

Imitation as Flattery: The UK's Trade Continuity Agreements and the EU's Normative Foreign Policy

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Abstract

This article analyses the United Kingdom's (UK) 'trade continuity programme'. The promise that, once outside the European Union (EU), the UK would strike new, lucrative trade deals continues to be an important part of the Brexiteers' narrative. What the UK was compelled to do first, however, was to conclude 'roll-over' agreements to replace the trade agreements already made by the EU. This article posits that, contrary to expectations, the UK's continuity programme should be regarded as a success – for both the UK and the EU. In most cases, the UK managed to replicate to a very large extent the terms originally granted to the EU, despite being a smaller market and despite challenging circumstances. From the EU's perspective, the UK's continuity programme can be regarded as a case of successful norm internalization and export. This first chapter of post-Brexit UK trade policy shows that even a country that has left the EU still legally commits itself and its partners to the EU's norms and values. Hence, the EU should welcome the UK's imitation as a shared normative basis to expand cooperation with its former member state in a challenging geopolitical environment.

1 Introduction: Accession Conditionality Turned Upside Down

There has been no shortage of writing over the past years about the United Kingdom's (UK) withdrawal from the European Union (EU), better known as 'Brexit', including from a legal perspective.¹ After the UK having been part of the EU's supranational

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¹ Indicative of this is that even dedicated book series have emerged on Brexit, such as 'The Law and Politics of Brexit' by Oxford University Press and 'Legal Perspectives on Brexit' by Routledge.

legal order for 47 years, EU–UK relations once again rest on the foundations of public international law. In addition to this re-internationalization of EU–UK relations through a set of bilateral agreements,² Brexit has also produced a ripple effect in global treaty relations.³ As pointed out by the *Financial Times* already in 2017, hundreds of international agreements concluded by the EU with partners around the world would no longer apply to the UK.⁴ These included the EU’s several dozen external trade agreements.

The prospect of ‘falling out’ of these agreements and reverting to less advantageous ‘World Trade Organization (WTO) terms’ with a range of trading partners stood in sharp contrast to the promises of Brexiteers that the UK, once freed from the ‘imperial yoke’⁵ of EU membership, would become a champion of free trade, initially under the banner of ‘Global Britain’. Hence, even while still an EU member state, the UK embarked on a ‘trade continuity programme’ to ensure that replacements would be ready in time before the agreements concluded by the EU ceased to apply to the UK. Therefore, in the present context, ‘rolling over’ agreements came to mean concluding new agreements to replicate pre-existing terms, rather than seeking ways to automatically extend the existing agreements. The programme covered both agreements focused on trade and broader ones with a strong economic dimension such as the EU’s association agreements.

This article presents an assessment of this programme, which, thus far, has only received limited attention by scholars,⁶ despite the salience of trade policy in Brexit discourses. This lack of attention could be explained by the fact that the withdrawal and subsequently future relations negotiations between the EU and UK had still been

² Two of these agreements are most notable. Firstly, the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement), OJ 2020 L 29/7. The Withdrawal Agreement includes the Protocol on Ireland/Northern Ireland (Protocol on Ireland/Northern Ireland). Secondly, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part (TCA), OJ 2021 L 149/10.

³ As predicted by Łazowski and Wessel, ‘The External Dimension of Withdrawal from the European Union’, 4 *Revue des Affaires européennes* (2016) 623; see also Santos Vara, Wessel and Polak, ‘The Implications of Brexit for EU and UK External Relations: An Introduction’, in J. Santos Vara and R.A. Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (2021) 1.

⁴ P. McClean, ‘After Brexit: The UK Will Need to Renegotiate at Least 759 Treaties’, *Financial Times* (30 May 2017), available at www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e.

⁵ Jacob Rees-Mogg, member of parliament, cited in UK House of Commons, ‘Business of the House’, *Hansard*, 66:490 (2019), column 490, available at <https://hansard.parliament.uk/Commons/2019-10-17/debates/C7D5E220-3549-4DF1-AF9E-07079573464C/BusinessOfTheHouse>.

⁶ Egan and Webber, ‘Brexit and “Global Britain”’: Role Adaptation and Contestation in Trade Policy’, *International Politics* (2023) (advanced access); Koutrakos, ‘Three Narratives on the United Kingdom’s Trade Agreements Post-Brexit’, in A. Łazowski and A. Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (2022) 403; Łazowski, ‘Copy-pasting or Negotiating? Post-Brexit Trade Agreements between the UK and non-EU Countries’, in J. Santos Vara and R.A. Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (2021) 117; Castellarin, ‘Le sort des accords internationaux de l’Union européenne après le retrait du Royaume-Uni’, 28 *Europe: actualité du droit Communautaire* (2018) 28; Larik, ‘Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations’, 113 *American Journal of International Law* (2020) 443.

ongoing until late 2020 and that the continuity programme was still in its early stages during much of this period. Now, the legal framework of 'post-Brexit law'⁷ between the EU and UK is firmly in place. The UK has been fully outside of the EU for several years, with the transition period having ended on 31 December 2020. Meanwhile, the UK government boasted, in September 2021, to have 'struck deals so far covering 68 countries plus the EU'.⁸ During the next two years, no further continuity agreements were signed. Hence, with the UK's trade continuity programme virtually concluded, and with the UK having moved on to signing new trade agreements, the topic is ripe for a legal and normative assessment.

As noted by Panos Koutrakos, 'it became apparent quite early on that rolling over the existing trade agreements would be neither automatic nor easy',⁹ while the chair of the International Trade Committee of the House of Commons lamented in March 2019 that '[h]opes of a new, post-Brexit era of international trade appear increasingly forlorn, thanks to the Government's slapdash approach to rolling over the free trade agreements the UK currently benefits from as a member of the EU'.¹⁰ Against such a sceptical backdrop, this article argues that the UK's trade continuity programme can be regarded as a success – for both the UK and the EU. As for the UK, it has managed to replicate terms with most external partners that are, to a very large extent, identical to those offered to the EU, although it is a significantly smaller market and although it was undergoing a particularly challenging period. As for the EU, while having lost the UK as a member state, the result of the continuity programme serves as a legal commitment for the UK to carry on the EU's normative trade policy, by which is meant here the pursuit of non-trade objectives, including the promotion of human rights, sustainable development and multilateral and regional cooperation, through trade agreements. Therefore, if anything, the EU should welcome the UK's manifold acts of imitation as flattery and regard them as signs of a shared normative basis for closer cooperation in an increasingly challenging geopolitical environment.

The designation 'trade continuity programme' notwithstanding, the UK's efforts have gone further than merely ensuring similar levels of market access and other terms of the trading relationship. The analysis presented here demonstrates that the UK ensures continuity in its own post-Brexit treaty relations with core elements of the EU's normative foreign policy agenda through trade. This is even more remarkable in light of the fact that leading UK politicians have played with the idea of withdrawing from the European Convention on Human Rights (or at least curbing its influence in the UK) and openly advertised breaches of the country's international

⁷ Larik and Wessel, 'The EU-UK Trade and Cooperation Agreement: Forging Partnership or Managing Rivalry?', in A. Łazowski and A. Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (2022) 122, at 125.

⁸ 'Policy Exchange Speech: Liz Truss Sets Out Britain's New Trade Policy', *UK Department for International Trade* (14 September 2021), available at www.gov.uk/government/speeches/policy-exchange-speech-liz-truss-sets-out-britains-new-trade-policy.

⁹ Koutrakos, *supra* note 6, at 412.

¹⁰ International Trade Committee, 'Lack of Progress Leaves Roll Over of EU trade agreements at "code red"', *UK House of Commons*, 15 March 2019, available at <https://committees.parliament.uk/committee/367/international-trade-committee/news/104332/eu-trade-agreements-chairs-letter-17-19/>.

legal obligations in the context of Northern Ireland.¹¹ Brexit itself – especially seeing the rather ‘hard’ way in which it materialized – can be seen as a repudiation of regional integration as such.

The way in which the global legal repercussions of the withdrawal from the EU were handled by the UK in the area of trade, reconceived as norm export by the EU and norm internalization by the UK, turn the original premise of ‘enlargement conditionality’ on its head:¹² countries wishing to become EU members have to accept the Union’s rules and values, which has long been heralded as one of the biggest success stories of EU external action.¹³ However, post-Brexit UK trade policy shows that, even in a situation of withdrawal, the EU imparted its norms and values onto a ‘newly third’ country, which is now committing itself and other external partners to them. That the UK continues to uphold and promote these norms internationally must be seen of course in light of the UK’s decades of EU membership, in which it also actively shaped EU trade policy and external action more broadly. Nevertheless, given the emphasis on Brexit as an opportunity to turn the UK into a ‘supercharged champion’ of free trade,¹⁴ it remains significant that the broad normative outlook was retained.

To develop this argument, section 2 of this article provides the background and context of the *status quo ante* Brexit regarding trade agreements with third countries, the legal need and progression of the continuity programme and the state of play three years after the UK’s departure from the EU. Section 3 analyses the continuity programme in terms of the formats it used, in terms of the relevant similarities and differences between the agreements concluded by the EU and those ‘rolled over’ by the UK and, lastly and most importantly, in terms of their normative elements. Section 4 provides a conclusion and an outlook to the future.

Before elaborating on these points, however, two disclaimers seem appropriate. First, in putting forward an argument that does not lambast UK post-Brexit policies and law-making, this article is in no way intended to pass judgement on the merits and demerits of the UK’s decision to leave the EU as such, which would need to take into account many additional factors, including but not limited to disentangling the economic consequences of Brexit from those of the COVID-19 pandemic and tracking the shift in trade volumes and patterns over time. In presenting its argument, the article accepts Brexit as a historical, political and legal fact and takes on the slew of new

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222. See, e.g., A. Forrest, ‘Suella Braverman Sparks New Government Row after Calling for UK to Quit ECHR’, *The Independent* (5 October 2022), available at www.independent.co.uk/news/uk/politics/suella-braverman-european-convention-human-rights-b2195809.html; ‘Northern Ireland Secretary Admits New Bill Will “Break International Law”’, *BBC News* (8 September 2020), available at www.bbc.com/news/uk-politics-54073836.

¹² E. Gateva, *EU Enlargement Conditionality* (2015).

¹³ Schimmelfennig and Sedelmeier, ‘The Europeanization of Eastern Europe: The External Incentives Model Revisited’, 27 *Journal of European Public Policy* (JEPP) (2020) 814, at 814–815 (where they also note that rule-of-law crises in several member states cast doubts on the sustainability of this success).

¹⁴ ‘PM Speech in Greenwich’, UK Prime Minister’s Office (3 February 2020), available at www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020.

international legal instruments it has engendered, including those outside of the EU–UK bilateral context, as research materials worthy of academic attention.

Second, the argument presented here should in no way be regarded as a validation of the various promises made by Brexiteers about ‘Global Britain’. This certainly includes any suggestion that trade agreements with smaller and more remote countries in an alleged ‘post-geographic trading world’¹⁵ could really compensate economically for the loss of market access to the EU, which remains the UK’s most important trading partner. It bears stressing that this article is focused on the continuity agreements, which are quintessentially aimed at maintaining, rather than enhancing, trading terms.

When this article speaks of ‘success’, it employs its own, more modest, standard. It is premised on consistency between how we evaluate the EU and the UK, now as a third country, in regard to their respective legal relations with the rest of the world. Essentially, if something is accepted as a success for the EU, it would only seem fair that replication of that same result by the UK should also be regarded as a success. Similarly, if international legal commitments in support of a particular value or cause (such as human rights or sustainable development) is seen as *a priori* praiseworthy when the EU takes them on, it should be seen as equally laudable when the UK does so. Conversely, critiques aimed at UK post-Brexit trade policy should also apply to the EU to the extent that both are guilty of the same failure or shortcoming – for instance, when it comes to enforcement and follow-through.

2 The Trade Continuity Programme: Rationale and History

This section explains why the UK felt compelled to launch a ‘trade continuity programme’ in the first place, what it entailed and how it was carried out. The section then moves to the programme’s results three years after the UK’s withdrawal from the EU, concluding that the UK has succeeded in concluding replacements for almost all the EU’s trade agreements with external partners, including the larger economies.

A Why Was a Continuity Programme Needed?

On ‘Brexit Day’ – that is, when the Withdrawal Agreement entered into force on 1 February 2020 – the EU had about 40 agreements with more than 70 countries.¹⁶ Not only was the UK bound by these agreements, it also benefited from the trading relationships established by them with third countries. While still a member of the

¹⁵ UK Department for International Trade, ‘Speech Delivered by International Trade Secretary Liam Fox at the Manchester Town Hall’, *UK Prime Minister’s Office* (29 September 2016), available at www.gov.uk/government/speeches/liam-foxs-free-trade-speech.

¹⁶ Withdrawal Agreement, *supra* note 2. For an authoritative list, see ‘Negotiations and Agreements’, *European Commission*, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en. The approximate numbers are due to the different ways in which these agreements could be counted. Several of these agreements are with groups of third countries, such as the CARIFORUM states. Moreover, the EU has agreements with Kosovo and the Palestinian Authority, which are not universally recognized as (representing) states.

EU, the UK took part in the Common Commercial Policy (CCP). This is an exclusive EU competence,¹⁷ meaning that ‘only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union’.¹⁸ This exclusive power applies to the conclusion of international trade agreements. However, because certain trade agreements go beyond the scope of what is covered by the CCP, these agreements are often concluded as ‘mixed agreements’ – that is, they include the member states as parties alongside the Union. This is more of a political choice than a legal necessity. In other words, mixity is ‘facultative’ and thus depends on what the Council of the EU will decide,¹⁹ as clarified by the Court of Justice of the European Union (CJEU).²⁰ Regardless of whether they were mixed or non-mixed (also known as ‘EU only’), the EU’s trade agreements applied to the UK.²¹

Due to the exclusive nature of the CCP, EU member states have relinquished their power to conduct autonomous trade policies. Trade agreements are negotiated by the European Commission. Nevertheless, member states retain control both through the Council of the EU and, in the case of mixed agreements, through their national ratification procedures.²² The lack of such autonomy has become one of the talking points of the campaign to leave the EU and, later, in the discourse for negotiating the UK’s future relationship with the EU. From the different assessments of its relative importance in scholarship, the common denominator seems to be that, while not as important as migration, trade policy autonomy assumes a central position in the Brexiteer’s vision for the UK.

According to Tim Oliver, ‘Vote Leave initially focused on the economic and sovereignty arguments, not least the ability of a non-EU UK to negotiate its own trade deals’, before migration took over as the predominant issue.²³ Gabriel Siles-Brügge notes that, while the issue of an autonomous UK trade policy was not pivotal to the referendum vote, it ‘has been central to the post-Brexit vision of leading actors

¹⁷ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47, Art. 3, para. 1.

¹⁸ *Ibid.*, Art. 2, para. 1.

¹⁹ Chamon and Govaere, ‘Introduction: Facultative Mixity, More Than Just a Childhood Disease of EU Law?’, in M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (2020) 1.

²⁰ Case C-600/14, *Germany v. Council (Convention Concerning International Carriage by Rail (COTIF))* (EU:C:2017:935), para. 68.

²¹ TFEU, *supra* note 17, Art. 216(2). According to the Court of Justice of the European Union (CJEU), mixed agreements have the same status in EU law as EU-only agreements. Case C-239/03, *Commission v. France (Étang de Berre)* (EU:C:2004:598), para. 25.

²² Mixed agreements can only enter into force once they are ratified by the European Union (EU) and all its member states. On the prominent role of the Council in the EU’s general treaty-making procedure, see TFEU, *supra* note 17, Art. 218, and, specifically for agreements under the CCP, see TFEU, *supra* note 17, Art. 207. Art. 207, para. 4, sub-para. 3 of the TFEU notes that unanimity in the Council is required for agreements covering sensitive issues such as cultural, audio-visual or health services, ‘where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them’.

²³ T. Oliver, *Understanding Brexit: A Concise Introduction* (2018), at 67.

behind the official “Vote Leave” campaign’.²⁴ For Joseph Weiler, this ability was something that Brexiteers ‘crowd about endlessly’,²⁵ while, in the assessment of Peter Holmes and Jim Rollo, it had ‘become the most advertised “gain” from Brexit’.²⁶ According to Koutrakos, Brexit ‘brought trade agreements to the centre of public discourse’.²⁷

Trade and migration are both embedded in the wider pro-Brexit narrative of ‘taking back control’. However, while the pledge to restrict migration can be more easily criticized for being xenophobic and isolationist, the promise of a ‘Global Britain’ added a more open and cosmopolitan component to the Brexiteers’ narrative. Moreover, it allowed Brexiteers to depict the EU as an economically stagnating, ‘protectionist and over-regulated entity that prevents Britain from embracing its historical free trade vocation’.²⁸ This sentiment is well captured in the following quote by senior Conservative politician Jacob Rees-Mogg: ‘We will be able to implement our own free trade deals. We will be able to set our own regulations. ... it will be a golden age for the United Kingdom when we are free of the heavy yoke of the European Union, which has bowed us down for generations and made us less competitive, less efficient and higher-cost.’²⁹

The debate about trade policy in the context of Brexit is essentially about different assessments of a trade-off between autonomy and collective leverage, reflecting two opposing narratives. For Brexiteers (and Eurosceptics more generally), even though the EU has managed to conclude a range of trade agreements, the UK (and maybe also other member states) would fare even better going it alone. It would be more agile and able to tailor trade agreements to its national interests rather than having to wait for the sluggish EU that must fashion common strategies by reconciling the various different interests of its member states. This could be described as the ‘Global Britain’³⁰ or ‘Britain Alone’ narrative in trade policy. For the Remainers (and those favouring European integration more generally), even though member states have lost their ability to conduct an autonomous trade policy by having conferred this power to the EU, they still fare better overall. This is so because, by acting collectively, leveraging the EU’s sizeable economic weight, they can obtain better terms

²⁴ Siles-Brügge, ‘Bound by Gravity or Living in a “Post Geography Trading World”? Expert Knowledge and Affective Spatial Imaginaries in the Construction of the UK’s Post-Brexit Trade Policy’, 24 *New Political Economy* (2019) 422, at 422.

²⁵ Weiler, ‘Editorial: Brexit, the Irish Protocol and the “Versailles Effect”’, 32 *European Journal of International Law* (2021) 733, at 738.

²⁶ Holmes and Rollo, ‘EU-UK Post-Brexit Trade Relations: Prosperity versus Sovereignty?’, 25 *European Foreign Affairs Review (EFAR)* (2020) 523, at 524.

²⁷ Koutrakos, *supra* note 6, at 403.

²⁸ Siles-Brügge, *supra* note 24, at 422. Similarly, see Koutrakos, ‘Managing Brexit: Trade Agreements Bidding on the UK Pursuant to Its EU Membership’, in J. Santos Vara and R.A. Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (2021) 75, at 75–76.

²⁹ As cited in UK House of Commons, *supra* note 5, column 490.

³⁰ Larik, ‘Brexit and the “Great British Trade-Off”: The Future of the EU’s and the UK’s External Treaty Relations’, in W.T. Douma *et al.* (eds), *The Evolving Nature of EU External Relations Law* (2021) 277, at 280–282.

and concessions from the external trading partners and also use ‘trade as a key foreign policy instrument of global influence’.³¹ This can be called the ‘Market Power Europe’ narrative.³²

Following the June 2016 referendum, the UK government, in addition to setting out its objectives in the withdrawal negotiations, started to outline what it wanted to achieve globally. Striking lucrative trade deals around the world was (and still is) a centrepiece of this agenda. However, there was an inverse relationship between the closeness of post-Brexit EU–UK relations and the UK’s autonomy to pursue its ‘Global Britain’ vision. Specifically, remaining in a customs union with the EU or maintaining close regulatory alignment with the EU would have constrained the UK’s trade policy. In such a ‘Turkey’ and ‘Norway’ scenario, respectively, the UK would not have been able to set its own tariffs (and, thus, the possibility of offering tariff-free access to external trade partners) or set its own regulations (including relaxing regulatory standards to accommodate external trade partners).

Hence, in a set of ‘red lines’, the UK government insisted on leaving the EU’s internal market and customs union, while proposals for closer alignment with the EU were rejected. Prime Minister Theresa May had already announced this in her Lancaster House speech of January 2017.³³ Later on, the UK Parliament rejected the version of the Withdrawal Agreement negotiated by May that would have temporarily kept the UK in a joint customs territory with the EU, with a view to solving the intractable question about Northern Ireland’s status. The concern that ‘the UK could find itself trapped in this arrangement for years, leaving it unable to pursue its own independent trade policy’, was one of the main reasons for rejecting it.³⁴

The Withdrawal Agreement concluded under the subsequent Johnson government instead included the arrangement where Northern Ireland is situated both in the UK’s ‘customs territory’³⁵ and the EU’s single market for goods.³⁶ The UK would become free to conclude its own trade agreements with other countries, which in principle could also cover Northern Ireland, ‘provided that those agreements do not prejudice the application of the Protocol on Ireland/Northern Ireland.’³⁷ The Withdrawal Agreement explicitly acknowledged the UK’s recovered autonomy in trade. According to its Article 129, already during the transition period when EU law was still largely applicable to the UK, the UK was allowed to ‘negotiate, sign and

³¹ Egan and Webber, *supra* note 6, at 4.

³² Larik, *supra* note 30, at 282–284, drawing on Damro, ‘Market Power Europe’, 19 *JEPP* (2012) 682.

³³ ‘The Government’s Negotiating Objectives for Exiting the EU: PM Speech’, *UK Prime Minister’s Office* (17 January 2017), available at www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

³⁴ T. Edgington, ‘Brexit: What Deal Did MPs Reject?’, *BBC News* (29 March 2019), available at www.bbc.com/news/uk-politics-47745831.

³⁵ Withdrawal Agreement, *supra* note 2, Protocol on Ireland/Northern Ireland, Art. 4, para. 1.

³⁶ *Ibid.*, Arts 5, 7–10 (in regard to which ‘the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law’, including the jurisdiction of the CJEU (Art. 12, para. 4). See further Moran, ‘Customs and Movement of Goods’, in F. Fabbrini (ed.), *The Law and Politics of Brexit*, volume 4: *The Protocol on Ireland/Northern Ireland* (2022) 145.

³⁷ Withdrawal Agreement, *supra* note 2, Protocol on Ireland/Northern Ireland, Art. 4, para. 2.

ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union'.³⁸ In doing so, the UK had to refrain from acting in a way that would be detrimental to the EU's interests.³⁹

The price the UK would pay for this regained freedom was that the trade agreements concluded by the EU with external partners would no longer apply to it. Thus, as one of the first steps of 'Global Britain' on the international stage, it needed to ensure that it would not lose out on the benefits of those trade agreements that it had been enjoying as an EU member state, which ushered in the need for the continuity programme. That none of the EU's trade agreements would continue to apply to the UK post transition was not a legal given. For EU-only agreements, the situation was clear as the UK had never been a party in its own name to them. Many EU trade agreements, however, are concluded as mixed agreements, for which the situation was less clear.⁴⁰ On the one hand, Giorgio Sacerdoti and Ramses Wessel have argued that the UK would automatically fall out of bilateral mixed agreements (that is, the EU and its member states plus one external partner or regional group) as participation in them was inextricably linked to EU membership.⁴¹ On the other, seeing that the UK was a party in its own name to mixed agreements, Eleftheria Neframi and Nicolas Levrat and Yuliya Kaspiarovich argued that, under the law of treaties, as codified by the Vienna Convention on the Law of Treaties,⁴² the UK should have officially terminated these mixed agreements.⁴³ Such termination has not happened. Instead, in practice, like EU-only agreements, mixed agreements were being rolled over by the UK with various third countries such as Canada, Ukraine and South Korea without formal denunciation. It thus appears that all parties involved assumed that these agreements would no longer apply to the UK post Brexit.

³⁸ Withdrawal Agreement, *supra* note 2, Art. 129, para. 4.

³⁹ *Ibid.*, Art. 129, para. 3.

⁴⁰ Silvereke, 'Withdrawal from the EU and Bilateral Free Trade Agreements: Being Divorced Is Worse?', 15 *International Organizations Law Review* (2018) 321, at 340.

⁴¹ Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World: Options and Constraints Post-Brexit', in F. Fabbrini (ed.) *The Law and Politics of Brexit* (2017) 71, at 82; Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States', 55 *Common Market Law Review* (2018) 101, at 120.

⁴² The United Kingdom (UK) is a party to the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. The EU, by contrast, is not a party but is bound by its principles as a matter of customary international law. The situation for multilateral mixed agreements is different, as evidenced by the UK's continued member status at, for instance, the World Trade Organization. UK Government, 'The United Kingdom's Withdrawal from the European Union: Communication from the United Kingdom' (1 February 2020), part 1.1, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862657/200131_GC_statement_pdf.pdf.

⁴³ Neframi, 'Brexit et les accords mixtes de l'Union Européenne', 62 *Annuaire français de droit international* (2018) 360, at 369; Levrat and Kaspiarovich, 'European Union Mixed Agreements in International Law under the Stress of Brexit', 13 *European Journal of Legal Studies* (2021) 121, at 141.

B A Short History of the Trade Continuity Programme

The history of the continuity programme can be divided into three periods: before, during and after the transition period established by the Withdrawal Agreement, which ran from February to December 2020 (see Figure 1).

The UK’s continuity programme had already started before the entry into force of the Withdrawal Agreement on 1 February 2020, which authorized the UK to commence negotiations to replicate EU trade agreements with external partners. In addition to the ‘preliminary discussions’ that the UK government had been having with external partners about new agreements,⁴⁴ it also negotiated and signed 18 continuity agreements while still being an EU member state. However, none of these agreements entered into force until the end of the transition period. This raised questions as to whether the UK was breaking its obligations under EU law, specifically the EU’s exclusive competence and the duty of sincere cooperation enshrined in the Treaty on European Union, which is incumbent upon the member states.⁴⁵ In the past, outside of the specific context of Brexit, the CJEU had found that member states had violated EU law obligations by negotiating agreements with third countries without authorization or proper consultation with the European Commission.⁴⁶ This issue is now moot,

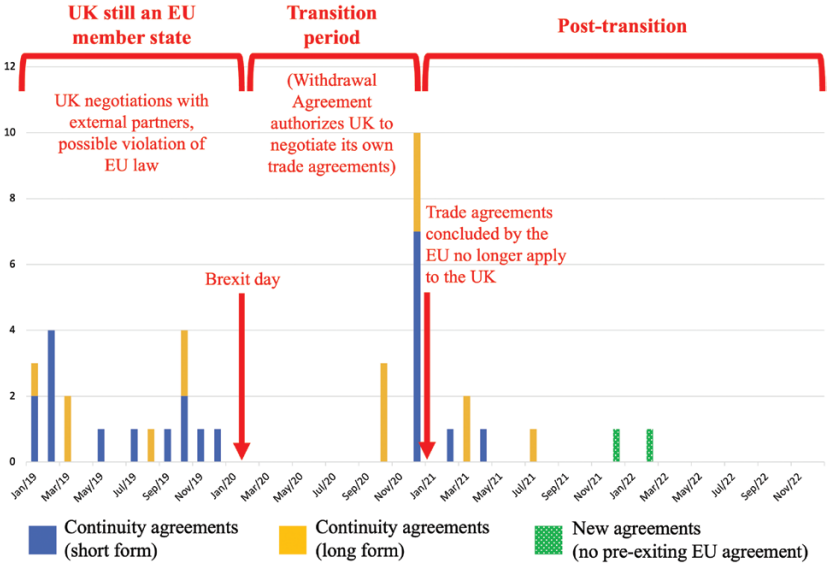


Figure 1: Signings of UK trade agreements by month
Source: Prepared by author, based on information provided on gov.uk.

⁴⁴ ‘Theresa May: UK Will Lead World in Free Trade’, BBC News (7 September 2016), available at www.bbc.com/news/uk-politics-37291832.

⁴⁵ Koutrakos, *supra* note 28, at 81–83; Larik, *supra* note 6, at 454; Treaty on European Union (TEU), OJ 2010 C 83/13, Art. 4, para. 3.

⁴⁶ Case C-433/03, *Commission v. Germany (Inland Waterways)* (EU:C:2005:462); Case C-266/03, *Commission v. Luxembourg (Inland Waterways)* (EU:C:2005:341).

however, as the European Commission refrained from starting infringement proceedings against the UK on this matter.

The first continuity agreement signed by the UK on 30 January 2019 was the Agreement Establishing an Association between the UK and Chile.⁴⁷ Remarkably, it retained the term 'association' despite this being a rather EU-specific format, which is seen as 'one of the most important and traditional tools of the EU's external policy'.⁴⁸ In the context of a bilateral agreement between two countries, it is unclear which one is associating itself with the other. Other early continuity agreements were the ones with Denmark in respect of the Faroe Islands⁴⁹ and with Pacific states such as Fiji and Papua New Guinea.⁵⁰ Seeing these countries' rather minuscule economic importance to the UK,⁵¹ the agreements were met with ridicule in the media, with opposition politicians in the UK considering them a 'pathetic return on [trade secretary Liam] Fox's promise of easy trade deals'.⁵² The first continuity agreement with one of the UK's top 10 trading partners was the one with Switzerland, signed in February 2019.⁵³ The agreement is peculiar in that it incorporates several of the bilateral agreements between the EU and Switzerland.⁵⁴ Another economically important agreement signed during this first period was that with South Korea.⁵⁵

Between the start of the transition period in February 2020 until October 2020, there was a lull in signing activity, though negotiations continued behind the scenes. As noted above, the Withdrawal Agreement authorized the UK to negotiate and sign international agreements in areas of EU exclusive competence, including trade agreements, as long as these would not enter into force until after the transition period ended. It also sought to ensure the continued application of the EU's agreements to the UK during this period. According to Article 129 of the Withdrawal Agreement,

⁴⁷ Agreement Establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Chile (UK–Chile Agreement), signed in Santiago, 30 January 2019.

⁴⁸ Van Elsuwege and Chamon, *The Meaning of 'Association' under EU Law: A Study on the Law and Practice of EU Association Agreements*, Study for the AFCO Committee, February 2019, at 9. The TEU, *supra* note 45, provides in Art. 217 for the EU to conclude agreements 'establishing an association involving reciprocal rights and obligations, common action and special procedure'.

⁴⁹ Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark in Respect of the Faroe Islands, signed in London, 31 January 2019.

⁵⁰ Interim Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the One Part, and the Pacific States, of the Other Part, signed in London, 14 March 2019.

⁵¹ The total UK–Faroe Island trade in 2021 is estimated at £1,091 million. UK Government, 'UK Trade Agreements in Effect', available at www.gov.uk/guidance/uk-trade-agreements-in-effect#trade-agreements-from-1-january-2021.

⁵² R. Partington, 'UK Signs Post-Brexit Trade Deal with Fiji and Papua New Guinea', *The Guardian* (14 March 2019), available at www.theguardian.com/business/2019/mar/14/uk-signs-post-brexit-trade-deal-with-fiji-and-papua-new-guinea.

⁵³ Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation, signed in Bern, 11 February 2019.

⁵⁴ *Ibid.*, Art. 1(1). The wider Swiss–UK economic relationship, furthermore, needs to account for Switzerland's commitments to align some of its regulations with the EU's. See Koutrakos, *supra* note 6, at 416.

⁵⁵ Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Korea (with Exchange of Notes) (UK–South Korea Agreement), signed in London, 22 August 2019.

the UK would remain ‘bound by the obligations stemming from the international agreements concluded by the Union ... or by the Union and its Member States acting jointly’ during the transition.⁵⁶ Moreover, the Withdrawal Agreement provided that, ‘[i]n accordance with the principle of sincere cooperation, the United Kingdom shall refrain, during the transition period, from any action or initiative which is likely to be prejudicial to the Union’s interests’.⁵⁷ The extent to which these caveats were heeded by the UK is unknown. In any event, the European Commission did not launch any legal complaints against the UK on these matters during this period either.

However, as regards the time-limited continued application of the EU’s external agreements to the UK beyond its withdrawal from the EU, it was plausible that the external partners’ consent would be required. This is particularly the case for ‘EU-only’ agreements that did not include the UK as a party in its own name. In this vein, the EU vowed in a footnote to Article 129 of the Withdrawal Agreement that it would ‘notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements’.⁵⁸ The EU proceeded to do so,⁵⁹ with apparently external countries acquiescing to this situation. The lull ended with the signature of the Political, Free Trade and Strategic Partnership Agreement between the UK and Ukraine in early October 2020.⁶⁰ Later that month, the UK signed another continuity agreement, this time with the economic heavyweight Japan, which even included expanded rules in the digital sphere compared to the original EU agreement, such as a ban on data localization.⁶¹

In December 2020, a ‘big bang’ of continuity treaty signings occurred, just in time for the end of the transition period and, thus, the possibility of discontinuity in the trading relations with countries with which EU agreements had not yet been rolled over. During this month, the UK signed 10 continuity agreements, including with economically significant partners such as Norway (together with Iceland and only covering goods at this stage), Canada, Singapore and Turkey.⁶² As a result, at the time the transition period ended and the EU’s external agreements ceased to apply to the

⁵⁶ Withdrawal Agreement, *supra* note 2, Art. 129(1).

⁵⁷ *Ibid.*, Art. 129(3).

⁵⁸ *Ibid.*, Art. 129(1), n. 1.

⁵⁹ Cover letter and Note Verbale on the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Doc. COM(2018) 841 final, 5 December 2018; Koutrakos, *supra* note 28, at 79–80.

⁶⁰ Political, Free Trade and Strategic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and Ukraine (UK–Ukraine Agreement), signed in London, 8 October 2020.

⁶¹ Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership, signed in Tokyo, 23 October 2020, Art. 8.85(1).

⁶² Respectively, the Agreement on Trade in Goods between the United Kingdom of Great Britain and Northern Ireland, Iceland and the Kingdom of Norway (UK–Iceland/Norway Agreement), signed in London, 8 December 2020; Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada (UK–Canada Agreement), signed in Ottawa, 9 December 2020; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore (UK–Singapore Agreement), signed in Singapore, 10 December 2020; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Turkey (with Exchange of Letters), signed in Ankara, 29 December 2020.

UK, the latter had rolled over 32 trade agreements. Also in December 2020, the UK signed the Trade and Cooperation Agreement with the EU.⁶³ However, this agreement cannot be considered a continuity agreement by any stretch of the imagination. The TCA in no way replicates the EU Treaties and instead signifies the fundamentally different relationship between the EU and UK post Brexit, which also ended the UK's position as a gateway to the EU's internal market for external partners. As the transition ended, both the TCA and most continuity agreements entered into force or were at least being provisionally applied pending full entry into force.

After the end of the transition period, the continuity programme continued as a few agreements remained that had not yet been rolled over. During the first four months of 2021, the UK signed four more continuity agreements with Albania, Cameroon, Ghana and Serbia, none of which can be considered very significant trading partners for the UK. An expanded agreement with Norway, Iceland and Liechtenstein was signed in July 2021, which in addition to trade in goods also covers issues such as services, investment, climate change and government procurement.⁶⁴ For the rest of 2021 and until the end of 2023, no further continuity agreements were signed. At the time of writing – that is, nearly four years after the UK's withdrawal from the EU – the UK has not yet concluded continuity agreements with Algeria, Bosnia and Herzegovina and Montenegro,⁶⁵ none of which are important trading partners for the UK. Meanwhile, some of the existing continuity agreements are being renegotiated, while others are being complemented with additional agreements, such as on digital trade.⁶⁶

Questions remain regarding efforts to ensure continuity for the hundreds of other bilateral and multilateral agreements, often of a technical nature, that have been concluded by the EU with external partners and that have ceased to apply to the UK. The fate of many of these agreements remains uncertain in regard to replication by the UK. The focus of this article, however, is the near complete body of rolled-over trade agreements, which can now be analysed as a whole.

3 Assessing the Trade Continuity Programme

With most pre-existing EU trade agreements having been 'rolled over' by the UK, it is an opportune moment to provide both a more technical legal and normative assessment of these agreements. This section identifies the two formats used by the UK and then proceeds with the appraisal of the trade continuity programme with an emphasis on the replication of key elements of the EU's normative external action, arguing that it can be seen as a success for both the UK and the EU.

⁶³ TCA, *supra* note 2.

⁶⁴ Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, signed in London, 8 July 2021.

⁶⁵ UK Government, *supra* note 51.

⁶⁶ See, e.g., Digital Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Ukraine, signed in London and Kyiv, 20 March and 5–11 May 2023.

A Two Formatting Approaches and the Extent of the Modifications

The continuity programme is remarkable as a form of practice in international treaty making, with a potential to develop further the international law of treaties in the special circumstances of a state withdrawing from a supranational integration organization with wide-ranging powers in its external relations. The UK employed two distinct modes for drafting the continuity agreements, including the reproduction and modification of the contents of the original EU agreements: ‘long-’ and ‘short-form agreements’. ‘Long-form’ agreements reproduce a modified version of the original agreements concluded by the EU with one or several third countries in its entirety. ‘Short-form agreements’, by contrast, include an incorporation clause. This clause states that the provisions of the original EU agreement ‘are incorporated into and made part of this Agreement, *mutatis mutandis*, subject to the provisions of’ the continuity agreement.⁶⁷ In some cases, a set of related agreements is incorporated.⁶⁸ In others, the clarifying proviso is added that, in case of inconsistency between the original and the continuity agreement, the provisions of the latter will prevail.⁶⁹

The short-form agreements also explicitly state which provisions are not being incorporated.⁷⁰ This immediately highlights divergences in UK trade relations with third countries compared to the EU, once the obvious and necessary is separated from the substantive modifications. For long-form agreements, a side-by-side comparison reveals differences between the original and the continuity agreement. The majority of the UK’s continuity agreements are of the ‘short-form’ type, with 22 short-form agreements and 15 long-form agreements at the time of writing. As observed by Adam Łazowski, there seems to be no discernible pattern for choosing one or the other.⁷¹ The UK has been using both throughout the negotiation period of 2019–2021 (see [Figure 1](#)). Long- and short-form agreements have been concluded with both minor and major trading partners.

Some modifications speak for themselves, the most obvious of which is replacing references to the EU with references to the UK. This also concerns specific references such as ‘European Commission’ being replaced with ‘UK Customs Authority’⁷² and replacing EU representatives in joint bodies created by these agreements with those from the UK.⁷³ More specifically, long-form agreements clarify that references to EU legislation in the agreements mean ‘European Union legislation in force as incorporated

⁶⁷ See, e.g., Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo, signed in Pristina, 3 December 2019, Art. 3.

⁶⁸ Agreement Establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Tunisia, signed in London, 4 October 2019, Art. 3 (which refers to the incorporation of both the EU–Tunisia Association Agreement and the EU–Tunisia Dispute Settlement Mechanism Protocol).

⁶⁹ UK–Canada Agreement, *supra* note 62, Art. I(6).

⁷⁰ UK–Singapore Agreement *supra* note 62, Art. 1(3).

⁷¹ Łazowski, *supra* note 6.

⁷² UK–Canada Agreement, *supra* note 62, Annex, modifications to Annex 5-A, para. 2.

⁷³ See, e.g., the ‘Canada-UK Joint Committee’ instead of the ‘CETA Joint Committee’. UK–Canada Agreement, *supra* note 62, Annex A, Part A, para. 1(b).

or implemented in United Kingdom law' on Brexit Day.⁷⁴ Other modifications are a logical consequence of the UK having left the EU and its internal market. For example, tariff rate quotas that were negotiated for the EU-28 had to be split in the bilateral trade agreements, which follows the parallel development of the splitting up of UK and EU-27 tariff rate quotas at the WTO.⁷⁵ By and large, these splits follow a pattern where the reduced size of the UK market is factored in based on 'historical trade flows' and 'relevant trade flow data'.⁷⁶ An area where the UK even gained an advantage concerns rules of origin, specifically bilateral cumulation, where certain continuity agreements provide for EU input to be counted as UK inputs. This makes it easier for UK products to meet local content requirements and thus to qualify for preferential tariff treatment.⁷⁷

While the two different approaches to continuity are relevant practice for handling situations where leaving a regional integration organization has consequences for global treaty relations, the continuity programme also allows for a normative appraisal of the UK's approach to its post-Brexit trade agreements and the pursuit of non-trade objectives through the latter.

B A Modest Success for the UK

Counting something as a success or failure depends on the assessment criteria applied. The expectations raised by the Brexiteers were vague at best and fantastical at worst (recall, for instance, Rees-Mogg's earlier-mentioned promise of a 'golden age'). Scholars are not, and should not be, bound by the promises made by politicians. Thus, as noted earlier, the present appraisal is not an attempt at an overall assessment that would somehow manage to clinically disentangle the UK's trade policy with third countries from its relations with the EU as well as from other developments such as the COVID-19 pandemic or Russia's war against Ukraine. Instead, a more modest threshold for success is used. It has a narrower focus, according to which the UK continuity programme can be regarded as successful to the extent that the UK managed to agree with its external partners largely on the same terms as accorded to the EU in its trade agreements because there was no legal obligation of these partners to do so.

⁷⁴ UK–South Korea Agreement, *supra* note 55, Art. 1.3(2).

⁷⁵ A. Monteiro, 'U.S., EU Reach WTO Tariff-Quota Pact Post Brexit, USTR Says', *Bloomberg* (8 March 2021), available at www.bloomberg.com/news/articles/2021-03-08/u-s-eu-reach-wto-tariff-quota-pact-post-brexit-ustr-says-kml13kd3i; see also Downes, 'The Post-Brexit Management of EU Agricultural Tariff Rate Quotas' (2017) 51 *Journal of World Trade* 741.

⁷⁶ UK Department for International Trade, *Continuing the United Kingdom's Trade Relationship with Canada*, Parliamentary Report, December 2020, paras 65, 66. See, e.g., UK–Canada Agreement, *supra* note 62, Annex A, modifications to Annex 5-A; UK–Chile Agreement, *supra* note 47, Annex, Section 5 and 6 (regarding modifications to the respective tariff schedules). This broad assessment comes with certain caveats. It does not exclude that tariff rate quotas (TRQs) are split in less or more favourable terms for the UK in specific instances. Moreover, in some agreements, TRQs are scheduled for future renegotiation. See UK–Canada Agreement, *supra* note 62, Annex A, modifications to Annex 5-A, part 3.

⁷⁷ UK–South Korea Agreement, *supra* note 55, Protocol Concerning the Definition of 'Originating Products' and Methods of Administrative Cooperation, Art. 3. Note, however, that cumulation with the EU is scheduled to end three years after the entry into force of the agreement.

It is argued here that, from this perspective, the programme can be regarded as a modest success for the UK for two main reasons. First, the UK's negotiators largely concluded the continuity programme under highly unusual, challenging circumstances. Second, the UK managed to have most of its trading partners commit to terms that were overall very similar to those granted to the EU, despite having significantly less market leverage than the EU, which stands in some contrast to the 'Market Power Europe' narrative. With respect to the first reason, the context in which the continuity programme needed to be carried out was marked by three mutually reinforcing challenges for the UK: a lack of time, a lack of resources and a lack of political attention. Of course, the source of these challenges was self-inflicted by the UK's decision to leave the EU in the first place, but once this became a political and legal fact, the ensuing challenges had to be dealt with.

First, negotiating, signing, ratifying and concluding trade agreements tends to be a time-consuming activity. While time spans vary,⁷⁸ as the EU's ambitious agreements such as the European Union–Canada Comprehensive Economic and Trade Agreement (CETA) and the agreement with EU–South Korea show, negotiations can drag on for many years.⁷⁹ While, admittedly, the UK could work from the templates of the pre-existing EU agreements, it had to fit negotiations with dozens of different countries, often concurrently, into a limited time frame. Hence, doubts were raised in the media that deals with major trading partners such as Japan and South Korea would not 'be ready in time, much to the alarm of business leaders'.⁸⁰ Due to the automatic count-down provided for in the withdrawal process under Article 50 of the TEU, the UK found itself in a position where not only EU law but also international agreements concluded by the EU would no longer apply to it within two years of triggering Article 50, unless the EU agreed to extensions or an agreement was concluded between the EU and the UK. Hence, the UK was under time pressure from the start not only to avoid a cliff-edge no-deal Brexit in regard to its relations with the EU but also to avoid a range of other, albeit less dramatic, cliff edges in its relations with third countries. This would explain the rush to sign no fewer than 19 continuity agreements between January and December 2019. After the Withdrawal Agreement launched the transition period, which provided for the continued applicability of the EU's external agreements to the UK, there was a possibility for a single mutually agreed extension, which the UK government rejected to use. This again put pressure on the UK's negotiators to finalize the continuity programme by the end of 2020. This explains the 'big bang' of signing 10 such agreements in December 2020.

⁷⁸ C. Freund and C. McDaniel, 'How Long Does It Take to Conclude a Trade Agreement with the US?', *Peterson Institute for International Economics* (21 July 2016), available at www.piie.com/blogs/trade-investment-policy-watch/how-long-does-it-take-conclude-trade-agreement-us.

⁷⁹ Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (CETA), OJ 2017 L 11/23; Framework Agreement between the European Union and Its Member States, on the One Part, and the Republic of Korea, on the Other Part (EU–South Korea Agreement), OJ 2013 L 20/1.

⁸⁰ R. Partington, 'Brexit: UK Has Rolled over Just £16bn Out of £117bn Trade Deals', *The Guardian* (3 February 2019), available www.theguardian.com/business/2019/feb/13/brexit-uk-trade-deals-eu.

Second, what compounded the time pressure was the lack of resources for conducting trade negotiations. Due to external trade being an EU exclusive competence, member states have organizationally delegated trade negotiations to the European Commission. Consequently, the UK first had to set up a new Department for International Trade (DIT) and staff it so that it could effectively mount the continuity programme (while negotiations with the EU were conducted by a separate Department for Exiting the European Union, which was dissolved after the UK left the EU).⁸¹ The DIT was set up on 13 July 2016, a few weeks after the referendum. Recruiting trade negotiators proved to be a challenge in the early stages.⁸² When a vacancy for the position of the UK's chief trade negotiator showed a salary exceeding that of the British prime minister, the media took this as 'a sign of the struggle the government is having in attracting the skilled staff it needs after decades of trade deals being handled from Brussels'.⁸³

Third, regarding the lack of political attention, it should be recalled that, despite the 'Global Britain' rhetoric, UK politics and media over the studied period were largely focused on the EU – first the withdrawal, and then the future relationship. The lingering uncertainty about these also cast a shadow of doubt on the continuity programme, possibly rendering this effort futile, apart from serving as a form of insurance in case of a no-deal scenario. For instance, if Theresa May's all-UK backstop version of the Withdrawal Agreement had kept the UK in the same customs territory as the EU, this would have resulted in a lack of autonomy of the UK's trade policy. A similar result would have been the case if, instead of the TCA, which still represented a 'hard Brexit', a partial customs union or European Economic Area (EEA) membership had been the result. None of this is to say that there would have been no value in having the continuity agreements ready as a backup. Some were specifically designed to only apply in a 'no-deal' scenario with the EU.⁸⁴ Nonetheless, their uncertain fate throughout this period can have done little to boost the morale of those negotiating with dozens of countries under time pressure. Despite these challenging circumstances, the UK managed to have 'roll-over' versions of the EU's trade agreements in place, for the most part, in time before the end of the transition period.

The second reason why the continuity programme can be regarded as a modest success is that the UK managed to obtain, to a very large extent, similar terms in these trade agreements as the EU. Considering this a success deserves some more explanation. At first glance, it may be considered a failure, seeing that the UK did not manage

⁸¹ Lazowski, *supra* note 6, at 118.

⁸² "We Have No Trade Negotiators" – Letwin', *BBC News* (25 August 2016), available at www.bbc.com/news/av/uk-politics-36805818.

⁸³ M. Leftly, 'UK Trade Negotiator Will Earn More Than PM', *The Guardian* (29 January 2017), available at www.theguardian.com/politics/2017/jan/29/brexit-trade-deal-vacancy.

⁸⁴ UK–Iceland/Norway Agreement, *supra* note 62, Art. 17(2) ('[t]his Agreement shall only enter into force in the event that the United Kingdom withdraws from the European Union without any agreement between the United Kingdom and the European Union on the terms of the United Kingdom's withdrawal or if any such agreement does not provide for the continued application to the United Kingdom of the Trade-Related Agreements between the European Union and one or both of Iceland and Norway in respect of trade in goods').

to extract terms that were ‘superior’ to those of the EU. Superior could mean, for instance, gaining greater market access for British exporters and giving fewer concessions to the external partners. Such a conclusion may indeed be merited if going by the high expectations raised by the Brexiteers. However, following this article’s more down-to-earth standard of success, the point of departure is rooted in the EU’s own rhetoric about its international trade policy. The ‘Global Britain’ narrative can be contrasted with the EU’s own narrative, which is steeped in the idea of exerting power mainly through the size of its internal market. For EU leaders, and proponents of European integration generally, this is an important rationale for the EU acting as a cohesive force on the world stage. Its ‘market power’ allows the EU to act as a formidable trade power that achieves both economic and non-economic objectives by wielding access to its market as a bargaining chip.⁸⁵ As noted in the EU’s 2021 Trade Strategy, trade is ‘one of the EU’s most powerful tools’.⁸⁶ The importance of economic size, as well as geographic proximity, is also encapsulated in the ‘gravity’ models that are popular with economists to explain the intensity of, and dependencies within, trading relationships.⁸⁷

Economic objectives include privileged access to others’ markets, including in protected sectors such as public procurement. Non-economic interests include prompting external partners to commit to international labour and environment standards supported by the EU.⁸⁸ An area that combines this economic and wider normative agenda is having treaty partners commit to aligning with the EU’s rules and norms, which is the case in the EU’s association agreements.⁸⁹ From this vantage point, leaving aside the bombastic claims of the Brexiteers, the results of the UK’s trade continuity programme raise a basic yet piquant question for the proponents of the EU as a market power: if market size is such an important factor for the EU, how did an economy that is only one-fifth its size in terms of gross domestic product (GDP) manage to obtain such similar results in key bilateral trade relations?

It is important to recall here that, as a matter of international law, there was no obligation whatsoever on the external treaty partners to go along with the UK’s requests to replicate the contents of their agreements with the EU after Brexit. There was in fact no obligation to roll over any agreements at all. Instead, the UK had to rely on the ‘good will’ of its partners ‘to extend these deals in a completely new context’.⁹⁰

⁸⁵ Jaremba, ‘Non-Economic Values and Objectives in EU Trade Policy: Different Models of Externalization and Enforcement’, in W. Weiß and C. Furculita (eds), *Global Politics and EU Trade Policy (European Yearbook of International Economic Law Special Issue)* (2020) 163.

⁸⁶ European Commission, *Trade Policy Review: An Open, Sustainable and Assertive Trade Policy*, Doc. COM(2021) 66 final, 18 February 2021, at 1.

⁸⁷ For a critical look at these models, see also Siles-Brügge, ‘Bound by Gravity or Living in a “Post Geography Trading World”? Expert Knowledge and Affective Spatial Imaginaries in the Construction of the UK’s Post-Brexit Trade Policy’, 24 *New Political Economy* (2019) 422, 427–430.

⁸⁸ This is done through inserting dedicated chapters in bilateral trade agreements (see below) as well as through unilateral schemes such as ‘Generalized Scheme of Preferences Plus’ (GSP+).

⁸⁹ See, e.g., Association Agreement between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part (EU–Ukraine Association Agreement), OJ 2014 L 161/3.

⁹⁰ Koutrakos, *supra* note 6, at 416.

As remarked by Łazowski, 'it would have been a mistake to assume *ab initio* that the non-EU countries were ready to automatically entertain requests received from Whitehall'.⁹¹ Instead, it could arguably serve as 'a good opportunity to renegotiate the terms laid down' in these agreements.⁹² Yet rolling them over with, to a very large extent, no less favourable terms is what most of these countries, including the economically more significant ones, ended up doing.

One could surmise that one motivation was avoiding any disruptions in ongoing economic relations. Relatedly, even though the UK has a smaller GDP than the EU, it still is a sizeable market that would retain leverage over significantly smaller trading partners. However, while this would explain the continuity agreements with smaller economies such as Kosovo, Cameroon and the Pacific states, it cannot easily explain why agreements with countries such as Canada, South Korea and Japan were rolled over. Each of these countries has the economic weight as well as expertise to renegotiate terms with a view to 'clawing back' some of the concessions granted to the larger EU. To a very large extent, this did not happen. With the benefit of hindsight, it is no longer true that 'large and important trading partners are missing from the list'.⁹³

Moreover, any expediency by which treaty partners may have been motivated to roll over agreements, including avoiding domestic parliamentary approval procedures, must be weighed against the fact that their governments must have realized the precarious state in which the UK found itself during this time. In diplomacy, this was an opportunity to recoup certain concessions from the UK, with the latter still settling for the political 'win' of announcing trade deals struck by 'Global Britain'. Future historians might shed light on whether this was considered and attempted. In any event, as the legal contents of the continuity agreements show, it did not materialize. In most cases, the agreements concluded by the UK are for an indefinite period of application and not a temporary stopgap.⁹⁴ Hence, in most cases, the UK managed to lock in the terms for the foreseeable future.

While the UK's success in replicating to a very large extent the terms granted originally to the EU by external trading partners raises some tricky questions about the added value of EU unity and market power, this feat is not necessarily something the EU should look upon with trepidation or resentment. As the next section argues, the EU should welcome the replication of the normative, non-purely economic elements of its trade agreements by its former member state.

⁹¹ Łazowski, *supra* note 6, at 118.

⁹² *Ibid.*

⁹³ Koutrakos, *supra* note 28, at 82. A year later, in 2022, Koutrakos notes that the 'number of roll-over agreements negotiated by the UK is considerable'. Koutrakos, *supra* note 6, at 416.

⁹⁴ See, e.g., Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part (UK-CARIFORUM Agreement), signed in Saint Lucia, 22 March 2019, Art. 243(1). In the case of the UK-Canada Agreement, there is an obligation to 'strive to conclude' a new trade agreement between the two countries within three years after the entry into force of the continuity agreement'. UK-Canada Agreement, *supra* note 62, Art. IV(4). However, the continuity agreement is not time limited in its application, nor does it state that failure to conclude the new trade agreement would lead to the suspension or termination of the continuity agreement.

C *Imitation as Welcome Flattery*

The analysis now turns to what the UK's trade continuity programme means for EU external action. It is argued here that considering the programme a modest success for the UK does not mean it cannot be a success for the EU also, at least in terms of its normative foreign policy agenda. The EU's normative foreign policy agenda is clearly enshrined in its main treaties after the Lisbon reform of 2009. Its tenets can be found, first, in Article 3(5) of the TEU, which calls, among other things, for contributions to 'sustainable development of the Earth', 'free and fair trade' and 'the strict observance and the development of international law'. Second, Article 21 of the TEU expands this list of foreign policy objectives further with, for instance, commitments to 'promote multilateral solutions to common problems',⁹⁵ to 'consolidate and support democracy, the rule of law, human rights and the principles of international law',⁹⁶ to 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources'⁹⁷ and to 'promote an international system based on stronger multilateral cooperation and good global governance'.⁹⁸ Even though these objectives do not create rights that can be claimed in court, they nonetheless constitute legally binding commitments.⁹⁹ They are carried over into policy through documents such as the EU's Global Strategy and various communications¹⁰⁰ and are also translated into the EU's treaty-making practice with external partners.

Due to the EU's 'market power', trade policy has traditionally been considered one of the most important – if not the most important – vehicle for the EU to pursue this agenda. The EU is a 'world power in trade and through trade'.¹⁰¹ This, too, is a legal commitment in the EU's primary law as the EU's 'common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.¹⁰² In general terms, any non-EU country legally committing itself to the EU's foreign policy agenda and pursuing it in its own international trade policy could only be seen as acting in the EU's interest. The promotion of the EU's normative foreign policy agenda by a non-EU country is exactly what can be observed in the UK's trade continuity programme. It is illustrated here using the three examples of the promotion of human rights through 'essential elements clauses', the promotion of sustainable

⁹⁵ TEU, *supra* note 45, Art. 21(1)(2).

⁹⁶ *Ibid.*, Art. 21(2)(b).

⁹⁷ *Ibid.*, Art. 21(2)(f).

⁹⁸ *Ibid.*, Art. 21(2)(h).

⁹⁹ J. Larik, *Foreign Policy Objectives in European Constitutional Law* (2016), at 168–172.

¹⁰⁰ European Union, Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union's Foreign and Security Policy, June 2016; European Commission and High Representative of the Union for Foreign Affairs and Security Policy (European Commission and High Representative), Strengthening the EU's Contribution to Rules-based Multilateralism, Joint Communication no. JOIN(2021) 3 final, 17 February 2021.

¹⁰¹ Meunier and Nicolaïdis, 'The European Union as a Trade Power', in C. Hill, M. Smith and S. Vanhoonacker (eds), *International Relations and the European Union* (3rd edn, 2017) 209, at 210.

¹⁰² TFEU, *supra* note 17, Art. 207(1); see further Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy', 15 *EFAR* (2010) 153.

development and environmental protection¹⁰³ and the promotion of multilateral co-operation, including regional cooperation and integration.

First, essential elements clauses are a staple feature in many EU trade agreements, having been introduced in the 1990s.¹⁰⁴ They not only allow for the suspension of the agreement but also offer opportunities for dialogue in case one of the parties violates certain normative principles, including human rights, democracy and the rule of law, which match those values to which the EU is committed internally and which it seeks to promote externally.¹⁰⁵ For example, the EU–Chile Association Agreement stipulates in its first article that '[r]espect for democratic principles and fundamental human rights as laid down in the United Nations Universal Declaration of Human Rights and for the principle of the rule of law underpins the internal and international policies of the Parties and constitutes an essential element of this Agreement'.¹⁰⁶ Later in the agreement, it is laid down that, derogating from the normal procedure regarding alleged non-compliance with the agreement, 'any Party may immediately take appropriate measures in accordance with international law in case of ... violation by the other Party of the essential elements of this Agreement referred to in Article 1, paragraph 1'.¹⁰⁷ This essentially means the option of suspending (parts of) the agreement.¹⁰⁸

Of the 37 agreements concluded by the EU that have been replicated by the UK, 26 have included essential elements clauses. These are mostly with countries from what can be considered the Global South. By contrast, the 11 agreements concluded by the EU with mostly advanced economies, such as Japan, Singapore, Iceland, Canada, South Korea and Switzerland, do not include such clauses.¹⁰⁹ Whenever such clauses are present in the trade agreements concluded by the EU, they have been taken over by the UK, either with no or only minor, non-substantive modifications. Examples of

¹⁰³ On these objectives in the EU's practice, see Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', 40 *Legal Issues of Economic Integration* (2013) 297.

¹⁰⁴ Hachez, "'Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way That Helps Human Rights?", 53 *Cuadernos europeos de deusto* (2015) 81.

¹⁰⁵ TEU, *supra* note 45, Arts 2, 3(5), 21.

¹⁰⁶ *Ibid.*, Art. 1(1); Agreement Establishing an Association between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part, OJ 2002 L 352/3; Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

¹⁰⁷ *Ibid.*, Art. 200(3)(b)

¹⁰⁸ Hachez and Marx, 'EU Trade Policy and Human Rights', in J. Wouters *et al.* (eds), *The European Union and Human Rights: Law and Policy* (2020) 365, at 367.

¹⁰⁹ While the trade agreements with these countries do not include essential elements clauses, related agreements at times do. For example, the EU–South Korea Agreement, *supra* note 79, includes essential elements clauses (in Art. 1(1) and 4(2)). This Framework Agreement, however, is not replicated as such by the UK. Its substantive provisions are instead reproduced in a joint statement on shared values. See UK Department for International Trade, Continuing the United Kingdom's Trade Relationship with the Republic of Korea, September 2019, 37–38, Annex A (which notes at the outset 'that this statement is not a legal binding document'). In the case of Canada, the Strategic Partnership Agreement (SPA) includes an essential elements clause (Art. 2), which states in addition that 'a particularly serious and substantial violation of human rights or non-proliferation ... could also serve as grounds for the termination of' CETA in accordance with CETA's standard termination procedure. Strategic Partnership Agreement between the European Union and Its Member States, of the One Part, and Canada, of the Other Part, OJ 2016 L 329/45, Art. 28(7). The EU's SPA with Canada does not appear to have been replicated by the UK.

complete replication of the essential elements clause are the trade agreements with the Andean countries and Egypt. In the case of Colombia, Ecuador and Peru, the trade agreement with the UK incorporates, in short-form style, the trade agreement with the EU, subject to certain modifications. Articles 1 and 2 of the original agreement,¹¹⁰ which identify the essential elements, and Article 8, paragraph 3, on the suspensive effects of violating them, are incorporated without modification – that is, they are not mentioned in the annex to the agreement listing modifications to particular provisions.

In other cases, slight modifications can be observed while maintaining the substance. An example of this is the replacement of references to the Cotonou Agreement, which no longer applies to the UK.¹¹¹ The Cotonou Agreement served as an overarching framework for relations between the EU and the group of African, Caribbean and Pacific (ACP) countries and is being replaced with a new Partnership Agreement, also known as the Samoa Agreement.¹¹² What is relevant for present purposes is that the Cotonou Agreement contains an essential elements clause and an associated dialogue and suspension mechanism to which several bilateral agreements between the EU and ACP countries refer back. For example, the EU–CARIFORUM Agreement states that ‘[t]his Agreement is based on the Fundamental Principles as well as the Essential and Fundamental Elements of the Cotonou Agreement, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement. This Agreement shall build on the provisions of the Cotonou Agreement’.¹¹³

In the case of the UK–CARIFORUM Agreement, a reference to the Cotonou Agreement is avoided, which makes sense as the Cotonou Agreement no longer applies to the UK.¹¹⁴ Instead, the contents of Articles 2 and 9 of the Cotonou Agreement are paraphrased in Article 2 of the agreement under the heading ‘Principles’.¹¹⁵ As noted by the UK government in its parliamentary report on the agreement, it ‘sought to ensure continuity of the effect of the references to the Cotonou Agreement in the existing Economic Partnership Agreement that are relevant to the UK’s trade relationship with

¹¹⁰ Trade Agreement between the European Union and Its Member States, of the One Part, and Colombia and Peru, of the Other Part (EU–Colombia, Peru and Ecuador Agreement), OJ 2012 L 354/3; Ecuador acceded to this agreement by virtue of a special protocol.

¹¹¹ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part (Cotonou Agreement), OJ 2000 L 317/3, Arts 9, 96.

¹¹² Partnership Agreement between the European Union and its Member States, of the One Part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the Other Part, signed in Samoa, 15 November 2023.

¹¹³ Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part (EU–CARIFORUM EPA), OJ 2008 L 289/3, Art. 2(1).

¹¹⁴ UK–CARIFORUM Agreement, *supra* note 94.

¹¹⁵ In other cases, the principles are, without reference to the Cotonou Agreement, *supra* note 111, listed in a dedicated Annex. See Interim Trade Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the One Part and the Republic of Ghana, of the Other Part (UK–Ghana Agreement), signed in London, 2 March 2021, Art. 2(1) and Annex F (Joint Statement of the Parties relating to the objectives and essential and fundamental elements of this Agreement), which also contains clauses on political dialogue and suspension.

the CARIFORUM States', which explicitly include 'the fundamental principles and essential and fundamental elements set out in the Cotonou Agreement and the ability to take appropriate measures in the event of a violation of those essential and fundamental elements under the Cotonou Agreement'.¹¹⁶ In the text of the provision, the reference to 'essential elements' is retained.¹¹⁷ Regarding the suspension clause in the case of non-compliance, the UK agreed to a Joint Declaration on Political Dialogue, Consultations and Appropriate Measures with the CARIFORUM states.¹¹⁸ The joint declaration is similar in wording to Article 96 of the Cotonou Agreement. However, its legal status is not altogether clear. According to Article 248 of the UK–CARIFORUM Agreement, the 'Annexes, Protocols and footnotes shall form an integral part of this Agreement', while joint declarations are not mentioned.

In other cases, however, there are some wider-ranging modifications to the essential elements clauses. In the case of the agreement between the UK and Serbia, the essential elements provisions from the original agreement concluded by the EU are reproduced through short-form incorporation,¹¹⁹ though with the following changes. First, the provision on political dialogue on a regional basis is not taken over.¹²⁰ Second, the joint declaration on Article 3 on weapons of mass destruction and non-proliferation from the original agreement is not reproduced. Instead, the UK and Serbia have included a newly worded joint declaration on Article 3, which not only removes references to the EU but also stresses that the incorporated clause reaffirming 'that the fight against the proliferation of WMD [weapons of mass destruction] and their means of delivery constitutes an essential element of this Agreement'.¹²¹ The overall substance and spirit of the clause is thus still preserved. Lastly, in the case of Mexico, it is ambiguous whether the essential elements clause was taken over.¹²²

Regarding essential elements clauses, certain semantic tweaks and a general desire to avoid references to the EU notwithstanding, the result of the UK's continuity programme shows that the UK has clearly taken over this legal device from the EU to stressing the normative foundations underlying most of its trade agreements. These

¹¹⁶ UK Department for International Trade, *Continuing the United Kingdom's Trade Relationship with the CARIFORUM States*, Parliamentary Report, May 2019, para. 99.

¹¹⁷ UK–CARIFORUM Agreement, *supra* note 94, Art. 2(2).

¹¹⁸ UK–CARIFORUM Agreement, *supra* note 94, Joint Declaration on Political Dialogue, Consultations and Appropriate Measures.

¹¹⁹ Stabilisation and Association Agreement between the European Communities and Their Member States of the One Part, and the Republic of Serbia, of the Other Part, OJ 2013 L 278/16, Arts 2, 3(1), 133(3).

¹²⁰ Partnership, Trade and Cooperation Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Serbia, signed in Belgrade, 16 April 2021, Annex I, part 2(a).

¹²¹ *Ibid.*, Annex, part 19(c).

¹²² The essential elements are referred to in the 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 (EU–Mexico EPPCCA), OJ 2000 L 276/45, Arts 1, 58(2) (b). In the short-form Trade Continuity Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Mexican States (UK–Mexico Agreement), signed in Mexico City, 15 December 2020, the annex does not contain modifications to these provisions. However, according to Art. 3(1) of the UK–Mexico Agreement, only 'trade-related provisions of the EU-Mexico EPPCCA' are incorporated, which creates some ambiguity.

foundations are a virtual match to those of the EU. Second, a large degree of reproduction can be seen also regarding clauses on environmental protection. Here, in the vast majority of cases, the UK has taken over virtually identical commitments to environmental protection and sustainable development from the trade agreements concluded by the EU. These come in two forms from EU practice. As the first form, in earlier trade agreements, the EU would dedicate at least one article to this topic. Second, in more recent agreements belonging to the wave of ‘deep and comprehensive’ trade agreements,¹²³ the EU has moved to include dedicated chapters on ‘trade and sustainable development’ and ‘trade and environment’. Whether these chapters actually achieve their stated goals, seeing that they are generally excluded from the general dispute settlement proceedings, is a matter of debate and criticism.¹²⁴ Nevertheless, the UK has through its continuity programme taken over almost all of these provisions and chapters as well, thus keeping itself and its external partners committed to these objectives under international law in the same fashion as the EU.

An example of a sole article on environmental protection can be found in the EU–Morocco Agreement. Its Article 48 states as an aim of cooperation ‘to prevent deterioration of the environment, to improve the quality of the environment, to protect human health and to achieve rational use of natural resources for sustainable development’.¹²⁵ It goes on to list a number of areas for cooperation, these being soil and water quality, the consequences of development and monitoring and preventing pollution of the sea.¹²⁶ This was taken over in the UK’s replica of the EU agreement through incorporation.¹²⁷ An example of chapters on trade and sustainable development and trade and environment being taken over is the UK’s agreement with Canada. It incorporates CETA’s chapters on these topics without substantive modification.¹²⁸ As confirmed by the UK government’s parliamentary report on the agreement, the UK has ‘replicated the content of the chapters [from CETA] on trade and sustainable development, labour and environment in their entirety in the TCA’.¹²⁹

There is one case, however, where a continuity agreement does not reproduce an environmental clause. In the UK’s trade continuity agreement with Mexico, the entire title on ‘cooperation’ in different policy areas, which can be found in the original Economic Partnership, Political Coordination and Cooperation Agreement (EPPCCA),

¹²³ See in-depth Araujo, *The EU Deep Trade Agenda: Law and Policy* (2016).

¹²⁴ See García, ‘Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case’, 10 *Politics and Governance* (2022) 58; Marx, Brando and Lein, ‘Strengthening Labour Rights Provisions in Bilateral Trade Agreements: Making the Case for Voluntary Sustainability Standards’, 8 *Global Policy* (2017) 78.

¹²⁵ Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, OJ 2000 L 70/2, Art. 48(1).

¹²⁶ *Ibid.*, Art. 48(2).

¹²⁷ Agreement Establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Morocco, signed in London, 26 October 2019.

¹²⁸ CETA, *supra* note 79, ch. 22, ch. 24; UK–Canada Agreement, *supra* note 62, Annex A (which includes no specific changes to these chapters).

¹²⁹ UK Department for International Trade, *supra* note 76, para. 101.

was not incorporated.¹³⁰ This includes Article 34 on '[c]ooperation on the environment and natural resources'.¹³¹ Neither the UK government's parliamentary report nor the explanatory memorandum explains this non-replication. The memorandum notes that the 'purpose of the Agreement is to maintain continuity of the effects of the trade provisions of the EU–Mexico EPPCCA as between the Parties in a bilateral context'¹³² and, in the same paragraph, points to future negotiations of a more ambitious agreement. This ambition is enshrined in the agreement, which commits the UK and Mexico to future negotiations 'for an ambitious, modern and comprehensive free trade agreement'.¹³³ It could be surmised that a trade and sustainable development chapter could be considered then. However, this case remains an oddity in the general pattern of the trade continuity programme.

By contrast, there is also an instance where the UK goes further than the EU – namely, the UK's 2021 trade agreement with the EEA countries Iceland, Norway and Liechtenstein. It is a peculiar case as it shows a continued commitment to environmental concerns while not replicating provisions from earlier agreements concluded by the EU. It could still be considered a continuity agreement in the widest sense as it seeks to ensure a close economic relationship between these countries despite the EEA Agreement no longer applying to the UK.¹³⁴ The EEA Agreement contains a brief chapter on environmental protection but no chapter on sustainable development. The UK's agreement with these three countries, by contrast, does not reproduce the provisions from the EEA Agreement but, instead, includes a chapter on trade and sustainable development, which contains a section on trade and environment, reminiscent of those found in more recent deep and comprehensive agreements concluded by the EU with other third countries.¹³⁵

The third and final example of normative continuity in EU and UK external trade policies are clauses on multilateral and regional cooperation, including regional integration. The promotion of multilateralism is a constitutional mandate for the EU and features as a prominent objective in key policy documents.¹³⁶ Promoting regional integration, or at least cooperation, elsewhere in the world can be implied from the mandate that the EU's external action should 'be guided by the principles which have inspired its own creation'.¹³⁷ One way to promote these goals is through their inclusion in bilateral agreements with external partners. Also here, we can see the UK taking over these provisions in the vast majority of cases. References to multilateral cooperation are arguably less surprising in view of the open and cooperative

¹³⁰ UK–Mexico Agreement, *supra* note 122, Annex, part 2.

¹³¹ EU–Mexico EPPCCA, *supra* note 122, Art. 34.

¹³² UK Department for International Trade, Explanatory Memorandum on the Trade Continuity Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Mexican States, Doc. CP 371, 26 February 2021, para. 4.4.

¹³³ UK–Mexico Agreement, *supra* note 122, Art. 9(1).

¹³⁴ Agreement on the European Economic Area, OJ 1994 L 1/3, Arts 73–75.

¹³⁵ Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, signed in London, 8 July 2021, ch. 13.

¹³⁶ TEU, *supra* note 45, Art. 21(1)(2); European Commission and High Representative, *supra* note 100.

¹³⁷ TEU, *supra* note 45, Art. 21(1)(1).

way in which British foreign policy has been presented by the UK's government post Brexit.¹³⁸ The promotion of regional cooperation and especially integration, by contrast, could be considered astonishing, seeing that the UK has painstakingly extracted itself from regional integration in the form of the EU. Nonetheless, even this ambition is taken over through its trade continuity programme in most, but not all, cases.

For example, in the case of Canada, CETA contains a mutual commitment to multilateralism in the area of the implementation and development of environmental agreements.¹³⁹ As the entire chapter on trade and environment, like the chapter on trade and sustainable development, was taken over in the continuity agreement (see above), so is the commitment to multilateral cooperation in this area. The commitment to 'effective multilateralism', another concept that was coined specifically for EU external relations,¹⁴⁰ enshrined in the EU–Ukraine Association Agreement, was taken over by the UK's replica as well.¹⁴¹ To add another, though more generic, example, the UK's agreement with the Southern African Customs Union member states and Mozambique reproduces the commitment to cooperation in multilateral fora that was already contained in the EU agreement.¹⁴²

Turning to the promotion of regional cooperation and integration, for example, the UK–CARIFORUM Agreement notes the parties' recognition 'that regional integration is an integral element of their partnership and a powerful instrument to achieve the objectives of this Agreement'.¹⁴³ The Stabilisation and Association Agreement between the EU and Albania states that 'foster[ing] regional cooperation in all the fields covered by this Agreement' is one of the aims of the association.¹⁴⁴ While the UK's agreement with Albania removed a reference to 'the approximation of [Albania's] legislation' to that of the EU in this provision,¹⁴⁵ the

¹³⁸ UK Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy*, Doc. CP 403, March 2021, at 11 ('[i]n keeping with our history, the UK will continue to play a leading international role in collective security, multilateral governance, tackling climate change and health risks, conflict resolution and poverty reduction').

¹³⁹ CETA, *supra* note 79, Art. 24.4.

¹⁴⁰ European Council, *A Secure Europe in a Better World: European Security Strategy*, 12 December 2003.

¹⁴¹ UK–Ukraine Agreement, *supra* note 60, Art. 3(2)(d); EU–Ukraine Association Agreement, *supra* note 89, Arts 3, 4(2)(b).

¹⁴² Economic Partnership Agreement between the Southern African Customs Union Member States and Mozambique, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, signed in London, 9 October 2019, Art. 5; Economic Partnership Agreement between the European Union and its Member States, of the One Part, and the Southern African Development Community EPA States, of the Other Part, OJ 2016 L 250/3, Art. 5.

¹⁴³ UK–CARIFORUM Agreement, *supra* note 94, Art.4(1) (reproducing Art. 4 of the EU–CARIFORUM EPA, *supra* note 113).

¹⁴⁴ Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Albania, of the Other Part (EU–Albanian SAA), OJ 2009 L 107/166, Art. 1(2).

¹⁴⁵ Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Albania (UK–Albania Agreement), signed in Tirana, 5 February 2021, Annex I, part 1(a).

aim of regional cooperation is still taken over. The original agreement also contains a dedicated Title III on 'regional cooperation'.¹⁴⁶ This title is pruned back in the UK's continuity agreement, with Articles 13–15 not being incorporated, leaving only Article 12, of which only the first paragraph is retained. Rather than also removing the rest, the continuity agreement substitutes a reference to the EU's assistance programmes with a statement that the 'United Kingdom may assist or support such regional cooperation, including as set out in Articles 13 to 15 of the EU-Albania Agreement'.¹⁴⁷ Hence, the UK still supports regional cooperation – in this case, in both generic terms as well as by playing a supporting role in the EU's activities.

In the case of Ghana, the continuity agreement goes even a bit further than the original. It adds a new article on the promotion of regional integration in West Africa, noting that it is 'an essential part' of the partnership.¹⁴⁸ The EU's agreement with Ghana contains less ambitious wording restricted to 'customs reforms'.¹⁴⁹ In the case of the Central American countries, the continuity agreement replicates a commitment to regional integration found in the original agreement.¹⁵⁰ However, the continuity agreement adds the words 'in Central America' after 'regional integration'.¹⁵¹ This arguably implies that the UK no longer supports regional integration in general through its foreign policy (which, indeed, would seem somewhat paradoxical after Brexit). Such clauses have also been scrapped altogether in a few instances, as can be seen from the UK's continuity agreement with the Andean countries, in which a reference to the importance of regional integration in the EU's agreement was not taken over.¹⁵²

In sum, this analysis has shown that the UK's trade continuity programme, in fact, was not only about trade but also reproduced, for the most part, the EU's broader normative approach to foreign policy through trade. The continuity programme, despite the abovementioned pressures, was a conscious and meticulous exercise for the UK government and its external interlocutors, through which it has clearly taken over the vast majority of normative provisions from the EU originals, thereby committing itself and its trading partners through international law to a foreign policy agenda that closely follows the EU's script.

¹⁴⁶ EU–Albania SAA, *supra* note 144, Title III.

¹⁴⁷ UK–Albania Agreement, *supra* note 145, Annex I, part 4(a).

¹⁴⁸ UK–Ghana Agreement, *supra* note 115, Art. 10(1).

¹⁴⁹ A stepping stone: Economic Partnership Agreement between Ghana, of the One Part, and the European Community and Its Member States, of the Other Part, OJ 2016 L 287/3, Art. 32.

¹⁵⁰ Agreement Establishing an Association between the European Union and Its Member States, on the One Hand, and Central America, on the Other Part, OJ 2012 L 346/3, Art. 2(e).

¹⁵¹ Agreement Establishing an Association between the United Kingdom of Great Britain and Northern Ireland and Central America, signed in Managua, 18 July 2019, Annex, part 2.

¹⁵² EU–Colombia, Peru and Ecuador Agreement, *supra* note 110, Art. 10; Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the One Part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the Other Part, signed in Quito, 15 May 2019, Annex, Modifications to Title I, ch. 2, part 4.

4 Conclusion: Common Values in the Age of Geopolitics

This article set out to provide a legal and normative appraisal of the UK's trade continuity programme. It explained, first, the programme's necessity due to the exclusive nature of the EU's wide-ranging competence in trade as well as its place in the discourses on the rationale and benefits of Brexit. The prospect of losing out on the terms of the trade agreements concluded by the EU represented a set of external cliff edges, in addition to the internal cliff edge of losing access to the EU's internal market without a follow-up deal. This put the UK's ambitious post-Brexit trade policy in a paradoxical and precarious position, with the trade continuity programme serving, first, to re-establish in the UK's own name the terms of trade with external partners from which it had already been benefiting as an EU member.

Two things in the realm of plausibility could have happened, but, as this analysis has shown, they did not occur for the most part. First, other countries could have exploited the UK's relative weakness and forced much more clearly recalibrated terms, taking some concessions back that had originally been granted to the EU, which had a larger market to use as leverage to extract these concessions in the first place. This would have been legally possible and not beyond the diplomatic clout of at least the more powerful partners. Second, the UK, reluctant to avoid embarrassment and eager to show international success by recasting continuity agreements as 'new' deals, could have not only acquiesced to such demands by the external partners but also simply jettisoned clauses that were not strictly on 'free trade', including on human rights and democracy, sustainable development and multilateralism and regional cooperation, seeing also that liberalization and market access were at least initially presented as the focus of the UK's post-Brexit trade policy.

As the present analysis has shown, neither happened to a significant degree. The UK managed, under challenging conditions, to conclude most continuity agreements on time, including those with economically significant partners. It managed to retain terms that are, by and large, equally as favourable as those granted to the EU. Leaving aside the hubris of Brexiteer rhetoric about 'golden ages', this should be seen as a moderate success for the UK's negotiators, especially those from the newly established Department for International Trade. It bears stressing once more that giving credit for this particular feat to the civil servants and trade negotiators does not equal by any measure the conclusion that Brexit as such could be considered a success.

As this article has argued, furthermore, the UK's trade continuity programme should be seen as a success for the EU too. In an environment where the EU and the UK were, and continue to be, embroiled in various post-Brexit disputes and tensions, albeit now partially tempered by the Windsor Framework,¹⁵³ the UK has retained core parts of the EU's broader normative foreign policy agenda, including the promotion of

¹⁵³ The Windsor Framework, agreed upon by the EU and UK in February 2023, aims at providing some pragmatic solutions to the enduring tensions caused by the implementation of the Protocol on Ireland/Northern Ireland. It consists of a Joint Committee Decision to amend the Withdrawal Agreement and of a combination of unilateral and joint measures. See further Melo Araujo, 'The Windsor Framework and its impact for Northern Ireland and EU-UK Relations', *Brexit Institute Working Paper* No. 3 (2023).

human rights, the rule of law and democracy, sustainable development and regional and multilateral cooperation. Through its own, now autonomous trade policy, it has committed itself and its trading partners under international law to pursue these goals. One of the first series of acts of the post-Brexit UK was thus not to diverge but, rather, to closely imitate the EU. The trade continuity programme can thus be seen as evidence against a 'new role orientation' and, instead, as evidence of 'at best 'role adaption',¹⁵⁴ where core normative elements from the EU's external action, next to free market ideals, are retained. The EU should welcome this normative continuity as something that serves its own interests.

Of course, this is not to say that this approach to normative foreign policy through trade is necessarily effective or that more could not be done to achieve these goals, by either the EU or the UK. Moreover, whether these goals will be fully implemented and how the UK government will address issues of non-compliance remain topics for future research, with considerable potential for structural comparison with the EU and its trade policy. What can be concluded, however, is that, from the point of view of the EU, it is much more desirable to have its former member state show a legal commitment to shared values on the world stage than to have it abandon them in order to gain a competitive advantage.

Looking to the future, while the trade continuity programme is largely concluded, some agreements are being renegotiated or complemented with additional agreements. Moreover, the UK has made progress in negotiating trade agreements with countries without a pre-existing agreement concluded by the EU. In December 2021, the UK–Australia Trade Agreement was signed, and another one was signed with New Zealand in February 2022. Seeing that they also include chapters on labour, the environment and development as well as innovative provisions on gender and animal welfare¹⁵⁵ shows that the UK appears set to pursue a normative trade policy broadly aligned with the EU even outside the context of ensuring continuity, and that it may even be moving in the direction of a virtuous competition with the EU.

Thus, at least through external trade policy, a 'kinder, gentler'¹⁵⁶ and more 'co-operative' Brexit has indeed taken place,¹⁵⁷ which may also inspire both sides to work towards gentler relations and closer cooperation in foreign and security policy based on their shared values – an area thus far not covered by the TCA or any other post-Brexit arrangement – as they both traverse a perilous new age of geopolitical great power tensions.

¹⁵⁴ Egan and Webber, *supra* note 6, at 15.

¹⁵⁵ Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, signed in London and Adelaide, 17 December 2021, chs 21–25; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand, signed in London, 28 February 2022, chs 6, 22–23, 25, 27. Moreover, the UK is aiming to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed in Santiago, 8 March 2018.

¹⁵⁶ Weiler, 'The Case for a Kinder, Gentler Brexit', 15 *International Journal of Constitutional Law (ICON)* (2017) 1.

¹⁵⁷ Streinz, 'Cooperative Brexit: Giving Back Control over Trade Policy', 15 *ICON* (2017) 271.

