Article Information.

Article Type:.	research-article
Journal Title:.	Yearbook of European Law
Publisher:.	Oxford University Press
ISSN (P):.	0263-3264
ISSN (E):.	2045-0044
DOI Number:.	10.1093/yel/yeaa010
Volume Number:.	00
Issue Number:.	0
First Page:.	1
Last Page:.	77

Divorce, European Style: e EU/UK Withdrawal Agreement

Divorce, European Style [AQ1]

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ABSTRACT

The Brexit withdrawal agreement is full of tensions between EU and international law, and mixes together provisions winding down the UK's membership and continuing the EU/UK relationship—culminating in the confused and incomplete provisions on Northern Ireland. This paper analyses the key elements of the agreement, including its legal effect, dispute settlement provisions, and rules on UK and EU citizens' acquired rights.

I. Introduction [AQ4]

To paraphrase Marshal Foch, the withdrawal agreement was not a peace: it was an eight-month armistice. Over three and a half years after the initial referendum vote to leave the European Union, the UK finally left, with the withdrawal agreement,[1] as of midnight (Central European Time) on 31 January 2020 ('Brexit day').[2] But by September 2020, there were already acrimonious disputes about alleged breaches of the agreement, which paralleled, and overlapped with, bad-tempered talks about the future relationship between the two sides—in particular focusing on the position of Northern Ireland under the agreement. At time of writing, it remained to be seen whether the UK and EU would be able to negotiate a treaty (or treaties) governing their future relationship; indeed, even the withdrawal agreement's survival (at least in its present form) currently seems uncertain. It was equally possible that these disputes were just the latest storm in a teacup. But in any event, and at least for now, the withdrawal agreement addresses a number of key issues which arose from the 'Brexit' process itself.

This paper analyses the core legal aspects of the agreement in depth, assessing its three major overlapping tensions. First of all, there is a tension between the close ties which the agreement still retains,[3] albeit in limited and diminishing fields, between the UK and the EU, on the one hand, and the nature of the treaty as an international agreement which winds down those links—and restores traditional UK approaches to law—on the other. Secondly, there is a tension between trying to cement the treaty as a final arrangement concluding the UK's 47-year membership of the EU yet trying to continue that relationship as regards certain issues via the withdrawal agreement—which has led to mixing toxic ingredients from the implementation of the withdrawal agreement with the combustible elements of the negotiation of the future relationship, with explosive results. Finally, these tensions reach their apex where the agreement addresses the links between Northern Ireland and Ireland: strengthening the former's links with the UK as it leaves the EU, yet retaining much of them with Ireland/the EU; resolving the issues in dispute, yet leaving them open to implementation and renegotiation; attempting to preserve the coexistence established by the Good Friday Agreement, yet unable to stop a process which in principle forces a choice between Northern Ireland's conflicting, yet overlapping, traditions.

II. Overview

Part One of the withdrawal agreement (Articles 1–8, discussed in Section IV), sets out its 'Common Provisions', which address issues like definitions and territorial scope. Part Two (Articles 9–39, discussed in Section VI) deals with citizens' rights: the legal status of EU citizens living in the UK, and UK citizens living in the EU, before the end of the transition period set out in the agreement (on which, see Part Four). Part Three of the agreement—the largest part—sets out 'separation provisions' (Articles 40–125, discussed in Section VII), which concern the exact details of phasing out the application of EU law in the UK at the end of the transition period.

Part Four sets out the rules on the transition period (Articles 126–132), during which substantive EU law still applies to the UK for a period after Brexit day. Because it applies before most of the rest of the withdrawal agreement,[4] I examine it first (Section V).

Next, Part Five (Articles 133–157, discussed in Section VIII) concerns the financial settlement, providing for further details of UK payments to the EU that derive from its period of membership (plus the transition period). Finally, Part Six (Articles 158–185, discussed in Section IX) sets out 'Institutional and Final Provisions'. These include rules on the decision-making organ set up by the agreement (the 'Joint Committee'), as well as some aspects of the jurisdiction of the Court of Justice of the EU (CJEU) over the agreement, dispute settlement rules, and rules on entry into force and dates of application. In addition there are three Protocols to the agreement (these have the same legal force as the main treaty), on Irish border issues, UK bases in Cyprus, and Gibraltar. Of these, the Protocol on Irish border issues has attracted the most attention. The Protocols are discussed separately (Section X).

There are also two horizontal sections of this paper: Section III looks at the basic legal issues arising from the agreement, while Section XI brings together for analysis all the provisions relating to dispute settlement, including the jurisdiction of the CJEU relating to the agreement.

This paper does not discuss the substance of the political declaration on the future relationship,[5] which is not binding as such—except in the context of its possible relevance to arguments about the parties' good faith during the future relationship negotiations (see Section IX). It should be noted at the outset that the withdrawal agreement, including in particular the provisions on citizens' rights and the Northern Ireland/Ireland Protocol, is also distinct from any failure to negotiate any treaties on the future relationship: in the event that negotiations on future treaties between the UK and EU are unsuccessful, this does not lead to automatic termination of the withdrawal agreement.[6] Politically speaking, however, failure or difficulties in those negotiations may well lead to pressure for a breach or termination of the withdrawal agreement, as already happened in practice in September 2020.

III. Basic legal issues

Although this paper is not an analysis of the legal issues arising from Article 50 of the Treaty of European Union (TEU) (as distinct from the withdrawal agreement) as such, it should be noted at the outset that the withdrawal agreement was *not* the legal cause of Brexit. The UK left the EU when it did because it had sent a notification to leave, which then (in the absence of revocation or further extensions of membership) took effect on 31 January 2020. This follows from the wording of Article 50, as interpreted by the EU courts.[7] In other words, the UK left *with* a withdrawal agreement, not *because* of it.

This section examines in turn the basic legal issues arising from the withdrawal agreement as a matter of EU law (Section III.A), as a matter of UK law (Section III.B), and as a matter of international law (Section III.C)—although there is inevitably some overlap between each of the first two sub-sections and the third sub-section [AQ5].

A. EU law issues

As a matter of EU law, the question first arises whether the EU validly concluded the withdrawal agreement, whether due to exceeding the limits on its competence or for another reason. Issues also arise as to the 'legal base' for the EU to agree on amendment, implementation, or termination of the withdrawal agreement—and indeed on whether amendment or termination of the agreement (besides the limited amendments or termination which it expressly provides for) are a possibility at all as a matter of EU law.[8] Finally, there is an issue of the legal effect of the agreement in the EU's domestic legal order.

(i) Concluding the withdrawal agreement

The validity of the conclusion of the withdrawal agreement has already been challenged by several direct actions, mainly arguing that it is invalid because it removes the status of EU citizenship from UK citizens.[9] The merits of this argument are considered in Section VI below; as noted there, to date the EU courts have found that such challenges lack standing.[10] But it is always possible that a national court will ask the CJEU questions about the validity of concluding the agreement.[11]

While it examines the merits of the arguments in pending cases, this paper cannot contemplate every other legal argument that might hypothetically be made, via the national courts, about the validity of the conclusion of the agreement. However, two issues have often been raised, both concerning the notion that competence under the withdrawal agreement must be limited in time—given that Article 50 TEU refers to future relationship issues as a separate matter, and does not expressly provide for the negotiation of treaties on the future relationship before Brexit day. First, it has been suggested that a transition period is outside the competence conferred by Article 50 (or at least the *EU's* competence to conclude a withdrawal agreement without the participation of Member States),[12] because this aspect of the withdrawal agreement governs the relationship between the two sides *after* Brexit day.

But the better argument is that this is within the scope of Article 50, because Article 50(2) requires the withdrawal agreement to take account of the 'framework for [the] future relationship'. In the absence of a more express exclusion, and in light of the Article 8 TEU obligation to develop a 'special relationship' with neighbouring States, it would be odd if there were no competence to agree transitional rules on the basis of Article 50. It would mean, despite Article 8 TEU (added to the Treaties at the same time as Article 50), that the Treaty drafters intended a period when there was no legal relationship with the withdrawing State. Of the three competing theses (competence to negotiate on the future relationship during the notification period; competence to agree a transition period in the withdrawal agreement; or a 'cold turkey' break with the withdrawing State), the 'transition period' thesis best reflects the wording of Article 50 (which expressly refers to taking account of the future relationship in the withdrawal agreement, but makes no express reference to negotiating it, and preserves the withdrawing Member State's status as a Member with limited exceptions during the notification period), as well as Article 8 TEU.[13]

However, the argument against the Northern Ireland/Ireland Protocol on these grounds is rather stronger. While the initial version of that Protocol was expressly temporary,[14] the revised version is not. Unlike the citizens' rights provisions in the withdrawal agreement—which apply for the lifetime of the persons concerned, but which only concern the preservation of aspects of a legal status which derives entirely from the UK's membership of the EU—the free trade arrangement between the EU and Northern Ireland and the other provisions of the Protocol are not about preserving a legal status deriving from membership, but about broader political concerns. If asked about the validity of the Protocol, the CJEU might fall back upon the possibility of the parties agreeing to amend it—but this is neither an obligation nor (as we shall see below) unique to the Protocol.

If the Court did find that the conclusion of the withdrawal agreement was invalid, first of all it would likely limit the temporal legal effect of its ruling, given the enormous impact of ruling that the conclusion of the treaty was invalid as from its entry into force.[15] Secondly, the invalidity would in principle only affect the EU, rather than the UK, because the treaty concerns a non-EU country;[16] although as the Court has some jurisdiction over the UK under the withdrawal agreement, it might be arguable that this was a special case where the finding of invalidity would have legal effect in the non-EU party too. Furthermore, as explained above, because the withdrawal agreement did not cause Brexit, even a hypothetical finding that it was invalid *in international law*, applying to both parties (see further Section III.C) would not 'overturn Brexit'; the UK would simply retroactively have left the EU without a withdrawal agreement.[17]

(ii) Subsequent developments: implementing, amending, or denouncing the withdrawal agreement

The withdrawal agreement expressly gives powers to its Joint Committee to amend or implement it in specified cases.[18] These powers are necessarily exercised after the agreement came into force, therefore after Brexit day. So this raises the question of whether Article 50, or another legal base, or even in some cases the participation of Member States, is necessary for the EU to agree to such measures.

In practice to date the Joint Committee has adopted one measure,[19] and the EU legal base (proposed by the Commission, uncontested by the Council) was Article 50.[20] It is submitted that this is correct: since the withdrawal agreement was bound to raise a number of complex legal issues that might be settled later, it would be unconvincing to argue that Article 50 rules out the possibility of conferring powers to implement the withdrawal agreement upon the Joint Committee. Furthermore, following the interpretation advanced above, Article 50 competence extends to the adoption of the EU position in the Joint Committee relating to the withdrawal agreement, as long as the Joint Committee is acting within the scope of the competence conferred by Article 50 (ie an orderly withdrawal and short transition, rather than a future relationship).[21]

As for the subsequent amendment or replacement of the agreement *by the parties*, as distinct from the Joint Committee, this is expressly provided for in several cases.[22] The legal base of any such measure should depend on whether it concerns the future relationship or not. In particular, replacement of the Northern Ireland/Ireland Protocol would solve any issue relating to the Protocol's compatibility with Article 50, as it would be based on legal bases relating to the future relationship.

Could the agreement be amended in other cases not referred to therein? Not by the Joint Committee, since it lacks the power to wish for more wishes;[23] but could it be amended by the parties? Amending a treaty with the consent of the parties is not a problem as a matter of international law;[24] but the issue is whether the EU can agree to this at all, and if so on what basis. It is submitted that it can do so, as nothing in Article 50 explicitly rules out amendment of the withdrawal agreement; it is always possible that the interests of orderly withdrawal or the details of a future relationship might lead to the parties agreeing to amend the arrangement between them after departure.[25] The legal base for such an amendment on the EU side depends on whether it concerns orderly withdrawal or the future relationship.[26]

As for an EU decision to terminate the withdrawal agreement, two issues arise: the legal base and the reviewability of that decision in light of international law; the latter point is considered below (Section III.A(iii); on the international law issues see Section III.C). Assuming that a decision to terminate the treaty would be valid under EU law in light of international law (a highly contestable assumption, as we will see), the legal base would in principle be Article 50 TEU, since the termination would concern the withdrawal of a Member State—although it might be argued that Article 50 only confers power to regulate the *orderly* withdrawal of a Member State, and the termination of the withdrawal agreement would conversely make the process rather more disorderly. If the EU sought to replicate provisions of the terminated agreement unilaterally (for instance, the separation and citizens' rights provisions), Article 50 could not be a legal base, since it makes no reference to any *legislative* process; the ordinary legal bases for such measures could be used instead. As regards citizens' rights, replicating the citizens' rights provisions would fall wholly within the scope of EU competence, since the rules in that part of the agreement do not concern the admission of UK citizens to seek work.[27] In the event that the UK and EU were willing to agree treaties to this effect, the question would arise whether Article 50, rather than other specific legal bases, could still serve as the legal basis for treaties concerning withdrawal of a Member State concluded after that country's withdrawal had taken effect.

(iii) Legal effect

There is no doubt that the CJEU has jurisdiction over the withdrawal agreement as regards the EU side.[28] Indeed, the EU Courts have already referred to the agreement during the transition period (see Section XI.A), and ruled on legal challenges relating to it (see Sections V, as regards the status of Advocate-General nominated by the UK and VI, as regards challenges relating to loss of EU citizenship). Given the extent of jurisdiction conferred on the CJEU as regards the UK in the withdrawal agreement (see Section XI), it would have been very odd if the CJEU had developed some convoluted exception from its case law to claim that it had no jurisdiction on the EU side.

However, what is the legal effect of the agreement within the EU legal order? While the agreement specifies its legal effect within the UK legal order (see discussion in Section IV), it does not provide for what legal effect it may have on the EU side. So it is necessary to consider the issue from first principles. In *Kupferberg*,[29] the Court ruled that in the absence of any agreement by the contracting parties, the Court can rule on the legal effect of an international treaty within the domestic legal order, taking account of the 'nature and structure' of the treaty in general, and on the specific provision of the agreement, taking account of its object, purpose, and context. The existence of a body like a Joint Committee does not preclude the Court from ruling that the agreement does not have direct effect; nor does the existence of a safeguard clause.[30] A prohibition on discriminatory internal taxation found in a free trade

agreement met the conditions to be directly effective. So did the provisions in association agreements regarding migration—if they were sufficiently clear, precise, and unconditional to confer direct effect.[31]

On the other hand, the CJEU has ruled that some international treaties do not meet its criteria for direct effect—in particular the WTO agreements.[32] In the Court's view, this was because of the role of negotiations in the WTO process and the nature of the WTO dispute settlement system, in particular the possibility of not complying with dispute settlement rulings, instead choosing to negotiate compensation with the winning party under the terms of the WTO dispute settlement system. The WTO was different from association agreements and the EU's FTAs, not being based on a special relationship of integration. Reciprocity was an issue, as the EU's main trading partners did not provide for the direct effect of WTO rules in their legal system, and so the EU judiciary should not 'disarm' the EU political institutions from having the same scope to manoeuvre that the EU's trading partners have. The Court has extended this reasoning to decisions of the WTO dispute settlement system.[33]

Applying these principles to the withdrawal agreement, should it be compared to an international treaty like the WTO, or to an integration treaty like the Ankara Agreement? Here the tension between treating the withdrawal agreement as a form of quasi-EU law, or as an international treaty of a different nature, plays out for the EU side. While the Court has (inevitably) not previously examined whether a treaty of this type meets the criteria for direct effect, it is submitted that it does. Even though its aim is to provide for the separation of the UK from the EU, rather than a form of integration, it does so in the context of providing for an orderly withdrawal.[34] Logically this objective suggests that, while a future relationship treaty with the UK may be a different issue, the withdrawal agreement is closely connected to the EU legal order. Simply put, the withdrawal will be less orderly without the direct effect of the agreement on the EU side.

This is borne out by the specific provisions of the agreement. It contains an exceptional degree of continued jurisdiction for the Court of Justice as compared to other treaties with non-EU countries, and includes obligations for the UK to apply the principles of direct effect and supremacy, which answers the Court's concern about reciprocity in the context of the WTO.[35] It contains a multitude of cross-references to EU law (much of which is itself directly effective), which the Court has considered when deciding favourably on the direct effect of other treaties.[36]

Although the dispute settlement system in the withdrawal agreement has many features in common with that of the WTO (see Section XI.D below), one striking difference is the inclusion of the CJEU within that system, with the jurisdiction to give rulings on any EU law issues which arise. Moreover, CJEU jurisdiction as regards some issues continues alongside the dispute settlement system (see Section XI.B and XI.C below), including in particular for EU citizens in the UK; the prospect of direct effect of the agreement for UK citizens in the EU could well prove particularly important for them. Arguably it follows that decisions of arbitrators under the withdrawal agreement have effect within the EU legal system as well, unlike the equivalent decisions of the WTO dispute settlement system—because the Court's objections to giving domestic legal effect to the latter were inextricably linked to its objections to giving such effect to WTO law as a whole, and (again) because the potential role of the CJEU in the withdrawal agreement arbitration process is fundamentally different from the WTO rules. Denying the legal effect of withdrawal agreement arbitration rulings within the EU legal order would, in some cases, have the effect that the Court's rulings were not fully binding.[37]

Although there is a safeguard clause in the Northern Ireland Protocol (see Section X.A), the case law, as we have seen, dismisses the relevance of such clauses when deciding on direct effect; this provision does not apply to the whole withdrawal agreement anyway. While, at time of writing, the UK was arguably planning to legislate to breach the agreement, the risk of non-compliance by either side is inherent in any international treaty, and has not prevented the Court from ruling that some treaties confer direct effect. The EU retains the power to address any breach via the agreement's rules on dispute settlement (see Section XI.D). Although the Joint Committee has a number of powers to implement or amend the treaty (see Section IX), unlike the WTO it could not be described as merely a framework for negotiations, for many provisions (such as the citizens' rights provisions) do not refer to any further action by the Joint Committee before they take effect.

Finally, it should be noted that the issue of direct effect arises not just as regards implementation of the treaty within the EU legal order; it is also relevant to the limits on any purported termination of the treaty by the EU, because it may impact upon whether the rules of international law on the termination of treaties (summarized, and applied to the

withdrawal agreement, in Section III.C) could be invoked against any EU measure which terminated the agreement in some form.[38]

The link between direct effect and the possible invocation of international law as regards the termination of treaties was made by the CJEU in *Racke*,[39] which concerned a challenge to the EEC's termination of a cooperation agreement with Yugoslavia, on the grounds of a fundamental change in circumstances, when the Yugoslav war broke out. Racke, an importer of wine from Yugoslavia, being affected by the termination of the treaty, challenged the EEC's decision in the German courts, which asked the CJEU if the EEC's termination of the treaty was valid.

According to the CJEU, 'even though the Vienna Convention [on the law of treaties: 'VCLT'] does not bind either the Community or all its Member States, a series of its provisions, including Article 62 [on change in circumstances], reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty.' The International Court of Justice (ICJ) had ruled already that on this point, the VCLT 'may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances'.

Next, the Court asserted that it had jurisdiction to rule on the validity of an EEC act in light of the rules of public international law. Before it applied those rules, it insisted that the rules in the treaty which the importer sought to invoke had to confer rights on individuals.[40] It found that they did, based on its usual test for 'direct effect' of an international treaty in EEC (now EU) law, as summarized above.

The Court then observed that international treaties concluded by the EEC (now EU) form an integral part of EU law, and that if the termination of the treaty were invalid, the company would still have rights regarding the import of Yugoslavian wines. So the EU has to 'respect international law in the exercise of its powers' and 'is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country'. On that basis '[i]t follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.'

Applying these rules, the Court noted that international law was based on compliance with treaties (the *pacta sunt servanda* principle), 'which constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle requires that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention).' Its importance had been further underlined by the case law of the International Court of Justice, ruling that 'the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases'.

Individuals could therefore invoke 'obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations' to challenge the EU's termination of a treaty. However, since the rules in question were complex and imprecise, the Court limited its judicial review to whether 'the Council made manifest errors of assessment concerning the conditions for applying those rules'. It decided that the civil war in Yugoslavia met the conditions to justify terminating the treaty. As for application of the procedural rules for terminating treaties in the VCLT (ie sufficient notice and consultation), the CJEU thought that prior warnings of termination were sufficient, and that '[e]ven if such declarations do not satisfy the formal requirements laid down by' the VCLT, 'the specific procedural requirements there laid down do not form part of customary international law'. Note that the Court did not confine itself to the 'fundamental change in circumstances' rule here—so the other rules concerning termination of treaties, including the 'material breach' rule discussed in Section III.C below, would be relevant.

The Court has subsequently reiterated that challenging EU law measures for breach of international law in general is subject to the requirement that the breach affects the EU's competence, impacts upon rights which individuals derive from EU law, and is a manifest error of assessment by the EU institutions as regards customary international law.[41]

Applying these principles to the withdrawal agreement, it has already been argued that the withdrawal agreement confers rights on individuals. The requirement that the dispute affect the EU's competence, not mentioned as such in *Racke* or *Opel Austria*, could be understood as being satisfied as regards an argument that the EU lacks competence to terminate the treaty due to the rules of international law. And given the significant constraints which international

law (partly due to the agreement itself) places upon terminating the withdrawal agreement, for the reasons discussed below (Section III.C), there may be an argument that a manifest error of assessment would have occurred if the EU decided to terminate it.[42]

Even if suspension or termination is valid, there are specific issues relating to citizens' rights. As noted below (Section III.C), suspension of the agreement expressly cannot affect them. And while the VCLT provisions concerning retention of rights in the event of termination of a treaty, or the ban on reprisals in the event that a treaty of a 'humanitarian character' is terminated for a material breach, arguably do not literally cover those covered by the citizens' rights rules,[43] it could be argued that in conjunction with the EU law principle of legitimate expectations, such rights cannot be removed.[44]

B. UK legal issues

In the UK, as a country with a 'dualist' approach to international law, treaties are not part of domestic law unless Parliament legislates to that effect, but remain binding on the UK as a matter of international law. This relationship is confirmed not only by international law,[45] but by the case law of UK courts.[46] At time of writing, there was some public confusion about these simple rules, due to some (frankly) misleading, ignorant, or downright dishonest contributions to the argument about the UK's proposed Internal Market Bill.[47] The reiteration of parliamentary sovereignty in the *Withdrawal Agreement Act* does not alter the position;[48] the fact that the EU concluded the agreement after the UK adopted the Act is immaterial, since parties to treaties sign up to *treaties*, not to the national implementing law of the other parties, as if treaties were some sort of international collective birthday card. The contrary interpretation would plainly contradict the VCLT and UK case law. It is—again—not possible for national law to authorize a breach of an international treaty at international level.

Whether the UK's Internal Market Bill, as it stood at time of writing, would breach the withdrawal agreement is considered separately in this paper (see particularly Sections IV and X.A). Leaving the bill aside for a moment, at present the UK has passed an Act of Parliament to give effect to the withdrawal agreement in domestic law (the *Withdrawal Agreement Act*).[49] Any secondary legislation or government action in breach of the agreement could, at least until the Internal Market bill is passed, be struck down by the courts.[50] However, the Act makes no specific reference to dispute settlement rulings forming part of UK law or not. The UK's 'dualist' approach to international treaties would suggest that they do not form part of UK law, unless it could be argued that Parliament's implementation of the withdrawal agreement in domestic law was implicitly intended to apply to dispute settlement rulings too.

The principle of parliamentary sovereignty means that there is no barrier to Parliament giving effect to a breach or termination of the treaty as a matter of domestic law; so unlike EU law, there is no need to consider whether international law might constrain the exercise of parliamentary powers. An attempt to terminate the treaty by the *executive* alone, without Parliament repealing or amending the Act which gives effect to it, might however raise domestic constitutional issues like those decided (in favour of Parliament) in *Miller I*, on the grounds that like EU membership, the withdrawal agreement created rights via means of an Act of Parliament, meaning that Parliament has to approve any decision to withdraw from the agreement, just as it had to approve withdrawal from the EU.[51]

C. International law issues

With the tabling of the UK Internal Market bill in September 2020, the issue of a breach of the withdrawal agreement was no longer a hypothetical issue for academics to ponder. While breach or termination of the treaty may well have political consequences instead or, or in addition to, the legal process, my focus here is the legal angle. The following discussion looks first at whether international law binds the EU at all, then at the specific issues of breach and termination of the withdrawal agreement in light of international law.[52]

Long-standing case law of the ICJ confirms that international law provides for the legal personality of international organizations, including the capacity to sign treaties.[53] Although there is no treaty in force governing the law of treaties as it relates to international organizations,[54] the ICJ has ruled, as noted above, that as between States, the non-application of the VCLT to a particular dispute does not prevent the application of the customary international law of treaties to that dispute; and as regards many issues, including the termination of treaties pursuant to Articles 60 to 62

VCLT (discussed below), the VCLT simply codifies customary international law.[55] Moreover, when giving an advisory opinion on the termination of a treaty between a State and an international organization, the Court reaffirmed that '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'[56] In particular, the ICJ specifically referred to the provisions of the VCLT and the (then) draft articles for a Convention relating to the law of treaties between States and international organizations dealing with the termination of treaties.[57] By analogy, it can be argued that the provisions of the latter Convention on the termination of treaties, just like the essentially identical provisions of the VCLT, reflect customary international law as far as treaties with international organizations are concerned.

Applying these principles to treaties signed by the EU, its capacity to sign international treaties is long established by the case law of the CJEU,[58] and the United Kingdom has signed treaties both alongside the Union (as a Member State) and with the Union, as (de facto) a non-EU State (the withdrawal agreement itself). Other Member States and non-Member States have done the same.[59] The application of the customary international law of treaties to the EU is not only a construct of CJEU case law,[60] but has been accepted by the UK courts[61]—and indeed by the UK Parliament, when it approved implementation of the withdrawal agreement.

It might be argued that the UK authorities and courts only accepted the CJEU's approach to the legal status of the EU in international law due to EU membership, but this has continued after membership: despite its alleged attempt to break it, the government still regards the withdrawal agreement as a treaty pursuant to international law,[62] and the EU as an interlocutor in negotiations for future relationship treaties.

(i) Breach of the treaty

The withdrawal agreement sets up detailed rules on dispute settlement to address any potential arguments about breach of the treaty. While the substance of these rules is discussed below (Section XI.D), suffice it to say for now that the dispute settlement rules in the agreement are exclusive, ruling out settling disputes by means other than set out in the agreement.[63] Logically this rules out not only resort to alternative fora like the International Court of Justice, but also unilateral actions of one party based on an allegation that the other party has breached the agreement—or even following a ruling that the other party has breached it, because the agreement provides for a remedies process in that case. Nor is suspension or termination automatic merely because one side has allegedly committed a breach, or even following a breach established by means of dispute settlement: the agreement provides that suspension is temporary and conditional (and cannot apply to citizens' rights), while there is no mention of the possibility of termination (besides parts of the Northern Ireland/Ireland Protocol).

(ii) Termination of the treaty

As far as treaties are concerned, the two main sources in international law are customary international law and the VCLT.[64] The latter sought to codify the customary rules but differs in some respects. Some EU countries have not ratified the VCLT; nor has the EU, as the Convention is open to States only.

The starting point in the VCLT is that the validity of a treaty or a State's consent to be bound by it can only be impeached under the VCLT.[65] Termination, suspension, denunciation, or withdrawal can only take place under the treaty or the VCLT.[66] Other international law still applies between the parties even if the treaty no longer does.[67]

Denouncing, withdrawing from, or suspending a treaty (as provided for in that treaty, expressly or by implication) must apply to the whole treaty unless the treaty otherwise provides, or the parties agree.[68] Invalidating, terminating, withdrawing from, or suspending a treaty as provided for in the VCLT must apply to the whole treaty, except (among other exceptions) if there is a 'material breach' of the treaty, or if the ground for termination, etc relates to certain parts of the treaty and they are severable from the others and they were not an 'essential basis' of the consent to the treaty.[69] A State loses its 'right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty' if it agrees expressly that the treaty is valid or remains in force, or its conduct suggests the same.[70]

The conclusion of a treaty can be invalid where a State's consent to be bound was very obviously in violation of its internal law on competence to conclude a treaty, if an error in a treaty was an 'essential basis' of the consent to be

bound, by fraud by another negotiating State, corruption of the State's representative procured directly or indirectly by another negotiating State, or coercion (acts or threats against the State's representative, or the threat or use of force against the State in violation of the UN Charter).[71] A treaty is void if it conflicts with 'a peremptory norm of general international law ("jus cogens")'.[72]

States can terminate or withdraw from a treaty only in accordance with its provisions or consent of the parties.[73] Crucially, if a treaty does not provide for termination, denunciation, or withdrawal, a State cannot denounce or withdraw from it unless either: '(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.' Twelve months' notice to leave is required in such cases.[74]

As for suspension of a treaty, this is possible 'in conformity with the provisions of the treaty' or if all the parties consent.[75] Either termination or suspension is possible in the event of a 'material breach' by one party, which 'entitles' the other party 'to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.[76] The VCLT defines a 'material breach' of a treaty as '(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty'.[77] But all this is 'without prejudice to any provision in the treaty applicable in the event of a breach',[78] and does 'not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.[79]

Termination, withdrawal, or suspension could also follow a 'fundamental change of circumstances' since the treaty was concluded, if it was 'not foreseen by the parties', if the original circumstances were an 'essential basis of the consent of the parties to be bound by the treaty' and 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'. This cannot be invoked if the change in circumstances was caused by the party wanting to end its obligations.[80]

The VCLT also regulates the process of termination or other forms of ending a treaty. A party seeking to end a treaty must give the other party three months' notice. It can then proceed as planned if there is no objection. But if there is an objection, the parties must try to find a solution. This does not affect anything in force regarding dispute settlement between the parties, so it is obviously possible that either the EU or UK would invoke the dispute settlement provisions in the withdrawal agreement in this scenario (if they had not done so already).[81]

If there is no negotiated solution within 12 months from raising the objection, one party may ask the ICJ to rule, or both can 'agree to submit the dispute to arbitration', or the conciliation process set up by the VCLT itself might apply.[82] The process of termination, etc must be in writing and communicated formally, and can be revoked at any time before it takes effect.[83]

As for the consequences of termination, etc, an invalid treaty is void and has no legal force, with safeguards for acts already performed in good faith.[84] In case of termination, '[u]nless the treaty otherwise provides or the parties otherwise agree', the parties have no further obligation to perform the treaty, but this 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'.[85]

For suspension, '[u]nless the treaty otherwise provides or the parties otherwise agree', suspension means that the treaty does not apply 'during the period of the suspension' and 'does not otherwise affect the legal relations between the parties established by the treaty'. The parties must 'refrain from acts tending to obstruct the resumption of the operation of the treaty'.[86]

Applying the VCLT principles to the particular circumstances of the withdrawal agreement, there is a limited possibility for the unilateral termination of part of the Protocol on Northern Ireland/Ireland (not the whole withdrawal agreement), in the event that it lacks continued consent in Northern Ireland, following a particular detailed procedure in that Protocol.[87] To date, the conduct of both parties (complying with the transitional period, participating in the Joint Committee) suggests that they believe that the treaty is valid and remains in force. Arguments that the treaty was concluded in violation of manifest rules of the UK's competence to conclude treaties, or under a form of duress, are not convincing.[88] Since there is no express provision on termination or withdrawal of the entire withdrawal agree-

ment, for such a possibility to exist it must be established that either the parties intended to admit this possibility or that it is implied by the nature of the treaty. I am unaware of any evidence of the former; as for the latter, the 'lifetime' nature of the citizens' rights provisions and the intention to create a 'durable' arrangement for Northern Ireland (unless the parties agree a replacement) and the Cypriot bases suggest the opposite,[89] as does the 'temporary' nature of partial suspension or financial penalties in the event of a breach. As noted already, the withdrawal agreement has specific provisions on suspension, allowing for it as a possible outcome of the dispute settlement process, except for the citizens' rights chapter.[90]

As for termination due to a material breach, again the treaty has specific provisions on this issue, and a general rule that disputes have to be dealt with in accordance with the treaty.[91] It is therefore arguable that termination of the entire withdrawal agreement in response to a breach of it is therefore ruled out by the agreement itself.[92] In particular, even if arguments relating to 'good faith' as regards trade negotiations are well-founded (see Section IX) there is a process in the treaty to settle disputes on this issue and it is untenable to suggest that the negotiation of a future trade agreement is 'essential to the accomplishment of the object or purpose of' the withdrawal agreement (ie the VCLT threshold for showing a 'material breach'). The issue is only briefly referred to in the text and preamble of the treaty, as compared to numerous references to 'orderly withdrawal' and specific aspects of the withdrawal process. Moreover the reference in Article 50 TEU to the withdrawal agreement taking account of the framework for the future relationship suggests that the negotiations to that end are not (and cannot be) the object or purpose of the withdrawal agreement. The desire by one party (the UK) to regard the future relationship negotiations as the centrepiece of the agreement was not shared by the other party, which referred most often to citizens' rights, the financial settlement, and the Irish border. In any event, the text of the jointly agreed treaty is decisive—and it does not support the UK's position.

Nor can it be seriously argued that the 'fundamental change of circumstances' provision applies: in the short time since the treaty was concluded, it is hard to point to a relevant issue which was 'not foreseen by the parties' (the safeguard clause being sufficient to address any impact of Covid-19 on economic circumstances in Northern Ireland). In any event it would still be necessary to prove that the original circumstances were an 'essential basis of the consent of the parties to be bound by the treaty' and 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty', and, as noted above, the argument cannot be invoked if the change in circumstances was caused by the party wanting to end its obligations.[93]

IV. Common provisions

Article 1 specifies that the withdrawal agreement sets out the arrangements for leaving the EU as well as Euratom.[94] It was difficult to avoid leaving Euratom at the same time as the EU, since Article 106a of the Euratom Treaty specifies that Article 50 TEU also applies to the Euratom Treaty, and Euratom shares the EU's institutions—which the UK was definitely leaving.

Article 2 sets out the definitions used by the withdrawal agreement, including 'Union law': the Treaties, including accession treaties; the Charter; EU law general principles; acts adopted by EU bodies; international agreements signed by the EU, or its Member States on the EU's behalf; 'agreements between Member States entered into in their capacity as Member States of the Union'; acts of Member States' representatives 'meeting within the European Council or the Council'; and declarations linked to Treaty amendments.[95] This definition is important because there are many references to EU law obligations throughout the withdrawal agreement. More generally, the definition is relevant for the scope of the obligation to take account of CJEU case law.[96] Note that it refers to EU law adopted before the end of the transition period.[97]

'Member States' are defined as the remaining 27 Member States, less the UK[98]—although in fact the UK is defined as a 'Member State' for many purposes in the withdrawal agreement. In general, Article 7 provides that 'Member States' refers to the UK in the context of the withdrawal agreement as regards *substantive* EU law, but not EU *institutional* law: the UK is not a Member State for the purposes of membership of EU institutions, bodies, offices, and agencies, or any role in their decision-making or governance, including 'comitology' proceedings on the implementation of EU law.[99] The transition period rules retain this distinction, with some nuances.[100]

A ‘Union citizen’ is anyone ‘holding the nationality of a Member State’—removing citizens of the UK from the status of EU citizenship (or arguably acknowledging that the loss of such status is an unavoidable consequence of Brexit).[101]

As for the territorial scope of the withdrawal agreement, Article 3 specifies that unless specified otherwise, references to the UK apply to the UK itself; Gibraltar, the Channel Islands, and the Isle of Man, to the extent that EU law applied to them before Brexit Day;[102] the UK’s bases in Cyprus, ‘to the extent necessary’ to implement the protocol to the 2003 accession treaty concerning them;[103] and the overseas countries and territories listed in Annex II to the Treaty on the Functioning of the EU (TFEU) which have special relations with the UK, to the extent that the withdrawal agreement applies to those special arrangements.[104] On the EU side, unless specified otherwise, references to the UK apply to the Member States’ territories as defined in Article 355 TFEU.

Next, the withdrawal agreement sets out rules on its legal effect and interpretation as regards the UK.[105] Article 4 provides that the agreement, and the EU law it makes applicable, shall have ‘the same legal effects’ in the UK as it does in the EU and its Member States—explicitly preserving the principle of direct effect.[106] The UK must give effect to this, including via the principle of supremacy—disapplying conflicting domestic provisions—by means of domestic primary legislation.[107] However, section 38 of the *Withdrawal Agreement Act* expressly preserves the principle of parliamentary sovereignty—leading to the possibility of a conflict in the event that Parliament passes an Act which breaches the UK’s obligations.[108] In September 2020 the UK proposed an Internal Market bill, which would expressly allow the government to disapply the agreement in domestic law as regards specific provisions of the Protocol on Northern Ireland/Ireland. Even before those powers are used in practice, it is submitted that if the bill is passed, this would be an obvious breach of the obligation to provide for the primacy of the agreement in domestic law. This equally applies if Parliament must approve the use of such powers first.[109]

Moving on to interpretation of the withdrawal agreement, it must be ‘interpreted and applied in accordance with the methods and general principles of Union law’ wherever it refers to ‘Union law’ or ‘concepts or provisions’ of EU law.[110] References to ‘provisions’ of EU law are easy enough to identify,[111] but the notion of ‘concepts’ of EU law is undefined. The phrase must mean something beyond ‘provisions’, as the parties would otherwise not have added; but it cannot refer to the whole withdrawal agreement, because if the parties had wanted to give the CJEU jurisdiction over the whole agreement, they would have done so expressly—which they did as regards the transition period,[112] but not the rest of the agreement.

This is another example of the tension in the withdrawal agreement between applying EU law notions and the approach of traditional international law. The best approach to interpreting ‘concepts’ of EU law is to assume that it means all cases where the agreement refers to EU law without identifying specific provisions of it. For instance, Article 4(2) requires the primacy of the agreement to be secured, as an aspect of securing the same legal effect as EU law has within the EU legal order; this is necessarily a reference to a concept of EU law. But Article 5 refers to the principle of good faith without any reference to EU law; this should not be regarded as a concept of EU law, because the agreement does not refer to it, even though (as noted below) its wording is similar to EU law provisions. If the parties had wanted to refer to EU law more expressly, they could have done so, as they did in many other provisions of the agreement.[113]

Moreover, references to EU law or its concepts or provisions in the withdrawal agreement must be ‘interpreted in conformity with’ relevant CJEU case law handed down *before* the end of the transition period; the UK need only have ‘due regard’ to case law handed down *after* that point.[114] Similarly, all references to EU law in the agreement (with exceptions) must be understood as references to EU law as amended or replaced on the last day of the transition period.[115]

Both the EU and the UK have a general ‘good faith’ obligation as regards the agreement, with a requirement to take the measures to ensure fulfilment of their obligations and refrain from measures which would jeopardize the agreement’s objectives. This is ‘without prejudice’ to the specific obligations to apply EU law set out in the agreement, including ‘the principle of sincere cooperation’.[116] As suggested above, it is arguable that this is *not* a concept

of EU law, and so need not be interpreted the same way. There is also a specific good faith obligation to negotiate a future relationship treaty, discussed further below.[117]

In September 2020, both sides suggested that the other was in breach of the good faith obligation—the EU suggesting this was true of the UK tabling an Internal Market bill that would arguably breach Article 4 of the agreement if adopted, the UK suggesting that this was true of the EU not listing its foodstuffs for export, and not negotiating in good faith on the future relationship. The future relationship point is discussed in Section IX; the foodstuff listing process is still underway at the time of writing, so cannot yet be judged; and alleging bad faith merely for tabling proposed legislation is an unconvincing interpretation of Article 5, given that a mere proposal has no legal effect.

Finally, Article 8 winds down the UK's access to the EU's information systems and databases. Unless otherwise provided, that access ends at the end of the transition period, and the UK must take measures to ensure that it no longer accesses those databases.[118] It remains to be seen whether some access might be agreed in a future relationship treaty.

V. Transition period

As noted already, the withdrawal agreement provisions on the transition period are set out in Part Four of the agreement—Articles 126–132.[119] This period started when the agreement entered into force, and lasts until the end of 2020, matching the end of the EU multiannual financial framework which was applicable when the UK left.[120] There was the possibility to extend the period by 'up to one or two years', provided that the Joint Committee had adopted a decision to that effect by 30 June 2020,[121] but it did not do so, due to the opposition of the UK.[122] Any agreement to extend the transition period after that date would require an amendment to the agreement itself.[123] Conversely, the transition period could potentially be curtailed early as regards foreign policy issues—although as discussed below,[124] that seems unlikely at the time of writing. There is no other provision for unilateral or agreed early termination of the transition period, unless the withdrawal agreement is amended by the parties.[125]

If an extension had been agreed, note that it could only be a 'single decision', that is, not a series of extensions, which had been agreed as regards the UK's EU membership. The EU would have notified the parties to international agreements of such an extension.[126] Extension of the transition period would have been a more complicated process than extension of EU membership: the EU's budget law and State aid law (as regards farm support, up to a certain level) would not have applied to the UK during the extended transition period after the end of 2020, but the UK would have had to make an ad hoc contribution to EU finances instead.[127] While it is sometimes assumed that an extension would have had to be for a one or two period, the agreement is in fact more flexible on this point. [AQ6][128]

The CJEU continues to have its usual jurisdiction as regards the UK during the transition period,[129] to interpret both the EU law obligations which still apply to the UK during that period and the withdrawal agreement itself, to the extent that the agreement is already applicable during the transition period. This jurisdiction is discussed further in Section XI.A below.

Part Four sets out substantive exceptions to the application of EU law during the transition period (Article 127). It then sets out specific rules regarding the EU institutions (Article 128), external relations (Article 129), and fisheries (Article 130).

On the substantive law of the EU, Article 127 lists what does *not* apply to the UK during the transition period. In other words, all EU law applies to the UK unless otherwise listed.[130] This includes new EU measures adopted during this period (see Article 6, discussed in Section IV above), as well as the usual legal effect and interpretation rules of EU law.[131] The first two exceptions are: EU law which was not applicable to the UK already due to its opt-outs on monetary union, Schengen, and justice and home affairs (JHA), as well as enhanced cooperation measures which it had not opted in to;[132] and the Treaty provisions on EU citizenship as regards citizens' initiatives and voting in the European Parliament and municipal elections.[133] The latter exclusion entails the continued application of other EU citizenship provisions, in particular free movement of persons. It might be argued that the status of EU citizenship itself therefore continues to apply to UK citizens solely during the transition period. Whether it applies after that point, and whether voting rights as a matter of EU law has validly ended during that period and beyond, is disputed.[134] As regards JHA, a separate provision of the withdrawal agreement states that Member States can refuse to

surrender their own citizens to the UK on the basis of the European Arrest Warrant (EAW) during the transition period, due to constitutional limits on extraditing their own citizens outside the EU.[135] While this is not expressly set out, it is also not possible to revoke the UK's notification of its decision to leave the EU during the transition period—because the UK has already left the EU, otherwise the withdrawal agreement would not be applying in the first place.[136]

Next, there is one area in which the transition period could be terminated early—the EU's Common Foreign and Security Policy, in the event that the UK and EU reach an agreement on their future relationship on this issue.[137] This is unlikely both because of the limited time to negotiate on this (the transition period being shorter than originally planned, due to extensions of the UK's EU membership), and because the UK has no interest in negotiating such a treaty.[138]

Although the UK is no longer an EU Member State, it is treated as one for the purposes of the substantive EU law which applies to it during the transition period.[139] There are derogations, however: the UK is not treated as a Member State for the purposes of defence cooperation, or where an information exchange programme includes 'access to security related sensitive information that only Member States (or nationals of Member States, or natural or legal persons residing or established in a Member State) are to have knowledge of', or as regards staff of the EU institutions and other EU entities.[140]

The impact of the withdrawal agreement on British citizens employed by EU bodies has been an issue before the EU courts as regards UK officials involved in foreign policy operations (where the case is still pending),[141] and as regards the Advocate-General nominated by the UK, whose legal challenge was unsuccessful on the procedural ground that the EU courts do not have jurisdiction to rule on collective acts of the Member States (which was the basis of her appointment).[142]

As regards institutional law, Article 128 first of all reiterates that the UK should be regarded as a Member State when EU law refers to Member States, except as regards EU institutions, governance of agencies, or voting in the committees that oversee the adoption of implementing measures by the Commission.[143]

Furthermore, during the transition period, the UK parliament 'shall not be considered to be a national parliament of a Member State', except for parts of the Treaty protocol on national parliaments—which means that consultation documents and proposals for EU legislation are still sent to the UK parliament during the transition period.[144] However, the rest of that Protocol ceased to apply to the UK parliament: it concerns national parliament objections (Article 3); a waiting period (Article 4); Council agendas (Article 5); simplified Treaty amendments (Article 6); the Court of Auditors (Article 7); bicameral parliaments (Article 8); and COSAC, the joint EP/national parliament body (Title II). Similarly, the Bank of England is no longer 'considered to be a national central bank of a Member State', with the exception that the Bank can still act as a fiscal agent for those buying government debt without this violating the Treaties' no-bailout clause.[145] The UK also lost the institutional right of actual EU Member States 'to submit proposals, initiatives or requests to the [EU] institutions'.[146]

As regards the role of UK experts, they can be involved in 'comitology' meetings on the implementation of EU law only 'exceptionally', without voting rights, where either the discussion concerns an individual measure that would be addressed to the UK or to 'natural or legal persons residing or established' there, or the UK's presence 'is necessary and in the interest of the Union, in particular for the effective implementation of Union law during the transition period'.[147] Also the UK cannot be a 'leading authority for risk assessments, examinations, approvals or authorisations' at the EU or collective level of Member States.[148] However, if a draft EU act refers explicitly to specific national 'authorities, procedures, or documents', the EU must consult the UK 'with a view to ensuring the proper implementation and application of that act' by the UK.[149]

Next, as regards EU external action, Article 129 sets out the general rule that the UK remains bound by treaties concluded by the EU alone, the EU together with its Member States (mixed agreements), or the Member States acting on behalf of the EU, during the transition period; the EU wrote to the non-Member States concerned to ensure that

they reciprocated.[150] During the transition period and even beforehand, the UK has sought to agree 'rollover' or 'continuity' treaties within non-EU countries with some (but far from complete) success at time of writing.[151]

As with internal EU discussions, the UK should not in principle take part 'in the work of any bodies set up by international agreements concluded by the Union', by means of mixed agreements, or by Member States acting on behalf of the EU—with the exception of cases where the UK 'participates in its own right' (presumably in the parts of mixed agreements which are within the scope of Member State competence), or the EU 'exceptionally invites' the UK to attend meetings as part of the EU delegation, if the EU considers that the presence of the [UK] is necessary and in the interest of the [EU], in particular for the effective implementation of those agreements during the transition period'.[152]

Furthermore, 'the principle of sincere cooperation' has a particular consequence for external relations: the UK must 'refrain, during the transition period, from any action or initiative which is likely to be prejudicial to the Union's interests, in particular in the framework of any international organisation, agency, conference or forum of which the United Kingdom is a party in its own right'.[153] Note, however, that logically this does not apply to the negotiation of treaties, since that is subject to a separate *lex specialis* rule: '[n]otwithstanding' the sincere cooperation rule, during the transition period the UK can negotiate, sign, and ratify international treaties for itself within the scope of EU exclusive competence, as long as those treaties do not enter into force during the transition period, except with EU consent.[154] These limits do not apply within the scope of the EU's *non*-exclusive competence; the scope of exclusive competence is often disputed.[155]

The UK may be consulted on a 'case-by-case basis' if there is a need for coordination',[156] recognizing that there are good reasons why the UK and EU might wish to coordinate their activity in international bodies. But the UK is constrained from commanding, or being the headquarters, of EU defence measures during the transition period.[157]

Significantly, the UK may refuse to apply an EU foreign policy measure during the transition period, 'for vital and stated reasons of national policy' declared to the EU's foreign policy High Representative. In that case, the UK must 'refrain from any action likely to conflict with or impede Union action based on that decision, and the Member States shall respect the position of the United Kingdom.'[158] This is adapted from two different rules about foreign policy decision making in Article 31 TEU—which is remarkable because the UK is not participating in EU decision making as such. It would work the same way as a 'constructive abstention' for Member States, which can opt in this field in some circumstances not to be bound by what the EU does, in which case they are still required to avoid frustrating the EU's action. Since the CJEU's jurisdiction remains limited as regards foreign policy, this exception could not easily be litigated.[159]

Finally, as regards fisheries, Article 130 states that the UK must be consulted as regards 'fixing of fisheries opportunities' related to the UK during the transition period, including in international fora.[160] This entails an opportunity to comment on relevant EU communications, advice, and proposals, and maintaining the 'relative stability keys' for fishing opportunities.[161] The UK may also 'exceptionally' attend international fishing bodies as part of the EU delegation, with a view to preparing its future membership in such bodies.[162]

The transition period provisions are the part of the withdrawal agreement which most fully retains the UK's links to EU law. Even there, though, the links are partly detached, with the UK removed from anything but a marginal role in the EU's institutions and other bodies, and free to start negotiating separate external relationships which apply after this point. Ironically, EU law itself was a barrier to the EU courts deciding on the *Sharpston* dispute on whether the Advocate-General nominated by the UK was swept up in the UK's detachment from the EU institutions or retained her post separately as an independent member of the Court—the tension between the withdrawal agreement as final settlement and continuing relationship being decided, on this point, in favour of the former.

VI. EU and UK citizens

Before examining the details of the withdrawal agreement provisions on citizens' rights, it is necessary to address a basic issue arising from the Brexit process: have UK citizens lost EU citizenship at all? If they could not lose that status once obtained, as some claim, then arguably the validity of at least some parts of the withdrawal agreement is suspect for 'removing EU citizenship from Brits'. Several pending cases have challenged the withdrawal agreement

along these grounds,[163] but standing has been an issue so far.[164] However, the issue may reach the CJEU via a reference from a national court.

Although the CJEU has not yet ruled on the issue, it is submitted that this argument is misconceived.[165] Article 20(1) TFEU states that: 'Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' At first glance, the interpretation is obvious: *only* nationals of Member States can be citizens of the Union; and since the UK ceased to be a Member State, its nationals are no longer EU citizens. While the word 'only' does not expressly appear, it must necessarily be inferred: there is no reference to nationals of non-Member States holding EU citizenship, or even a power for the EU or individual Member States to extend EU citizenship to non-EU nationals.

Against this obvious interpretation, three counter-arguments are often made.[166] First of all, it is argued that there is no Treaty provision providing for the removal of EU citizenship once it is granted. This is a misconception of the notion of EU citizenship, since it is based on nationality of a State, and that State's nationality is not being removed. Furthermore, even on the argument's own terms, there *is* a Treaty provision providing implicitly for the removal of EU citizenship: Article 50 TEU, by means of which the Treaties 'cease to apply' to the withdrawn Member State, including the status of EU citizen for its nationals.

Secondly, it is argued, based on the final sentence of Article 20(1) TFEU (EU citizenship is 'additional to' Member State nationality), that EU citizenship is separate from nationality of a Member State. But this simply ignores the previous sentence, which bases EU citizenship only upon holding nationality of a Member State. There is no further indication that EU citizenship is independent of Member State nationality; quite the reverse. CJEU case law links the two, holding that loss of Member State nationality automatically entails the loss of citizenship of the Union.[167] Taken as a whole, Article 20(1) TFEU indicates that the status of EU citizenship is *founded upon* nationality of a Member State, and then *expands* upon that foundation. By analogy with architecture, national citizenship is a house, and EU citizenship is a loft—and while you can have a house without a loft, you cannot have a loft without a house.

Finally, it is argued that like nationality of a State, EU citizenship can only be removed on an individual basis, for cause and with procedural rights. This is, after all, what the CJEU has said about loss of nationality of a Member State in *Rottmann* and *Tjebbes*, precisely because that loss entails the loss of EU citizenship. But this again misconceives the notion of EU citizenship as if it were identical to that of a state, whereas it is based upon, and not separate from, Member State nationality—as the absence of a law on obtaining EU citizenship from an EU agency proves. This argument is also confused on its own terms, as it ignores the principal means of *acquiring* EU citizenship. Quite simply, while some individuals have acquired EU citizenship as individuals, as a consequence of acquiring nationality of a Member State, most of those who have acquired it since the creation of the concept in 1993 have acquired it collectively—*because the Member State of which they are nationals joined the European Union*. It logically follows that the means of losing EU citizenship include not only the individual loss of nationality of a Member State, on which the CJEU has ruled, but also *because the State of which they are nationals withdrew from the European Union.*

If the arguments for UK citizens retaining EU citizenship are nevertheless ultimately successful, the legal framework will look rather different. But for now, our focus is Part Two of the withdrawal agreement, which aims to preserve parts of the 'acquired rights' of EU citizens in the UK and UK citizens in the EU.[168] This is a key part of the withdrawal agreement, affecting millions of people directly. It mostly applies from the end of the transition period,[169] because the free movement of persons between the EU and UK fully applies during that period.[170] There are particular rules on CJEU jurisdiction over references on Part Two sent from the UK courts after the transition period (see discussion in Section XI.C.ii below).

Part Two has four titles:

1. Title I on General Provisions (Articles 9–12), which covers definitions, personal scope, continuity of residence, and non-discrimination;
2. Title II on Rights and Obligations (Articles 13–27), with Chapter 1 on residence rights and documents (Articles 13–23), covering entry and exit rights, residence rights, status, the application process, safeguards and appeal rights, related rights, and equal treatment; Chapter 2 on the rights

of workers and self-employed persons (Articles 24–26), Chapter 3 on professional qualifications (Articles 27–29);

3. Title III on Social Security (Articles 30–36); and
4. Title IV on Other Rights (Articles 37–39).

A. General provisions

Article 9 defines 'family members' as those within the personal scope of the agreement (as discussed below), if they are core family members of EU or UK citizens as defined in the EU citizens' Directive,[171] or persons other than extended family members of those citizens 'whose presence is required' for those citizens not to lose their rights of residence.[172] 'Frontier workers' is defined by reference to the EU Treaty provisions on workers and the self-employed.[173] A 'host State' is the UK (for EU citizens) or an EU Member State (for UK citizens) respectively, if they exercised EU law rights to live there before the end of the transition period and continue to live there afterward.[174] The definitions are 'without prejudice' to Title III of Part Two, given that social security rules have a different scope.[175]

The cross-references to EU legislation and the EU Treaties underline an important feature of Part Two (as well as much of the rest of the withdrawal agreement): much of it is defined by reference to EU law.[176] This means that the interpretation of those provisions must follow CJEU case law, as well EU law principles more generally.[177]

Who exactly is covered by the citizens' rights provisions? Article 10 defines the personal scope of Part Two UK citizens who moved to the EU, or EU citizens who moved to the UK, 'in accordance with' EU law, before the end of the transition period, if they continue to live there afterward,[178] along with frontier workers who exercised EU law rights before that point,[179] and family members of these groups, on the condition that they either: resided in the host State based on EU law before the end of the transition period and continued to reside there; or were directly related to a sponsor and lived outside the host State then, as long as they meet the free movement law conditions for family members to join the sponsor afterward; or were born or adopted after that point, and meet the free movement law conditions applicable to the admission of children to join the sponsor afterward; or were living in a host State separately from a sponsor in accordance with free movement law.[180] The references to prior residence on the basis of EU law do not expressly require the residence to be on the basis of EU *free movement law*: it is possible that a non-EU citizen could be legally present on the basis of EU immigration or asylum law, and then marry an EU citizen.

Where a Member State has 'facilitated' the entry of an extended family member on the basis of free movement law before the end of the transition period, or an application from such a family member is pending at that point and is subsequently successful, that family member also retains their right of residence.[181] The entry of a partner falling within the scope of the 'extended family member' rules must also be facilitated after the end of the transition period, if the relationship was already 'durable' then and continues up until the time of admission.[182]

Several issues arise as regards the personal scope of the citizens' rights provisions. First of all, the obligation to follow the case law of the CJEU must mean that its case law on dual citizens of two Member States is applicable: for instance *McCarthy* (a dual Irish/British citizen who has not moved within the EU cannot invoke free movement rights) as compared to *Lounes* (a dual citizen of two Member States can claim rights in one of those Member States if she *has* moved between them).[183] On the other hand, the wording does not appear to cover citizens of the UK or a Member State who have moved to the EU or UK respectively, and then return to their State of origin.[184] Nor does it cover *Zambrano* cases, which concern the position of non-EU parents of a child of the *host State*, whose residence is necessary because of their caring obligations for the child.[185] A fourth line of relevant case law—on the children of workers and their carers—is addressed by Article 23 of the Agreement, discussed below.

The general provisions in this Title also contain two further rules. First, continuity of residence of UK or EU citizens for the purpose of defining the scope of the rules is not affected by certain absences.[186] If an EU or UK citizen obtained permanent residence on the basis of the EU citizens' Directive before the end of the transition period, it cannot be lost through absence from the host State unless the absence is more than five years long.[187]

Second, there is a non-discrimination rule: within the scope of the citizens' rights provisions, subject to any special rules set out, discrimination on grounds of nationality is prohibited for those covered by the provisions.[188]

B. Rights and obligations

Article 13 sets out how UK and EU citizens, and their family members, retain residence rights on the basis of the conditions of EU free movement law.[189] Neither the UK nor the EU can impose further conditions or limits on these residence rights besides those referred to in the agreement. There is explicitly no discretion in applying those conditions and limits, except 'in favour of the person concerned'.[190]

A version of EU free movement rules on entry and exit is retained.[191] The EU and UK citizens covered by the agreement, and their family members, can leave the host State and enter it with a valid passport or identity card (for EU or UK citizens), or a passport (for non-EU and non-UK citizens). But five years after the end of the transition period (so by the end of 2025) the host State could refuse to accept identity cards for this purpose any longer.[192] No visas can be imposed where the EU or UK citizen or family member holds a document issued under the terms of the agreement.[193] For those exercising the family reunion rights after the end of the transition period,[194] the host State must 'grant every facility' to obtain visas, which must be issued for free and on an accelerated basis.[195]

Next, the agreement turns to the acquisition and retention of permanent residence status. EU and UK citizens and their family members, who have resided legally on the basis of EU law for five years (or a shorter period where that law provides for this), have the right to reside permanently on the basis of the conditions set out in EU free movement law. This does not merely apply to periods of residence or work *before* the end of the transition period, but to periods *afterward* too—so those who do not qualify for permanent residence at that point have the prospect of acquiring it afterwards on the basis of the same rules.[196] To determine how to count that five years, the agreement refers again to the rules of the citizens' Directive.[197] Once a UK or EU citizen has permanent residence under the agreement, it can only be lost through absence from the State for more than five consecutive years.[198] At first sight, this is more generous than the citizens' Directive, where that status can be lost after only two years' absence.[199] Nevertheless, the persons concerned still have lesser protection overall, since under the Directive they could always exercise free movement rights from scratch if they met the criteria in the citizens' Directive. Post-Brexit they cannot.

For the avoidance of doubt, the agreement specifies that EU or UK citizens or their family members do not lose rights if they change status, for instance between student and worker.[200] This includes family members who were dependent on EU or UK citizens before the end of the transition period becoming no longer dependent upon them—an important guarantee for young people in particular.[201] However, persons who are resident on the basis of being family members of EU or UK citizens at the end of the transition period cannot become primary right holders.[202]

This brings us to the most complex provision in Part Two: the application for new status by UK or EU citizens. The host State *may* require EU or UK citizens and their families to apply for a new residence status which confers the rights in the agreement, and a document evidencing such status.[203] If a host State does not take this route, UK or EU citizens and their family members still have the right to receive a residence document which must state that it has been issued in accordance with this Agreement.[204] The UK in particular has required EU citizens to apply for a new status, establishing a 'settled status' process,[205] thereby breaking the pledge of 'automatic indefinite leave to remain' for EU27 citizens in the UK made during the referendum campaign.[206]

Article 18 sets out a number of conditions about application for the new status. First, there is no residual discretion in deciding on the status; if the applicant meets the conditions, he or she must be granted the status and the associated document.[207] The deadline to apply must be no less than six months after the end of the transition period—so 30 June 2021.[208] This deadline must be extended by a year where the host State has technical problems registering the application or issuing the certificate proving that it has been made.[209] If the person concerned misses the deadline to apply, they must be allowed to submit within a later 'reasonable further period of time if there are reasonable grounds' for missing the deadline.[210] Before the deadline (including any extension of it), all rights in Part Two must be deemed to apply to all UK or EU citizens and their family members—with the possibility that those who enter for the

first time after the end of the transition period will temporarily benefit from this presumption.[211] Equally Part Two is deemed to apply to applicants pending a decision on their application, or pending a judgment brought following a challenge an applicant may bring against a refusal.[212]

As for the application itself, the host State must 'ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided'.[213] In particular, application forms must be short and simple,[214] and the document must be issued for free or for the same price as citizens of the host State pay for similar documents,[215] except those who already have a permanent residence document issued on the basis of the citizens' Directive or have documentation of a permanent residence right based on national law have the right to exchange that document for a new status free of charge.[216]

Identity must be verified via presenting a valid passport or national ID card for EU or UK citizens, or a valid passport for family members who are not EU or UK citizens.[217] Other supporting documents may be submitted as copies, unless there are doubts about their authenticity.[218] The only extra documents which may be requested for EU and UK citizens are (where relevant) proof of employment or self-employment, evidence of sufficient resources and comprehensive sickness cover, and proof of enrolment in an educational institution.[219] As for their family members, further documents can be requested, confirming existence of the family relationship or partnership, a registration certificate or other proof of residence, evidence of dependence (where required) or proof of status as an extended family member or evidence of partnership.[220] Authorities of the host State must help the applicants prove their eligibility, to avoid and correct mistakes, and to provide further evidence.[221] Host states may 'systematically' carry out criminality and security checks on applicants, solely to check if the criteria to refuse their application set out in the public security exception in Article 20 is satisfied.[222]

There is a right of judicial redress if the residence status is refused—involving 'an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based', as well as proportionality.[223]

Article 19 provides that the application process for post-transition status referred to in Article 18 can begin during the transition period—if the host State chooses to permit this.[224] The same rules on decision making on applications (and on offering a residence document if there is no requirement to apply for a new status) will operate.[225] If an application is accepted during the transition period, the decision accepting it can only be withdrawn, before the end of that period, on grounds of public policy or security, or abuse of rights, as defined in the citizens' Directive.[226] An applicant who is refused during the transition period can apply again 'at any time' up to the deadline set out in Article 18 (at least six months after the end of the transition period).[227] They can also use the redress procedures in Article 18 to challenge any refusal.[228]

When can EU and UK citizens (or their family members) covered by the withdrawal agreement be removed? Article 20 specifies that where conduct occurs *before* the end of the transition period, expulsion is subject to the fairly strict constraints of the citizens' Directive.[229] If the conduct occurs *after* the end of that period, national law applies.[230] Regardless of when it took place, abuse of rights or fraud as defined in the citizens' Directive can lead to termination of rights.[231]

Article 21 provides for procedural guarantees in such cases, again referring to the EU citizens' Directive.[232] This incorporates guarantees relating to notification of decisions, appeal rights and stay on the territory, entry bans, and reconsideration of decisions.[233] However, the withdrawal agreement states that those who submit 'fraudulent or abusive applications' can be removed from the territory before a final judgment challenging their removal, subject to the constraints of the citizens' Directive.[234]

The agreement then turns to ensuring acquired rights for specific groups. Family members of EU or UK citizens who have the right of residence or permanent residence, regardless of their own nationality, can take up employment or self-employment in the host State.[235] Equal treatment must be guaranteed, subject to the limits set out in the citizens' Directive.[236] Workers retain the specific rights in the TFEU and EU secondary legislation on workers,[237] including non-discrimination in work, access to employment, assistance from employment offices, working conditions,

social and tax advantages, collective rights, housing benefits, and access to education by their children. Even after a worker has left the host State, the primary carer for his or her direct descendants can reside in that state 'until the descendant reaches the age of majority', and even after that point if the 'descendant continues to need the presence and care of the primary carer in order to pursue and complete his or her education'.[238]

As for self-employed persons, they also retain rights based on the TFEU,[239] including the right to take-up self-employment and to set up and manage companies, as well as rights matching those of workers.

There are also specific rights for frontier workers, which do not reflect any particular provision of EU law.[240] The state they work in may require EU or UK citizens who have rights as frontier workers under the agreement to apply for a document certifying their rights, which then must be issued to them.[241]

A final chapter of Title II of this Part deals with professional qualifications. Recognition of professional qualifications under EU law before the end of the transition period must be maintained.[242] Procedures for recognition ongoing at the end of the transition period are also protected,[243] and UK and Member States' administrations should cooperate for this purpose.[244] However, this does not cover recognition of UK qualifications in the EU, or vice versa, for those who move after the end of that period. The discussions on a future relationship treaty, if the negotiations are successful, may cover this issue.[245]

C. Social security

As noted above, the social security provisions have a different personal scope than the citizens' rights provisions in general, covering EU and UK citizens, in circumstances defined by EU social security law at the end of the transition period.[246] They also apply to stateless persons and refugees who have moved between the UK and EU by that point,[247] as well as those covered by EU law on non-EU citizens who move within the EU.[248] Social security coordination for those not covered by these rules, but who move after the end of the transition period, is subject to future relationship negotiations.[249]

The coordination rules under EU social security law will apply,[250] as well as the rules on reimbursement, recovery, and offsetting of overlapping payments,[251] and EU social security law extends also to those in special situations.[252] Furthermore, these rules will also be updated to cover any amendments of EU legislation, subject to some possible exceptions for sensitive issues.[253]

To apply this Title, the UK has observer status in EU bodies and has access to EU databases, by way of derogation from the normal rules in the agreement.[254] The social security Title also applies to citizens of Iceland, Liechtenstein, Norway, and Switzerland, subject to the UK and EU negotiating treaties with the countries concerned and the Joint Committee deciding that the Title shall apply.[255]

Finally, the other provisions of Part Two concern: an obligation to disseminate publicity about the rights and obligations of people covered by it;[256] the possibility to apply more favourable provisions;[257] and confirm the lifelong application of this Part as long as people meet the relevant conditions.[258] On the 'more favourable provisions' point, the CJEU has ruled, as regards the equivalent provisions of the citizens' Directive, that a decision by a Member State to apply more favourable rules did not bring the person concerned within the scope of the system set up by the Directive.[259] However, it cannot be assumed that the same interpretation applies to the withdrawal agreement, given the absence of a cross-reference to the EU legislation here. This raises the question of whether the UK's discretion to waive the comprehensive sickness insurance requirement (see discussion on Article 18), or adopt national rules on *Surinder Singh* cases (see discussion on Article 9) will bring the persons concerned within the scope of the rights in the agreement, or whether their position will remain solely based on national law.

Overall, the citizens' rights provisions form another compromise between the EU and international law nature of the withdrawal agreement. Rights are retained by reference to EU law rules, but not all rights: UK citizens have arguably lost EU citizenship as such, and if so then even those in the EU have lost free movement rights between Member States.[260] Both EU and UK citizens in each other's territories have lost some of their rights to voting, family reunion,

protection from expulsion, and rights to return as from the end of the transition period. The protection guaranteed for EU citizens in the UK in the form of the jurisdiction for the CJEU is gone after eight years; the role of the Monitoring Authority might end then too.

On the other hand, the withdrawal agreement does provide a final settlement of EU membership, with the future relationship taking a rather different approach than free movement. The legal distinction on paper may be clear enough, but it remains to be seen how the distinction between EU and UK citizens with rights under the withdrawal agreement, and new arrivals without such rights, will play out on the ground—especially if there are difficulties proving status, and during the six-month period when new arrivals will not have a right to reside but existing residents covered by the withdrawal agreement are not obliged to apply for new status yet.

VII. Separation provisions

This part of the withdrawal agreement (Part Three: Articles 40-125) sets out exactly how EU law ceases to apply as regards the UK at the end of the transition period, for a list of different issues.[261] It consists of thirteen titles, concerning in turn: goods placed on the market;[262] ongoing customs procedures;[263] ongoing VAT and excise procedures;[264] intellectual property protection;[265] police and criminal law cooperation;[266] cross-border civil litigation;[267] personal data;[268] public procurement;[269] Euratom;[270] judicial and administrative procedures;[271] administrative cooperation;[272] privileges and immunities;[273] and other issues, such as the EU banks, transparency, and the European Schools.[274]

Of these provisions, the Articles on CJEU jurisdiction are discussed further in Section XI.B below, although it should be noted here that the CJEU will not have jurisdiction over the separation provisions part of the withdrawal agreement as regards references from the UK courts. It will, however, have jurisdiction to interpret them in the event that disputes go to arbitration (see Section XI.D below), because the arbitrators are obliged to refer issues relating to the interpretation of EU law to the Court, and this part of the treaty refers extensively to the interpretation of EU law.

The provisions on geographical indications (part of the intellectual property title) were the most difficult to negotiate, as the UK was reluctant to tie its hands as regards other negotiating partners. Ultimately, the withdrawal agreement obliges the UK to guarantee the continued protection of geographical indications for products which were protected at the end of the transition period, although it remains to be seen if the UK will convince the EU to change these provisions.[275]

It is possible that the future relationship will provide for continued EU/UK cooperation on some of these issues, in which case some of these separation clauses either will not come into practical effect at all, or will only apply in part, being phased out in favour of a different EU/UK relationship, rather than no relationship at all. There are also some omissions from Part Three—notably the Dublin system on allocation of responsibility for asylum. It may be relevant that the Joint Committee can amend Part Three, *inter alia* to 'to address omissions' and 'to address situations unforeseen when this Agreement was signed' (the latter would cover the transition to a future relationship treaty).[276]

Like much of the agreement, Part Three retains much of a link with EU law—but only for the purposes of ending the UK's membership. Nevertheless, that process entails significant detail and, as regards CJEU jurisdiction in particular, applies for several years afterwards, to ensure the pending cases and issues are fully dealt with.

VIII. Financial settlement

Part Five of the withdrawal agreement (Articles 133–157) incorporates the earlier agreement that the UK takes part in the EU's spending until the end of the current budget cycle (end 2020), which matches the end of the transition period (discussed in Section V).[277] This Part became applicable as soon as the withdrawal agreement entered into force (Article 185), and is still subject to some CJEU jurisdiction after the transition period ends (see Section XI.C.ii).[278]

It consists of seven chapters. Chapter I (General Provisions; Articles 133–134) requires that the budget issues be calculated in euro, and sets out arrangements for auditing. Chapter Two (General Provisions; Articles 134–148), the bulk of Part Five, regulates the UK's participation in the EU budget until the end of 2020. This includes continued application of EU budget law for that period if contributions have to be adjusted and some reimbursements for the UK, to offset its payments.

Further chapters concern the European Central Bank, the European Investment Bank, and several types of external spending: the European Development Fund for associated developing countries, the trust fund for Africa, assistance for refugees in Turkey, and EU foreign policy spending.

IX. Institutional and final provisions

Part Six of the withdrawal agreement (Articles 158–185) contains four Titles. Title I (Articles 158–163) concerns jurisdiction of the CJEU, and is discussed further in Section XI.C below.[279] Title II (Articles 164–166) sets out 'Institutional Provisions'—mainly concerning the Joint Committee and subordinate bodies. Title III (Articles 167–181) concerns dispute settlement, and is discussed further in Section XI.D below. Finally, Title IV (Articles 182–185) sets out final provisions, including a provision on negotiations for a future relationship.

A. Institutions

The Joint Committee has the responsibility to implement and apply the withdrawal agreement.[280] Resembling the decision-making bodies set up by many international agreements, it consists of representatives of both the UK and the EU, which co-chair it.[281] In practice, the UK and EU have been represented by a cabinet minister and Commissioner respectively.[282] The meeting schedule and agenda are set by mutual consent.[283] It will meet at least once a year, or at the request of either side;[284] it has met several times so far in 2020, including an emergency meeting in September 2020 due to UK government proposals that the EU believed would breach the withdrawal agreement.

The Committee is assisted by six specialized committees dealing with specific issues: citizens' rights, the separation provisions, the three Protocols, and the financial settlement.[285] They must meet at least once a year, and most of them had met during 2020 at time of writing.[286]

At least potentially, the Committee's biggest role is to take decisions to implement the agreement, although it does not have a general power to do so, and can only act where the agreement has conferred power upon it.[287] This includes the power to amend parts of the agreement to correct omissions or deficiencies,[288] as well as a number of specific powers scattered across the agreement.[289] It must act by mutual consent;[290] its decisions are binding and have the same legal effect as the rest of the agreement.[291] In practice, it has adopted only one decision at time of writing.[292]

B. Final provisions

The final provisions are mostly 'boilerplate' rules—with the exception of the contentious provision on negotiations on the future relationship. The uncontroversial provisions confirm that the three Protocols and nine Annexes are binding (Article 182); set out the authentic languages of the text and the depositary (Article 183); and establish the date of entry in force (Article 185). Much of the withdrawal agreement applies from the end of the transition period: the Parts on citizens' rights, separation provisions, dispute settlement, and the three Protocols (with specified exceptions which apply immediately). The rest has applied from the entry into force of the agreement.

This brings us to the most difficult issue: the negotiation of the future relationship. Article 184 provides as follows:

The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration of 17 October 2019 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.

Procedurally, arguments about Article 184 could be litigated before the CJEU before the end of the transition period, by means of 'failure to act' proceedings or an Article 218 TFEU request brought by the UK, or infringement actions brought by the Commission against the UK.[293] However, it might be difficult at time of writing to decide such actions in time to affect the negotiations on the future relationship before the end of the transition period. After

that point, a dispute could be referred to the arbitrators in accordance with the dispute settlement rules (see Section XI.D). It might be arguable whether the obligations in Article 184 are as strong after that point, since the requirement to negotiate with a view to ensure, 'to the extent possible', that the agreements apply by then would be spent. However, as (unlike Part Four) Article 185 of the agreement does not 'switch off' Article 184 at the end of the transition period, the better view is that some degree of obligation remains. In terms of process, the arbitrators should not have to ask the CJEU to interpret this provision, pursuant to Article 174: there is no reference to any provisions of EU law; there are no implied references to a 'concept' of EU law (see the interpretation of Article 4 in Section IV); and the context of negotiations on the future relationship is intrinsically different from the obligations that Article 4 TFEU imposes upon Member States.[294]

Some in the UK have argued that the EU has been negotiating in bad faith, suggesting that this entitles the UK to breach the agreement in turn. Frankly, this is an obvious misinterpretation of the agreement, which requires the parties to use the dispute settlement process set out within it, provides for suspension of obligations only after the arbitrators have ruled that the other side has breached the agreement, and *only then* if the party in breach has not complied with that ruling within a reasonable time.[295]

So what, substantively, would constitute a breach of the obligation to negotiate in 'good faith'? A complete failure to engage in the talks would surely be a breach: but both sides have submitted negotiating texts and showed up to negotiation sessions. It might be questioned whether, beyond that, the text of Article 184 contains a strong enough obligation so that the *substance* of the parties' negotiation positions could be justiciable *at all*—given that the obligation is hedged with the phrases 'best endeavours' and 'to the extent possible'. The highly qualified nature of these obligations cannot support an argument that the EU (or the UK) is obliged to conclude and ratify a treaty: that goes beyond the plain meaning of the words 'best endeavours'.

But if the substance of the negotiation positions is justiciable, what should count? Some argue that PowerPoint® slides by Michel Barnier and tweets by Donald Tusk should count in assessing 'bad faith'. But if they count, then so should comments by UK Prime Ministers and Foreign Secretaries referring to 'citizens of nowhere', EU citizen 'queue jumpers', and comparing the EU to Nazis and the USSR. The *only* reference point in Article 184 is the political declaration on the future relationship, and it is submitted that, if the substance of the negotiation position is justiciable at all, this is the only text which could be taken into account. On the most contentious issue—State aid—the political declaration states that the parties 'should uphold the common high standards', including a 'robust and comprehensive framework' for State aid control, and 'should rely on appropriate and relevant Union and international standards', with 'appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement'.[296]

Comparing this to the parties' proposals, the EU seeks to retain the application of substantive EU State aid law to the UK, with penalties if the UK does not apply new EU State aid measures; UK national courts could refer State aid questions to the CJEU; UK authorities would apply State aid law but with close involvement of the EU side. For its part, the UK has proposed only consultations on subsidies, with no reference to domestic enforcement, and exclusion of dispute settlement.[297] Both parties are, with respect, some distance away from the political declaration: the EU's proposal for CJEU involvement is not based on anything there, and the UK position is not consistent with what the political declaration says on domestic enforcement or dispute settlement. Nor does the UK position uphold existing common standards, although it does refer to international standards, whereas the EU refers to EU standards: the political declaration refers to both. The EU's proposal that the UK must in principle apply new EU State aid is an ambitious interpretation, but not the only possible one.

Given the vagueness of the commitments in the political declaration, and the evidence that each side has adopted interpretations of it that are partly defensible and partly highly dubious, it is difficult to see what role dispute settlement could have in usefully reviewing the substance of negotiating positions for good faith. Certainly any suggestion that either side is wholly responsible for bad faith negotiations does not stand up.

X. Protocols

The three protocols attached to the withdrawal agreement deal with what critics of the British Empire might call its remaining 'pink bits' in Europe: Northern Ireland, Cypriot military bases, and Gibraltar. The first of these was the most controversial part of the withdrawal agreement to negotiate and, so far, to implement.

A. Ireland and Northern Ireland

Although disputes about this Protocol arose throughout its negotiation and continued into the transition period,[298] in fact most of it will not apply until the end of the transition period: only the provisions on territorial integrity, the powers of the Joint Committee to implement it, the possibility of replacing it, and the provisions on consultative bodies applied from the entry into force of the withdrawal agreement.[299] As noted already, there were major changes made to this Protocol in order to secure its support in the UK Parliament; the following analysis points to what those changes were.[300] And yet its implementation has nevertheless been a major issue since the withdrawal agreement entered into force.

As for the substance of the Protocol,[301] first of all, its Article 1 specifies that the Protocol does not affect the UK's territorial integrity. Claims that it 'annexes' Northern Ireland into the EU are therefore false. But the provisions in the prior version emphasizing that the Protocol is meant to be temporary have been dropped,[302] as have a link back to the possible extension of the transition period and a review clause. However, the possibility of replacing the Protocol by future UK/EU trade arrangements is maintained (Article 13(8) of the Protocol).[303] To implement the Protocol, the Council may authorize Ireland to negotiate a bilateral treaty with the UK within the scope of the EU's external competence, subject to detailed conditions.[304]

The Protocol is 'without prejudice to' the 'consent' provisions of the Good Friday Agreement relating to a change of status in Northern Ireland. While some have claimed that the withdrawal agreement itself is a change of status requiring such consent, the UK Supreme Court has interpreted the *Northern Ireland Act* to mean that the consent principle applies only to Irish unity—therefore not to Brexit, and logically not to any other change falling short of Irish unity either.[305]

Next, Articles 2 and 3 of the Protocol, which are unamended, refer to equality rights and the common travel area between the UK and Ireland (these issues were never controversial).[306] Maintaining the common travel area does not keep in place free movement between the UK and the EU, as it does not mean that citizens of Member States other than Ireland are free to settle anywhere in the UK, even in Northern Ireland. While it inevitably means that entry is not being checked at the land border, the UK has other means of checking whether persons have the right to stay on the territory—through employers, for instance.

The revised Protocol then drops the previous UK-wide customs union backstop.[307] This text had linked to Annexes on trade in goods between EU/UK/non-EU states, customs cooperation, and a 'level playing field', which meant some degree of continued harmonization of law relating to tax, the environment, labour law, State aid, competition, and public companies/monopolies. However, this had fallen short of the obligations of EU Member States; there had been limited obligations to keep up with new EU legislation and CJEU case law; and the arbitration rules (including CJEU jurisdiction) mostly had not applied to this 'level playing field'. A big chunk of EU law would not have applied to the UK—most notably the free movement of persons, services, and capital, and contributions to the EU budget.

In place of the UK/EU customs union backstop, in the revised Protocol a new Article 4 first specifies that Northern Ireland is part of the UK's customs territory for international trade purposes, including free trade agreements that might be concluded by the UK. But as Weatherill points out, this is 'misleading advertising', as it is far from the full story about the customs status of Northern Ireland.[308]

To tell that story, we start with a new Article 5 of the Protocol, which regulates trade between Great Britain and Northern Ireland.[309] [AQ7] No customs duties are charged on goods moved from Great Britain to Northern Ireland, or which enter Northern Ireland from other non-EU countries, unless there is a 'risk' that the goods may be sold in the EU, either by itself or following processing. There is also an exemption for personal property brought from Great Britain to Northern Ireland.[310] A good must be considered as being at risk of further movement to the EU 'unless it is established that' it 'will not be subject to commercial processing in Northern Ireland' and 'fulfils the criteria established by the Joint Committee', which must adopt a decision on this by the end of the transition period. The Joint Committee must 'take into consideration', among other things, 'the final destination and use of the good', 'the nature and value of the good', 'the nature of the movement', and 'the incentive for undeclared onward-movement into the

Union, in particular' if duties are payable.[311] There is also a definition of 'processing', and the Joint Committee must also adopt a decision by the end of the transition period establishing conditions under which processing is exempt from the definition. Also, EU customs law, including international agreements, applies to Northern Ireland, although the Joint Committee must agree on the conditions in which this is the case for fisheries products.[312]

The EU position is that in the absence of a Joint Committee decision, customs duties will apply to fish landed in Northern Ireland from UK vessels, and that customs duties will apply on goods entering Northern Ireland from Great Britain 'subject to Articles 5(1) and (2)'.[313] The UK position is that only goods at 'clear and substantial risk' of ending up in the EU via Northern Ireland should be subject to tariffs.[314] Those words do not appear in Article 5, although since the list of criteria which it must take into account is non-exhaustive ('inter alia') it would be open to the Joint Committee to adopt this threshold if mutually agreed. The UK position also asserts that tariff reductions agreed with non-EU countries in free trade agreements will fully apply to Northern Ireland; but this overlooks the point that the 'at risk' rule also applies to imports from non-EU countries. Examples of products which, in the UK view, are not 'at risk' of heading to the EU are products for sale in supermarkets, a supplier sending goods to a company in Northern Ireland, and raw produce for processing in Northern Ireland then sent back to Great Britain.[315] The Joint Committee could 'automatically' classify some goods as internal UK trade, 'particularly where a business could certify that it was selling its goods in Northern Ireland and not the EU, or where, for example, goods were perishable or it would be uneconomical to try to divert them in to the EU market through Northern Ireland.' For the UK, it is only a 'technical exercise' for the Joint Committee to ensure that fish caught by UK vessels are not subject to tariffs in Northern Ireland.

As we can see, much (but not all) of Article 5 is dependent for its operation upon decisions to be made by the Joint Committee. However, Article 5 does not explicitly state what the default position is in the event that the Joint Committee does not take the decisions which it is required to take.[316] Since the Committee acts by mutual consent of the UK and EU, it is implausible to argue that either party is solely responsible for a failure of the Committee to act.[317] It seems likely, at the time of writing, that the UK will table a Finance Bill aiming to assert its own interpretation of Article 5 in the event of a failure to agree.[318]

As before, an Annex applies a long list of EU laws on customs, trade, and goods regulation to Northern Ireland.[319] It is now specified explicitly that customs duties charged for goods entering Northern Ireland are kept by the UK, not given to the EU, and the UK can reimburse traders for duties charged on goods moved from Great Britain to Northern Ireland—although this is subject to EU State aid rules.[320] There are no customs duties on trade between Northern Ireland and the EU, and there is a ban on discriminatory internal taxation and quantitative restrictions on goods between them.[321]

The Protocol also retains provisions on the UK internal market, specifying that nothing in the Protocol prevents the UK ensuring 'unfettered' access for goods between Northern Ireland and Great Britain. However, this strong statement is immediately qualified: EU laws made applicable by the Protocol which restrict exports shall only apply to such trade 'to the extent strictly required by any international obligations of the Union'—which is neither further defined, nor left to the Joint Committee to define.[322] The parties have a 'best endeavours' obligation to facilitate' trade between Northern Ireland and the rest of the UK; the Joint Committee can only make recommendations here.[323] The UK position is that 'no additional process or paperwork' can be imposed, referring to the 'unfettered' clause; in its view, export restrictions in accordance with the EU's international obligations can only refer to a small number of products like endangered species exports.[324] In fact, the UK Internal Market bill would give ministers the power to ignore the withdrawal agreement as regards any 'exit procedures' required by the Protocol.[325]

There are lists of specific EU laws that apply in Northern Ireland: product regulation,[326] VAT and excise tax,[327] a single electricity market,[328] and State aids.[329] However, an Annex on agriculture and the environment has been dropped,[330] and the VAT provisions have been amended to clarify that the UK keeps the revenue, can reduce VAT rates for Northern Ireland (to match exemptions and reduced rates in Ireland).[331]

The State aid commitment has proved controversial, in light of its uncertain scope, as it applies wherever aid could 'affect' trade between the EU and Northern Ireland—thus potentially having an impact on aid given to business in

Great Britain too.[332] There is an obvious tension between this obligation and the UK's policy of refusing to continue to apply EU State aid law for the rest of the country after the end of the transition period (on which, see further Section IX above). Again, the UK Internal Market bill would give ministers power to ignore the State aid provisions.[333]

The vague reference to other North/South cooperation was retained in the revised Protocol.[334] The institutional provisions of the Protocol are retained: while the UK in principle has the power to apply the Protocol in practice,[335] EU bodies, including the CJEU, have competence to apply or interpret the provisions of the Protocol relating to customs (from Great Britain to Northern Ireland), product regulation, VAT and excise tax, the electricity market, and State aid.[336,337]

EU officials may be present when UK officials are implementing the Protocol, subject to details to be adopted by the Joint Committee.[338] The EU and UK have already disputed the application of this provision—with the EU believing that it entitled them to open an office in Belfast, and the UK disagreeing.[339] While this provision does not refer explicitly to an office on the territory of Northern Ireland, it is conceivable that arbitrators might take the view that the principle of effectiveness requires it. But this raises the same question as with Article 5: whether arbitrators can step in to interpret a particular provision of the Protocol if the Joint Committee has powers to implement it, but fails to agree on how to use its powers, if the Protocol does not provide for a default if that happens.

While the withdrawal agreement applies in general to the Protocol,[340] CJEU case law adopted even after the end of the transition period applies,[341] and similarly references to EU law include EU law amended or replaced after the end of that period.[342] If the EU adopts a new act within the scope of the Protocol which neither amends nor replaces an existing act, the UK and EU have discussions within the Joint Committee as to whether it applies.[343] Also, despite the general application of EU law within the scope of the Protocol, the UK still loses access to EU databases in principle, and UK authorities cannot carry out risk assessments et al of products.[344]

There is a safeguard clause, for use 'unilaterally' by either side if '*the application of the Protocol* leads to serious economic, societal, or environmental difficulties that are liable to persist, or to diversion of trade' (emphasis added). The measures must be 'strictly necessary' to 'remedy the situation' and 'shall be restricted with regard to their scope and duration' to that end.[345] However, if a safeguard measure 'creates an imbalance between the rights and obligations under this Protocol', the other party 'may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance'. Priority shall be given to such measures as will least disturb the functioning of this Protocol.[346] Safeguards on grounds of national security are also possible, by reference to the arms controls and national security exceptions set out in the TFEU.[347] The UK government did not seek to use the safeguard clause to justify its proposed Internal Market bill, although this would arguably have placed it on a more legally secure footing.

The safeguard clause raises several issues.[348] Its restriction to issues arising from the application of the Protocol means that it cannot be used to address difficulties that arise from anything else in the agreement, and still less to justify a termination of the entire agreement. The proportionality clause, and *a contrario* interpretation of the provision for termination of the Protocol (considered next) confirm that interpretation. Dispute settlement for use of the safeguard clause is not switched off, and arguably the reference to unilateral action simply reserves the power to make the safeguard decision to the authorities of each side, rather than precludes review by arbitrators. If arbitrators had no power to examine safeguard measures and the retaliation to them, it is hard to see how the principles of proportionality and necessity, and the limits on the scope of the safeguard, could be guaranteed.

Finally, a new provision on 'consent' specifies that the Northern Ireland Assembly can, under certain conditions, terminate the customs and other economic provisions of the Protocol.[349] The absence of a power to end the previous backstop unilaterally had been controversial, and this provision is a significant concession from the EU—although it cannot be applied for several years, and its conditions might be hard to satisfy.[350]

Overall, the Protocol is a difficult compromise that, at time of writing, has failed to work. The parties do not agree on much of what the Protocol means, on how the Joint Committee should implement it—although note that only some provisions are subject to Joint Committee powers to implement them. In many cases it is not clear what happens if the Joint Committee fails to agree. In any event, the UK's intention with the Internal Market bill is to create a

fait accompli to address at least some cases where the parties disagree. Whether this can be resolved as part of the negotiations on the broader relationship or via dispute settlement remains to be seen.

B. UK bases in cyprus

This Protocol, all of which applies from the end of the transition period,[351] extends a large part of the agreement to the Cypriot bases.[352] EU data protection law continues to apply to the bases,[353] as do the rules on the effect of CJEU judgments, subsequent revisions to EU legislation within the scope of the Protocol, and access to databases.[354]

The bases in Cyprus remain within EU customs territory after Brexit,[355] and EU regulations on the internal market in goods,[356] including agricultural and fisheries laws,[357] still apply. EU law on excise taxes and VAT also continues to apply.[358] Goods supplied to the staff on the bases are exempt from customs and taxes,[359] and the UK and Cyprus 'shall' agree further rules on social security coordination as regards the persons employed on the bases' territory.[360] There are rules on checks at the border of the bases area, which are vaguely similar to the basic rules in the Schengen Borders Code, with some adaptations.[361] The UK and Cyprus have a general obligation to cooperate to prevent fraud, and may sign further treaties regarding cooperation within the scope of the Protocol.[362] On this point, the decision concluding the withdrawal agreement on the EU side sets out a process for authorizing Cyprus to negotiate bilateral treaties with the UK within the scope of the EU's external competence, subject to detailed conditions.[363]

Finally, the Protocol includes rules on the specialized committee on the Protocol, the powers of the Joint Committee, the role of the EU institutions (including the usual jurisdiction of the CJEU), and the general allocation of responsibility for implementation between the UK and Cyprus.[364]

C. Gibraltar

Everything in this Protocol expires at the end of the transition period—except Article 1, which provides for the UK and Spain to cooperate on workers' rights as regards the Spain/Gibraltar crossing, noting that Part Two on citizens' rights (see Section VI above) applies to frontier workers in Spain and Gibraltar.[365] Next, EU law on aviation which does not apply to Gibraltar shall continue not to apply to Gibraltar, unless the Joint Committee decides differently.[366] There are some specific obligations on tax and fraud, including an obligation for the UK to extend UN treaties on tobacco control to Gibraltar by June 2020.[367] The Protocol also includes general provisions on cooperation on environmental protection and fishing, as well as police cooperation.[368]

The fairly short period of engagement as regards Gibraltar, as compared to the longer-term provisions on the EU/UK relationship as regards Northern Ireland and the Cypriot bases, fits in with the EU's longer-term approach, which in principle defines Gibraltar as an issue for bilateral Spain/UK relations. In particular, the EU position on the future relationship talks is that any treaty agreed on the basis of its negotiation mandate will not apply to Gibraltar.[369] As with the other Protocols, the Council may authorize Spain to negotiate a bilateral treaty with the UK within the scope of the EU's external competence, subject to detailed conditions.[370]

XI. Dispute settlement

The withdrawal agreement provisions on dispute settlement are scattered throughout the text, most prominently in the arbitration process set out in Part Six of the agreement, but also in a number of other provisions. It makes sense to look at these provisions chronologically—starting with the transition period (Section XI.A), then the separation provisions relating to the transition period (Section XI.B), then the rules which apply afterward—distinguishing between the continued jurisdiction of the CJEU as such (Section XI.C), and the dispute settlement process involving arbitrators, which *might* involve the Court (Section XI.D). It was rightly agreed that the CJEU is only involved in disputes involving EU law, with any other aspects to the dispute being decided by the arbitrators.[371]

A. Transition period

The key provision on dispute settlement during the transition period is Article 131 of the withdrawal agreement, which provides, as regards 'supervision and enforcement', that during this period EU institutions, bodies, offices, and

agencies continue to have the powers conferred upon them by 'Union law' as regards the UK and 'natural or legal persons residing in or established in' the UK.[372] Article 131 specifies '[i]n particular' that the CJEU 'shall have jurisdiction as provided for in the Treaties'. This also applies, during the transition period, to the 'interpretation and application' of the withdrawal agreement itself—although, as noted above (see Section IX), only a few provisions of the agreement apply during the transition period other than the agreement's provisions on the transition period itself.

Since the exceptions to the application of EU law to the UK during the transition period set out in Article 127 do not apply to any aspects of the Court's jurisdiction (see Section V), it logically follows that the ordinary jurisdiction of the Court applies during this period as regards the UK, without any exceptions.[373] Indeed, the Court of Justice has given rulings during the transition period relating to the UK—although it has, with respect, appeared to wrongly attribute its jurisdiction during this period to Article 86 of the agreement (which governs its jurisdiction over cases *pending at the end of the period*), rather than Article 131.[374] Also, at the time of writing, six cases from the UK had been sent to the CJEU during the transition period.[375] Another issue arising from the transition period—and potentially afterwards too—is whether the role of the Advocate-General linked to the UK had to end on Brexit day.[376]

B. Separation provisions

As noted above (Section VII), the CJEU does not have jurisdiction as such to interpret the separation provisions in Part Three of the withdrawal agreement as regards the UK side, although it might end up interpreting them upon reference from the arbitrators set up by the dispute settlement provisions of the agreement, discussed in Section XI.D below.[377]

However, the separation provisions do include rules on what happens to cases pending at the end of the transition period. The key provision is Article 86 on pending cases, which provides first of all that the CJEU continues to have jurisdiction in any proceedings brought by or against the UK before the end of the transition period. This explicitly applies to 'all stages of proceedings', including appeals before the Court of Justice and cases referred back to the General Court.[378] There is no explicit mention of jurisdiction under Article 260 TFEU in the event that the UK fails to give effect to one of the judgments pending against it pursuant to Article 258.[379] Moreover, the express reference to Article 260 TFEU in Article 160 of the withdrawal agreement (see Section XI.C.ii below) suggests *a contrario* that Article 86 does not include the powers to bring Article 260 proceedings against the UK after the end of the transition period. Nevertheless, arguably the UK could still end up being fined for not complying with a CJEU ruling pursuant to the dispute settlement system discussed below (see Section XI.D). The CJEU will also continue to have jurisdiction to rule on preliminary rulings requested by UK courts before the end of the transition period.[380] A pending case is defined 'at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or the General Court, as the case may be.'[381]

The agreement also gives the Court jurisdiction over cases relating to the UK that are not brought until *after* the transition period ends, if they relate to certain types of proceedings that are underway, or events which occurred, before that period ends. First of all, Article 87(1) states that if the EU Commission believes that the UK has breached EU law, including its obligations under the withdrawal agreement transition period, before that period ends, it can bring an infringement proceeding or a State aid case to the CJEU up until four years after the transition period ends (so by the end of 2024). There is no equivalent provision for references for a preliminary ruling pending before the UK courts at the end of that period.[382]

Next, the Court has jurisdiction over infringement or State aid proceedings if the UK fails to comply with a decision adopted by an EU body before the end of the transition period, or which was adopted after the end of that date as long as the proceedings were launched beforehand, or (as regards State aids and anti-fraud measures) relate to events before the end of the transition period.[383] For these cases, the four-year time limit on Court jurisdiction runs from the date of the *decision*, not the end of the transition period. In any event, the Commission 'shall apply the same principles' to the UK as it does to Member States when deciding whether to bring proceedings.[384]

Where the Court exercises this jurisdiction on pending cases or pending proceedings, or on events occurring before the end of the transition period, its ordinary procedural rules apply.[385] The withdrawal agreement also confirms

that judgments issued before the end of the transition period are binding on the UK, as are judgments relating to cases or proceedings pending on that date, or events occurring before that date.[386] If the UK is found to have breached its obligations under EU law or the withdrawal agreement in such judgments, it must 'take the necessary measures to comply with that judgment'.[387] This is similar to the wording of Article 260(1) TFEU on the obligation to comply with infringement proceeding judgments (although as with Article 86, for the reasons discussed above, it appears that Article 260(2) TFEU does not apply as such to Article 87). But again, even if Article 260(2) does not apply to the UK after the end of the transition period, it is possible, as discussed below in Section XI.D, that arbitrators can impose a fine on the UK (or the EU) for non-compliance with a ruling issued as part of the dispute settlement process, and that such a ruling may relate to non-compliance with a prior CJEU judgment.[388] There is also a possible overlap between Articles 87 and 160 of the withdrawal agreement (discussed further in Section XI.C.ii below); the latter provision *does* explicitly provide for Article 260 TFEU proceedings as regards the financial settlement provisions of the withdrawal agreement.

Finally, the EU Treaties' rules on enforcement of judgments in national law apply to the UK in respect of judgments issued before the end of the transition period, and judgments relating to cases or proceedings pending on that date, or events occurring before that date.[389] The UK retains the right to intervene or participate in all CJEU cases in the same way as a Member State up until all the pending cases referred to in Article 86 are resolved.[390] Similarly, the UK can intervene in infringement proceedings or preliminary rulings until the end of the four-year period to bring additional cases against the UK set out in Article 87(1), where it was subject to the same obligations as a Member State.[391] It can also intervene or participate in cases where the validity of a decision addressed to the UK, or a natural or legal person residing in the UK, is challenged.[392] Lawyers authorized to practise in the UK may still represent the parties involved in cases before the CJEU and may still represent those parties in the CJEU proceedings.[393]

C. Continued CJEU jurisdiction

Quite apart from the CJEU's jurisdiction over cases or proceedings pending at the end of the transition period, or events occurring before that date, it will also have some jurisdiction over entirely new cases arising after that date—leaving aside the specific issue of its potential rule in the general dispute settlement process set up by the withdrawal agreement (discussed in Section XI.D below), as well as the ordinary jurisdiction of the CJEU as regards EU Member States and the withdrawal agreement (which calls for no further comment). There are four different categories of this continued jurisdiction, each of which relates to specific provisions of the withdrawal agreement, rather than the agreement as a whole—although presumably when exercising this specific jurisdiction, the Court might need to refer to the general provisions in Part One, or to the provisions which confer jurisdiction upon it in Part Six. These specific conferrals of jurisdiction for the CJEU preserve its jurisdiction over some cases which were pending in national courts before the end of the transition period that would otherwise fall outside the scope of Articles 86 and 87 (see Section XI.B above).

(i) Citizens' rights

Article 158 of the withdrawal agreement contains a specific, time-limited jurisdiction, as regards preliminary rulings sent from the UK courts and Part Two of the agreement, concerning citizens' rights.[394] The case must be 'commenced at first instance' within eight years of the end of the transition period (so by the end of 2028) in any UK court or tribunal,[395] if that court or tribunal considers that a preliminary ruling 'considers that a decision on that question is necessary to enable it to give judgment' in the case. This means that the Court will have jurisdiction over cases pending before the UK courts at the end of 2028 (if the UK courts choose to refer questions as regards those cases), rather than (more narrowly) cases pending before the CJEU itself.[396] Like (most of) Section Two itself, this provision applies from the end of the transition period.[397]

There is no obligation for final UK courts to refer, although the obligation to do so under the parallel Article 267 TFEU is in any event not as strong as it might first appear.[398] Also, the Court's jurisdiction expires earlier when applications are made during the transition period.[399] The legal effects of such judgments in the UK must be the same as the legal effects of preliminary rulings for the Member States.[400]

The withdrawal agreement also provides for a non-judicial means of dispute settlement as regards implementation and application of Part Two for EU citizens and their family members in the UK: the creation of an 'independent' monitoring authority.[401] This body must have 'equivalent' powers to the EU Commission 'to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries'.[402] It must also have the power to bring a legal action in the UK courts 'with a view to seeking an adequate remedy', following a complaint.[403] The precise remedy is not specified, but arguably the EU law principle of an adequate remedy is applicable.[404] In any event, Part Two provides for specific remedies for cases brought by individuals.[405] Implicitly the body will not be able to make its own binding decisions on complaints brought to it (unlike, for instance, a data protection authority).

The monitoring body and the Commission must inform the Committee on citizens' rights created by the agreement annually about the implementation and application of Part Two in the UK and the EU.[406] This information must 'in particular' include 'measures taken to implement or comply with Part Two and the number and nature of complaints received'. No earlier than eight years after the end of the transition period, the Joint Committee must assess the functioning of the body and may decide 'in good faith' that the UK may abolish it.[407] This timeframe matches the eight-year cutoff for CJEU jurisdiction in Article 158.

(ii) Financial settlement

Similar (but not identical) to the special jurisdiction on citizens' rights after the end of the transition period, Article 160 of the withdrawal agreement provides for special jurisdiction relating to the financial settlement provisions of Part Five.[408] This provision applies from the end of the transition period, even though Part Five itself applies from the entry into force of the withdrawal agreement.[409]

Unlike the special jurisdiction over citizens' rights, Article 160 applies Article 267 TFEU as such to the UK courts, therefore with no exception to the obligation for final courts to refer questions to the CJEU. Moreover, it also applies Articles 258 and 260 TFEU on infringement actions and the subsequent enforcement of infringement actions, and it is not limited in time (although in practice the financial settlement provisions will become less relevant over time anyway). It applies to the 'interpretation and application of applicable Union law referred to in Article 136 and Article 138(1) or (2)'—which concern EU budget law that continues to apply to the UK after the end of the transition period, but which relates to events which occurred before that date.

Article 160 is 'without prejudice to Article 87', which, as discussed above (Section XI.B), concerns new cases brought after the transition period relating to proceedings that started or events that took place before the end of that period. Article 160 differs from Article 87 in that it has a different material scope, being limited to disputes concerning the financial settlement provisions, expressly includes Article 260 TFEU, and has a different temporal scope in two respects: Article 160 jurisdiction is not limited in time, and it applies to events occurring after the end of the transition period (albeit related to budget laws applicable beforehand), rather than events occurring before it. At first glance, the latter distinction rules out overlap of the two Articles. But in the event that they do overlap, it is not clear from the text if either provision takes priority over the other.

(iii) Protocol on Ireland and Northern Ireland

This controversial protocol requires the continued application of CJEU case law, even case law delivered after the end of the transition period, where the Protocol refers to concepts and provisions of EU law.[410] It also confers jurisdiction on the CJEU as regards a number of provisions of the Protocol:[411] the rules on exchange of information (Article 12(2), second sub-paragraph); the provisions on customs and movement of goods relating to Northern Ireland (Article 5); and technical regulations, VAT and excise law, the electricity market, and State aid law as applicable to Northern Ireland (Articles 7–10).[412] It is specified in particular that Article 267 TFEU is fully applicable—with the necessary implication that not only the lower courts and appeal courts in Northern Ireland, but any UK courts dealing with issues relating to the protocol on Northern Ireland (if the CJEU has jurisdiction over the matter) can refer questions to the UK—including the UK Supreme Court. The UK can participate in CJEU proceedings as regards relevant case law, as can UK lawyers.[413]

(iv) Protocol on Cypriot bases

Like the protocol on Northern Ireland/Ireland, this Protocol requires the continued application of CJEU case law, even case law delivered after the end of the transition period, where the Protocol refers to concepts and provisions of EU law.[414] It also contains provisions for the CJEU's jurisdiction: the Court's jurisdiction continues as regards the Sovereign Base Areas.[415] *Unlike* the protocol on Northern Ireland/Ireland, that jurisdiction continues as regards the entire Protocol.

(v) General provisions on the court's jurisdiction

Title I of Part Six ends with some general rules on the Court's jurisdiction (Articles 161 to 163), which are mostly relevant to all types of its jurisdiction under the withdrawal agreement. Like the rest of that Title, these provisions will only apply from the end of the transition period.[416] Where a national court of a Member State sends questions to the CJEU concerning interpretation of the withdrawal agreement, the national court's decision will be notified to the UK.[417] UK court requests for a preliminary ruling, or infringement actions against the UK, based on Articles 158 or 160 (see Section XI.C(i) and (ii) above) will be subject to the EU Treaty provisions on the relevant CJEU jurisdiction.[418] As regards those Member State national court references, Articles 158 or 160, or the protocol on Cypriot bases, the UK may participate in the CJEU proceedings, as can UK lawyers.[419]

Conversely, Article 162 provides that the Commission has the right to participate in *UK* court proceedings '[w]here the consistent interpretation and application of this Agreement so requires'. This entails submitting written observations in cases concerning the interpretation of the agreement, as well as (with the permission of the national court) making oral observations. The Commission must inform the UK before making those submissions, but the UK does not have the right to veto the Commission doing so. This provision does not expire (but will likely become less relevant over time).

While at first sight this simply mirrors the UK's power to intervene in EU court proceedings relating to the withdrawal agreement, the explicit power for the Commission to intervene in a national court proceeding is novel, although it has done so in practice,[420] and it has the explicit power to make observations in EFTA (European Free Trade Area) Court proceedings.[421] It overlaps with the stronger power of the citizens' rights monitoring body to bring cases to the UK courts on citizens' rights (Article 159). It will be particularly relevant where the UK courts have the power to ask the CJEU questions for a preliminary ruling (as regards citizens' rights in Part Two, the budget legislation referred to in Article 160, and the Northern Ireland and Cypriot bases protocols), although it is not limited in scope to cases where a national court could refer questions about the agreement to the CJEU. It could, for instance, be particularly relevant to UK court proceedings about the separation provisions in Part Three of the agreement, which cannot be referred to the CJEU by UK courts.

Finally, Article 163 provides for 'regular dialogue and exchange of information' between the EU courts and the 'highest' UK courts, '[i]n order to facilitate the consistent interpretation of this Agreement and in full deference to the independence of courts', by analogy with the dialogue between the CJEU and the highest courts of the Member States.

D. Dispute settlement process

The dispute settlement provisions of the withdrawal agreement begin with a 'best endeavours' clause on 'cooperation': the two sides should aim to agree 'on the interpretation and application of' the withdrawal agreement, making 'every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation.'[422] This does not appear to amount to a concrete or enforceable legal obligation.

More concretely, Article 168 rules out the use of forms of dispute settlement between the parties as regards the withdrawal agreement other than those set out in the agreement. It applied as soon as the agreement entered into force.[423] While the UK government has taken the view that it will resort to dispute settlement when it aims to override the agreement in national law because of its belief that the EU is acting in bad faith, this does not justify the breach of the agreement in the meantime—because suspension of obligations under the agreement is only authorized if one party is found to have breached it by the arbitrators, and the arbitration decision is not complied with in time, as detailed further below.[424]

The remainder of the dispute settlement provisions (Articles 169 to 181) only apply from the end of the transition period[425]—with disputes before that point being subject to the Court's usual jurisdiction (extended to the withdrawal agreement).[426] The process begins with another 'best endeavours' clause, under which the parties try to 'resolve any dispute regarding the interpretation and application' of the agreement by entering into consultations in the Joint Committee 'in good faith, with the aim of reaching a mutually agreed solution'.[427]

If there is no 'mutually agreed solution' after three months, '[w]ithout prejudice to Article 160'—which provides for preliminary rulings and infringement proceedings regarding aspects of the financial settlement[428]—either party may request an arbitration panel to be set up. This request must 'identify the subject matter of the dispute to be brought before the arbitration panel and a summary of the legal arguments in support of the request'.[429] The parties may jointly agree that a panel may be requested before the end of the three month period.[430] Presumably the reference to Article 160 means that the Commission has the option to choose the infringement process instead of the arbitration process for disputes within the scope of Article 160. Note that even if the arbitration process applies to these disputes, they are likely to end up in the CJEU because the arbitrators refer them there anyway.[431]

There are detailed rules on the composition of panels: before the end of the transition period, the Joint Committee has to set up a list of 25 persons 'willing and able' to serve as members of the panel.[432] Each party suggests ten persons, and the two parties must jointly suggest five persons to act as chairs.[433] The panellists must be persons 'whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognised competence, and who possess specialised knowledge or experience of Union law and public international law'. They cannot be officials of EU institutions, Member State governments, or the UK government.[434]

A panel must be set up within 15 days of the request to establish one.[435] Each arbitration panel will have five members,[436] consisting of two members each nominated by each party from the list of panellists, as well as a chair selected by consensus of the panel from the five persons jointly agreed as chairs.[437] If the panellists cannot agree on a chair within the 15-day time limit, there is a tie-break rule: the UK or EU may ask 'the Secretary-General of the Permanent Court of Arbitration' to decide on the chair by lot, from among the list of five people. He or she must make that selection within five days of being asked.[438] Panels' rules of procedure are set out in an Annex to the withdrawal agreement.[439]

Arbitrators should try to decide by consensus, but if necessary can revert to majority vote. In that case dissenting opinions cannot be published.[440] The panel's decision is binding on both sides, shall set out findings of fact and its reasoning, and must be published.[441] Panellists must be independent of any government or organization, and comply with a code of conduct;[442] they enjoy immunity from legal proceedings as regards their work on the panel.[443]

What if either or both parties attempt to frustrate the process, either by not nominating panellist and/or by not jointly agreeing five persons to act as chairs? In that case, the agreement provides for another tie-break rule: if the list has not been adopted by the deadline to establish the panel, the EU and UK must each nominate two persons to serve on the panel within five days. If they fail to agree jointly on a chair, the Secretary-General of the Permanent Court of Arbitration has five days to propose a chair. Unless the UK or EU objects, that person must be appointed.[444]

This still leaves open the possibility of refusing to nominate persons to the panel, or objecting to the chair. So there is a catch-all tie break: if there is no panel set up within three months of the request to create one, the Secretary-General of the Permanent Court of Arbitration shall appoint the whole panel within 15 days.[445] Between them, the various tie-break rules avoid any Trump-like scenario of the process being blocked by one side's recalcitrance in appointing panellists or agreeing to chairs.[446]

Once the panel is set up, it must decide on its ruling and notify it to the parties and the Joint Committee within 12 months of being established. If it cannot meet that deadline, its chair must inform the parties, giving reasons and a new date.[447] Either party can ask the panel to rule urgently within ten days after it is set up; in that case the panel must decide within 15 days if the case is urgent, and if so 'shall make every effort' to notify its ruling to the parties

within six months after it was established.[448] If the case is referred to the CJEU (as discussed just below), or if a request to refer it to the CJEU is made, the deadlines are suspended.[449]

This brings us to the obligation for the arbitrators to refer points of EU law to the CJEU—following CJEU case law that holds it to be a breach of EU law for the EU institutions to agree to confer jurisdiction on an international court to give rulings on points of EU law which bind the EU or its Member States.[450] Where the arbitrators are seized of a dispute which 'raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to' in the withdrawal agreement, 'or a question of whether the United Kingdom has complied with its obligations under Article 89(2)', the arbitrators cannot decide the question of EU law, but must request the CJEU to give a ruling on it. The Court's ruling will bind the arbitration panel.[451]

The obligation to send questions therefore arises not only as regards 'provisions' of EU law—which can easily be identified—but also 'concepts' of EU law, which are less obvious (although see the interpretation of this term in Section IV above); and to the UK's obligations (set out in Article 89(2)) to comply with CJEU rulings in cases decided before the end of the transition period, pending at the end of the transition period, or relating to events which occurred before the end of the transition period, as further defined in Articles 86 and 87 (see Section XI.B above). Since the arbitrators (as discussed below) have the power to order payment of fines to comply with their rulings, this makes up for the absence from Articles 86 and 87 of the power (set out in Article 260 TFEU) for the CJEU to order the UK to pay fines for not complying with infringement rulings against it. Although (just like Article 260 TFEU) the CJEU will be ruling again on whether the UK complied with its prior judgment, one important difference between using Article 260 TFEU and the arbitration process is that the arbitrators are also able to fine *the EU* for not complying with arbitration rulings against it. Also, as the CJEU judgment will not be imposing the fines, the losing party will have an opportunity to avoid paying a fine by means of compliance with the original CJEU judgment until the arbitration process has reached an end, as discussed further below.

After the Court's judgment, the panel has at least 60 days to give its ruling.[452] The Treaty rules on preliminary rulings from national courts, and the rules on UK interventions and rights of audience of UK lawyers, will apply to references to the CJEU from the arbitrators.[453]

What is the impact of an arbitration panel ruling? First of all, it is binding on both the UK and the EU. They must 'take any measures necessary to comply in good faith' with the ruling, and try to agree on the time period to comply with it.[454] If the respondent has lost the case, it must inform the complainant within thirty days of the amount of time it thinks it will need for compliance—referred to as the 'reasonable period of time'.[455] If the EU and UK cannot agree on this period, the complainant may, within 40 days of this information, ask the arbitration panel to rule on what the 'reasonable period of time' should be. The panel must rule on this within 40 days.[456] If some or all of the panellists cannot reconvene, a new panel must be set up under the rules for setting panels up.[457] The EU and UK may, however, agree to extend the reasonable period.[458] Overall, the process of arbitrating the time period for compliance has some broad similarities to the WTO dispute settlement system.[459]

What happens when the period to comply runs out? The respondent must tell the complainant beforehand what it has done to comply with the panel ruling.[460] If the complainant thinks that the respondent has not fully complied with the panel ruling, it can ask the original panel to rule on the issue; it will decide within 90 days.[461] Again, if some or all of the panellists cannot reconvene, a new panel must be set up under the rules for establishing panels.[462] It is possible that this process will lead to further questions being sent to the CJEU, if the dispute concerns interpretation of a concept or provision of EU law.[463]

At the end of the day, the process has some teeth for enforcement. If the panel confirms that the respondent has failed to comply with the original ruling by the deadline to comply with it, it may impose a 'lump sum or penalty payment' upon that party, if the complainant requests it. To determine the size of that payment, the panel must 'take into account the seriousness of the non-compliance and underlying breach of obligation, the duration of the non-compliance and underlying breach of obligation.'[464] This has some similarity to the Article 260 TFEU process, rather than WTO law, given that Article 260 TFEU also refers to a 'lump sum or penalty payment' and the criteria to determine the amount of the fine resemble those developed by the Commission and CJEU case law.[465] However, there is no express reference to CJEU case law or to EU law here.

If the respondent fails to pay the fine imposed upon it after one month, or if it still fails to comply with the original ruling six months after the ruling that it has failed to comply with it, the complainant may either suspend its obligations resulting from the withdrawal agreement *other than the citizens' rights provisions*, or parts of another treaty between the UK and the EU, under the conditions set out in that agreement.[466] No such agreement exists yet, although the EU has proposed that the future relationship treaty with the UK contains such rules.[467]

However, this 'retaliation' is subject to conditions: the complainant must notify the respondent of which provisions it intends to suspend; before it suspends its obligations under a future relationship agreement, it must consider whether suspending some of the withdrawal agreement would be more proportionate; all retaliation must 'be proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question and, where the suspension is based on the fact that the respondent persists in not complying with the arbitration panel ruling referred to in Article 173, whether a penalty payment has been imposed on the respondent and has been paid or is still being paid by the latter.' The complainant must wait at least 10 days after notifying the respondent before implementing the retaliation—unless the respondent asks for arbitration over the retaliation because it is arguably disproportionate. In that case, the original panel reconvenes and gives its ruling on this issue 60 days after it is requested to do so; the retaliation is suspended in the meantime.[468]

However, this retaliation is 'temporary', and can be applied only until the breach of the withdrawal agreement is rectified to be consistent with that agreement, or until the EU and UK otherwise agree to settle their dispute.[469] It follows that denouncing the withdrawal agreement would be inconsistent with this limit on retaliation. In any event, such a measure would arguably always be disproportionate; and it would necessarily violate the rule that retaliation cannot take the form of suspending the obligations relating to citizens' rights.

Finally, the rules allow for the possibility that the respondent later claims that it has eventually complied with the arbitration ruling, but the complainant disputes this claim.[470] How to determine who is correct—and whether the imposition of ongoing fines or retaliation must therefore come to an end or not? First of all, the respondent notifies the complainant of its purported compliance and its request to end the fines or retaliation.[471] If the EU and UK do not agree on whether the compliance is satisfactory within 45 days, either party may request the original panel to rule on the issue. The panel must rule and report to the parties, and the Joint Committee, within 75 days.[472] If the respondent wins this case, or the complainant does not ask for a panel within 45 days of being notified, the complainant must end its retaliation within 15 days, or the penalty payment must end immediately. As usual, if interpretation of a provision or concept of EU law is involved, the CJEU must be asked to rule.[473]

The dispute settlement provisions of the withdrawal agreement are a further example of its ambivalence between EU law and international law frameworks. After the end of the transition period, the agreement makes no clear choice between the CJEU route and the international route to dispute settlement: not only do they coexist and overlap, but also the CJEU is embedded in the arbitration procedure, a sleeping dog set to awaken the moment that there is a threat to its guardianship of the interpretation of EU law. The final break between the UK and EU, in these parts of the withdrawal agreement, takes place in multiple stages: an end to the main jurisdiction at the end of the transition period, with fragments remaining afterwards, some (but not all) of which expires at various points in the years ahead. While the dispute settlement provisions in many free trade agreements are not frequently invoked,[474] the complexity of untangling the UK's membership and the plethora of dispute settlement options in the withdrawal agreement suggests that it may be an exception.

XII. Conclusion

To borrow a phrase made famous via the Brexit negotiation process, the withdrawal agreement tries to have its cake and eat it too. With its simultaneous nods to the EU law links of the UK's past, and the international law nature of its future, the agreement is a gradual route out of EU membership matching the ever-more gradual routes into it for other European countries. The complex compromise—consisting of overlapping dispute settlement processes, mixing EU law and international law concepts, and multiple exit points from the ever-diminishing fragments of EU law that apply to the UK—is anything but tidy. But in that, it echoes the convoluted nature of the UK's EU membership, replete with opt-outs, rebates, and handbags at dawn.

It may be that this attempt to compromise will be the downfall of the withdrawal agreement in practice, since even those last few fragments remain intolerable for the fiercest opponents of the UK's former membership—whom, it seems, would level a British city to kill a European mosquito. Its most difficult challenge lies in the attempt to compromise over Northern Ireland, which brings together a bingo card full of the agreement's legal quirks: vague and conflicting provisions, overlapping CJEU jurisdiction and international dispute settlement, key issues left for further negotiations, and a deep disagreement over whether, and if so how much, the arrangements are potentially permanent, on the one hand, or linked to further negotiations, on the other.

Yet apart from the more legalistic tensions, there are other ways on which the provisions on Northern Ireland are a microcosm of broader conflicts. First of all, they represent an attempt to resolve several overlapping and perhaps irreconcilable objectives: the UK demand for territorial integrity, the EU concern about external borders and single market cohesion, and the peace project in Northern Ireland itself. It is not that there is an explicit link between the detailed rules of the Protocol and the Good Friday Agreement; it is that the Protocol tries to adapt the broader UK/Ireland relationship, with its impact on Northern Ireland, to the changed circumstances of Brexit.

The inherent logic of the Good Friday Agreement was to reconcile those who felt British and those who felt Irish by saying that they were free to be either (or both), without having to choose. This coexistence was underpinned by—or at least unthreatened because of—the parallel EU membership of the UK and Ireland. The first version of the withdrawal agreement tried to retain the UK's integrity, without threatening the community balance, by keeping closer economic links between the UK *as a whole* and the EU. The second version instead detaches the UK further from the EU, and Northern Ireland with it—while *simultaneously* retaining the latter's economic links with the EU, as *distinct from* the rest of the UK. This sleight of hand is maintained precisely by the various legal tricks described above.

In doing so, it resembles the Good Friday Agreement's strategy to reconcile the communities: Northern Ireland can be both British and Irish/European at the same time. But economic regulation is a sharper tool than cultural affinity: a real choice actually has to be made between land border checks and checks in the sea, if the goals of UK territorial integrity and EU border/single market cohesion are to be achieved. Perhaps in a different universe, the parties reached agreement easily on how to apply the Protocol in a way that reconciled these objectives. In this universe, at the time of writing, they had not. And the future of EU/UK relations in general, and the withdrawal agreement in particular, may rest on whether this proves to be merely one [AQ8] phase in the political theatre of negotiations, or part of an exit stage right from any significant EU/UK relationship at all. [AQ9] [AQ10]

1. [2020] OJ L 29/7. A previous version of the withdrawal agreement, agreed in 2018 ([2019] OJ L 66 I/1), did not come into force because the UK Parliament refused to ratify it. After a minor amendment as regards its entry into force ([2019] OJ L 110 I/1), due to the extensions of the UK's EU membership, the revised agreement, which differs from the original only as regards the Protocol on Northern Ireland and Ireland, was negotiated in autumn 2019. For the domestic law on ratification on each side, see the *European Union* (*Withdrawal Agreement) Act 2020* (for the UK), hereinafter the 'Withdrawal Agreement Act'; and, for the EU, the Council decision on conclusion of the agreement ([2020] OJ L 29/1). All references to Articles are to the withdrawal agreement unless otherwise indicated. This paper is updated to time of writing (17 September 2020).

2. [2020] OJ L 29/189. For the detailed background to the withdrawal agreement, see Dougan, 'So long, farewell, auf wiedersehen, goodbye: the UK's withdrawal package', (2020) 57 *CML Rev*, 631 at 1–15 SSRN version.

3. On this feature of the agreement see particularly Dashwood, 'The Withdrawal Agreement: common provisions, governance and dispute settlement', (2020) 45 *ELR*, 183.

4. See Art. 185.

5. [2020] OJ C 34/1.

6. While it is expressly possible for the parties to amend the Ireland/Northern Ireland Protocol, there is nothing automatic about that; the possibility of unilateral termination of the Protocol is several years in the future; and the references to the Protocol being 'temporary' were removed when it was renegotiated: see further Section X.A.

7. Art. 50(3) TEU: 'The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, *failing that*, two years after the notification …'. The words 'failing that' can only mean a withdrawal agreement is not a legal necessity to leave the EU. Only this interpretation would be consistent with a sovereign, unilateral right to leave, as stressed by the CJEU ruling in Case C-621/18 *Wightman*

ECLI:EU:C:2018:999, for otherwise the EU could prevent a Member State from leaving by refusing to agree a withdrawal agreement. The EU courts have more specifically referred to the possibility of leaving without a withdrawal agreement in *Wightman*, paras 57, 73, and 75, and the operative part of the ruling ('or, if no such agreement has been concluded'; see also para. 59: '*one* of the *events*'), and Case T-458/17 *Shindler* ECLI:EU:T:2018:838, paras 43 ('in the absence of a withdrawal agreement, the Treaties will cease to apply'; para. 57 is nearly identical) and 47 ('when the United Kingdom withdraws from the EU, whether or not an agreement is concluded'); see also para. 65 and the logic of para. 46. All emphases are mine.

8. The *international law* aspects of any potential termination of the treaty are considered further in Section III.C below.

9. Cases: T-198/20 *Shindler*; T-231/20 *Price*; and T-252/20 *Silver*. Note that the General Court judgment in Case T-458/17 *Shindler* ECLI:EU:T:2018:838 (upheld by the CJEU on appeal: Case C-755/18 P *Shindler* ECLI:EU:C:2019:221) dismissed a challenge to the Council mandate to negotiate the withdrawal agreement, on the grounds that the applicants lacked a legal interest to bring the case, *inter alia* because their legal status was liable to change in any event following the UK's unilateral decision to leave.

10. See the interim measures order of the General Court in Case T-231/20 *Price* ECLI:EU:T:2020:280, on appeal to the CJEU: Case C-298/20 P(R).

11. The CJEU has explicitly confirmed that the validity of an EU decision to conclude an international agreement can be challenged not only in an annulment action directly before the EU courts, but also via a national court reference for a preliminary ruling: Case C-266/16 *Western Sahara Campaign UK* ECLI:EU:C:2018:118. Note that the Advocate-General's opinion in that case argued that the substantive test for individuals challenging the EU's conclusion of a treaty for breach of international law are less onerous than for those challenging EU measures for breach of international law in other circumstances (ECLI:EU:C:2018:1, paras 76-97), discussed in Section III.A(ii) below. The Court did not find it necessary to rule on the point.

12. But the difficulty with arguing that the transition period requires the Member States to be joint parties to the withdrawal agreement—apart from the absence of any reference to Member States in Art. 50(2) TEU as regards concluding the treaty—is that this would *also* conflict with the EU interpretation that Art. 50, and the period leading up to Brexit day, cannot deal with future relationship issues. In any event, since the EU would have exclusive competence over some issues dealt with in the transition period provisions, it does not really address the underlying issue anyway.

13. See also *Wightman* (n 7), in which the Court interpreted a point on which Art. 50 was silent, *inter alia* by looking at the broader legal framework of the Treaties. It might also be argued, following the interpretation of the purpose of Art. 50 in *Wightman*, that the outcome if the 'cold turkey' thesis were correct would not be an 'orderly withdrawal' from the EU.

14. For details, see Section X.A below. In fact even that initial version of the Protocol could nevertheless be criticized on competence grounds, because there was no fixed expiry date of the Protocol.

15. See, for instance, the judgment in Case C-236/09 *Test-Achats* ECLI:EU:C:2011:100.

16. See *Western Sahara Campaign UK* (n 11), para. 50, and Case C-327/91 *France v Commission* ECLI:EU:C:1994:305, para. 17.

17. As for the legal effects of an invalid treaty, international law, similar to EU law, protects the legality of acts performed by the parties in good faith before the invalidity was invoked: see Art. 69(1)(b) of the Vienna Convention on the Law of Treaties.

18. See Section IX below for details.

19. [2020] OJ L 225/53.

20. COM (2020) 195, 15 May 2020; [2020] OJ L 187/12.

21. For the reasons explained above, this makes the use of Art. 50 questionable for Joint Committee measures based on the Northern Ireland/Irish Protocol. Although an alternative or additional legal base might be possible, this

does not solve the underlying lack of legal basis for the Protocol in Art. 50. Whether Art. 50 competence would extend to agreeing on a withdrawal agreement *after* the withdrawal date is hypothetical.

22. See Art. 127(2) and Art. 13(8) of the Northern Ireland/Ireland Protocol.

23. Arguably Art. 164(5)(b) permits the Joint Committee to amend the agreement to give itself further powers to amend Parts of the withdrawal agreement other than Parts One, Four, and Six; but such powers would have to be necessary for the purposes listed in Art. 164(5)(b). So this would be no different from the powers it has anyway to adopt such amendments directly. The parties could give the Joint Committee more powers by amending the agreement, but this begs the question.

24. Art. 39 Vienna Convention on the Law of Treaties (VCLT): amendments are possible unless the treaty otherwise provides. Compare to the limits which international law places upon *terminating* treaties, discussed in Section III.C below.

25. Also, given that the *Wightman* judgment took account of the VCLT when interpreting Art. 50 as regards revoking the notification of withdrawal, the VCLT provisions on amending treaties should logically also be taken into account by analogy. For a critique of the Court's use of the Vienna Convention in *Wightman*, see Vidmar, 'Unilateral Revocability in *Wightman*: Fixing Article 50 with Constitutional Tools', (2019) 15 *European Constitutional Law Review*, 359.

26. It might be argued that Art. 13(8) of the Northern Ireland/Ireland Protocol has an *a contrario* effect ruling out other amendments by the parties. But in the absence of express wording to that effect it is submitted that the withdrawal agreement has not provided otherwise than the normal rule of international law pursuant to Art. 39 VCLT.

27. See the reserve of national competence in Art. 79(5) TFEU. The continuation of free movement of people during the transition period would, on the other hand, affect that national competence.

28. Case law starting with Case C-104/81 *Kupferberg* ECLI:EU:C:1982:362, para. 14, asserting the Court's jurisdiction to interpret international treaties concluded by the EEC (now the EU). This also applies to measures implementing an international agreement (Case C-192/89 *Sevince* ECLI:EU:C:1990:322): so it follows that the CJEU can also interpret decisions of the withdrawal agreement Joint Committee, which have the same legal effect as the main agreement (Art. 166(2)).

29. Ibid., paras 14–17.

30. The safeguard point is reiterated again in *Sevince* (n 28, para. 20).

31. Case law starting with Case C-12/86 *Demirel* ECLI:EU:C:1987:400. The same criteria apply to measures implementing an international treaty, such as decisions of the withdrawal agreement Joint Committee (*Sevince*, n 28, para. 15).

32. Case law starting with Case C-149/96 *Portugal v Council* ECLI:EU:C:1999:574—which elaborates upon previous case law denying direct effect to pre-WTO versions of the GATT.

33. See, for instance. Cases C319/10 and C320/10 *X and X BV* EU:C:2011:720 and Case C207/17 *Rotho Blaas* EU:C:2018:840.

34. See the fifth, seventh, twelfth, and thirteenth recitals in the preamble to the withdrawal agreement; the third and twelfth recitals in the preamble to the Protocol on Ireland/Northern Ireland; and the fourth and fifth recitals in the preamble to the Protocol on Gibraltar. See also, by analogy, the CJEU's stress on 'orderly withdrawal' as one of two main purposes of Art. 50 TEU (*Wightman*, n 7, para. 15).

35. Moreover, Art. 4(3) and (4), concerning the interpretation of the agreement consistently with EU law principles and the effect of CJEU case law, are not solely addressed to the UK.

36. See *Sevince* (n 28), para. 20.

37. An argument might, however, be made that while withdrawal agreement arbitration rulings following a CJEU judgment should have effect within the EU legal system, arbitration rulings who do *not* follow a CJEU judgment should not, since they are more similar to WTO rulings.

38. The following discussion of the domestic legal constraints on termination is distinct from the discussion of the legal base: see Section III.A.ii above. On the role of the EU and international law on treaties more generally, see Sáenz de Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship', (2019) 30 *European Journal of International Law*, 721.

39. Case C-162/96 ECLI:EU:C:1998:293.

40. See also Case T-115/94 *Opel Austria* ECLI:EU:T:1997:3, in which it was similarly crucial that the breach of the treaty by the EU directly affected rights.

41. Case C-366/10 *Air Transport Association of America and others* ECLI:EU:C:2011:864. As noted above (n 11), it has been argued that less strict principles apply as regards a challenge to the *conclusion* of a treaty by the EU—an issue which does not concern us here.

42. See also, by analogy, the CJEU's willingness to take into account the VCLT provisions on termination of treaties in *Wightman* (n 7). It would be odd if those principles applied to withdrawal from the EU based on Art. 50 TEU, but not to the withdrawal agreement, which is also based on Art. 50.

43. Arts 70 and 60(4) VCLT, discussed further below.

44. The judgment in *Opel Austria* (n 40) explicitly drew a link between an international law rule (in that case good faith, codified in Art. 18 VCLT) and the EU law principle of legitimate expectations. It might be argued that a similar link exists between Art. 70 VCLT and that EU law principle—especially given that the content of Art. 70 is obviously similar to the EU law principle. See Minnerop, 'Continuity as the rule, not the exception: how the Vienna Convention on the Law of Treaties protects against retroactivity of "Brexit"', (2018) *European Human Rights Law Review*, 474.

45. Art. 27 VCLT: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' This codifies a rule of customary international law, as the ICJ has confirmed: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, International Court of Justice (ICJ) Reports 2008, p. 177, para. 124.

46. See, for instance, *Miller I* (*R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5), para. 55: 'although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law'.

47. For instance, the Attorney-General's legal statement on the bill (at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf) claims that '[u]nder this approach [parliamentary sovereignty], treaty obligations only become binding to the extent that they are enshrined in domestic legislation', citing *Miller I*. But *Miller I* actually stated (see note 47) that, consistently with the VCLT, treaties remain '*binding on the [UK] in international law*'. Her statement missed out the crucial words 'only become binding *in domestic law*', leaving a wholly misleading impression that parliamentary sovereignty justifies a breach of a treaty at the international level, and in effect misquoting a Supreme Court judgment.

48. Section 38 of the Act.

49. The Act's implementation of specific provisions of the agreement is referred to in other sections of this paper.

50. See sections 1–2 of the Act, as regards the transition period in Part Four of the agreement; see section 5 of the Act as regards the remainder of the agreement.

51. *Miller I* (n 46), particularly paras. 86–94.

52. On the underlying issues as regards the link between domestic law and withdrawal from treaties, see Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal', (2019) 30 *European Journal of International Law*, 73.

53. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 179.

54. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), drawn up in 1986, has not been ratified by a sufficient number of parties to come into force.

55. See *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, para. 46.

56. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p. 73, para. 37.

57. Paras 47 and 49 specifically refer to the limits on denunciation of treaties in Art. 56 VCLT and the corresponding draft provisions (at the time) of what became the VCLTIO.

58. Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32.

59. See also the role of the EU in contributing to the development of customary international law: Odermatt, 'The Development of Customary International Law by International Organizations', (2017) 66 *International and Comparative Law Quarterly*, 491.

60. For instance, see *Racke*, *Western Sahara*, *Air Transport Association of America* (nn 39, 11, and 41), and Case C-286/90 *Poulsen and Diva Navigation* EU:C:1992:453, para. 9.

61. In *The Queen on the application of Western Sahara Campaign UK v The Commisioners for Her Majesty's Revenue and Customs, The Secretary of State for the Environment Food and Rural Affairs ([2015] EWHC 2898 (Admin))*, the High Court based its reference to the CJEU on the question of whether the EU had validly concluded a treaty on the CJEU case law concerning the review of the validity of EU decisions in conflict with international law. In *R. (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change ([2010] EWHC 1554 (Admin))*, the High Court asked the CJEU if EU legislation was valid in light of customary international law and various treaties.

62. See, for instance, the Attorney-General's statement (n 47).

63. Art. 168.

64. The following summary of the VCLT borrows in part from my EU Law Analysis blog post, 'How do you solve a problem like Suella? The legal aspects of breach and termination of the withdrawal agreement', at: http://eulawanalysis.blogspot.com/2020/02/how-do-you-solve-problem-like-suella.html. See also Miller and de Mars, 'Could the Withdrawal Agreement be terminated under international law?', House of Commons Briefing Paper 8463, 24 March 2019.

65. Art. 42(1) VCLT.

66. Art. 42(2) VCLT.

67. Art. 43 VCLT.

68. Art. 44(1) VCLT.

69. Art. 44(3) VCLT.

70. Art. 45 VCLT.

71. Arts. 46-52 VCLT.

72. Art. 53 VCLT.

73. Art. 54 VCLT.

74. Art. 56 VCLT.

75. Art. 58 VCLT.

76. Art. 60(1) VCLT.

77. Art. 60(3) VCLT.

78. Art. 60(4) VCLT.

79. Art. 60(5) VCLT.

80. Art. 62 VCLT.

81. Art. 65 VCLT.

82. Art. 66 VCLT.

83. Arts. 67 and 68 VCLT. Note that the CJEU has already referred to Art. 68 in the context of Art. 50 (*Wightman*, n 7, para. 71).

84. Art. 69 VCLT.

85. Art. 70 VCLT.

86. Art. 72 VCLT.

87. Art. 18 of the Protocol (see discussion in Section X.A).

88. Arts 46–52 VCLT. While it is sometimes argued that some provisions of the Northern Ireland/Ireland Protocol conflict with the Act of Union with Ireland, Art. 46 VCLT requires that the 'violation was manifest and concerned a rule of its internal law of fundamental importance', further defining 'manifest' as 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. In any event, it is questionable whether a conflict with the Act of Union provisions on trade amounts to a restriction on the UK's competence to *conclude* the treaty. It is submitted that any conflict with the Act of Union is more an issue concerning conflicts between successive treaties (see Art. 30 VCLT). Arguments about duress do not stand up: there is no evidence of threats against a UK representative (Art. 51 VCLT), or the use of force or threat of force against the UK (Art. 52 VCLT); and the EU's agreement to renegotiate the original version of the treaty, and the possibility for the UK to leave the EU without a withdrawal agreement (confirmed in the case law: see n 7), further weakens any argument along these lines.

89. See respectively Art. 39 and the twelfth recital in the preamble to the agreement.

90. Art. 58 VCLT, which gives precedence to the specific provisions of a treaty, therefore applies.

91. The rules in Art. 60 VCLT are 'without prejudice' to such specific provisions: Art. 60(4).

92. In any event, the use of the 'material breach' clause is not automatic once a material breach by the other party is established, still less if it is merely alleged: the party wishing to terminate a treaty on these grounds has to take positive steps to do so, as defined in the VCLT.

93. Art. 62 VCLT.

94. Art. 7(2) further specifies that all references to the EU in the withdrawal agreement include Euratom. There are some specific separation provisions regarding Euratom (see Section V below).

95. Art. 2(a).

96. Art. 4(4)

97. Art. 6(1), discussed below.

98. Art. 2(b). It follows that the provisions on citizens' rights (see Section VI) will not apply to nationals of any new Member States, but will still apply (as far as this withdrawal agreement is concerned, unless it is amended) if another Member State leaves the EU.

99. Art. 7(1).

100. Art. 128, discussed in Section V below. Art. 128(5) provides for UK participation in comitology processes on a limited basis during this period, and Art. 127(7)(c) disapplies the staff regulations during the transition period, complementing the exclusion from the EU institutions and other bodies. See also the derogations from Art. 7 in Art. 34(1) as regards social security, Arts 136(3)(d), 138(3), and 152(2) as regards the financial settlement, and Arts 7(3) and 13(5) of the Ireland/Northern Ireland protocol.

101. Art. 2(c). Art. 2(d) defines 'UK citizen' in turn, referring to definitions offered by the UK during its EU membership. On these definitions, see Case C-192/99 *Kaur* ECLI:EU:C:2001:106. On the position of dual citizens of

the UK and EU, and on the question of whether UK nationals have lost EU citizenship, see the discussion of the citizens' rights rules in Section VI below.

102. See previously the implied reference to Gibraltar in Art. 355(2) TFEU, and the express reference to the Channel Islands and Isle of Man in Art. 355(5)(c) TFEU. On the scope of EU law applicable to Gibraltar, see, for instance, Case C-267/16 *Buhagiar* ECLI:EU:C:2018:26; as regards the Channel Islands, see for instance Case C-179/96 *Pereira Roque* ECLI:EU:C:1998:368. There is also a Protocol to the withdrawal agreement on Gibraltar: see Section X.C below.

103. This wording is nearly identical to Art. 355(5)(b) TFEU. There is also a Protocol to the withdrawal agreement on these bases: see Section X.B below.

104. A footnote lists these territories as Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Saint Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, and Turks and Caicos Islands.

105. On its legal effect in the EU, see Section C above.

106. Art. 4(1). See section 5 of the *Withdrawal Agreement Act*, which inserts a section 7A into the *European Union (Withdrawal Act) 2018* (hereinafter 'Withdrawal Act'). For a critique of this approach as regards citizens' rights, see Smismans, 'EU citizens' rights post Brexit: why direct effect beyond the EU is not enough' (2018) 14 *European Constitutional Law Review*, 443.

107. Art. 4(2). The legislation concerned is the *Withdrawal Agreement Act.*

108. For the reasons discussed in Section III.B, the exercise of this sovereignty does not justify a breach of the treaty at the international level.

109. The UK government released a 'Statement on Notwithstanding Clauses' (https://www.gov.uk/government/publications/government-statement-on-notwithstanding-clauses/government-statement-on-notwithstanding-clauses) asserting that it would invoke the dispute settlement provisions of the agreement if it were to use these provisions of the bill. This would still breach the agreement, for the reasons explained in Section XI.D.

110. Art. 4(3). Note that this is not limited to the UK, but applies to the EU too.

111. For instance, see the many provisions referred to as regards citizens' rights, discussed in Section VI below.

112. Art. 131. Art. 174 likewise assumes that not all disputes submitted to arbitration will require a reference from the arbitrators to the CJEU.

113. In this case, the third paragraph of Art. 5 confirms this interpretation, noting that the good faith principle is 'without prejudice' to EU law. If the good faith obligation were itself a concept of EU law, there would be no need for this clarification. See also *Demirel* (n 31), in which a similar provision in an association agreement was interpreted by the CJEU as a general requirement to cooperate, not a directly effective right.

114. Art. 4(4) and (5). The latter provision is addressed only to the UK; the former provision is not. Note the exception to this rule set out in Art. 13(2) of the Northern Ireland/Ireland Protocol (discussed in Section X.A) and in Art. 1(2) of the Protocol on Cypriot bases (discussed in Section X.B).

115. Art. 6(1). The exceptions are Parts Four and Five (on the transition period and the financial settlement, presumably because they start applying *before* the end of the transition period), and anywhere else 'otherwise provided'. This refers to Art. 13(3) of the Protocol on Ireland/Northern Ireland and Art. 1(4) of the Protocol on Cypriot bases, which do not limit the obligation in time.

116. Art. 5. This is similar to the obligation for Member States set out in Art. 4(3) TEU, but there is no specific reference to this provision of EU law. However, that EU law obligation applies to the UK during the transition period, as it is not excluded from application by virtue of Art. 127. It explicitly applies to external relations during this period, with an express exception for UK treaty making (Art. 129; see discussion in Section V).

117. Art. 184, discussed in Section IX.

118. The exceptions are Art. 29(2) (an extra nine months to use the internal market information system as regards recognition of qualifications), Art. 34(2) (social security coordination system), Arts 50 and 53 (access to customs and

VAT databases for the purpose of complying with its obligations under the relevant separation provisions), Art. 62(2) (joint investigation teams with UK participation which are underway at the end of the transition period), Art. 63(1)(e) (three months' further access to the follow-up process in the Schengen Information System), Art. 63(2) (a year's further access to certain JHA information systems to wrap up pending requests), Art. 78 (nine months' access to the procurement databases as regards pending bids), Art. 96(6) (wrapping up greenhouse gas obligations), Arts 99(4) and 100(2) (linked to several extra years' exchange of information on taxation), and Art. 138(4) (financial settlement).

119. Art. 126 also uses the alternative phrase 'implementation period', preferred by the UK. Since the withdrawal agreement only uses this term once, I will use only 'transition period' for the sake of simplicity. For domestic implementation in the UK, see sections 1–4 of the *Withdrawal Agreement Act*. On the competence of the EU to conclude Part Four on the basis of Art. 50 TEU, see Section III.A(i) above.

120. Art. 126.

121. Art. 132.

122. See also section 33 of the *Withdrawal Agreement Act*, which ruled out agreement to an extension on the UK side—although had it wished to agree to an extension, the UK government could have asked Parliament to amend the Act.

123. On this issue, see the discussion in Section III above. Note that the Joint Committee cannot amend Part Four, so there is no prospect of a simplified amendment extending the transition period: Art. 164(5)(d).

124. See discussion of Art. 127(2).

125. An *a contrario* interpretation of Arts 127(2) and 132 confirms this interpretation. As the Joint Committee cannot amend Part Four, it cannot shorten the transition period either.

126. See the footnote to Art. 129, discussed below.

127. Art. 132(2) and (3).

128. Even on a literal reading, '*up to* one or two years' is more flexible. See also Art. 132(2)(c): '[i]n the event that the period by which the transition period is extended is not a multiple of 12 months' and Art. 158(3): 'corresponding *number of months*' (emphases added).

129. Art. 131.

130. Art. 127(1), first sub-paragraph. For the definition of 'Union law' see Art. 2(a).

131. Art. 127(3).

132. Art. 127(1)(a). See also Art. 127(4)—the UK cannot participate in enhanced cooperation launched after Brexit Day, or which was not implemented before Brexit Day—and (5)—the UK can only opt in to Schengen or JHA measures which build upon those it had opted in to before Brexit Day.

133. Art. 127(1)(b). There are no separation provisions in Part Three of the agreement as regards those already holding office.

134. See the analysis of this issue in Section VI below.

135. Art. 185. There are no separation provisions for what happens on Brexit Day where an EAW is pending in such cases, and no express rule on what happens to the fugitive instead of extradition. The exception does not apply to the surrender of citizens of other States, such as the UK itself. The EU declared that Germany, Austria, and Slovenia would invoke this clause: [2020] OJ L 29/188.

136. This is confirmed by Art. 50(5) TEU, which requires a withdrawn Member State to use the usual accession process if it wishes to join the EU again, and by the judgment in *Wightman* (n 7), which states that the power to revoke the notification applies until the withdrawal agreement enters into force or the UK leaves with no withdrawal agreement by operation of Art. 50. See also the explicit derogation from Part Four in Arts 135(2) and 137(2): the UK is not bound by changes in EU budget law during the transition period that affect its financial contributions, and some funding measures cease to apply to the UK from Brexit Day.

137. Art. 127(2). There are also provisions on foreign policy in Arts 127(7) and 129(6) and (7).

138. See 'The Future Relationship with the EU The UK's Approach to Negotiations', Feb. 2020, para. 8.

139. Art. 127(6).

140. Art. 127(7). See Commission Decision C(2020)5159, 27 July 2020, establishing that the UK shall not have access to a database relating to security-related controls on foreign investment.

141. T-194/20 *JF v EUCAP Somalia*.

142. Orders in Cases C-424/20 P(R) *Representatives of Governments of the Member States v Sharpston* ECLI:EU:C:2020:705 and C-423/20 P(R) *Council v Sharpston* ECLI:EU:C:2020:700, overturning the order of 4 September 2020 in T-550/20 P(R), *Sharpston v Council and Representatives of Governments of the Member States*. See also Cases T-180/20 *Sharpston v Council and Conference of Governments of the Member States* and T-184/20 *Sharpston v Court of Justice of the European Union*, pending. This dispute was not, however, specifically connected to the transition period provisions.

143. Art. 128(1), referring to Art. 7, discussed in Section IV above. 'Union law' is defined in Art. 2(a).

144. Art. 128(2).

145. Art. 128(4), making an exception for Art. 21(2) of the protocol on the Statute of the ESCB and ECB.

146. Art. 128(3). A footnote states that this 'should in particular concern Arts 7, 30, 42(4), 48(2)—(6) and 49 TEU and Arts 25, 76(b), 82(3), 83(3), 86(1), 87(3), 135, 218(8), 223(1), 262, 311, and 341 TFEU.'

147. Art. 128(5).

148. Art. 128(6), referring to the measures listed in Annex VII.

149. Art. 128(7).

150. Art. 129(1). On that latter point, a footnote states that: 'The Union will 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.' For the text of the notification, see https://ec.europa.eu/commission/sites/beta-political/files/template-note-verbale-international-partners-after-signature-withdrawal-agreement.pdf. The point about the EU and Member States acting jointly is defined by reference to Art. 2(a)(iv): see Section IV above.

151. For details, see: https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries. Note that even where the terms of a continuity agreement with the UK are identical to the corresponding agreement with the EU, the situation as regards rules of origin (ie adding UK input to a third-country good, then exporting it to the EU) will change when the UK exits the customs union at the end of the transition period.

152. Art. 129(2). The latter exception only applies 'where Member States' participation is permitted under the applicable agreements'. As a further exception, Art. 130(3), discussed below, includes a specific rule for UK participation in international fisheries bodies.

153. Art. 129(3). On the principle of 'sincere cooperation' in the overall agreement, see Art. 5, discussed in Section IV above. On the principle in general, see Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law' in Varju, ed., *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, 2019), and Eckes, Disciplining Member States: EU Loyalty in External Relations, (2020) *Cambridge Yearbook of European Legal Studies*, 1.

154. Art. 129(4). For the process of consent on the EU side, see Art. 3 of the Council decision on conclusion of the agreement (n 1). The Commission has proposed to authorize the UK to sign up to international fisheries treaties during the transition period: COM (2020) 489, 7 September 2020. Brexit might also lead to authorization to Member States to negotiate with the UK: see Art. 4 of the Council decision as regards the Protocols to the withdrawal agreement, and the proposal to authorize France to negotiate with the UK as regards the Channel tunnel (COM (2020) 622, 27 July 2020). For more on this element of the withdrawal agreement, see Cremona, 'The Withdrawal Agreement and the EU's international agreements' (2020) 45 *ELR*, 237.

155. Govaere, '"Setting the international scene": EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 *CML Rev*, 1277.

156. Art. 129(5), which is '[w]ithout prejudice' to Art. 127(2)—ie the (moot) possibility of an early EU/UK deal on foreign policy.

157. Art. 129(7).

158. Art. 129(6).

159. See Art. 275 TFEU, which continues to apply to the UK during the transition period pursuant to Art. 131 of the withdrawal agreement.

160. Art. 130(1).

161. Art. 130(2) and (4). The latter point is expressly 'without prejudice to' the general rule that EU law applies to the UK during the transition period, in Art. 127(1).

162. Art. 130(3), which expressly derogates from Art. 129(2), discussed above. As noted in n 154 above, the Commission proposed that the UK be authorized to sign up to the treaties concerned during the transition period.

163. Cases: T-198/20 *Shindler*; T-231/20 *Price*; and T-252/20 *Silver*.

164. Interim measures ruling in Case T-231/20 R *Price* ECLI:EU:T:2020:280 (on appeal to the CJEU: Case C-298/20 P(R), pending).

165. For the alternative view, see Roeben, Minnerop, Tells, and Snell, 'Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit' (2018) *European Human Rights Law Review*, 450. See also, on this issue, Spaventa, 'Mice or horses? British citizens in the EU 27 after Brexit as "former EU citizens"', (2019) 44 *ELR*, 589 at 594.

166. A fourth argument—that the CJEU has ruled that EU citizenship is the fundamental status of nationals of Member States—defeats itself: the UK is no longer a Member State.

167. See Cases C-221/17 *Tjebbes* ECLI:EU:T:2019:189 and C-135/08 *Rottmann* ECLI:EU:T:2010:104.

168. See also the analysis by Dougan (n 2), 29–36 citizens of the SSRN version. For UK implementation, see Part 3 of the *Withdrawal Agreement Act*.

169. The two exceptions are Art. 19 (early applications for status) and Art. 34 (UK involvement in adoption of social security measures), which applied from the entry into force of the withdrawal agreement (Art. 185).

170. However, although there are no exceptions relating to free movement of persons in Art. 127, there are some exceptions relating to the aspects of EU citizenship which are not directly part of free movement. See generally Section V above.

171. Art. 9(a)(i), referring to Art. 2(2) of Directive 2004/38 ([2004] L 158/77), which defines family members as a spouse, a partner with a registered partnership (subject to conditions), a direct descendant of the EU/UK citizen or spouse/partner who is under 21 or dependent, and a dependent direct relative in the ascending line of the EU/UK citizen or spouse/partner. See also the definition of 'rights of custody' in Art. 9(e), as regards children, referring to other EU legislation which states that the term 'shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence.'

172. Art. 9(a)(ii), referring to those *not* within the scope of Art. 3(2) of Directive 2004/38.

173. Art. 9(b), referring to Arts 45 and 49 TFEU. See also the definition of 'state of work' in Art. 9(d).

174. Art. 9(c).

175. Art. 30.

176. In particular, as regards citizens' rights, Part Two refers to the following provisions of EU law: Art. 2(2), Directive 2004/38 (Arts 9(a) and 10(1)(e)); Arts 45 and 49 TFEU (Art. 9(b)); Art. 2(9), Reg. 2201/2003 (Art. 9(e)); Arts 12, 13, 16(2), 17, and 18, Directive 2004/38 (Art. 10(1)(f)); Art. 3(2), Directive 2004/38 (Art. 10(2) and (3));

Art. 18 TFEU (Art. 12); Arts 21, 45, or 49 TFEU and Art. 6(1), Art. 7(1)(a), (b), or (c), Art. 7(3), Art. 14, Art. 16(1), or Art. 17(1) of Directive 2004/38/EC (Art. 13(1)); Art. 21 TFEU and Art. 6(1), Art. 7(1)(d), Art. 12(1) or (3), Art. 13(1), Art. 14, Art. 16(1), or Art. 17(3) and (4) of Directive 2004/38/EC (Art. 13(2)); Arts 4(1) and 5 (1), Directive 2004/38/EC (Art. 14(1)); Arts 16, 17 and 18, Directive 2004/38/EC (Art. 15(1)); Arts 16(3) and 21, Directive 2004/38/EC (Art. 15(2)); Art. 7, Directive 2004/38/EC (Art 16); Arts 2(2)(c) or (d), 3(2), 7(1)(a), (b), and (c) and (2), 8(3), (4), and (5), 10(2), 19, 20, and 27(3), Directive 2004/38/EC (Art. 18); Chapter VI and Arts 31 and 35, Directive 2004/38/EC (Art. 19); Art. 15 and Chapter VI of Directive 2004/38/EC (Art. 20); Art. 23 of Directive 2004/38/EC (Art. 21); Art. 24 of Directive 2004/38/EC (Art. 22(1)); Arts 6 and 14(4)(b) of Directive 2004/38/EC (Art. 22(2)); Art. 45 TFEU and Regulation 492/2011 (Art. 23); Art. 49 TFEU (Art. 24(1)); Directives 2005/36, 98/5, 2006/43, and 74/556 (Arts 26 and 27); Regulations 1231/2010 and 859/2003 (Art. 29); and Regs. 883/2004 and 987/2009 (Arts 29, 30, and 32).

177. Arts 4 and 6, discussed further in Section IV above. On the case law interpreting Directive 2004/38 in particular, see Guild, Peers, and Tomkin, *The EU Citizenship Directive: A Commentary* (2nd edn, Oxford University Press, 2019).

178. Art. 10(1)(a) and (b). Again, this definition is 'without prejudice' to Title III of Part Two, given that social security rules have a different scope (Art. 30).

179. Art. 10(1)(c) and (d).

180. Art. 10(1)(e) and (f).

181. Art. 10(2) and (3), referring to Art. 3(2) of Directive 2004/38, which concerns: '(a) any other family members, irrespective of their nationality, not falling under the definition' in Art. 2(2) who, 'in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'; and (b) 'the partner with whom the Union citizen has a durable relationship, duly attested'.

182. Art. 10(4); this does not apply to other categories of extended family members. Art. 10(5) sets out a safeguard for all extended family members referred to in Art. 10(3) and (4): the State concerned 'shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons'. This copies the wording of Art. 3(2) of Directive 2004/38 without referring to it. Arguably it is a 'concept' of EU law for the purposes of Art. 4 of the withdrawal agreement, although see the interpretation of that phrase in Section IV.

183. Respectively Cases C-434/09 ECLI:EU:C:2011:277 and C-165/16 ECLI:EU:C:2017:862. The case law also makes clear that a dual citizen of an EU Member State and a non-EU country can rely on their EU citizenship: Case C-369/90 *Micheletti* ECLI:EU:C:1992:295. Logically this equally applies to a dual citizen of the UK and a non-Member State in the context of the citizens' rights provisions.

184. Case law starting with Case C-270/90 *Surinder Singh* ECLI:EU:C:1992:296. The UK, at least, has addressed the position of this group unilaterally: see Appendix EU to the Immigration rules, para. EU12 (though note, in accordance with the definitions to the rules, that the route expires on 29 March 2022).

185. Case law starting with Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124. While at first sight Art. 9(a)(ii) covers such cases, it seems rather that they are not covered because Art. 9(a)(ii) only applies to persons within the scope of Art. 10, and there has been no movement between the UK and the EU in such cases. Again, the UK has addressed the position of this group unilaterally: see Appendix EU to the Immigration rules, para. EU11. As Spaventa points out, Part Two's 'greatest strength is its greatest weakness'—as its approach to securing rights by reference to free movement law leaves out those outside the strict scope of that law: 'The rights of citizens under the Withdrawal Agreement: a critical analysis', (2020) 45 *ELR*, 193.

186. Art. 11, first sentence, referring to Art. 15(2), which refers in turn to EU law rules on the acquisition of permanent residence.

187. Art. 11, second sentence, referring to Art. 15(3).

188. Art. 12, referring to the non-discrimination rule in Art. 18 TFEU. Note that other non-discrimination clauses appear in Arts 22 and 23. This is without prejudice to the common travel area (Art. 38(3)).

189. Art. 13(1) refers to TFEU provisions and the relevant Articles of Directive 2004/38 as regards EU and UK citizens. Art. 13(2) does the same for family members who are EU and UK citizens, while Art. 13(3) refers to the relevant provisions for family members who are *not* EU or UK citizens.

190. Art. 13(4).

191. There is no equivalent to Art. 4(3) and (4) of the citizens' Directive, concerning the issue of passports or identity cards to nationals. Nor is there any equivalent to: Art. 5(3) of the Directive, banning entry or exit stamps in passports of those non-EU family members holding a residence card; Art. 5(4) of the Directive, giving people the opportunity to obtain travel documents or visas; or Art. 5(5) of the Directive, an option to require reporting presence, which can be made subject to proportionate and non-discriminatory sanctions.

192. Art. 14(1). The first sentence matches—and cross-refers to—Art. 4(1) and the first sub-paragraph of 5(1) of the citizens' Directive.

193. Art. 14(2), referring to the documents issued in accordance with Arts 18 and 26, discussed below. This can be compared to Art. 5(2) of the citizens' Directive, which also provides for exemption of the visa requirement if the person has a residence card provided for in the Directive, and covers short-term visits: see Case C-202/13 *McCarthy* ECLI:EU:C:2014:2450.

194. See discussion of Art. 10 above.

195. Art. 14(3). This is essentially identical to Art. 5(2) of the citizens' Directive, second sub-paragraph, but there is no cross-reference to the Directive.

196. Art. 15(1); Art. 16 confirms the latter point. These provisions refer to Arts 16–18 of the Directive. The details of obtaining permanent residence status despite less than five years' residence are set out in Art. 17 of the Directive. It is unclear if the reference to time spent on the basis of EU law is more generous than the CJEU's interpretation of the Directive, which provides that permanent residence status can only be obtained on the basis of residence *in accordance with the Directive*, even though it is not the only basis for residence rights under EU law: see C-529/11 *Alarape and Tijani* ECLI:EU:C:2013:290.

197. Art. 15(2), referring to Arts 16(3) and 21 of the Directive. The former states that continuity of residence is not broken by 'temporary absences' that do not exceed a total of six months a year, or by longer absences for conscripted military service, or for a single longer absence of up to a year for 'important reasons' (with a non-exhaustive list of possible reasons). The latter refers to means of proof to show continuity of residence, and provides that continuity is broken if an expulsion is enforced.

198. Art. 15(3).

199. See Art. 16(4) of the Directive.

200. Art. 17(1). This does not reflect any explicit provision of EU free movement law.

201. Art. 17(2).

202. Presumably this exception aims to prevent the persons concerned being able to sponsor family members in turn.

203. Art. 18(1). The document may be in digital form. Note that holding the document as a condition enjoying rights diverges from the approach under Art. 25 of the citizens' directive, which states that holding forms cannot be a precondition for having any form of status under the Directive. The new residence document must state that it was issued in accordance with the agreement: Art. 18(1)(q).

204. Art. 18(4), which refers to issuing this document 'in accordance with the conditions set out in' the citizens' Directive. Again, the document may be in digital form. The EU has implemented a standard format: see Commission Decision C(2020)1114, 21 February 2020, adopted on the basis of the powers conferred by Art. 5 of the Council decision concluding the withdrawal agreement (n 1).

205. See Appendix EU to the immigration rules.

206. See that pledge at: http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html. The claim of 'no less favourable status' was also breached, given the changes on admission of family members after the end of the transition period and the limits on retaining status departure from the country.

207. Art. 18(1)(a). See also Art. 13(4).

208. Art. 18(1)(b). For those who have the right to enter later (ie family members referred to in Art. 10), the deadline is either 30 June 2021 or three months after entry, whichever comes later. A certificate of application must be issued to an applicant. Compare to Art. 8(2) of the citizens' Directive.

209. Art. 18(1)(c).

210. Art. 18(1)(d). Arguably the right to a remedy in Art. 18(1)(r) still applies here.

211. Art. 18(2), which is however subject to the grounds for expulsion in Art. 20.

212. Art. 18(3). The right to judicial redress is set out in Art. 18(1)(r); Art. 18(3) also refers to the safeguards and right to appeal in Art. 21, and the limited possibility to remove someone while a court case is pending set out in Art. 20(4). See also Art. 19 on the position of applications made during the transition period.

213. Art. 18(1)(e).

214. Art. 18(1)(f).

215. Art. 18(1)(g). This provision resembles Art. 25(2) of the citizens' Directive. The UK has chosen to waive fees.

216. Art. 18(1)(h), referring to Arts 19 and 20 of the Directive. This applies during the usual deadline, and is subject to check on identity and residence and a criminality and security check on the basis of Art. 18(1)(p) of the agreement.

217. Art. 18(1)(i). Identity documents must be returned without delay before the decision is made. Compare to Art. 8(3) of the citizens' Directive.

218. Art. 18(1)(j).

219. Art. 18(1)(k), referring to Art. 8(3) of the citizens' Directive, the criteria to reside under Arts. 7(1)(a), (b), and (c) of the Directive, and the definition of 'sufficient resources' under Art. 8(4) of the Directive. Note that the UK has waived the 'sickness insurance' requirement.

220. Art. 18(1)(l) and (m), referring to a number of provisions of the citizens' Directive. Art. 18(1)(n) refers to a general requirement of proportionate documentation, for those not covered by Art. 18(1)(k) to (m); this may be a reference to children of workers, and the childrens' carers, who are covered by Art. 23.

221. Art. 18(1)(o).

222. Art. 18(1)(p); host States may require the applicant to declare their criminal record. This compares with Art. 27(3) of the citizens' Directive, which rules out systematic checks, although the agreement nevertheless refers to using the process of exchanging information between authorities to see if there is a criminal record, set out in Art. 27(3) of the Directive.

223. Art. 18(1)(r); this compares with Art. 31(3) of the citizens' Directive.

224. Logically enough, this Article applied from the entry into force of the withdrawal agreement (Art. 185). This can only be voluntary for the persons concerned. The CJEU's jurisdiction over Part Two ends slightly earlier for such cases (Art. 158(3)).

225. Art. 19(2), referring to Art. 18(1) and (4). Decisions on applications 'shall have no effect until after the end of the transition period'.

226. Art. 19(3), referring to Chapter VI and Art. 35 of the Directive. For withdrawals of status after that point, see Art. 20.

227. Art. 19(4), referring to Art. 18(1)(b).

228. Art. 19(5), referring to Art. 18(1)(r). This is 'without prejudice to' the right to apply again, set out in Art. 19(4|).

229. Art. 20(1), referring to Chapter VI of the Directive.

230. Art. 20(2). Although it is not mentioned here, if UK citizens obtain EU long-term resident status, EU law could also be relevant to expulsion decisions: see Art. 12 of Directive 2003/109, [2003] OJ L 16/44.

231. Art. 20(3), referring to Art. 35 of the Directive. The procedural rights in Art. 21 of the agreement apply. On abuse of rights, see *McCarthy* (n 192 above) and Case C-127/08 *Metock* ECLI:EU:C:2008:449.

232. The reference is to Art. 15 and Chapter VI of the Directive. The latter covers removal on grounds of public policy or security, while the former refers to removal on other grounds, implicitly due to not, or no longer, meeting the conditions to stay: see Case C-94/18 *Chenchooliah* ECLI:EU:C:2019:693. Art. 15(2) of the Directive states that '[e]xpiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State'.

233. Arts 30 to 33 of the Directive. Note that Art. 15(3) of the Directive rules out applying an entry ban in cases covered by its Art. 15, and Art. 15(1) of the Directive applies its Arts. 30 and 31 to decisions within the scope of its Art. 15.

234. Art. 20(4), referring 'in particular' to Arts 31 and 35 of the Directive. Note that Art. 31(2) of the Directive only allows removal from the territory prior to a judgment, where the person concerned has applied for an interim order to suspend removal, in a limited number of cases: an expulsion decision based on a prior judicial decision; if there was prior access to judicial review; or where the expulsion is based on 'imperative grounds of public security' as defined in the Directive.

235. Art. 22, referring to Art. 23 of the citizens' Directive.

236. Art. 23(1), referring to Art. 24 of the citizens' Directive and subject to the specific provisions of the agreement; this provision is without prejudice to the UK/Ireland common travel area (Art 38(2) of the agreement). Art. 23(2) of the agreement reproduces the exceptions in Art. 24(2) of the Directive: there is no right to equal treatment in benefits during the first three months of residence or an extended period of work-seeking, or student assistance before persons obtain permanent residence, except for 'workers, self-employed persons, persons who retain such status or to members of their families'.

237. Art. 24(1), referring to Art. 45 TFEU and Reg. 492/2011 ([2011] OJ L 141/1).

238. Art. 24(2), which reflects the case law on Art. 10 of Reg. 492/2011 and its predecessor, Art. 12 of Reg. 1612/68 [1968] OJ L 257/2, which gave residence rights to children in education and their carers as a corollary of access to education. The residence right of the child of a worker (or former worker) is protected by Art. 24(1)(b)(vii) of the agreement, since it must be interpreted in accordance with prior CJEU case law (according to Art. 4(4) of the agreement). See most recently the *Alarape and Tijani* case, discussed above as regards Art. 15.

239. Art. 25(1)(b), (2), and (3), referring to Art. 24(1)(c) to (h), (2), and (3). The extension of the provision on workers' equality in Art. 24 to self-employed persons via Art. 25(1)(b)) is significant, since Reg. 492/2011 does not apply as such to self-employed workers; rather their equal treatment rights are based on the Treaties.

240. Art. 24(3).

241. Art. 26, which also does not reflect any particular provision of EU law. The standard EU residence document for UK citizens covered by the withdrawal agreement (n 204) will also apply to those covered by Art. 26.

242. Art. 27, referring to the general EU law on recognition of qualifications as well as specific legislation on lawyers, auditors, and self-employed persons involved in the trade or use of toxic products. The references to EU legislation mean that Arts. 4 and 6 apply to interpretation.

243. Art. 28, again referring to the EU legislation on these issues. This provision could equally have been placed in the 'separation provisions' Part of the agreement (see Section VII below).

244. Art. 29, which resembles part of Art. 56 of Directive 2005/36 ([2005] OJ L 255/22), without referring to that provision. This could address some of the public concerns about professionals from other countries who have faced a prior sanction.

245. See, for instance, Art. SERVIN.5.14 in the EU proposal for a future relationship treaty: https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf

246. Art. 30(1), referring to the EU legislation on the issue. In each case, family members and survivors are also covered.

247. Art. 30(1)(f). This group of people is covered by EU law on social security coordination: see Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Addou* ECLI:EU:C:2001:532. Again, family members and survivors are also covered.

248. Art. 30(1)(g), referring to Reg. 859/2003 ([2003] OJ L 124/1), which the UK opted in to. Again, family members and survivors are also covered.

249. See, for instance, Art. MOBI.5 in the EU proposal for a future relationship treaty (n. 245 above).

250. Art. 31.

251. Art. 35.

252. Art. 32, again referring to EU legislation.

253. Art. 34, derogating from Arts 7 and 8. The UK has negotiated treaties with the non-EU States concerned, although it is not known whether those States have agreed parallel treaties with the EU to cover UK citizens. The former point (Art. 34(1)) applied from Brexit day, rather than the end of the transition period (Art. 185).

254. Art. 36.

255. Art. 33. The UK has negotiated treaties with the non-EU States concerned, although it is not known whether those States have agreed parallel treaties with the EU to cover UK citizens.

256. Art. 37, which is identical to (but does not refer to) Art. 34 of the citizens' Directive (n 171), adapted to the specific circumstances of this agreement.

257. Art. 38(1), which is identical to (but does not refer to) Art. 37 of the citizens' Directive (n 171), adapted to the specific circumstances of this agreement. The rule does not apply to the social security provisions. Also, the non-discrimination provisions (Arts 12 and 23(1)) are without prejudice to the common travel area (Art. 38(2)). On the latter, see further the provisions of the Northern Ireland Protocol (Section X.A below).

258. Art. 39.

259. Joined Cases C-424/10 and C-425/10 *Ziolkowski* ECLI:EU:C:2011:866.

260. As Spaventa points out (n 185 above at 198), that loss of free movement rights is 'particularly disappointing'.

261. For UK implementation, see section 18 of the *Withdrawal Agreement Act*, adding a section 8B to the *Withdrawal Act*.

262. Title I (Arts 40–46).

263. Title II (Arts 46–50).

264. Title III (Arts 51–53).

265. Title IV (Arts 54–61), including EU trademarks, EU design rights, EU plant variety rights, geographical indications, and database rights.

266. Title V (Arts 62–65), including European Arrest Warrants and several other judicial cooperation and policing measures. The UK must continue to apply EU fair trials legislation which it has opted in to as regards these proceedings (Art. 65).

267. Title VI (Arts 66–69), including legislation on conflicts of law, judicial cooperation, and ancillary measures on issues like service of documents, legal aid, mediation, and evidence.

268. Title VII (Arts 70–74).

269. Title VIII (Arts 75–78).

270. Title IX (Arts 79–84).

271. Title X (Arts 85–97), consisting of chapters on judicial proceedings (Arts 85–91) and administrative proceedings (Arts 92–97). The judicial provisions are discussed in Section XI.B below.

272. Title XI (Arts 98–100).

273. Title XII (Arts 101–120), including chapters on property, funds, and assets (Arts 101–103), communications (Art. 105), Members of the European Parliament (Arts 106–108), representatives of the UK (Art. 109), staff of the EU institutions (Arts. 110–115), and other provisions, including on EU banks (Arts 116–119).

274. Title XIII (Arts 120–125). Note that the UK is bound by the European Schools treaty *beyond* the end of the transition period, ie to the end of the school year which is ongoing at the end of that period (Art. 125).

275. See the proposed Art. 24.25 in the UK's proposal for a future free trade agreement: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf.

276. Art. 164(5)(d).

277. The Joint Committee has made minor amendments to this Part (n 19). For UK implementation, see section 20 of the *Withdrawal Agreement Act*.

278. For more on this part of the agreement, see 'The EU Financial Settlement' from the Office of Budget Responsibility (https://obr.uk/docs/dlm_uploads/AnnexB-1.pdf); 'Exiting the EU: the Financial Settlement', from the National Audit Office (https://www.nao.org.uk/wp-content/uploads/2018/04/Exiting-the-EU-The-financial-settlement.pdf); and 'Brexit Deal: the Financial Settlement', from the Institute for Government (https://www.instituteforgovernment.org.uk/explainers/brexit-deal-financial-settlement).

279. Note that these are not the only provisions of the agreement which confer jurisdiction on the Court: see generally Section XI.

280. Art. 164(3). For more on the Joint Committee, see Dashwood (n 3) at 187–9.

281. Art. 164(1).

282. For the UK side, section 34 of the *Withdrawal Agreement Act*, adding a section 15B to the *Withdrawal Act*, requires the UK representative to be a minister. Moreover, section 35 of the *Withdrawal Agreement Act*, adding a section 15C to the *Withdrawal Act*, rules out the UK agreeing to the Joint Committee acting by written procedure.

283. Art. 164(2). Its rules of procedure are set out in Annex VIII to the agreement.

284. Art. 164(3). Either party can refer an issue to the Joint Committee relating to the implementation, interpretation, or application of the withdrawal agreement. For the Committee's role in dispute settlement, see Section XI.D below.

285. Art. 165(1). More specialized committees could be set up by the Joint Committee: Art. 164(5)(b).

286. Art. 165(2). The rules of procedure are in Annex VIII. The specialized committees are co-chaired by the parties and set meeting dates and agendas by mutual consent.

287. Art. 166(1).

288. Art. 164(5)(b): this power cannot be used to amend Parts One, Four, or Six. It expires four years after the end of the transition period, and cannot be used to amend 'essential elements' of it.

289. See Arts 33(2), 36(1), 36(2), 36(4), 50, 53, 62(2), 62(3), 63(1)(e), 63(2), 99(3), 100(2), 132(1) (which has passed its expiry date to be used); 138(5), 159(3), 171(1), 172, 181(1), and Arts 5(2), 5(3), 8, 10, 12(3), and 13(4) of the Northern Ireland/Ireland Protocol; Art. 2 of the Protocol on Cypriot bases; and Art. 2 of the Protocol on Gibraltar.

290. Art. 166(3).

291. Art. 166(2).

292. Note 19 above.

293. The Court's usual jurisdiction applies to the UK as regards the withdrawal agreement during the transition period: Art. 131.

294. A better point of reference is Art. 129(4), which exempts the UK from the usual 'sincere cooperation' rules in order to negotiate international treaties during the transition period. Note that Art. 129(4) is not explicitly confirmed to non-EU countries; it should be read consistently with Art. 184, which obviously provides that the UK is free to negotiate with the EU.

295. See generally Sections III.C and XI.D.

296. Para. 77 of the political declaration (n 5).

297. Chapter 21 of the UK's proposed FTA (n 275).

298. For the parties' contrasting views on implementation of the Protocol, see the Commission's 'Technical note on the implementation of the Protocol on Ireland / Northern Ireland', UKTF (2020) 16, 30 April 2020, online at: https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/20200430_note_protocol_ie_ni.pdf and the UK government Command Paper, 'The UK's Approach to the Northern Ireland Protocol', May 2020, online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887532/The_UK_s_Approach_to_NI_Protocol_Web_Accessible.pdf - referred to respectively as 'the EU position' and 'the UK position'.

299. Art. 185 of the withdrawal agreement, referring to Art. 1; the third, fourth, and sixth subparagraphs of Art. 5(2); the second sentence of Art. 5(3); the last sentence of Art. 10(2); Art. 12(3); Art. 13(8); Art. 14; Art. 15(1) to (4) and (6); Art. 19; and the first paragraph of Annex 6 of the Protocol. On competence to conclude the Protocol on the basis of Art. 50 TEU, see Section III.A(i) above. For UK implementation see sections 21–24 of the *Withdrawal Agreement Act*.

300. On this point, see also Craig, 'Brexit a drama: the endgame—Part I', (2020) 45 *ELR*, 163 at 165–7.

301. On the Protocol, see Dougan (n 2), 37—47 SSRN version and Weatherill, 'The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's' (2020), 45 *ELR*, 222.

302. Specifically Arts 1(4), 2, and 3 of the previous version of the Protocol were dropped. For a 'track changes' version see: https://drive.google.com/file/d/1orJcVeVymX27PlR5b2XFk8tRoQ1HljBv/view

303. Arts 13(8) of the Protocol, the text of which had previously been set out in Art. 2(2) of the previous version of the Protocol.

304. Art. 4 of the Council decision on conclusion of the withdrawal agreement (n 1). See also Art. 2(1)(a) of that decision, on Irish participation in representation of the EU alongside the Commission when issues concerning the Protocol are discussed.

305. *Miller* (n 46), para. 135.

306. Art. 2 of the Protocol refers to EU legislation listed in Annex 1 to the Protocol. Art. 3(2) of the Protocol specifies that Ireland still has obligations under free movement law as an EU Member State. Note that a Protocol on the common travel area remains attached to the Treaties.

307. Specifically Art. 6 of the previous version of the Protocol was dropped.

308. Note 301, at 224.

309. Compare to Art. 6 of the previous version of the Protocol. For further analysis of Art. 5 of the Protocol, see Peretz and Artley, 1483 *Tax Journal*, 14.

310. Art. 5(1) of the Protocol. The personal property exception is defined by reference to EU legislation.

311. Art. 5(2) of the Protocol. The Joint Committee may amend its decisions at any time, and must take account of the specific circumstances of Northern Ireland.

312. Art. 5(3) of the Protocol, referring to a definition in the EU customs code. Unlike Art. 5(2) of the Protocol, there is no time limit for the Joint Committee to act, although its powers apply from the entry into force of the agreement. Art. 5(7) exempts duties on 'consignments of negligible value, on consignments sent by one individual to another or on goods contained in travellers' personal baggage', under the conditions defined in EU customs law.

313. EU position, n 298.

314. UK position, n 298.

315. In the latter case, the obvious question is how to be certain that the finished product will end up in Great Britain, not the EU.

316. Weatherill argues (n 301, 229) that the default is that tariffs are charged.

317. For that reason, the UK's government's assertion in its 'Statement on Notwithstanding Clauses' (n 109) that an EU position in the Joint Committee could constitute a lack of 'good faith' is unconvincing. The equivalent claim by the EU against the UK would be equally unconvincing.

318. 'Statement on Notwithstanding Clauses' (n 317).

319. Art. 5(4) of the Protocol, referring to Annex 2.

320. Art. 5(6) of the Protocol, which refers to Art. 10 of the Protocol as regards State aid. The UK government intends to make 'full use' of the possibility to repay tariffs (UK position, n 298), making no reference to the State aid rules applying to this. As Weatherill bluntly points out (n 301, 230), the rules 'plainly deny the UK carte blanche to spaff compensation in Northern Ireland'.

321. Art. 5(5) of the Protocol, which explicitly applies Arts 30 and 110 TFEU to EU/Northern Ireland trade.

322. Art. 6(1) of the Protocol.

323. Art. 6(2) of the Protocol.

324. UK position (n 298), which also lists a number of measures that it opposes: import customs declarations, entry summary declarations, tariffs, customs checks, *new* regulatory check, *additional* approvals to place goods on the market, and export or exit summary declarations. Para. 20 of the UK position states that products sold to Great Britain from Northern Ireland will not end up back in the internal market, but this misses the point of the second sentence of Art. 6(1) of the Protocol, which is about EU *export* controls.

325. Clauses 42 and 45 of the bill. On the compatibility of the bill with the agreement, see Sections III and IV above.

326. Art. 7 of the Protocol.

327. Art. 8 of the Protocol, which refers to Annex 3 for the list of applicable EU legislation.

328. Art. 9 of the Protocol, which refers to Annex 4 for the list of applicable EU legislation.

329. Art. 10 of the Protocol, which refers to Annex 5 for the list of applicable EU legislation.

330. Art. 10 of the previous version of the Protocol.

331. The Joint Committee also has additional powers to amend these rules.

332. The Joint Committee has the power to define how the State aid rules apply to farm support, subject to detailed criteria; if it fails to agree there is an agreed default position (the standard EU State aid rules apply). See Art. 10(2) of the Protocol and Annex 6. The UK position (n 298) aims to maintain the current level of support for agriculture, with some flexibility, and correctly points out that the Protocol State aid rules apply to goods and electricity, but not services. For further analysis of Art. 10 of the Protocol, see Peretz and Artley (n 309), 11. For his part, Weatherill argues (n 301, 225) that 'this is a low threshold and Art. 10 casts its net eastwards across the Irish Sea'.

333. Clauses 43 and 45 of the bill. On the compatibility of the bill with the agreement, see Sections III and IV above.

334. Art. 11 of the Protocol, which mainly refers to cooperation between the UK and Ireland. The Joint Committee has a role as regards review and recommendations. On the possibility of the EU authorising Ireland to agree treaties with the UK within the scope of EU exclusive competence, see n 304.

335. Art. 12(1) of the Protocol.

336. Art. 12(4) of the Protocol. For more on the role of the Court of Justice here, see Section XI.C. Note also that disputes over any provision of the Protocol could go to arbitration, and the arbitrators must ask the CJEU to interpret any dispute about a concept or provision of EU law, which covers much (but not all) of the Protocol: see Section XI.D. EU measures have the usual force of EU law (Art. 12(5)), and there are provisions for UK representation before the CJEU (Arts 12(6) and (7)).

337. Clause 45 of the Internal Market bill would allow UK ministers to override the Commission and CJEU on State aid issues. On the compatibility of the bill with the agreement, see Sections III and IV above.

338. Art. 12(2) and (3) of the Protocol. There is no deadline for the Joint Committee to act, although it can exercise his power from the entry into force of the withdrawal agreement: Art. 185.

339. UK position (n 298), paras 53 to 55.

340. Art. 13(1) of the Protocol. The separation provisions on goods and taxation in Part Three (see Section VII) are 'without prejudice' to the Protocol, in light of its particular rules on these issues.

341. Art. 13(2) of the Protocol, as a derogation from Art. 4(5) of the withdrawal agreement.

342. Art. 13(3) of the Protocol, as a derogation from Art. 6 of the withdrawal agreement.

343. Art. 13(4) of the Protocol.

344. Art. 13(5) and (6) of the Protocol.

345. Art. 16(1) of the Protocol. The parties must give priority to 'measures as will least disturb the functioning of this Protocol'.

346. Art. 16(2) of the Protocol. Again, the parties must give priority to 'measures as will least disturb the functioning of this Protocol'. Annex 7 to the Protocol sets out procedures for the safeguards and the retaliatory measures (Art. 16(3) of the Protocol).

347. Art. 13(7) of the Protocol, referring to Arts 346 and 347 TFEU. The reference to EU law means that the CJEU case law on these provisions applies: that includes Case C-222/84 *Johnston* ECLI:EU:C:1986:206, which specifically relates to Northern Ireland, in which the Court of Justice insisted that the exceptions must be narrowly interpreted and judicial review of their use must be possible.

348. Note that the UK's Internal Market bill does not invoke the safeguard explicitly.

349. There is also a unilateral UK declaration related to this: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf.

350. Art. 18 of the Protocol. On termination of the treaty generally, see Section III.C above.

351. Art. 185.

352. Art. 1(1) of the Protocol, referring to the first three Titles of Part Three (see Section VII above) and Part Six (see Sections IX above and XI.D below).

353. Art. 1(3) of the Protocol.

354. Art. 1(2), (4), and (5) of the Protocol, referring to Arts 4, 6, and 8 of the withdrawal agreement (see Section V above). However, changes to the law on *de facto* border control with Northern Cyprus are not necessarily applicable.

355. Art. 2 of the Protocol, which allocates jurisdiction as between Cyprus and the UK for application of these rules, including as regards the *de facto* border with Northern Cyprus.

356. Art. 2(7) of the Protocol, referring to EU legislation on goods in general and specifically to Arts 34 to 36 TFEU and legislation based on Art. 114 TFEU.

357. Art. 6 of the Protocol.

358. Art. 3 of the Protocol.

359. Art. 4 of the Protocol.

360. Art. 5 of the Protocol.

361. Art. 7 of the Protocol, which also contains provisions on asylum in Art. 7(4): the bases must take back an asylum seeker who enters Cypriot territory via the bases, and the UK and Cyprus should cooperate on asylum issues.

362. Art. 8 of the Protocol.

363. Art. 4 of the Council decision on conclusion of the withdrawal agreement (n 1). See also Art. 2(1)(b) of that decision, on Cypriot participation in representation of the EU alongside the Commission when issues concerning the Protocol are discussed.

364. Arts 9 to 13 of the Protocol. On the CJEU see Section XI.C(iv) below.

365. Art. 185. On the territorial scope of the withdrawal agreement as regards Gibraltar, see Section IV above.

366. Art. 2 of the Protocol.

367. Art. 3 of the Protocol. The UK complied with these obligations on time: see FCO Treaty Action Bulletin of June 2020, online at: https://www.gov.uk/government/publications/treaty-action-bulletin-june-2020/treaty-action-bulletin-june-2020

368. Arts 4 and 5 of the Protocol.

369. Council doc 5870/3/20, 25 Feb 2020, para. 167.

370. Art. 4 of the Council decision on conclusion of the withdrawal agreement (n 1). See also Art. 2(1)(c) of that decision, on Spanish participation in representation of the EU alongside the Commission when issues concerning the Protocol are discussed.

371. For a critique of the notion that the CJEU should have had sole jurisdiction to resolve disputes, see Howell, 'Post-"Brexit" Financial Governance: Which Dispute Settlement Framework Should Be Utilised?' (2020) 83 *MLR*, 128–62.

372. On the substance of Part Four, see Section V above. For the definition of 'Union law', see Art. 2(a).

373. This also follows from the broad wording of Art. 86, discussed in Section XI.B of this paper, which concerns jurisdiction over cases involving the UK pending at the end of the transition period.

374. Case C-276/19 *Commission v UK*, ECLI:EU:C:2020:368, paras 2 to 4. See also the opinions in Case C-255/19 *SSHD v OA*, pending, ECLI:EU:C:2020:342, paras 11–13, and Case C-459/19 *Wellcome Trust*, pending, ECLI:EU:C:2020:496, paras 30–32, which also mention Art. 89. Pursuant to Art. 185, these provisions only apply from the end of the transition period, so cannot be the legal basis for judgments or opinions delivered during it. The Court has also delivered orders in Case C-692/19 *Yodel International* ECLI:EU:C:2020:288 and judgments in Cases C-182/19 *Pfizer Consumer Healthcare Ltd* ECLI:EU:C:2020:243 and C-231/19 *BlackRock Investment Management (UK) Ltd* ECLI:EU:C:2020:513 during the transition period.

375. Cases: C-156/20 *Zipvit*; C-168/20 *MH and ILA*; C-206/20 *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria*; C-209/20 *Renesola UK*; C-247/20 *HMRC*; and C-349/20 *SSHD*, pending.

376. See the analysis in Part IV above.

377. On the substance of Part Three, see Section VII above.

378. Art. 86(1). At time of writing, this would possibly be relevant to four cases, namely: Case C-664/18 *Commission v UK*; Case C-213/19 *Commission v UK*; Case T-363/19 *UK v Commission*; and Case T-37/20 *UK v Commission*. It remained possible that these cases would be decided or withdrawn during the transition period, and/or that more such cases would be brought before the period ended.

379. The wording of Art. 86 would, however, cover an Art. 260 TFEU case pending against the UK at the end of the transition period. At time of writing, no such cases were pending.

380. Art. 86(2). At time of writing, this would possibly be relevant to 21 cases, namely: Case C-623/17 *Privacy International*; Case C-703/18 *Healthspan*; Case C-77/19 *Kaplan International Colleges*; Case C-235/19 *United Biscuits*; Case C-255/19 *SSHD v OA*; Case C-279/19 *HMRC*; Case C-410/19 *Software Incubator*; Case C-459/19 *Wellcome Trust*; Case C-578/19 *Kuoni Travel*; Case C-579/19 *Food Standards Agency*; Case C-624/19 *Tesco Stores*; Case C-729/19 *Department of Justice for Northern Ireland*; Case C-760/19 *JCM Europe*; Case C-946/19 *MG*; Case C-2/20 *Daimler*; Case C-156/20 *Zipvit*; Case C-168/20 *MH and ILA*; Case C-206/20 *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria*; C-209/20 *Renesola UK*; Case C-247/20 *HMRC*; and Case C-349/20 *SSHD*. It remained possible that these cases would be decided or withdrawn during the transition period, and/or that more such requests would be made before the period ended.

381. Art. 86(3).

382. However, cases pending before UK courts at the end of the transition period (or cases brought before those courts after that point) might still be referred to the CJEU if they relate to a specific area where the CJEU will still have jurisdiction: see Section XI.C below. Or they might lead to UK/EU disputes which will be subject to the dispute settlement system, and to the CJEU via that route: see Section XI.D below.

383. Art. 87(2), referring to decisions referred to in Art. 95(1), which in turn refers to Arts 92 and 93, which concern competitions, mergers, State aid, financial services regulation, and anti-fraud measures. It is possible for the Commission to agree to transfer the power to monitor the application of competition and merger decisions to the UK (Art. 95(2)). The legality of the decisions in question can be examined 'exclusively' by the CJEU on the basis of Art. 263 TFEU (Art. 95(3)). Art. 299 TFEU, on the enforceability of such decisions in national law, will apply (Art. 95(4)). The power to start new State aid or anti-fraud proceedings against the UK relating to events before the end of the transition period runs out four years after the end of that period (Art. 93).

384. Art. 87(3).

385. Art. 88.

386. Art. 89(1). The obligation to give effect to judgments issued before the end of the transition period does not itself apply until the end of the transition period (Art. 185), although an obligation to give effect to such judgments during that period can anyway be inferred from Art. 131.

387. Art. 89(2).

388. However, it might be argued that imposing two sets of fines would be disproportionate.

389. Art. 89(3), referring to Arts 280 and 299 TFEU.

390. Art. 90, first paragraph. The power for a non-EU country to intervene in a CJEU case is not new; Art. 23 of the Court's Statute already provides for cases where an agreement between the EU and a non-EU country confers such a power on a non-EU country.

391. Art. 90(a) and (b). This can extend further, to the time when the Court gives its final judgment based on Art. 87(1). The power to intervene in preliminary rulings applies even though Art. 87 does not give the Court power to give preliminary rulings relating to the UK. Presumably the withdrawal agreement provides for this because preliminary ruling judgments may be used as precedent for other CJEU rulings.

392. Art. 90(c), referring to Art. 95(2).

393. Art. 91(1). Art. 91(2) extends the same right as regards new proceedings referred to in Art. 87 or Art. 95(3), or where the UK intervenes or participates pursuant to Art. 90. These lawyers must be treated the same as lawyers entitled to practise in a Member State (Art. 91(3)).

394. There is no provision for infringement proceedings as regards such cases. For discussion of the substance of Part Two, see Section VI above.

395. On the impact of extending the transition period, see Art. 158(3). There is no further definition of when a case is 'commenced': compare with Art. 86(3).

396. Compare with the narrower scope of Art. 86, discussed in Section XI.B above. However, Art. 158 is narrower than Art. 87, in that the case must have been brought to *court* before the end of 2028; the Court will not have jurisdiction over an *administrative proceeding* pending on that date, or *events* which occurred before that date.

397. Art. 185. Note that, as an exception, Arts. 19, 34(1), and 44 in Part Two apply from the entry into force of the withdrawal agreement. However, there is no lacuna in the Court's jurisdiction, as the second paragraph of Art. 131 provides for it to have its normal jurisdiction over the withdrawal agreement (to the extent that it is applicable) during the transition period.

398. Case law starting with Case C-283/81 *CILFIT*, ECLI:EU:C:1983:335.

399. Art. 158(1), second sub-paragraph.

400. Art. 158(2).

401. Art. 159, which is applicable from the end of the transition period (Art. 185). This is problematic because it means the body cannot assist EU citizens during the initial period of applying for 'settled status' before that point, even though the UK government, pursuant to Art. 19, has provided for applications to be made voluntarily before the end of the transition period.

402. In light of the reference to Part Two, presumably 'family members' has the same meaning as in Art. 9. 'Union citizens' are defined in Art. 2.

403. Art. 159(1).

404. On the position where an equality body seeks a remedy, but not on behalf of a specific victim, see, for instance, Cases C-54/07 *Feryn* ECLI:EU:C:2008:397 and C-507/18 *Associazione Avvocatura per i diritti LGBTI* ECLI:EU:C:2020:289.

405. Art. 21.

406. Art. 159(2). On this Committee, see Art. 165, discussed in Section IX above.

407. Art. 159(3), referring to Arts 164(4)(f) and 166. On the powers of the Joint Committee generally, see discussion in Section IX above.

408. On the substance of Part Five, see Section XIII above.

409. Art. 185. However, as with some provisions of Part Two, there is no lacuna in the Court's jurisdiction, as the second paragraph of Art. 131 provides for the Court to have its normal jurisdiction over the withdrawal agreement (to that extent that it is applicable) during the transition period.

410. Art. 13(2) of the protocol, derogating from Art. 4(4) and (5) of the main agreement (discussed in Section IV above). On the substance of this protocol, see Section X.A above. As noted there, it applies from the end of the transition period, except for a number of Articles which applied from the entry into force of the agreement. Art. 13(2) of the protocol applies from the end of the transition period; Art. 4 of the main agreement is applicable before that point.

411. Art. 12(4) of the protocol, which applies from the end of the transition period. The Court's usual jurisdiction is applicable before that point, as regards the parts of the protocol which are applicable during the transition period (Art. 131 of the main agreement, discussed in Section V above).

412. Referring to Art. 12(2), second sub-paragraph, Art. 5, and Arts 7 to 10 of the protocol.

413. Art. 12(6) and (7) of the protocol.

414. Art. 1(2) of the protocol, derogating from Art. 4(4) and (5) of the main agreement (discussed in Section IV above). On the substance of this protocol, see Section X.C above. As noted there, it applies from the end of the transition period, except for its Art. 11, which applied from the entry into force of the agreement.

415. Art. 12 of the protocol.

416. Art. 185. None of them will expire as such at any particular date, although to some extent they refer to provisions which are themselves set to expire (ie Art. 158).

417. Art. 161(1).

418. Art. 161(2).

419. Art. 161(3). This is similar to the provisions of Arts. 90 and 91, discussed above (Section XI.B).

420. See, for instance, Case C-131/03 P *RJ Reynolds Tobacco and others*, ECLI:EU:C:2006:541.

421. Art. 20 of the EFTA Court Statute (Protocol 5 to the EFTA Court/EFTA Surveillance Authority agreement).

422. Art. 167. This provision applies from the entry into force of the agreement (Art. 185). On the dispute settlement process, see also Dashwood (n 3), 190–2.

423. Art. 185. On the broader implications of this rule, see Section III.

424. 'Statement on Notwithstanding Clauses' (n 109).

425. Art. 185.

426. Art. 131, discussed in Section XI.A above.

427. Art. 169(1). On the Joint Committee, see Section IX above. Compare to consultations under Art. 4 of the WTO Dispute Settlement Understanding.

428. See discussion in Section XI.C(ii) above.

429. Art. 170(1). Compare to Art. 6 of the WTO Dispute Settlement Understanding, which provides for a right to a panel after a certain period of consultations.

430. Art. 170(2).

431. See discussion of Art. 174 below.

432. The Joint Committee had not yet established this list at time of writing. The obligation to adopt this list before the end of the transition period conflicts with the rule that Art. 170 does not apply until then (Art. 185).

433. Art. 171(1).

434. Art. 171(2).

435. Art. 171(4).

436. Art. 171(3).

437. Art. 171(5).

438. Art. 171(6).

439. Art. 172, referring to Part A of Annex IX. Compare to Art. 12 of the WTO Dispute Settlement Understanding, referring to Appendix 3 of that Understanding.

440. Art. 180(1).

441. Art. 180(2). On the UK side, see further the obligations in section 30 of the *Withdrawal Agreement Act*, inserting a new section 13B into the *Withdrawal Act*.

442. Art. 181(1). The code of conduct is set out in Part B of Annex IX, and can be amended by the Joint Committee.

443. Art. 181(2).

444. Art. 171(8).

445. Art. 171(9).

446. There is a structural difference in that the blockage in the WTO dispute settlement process concerns non-appointment to the Appellate Body, whereas the withdrawal agreement dispute settlement process has no Appellate Body. However, the underlying issue (non-appointment as a means to frustrate the process) is the same. Art. 171 as a whole can be compared to Art. 8 of the WTO Dispute Settlement Understanding, although there are different 'tie-

break' rules as regards the final arbitrator, the qualifications are different, and there are five arbitrators instead of the usual three WTO panellists.

447. Art. 173(1). The date of establishing the panel is the date on which its selection was completed (Art. 171(7)).

448. Art. 173(2). Art. 173 as a whole can be compared to Art. 12(8) and (9) of the WTO Dispute Settlement Understanding, although the deadlines are different.

449. Art. 174(3).

450. Case law beginning with *Opinion 1/91* ECLI:EU:C:1991:490.

451. Art. 174(1), which also states that the panel must hear the parties before making the request. Art. 174(2) states that either party may raise the point before the panel; it has ten days to decide and must give reasons for its assessment. The parties can ask it to reassess its decision.

452. Art. 174(3).

453. Art. 174(4), referring to Arts 161(2) and (3), discussed in Section IX.C(iv) above.

454. Art. 175.

455. Art. 176(1).

456. Art. 176(2).

457. Art. 176(3), referring to Art. 171, discussed above. The new panel has 60 days to rule.

458. Art. 176(5).

459. See Art. 21(3) of the WTO dispute settlement understanding, although the DSU rules have different time limits and a suggested guideline period for compliance (15 months). Art. 176(4) can be compared to Art. 21(6) of the WTO dispute settlement understanding, which provides for more detailed review of compliance with a DSU ruling.

460. Art. 177(1). Art. 176(4) requires the respondent to inform the complainant in writing of its progress in compliance one month before the time period to comply runs out. Art. 177 deals with an issue not expressly dealt with in the WTO dispute settlement rules, but which is assessed in the context of disputes over retaliation for non-compliance.

461. Art. 177(2).

462. Art. 177(3), referring to Art. 171, discussed above, and copying Art. 176(3). Again, the new panel has 60 days to rule.

463. Art. 177(4): in that case Art. 174, discussed above, applies 'mutatis mutandis'.

464. Art. 178(1).

465. Peers, 'Sanctions for Infringement of EU Law after the Treaty of Lisbon', (2012) 18 *European Public Law*, 33.

466. Art. 178(2). Compare to Art. 22(3) to (6) of the WTO dispute settlement understanding.

467. Art. FINPROV2 in the proposal (n 245).

468. Art. 178(3). Compare to Art. 22(6) and (7) of the WTO dispute settlement understanding. Again, if the original panel cannot reconvene, a new panel is set up (Art. 178(4), referring to Art. 171). There is no provision to ask the CJEU to rule again at this point.

469. Art. 178(5). Compare to Art. 22(8) of the WTO dispute settlement understanding.

470. This has been a live issue in WTO dispute settlement, which has been addressed in practice rather than by specific rules. See also the case law on Art. 260 TFEU, starting with Case C-292/11 P *Commission v Portugal*, ECLI:EU:C:2014:3.

471. Art. 179(1).

472. Art. 179(2). Again, if the panel cannot reconvene, a new panel must be set up (Art. 179(3), referring to Art. 171).

473. Art. 179(4), referring to Art. 174.

474. Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement', (2017) 20 *Journal of International Economic Law*, 927.

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Comments

C1 Author: Can I change the title to "The End - or a New Beginning? The EU/UK Withdrawal Agreement" I forgot I had used "Divorce, European Style" as a title for something else ten years ago. ;