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Article

## EU–UK institutional arrangements and Brexit: a view from Switzerland

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### Abstract

In 1972 the UK signed an accession treaty with the EU while Switzerland and the EU concluded a free trade agreement. Nowadays, both countries have a very close relationship with the EU and are not (or not anymore) EU Member States. This article aims to analyse two complex legal paths taken by countries able but not willing (or no longer willing) to be part of the EU through institutional arrangements they have already negotiated or are currently negotiating with the EU. On the one hand, the UK was part of the EU legal order and is now extracting itself from the realm of EU law while switching to relations with the EU based on international law. On the other hand, Switzerland has built its relations with the EU on numerous bilateral agreements based on EU law without establishing a homogeneous institutional mechanism, which the EU has been insistently demanding since 2013. These two situations are paradoxically similar as for both of them the design of institutional arrangements depends on the degree of integration with/extraction from EU law. A comparison between the EU–UK withdrawal

agreement, the EU–UK Trade and Cooperation Agreement (TCA) and the EU–Switzerland draft institutional agreement, as proposed in this article, confirms that the degree of institutional flexibility that the EU is able to offer to a third country with which it concludes an agreement is dependent on whether that agreement is based on EU law, and in particular, EU internal market law. This article argues that depending on the nature of law the agreement is based on, from an EU perspective variations in the role of Court of Justice of the European Union (CJEU) and/or of an arbitral tribunal may make sense, but this is not the case when one takes an outside perspective.

**Keywords** Institutional arrangements; Brexit; EU–UK withdrawal agreement; transition period; TCA; EU–Switzerland bilateral agreements; EU–Switzerland institutional agreement; CJEU

## Introduction

The topic of this special issue is both challenging and new. If the EU's external action is widely addressed by the EU scholarship,<sup>1</sup> it is less often analysed from an outside perspective.<sup>2</sup> It is particularly difficult for EU legal scholars to adopt an auto-reflexive perspective and to look at the EU legal order from the outside, mostly through international law lenses. And the present author is no exception. It was very difficult to address the topic through an external (in this case Swiss) perspective as the temptation to bring the analysis into the realm of EU law is strong. This article will address the issue of institutional arrangements negotiated between the EU and the UK taking into consideration the negotiations on the so-called draft 'Framework Agreement' on institutional issues between the EU and Switzerland.<sup>3</sup>

While in 1972 the UK signed the treaty of accession to the European Economic Community and to the European Atomic Energy Community,<sup>4</sup> in the same year Switzerland signed a free trade agreement with the European Economic Community.<sup>5</sup> Of course, the rationales behind these two international treaties were very different. If the UK, at that moment, was 'determined in the spirit of [the] Treaties

<sup>1</sup>Examples include Marise Cremona, *Structural Principles in EU External Relations Law* (Bloomsbury 2018); Marise Cremona, *Developments in EU External Relations Law* (Oxford University Press 2008); Marise Cremona and Anne Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Bloomsbury 2014); Paul James Cardwell, *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser Press 2012); Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *European Law Review* 4; Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008); Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011); Christophe Hillion, 'Tous Pour Un, Un Pour Tous! Coherence in the External Relations of the European Union' <https://papers.ssrn.com/abstract=2405364> accessed 2 June 2020; Panos Koutrakos, *EU International Relations Law* (Bloomsbury 2015); Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert de Baere and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (Oxford University Press 2013); Allan Rosas, 'EU External Relations Law: Time for a Reality Check?' [2020] *Maastricht Journal of European and Comparative Law*, DOI. 1023263X20922387; Ramses A Wessel and Joris Larik, *EU External Relations Law: Text, Cases and Materials* (Bloomsbury 2020); Jan Wouters, Dominic Coppens and Bart De Meester, 'The European Union's External Relations after the Lisbon Treaty' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008).

<sup>2</sup>See, for example, Enzo Cannizzaro, *The European Union as an Actor in International Relations* (Kluwer Law International BV 2002); Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel, *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011); Martti Koskeniemi, *International Law Aspects of the European Union* (Martinus Nijhoff Publishers 1998); Siobhán Airey, 'The EU's Role in Global Governance The Legal Dimension', Edited by B. Van Vooren, S. Blockmans and J. Wouters (Oxford: Oxford University Press 2013, ISBN 9780199659654) (2014) 52 *JCMS: Journal of Common Market Studies* 701; see also Paz Andrés Sáenz De Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship' (2019) 30 *European Journal of International Law* 721; Maria Gavouneli, 'International Law Aspects of the European Union' (2000) 8 *Tulane Journal of International and Comparative Law* 147; Anthony Valcke, 'The European Union and the International Legal Order: Discord or Harmony?' <https://papers.ssrn.com/abstract=778567> accessed 2 June 2020; Bart Van Vooren, Steven Blockmans and Jan Wouters, *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013).

<sup>3</sup>*Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018.*

<sup>4</sup>Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community 1972 (OJ L 73) 198.

<sup>5</sup>Agreement between the European Economic Community and the Swiss Confederation 1972 (OJ L 300).

to construct an ever closer union among the peoples of Europe on the foundations already laid',<sup>6</sup> the *raison d'être* of the agreement between the EU and Switzerland was 'to promote through the expansion of reciprocal trade the harmonious development of economic relations between the European Economic Community and the Swiss Confederation'.<sup>7</sup> Thus, in 1972 the UK expressed its will to fully participate in the European project with the whole legal integration that it implies, while Switzerland preferred to conclude an international free trade agreement. The situation of these two countries regarding European integration has changed and even seems quite similar nowadays, which facilitates the comparison that this article proposes. One obvious similarity between the UK and Switzerland regarding their relations with the EU is their genuine disenchantment with the CJEU.<sup>8</sup> The legal architecture of institutional arrangements that both countries have already negotiated or are currently negotiating with the EU is of a particular interest with regard to the role devoted to the CJEU in external institutional settings.

The very concrete issues this article aims to address are the institutional arrangements between the EU and the UK post Brexit<sup>9</sup> from an outside perspective, taking into consideration Switzerland's experience in institutional negotiations with the EU. Both countries are trying to build a solid relationship with the EU based on equality between the treaty parties without further integration or association. This seems to be problematic in view of, for instance, the principle of autonomy of the EU legal order. In this sense, the Swiss case is interesting as it helps to bring some light to the tumultuous legal path that the UK has taken towards its relationship with the EU.

The institutional framework between the EU and the UK, during the negotiations also referred to as 'governance issues', has already been addressed by EU legal scholarship regarding the withdrawal agreement<sup>10</sup> and the TCA.<sup>11</sup> Institutional design offered by the EU to its neighbour countries is extensively analysed by EU scholarship in general.<sup>12</sup> Even though there are numerous types of 'institutional models',<sup>13</sup> it is very difficult to apply one specific model to the EU–UK governance design post Brexit. As Jed Odermatt has argued elsewhere, the specific relationship between the UK and the EU post Brexit calls for a tailor-made solution regarding the institutional settings as it creates the unprecedented situation of 'a state departing an international institution while at the same time establishing a new relationship with it'.<sup>14</sup>

<sup>6</sup>Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community 1972 (n 4).

<sup>7</sup>Agreement between the European Economic Community and the Swiss Confederation 1972 (n 5) art 1 a.

<sup>8</sup>See, for example: Jed Odermatt, 'How to Resolve Disputes Arising from Brexit: Comparing International Models' [2018] SSRN Electronic Journal <https://www.ssrn.com/abstract=3193892> accessed 26 May 2020; Joris Larik, 'Decision-Making and Dispute Settlement for the Withdrawal of the United Kingdom from the European Union' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3572033> accessed 25 May 2020; Tobias Lock, 'Dispute Resolution after Brexit' (*Verfassungsblog*) <https://verfassungsblog.de/dispute-resolution-after-brexit/> accessed 28 May 2020; for a comparative perspective, Charlotte Sieber-Gasser, 'Not United, but Linked in Negotiations with the EU: Switzerland and the UK' (*Blog DCU Brexit Institute*) <http://dcubrexitinstitute.eu/2019/07/not-united-but-linked-in-negotiations-with-the-eu--switzerland-and-the-uk/> accessed 25 May 2020; for a Swiss perspective, Benedikt Pirker, 'Dispute Settlement and Interpretation in the Draft Framework Agreement between Switzerland and the EU' (*European Law Blog*, 12 December 2018) <https://europeanlawblog.eu/2018/12/12/dispute-settlement-and-interpretation-in-the-draft-framework-agreement-between-switzerland-and-the-eu/> accessed 31 May 2020.

<sup>9</sup>Agreement on the withdrawal of the UK and Northern Ireland from the EU and the EAEC and the Political declaration setting out the framework for the future relationship between the EU and the UK (OJ 2019 C 384 I/01 and I/02); Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) (OJ 2020 L 444).

<sup>10</sup>Larik (n 8); Steve Peers, 'EU Law Analysis: Analysis 3 of the Revised Brexit Withdrawal Agreement: Dispute Settlement' (*EU Law Analysis*, 18 October 2019) <http://eulawanalysis.blogspot.com/2019/10/analysis-3-of-revised-brexit-withdrawal.html> accessed 26 May 2020; Lock (n 8).

<sup>11</sup>Federico Fabbrini and Giovanni Zaccaroni, 'The Future EU-UK Relationship: The EU Ambitions for a Comprehensive Partnership' (2020) 11 Brexit Institute Working Paper Series; Nicolas Levrat, 'Governance: Managing Bilateral Relations' (2021) 10 Brexit Institute Working Paper Series.

<sup>12</sup>See, for example, Sieglinde Gstöhl and David Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2019).

<sup>13</sup>For a detailed comparative analysis, see, for example, Franklin Dehousse and Xavier Miny, 'What Are the Judicial Options for the Future EU/UK Agreement?' [2018] *Journal of European Studies* (CERIS) <https://orbi.uliege.be/handle/2268/222926> accessed 25 May 2020.

<sup>14</sup>Odermatt, 'How to Resolve Disputes Arising from Brexit' (n 8); the author argues that 'the House of Lords European Union Justice-Sub Committee report on dispute resolution concludes, "there is no *one size fits all* dispute resolution model that could deal with all the issues caused by Brexit". Indeed, international adjudication offers a number of "models" for dispute settlement, including the WTO model, various quasi-judicial systems, the EFTA Court, and others. Yet none appear to be fully appropriate to the Brexit context. A standing Brexit dispute settlement body, combining elements of the EFTA Court system and the more traditional inter-state model used in FTAs, could potentially address the legal and political concerns of both the EU and the UK.'

Institutional arrangements in different international agreements that the EU is concluding with its neighbourhood are very different.<sup>15</sup> However, it is generally acknowledged in the legal literature that what is usually referred to as ‘institutional framework’<sup>16</sup> or ‘governance’<sup>17</sup> includes: (1) international supervision in order to monitor compliance with the agreement by both parties; (2) the law applicable to the agreement and its update regarding the evolution of EU law, if it is referring to EU law; (3) dispute settlement mechanisms.<sup>18</sup>

In this article I propose to explore two legal paths of institutional ‘satellisation’ of two countries that are able, but no longer willing, to be part of the EU. On the one hand, the UK was part of the EU legal order and is now trying to extract itself from the realm of EU law, while at the same time building its relations with the EU based on international law. On the other hand, Switzerland has built its relations with the EU on numerous bilateral agreements based on EU law without establishing a homogeneous institutional mechanism – something the EU has been demanding since 2013. Most of the bilateral agreements refer to EU law as the law of implementation of these agreements aiming to produce direct effect on individuals. The main problem is that this reference to EU law is ‘static’ (relevant EU law at the moment of conclusion of the agreement) without taking into account the evolution of the EU *acquis*, as is the case for other European Free Trade Association (EFTA) Member States members of the European Economic Area (EEA). These two situations are paradoxically similar as for both of them the design of institutional arrangements will depend on the degree of integration with/extraction from EU law.<sup>19</sup>

The idea of this article is not to adapt a ‘model-based’ approach for the EU–UK institutional arrangements, but to try to identify some peculiar features regarding institutional designs that the EU is offering to its neighbours via comprehensive but also very different international agreements. The main hypothesis is that the degree of institutional integration that the EU offers to its neighbours is dependent on the degree of participation in the internal market.<sup>20</sup> But this degree of integration in the internal market can be summarised as including three main variables relevant for the architecture of institutional arrangements: (1) the law governing the agreement (EU or International law), (2) the rationale behind the agreement (association, free trade, EEA, Brexit, Switzerland–EU), and (3) direct effect of the provisions of the agreement on individuals.<sup>21</sup>

<sup>15</sup>Dehousse and Miny (n 13); see also Elizabeth Howell, ‘Post-“Brexit” Financial Governance: Which Dispute Settlement Framework Should Be Utilised?’ (2020) 83 *The Modern Law Review* 128; Christopher Vajda, ‘The EU and Beyond: Dispute Resolution in International Economic Agreements’ (2018) 29 *European Journal of International Law* 205.

<sup>16</sup>For the EU–Switzerland institutional framework, see Christine Kaddous, ‘Switzerland and the EU: Current Issues and New Challenges under the Draft Institutional Framework Agreement’ in Sieglinde Gstöhl and David Pinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and its Neighbours* (Routledge 2019); Matthias Oesch, ‘Switzerland–EU Bilateral Agreements, the Incorporation of EU Law and the Continuous Erosion of Democratic Rights’, (2020) 39 *Yearbook of European Law* 602; Pirker (n 8); Sieber-Gasser (n 8); Yuliya Kaspiarovich, ‘Accord-cadre institutionnel: entre le droit de l’UE et les particularités suisses’ in Véronique Boillet, Francesco Maiani, Etienne Poltier, Daniel Rietiker and Barbara Wilson (eds), *L’influence du droit de l’Union européenne et de la Convention européenne des droits de l’homme sur le droit suisse* (Schulthess Éditions Romandes 2016); Christa Tobler, ‘Switzerland–EU: Whereto with the Draft Institutional Agreement?’ (*EFTA-Studies*, 19 February 2020) <https://www.efsa-studies.org/post/whereto-with-the-draft-institutional-agreement> accessed 26 May 2020; also regarding the Swiss–EU relationship as a model for the UK, Pérez Crespo and María José, ‘After Brexit ... The Best of Both Worlds? Rebutting the Norwegian and Swiss Models as Long-Term Options for the UK’ (2017) 36 *Yearbook of European Law* 94; Astrid Epiney, ‘The Future Relationship between EU and UK – “Bilateral Agreements” EU – Switzerland as a Model?’ in Stefan Kadelbach (ed), *Brexit – And What It Means* (Nomos Verlagsgesellschaft mbH Co KG 2019); Frank Meyer, ‘The “Swiss Model” as an Option for the Future UK–EU Relationship’ (2017) 28 *Criminal Law Forum* 275; Christa Tobler, ‘One of Many Challenges after “Brexit”: The Institutional Framework of an Alternative Agreement — Lessons from Switzerland and Elsewhere?’ (2016) 23 *Maastricht Journal of European and Comparative Law* 575.

<sup>17</sup>Larik (n 8); Peers, ‘EU Law Analysis’ (n 10); Pirker (n 8).

<sup>18</sup>Tobler, ‘One of Many Challenges after “Brexit”’ (n 16) 578; Yuliya Kaspiarovich, ‘Le cadre institutionnel pour les accords bilatéraux Suisse–UE: statu quo, perspectives et critiques’ (University of Geneva 2014) <https://archive-ouverte.unige.ch/unige:54903> accessed 26 May 2020.

<sup>19</sup>Of course, resistance towards the EU in general, and the CJEU in particular, is strong in both countries but for different political reasons. In Switzerland, historically, the reference to ‘foreign judges’ is very problematic as it goes to the root of Swiss independence (William Tell). See, for example, René Schwok, ‘What Strategies to Overcome the Current Impasse Between Switzerland and the European Union?’ [2014] *Études européennes* 5.

<sup>20</sup>For a detailed comparative analysis of this hypothesis, see Dehousse and Miny (n 13).

<sup>21</sup>For this issue in particular, see this very interesting contribution: Jed Odermatt, ‘Brexit, Justice and Dispute Settlement’ in Tawhida Ahmed and Elaine Fahey (eds), *On Brexit: Law, Justices and Injustices* (Edward Elgar 2019). In this article I will not address the issue of direct effect of provisions resulting either from the withdrawal agreement concluded between the EU and the UK or from the TCA as its art COMPROV 16 expressly states that ‘nothing in this agreement ... shall be construed as conferring rights or imposing obligations on persons’.

This article will proceed in the following way. First, I will summarise institutional settings in the EU–UK agreement(s) and in the draft framework agreement negotiated between the EU and Switzerland. Second, I will identify the complexity of the legal ‘satellisation’ of countries which are not part of the EU legal order but closely linked to it through complex institutional settings negotiated in international agreements with the EU. I will analyse the legal path of the extraction from/integration with the EU legal order of non-EU Member States. This will help us to identify the nature of law governing international agreements concluded by the EU with its neighbour countries and the rationale behind those agreements. The main goal for such an analysis is to identify a logic behind institutional settings that the EU is offering to its neighbours not willing to participate in the ‘process of creating an ever closer union among the peoples of Europe’.<sup>22</sup> The Swiss experience with regard to bilateral relations it established with the EU shows that the degree of substantive legal integration is directly proportionate to EU external institutional requirements. This issue is currently of primary importance for the UK as its domestic law was for decades based on EU substantive law.

## EU–UK institutional arrangements

On 31 January 2020 the UK officially became a third State to the EU. However, while *de jure* the UK is not an EU Member State anymore, this does not mean that the UK has lost all its legal obligations vis-à-vis the EU. On the basis of the withdrawal agreement concluded between the EU and the UK,<sup>23</sup> during the transition period the UK no longer participated in EU institutions<sup>24</sup> while it continued to apply EU substantive law.<sup>25</sup> At the time of writing, two agreements have been concluded between the EU and the UK, namely the Agreement on the Withdrawal of the UK and Northern Ireland from the EU and European Atomic Energy Community, and the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.<sup>26</sup> I will identify the relevant institutional provisions in both these agreements and follow their transformation and evolution from the withdrawal agreement through the transition period and resulting in the TCA.

### 2.1. EU–UK ‘governance’ issues in the withdrawal agreement

In this agreement several provisions are relevant for the institutional analysis of this article.<sup>27</sup> We will first look at institutional provisions in the withdrawal agreement, and then in the TCA, in order to compare them with what Switzerland managed to agree on with the EU over long years of tumultuous negotiations.

Let us start with Article 4 on *Methods and principles relating to the effect, the implementation and the application of this agreement*:

1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.<sup>28</sup>

<sup>22</sup>TEU, Consolidated version of the Treaty on European Union 2016 (OJ C 202), art 1 al. 2.

<sup>23</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9).

<sup>24</sup>*ibid*, art 128.

<sup>25</sup>Steve Peers, ‘EU Law Analysis: Analysis 1 of the Revised Brexit Withdrawal Agreement: Overview’ (*EU Law Analysis*, 18 October 2019) <http://eulawanalysis.blogspot.com/2019/10/analysis-1-of-revised-brexit-withdrawal.html> accessed 26 May 2020; Steve Peers, ‘EU Law Analysis: Analysis 2 of the Revised Brexit Withdrawal Agreement: Transition Period’ (*EU Law Analysis*, 18 October 2019) <http://eulawanalysis.blogspot.com/2019/10/analysis-2-of-revised-brexit-withdrawal.html> accessed 26 May 2020; Peers, ‘EU Law Analysis’ (n 10); Steve Peers, ‘EU Law Analysis: Analysis 4 of the Revised Brexit Withdrawal Agreement: Citizens’ Rights’ (*EU Law Analysis*, 19 October 2019) <http://eulawanalysis.blogspot.com/2019/10/analysis-4-of-revised-brexit-withdrawal.html> accessed 26 May 2020.

<sup>26</sup>TCA (n 9).

<sup>27</sup>Larik (n 8); Odermatt, ‘How to Resolve Disputes Arising from Brexit’ (n 8); also Lock (n 8); Peers, ‘EU Law Analysis’ (n 10).

<sup>28</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) art 4(1).

This provision does not imply that jurisdiction is granted to the CJEU, but it does mean that the withdrawal agreement refers to EU law.<sup>29</sup> Even though provisions referred to in the withdrawal agreement are identical in substance to EU law, they do not have the same nature as EU law per se, according to the CJEU reading.<sup>30</sup> Even though EU law relevance in the EU–UK relationship will diminish over time, especially after the transition period, the withdrawal agreement still refers to EU law and of course to the CJEU as the only jurisdiction competent to interpret it. This provision also reflects the relevance of the EU law principles of supremacy and direct effect, which were also applicable in the UK during the transition period.<sup>31</sup>

Articles 86–92 and also 95 regarding *Judicial procedures* address the issue of the continuing jurisdiction of the CJEU with regard to cases introduced during the transition period,<sup>32</sup> as well as their continuity beyond this period with regard to the principle of legal certainty.<sup>33</sup> In terms of time frame, during the transition period<sup>34</sup> and by the end of this period,<sup>35</sup> all cases that have reached the CJEU are pending and will be considered by the CJEU.<sup>36</sup> There are also some substantial provisions that extend the jurisdiction of the CJEU beyond the transition period. Different types of ‘sunset clauses’ for the separation period are envisaged with regard to citizens’ rights, EU budget legislation, Irish border control and the protocol on UK army bases on Cyprus.<sup>37</sup> EU law will still be applicable in the UK far beyond the transition period. Concerning EU27 citizens’ rights, preliminary rulings may be requested from UK courts during the eight-year period after the transition period.<sup>38</sup> Preliminary rulings and infringement procedures concerning financial settlement may be brought before the CJEU indefinitely after the transition period.<sup>39</sup> The CJEU is also granted full jurisdiction over the Northern Ireland protocol (until it is replaced)<sup>40</sup> and the Cyprus bases protocol indefinitely.<sup>41</sup>

Article 131 on *Supervision and enforcement* during the transition period states:

During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties. The first paragraph shall also apply during the transition period as regards the interpretation and application of this Agreement.<sup>42</sup>

This provision implies that the jurisdiction of the CJEU also applied during the entire transition period up to the end of 2020.<sup>43</sup> It also means that the UK would need to comply with the rulings of the CJEU without having its own judge at the Court.<sup>44</sup>

<sup>29</sup>Peers, ‘EU Law Analysis’ (n 10).

<sup>30</sup>*Opinion 1/91 relating to the creation of the European Economic Area* [1991] ECLI:EU:C:1991:490 (CJEU); *Polydor Limited and RSO Records Inc v Harlequin Records Shops Limited and Simons Records Limited* [1982] ECLI:EU:C:1982:43 (CJEU); as well as this comment on the Polydor principle: Christa Tobler, ‘Context-Related Interpretation of Association Agreements: The Polydor Principle in a Comparative Perspective: EEA Law, Ankara Association Law and Market Access Agreements between Switzerland and the EU’ in Daniel Thym and Margarite Zoetewij-Turhan (eds), *Rights of third-country nationals under EU Association Agreements* (Brill Nijhoff 2015); Tomer Broude and Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011).

<sup>31</sup>Larik (n 8) 8–9.

<sup>32</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, arts 86–92, 95 (n 9). These provisions are situated in part three of the agreement dealing with separation provisions, Title X ‘Union judicial and administrative procedures’, Chapter 1 ‘Judicial procedures’.

<sup>33</sup>Peers, ‘EU Law Analysis’ (n 10); Larik (n 8).

<sup>34</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) arts 127, 131.

<sup>35</sup>*ibid*, art 86.

<sup>36</sup>See the time frame summarized by Peers, ‘EU Law Analysis’ (n 11).

<sup>37</sup>*ibid*.

<sup>38</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) art 158.

<sup>39</sup>*ibid*, art 160.

<sup>40</sup>*ibid*, art 12(4).

<sup>41</sup>*ibid*, art 12.

<sup>42</sup>*ibid*, art 131.

<sup>43</sup>*ibid*, art 126.

<sup>44</sup>Larik (n 8); Peers, ‘EU Law Analysis’ (n 10).

Regarding Part 6 of the withdrawal agreement on *Institutional and Final provisions*, I have divided the analysis into two parts. First, Articles 158–63 regarding the title on *Consistent interpretation and application* deal with an extended jurisdiction of the CJEU beyond the transition period. Interestingly enough, Articles 158 and 159 of the withdrawal agreement deal with provisions of direct effect on individuals (EU citizens' rights) and thus refer to the EU law. For this reason, the jurisdiction of the CJEU<sup>45</sup> and the establishment of a surveillance authority from the UK side<sup>46</sup> (reminiscent of the two-pillar structure of the EEA) are mandatory according to the principle of the autonomy of the EU legal order. The EU law must be interpreted by the CJEU.<sup>47</sup> In his speech at the 28th Congress of the International Federation for European Law (FIDE), in the presence of CJEU President Koen Lenaerts and former President Vassilios Skouris, Michel Barnier, Chief Brexit Negotiator, said:

By creating, or joining the European Union, Member States accepted to put together certain parts of their sovereignty to create a body of law which applies to them and their citizens. It is this community of law, based on reciprocal trust, which the United Kingdom is about to leave.

And the agreement which we are negotiating aims to ensure an orderly withdrawal, which means unravelling the relationships established over decades between Member States, and also between private parties.

As opposed to a classic international agreement, the Withdrawal Agreement is not limited to creating rights and obligations between two sovereign parties. It will create rights that are directly enforceable by litigants.<sup>48</sup>

As perfectly described by the EU Brexit chief negotiator, and from the perspective of EU law, a huge web of legal commitments established not only between the EU Member States and the EU, but also among its citizens, is based on EU law. Leaving the EU also implies extraction from this very complex legal system. If the relations between the EU and the UK are to smoothly switch from the EU law settings (with the CJEU as the highest judicial authority) to the realms of international law (with arbitration as a remedy), the rights of individuals based on EU law should be granted the same substance in comparable or identical contexts. It is mostly for this reason that the pure internationalisation of the EU–UK relationships is so difficult to achieve.

Article 163 of the withdrawal agreement settles the principle of dialogue between the CJEU and the highest Courts of the UK:

In order to facilitate the consistent interpretation of this Agreement and in full deference to the independence of courts, the Court of Justice of the European Union and the United Kingdom's highest courts shall engage in regular dialogue, analogous to the dialogue in which the Court of Justice of the European Union engages with the highest courts of the Member States.<sup>49</sup>

A substantively very similar provision can be found in the draft framework agreement between the EU and Switzerland.<sup>50</sup> However, there are no concrete provisions on how such a dialogue should take place.

Second, Articles 164–6, title 2 on *Institutional provisions* and Articles 167–81, title 3 on *Dispute settlement* deal with disputes that might arise between the parties, the UK and the EU, under the withdrawal agreement in international law. From a legal point of view, the above-mentioned institutional provisions are an illustration of a difficult process of extraction of the parties' relations from the

<sup>45</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) art 158.

<sup>46</sup>*ibid*, art 159.

<sup>47</sup>Peers, 'EU Law Analysis' (n 25); Peers, 'EU Law Analysis' (n 10) especially regarding the comment over art 158 of the withdrawal agreement; Steve Peers points out that the procedure of some kind of 'preliminary ruling' embedded in art 158 of the withdrawal agreement differs slightly from the procedure under art 267 Treaty on the Functioning of the European Union (TFEU): 'The Court's jurisdiction is slightly less than it is under Article 267 TFEU in that final courts in the UK are not obliged as a rule to refer cases under this Article, whereas they are under Article 267 TFEU.'

<sup>48</sup>Michel Barnier, 'Speech by Michel Barnier at the 28th Congress of the International Federation for European Law (FIDE)', 26 May 2018 [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_18\\_3962](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_3962) accessed 28 May 2020.

<sup>49</sup>Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) art 163.

<sup>50</sup>Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018 (n 3) art 11.

realms of the EU legal order. Regarding the implementation, application and interpretation of the withdrawal agreement, the EU and the UK agreed to establish a Joint Committee.<sup>51</sup> Furthermore, six additional specialised committees on substantive matters of the agreement are also established under the withdrawal agreement and are composed of representatives from both parties, the EU and the UK.<sup>52</sup> In the draft framework agreement between the EU and Switzerland, the same type of Joint Committee (*Comité mixte horizontale*)<sup>53</sup> as well as specialised committees (*comités sectoriels*) are established.<sup>54</sup> For the EU–Switzerland draft institutional agreement it makes perfect sense to establish specialised committees as the institutional agreement has a very limited scope of application, only referring to five bilateral agreements concluded between the EU and Switzerland.<sup>55</sup> As regards the EU–UK institutional arrangements as settled in the withdrawal agreement, it is noticeable that specialised committees are almost exclusively established in the fields covered by extensive application of EU law (as is also the case for the scope of application of the draft framework agreement between the EU and Switzerland). Regarding the dispute settlement mechanism, the rule is that a solution to a dispute raised under the withdrawal agreement<sup>56</sup> shall be found first within the Joint Committee.<sup>57</sup> If not, one of the parties may request the establishment of an arbitration panel.<sup>58</sup> According to Article 174 of the withdrawal agreement, the arbitration panel cannot decide on any question related to the interpretation of EU law.<sup>59</sup>

Without going into procedural details further settled in Article 174,<sup>60</sup> it is important to note that issues related to the interpretation of questions or concepts coming from EU law should be addressed to the CJEU, as the only jurisdiction competent to interpret EU law.<sup>61</sup> What is interesting for this analysis is that the dispute settlement mechanism under the withdrawal agreement, even for its inter-parties' disputes, still refers to EU law and the jurisdiction of the CJEU for its interpretation. For this very reason, it is impossible for the UK to avoid the jurisdiction of the CJEU.<sup>62</sup> The internationalisation of the relations between the EU and the UK is achieved through the arbitration panel.<sup>63</sup> However, if questions or concepts coming from EU law and relevant for a dispute need to be addressed, the arbitral panel must

<sup>51</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) art 164.

<sup>52</sup> *ibid*, art 165. The following six specialised committees are established: the Committee on Citizens' Rights, the Committee on the Other Separation Provisions, the Committee on Issues Related to the Implementation of the Protocol on Ireland/Northern Ireland, the Committee on Issues Related to the Implementation of the Protocol Relating to the Sovereign Base Areas in Cyprus, the Committee on Issues Related to the Implementation of the Protocol on Gibraltar, and the Committee on the Financial Provisions. According to art 164(5b), the Joint Committee may establish specialised committees other than those established by art 165.

<sup>53</sup> Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018 (n 3) art 15.

<sup>54</sup> *ibid*, arts 3, 10.

<sup>55</sup> *ibid*, art 2. I will further refer to this agreement as the 'draft framework agreement' or 'draft institutional agreement' between the EU and Switzerland to be considered as synonyms.

<sup>56</sup> See also the principle of the exclusivity of procedures in Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (n 9) art 168.

<sup>57</sup> *ibid*, art 169.

<sup>58</sup> *ibid*, arts 170–1.

<sup>59</sup> *ibid*, art 174(1) reads as follows: '1. Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel.'

<sup>60</sup> Larik (n 8); Peers, 'EU Law Analysis' (n 10).

<sup>61</sup> Steven Blockmans and Ramses A Wessel, 'The Influence of International Organisations on the EU and Its Legal Order: Between Autonomy and Dependence' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser Press 2013); Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky European Union Law Issue' (2015) 38 *Fordham International Law Journal* 955; Daniel Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105; Panos Koutrakos, 'More on Autonomy – Opinion 1/17 (CETA)' [2019] *European Law Review* 293; Jan Willem van Rossem, 'The Autonomy of EU Law: More Is Less?' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser Press 2013); Ramses A Wessel and Steven Blockmans, 'Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations – An Introduction' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser Press 2013).

<sup>62</sup> One of the main political requirements in Brexit negotiations; see for a more detailed analysis, Larik (n 8).

<sup>63</sup> Joris Larik, 'Brexit, the Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020) 3 *American Journal of International Law* 1; Jed Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 *Emory International Law Review* 24.

refer questions to the CJEU. In the conclusion to this article, we will see that these kinds of institutional arrangements are usually used for association agreements, or the EEA agreement, or the EU–Switzerland draft framework agreement;<sup>64</sup> in other words, international agreements based on, or strongly linked to, EU law. Also, with regard to the above-mentioned agreements, the rationale is usually an aspiration to have more integration or deeper association with the EU.

## 2.2. EU–UK institutional framework as settled in the TCA

The EU–UK Trade and Cooperation agreement is very close to the EU–Canada Comprehensive Economic and Trade Agreement (CETA)-type agreement, from the institutional and legal framework perspective. If we look at the institutional arrangements as settled in CETA,<sup>65</sup> or the EU–Singapore free trade agreement,<sup>66</sup> no reference to the CJEU is envisaged.<sup>67</sup> According to my reading, it means that these comprehensive free trade agreements are entirely situated under the realm of international law without any reference to the EU law as the law applicable to the bilateral relationship.<sup>68</sup> EU law is only considered as the ‘domestic’ law of one of the parties, as is usually the case in a classical international agreement. Such is the case for the EU–UK TCA. The TCA, as signed by both parties, seems very far from the EU–UK withdrawal agreement in terms of its institutional setting and also very far from institutional provisions proposed under the first version of the draft text on the future partnership agreement between the EU and the UK.<sup>69</sup> The institutional arrangements that one can find in the *Draft text of the Agreement on the New Partnership with the UK*<sup>70</sup> were very similar to those enshrined in Articles 164–6 of the withdrawal agreement, which is not the case for the TCA.

One peculiar characteristic of the TCA is the huge gap between the very elaborate institutional framework and the paradoxically poor substantive content. As Nicolas Levrat points out:

One can therefore infer that the elaborate institutional framework was rather designed to set the stage for future negotiations of sectoral agreements between the EU and the UK, rather than to ensure governance of an already established, legally secured, bilateral relationship. In other words, ‘governance’ under the TCA in the next years will most likely consist in a continuing negotiating exercise aiming at extending the legal provisions governing EU–UK bilateral trade and cooperation.<sup>71</sup>

The complex governance architecture of the TCA consists in effect in the Partnership Council,<sup>72</sup> eight specialised committees and the ‘trade partnership committee’ supervising 10 other ‘trade specialised committees’. Such a decentralised and comprehensive microcosm of committees is designed to establish a system of governance responsible for the monitoring and review of the implementation of the TCA as well as for supplementing future agreements.<sup>73</sup>

The design of the TCA agreement in particular, and the whole idea behind the future relationship between the EU and the UK in general, very much resembles the relationship between the EU and Switzerland, just the other way around. In other words, Switzerland has signed over 100 agreements

<sup>64</sup>For a comprehensive comparative analysis of different institutional settings of EU international agreements, see: Dehousse and Miny (n 13).

<sup>65</sup>Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part 2017 (OJ L 11) 1057.

<sup>66</sup>Free trade Agreement between the European Union and the Republic of Singapore 2019 (OJ L 294) 753.

<sup>67</sup>AG Sharpston, *Opinion 2/15 on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* [2016] ECLI:EU:C:2016:992 (CJEU); *Opinion 2/15 on the conclusions of the Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376 (CJEU); AG Bot, *Opinion 1/17 on the conclusion of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* [2018] ECLI:EU:C:2018:163 (CJEU); *Opinion 1/17 on the conclusion of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* [2019] ECLI:EU:C:2019:341 (CJEU).

<sup>68</sup>According to the CJEU, it should be understood as a ‘fact’: *Opinion 1/17 on the conclusion of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* [2019] ECLI:EU:C:2019:341 (CJEU), paras 130–1.

<sup>69</sup>Draft text of the Agreement on the New Partnership with the United Kingdom, published on the UKTF website on 18 March 2020.

<sup>70</sup>*ibid*, 299–312, 379–80.

<sup>71</sup>Levrat (n 11) 8.

<sup>72</sup>TCA, art INST 1.

<sup>73</sup>*ibid*, art INST 2.

with the EU without establishing a homogeneous institutional framework for them, especially regarding market access agreements. Now, the EU and Switzerland are struggling to conclude an institutional framework agreement that would govern selected market access agreements. Some lessons were thus learned from the Swiss experience; the TCA seems to establish first a governance framework in order to provide it with some substance in future years. For this particular reason the TCA is designed to welcome future supplementing agreements, which will be governed by the TCA and 'form part of the overall framework'.<sup>74</sup>

As regards the dispute settlement mechanism envisaged in the TCA, any party, meaning the EU or the UK, can 'request the establishment of an arbitral tribunal'.<sup>75</sup> Such a tribunal has a competence strictly limited to the dispute settlement between the contracting parties under international law, whose decisions and rulings 'shall be binding on the Union and on the UK'.<sup>76</sup> Furthermore, Article COMPROV 13 states that the TCA and any supplementing agreement

shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.<sup>77</sup>

Such a clear statement excludes any possible teleological interpretation by the CJEU. Not only is the CJEU considered as a 'domestic court' of one of the contracting parties,<sup>78</sup> the TCA also expressly provides that 'for greater certainty, an interpretation of this agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party'.<sup>79</sup>

The legal path towards 'satellisation' of the UK regarding the EU is very complex. Even though the desire of the UK to leave the EU was manifested in the withdrawal agreement, it is very difficult in practical terms for the UK to internationalise its legal relationship with the EU. For this reason, the legal path towards a higher degree of legal internationalisation passes through the three stages: the withdrawal agreement, a transition period and, now, the TCA, which will be supplemented by additional agreements between the EU and the UK.<sup>80</sup>

## EU–Switzerland institutional framework

The case of Switzerland is of particular interest for the UK post-Brexit relationship with the EU. Switzerland is neither an EU Member State, nor an EEA member;<sup>81</sup> it is a signatory to EFTA and has concluded more than 100 bilateral agreements with the EU.<sup>82</sup> Each agreement is very different in terms of scope, signatory parties (the EU and its Member States, or the EU alone) and institutional arrangements. Numerous bilateral agreements grant Switzerland access to the EU internal market. The main issue nowadays for the EU–Switzerland relationship regarding EU internal market access is for Switzerland to agree with the EU on harmonised rules regarding institutional arrangements.<sup>83</sup>

<sup>74</sup>ibid, art COMPROV 2.

<sup>75</sup>ibid, art INST 14(1).

<sup>76</sup>ibid, art INST 29(2).

<sup>77</sup>ibid, art COMPROV 13(1).

<sup>78</sup>ibid, art INST 29(4).

<sup>79</sup>ibid, art COMPROV 13(3).

<sup>80</sup>ibid, art COMPROV 2; Levrat (n 11).

<sup>81</sup>For a comparison between Switzerland and the EEA, see Benedikt Pirker, 'Switzerland and the EEA' in Finn Arnesen, Halvard Haukeland Fredriksen, Hans Petter Graver, Ola Mestad and Christoph Vedder (eds), *Agreement on the European Economic Area* (Nomos Verlagsgesellschaft mbH Co KG 2018); Christine Kaddous, 'Switzerland and the EU: Current Issues, New Challenges and Comparisons with the EEA' in Patricia Van Gene-Saillet and others (eds), *Liber amicorum en l'honneur du Professeur Dusan Sidjanski* (L'Âge d'homme 2017).

<sup>82</sup>Benedikt Pirker and Livia Matter, 'Europarecht: Schweiz-Europäische Union Recent Practice' (2020) 30 *Swiss Review of International and European Law* 75; Christine Kaddous, 'The Relations between the EU and Switzerland' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge University Press 2008).

<sup>83</sup>For more details, see 'Institutional agreement between Switzerland and the EU: key points in brief' [https://www.eda.admin.ch/dam/europa/en/documents/abkommen/InstA-Wichtigste-in-Kuerze\\_en.pdf](https://www.eda.admin.ch/dam/europa/en/documents/abkommen/InstA-Wichtigste-in-Kuerze_en.pdf) accessed 27 April 2021.

The relations between the EU and Switzerland are based on more than 100 bilateral agreements.<sup>84</sup> Even though all of these agreements are very different in terms of their scope and institutional settings, they are almost all based on EU law. In other words, the law implementing the agreements refers to the EU *acquis*. However, most of them are *static* and are based on the EU law relevant at the moment of signature. But EU law is *dynamic* by nature and evolves very quickly, especially in such areas as the internal market. For this particular reason, the EU insists in negotiations with Switzerland over an institutional arrangement, on the *dynamic* incorporation in Swiss law of the evolving EU legislation regarding its internal market. The EU has concluded numerous agreements granting access to the internal market to Swiss operators since Switzerland rejected the EEA agreement by referendum in 1992.<sup>85</sup> Interestingly, the EU did not seek from Switzerland, at the beginning, any comprehensive institutional settings regarding internal market access agreements. Bearing in mind how protective the EU is regarding the autonomy of its legal order,<sup>86</sup> this is unexpected.<sup>87</sup> According to the logic discussed below, as long as the EU's relations with foreign countries are based on EU law or otherwise related to it, an institutional setting is mandatory and the CJEU must have a key role in it.

How did it come about that Switzerland could survive without the usually required institutional arrangements since 1992, while benefiting from generous internal market access through sectorial bilateral agreements? The response is very simple: Switzerland was supposed to become an EU Member State and even notified its membership application to the Council. Thus, during a long period of time, the rationale behind bilateral agreements, and most importantly the absence of a comprehensive institutional setting, was guided by the idea of an eventual accession of Switzerland to the EU, or at least by closer institutional integration conditioning EU internal market access. Only when it became clear that Switzerland was no longer willing to become an EU member (and the application of membership was withdrawn) did the EU start to insist on the conclusion of a comprehensive institutional (also framework) agreement covering all bilateral agreements granting access to the internal market. This institutional agreement has been under negotiation between the EU and Switzerland since 2013.<sup>88</sup> No major bilateral agreements have been concluded between the EU and Switzerland since then, as the EU made any further development of bilateral agreements conditional on the prior conclusion of a framework agreement. A first draft version of the institutional agreement was finalised in November 2018.<sup>89</sup> I will compare provisions of the 'framework' agreement negotiated (but not signed at the moment of the writing) between the EU and Switzerland with already discussed articles of the withdrawal agreement and the TCA.

The institutional agreement negotiated between the EU and Switzerland is also called a 'framework' agreement because it is applicable to a limited list of bilateral agreements qualified as 'granting the internal market access' to Swiss operators. These agreements are listed in Article 2.<sup>90</sup> A compromise was found with Switzerland regarding the principle of homogeneous interpretation of EU law in Switzerland relevant for the agreements listed in Article 2<sup>91</sup> as well as the updating of these agreements in the light of new EU law.<sup>92</sup> The main issue in Swiss–EU relations was to accommodate the principle of EU

<sup>84</sup>For a comprehensive overview of agreements concluded between the EU and Switzerland, see, for example, Kaddous, 'The Relations between the EU and Switzerland' (n 82); Pirker and Matter (n 82).

<sup>85</sup>Pirker (n 81); Kaspiarovich (n 18).

<sup>86</sup>*Opinion 1/91 relating to the creation of the European Economic Area* (n 30); *Opinion 1/92 relating to the creation of the European Economic Area* [1992] ECLI:EU:C:1992:189 (CJEU); *Opinion 1/09 on the creation of a unified patent litigation system* [2011] ECLI:EU:C:2011:123 (CJEU); *Opinion 2/13 on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014:2454 (CJEU); *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158 (CJEU).

<sup>87</sup>Dehousse and Miny (n 13).

<sup>88</sup>I have discussed it in detail in Kaspiarovich (n 18).

<sup>89</sup>Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018 (n 3); Tobler, 'Switzerland-EU' (n 16).

<sup>90</sup>Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018 (n 3) art 2; Agreement on the free movement of persons, Agreement on air transport, Agreement on the carriage of goods and passengers by rail and road, Agreement on trade in agricultural products, Agreement on mutual recognition in relation to conformity assessment, all of them part of the so-called Bilateral I package signed on 21 June 1999.

<sup>91</sup>Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018 (n 3) art 4 on the principle of uniform interpretation.

<sup>92</sup>Tobler, 'One of Many Challenges after "Brexit"' (n 16).

legal autonomy and Swiss sovereignty<sup>93</sup> with regard to a so-called ‘dynamic’ adaptation of Swiss law to new developments of relevant EU law covering the scope of bilateral agreements listed in Article 2. This ‘dynamic’<sup>94</sup> updating of Swiss law is considered as respectful of national constitutional principles, especially regarding the practice of holding referendums.<sup>95</sup>

Article 14<sup>96</sup> of the draft framework agreement establishes the *Comité mixte horizontal* in a manner very similar to the Joint Committee in the EU–UK institutional settings resulting from both the withdrawal agreement and the TCA. The draft institutional agreement also establishes five *comités sectoriels*<sup>97</sup> (one for each agreement listed under Article 2). These committees are also very close to specialised committees in the Brexit context.

Article 15 of the agreement provides for a dispute settlement mechanism. Here, too, in a manner similar to the EU–UK institutional arrangements, a dispute is first discussed in a political forum. Regarding the issue of controversy between the parties, the dispute should be raised before the relevant *comité sectoriel*.<sup>98</sup> If the dispute is not settled in the *comité sectoriel*, the EU or Switzerland may request the establishment of an arbitral tribunal (exactly the same logic as under the EU–UK withdrawal agreement and the TCA).<sup>99</sup> However, the arbitral tribunal established by the parties under the EU–Switzerland framework agreement may request the interpretation of relevant EU law by the CJEU (of course, only if such an interpretation is relevant for settling the dispute). The Court’s judgment is binding on the parties.<sup>100</sup> This is not the case under the TCA. The whole agreement is concluded under the realm of international law without reference to the EU law. It is explicitly stated in the TCA that its provisions do not produce direct effect on individuals.<sup>101</sup> For this very reason, the reference to the CJEU is simply excluded.

The EU–Switzerland framework agreement as a model for the EU–UK post-Brexit relationship has been discussed in the legal literature.<sup>102</sup> However, it seems that the EU is not applying a model-based approach anymore to the relationship with its neighbour countries.<sup>103</sup> The historical logic behind the EU–Switzerland relationship is totally opposite to the EU–UK relationship, even if it might appear that in the current context the UK’s and Switzerland’s situations with regard to the EU are very similar. Both countries are willing to internationalise their relations with the EU as much as possible and keep as few references to EU law as possible in their national legal orders (thus minimising the role of the CJEU in the institutional arrangements they have already negotiated or are currently negotiating with the EU), while of course, in the case of Switzerland, keeping its access to the EU internal market as extensive as possible.

## Conclusion: the complex legal path towards ‘satellisation’ around the EU legal order

As we have seen, it is extremely difficult for a State willing to leave the EU to extract itself from the EU legal order<sup>104</sup> and to internationalise its relationship with the EU. This article analysed the institutional arrangements negotiated, or under negotiation, between the EU and the UK, on the one hand, and between the EU and Switzerland, on the other. The legal arrangements for the UK’s three-step extraction from the EU legal order (withdrawal → transition → TCA) reveal similarities with the institutional setting negotiated under the EU–Switzerland draft framework agreement, which makes the Swiss perspective

<sup>93</sup>Regarding the discussion on autonomy v sovereignty in the EU–UK setting, see Odermatt, ‘How to Resolve Disputes Arising from Brexit’ (n 8) 5–8.

<sup>94</sup>For discussion of the ‘dynamic’ system of updating Swiss law regarding new relevant EU *acquis*, see Tobler, ‘One of Many Challenges after “Brexit”’ (n 16) 589–91.

<sup>95</sup>Accord facilitant les relations bilatérales entre l’Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe, version préliminaire publiée sur le site web du Département fédéral des affaires étrangères de la Suisse le 23 novembre 2018 (n 3) art 14.

<sup>96</sup>*ibid*, art 15.

<sup>97</sup>*ibid*, arts 3, 10ff.

<sup>98</sup>*ibid*, art 15(1).

<sup>99</sup>*ibid*, art 15(2).

<sup>100</sup>*ibid*, art 15(3).

<sup>101</sup>TCA, art COMPROV 16.

<sup>102</sup>Tobler, ‘One of Many Challenges after “Brexit”’ (n 16); Pirker (n 8); Meyer (n 16); Howell (n 15); Crespo and José (n 16).

<sup>103</sup>Levrat (n 11).

<sup>104</sup>Ramses A Wessel, ‘You Can Check out Any Time You like, but Can You Really Leave?: On “Brexit” and Leaving International Organizations’ (2016) 13 *International Organizations Law Review* 197.

relevant also for future negotiations. Considering the institutional arrangements presented above, I have tried to identify some kind of consistency between institutional arrangements negotiated by the EU in different international agreements. The most obvious finding is that depending on the rationale behind an international agreement and the nature of law the agreement is based on, from an EU perspective, variations in the role of the CJEU and/or of an arbitration tribunal make perfect sense and are logically consistent, but that is not the case when viewed from the outside. From an EU law perspective, the most important variable regarding the design of institutional arrangements laid down in an international agreement with a third country is the nature of the law applicable to it. If we position ourselves in the realm of international law, a dispute settlement mechanism based on arbitration or other international or supranational jurisdictions would be perfectly sufficient, independent of the law the international agreement is based on. However, the case law of the CJEU has established that the very *raison d'être* of the EU legal order does not allow the EU to enter into an international agreement creating a supranational jurisdiction that would be competent to interpret EU law.<sup>105</sup> Thus, the dispute settlement mechanism in an international agreement and the role assigned to the CJEU will obviously depend on the nature of the law involved in this agreement (again, according to the EU law perspective). In order to identify the nature of the law involved, we must look at the provisions in every agreement on a case-by-case basis.

From the perspective of general rules of international law, however, inter-parties relations are governed by international law (through an international jurisdiction established by the agreement or an arbitration); and regarding rights granted to individuals under an international agreement, national law will apply and the dispute will be dealt with under the national judicial system (if nothing else is agreed among the parties, for example investor-state dispute settlement under CETA, or the role of the CJEU regarding EU27 citizens' rights under the EU–UK withdrawal agreement, in which case EU law might be applicable and the role of the CJEU extended).

However, on the international stage, the role granted to the CJEU under international agreements concluded by the EU with third states is the result of political insistence by EU negotiators and is not commonly accepted practice under international law. It would be difficult to imagine Switzerland imposing the jurisdiction of the *Tribunal fédéral* over an international agreement negotiated with the EU or any other treaty partner. In other words, considering inter-parties' relations within an international agreement (EU and a third State), international law would normally govern such relations and the role of the CJEU should not be of any particular relevance in the international setting (of course, unless it is agreed by the parties). The CJEU would be considered as a court of one of the contracting parties and it would be perfectly normal for the other contracting party to refuse the jurisdiction of the CJEU over the entire agreement.

The previous sections attempted to identify a systemic approach regarding the role attributed to the CJEU in existing comprehensive agreements concluded by the EU with its neighbours. From an EU perspective, the role that the CJEU should play in a given international agreement will depend on the rationale behind the agreement and the nature of law it is based on. From the perspective of international law, these findings seem completely irrelevant and will only serve as information in relation to negotiations of institutional arrangements with the EU.

As regards 'lessons learned from Switzerland',<sup>106</sup> we can clearly see that any international agreement concluded by the EU with a third State based on EU law cannot be *static*. It must be dynamically adapted to the evolution of EU law. As long as the agreement is based on EU law, it remains very difficult (if not impossible)<sup>107</sup> to avoid the jurisdiction of the CJEU, even in a light form (as seen above). For this particular reason, it is clearly stated in the TCA, from the very beginning, that it is exclusively based on public international law and should be interpreted accordingly.<sup>108</sup> This helped to avoid any reference to the jurisdiction of the CJEU. At the same time, it was rightly pointed out that

<sup>105</sup>See a very interesting reading of this issue by Nicolas Levrat, 'The Implications of Supranationality and Legitimacy: A Legal Perspective' in Mario Telò and Anne Weyembergh (eds), *Supranational Governance at Stake: The EU's External Competences Caught Between Complexity and Fragmentation* (Routledge 2020).

<sup>106</sup>Tobler, 'One of Many Challenges after "Brexit"' (n 16).

<sup>107</sup>For similar considerations regarding the UK's international relations with other countries post Brexit, see: Larik (n 63); Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (n 63); Panos Koutrakos, 'Brexit and International Treaty-Making' [2016] *European Law Review* 1; Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and Its Member States' (2018) 55 *Common Market Law Review* 101.

<sup>108</sup>TCA, art COMP/PROV 13.

the EU–UK relationship will always remain very special<sup>109</sup> in the complex architecture of EU international agreements with different institutional arrangements.

## **Declarations and conflicts of interest**

The author declares no conflicts of interest with this work.

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<sup>109</sup>Odermatt, 'How to Resolve Disputes Arising from Brexit' (n 8).