

Relics of Empire or Full Partners of a New Global United Kingdom?

The Impact of Brexit on the UK Crown
Dependencies and Overseas Territories

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About the Author

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Message from the Author

This is an expanded version of a section entitled 'The Crown Dependencies and Overseas Territories' in a previous paper published by the Constitution Society in 2017, *Negotiating Brexit: the Legal Landscape* by Richard Gordon QC and Alastair Sutton.

Synopsis

Joining the EC in 1973

45 years ago, when the UK joined the European Communities (EC) and following consultations with all its dependent territories, the UK agreed special legal relationships (short of full membership) with the six Member States for its territories. The Crown Dependencies (Jersey, Guernsey and the Isle of Man) were “in” the common market for trade in goods; the Overseas Territories – like their French and Dutch counterparts – obtained preferential access for trade in goods and the poorer amongst them received EU financial aid.

Gibraltar (the only territory which is not an Island) obtained a unique relationship, limited in essence to trade in services, but with derogations for trade in goods, the customs union, indirect tax and agriculture.

The six existing Member States accepted the UK’s requests for these special arrangements because the UK was joining the EC and committed to converging with the EU acquis. The arrangements for the dependencies were in any event peripheral to UK accession and not controversial.

Radical Changes in the Last 45 Years: in the world, in the European Project, in the UK and in many of the territories

In the last 45 years, the global environment has changed, notably as a result of the 2007 crisis. The work of the G20 and the OECD on tax and financial services has been emulated (and exceeded) by the EU, with a particular focus on national fiscal losses through evasion, avoidance, “tax havens”, and the erosion of national tax bases as a result of profit-shifting by multinationals.

The European Project has evolved from a customs union of 6 States to a Union of 28 States, embracing a Single Market, an economic and monetary union and cooperation in justice, security, foreign affairs and defence policies.

At least 6 of the UK’s territories (the 3 Crown Dependencies, as well as Bermuda, the Cayman Islands and the British Virgin Islands) have become high-profile international finance centres, with their economic relations with the EU falling almost entirely outside the legal framework agreed in 1972, coming under increasing pressure to limit or abandon fiscal and regulatory competition and to conform to international and EU standards.

New Arrangements need to be negotiated

Given the wholly different political and economic situation now compared with 1972, there is, in the author’s view, no question that the EU27 would agree to maintain the status quo for the UK’s territories. New arrangements must therefore be considered by all parties concerned.

Increasing Pressure for Compliance with Global and EU Standards

Although formally accepting responsibility under UK and international law for the territories’ defence and external relations, the exercise of the territories’ internal legislative autonomy to deal with tax, economic crime and financial services differently from the UK, has made it difficult for the UK to defend its territories in international bodies such as the EU and OECD. Especially since the 2007 crisis, many of the territories have been under pressure from the G20, OECD, EU and UK to comply with international and EU standards in these fields.

The Territories (except Gibraltar) were not consulted on Brexit

With the exception of Gibraltar, none of the UK's 20 territories and 500,000 inhabitants participated in the 2016 referendum and none were consulted before the UK initiated the withdrawal process under Article 50 TEU. Now however a Joint Ministerial Committee (JMC) provides a framework for consultations, for the territories as well as the devolved administrations (Scotland, Wales and Northern Ireland). Understandably, little progress appears to have been made so far on the territories' future relations with the EU.

Negotiating Climate worsening for the UK and its Territories

The UK's decision to leave the EU at a time of unprecedented international crisis was deeply regretted by all Member States. Since the referendum however, the extraordinary delays and lack of legal clarity in the UK's negotiating position have led to frustration, resentment and now resignation on the part of the 27 and the Institutions. For most Member States, as well as the Commission and the Parliament, Brexit is now inevitable and the EU27 have "moved on" with Brexit falling down the EU's agenda.

The negotiating "climate" is therefore not propitious for the UK and worse for the territories, whose situation obviously depends on the settlement made for the UK itself. There is no precedent for an EU agreement with a dependent (non-sovereign) territory of a third country or non-Member State.

Territorial Scope of Withdrawal Agreement and "Future Framework" Uncertain

The EU guidelines both for the Withdrawal Agreement and the "future arrangement" provide, as regards their territorial application, that no future agreement may be made "notably" concerning Gibraltar, without the agreement of the UK and Spain. Legally, therefore the territorial scope of both agreements remains open nearly 2 years after the referendum, 14 months after the initiation of Article 50 proceedings and only 10 months before UK withdrawal.

The ball is in the UK's court to propose to the EU the territorial scope which it seeks both for the Withdrawal Agreement and the future bilateral agreement. This must however follow consultation with the territories, who must first decide for themselves (jointly, severally or in groups) what future bilateral relations (if any) they wish the UK to negotiate for them with the EU27. Assuming the UK accepts their demands, the EU will then have to decide to what extent (if at all), its own political and economic interests justify the time and effort needed to negotiate arrangements with the UK for the territories, jointly or severally.

Three Possibilities for Territories' Future Relations with EU

There are, in the author's view, three possible scenarios for the territories' future relations with the EU over the medium- to long-term, taking into account the current intention of the UK Government to seek a "deep and special partnership" based on a free trade area with the EU:

1. Territories with the capacity to participate in a free trade agreement (as outlined by the EU in its guidelines of 23 March 2019)¹ could be covered by, and on broadly the same terms as, the agreement reached with the UK, crucially including its “level playing field” requirements; or
2. The Territories could seek differential treatment (as now), for example in groups comprising the CDs, the OTs and Gibraltar, either within or outside the new agreement to be negotiated by the UK; or
3. Some or all of the territories could decide to remain without a bilateral link to the EU, with issues such as compliance and equivalence being decided unilaterally by the EU.

Entrustments

Although “entrustments” have allowed the territories to conduct their own external relations in tax and financial services, new relations with the EU must be negotiated by the UK, on terms agreed between London and the individual (or groups of) territories. For its part, the EU will need a “mandate” agreed by the 27 on a proposal from the Commission, following consultation with the Parliament.

Doubtful EU27 Interest in New Relations with “Problematic” Jurisdictions

It is not clear, at the time of writing, what (if any) political or economic interest there is in the EU in concluding (unprecedented) new arrangements with dependent territories of a third country, especially when at least 6 of these have been designated “problematic”. Much will depend on the political will in the UK (including the territories themselves) and the EU27.

WTO Membership Less Important than Legal Certainty with EU27

The extension of UK WTO membership (not individual membership under WTO Article XII) to those of its territories which seek a fuller “engagement” in the international economic “club” will be complex and time-consuming and should not take precedence over the territories’ relations with the EU27.

Inclusion of the Territories in “Global UK’s” Future Bilateral Agreements

In addition to their possible future relations with the EU27, the role and status of the territories in the UK’s new global policies outside the EU, including the UK’s new bilateral (free trade) agreements with other third countries, also require consideration. Similarly, in a time-frame of 30 years or so, the future constitutional status (and economic prosperity) of Gibraltar and the Falkland Islands may well (despite the undoubted sensitivity of the matter) need to be reconsidered in the years to come, as a consequence of Brexit.

¹ The Crown Dependencies, plus Bermuda and (possibly) the Cayman and British Virgin Islands

Introduction

The purpose of this paper is to draw attention to one aspect of Brexit which may have received insufficient attention. The relationship of Gibraltar, the Channel Islands, the Isle of Man, Bermuda and the Falkland Islands (not to mention St. Helena, Diego Garcia, Tristan de Cunha and other remote Islands) with the EU and the consequences of Brexit for the 500,000 people who live in these UK dependencies, is not well-understood. Even in the UK, the constitutional status of these diverse Islands and their legal ties to the EU, are largely unknown. However, responsibility for these territories lies squarely with the UK. For them as for the UK itself, time is running out to fashion a new relationship with the EU before the end of the transitional period in December 2020. Serious consideration of their future is now urgent.

45 years ago, at the end of the accession process, the UK reached agreement on a variety of different relationships for its dependent territories with the European Community (EC). These treaty-based relations will end on 29 March 2019. As a result, almost 500,000 UK citizens in all the UK's overseas dependencies will be deprived of their links with the EU. Some may welcome the reversion to a newly-independent UK, where - in some circles at least - withdrawal from the EU is linked with a renaissance of Britain's imperial past and an opportunity to renew relations with the Commonwealth.

Other territories may be indifferent (never having felt part of the "European family") or undecided. Yet others may miss preferential trade terms, development financing and, perhaps above all, having a "friend at court" in the most powerful

trading bloc in the world. With the exception of voters in Gibraltar (population 35,000) who voting overwhelmingly to "remain", the other territories and their electorates were not consulted before, during or after the referendum.

At the time of writing (May 2018), it is not clear what if any legal links will exist between these non-sovereign, dependent territories and the EU after the termination of UK membership². Even if the case of Gibraltar is probably the most sensitive both for the UK and the EU (as evidenced by the European Council guidelines of 23 March 2018³), there is at present no legal certainty on the situation of any of the CDs and OTs even in a transitional period till the end of 2020, assuming that such a transitional period is agreed as part of the Withdrawal Agreement under Article 50 TEU. The situation thereafter is even less clear, in the absence of any detail on the substance or (crucially) the territorial scope of a new bilateral agreement between the EU27 and the UK.

In this paper, I first summarise the current legal arrangements for the territories and the way their relations with the EU have evolved in practice over the last 45 years. I then examine a number of options for their future legal relationship with the EU. I have taken, rather arbitrarily, a time-horizon of 2050. A period of 32 years is however relatively short in international relations and it would be unrealistic to expect any "deep and special partnership" negotiated now by the UK with the EU27 to be revised in the foreseeable future.

How then do the territories themselves (jointly and severally) view their relations over the next 20-30

2 By "termination of UK membership" is meant the end of the 2 year period set by Article 50 TEU and triggered by the sending of the UK's letter announcing its intention to withdraw on 29 March 2016. On the assumption however that the Withdrawal Agreement under Article 50 TEU will be implemented and that it will contain a transition period preserving intact the current legal arrangements for the UK's territories, "termination" in a substantive sense will occur at the end of December 2020.

3 European Council document EUCO XT 20001/18 of 23 March 2018

years or so with the evolving EU? Perhaps even more importantly, how do they and the UK view their own constitutional relationship, including the extent to which “mature” democracies such as the Crown Dependencies and Bermuda should be allowed to conduct their own external economic relations in the 21st century?

What is the level of political will in the UK to take responsibility for negotiating a new relationship for its territories with the EU, especially when the future UK relationship with the EU27 is still in doubt? Does the UK intend to negotiate a “one size fits all” arrangement with the EU, covering the UK and all its territories with the same legal “umbrella”? If so, how would the constitutional autonomy of the territories be reconciled with the UK’s responsibility under UK and international law for the management and enforcement of their obligations? If not, is the UK prepared to replicate and to update the present situation, with contrasting legal arrangements for the CDs, the OTs and Gibraltar?

Finally, to what extent (if at all) does the EU27 have an interest in maintaining or developing bilateral relations with the UK’s diverse territories - whether through the intermediation of the UK or directly - taking into account the EU’s perception of many of these “off-shore” jurisdictions as being inimical (as “tax havens”) to the EU’s economic interests? Does the political will (reflecting economic interest) exist in the 27 (and in the European Parliament) to devote the time and effort either to extending the territorial coverage of a new agreement with the UK to nearly

20 diverse territories or to negotiating separate arrangements for them individually or in groups?

Against the background of all this (almost total) uncertainty, one thing is crystal clear. 2019 is not 1972! The political environment in the UK, in an EU of 28 rather than 6 Member States and globally, bears no resemblance to that which prevailed in the early 1970s. And the political “leverage” of a withdrawing State (bent on divergence rather than convergence) is greatly reduced. UK withdrawal (assuming its occurs⁴) will have serious political, economic, legal and constitutional consequences for the UK and its constituent elements⁵, for Europe and the “European Project”, as well as for third countries and international organisations (e.g. the UN, NATO, the WTO and the OECD). This would have been the case even if, in deciding on withdrawal, the UK government had offered a clear alternative to EU membership. This was not the case. And today, nearly 2 years after the referendum on 23 June 2016, more than 1 year after the despatch of the Article 50 notification, and 11 months from withdrawal, the UK’s “future partnership”⁶ remains devoid of legal certainty for the UK itself and even more so (as this paper demonstrates) for its many and diverse dependent territories.

4 I take the view (together with the former Director General of the Council Legal Service) that, under EU law, the decision to notify the EU of its intention to withdraw is reversible. However, at the time of writing (May 2018), it seems increasingly improbable (though not completely excluded) that the political situation in the UK will evolve in such a way that (for example) Parliament, when consulted, rejects the terms of withdrawal and/or any new agreement, as negotiated by the Government. Perhaps more importantly however is the fact that, amongst the 27 Member States, there may very well be no consensus now to support the UK remaining in the EU, even if there is no legal means to enforce such a view.

5 I refer here to Scotland, Wales, Northern Ireland as well as the OTs (including Gibraltar) and the CDs.

6 The heading for the Prime Minister’s speech on 2 March 2018

Background

One of the many unique contributions made by the UK to the EU has been through the legal affiliation to the Union of around 20⁷ diverse non-sovereign or “dependent” jurisdictions around the globe. Of the 28 EU Member States, only four (France, the Netherlands, Denmark and the UK) have overseas territories which are linked to the EU. The termination of the UK’s membership of the EU on 29 March 2019 will bring with it the severance of the EU’s legal links with the UK’s territories which, since 1973, have provided an EU “presence” around the globe. It will also greatly diminish the political and economic importance of the EU’s relations with Overseas Countries and Territories (OCTs) under Part Four of the Treaty on the Functioning of the European Union (TFEU). Following the UK’s withdrawal, there will be only 13 such territories left⁸.

Perhaps more importantly however, from 30 March 2019 onwards (and subject to the terms of any transitional arrangements negotiated by the UK as part of the Article 50 Withdrawal Agreement with the EU27), the UK’s dependencies will no longer benefit from their legal links with the EU. For many of these, this will mean the end of preferential access for their products⁹ to EU markets and of EU financial assistance¹⁰. Neither the UK nor its territories will be - at least in legal terms - members of the “European family”.

It now appears (following the guidelines decided

by the European Council on 23 March 2018) that the present legal relationship between the EU and the UK (acting on behalf of its dependencies) will be prolonged for at least a limited period (for example till the end of 2020) under the Withdrawal Agreement currently being negotiated between the EU and the UK. However these most recent guidelines are not entirely clear on this point, stating (para. 1) that “the territorial application of the Withdrawal Agreement, notably as regards Gibraltar,” remains an open issue. Despite this ambiguity, it seems unlikely that the EU27 would seek to change either Protocol 3 (for the CDs) or the application of Part Four of the TFEU (for the OTs except Gibraltar) for the 20 month period till the end of 2020. The situation thereafter is of course entirely different and far less certain for all the territories. Meanwhile, despite positive comments by the Spanish authorities, it is not yet clear that a solution will be reached on Gibraltar, either for the transitional period or for the future bilateral arrangement.

As far as the UK is concerned, withdrawal from the EU and the need to define a new role for the UK in the world (which is a frequently stated priority for the May government and for “Brexiters” in general), will force the UK and the territories (jointly and severally) to review their own relationship, at least as far as relations with the EU, third countries and international organisations are concerned. A Joint Ministerial Council (JMC) which has been established to provide a framework for involving the

7 The precise number is difficult to identify because of the “federal” nature of certain jurisdictions, such as the Bailiwick of Guernsey, which comprises the autonomous Islands of Alderney and Sark (see below).

8 Greenland (Denmark), New Caledonia and dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Fortuna Islands, St. Pierre and Miquelon (France) and Aruba, the Netherlands Antilles -Bonaire, Curacao, Saba, Sint Eustatius and Sint Maarten – (Netherlands). An excellent overview of the relationship which the OTs currently have with the EU is on the report produced for the United Kingdom Overseas Territories Association (UKOTA) in June 2016, entitled “The United Kingdom Overseas Territories and the EU: Benefits and Prospects.

9 Particularly agriculture and fisheries products

10 For those territories which notably in terms of their GDP.

devolved territories, as well as the CDs and OTs, in the withdrawal process. Understandably, in view of the continuing uncertainty regarding the UK's own future relationship with the EU27, it does not yet appear to have reached the point where concrete details of future arrangements are discussed.

The terms and conditions of the Withdrawal Agreement and of the future bilateral agreement depend in large measure on the political will on both sides. This is true as regards the agreements seen as a whole, but especially as regards the terms on which the UK's OTs and CDs might be covered, especially by the future bilateral agreement.

At least for some of the UK's dependent territories, the political attitude of the EU27 (including the Commission and the European Parliament) is not neutral, far less benevolent. Territories such as Bermuda, the Cayman Islands, the British Virgin Islands and all three Crown Dependencies are not only prosperous (at least in terms of their average GDP) and therefore do not qualify for EU development assistance, but have also been identified by the EU as "problematic" in terms of their tax and related policies.

In any event, even if the current status of all the UK's dependent territories is preserved intact in any transitional period, it is by no means clear what arrangement will be made for around 20 such jurisdictions – individually or as a group – once their current relationship comes to an end. At the time of writing (May 2018), it does not appear that (either collectively or individually) the territories themselves have decided on the relationship with the EU which they would seek. Neither does it appear that the UK (which would be legally responsible for negotiating with the EU27 on behalf of its territories) has completed consultations with the territories in preparation for such negotiations.

At the very least, it can be said with certainty that

the political attitude of the EU27 to the Union's future relationship with the UK on behalf of its dependent territories will be very different from the positive disposition which prevailed in 1972. First, there is little evidence that the inclusion of the UK's highly diverse territories in any future agreement (probably a "classical" free trade agreement) is of significant economic or political importance to the EU27.

On the contrary, in the current international climate, following the economic and financial crisis which has prevailed since 2008, there would appear to be little likelihood of the EU agreeing to a simple renewal of existing legal arrangements for jurisdictions which are viewed as "problematic" in terms of the observance of minimum standards for direct tax, economic crime, as well as financial and related services. It is likely that on this as on every issue involved in the withdrawal and future relationship negotiations, the EU approach will be driven principally by self-interest. The outline "mandate" for the future agreement, settled at the European Council of 23 March 2018, makes this crystal clear (see below).

It is not surprising that the legal status of the many and very diverse UK territories, both under EU and UK constitutional law, is not well-known. Therefore, before discussing the possible form and content of the future relations of the UK's territories with the EU27 (and with the rest of the world), it is necessary to describe the current status of these territories under EU law. The diversity of these legal arrangements reflects not only the wishes of the populations of these jurisdictions in 1972, but also the different economic and political interests of the Islands (and Gibraltar) and their current governments. With the exception of the provisions of Part Four of the TFEU on Overseas Countries and Territories (OCTs), which applies to the territories of France, Denmark and the Netherlands as well as the

UK, the arrangements made for Gibraltar and the CDs in 1972 are unique in EU law. It is uncertain – to say the least - whether such arrangements could be maintained in any new agreement, even if the territories concerned so wished (see below).¹¹

The Legal Status of the UK's Dependencies¹² in UK, International and EU Law

With the exception of Gibraltar, all the UK's overseas territories are Islands. Under public international and UK constitutional law, the UK exercises sovereignty over all its dependencies and is fully responsible for their defence and international relations. The UK also carries international responsibility for acts or omissions committed by its territories in breach of international law. UK sovereignty over its island dependencies extends to the territorial waters and continental shelf (including fisheries and other sub-sea resources), as well as the airspace above the islands, in accordance with international law.

The CDs comprise the Channel Islands of Jersey, Guernsey, Alderney and Sark,¹³ as well as the Isle of Man (IOM), which is located between England and Ireland in the Irish Sea.¹⁴ The OTs are Anguilla, Bermuda, the British Antarctic Territory, the British

Indian Ocean Territory, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena, Ascension and Tristan da Cunha, South Georgia and the Sandwich Islands, the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, the Turks and Caicos Islands and the British Virgin Islands.¹⁵ As a result of its relationship with these territories, the UK (and, until UK withdrawal, the EU) has a territorial presence in every ocean in the world, as well as the Mediterranean Sea.

The present paper deals, as the title makes clear, with those UK territories which - as a result of UK accession to the (then) European Communities in 1973 - have a relationship with the EU under the Treaties. The paper is not concerned with the distinctions under UK constitutional law between "British Overseas Territories", "dependent territories", "colonies", "Her Majesty's Dominions", "British Possessions" or "the British Islands". Such appellations may be relevant in the context of the legal relationship between the individual territories and the UK under UK constitutional law, but their status under public international law is identical.

Nor is the paper concerned with the history of the individual territories or the way in which they were acquired. In this latter context, it may be

11 As far as the CDs are concerned, it would in any event not be possible for them to remain within the EU customs union as is the case today if the future bilateral agreement is to take the form of a free-trade agreement. If this is the case, Protocol 3 would in any event need to be re-negotiated.

12 As is made clear below, I use the term "dependencies" here to indicate that, whatever the different constitutional relationships of individual dependencies with the UK may be, in terms of public international law, the UK is wholly responsible for their defence and international relations (including international responsibility for breach of international law).

13 Both Guernsey and Jersey comprise a number of other small islands (such as Herm, Jethou and Breqou in the case of Guernsey), but these have no separate legal status under UK or international law

14 For a detailed explanation of the Crown Dependencies' legal relationship with the EU, see my article on Jersey's Changing Constitutional Relationship with Europe in the Jersey Law Review, 2005.

15 A full description of the UK's relations with and policies for the OTs is set out in a White Paper of 2012 entitled The Overseas Territories – Security, Success and Sustainability (Cm 8374)

relevant however that, in the case of Gibraltar and the Falkland Islands, UK sovereignty is contested by Spain and Argentina respectively.¹⁶ Spain, in particular may, both in the Article 50 process and in the negotiation for a new bilateral arrangement between the UK and the EU27, seek to change the present legal arrangement governing Gibraltar's status in the EU and, conceivably, Gibraltar's constitutional relationship with the UK more generally.

And arguably, as regards the UK's dispute with Argentina on sovereignty over the Falkland Islands, the position of the UK may be weakened once it no longer enjoys the support of the other Member States in the EU, including in international organisations such as the United Nations¹⁷ and its "family".¹⁸ Certainly, Argentina may be expected to pay close attention to any future relationship with the EU negotiated for that territory by the EU.

The EU Legal Status of the Crown Dependencies¹⁹

Article 355(5)(c) TFEU provides that:

"the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European

Economic Community and to the European Atomic Energy Community signed on 22 January 1972."

Protocol 3 to the UK's accession Treaty contains 6 articles, which are "miscellaneous" in the sense that they follow no "legal logic", other than to make specific provision for issues identified by the UK's negotiators following consultations with the Insular authorities as being relevant to the Islands' future relationship with the (then) EC. In essence, following debates in the Jersey and Guernsey legislatures between 1970 and 1972, and in Tynwald in the Isle of Man, it was decided that the only reason for the Crown Dependencies to affiliate with the "common market" was to provide a legal guarantee for continuing market access for their agricultural, horticultural and fisheries products, notably if not exclusively in the UK, France and – in the case of the Isle of Man – Ireland.

The UK White Paper of July 1971²⁰ noted that the inclusion of the CDs in the Community "would present constitutional, administrative and economic difficulties". The UK therefore sought for them "a form of association which would provide for an exchange of reciprocal rights and obligations between the Community and the Islands". In the event, the Protocol which was agreed was unique, pragmatic and – unlike Part Four of the Treaty which applied to the OTs – outside the normal institutional

¹⁶ Important and authoritative background on all these issues is contained in Hendry and Dickson, *British Overseas Territories Law*, 2011 (see especially the Introduction and Constitutional Arrangements at pp. 1-29).

¹⁷ Evidence of the declining support of and sympathy for the UK in the UN was shown recently by the failure of the UK to secure the re-appointment of Sir Christopher Greenwood as the UK judge on the International Court of Justice (ICJ) – the first time since the creation of the UN in 1945 that the UK has not had a judge on the ICJ. In the voting in the General Assembly, the UK was not even supported by all 27 other EU Member States.

¹⁸ Including, crucially, for the purposes of international trade, the WTO, where the EU – as the largest trading bloc in the world – tends to dominate policy-making. Given the withdrawal of the United States under the Trump Presidency from the day-to-day operation of the WTO (notably by obstructing the nomination of judges in the Appellate Body), the dominant influence of the EU27 may well increase.

¹⁹ For a full analysis of the CDs' relations with the EU (at least until 2005) see Sutton, *Jersey's constitutional relations with the EC*, in the *Jersey Law Review* 2005.

²⁰ Cmnd. 4715 at paras. 123-4

framework of the Treaties.²¹

Although the relevant Treaty language, for example on the customs union, the free movement of goods or even on agricultural State aids, was not used in the Protocol, this has had little or no effect in practice. It has been assumed (including by the CJEU) that the intention underlying Article 1(1) of Protocol 3 was to treat the CDs as part of the EU customs union, both for internal and external policy. At no point in the last 44 years however has there been any detailed consideration of the extent to which the burgeoning secondary *acquis* on customs, the free movement of goods or agricultural state aids applies, as a matter of law, to the CDs.²²

There have, for example, been no infringement proceedings brought by the Commission against the UK as a result of a failure by one or other CD to apply - in a timely, comprehensive and accurate way - the provisions of a directive or regulation in the fields covered by Protocol 3. In part this is no doubt because of the relative paucity of trade in manufactured or even agricultural goods with Member States other than the UK. It is therefore no exaggeration to say that the Protocol has been of declining practical significance over the last 44 years, particularly as financial services have come to dominate the Insular economies and where the Islands have been treated by the EU as “third countries” and, especially since the 2007-8 economic crisis, the territories’ compliance with international and EU standards on tax transparency, harmful tax and “profit-shifting” have tended to dominate

relations with the EU. Achieving recognition of equivalence by the EU for market access in financial and related services has also been a priority, both of the CDs and, for example, Bermuda in insurance in recent years.

Very few legal issues have arisen concerning the interpretation of the Protocol. There have been only three references to the CJEU for preliminary rulings under Article 267 TFEU since 1973 - two from Jersey²³, one from the Isle of Man²⁴ and none at all from Guernsey. Two of these cases involved the interpretation of Article 4 of the Protocol which provides that the Islands are to “apply the same treatment to all natural and legal persons of the Community”. The other (the “Jersey potatoes” case) held that, although the Islands and the UK constituted a single State for the purposes of EU law on the free movement of goods, certain measures taken in Jersey purporting to regulate the marketing of potatoes were contrary to EU law because of their potential effect on the re-export of potatoes from the UK to other Member States.

In terms of the “management” of the EU’s relations with the CDs, there is no Commission department (or “desk officer”) with specific responsibility for the EU’s relations with the CDs (or indeed Gibraltar). This is not the case, at least for areas covered by Part Four TFEU and the related Council Overseas Association Decision (OAD)²⁵ for the OTs. Ironically, the Commission departments with the greatest knowledge of Insular law and policy are those dealing with direct taxation, financial services and

21 By this I mean that, unlike the OTs, the CDs (and Gibraltar) were given no formal status under Community law.

22 This is in marked contrast to the situation of Gibraltar which, under the UK’s Treaty of Accession and related EU law, is covered at least partially by EU law (including financial and other services) and where the Commission has carefully monitored and occasionally enforced the comprehensive and accurate implementation of EU law in Gibraltar (see further below).

23 Rui Alberto Roque Pereira v His Excellency the Lieutenant Governor of Jersey (Case C 171/96 [1998] ECR I-4607; Jersey Produce Marketing Organisation Ltd. v. States of Jersey and the Jersey Potato Marketing Board (Case C-293/02 [2005] ECR I- 9543)

24 Department of Health and Social Security v. Christopher Steward Barr and Montrose Holdings Ltd. (Case C 355/89 [1991] ECR I- 3479

25 Council Decision 2013/755/EU of 25 November 2013, which entered into force on 1 January 2014.

economic crime (especially anti-money laundering measures),²⁶ all areas which fall outside Protocol 3.

The Impact on the CDs of EU Law and Policy outside Protocol 3

The growth of the financial services sector in all three CDs, the role of tax policy in this context and the increasing importance of tax rates and structures in the global economy (especially since the 2007 financial crisis) has meant that the formal, legal framework for their relations with the EU has been over-shadowed by issues wholly outside Protocol 3. Historically however, the CDs' relations with the EU may be divided into **five periods**.

First, in the period between 1973 and 1985 following the accession of the UK, Ireland and Denmark, the European Project itself was adversely affected by the economic downturns following the "oil shocks" of 1973 and 1979. Little progress beyond the customs union was made. As far as the CDs were concerned, their economies continued to be based largely on the production and sale of agricultural, horticultural and fisheries products, for which Protocol 3 was ideally suited.

However, the appointment of the Delors Commission in 1985 and the launch of the project to complete the internal market²⁷ made it clear to the Islands (which had already become substantial financial centres) that, irrespective of the narrow material scope of Protocol 3, they were likely in the future to be increasingly affected by law and policy adopted in the (then) European Community. As a result, in a **second phase** of their relations with the (then) EC, all three²⁸ jurisdictions took steps from 1989 onwards to monitor more closely European developments likely to affect their interests.²⁹ Likewise, in London, the Home Office (as the UK Ministry to which responsibility for the CDs was attributed)³⁰ assumed an increasing workload as a result of the "Single Market project", notably as regards financial services and taxation, but also areas closely related to the free movement of goods such as consumer protection, health and environmental policy, public procurement, transport and intellectual property.

The UK's role in this context was and is primarily to monitor EU developments (with the assistance of the UK Permanent Representation to the EU in Brussels)

26 Commission DGs FISMA, TAXUD and Just.

27 The programme for the completion of the internal market was set out in a Commission White Paper of 1985, unanimously approved by the European Council in Milan in April 1985, the most significant part of which was the proposal for the complete abolition of national frontiers. It is ironical, in the context of Brexit, that the leading EU politician involved in the negotiation of the proposals contained in the White Paper was Commission Vice President Lord Cockfield, nominated by Prime Minister Margaret Thatcher.

28 Throughout this paper I refer to the CDs as "three" jurisdictions (Jersey, Guernsey and the Isle of Man), without prejudice to the arguably separate status under UK constitutional law of Alderney and Sark as dependencies of the British Crown in their own right. In this context, it is useful to mention that the terms "Crown Dependency" and "Bailiwick" appear to have no special meaning in UK constitutional law.

29 I was appointed by the States of Jersey (and subsequently by the States of Guernsey and the Isle of Man Government) as their European legal adviser in 1989. I continued in this role until 2010.

30 The Home Office was succeeded, so far as responsibility for the CDs was concerned, by the Department for Constitutional Affairs and, today, the Ministry of Justice (MoJ). Responsibility for the OTs, including Gibraltar, lies with the Foreign and Commonwealth Office (FCO). It is not obvious why Ministerial responsibilities in London are divided in this way, particularly since – in any event – the MoJ must consult the FCO and other "sectoral" Ministries on issues falling within their competence and, in practice, there is a very considerable commonality of interest between the CDs and OTs such as Gibraltar, Bermuda, the Cayman Islands, the British Virgin Islands and the Turks and Caicos Islands.

– both under and outside Protocol 3 – and advise the Insular authorities on the requirement for action by the Islands to ensure fulfilment of their³¹ obligations under EU law. The role of the Treasury and the FCO on the other hand has, especially in recent years, been quite different. It has been to ensure - as a matter of policy rather than law – that all the UK’s dependencies take measures to comply with international and EU standards on direct taxation and the prevention of economic crime.

The **third phase** in the CDs’ relations with “Europe” can be traced to 1996, when the Commission launched a “package” of measures on direct taxation. It had already become apparent in the mid-1990s that tax policy would be increasingly important in a frontier-free single market, especially one which was to lead to economic and monetary union by 1999.³² Even at that early stage, fiscal losses (or the erosion of national tax bases) through tax avoidance, evasion, “tax havens” and “aggressive” tax planning by multilateral companies had been identified as a serious and growing problem. Despite the absence of any specific Treaty provision³³, two measures in particular were brought forward in the late 1990s to address the issue of fiscal losses, principally between Member States, but with an external dimension focussed on

the EU’s “near neighbours”, including the CDs.³⁴ These were the directive on the taxation of interest on savings and the Code of Conduct on Harmful Business Taxation.

The initial reaction of the CDs to the EU’s attempts to extend tax policy to them (outside the framework of their legal relationship with the EU under Protocol 3) was to resist. No formal legal challenge was ever made by the Crown Dependencies (or by the UK on their behalf)³⁵ to the EU’s attempt to require them to adopt measures under EU law, notably the taxation of savings interest directive.³⁶ Similarly, the extraterritorial extension by the EU of the Code of Conduct on Harmful Business Taxation³⁷ to the Islands was politically resented but not legally challenged.

The **fourth phase** in relations between Jersey, Guernsey and the Isle of Man, on the one hand, and the EU on the other dates from the financial and economic crisis which erupted in late 2007. Even before this event, I had urged the authorities in all three CDs to adopt a policy – commensurate with their limited resources - of “constructive engagement” with the EU institutions and Member States. Such closer involvement of the CDs with the EU institutions and Member States in any

31 The legal obligations under the Protocol are of course obligations primarily of the UK itself. Any failure by the Islands to respect those EU obligations which fall under the Protocol (e.g. on the free movement of goods) would incur the responsibility of the UK under EU law. This is also the case for the OTs (including Gibraltar) under Part Four of the TFEU, the OAD or the specific provisions relating to Gibraltar.

32 The “roadmap” for economic and monetary union was set in the Maastricht Treaty of 1992.

33 In contrast to the situation for indirect taxation where Article 113 TFEU provides for “such harmonization as is necessary to allow the free movement of goods”, there is no equivalent provision for EU action on direct taxation. The now massive volume of EU acquis on direct taxation therefore comprises several hundred cases decided by the CJEU largely on reference from national courts (mainly in Germany, the UK and the Netherlands), EU directives based on Article 115 TFEU, inter-governmental measures outside the Treaties (e.g. the Code of Conduct on Harmful Business Taxation) and “soft law” measures such as Commission Communications, Guidelines etc.

34 Other jurisdictions covered by the external dimension of EU direct tax policy were Switzerland, Liechtenstein, Monaco, San Marino and Andorra. In addition, the EU insisted on the adoption of its direct tax acquis in its association and accession negotiations with other European “third countries.”

35 For example based on the principles of legal certainty and legitimate expectations.

36 Directive 2003/48 of 3 June 2003

37 Adopted by EU Member States as a non-binding inter-governmental arrangement in 1998.

event became unavoidable as a result of the extra-territorial application of EU direct tax law, on the one hand and the CDs' desire to achieve EU market access for their financial products (by means of the EU's equivalence assessment process) on the other.

In addition, following successive Treaty changes, culminating in the adoption of the Lisbon Treaty in 2009, the free movement in goods (to which Protocol 3 is essentially confined) became inextricably linked with other policy areas such as the protection of consumers, health and the environment. The cumulative effect of all these developments was to change out of all recognition the Islands' relations with "Brussels", compared with the way they had been conceived in the early 1970s. This is so, in my view, to a far greater extent than is the case for the OTs, although there is no doubt that international developments on tax, financial services and economic crime have radically altered the situation for OTs such as Bermuda, the BVI and Cayman Islands.

A **fifth phase** in the CDs' relations with "Europe" is of course the subject of this paper, namely the withdrawal of the UK (and all its OTs and CDs) from the EU under Article 50 TEU and the shaping of a new relationship. The European Union Committee of the House of Lords published a report on Brexit and the Crown Dependencies in March 2017.³⁸ My evidence to that Committee complements the views set out in this paper.

The CDs' Presence in Brussels

In 2011 and in response to the increased importance of the EU in the Islands' external relations, all three Crown Dependencies opened offices in Brussels.³⁹ Unlike the Brussels offices of the Scottish and

Welsh Governments, the CDs' representatives have no diplomatic status. Nonetheless, the physical presence of Insular representatives in Brussels, with the possibility not only for daily contact with the EU Institutions but also with Member State and third country representations, served the dual purpose of providing timely information on EU activities with an impact on the Islands and of enhancing knowledge of the Islands in the Institutions themselves. The Brussels office also provided a platform for more regular and intensive visits by Insular politicians. In short, both CIBO and the Isle of Man Brussels office were instruments for the practical implementation of "constructive engagement".

Whether these offices "on the EU's doorstep" as it were have fundamentally changed the common perception of the CDs as "tax havens" is doubtful.⁴⁰ On the other hand, there can be little doubt that the CDs' physical presence in Brussels has enhanced knowledge in the Institutions of the Islands, including their legal status under UK and international law, their laws and policies and, reciprocally, their own familiarity with the workings of the EU Institutions.

Despite the formal and constitutional responsibility of the UK for the external relations of the Crown Dependencies, the "constructive engagement" of the Islands with the EU has been carried on independently and without substantial consultation with the UK. This reflects the fact (discussed in more detail below) that, most notably in areas such as tax, financial services and economic crime, the external autonomy of the CDs has tended to reflect their self-governing status under UK constitutional law.

It would seem that, following the withdrawal of

38 HL Paper 136 (19th Report of Session 2016-2017)

39 Jersey and Guernsey opened a joint office, the Channel Islands Brussels Office (CIBO).

40 See below

the UK from the EU, when all the CDs and OTs will become non-sovereign dependencies of a “third country”, the independent representation of the Islands in Brussels will become more important than ever. The same may well be said for the OTs (or at least some of them) and Gibraltar.⁴¹

The Legal Status of the UK’s Overseas Territories under EU law

Unlike the CDs, most of the UK’s OTs have been covered, since 1973, by Article 355 (2) TFEU which provides that the “special arrangements for association set out in Part Four” are to apply to the non-European territories listed in Annex II TFEU. The UK territories listed are Anguilla, Cayman Islands, Falkland Islands, South Georgia and South Sandwich Islands, Monserrat, Pitcairn, Saint Helena and Dependencies⁴², British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands (BVI) and Bermuda.

In essence, Part Four TFEU treats the EU’s OCTs⁴³ as “third countries”⁴⁴ with a privileged or preferential relationship reflecting, for most of the OCTs at least, their less-developed status. It is no coincidence that Part Four (and its related secondary legislation) are administered in the Commission by a Task Force in the Directorate General for Development.⁴⁵

The purpose of association for the OCTs is to “promote the economic and social development of the countries and territories and to establish close relations between them and the Union as a whole.”⁴⁶

Although the OCTs are outside the EU’s customs union, they benefit from preferential market access in the EU on the same basis as trade between Member States. Article 200 (1) and (2) TFEU prohibit customs duties on bilateral trade between Member States and OCTs. The right of establishment as defined in EU law applies reciprocally between Member States and the OCTs.

Article 203 TFEU provides a legal basis for detailed rules and procedures for the implementation of the principles in Articles 198-202 TFEU. The latest relevant Council Decision entered into force on 1 January 2014.⁴⁷ It replaced – and substantially “updated” an earlier Decision of 2001. Despite having previously decided to remain outside earlier OADs, Bermuda joined that adopted in 2013.

The new OAD sought to base the future relationship between the EU and the OCTs on three principles:

- a. Enhancing competitiveness;
- b. Strengthening resilience and reducing vulnerability; and
- c. Promoting cooperation and integration between the OCTs and other partners and neighbouring regions.

The new approach adopted by the EU in the 2014 Decision was to “move away from a classic development cooperation approach to a reciprocal partnership to support the OCTs’ sustainable development”. The “solidarity between the Union and the OCTs should be based on their unique relationship and their belonging to the same

41 Gibraltar has had a long-standing “presence” in Brussels, recently significantly enhanced.

42 Ascension and Tristan de Cunha

43 Overseas Countries and Territories

44 Note however that the Council Decision implementing Part Four TFEU explicitly states (in preambular paragraph 4) that the OCTs are not “third countries”.

45 DG DEVCO

46 Article 198 TFEU.

47 Council Decision 2013/755/EU of 25 November 2013 OJ L344/1 of 19.12.2013

European family.”⁴⁸ The 2014 Decision provides a legal framework for cooperation in a very wide range of areas. These include, environment and climate change issues, biodiversity, forestry and fisheries, waste management, energy, transportation, research and innovation, youth, education, training, health, employment and social policy. Culture, tourism and the fight against organised crime are also included.⁴⁹

Trade and Financial Assistance remain Key Issues for Most OTs

Despite an undoubted effort to modernise the overall approach of the Union to its relations with OCTs, notably by expanding the areas for cooperation, the “core” provisions underpinning the Union’s relations with OCTs remain those set out in Parts Three and Four of the 2014 Decision, namely trade and trade-related cooperation and instruments for sustainable development. As far as trade is concerned, exports from the OCTs to the EU are to be free from customs duties, quantitative restrictions and measures having equivalent effect. The OCTs may derogate from these principles if they consider this necessary “in view of their respective development needs”.⁵⁰

As far as trade in services is concerned (and in contrast to trade in goods) market access both in the EU and in the OCTs is subject to a “most favourable treatment” provision.⁵¹ The Decision also makes extensive provision for cooperation (including on relevant regulation) in areas such as environmental policy, climate change, labour and sustainable development. Current payments and capital movements between the Union and OCTs are to be

free from restriction, subject to safeguards set out in the TFEU.

However, the desirability (if not a legal requirement) for the OCTs to introduce laws and policies comparable to (or at least converging with) that is the EU, is a theme which runs through Part Three of the OAD. This is the case for competition policies, intellectual property rights, technical barriers to trade, consumer and health protection, as well as sanitary and phyto-sanitary measures. The need for regulatory alignment as an integral part of EU-OCT cooperation is especially clear in Article 70 of the 2014 Decision covering international financial services and the prevention and combat of money laundering and financing of terrorism. More specifically, Article 71 provides that “the Union and the OCTs shall promote regulatory convergence with recognised international standards on regulation and supervision in the area of financial services” including banking, insurance, securities, taxation and money laundering. As far as taxation is concerned, Article 72 provides that:

“The Union and the OCTs shall promote cooperation in the tax area in order to facilitate the collection of legitimate tax revenues and to develop measures for the effective implementation of the principles of good governance in the tax area, including transparency, exchange of information and fair tax competition.”

The OAD’s provisions on cooperation and regulatory convergence in financial services, economic crime and taxation are of particular interest at a time when many OCTs (especially those related to the UK) have come under increasing pressure from the EU to conform to standards adopted in the EU,

48 See para. 5 of the preamble to the 2014 Decision.

49 All these “areas of cooperation for sustainable development in the framework of the Association” are set out in Part Two of the Decision (Articles 15-41)

50 See Article 45(1) of the 2014 Decision

51 Article 51

whether or not these are based on international standards. This is the case, for example, where OCTs seek EU “equivalence” decisions as a basis for market access for their financial services products (e.g. insurance or fund management) or, in direct taxation, where OCTs seek to avoid “blacklisting” by the EU. It is doubtful whether UK withdrawal from the EU and the abrogation of Part Four TFEU and the OAD for UK OCTs on 29 March 2019 will be of any significant concern to territories such as Bermuda, the Cayman Islands and the BVI, although clearly for Islands which are more dependent on preferential trade with and financial assistance from the EU, this may not be the case.

Financial Assistance

UK withdrawal from the EU and the cessation of EU funding will certainly impact adversely on the poorer UK OTs, unless such assistance is replaced by the UK.

Currently, Part Four of the 2014 OAD provides for:

- a. Adequate financial resources and appropriate technical assistance aimed at strengthening the OCTs’ capacities to formulate and implement strategic and regulatory frameworks;
- b. Long-term financing to promote private sector growth.

EU financing for OCTs is made available under the European Development Fund (EDF)⁵² and may cover sector policies and reforms, institutional development (e.g. capacity building and integration of environmental aspects), technical cooperation

and compensation for fluctuations in export earnings. This facility is only applicable to certain, least developed, UK OTs⁵³. Bermuda, the Cayman Islands and BVI, all with per capita GDP above the EU average are excluded from EDF funding.

Provision is also made for the grant of humanitarian and emergency aid. The latter has recently been especially important for those Caribbean OCTs devastated by hurricanes in 2017. In addition, since 2014, funding for all OCTs may be available under thematic Union programmes and instruments provided for in the Union’s general budget.

OCT Participation in the Management of the Association

Unlike the situation of the Crown Dependencies, UK OTs have a direct role in the management of the association and therefore with the EU institutions, notably the Commission. This will of course come to an end on 29 March 2019. At that time, even if the substantive provisions of the TFEU and the OAD continue to apply (including those on financial assistance till the end of 2020⁵⁴), it appears unlikely that the UK and its territories will continue to participate – during any transitional period – in the “instances” of the association referred to in Article 14 of the OAD.⁵⁵

It is important to underline that the EU’s acceptance of participation by the OCTs in the management of the association is at most a recognition of the constitutional autonomy of the territories in areas covered by the relevant provisions of EU law. Thus,

52 The current EDF runs from 2014-2020. A total of 77 million euros is allocated under the 11th EDF for Anguilla (14.0), Montserrat (18.4), Turks and Caicos (14.6), Pitcairn (2.4), Falkland Islands (5.9) and St. Helena (including Ascension and Tristan da Cunha) (21.5).

53 Anguilla, Montserrat, Turks and Caicos, Pitcairn, Falkland Islands and St. Helena (including Ascension and Tristan da Cunha).

54 A date which coincides with that proposed by the Commission for the end of the transitional period, but yet to be confirmed by the Council and the European Parliament.

55 These are the OCTs-EU Forum, the trilateral consultations and working parties.

in meetings of the Council of Ministers, when issues concerning the OCTs are discussed (for example the renewal with modifications of the OAD), only Member States are present. Article 4 of the OAD provides that “management of the association shall be conducted by the Commission and the OCTs’ authorities and, where necessary, by the Member State to which the OCT is linked, in accordance with respective institutional, legal and financial competences.”

The OAD recognises that, as a practical matter, the implementation of the association (notably but not exclusively in the area of trade and financial assistance) is best achieved by a dialogue between the Commission’s services and representatives of the OCTs themselves. Thus, Article 13(2) of the OAD provides that:

“the dialogue shall be conducted in full compliance with the respective institutional, legal and financial powers of the Union, of the OCTs and of the Member States to which they are linked. The dialogue shall be conducted in a flexible manner: it may be formal or informal, at an appropriate level or format, and conducted within the framework referred to in Article 14.”⁵⁶

It is clear that Part Four of the TFEU and the detailed provisions in the OAD provide a unique institutional and legal framework for the practical involvement of Member States’ dependent territories in the daily work of the “European family”. This is in contrast to the legal and practical status of the Crown

Dependencies and indeed to Gibraltar (see below).

However, the extent to which the UK’s OTs have felt part of a “European family” (given their geographical remoteness from Europe and their affiliation with other territories or States in the region in which they are situated) may be doubted. In addition, for the more developed territories, especially those whose economies depend on financial and related services, the OAD’s provisions on cooperation and regulatory convergence have not been of significant practical assistance to the territories in enhancing market access in the EU.⁵⁷ It is not clear therefore at this stage what form of relationship the UK’s OTs will seek with the EU after UK withdrawal.⁵⁸

Nonetheless, in their evidence to the EU Select Committee of the House of Lords in July 2017⁵⁹, representatives of many OTs (Anguilla, BVI, Montserrat, Pitcairn, Tristan de Cunha, Turks and Caicos, the Falklands and St. Helena) all underlined the importance of EU financing, not only under the 11th EDF programme, but also EU “horizontal” programmes such as the Biodiversity and Ecosystem Services in Territories of Europe Overseas (BEST) initiative. The Committee, on behalf of the Islands, asked the UK Government how it planned “to cover any funding gap resulting from Brexit [and whether the Government was] willing to countenance continued EDF funding to the OTs, even if this means continued UK contributions to the EU budget?”

⁵⁶ Article 14 sets out the three “instances” of the association - the forum, the trilateral consultations and working groups.

⁵⁷ This is without prejudice to the recognition by the EU of the equivalence of Bermuda’s regulation and supervision of insurance, which was achieved by a dialogue conducted outside the OAD framework.

⁵⁸ The view has also been expressed by some UK OTs that the administrative conditions and procedures relating to the trade and financial assistance provisions of the association are excessively onerous, especially given the resource limitations in the OTs.

⁵⁹ Summarised in the letter written to the Government by Lord Jay of Ewelme on behalf of the Committee Chairman on 11 September 2017

On trade, likewise, several Islands (notably the Falklands⁶⁰, Pitcairn⁶¹, Anguilla⁶² and Tristan de Cunha⁶³) stressed the importance of continued market access in the EU, on preferential terms after Brexit. Loss of UK support in EU institutions was highlighted as a potential problem in financial services by Bermuda, the BVI and Anguilla. The free movement of people (especially students) under existing EU (OAD) law was mentioned by Bermuda and the BVI.

The External Relations of the CDs and Certain OTs Outside the EU

It is no exaggeration to say that relations with the EU (and possibly with the UK) for the CDs and for at least some OTs have been changed irreversibly since the global financial and economic crisis of 2007. Following the crisis, in the absence of any global institution responsible for financial services or taxation (comparable, for example, to the WTO or UN specialised agencies) the G20 has emerged as the principal forum for policy-making in economic, financial and fiscal policy. Under the “umbrella” of the G20, a number of international bodies have seen their roles greatly enhanced, none more so than the

OECD and its “offspring” the Global Forum.⁶⁴

The EU and its 28 Member States, has played a leading role not only in the G20 but especially in the OECD⁶⁵. In describing the current relations of the CDs and other financial centres such as Bermuda, the Cayman and British Virgin Islands (BVI) with the EU since 2007 therefore, it is important to set this in the wider context of the Islands’ growing international “personality”⁶⁶, notably within the “family” of international bodies which now function principally under the aegis of the G20.

Since its inception in 1961, the OECD has played an important role in establishing ground rules (such as “model” conventions) for international tax policy. In contrast (and largely because of the absence in the EU Treaties of any express provision on direct taxation), it was only in the mid-1990s that the EU – conscious of the damage caused by fiscal losses and the erosion of national tax bases as a result of tax avoidance or evasion – gave political priority to measures in this area. The two most important of these were the Code of Conduct on harmful business taxation⁶⁷ and the directive on the taxation of savings interest. The former gave effect in the EU to an OECD Report of 1998 on harmful⁶⁸ business

60 80% of the Falklands’ fish exports go to the EU, as well as its meat and wool exports.

61 Pitcairn’s honey exports to the EU require annual EU approval for market access.

62 Anguilla’s exports largely go to French and Dutch St. Martin and could therefore cease after Brexit. The Anguilla representative also stressed the broader issue of cooperation with neighbouring territories of EU Member States, which could suffer as a result of Brexit. See further: Anguilla and Brexit: Britain’s forgotten EU border (Government of Anguilla). Pitcairn noted a similar issue as regards relations with French Polynesia.

63 9% of Tristan de Cunha’s lobster trade goes to the EU.

64 Others include the Basel Committee of Banking Supervisors, the International Association of Insurance Supervisors (IAIS), the International Organisation of Securities Commissions (IOSCO) and the Financial Action Task Force (FATF).

65 Historically, the EU has lacked “exclusive competence” in macro-economic and fiscal policy and has therefore been represented mainly by its Member States. In recent years however, the EU Commission has played an increasingly important role in EU tax policy and has enhanced its representation in the OECD.

66 I use the term “personality” here in the political rather than as the term is used in international law.

67 Due to the political sensitivity amongst the Member States of ceding competence on direct tax to the EU, the Code is an inter-governmental agreement outside the framework of EU law. In practice however, the Code operates under the “umbrella” of the ECOFIN Council, with the Commission playing an important – if informal – role.

68 The term “harmful” means, in broad terms, any tax measure which affects the location of business investment by giving favourable treatment to non-residents (“reverse discrimination”).

taxation. The latter established a system of reporting by banks and other financial institutions of interest paid on savings of non-residents.

Both measures have been given extra-territorial effect by the EU, notably as regards the UK's dependent territories and European countries neighbouring the EU such as Switzerland, Liechtenstein, Andorra and San Marino. All acceding States have also been required to adopt these measures as a pre-condition of accession. The extension of these measures to the CDs and OTs - outside the legal framework of their legal relations with the EU (and arguably contrary to the principles of legitimate expectations and legal certainty) was at first bitterly resented by the UK's dependent but fiscally autonomous jurisdictions, but then reluctantly implemented under pressure from the UK, especially HMT and the FCO.

It is interesting (and perhaps relevant for the future relations between the UK and its dependencies on the one hand and the EU27 on the other) that the UK has used its sovereign responsibility under international (and EU) law not to defend the Islands' fiscal autonomy but rather to require them to align with international and EU standards both on tax and international economic crime, notably money-laundering. This remains the case today, as shown by the UK's failure to oppose the recent ECOFIN decision to establish a novel standard prohibiting the facilitation of offshore structures or arrangements without any substantial economic

presence ("shell companies").

There is no doubt that the extra-territorial activities of the EU in direct tax has radically and irreversibly changed relations with the EU for the CDs and OTs. The need for "constructive engagement" which became important following the launch of the EU's Single Market project in 1985, was even more so as a result of the EU's fiscal policy, especially when it became clear that the UK was unwilling to defend Insular law and policy in the Council.

The main aim of "constructive engagement" was (and is) not only to convince the EU Member States and institutions⁶⁹ of the Islands' compliance with international standards on tax, economic crime and financial services, but also to ensure that EU decision-makers are accurately and comprehensively informed about the legal and constitutional status of each jurisdiction⁷⁰ and their track-record of laws and practice to implement international and EU standards. It is far from clear, in my view, that despite the efforts - especially of the CDs - in this regard, EU law and policy in the tax field is made on the basis of facts rather than political prejudice against "tax havens". It is ironical that EU decision-making in other areas - notably unilateral decisions on the equivalence of Insular law and policy in areas such as financial or related services⁷¹ - involves exhaustive empirical investigation, notably by the Commission, assisted by the European Supervisory Authorities.⁷²

69 Notably the Commission but also the Parliament which, despite the absence of Treaty powers exercises considerable political influence on the Commission and the Council in the matter of tax avoidance or evasion, as well as related issues such as anti-money laundering legislation. The Parliament has used the Panama and Paradise Papers leaks to increase its powers in the field of tax and economic crime by establishing investigatory committees.

70 In meetings in the French Senate and National Assembly in 2015, it was clear that two senior French politicians who had pressed for measures against Bermuda were wholly unaware of the geographical location of the island, let alone its legal status or track-record of compliance. The same is often the case, for example, when EU decision-makers fail to distinguish between the individual Channel Islands.

71 The case of Bermuda in insurance for example.

72 Notably EIOPA (on insurance) and ESMA in the field of asset management under the Alternative Investment Fund Managers (AIFMD) Directive.

Several reasons account for a less rigorous approach in direct taxation. First, the loss of fiscal revenue by EU Member States as a result of “aggressive” tax planning by multinational enterprises (MNEs) has created political pressure for action. “Offshore” and non-sovereign⁷³ jurisdictions (especially those related to an EU Member State which is greatly weakened by its withdrawal from the EU) present an easy target for such action. The use of “power politics” and “soft law” instruments (resulting in the almost complete impossibility of judicial review of measures such as “blacklisting” or other sanctions) exacerbates the situation.

The failure of the UK’s CDs and OTs to secure greater recognition of their undoubted efforts to comply with international and EU standards does not augur well for the future when they no longer have “a friend at court”. Even if the UK appears to have taken a conscious decision not to defend more staunchly its dependencies’ fiscal laws and policies in the EU, its ability to do so as a “third country”⁷⁴ will be greatly reduced. This will be so especially if the UK itself adopts tax and other standards as an instrument of international competitiveness (as Prime Minister May has threatened), thereby provoking counter-measures from the EU27.

The Representation of Insular Interests in International Organisations

The ambition of the OECD (and its key Member States⁷⁵) as a global “rule maker” in the 1990s - excluding the vast majority of States in the international community as reflected in the United Nations - led to the creation of the Global Forum⁷⁶ in 2000. The Forum now has 148 Members and includes all the relevant UK dependencies.⁷⁷ Apart from providing technical assistance to less-developed jurisdictions, the Forum aspires to enhance the international visibility of member jurisdictions as reliable locations in which to do business. Crucially however, the Forum is a consultative body where non-OECD jurisdictions have a voice (though not a vote) on decisions taken in the OECD on tax transparency, harmful tax and “profit-shifting”.⁷⁸

The EU purports to base its tax laws and policies on decisions taken multilaterally in the OECD. This is certainly the case for tax transparency, where EU Member States have all concluded tax information exchange agreements (TIEAs) based on the OECD Model⁷⁹. More recently the EU and its Member States have implemented the OECD’s Automatic Exchange of Information (AEOI) agreement.

As far as “harmful” tax is concerned, the EU has (as indicated above) implemented the OECD Report of 1998 in its Code of Conduct. More recently however, as part of the EU’s External Tax Strategy⁸⁰, the EU has extended the concept of “harmful” tax to embrace “fair” taxation, a concept which like others in the field of direct taxation (e.g. “tax haven”)

73 i.e. lacking legal personality under public international law

74 On the weakness of “third countries” when dealing with the EU27, see *Negotiating Brexit* by Richard Gordon Q.C. and the present author, *Constitution Society Report* of November 2017.

75 The OECD has 35 Member States (including 22 from the EU alone) and has been identified as a “rich man’s club” representing only States with the highest GDPs.

76 The Global Forum on Transparency and Exchange of Information for Tax Purposes

77 That is those which are “financial centres”

78 E.g. in the recent Base Erosion and Profit-Shifting (BEPS) negotiations in the OECD.

79 Exchange of Information on Request (EOIR)

80 See Commission Communication (2016) 24 final

has no precise legal definition. In this respect, the EU has gone beyond internationally agreed standards by unilaterally adopting a measure which condemns the “facilitation of offshore structures and arrangements which attract profits without real economic activity”. However, in the absence of any system of compulsory dispute settlement in international tax policy, the EU is able to compel respect for this new “norm”, including through the threat of unilateral sanctions such as “blacklisting”.

Finally, in perhaps the most remarkable attempt at international rule-making in tax matters, the OECD adopted in 2016 a series of 15 action plans in the Base Erosion and Profit-Shifting (BEPS) project. As with all OECD projects in the field of international taxation, the Global Forum has been closely associated with and consulted on the project. In the case of the anti-BEPS project, many non-OECD jurisdictions (including all significant UK jurisdictions) have joined an “inclusive framework” in which they commit to implement the anti-BEPS principles, although they did not participate in its negotiation.

As indicated above, all significant UK dependencies now participate fully in the work of the OECD through its Global Forum. They therefore meet and work alongside EU Commission and Member State representatives at the multilateral as well as bilateral level. Against this background, it may be questioned why – some 44 years after UK membership of the EU – relations between individual territories and the EU (and its Member States) remain beset by mistrust and uncertainty. This situation will certainly not improve as a result of UK withdrawal. One key issue is whether – despite periodic assertions by the UK authorities as to the importance of the dependencies – the UK has been sufficiently vigorous in promoting

their image, interests and reputation. This is a vital issue because if the UK has failed to assert its legal and constitutional responsibilities sufficiently as an EU Member State, this task will certainly be more difficult as a third country from March 2019 onwards.

One difficulty which confronts the dependencies now and post-withdrawal is the fact that international and EU tax policy tends to be dominated by “power politics”, with minimal reliance on the rule of law.⁸¹ Thus, fundamental terms such as “tax haven” remain in common usage, yet lack legal definition. The same is true for terms such as “avoidance”, “evasion” or “aggressive” tax planning or even (as indicated above) “fair taxation”. Decisions such as those to “screen” third countries or jurisdictions for compliance with EU standards or criteria are political (taken by Finance Ministers in the ECOFIN Council). The procedural hurdles inhibiting judicial review by the European courts are formidable. And, in any event, the UK’s CDs have come under serious pressure, not only from the EU but also from the UK itself to comply with (or even exceed⁸²) international or EU standards or criteria.

It is difficult to imagine, against this background, that the challenges facing the OTs and CDs will be less burdensome after UK withdrawal than is the case today.

CD and OT Compliance with International and EU Standards

In contrast with the situation in taxation, where suspicion prevails that virtually all UK OTs and CDs make use of their tax rates and structures unfairly, progress has been made in recent years towards recognition by the EU and relevant international

81 This is because only the WTO amongst international organisations provides for compulsory dispute settlement.

82 In the case of the maintenance of a publically accessible central register of ultimate beneficial owners of companies.

organisations of regulatory and supervisory compliance by the UK's territories in financial and related services. The Islands themselves (or, rather, their financial supervisory bodies) are members of the relevant international organisations.⁸³ Such membership of international supervisory bodies does not of course constitute “recognition” of international personality of the Islands themselves under international law. Nonetheless, in the same way as membership of the Global Forum, such a “presence” with supervisors from other jurisdictions including the EU's Member States, undoubtedly enhances knowledge, mutual confidence and collegiality. For the EU however, there is no question of equating compliance with international standards with compliance with EU law. Although largely based on standards adopted (for example) in the OECD or FATF (as far as anti-money-laundering measures are concerned), the EU remains free to adopt and adapt its own rules and to base its assessment of third countries' regulatory and supervisory systems on these rather than the relevant international standards.

At a time when EU policy⁸⁴, both in tax and financial services is towards a level playing field and the outlawing of regulatory and fiscal arbitrage, the maintenance of low (or zero) tax rates and “lighter touch” regulation (perhaps made worse by perceived lax supervision) by “offshore” jurisdictions naturally attracts criticism and the threat of counter-measures from the EU. This is because lower tax rates (at least in theory) attract business and/or profits away from the EU.

In the case of financial and related services, the incentive for the territories to align their regulatory and supervisory practices on those in European Rulebooks is greater because, without positive “equivalence” decisions by the EU, access to the largest financial services market in the world will be denied. For this reason, depending on their “specialties”, individual territories have sought equivalence decisions in insurance, asset management and audit services. The only positive decisions so far have been in insurance (Bermuda) and audit (Bermuda and the CDs). The European Securities and Markets Authority (ESMA) in Paris⁸⁵ has made and submitted to the Commission (preliminary) positive assessments of Bermuda and the CDs in the field of asset management, but final decisions by the Commission have been postponed against the background of a review by the EU of equivalence criteria to be applied (including to the UK as a third country) after UK withdrawal.⁸⁶

For the most part, the territories have conducted their discussions with the EU (Commission, ESAs, Parliament and Member States) themselves, without UK assistance. For the EU of course, granting market access based on equivalence to third countries (or non-sovereign jurisdictions) is largely a matter of self-interest. Thus,⁸⁷ the EU states that recognition of non-EU regulatory frameworks “brings benefits to both parties as:

- It allows authorities in the EU to rely on supervised entities' compliance with equivalent rules in a non-EU country
- It reduces or even eliminates overlaps in

83 The Basel Committee of Offshore Banking Supervisors, IOSCO and the IAIS.

84 At least the policy of the present Commission and a majority of Member States

85 One of three European Supervisory Authorities (ESAs) – the others being the European Insurance and Occupational Pensions Authority (based in Frankfurt) and the European Banking Authority (EBA) now moved to Paris from London as a result of Brexit.

86 Commission staff working document SWD (2017) 102 final EU equivalence decisions in financial services policy: an assesment

87 DG FISMA website on “Recognition of non-EU financial frameworks (equivalence decisions)”

compliance requirements for both EU and foreign market players

- It makes certain services, products or activities of non-EU companies acceptable for regulatory purposes in the EU
- It allows less burdensome prudential regime (sic) to apply to EU banks and other financial institutions with exposures in equivalent non-EU countries.”

The advantages of EU equivalence decisions to dependent territories which are “financial centres” is obvious. The converse is not – at least from the EU perspective – necessarily the case. Thus, it is asserted by the territories and by the UK (or at least by the City of London) that the UK’s financial centres (especially the CDs but also those further afield) act as important channels for the flow of capital and investments not only to the UK, but to Europe more widely. It is also asserted that “off-shore” centres provide “tax neutral”⁸⁸ bases to facilitate investments around the world by multinational companies, either individually or in groups. According to this argument, “offshore” centres provide an indispensable (or at least useful) service, by “oiling the wheels” of the global economy.

It is not obvious that this macro-economic argument has ever been fully accepted by the EU (or indeed by the OECD), although the presence of UK Ministers, MEPs and officials in the EU institutions until now will certainly have assisted in pressing the mutual interest of the territories and the UK in achieving equivalence.

As far as compliance with measures against economic crime (mainly anti-money laundering) are concerned, all relevant UK territories seek to comply with FATF’s⁸⁹ basic Recommendations. They are assessed regularly by regional committees and are represented in FATF itself by the UK. Despite efforts by the territories themselves to comply with FATF Recommendations and the UK’s membership of the EU, there has so far been no unanimous recognition by the EU of OT and CD compliance with these standards.

The Legal Status of Gibraltar under EU Law⁹⁰

Gibraltar is the only⁹¹ UK territory mentioned by name in the successive negotiating guidelines adopted by the Council under Article 50 TEU. Likewise, Spain is the only Member State mentioned explicitly in these guidelines (apart from the Republic of Ireland in the context of the Irish border issue), which have been adopted unanimously by the European Council, following consultations between the Commission, Member States and the European Parliament. The political sensitivity of Gibraltar, especially for Spain but also, by implication, for the other Member States, is therefore obvious.⁹²

It is clear from the foregoing description of the legal status of the Crown Dependencies (CDs) and the Overseas Territories (OTs) that an attempt was made - by the UK and EC in the accession process before 1973 - to “tailor” a relationship with the (then) EC in a way which reflected the wishes of

88 This term has no precise legal definition and is not universally understood, at least by tax policy officials in the EU and its Member States.

89 The Financial Action Task Force was established in 1989 and has 37 Members, roughly equivalent to OECD Member States.

90 For a full account of the Gibraltar Government’s approach to Brexit see House of Lords EU Committee Report (HL Paper 116) published on 1 March 2017 and an update published by the House of Commons library on 5 April 2018

91 I exclude for these purposes the UK’s sovereign bases in Cyprus.

92 As far as the other territories are concerned, the use of the term “notably” in connection with Gibraltar in paragraph of the guidelines of 23 March 2018, creates at least some uncertainty to the outside world as to their status under any transitional agreement.

the territories (and their peoples and politicians) themselves. The case of Gibraltar is further evidence of this approach. Unlike the CDs, Gibraltar is not in the EU's customs union (and is not subject to EU law on the free movement of goods⁹³), although (again unlike the CDs and the OTs) Gibraltar does benefit from participation in the EU's internal market for services, including (perhaps crucially for Gibraltar's economy) financial and gambling services.

In broad terms, unlike the CDs and OTs, Gibraltar is covered by EU law, unless exceptions have been made in the Treaties. Thus, Article 355(3) provides that "the provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible".⁹⁴ When the Lisbon Treaty was signed, the UK and Spain signed a joint Declaration⁹⁵ providing that: "the Treaties apply to Gibraltar as a European territory for whose international relations a Member State is responsible. This does not imply changes in the respective positions of the Member States concerned."

The exceptions to the application of EU law in Gibraltar are set out in Articles 28-30 of the UK Act of Accession⁹⁶. In broad terms, these provisions exclude Gibraltar from:

- a. the customs territory of the Union, including rules on the free movement of goods;
- b. the common commercial policy of the Union;
- c. the common agricultural policy of the Union;

- d. EU rules on VAT and other turnover taxes;
- e. The obligation to contribute to the budget.

Unlike the CDs and OTs⁹⁷, Gibraltar is represented in the European Parliament. As far as freedom, justice and security is concerned, Gibraltar is only bound by the measures which the UK has opted into in accordance with the relevant Protocol annexed to the Lisbon Treaty.⁹⁸ Gibraltar is therefore outside the Schengen area and only bound by the Schengen acquis to the extent that it takes part in it under this Protocol. Gibraltar is also, like the UK, excluded from EU law on the third stage of economic and monetary union⁹⁹. Gibraltar is also covered by the Protocol on the application of the Charter of Fundamental Rights of the EU to Poland and the UK.¹⁰⁰

It is clear from this summary description of Gibraltar's status under EU law that UK withdrawal from the EU will have a direct and potentially harmful effect on Gibraltar. Despite the wide-ranging exclusions and exceptions outlined above, Gibraltar more than any other UK territory has been required to implement a significant part of the EU acquis, especially as regards the internal market (including financial services, telecommunications and direct taxation). Gibraltar's economy is therefore not only more integrated into that of the EU27, but also underpinned by EU law. In their evidence to the EU Committee of the House of Lords,

93 See *Commission v. UK* [2003] ECR I-9481

94 See further, Hendry and Dickson, loc.cit. at Chapter 15 – "The territories and the European Union".

95 Declaration 55 annexed to the Final Act of the Intergovernmental Conference [2007] OJ C306/268

96 [1972] OJ L73/14

97 In *Emam and Sevinger* [2006] ECR I-8055, the CJEU held that the OCTs are not required to hold elections to the European Parliament. However, in *Matthews v. UK* [(1999) 28 EHRR 361], the European Court of Human Rights held that Gibraltar was entitled to hold elections to the European Parliament. This was confirmed in *Spain v. UK* [2006] ECR I-7917

98 Protocol on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice [2008] OJ C115/295

99 [2008] OJ C115/284

100 [2008] OJ C115/313

Gibraltar stated that 70% of all Gibraltar's legislation currently emanates from the EU.

Against this background (and taking into account the continuing political controversy between the UK and Spain concerning sovereignty), it is clear that UK withdrawal is likely to have a serious adverse effect on Gibraltar's economy, including not only Gibraltar's own (UK) citizens, but also the many thousand Spanish workers who cross the frontier every day to work in Gibraltar. In terms of political controversy and economic effect, it appears that to draw an analogy between the situation of Gibraltar on the one hand and Northern Ireland on the other is not inappropriate, both in terms of the political as well as economic implications of withdrawal and the (possible) failure to find a solution for the future which is acceptable to all the parties.¹⁰¹

It is already clear from the guidelines and negotiating directives adopted respectively by the European Council and the Council of Ministers for the Article 50 withdrawal negotiations with the UK that the status of Gibraltar in any future bilateral arrangement between the EU27 and the UK (perhaps even any transitional period included in a Withdrawal Agreement), will not be without controversy (see below). It is remarkable that the "marker" put down by Spain as regards the treatment of Gibraltar in any future EU arrangement with the UK is the only example in the guidelines and directives adopted by the Council of a reference to the interests of an individual Member State.¹⁰²

The Impact of Withdrawal on the CDs, OTs and Gibraltar

Without any doubt, the most immediate and direct

impact of UK withdrawal from the EU will be on Gibraltar, its economy and inhabitants, as well (at least potentially) as the thousands of Spanish nationals who currently cross the border each day to work in Gibraltar. Although the future relationship of all UK territories (as well as of the UK itself) and the EU is uncertain, the fact that Gibraltar has been mentioned separately in the European Council's guidelines (see below) indicates the potential difficulties which lie ahead as a result of the UK's continuing dispute on sovereignty with Spain.

In evidence to the EU Committee in the House of Lords, Gibraltar noted that, in the wake of the referendum result, Spain renewed calls for the UK to enter bilateral discussions on Gibraltar's status, alongside Brexit negotiations, and proposed joint sovereignty as the only avenue to protect its relationship with the EU.

The Gibraltar economy has benefitted from full participation in the EU's Single Market for financial and other services such as gambling and tourism. Unless provisions on the freedom of services comparable to those in Articles 56-62 TFEU are maintained – and extended to Gibraltar – under the future EU27-UK bilateral agreement, a serious negative impact on the Gibraltar economy will be difficult to avoid. And even if, in legal theory, any future bilateral trade agreement is subject to qualified majority voting (QMV) in the Council, it is likely that the Spanish "reservation" approved by the European Council (and now repeated in the Commission's proposal for a Withdrawal Agreement) could in practice be used to block the extension of any new agreement to Gibraltar.

The effect of UK withdrawal on the CDs and at least some OTs will be less marked than for Gibraltar. The evolution of the economies of the CDs and

101 i.e. the UK, Spain, Gibraltar, Northern Ireland and the Republic of Ireland

102 I exclude for these purposes references to Cyprus and the Sovereign Base Areas of the UK

at least Bermuda, the Cayman and British Virgin Islands towards a heavy dependence on financial services (and to a lesser extent tourism) has meant that these jurisdictions are already, in practice, at least “third countries”. The EU’s treatment of them in taxation and financial and related services is no different from other jurisdictions outside the EU and unrelated to a Member State.

For OTs such as the Falkland Islands which not only benefit from EU financial assistance but also preferential access to EU markets for fisheries and other products, retention of such access is important, even if EU aid could be replaced by additional assistance from the UK.

More generally, for all the UK’s territories, a decision on their (individual) future relations with the EU is urgent. Time passes quickly (as the two years since the referendum have shown) and, for the moment at least, it must be assumed that, even if a transitional period is agreed (which is far from certain at the time of writing), this may only last until the end of 2020. For Gibraltar, the deadline may be, in the absence of agreement between the UK and Spain, by 29 March 2019.

In my view, the likelihood of a new bilateral agreement being negotiated and approved by national Parliaments and the European Parliament and ready for provisional application, by the end of 2020 is remote. If this prognosis is correct and in the absence of any extension of a transitional period by unanimous agreement of the 27 Member States (with the consent of the European Parliament), trade relations between the UK and the EU27 would be governed by WTO rules alone, whilst for the territories (which are not affiliated to the WTO¹⁰³),

there would be a legal vacuum.

The different possibilities for the territories’ future relations with the EU are discussed below in the second half of this paper. However, one general comment can be made at this stage. This is that the prospects for political support in the EU27 for favourable new arrangements with the UK’s territories appear remote indeed. Even if clear negotiating positions are agreed between the territories and London – jointly or, more likely, severally – in the coming months, a repeat of the situation in 1972 (where arrangements at least for the CDs were negotiated under time pressure at the last minute) can be excluded. For the territories as for the UK, the crucial political will comparable to that which is needed to underpin the convergence and eventual accession of States to the EU is – if not absent – at least greatly reduced in cases of divergence and withdrawal.

A second general comment is that even if there is a measure of political will in the UK to press the EU27 for new forms of association for its territories, this is unlikely to be replicated in the EU. Even if the political significance of UK withdrawal has already diminished as new political and economic priorities occupy the attention of the 27 and the Institutions¹⁰⁴, EU self-interest will continue to support efforts to negotiate a new bilateral framework for the UK itself up to and beyond the Institutional changeover in 2019. This is not the case for the UK’s numerous, diverse (and, from an EU perspective “problematic”) territories, although there is no technical or legal reason why, for example, equivalence decisions already taken or in the pipeline¹⁰⁵ will not be continued or even renewed.

103 Except for the Isle of Man

104 See my summary of the EU27’s priorities since the announcement of the UK’s intention to leave the EU in *Negotiating Brexit -the Legal Landscape*, Constitution Society, November 2017

105 E.g. the insurance decision for Bermuda and the audit decisions for Bermuda and the CDs.

This forecast may be thought to be unduly pessimistic. However, if it to be proved wrong, an unprecedented effort will be needed in and between each dependent territory, to identify their political and economic interests in a new bilateral arrangement with the EU, the allocation of responsibilities between each dependency and the UK in the negotiation of such an arrangement and – on the part of the UK authorities – to convince an agnostic EU of its interests in concluding such arrangements. For many EU Member States, it may well be thought that, unless the UK’s “offshore financial centres” are prepared to accept the level of harmonisation with EU standards in tax and financial services currently being accepted by European “micro-States” such as Andorra, San Marino, Liechtenstein and Monaco, issues of market access and compliance are better dealt with unilaterally, as at present.

The Situation of the UK’s Territories in the Article 50 Withdrawal Process

On 29 April 2017, the European Council adopted guidelines defining the framework for negotiations under Article 50 TEU and set out the overall principles to be followed by the Union in the negotiations. The guidelines (para.4) made it clear that: “on the date of withdrawal (29 March 2019) the Treaties will cease to apply to the UK, to those of its overseas countries and territories currently associated to the Union, and to territories for whose external relations the UK is responsible”.

Crucially, at least as far as Gibraltar is concerned, the guidelines continued (para.24) as follows: “After the UK leaves the Union, no agreement between the EU and the UK may apply to the

territory of Gibraltar without the agreement of the Kingdom of Spain and the UK.”

In negotiating directives adopted on 22 May 2017, the Council stated that: “In accordance with Article 50 TEU and the European Council guidelines, the Agreement should also recall that Union law ceases to apply on the withdrawal date to the overseas countries and territories having special relations with the UK¹⁰⁶ and to the European territories for whose external relations the UK is responsible, to which the Treaties apply by virtue of Article 355 TFEU. On the territorial scope of the Withdrawal Agreement and of the future framework, the negotiating directives should fully respect paragraphs 4 and 24 of the European Council guidelines”.

The possible territorial scope of any transition arrangement is referred to in the Council’s negotiating directives for the Commission (para. 5) of 29 January 2018, where the Council confirms the continuing application of paras. 4 and 24 of the European Council’s guidelines of May 2017, notably (but not exclusively) as regards Gibraltar.

Uncertainty as regards the territorial scope not only of any future bilateral agreement but also of the Withdrawal Agreement appears in the European Council guidelines adopted on 23 March 2018. The main purpose of these guidelines was to set out the broad framework - as currently seen by the EU – for the future bilateral agreement between the UK and the EU²⁷. However, the fact that even the Withdrawal Agreement (and the transitional arrangements comprised in it) is still not agreed, is reflected in the first paragraph of the guidelines which provides that: “The European Council calls for intensified efforts on the remaining withdrawal issues as well as issues related to the territorial application of the Withdrawal Agreement, notably

106 i.e. the OCTs listed in the 12 last indents to Annex II of the TFEU

as regards Gibraltar, and reiterates that nothing is agreed until everything is agreed.”

Although it seems unlikely that the EU27 would seek to change current arrangements for the UK’s dependencies (with the possible exception of Gibraltar) in the Withdrawal Agreement (which, after all, will only last until the end of December 2020), the use of the word “notably” leaves at least an element of doubt.

The Commission’s draft Withdrawal Agreement published on 28 February 2018 addresses territorial scope in Article 3¹⁰⁷ as follows:

“1. Unless otherwise provided in this Agreement or in Union law made applicable by this Agreement, any reference in this Agreement to the United Kingdom or its territory, shall be understood as referring to:

- a) The United Kingdom;
- b) The Channel Islands, the Isle of Man, Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus to the extent that Union law was applicable to them before the date of entry into force of this Agreement;
- c) The overseas countries and territories listed in Annex II to the TFEU having special relations with the UK¹⁰⁸, where the provisions of this Agreement relate to the special arrangements for the association of overseas countries and territories with the Union.

2. Unless otherwise provided in this Agreement or in Union law made applicable by this Agreement, any reference in this Agreement to Member States,

or their territory, shall be understood as covering the territories of the Member States to which the Treaties apply as provided in Article 355 TFEU.”

The immediate reaction by the UK Government (and parts of the media) to the Commission’s proposal was hostile, notably as regards the proposed fall-back solution for the Irish border with Northern Ireland, the continued jurisdiction of the CJEU during the transitional period, as well as the possibility for “sanctions” against the UK for infringement of EU law as made applicable to the UK in the WA.

As might be expected in view of the “internal” political controversy surrounding UK withdrawal, both within and between the political parties and in the country more generally, even the possibility of the status of Gibraltar being “taken hostage” during the negotiations (for the transition as well as for the future bilateral arrangement) has barely been noticed. At least for the other territories however – and barring changes in the EU27’s internal discussions of the mandate – their current status under EU law would appear likely to be preserved until the end of 2020.¹⁰⁹

As I have stated throughout this paper however, in view of the lack of political support for (or even interest in) the future relationships of the territories with the EU27 in Westminster, it is for the Islands themselves to “make the running” in ensuring that their interests are duly taken into account in good time, both for the WA and the future EU27-UK agreement.¹¹⁰

107 A footnote to the text provides (crucially as far as Gibraltar is concerned) that “it is recalled that the territorial scope of the Withdrawal Agreement, including as regards the transition period, should fully respect paragraphs 4 and 24 of the European Council guidelines of 29 April 2017, notably as regards Gibraltar”.

108 Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda.

109 As indicated above however, the use of the term “notably” in the guidelines adopted on 23 March 2018 does leave an element of doubt in this respect.

110 Unlike the situation in 1972, at least so far as the CDs were concerned.

Possible Scenarios for the Future Relationship of the Territories with the EU

In the early 1970s during accession negotiations, the UK - as an applicant State committed to the process of convergence with the EC6 - was in a position to “make clear in the negotiations that we needed to ensure that trade relations between [dependent territories¹¹¹] and the enlarged Community should be safeguarded either by the establishment of association arrangements, comparable with those already accorded to developing countries enjoying similar traditional relations with members of the present Community or, where this was not appropriate, by alternative solutions.” Separate and special arrangements were made for Gibraltar. Similarly, it was recognised that the inclusion in the EC of the CDs “would present constitutional, administrative and economic difficulties”¹¹² and that “an exchange of reciprocal rights and obligations between the Community and the Islands” would be appropriate. There was no suggestion in the accession process that the UK’s dependent territories would not be covered, in some shape or form, by the UK’s Accession Agreement.

Now, nearly 50 years later and against the background of the UK’s unilateral decision to withdraw from the EU, the political, economic and legal situation of the UK and all its dependencies (whatever their constitutional relations with the UK itself) is completely different. There are multiple reasons for this, which include:

- a. A withdrawing State, seeking to diverge from the EU27, does not have the same negotiating power (or “leverage”) as an acceding State committed to the process of convergence;
- b. Under international law, the territorial scope of an international agreement is a matter for negotiation and agreement between the parties¹¹³;
- c. The EU has already made it clear in the European Council guidelines adopted on 23 March 2018 that “intensified efforts on the remaining withdrawal issues as well as issues related to the territorial application of the Withdrawal Agreement, notably¹¹⁴ as regards Gibraltar” are required;¹¹⁵
- d. The political and economic interests of all the parties concerned (EU27, UK and dependencies) have changed fundamentally since UK accession;
- e. The number and diversity of UK dependencies (which is unique in the United Nations) means that, for the EU27 and the UK, negotiations for a new relationship for each territory (or even for each group of territories such as the CDs) would not only be politically sensitive but also technically complex;
- f. It is difficult to discern the EU27’s interests in concluding bilateral agreements with the UK for each (or each group) of its territories, when any issues in the EU’s relations with the territories (e.g. on compliance with tax or other regulatory issues) can be addressed by unilateral measures (e.g. equivalence

111 Which were treated in the accession negotiations in an analogous way to developing members of the Commonwealth

112 See UK White Paper on The United Kingdom and the European Communities (CMND. 4715) of July 1971 at pages 30-31

113 Article 29 of the Vienna Convention on the Law of Treaties provides that “ unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

114 But possibly not exclusively

115 If the territorial scope of the Withdrawal Agreement (including a possible transitional phase) concluded under Article 50 TEU may be negotiated, it follows a fortiori that the territorial scope of any new bilateral agreement between the EU27 and the UK is a matter for negotiation.

decisions or assessments of compliance on tax or economic crime, backed up by the threat of sanctions such as “blacklisting”);

- g. It also seems unlikely that the UK would wish its own future bilateral agreement with the EU27 to be delayed whilst separate arrangements are negotiated, as part of the UK’s new agreement with the EU27.

Preliminary Issues to be Settled

Although a Joint Ministerial Council has been established as a framework for the consideration of the interests of the devolved administrations and the dependent territories, there is as yet no clarity on the precise nature of the future relations which the UK’s territories seek (individually or collectively) with the EU27. One thing is however clear; the status quo is not a possibility, at least as long as the UK’s negotiating position remains that of withdrawing from the EU’s customs union and internal market. The political situation today (or, more importantly in 2020 at the end of the transitional arrangement) bears no resemblance - for the territories, for the UK or - crucially - for the EU, to that in 1972. Each territory must now decide on the substance of the future relationship which it would ideally wish to establish with the EU for the foreseeable future, discuss this with the UK authorities and then agree on the form, procedure and timing for negotiations with the EU.

On the European side, it seems safe to say that the present legal structures, dating from the special circumstances of “accession and convergence” of 1972 can be ruled out. The territorial scope of the future EU27-UK agreement is a matter of negotiation, with the ball initially being in the UK’s court to make proposals to the EU on this as on other areas, taking into account the wishes of the territories.

The Relevance for the UK Territories of the EU’s Outline Directives for a Future EU27 – UK Agreement

Given the self-governing status of all the UK’s dependencies (even if, constitutionally, there are significant differences between, for example, the CDs and the OTs¹¹⁶) – and the differences in their size, populations and economies – it seems at least at first sight unlikely that any of the territories would accept a simple extension of any arrangement made by the UK with the EU. The first priority therefore will be for the Islands (and Gibraltar) to decide, first on the substance of the relationship (if any) which they wish to have with the EU27 in the future and, secondly, whether - as currently in the case of the CDs and OTs – to seek such a relationship as part of a group or individually.

As is discussed below however, this possibility (Option 1) should not be ruled out, at least for such territories as seek the legal continuity in their relations with the EU27, which would be provided by their being brought under the legal “umbrella” of the UK’s future framework and on the same terms as the UK.

Before this exercise even begins however, it is important for the UK and its territories to take note of the starting position of the EU27, as sketched out in the guidelines (“future framework”) adopted on 23 March 2018. In 2019 (as opposed to 1972), the EU will not start “with a blank page”. Certain fundamental principles (or “red lines”) have already been agreed by the 27 and the Institutions and these will apply equally (or perhaps with even greater vigour) to any agreements negotiated by the EU with the UK for its dependencies as well as for the UK itself.

¹¹⁶ It is for example generally accepted that the right of legislative or executive intervention by the UK is greater in the case of the OTs than the CDs, although the precise extent of this executive power has never been judicially tested in the case of the CDs.

The European Council states¹¹⁷ that “any agreement with the UK will have to be based on a balance of rights and obligations, and ensure a level playing field¹¹⁸.” In clear terms this means that scope for regulatory or fiscal “arbitrage” will be reduced if not excluded altogether. The Council has expressly excluded “cherry-picking” by the UK on a sector-by-sector basis. It is difficult to see this principle applying to any agreements with the dependencies, given the narrow base of their economies. However, in any agreement negotiated by the EU27, a balance of interests would appear to be a pre-condition and it is not obvious at this stage what benefit could be obtained by the EU bilaterally from an agreement with the dependencies that could not be imposed unilaterally.

The need for “robust guarantees which ensure a level playing field” is underlined in paragraph 12 of the guidelines of 23 March 2018. The Council adds that the aim of these guarantees should be “to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, social, environment and regulatory measures and practices.” This will require “a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness.”

In my view, the need for any agreement to reflect, proportionately, the “depth and breadth of economic connectedness” is of particular importance when

considering the prospects and possibility for any future agreements between the EU27 and the UK on behalf of any of its territories. The narrow scope of the economies of all the UK territories reflects their limited economic connectedness with “Europe”, once the UK is no longer a Member State. Hence the absence of obvious or manifest interest in the EU27 in new bilateral arrangements with any or all of the territories.

To the extent however that any bilateral agreement(s) is negotiated in the future by the UK with the EU on behalf of UK territories, the EU would certainly insist on the need for adequate data protection rules, in line with the General Data Protection Regulation (GDPR) which comes into force in May 2018. Paragraph 14 of the March 23 guidelines provides that:

“In the light of the importance of data flows in several components of the future relationship, it should include rules on data. As regards personal data, protection should be governed by Union rules on adequacy with a view to ensuring a level of protection essentially equivalent to that of the Union”.

Data protection is of course crucial in any agreement covering financial and related services, as well as taxation.¹¹⁹ In addition, the scope for economic activities even in small jurisdictions based on digital technology will lead to EU insistence on third country compliance with the evolving EU acquis in the digital single market.

117 Guidelines of 23 March 2018 at para.7

118 The requirement for a “level playing field” is repeated in para.8

119 The UK and the EU agreed on 4 May 2018 to include data protection as one of 3 “cross-cutting cooperation and standalone issues” for discussion on the future framework.

Negative Fallout for the Territories resulting from the UK's Inept Handling of its Withdrawal

In the early 1970s, when the UK was negotiating full accession for itself and more limited relationships for its territories, the "European Project" took the form of a completed customs union¹²⁰. At that time, as described above, the interests of the UK and its dependencies were largely focussed on trade in goods.

In the last 45 years, in broad terms, even if the economies of many dependencies have evolved substantially (notably to embrace financial and related services), the legal framework for their relations with the EU has remained static. The EU, on the other hand, has evolved - as a result of 6 inter-governmental conferences (IGCs) and subsequent Treaty changes - to a Union embracing 28 Member States, a Single Market, Economic and Monetary Union (EMU) and common policies in "new" areas such as justice, freedom and security, foreign and defence policies, as well as policies related to or built on the Single Market such as consumer, health and environmental protection, energy and aviation. Of all the UK dependencies, Gibraltar alone has been able to benefit from the legal arrangements made at the time of accession on market access for services, notably financial services.

The UK's decision to withdraw from the EU, made without consultation of any of the territories (with the exception of Gibraltar) or their (approximately) 500,000 inhabitants¹²¹, entails the abrogation of the legal frameworks (Protocol 3, Part Four of the TFEU and the special arrangements for Gibraltar) for

these territories, at the latest at the end of December 2020. At the time of writing (May 2018), almost two years after the referendum, 13 months after formal notification under Article 50 TEU and less than 1 year before withdrawal, the UK has still to make a formal proposal to the EU on the legal framework for a future bilateral relationship.¹²²

The UK Prime Minister in her Mansion House speech of 2 March 2018 explicitly rejected a relationship based on UK participation in a customs union or internal market, limiting the UK's approach to a free trade area. Taking the Prime Minister's firm and repeated position into account, the European Council set out on 23 March the broad lines of a future arrangement with a "classical" free trade arrangement at its core, whilst leaving the door open for "upgrading" this approach if the UK position evolves in the future.

Against this background, the implications for the UK's territories are as follows:

- a. At the end of the transitional period (currently set for the end of 2020) or from 1 April 2019 if no such "breathing space" is agreed, the present legal framework(s) will terminate;
- b. Since none of the UK's territories (with the exception of the Isle of Man) are affiliated to the WTO, in the absence of a new bilateral framework, there will be no international legal basis for trade in goods or services between the territories and the EU27;
- c. It is legally conceivable that the UK could seek to extend the territorial scope of any new arrangement which it negotiates with the

120 The customs union was completed, ahead of the date scheduled in the EEC Treaty (1970) in 1968, with the complete abolition of tariffs between the 6 and with the establishment of a common external tariff. Of course, many non-tariff barriers (NTBs) remained and these were addressed (and still are) in the Single Market project.

121 Gibraltar, with a population of around 35,000 people, was the only territory allowed to participate in the referendum of 23 June 2016.

122 The EU (Commission) and the UK agreed on 4 May 2018 on a list of "Topics for discussion on the future framework".

EU27¹²³ to some or all of its territories, although any such territorial extension would require unanimous EU acceptance;

- d. To the extent that, because of the diversity of the territories' interests and/or an absence of political will in any or all of the parties¹²⁴, the solution at (c) above is not feasible, then any new bilateral arrangement(s) for the territories would have to be negotiated separately for the territories individually or in groups, taking into account the legal and constitutional issues discussed below.

At the time of writing (May 2018), given the extraordinary delay on the UK side in moving the Article 50 process forward - and the doubtful political or economic incentive on the EU side to find a new accommodation for the UK's dependent territories - the most probable scenario is that, from the end of 2020 (or perhaps from April 2019) and for the foreseeable future, the UK's territories will have no bilateral legal relationship with the EU27.

If this is the case:

- a. Continued market access for goods would be possible based on the EU's common external tariff and non-tariff measures (e.g. quotas, standards etc.), although without the legal guarantees and procedural safeguards provided by the WTO Agreements¹²⁵;
- b. Market access for services would depend on unilateral EU recognition of equivalence on a case by case and sector-by-sector basis, taking into account the self-interest of the Union and

its Member States and, as for trade in goods, without the legal certainty which a binding bilateral agreement would provide;

- c. Relations with the EU in other areas (e.g. tax) would be based on cooperation with the EU and its Member States within international bodies such as the Global Forum of the OECD, including multilateral agreements such as that on the automatic exchange of information, and on unilateral EU decisions on compliance with EU standards notably in the fields of tax and financial and related services, such as that on the facilitation of off-shore structures or arrangements without sufficient economic substance ("shell companies").¹²⁶

Constitutional Issues under the EU27-UK Agreement

Under UK constitutional and public international law, the UK is responsible for the defence and international relations of its dependent territories. Over recent years however, particularly in the field of tax and as a result of their fiscal autonomy, many territories have represented their own interests in international organisations such as the OECD's Global Forum. Many have also become parties to international arrangements such as the OECD's agreement on the automatic exchange of tax information and the Inclusive Framework under the Base Erosion and Profit Shifting (BEPS) project.

In addition, following the EU's initiatives in 2003 in implementing the directive on the taxation of savings interest and the Code of Conduct on harmful

123 Despite assertions by David Davis to the effect that a new bilateral agreement could be negotiated, ratified by 29 Parliaments and in force by the end of the transition period, there are few in the EU Member States and Institutions who share this optimism.

124 By "parties" I mean the territories themselves, the UK, the EU Member States and Institutions (including the European Parliament).

125 Under GATT Articles XXII and XXIII and the Dispute Settlement Understanding (DSU)

126 See the Council Conclusions of 10 December 2016 on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes – OJ C461/2 of 10/2/2016

business taxation, all the CDs and most of the OTs have concluded bilateral arrangements with all EU Member States (on the basis of a common model) for the exchange of tax information. The legal status of these agreements has not been formally defined, although since they are between subjects and objects of international law, they cannot formally be governed by public international law. They are, above all, practical arrangements for sharing tax information between fiscally-autonomous jurisdictions and, in this sense, sui generis.

Although the scope of the legislative, executive and judicial autonomy of the UK's territories is not identical¹²⁷, many territories also represent their own interests internationally in areas such as the regulation and supervision of financial services¹²⁸, as well on the prevention of economic crime, such as money laundering¹²⁹.

The crucial importance of international regulation, supervision and enforcement in the related fields of tax, financial services and the prevention of economic crime¹³⁰, particularly since the economic and financial crisis of 2007, has tended to highlight the "personality" or at least visibility of many of the UK's dependencies in international relations. The fact that the prevention of fiscal losses (or the erosion of national tax bases) through tax avoidance or evasion and "aggressive" tax planning by multinational corporations, has now become

a dominant theme in international economic relations has also tended to increase the visibility of certain jurisdictions which have been labelled as "tax havens".¹³¹ Amongst the UK's dependent territories, the Crown Dependencies, Bermuda, the British Virgin Islands, Gibraltar and the Cayman Islands are the most frequently-cited in this context.

Before turning to the relevance of the territories' constitutional autonomy for any future bilateral agreement(s) between them and the EU, it is important to clarify the relevant principles of UK constitutional and public international law. First, when territories represent their own interests internationally in areas such as tax, financial services and economic crime, they do so on the basis of delegated authority (usually called "entrustments") from the UK¹³². The grant and scope of entrustments is a matter of executive discretion. It is practically convenient (though not legally necessary) for the UK to allow (or to "entrust") its territories to represent their own interests and even to conclude agreements in areas where their own law and policy may differ from the UK. The ultimate legal responsibility for ensuring respect for relevant international rules or standards lies however with the UK, which also bears international responsibility for breaches of international (and EU) law by the territories.

It has sometimes been suggested that, as a result of

127 It is generally accepted, for example, that the extent to which the UK may lawfully intervene legislatively or by executive action in the Crown Dependencies is more limited than is the case for the Overseas Territories. However, in the absence of a written constitution in the UK and without binding judicial authority (e.g. of the Privy Council or Supreme Court), especially as regards the Crown Dependencies, an element of legal uncertainty remains in this area. Practice in recent years in areas such as tax, the prevention of economic crime and financial regulation does however indicate that the political powers of persuasion of the UK Government towards its dependent territories are considerable.

128 In organisations such as the International Association of Insurance Supervisors (IAIS), the International Organisation of Securities Commissions (IOSCO) and the Basel Group of Off-Shore Banking Supervisors.

129 In the Financial Action Task Force (FATF) or its regional equivalents.

130 It is now appropriate to add the protection of personal data to this list.

131 As discussed earlier, despite the acknowledged need for legal certainty in fiscal matters, terms such as "tax haven", "aggressive" tax planning, "avoidance" and "evasion" remain legally undefined, at least in EU and international law.

132 On entrustments generally see Hendry and Dickson, *British Overseas Territories Law*, 2011 at pages 234-239 and 257-261.

the expanding role of at least certain dependencies over recent years, they may have acquired a measure of “international personality”. In non-legal terms this is undoubtedly true. However, under public international law, unless and until an entity is recognised as a subject of international law, that entity, jurisdiction or organisation remains merely an object of international law. None of the UK’s many and diverse territories have been recognised, either by individual States, by the EU or by international organisations such as the OECD, IMF or United Nations, as having acquired full international personality. A clear distinction must therefore be drawn between the informal contacts which take place on an everyday basis (for example with the OECD and Global Forum and with the EU Institutions) by representatives of the territories and the formal negotiations of rights, obligations and commitments under international or EU law.¹³³

The potential for conflict or friction both between the UK and its dependencies on the one hand and with relevant international organisations (especially the EU) on the other, exists but has so far (very largely) been avoided. One example illustrates the issue.¹³⁴ Under Protocol 3 of the UK Treaty of Accession the UK accepted obligations under EU law for the CDs, notably on the customs union, the free movement of goods and, to a limited extent on agricultural state aids. Fortunately, in the last 44 years, there have been very few cases where the EU institutions suspected an infringement of EU law by one or more of the CDs. However, if an infringement of EU law was established (e.g. following a decision by the Commission in an infringement or state

aids case), it would be the UK’s responsibility to secure respect for EU law by and in the relevant dependency, even if - under UK constitutional law - the UK lacked the executive or legislative “competence” to enforce EU law in the territory concerned.¹³⁵

This issue has arisen more acutely in the case of Gibraltar, as a result of the broader “exposure” to EU law under Article 355(3) TFEU and related EU law provisions, notably as regards the implementation of certain EU services directives in Gibraltar law. So far at least, the resolution of such difficulties as have arisen has been managed pragmatically (and successfully) as between London and the dependency in question, including Gibraltar.

My purpose in discussing this issue in some detail here is to provide background for the situation which may arise in negotiations for a future framework for relations between the EU27 and some or all of the UK’s dependencies.

Challenges in including the Territories in the Future EU27-UK Agreement

Some of the challenges which now face the UK and its dependencies in shaping their future relations with the EU27 have been touched on above. These may perhaps be summarised as follows:

The international environment has now changed radically since 1971, notably (but not exclusively) as regards economic, financial and fiscal policy and the role now played by many CDs and OTs in the global economy;

133 The respective roles of the UK (as well as France, the Netherlands and Denmark) and the OTs under Part Four of the TFEU is an excellent example of the pragmatic and practical involvement of the territories in the day-to-day management of the EU-OCT relationship, but where the formal responsibility remains with the UK, which alone can represent insular interests in the Council. Mutatis mutandis, the same applies to the Crown Dependencies in their relations with the EU on tax. Only the UK can represent their interests in the EU Council of Ministers and its subordinate organs (e.g. the Code of Conduct Group).

134 See further on this issue my article on Jersey’s constitutional relationship with the EU in the Jersey Law Review 2005.

135 As indicated above, the precise circumstances in which the UK may intervene legislatively or by executive action (for example to ensure the “good governance” of the territory in question) has never been judicially settled.

The “leverage” of the UK in negotiating a new framework with the EU27 (for itself, let alone for its many and diverse dependencies) is substantially reduced as a result of the acrimony surrounding UK withdrawal;

The number and diversity of interests of the UK dependencies (including the disparity of their interests in their relations with Europe) - as well as the absence of reciprocal interest on the part of the 27 Member States - makes it unlikely that any agreements can be concluded in the foreseeable future. There are no precedents for EU bilateral agreements with dependent territories of non-Member States.

Possible Options for Future Relations between the Territories and the EU

The status of the dependencies under UK constitutional and public international law is at the heart of any future relationship which they (individually or collectively) may seek to negotiate or to have negotiated on their behalf with the EU or indeed with other international partners, including organisations such as the WTO. And, as stated throughout this paper, the issue of political will – in the territories, in London and in the prospective partners (principally the EU in Brussels and the WTO in Geneva) – is at least as important as the legal challenges.

It is clear now (in May 2018) that the likelihood of the UK having a new bilateral agreement negotiated, signed, ratified and in force by 1 January 2021 is doubtful (to say the least). It would be unprecedented for a “deep and special” arrangement with a free trade area at its core to be negotiated, ratified and implemented within 21 months, even if much informal preparatory work is done before formal UK withdrawal on 29 March

2019. It is even more unlikely (even if the UK adopts the “one size fits all” approach for its dependencies) that a new EU27-UK agreement could be negotiated with special provisions for the dependencies. In all probability therefore the dependencies face the prospect of a legal vacuum in their relations with the EU for an indefinite period from 2021 (or April 2019 if the Withdrawal Agreement is not in force by that date or if that Agreement does not prolong the current legal arrangements in Protocol 3, Part Four of the TFEU and Article 355 TFEU for Gibraltar.

OPTION 1: “One size fits all” – some or all of the territories are covered by the new EU27-UK agreement and on the same terms as the UK

There are several compelling reasons why it is unlikely that all or even most of the UK’s territories could be covered by the “future arrangement” between the UK and the EU27 and subject to the same terms as the UK itself. This is so, even if this is probably the only way, given the time constraints and lack of internal planning in the UK (at least at political level), to avoid a legal vacuum for the territories in their relations with the EU27 after 2021.

In particular, it may well be unrealistic to expect small jurisdictions with micro-economies which are wholly or largely dependent on outside assistance, to fall under the legal “umbrella” which may be negotiated by the EU27 and the UK. This may especially be the case for territories such as Montserrat, Pitcairn, St. Helena, Ascension and Tristan de Cunha, South Georgia and the South Sandwich Islands and even the Falkland Islands. On the other hand, bearing in mind comparisons with other like jurisdictions in Europe, there would appear to be no objective reason why the CDs, as well as Gibraltar and Bermuda, should not contemplate a more ambitious future in association

with the UK.¹³⁶

It is interesting in this context to note that in their evidence to the EU Committee of the House of Lords in July 2017, several Islands stated that their future trade prospects would be improved by being associated with the UK's own new trade policy. The Committee therefore asked the Government what steps it is taking to enable the OTs to participate in future post-Brexit trading opportunities, specifically and against the background of fears expressed by some OT representatives that their interests would be overlooked or "side-lined" as being "too distant or too small", the Committee asked how the Government will consult, involve and inform the OTs about its negotiations on trade agreements with non-EU States. It should also be noted that the Gibraltar Government in its own evidence to the Select Committee in early 2017 stated that the UK Government "has a responsibility to support Gibraltar in benefitting from any opportunities that arise following Brexit, including by participating in any new international trade deals."

There is of course no reason under public international law why a State should not define the territorial scope of its international agreements as it sees fit, provided that the other Party agrees. Although UK practice on the territorial scope of its international agreements is not uniform, there are many examples where, after consultation with the territories concerned, they have been covered by the same commitments as the UK itself.

At first sight and taking into account the fact that the current arrangements for the CDs and Gibraltar focus essentially on trade (in goods in the case of the

CDs and in services in the case of Gibraltar), there is no reason why the UK could not seek to include these territories in the new bilateral free trade (or "association") agreement. Similarly, for the OTs which currently benefit from preferential access to the EU under Part Four of the TFEU and the OAD of 2014, participation in a preferential agreement centred on free trade in goods would preserve their existing advantages.¹³⁷

As far as trade in services is concerned, the European Council guidelines of 23 March 2018 provide that the future agreement could address: "trade in services, with the aim of allowing market access to provide services under host state rules, including as regards right of establishment for providers, to an extent consistent with the fact that the UK will become a third country and the Union and the UK will no longer share a common regulatory, supervisory, enforcement and judiciary framework".

There is no obvious reason why a provision of this type could not be applied equally to the UK's territories, or at least those with an interest in trade in services with the EU27.

At the time of writing (May 2018), taking into account the Spanish "reservation" endorsed unanimously by the other Member States in paragraphs 4 and 20 of the guidelines, it is uncertain to what extent the EU27 will accept the territorial extension of the Withdrawal Agreement or the future agreement to include autonomous or self-governing territories of the UK. The general assumption at present seems to be that, with the possible exception of Gibraltar, the current EU acquis would be run on unchanged during the

¹³⁶ I am less certain that the Cayman Islands, BVI and the Turks and Caicos Islands have the economic and administrative capacity to associate on a comprehensive basis with the EU and the WTO.

¹³⁷ As indicated above, it may be more feasible and less onerous to negotiate trade arrangements for jurisdictions such as the Falkland Islands separately.

transitional period (if one were agreed).

As far as the future agreement is concerned, the situation for the moment is “open” in the sense that, in the absence of any clear and detailed information on the scope and content of the agreement, it is impossible to say with certainty whether (and, if so, in what terms) the EU27 would accept the extension of the future agreement to the territories. Assuming that the UK and at least the economically more important territories were prepared to apply the same treaty rules, however, it is conceivable that the EU27 (and the EU Institutions especially the European Parliament) might accept such a broader territorial scope. In this respect, participation in the agreement with the UK would strengthen the position of the territories in their relations with the EU in the future, giving greater legal certainty on substance and the institutional support of the UK in dispute settlement and in the management of the agreement more generally.

There are of course two preconditions if this approach were to be followed. First, the territories (or at least as many of them as wished to follow this approach) would need to reach agreement amongst themselves and persuade the UK that such a concerted initiative was in the interest of the wider UK. It would of course reflect the UK’s long-standing and often-repeated commitment to “support them and to ensure their security and good governance”.¹³⁸ Admittedly, this would require an unprecedented effort both in and amongst the territories themselves (putting to one side the

arcane constitutional distinction between Crown Dependencies and Overseas Territories)¹³⁹, as well as in and with the UK authorities. Strong political leadership would be required on all sides, not least in the UK itself, where the preoccupation with the internal constitutional issues (the tension between the executive and parliament in the Brexit process, the status of the devolved regions, especially Northern Ireland) tend to eclipse interest (political, media and public) in the future of the UK territories.

Secondly an equally unprecedented effort would be required on the part of the territories to accept that, for the purposes of this agreement and in the substantive areas regulated by it, their internal laws would be more closely aligned with those of the UK and their interests would be represented by the UK in the institutions established under the agreement¹⁴⁰. As indicated above, the benefits of such an “integrated” approach for the territories would be guaranteed market access for goods, a legal basis for access to the EU market in services and digital products, as well as a relationship based on the binding rules and procedures set out in the agreement in areas such as services (including financial and related services), environment and climate change, intellectual property and (crucially) data protection. On the EU side of course, it would be crucial to receive re-assurance from the UK that it would guarantee respect for all the obligations undertaken by the territories in the agreement, irrespective of their constitutional relations with the UK.

138 Foreign Secretary Hague in his foreword to the 2012 White Paper on the Overseas Territories (Cm 8374). See also Prime Minister May’s Mansion House speech of March 2018 where she spoke of negotiating a “deep and special partnership for the UK and its Overseas Territories”.

139 Even if this distinction is important to those concerned, especially in the CDs. And, as the recent debate in Parliament on the requirement for all the territories to establish, update and to provide for public access to central registers of beneficial owners of companies registered in their jurisdictions, has shown, even the UK itself may recognized that its powers to intervene legislatively for the OTs is greater than for the CDs.

140 It would of course be possible for Insular representatives to participate with their UK colleagues as members of the UK Delegation whenever matters pertaining to their Island were discussed.

Perhaps most important of all, joining with the “mother country” in this unprecedented way – in perhaps the most important bilateral agreement ever to be negotiated by the UK – would mark the determination of the Islands (and Gibraltar) to develop their relationship with the EU (and the wider international community) as members of the UK’s global “family”. In addition, by accepting the same obligations as those of the UK, notably as regards the “level playing field”, together with the conditions set out in the agreement prohibiting regulatory and fiscal “arbitrage”, the territories would make it more difficult for the EU27 to take unilateral measures against them for example in the field of tax and perhaps facilitate future equivalence decisions in financial and related services.

It may well be objected that even a “classical” free trade agreement, covering the areas set out in the European Council’s guidelines of 23 March 2018, would be excessive (or disproportionate) in terms of material scope for many (perhaps even most) of the UK’s territories with narrowly-based economies. It is worth recalling that the scope of the future agreement as currently set out by the EU (and reflected in the “topics for discussion” paper agreed on 4 May) includes

- General provisions on structure, governance, interpretation and application, dispute settlement, non-compliance and participation and cooperation with EU bodies
- Provisions on the economic partnership including trade in goods, agriculture, food and fisheries, customs, services and investment, financial services, digital and broadcasting, transport, energy and “mobility”

- Provisions on the “level playing field”
- The security partnership including law enforcement and criminal justice
- Foreign, security and defence policy
- Data protection, cooperation in areas such as science, innovation, culture

With the obvious area of foreign, security and defence policy (which would in any event be a “reserved” area for the UK), there are few if any issues in this list which, *a priori*, would not be appropriate or relevant to Island economies such as those of the CDs, Gibraltar and possibly certain OTs.

Compared with the limited material scope of Protocol 3, Part Four of the TFEU and the limited provisions under Article 355 TFEU which apply to Gibraltar, the acceptance by certain territories of such wide-ranging commitments would certainly break new ground. Arguably, the economic developments over the last 45 years at least in certain territories would justify innovating in this way if, in so doing, the territories obtained a more secure basis for their relations with the EU27 and greater legal certainty for their administrations as well as economic operators.

It is useful to keep in mind in this context that a number of European “micro-States” have already placed their relations with the EU on a broader footing. Liechtenstein with a population of 35,000 is a member State, not only of the EEA Agreement¹⁴¹, but also of the WTO and the United Nations. It plays a full role in all the EEA and EFTA institutions, including the periodic Presidency of the EFTA side of the EEA.¹⁴²

Andorra (85,000 inhabitants), Monaco (37,000)

141 Covering the free movement of goods, services, persons and capital, as well as competition and state aids policies and a range of “flanking policies”, such as consumer and environmental protection. The EEA does not cover indirect taxation, agriculture and external relations. The EEA is a free trade area and not a customs union, meaning that members are free to conclude agreements with third countries.

142 The other EEA Members are Norway, Iceland and the EU.

and San Marino (33,000) are all in the EU customs union¹⁴³ and are all in the process of broadening and deepening their relations with the EU. Although participation in the EEA Agreement appears to have been ruled out (notably by Norway), the EU and the three States concerned have proceeded on the basis of an Association Agreement aimed at integrating them into the internal market. The three micro-States are members of the eurozone, but outside the EU for indirect tax. Like the UK's CDs and OTs, all have concluded tax transparency agreements with the EU, initially under the tax on savings directive and now on the basis of automatic exchange.

In broad terms, the EU's approach to its neighbouring States is to eliminate "fragmentation" and to extend the EU *acquis* at least as far as the internal market (including its external dimension) is concerned, thereby creating a level playing field and eliminating regulatory or fiscal "arbitrage" or undercutting. This approach is followed by the EU in respect of all neighbouring States, both large and small, including those which are either applying for EU membership or not. A Commission Report published at the end of 2013 provides a clear indication of the approach which, in my view, the EU is likely to follow in 2019 and thereafter both for the UK itself and for those of its European territories¹⁴⁴ which opt for a treaty-based relationship with the EU.¹⁴⁵

Against this background, there is, in my view, a strong case to be made for the UK and its overseas territories seizing this opportunity to move their legal relationship with the EU into the 21st century and, in so doing, to strengthen the UK side of the future agreement with the largest economic entity in the world.

143 For Andorra, membership of the customs union is partial.

144 It is not excluded that a similar approach could be followed by the EU for the UK's non-European territories, should this be proposed by the UK after consultation with the territories concerned, though the need for an approach

145 Report from the Commission on EU relations with Andorra, Monaco and San Marino: Options for their participation in the Internal Market COM(2013) 793 final

1) Constitutional implications of an "integrated approach"

It may well be that at least certain UK territories – including those in Europe – would prefer a more independent approach to their relations with the EU27 in the years ahead. As indicated above, in areas such as tax and financial services, many territories have been entrusted by the UK to conduct relations with the EU independently and outside the legal framework which applies to them under the Treaties (Protocol 3, Part Four TFEU and Article 355 TFEU). It would certainly be possible for this approach to continue after UK withdrawal. It may in any event be necessary if no new bilateral agreement is concluded and implemented before the end of 2020 (or before April 2019 if no transitional arrangement is made). It may also be the case that the EU itself would prefer not to complicate its already difficult relations with the UK up to and after withdrawal, by concluding new arrangements with the UK which include some or all of its territories.

However, to the extent that bilateral arrangements are agreed for the territories, whether on the same terms as those agreed with the UK or (see below) under separate and different agreements), the constitutional situation is clear. In its future relations with the UK's territories (whether bilateral or unilateral), the starting point for the EU will be to deal with the UK, as the sovereign power responsible under international law for the external relations of its dependent territories. Of course, in the future as now, the EU may well accept that on issues where the territories act autonomously, it makes practical sense to deal with them directly at least at the informal level. In general however, the

EU (as a recognised “international person” itself) deals formally with other sovereigns, whether these are States or international organisations. The EU’s dealings with the UK’s territories under the Code of Conduct on harmful business taxation and under Part Four of the TFEU (i.e. in having informal contacts with the territories but dealing formally only with the UK) are examples of this “classical” approach.

The fact that some or all of the territories choose to conduct their future relations with the EU27 under a UK “umbrella” and on the same terms as the UK, would of course limit their legislative and executive autonomy. However, it would not remove it altogether. In areas such as direct tax for example, it is unlikely that any future EU27 bilateral agreement with the UK would lay down prescriptive rules on tax structures and rates. There would certainly be a provision prohibiting unfair fiscal (and other regulatory) “arbitrage”.¹⁴⁶ It is inconceivable that the EU would not insist that such provisions applied equally to the territories, whether they were covered by the UK agreement, related through separate arrangements or dealt with on a unilateral basis.

The practical “modalities” governing the way in which the territories participate in a bilateral agreement “alongside” the UK would have to be settled, hopefully pragmatically, in discussions between the individual territories and the relevant¹⁴⁷ UK authorities. In this respect, there would be a

certain similarity with the situation which exists today and which will certainly apply in the future for the devolved administrations in Scotland, Wales and Northern Ireland.¹⁴⁸ It would however be possible, if this were agreed between the UK and the territories (as well as the devolved administrations) for UK delegations involved in the administration of the new agreement (perhaps especially dispute settlement) to include representatives from the administrations of the territories.

The fact that the territories were bound by the same international rules as the UK (for example in a free trade agreement or indeed in the WTO – see below)) would limit but not necessarily deprive the territories of their legislative autonomy in implementing the commitments entered into on their behalf by the UK. The future bilateral agreement with the UK will not be “self-executing”. Unlike much EU law today, the principles and rules in the new agreement will not be directly effective or applicable in the courts of the UK or the territories. It might of course be simpler if, in a given area such as insurance or asset management, the territories implemented the same rules as the UK, in order to facilitate the negotiation of mutual recognition or equivalence arrangements with the EU. This would be a matter for consideration once the precise terms of the new agreement are negotiated.¹⁴⁹

In terms of fundamental principle¹⁴⁸ therefore, the constitutional relationship between the CDs, OTs

146 The guidelines adopted by the European Council on 23 March 2018 provide (para.12) that “the aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aids, tax, social, environmental and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness.”

147 On most issues this would be the FCO in consultation with relevant “line” Ministries such as HMT, DEFRA etc.

148 The situation on Northern Ireland might be particularly important to the extent that the EU’s “fallback” solution of “regulatory alignment” with the EU is adopted after UK withdrawal. This might well raise even more sensitive constitutional issues for the UK and Northern Ireland than would arise for the UK and its territories if the “integrated model” is followed.

149 At present, the contents of the “future framework” are limited to the broad statement of principle in the European Council guidelines of 23 March 2018 and the “topics for discussion” agreed on 4 May 2018.

and Gibraltar on the one hand and the UK on the other would not be changed if the territories were to join the new agreement with – and on the same terms as – the UK. Whether such an approach would be politically acceptable to the territories, the UK or the EU is of course a different matter. The EU in particular would seek total clarity and reassurance in any bilateral agreement covering the territories on the way in which the (unwritten) UK constitutional situation would impact on the operation of the agreement as far as the territories are concerned.¹⁵⁰

2) The possible extension of this “integrated” approach to membership of¹⁵¹ the WTO for the territories

Of all the UK’s territories, only the Isle of Man is affiliated to the WTO. In 1997, the UK requested the extension of the territorial scope of its WTO membership to the Isle of Man. This request, which was made through the WTO Secretariat in Geneva was accepted without formal negotiations by the WTO Members. This move followed the creation of the WTO by the Marrakesh Agreement upon the conclusion of the Uruguay Round in international trade negotiations. The WTO agreements represented nothing less than a revolution in international trade policy since the establishment of the GATT in 1947. The substantive rules of the GATT (covering only trade in goods) were extended to trade in services, trade-related intellectual property measures and trade-related investment measures¹⁵².

Whilst these “new” sectors (especially services) are

of potential interest to many UK territories, of equal importance is the introduction of a compulsory dispute settlement mechanism. Despite the paralysis which has affected the WTO in recent years, especially since the global crisis in 2007, the compulsory settlement of disputes through panels and an Appellate Body, has been widely used by and between virtually all WTO Members. It is also now threatened by the United States (under President Trump) blocking new appointments to the Appellate Body, thereby rendering it inoperative.

Whilst affiliation to the WTO may be disproportionately burdensome for small territories with insignificant international trade either in goods or services, for the larger territories which are significantly “engaged” in the international economic system, WTO affiliation is not only a “badge” of membership of a global economic “club” but also recognition of a willingness to conform to agreed international standards in international trade, including services, intellectual property and investments.

It may well be that formal “membership” of the WTO under the “accession” procedure in Article XII of the WTO Agreement¹⁵³ may be too lengthy and burdensome a procedure, even for the more developed territories. Taking into account the limited resources (including qualified personnel) and administrative capacity in many of the territories, it may be thought that the economic benefits (notably in terms of market access for financial services) which might accrue under,

150 In view of the much-publicised differences between the UK (London, Whitehall, Westminster) authorities and those in Edinburgh, Cardiff and Belfast on EU issues, the EU will also pay the closest attention to the way in which the UK constitutional outcome to Brexit impacts on the day-to-day operation of any new bilateral arrangement.

151 The term “affiliation to” rather than “membership of” would be more appropriate on the assumption that the UK and its territories follow the approach adopted by the UK for the Isle of Man in 1997.

152 Under, respectively, the General Agreement on Trade in Services (GATS), the agreement on trade-related aspects of intellectual property rights (TRIPS) and the agreement on trade-related investment measures (TRIMs).

153 “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the multilateral trade agreements may accede to this Agreement...”.

for example, the GATS, might not justify the commitment in time and resources which “full” WTO membership would involve.

On the other hand, on the assumption that the other 163 WTO Members (including the EU), guided by the advice of the WTO Secretariat,¹⁵⁴ would accept such an arrangement and the UK would undertake to negotiate it on behalf of its territories¹⁵⁵, those territories which do wish to affiliate with the WTO could do so by means of a territorial extension of the UK’s own WTO membership. Even this less formal approach would certainly take time (possibly years) to accomplish and therefore should be initiated sooner rather than later.

There are many reasons why even a mere extension of UK membership would be a complex and time-consuming matter. First, coinciding with the difficult and sometimes acrimonious “Brexit” process, it cannot be assumed that the 27 EU Member States and the Commission (which represents the EU in WTO matters) would simply acquiesce in such an extension. Secondly, it is difficult to imagine that the UK would accept to conduct negotiations for this extension (especially for several territories) in parallel with its “re-integration”¹⁵⁶ into the WTO, as an “independent” Member outside the EU. Thirdly, even a simple extension of UK membership would involve a detailed examination of the economies of the “applicant” territories and the extent to which their domestic legislation (for example in areas such as intellectual property or

inward investments) was compatible with WTO rules, notably on non-discrimination.¹⁵⁷ Such a comprehensive examination necessarily involves inter-departmental cooperation within the territory concerned, as well as with counterparts in London (in the FCO, HMT, Department for International Trade etc.). Finally, the adaptation of the UK’s schedules of commitments in goods and services to accommodate the extension of the UK’s WTO membership to the territories, would undoubtedly be a complex and time-consuming matter.

The fact that preliminary and exploratory discussions have been underway between certain territories and the UK for a number of years already (with informal advice from the WTO Secretariat) illustrates the complexity even of the “extension” approach. Finally, affiliation to the WTO is a very different matter from membership of the original GATT (1947), which only applied to trade in goods. The fact that the WTO now covers trade in services, trade-related intellectual property and investment measures, as well as a system of binding dispute settlement inevitably complicates the accession or extension process.

Against this background and given the severe time constraints now facing the UK as withdrawal looms, priority should in my view be given to securing a legal basis for the territories’ relations with the EU rather than WTO affiliation.

3) Constitutional implications of WTO membership for the UK and its territories

154 The advice of the Secretariat is particularly influential with the smaller WTO Members

155 Neither of which can be taken for granted in the present political and economic climate

156 The UK may well not accept that “re-integration” is necessary, since it has been a full WTO Member since 1995. However, it would be wrong to under-estimate the potential complexity involved in the adaptation of schedules of concessions, as well (for example) as the adaptation of tariff rate quotas on certain agricultural products with third countries.

157 Note that the WTO legal order is founded on non-discrimination, whether through the most-favoured nation (MFN) clause in GATT Article I (requiring non-discrimination as between third countries) or the national treatment clause in GATT Article III. GATT Article XXIV and Part IV of the GATT provide derogations to the non-discrimination principle for customs unions and free trade areas on the one hand and for developing countries on the other.

Much of what has been said above on the constitutional implications of an “integrated” approach to the future agreement with the EU applies to the affiliation of UK territories to the WTO. The fundamental principles of UK constitutional and public international law (notably the principles of international personality, recognition and international responsibility) are the same in both cases.

However, to a greater extent than is possible in the EU, UK territories possessing legislative autonomy would be free to enact their own legislation which differed from that in the UK, provided WTO rules (notably those on non-discrimination) were respected. This is because WTO rules are in general less prescriptive than EU law. They are established by international treaty and are not directly applicable in national law. The same will of course be the case when (or if) there is a new bilateral agreement between the EU27 and the UK. However, it is likely that even an agreement with the EU centred on the free trade or association model will contain rules (especially on the requirement for a level playing field) which are more detailed and precise than any WTO rules.¹⁵⁸

In any event, in both cases, it is inevitable (in my view) that the UK would require very close cooperation and oversight as regards legislative or executive measures taken by the territories (though not necessarily amounting to UK legislation being applied in the territories) either under a bilateral EU agreement or under the WTO. In both cases, the UK would be internationally responsible for action taken by its territories and would therefore have a direct interest in ensuring conformity and compatibility.

This does not mean however that individual territories could not take part in the work of relevant WTO committees, as part of the UK delegation. Subject to the agreement of the UK, representatives of the territories could represent and defend their interests (especially to the extent that their legislation or practice in the matter was not the same as that in the UK. Representatives of the territories could also be placed in the UK Mission in Geneva, to the extent that their administrative capacity allowed this. In this way, representatives of the territories could “network” with the WTO diplomatic community in Geneva, as well as with the WTO Secretariat. The “learning curve” for the territories would be steep, but could be assisted by the fullest possible integration in the day-to-day work of the WTO in Geneva.¹⁵⁹

There is an interesting analogy which, with due caution, is relevant here. From the late 1960s if not earlier, Hong Kong (as a UK Crown Colony) exercised full autonomy in international trade policy in the GATT. Formally, Hong Kong’s “membership” of the GATT (and later the WTO) was achieved by and through the UK. In meetings in the GATT, the Hong Kong Delegation sat as part of the UK Delegation, which since 1973 was, with other Member States, part of the EC (later EU) delegation. When taking the floor in meetings, the GATT Director General called on “the representative of the UK, speaking on behalf of Hong Kong”. The relevant Hong Kong official would then take the floor. Even today, under the terms of its arrangement with the Peoples’ Republic of China (China), Hong Kong acts autonomously in the WTO. Similar arrangements have existed (and exist today) for Macau in its relationship first with Portugal and now with China.

158 In this respect a comparison of the rule-making in the EU’s agreements with Canada, Korea and Japan is instructive.

159 More than perhaps any other international institution, the WTO (as previously the GATT from 1947 till 1995) provides a framework for economic diplomacy in a collegiate (even “club-like”) atmosphere. Many (even most) trade policy decisions are taken in Geneva without “instructions” from capitals. There is of course a challenge for the UK itself, after 45 years of exclusive EU competence for trade policy being exercised by the Commission, to adapt to managing its own affairs in the WTO.

Hong Kong was and is one of the largest economies in the world, covering both goods and services. At least from the time of UK accession to the EU in 1973, Hong Kong negotiated independently both multilaterally and bilaterally. It negotiated and implemented the GATT Multifibres Arrangement (MFA) in 1974, as well as bilateral textiles agreements with its international partners, including the EU. Although initially, the Hong Kong Mission to the GATT was physically located in the UK Mission, Hong Kong has now had for many years one of the largest “self-standing” Missions in Geneva. In many respects therefore the case of Hong Kong, though legally instructive, is unlikely to be seen by the UK as a precedent, even for the economically most-significant territories.

The “entrustment” granted by the UK to Hong Kong in its international economic policy was, at least from the late 1960s, comprehensive and unqualified. On the other hand, the UK continued to exercise sovereignty in defence and political matters for Hong Kong, as evidenced by the conduct of negotiations with China for the “handover” of sovereignty in 1997.

The case of Hong Kong was therefore entirely different, politically and economically - though not legally¹⁶⁰ - from that, for example, of the Crown Dependencies or Bermuda. At the heart of the conduct of international relations lies the issue of trust. As discussed above, entrustment is a discretionary act of executive power by the UK. It is a delegation of power to a dependent territory to represent its own interests with third countries or in international institutions, including the negotiation and conclusion of agreements, in areas where that territory exercises internal legislative and executive

autonomy.

The issue therefore which faces those territories which wish to conduct their own external affairs (whether with the EU, the WTO, the OECD, the FATF or other international organisations) is to reach agreement with the UK (notably through the FCO) on the conditions for so doing. UK practice in recent years has been relatively liberal in fiscal matters and (as regards meetings between financial supervisors) in financial services. There is of course a significant difference between “sectoral” autonomy such as that in tax and financial services on the one hand, and the delegation of authority in the management of a comprehensive bilateral agreement such as that with the EU, or the wide-ranging coverage of the WTO.

4) Potential opposition to the extension of the territorial scope of the future arrangement to cover UK territories

As with any unprecedented move, opposition may be expected from:

- a. The EU27 and its Institutions;
- b. The territories themselves (politicians, officials and electorates and
- c. Certain UK politicians and officials (as well perhaps as private sector interests concerned about possible delay to the agreement).

There is no precedent for the EU negotiating bilateral agreements with non-sovereign entities outside the EU, either directly or through their sovereign. And, as is explained below, if the territories remain outside the new EU27-UK framework, the most likely approach of the EU will be to deal with each territory, to the extent it is in the EU's interest to do so, on an individual and

¹⁶⁰ It may be that the legal capacity of the UK to intervene directly in the governance of Hong Kong was always (at least since 1960 onwards) more akin to the situation which prevails today with the OTs rather than with the CDs. This is illustrated by the recent legislation adopted in the UK on the establishment of publicly-accessible public registers for companies, which may be enforced (by 2020) by directly-applicable UK legislation in the OTs but not the CDs.

unilateral basis.¹⁶¹

It may well be that the EU27 would in any event prefer such an approach, taking into account their recent experience with “problematic” jurisdictions such as the CDs and OTs. Taking note of the lack of clarity under the UK’s (partially) unwritten constitution so far as the devolved regions are concerned and experience with the UK and its territories, *inter alia*, on tax, the EU may prefer to settle a new bilateral agreement with the UK first and negotiate new arrangements for the territories at a later date.

For the territories, it may well be that the natural instinct of most if not all would probably be to remain, as in 1973, outside or at least without formal attachment to the EU. Certainly, in the immediate aftermath of the Brexit referendum, some (especially in the CDs) expressed the view that their jurisdictions could continue with their current business model (expressed by some as “the collection and distribution of capital”) unaffected by Brexit. Whether such a view is shared by the 250,000 inhabitants of the CDs is not clear. In my own view, it must be said that:

- a. In the 21st century and following the unprecedented economic crisis of 2007-8, the presence of economically significant, non-sovereign entities (especially those in Europe) seeking to attract trade, investment or capital by emphasising their regulatory or fiscal differences has now become unacceptable, at least in the eyes of most G20, OECD and (especially) EU Member States and Institutions;

- b. Thus, “the writing is on the wall” (and has been for some time) for “offshore centres” whose economic model is based on regulatory and fiscal arbitrage (in clear terms, the absence of an international level playing field). Regulatory alignment, at least so far as fundamental principles are concerned - in financial and related services, in data protection and in the fight against economic crime and fiscal cooperation¹⁶² - is now well-established in international comity if not “hard” economic law¹⁶³;
- c. Even if UK support for its dependencies in international bodies (especially the EU and the OECD) has not been unqualified¹⁶⁴, it seems difficult to contest the fact that, after Brexit, small non-sovereign jurisdictions’ relations with the EU27 would be strengthened by their “solidarity” with the UK under one agreement, one set of legal principles and a single institutional framework;
- d. Such an approach would not imply abandoning, for issues outside the agreement, their legislative autonomy. Even for areas such as tax, which would be covered by the agreement but where no precise rules would be laid down on issues such as rates and structures, the territories would retain their fiscal autonomy in the same way that the States of the United States do.

5) The “burden of proof” is on the UK (and the territories themselves) to convince the EU27 to accept an extended territorial coverage for the new agreement

161 Whether in imposing sanctions for non-compliance with tax standards or in granting equivalence in areas such as financial or business services.

162 Excluding at least for the time being the international harmonization of tax rates and structures, provided such differences as remain are not deemed “harmful” or “unfair” (as internationally-defined)

163 Soft law

164 For the most part, over the last 20 years, the UK has joined other Member States in putting pressure on the territories to align with EU measures such as the tax on savings directive and the Code of Conduct on harmful business taxation.

I have set out in a previous paper for the Constitution Society¹⁶⁵ the formidable challenges facing the EU27 in 2018 and beyond. These include consolidating the governance and economic growth in the eurozone, strengthening the constitutional governance of the EU itself (notably in ensuring respect for fundamental values in Central Europe), managing immigration in the broader context of relations with the Middle East, handling relations with Putin's Russia and Trump's United States, strengthening Europe's role in Asia, notably but not exclusively in relations with China and Japan and, last but not least, developing the economic integration of Europe in areas such as digital services.

It must also be kept in mind in the UK also that, with effect from Spring 2019, the EU Institutions will be in "election mode". The last date for the ratification of the Withdrawal Agreement by the European Parliament is March 2019. Thereafter, there will be European elections in May, with the new Parliament devoting primary attention to the nomination of a new Commission President, hearings for the new "college" of Commissioners and the appointment of a new President of the European Council.

"Brexit" will not be "off the agenda" after March 2019, but – if only in practical terms – negotiations for the "future arrangement" will not begin in earnest until the new Institutions (especially the Commission) are in place in January 2020.¹⁶⁶ This will leave less than one year for a new agreement to be finalised and submitted for ratification to all 29 Parliaments.

¹⁶⁵ See Negotiating Brexit – the Legal Landscape, published by the Constitution Society in November 2017

¹⁶⁶ There is of course no reason why, as already planned by the EU, a start could not be made to negotiations for the future agreement from April 2019, since the officials (notably in DG Trade) who would handle the negotiations would still be in place under the Commission which takes office in November 2019.

¹⁶⁷ I share the view taken by the former Director General of the Council Jean-Claude Piris, that the Article 50 notice may be revoked and there is no legal basis in EU law to force an "Article 50 State" to withdraw.

¹⁶⁸ Of course, Member States such as Sweden which have significant trade in goods with the UK will also place great importance on the early conclusion of a new bilateral arrangement. This is not however the attitude of the EU27 as a whole.

¹⁶⁹ In paras 4 and 20 of the April 2017 guidelines adopted by the European Council and in the preamble to the Guidelines of 23 March 2018

UK withdrawal is seen (at least for the moment) as a fait accompli by the EU27. This is of course the only basis upon which the Union can work. So, even if there is no legal doubt¹⁶⁷ that the UK's unilateral notification of 29 March 2016 may be withdrawn at any time before the end of the 2 years period indicated in Article 50, the EU27 has moved on. The breakdown (or at least paralysis) in governance in the UK under the present government since March 29, 2016 has meant that the draft Withdrawal Agreement, as well as the outline for the "future framework" has been almost entirely the work of the EU Commission in the closest possible cooperation with Member States and the European Parliament. The ratification of the Withdrawal Agreement is a vital interest for the EU, not least because of the need to provide legal certainty and protection for more than 3 million EU citizens in the UK, but also to ensure that the financial settlement is implemented. Above all, the EU and the UK share an interest (as the European Council has said) in an "orderly withdrawal", on the basis of legal certainty.

The substantive and territorial coverage of any future agreement (which is more vital to the UK than to the EU27¹⁶⁸, notably in trade in goods and services) is as much in the hands of the UK as the EU27. For the moment however, it is the EU which has outlined the potential material scope of the agreement in the guidelines adopted on 23 March 2018 and confirmed in the "topics for discussion" paper agreed with the UK on 4 May 2018. The EU has also highlighted¹⁶⁹ the fact that further

negotiations are required on the territorial scope both of the Withdrawal Agreement and the future agreement, “notably” (but perhaps not exclusively) as regards Gibraltar. Here, the Spain has obtained from its 26 partners an effective veto on any future agreement between the UK and the EU so far as Gibraltar is concerned.

Even on the assumption (which may not be justified) that the existing arrangements for the CDs and OTs (possibly except Gibraltar) will be maintained until the end of 2020, there is at the moment no legal certainty on the status of the territories after that date. It is therefore for the UK, following consultations with its territories, to take the initiative with the EU in proposing the territorial scope which it is in the UK’s interests to achieve in the negotiations beginning in April 2019. There is little sign (at least to judge from public speeches by members of the government) that work on this matter is well-advanced¹⁷⁰ or even that it is a priority for the present UK government.

OPTION 2: maintaining separate legal arrangements for different groups of territories

Immediately after the referendum and the UK government’s decision to withdraw from the EU, the view was expressed – at least in certain UK territories - that “Brexit” would make little difference to their economic future as international finance centres “distributing money around the world”. Of course, not all UK territories are “finance centres” and even for those that are, their populations (100,000 in the case of Jersey) do not all depend on international finance.

In any event, although it appears unlikely that the present legal arrangements can be maintained, for the CDs, the OTs or Gibraltar, one option would

be for the UK to propose to the EU that separate arrangements be made, as at present, for the distinct groups of territories. There are however several reasons why the broad replication of the arrangements made in 1972 is unlikely to be acceptable to the EU more than 45 years later. My reasons for taking this position have been set out above and can be summarised as follows:

As a withdrawing State, the UK does not have the leverage to persuade the EU to make special arrangements for territories which appear to have little to offer to the EU itself;

Perhaps more significantly, the EU has identified many of the territories as “problematic”, notably in terms of tax and related policies and would be unlikely to accept negotiations for example on the free movement of goods (as currently is provided for the CDs and the OTs, except Gibraltar) unless issues such as tax, financial services and the fight against economic crime were also included;

For the Islands (and Gibraltar) to seek sectoral arrangements with the EU only in those areas of interest to them would appear to fall foul of the EU’s rejection of “cherry-picking”, as well as being incompatible with the more comprehensive approach adopted with comparable European jurisdictions such as Andorra, San Marino, Monaco and Liechtenstein;

Whilst the EU might contemplate concluding with the UK new arrangements for its territories (perhaps even without the comprehensive coverage envisaged for the UK) - either as part of the “future arrangement” foreseen in Article 50 or separately - the EU is likely to insist on the same “level playing field” criteria (i.e. no regulatory or fiscal “undercutting”) which have been included in the March 23 guidelines for negotiations with the UK.

¹⁷⁰ More than two years after the referendum, more than 1 year after the Article 50 letter was sent and only 10 months before the termination of the current legal arrangements

The issue of timing also appears to be important, unless the prospect of a legal vacuum is a matter of indifference to the territories and to the UK. As indicated above, time is already very short for a “future arrangement” to be negotiated, ratified and in force for the UK itself in the 20 months between April 2019 and January 2021.¹⁷¹ To include in such negotiations separate and different arrangements from those sought by the UK itself and by different groups of territories is simply not realistic.

The starting point for the UK and its territories must be to recognise that a paradigm shift has occurred in Europe since 1972, with regard to the European Project and as between Member States, applicant States and third countries. To this may be added a fourth category – withdrawing States. Likewise, the EU (and indeed international) attitude to jurisdictions which specialise in international finance has changed radically since 1972 and especially as a result of the global crisis in 2007-8.

In deciding on the most appropriate legal framework for their relations with the EU after UK withdrawal, the UK and its territories should take a long view (for example until 2050), taking stock of potential developments:

At global level, notably with the growing power of Asia in general and China in particular, including the future of global institutions such as the WTO and the probable impact of isolationist policies by the United States;

In Europe, notably the prospects for the European Project, including potential new Member States from the Balkans, as well as threats posed by populist and nationalist movements;

In the UK, including the future constitutional

“settlement” with the devolved administrations, especially in Northern Ireland, taking into account the arrangement finally reached on the Ireland/Northern Ireland border.

In one hypothesis, if the European Project loses momentum or is abandoned (wholly or even partially) then UK withdrawal may be seen in the future as a positive development. In such a “forward view”, the perceived urgency for the UK’s territories (at least the more prosperous amongst them) to enter into new arrangements with the EU27 may be diminished.

As the UK withdrawal process stands today however, a legal vacuum appears to be unavoidable for the UK’s territories with effect from 1 January 2021, assuming that the current arrangements are prolonged during a transitional period. This may well be the case if Option 1 above is chosen; but it will almost certainly be the case under Option 2.

OPTION 3: no legal framework for the territories’ relations with the EU?

Although the constant (and increasingly vociferous) complaint of economic operators and citizens in the UK, the EU and around the world is of the total legal uncertainty which Brexit has created, it is somewhat ironic that some territories (or at least their politicians) appear to take the view that their interests would be best served (or at least not harmed) by there being no bilateral replacement regime in place for the territories after UK withdrawal (or the end of the transitional period). The basis for this approach appears to be that, for example the CDs or certain OTs, are “global players” in international capital markets and that the demand for their “intermediation” services will

¹⁷¹ As indicated above, given the institutional changes in the EU in the second half of 2019 (and indeed the “running in period” in early 2020, the time available for negotiations with the UK (whether its territories are included or not) is in reality around 9 months.

continue if not expand in the foreseeable future.

Such an attitude, if it exists, is in my view dangerously complacent for the following reasons.

1) Global volatility, political and legal uncertainty because of the acrimonious nature which has imbued UK withdrawal, the absence of precedent for EU relations with dependent territories of third countries and the changes in political “atmospherics” as a result of the institutional “changeover” in the EU in 2019

In May 2018 as this paper is being written, there is more uncertainty in world affairs than, arguably, at any time since the Second World War¹⁷². This is of course one reason (but only one) why the UK’s decision to disregard the entreaties of its friends and allies in Europe, the Commonwealth and around the world and to leave the most successful attempt to secure peace and prosperity on the European continent, is regrettable and untimely. For “off-shore” Islands which are legally attached to another “off-shore” Island to cut themselves adrift from their European neighbours (in the case of the CDs and Gibraltar¹⁷³) at such a time appears unwise to say the least.

Just as the UK’s decision to withdraw from the EU under Article 50 TEU brought the Union (and the UK) into “uncharted legal waters”, so the way in which the EU will deal with dependent territories of a third country is also without precedent and therefore unknown. Placing the future relations with the EU of the territories as well as the UK itself on a firm legal basis would remove much¹⁷⁴ if not all

legal uncertainty.

The effect of the institutional “changeover” in 2019, with the election of a new Parliament and the appointment of a new Commission (and possibly a new EU Brexit negotiator) is unpredictable. However, the EU27 under the combined leadership of France (under President Macron) and Germany (under even a weakened Chancellor Merkel) is unlikely to give priority to re-establishing bilateral relations with the dependent territories of a third country, at least in the absence of significant pressure from the UK to do so and on the basis of politically and legally sustainable proposals which take into account EU concerns.

2) The absence of the UK from EU institutions from 1 April 2019

Under Article 6 (1) of the draft Withdrawal Agreement (accepted by the UK), the UK will be excluded from “the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions”.

There is no doubt that, from UK accession in 1973 onwards, the UK has played an important role in ensuring that the interests of its dependencies were not ignored by the EU. It is probably not an exaggeration to say that, without the UK’s presence in the Council and its subsidiary bodies as an important Member State, the involvement of the Islands (and Gibraltar) in EU law and policy would have been much diminished if not non-existent.

172 I refer *inter alia* to the weakening of global institutions such as the UN and its specialized agencies (including the WTO which has brought unparalleled prosperity to the world since 1947), the isolationism of Trump’s United States, the international adventurism of Putin’s Russia, turbulence in the Middle East, the apparently inexorable expansion of China and its influence around the world and the unprecedented movements of people(s).

173 It must be said that I have seen no indication that Gibraltar seeks any future other than to remain under UK sovereignty and to guarantee its future prosperity through a continuation of its trade with the UK and, to the extent legally possible, with the EU.

174 In all probability, even under a bilateral agreement of the “free trade” type described above, a measure of discretion would remain for the EU in assessing equivalence in financial and related services as well as on compliance in international tax policy.

Certainly, the “aid and trade” provisions of Part Four of the TFEU would not have been applicable to the OTs and Gibraltar would not have had access to EU services markets.

It is of course the case that the increased attention to compliance issues - especially in direct tax, but also in financial services and the fight against economic crime – in recent years have tended to highlight differences between the law and policy of the UK on the one hand and certain of its autonomous territories on the other.

Difficulties have arisen (as discussed earlier in this paper), for example, in the extra-territorial extension to the territories of the Code of Conduct on harmful business taxation, the directive on the taxation of savings interest and, most recently, the EU’s external tax strategy. This consequence of the UK’s constitutional arrangements has not facilitated the defence of Insular interests by the UK. On the one hand, the UK has a responsibility under UK and international law to ensure that its territories do not act in breach of international obligations. On the other hand however, the extra-territorial extension of EU tax law to the CDs and OTs outside the legal framework of their relationship with the EU was arguably illegal or at least contrary to their legitimate expectations. This argument was never made on their behalf to the EU by the UK however.

Against this background, even if the UK has sometimes been perceived by the territories as having put pressure on them to conform to standards set by the EU and although the territories have been excluded from internal EU discussions on issues affecting their interests, the UK’s role

and responsibility for its territories has generally be recognised and respected by the other Member States and the Institutions.¹⁷⁵ In addition, at a more practical level, the presence of UK officials in the Commission and in agencies such as the European Supervisory Authorities (ESA) when equivalence assessments were being made, has undoubtedly assisted understanding of territories’ status, laws, policies and practices. Some UK MEPs have also taken a particular interest in EU policy towards the territories, notably in areas such as insurance. This has undoubtedly been of assistance for example in obtaining an equivalence decision for Bermuda on insurance in 2015.

The benefits of a UK “presence” in all the EU institutions will be lost from April 2019 onwards. This is why, as urged throughout this paper, the UK and the territories themselves (for example through their offices in Brussels) will need to make increased efforts of “constructive engagement” if their interests in the future are not to be ignored in the EU.

3) Increasingly rigorous (and discretionary) EU compliance procedures

Notwithstanding the resilience of the many Insular economies (and Gibraltar) based essentially on financial services¹⁷⁶, there is no guarantee that the international and European regulatory climate will remain favourable indefinitely. There has now been consistent pressure on the territories (from the OECD, the EU and the UK itself) to adopt measures to conform to international standards in tax¹⁷⁷; financial services and the fight against economic crime (money laundering and the establishment of

175 It has never been contested that the UK would be entitled to use its “veto” in matters of tax policy in the Council (ECOFIN) in matters affecting one or more of its territories, but it does not appear ever to have done so.

176 Note that most such economies are not based on financial services in general, but usually on one sector in particular (e.g. reinsurance, captive insurance, asset management etc.). Such economies are particularly vulnerable to international shocks such as sanctions, blacklisting etc. Hence the efforts of many jurisdictions to diversify their economies in recent years.

177 Transparency, fair taxation and base erosion and profit shifting (BEPS)

a publicly-accessible central register of companies showing their beneficial ownership).

Successive G20 meetings following the eruption of the global economic crisis in late 2007 marked a turning point in coordinated international action against jurisdictions and policies perceived by G20 members as having been at the root of the crisis. Certainly, excessive risk-taking by financial institutions, notably in the US and the UK was high on the list of causes identified, but so too were the related issues of inadequate supervision, an absence of international cooperation between supervisors, as well as fiscal losses and the erosion of national tax bases through tax avoidance and evasion, “aggressive” tax planning by multinational companies and money-laundering.

In the politically-charged atmosphere sparked by the global crisis, “off-shore”¹⁷⁸ jurisdictions, including many UK dependent territories, were “caught in the cross-fire” and frequently labelled as “tax havens”. Despite the efforts of all of them, with the encouragement of the UK authorities, to adopt all relevant international standards adopted for example in the OECD, many remain under threat of punitive action, notably in the EU.

The EU has, as a result of the crisis, extended its regulatory reach to cover virtually all areas of financial activity, strengthened EU supervisory cooperation through the ESAs and sought to increase

the extra-territorial reach of its standards, beyond those adopted in the OECD¹⁷⁹. Thus, at the time of writing, the threat of blacklisting hangs over a number of UK territories unless they take measures to require adequate economic substance in companies investing in their territories. There is no indication that these pressures will diminish in the foreseeable future. Indeed there are indications that the EU is moving towards a more “holistic” approach to compliance, for example taking into account a third country’s rules on tax, anti-money laundering, transparency of corporate ownership, as well as regulatory and supervisory standards for financial and related¹⁸⁰ services.

4) Freedom of capital movements allowed for third countries and jurisdictions under Article 63(1) TFEU, but subject to discretionary safeguards

Even if the freedom of capital movements is based on European and international law¹⁸¹, thereby providing a legal basis for the accumulation and distribution of capital for investment or other purposes by international finance centres, EU Member States have a wide discretion to restrict or prevent such capital flows under Article 65(1)(b) TFEU.

5) The legitimacy of “international finance centres” - though accepted by many economists - is not officially recognised by the EU, OECD and IMF

Even if there is academic and industry support¹⁸²

178 A term for which no clear definition exists under national, EU or international law

179 The prohibition in paragraph 2.2. of the Commission’s External Tax Strategy against “the facilitation of off-shore structures or arrangements” without sufficient economic substance is an example of this unilateral action.

180 E.g. audit and accounting

181 Article 63(1) TFEU provides that there shall be no restrictions on the freedom of capital movements either between Member States or between Member States and third countries. This provision is unique in EU law in granting rights to non-Member States and jurisdictions such as the UK’s territories. Article 63 reflects similar provisions in the OECD Code of liberalization of capital movements. However, the safeguard clause in Article 65 (1)(b) TFEU provides a wide discretion for derogations to be imposed by the EU. It provides, inter alia that “ the provisions of Article 63 shall be without prejudice to the right of Member States to take requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.”.

182 See for example *Offshore Financial Centres and Regulatory Competition* (Andrew P. Morriss ed.), Washington, 2010

for the theory that “tax neutral” international finance centres provide significant benefit to the international economy (including by promoting investments both in the EU itself as well as in developing countries) this view does not appear to be shared in the official documents of, for example, the EU, the OECD or the IMF. It may well be that, informally, the advantages to the international economy of “tax neutral”¹⁸³ international finance centres”¹⁸⁴ are recognised in Finance Ministries around the world. However, there is no doubt that the need to address fiscal losses, money laundering, illicit profit-shifting and “shell” companies, takes political priority at least in OECD Member States. It would be a mistake to expect that this situation might change in the foreseeable future.

6) The role of the City of London as the primary partner of the UK’s international finance centres will be diminished by Brexit

The City of London, which has been the primary destination for funds managed in the UK’s territories, will (as the UK Prime Minister has admitted) no longer benefit from passporting rights of access to EU markets after withdrawal. The impact on the City, as the world’s leading capital market, and on its “partners” in the UK’s territories, is difficult to assess at this stage. It is safe to say however that the “harder” Brexit is, the more likely business is likely to shift to other markets in Europe but also to New York and Asia¹⁸⁵. This is so even if,

as indicated above, the free movement of capital between the UK and its dependencies on the one hand and the EU on the other will still be guaranteed by Article 63(1) TFEU (as well as the OECD Codes of Liberalisation of Capital Movements) after withdrawal.

7) Unilateral EU equivalence decisions will still be legally possible after Brexit, although it is unclear how the EU’s discretion will be used for dependent territories of a third country

It is legally possible that, even without a bilateral agreement covering some or all of the territories after withdrawal (and after any transitional period), the EU¹⁸⁶ could continue to assess individual territories for equivalence on a case by case and sector by sector basis, in accordance with the criteria laid down in the relevant directive. There is also no legal reason why equivalence decisions taken so far should be affected by UK withdrawal.¹⁸⁷ As indicated above, these are unilateral decisions based on technical assessments of third countries’ and other jurisdictions’ regulatory and supervisory standards, but with a discretionary element emanating from the Commission, the European Parliament or the Council. Although legally subject to judicial review in the European Courts, the technical nature of the assessments makes annulment by the European Courts unlikely in the absence of a “manifest error of appreciation” by the Commission.

For the future, it is unclear how the EU (and

183 Another term without a clear legal definition, although generally taken to mean jurisdictions where taxes are low or non-existent.

184 “International finance centres” are of course not only those “classically” identified as “tax havens”, including many UK territories. Such centres might well include, for example, the UK itself, Luxembourg, Cyprus, Malta and even the Netherlands.

185 As indicated at (b) above however, Article 63(1) TFEU offers at least some guarantee for third countries (including non-sovereign jurisdictions outside the EU) of continued freedom of capital movement, though not the provision of cross-border financial services.

186 EU equivalence decisions are taken by the Commission after technical preparation by the relevant European Supervisory Authority (the European Securities and Markets Authority – ESMA, the European Insurance and Occupational Pensions Authority – EIOPA and the European Banking Authority – EBA) and consultation with Member States and the European Parliament.

187 These include decisions on insurance and audit for Bermuda; audit for the Cayman Islands; audit and credit institutions and investment firms for Jersey, Guernsey and the Isle of Man.

the Commission in particular) will proceed on new or pending equivalence requests from the dependent territories of a third country. There are no precedents for such decisions and the absence of the UK from all EU Institutions (including the European Supervisory Authorities) will certainly not assist positive assessments for UK territories. It is relevant also to state that, for the time being, the Commission has initiated a review of its equivalence procedures across the board.¹⁸⁸ This review is not unrelated to the prospect of the UK becoming a third country from April 2019. However, the Commission has for some time recognised the need for a more cohesive approach to equivalence regimes for third countries.¹⁸⁹

8) Trade in goods and services would be adversely affected in the absence of a new bilateral agreement

In the absence of a new bilateral agreement reproducing, for example, the trade provisions of Protocol 3 or Part Four of the TFEU, exports of goods from UK territories (CDs and OTs) after UK withdrawal will lose preferential access (in the case of the OTs) and will be subject to full EU tariffs and non-tariff measures. Gibraltar would lose its current access to EU services markets.

9) EU financial assistance under Part Four of the TFEU and the OAD (as well as the territories participation in EU-funded programmes) will cease in the absence of a new bilateral agreement.

Currently it is the poorest UK territories which benefit from EU funding. However, under the 2014 OAD financial assistance for participation in EU programmes was made available to all OCTs. All EU financing to UK territories will cease on

UK withdrawal, unless prolonged under future arrangements. It is also unclear at present whether the use of UK territories such as the Falkland Islands, Ascension and Diego Garcia for EU projects such as the Galileo satellite navigation system will continue after withdrawal.

The Longer Term Future for UK Territories – a Perspective till 2050

As its title indicates, the purpose of this paper is to examine, as far as is possible in the current state of uncertainty that surrounds Brexit, the impact of UK withdrawal from the EU on almost 20 territories spread around the world, comprising around 500,000 British citizens. From my own experience, I know that every UK territory where the Union flag flies over the Governor's¹⁹⁰ residence feels a strong allegiance to the Queen and the Commonwealth.

The history of each territory is closely related to the UK's imperial past. In the case of the Channel Islands, their unique relationship with the Crown dates back to an earlier English withdrawal (from France!) and the Charters granted by King John in 1204. More recently, each and every UK territory (and their citizens) fought alongside the "mother country" in both World Wars and in conflicts since. The Channel Islands, uniquely amongst UK territories, suffered under German occupation for 5 years between 1940 and 9 May 1945.¹⁹¹ In 1982, 255 UK military personnel and 3 Falkland Islanders were killed in the re-taking of the Falkland Islands from Argentina.

As this paper demonstrates, for the past 45 years,

188 See Commission staff working document on EU equivalence decisions in financial services policy: an assessment SWD (2017) 102 final

189 As EU law stands at present, different procedures and standards exist under different "sectoral" directives, whilst in some cases, no provision at all is made for the conditions under which third countries may access EU markets.

190 Or the Lieutenant Governor in the case of the CDs

191 Liberation Day is still celebrated every year in Jersey and Guernsey on 9 May.

all UK territories have been associated, through different legal frameworks, with UK membership of the EU. Unlike the French overseas departments (Guadeloupe, Guyane, Martinique and Reunion), the UK's territories have not been fully integrated into the EU, but rather had limited legal ties, reflecting their economic interests and political wishes in 1972. Nonetheless, Brexit is, by common accord, a turning point in the history of the UK and its territories, as well as the wider world, including the Commonwealth.

In these circumstances, it is surprising that the FCO's "Objectives 2017-2018" for the Overseas Territories do not mention planning for Brexit. The basis for UK policy towards its OTs is still that set out in a comprehensive White Paper on 2012.¹⁹² That White Paper stated that:

"realising our vision for the Overseas Territories in an increasingly in an increasingly interconnected world requires active engagement with other states and international organisations. The UK Government is responsible for the external relations of the Territories but we encourage Territory Governments to play an active role in building productive links with the wider world. A number of responses to the public consultation suggested that the UK and Territory Governments could do more to work together to harness international support for the Territories."

This was of course written 4 years before the referendum. Now, as Brexit looms, the time has surely come for the UK and the territories, individually and collectively, to plan for the future. It is worrying (even if understandable in view of the many crises faced by the government "at home") that the Prime Minister said in her Mansion House speech on 2 March 2018:

"As Prime Minister it is my duty to represent all of

our UK, England, Scotland, Wales and Northern Ireland: north and south from coastal towns and rural villages to our great cities."

Although there was no indication here that she had the territories in mind, she did however add, in her conclusion, that the approach she had set out for negotiations with the EU "is an approach to deliver for the whole of our UK and our wider family of overseas territories."

So the overseas territories (and, hopefully, the Crown Dependencies and Gibraltar) are not forgotten. And it would of course be wholly unrealistic to expect detailed plans to have been made for their future when the UK's own relationship with the EU27 is still unclear and uncertain.

The Relevance and Role of the Territories in the UK's Global Strategy Post-Brexit

I have suggested in this paper that 2050 might be an appropriate horizon against which to plan for the UK's global future, including the role played in it by the territories. 32 years may seem a long time; however, the 45 years since UK membership (during which time I have followed developments from inside and outside the Institutions in Brussels) have passed quickly. It is already nearly 30 years since the fall of the Berlin Wall – and the Central European Member States (as well as the former East Germany) have still to reach the level of economic development achieved in Western Europe. And it is likely that the new bilateral agreement with the UK will provide the basis for the UK's relations with the EU for many years to come. So, long-term forward planning is vital, especially for the UK's Island territories and Gibraltar.

192 Cm 8374 – The Overseas Territories - Security, Success and Sustainability

The Possible Inclusion of the Territories in the UK's New Bilateral Agreements with the UK's International Partners

For the last 45 years the UK's trade policy, including agreements with third countries, has been handled by the EU (Commission), exercising exclusive competence, latterly under Article 207 TFEU, which is legal basis for the EU's common commercial policy. None of the EU's agreements with third countries were extended to the UK's territories. It is now open to the UK to seek to include those territories which so wish in the territorial scope of its new bilateral agreements.

First of course, the fundamental question raised above in connection with the new EU27-UK agreement (whether the territories wish to be covered by the common rules in this agreement) is relevant also for the future UK agreements with third countries such as the United States, Japan, Korea, China and Commonwealth countries. In this context, trade in goods is probably less important than the potential for trade in services – not only financial and related services, but also digital “products” and the intrinsically - related intellectual property and data protection issues.

For certain of the larger and more prosperous territories, the increased external autonomy which they have exercised in recent years (especially in tax matters) may weigh against the limitations of their international personality that such “integration” into UK external economic policy may represent. For these territories however, the question must be asked whether their prosperity in terms of trade and investment over the next 30 years is better safeguarded in association with the 5th or 6th largest economy in the world, or independently as

increasingly anomalous “sub-State” entities.

Market access for services is vital in this context. In this area, the extent to which certain territories see themselves as competitors with the UK (City of London) will be relevant. Obviously, for Islands (and Gibraltar) which aspire to a global role in financial markets, the extent to which the “level regulatory playing field” which is a hallmark of the EU's external policy will be replicated at global level (including with Asian partners such as China, Hong Kong and ASEAN) is also relevant in this context. Finally, the attitude of the UK's trading partners around the world (perhaps especially countries which are partners of the UK's Islands within the Commonwealth) on the territorial scope of the new agreements is crucial.

The Relevance of the Territories to the UK's Global Defence and Security Policy

The UK Prime Minister has made it clear that withdrawal from the EU does not imply severance of the UK's cooperation with the EU on security and defence. The EU in its 23 March 2018 guidelines for the future bilateral relationship has stated¹⁹³ “in view of our shared values and common challenges, there should be a strong EU-UK cooperation in the fields of foreign, security and defence policy”. In my view, in this area, the UK fails (as in many other areas of EU policy) to appreciate the essential “inter-connectedness” of all EU policies, since the entry-into-force of the Lisbon Treaty in 2009 and the abolition of the “three pillars” established in the Maastricht Treaty in 1992.

Nonetheless, as the recent visit of President Macron to Australasia and Oceania makes clear, France certainly sees French defence and security in a

193 Para. 13

global context. In the UK's 2012 White Paper on the OTs, the Government said that "the UK sees its responsibility for the defence, security and safety of the Overseas Territories as a core task of Government". The Government undertook to defend the territories, including their territorial waters and airspace from any external security threats they may face. This included maintaining a "defensive military posture to defend the Falklands and other British islands."

The White Paper mentions in particular the role of territories such as Gibraltar (for operations in the Mediterranean, North Africa and the Gulf), the British Indian Ocean Territory (Diego Garcia) and Ascension as making possible the UK's "global reach" on defence and security. Tackling serious crime, natural and man-made disasters, aviation and maritime safety are also highlighted as areas for UK cooperation with its territories.

My purpose in raising defence and security policy in this paper is not to suggest that UK withdrawal from the still-embryonic EU defence and security policies is a top priority either for the Islands (and Gibraltar) or the UK itself in the short term. There are however questions raised by the reductions being made in the UK's armed forces, the level of their current commitments¹⁹⁴, the sustainability of "global reach" (for example as regards remote Islands such as the Falklands) and the alliances maintained by the UK especially with former EU partners such as France, to counter threats to UK territorial interests wherever they may arise around the world.

In her Mansion House speech in March 2018, the Prime Minister envisaged:

"A global Britain which thrives in the world by forging a bold and comprehensive economic

partnership with our neighbours in the EU and reaches out beyond our continent to trade with nations across the globe".

The UK's focus on trade after Brexit reflects a consistent UK government view, possibly since accession in 1973, that the European Project was primarily about trade in a "common market". This is ironic in view of the very clear understanding set out in the UK's July 1971 White Paper on The United Kingdom and the European Communities, on the essentially political and security goals of post-War European integration. In any event, it seems to me that:

- a. In designing its global strategy post-Brexit, the UK must take the interests of all its overseas territories into account, not only in terms of trade and economic policy, but also as regards defence and security policies; and
- b. At the very least, serious consideration should be given by the UK and its territories (jointly and severally) to the need to "integrate" those of the territories which so wish into the UK's bilateral economic agreements with partners round the world, especially if these cover security and defence issues as well as trade and economic policy matters.

"Blue Sky" Thinking - Independence and Related Issues

The right of all UK territories to self-determination under international law is confirmed in the 2012 White Paper: "the UK is committed to defend the Territories and protect their peoples from external threats, ensuring their right of self-determination."¹⁹⁵ The possible independence

194 UK armed forces are apparently currently operating in 65 different countries (and presumably on a variety of different legal bases) around the world.

195 White Paper, page 8.

of one or more territories has not featured in the aftermath of Brexit. It may be of course that the new “independence” of the UK tends to reinforce the “underlying constitutional structure between the UK and its Territories, which form an undivided realm”.¹⁹⁶ There is no doubt however, under the criteria on self-determination established by the United Nations, statehood is a possibility, at least legally, for a number of UK territories. There are, after all, many UN Members with smaller populations and economies than, for example, the Channel Islands, the Isle of Man and Bermuda. However, there appears to be no indications that independence is a live issue at present in the OTs. However, the possibility of full “independence” or sovereignty under international law has been discussed in recent years, at least as regards the Channel Islands.¹⁹⁷

The background to that debate was the increasing tension between the Islands and the UK on the international defence of the Islands’ tax policies. More generally, the internal legislative autonomy under UK constitutional law of Jersey and Guernsey¹⁹⁸ had lead to a situation on tax (although it could arise in areas such as the regulation and supervision of financial services, as well as legislation on economic crime or company registration and transparency¹⁹⁹) where the differences between UK and Insular legislation made it impossible for the UK to defend the latter

in the EU or other international organisations. This is the issue which still confronts the Islands, whether or not they seek “integration” in the UK’s future agreement with the EU or not. Whether such “constitutional” tensions could lead the population in any UK territory to vote for independence (or indeed any change in its status with the UK) is difficult to predict but seems unlikely at this stage.

The Future Status of Gibraltar and the Falklands Islands²⁰⁰

The future status of Gibraltar under any future EU27-UK agreement has been explicitly tabled by Spain in the EU’s guidelines of April 2017. The Spanish Foreign Minister has apparently confirmed that Spain will not re-open the discussion on sovereignty in the context of these negotiations. For the UK (and of course for the Government of Gibraltar), at least at present, the matter is not negotiable. The quasi-unanimous vote of the Gibraltar people not only to keep Gibraltar’s current status with the EU, but also to remain subject to UK sovereignty - as well as Gibraltar’s role in UK defence policy - means that any change in Gibraltar’s status is not currently on the table.

There is however little doubt that, even if more than 90% of Gibraltar’s external trade is with the UK, market access to the EU for financial and gambling

196 White Paper page 8. The Crown Dependencies were not of course covered by the White Paper, though do of course form part of the “undivided realm” though under different constitutional arrangements than the OTs and Gibraltar.

197 See for example, *Dependence or Sovereignty – Time to take stock*. Jersey and Guernsey Law Review 2012

198 The Isle of Man was not involved in this debate, at least on this occasion.

199 This is currently the case on the UK’s demands for the Islands to adopt laws enabling public access to a central company register setting out the beneficial ownership of companies.

200 It is not appropriate in this paper to discuss the future status of Northern Ireland. However, there are certain analogies between this Province of the UK and Gibraltar, arising from their land border with an EU Member State. The obtuse discussion in the UK about “hard” and “soft” borders (which are legally imprecise terms) tends to hide the fact that the border between the Republic of Ireland and the UK, as well as between Spain and Gibraltar, will become on 29 March 2019, an external border of the EU and will have to be protected as such. There are distinct limits (in my view) to the extent to which 27 Member States will accept a sui generis legal regime on either of these frontiers. This is one reality of “Brexit” which has not been fully understood in the UK, including in political circles.

services has been beneficial to Gibraltar's small economy. The daily transit of some 7000 workers from La Linea to Gibraltar is also relevant.

Against this background, the Prime Minister's confirmation that the future relationship of Gibraltar with the EU will be negotiated as part and parcel of the UK's own future agreement is welcome. It remains to be seen however in the longer term to what extent (if at all) a change in legal status might guarantee greater economic prosperity, for example through closer association with Spain inside the EU.

The political, constitutional, economic and geographic) situation of the Falkland Islands is of course very different from that of Gibraltar. It is sometimes forgotten that, under the Thatcher government, there were discussions on the possibility of a "leaseback" arrangement for the Falklands with Argentina. The invasion of South Georgia and the Falklands by the Galtieri regime and the subsequent conflict has of course made such proposals unimaginable.

However, within the time-horizon of this paper (2050), circumstances as yet unforeseen may arise which require re-consideration of this matter.

It is relevant to note in this context that in the evidence given to the EU Committee of the House of Lords²⁰¹, the concern was expressed by the Falkland Islands representative that "Brexit would remove the obligations of other Member States to recognize and accept that the OTs are part of the UK and that consequently [they] may well lose the support of the rest of Europe, and may well see Spain and possibly other EU Members give greater support to Argentina over its mistaken and illegal claim to the Falkland Islands." The Committee therefore asked the

Government what steps are being taken to ensure that the commitment of EU Member States to the existing constitutional status of the Falkland Islands will continue after Brexit.

Conclusion

My main purpose in this paper has been to draw attention to the political and legal uncertainties currently affecting the Crown Dependencies, Overseas Territories and Gibraltar as a result of the UK's imminent withdrawal from the EU. "Legal and political uncertainty" is of course the main theme (and strongest criticism) of the way in which this process is being handled by the Government. Seen from London, Edinburgh, Cardiff, Belfast, Dublin, Brussels or the 26 other capitals), the problems facing the UK's territories are minimal compared with those facing the UK itself.²⁰²

In the 2012 White Paper on the OTs, the then Foreign Secretary (William Hague) said that: "we and Territory Governments share significant challenges [but] in many respects the Territories are more vulnerable than the UK. We have a broad responsibility to support them and to ensure their security and good governance".

As a result of Brexit and of other global and national developments, the challenges facing both the UK and the Territories are far greater in 2018 than in 2012. That is why, in my submission, consideration of the various options and issues set out above is important and perhaps overdue.

201 See the letter written on behalf of the Committee to the UK Government on 13 September 2017

202 I refer here also to issues in the UK on immigration, health, education, justice, growth, innovation and employment, as well as "internal" constitutional matters, which are not unrelated to the UK's withdrawal from the EU.

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