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THE FUTURE OF THE UNITED KINGDOM IN EUROPE*

EXIT SCENARIOS AND THEIR IMPLICATIONS ON TRADE RELATIONS

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Submitted by
Katrin Fernekeß, Solveiga Palevičienė and Manu Thadikkaran

To : Marc Glendening
The People's Pledge
83 Victoria Street
London
SW1H OHW
United Kingdom

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LIST OF ABBREVIATIONS

CET	Common External Tariff
CJEU	Court of Justice of the European Union
CU	Customs Union
EC	European Community
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GPA	Agreement on Government Procurement
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

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EXECUTIVE SUMMARY

The present paper deals with the recent debates on the possibilities of the UK leaving the EU and its consequences. This paper is structured in four sections. The first section deals with a general introduction and overview on the various aspects of UK's withdrawal from the EU and its consequences.

The second section deals with general procedures of withdrawal from the EU under Article 50 of the Lisbon Treaty. It concludes that Article 50 of the Lisbon Treaty shall be interpreted as requiring both parties to negotiate in good faith as well as obliging the EU to conclude a withdrawal agreement. Under this provision, the EU would further be obliged to make serious good efforts to reach an agreement on future trade relations with the UK. Nevertheless, this may be contingent upon the UK submitting a proposal to this effect. Furthermore, Article 50(3) of the Lisbon Treaty provides for a two-year period to reach a withdrawal agreement. It enables either party to escape the conclusion of a withdrawal agreement if the other party considerably breaches its good faith obligation.

Thereinafter this section deals with the issue concerning the need to agree on the protection of acquired rights of/against UK individuals and entities as well as the survival of claims based on EU law after the UK's withdrawal from the EU. The general EU law requirements of legitimacy presuppose that upon withdrawal, the UK and the EU would be required, or at least recommended, to agree on the protection of acquired rights and legitimate expectations of/against individuals and entities of the UK. At the same time, the claims of/against UK individuals and entities would survive even in case the UK and the EU fail to conclude such agreement. In any pending case based on EU law before the CJEU or the domestic court of a Member State, the claimant may raise the principle of legal certainty and its different aspects, such as protection of legitimate expectations, non-retroactivity and acquired (vested) rights. The situation with UK courts will differ as they will not be obliged to apply the rules of EU law on legal certainty after the Lisbon Treaty is terminated. However, they would still be obliged to follow the minimum standards of protection of acquired rights.

This section also explores the options available to the UK for its continued trade relations with the EU after withdrawal. Upon withdrawal, the UK may opt for one of the five models discussed in this paper for its relations with the EU, namely, (1) EEA Model; (2) Swiss Model; (3) Customs Union Model; (4) FTA Model; and (5) Exit without any agreement.

The EEA Model grants the UK access to the EU single market with a lesser financial contribution and more control over its external commercial policies. The Swiss Model allows the UK and the EU to enter into bilateral agreements on particular areas only. This also provides most of the advantages of the EEA Model, while leaving the possibility that the UK may have more bargaining power with the EU than Switzerland under this model. The Customs Union Model allows the UK and the EU to eliminate the duties on certain negotiated goods. There will be a Common External Tariff (CET) and the negotiated goods from the UK will have access to the EU single market without any financial contribution. The FTA Model allows far lesser integration into the EU system, with the lack of any financial contribution or CET. The last model is the UK exiting without any trade-related agreement. Here, the UK's trade relations with the EU would be shaped solely by the WTO rules. This would grant complete autonomy to the UK in all sectors. While these models have certain benefits, each of them also poses various difficulties in terms of financial and political autonomy. Therefore, each of these models should be carefully weighed against the scheme of the current EU membership of the UK prior to any decision regarding withdrawal from the EU.

The third section focuses on the impact of the withdrawal on existing UK-EU relations as well as the possible relations of the UK with the rest of the world, especially with its accession to the WTO. As the UK is party to various agreements entered into by the EU, the status of the UK in these agreements after withdrawal is of utmost importance. As regards the EU's exclusive agreements, they cease to apply to the UK after withdrawal. As to the EU's mixed agreements, which bear the signature of the UK along with the EU, they may or may not continue depending on the level of negotiations between the UK and the EU during withdrawal. The most likely legal outcome of these mixed agreements is that the UK would be automatically disqualified from them for the reasons that the UK will no longer be a 'party' as defined in these agreements and

the territorial application of the agreements cannot be extended to a country outside the EU. Nevertheless, if the UK continues to be a party to these agreements, the third country with whom the agreement has been entered into can terminate it in relation to the UK, based on the termination clause in the treaty or under the rules of international law. Any questions that may arise in this regard can be settled mutually by the parties, or the International Court of Justice. However, for practical convenience, the third countries may agree with the EU and the UK for the continuation of these agreements in relation to the UK. In such situation, the parties merely have to modify and make amendments to the necessary extent to clarify the applicability of the agreements to the UK. Therefore, the fate of these mixed agreements would greatly depend on the level of negotiations between the UK, the EU and the third countries after withdrawal.

The third section further concludes that the UK's EU-exit would have major implications for its WTO membership. Upon its withdrawal from the EU, the UK's WTO membership will not automatically remain in place. In order to preserve its WTO membership, the UK will have to submit its individual schedules of commitments under several WTO agreements, unless it enters into a customs union with the EU. The approval of these schedules is subject to the consensus of all other WTO members, which underlies complex procedures and cannot be taken for granted since major difficulties may arise. The approval of the UK's new schedules may require extensive negotiations on their design and extent with a view to preserve the UK's WTO membership. Besides, the UK's membership to the Agreement on Government Procurement is dependent on the preservation of its WTO membership. It is therefore concluded that once the UK's WTO membership is approved, the UK would also have to preserve its membership to the Agreement on Government Procurement upon its EU-exit. This process, however, involves difficulties similar to the submission of schedules under the WTO Agreements indicated above.

Moreover, this section also concludes that once the UK's WTO membership is approved, its trade relations with non-EU parties to the WTO would continue to be governed by the very same WTO rules that currently govern this relationship. The tariffs applied by any WTO member would thus continue to be governed by the WTO's MFN principle, which guarantees non-discrimination among WTO members. As to non-tariff barriers, the trade relations between the UK and non-EU

members to the WTO would continue to be governed by the standard rules set out in the relevant WTO Agreements. Nevertheless, these trade relations are subject to any changes set out in the UK's new schedules and any continuing or new FTA relations between the UK and non-EU parties to the WTO.

Finally, this section concludes that the UK's EU-exit may generate both advantages and disadvantages for the UK's position vis-à-vis the world's regional trade networks. This problematic results from the fact that not only the UK but also all other non-EU parties to the WTO may deviate from the MFN treatment obligation under certain conditions. Consequently, the nature and extent of trade advantages granted to the UK will depend on negotiations, having major implications on the UK's key industry sectors and other stakeholders.

The final section of this paper provides a short assessment of the findings as to the UK's exit procedures from the EU and its possible consequences.

1. INTRODUCTION

The UK has been a member of the European Economic Community since 1973 and was one of the founding members of the EU in 1992. The EU membership of the UK is unique in some respects since the UK is not part of the Schengen area. Given the current debate on a potential future withdrawal of the UK from the EU, the procedure for such withdrawal and the implications thereof must be carefully examined. Recently, various general studies have been published on this topic.[1] In this paper, we attempt to analyse the hurdles that the UK may face when withdrawing from the EU as well as the scenarios that the UK may face in relation to the EU and the rest of the world after withdrawal, with a special focus on the UK's trade relations.

The second chapter of this paper will examine the procedures of withdrawal from the EU under Article 50 of the Lisbon Treaty. It will mainly focus on two issues: first, the possibility for the UK to negotiate an agreement on future trade relations with the EU and to agree on an alternative to the EU model; second, the possibility for the UK to withdraw from the EU without any agreement.

Thereafter, we will discuss the need to agree on the protection of acquired rights of/against UK individuals and entities as well as the survival of claims based on EU law. This part will also analyse whether any claims based on EU law or acquired rights of/against UK individuals and entities may survive under national, EU or international law, irrespective of a UK-EU agreement. It will further examine whether the UK and the EU may be required, or at least recommended, to agree on some extent of protection of acquired rights on the grounds of EU law, international customary law and/or national law.

After a discussion on the EU-exit procedures for the UK, we will turn our attention to the possible models that may be adopted by the UK within Europe. These include the EEA Model, the Swiss Model, the Customs Union Model, the FTA Model and an exit without any agreement.

[1] *Leaving the EU* (Research Paper 13/42, House of Commons Library, 01 July 2013), <http://www.parliament.uk/briefing-papers/RP13-42> accessed 27 November, 2013; Confederation of British Industry (CBI) Report, *Our Global Future. A Business Vision for a Reformed EU* [November 2013], <http://www.cbi.org.uk/media/2451423/our_global_future.pdf> accessed 14 November, 2013.

These models differ in their level of integration into the EU, in terms of adopting the internal and external EU policies and financial contribution to the EU. We will attempt to compare these models with their advantages and disadvantages for the UK with the EU membership.

In the third chapter of this paper, we will analyse the implications of UK's withdrawal on its relations with third countries. The EU has entered into various agreements with third countries for international cooperation. While some of these agreements have been solely entered into by the EU (exclusive agreements), there are other agreements where each Member State of the EU is a party along with the EU (mixed agreements). Upon withdrawal, the fate of these mixed agreements conferring rights and obligations on the UK, the EU and the third countries needs to be examined. The continued existence of these agreements in relation to the UK is of immense importance when the UK has to negotiate the exit terms with the EU. The parties to these agreements may either choose to continue the rights and obligations even after UK's withdrawal, which would necessitate appropriate amendments to the agreements. Alternatively, the possibility of the UK being automatically disqualified from these agreements also needs to be analysed in light of the provisions of these agreements. In any case, the UK will have to conduct detailed negotiations with the EU as well as various third countries in the event of its withdrawal from the EU.

Further, the UK's EU-exit would have major implications for its membership to the World Trade Organization (WTO) as the latter is conditioned upon the submission of new UK schedules of commitments under several WTO agreements, subject to approval by consensus of all other WTO members. We will examine the major difficulties that these procedures may involve by means of different scenarios. In addition, the UK's EU-exit has major implications on its membership to the Agreement on Government Procurement (GPA). Therefore, once the UK's WTO membership is approved, the UK would have to preserve its membership to the GPA, which might also involve difficulties that shall be discussed here. Moreover, we will explain that once the UK's WTO membership is approved, the UK's trade relations with non-EU parties to the WTO would continue to be governed by the same WTO rules that govern this relationship now, being subject to any changes set out in the UK's WTO schedules and any continuing or new

Free Trade Agreement (FTA) relations between the UK and non-EU parties to the WTO. Finally, we will demonstrate that the UK's EU-exit would generate both advantages and disadvantages for the UK's position vis-à-vis the world's regional trade networks. This stems from the fact that not only the UK but also all other non-EU parties to the WTO may deviate from the MFN treatment obligation under certain conditions. In this regard, it will also be shown that the UK's withdrawal from the EU may have major implications on the UK's key industry sectors and other stakeholders.

2. UK WITHDRAWAL AND ITS IMPACT ON UK-EU RELATIONS

2.1 EXPECTATIONS FOR THE UK FROM THE WITHDRAWAL PROCESS

2.1.1 Upon withdrawal, the UK will have the possibility to agree on future relations with the EU

The UK has the right to exit from the EU which, for the first time, was established under Article 50 of the Lisbon Treaty.[2] Prior to 2009, it was debatable whether or not and on what conditions a Member State was allowed to withdraw from the EU.[3]

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[2] Article 50 says: "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

See Consolidate Version of Lisbon Treaty <http://www.consilium.europa.eu/documents/treaty-of-lisbon?lang=en> accessed 23 October, 2013.

[3] Different opinions were mainly based on the idea whether EU law qualified as part of public international law or whether it should be determined as an autonomous legal order. The prevailing view was that the establishment of the EU was for an unlimited period and consequently, Member States could not withdraw. However, EU Member States insisted on the necessity to recognize an inherent right of withdrawal for any Member State. See for example: P. Athanassiou. *Withdrawal and expulsion from the EU and EMU: some reflections* (Legal working paper series, Legal Counsel, European Central Bank, December, 2009), 8-22 <https://www.ecb.europa.eu/pub/pdf/-scplps/ecblwp10.pdf> accessed 26 October, 2013.

In case the UK decides to withdraw from the EU, it may do so at any time by notifying the European Council about this intention. Article 50(2) of the Lisbon Treaty then obliges the Council to start negotiations and carry them out in accordance with the recommendations submitted by the Commission[4] as well as in light of the guidelines provided by the European Council.

Article 50(3) of the Lisbon Treaty establishes a two-year period for the parties to reach an agreement that would set out the arrangements for withdrawal, which may include provisions on future EU-UK relations.[5]

Two questions arise from the wording of Article 50 of the Lisbon Treaty:

1) Would the EU be obliged to negotiate with the UK on future trade relations and agree on an alternative to the EU model?
2) Does Article 50 of the Lisbon Treaty allow the UK or/and the EU to withdraw without any agreement?

[4] Art. 218(3) of the Lisbon Treaty provides as follows: "The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or head of the Union's negotiating team."

[5] This agreement shall be concluded by the Council, based on a qualified majority vote. In accordance with the Treaty, the new qualified majority corresponds to at least 55 per cent of the members of the Council, comprising at least 15 of them and representing at least 65 per cent of the European population. See for further information: <http://europa.eu/legislation_summaries/glossary/qualified_majority_en.htm/> accessed 26 October, 2013. In addition, the European Parliament would have to consent to the agreement, too. Under the consent procedure, the Parliament expresses its approval on a Council Draft Act by absolute majority vote, i.e. by a majority of all its members, regardless of whether or not all are present. See for more detailed information: <http:// europa.eu> accessed 26 October, 2013.

2.1.2 Withdrawal will necessitate the parties to negotiate in good faith and to make serious good efforts to reach an agreement on future trade relations

Article 50(2) of the Lisbon Treaty provides that "the Union shall negotiate and conclude an agreement with [the separating] State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union".

This means that the EU shall be obliged not only to *negotiate* but also to *conclude* an agreement with the UK. This agreement would cover arrangements concerning the past relationship between the EU and the UK. Also, it may go further and include an arrangement concerning their future relationship. However, this provision remains silent on the content of a possible future agreement and does not give any answer to the question as to whether the EU will be obliged to agree on any alternative trade relationship, e.g. an agreement such as those followed by Norway, Switzerland or Turkey. Besides, this provision obliges only the EU and remains silent on whether the UK itself will have any obligation to negotiate any arrangements concerning its withdrawal.

Similarly, other provisions of the Lisbon Treaty do not expressly provide further explanations on the extent of the obligations of the EU and the UK during the withdrawal process.[6] However, further clarification to Article 50 is provided in the relevant provisions of the Lisbon Treaty on foreign policy in trade relations, as well as the provisions on general standards that govern the

[6] The difficulties that may arise when interpreting the ambiguous clauses of Article 50 of the Lisbon Treaty have recently been discussed in a number of articles and surveys. In most of them it is argued that the full impact of a UK withdrawal is impossible to predict. Therefore, it is only possible to identify difficulties which may arise and to roughly estimate some of the impacts of withdrawal. See for example: A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, (European Law Review, Vol. 37, 2012), 523-540; J. Herbst, *Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?* (*German Law Journal* (6:2005), 1755 – 1760, <http://www.germanlawjournal.com/pdfs/Vol06No11/PDF_Vol_06_No_11_1755-1760_Special%20Issue_Herbst.pdf> accessed 27 November, 2013; *Leaving the EU* (Research Paper 13/42, House of Commons Library, 01 July 2013), 9-16, <http://www.parliament.uk/briefing-papers/RP13-42> accessed 27 November, 2013; P. Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 2013, 210-219, <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf> accessed 27 November, 2013; T. Oliver, *Europe without Britain: Assessing the Impact on the European Union of a British Withdrawal* (SWT research paper, German Institute for International and Security Affairs, 2013), <http://www.swp-berlin.org/fileadmin/-contents/products/research_papers/2013_RP07_olv.pdf> accessed 27 November, 2013, etc.

behaviour of parties negotiating international agreements, i.e. sincere cooperation and good faith, present in EU and international law.

The relations between the EU and the UK are governed by the principle of sincere cooperation, which is established in Article 4(3) of the Lisbon Treaty.[7] According to the principle of good faith, the Member States must take all appropriate measures to fulfil their obligations arising out of the Lisbon Treaty and may do nothing detrimental to the proper functioning of the EU.[8]

Generally, this principle contains both positive and negative obligations for the UK as a Member State, namely (i) the obligation to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Lisbon Treaty; (ii) the obligation to facilitate the achievements of the EU tasks; and (iii) the "obligation to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty".[9]

The Court of Justice of the European Union (CJEU) extended the duty of cooperation to *reciprocal duties* of cooperation between the EU and its Member States by its practice.[10] In the Lisbon Treaty, the mutual nature of this principle has been established explicitly under Article 4. Consequently, the principle of sincere cooperation governs the actions of the EU and the UK in all areas relating to the objectives of the Lisbon Treaty and "does not depend either on whether

[7] Lisbon Treaty (2009), Art. 4(3) states that "according to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives". The full text of the Lisbon Treaty is available at <http://www.consilium.europa.eu/-documents/treaty-of-lisbon?lang=en> accessed 26 October, 2013.

[8] H. Schermers, Denis F. Waelbroeck, *Judicial Protection in the European Union: Sixth Edition* (Kluwer Law International, 2001), 113.

[9] See Kapteyn and V. Themaat. *The Law of the European Union and the European Communities* (Publisher Alphen aan den Rijn : Kluwer Law International, 2008), 147 – 157.

[10] See, for example: Case C-230/81 *Luxembourg v European Parliament* [1983] ECR 255, para 37, Case C-65/93 *European Parliament v Council* [1995] ECR I-643, para. 23.

the EU competence concerned is exclusive or on any right of the UK to enter into obligations towards non-member countries".[11]

The practice of the CJEU extends the duty of sincere cooperation to all possible areas of the EU's relationship with its Member States. Therefore, at the stage of withdrawal, the UK and the EU will be bound by this duty necessitating the negotiations to fulfil the requirements of sincere co-operation and good faith. This conclusion finds further support in special provisions of the Lisbon Treaty, which governs the principles underlying the EU's foreign policy in Articles 3(5) and 8 of the Lisbon Treaty, as well as in relevant principles of international customary law.

Firstly, Article 3(5) of the Lisbon Treaty states that in its relations with third parties, the Union "*shall uphold and promote* its values and interests and contribute to the protection of its citizens. It shall contribute to […] the *sustainable development of* […] *free and fair trade* […], as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".[12] Besides, Article 8 of the Lisbon Treaty states that "the Union *shall develop* a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness founded on the values of the Union and characterized by close and peaceful relations based on co-operation. […] For the purposes of paragraph 1, *the Union may conclude specific agreements* with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly".[13]

[11] C. Hillon. *Mixity and coherence in EU external relations: the significance of the duty of cooperation*, <http://www.asser.nl/upload/documents/9212009_14629clee09-2full.pdf>,22 accessed 26 October, 2013; see also: Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para. 58; Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para. 64.

[12] Lisbon Treaty (2009), Art. 3(5), Emphasis added.

[13] Lisbon Treaty (2009), Art. 8, Emphasis added.

Secondly, good faith, as a customary international law principle, is established in Article 26 (as a guide for contractual behaviour)[14] as well as in Article 31 (as a guide for the interpretation of treaties)[15] of the Vienna Convention on the Law of Treaties between States (VCLT). It implies that good faith must be observed in performing obligations under agreements as well as in negotiating either at a pre-agreement stage or at withdrawal procedures.[16]

The practice of international tribunals recognises that negotiations in good faith include the following duties: (1) negotiations shall be meaningful; (2) meaningful negotiations cannot be conducted if "either party insists upon its own position without contemplating any modification of it"[17], meaning that the parties are obliged to take into consideration both their own interests and the interests of the other party; (3) the parties must not unjustifiably delay negotiations[18]; (4) the parties are under an obligation to act in such a way as "to achieve a satisfactory and equitable result".[19]

[14] Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 26 says that "treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*)".

[15] VCLT (n 12), Art. 31 indicates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[16] See for more information: A. D. Mitchell. *Good faith in WTO dispute settlement*, 345, <http://www.worldtrade-law.net/articles/mitchellgoodfaith.pdf> accessed 26 October, 2013.

[17] *North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, 46-47.

[18] *Case concerning the Government of the State of Kuwait/The American Independent Oil Company (AMINOIL)*, March 24, 1982, *International Legal Materials*, 1982, vol. 21, 1014.

[19] *North Sea Continental Shelf case* (n 17). In this case, the Court also stated that "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a forma1 process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it." See also: *Case concerning the Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Reports, 226, 244; See also: *Gabc˘íkovo-Nagymaros Project Case (Hungary v. Slovakia)*, [1997] ICJ Rep 7, 141; *Case concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep 14, 146.

In the context of the Lisbon Treaty, these standards of conduct imply that the UK and the EU will be obliged to consider the interests and reasonable expectations of each other in addition to their own interests during withdrawal negotiations. Besides, ensuring meaningful negotiations would require the EU and the UK to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage of the other party.

Further, as mentioned above, Article 50 of the Lisbon Treaty obliges the EU not only to *negotiate* but also to *conclude* an agreement with the UK. In this context, the good faith standard would require the EU not only to negotiate the withdrawal agreement in good faith but also to make serious efforts aiming at the conclusion of such an agreement. Consequently, if the UK provides a proposal on future UK-EU relations at the time of notifying the EU, the latter will be obliged to consider the UK's proposal seriously and in good faith.

In short, Article 50 of the Lisbon Treaty does not specify what kind of agreement the EU is obliged to reach with the UK. In case the UK provides a proposal on future trade relations upon its withdrawal, the EU would be obliged to take this proposal seriously and negotiate it with the UK.

2.1.3 Obligation of the EU to conclude a withdrawal agreement is not absolute in light of the two-year period under the Lisbon Treaty

Article 50(3) of the Lisbon Treaty provides that "the 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."[20]

At first glance, a literal analysis of this provision would suggest (i) that the UK and the EU would have to negotiate for a period of two years, after which the mutual obligations on good faith and

[20] Lisbon Treaty (2009), Art. 50(3). Emphasis added.

sincere cooperation will expire; and (ii) that if no agreement is reached after this period, the UK may withdraw without any agreement.

This reading, however, would undermine the obligation to conclude an agreement laid down in Article 50(2) of the Lisbon Treaty. This raises the issue of the meaning of Article 50(3) of the Lisbon Treaty and its impacts on the obligation of the EU to conclude a withdrawal agreement.

In contractual relations, whether international or not, the requirement of good faith at the negotiation stage is generally considered as an obligation of conduct, and not as one of result. Consequently, the parties may not be forced to reach a definite agreement during their negotiations. The only requirement with regards to the negotiation procedure is to make serious good efforts to reach an agreement.[21] For example, the CJEU's practice concerning mutual obligations in external contractual relations with third parties[22] shows that parties are in general only bound by the obligation "to use their best endeavours to reach a common position with the Community".[23] However, in certain circumstances, it is argued that the duty of cooperation may amount to an obligation of result.[24]

[21] *Case concerning the Railway traffic between Lithuania and Poland (Railway Sector Landwar*ów-Kaisiadorys), advisory opinion of 15 October 1931, *P.C.I.J. Series A./B.* no. 42, 116; *North Sea Continental Shelf* case (n 14), 48; See also: *Pulp Mills case* (n 16), 150; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 58, para. 158: "Clearly, evidence of such an attempt to negotiate – or of the conduct of negotiations – does not require the reaching of an actual agreement between the disputing parties."; as further examples, see also the following cases: *Government of the State of Kuwait/The American Independent Oil Company (AMINOIL)*, March 24, 1982, *International Legal Materials*, 1982, vol. 21, p. 1014 and the Appellate Body Report *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (22 October, 2001), where the WTO Appellate Body made statements on "on-going, serious good faith efforts" to reach a multilateral agreement on the protection of sea turtles in the Indian Ocean and the Southeast Asian region.

[22] See C. Hillon (n 11).

[23] Opinion of AG Tesauro in Case C-53/96 Hermès [1998] ECR I-3603, para 21.

[24] C. Hillon (n 11); see for example: joined Cases C-300/98 Christian Dior and C-392/98 Assco Gerüste [2000] ECR I-11307.

Accordingly, the requirement for the EU not only to negotiate but also to conclude a withdrawal agreement with the UK is not common. Nevertheless, this requirement seems to be established in the Article 50(2) of the Lisbon Treaty not accidentally. It becomes particularly clear when taking into account the EU goals of continuity and overall integration.

Therefore, the two-year negotiation period set out in the Lisbon Treaty in combination with the requirement to conclude a withdrawal agreement allows the following interpretation: the two-year period may be understood as an 'escape clause' for the parties if either party breaches good faith in terms of insufficient efforts in negotiations or unreasonable conditions for withdrawal. This means that nor the UK may be forced to stay within the EU at any price, nor may the EU obligation to conclude agreement be absolute.

2.2 CONSEQUENCES OF TERMINATION OF THE LISBON TREATY FOR CLAIMS OF/AGAINST INIDIVIDUALS AND LEGAL ENTITIES OF THE UK

2.2.1. After the termination of the Lisbon Treaty, the UK will no longer be bound by EU law

Article 50(3) of the Lisbon Treaty provides that "the 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."[25]

The Lisbon Treaty as a primary source of EU law has direct effect on the validity and applicability of EU law. Therefore, Article 50(3) of the Lisbon Treaty generally implies that the UK will no longer be bound by EU law after its termination of the Lisbon Treaty.

Consequently, EU law would no longer be applied to all future rights and obligations of UK individuals and entities after its termination. Thus, the termination of the Lisbon Treaty may directly impact the rights of individuals and entities for the future as well as indirectly impact the

[25] Lisbon Treaty (2009), Art. 50(3). Emphasis added.

rights and obligations that have already been acquired on the continuous EU claims before termination.

In this regard, two questions arise from the wording of Article 50 of the Lisbon Treaty:

1) Upon withdrawal, will the EU and the UK be bound to agree on the protection of acquired rights of/against UK individuals and entities as well as the survival of claims based on EU law?
2) Will any claims based on EU law or acquired rights of /against UK individuals and entities survive and be protected under national, EU or international law, even if the UK and the EU do not reach an agreement?

2.2.2 Upon withdrawal, the EU and the UK will be required to agree on the protection of acquired rights and the survival of claims of /against UK individuals and entities

As mentioned above, Article 50 of the Lisbon Treaty only states that EU Treaties cease to apply to the departing country when the exit agreement enters into force or, in case the agreement is not concluded, after two years from the date of notification of the intention to leave.[26] No provision of the Lisbon Treaty directly includes any rules on the possible protection of acquired rights of/against UK individuals and entities and the possible survival of claims based on EU law.

Many international treaties, such as the European Convention on Human Rights or the Energy Charter Treaty, usually provide for the protection of acquired rights of individuals before the termination of a treaty. These provisions establish the so-called 'survival clauses', i.e. specific provisions on the continuing applicability of some provisions of the treaty even after termination. For example, it is recognised that the extension of the continuing effect of investment treaties is established "to protect investors who have made investments in reliance on the expectations of treaty protection".[27] In order to adapt certain provisions to the reduced number of international

[26] Lisbon Treaty (n 2), Art. 50.

[27] Ibidem, 1200.

organisations, some treaties also provide for a certain time period after expiry during which termination shall take effect.[28]

The Lisbon Treaty does not include any such survival clause. It refers only to the possibility to agree on certain "arrangements for […] withdrawal, taking account of the framework for [the] future relationship with the Union".[29] There is no explicit provision with regards to the content of such an agreement. Thus, upon withdrawal, the UK and the EU are free to agree to some extent on the protection of rights and obligations, whether acquired or not. The UK and the EU may further agree on the survival of the claims based on the EU law.

This approach was applied when Greenland left the EU in 1985.[30] The European Commission opined upon Greenland's withdrawal that the rights acquired by Community nationals in Greenland and vice versa should be protected and that "new arrangements must contain a clause allowing the Council, on a proposal from the Commission, to adopt transitional measures as may be required".[31]

Article 50 of the Lisbon Treaty only provides the opportunity for the UK and the EU to agree on consequences of withdrawal to the rights and obligations of UK individuals and entities upon withdrawal. Therefore, it remains uncertain whether there would be an agreement between the UK and the EU on this issue.

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[28] Ibidem.

[29] Lisbon Treaty, Art. 50(2).

[30] Since the foundation of the EU, only a small number of former territories of EU members withdrew from the EU when they gained independency: Greenland, Algeria and Saint Barthélemy. Most of these territories were not considered parts of the EU, but were associated as overseas countries and territories. Generally, EC laws were not in force in these territories. Therefore, Greenland's case is for example no direct precedent because Greenland was an overseas territory of Denmark rather than a Member State and Greenland's withdrawal was further a *negotiated*, not a *unilateral* one.

[31] *Status of Greenland: Commission opinion*, COM (83) 66 final, 2 February 1983, 12. Also see: *Leaving the EU* (n 1), 14, 15.

Relevant EU law provisions on legitimacy and legal certainty support the position that upon withdrawal, the UK and the EU may be required, or at least recommended, to agree on the protection of acquired rights to some extent.

First, EU law is applicable not only to the mutual relationship between the EU and the UK. It further may have direct and/or indirect effect on the trade relations among individuals and companies of Member States.[32] Provisions of EU law that create individual rights may be invoked and directly enforced by individuals in national courts or the European courts (either horizontally between private individuals, or vertically by an individual against the UK, the EU and any other Member State).

Second, the Lisbon Treaty is a primary source of EU law. It provides requirements for the legitimacy of all other sources of EU law that may be invoked against any EU legal act "which is intended to produce legal effects vis-à-vis third parties"[33] brought for judicial review to the CJEU under Article 263 of the Lisbon Treaty. Therefore, the withdrawal agreement from the EU and the withdrawal agreement as such may have to comply with the Lisbon Treaty and the rules of legitimacy of EU legal acts. In the context of protection of the rights and obligations of

[32] Direct effect is a principle of EU law, which was first referred to by the CJEU in the case *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/52, 1963*). Accordingly, Treaty provisions and further pieces of EU law may be directly invoked by individuals and used to justify claims before domestic courts as well as to override domestic law. This principle only relates to certain European acts and ensures the application and effectiveness of European law. However, it is subject to several conditions. Its direct effect may relate to relations between an individual and a Member State (vertical effect) or be extended to relations between individuals (horizontal effect). The doctrine of indirect effect requires national courts - being organs of the Member State and thus required to fulfill EU obligations - to interpret domestic law consistently with EU directives.

[33] Lisbon Treaty (2009), Art. 263 "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of power."

individuals and entities, this implies that in case the UK and the EU do not agree on certain degree of protection of acquired rights of/against individuals of the UK, there may be the possibility to invoke this argument against the UK and the EU itself by contesting the legitimacy of the withdrawal agreement from the EU and the withdrawal agreement in the CJEU.[34]

Third, the possibility to argue in favour of the protection of acquired rights of individuals may be raised during the negotiation process of the withdrawal agreement. Under Article 50 of the Lisbon Treaty, the withdrawal agreement will be negotiated as an international agreement. Under Article 218(11) of the Lisbon Treaty, a Member State, the European Parliament, the Council or the Commission may request the opinion of the CJEU "as to whether an agreement envisaged is compatible with the Treaties". Upon withdrawal, there may hence be the possibility to verify in advance both the formal and the substantive validity. Further, Article 218(11) of the Lisbon Treaty also states that "the agreement envisaged may not enter into force unless it is amended or the Treaties are revised" in cases where the opinion of the Court is adverse. It means that in case the CJEU finds that it is necessary to include relevant provisions on protection of acquired rights, the withdrawal agreement would have to be amended accordingly and may not be concluded until then.

In conclusion, the general requirements of legitimacy of EU law presuppose that upon withdrawal the UK and the EU would be required or at least recommended to agree on general matters of the UK's EU-exit, as well as on the extent of the protection of acquired rights of individuals and entities.

[34] It should be noted that the extent to which the international agreements may be subject to CJEU review is debated. Besides, under Article 24(1) of the Lisbon Treaty (TEU) and Article 275 of Lisbon Treaty (TFEU), the powers of the CJEU are very limited in the area of foreign and security policy. See for example: P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 243-252; Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), 415 – 417.

2.2.3 In any case, minimum standards under Lisbon Treaty require the protection of vested (acquired) rights

Even if the UK and the EU do not agree on the protection of the rights of/against UK individuals and entities, the minimum standard of protection of acquired rights of individuals and entities should be respected on the grounds of EU law and international customary law. This conclusion may be supported by the following EU and international law provisions.

i) When taking their decisions, the EU courts and national courts of EU Member States would apply the EU rules of legal certainty and protect acquired rights and legitimate expectations of/against individuals and entities of the UK

The European courts (the European Court of Justice or the General Court) as well as national courts in dealing with the applicability of the EU law in these matters will further be bound to interpret and decide on the scope of the applicability of EU law in accordance with the requirements of EU primary law and its principle of legal certainty.[35] In the context of the protection of the rights and obligations of individuals and entities, the requirement of legal certainty may thus be one of the key principles under which individuals and entities may require further protection of their rights and interests under EU law, even after the UK has left the EU.

This principle is recognized as a general principle of EU law by the CJEU and is mostly applied when determining the validity of different kinds of national regulatory measures or EU law as

[35] The CJEU judges on different types of cases depending on the issue to which a dispute relates: actions against Member States for failure to apply the EU law, actions for annulment of certain EU rules, preliminary rulings for national courts on questions on the interpretation of EU law, actions for failure to make decisions required against the EU institutions, applications for compensation for damage caused by the EU institutions, or EU employees. The General Court has jurisdiction to judge on: direct actions brought by individuals or Member States against acts of the institutions of the European Union; actions seeking compensation for damage caused by the institutions of the EU or their staff; actions based on contracts made by the EU; actions relating to Community trademarks; appeals, limited to points of law, against the decisions of the EU Civil Service Tribunal; actions brought against decisions of the Community Plant Variety Office or of the European Chemicals. Its case law has mostly developed in the fields of intellectual property, competition and State aids.

such.[36] In this context, it may be useful to investigate as to what extent EU law may be applicable in the claims already brought by individuals or entities before the termination of the Lisbon Treaty.

Firstly, the CJEU generally recognizes the broad freedom of the legislator to modify the regulatory framework for the future, even if the new rules negatively affect existing relations.[37] Therefore, an individual usually cannot claim any rights in relation to the maintenance of an advantage obtained from the law and enjoined at a given time. Accordingly, it is recognised that any such decline in an advantage cannot be considered an infringement of a fundamental right.[38]

Secondly, the freedom of the legislator to modify the regulatory framework is not absolute and would be always governed by the principle of legal certainty which entails the following aspects: that the law should have no retroactive effects, acquired rights are protected and that legitimate expectations should be preserved.

Under EU law, we have to distinguish between situations when changes in a legal regime may have an impact on events that have already occurred (the so-called 'retroactive effect of law' or 'actual retroactivity of law') and when changes in a legal regime may have an impact on events that occurred in the past, but which are not yet definitively concluded (the so-called principle of **'**immediate application of law' or 'apparent retroactivity of law').

[36] The basic idea of legal certainty is that "rules imposing obligations on persons shall to be clear and precise so that they may know their rights and obligations, and so take steps accordingly".D. Edward, R. Lane. *Edward And Lane On European Union Law*, (Edward Elgar Pub, 2013), 397. It means that the principle of legal certainty aims at ensuring the respect of regulatory stability and predictability. Case C-143/93 *Gebroeders van Es Douane Agenten*, [1996], para. 29.

[37] See Case C-60/98 *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl*, [1999], ECR I-3939, paras. 24-25.

[38] For example, it is well established that "prudent economic traders can have no legitimate expectations that a legal situations, merely because it has existed for years, will never be changed. Traders are unable to invoke vested rights in order to maintain a certain benefit". Henry G. Schermers (n 8), 74; see also: Case 245/81 *Edeka v. Germany*, [1982], paras. 19-20.

As a matter of principle, legal rules are not retroactive. Accordingly, "a case shall be judged in the light of the law as it stood at the time it began and not as it may have been changed or developed subsequently".[39] Thus, acquired rights of individuals shall be protected and a new legal regime may be applied only for future but not past relations.

The principle of non-retroactivity is not absolute and does not preclude any changes in law. Instead, it requires that "the legislature takes into account the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules".[40] Therefore, under the practice of the CJEU, the retroactivity of law is possible but subject to strict limitations: any retroactive effect must be considered necessary to achieve the objectives of the measure, and the legitimate expectations of those affected must be respected.[41]

In case of apparent retroactivity of the law, it is recognized that immediate application of the law to future consequences of previous facts can only be accepted if "1) either if the purpose to be achieved demands so; 2) or where the legitimate expectations of those concerned are duly respected".[42] However, in the case of true retroactivity, these conditions are cumulative, whereas in case of immediate application of the law, they are alternative.[43]
Accordingly, when protecting rights of individuals, the CJEU takes into consideration not only the rights of individuals acquired and concluded in the past but also, to some extent, their legitimate expectations in cases of continuous relations that occurred in the past. Subsequently,

[39] E. Lane (n 36), 397.

[40] H. Schermers (n 8), 78.

[41] P. Craig, *EU Administrative Law, 2nd ed.* (Oxford University Press, 2006), 637.

[42] H. Schermers (n 8), 77. See, for example, *Represenative rate case (Germany v. Commission)*, Case 278/84 [1978], para. 36.

[43] P. Craig (n 41), 640.

"in some cases new acts may not enter into force immediately, as this would have an adverse effect on legitimate regard for legal certainty".[44]

Usually, it is very difficult to prove that legitimate expectations of individuals in continuous relations are worth to be protected. It is argued that in such situations, "the applicant must be able to point either to a bargain of some form between the individual and the authorities, or to a course of conduct or assurance on the part of the authorities which can be said to generate the legitimate expectations".[45]

For example, in the *CNTA* case,[46] where a taxpayer had planned his affairs on the basis of a policy of the EU Commission with regards to a partial exemption method, and where the policy or practice was altered, the CJEU stated that a tax payer could seek redress in certain circumstances, despite the fact that the alteration in policy or practice was prospective and not retrospective. Here, the case was related to the protection of the legitimate expectations of a trader concerning contracts that were already in the course of completion but not yet fully completed at the time of publication of certain legal act. CNTA obtained an export licence for a certain product, arranged export refunds to be fixed in advance and lodged the required deposit. Those refunds were revoked and the applicant brought an action for damages claiming that the withdrawal of compensatory amounts with immediate effect destroyed his legitimate expectations. It was recognized that if a taxpayer is able to prove its legitimate expectations, the court would decide the case and make a decision in balancing these expectations with the need of the relevant public body to change the law or its policy. The Community would be held liable in damages if the court finds the absence of an overriding public interest and that the refunds were revoked "without adopting transitional measures that would have enabled the traders either to

[44] H. Schermers (n 8), 78.

[45] P. Craig (n 41), 637.

[46] See *CNTA v. Commission*, Case 74/74 [1975], ECR 533.

have avoided the loss suffered in the performance of the export contracts or to be compensated for such loss".[47]

In considering the above, one can conclude that acquired rights and legitimate expectations of/against individuals and entities of the UK need to be protected. The main principle that may be invoked in claims brought before EU courts and national courts of EU Member States is the principle of legal certainty together with its different aspects, such as the protection of legitimate expectations, non-retroactivity and acquired (vested) rights. The particular effects of these principles would depend on individual circumstances and shall be solved on a case-by-case basis.

ii) UK courts deciding on cases brought by/against UK individuals and entities would apply the minimum standards of protection of acquired rights

UK courts will not be obliged to apply the rules of EU law on legal certainty after the Lisbon Treaty is terminated. However, they may still be obliged to apply the minimum standards of protection of acquired rights.

First, many provisions of EU law were implemented into the UK's national legal system during the past and thus became part of UK national law.[48] Therefore, national law that has already been implemented on the issue would survive and be applied.

Secondly, minimum standards of protection of acquired rights that should be followed by the states when changing international agreements may be found in Article 70 of the VCLT providing for the consequences of the withdrawal of an international treaty and international law rules. It states that "unless the Treaty provides otherwise or the parties agree otherwise, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the Treaty;

[47] P. Craig (n 41), 640.

[48] The domestic legislation that provides the mechanism for the implementation of EU law into British law is the European Communities Act 1972, which would be amended or repealed following Britain's withdrawal from the EU. See: *Leaving the EU* (n 1), 14.

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the Treaty prior to its termination".[49]

The main purpose of this provision is "to strike a balance between two conflicting provisions: total disappearance of the Treaty and its effects, and the continuance of the legal situation established in the course of the execution of the Treaty".[50]

This article contains several rules: first, it provides that parties have a right to agree otherwise; second, it provides, that termination releases the parties from any obligation further to perform a Treaty; third, termination does not affect any right, obligation or legal situation of the parties created through the execution of the Treaty prior to its termination. It further establishes the non-retroactive effect of termination and even goes further recognising that disputes concerning the application of the Treaty, which have already arisen under the Treaty, continue to exist even if the Treaty is terminated.[51]

The main issue with regards to the application of Article 70 of the VCLT on the rights and obligations for individuals and entities of states terminating international agreements is that this article does not directly address the rights of individuals. Despite this, the international tribunals recognise as a customary international law rule that a treaty obligation continues to exist and therefore protects the acquired rights of individuals and entities of the states notwithstanding the termination of such treaty.[52]

[49] VCLT (n 12), Art. 70.

[50] O. Dörr, and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: a Commentary*, (Heidelberg, Springer, 2012), 1195.

[51] O. Dörr (n 50), 1206. It is argued that claims acquire an existence independently of the Treaty, whose breach gave rise to them.

[52] M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Netherlands, Martinus Nijhoff Publishers, 2009), 873.

It should further be noted that the UK's law system is not monistic but dualistic. It means that UK courts would not apply international law directly in solving cases on the protection of acquired rights of/against the UK's individuals and entities. However, this does not preclude the obligation of the UK itself as any other state to follow minimum standards of protection established in international customary law. Therefore, either the UK court would be obliged to apply relevant national rules on the protection of acquired rights, or the UK would be required to adopt relevant national legislation rules on the issue.

2.3. EU-UK RELATIONS AFTER WITHDRAWAL

2.3.1 Upon withdrawal from the EU, the UK can opt for one of five "models" to cooperate with the EU economically

Upon its withdrawal from the EU, the UK would need to consider the alternatives available to it in order to ensure the continuance of smooth trading relations in Europe. It would be difficult for countries in Europe, within or outside the EU, to operate in isolation. Therefore, the UK may consider entering into an arrangement within Europe which is mutually beneficial. Towards this end, the UK can negotiate an arrangement with the EU at the time of withdrawal for preferential treatment or negotiate the accession to another trading bloc within Europe. The UK, in this regard, can mainly consider five models: (1) the EEA model; (2) the Swiss model; (3) the customs union model; (4). Free Trade Agreement (FTA) model; or (5) an exit without any agreement for future EU-UK trade relations. In this section, the models will be discussed in the order of their decreasing level of integration into the EU framework.

a) European Economic Area (EEA): The Norway Model

The EEA Agreement, between Norway, Iceland and Liechtenstein on the one hand and the EU on the other, allows the former access to the EU single market along with free movement of goods, services, people and capital and vice versa. The EEA Agreement requires its Member States to adopt the EU policies in the areas of social policy, consumer protection, environment, statistics and company law, all of which relate to the free movement of labour, goods, services and

capital.[53] It does not include the EU policies on Common Agricultural and Fisheries Policies, Customs Union, Common Trade Policy, Common Tax Policy, Common Foreign and Security Policy, Justice and Home affairs and Economic and Monetary Union.[54]

One of the benefits of joining the EEA is that it would allow the UK to have access to the EU single market with a far lower financial contribution to the EU than required under EU membership. Further, since the EEA is a free trade agreement, the UK would retain the power to conduct its external commercial policy independently and could thus enter into free trade agreements with non-EU nations on its own terms. As part of the EEA, the UK will not be bound by the common external tariff (CET) set by the EU for other countries, while having access to the EU single market.

However, there are three issues posing problems in the UK being part of the EEA. First, The EEA members have to be either members of the European Free Trade Association (EFTA) or the EU,[55] as the EEA was concluded to ensure market integration between EFTA and EU Members. The UK would have to be a member of the EFTA to gain access to the EEA after its EU-exit. The UK, therein, would also be party to all other EFTA Agreements. However, there lies the possibility that any of the current EFTA members may veto the entry of the UK into EFTA. Accession to the EFTA requires an approval from the EFTA Council,[56] which is represented by all Member States with one vote. This approval needs to be unanimous[57] and a negative vote by even one Member can result in the UK being denied accession to the EFTA. The EFTA, which

[53] Part V, Agreement on the European Economic Area, available at <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf> 10 October, 2013. (EEA Agreement). This provision lists the areas, the EU laws of which should be incorporated into the laws of the EEA Members under the Agreement.

[54] *European Economic Area (EEA) Factsheet* prepared by the EEA Coordination Unit of the Principality of Liechtenstein (July, 2013), < http://www.llv.li/pdf-llv-sewr-ewr-kurzinformation_englisch.pdf> 13 October, 2013.

[55] See Preamble to the EEA Agreement (n 53).

[56] Art. 41(1), Convention Establishing the European Free Trade Association (EFTA Stockholm Convention, 4 January, 1960).

[57] EFTA Agreement (n 56), Art. 32(5).

consists of Norway, Iceland, Lichtenstein and Switzerland, is an intergovernmental organization aimed at promoting free trade and economic integration to its Member States. It consists of a homogenous group of countries in terms of size and economic development.[58] The EFTA members might be apprehensive of the fact that the UK would assume a dominant position in the EFTA on account of its size as opposed to that of the other members. This leaves open the problem that the UK might not quite fit into to the EFTA, thereby being denied access to the EEA.

Second, the question as to what duty is to be levied on a good travelling from the UK to the EU, upon joining the EEA, would be based on the EU rules of origin. Rules of origin are specific provisions applied by a country to determine the origin of goods for a specific trade agreement.[59] These rules can be simple or complex depending on the agreement entered into by countries for this purpose. For trading between the EU, EEA countries, Switzerland and Turkey, the *Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin*[60] would be applicable. Within the EEA, the goods from the UK can travel freely upon the accession of the UK to the EEA. However, as the EEA members do not share a CET with the EU, only those goods which originate in the EEA zone would be allowed free access into the EU. If a product is entirely produced in the UK, it would be allowed free access into the EU.[61] However, if some of the components are produced in the UK and some other components are added from a third country, the rate of duty on such goods would depend on whether the products from third countries have been *sufficiently worked or processed* within the EEA zone.[62] At the same time, a product would

[58] *Leaving the EU* (n 1), 20.

[59]Definition given by the World Customs Organization, <http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin/specific-topics/general-topics/roo-agr-eur.aspx> accessed 10 November, 2013.

[60]Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin (February, 2013), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:054:0004:0158:EN:PDF> accessed 10 November, 2013.

[61] Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin (n 60), Art. 2(1)

[62] Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin (n 60), Art. 6. Annex II to this Agreement also contains the conditions which fulfils 'sufficient working and processing' on various goods.

be regarded as having UK origin if it comprises of components originating within the EU, the EEA, Switzerland or Turkey, provided they exceed the minimum requirement of *insufficient working or processing*.[63] For example, certain parts of a car may be imported to the UK from the US and assembled with certain other parts manufactured within the UK. The question of duty on this car while entering the EU market will then depend on whether adequate transformation has taken place on the US components in the UK within the meaning of *sufficient working or processing* under the Article 6 of the Rules of Origin. Nevertheless, if the UK manufactures the car with components from Turkey, the components from latter needs to be transformed only to the extent of crossing the minimal requirement of *insufficient working or* processing within the meaning of Article 7 of the Rules of Origin. This process of determining the origin of goods can prove to be costly, tedious and excessively bureaucratic in nature. In fact, a 1992 study on EC-EFTA relations reveals that border formalities regarding rules of origin to be applied on exports amount to around 3 per cent of the total value of the goods.[64] Another study in 2006 reveals that the trade-weighted average of compliance costs is 8 per cent for the EU Rules of Origin.[65] Moreover, a portion of this cost will fall on the exporter in the UK in the form of administrative and compliance costs.[66] It would, thus, increase the administrative cost of the authorities as well as result in wastage of time and expenses of the exporters,[67] acting as a disincentive to international trade.

[63] Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin (n 60), Art. 7. The provision contains a list of processes which acts as minimum requirement for the benchmark of 'Insufficient working or processing'.

[64] P. Waer, *European Community Rules of Origin*, in: E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade: A Comparative Study* (Ann Arbor: University of Michigan Press, 1992), 85-194.

[65] Cadot, Olivier, C. Carrère, J. Melo, and B. Tumurchudur, *Product-Specific Rules of Origin in EU and US Preferential Trading Arrangements: An Assessment* (World Trade Review 5(2), 2006), 199–224.

[66] G. Thompson and D. Harari, *The Economic Impact of EU Membership on the UK* (SN/EP/6730, House of Commons Library, 17 September, 2013), 11.

[67] R. Stewart-Brown and F. Bungay, *Rules of Origin in EU Free Trade Agreements* (Trade Policy Research Centre, February, 2012) <http://tprc.org.uk/pages/posts/rules-of-origin-in-free-trade-agreements-10.php> accessed 14 October, 2013.

Third, the UK may still have to make a substantial financial contribution to the EU as part of the EEA with a reduced role in decision making in the EU. The EEA countries have to adopt all the EU laws and policies relating to the specified areas.[68] As of 2012, a total of 6,816 EU legal acts were incorporated into the EEA Agreement.[69] All these laws will have to be adopted by the UK as an EEA member, with having only a right to be consulted on the formation of these laws.[70] This would be a disadvantage as the UK, currently being an EU Member State, has one of the highest shares of votes (29 votes) in the Council of the European Union.[71] Moreover, the refusal of an EEA Member to adopt an EU law could even lead to a partial suspension of the EEA Agreement in relation to that particular country.[72] At the same time, EEA members also have to make an annual financial contribution to the EU.[73] This contribution is made by the EEA countries towards the object of reducing economic and social disparities between the regions. Therefore, the amount to be contributed by each country would depend on the size of its economy and GDP.[74] In addition, the EEA states also have to pay an administrative cost annually to the EU.[75] For instance, as an EEA member, Norway makes a contribution of around 340 million Euros annually.[76] If the UK is to make financial contributions to the EU as part of the EEA, it

[68] EEA Agreement (n 53), Part V.

[69] EEA Factsheet (n 54).

[70]EEA Agreement (n 53), Art. 92(2).

[71] *Council of the European Union* in *How the EU works?* <http://europa.eu/about-eu/institutions-bodies/council-eu/> accessed 27 November, 2013.

[72]EEA Agreement (n 53), Art. 103(2).

[73] EEA Agreement (n 53), Art. 116.

[74] EEA Agreement (n 53), Art. 82(1)(a).

[75] See EEA EFTA Budget, available at < http://www.efta.int/eea/eu-programmes/application-finances/eea-efta-budget>, accessed 12 October, 2013.

[76]*Is Norway's EU example really an option for Britain* (The Telegraph, 08 July, 2012) <http://www.telegraph.co.uk/news/worldnews/europe/norway/9383678/Is-Norways-EU-example-really-an-option-for-Britain.html> accessed 12 October, 2013.

would have a reduction of only 17 per cent than what is being paid currently as an EU member.[77] Therefore, the EEA membership would extend the EU policies to the UK with minimal control over its formation, as well as attribute a financial contribution for the benefit of market access. However, this does not mean that the EU will have absolute authority to make arbitrary laws. In many cases, the EU does not have a choice but to adopt laws in consonance with global standards or United Nations Security Council Resolutions in order to maintain its role at the global level.[78] Therefore, the UK may have the possibility to exert some influence through these international organisations and standards to ensure that the EU laws affecting the UK are not arbitrary.

Consequently, there are various advantages and disadvantages to be weighed before the UK joining the EEA. These must be weighed thoroughly prior to making a decision after the UK withdrawal from the EU.

b) Series of Bilateral Agreements: The Swiss Model

Another option available to the UK upon withdrawal is to enter into a series of bilateral agreements with the EU. By not joining the EEA, Switzerland has followed this model.[79] This makes it possible for Switzerland, through negotiations with the EU, to access the single internal market of the EU without losing its autonomy in other external relations such as monetary, fiscal and trade spheres. The EEA model, in this regard, would require the EU laws on a wider set of areas specified in the Agreement to be adopted by the countries. However, the Swiss model provides opportunity for Switzerland to pick and choose the particular areas in which it wants to have bilateral relations with the EU. The financial contribution of Switzerland to the EU is also

[77] *Leaving the EU* (n 1), 22.

[78] R.A. Wessel and S. Blockmans, *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press/Springer, 2013), pp. 1-9.

[79] Areas include: Agriculture, Civil Aviation, Cooperation between Competition Authorities, Cooperation with EDA, Customs Facilitation and Security, Education, Vocational Training, Youth, Environment, Eurojust, Europol, Fight against Fraud, Free Movement of Persons, Free Trade, Insurance, Media, Overland Transport, Pensions, Processed Agricultural Products, Public Procurement Markets, Research, Schengen, Statistics, Taxation of Savings and Technical Barriers To Trade. A list of agreements is available at <http://www.europa.admin.ch/themen/-00500/index.html?lang=en> accessed 14 October, 2013.

considerably less as compared to the EEA membership. Nevertheless, the Swiss model does require a considerable degree of integration into the EU without membership.[80]

The applicability of the Swiss model to the UK would have to be tested against the differences between UK and Switzerland to understand its true implication. The terms of the bilateral agreements under this model would be greatly dependent on the bargaining strength of both the parties. Unlike Switzerland, the UK has a lesser level of dependence on the EU due to its size, economic position and location. For instance, the EU purchases almost 60 per cent of Swiss exports while it purchases only 48.6 per cent of the exports from the UK. Therefore, the UK could be at a stronger bargaining position than Switzerland when negotiating the bilateral agreements with the EU. In addition, following the negotiations with the EU, Switzerland had to make a financial contribution of only 550 million Swiss Francs per year during the period 2007-13 as opposed to 3.4 billion Swiss francs had Switzerland been a member of the EU.[81] So, the contribution that the UK will have to make to the EU would reduce by around 60 per cent of what is currently being paid if the UK follows the Swiss model.[82]

However, there are certain roadblocks for the UK to successfully implement the Swiss model. First, the accommodating attitude of the EU towards Switzerland is changing as the bilateral agreements were originally intended as a temporary feature.[83] In this backdrop, it cannot be certain that EU would have the same attitude as it had previously with Switzerland in negotiating a series of bilateral agreements with the UK.

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[80] C. Church, P. Dardanelli and S. Mueller, *The Future of the European Union: UK Government Policy* (Centre for Swiss Politics, University of Kent, May 2012) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cm-faff/writev/futunion/feu08.htm> accessed 16 October, 2013.

[81] *Let the UK take a Swiss role in the EU* (The Telegraph, 18 October, 2007) <http://www.telegraph.co.uk/comment/-3643414/Let-the-UK-take-a-Swiss-role-in-the-EU.html> accessed 14 October, 2013.

[82] *Leaving the EU* (n 1), 23.

[83] *Switzerland and the EU: The Prospects of Bilateralism*, (Centre for Security Studies, ETH Zurich, Vol. 3, No. 37, July 2008) < http://www.css.ethz.ch/publications/pdfs/CSS-Analyses-37.pdf> accessed 18 October, 2013.

Second, the products travelling from the UK to EU, under this model, would be subject to the *Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin*. Therefore, the complexities of rules of origin, as discussed in the Norway model (EEA), would be equally applicable under the Swiss model.

Third, EU law is an active system which is flexible and constantly evolving, while the Swiss model is more static in nature.[84] This would mean that new bilateral agreements as well as amendments to the existing agreements would be necessitated with every change in relevant EU laws to ensure conformity. This can prove to be a tedious arrangement. At the same time, there are no effective dispute resolution mechanisms under these bilateral agreements to specifically deal with breaches arising from these agreements.

Fourth, the UK would still be bound by EU laws on the negotiated areas, while not having a say in the formation of these laws. Like in the EEA, the UK will have to apply the relevant EU laws without having access to the formation of the same.[85] The Swiss model would provide with the UK only a right to be consulted in the formation of the EU laws that would have to be incorporated. This can prove to be a disadvantage in sectors like financial markets, which is of immense importance to the UK, if the UK has to comply with EU laws without having any scope to influence these laws. In addition, the UK will not be aware of the changes that may come within the EU regime and would need to often conduct bilateral talks to ensure the smooth functioning of the relations. This would prove to be an additional effort that would be required from the UK under this model.

Thus, the Swiss model allows the UK to have certain level of integration into the EU system, while retaining its own monetary policies and external autonomy. At the same time, it poses the

[84] D. Buchan, *Outsiders on the Inside: Swiss and Norwegian Lessons for the UK* (Centre for European Reform, September, 2012) <http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan_swiss_norway_11oct12-6427.pdf> accessed 18 October, 2013.

[85] See generally: Report prepared for the City of London Corporation, *Switzerland's Approach to EU Engagement: A Financial Services Perspective* (Centre for Swiss Politics, University of Kent, April 2013) <http://www.cityoflondon.gov.uk/business/economic-research-and-information/researchpublications/Documents/-research-2013/Switzerlands-approach-to-EU-engagement.pdf> accessed 19 October, 2013.

risk of limiting the independence of the UK in practice. In this light, the arguments in favour of and against the adoption of Swiss model by the UK need to be carefully weighed before adopting this model.

c) Customs Union (CU): The Turkish Model

The third option that the UK can explore is the Customs Union (CU) model followed by Turkey. Under this model, all customs duties, quantitative restrictions and other charges are eliminated between Turkey and the EU on the covered goods as specified in the Agreement. For these covered goods, there would be a CET against all third country imports.[86]

In the CU model, the parties have to decide four issues through negotiations: (1). Goods and services to be covered under the CU; (2). Determination of CET; (3). Collection of CET; and (4). Allocation of CET. In the case of the Turkey-EU CU, the parties agreed from the onset that the CU should be restricted to industrial goods, that Turkey should accept the external tariff of the EU, that the CET revenue would be collected by each party at the initial port of entry and that the CET revenue would accrue as income to the party collecting that revenue.[87] If the UK decides to adopt this model, these issues will need to be negotiated with the EU.

The adoption of this model by the UK poses three issues. First, it would require the UK to have a CET with the EU for goods from third countries covered under the CU. This CET may be fixed by EU when it concludes a free trade agreement with a third country. As in the case of Turkey, the UK will have to accept this CET fixed by the EU without having much influence over the same. For example, if the EU fixes a tariff of 10 per cent for goods covered under the CU for country A, the UK will also have to apply the same rate of duty irrespective of where the point of entry of the goods into the CU.

[86] S. Togan, *The EU-Turkey Customs Union: A Model for Future Euro-Med Integration* (MEDPRO Technical Report No. 9, March 2012).

[87] S. Togan (n 86).

Second, this model would require the UK to allow free access to goods from countries with which the EU has an FTA. These FTAs may contain a clause stating that the other country should enter into an FTA with the UK as well to ensure reciprocal benefits. In practice, however, the other country will not promptly conclude a free trade agreement with the UK. This can lead to a situation whereby the goods from the third country may enter the UK without paying any duty while the goods from the UK entering the other country will have to pay the duty. For instance, the free trade agreement between EU and Mexico may allow the goods to enter the EU, and thereby the UK, without payment of any duties. However, the goods from the UK entering Mexico will have to pay the duties until Mexico negotiates an FTA with the UK to this effect. This would lead to a situation of a one-sided benefit with the UK not having the advantages of EU's FTA with the other country. This has been a phenomenon in EU-Turkey relations. Evidence for the same can be found from the fact that in 2012, the value of imports into Turkey, which follows this model, from Mexico was around USD 867 million while the exports from Turkey to Mexico was only USD 206 million.[88] One of the main reasons for this overall import-export imbalance is the consequences of the EU-Turkey CU. This overall imbalance can lead to a deficit in the balance of payments and hamper the economic development of the UK, were it to adopt the Turkish model.

Third, the problems associated with the rules of origin, as discussed in the EEA Model, would also be applicable to this model.

Therefore, the CU model followed by Turkey may not be a favourable option for the UK. While it is true that this model has aided in the economic development of Turkey, it may not be more beneficial than the EU membership of the UK. In fact, Turkey had entered into the customs union with the EU with a view of attaining full EU membership.

[88] Statement by Turkey's Economy Minister, Zafer Çağlayan <http://www.hurriyetdailynews.com/revise-customs-union-or-cancel-it-totally--turkey-tells-eu.aspx?pageID=238&nid=43815> accessed 22 October, 2013.

d) Free Trade Agreement (FTA): The Korean Model

The fourth option available to the UK would be to sign an FTA with the EU on its withdrawal. An FTA would ensure that substantially all trade in goods and services, decided through negotiations, can freely travel between the UK and the EU without any tariff hindrances. This model would require lesser integration into the EU system by the UK, as compare to the previous models. Unlike the EEA and Swiss models, the Korean model would not require the implementation of EU laws or directives. Further, it would not be required to adopt a CET with the EU, as in the Turkish model. Moreover, the UK can negotiate for a strong dispute settlement mechanism under the FTA to resolve disputes in a fast and efficient manner.

However, there are certain disadvantages for this model. First, an FTA with the EU, in the usual sense, would include free movement of goods and services between the EU and the UK. The free movement of capital and labour will not be guaranteed by the FTA. Though the UK may negotiate for the free capital and labour movement, the EU might refuse the same and it would change the nature of the FTA.

Second, the UK will need to negotiate with the EU about the goods and services to be included in the FTA and the tariff levels. This may be modelled under the current UK-EU trade relations or a new set of tariffs may be drawn up through negotiations. In the latter case, the negotiations may take a longer time period for the FTA to be concluded through negotiations. In doing so, the EU as a bloc may have a relatively higher bargaining power. At the same time, the UK is an important import destination for the EU countries. In September, 2013, the EU imports into the UK were £19.2 billion. This depicts an increase of £2.8 billion (16.9 per cent) compared to August 2013 and an increase of £2.3 billion (13.5 per cent) compared to September 2012. Therefore, the negotiations in this regard will not necessarily be giving any undue advantage to the EU over the UK.[89]

[89] *Overseas Trade Satistics – EU Latest Release* (12 November, 2013), <https://www.uktradeinfo.com/statistics/-euoverseastrade/Pages/EuOTS.aspx>, accessed 27 November, 2013.

Third, the entry of UK goods into the EU under an FTA would have to be determined according to the Rules of Origin. This would also have to be negotiated by the UK with the EU while concluding the FTA. The UK and the EU may agree for the rules of origin as applicable to the EEA countries, Switzerland and Turkey. Otherwise, a new set of rules of origin, as in the case of EU and Korea[90], will have to be negotiated and drafted between the UK and the EU. The terms of these rules would purely be based on the status of negotiations between the UK and the EU.

Therefore, there are various considerations for the UK to be taken into account prior to concluding an FTA relationship with the EU.

e) Exit without any agreement: The US Model

Upon its withdrawal, the UK could conclude an exit agreement with the EU, which does not provide for any further formal relationship with the EU. In this scenario, the UK's external trade relations are fully shaped by the multilateral trading system through WTO membership.[91] The UK would share the very same rights and obligations under WTO law as any other WTO Member, e.g. the US. Likewise, the trade relations between the EU and the UK will be covered merely by WTO rules as they apply between all other WTO Members, e.g. the EU and the US. In the following, this scenario will thus be referred to as the 'US model'.

This model would ensure complete autonomy for the UK. The UK would not have to give any special consideration to any EU aspect while entering into agreements with other countries. However, this would also mean that the UK will no longer be part of the European trading bloc. The UK exporters would be faced with higher tariffs from the EU, as compared to other European countries and vice versa. This would ultimately lead to reduced trade for the UK within Europe. The intertwined nature of trade in Europe, therefore, can severely affect UK's trading

[90] *Protocol concerning the definition of 'originating products' and methods of administrative cooperation* (May, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:1344:1414:EN:PDF> accessed 12 November, 2013.

[91] *Our Global Future. A Business vision for a Reformed EU* (n 1), 134.

relations within Europe under this model. The implications of this model would be further discussed in the next chapter.

Therefore, the alternate models available to the UK upon its withdrawal from the EU have various advantages and disadvantages. A careful analysis of these features of each is necessary prior to entering into negotiations with the EU for an exit arrangement. The following table illustrates the main advantages and disadvantages of the different models in comparison with EU membership:

Model	Advantages	Disadvantages
EU Membership	1. Access to the EU Single market 2. One of the highest share in voting over the formation of EU laws (29 votes) 3. Bargaining power of the EU as a bloc in negotiating agreements 4. UK has a strong voice to influence EU relations with rest of the world	1. Reduced flexibility for internal laws to ensure conformity with EU laws 2. Reduced flexibility in external policies 3. High budget contribution to the EU 4. Regulatory costs imposed by EU
Norway Model (EEA)	1. Access to the EU single market without adopting the wider EU regional policies 2. Freedom to determine its own external policies 3. No common external tariff set by the EU 4. Lower financial contribution to the EU	1. EFTA members may veto the entry of the UK into EFTA, and thereby the EEA 2. EEA Members have to adopt certain EU laws on single market 3. Financial contribution to the EU without any formal influence on the formation of EU laws 4. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations) 5. Lack of bargaining power with third

		countries which EU would have as a bloc
Swiss Model (bilateral agreements)	1. Access to the EU single market without adopting the wider EU regional policies 2. Freedom to determine its own external policies 3. No common external tariff set by the EU 4. Lower financial contribution to the EU 5. UK may have a higher bargaining power in concluding bilateral agreements with the EU	1. EU might not have the same attitude to the UK as it had to Switzerland for adopting this model 2. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations) 3. Static nature of this model, as opposed to evolving EU laws may become tedious 4. No effective dispute settlement mechanism under this model (unless specifically negotiated) 5. Conformity with EU laws to be ensured in areas covered by bilateral agreements, while having no formal influence on the formation of these laws 6. Indirect financial contribution to EU policies and European infrastructure 7. Lack of bargaining power with third countries which EU would have as a bloc
Turkish Model (CU)	1. Access to the EU single market on negotiated goods 2. Freedom to determine its own internal laws 3. No requirement to ensure conformity with EU laws 4. No financial contribution to the EU	1. Application of common external tariff and product regulations decided by the EU 2. Lesser flexibility in determining external trade policy 3. FTAs concluded by the EU would lead to goods from those third countries entering the UK freely while this benefit will not be granted to the UK goods unless UK separately concludes an FTA with other countries

		4. Lack of bargaining power with third countries which EU would have as a bloc 5. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations)
Korean Model (FTA)	1. Access to EU single market on negotiated goods 2. Freedom to determine its own internal and external policies 3. No financial contribution to the EU 4. Possibility to negotiate an effective dispute settlement system	1. FTA may not guarantee free movement of capital and labour to the EU 2. Negotiations to conclude the agreement may consume a longer time period 3. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations) 4. Lack of bargaining power with third countries which EU would have as a bloc
US Model (no agreement)	1. Complete freedom over internal and external policies 2. No financial contribution to the EU 3. Protection under the WTO regime	1. UK would be faced with new tariffs 2. UK will have to negotiate the terms of its accession to WTO with all other WTO members 3. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations) 4. Lack of bargaining power with third countries which EU would have as a bloc

3. IMPACT OF WITHDRAWAL ON UK RELATIONS WITH EU AND NON-EU COUNTRIES.

3.1 FATE OF EXISTING FTAS.

After withdrawing from the EU, the question remains as to the status of the existing FTAs concluded by the EU with other countries. The provisions of these agreements indicate that they would be automatically terminated for the UK upon its withdrawal from the EU. In any case, the third countries with whom the agreements are concluded have the right to terminate the agreement with the UK.

Under the scheme of the EU, certain areas such as customs union, common commercial policy, competition rules, etc. fall within the exclusive competence of the Union.[92] In these areas, the Union is allowed to enter into agreements on its own and they would be binding on all Member States, which would not have to specifically ratify them. Certain other areas such as internal market, social policy, environment, transport, energy, etc. fall within the shared competence of the Union and its Member States.[93] When entering into agreements covering these areas, the Member States are a party along with the EU in relation to the third country. These agreements, commonly known as mixed agreements, relate to the areas under the EU law over which the Member States also have the competence to legislate.[94] Mixed agreements include bilateral agreements between various third countries as well as multilateral conventions on various matters of international importance.[95] All the FTAs entered into by the EU are mixed agreements. As the UK has entered into these mixed agreements in its own capacity along with the EU, the effect of the withdrawal of the UK on these agreements need to be examined.

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[92] Art. 3, Treaty of the Functioning of the European Union (TFEU), <http://eur-lex.europa.eu/-LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> accessed 20 October, 2013.

[93] TFEU (n 92), Art. 4.

[94] See Annexure A containing a list of all the mixed agreements entered into by the EU.

[95] J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International, 2001).

3.1.1 Automatic termination of exclusive and mixed agreements

Upon withdrawal from the EU, the UK would no longer have any rights or obligations under the agreements entered into by the EU under its exclusive competence. The UK is bound by these agreements only by virtue of its membership in the EU. These agreements are solely entered into by the EU with the third country. The rights and obligations therein on the UK arise only due to its EU membership. Once the UK withdraws from the EU, these rights and obligations cease to exist on the UK, as the termination of EU membership terminates the requirement to take up any further action under these agreements entered into by the EU.[96] To further support this point, Article 216(2) of the Treaty of the Functioning of the European Union states that *agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*. Consequently, if the UK ceases to be a *Member State* of the EU, these agreements would no longer be applicable to the UK. For example, the Air Services Agreement between EU and Sri Lanka is an exclusive agreement entered into by EU on the one hand and Sri Lanka on the other hand.[97] The UK has not specifically been named as a party to this Agreement. Therefore, it would automatically cease to exist in relation to the UK upon its withdrawal from the EU.

As regards the mixed agreements, the question arises whether the UK would still be a party to these agreements as they were entered into by the UK, along with the EU. An examination of the provisions and intent of these agreements indicates that these agreements would be automatically terminated with regards to the UK upon its withdrawal from the EU.

Every mixed agreement defines the term 'parties' of the agreement. To quote an example, the EU has concluded a free trade agreement with Korea in 2010.[98] Article 1.2 of this agreement defines

[96] VCLT (n 12), Art. 70.

[97] Agreement between the European Union and the Government of the Democratic Socialist Republic of Sri Lanka on certain aspects of air services (February, 2013), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?-uri=OJ:L:2013:049:0002:0009:EN:PDF>, accessed 13 November, 2013.

[98] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (September, 2010) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:20-11:127:0006:1343:EN:PDF> accessed 23 October, 2013.

'parties' as *the European Union or the Member States or the European Union and the Member States on the one hand and Korea on the other*. While this does attribute rights as well as individual responsibility to each Member State to perform the obligations under the agreement, it cannot be extended to apply to the UK once it terminates its status as a 'Member State' of the EU. To clarify this point, the preamble to the Agreement recognizes the UK as the Contracting Parties to the Treaty on European Union and the Treaty on the Functioning of the European Union. The parties of this agreement are these 'Member States' of the European Union. On withdrawal from the EU, the UK would cease to be a party to the Treaty on European Union and the Treaty on the Functioning of the European Union, which automatically disqualifies it from being a 'party' to the free trade agreement with Korea.

To take another example, Article 352 of the EU Association Agreement with Central American States[99] defines parties as *the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, referred to as the "Republics of the CA Party" on the one hand, and the European Union or its Member States or the European Union and its Member States, within their respective areas of competence, referred to as the "EU Party" on the other*. While the Central American States are named separately, such separate identity of the EU Member States is not recognised. This indicates the intention of the parties to grant the benefits to EU as a whole. The only rationale for the UK to have signed the agreement separately is due to the division of competences within the EU system, whereby the sovereignty of the individual Member States require them to give specific consent to the Agreements. However, this consent is not an indication that the EU Member State individually entered into an agreement with the third country. As regards the third country party, it is entering into an agreement with only the EU Member States. The status of an EU Member State, therefore, is essential for the UK to continue

[99] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (December, 2012), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?-uri=OJ:L:2012:346:0003:2621:EN:PDF>, accessed 15 November, 2013.

with these agreements. Similar definition of parties can also be seen in the EU agreement with the CARIFORUM States.[100]

(Refer to Annexure A for the relevant provisions on termination and definition of parties in some of the mixed agreements).

Moreover, every mixed agreement has a clause on territorial application. In the case of the EU-Korea FTA, Article 15.15 states that *this Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the territory of Korea. References to 'territory' in this Agreement shall be understood in this sense, unless explicitly stated otherwise*. Similarly, Article 360 of the Association Agreement between EU and Central American States reads as *for the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties*. These provisions clarify the intent of the parties to only apply these agreements to those countries which are governed by the EU Treaties. If the UK ceases to be an EU Member, these treaties will no longer be applicable to the territory of the UK. This would again lead to an automatic termination of the mixed agreements in relation to the UK after its withdrawal.

While signing and ratifying these mixed agreements, the UK had agreed to these provisions of the definition of parties and territorial application. The UK is, thus, bound by these terms as per Articles 11–13 of the VCLT. Therefore, these principles of treaty interpretation under international law would also indicate that the UK would be automatically disqualified from the mixed agreements upon its withdrawal from the EU.

[100] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (October, 2008), <http://eur-lex.europa.eu/-LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF> accessed 15 November, 2013.

3.1.2 Termination of the Agreement by the non-EU country

In an alternate scenario, let us assume that the UK manages to establish the continuance of these mixed agreements since they were entered into by the UK in its individual capacity as well. This still poses the need for fresh negotiations as the third country may decide to terminate the agreement with the UK, while retaining it with the EU. Most of the mixed agreements entered into by the EU and its Member States with third countries have a termination clause. To quote the same example of the EU-Korea FTA[101], Article 15.11 of this Agreement gives Korea the right to terminate the agreement with the other party at any time with a notice of six months. As the UK falls within the definition of a 'party' under this alternative scenario, even in its individual capacity,[102] Korea can notify its intention to terminate the agreement in relation to the UK. This would leave the UK with having to negotiate a fresh agreement with Korea on its trade relations without the bargaining position of EU as a bloc.

Another alternative situation, which is rather unlikely, would be when there is no termination clause in a mixed agreement. The possibility of termination of the agreements subsists even in this situation. Under international law, a party is allowed to terminate an agreement if there has been a fundamental change in circumstances which did not exist at the time the agreement was concluded.[103] If a situation of fundamental change in circumstances has radically transformed the extent of obligations imposed by an agreement, the parties may terminate the treaty.[104] Assuming the UK withdraws from the EU, a third country may invoke this principle to terminate the mixed agreement in relation to the UK. It can be argued that the FTA was entered into by the third

[101] EU-Korea FTA (n 98).

[102]EU-Korea FTA (n 98), Art. 1.2.

[103] VCLT (n 12), Art. 62. However, for any interpretation of treaty relations with the EU, UK and a third country, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 would apply. This treaty is not yet in force as the required number of States has not ratified it. In any case, fundamental change in circumstances is an accepted ground for terminating a treaty under international law (See *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* (Jurisdiction), [1974] ICJ Rep 3).

[104] *Fisheries jurisdiction case* (n 104), 19-20.

country at a time when the UK was part of the EU bloc. The fact that the UK is no longer governed by the EU laws or policies can be interpreted as a 'fundamental change in circumstance' under international law. However, the situation of fundamental change in circumstance would arise depending on the UK-EU relation upon withdrawal. If the UK negotiates for an arrangement with the EU to retain the EU laws or allowing the tariff under the various FTAs, there would not be any ground for termination of the agreement in relation to the UK. At the same time, any dispute in relation to the existence of any of these scenarios or the scope of 'fundamental change in circumstances' can be submitted to the International Court of Justice by the UK, the EU or the third country.

In a practical sense, however, there would not be any strong reason for a third country to terminate the agreements in relation to the UK, if the level of tariffs and other benefits in the agreement remains unchanged. In such situations, the third country and the EU can amend the agreements without much difficulty to include the UK as a separate party to the agreement. All the mixed agreements provides for the scope of amending the agreement between the parties. Article 15.5 of the EU-Korea FTA states that *the Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures, on such date as the Parties may agree.* Under the Vienna Convention of the Law of Treaties, the parties to a treaty can modify it amongst themselves if the treaty provides for the same.[105] This would be a mere technical task and the same can be done through a relatively quick process, provided the EU and the third country agree for such amendments.

If the mixed agreements with third countries continue to exist after withdrawal (*status quo*), there would be reduced flexibility for the UK in determining its own external trade policies despite the benefits to the UK under these agreements. The continuance of the obligations under these Agreements would mean that the UK will have to follow the policies and duties negotiated and

[105] VCLT (n 12), Art. 41.

fixed by the EU with the third countries. This would go against one of the rationales for withdrawal, whereby the UK can negotiate Agreements with third countries on its own terms.

For instance, if the EU FTA allows access of certain goods from Korea without payment of duties to the EU, the same access will have to be accorded by the UK as well even after its withdrawal from the EU. This might be an advantage for the UK only in those situations where it is not able to negotiate better terms with a third country individually. In such cases, it would be better for the UK to apply the terms negotiated by the EU as a bloc. Moreover, the UK would not be part of the future FTAs to be concluded by the EU, such as the EU-US FTA. The UK, in these situations, will have to separately conclude an FTA with the third country with a lesser bargaining power as opposed to the bargaining power of EU as a bloc. But, in other cases where the UK would want to negotiate its own terms, the *status quo* situation would preclude fresh negotiations. Therefore, withdrawal from the EU would create difficulties for the UK in maintaining its relations with various non-EU countries, unless the UK negotiates a beneficial arrangement with the EU.

3.2. TRADE RELATIONS UNDER THE WTO REGIME

3.2.1 The UK's EU-exit would have major implications for its WTO membership

Upon its withdrawal from the EU, the UK would not automatically remain an independent WTO member in its own rights. Instead, certain preconditions for continued WTO membership would apply to the UK.

Currently, both the EU and its Member States are adherents to the WTO under joint membership.[106] Upon its EU-exit, the UK would not become an independent WTO Member without any transition as certain pre-requirements apply to WTO membership.

The accession procedure as laid down in Article XII of the WTO Agreement[107] is supplemented by preconditions to WTO membership. According to Article XI of the Agreement Establishing

[106] See for further information: E. Steinberger, "The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO" [2006] 17 (4) EIJL 837.

the WTO, "[t]he contracting parties to GATT 1947 as of the date of entry into force of this Agreement […], which accept this Agreement and the Multilateral Trade Agreements and *for which Schedules of Concessions and Commitments are annexed to GATT 1994* and *for which Schedules of Specific Commitments are annexed to GATS* shall become original Members of the WTO."[108]

Hence, WTO membership is dependent on the submission of schedules of concessions and commitments.

Assuming the UK does not enter into a CU with the EU after its withdrawal, it would no longer be part of the common schedules. In this scenario, the UK must submit its own new schedules after the conclusion of an exit agreement with the EU if it is to remain a WTO member. These schedules need to be accepted by all other WTO members in consensus[109] and certified following certain procedures[110], which might create difficulties.

a) The UK will have to design its own schedules of concessions and commitments

As Article XI of the Agreement Establishing the WTO conditions WTO membership to the submission of new schedules of concessions and commitments under the GATT and the GATS,[111] the following section will shed light on the design of the UK's new schedules. In this context, it will further elaborate on potential difficulties this process may involve.

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[107] "Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to [the WTO] […]" (Article XII: 1of the Agreement establishing the World Trade Organization 1995 [*WTO Agreement*]).

[108] WTO Agreement (n 107), Art. XI:1.

[109] WTO Agreement (n 107), Art. IX:1.

[110] Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980, L/4962, BISD 27S/25; See also: Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, adopted by the Council for Trade in Services on 14 April 2000, S/L/84.

[111] WTO Agreement (n 107), Art. IX:1.

Upon its withdrawal from the EU, the UK would have to submit new schedules in order to preserve its membership and remain within the WTO. Assuming the UK does not enter into a CU with the EU after its withdrawal, the common schedules that the UK currently shares with all EU members[112] will automatically cease to apply to the UK.

In its schedules of concessions under the GATT, the UK is obliged to list concessions on tariff cuttings and bound customs duty rates with regards to goods in general.[113] As to agricultural goods, however, the UK must submit separate schedules of concessions that relate not only to tariff quotas but also include limits on export subsidies and certain forms of domestic support.[114] With regards to the UK's schedules of commitments under the GATS, the UK is obliged to submit a list containing individual commitments on market access.[115] Within the framework of these schedules, the EU has for example fixed a tariff of 7.5 per cent to be applied to frozen haddock.[116]

Similarly, the UK must schedule its own list of exemptions from the MFN treatment obligation of Article II:1 of the GATS,[117] which will be further explained in the following section. In case the UK does not enter into a CU with the EU after its withdrawal, the currently applied common list

[112] The currently applied common schedules of concessions under the GATT can be found at: World Trade Organization, 'Goods Schedules' (*Current Situation of Schedules of WTO Members*) <http://www.wto.org/english/-tratop_e/schedules_e/goods_-schedules_table_e.htm> accessed 16 October, 2013. The currently applied common schedules of commitments under the GATS are available at: World Trade Organization, 'Services: Commitments' (*Schedules of commitments and lists of Article II exemptions*) <http://www.wto.org/english/tratop_e/serv_e/-serv_commitments_e.htm> accessed 16 October, 2013.

[113] Art. II of the General Agreement on Tariffs and Trade, 1994 [*GATT 1994*].

[114] Art. III of the Agreement on Agriculture, 1995.

[115] Art. XX of the General Agreement on Trade in Services, 1995 [*GATS*].

[116] World Trade Organization, 'Consolidated Tariff Schedules database' (*European Union, Bound Concessions at the HS 6-digit subheading level*) < http://tariffdata.wto.org/> accessed 29 November, 2013.

[117] GATS (n 115), Art. II:1.

of Article II exemptions for all EU Members[118] will cease to apply. Most exemptions from the MFN principle of non-discrimination that is currently applied by WTO members concern the access to communication and transport services. Under its list of Article II exemptions, the EU for example currently grants more favourable treatment to certain audio-visual services from Finland, Norway, Sweden and Iceland.[119]

b) The certification of the UK's new schedules cannot be taken for granted

Assuming the UK and the EU do not enter into a CU, the UK will remain a WTO member only upon the certification of its new schedules. In the following, it will be argued that the certification procedure for the UK's new schedules is no straightforward process that cannot be taken for granted.

First, the UK's new schedules of concessions and commitments under GATT and GATS need to be accepted by all other WTO members[120] and certified[121] in order to enter into force. According to Article IX:1 of the WTO Agreement, [122] the UK's new schedules will have to be accepted by consensus. Only upon certification, the schedules will become legally binding, being annexed to the GATT 1994[123] and the GATS.[124] Cross-reference to the schedules for agricultural goods is

[118] The currently applied common List of Article II Exemptions is available at: World Trade Organization, 'Services: Commitments' (*Schedules of commitments and lists of Article II exemptions*) <http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm> accessed 16 October, 2013.

[119] European Communities and their Member States. Final List of Article II (MFN) Exemptions, GATS/EL31, issued on 15 April 1994.

[120] WTO Agreement (n 107), Art. IX:1.

[121] Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980, L/4962, BISD 27S/25; see also: Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, adopted by the Council for Trade in Services on 14 April 2000, S/L/84.

[122] "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947." (WTO Agreement (n 107), Art. IX:1). With regards to the required submission of schedules under the GATT and the GATS, Article XI:1 of the WTO Agreement does not provide for a special decision-making procedure (cf. WTO Agreement (n 107), Art XI:1).

[123] GATT 1994 (n 113), Art. II:1.

[124] GATS (n 115), Art. IV:1.

further made in the Agreement on Agriculture.[125] With regards to any "formal"[126] changes that are of a "purely technical nature"[127], the schedules normally need to be certified following the procedures set out in the respective Council Decisions[128], which is only effective if no WTO member has raised objection within a certain time frame.[129] However, these Council Decisions may not strictly apply in case of the UK's EU-exit, e.g. if the UK's withdrawal from the EU and the necessary rectifications resulting therefrom are not considered merely formal"[130] changes of "purely technical nature"[131]. It thus cannot be taken for granted that the procedures set out in the respective Council Decisions[132] will be followed without deviations.

Second, the UK must schedule its own list of exemptions from the MFN treatment obligation of Article II:1 of the GATS. The procedure for the approval of the UK's list of Article II exemptions is not straightforward either. The submission of exemptions is normally only possible upon accession and it is therefore uncertain which approach will be taken to approve a new UK list of Article II exemptions.[133] Members could publish their exemptions in the GATS *Annex on Article II Exemptions* only until the WTO Agreement entered into force on 1 January 1995.[134] Paragraph

[125] Agreement on Agriculture (n 114), Art. IV:1.

[126] Procedures for Modification and Rectification of Schedules of Tariff Concessions (n 121), para. 2.

[127] Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (n 121), para.1.

[128] Procedures for Modification and Rectification of Schedules of Tariff Concessions (n 121); Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (n 121).

[129] Ibidem.

[130] Procedures for Modification and Rectification of Schedules of Tariff Concessions (n 121), para. 2.

[131] Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (n 121), para.1.

[132] Procedures for Modification and Rectification of Schedules of Tariff Concessions (n 121); See also: Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (n 121).

[133] GATS (n 115), Paragraph 1 *Annex on Article II Exemptions*.

[134] Ibidem.

6 of the GATS *Annex on Article II Exemptions* provides for a maximum period of ten years, which would have implied the expiration of all exemptions by January 2005. Nevertheless, the lists of Article II exemptions are currently still applied, with Members relying on the vague language of Paragraph 6 of the GATS *Annex on Article II Exemptions*.[135]

As to "[a]ny new exemption applied for after the date of entry into force of the WTO Agreement"[136], exemptions from the MFN provision under Article II:1 of the GATS shall be dealt with under the waiver procedure laid down in Article IX:3 of the WTO Agreement.[137] In practice, this procedure requires all WTO members to consent to the grant of a waiver[138] and thus, indirectly, to the UK's new list of Article II exemptions. However, since the submission of exemptions is normally only possible upon accession,[139] it cannot be said with certainty which approach will be taken to approve the UK's list of Article II exemptions. In this regard, one can therefore not rule out that the UK and the Ministerial Conference agree to a *sui generis* procedure during negotiations to be applied in this specific case.

Throughout this process, one or more WTO members might not give its consent to or block the certification of the new UK schedules as a means of political retaliation for past conflicts of the UK with other WTO members, e.g. the Falklands Conflict between the UK and Argentina. Besides, one or more EU Member States might lobby at the EU commission to block the UK's new WTO membership. One example for the power of individual EU Member States in this regard is the fact that France, having significant cultural interests in a dispute between the EU and

[135] It uses terms that are open to interpretation, e.g. "in principle" (Paragraph 6 of the *Annex on Article II Exemptions)* and "*should* not exceed" (Paragraph 6 of the GATS *Annex on Article II Exemptions. Emphasis added*).

[136] GATS (n 115), Paragraph 2 *Annex on Article II Exemptions*.

[137] Ibidem.

[138] WTO Agreement (n 107), Art. IX:3.

[139] GATS (n 115), Paragraph 1 *Annex on Article II Exemptions*.

the US over audio-visual services,[140] lobbied for certain measures to be taken by WTO accession candidates, which then the EU as a whole made precondition to its consent for the WTO accession of Croatia, Albania, and Moldova.[141] The UK could other members to approve its new schedules by deliberately making concessions, which would, however, imply economic losses for the UK.

c) Other members may withdraw or modify their schedules in response to the new UK schedules

When negotiating the UK's new schedules on concessions and commitments, other members might wish to withdraw or modify their schedules in response to the design of the UK's new schedules. This problematic shall be illustrated in the following section by means of different scenarios.

Indeed, WTO law provides two different procedures to modify or withdraw schedules. First, members may modify or withdraw their schedules following the specific procedures set out in Article XXIV of the GATT 1994 and Article V of the GATS. Normally, these procedures are standardly followed when the EU modifies its schedules in order to include a new member, e.g. in case of Croatia's recent accession to the EU.[142] In case the specific procedures apply when the EU is excluding a member from its schedules, they would apply for the revision of the EU's schedules. According to a cross-reference made in Article XXIV:6 of the GATT 1994, the specific procedures apply "with respect to a customs union, or an interim agreement leading to a

[140] Further information and a discussion of the background of this conflict is provided in: C. Pauwels and J. Loisen, "The WTO and the Audiovisual Sector: Economic Free Trade vs Cultural Horse Trading?", 18 (3) Eur J Commun [2003] 291.

[141] C. Grasstek, *The History and Future of the World Trade Organization* (WTO Publications, 2013) 129 et seq.; see also: International Center for Trade and Sustainable Development, "WTO Accession Update", 3 (43) Bridges Weekly Trade News Digest (1999).

[142] Renegotiations under Article XXIV of the GATT and Article V of the GATS are currently still on-going (see World Trade Organization, 'Goods Schedules' (Current Situation of Schedules of WTO Members) <http://www.wto.org/english/tratop_e/schedules_e/goods_-schedules_table_e.htm> accessed 16 October, 2013 and World Trade Organization, 'Services: Commitments' (Schedules of commitments and lists of Article II exemptions) <http://www.wto.org/english/tratop_e/serv_e/serv_commit-ments_e.htm> accessed 16 October, 2013).

formation of a customs union"[143]. However, the exclusion of a separating member is rather a restructuring of a CU. Rather than Article XXIV of the GATT 1994, the counterpart provision, Article V:5 of the GATS, would point to the application of the specific procedures, referring to situations of "conclusion, enlargement or *any significant modification*"[144]. Indeed, restructuring the composition of members to a CU could be regarded as a "significant modification"[145]. Then, the specific procedures set out in Article XXIV of the GATT 1994 and Article V of the GATS would apply and lay down additional requirements to the ordinary procedures. Article XXIV:6 of the GATT 1994 states that "due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union."[146] As to the modification or withdrawal of GATS schedules, Article V:5 of the GATS sets forth that the withdrawing or modifying member "shall provide at least 90 days advance notice of such modification or withdrawal"[147]. Although these requirements seem to strengthen the UK's bargaining position at first sight, they are mere 'best endeavours' clauses and there is thus no guarantee that the UK would continue to get the same level of concessions that is currently granted in the EU schedules from the after its EU-exit.

Second, members' schedules may be modified or withdrawn schedules according to the ordinary procedures laid down in Articles XXVII and XXVIII of the GATT 1994 as well as Article XXI (a) of the GATS. However, these procedures are subject to compensation negotiations that must be conducted with those members that are affected by the intended modification[148] or

[143] GATT 1994 (n 113), Art. XXIV:5.

[144] GATS (n 115), Art. V:5.

[145] Ibidem.

[146] GATT 1994 (n 113), Art. XXIV:6.

[147] GATS (n 115), Art. V:5.

[148] As to the schedules of concessions under the GATT, Art. XXVIII:1 of the GATT 1994 read in conjunction with para. 7 of the *Understanding on Article XXVIII of the GATT 1994*. With regards to the schedules of commitments under the GATS, see Article XXI:2 (a) of the GATS.

withdrawal.[149] In case negotiations between the EU and the UK fail, the provisions in GATT and GATS require different steps to be taken. According to Article XXVIII:3 (a) of the GATT 1994, the EU would still be free to modify or withdraw its concessions if the UK disagrees.[150] Then, the UK may withdraw from substantially tantamount concessions.[151] Under the GATS, however, the UK may refer the matter to arbitration.[152] The modification or withdrawal may not be effected until the EU has made compensatory adjustments that are in line with the findings of the arbitration.[153] If the EU does not comply with the findings of the arbitration, the UK may "modify or withdraw substantially equivalent benefits in conformity with those findings."[154]

In the first scenario, the UK would simply adopt the EU schedules and continue to apply the same concessions and commitments than before its EU-exit. This option would involve the least amount of effort for the UK with regards to the time and technical expertise invested in negotiations and design of the schedules.

In the second scenario, other WTO members might demand more extensive or additional concessions from the UK than previously applied under the common EU schedules. On the one hand, they might condition their consent to the UK's new schedule to these requirements. Since the submission of individual schedules is a precondition to the UK's WTO membership, the UK might find itself constrained to comply with these demands. Otherwise, the UK would risk the rejection of its new schedules in the consensus-voting. On the other hand, members might adopt the new UK schedules but in exchange modify or withdraw certain concessions made in their own schedules.

[149] In matters relating to the schedules of concessions under the GATT, See GATT 1994 (n 113), Art. XXVII. As to the schedules of commitments under the GATS, Art. XXI:2 (a) of the GATS.

[150] GATT 1994 (n 113), Art. XXVIII:3(a).

[151] GATT 1994 (n 113), Art. XXVIII:3.

[152] GATS (n 115), Art. XXI:3(a).

[153] GATS (n 115), Art. XXI:4(a).

[154] GATS (n 115), Art. XXI:4(b).

None of the above described scenarios is wholly improbable. The UK inevitably needs to balance the risks as well as the economic advantages involved in each of the scenarios and determine its strategy accordingly when negotiating the design of its new schedules.

d) The UK's EU-exit has major implications on its membership to the Agreement on Government Procurement (GPA)

The UK's membership to the GPA is based on its EU membership. The following section will argue that the UK would have to preserve its membership to the GPA upon its EU-exit and elaborate on difficulties that might arise in this regard.

Only WTO members may become parties to the GPA.[155] The above descried procedures to preserve the UK's WTO membership after its EU-exit are thus pre-requirement to its adherence to the GPA. In this regard, Article XXIV:10 (b) of the GPA states: "If a Party […] ceases to be a member of the WTO, it shall cease to be a party to this Agreement with effect from the same date."[156] The UK would hence have to enter into negotiations in order to preserve its membership to the GPA. The accession procedure is regulated in Article XXIV:2 of the GPA. Any WTO "may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed."[157] The UK's membership to the GPA thus depends on the consent of the other parties to the GPA.[158]

The negotiations for the UK's membership to the GPA will mainly be shaped by the fact that the UK is obliged to submit, (i) extensive information on national government procurement

[155] Art. XXIV:2 of the Agreement on Government Procurement 1996 [*GPA*].

[156] GPA (n 155), Art. XXIV:10(b).

[157] GPA (n 155), Art. XXIV:2.

[158] Currently: Armenia, Canada, the European Union (with respect to its Member States), Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands (with respect to Aruba), Norway, Singapore, Switzerland, and the United States.

legislation;[159] and (ii) schedules for its individual Appendix I annexes of the GPA, in which it determines the coverage of the GPA.[160] The submission of schedules is required since the GPA does not automatically cover all government procurement of its parties. So far, a common GPA schedule for all EU Member States has been applied[161] and the EU has acted on behalf of its Member States when notifying any changes thereto.[162] A Cabinet Office Memorandum issued in May 2013 further clarifies: "The European Commission negotiates on behalf of the EU as a whole; individual EU Member States are not separately represented. All the EU Member States have substantially the same coverage with respect to each of the other GPA parties."[163] In its new schedules, the UK would have to specify, inter alia, the entities that procure in accordance with the GPA.

Like in case of the schedules under the GATT and the GATS, the UK might be obliged to grant more extensive or additional concessions in order to gain the consent of the parties to the GPA, so that it can preserve its GPA membership. Furthermore, other GPA members might also in this case wish to withdraw or modify their schedules in response to the UK's new schedules. In case other parties' "rectifications, transfers or other modifications are of a purely formal or minor

[159] GPA (n 155), Art. XXIV:1.; See also: Checklist of Issues For Provision of Information Relating to Accession to the Agreement on Government Procurement, GPA/35, issued by the Committee on Government Procurement on 21 June 2000.

[160] GPA (n 155), Art. XXIV:5.

[161] The currently applied common Appendix I is available at: World Trade Organization, 'Appendices and Annexes to the GPA' <http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm> accessed 16 November, 2013.

[162] Notification of National Implementation Legislation, GPA/20, Communication from the European Community submitted to the Committee on Government Procurement on 28 January 1998; see also: Review of National Implementing Legislation, GPA/32, submitted by the European Community to the Committee on Government Procurement on 12 January 2000. Likewise, a common appendix of commitments under the GPA has been submitted by the EU to the Protocol Amending the Agreement on Government Procurement in 2012 (See Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement of Government Procurement, Following Their Verification review, As Required By the Ministerial Decision of 15 December 2011 (GPA/112), Paragraph 5, GPA/113, issued by the Committee on Government Procurement on 2 April 2012).

[163] Explanatory Memorandum on European Community Documents, submitted by the Cabinet Office on 9 May 2013, < http://europeanmemoranda.cabinetoffice.gov.uk/files/2013/05/7915-13.pdf> accessed 16 November, 2013.

nature"[164], they will become effective after a notification period, provided there is no objection.[165] The same applies if a party wishes to withdraw from an entity of its Appendix I schedules.[166] But if the UK objects to the withdrawal, the matter may be referred to dispute settlement procedures.[167] In other cases, where major changes that are not "purely formal"[168] are made, the Committee on Government Procurement will consider compensatory adjustments, "with a view to maintaining a balance of rights and obligations and a comparable level of […] coverage […] prior to such modification."[169]

Similar to the respective procedures relating to the schedules under the GATT and the GATS, this provision is a mere 'best endeavours' clause and hence does not provide a guarantee to the UK that it would continue to get the same level of coverage that is currently granted in the schedules of any GPA party, e.g. the EU. The course and outcome of negotiations is thus crucial for the level of GPA coverage. When negotiating the design of its new schedules under the GPA, the UK will hence have to consider other parties' possible reactions in response to its new GPA schedules.

3.3 As a WTO Member, the standard WTO rights and obligations will apply to the UK.

The following section will be based on the assumption that the UK's new schedules get certified by consensus, thereby preserving the UK's WTO membership. It will shed light on the standard rights and obligations under WTO law which would apply to the trade relations between the UK

[164] GPA (n 155), Art. XXIV:6(a).

[165] Ibidem.

[166] GPA (n 155), Art. XXIV:6(b).

[167] GPA (n 155), Art. XXII.

[168] GPA (n 155), Art. XXIV:6(a).

[169] Ibidem.

and the non-EU members to the WTO, except where the UK has concluded an FTA which provides otherwise with one or more of these third countries.[170]

3.3.1 MFN treatment remains guaranteed under GATT and GATS

The tariffs applied by any WTO member towards the UK are bound to the so-called MFN level as a guaranteed maximum, which applies on a country and product specific basis. Like every WTO member, the UK can rely on the WTO's MFN principle, according to which every WTO member must receive the same treatment (i.e. trade advantages) granted to the most favoured nation. The MFN principle applies to goods[171] as well as services and service suppliers.[172]

In practice, this would for example mean that if the EU as one WTO member grants a certain customs rate on cars to Japan, it must grant the same rate to cars imported from any other WTO member, including the UK. However, it should be noted that this principle applies only to the UK's trade relations with non-EU members to the WTO except where an FTA has been concluded that provides otherwise. This exception will be further explained in the following section.

3.3.2 The standard WTO rules on non-tariff barriers continue to apply

Likewise, the UK's withdrawal from the EU would not imply any changes to the standard WTO rules on ton-tariff barriers. The UK's trade relations with non-EU members to the WTO would still be subject to the ordinary WTO rules on non-tariff barriers, such as the general prohibition on quantitative restrictions under Article XI: 1 of the GATT 1994[173] and the relevant disciplines

[170] This scenario will be discussed in the following section on the UK's regional trade relations.

[171] GATT 1994 (n 113), Art. I:1.

[172] GATS (n 115), Art. II:1. This aspect has been recognized in recent studies on the UK's potential EU-exit, inter alia in: *Our Global Future. A Business Vision for a Reformed EU* (n 1) 134, 135; Leaving *the EU* (n 1) 27.

[173] GATT 1994 (n 113), Art. XI:1.

laid down in other WTO Agreements, e.g. the Agreement on Sanitary and Phytosanitary Measures or the Agreement on Technical Barriers to Trade.[174]

The UK could hence have recourse to the WTO dispute settlement system when disputing over tariff and non-tariff barriers applied by the EU. One example for this scenario is the current WTO dispute over fisheries measures between the EU and the Faroe Islands since the latter are covered by Denmark's WTO membership but do not fall within the territorial scope of the EU.[175] However, these rules will only to the UK's trade relations with non-EU members to the WTO unless there is no FTA that provides otherwise. This exception will be further explained in the following section.

3.4 THE UK'S EU-EXIT HAS IMPORTANT CONSEQUENCES WITH REGARDS TO THE UK'S REGIONAL TRADE RELATIONS UNDER WTO LAW

For the following discussion of the UK's relations governed by regional trade agreements with non-EU parties to the WTO, it shall be recalled that the UK will be able to independently negotiate its trade agreements with other countries without the obligation to coordinate these activities with the EU, unless it remains in the EU customs territory.

3.4.1 Under certain conditions, WTO Members may deviate from the MFN principle

In its regional trade agreements concluded with other WTO members that are not part of the EU, the UK would – like all other WTO members – have the possibility to deviate from the WTO's MFN principle, provided certain conditions are fulfilled.

[174] This aspect has been stressed in *Leaving the EU* (n 1), 25. However, it has not been included in the discussion in *Our Global Future. A Business vision for a Reformed EU* (n 1), 135.

[175] *European Union - Measures on Atlanto-Scandian Herring*, Request for consultations by Denmark in respect of the Faroe Islands, WT/DS469/1, dated 04 November 2013. Further information is available at: World Trade Organization, 'Faroe Islands files dispute against the EU over fisheries measures' <http://www.wto.org/english/news_e/news13_e/ds469rfc_04nov13_e.htm> accessed 13 November, 2013.

Depending on the type of trade agreement, both Article XXIV of the GATT 1994 and Article V of the GATS set out pre-conditions for such treatment with regards to goods as well as services and service suppliers. As for goods, the conditions imposed on FTAs are less demanding compared to CUs. Whereas FTAs merely have to fulfil the so-called *internal trade requirement*,[176] CUs further have to fulfil the so-called *external trade requirement*. This entails the obligation of CUs to as the apply a common external tariff.[177,178] With respect to services and service suppliers, the conditions to deviate from the MFN principle vary according to economic integration agreements[179] and labour markets integration agreements.[180]

Consequently, whether trade agreements between WTO members may deviate from the MFN treatment obligation with regards to goods and/or services suppliers depends on whether they have been concluded under Article XXIV of the GATT 1994 and/or the Article V of the GATS. The EU can be cited as an example for a WTO member that makes extensive use from this

[176] GATT 1994 (n 113), Art. XXIV:8(b) and XXIV:5(b); According to the *internal trade requirement*, the members of a free trade must eliminate the "duties and other restrictive regulations of commerce […] on substantially all trade" [GATT 1994 (n 113), Art. XXIV:8(b)] among each other. Besides, the "duties and other restrictive regulations of commerce" [GATT 1994 (n 113), Art. XXIV:5(b)] applied by any Member of a free trade area to trade with third countries may not be higher or more restrictive *after* the creation of that free trade area than those applied *before*. In addition to this, an FTA measure that would otherwise be considered inconsistent with the MFN principle is only justified if the creation of the FTA would have been prevented without this measure [GATT 1994 (n 113), Art. XXIV:5(b)].

[177] GATT 1994 (n 113), Art. XXIV:8(a)(ii).

[178] GATT 1994 (n 113), Art. XXIV:5(c) further lays down requirements concerning interim agreements, thereby recognizing the fact that plurilateral trade agreements are a complex matter, requiring an extensive negotiation and implementation process.

[179] In this case, the agreement must meet the substantial '*sectoral coverage'-requirement* (Art.V:1 (a) of the GATS), the '*substantially all discrimination'-requirement* (Art. V:1 (b) of the GATS), as well as the *'barriers to trade'-requirement* (Art. V:4 of the GATS). In addition, a measure that would otherwise be considered inconsistent with the MFN principle is only justified if the creation of the agreement would have been prevented without this measure (See the chapeau of Art. V:1 GATS).

[180] As to labour markets integration agreements, these type of agreement is required to exempt the citizens of signatories to the agreement from residency and working permit requirements (See Art. V bis (a) of the GATS) and must further be notified to the Council for Trade in Services (See Art. V *bis* (b) of the GATS).

possibility in its trade agreements with third countries, as illustrated in the table annexed to this work.[181]

3.4.2 The UK's EU-exit implies both advantages and disadvantages with regards to its position in trade negotiations and vis-à-vis the world's regional trading networks

The following section will explain the reasons for which the UK's EU-exit would put the UK into a new position in trade negotiations and thus its position vis-à-vis the world's regional trading networks, which entails both advantages and disadvantages.

Once the above described pre-conditions for deviations from the MFN principle are fulfilled, the UK - but also any other WTO member – may grant or receive more or less concessions in the regional trade agreements that it concludes. The nature and extent of trade advantages will depend on negotiation.

On the one hand, it would be an advantage for the UK to independently negotiate its regional trade agreements if it does not remain within the EU customs territory. This way, the UK could independently decide over the concessions to be enshrined in its regional trade agreements in accordance with its own economic needs and capacities. It could for example independently decide to grant lower tariffs to e.g. the US than to France. Further, the UK would not have to align its negotiation strategy to the wishes and needs of other EU Member States anymore. This would certainly shorten the length of negotiations.

On the other hand, the UK's new position in trade negotiations would entail certain disadvantages. First, it should be borne in mind that the UK could not rely anymore on the strong network of trade agreements in force and under negotiations maintained by the EU, unless it negotiates an agreement to this effect with the EU.[182] This way, the UK will be excluded from an important and ever-growing net of trade advantages, as illustrated in the annexures of this work.

[181] See Annexure B.

[182] See Annexure C.

In more drastic terms, the UK may face the risk of being isolated. Given the fact that all WTO members may deviate from the MFN principle, the EU will for example not be obliged to grant the UK the same trade benefits that it accords other WTO members under a regional trade agreement. An important example to quote here is the Transatlantic Trade and Investment Partnership (TTIP) agreement that the EU is currently negotiating with the US. By leaving the EU, the UK would be excluded from a regional integration agreement that is predicted to boost the EU's economy by € 120 million.[183] The UK would face significant losses: A study conducted in May 2013 has shown that the TTIP promises to raise UK national income by between £4 billion and £10 billion annually or up to £100 billion over a ten-year period.[184]

Second, the UK would not benefit from the EU's far-reaching diplomatic activities and negotiation power anymore.[185] Consequently, it would have to engage in extensive trade negotiations around the world in order to remain integrated in regional trade activities, which would require great diplomatic efforts and technical expertise. In its individual capacity, the UK would have less negotiation power than a community of countries, such as the EU. Therefore, it is likely that the UK will not succeed to negotiate as many and as far-reaching trade advantages than the EU and its Member States in common action.[186]

[183] European Commission, "Transatlantic Trade and Investment Partnership (TTIP) - The biggest trade deal in the world" <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 19 October, 2013. This Agreement however has not been included into the discussion contained in *Our Global Future. A Business Vision for a Reformed EU* (n 1), 136.

[184] Centre for Economic Policy Research, "Estimating the Economic Impact on the UK of a Transatlantic Trade and Investment Partnership (TTIP) Agreement between the European Union and the United States (Final Project Report" [May 2013], 6, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/-file/198115/bis-13-869-economic-impact-on-uk-of-tranatlantic-trade-and-investment-partnership-between-eu-and-us.pdf> accessed 19 October, 2013.

[185] A list of agreements under negotiations as at 08 October 2013 can be found at: European Commission, "Overview of FTA and other trade negotiations" <http://trade.ec.europa.eu/doclib/docs/2006/december/-tradoc_118238.pdf> accessed 20 October, 2013.

[186] This conclusion finds support in *Our Global Future. A Business vision for a Reformed EU* (n 1), 136.

3.4.3 The UK's EU-exit has important consequences on key industry sectors and other stakeholders

This section will argue that key UK industry sectors and other stakeholders would face significant losses with regards to the UK's exclusion from the trade advantages enshrined in the EU's trade agreements. Given the fact that the EU may deviate from the MFN principle in its trade agreements with other WTO members, it may exclude the UK from the trade advantages and other benefits granted therein.

First, this shall be illustrated by the example of trade relations between the EU and the UK. Unless an FTA between the UK and the EU provides otherwise, the UK could merely claim tariff treatment at MFN level. Looking at the simple average tariffs applied by the EU in 2012, agricultural goods were burdened with an average MFN tariff rate of 13.2 per cent and all other goods with an average MFN tariff rate of 4.2 per cent.[187] As an EU member, however, the UK is currently not charged any tariffs if exporting to other EU countries as a zero tariff applies within the Single Market.[188] However, upon its withdrawal, MFN tariffs would be levied on 90 per cent of UK goods by value upon their importation into the EU customs territory.[189] This would significantly increase competitive pressure on UK exporters.[190]

Second, this aspect shall be illustrated by means of analysing the industry sector and product coverage of EU's current trade agreements with other EU members. The key industry sectors that are typically covered in the EU's trade agreements with other WTO members are thus the food industry, the construction sector, the heavy industries, electrical industries, the textiles and

[187] World Trade Organization, International Trade Center, United Nations Conference on Trade and Development [November 2013], "World Tariff Profiles 2013", 76, <www.wto.org/English/res_e/booksp_e/tariff_profiles-13_e.pdf> accessed 13 November, 2013.

[188] See for more detailed explanations: P. Craig, Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (4*th* edition, Oxford University Press 2008) 637 et sqq.

[189] *Leaving the EU* (n 1), 27. See Annexure D for a detailed listing of the average MFN tariffs applied by the EU to different product groups.

[190] This fact has been recognized in *Leaving the EU* (n 1), 27.

clothing sector, as well as footwear production, all industries fabricating household products, and the printing, photography as well as packaging industries. Looking at the agreements in greater detail, it first stands out that all agreements currently in force cover agricultural and fishery products. The vast majority further covers alcohols. In addition, certain products are covered in the majority of agreements currently in force, namely, textile and clothing, footwear, household products (e.g. cosmetics and furniture), wood, minerals and chemicals (e.g. copper), aluminium, steel and iron, machinery, glass, and paper.

But apart from industry sectors, other stakeholders may also be disadvantaged if the EU could exclude the UK from certain benefits granted in its future trade agreements. Better trading conditions are often not the only advantages generated. First, many of the agreements concluded by the EU further contain so-called "WTO-plus provisions",[191] i.e. provisions that build on or deepen commitments made at WTO level.[192] One example for such provisions is the information exchange with regards to standards, as included in agreement between the EU and Mexico.[193]

Second, it is very typical for the EU's preferential trade agreements to include so-called "WTO-extra provisions",[194] i.e. commitments made in policy areas which are currently not covered by WTO provisions.[195] One very frequent example is the inclusion of environmental commitments, as in the preferential trade agreements with Tunisia,[196] Israel,[197] or Egypt.[198] Some agreements

[191] R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications" [03 March 2011] CRS Report for the US Congress, 24, <http://www.fas.org/sgp/crs/row/R41143.pdf> accessed 20 October, 2013.

[192] Ibidem.

[193] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (October, 2000), Art. 21(2).

[194] R. Ahearn (n 191), 27.

[195] Ibidem.

[196] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (March, 1998), Art. 43 (4), 45(b) and 48.

[197] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other par (June, 2000), Art. 42(2), 50 and 51(a).

even contain provisions on cultural cooperation, e.g. the preferential trade agreement between the EU and Mexico.[199]

The UK's new position in regional trade relations, thus, entails advantages as well as disadvantages. This would be an important consideration for key industrial sectors and stakeholders in other policy areas. The UK must, therefore, carefully examine the implications of its trade relations with non-EU countries under the WTO regime.

[198] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arabic Republic of Egypt, of the other part (September, 2004), Art. 40(4), 44 and 60.

[199] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (October, 2000), Art. 31.

4. CONCLUSIONS

The possibility of an exit for the UK from the EU is given as Article 50 of the Lisbon Treaty establishes the inherent right for the UK to withdraw from the EU. However, the practical implications of such exit must be carefully analysed. The exit of the UK from the EU, therefore, would require enormous focus on negotiating a beneficial exit arrangement.

Article 50 of the Lisbon Treaty may be interpreted as implying both parties to negotiate in good faith as well as obliging the EU to conclude a withdrawal agreement. Under the scheme of this provision, the EU would be obliged to make serious good effort to reach an agreement on future trading relations with the UK. Nevertheless, this will be contingent upon the UK submitting a proposal to this effect. While this obligation is not absolute, the two-year period established in the Lisbon Treaty does not allow the parties to waive from their obligation to conclude a withdrawal agreement. Therefore, it may be interpreted as an 'escape clause' for the EU or the UK in the event of a breach of good faith by the other party in terms of lack of sufficient efforts in negotiations or setting of unreasonable conditions for withdrawal.

Further, the Lisbon Treaty does not directly include any provisions on possible protection of acquired rights of/against individuals and entities of the UK and of survival of disputes based on EU law. The general requirements of legitimacy of EU law presupposes that, upon withdrawal, the UK and the EU may be required to agree on protection of acquired rights and legitimate expectations of/against individuals and entities of the UK. At the same time, the claims of/against the individuals and entities of the UK would survive in the failure of the UK and the EU to conclude such agreement. In a case based on EU law and pending before the CJEU or the domestic court of a Member State, the claimant may raise the principle of legal certainty and its different aspects such as protection of legitimate expectations, non-retroactivity and acquired (vested) rights. The particular effect of those principles in these cases would then depend on individual circumstances. The UK courts will not be obliged to apply the rules of EU law on legal certainty after the Lisbon Treaty is terminated. However, they would still be obliged to follow the minimum standards of protection of acquired rights.

In the event that the UK manages to negotiate an exit agreement with the EU, it may opt for one of the five models discussed, for its future trading relations with the EU. Each of these models represents different levels of integration into the EU framework. The EEA model, while ensuring increased access and trading benefits with the EU, results in a high level of integration to the EU in terms of internal laws and external policies. The Swiss model, coupled with the UK's bargaining power, gives some opportunity to negotiate a tailor-made set of agreements with the EU. However, the outcome of this model entirely depends on the negotiations to be held with the EU. The Customs Union model leads to a different level of EU integration in terms of external policies, while keeping internal sovereignty intact. However, this model does not ensure reciprocal benefits with respect to third countries that enter into FTAs with the EU. The FTA model represents a far lower level of integration into the EU as compared to the other models, leaving more scope for internal and external sovereignty. However, this would also mean that the benefits that UK may receive from this model in terms of access to the EU single market would be far less than in other models. Finally, the UK can decide to exit the EU without any agreement, in which case the UK-EU relation would be governed by WTO laws. While this would grant complete internal and external freedom to the UK, it will lose all types of trading concessions from a huge trading bloc i.e. the EU. Therefore, the advantages and disadvantages of each of these models must be carefully analysed in comparison with the UK's current EU membership prior to entering into any exit negotiations with the EU.

The UK's withdrawal from the EU would also have an impact on the agreements concluded by the EU while the UK was an EU Member. As regards the exclusive EU agreements, they would cease to apply to the UK upon withdrawal, unless the UK negotiates an arrangement for their continued application. As regards mixed agreements, the provisions of these agreements indicate to the legal likelihood that they would be automatically terminated upon UK's withdrawal. The parties to this agreement can only be either the Member States of the EU or the third country. Further, the territorial application of these agreements is limited to those territories governed by the EU treaties or that of the third country. Upon withdrawal, neither would the UK be a Member State of the EU nor would the territory of the UK governed by the EU treaties. This sufficiently

points to the legal outcome of the automatic termination of these mixed agreements in relation to the UK after its withdrawal from the EU. Alternatively, these agreements have a termination clause and the third countries have the possibility to terminate the agreement in relation to the UK. At the same time, these agreements also contain the provisions for amendments which can be used to make appropriate changes to these agreements, after negotiations, to allow the UK to continue as a party to these agreements. Therefore, the fate of these agreements entirely depends on the negotiations between the UK, EU and the third country after withdrawal.

With regards to the UK's trade relations under the WTO regime, the UK's withdrawal from the EU may have major implications for its WTO membership as the latter is conditioned upon the submission of new UK schedules of commitments under the GATT and the GATS. These procedures can involve major difficulties since the new UK schedules will be subject to approval by consensus of all other WTO members. Further, the certification of the UK's new schedules is not a process that can be taken for granted. During these negotiations, other WTO members might exert pressure, conditioning their consent to certain benefits. Similarly, other WTO members might wish to withdraw or modify their schedules in response to the UK's new schedules. Consequently, the design and negotiation of the new UK schedules require political sensitivity. The same applies to the negotiations for the UK's membership to the GPA, which is based on its EU membership and therefore needs to be preserved after its withdrawal. In this regard, the UK must submit schedules to specify the coverage of the GPA, which might involve difficulties similar to those under the procedures for the submission of schedules under other WTO agreements, since other members might wish to withdraw or modify their schedules in response to the UK's new schedules.

Additionally, once the UK's WTO membership is approved, the UK's trade relations with non-EU parties to the WTO would continue to be governed by the same WTO rules that currently govern this relationship, being subject to any changes set out in the UK's WTO schedules and any continuing or new FTA relations between the UK and non-EU parties to the WTO. Moreover, the UK's EU-exit would imply both advantages and disadvantages for the UK's position vis-à-vis the world's regional trade networks. This has been explained by the fact that

not only the UK but also all other non-EU parties to the WTO may deviate from the MFN treatment obligation under the WTO's regional trade exception. In this regard, the UK's withdrawal from the EU would have major implications on the UK's key industry sectors and other policy areas.

Thus, the implications of the UK's withdrawal from the EU may have far-reaching consequences. These consequences can be positive or negative, depending on the negotiations with the EU at the time of withdrawal. This paper has attempted to shed light on some of these scenarios and implications, providing key information for the future of the UK in Europe.

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- **ANNEXURE A**

LIST OF SOME OF THE MAJOR EU MIXED AGREEMENTS			
Nature of the Agreement	**Parties**	**Provision on termination**	**Definition of parties**
Euro-Mediterranean Aviation Agreement (2013)	EU and its Member States on the one hand and State of Israel on the Other	**Art. 28(2):** Either Party may, at any time, give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simulta-neously to the ICAO. This Agreement shall terminate at midnight GMT at the end of the IATA traffic season in effect one year following the date of written notification of termination, unless the notice is withdrawn by agreement of the Contracting Parties before the expiry of this period.	**Art. 1(7):** "Contracting Parties" means, on the one hand, the European Union or its Member States, or the European Union and its Member States, in accordance with their respective powers, and, on the other hand, Israel.
Association Agreement (2012)	EU and its Member States on the one hand and Central America on the other	**Art. 354 (2) and (3):** **(2)** Any Party shall give written notification to the respective depositary of its intention to denounce this Agreement. **(3)** In case of denunciation by any Party, the other Parties shall examine in the context of the Association Committee the effect of such denunciation on this Agreement. The Association	**Art. 352(1):** The Parties to this Agreement are the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, referred to as the "Republics of the CA Party" on the one hand, and the European Union or its Member States or the European Union and its Member States, within their respective areas of competence, referred to as the "EU Party" on the other.

		Council shall decide on any necessary adjustment or transition measures.	
Trade Agreement (2012)	EU and its Member States on the one hand and Colombia and Peru on the other	**Art. 331 (2) and (3):** **(2)** Any Party may withdraw from this Agreement by means of a written notification to all other Parties and the Depositary. Such withdrawal shall become effective six months after the date of receipt of such notification by the Depositary. **(3)** Notwithstanding paragraph 2, when a signatory Andean Country withdraws from this Agreement, this Agreement shall continue to be in force between the EU Party and the other signatory Andean Countries. This Agreement shall be terminated in case of withdrawal by the EU Party.	**Art. 6(1):** For the purposes of this Agreement: 'Party' means the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), or each of the signatory Andean Countries; 'Parties' means, on the one hand, the EU Party and, on the other hand, each signatory Andean Country.
Common Aviation Area Agreement (2012)	EU and its Member States on the one hand and Republic of Moldova on the other	**Art. 27:** Either Party may, at any time, give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to ICAO. This Agreement shall terminate at midnight GMT at the end of	**Art. 1(15):** 'Parties' shall mean, on the one hand, the European Union or its Member States, or the European Union and its Member States, in accordance with their respective powers (the European Party), and, on the other hand, the Republic of Moldova (the Moldovan Party).

		the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification of termination, unless the notice is withdrawn by mutual agreement of the Parties before the expiry of this period.	
Partnership and Cooperation Agreement (2012)	EU and its Member States on the one hand and Republic of Iraq on the other	**Art. 116(2):** This Agreement is concluded for a period of 10 years. It shall be automatically renewed on a yearly basis unless one of the Parties renounces it at least six months before its expiry date. The termination shall take effect six months after receipt of the notification by the other Party. Such termination shall not affect on-going projects commenced under this Agreement prior to the receipt of the notification.	**Art. 122:** For the purposes of this Agreement, 'the Parties' shall mean the Union or its Member States or the Union and its Member States, in accordance with their respective powers, on the one hand, and Iraq, on the other.
Euro-Mediterranean Aviation Agreement (2012)	EU and its Member States on the one hand and Hashemite Kingdom of Jordan on the other	**Art. 27(2):** Either Contracting Party may, at any time, give notice in writing through diplomatic channels to the other Contracting Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to ICAO. This Agreement shall terminate at midnight GMT at the end of the IATA traffic season in effect one year following the date of written notification of	**Art. 1(7):** 'Contracting Parties' shall mean, on the one hand, the European Union or its Member States, or the European Union and its Member States, in accordance with their respective powers, and, on the other hand, Jordan.

		termination.	
Common Aviation Area Agreement (2012)	EU and its Member States on the one hand and Georgia on the other	**Art. 27:** Either Party may, at any time, give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to ICAO and to the UN Secretariat. This Agreement shall terminate at midnight GMT at the end of the IATA traffic season in effect one year following the date of written notification of termination, unless the notice is withdrawn by mutual agreement of the Parties before the expiry of this period.	**Art. 1(15):** 'Parties' shall mean, on the one hand, the European Union or its Member States, or the European Union and its Member States, in accordance with their respective powers (the European Party), and, on the other hand, Georgia (the Georgian Party.
Free Trade Agreement (2011)	EU and its Member States on the one hand and the Republic of Korea on the other	**Art. 15.11:** **(2)** Either Party may notify in writing the other Party of its intention to denounce this Agreement. **(3)** The denunciation shall take effect six months after the notification under paragraph 2.	**Art. 1.2:** The Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Korea
Cooperation Agreement on Satellite Navigation (2010)	EU and its Member States on the one hand and the Kingdom	**Art. 12:** Either Party may, by giving six months notice to the other in writing, terminate this	**Preamble:** The European Union, the Member States and Norway hereinafter jointly referred to as 'the Parties'.

	of Norway on the other	Agreement.	
Framework Agreement (2013)	EU and its Member States on the one hand and the Republic of Korea on the other	**Art. 49(3):** This Agreement shall be valid indefinitely. Either Party may notify in writing the other Party of its intention to denounce this Agreement. The denunciation shall take effect six months after the notification.	**Art. 47:** For the purposes of this Agreement, the term 'the Parties' means the European Union or its Member States, or the European Union and its Member States, in accordance with their respective competences, on the one hand, and the Republic of Korea, on the other.
Interim Agreement establishing a framework for an Economic Partnership Agreement (2012)	EC and its Member States on the one hand and the Eastern and Southern Africa States on the other	**Art. 62(7):** The EC Party or a Signatory ESA State(s) may give written notice to the other of its intention to denounce this Agreement.	**Art. 61(1):** The Contracting Parties of this Agreement shall be the Union of Comoros, the Republic of Madagascar, the Republic of Mauritius, the Republic of Seychelles, the Republic of Zambia and the Republic of Zimbabwe hereinafter referred to as the 'ESA States', on the one part, and the EC or its Member States or the EC and its Member States within their respective areas of competence as derived from the Treaty establishing the European Community, and hereinafter referred to as the 'EC Party', on the other part for which this Agreement has entered into force or is provisionally applied.
Agreement on Maritime Transport	EC and its Member	**Art. 15(1):** This Agreement is concluded for	

(2008)	States on the one hand and the People's Republic of China on the other	a period of five years. It shall be tacitly renewed on a yearly basis unless one of the Parties denounces it in writing six months before the date of expiry.	No definition of Parties.
Association Agreement (2002)	EC and its Member States on the one hand and the Republic of Chile on the other	**Art. 199 (2) and (3):** **(2)** Either Party may give written notice to the other of its intention to denounce this Agreement. **(3)** Denunciation shall take effect six months after notification to the other Party.	**Art. 197:** For the purposes of this Agreement, 'the Parties' shall mean the Community or its Member States or the Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, on the one hand, and the Republic of Chile, on the other
Euro-Mediterranean Association Agreement (2004)	EC and its Member States on the one hand and the Arab Republic of Egypt on the other	**Art. 88:** This Agreement is concluded for an unlimited period. Each of the Parties may denounce this Agreement by notifying the other Party. This Agreement shall cease to apply six months after the date of such notification.	**Art. 89:** For the purpose of this Agreement the term 'Parties' shall mean Egypt on the one hand and the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, on the other hand.
Euro-Mediterranean Association Agreement (2005)	EC and its Member States on the one hand and the People's Democratic Republic of	**Art. 107:** This Agreement shall be concluded for an unlimited period.	**Art. 106:** For the purposes of this Agreement, 'Parties' shall mean, on the one hand, Community, or the Member States or the Community and its Member

	Algeria on the other	Each of the Parties may denounce this Agreement by notifying the other Party. The Agreement shall cease to apply six months after the date of such notification.	States, in accordance with their respective powers, and, on the other hand, Algeria
Economic Partnership, Political Coordination and Cooperation Agreement (2000)	EC and its Member States on the one hand and the United Mexican States on the other	**Art. 57(2):** Either Party may denounce this Agreement by notifying the other Party. This Agreement shall cease to apply six months after the date of such notification.	**Art. 55:** For the purposes of this Agreement, 'the Parties' shall mean, on the one hand, the Community or its Member States or the Community and its Member States, in accordance with their respective areas of competence, as derived from the Treaty establishing the European Community and, on the other hand, Mexico.
Agreement on Trade, Development and Cooperation (2000)	EC and its Member States on the one hand and the Republic of South Africa on the other	**Art. 99:** This Agreement shall be valid for an unlimited period. Either Party may denounce this Agreement by notifying the other Party in writing. The Agreement shall cease to apply six months after the date of such notification.	**Preamble:** Contracting Parties to the Treaty establishing THE EUROPEAN COMMUNITY, hereinafter referred to as the 'Member States, and THE EUROPEAN COMMUNITY, hereinafter referred to as the 'Community, of the one part, and THE REPUBLIC OF SOUTH AFRICA, hereinafter referred to as 'South Africa, of the other part, hereinafter referred to as the 'Parties.
Euro-Mediterranean Association Agreement	EC and its Member States on the	**Art. 93:** This Agreement shall be concluded for an unlimited	**Art. 92:** For the purposes of this Agreement, 'Parties' shall mean,

(2000)	one hand and the Kingdom of Morocco on the other	period. Either Party may denounce this Agreement by notifying the other Party. This Agreement shall cease to apply six months after the date of such notification.	on the one hand, the Community or the Member States, or the Community and its Member States, in accordance with their respective powers, and, on the other hand, Morocco.
Euro-Mediterranean Association Agreement (2000)	EC and its Member States on the one hand and the State of Israel on the other	**Art. 82:** The Agreement is concluded for an unlimited period. Each of the Parties may denounce the Agreement by notifying the other Party. The Agreement shall cease to apply six months after the date of such notification.	**Art. 81:** For the purpose of this Agreement the term Parties shall mean the Community, or the Member States, or the Community and the Member States, in accordance with their respective powers, of the one part, and Israel of the other part.
Framework Cooperation Agreement leading ultimately to the establishment of a political and economic association (1999)	EC and its Member States on the one hand and the Republic of Chile on the other	No provision for termination.	**Art. 39:** For the purposes of this Agreement, 'the Parties' shall mean the Community, its Member States or the Community and its Member States, within their respective areas of responsibility, as defined in the Treaty establishing the European Community, on the one hand, and the Republic of Chile, on the other.
Association Agreement (1998)	EC and its Member States on the one hand and	**Art. 93:** This Agreement shall be concluded for an unlimited	**Art. 92:** For the purposes of this Agreement, 'Parties` shall mean,

	the Republic of Tunisia on the other	period. Either Party may denounce this Agreement by notifying the other Party. The Agreement shall cease to apply six months after the date of such notification.	on the one hand, the Community or the Member States, or the Community and its Member States, in accordance with their respective powers, and, on the other hand, Tunisia.
Economic Partnership Agreement (2008)	EC and its Member States on the one hand and the CARIFORUM States on the other	**Art. 244(2):** Either Party or Signatory CARIFORUM State may give written notice to the others of its intention to denounce this Agreement.	**Art. 233:** Contracting Parties of this Agreement are Antigua and Barbuda, the Commonwealth of The Bahamas, Barbados, Belize, the Commonwealth of Dominica, the Dominican Republic, Grenada, the Republic of Guyana, the Republic of Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Republic of Suriname, and the Republic of Trinidad and Tobago, herein referred to as the 'CARIFORUM States', on the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, herein referred to as the 'EC Party', on the other part .
Agreement on Air Transport	EC and its Member States on the	**Art. 24:** A Party may at any time give	**Art. 1(2)(e):** 'Party' means either Canada or

(2010)	one hand and Canada on the other	notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be communicated simultaneously to the International Civil Aviation Organisation and the United Nations Secretariat. The Agreement shall terminate one (1) year after the date of receipt of the notice by the other Party, unless the notice to terminate is withdrawn by mutual consent before the expiry of this period. In the absence of an acknowledgement of receipt by the other Party, the notice shall be deemed to have been received fourteen (14) days after the receipt of the notice by the International Civil Aviation Organisation and the United Nations Secretariat.	the Member States and the European Community taken together or individually.

Note: This data has been collected and compiled from the Agreements Database of the Council of the European Union, <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?lang=en>

ANNEXURE B

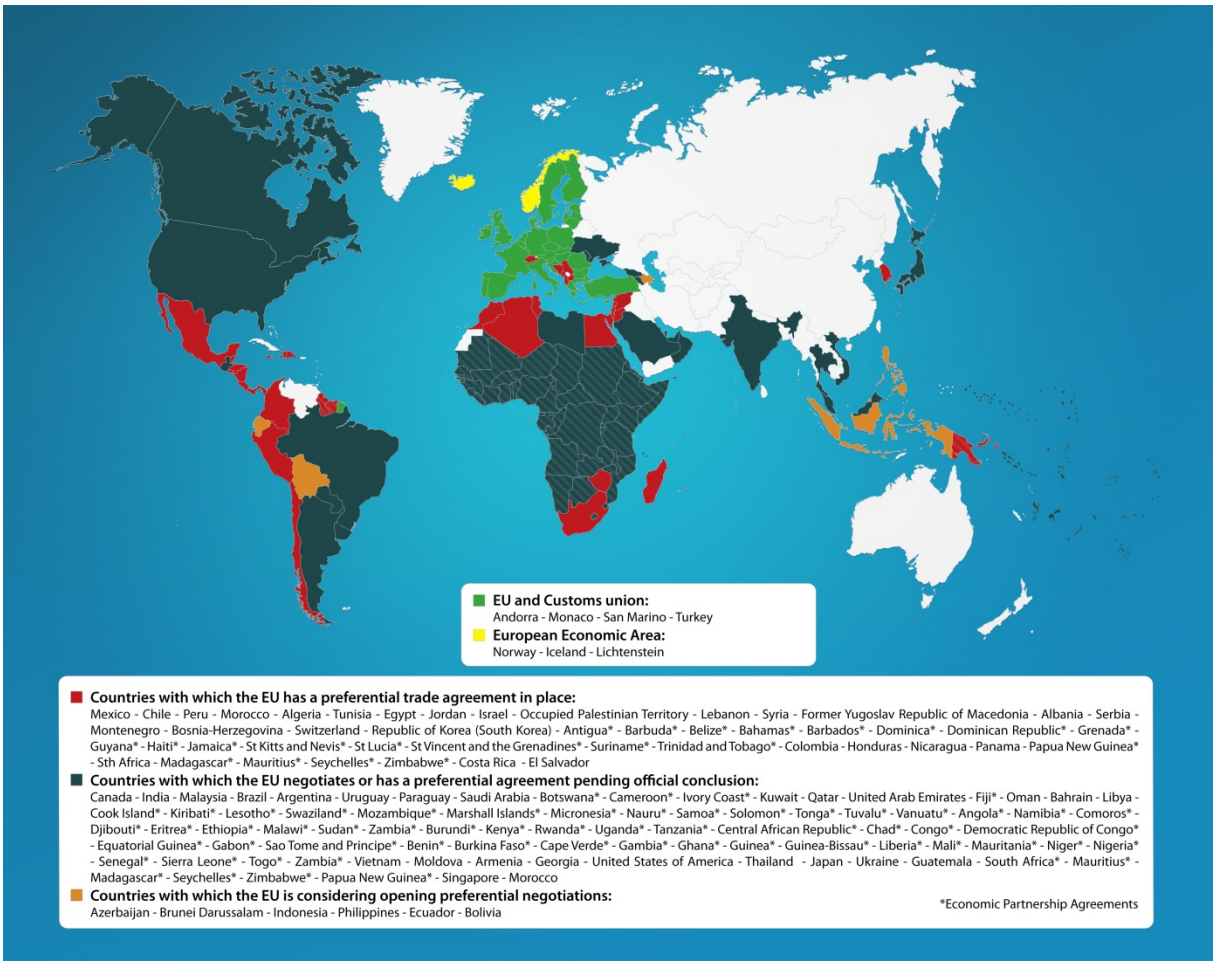
Agreement	Type	Notification under Article XXIV of the GATT	Notification under Article V of the GATS
EU-Albania	FTA & EIA	x	x
EU-Algeria	FTA	x	
EU-Andorra	CU	x	
EU-Bosnia Herzegovina	FTA	x	
EU-Cameroon	FTA	x	
EU-CARIFORUM States EPA	FTA & EIA	x	x
EU-Central America	FTA & EIA	x	x
EU-Chile	FTA & EIA	x	x
EU-Colombia and Peru	FTA & EIA	x	x
EU-Côte d'Ivoire	FTA	x	
EU-Eastern and Southern African States Interim EPA	FTA	x	
EU-Egypt	FTA	x	
EU-Faroe Islands	FTA	x	
EU-Former Yugoslav Republic of Macedonia	FTA & EIA	x	x
EU-Iceland	FTA	x	
EU-Israel	FTA	x	
EU-Jordan	FTA	x	

EU-Republic of Korea	FTA & EIA	x	x
EU-Lebanon	FTA	x	
EU-Mexico	FTA & EIA	x	x
EU-Montenegro	FTA & EIA	x	x
EU-Morocco	FTA	x	
EU-Norway	FTA	x	
EU-OCT	FTA	x	
EU-Palestinian Authority	FTA	x	
EU-Papua New Guinea/Fiji	FTA	x	
EU-San Marino	CU	x	
EU-Serbia	FTA	x	
EU-South Africa	FTA	x	
EU-Switzerland and Liechtenstein	FTA	x	
EU-Syria	FTA	x	
EU-Tunisia	FTA	x	
EU-Turkey	CU	x	

Note: Trade agreements ratified under Article XXIV of the GATT and/or Article V of the GATS.[200]

[200] World Trade Organization, "RTA database" (*List of all RTAs*) <http://rtais.wto.org/UI/PublicAll-RTAList.aspx> accessed 19 October 2013.

ANNEXURE C



Note: The EU's network of trade agreements in force and under negotiation.[201]

[201] Chart available at: European Commission, "EU trade relations world wide – a map" <http://ec.europa.eu/-trade/policy/countries-and-regions/agreements/> accessed 19 October 2013.

ANNEXURE D

Agricultural products	
Product groups	**Applied average MFN tariff rate (in per cent)**
Animal products	20.4
Dairy products	52.9
Fruit, vegetables, plants	10.7
Coffee, tea	6.2
Cereals and preparations	17.1
Oilseeds, fats, and oils	5.6
Sugars and confectionery	32.1
Beverages and tobacco	19.9
Cotton	0.0
Other agricultural products	4.3
Non-agricultural products	
Product groups	**Applied average MFN tariff rate (in per cent)**
Fish and fish products	11.8
Minerals and metals	2.0
Petroleum	2.8
Chemicals	4.6
Wood, paper, etc.	1.0

Textiles	6.6
Clothing	11.5
Leather, footwear, etc.	4.2
Non-electrical machinery	1.9
Electrical machinery	2.8
Transport equipment	4.3
Manufactures (if not elsewhere specified)	2.7

Note: Applied average MFN tariff rates as applied by the EU in 2012.[202]

[202] World Trade Organization, International Trade Center, United Nations Conference on Trade and Development (n 187).