der Wel & Wessel, *supra* note 218, at 71.

<sup>264</sup> House of Lords, European Union Committee, *Brexit: The Options for Trade*, 5th Report of Session 2016–17, HL Paper 72 (Dec. 13, 2016), <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/72/72.pdf> [<https://perma.cc/3S2J-CE3M>].

<sup>265</sup> *Id.*

<sup>266</sup> See van der Wel & Wessel, *supra* note 218, at 72.

<sup>267</sup> See John Springford & Sam Lowe,  *Holding out Hope for a Half-Way Brexit House*, CENTRE FOR EUROPEAN REFORM BULLETIN NO. 118, 2 (Feb./Mar. 2018), [https://www.cer.eu/sites/default/files/bulletin\\_118\\_js-sl\\_article2.pdf](https://www.cer.eu/sites/default/files/bulletin_118_js-sl_article2.pdf) [<https://perma.cc/VT9D-ET34>].

In the area of security and defense, as with Norway and Switzerland, Turkey remains free to conduct its own policy. It is a NATO member, has contributed to CSDP operations, and has concluded a framework agreement with the EU to that effect.<sup>268</sup> Turkey has a range of treaties in the defense field with the U.S. as well,<sup>269</sup> but no comprehensive, modern trade agreement.<sup>270</sup> As an EU candidate country, Turkey occasionally aligns itself with the EU in international fora.<sup>271</sup>

In sum, in the areas of security and defense, also in the case of Turkey, the transatlantic triangle is very flexible and has allowed the country to cooperate closely both with the U.S. and the EU. In the trade and regulatory field, the constraints imposed by Turkey's association with the EU only cover certain sectors. However, they weigh heavily due to the obligation of alignment without voting rights and without automatic economic benefits in return.

#### 4.4. Canada

Deep and comprehensive trade agreements represent a more hands-off approach to association with the EU than the models outlined above. Nonetheless, they aim to provide "increased market access and regulatory convergence."<sup>272</sup> The current "gold standard," in the EU's eyes,<sup>273</sup> is embodied in the Comprehensive Economic and Trade Agreement between the EU and Canada

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<sup>268</sup> See Agreement between the European Union and the Republic of Turkey Establishing a Framework for the Participation of the Republic of Turkey in the European Union Crisis Management Operations, June 29, 2006, 2006 O.J. (L 189) 17 (setting forth the conditions under which Turkey would be invited to contribute to EU crisis management). See also Tardy, *supra* note 140, at 3 (listing seven CSDP missions to which Turkey contributed).

<sup>269</sup> See U.S. Dep't of St., *supra* note 81, at 467–68 (listing twenty-three defense treaties in force between the United States and Turkey).

<sup>270</sup> See *Id.* at 471 (noting the existence of an investment protection agreement signed in Washington, Dec. 3, 1985).

<sup>271</sup> See Kemppainen, *supra* note 235 (stating Turkey's alignment with the European Union's General Statement concerning the Comprehensive Test Ban Treaty).

<sup>272</sup> See van der Wel & Wessel, *supra* note 218, at 72.

<sup>273</sup> See European Commission Statement 16/446, Joint statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA), Feb. 29, 2016, [http://europa.eu/rapid/press-release\\_STATEMENT-16-446\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm) [<https://perma.cc/6BE2-9M6H>] (announcing the completion of the legal review of the CETA).

(CETA), which was signed on October 30, 2016. It is not yet in force, since as a mixed agreement it requires ratification by Canada, the EU, and all of its Member States,<sup>274</sup> which highlights the continued importance of the latter in this particular transatlantic triangle. CETA has been provisionally applied since September 2017.<sup>275</sup> Moreover, an opinion has been requested from the CJEU to determine whether CETA, in particular its chapter on institutionalized investment protection, is compatible with the EU Treaties.<sup>276</sup> Hence, ratification of such an advanced FTA is drawn out while legal uncertainty persists.

CETA “phases out the tariffs on 98% of all goods and addresses several other discriminatory measures such as subsidies and quotas,”<sup>277</sup> but still maintains tariffs in some limited cases such as with fishery and agricultural products.<sup>278</sup> Moreover, CETA guarantees geographical indications and opens public procurement markets.<sup>279</sup> Furthermore, it establishes a sophisticated institutional setup, including a Joint Committee, inter-party arbitration, an Investment Court System (ICS), and a Regulatory Cooperation Forum.<sup>280</sup> While it is innovative in that it maintains a “negative list” approach to services, this still means that some sectors remain excluded, such as audio-visual services and public services in the ar-

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<sup>274</sup> See CETA, *supra* note 108, at art. 30.7, ¶ 2.

<sup>275</sup> See Council Decision (EU) 2017/38 of 28 October 2016 on the Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, 2017, O.J. (L 11) 1080, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0038&from=EN> [<https://perma.cc/Z258-ZXDB>] (including the exact date which was jointly announced). See also European Commission Statement 17/1959, EU and Canada agree to set a date for the provisional application of the Comprehensive Economic and Trade Agreement, July 8, 2017, [http://europa.eu/rapid/press-release\\_STATEMENT-17-1959\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-1959_en.htm) [<https://perma.cc/FHH5-FE8Q>] (announcing the date of provisional application as September 21, 2017).

<sup>276</sup> See Opinion 1/17, Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU, 2017 O.J. (C 369) 2.

<sup>277</sup> See van der Wel & Wessel, *supra* note 218, at 72.

<sup>278</sup> *Id.*

<sup>279</sup> See CETA, *supra* note 108, at ch. 19 (on government procurement) and ch. 20, section B, sub-section C (on geographical indications).

<sup>280</sup> *Id.* at art. 26.1 (on the Joint Committee), ch. 29 (on inter-party disputes), ch. 8, section F (on investment disputes), and art. 21.6 (on the Regulatory Cooperation Forum). The new investment court system is not covered by provisional application, see Council Decision (EU) 2017/38, *supra* note 275, at art. 1(a) (noting it does not include the CETA provisions which make up section F on the “Resolution of investment disputes between investors and states.”).

eas of health, education, and social protection.<sup>281</sup> In terms of providing market access for financial services, it is a far cry from passporting rights that EU members enjoy. In this domain, CETA offers not much more than what exists under the terms of the multilateral General Agreements on Trade in Services (GATS) already. This means “Canadian companies have to establish a subsidiary in the EU in order to be able to sell their financial services.”<sup>282</sup>

Being an FTA with no customs union, Canada remains free to adjust its tariff schedules (as far as its WTO schedules allow) with the non-EU world. Moreover, it can conclude trade agreements with third countries. CETA and the additional Joint Interpretative Statement repeatedly stress the “right to regulate.”<sup>283</sup> This implies regulatory freedom rather than restraint in Canada’s external trade policy. However, while regulatory compliance with EU standards is not a legal requirement, it remains an economic necessity if Canada wants to be able to export its goods and services to the EU.<sup>284</sup> Unlike Norway, Switzerland, and Turkey, Canada has a free trade agreement with the U.S. in the form of NAFTA (currently in the process of being revamped as the USMCA), of which Mexico is also a party.<sup>285</sup> Thanks to CETA and NAFTA, Canada is an example of a country with wide-ranging market access covered by FTAs with both the EU and the U.S. However, important limits apply to such access, while NAFTA is currently being renegotiated at the request of the Trump Administration.<sup>286</sup>

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<sup>281</sup> See van der Wel & Wessel, *supra* note 217, at 72 (listing a few major service sectors which are not included); see also Dominic Webb, *CETA: The EU-Canada Free Trade Agreement*, UK House of Commons Library Briefing Paper No. 7492 (Sept. 12, 2017), at 11, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7492#fullreport> [<https://perma.cc/3NG2-J57T>] (listing the public services which were excluded from CETA).

<sup>282</sup> See van der Wel & Wessel, *supra* note 217, at 73.

<sup>283</sup> See CETA, *supra* note 108, at art. 8.9, ¶ 1, art. 23.2, art. 23.4. See also Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Can.-EU, Oct. 27, 2016, 2016 O.J. (L 11) 3, pts. 1(e), 3, 6(a).

<sup>284</sup> See van der Wel & Wessel, *supra* note 217, at 73 (“Besides compliance with EU rules and standards when exporting goods to the EU, Canada does not have to incorporate any EU legislation within its domestic legislation.”).

<sup>285</sup> See U.S. Dep’t of St., *supra* note 81, at 64–78 (overviewing the bilateral agreements between Canada and the U.S.).

<sup>286</sup> See, U.S. Office of the Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf> [<https://perma.cc/V8KF-TXEM>] (announcing the renegotiation of NAFTA at the

In the area of security and defense, it is noteworthy that CETA is accompanied by a Strategic Partnership Agreement between Canada and the EU.<sup>287</sup> The language of the latter is rather hortatory, and leaves Canada as free as the countries in the examples above. For instance, the agreement stresses common international commitments, ranging from human rights<sup>288</sup> to the International Criminal Court,<sup>289</sup> and establishes a political dialogue and consultative mechanism.<sup>290</sup> In addition and prior to the 2016 Strategic Partnership Agreement, Canada concluded a framework agreement with the EU on taking part in CSDP operations,<sup>291</sup> and contributed to several of these operations over the years.<sup>292</sup> Like Norway, Canada is a NATO member and also has numerous bilateral treaties with the U.S. in the field of defense.<sup>293</sup> Hence, in the security and defense field, Canada is able to entertain simultaneous cooperation arrangements with both the EU and the U.S.

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

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behest of President Trump).

<sup>287</sup> See Strategic Partnership Agreement between the European Union and its Member States, of the One Part, and Canada, of the Other Part, EU-Can., Oct. 30, 2016, 2016 O.J. (L 329) 45, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A1203\(03\)&qid=1536962793825&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A1203(03)&qid=1536962793825&from=EN) [<https://perma.cc/DM9N-96MY>].

<sup>288</sup> *Id.* at art. 2.

<sup>289</sup> *Id.* at art. 5.

<sup>290</sup> *Id.* at arts. 26 and 27.

<sup>291</sup> See Agreement between the European Union and Canada Establishing a Framework for the Participation of Canada in the European Union Crisis Management Operations, EU-Can., Nov. 24, 2005, 2005 O.J. (L 315) 21, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22005A1201\(01\)&qid=1536962972715&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22005A1201(01)&qid=1536962972715&from=EN) [<https://perma.cc/M928-JV2B>] (enumerating the conditions under which the EU may invite Canada into its crisis management operations).

<sup>292</sup> See Tardy, *supra* note 140, at 3 (listing Canadian contributions to CSDP operations).

<sup>293</sup> See U.S. Dep't of St., *supra* note 81, at 64-78 (listing bilateral treaties between Canada and the United States).



#### 4.5. “No Deal”

Another option, though not really a “model,” is that the EU and UK will fail to agree on a future agreement which would closely associate them with each other. In the trade realm, such a “no deal” scenario would lead to their trade relationship falling back onto WTO rules, including the application of tariffs in certain areas and limits in terms of access to the EU internal market, especially in the area of services.<sup>294</sup> According to economic modelling by RAND Europe in 2017, such a scenario would result in reducing the UK’s “future GDP (compared to full EU membership) by about 4.9 per cent, or \$140bn, over 10 years.”<sup>295</sup> For the EU, according to this estimate, the loss in GDP “would be relatively minor, about 0.7 per cent of GDP.”<sup>296</sup> In the words of Gormley, such a scenario “would be a hard Brexit on the most disadvantageous terms for all parties.”<sup>297</sup> Nonetheless, a “no deal” Brexit on WTO terms has been vigorously advocated by some prominent British politicians.<sup>298</sup>

Such an outcome would leave the UK free to conclude trade agreements with other countries and to determine its own tariffs and regulations (in accordance with WTO rules). However, the UK would still need to comply with relevant EU laws and regulations to be able to export to the EU’s internal market even under the WTO framework.<sup>299</sup>

In the field of security and defense, “no deal” would mean not following up the UK’s ejection from the CFSP/CSDP with a future

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<sup>294</sup> See van der Wel & Wessel, *supra* note 217, at 75–76 (“Furthermore, the WTO option would significantly limit the UK’s access to the services market.”).

<sup>295</sup> CHARLES P. RIES ET AL., RAND EUROPE, AFTER BREXIT ALTERNATE FORMS OF BREXIT AND THEIR IMPLICATIONS FOR THE UNITED KINGDOM, THE EUROPEAN UNION AND THE UNITED STATES xi–xii (2017) (internal footnotes omitted). This scenario does not assume that the UK concludes an FTA with the U.S.

<sup>296</sup> *Id.*

<sup>297</sup> Laurence W. Gormley, *Brexit – Nevermind the Whys and Wherefores? Fog in the Channel, Continent Cut off!*, 40 FORDHAM INT’L L.J. 1175, 1206 (2017).

<sup>298</sup> See Iain Duncan Smith, *Sorry, Project Fear, We are Not Going to Fall off a Cliff-Edge – Britain will Thrive*, DAILY TELEGRAPH (Aug. 15, 2018), <https://www.telegraph.co.uk/politics/2018/08/15/sorry-project-fear-not-going-fall-cliff-edge-britain-will/> [<https://perma.cc/5WT8-RSNN>] (making the case for “no deal,” and accepting the terms of the WTO over another deal with the EU).

<sup>299</sup> See CHARLES P. RIES ET AL., *supra* note 295, at xi (noting that under a “no deal” scenario, the “UK would be able to set its own tariffs and establish its own regulatory standards, although any divergence from EU standards would increase non-tariff barriers (NTBs).”).

arrangement to contribute as a third country, such as the framework agreements of Norway and Canada. However, the UK would remain connected to 22 EU Member States via its continued NATO membership, and hence indirectly to the EU via EU-NATO cooperation (see *supra* 3.3.2).

In addition, as these different models reveal, the way security and defense cooperation and third country participation are structured in the EU, this policy domain is far less restrictive than cooperation with third countries in trade and regulatory matters. For instance, neither neutrality nor NATO membership preclude contributing to CSDP operations conducted by the EU, nor do they preclude (parallel) cooperation on a bilateral basis with individual EU members. The EU's CFSP/CDSP hardly clouds these relationships. By contrast, close association with the EU through either a customs union or EEA membership puts significant restraints on an independent trade policy. It is here that the shadow of the EU-Member States side of the triangle looms largest over its relations with third countries. In the case of deep FTAs such as CETA, the "right to regulate" applied to both sides of the agreement. They suggest leeway, but at the same time legally cement the need for compliance with evolving EU standards to benefit from market access under such an FTA. Thus, the third country still remains in the penumbra of the internal market. This fundamental difference between trade and security and the more rigid trade-offs that exist in the former field together form key factors in the development of the "new transatlantic trigonometry" post-Brexit.

## 5. NEW TRANSATLANTIC TRIGONOMETRY

While the previous sections were about the situation pre-Brexit and alternative models of association with the EU that exist with other countries, the analysis now turns to a future in which the UK has ceased to be an EU member. In particular, it addresses what this will entail for legal relations with the U.S. The good news from a transatlantic point of view is that the vast majority of triangular treaty relations the U.S. entertains with the EU and its Member States will remain unaffected by Brexit. However, the EU itself did not freeze up in a state of paralysis after the Brexit referendum. To the contrary, it has been moving ahead in its external relations, both with internal reforms and new approaches to international agreements. This situation represents a double challenge: first,

Brexit calls into question the UK's position regarding the existing bilateral and multilateral EU-agreements with the U.S.; second, beyond maintaining continuity, future treaty relations between the U.S. and UK will be conditioned by the form of the future relationship the latter will have with the EU. The UK may be out of the EU, but the closer an association with the EU it desires, the more it will remain part of this triangular relationship when engaging with non-EU countries.

The crux will not necessarily lie in the quantity of agreements to be renegotiated here, but in the qualitatively relevant ones. The lesson from the previous sections applies here: It is the economic, "low politics" agreements that will be most legally and politically challenging, while a transatlantic readjustment in the "high politics" of security and defense will be a lot more straightforward by comparison. To elaborate on these points, the final section of this Article first catches up with the intervening developments in the EU and explains their relevance in the transatlantic context (5.1.) and addresses important timing issues for the way forward (5.2.). Subsequently, it turns to the future of the U.S.-EU-UK triangle, first from the point of view of continuity (5.3.) and then moving on to future agreements (5.4.).

### 5.1. *The EU as a Moving Target*

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

That Brexit represented an existential challenge for the EU became clear in the context of the finalization of the EU's Global Strategy for Foreign and Security Policy in June 2016. The Global Strategy, which covers all areas of EU external relations, was approved only a few days after the EU membership referendum in the UK. Hence, its authors felt compelled to make a direct reference to it. In the Strategy's foreword, High Representative Federica Mogherini observed that the "purpose, even existence, of our Union is being questioned"<sup>300</sup> noting that this "is even more true after the British referendum."<sup>301</sup>

In the area of trade, the EU has continued to push ahead with

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<sup>300</sup> SHARED VISION, COMMON ACTION: A STRONGER EUROPE, *supra* note 55, at 3.

<sup>301</sup> *Id.*

bilateral negotiations with, among others, Canada, Japan, Mercosur, Mexico, and Vietnam.<sup>302</sup> The above-mentioned Comprehensive Economic and Trade Agreement with Canada was signed in October 2016 and is being provisionally applied (*supra* 4.4.). Even though CETA was hailed as the new “gold standard” of its FTAs,<sup>303</sup> the protracted ratification process and questions about the legality of its Investment Court System has prompted a fine-tuning of the EU’s approach to trade agreements elsewhere.

The clearest manifestation of this new approach is the forthcoming EU-Japan Economic Partnership Agreement (“EPA”). Negotiations on it were finalized in December 2017. A remarkable new feature is the splitting of the originally envisaged EPA into two parts—one falling under the EU’s exclusive competence; the other including “shared” elements such as investment protection, on which negotiations continue.<sup>304</sup> This has an important consequence from the point of view of EU foreign relations law: for the EU-exclusive agreement, ratification by all Member States can thus be avoided.

From a transatlantic relations perspective, CETA and the EPA with Japan send two different signals regarding the prospects of a TTIP—or any successor initiative. On the one hand, if hailing CETA as the EU’s new “gold standard” means that it will be the substantive baseline for future negotiations, this will make finding common ground with the U.S. even harder. In particular, not only the heavily institutionalized Investment Court System,<sup>305</sup> but also issues such as guaranteeing geographical indications and the open-

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<sup>302</sup> See Jakob Hanke, *EU Takes Over Global Trade Stage*, POLITICO (Dec. 8, 2017), <https://www.politico.eu/article/eu-takes-over-global-trade-stage/> [<https://perma.cc/D7E4-F2RJ>] (discussing numerous trade deals the EU is currently pursuing).

<sup>303</sup> See European Commission Statement 16/446, *supra* note 273.

<sup>304</sup> See European Commission, EU News 267/2017 Joint Statement by the President of the European Commission Jean-Claude Juncker and the Prime Minister of Japan Shinzo Abe (Dec. 8, 2017), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1768> [<https://perma.cc/MKN2-AKVJ>] (noting that negotiations are ongoing).

<sup>305</sup> The U.S. administration is said to be pursuing an aggressive approach towards the WTO’s Appellate Body. See Gregory Schaffer, *The Slow Killing of the World Trade Organization*, HUFFINGTON POST (Nov. 17, 2017), [https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization\\_us\\_5a0ccd1de4b03fe7403f82df](https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization_us_5a0ccd1de4b03fe7403f82df) [<https://perma.cc/HCD2-FDQG>] (detailing the Trump Administration’s plans to effectively destroy the WTO by blocking appointments to its Appellate Body, which may reflect a general skepticism towards international adjudicatory bodies with jurisdiction over the U.S.).

ing of public procurement markets will be hard to swallow for U.S. negotiators.<sup>306</sup>

On the other hand, the “splitting” approach as seen in the EPA with Japan makes it considerably easier to ratify the EU-exclusive agreement on the EU side. Moreover, it removes the investment protection chapter and its institutional architecture, which is still politically and legally contentious,<sup>307</sup> from the immediate agenda for both sides. In any event, it is unlikely that the U.S., as an economic superpower outweighing the EU post-Brexit,<sup>308</sup> will keenly work from any EU blueprint.

Turning to security and defense, the EU has made this a priority area of implementing its 2016 Global Strategy. Even though the UK under the Blair government played a crucial role in unlocking the CSDP in the late 1990s (see *supra* 2.1.), subsequent UK governments blocked efforts for more integrated structures or institutions such as a common operational headquarters.<sup>309</sup> However, with the withdrawal process officially launched, reforms in EU defense policy have started to gain traction.<sup>310</sup>

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<sup>306</sup> See DANIEL S. HAMILTON, CREATING A NORTH ATLANTIC MARKETPLACE FOR JOBS AND GROWTH: THREE PATHS, ONE DETOUR, A U-TURN, AND THE ROAD TO NOWHERE 14 (2018) (noting that “Washington was unwilling (and largely unable) to open public procurement, or compromise on geographical indications, two primary goals for the Europeans.”).

<sup>307</sup> See Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved) Paradigm for Investor-State Adjudication*, 55 COLUM. J. TRANSNAT'L L. 178, 226 (2016) (discussing the different critiques on investor-state dispute settlement and concluding that although “incorporating an updated and reformed ISDS system into the TTIP agreement theoretically presents the best available alternative to the current regime, only a miraculous shift in public perception would render that option practicable”). See also, HAMILTON, *supra* note 306, at 14.

<sup>308</sup> See Josh Zumbrum, *Brexit Will Put the U.S. Back atop the World GDP Rankings*, WALL STREET JOURNAL (June 29, 2016), <https://blogs.wsj.com/economics/2016/06/29/brexit-will-put-the-u-s-back-atop-the-world-gdp-rankings/> [<https://perma.cc/62DL-DGYJ>] (discussing the macroeconomic consequences and concomitant effects on EU-U.S. trade negotiations of Brexit).

<sup>309</sup> See Hajnalka Vincze, *The Transatlantic Dimension of Euroscepticism*, in THE UK CHALLENGE TO EUROPEANIZATION: THE PERSISTENCE OF BRITISH EUROSCEPTICISM 232, 240–41 (Karine Tournier-Sol & Chris Gifford eds., 2015) (discussing UK opposition to integration with EU security and defense initiatives). This opposition also continued after the Brexit referendum. See also Andrew Rettmann, *UK Blocks Blueprint for EU Military HQ*, EU OBSERVER (May 16, 2017), <https://euobserver.com/foreign/137916> [<https://perma.cc/DKG8-SFES>] (discussing the UK's efforts to block the establishment of an EU military headquarters after the Brexit vote).

<sup>310</sup> Council of the European Union, Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence, Brussels, Nov. 14,

Three developments are illustrative of this trend. First, a “Military Planning and Conduct Capability” – an EU headquarters but only for “non-executive” missions, i.e., those concerned with training – was established in June 2017.<sup>311</sup> Second, the European Commission successfully initiated a new “European Defence Fund” to the order of 5.5 billion euros per year.<sup>312</sup> This initiative is relevant in that it starts to blur the line between the supranational and intergovernmental modes of operation in EU external relations by giving defense a more prominent role in the regular EU budget.<sup>313</sup> This entails more involvement of the European Parliament and Commission,<sup>314</sup> which are traditionally structurally sidelined in the CFSP/CSDP. Moreover, it moves the EU towards becoming a closer and more active military procurement market, which should be of economic interest to U.S. defense industry and, hence, also the U.S. government’s trade policy.

Third, a framework called “Permanent Structured Cooperation” (PESCO) has been activated. Provided for in the EU Treaties following the Lisbon reform,<sup>315</sup> the provisions on PESCO laid dormant for eight years. In late 2017, it was officially launched.<sup>316</sup> It allows a group of Member States to work together more closely

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2016, <http://www.consilium.europa.eu/media/22459/eugs-conclusions-st14149en16.pdf> [<https://perma.cc/QS36-G7LX>].

<sup>311</sup> Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA), 2018 O.J. (L 146) 133.

<sup>312</sup> European Commission, Press Release IP/17/1508, *A European Defence Fund: €5.5 Billion per Year to Boost Europe’s Defence Capabilities* (June 7, 2017).

<sup>313</sup> *Id.* (“The Fund will create incentives for Member States to cooperate on joint development and the acquisition of defence equipment and technology through co-financing from the EU budget and practical support from the Commission.”).

<sup>314</sup> See TFEU, *supra* note 28, at art. 314 (establishing the involvement of the Commission, Council, and Parliament in the adoption of the EU’s annual budget). See also *supra* 2.3.

<sup>315</sup> See TEU, *supra* note 28, at art. 46; see also TEU, *supra* note 28, Protocol No. 10 (discussing permanent structured cooperation established by Article 42 of the Treaty on European Union, attached to the EU Treaties).

<sup>316</sup> See Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, Nov. 13, 2017, <http://www.consilium.europa.eu/media/31511/171113-pesco-notification.pdf> [<https://perma.cc/HV8G-F56D>] (announcing the initiation of PESCO).

in the creation of military capabilities and their deployment in order to conduct “the most demanding missions.”<sup>317</sup> Among the 25 PESCO countries, voting requirements on certain matters switches from unanimity to qualified majority.<sup>318</sup> Hence deviation—though a slight one—from the intergovernmental mode of operation can be seen here as well. All EU Member States except Denmark, Malta, and the UK take part in PESCO.<sup>319</sup> Since the latter is assumed to be leaving the EU, it did not sign up.<sup>320</sup>

A way back in for the UK is that PESCO allows for third-country participation. However, interested third countries “would need to provide substantial added value to the project, contribute to strengthening PESCO and the CSDP, and meet more demanding commitments.”<sup>321</sup> As is the case with contributing to CSDP operations, the EU “will not grant decision powers to such Third States in the governance of PESCO.”<sup>322</sup> Admission to PESCO will be granted by the Council “in PESCO format” after checking “if the conditions set out in the general arrangements are met.”<sup>323</sup> If admitted, “the participating Member States taking part in a project may enter into administrative arrangements with the third State concerned.”<sup>324</sup> Hence, next to a framework agreement for the UK’s participation in PESCO, there would be additional “soft” agreements between the UK and EU countries that take part in PESCO.

From a transatlantic perspective, this would in theory also allow the U.S. to take part in PESCO. However, for the time being PESCO as well as the European Defence Fund should be seen from the perspective of EU-NATO relations. Both have the potential to

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<sup>317</sup> TEU, *supra* note 28, at art. 42, ¶ 6.

<sup>318</sup> See TEU, *supra* note 28, at art. 46, ¶ 2 (concerning the establishment of PESCO); see also, TEU, *supra* note 28, art. 46, ¶ 3 (concerning the admission of Member States to PESCO at a later stage); see TEU, *supra* note 28, at art. 46, ¶ 4 (concerning the suspension of underperforming participating Member States).

<sup>319</sup> See Council Decision (CFSP) 2017/2315 of 11 December 2017, 2017 O.J. (L 331) 57, art. 2 (establishing permanent structured cooperation (PESCO) and determining the list of participating Member States).

<sup>320</sup> See Andrea Shalal & Robert Emmott, *EU to Sign Joint Defense Pact in Show of post-Brexit Unity*, REUTERS (Nov. 8, 2017), <https://www.reuters.com/article/us-eu-defence/eu-to-sign-joint-defense-pact-in-show-of-post-brexit-unity-idUSKBN1D81CT> [<https://perma.cc/U9SW-9E2U>] (“But it was clear that Britain, which intends to leave the bloc following the Brexit referendum of June 2016, would not participate, officials said.”).

<sup>321</sup> See Council Decision (CFSP) 2017/2315, *supra* note 319, Annex III, pt. 2.2.1.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*, art. 9, ¶ 3.

be seen as tangible steps towards increased and more efficient defense spending among European NATO members, a contentious point highlighted by the current administration.<sup>325</sup> At the same time, none of these initiatives have a direct, legally relevant impact on NATO, although better EU-NATO cooperation has been exhorted as desirable by the leadership of both organizations.<sup>326</sup>

Across different policies, the EU is changing its approach towards external relations. These changes affect both the procedures for, and content of, international treaties with third countries going forward, including with the U.S. and the post-Brexit UK.

## 5.2. *Timing Issues*

Before turning to the substantive issues of (re-)negotiating treaties with the U.S., two preliminary points need to be made concerning timing. Firstly, as long as the UK remains a member of the EU, it will be covered by, and bound by, the treaties that the EU concludes.<sup>327</sup>

Once the UK ceases to be an EU member, it may enter a transitional phase with the EU. Such an arrangement has been flagged as desirable by the UK government.<sup>328</sup> Also, the EU has indicated

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<sup>325</sup> See Peter Baker, *Trump Says NATO Allies Don't Pay Their Share. Is That True?*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/world/europe/nato-trump-spending.html> [<https://perma.cc/NJ7U-Z8JF>] (discussing President Trump's claim that European NATO members are failing to contribute enough to defense spending).

<sup>326</sup> See, e.g., the Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, Warsaw, July 8, 2016, <http://www.consilium.europa.eu/media/31947/st14802en17.pdf> [<https://perma.cc/TDY5-2S8S>] (committing "to give new impetus and new substance to the NATO-EU strategic partnership"). See also Council of the European Union, Council Conclusions on the Implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization, Brussels, Dec. 5, 2017 (announcing the intention of the European Union, European Commission, and NATO to enhance strategic cooperation on security and defense).

<sup>327</sup> See TFEU, *supra* note 28, at art. 216, ¶ 2 ("Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.").

<sup>328</sup> See Prime Minister's Office, PM's Florence speech: A New Era of Cooperation and Partnership between the UK and the EU (Sept. 22, 2017), <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> [<https://perma.cc/3XZX-JED2>] (suggesting "an implementation period of around



an interest for a transition period, though under the premise that “the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition.”<sup>329</sup> This arrangement would entail, among other things, that the UK “will have to continue to comply with EU trade policy” and apply the EU’s customs tariffs.<sup>330</sup> According to the supplementary negotiating directives of January 2018, moreover, “the United Kingdom should remain bound by the obligations stemming from” EU agreements but will “no longer participate in any bodies set up by those agreements.”<sup>331</sup>

Nevertheless, from a transatlantic perspective, any transitional arrangement is an agreement between the EU and UK, and thus, *res inter alios acta* as far as the U.S. is concerned. The EU and UK cannot together agree that the UK will emerge as a new quasi-party to existing EU treaties with third countries where the UK was not a party before (i.e., non-mixed agreements, *supra* 3.2.). Such “roll-over” during the transition would require the consent of the other parties,<sup>332</sup> including the U.S., in each case, following the logic of the law of treaties discussed below. With the presumptive Brexit date of March 29, 2019 looming, this leaves relatively little time for preparing the negotiation of such consent with the United States and others. Nevertheless, assuming the transition is limited in time and will not become entirely open-ended, this is likely to raise the chances for approval from the American side. The U.S. may then save its demands for concessions and adaptations for the post-transition period.

The approaching Brexit deadline leads to the second preliminary point, i.e., the question of when the UK can start negotiating new treaties with the U.S., either to replace existing ones (post-transition) or to tread new ground. Politically, it would make sense for the UK to commence as soon as possible, even while it is

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two years.”).

<sup>329</sup> European Council, *supra* note 42, at 2.

<sup>330</sup> *Id.*

<sup>331</sup> Council of the European Union, *supra* note 44, at pt. 15. See also Draft Agreement on the Withdrawal of the United Kingdom, *supra* note 45, at art. 129, ¶¶ 1–2.

<sup>332</sup> Ramses A. Wessel, *Consequences of Brexit for International Agreements Concluded by the EU and its Member States*, 55 COMMON MKT. L. REV. 101, 116 (2018) (noting that the UK “may in some cases aim at what could largely be a copy of the agreements that were concluded by the EU. This, of course, assumes that the other contracting parties would agree to such a solution. In fact, this should not be taken as a given.”).

still an EU member. However, legally, the UK is barred from negotiating international agreements on its own in cases where they touch upon EU exclusive competences, where EU rules may be affected, or where the “duty of sincere cooperation” might be violated (*supra* 3.3.). Here, the triangular relationship comes to the fore again, as the UK remains conditioned in its international dealing until the end of its EU membership. During a transition period, this side of the triangle would change in nature from EU law to international law. Nonetheless, significant restrictions are likely to apply then as well. According to the supplementary EU directives, the UK “may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorized to do so by the Union.”<sup>333</sup> However, at least this opens the possibility for the UK to start negotiations during the transition. In October 2017, the UK government had acknowledged that it “would not bring into effect any new arrangements with third countries which were not consistent with the terms of [its transitional] agreement with the EU.”<sup>334</sup>

It would be legally possible, and politically advisable, for the EU to authorize the UK to start negotiations with third countries as soon as possible,<sup>335</sup> definitely during the transition. While still an EU member, the UK government has been careful to brand its talks with third parties as “preliminary discussions” rather than negotiations.<sup>336</sup> With the United States in particular, it has set up a “trade and investment working group.”<sup>337</sup> A core task of this group’s work will be to ensure the continuity of treaty relations and explore future agreements. As its name suggests, the focus is on economic issues rather than security and defense.

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<sup>333</sup> See Council of the European Union, *supra* note 44, at pt. 16. See also Draft Agreement on the Withdrawal of the United Kingdom, *supra* note 45, at art. 129, ¶ 4.

<sup>334</sup> UK DEPARTMENT FOR INTERNATIONAL TRADE, PREPARING FOR OUR FUTURE UK TRADE POLICY, 2017, Cm. 9470, at 28.

<sup>335</sup> Thomas Streinz, *Cooperative Brexit: Giving back Control over Trade Policy*, 15 INT’L J. CONST’L L. 271, 284–87 (2017); see also TFEU, *supra* note 28, at art. 2, ¶ 1.

<sup>336</sup> *Theresa May: UK will Lead World in Free Trade*, BBC (Sept. 7, 2016), <http://www.bbc.com/news/uk-politics-37291832> [https://perma.cc/K4PS-TDX4].

<sup>337</sup> UK DEPARTMENT OF INTERNATIONAL TRADE, US-UK TRADE WORKING GROUP LAYS GROUNDWORK FOR POTENTIAL FUTURE FREE TRADE AGREEMENT (July 25, 2017), <https://www.gov.uk/government/news/us-uk-trade-working-group-lays-groundwork-for-potential-future-free-trade-agreement> [https://perma.cc/ZN6R-EBSY].

### 5.3. Ensuring Continuity in Treaty Relationships

There are various parallel ongoing developments in the transatlantic triangle, i.e., Brexit negotiations, EU reforms, as well as a generally perceived unpredictability of the new U.S. administration.<sup>338</sup> Hence, a legal analysis on the way forward needs to start with the issue of ensuring “continuity” of existing relationships despite the potential for disruption inherent in the UK’s withdrawal from the EU. The focus will be on the post-transitional period, though it should be noted that also for the continuing application of EU-agreements with the U.S. during a transition phase, the latter’s consent would be needed. First, bilateral agreements will be discussed, followed by the multilateral ones. Within each category it makes sense to distinguish again between non-mixed and mixed agreements.

“Continuity” of existing agreements has been noted as an objective of the UK government.<sup>339</sup> As to what it means by “rolling over” existing agreements concluded by the EU beyond a transition period, domestic discussion for a new “Trade Bill” provides some clarification.<sup>340</sup> According to a House of Commons briefing paper, “[i]nstead of seeking to become a party to existing EU trade agreements in the long term (sometimes called ‘trilateralisation’), the Government’s approach is to negotiate new bilateral agreements with the third countries that are ‘substantively the same or as similar as possible.’”<sup>341</sup> This may be an optimistic assessment, particularly when dealing with the United States.

In the case of the U.S., there is no existing comprehensive bilateral trade agreement given the freezing of TTIP negotiations. Nevertheless, many of the approximately 50 bilateral agreements in

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<sup>338</sup> See, e.g., Keren Yarhi-Milo, *After Credibility: American Foreign Policy in the Trump Era*, 97 FOREIGN AFF. 68, 72 (2018) (“Yet the president’s track record of flip-flopping on key campaign pledges, his bizarre and inaccurate outbursts on Twitter, his exaggerated threats, and his off-the-cuff assurances have all led observers to seriously doubt his words.”).

<sup>339</sup> UK DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 334, at 28 (“The UK Government is committed to seeking continuity in its current trade and investment relationships, including those covered by EU third country FTAs and other EU preferential arrangements.”).

<sup>340</sup> Lorna Booth et al., *The Trade Bill*, House of Commons Library Briefing Paper (July 2, 2018), at 31 (explaining that the new legislation is to give “the Government powers to change domestic legislation to ensure that any such ‘transitioned’ trade agreements can be implemented.”).

<sup>341</sup> *Id.* at 29–30.

force between the EU and U.S. have a trade or trade-related dimension,<sup>342</sup> and hence would need to be replicated.<sup>343</sup> Moreover, there are several other agreements, beyond the scope of the "Trade Bill", including in the field of security, where there is little clarity about whether they are to be "rolled over" or not.<sup>344</sup> Yet in other cases, such as air transport, "suspended" agreements may reactivate themselves even though they might be outdated.<sup>345</sup>

From a UK foreign relations law point of view, the conclusion of "roll over" agreements is fairly uncontroversial for three reasons. First, the UK is already complying with them while still an EU member. Second, treaties are made by the British government under the "royal prerogative," leaving Parliament only limited powers of prior scrutiny.<sup>346</sup> Third, government powers for ensuring continuity are further bolstered through special legislation, such as the above-mentioned Trade Bill. However, there are possible hurdles on the U.S. side.

The EU-only bilateral agreements in force with the U.S. cease to apply to the UK post-Brexit.<sup>347</sup> Hence, "roll-over" is a somewhat euphemistic term, describing what under the international law of treaties amounts to the conclusion of new agreements with the U.S. Neither the replication of the content in the new agreement nor the other party's consent can be presumed, the latter being regulated by American foreign relations law. This required, in any event, the President's approval.<sup>348</sup> Depending on the subject matter, it will

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<sup>342</sup> Agreement between the United States of America and the European Community on Trade in Wine, U.S.-EU, Mar. 10, 2006, T.I.A.S. 05-1123.

<sup>343</sup> E.g., Agreement between the Government of the United States of America and the European Union on the Coordination of Energy-Efficiency Labelling Programs for Office Equipment, U.S.-EU, Jan. 18, 2013, T.I.A.S. 13-220.

<sup>344</sup> For instance, there exists a U.S.-UK agreement in parallel to the U.S.-EU one. See Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, U.S.-UK-N. Ir., Jan. 6, 1994, T.I.A.S. 96-1202 (rendering, potentially, the replication of the EU-U.S. agreement unnecessary).

<sup>345</sup> Agreement on Air Transport Services, *supra* note 204 (showing that the suspended U.S.-UK Agreement on North Atlantic Air Fares stems from 1978).

<sup>346</sup> See Miller, *supra* note 35, at ¶¶ 54-58 (summarizing the UK's dualist system, with reference to case law and convention). See also CAMPBELL MCLACHLAN, FOREIGN RELATIONS LAW 129 (2014) (concluding that "the process of negotiation, conclusion and signature of treaties remains with the executive, as indeed does their ratification on the international place.").

<sup>347</sup> See e.g., Odermatt, *supra* note 49, at 1056; Łazowski & Wessel, *supra* note 47, at 13.

<sup>348</sup> Some agreements may be, and increasingly are, concluded as executive

also require different forms of Congressional involvement.<sup>349</sup> From a continuity point of view, a logical starting point for procedural clarity is, hence, to check under which procedure in U.S. law relevant agreements were concluded with the EU in the first place.

Moreover, the case of dealing with the U.S. might be distinguished from most of the many dozen continuity negotiations that await the post-Brexit UK. On the one hand, there is the oft-invoked “special relationship,”<sup>350</sup> which may imply a degree of goodwill towards the UK. On the other, any “special relationship” bonus may be mitigated by several factors. In contrast to smaller, especially developing countries, the United States has the administrative capacity, negotiating experience, and considerable economic and political leverage to check closely whether it is in the country’s interest to simply “roll over” an agreement, or whether its content should be adapted given the new political and economic reality. Most importantly, the contracting party is no longer the whole EU and its internal market, but one country with an economy – though sizeable – amounting to one sixth of the EU’s gross domestic product (GDP).<sup>351</sup> In particular, this would involve checking whether any concessions were given to the EU at the time, which would no longer seem merited *vis-à-vis* the UK.<sup>352</sup> Such an approach would be consistent with the current administra-

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

<sup>349</sup> See text and references *supra* note 53.

<sup>350</sup> See *Highlights: President Trump News Conference with UK Prime Minister May*, RTE (last updated July 13, 2018), <https://www.rte.ie/news/world/2018/0713/978496-donald-trump-presser/> [<https://perma.cc/AU5Z-XLA3>] (noting that the President said, “I would say I would give our relationship in terms of grade the highest level of special.”). But see Jeffrey A. Stacey, *The Hollowing Out of the Special Relationship: The Bleak Future of the U.S.-British Alliance*, FOREIGN AFF. (Sept. 5, 2017), <https://www.foreignaffairs.com/articles/2017-09-05/hollowing-out-special-relationship> [<https://perma.cc/UV57-HVM5>] (noting the deteriorating nature of the UK U.S. relationship).

<sup>351</sup> EUROPEAN COMMISSION, EUROSTAT, SHARE OF MEMBER STATES IN EU GDP (Apr. 10, 2017), <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1> [<https://perma.cc/JR9A-DZU8>] (noting that the UK accounts for 16 percent of the EU’s GDP).

<sup>352</sup> Wessel, *supra* note 332, at 15 (stressing that the other party’s consent to copy-paste an agreement “should not be taken as a given” and that “in some cases copy-pasting existing agreements to make them adjusted for the United Kingdom would be less easy than it sounds as many of the provisions were tailor-made for the EU-situation”).

tion's "America First" approach to foreign policy and treaty-making.<sup>353</sup>

In the mixed-bilateral setting, which only concerns one agreement that is in force in the case of the U.S., the UK's case for continuity is somewhat stronger. Alongside the EU, it is one of the parties. This might seem to favor its continued status as a party post-Brexit. However, here it is "essential to recall that these are not just international agreements that the UK entered into individually,"<sup>354</sup> but as an EU Member State. Hence, mixed agreements are still bilateral in nature, with the U.S. being a party "of the one part", and the EU and its Member States concluding it "of the other part".<sup>355</sup> Institutionally, moreover, mixed agreements reflect this bilateral nature. For instance, in CETA, a joint committee that consists of "representatives of the European Union and representatives of Canada," will be "co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees."<sup>356</sup> Keeping the UK in "would change the nature of a bilateral agreement to a multilateral agreement."<sup>357</sup>

Therefore, it cannot be assumed the UK will remain a party once it is no longer an EU Member State. As a consequence, "trilateralizing" erstwhile bilateral mixed agreements requires renegotiation of the text, necessitating the consent of the other parties. In the case of the 2004 Galileo/GPS Agreement, its institutional setup is less complex than CETA. Nonetheless, the "bilateral" nature of the agreements is apparent here, too. For instance, it provides that for consultations in the context of dispute settlement that, "[r]epresentatives of the Council of the European Union and the European Commission, of the one part, and of the United States, of the other part, shall meet as needed."<sup>358</sup> The agreement clarifies,

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<sup>353</sup> See the President's preface to the NATIONAL SECURITY STRATEGY, *supra* note 55, at i (observing an "America First foreign policy in action", which puts an emphasis on "enforcing our borders, building trade relationships based on fairness and reciprocity, and defending America's sovereignty without apology.").

<sup>354</sup> See Wessel, *supra* note 332, at 17. See also Odermatt, *supra* note 49, at 1059-60.

<sup>355</sup> See Agreement on the Promotion, Provision and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications, *supra* note 79 (using the formulation "of the one part"/"of the other part" at its outset).

<sup>356</sup> CETA, *supra* note 108, at art. 26.1.1.

<sup>357</sup> Wessel, *supra* note 332, at 20.

<sup>358</sup> See Agreement on the Promotion, Provision and Use of Galileo and GPS satellite-based navigation systems, *supra* note 79, at art. 17, ¶ 2.

moreover, that “the Parties’ shall mean the European Community or its Member States or the European Community and its Member States, within their respective areas of competence, on the one hand, and the United States, on the other.”<sup>359</sup> It does not envisage non-EU third countries as members.

Alternatively, the UK could accept ceasing to be a party to this mixed agreement by officially withdrawing from it, or simply acquiescing into being ejected from it, and instead renegotiate a bilateral agreement with the U.S. However, since the agreement concerns an EU project, administered by the European Space Agency (ESA), the UK’s stake and position remain unclear.<sup>360</sup>

In the multilateral setting, the distinction between mixed and non-mixed needs to be kept in mind as well. The added difficulty in maintaining continuity here stems from the possible need for consent, not just from the U.S., but also the other parties. In the non-mixed category, the 2005 Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) serves as a rare multilateral example involving both the EU and the U.S. but not the Member States. The UK has never been a party in its own right, and hence could not lay claim to such status post-Brexit. Hence, its options are to either conclude a bilateral agreement with the U.S. (and possibly others) to that effect or join the multilateral agreement. The latter is legally easy to achieve since the existing members cannot veto acceptance in this particular case.<sup>361</sup>

The multilateral, mixed category is legally a more complex setting. However, in terms of retaining membership, the UK’s position is much stronger here. In the case of the Treaty of Amity and Cooperation in Southeast Asia, the UK is a party in its own right alongside the EU since 2012.<sup>362</sup> Prominent examples of international organizations with mixed membership include the WTO and

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<sup>359</sup> *Id.* at art. 18. The agreement refers to the European Community because it was concluded before the Lisbon Treaty created the EU as a single legal person. See TEU, *supra* note 28, at art. 1, ¶ 3 (“The Union shall replace and succeed the European Community.”).

<sup>360</sup> ESA is not an EU agency but a separate intergovernmental organization, of which the UK is a member. See Framework Agreement between the European Community and the European Space Agency, EU-ESA, Nov. 25, 2003, 2004 O.J. (L 261) 64 (establishing a framework for cooperation between the EU and the ESA).

<sup>361</sup> Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs), *supra* note 167, at art. 7, lit. b (“This Agreement shall be open for acceptance by any Member of the WTO.”). The UK’s membership of the WTO post-Brexit is not disputed.

<sup>362</sup> Treaty of Amity and Cooperation in Southeast Asia, *supra* note 160.

Food and Agricultural Organization (FAO). In these two examples, the UK is a founding member, as is the U.S. Moreover, in contrast to the bilateral mixed treaties, the UK is not only a party by virtue of being an EU country, but at least partially in its own right. This makes continued membership the presumption. As confirmed in CJEU case law and “declarations of competence” issued in these multilateral settings, EU Member States also exercise their own competences in these organizations,<sup>363</sup> though their freedom of action is restricted by EU law (*supra* 3.3.). Post-Brexit—or at least post-transition—these constraints will fall away. At the same time, “the UK will become responsible for the implementation of all provisions,” including those that used to be covered by the EU.<sup>364</sup>

Nevertheless, continuity of membership does not equate continuity of *terms* of membership. Consequently “the UK’s continued participation may become subject to negotiations between the EU, its Member States and third countries (including the UK in a new special position).”<sup>365</sup> In the case of the WTO, negotiations with affected WTO members may be necessary for agreeing on the UK’s future tariff schedules and for the splitting up of the tariff rate quotas between it and the EU. Nonetheless, these will not affect the UK’s status as a WTO member as such.<sup>366</sup>

It should be recalled, furthermore, that in more security-

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<sup>363</sup> See Opinion 1/94, *supra* note 205, at ¶ 105; see also Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 E.C.R. I-01255, ¶ 31. See also Andrés Delgado Casteleiro, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, 17 EUR. FOREIGN AFF. REV. 491, 492 (2012) (observing that issuing declarations of competence has become a common practice as “an attempt to apportion the responsibilities within a multilateral agreement based on who has competence (the EU and/or its Member States) over the issue covered by the specific provisions of the multilateral agreement”).

<sup>364</sup> Wessel, *supra* note 332, at 21.

<sup>365</sup> *Id.*; see also Peter Ungphakorn, *Nothing Simple About UK regaining WTO Status post-Brexit*, INT’L CTR. FOR TRADE & SUSTAINABLE DEV. (June 27, 2016), <https://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit> [<https://perma.cc/GHZ9-LKK6>]; Aakanksha Mishra, *A Post Brexit UK in the WTO: The UK’s New GATT Tariff Schedule*, in GETTING TO BREXIT: LEGAL ASPECTS OF THE PROCESS OF THE UK’S WITHDRAWAL FROM THE EU 9, 9 (Jennifer A. Hillman & Gary Horlick eds., 2017) (“There are certain ways by which the UK could establish itself as a WTO member in its own right. However, each approach is fraught with a set of complexities.”).

<sup>366</sup> Lorand Bartels, *The UK’s Status in the WTO Post-Brexit*, in THE UNITED KINGDOM AND THE FEDERAL IDEA 227, 229–32 (Robert Schütze & Stephen Tierney eds., 2018) (detailing the UK’s status as an original member of the WTO with full rights and responsibilities).



oriented organizations such as the UN and NATO, the UK is a member but not the EU (*supra* 3.3.2.). Hence, Brexit's impact on its continued status alongside the U.S. will be very limited, and also because EU powers and obligations of "sincere cooperation" in the security and defense field are already less invasive while being an EU member.<sup>367</sup> This again reveals that the real difficulty in "transatlantic trigonometry" is in the allegedly "low politics", not the "high politics" of security and defense, both in the bilateral and multilateral sphere, for both existing and future agreements.

#### 5.4. Parameters for New Agreements

Beyond ensuring continuity by finding replacements for EU agreements, the UK will be freer post-Brexit—or in any event post-transition—to conclude new treaties with external partners. Given the "special relationship" with the UK, the U.S. would be a logical priority in such endeavors. However, the influence of the EU will be felt even after the UK ceases to be an EU country, the extent of which will be contingent on the future shape of the UK-EU-side of the transatlantic triangle.

From a policy perspective, going beyond continuity fits the theme of *Global Britain* as outlined in government papers, according to which the "UK intends to pursue new trade negotiations to secure greater access to overseas markets for UK goods exports."<sup>368</sup> This appears to be indeed the primary focus of *Global Britain*, while in security and defense matters the UK seeks close alignment with the EU post-Brexit and continued reliance on NATO.<sup>369</sup>

This means that advances in post-Brexit bilateral U.S.-UK transatlantic relations are likely to focus primarily on trade issues. With no TTIP in existence that could be "rolled over", the UK would have to negotiate a trade agreement with the U.S. from scratch. A new free trade agreement with the U.S. has been floated ever since the referendum,<sup>370</sup> with one of the stated aims of the UK-

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<sup>367</sup> Larik, *supra* note 191, at 187–89 (describing the limited legal effects of loyalty obligations in the CFSP).

<sup>368</sup> UK DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 334, at 29.

<sup>369</sup> See HM GOVERNMENT, FOREIGN POLICY, DEFENCE AND DEVELOPMENT: A FUTURE PARTNERSHIP PAPER 19 (Sept. 12, 2017) (stating that "NATO will continue to be the cornerstone of our security and the UK will continue to champion and drive forward greater cooperation between the EU and NATO ...").

<sup>370</sup> See, e.g., Benjamin Oreskes & Victoria Guida, *The Bright Side of Brexit?* A

U.S. Trade and Investment Working Group being “to lay the groundwork for a potential, future free trade agreement once the UK has left the EU.”<sup>371</sup>

Such a new free trade agreement would be an example for the *new* nature of the transatlantic treaty triangle. The UK-EU side of it would no longer be governed by EU law and its “constitutional” features.<sup>372</sup> Hence, the international legal nature of all three sides of this new trade triangle would be the same in nature, i.e., public international law, possibly specified in the form of treaties. All this may imply a large degree of freedom and flexibility, but several economic, political and legal constraints apply.

In principle, post-Brexit and transition, the UK could even conclude a trade agreement with the U.S. before it does so with the EU. However, there will be what could be termed a pull towards “implicit sequencing” in negotiations in the transatlantic triangle, as opposed to the “explicit sequencing” of withdrawal negotiations (*supra* 2.2.). The main reason for this is the current economic reality that “[t]he UK exports almost half of its goods and services to the EU—twice as much as to the U.S.”<sup>373</sup> According to the study conducted by RAND Europe, a scenario in which the UK and U.S. would conclude an FTA, but in which the EU would have FTAs with neither, would benefit the UK to some extent, yet “still be less beneficial than an FTA with the EU.”<sup>374</sup>

Hence, the shape and content of the future UK-EU trade relationship will continue to loom over the UK-U.S. side even post-Brexit, meaning that there is an incentive for the UK to clarify first the future EU-UK trading relationship before finalizing the UK-U.S. one. Having a clearer idea of the basis for negotiating a U.S.-UK FTA makes sense also from a U.S. point of view. As noted by Hamilton, “[b]efore Washington begins to negotiate a formal bilateral deal with the UK, it will want to understand ... London’s end goals with regard to a deal with the EU.”<sup>375</sup>

It is at this point that the different models of association with

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*U.S.-UK Trade Deal*, POLITICO (June 24, 2016), <https://www.politico.com/story/2016/06/brexit-us-britain-trade-deal-224776> [<https://perma.cc/623Z-92DY>] (reporting on the likelihood of a new two-way trade deal between the U.S. and the UK).

<sup>371</sup> UK DEPARTMENT OF INTERNATIONAL TRADE, *supra* note 337.

<sup>372</sup> See *Kadi v. Council*, *supra* note 77, at ¶ 281.

<sup>373</sup> HAMILTON & QUINLAN, *supra* note 8, at 2.

<sup>374</sup> RIES ET AL., *supra* note 295, at 86.

<sup>375</sup> HAMILTON, *supra* note 306, at 43.

the EU and their transatlantic implications come to the fore (*supra* 4.). Depending how deep and specifically regulated this relationship will be, it will have varying degrees of impact on the UK's ability to strike a trade agreement with the U.S. For instance, a Norway-type (EEA) or Swiss-type (set of bilateral agreements) arrangement will continue to hamper its freedom to maneuver and to make concessions on regulatory issues that would deviate from the *acquis* of EU law even beyond any transitional period. Similarly, a Turkey-style customs union hampers its ability to provide tariff concessions (in the areas covered by the customs union), and in fact commit it to follow the EU's lead in trade policy.

From the British Government's official pronouncements to date, neither of these more restrictive models involving a customs unions or Norway or Swiss-style single market access is likely.<sup>376</sup> Instead, a CETA-style agreement, i.e., a deep and comprehensive free trade agreement potentially fleshed out with some form of customs facilitation and free trade in goods in exchange for alignment with relevant EU regulations, appears to be the landing zone.

With regards to the U.S., the CETA-model would provide the UK with maneuvering space in terms of tariffs and regulation, at least legally speaking. A "right to regulate"<sup>377</sup> inherent in such a kind of FTA could come to be used as a "right to deregulate" or a "right to diverge" from EU standards to accommodate U.S. interests. This may be necessary to make such a deal attractive to the U.S. in the first place.

In terms of political economy, Britain will be the smaller market facing an assertive "America First" approach. According to RAND Europe, the sobering assessment is that "an FTA with the UK would be of negligible macroeconomic benefit"<sup>378</sup> to the U.S. Hence, the latter can be expected to seek additional concessions to make such a bilateral FTA worthwhile. On the one hand, "[s]ome issues may be less difficult in U.S.-UK negotiations than they were in TTIP, for instance, the EU's insistence on 'cultural exceptions' or geographic indications."<sup>379</sup> On the other hand, important obstacles remain. Agriculture, for instance, could become a sensitive issue politically, given that British farmers may not be "keen on a trade

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<sup>376</sup> See *supra* note 217 (providing official statements of the UK government's stance on the future relationship between the UK and the EU).

<sup>377</sup> See CETA, *supra* note 108, at 8.

<sup>378</sup> RIES ET AL., *supra* note 295, at 86.

<sup>379</sup> HAMILTON, *supra* note 306, at 44.

deal that would open them up to U.S. competition at the very time they are losing generous EU subsidies.”<sup>380</sup> Moreover, issues that already troubled the TTIP negotiations, such as food and animal standards, like the infamous “chlorine chicken”, will resurface in the context of a U.S.-UK FTA.<sup>381</sup> Other likely contentious points are public procurement and sensitive domestic areas such as healthcare.<sup>382</sup>

The UK may want to acquiesce to some of the American demands in order to have a deal, if only for political window dressing. Nevertheless, even if accommodating U.S. interests (and thus ensuring U.S. constitutional hurdles will be met more easily), the UK remains constrained by two more factors. The first is UK domestic politics and the UK’s “foreign relations law.” Given wide discretion of the government due to the “royal prerogative” in treaty-making, it is legally largely unencumbered, though unlike situations that concern “continuity” that are about the status quo and are covered by enabling legislation such as the Trade Bill (*supra* 4.3.), it could face fiercer political opposition and subsequent problems when it comes to implementation by Parliament.<sup>383</sup>

The second is EU law regulating access to the internal market, under the penumbra of which the UK remains, which brings out once more the triangular nature of the transatlantic relationship post-Brexit. This puts the British government in a difficult position. On the one hand, the closer the UK stays aligned with EU regulations, the less maneuvering space it has for accommodating U.S. interests. On the other hand, UK producers and service providers would still need to comply with relevant EU rules if they want to fully benefit from a new CETA-style UK-EU FTA, in addition to undergoing customs and rules of origin checks that will have to be introduced. If British products do not meet EU safety standards or content requirements to qualify for the benefits under a future FTA, they will not be able to receive the preferential treatment granted by the agreement. In such a scenario, according

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<sup>380</sup> *Id.* at 45.

<sup>381</sup> Richard Partington, *Trump Adviser Ross says UK-US Trade Deal will mean Scrapping EU Rules*, GUARDIAN, Nov. 6, 2017, <https://www.theguardian.com/business/2017/nov/06/trump-ross-says-uk-us-trade-deal-eu-brexit-chlorinated-chicken> [<https://perma.cc/55AP-6T5Y>] (warning that any post-Brexit deal with the U.S. will depend on the UK discarding rules set by Brussels).

<sup>382</sup> HAMILTON, *supra* note 306, at 45 (noting that other market access issues may arise due to the UK’s concern regarding certain U.S. restrictions on trade).

<sup>383</sup> See generally *supra* note 346.

to the so-called “Brussels effect,” even with the UK no longer being in the EU, adapting to the latter’s generally stricter regulations would allow British businesses to trade on *both* sides of the Atlantic,<sup>384</sup> rather than having to choose one over the other.

An even more ambitious model for future transatlantic trade relations is a trilateral, revamped (and possibly renamed) TTIP-style agreement. The parties to such an agreement would be the UK, the EU (and possibly the Member States), and the U.S. According to the RAND Europe report, this would be the economically most advantageous scenario for all sides.<sup>385</sup> Legally and politically, however, such an agreement will be extremely difficult to realize. Turning already troubled TTIP talks into three-way negotiations including the UK following an acrimonious Brexit process does not create a promising starting point. Moreover, it would require, among other things, an institutional redesign of the agreement into a “trilateral” relationship. A Joint Committee would have to include members from all three sides. In addition, all three would have to have a say in appointing and selecting members of inter-party and possibly investor-state dispute settlement bodies.<sup>386</sup> A more realistic—though still more long-term scenario—is that of working incrementally towards a more open and better coordinated “North Atlantic Marketplace” in a way that avoids past pitfalls and dead ends.<sup>387</sup>

In the multilateral sphere, not much new is to be expected. In contrast to the continuity scenario, this would entail the U.S. and UK joining or creating new multilateral treaties and organizations. *Global Britain* certainly professes a multilateral dimension.<sup>388</sup> However, this is not reciprocated by the current U.S. administration,

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<sup>384</sup> Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 (2012) (“Trading with the EU requires foreign companies to adjust their conduct or production to EU standards—which often represent the most stringent standards—or else forgo the EU market entirely.”).

<sup>385</sup> RIES ET AL., *supra* note 295, at 57–58 and 67 (contending that the largest potential gains for all three partners would arise from this scenario).

<sup>386</sup> See generally *supra* note 357.

<sup>387</sup> HAMILTON, *supra* note 306, at 22–24 (explaining the potential benefits of a North Atlantic Marketplace).

<sup>388</sup> See HM GOVERNMENT, *supra* note 369, at 2 (“The UK will also continue to . . . be a champion of the UN and multilateralism . . .”). See also, UK DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 334, at 25 (“Already a champion of multilateral trade from within the EU, the UK is preparing to take on an even greater role in the WTO outside the EU . . .”); Political Declaration Setting out the Framework for the Future Relationship, *supra* note 45, at pt. 6 (“The Parties also reaffirm their commitment to promoting effective multilateralism.”).

which has shown a preference for bilateral rather than multilateral approaches.<sup>389</sup> Examples include the “unsigning” of the Trans-Pacific Partnership<sup>390</sup> and withdrawing from the Paris Climate Accord, the Iran Nuclear Deal, and the UN Human Rights Council.<sup>391</sup>

In the security and defense field, the limited impetus of Brexit for new transatlantic multilateral approaches will become evident. The UK’s NATO membership will remain unaffected, while the British government has expressed a preference for very close association with the EU’s CSDP. It offered the EU “a future relationship that is deeper than any current third country partnership,” which should be “unprecedented in its breadth, taking in cooperation on foreign policy, defence and security, and development.”<sup>392</sup> As seen above, there exist already facilities for third country contributions, contingent on EU approval, that could form the basis for such a partnership, and which are not mutually exclusive with NATO and bilateral UK-U.S. cooperation (*supra* 5.1.).

Third-country associations with the EU’s CSDP would also lead to an “open triangle” involving the U.S. and UK as external contributors. As noted above, the U.S. already has such an arrangement in place (*supra* 3.2.1.). The UK could either replicate this or seek a more enhanced form of association, as expressed in its “future partnership paper,” including third-country association with the newly activated PESCO (*supra* 5.1.). Consequently, the U.S. and UK could find themselves both contributing to certain EU missions in the future, when they decide to do so. However, given that third-country participation in such missions needs to respect

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<sup>389</sup> See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT 1 (Mar. 2017) (noting that U.S. trade policy goals “can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations ...”).

<sup>390</sup> Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES, Jan. 23, 2017, <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> [<https://perma.cc/Y9T4-8CC7>].

<sup>391</sup> See Joris Larik, *The EU’s Global Strategy, Brexit and “America First”*, 23 EUR. FOREIGN AFF. REV. 343, 361–62 (2018) (summarizing the international legal commitments from which the U.S. has withdrawn under the Trump Administration). See also HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018) (providing an extensive account and critique of the Trump Administration’s approach to international law).

<sup>392</sup> HM GOVERNMENT, *supra* note 369, at 18. See also Political Declaration Setting out the Framework for the Future Relationship, *supra* note 45, pt. 80 (“With a view to Europe’s security and the safety of their respective citizens, the Parties should establish a broad, comprehensive and balanced security partnership.”).

the “decision-making autonomy” of the EU,<sup>393</sup> the triangular relationship framed by the CSDP would be lopsided towards the latter.

Lastly, apart from new international agreements and treaty-based organizations, more flexible forms of collaboration are available. For instance, recalling the Iran Nuclear Deal and its “P5+1”/“E3+3” format,<sup>394</sup> such approaches are easily adaptable to the post-Brexit world. Institutionally, it would mean that the UK continues to take part in this grouping, but henceforth in its own right completely, whereas France and Germany continue to see their participation in part, as an exercise of the Union’s Common Foreign and Security Policy. In short, formats such as “E3+3” would simply become “E2+4” – or “E2+3” in case the U.S. refrains from taking part.

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

## 6. CONCLUSION

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

First, the transatlantic impact of Brexit is in the first place an empirical challenge. Beyond a general sense that the UK will have to renegotiate numerous international agreements with its partners, closer analysis of databases and compendia reveals that it is not always clear what is exactly at stake. However, there are two

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<sup>393</sup> See *supra* note 138.

<sup>394</sup> See Harnisch, *supra* note, at 160.

consoling factors. The existing treaty relations between the U.S. and the EU and its (remaining) Member States remain in place, as will existing bilateral U.S.-UK treaties. In addition, the number of agreements to be replicated by the UK is manageable—at least for the U.S., which only has to go through this exercise once. Nevertheless, there is no time to be wasted for preparing replication and renegotiation in order to avoid unforeseen effects and protracted legal uncertainty.

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

Third, achieving a “kinder, gentler Brexit”<sup>395</sup> in the transatlantic context is a political challenge with many moving parts. Not only are the governments in the U.S. and UK implementing their respective visions of “America First” and *Global Britain*, but also the EU has been propelled on a course of reform and activism. While the near-term will be about continuity, fitting the different pieces of the transatlantic space back together is neither impossible nor an inevitability. Legally, upsetting existing relationships can be minimized, though it will be a matter of negotiations and hence come with adjustments based on the shifted power relations. In an effort to “take back control” from the EU, to use the favorite slogan of the Leave-campaign and Brexiteers,<sup>396</sup> the UK is in fact on a course to handing control over many international engagements to its external partners, whose consent will be required in many instances for continuing existing agreements and for putting in place new ones. Avoiding disruption—perhaps counterintuitively—has been shown to be easier, legally and politically, in the “sovereignty sen-

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<sup>395</sup> Weiler, *supra* note, at 6.

<sup>396</sup> ARMSTRONG, *supra* note 3, at 65.



sitive” fields of security and defense, while deeper integration and more apparent trade-offs in the trade and regulatory sphere turn the latter into the principal arena for a drawn-out struggle for the shape of future relations.

Two hundred and twenty-two years ago, George Washington used his farewell address to caution his fellow citizens against “interweaving our destiny with that of any part of Europe, [as this would] entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor or caprice[.]”<sup>397</sup> To some, Brexit may be seen as European “rivalship” and “caprice” *par excellence* and proof of the first President’s considerable prescience. Nonetheless, in view of the many hundreds of treaties that link the two sides of the Atlantic together, and in view of the immense trade flows, as well as enduring political and personal connections between them, entanglement is a reality in law and fact. Hence, for the sake of the future of the transatlantic relationship, now is not the time—to use Washington’s words once more—to show “infidelity to existing engagements” but to recall that “[h]armony, liberal intercourse with all nations, are recommended by policy, humanity, and interest.”<sup>398</sup>

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<sup>397</sup> WASHINGTON’S FAREWELL ADDRESS 1796, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) [<https://perma.cc/WP9H-WACC>] (last visited Jan. 28, 2018).

<sup>398</sup> *Id.*