



Interpreting the EU-UK Trade and Cooperation Agreement before British courts

Allan F. Tatham*

ABSTRACT: The Trade and Cooperation Agreement between the European Union and the United Kingdom entered into force in early 2021. It represents another pillar in the new, post-Brexit relations between the two parties. Despite the express terms of the TCA, domestic courts will still have to deal with the effect of the Agreement in cases before them. The England and Wales Court of Appeal, in two recent judgments, has already given guidance to courts within their jurisdiction in how to approach the use of the TCA in their own decision-making. These judgments represent the first judicial pronouncements on the effect and interpretation of the TCA's provisions in national courts.

KEYWORDS: Brexit – Trade and Cooperation Agreement – international treaties – judicial interpretation – British courts.

* Lecturer in EU Law, Public International Law and International Relations, Law Faculty CEU San Pablo University.

1. Introduction¹

The terms of the Trade and Cooperation Agreement (“TCA”)² were finally announced by the European Union (“EU”) and the United Kingdom (“UK”) on December 24, 2020. It entered into provisional force on January 1, 2021, and permanent force finally on May 1. Although the EU and the UK are the only parties that can use the dispute settlement mechanisms under the TCA, nevertheless national courts (and even the Court of Justice of the European Union, “CJEU”) will undoubtedly be called upon to deal with it in cases before them.

This brief study will look at two decisions of the Court of Appeal of England and Wales (“EWCA”) that provide initial indications as to how these courts might be able to address the effect and interpretation of the TCA in their judgments. The article starts by looking at the legal basis and nature of the TCA (section 2) as well as the rules on interpretation contained in it (section 3). The next part examines in more detail the EWCA decisions and the guidance they have offered to the domestic courts in their future use of the TCA (section 4). It then seeks to look at further possible approaches that UK courts might take with respect to dealing with issues related to the TCA in cases before them (section 5) and then concludes with some short observations (section 6).

2. Legal basis and nature of TCA

Article 1 of the TCA sets out its objective as establishing the basis for a broad relationship between the EU and the UK, “*within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties’ autonomy and sovereignty*”. In this context, the TCA was actually designed to manage a paradox. Rather than promoting convergence between the Union and a third country as in other free trade agreements, it actually tries to manage (progressive) divergence between the EU and the UK since the latter has separated itself from the common customs union and single market while, at the same time, it seeks to promote stability in the parties’ relations.

The present TCA itself is therefore somewhat of a special case.³ Its nature is that of an international trade treaty – created in the image of the EU-Canada Comprehensive Economic and Trade Agreement (“CETA”),⁴ one of the Union’s new generation free trade agreements (“FTAs”)⁵ – but concluded on the basis of

¹ Some of the arguments contained in this article were presented in an earlier form in Allan F. Tatham, “El acuerdo con Reino Unido. Implicaciones para España”, in Documento de Trabajo: Serie Unión Europea y Relaciones Internacionales, no. 108 (Madrid: Real Instituto Universitario de Estudios Europeos, CEU Universidad San Pablo, 2021). The usual disclaimer applies.

² 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 (provisional version, 2020 *O.J.* L 444/14; definitive version, 2021 *O.J.* L 149/10) (“TCA”). This work will use the new article numberings contained in the definitive version.

³ Christina Eckes & Päivi Leino-Sandberg, “The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?”, *Modern Law Review* (2021), doi.org/10.1111/1468-2230.12698.

⁴ Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (“CETA”) (2017 *O.J.* L 11/23).

⁵ These new generation FTAs also include, e.g., Agreement between the European Union and Japan for an Economic Partnership (“JEPA”) (2018 *O.J.* L 330/3); Free Trade Agreement between the European Union and the Republic of Singapore (2019 *O.J.* L 294/3); and Free Trade Agreement

Article 217 Treaty on the Functioning of the European Union (“TFEU”) that provides for the establishment of an association agreement with a third country. Such agreements are traditionally concluded as mixed agreements⁶ because they include provisions concerning areas in which the EU shares competence with its Member States and so require ratification by all 27 States. However, “[i]n view of the exceptional and unique character” of the TCA, the Council of the EU exercised its power to classify it as an “EU only” association agreement.⁷ In this way, the Council exceptionally allowed itself to exercise shared EU competences for certain provisions of the TCA (e.g., social security coordination and aviation traffic rights) and so conclude it⁸ on a unanimous vote⁹ with the consent of the European Parliament (“EP”).

The CJEU recently confirmed this approach in *Governor of Cloverhill Prison*,¹⁰ in which case it observed that agreements (concluded on the basis of Article 217 TFEU) might contain rules concerning all the fields falling within the competence of the EU. Given that the EU shared competence as regards justice and home affairs,¹¹ measures falling within that area – like the surrender mechanism in that case – might therefore be included in an association agreement such as the TCA.¹² In fact, the CJEU recognised¹³ that, in order to ensure an appropriate balance of rights and obligations between the parties to the TCA and to secure the unity of the 27 EU Member States, the TCA had to have a sufficiently wide scope.

Returning to the TCA ratification narrative, due to the lack of time to organise the necessary consent vote from the EP before the end of the transition period on December 31, 2020,¹⁴ the European Commission¹⁵ regarded it as “a matter of special urgency” that the TCA be in place from January 1, 2021, thereby avoiding a legal lacuna. Thus, with the Council’s agreement,¹⁶ the TCA entered into provisional

between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2021 O.J. L 217/6).

⁶ Christine Kaddous, “Les accords mixtes”, in *Les accords internationaux de l’Union européenne*, 3rd edn., ed. Niki Aloupi *et al.* (Brussels: Editions de l’Université de Bruxelles, 2019), 301, 302-03, 306-08.

⁷ As long as an international agreement does not cover areas coming under exclusive Member State competence, it could then be concluded as an EU-only agreement. For this to happen, the Council of the EU (bringing together the Member States) would have to decide to exercise the EU’s shared competences, thereby pre-empting the Member States: Arts. 2(2) and 3(2) TFEU.

⁸ Council Decision (EU) 2020/2252 on the signing, on behalf of the Union, and on provisional application of 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 (2020 O.J. L 444/2).

⁹ Art. 218(6)(a)(i) TFEU. Association agreements require unanimity in the Council: Art. 218(8), second paragraph.

¹⁰ Judgment *SN, SD, Governor of Cloverhill Prison (intervening)*, case C-479/21 PPU, ECLI:EU:C:2021:929.

¹¹ Art. 4(2)(j) TFEU.

¹² Case C-479/21 PPU, *Governor of Cloverhill Prison*, note 9, paras. 68-69.

¹³ *Ibid.*, para. 66.

¹⁴ Art. 126, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019 O.J. C 384 I/1) (“WA”).

¹⁵ The European Commission had previously said it would not seek provisional application of agreements prior to EP consent except for urgent or technical reasons: Andrei Suse and Jan Wouters, “The Provisional Application of the EU’s Mixed Trade and Investment Agreements”, *Working Paper Leuven Centre for Global Governance Studies*, no. 201 (2018): 10-11, https://ghum.kuleuven.be/ggs/publications/working_papers/2018/201suse.

¹⁶ Art. 218(5) TFEU.

effect,¹⁷ pending the EP's democratic scrutiny and ratification. The EP had intended to grant its consent by the end of February¹⁸ but the EU-UK Partnership Council (the highest TCA body) postponed it to the end of April.¹⁹ Even this scheduling became doubtful because of the UK's unilateral extension in early March of the grace period for adaptation to the new customs rules and border controls between Great Britain and Northern Ireland.²⁰ In retaliation, the EP announced on March 4 its refusal to grant any consent until this matter were resolved, thereby potentially pushing the deadline beyond the end of April.²¹ Having addressed these problems, the EP finally gave its consent to the TCA on April 27,²² some four months after the UK had made it part of domestic law on December 30, 2020 through the European Union (Future Relations) Act 2020 ["EU(FR)A 2020"].²³ After the Council's conclusion of the TCA,²⁴ it accordingly entered into full force on May 1, 2021.

3. The TCA provisions on interpretation and effect

The provisions of the TCA that deal with its effect and its interpretation need to be seen within the context of the UK's "red lines", viz., its demand during

¹⁷ Under international law, treaties can be provisionally applied: Art. 25 Vienna Convention on the Law of Treaties, May 23, 1969: U.N.T.S., v. 1155, 331 ("VCLT"). In fact, the EU has previously done so on a number of occasions: Merijn Chamon, "Provisional application of treaties: The EU's contribution to the development of International Law", *European Journal of International Law*, v. 31, no. 3 (2020): 883-915.

¹⁸ The Commission foresaw TCA application on a provisional basis "for a limited period of time" until February 28, 2021 and thereby implied EP consent by that date: European Commission, "Questions & Answers: EU-UK Trade and Cooperation Agreement", December 24, 2020, 2, accessed December 14, 2021, https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532. However, on December 28, the EP's Conference of Presidents (Political Group leaders) indicated that this might not take place until during the March plenary session: European Parliament, "European Parliament to scrutinise deal on future EU-UK relations", *Press Release*, December 28, 2020, accessed December 14, 2021, <https://www.europarl.europa.eu/news/en/press-room/20201228IPR94701/european-parliament-to-scrutinise-deal-on-future-eu-uk-relations>.

¹⁹ On February 23, 2021, the EU-UK Partnership Council decided, at the EU's request, to extend the provisional application until April 30, 2021 to allow sufficient time to complete the legal-linguistic revision of the agreements in all 24 languages: Council of the EU, "EU-UK trade and cooperation agreement: Council requests European Parliament's consent", *Press Release*, February 26, 2021, accessed December 14, 2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/02/26/eu-uk-trade-and-cooperation-agreement-council-requests-european-parliament-s-consent/>.

²⁰ Shawn Pogatchnik, "Soiled deal: UK defies EU ban on British dirt on plants shipped to Northern Ireland", *politico.eu website*, March 5, 2021, accessed December 14, 2021, <https://www.politico.eu/article/soiled-deal-uk-defies-eu-ban-on-british-dirt-on-plants-shipped-to-northern-ireland/>.

²¹ Hans von der Burchard, "MEPs postpone setting date to ratify Brexit deal amid Northern Ireland row", *politico.eu website*, March 4, 2021, accessed December 14, 2021, <https://www.politico.eu/article/meps-postpone-setting-date-for-brexit-deal-ratification/>.

²² European Parliament, "Parliament formally approves EU-UK trade and cooperation agreement", *Press Release*, April 23, 2021, accessed December 14, 2021, <https://www.europarl.europa.eu/news/en/press-room/20210423IPR02772/parliament-formally-approves-eu-uk-trade-and-cooperation-agreement>.

²³ European Union (Future Relations) Act 2020, c. 29 ("EU(FR)A 2020").

²⁴ Council Decision (EU) 2021/689 on the conclusion, on behalf of the Union, of 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (2021 *O.J. L* 149/2).

the TCA negotiations to exclude the jurisdiction of the CJEU from reviewing, interpreting or applying the Agreement.²⁵ In this respect, the UK was ultimately successful in securing this exclusion.

The TCA is an international treaty and thus subject to interpretation by the rules of international law by each party. According to Article 4(1) TCA, then, the provisions of the TCA and any supplementing agreement are to be interpreted in good faith, in accordance with their ordinary meaning in their context, as well as in light of the object and purpose of the relevant agreement, in accordance with customary rules of interpretation of public international law. These latter rules include those codified in the 1969 Vienna Convention on the Law of Treaties (“VCLT”).²⁶

Neither the TCA nor its supplementing agreements create a *prima facie* obligation to interpret their provisions in accordance with the domestic law of either party²⁷ nor does it mean that an interpretation of such agreement given by the courts in the EU (including the CJEU) bind the UK courts or vice versa.²⁸ However, since there would be many cases in the future in which a British court would have to determine the meaning of domestic law by reference to the TCA, the EU(FR)A 2020 provides in section 30 that such courts “*must have regard to Article [4] of the Trade and Cooperation Agreement (public international law) when interpreting that agreement or any supplementing agreement.*” The EU(FR)A 2020 thus cross-refers to the TCA which itself incorporates the VCLT.

In addition, the direct effect of the TCA and the supplementing agreements is expressly excluded.²⁹ As a result, individuals and companies looked to be excluded from gaining directly effective rights under the TCA that could be litigated in their national courts. Nevertheless, although the EU(FR)A 2020 implemented a substantial portion of the TCA into domestic law, where any gaps remain between the two, section 29(1) of the EU(FR)A 2020 provides: “[E]xisting domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement . . . so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

There is accordingly a clear attempt by both parties to try to prevent the creation by judicial fiat of rights for individuals and companies that can be enforced in the national courts in the UK and the EU. Yet the EU(FR)A 2020 does not leave litigants in British courts totally bereft of protection as regards the TCA.

²⁵ Even before the negotiations for the WA began back in 2017, the UK insisted that, whatever trade agreement were eventually to be concluded, the CJEU would have no jurisdiction to review or interpret it: Allan F. Tatham, “El largo y sinuoso camino: un análisis de la negociación del Brexit desde la perspectiva británica”, *El Cronista del Estado Social y Democrático de Derecho*, no. 84-85 (2020): 28, 31-32. On the TCA negotiations, see Simon Usherwood, “Our European Friends and Partners? Negotiating the Trade and Cooperation Agreement”, *Journal of Common Market Studies* (2021), doi.org/10.1111/jcms.13238.

²⁶ VCLT, note 16.

²⁷ Art. 4(2) TCA.

²⁸ Art. 4(3) TCA.

²⁹ Art. 5(1) TCA. Article 5(2) TCA also precludes either party from establishing, under domestic law, a right of action against the other party in case that party has allegedly breached the TCA or any future supplementing agreement.

4. Judicial interpretation of the TCA in the UK

So far, even with the few decisions made in 2021, it is possible to discern the British courts' determination to use retained EU law and retained EU case law in resolving cases before them,³⁰ in order to deal with the new legal arrangements under both the WA and the TCA and their related domestic legislation. Given the importance of the matter, Lord Justice Green ("Green LJ") was at the forefront of discussions in the England and Wales Court of Appeal in providing guidance to other UK courts, *inter alia*, on the use of the TCA in the interpretation of national legal rules. His *obiter dicta* (non-binding but nevertheless persuasive statements) on the TCA are to be found in *Lipton v. BA City Flyer Ltd.*³¹ and *Heathrow Airport v. H.M. Treasury.*³²

a) Background to the two Court of Appeal cases

Looking at these cases in turn, in that of *Lipton*, delivered on March 30, 2021, the claimant sought compensation under Regulation (EC) 261/2004³³ for the cancellation of his flight from Milan to London in January 2018. The airline claimed that no compensation was due because the captain had become ill while he was off-duty and it was held at first instance that this event was covered by the "extraordinary circumstances" exception within the meaning of Article 5(3) of the 2004 Regulation. Before the Court of Appeal, the airline lost and was ordered to pay compensation.

The focus of the Court of Appeal's decision was its construction of the 2004 Regulation and its guidance on how British courts were to approach the application of retained EU law,³⁴ after the full Brexit.³⁵ Nevertheless, it also contains some initial guidance for UK judges in respect of the applicability of other instruments, including the TCA.

The subsequent *Heathrow Airport* case was concerned with the UK Government's decision to abolish most "duty free" (VAT-exempt) shopping as of 1 January 2021. Such decision had been taken as part of a review of fiscal and customs arrangements following the "full Brexit" on that date.³⁶ The decision had affected major British

³⁰ See, e.g., *Open Rights Group, R. (On the application of) v. Secretary of State for the Home Department* [2021] EWCA Civ 800; *Secretary of State for Work and Pensions v. Hughes* [2021] EWCA Civ 1093; *Sansó Rondón v. LexisNexis Risk Solutions UK Ltd.* [2021] EWHC 1427 (QB); and *Murphy v. H.M. Revenue and Customs* [2021] EWHC 1914 (Admin).

³¹ *Lipton v. BA City Flyer Ltd.* [2021] EWCA Civ 454.

³² *Heathrow Airport Limited v. Her Majesty's Treasury* [2021] EWCA Civ 783.

³³ Regulation (EC) no. 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights: 2004 O.J. L 46/1.

³⁴ According to the European Union (Withdrawal) Act 2018, c. 16, sections 2 and 7, "retained EU law" consists of all EU law in force on the day before Brexit and continues to be, or forms part of, domestic law by virtue of the Act. It may accordingly be later amended, replaced or repealed by the UK Parliament. Such retained EU law also includes, by section 6(7), retained case law, comprising both (a) retained domestic case-law being any principles decisions of a UK court or tribunal that had applied EU law before Brexit; and (b) retained European case-law being any principles and decisions of the CJEU as they have effect in EU law before Brexit. For further discussion, see Allan F. Tatham, "The constitutional challenges that the Brexit negotiations have created in the United Kingdom: An overview", *Revista de Derecho Comunitario Europeo*, v. 59 (2018): 263, 281-85.

³⁵ However, it is unclear from the judgment why it was necessary to do so given that the events in question had occurred in 2018, i.e., before the end of the 2020 transition period.

³⁶ The WA finally entered into force on January 31, 2020, the date on which the United Kingdom formally left the EU. Under its terms (Arts. 126-132 WA), however, from February to December

airports and retailers that sold duty free items from airport lounges as well as certain high street retailers selling popular luxury branded items often to wealthy visitors from such places as China, Southeast Asia and the Gulf.

The claimants in *Heathrow Airport* were companies from among this group of airports and retailers that challenged the Government's decision on abolition. One of the grounds for their challenge was based on the TCA. They claimed that the Government should have factored into its consideration of removing duty-free status of the relevant goods, the existence (or possible existence) of such a free trade agreement. Had it done so, then they argued the Government's analysis would have been altered and it would have had more options open to it, some of which would have been far more favourable to the claimants. The Government's omission to taking into account the TCA thus represented a serious failure on its part to consider a relevant consideration.

In its decision in *Heathrow Airport*, delivered on May 21, 2021, the Court of Appeal held that the claims failed and that the existence of otherwise of the TCA did not alter its analysis. When the decision had been taken, it had been completely rational for the Government not to take into account the TCA that was still being negotiated at that time and might never have entered into force. Moreover, it was also a matter for the Government's discretion not to decide to re-open its previous decision to abolish duty-free shopping once the TCA had been negotiated and entered into force. In addition, although the TCA addressed a variety of matters relating to taxation, it did not address rates of tax. The power to set rates of tax was an issue that the Government had evidently concluded was not to be the subject of agreement with the EU.

b) The considered approach of Green LJ

Taking the judgments of Green LJ in both cases, it is possible to expound and analyse his guidance on how courts in the UK might be able to approach dealing with the TCA in cases before them.

While acknowledging that *prima facie* the TCA did not have direct effect,³⁷ Green LJ observed that that provision was without prejudice³⁸ as “*to how the UK, quite separately, decides to implement the TCA as a matter of domestic law and as to how domestic implementing laws might then be invoked for instance as a basis for the bringing of claims in the courts and tribunals*”. Moreover, the TCA³⁹ addressed a different situation and so prevented the UK and the EU – as the two parties to the treaty – from adopting laws that would enable any person to bring proceedings against the other party for breach of the TCA. In other words, UK domestic law could not provide that the EU would be able to be sued in the British courts for breach of the TCA and, equally, the EU could not provide that the UK could be sued in the courts of the EU and its Member States.⁴⁰

However, he noted that the UK Parliament had implemented the TCA by means of the EU(FR)A 2020,⁴¹ the Long Title to which included the following

2020, the UK was in a transition period, during which time British courts still had to apply, interpret and be bound by EU law and the CJEU rulings and interpretations as if the UK were still a full Member State.

³⁷ Art. 5(1) TCA.

³⁸ *Heathrow Airport*, note 31, para. [224].

³⁹ Art. 5(2) TCA.

⁴⁰ *Heathrow Airport*, note 31, para. [225].

⁴¹ *Lipton*, note 30, para. [76].

phrase: “*An Act to make provision to implement and make other provision in connection with, the Trade and Cooperation Agreement ...*”. The EU(FR)A contains different parts relating to a wide variety of subject matter covered by the TCA and so included a substantial portion of the subject matter of the TCA.⁴² Since not every provision of the TCA was specifically implemented, section 29 of the EU(FR)A 2020 provided a “sweeping up mechanism”.⁴³

That section did not lay down a principle of purposive interpretation⁴⁴ but was more fundamental and amounted to “*a blanket, generic, mechanism to achieve full implementation, without the need for any further parliamentary or other executive intervention*”.⁴⁵ As such, it transposed the TCA into domestic law, expressly and mechanistically changing domestic law in the process.⁴⁶ Green LJ thus noted that applying section 29 to domestic law on a particular issue now meant what the TCA said it meant, regardless of the language used and further stated:⁴⁷ “*it provides that domestic law (as defined) ‘has effect ... with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement’.* The phrase “has effect” is important. Parliament has mandated a test based upon the result or effect. The phrase “has” makes clear that this process of modification is automatic i.e. it operates without the need for further legislative intervention. The concept of modification is interpreted broadly in section 37(1) to “include” (and therefore is not limited to) amendment, repeal or revocation. Section 29 is capable of achieving any one or more of these effects.”

This process, under section 29, of automatic modification of domestic law by the TCA was, however, subject to two limitations:⁴⁸ (i) it applied only so far as required, i.e., it did not modify a domestic law that, otherwise, was already consistent with the TCA; and (ii) it covered modifications “*necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement*”. This was necessary since, under the TCA, the parties have bound themselves to a variety of international law obligations beyond the TCA itself, including (as noted earlier) provisions of the agreements under the WTO that are incorporated by express reference.⁴⁹

Green LJ further sketched out the way⁵⁰ in which British courts might approach their tasks of interpreting and applying the TCA in cases before them. As regards the principles of interpretation, the UK Parliament had already clearly instructed domestic courts and tribunals as to what principles were to be applied through

⁴² For example, EU(FR)A 2020, section 8, on passenger and vehicle registration, empowers the UK Secretary of State for Transport to disclose vehicle registration data in accordance with specified provisions of the TCA. This provision thus incorporates the TCA by cross reference: *Lipton, ibid.*, para. [76].

⁴³ *Lipton, ibid.*, para. [77].

⁴⁴ Such as that found in the UK Human Rights Act 1998, c. 42, section 3(1), which states: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. These rights are to be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, E.T.S., no. 5.

⁴⁵ *Heathrow Airport*, note 31, para. [227]; *Lipton*, note 30, para. [78].

⁴⁶ *Heathrow Airport, ibid.*, para. [228]. In *Lipton, ibid.*, Green LJ had rather used the word “implicitly”.

⁴⁷ *Heathrow Airport, ibid.*; and, similarly, earlier in *Lipton, ibid.*

⁴⁸ *Heathrow Airport, ibid.*, para. [230]; *Lipton, ibid.*, para. [80].

⁴⁹ For example, Art. 19 TCA (National treatment on internal taxation and regulation) incorporates Art. III GATT into the TCA; and Art. 20 TCA (Freedom of transit) likewise incorporates Art. V GATT.

⁵⁰ *Lipton*, note 30, para. [82].

EU(FR)A 2020. In fact, section 30 of the EU(FR)A 2020 cross-referred to the TCA that, as already noted above, itself incorporates the VCLT.

c) The three-step approach adopted by Green LJ

Consequently, Green LJ set out the three-step test to be used when applying EU(FR)A 2020, section 29.⁵¹ The court in question first had to identify the relevant domestic law. Then, as a second step, it needed to determine whether the domestic law was the same as the corresponding provisions of the TCA: if that were the case, then under EU(FR)A 2020, section 29(1) there would no need to apply the “*automatic read-across*”. If, however, there were any inconsistency or daylight or a lacuna, then the inconsistent or incomplete provision would be amended or replaced by the automatic read across of the TCA provision, and the gap would thus be plugged. Following Green LJ’s approach in *Lipton* and *Heathrow*, the UK courts are now in a position to use the TCA where domestic law is deficient.

5. Further possible approaches by the UK courts

The guidance proposed by Green LJ opens up further avenues of exploration as to the ability of domestic courts to use the TCA in their decisions. Such *obiter dicta*, despite the express wording limiting its effect and interpretation contained in Articles 4 and 5 TCA, supports the argument that interpretation of the TCA will need to be more nuanced in practice.

For example, the EU’s other new generation trade agreements expressly refer to the use of the reports of the WTO panels and the AB to assist in their interpretation.⁵² In the TCA, however, while there is no express provision to that effect, neither is there any actual prohibition from using interpretations made by those WTO bodies or even by the CJEU, in order to determine the meaning of the TCA. Due to their close drafting alignment with EU and WTO provisions, some TCA clauses actually lend themselves to being interpreted in line with previous rulings of the CJEU or reports of WTO panels and AB, e.g., on competition policy and state aids (subsidies). In practice,⁵³ then, national courts (in the UK and the EU) and even TCA arbitration panels⁵⁴ – conscious of maintaining legal certainty and mindful of the dynamic nature of the evolving relations under the Agreement – would therefore be likely to obtain guidance from WTO reports and CJEU decisions as inspiration for interpreting the same or similarly worded TCA provisions.

Even the fear that interpretative approaches by courts in the respective systems might lead to profound differences in understanding of TCA provisions, may be somewhat exaggerated. The CJEU’s approach to judicial interpretation⁵⁵ has, since its seminal ruling in *Van Gend en Loos*,⁵⁶ looked to “the spirit, the general scheme and the wording” of the Treaty provision concerned. This approach is also consonant

⁵¹ *Ibid.*

⁵² For example, CETA, note 3, Art. 29.17; and JEPa, note 4, Art. 21.16.

⁵³ Allan F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Leiden: Martinus Nijhoff, 2009), 32-40.

⁵⁴ Arts. 739-745 TCA.

⁵⁵ Koen Lenaerts, “Interpretation and the Court of Justice: a basis for comparative reflection”, *International Lawyer*, v. 41, no. 4 (2007): 1011, 1016-17.

⁵⁶ Judgment *Van Gend en Loos v. Neth. Inland Revenue Admin.*, case 26/62, ECLI:EU:C:1963:1, 12.

with that set out under Article 31(1) VCLT and which is itself expressly required for interpretation by courts in both parties under Article 4(1) TCA.

British courts, for their part, where the interpretation of an international treaty is relevant at the domestic legal level, will therefore have to undertake themselves.⁵⁷ The approach of the English courts – when interpreting UK legislation designed to give effect to domestic legislation that implements international treaties – are to construe that legislation so far as possible in order to make it compatible with the treaty.⁵⁸ This principle of consistent interpretation⁵⁹ is based on a strong presumption that the UK Parliament intended to legislate consistently with its international obligations.⁶⁰ Moreover, if the provisions of a particular treaty article are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the treaty looking at it, as a whole, by reference to its language as set out in the relevant UK legislation.⁶¹

The process of treaty interpretation by British courts should take account of the fact that:⁶² “*The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law*”. Thus, it ought to be interpreted as:⁶³ “*unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance*”.

In view of the above approach of the British courts, it should come as no surprise that they regularly refer to the VCLT in dealing with treaty interpretation in cases before them.⁶⁴ Consequently, it could be argued, that the courts in both the EU and the UK – based on the broad nature of their continued and developing relationship under the terms of Article 1 TCA – are enjoined to interpret the TCA, via Articles 31 and 32 VCLT, with this purpose in mind.

This point is also supported by the approach to treaty interpretation by international courts and tribunals⁶⁵ that will, in an appropriate case, interpret an international treaty “not [as] static” but as “open to adapt to emerging norms of international law”.⁶⁶ They will endeavour to place a factual situation, as it has developed since the inception of a treaty, “*within the context of the preserved and developing*

⁵⁷ See, e.g., *Occidental Exploration Production Co. v. Republic of Ecuador* [2005] EWCA Civ 1116.

⁵⁸ The similarities to the CJEU’s own principle of indirect effect or consistent interpretation are obvious: Judgment *Marleasing SA v La Comercial Internacional de Alimentación SA*, case C-106/89, ECLI:EU:C:1990:395, paras. 7-8.

⁵⁹ See Arden LJ in *Commissioners for H.M. Revenue and Customs v. IDT Card Services Ireland Ltd.* [2006] EWCA Civ 29, para. [75].

⁶⁰ See the UK Supreme Court in *R. (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16, Lord Carnwath, para. [115]; Lord Hughes, para. [137]; and Baroness Hale, paras. [239]-[240].

⁶¹ Lord Diplock in the House of Lords decision in *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 279.

⁶² Lord Diplock, *ibid.*, 281-282; and Lord Scarman, *ibid.*, 293.

⁶³ As Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd.* [1987] A.C. 141, 152.

⁶⁴ See, e.g., *Jindal Iron and Steel Co. Ltd. v. Islamic Solidarity Shipping Co. Jordan Inc.* [2004] UKHL 49, para. [20]; *Warner v. Scapa Flow Charters* [2018] UKSC 52, paras. [14]-[17]; *Moohan v. Lord Advocate* [2014] UKSC 67; and *R. (on the application of Tag Eldin Ramadan Bashir) v. Secretary of State for the Home Department* [2018] UKSC 45.

⁶⁵ *Tag Eldin Ramadan Bashir*, *ibid.*, para. [95].

⁶⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] I.C.J. Rep. 7, para. 112.

treaty relationship, in order to achieve its object and purpose in so far as that is feasible".⁶⁷ The Arbitral Tribunal in the *Iron Rhine Railway Arbitration Award*⁶⁸ used this approach in support of the proposition that "an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule". It also referred⁶⁹ to the "principle of effectiveness" in support of a "*dynamic and evolutive approach to a treaty*." Adoption of this approach to judicial interpretation of the TCA on both sides of the Channel and the Irish Sea, would likely have the effect of slowing down the process of divergence between the two systems.

6. Conclusion

Green LJ's approach to interpreting the TCA as a guide for courts and tribunals in the UK will ensure that, at least in the short to medium term, a combination of that treaty together with section 29 of the EU(FR)A 2020 will have the effect of ensuring a seamless application of the relevant law, without resort to executive or parliamentary intervention. His practical advice must necessarily be considered within the context of the evolutionary or dynamic character of the relations between the UK and the EU. Nevertheless, the approach for which he advocated in the UK legal system(s) seems to be subject to temporal limitations. Even Green LJ noted,⁷⁰ the task of the EWCA in *Lipton* had been relatively straightforward because, as of the date of its judgment, the new, post-Brexit, legal regime had been in place for only a few months and nothing of relevance in the pertinent CJEU case law had changed. The analysis would, however, inexorably alter over the coming years:⁷¹ "As time moves on, and the case law of the CJEU evolves, then the differences between the current state of EU law and that which the Court is to take account of might become more accentuated. At that stage the analysis might become more complex".

His understanding of that difference also lies in his recognition of the dichotomy of the courts in the UK and in the EU in how they interpret the TCA, under the terms of the VCLT. While he sets out how the UK courts can respond and deal with legal issues arising under the TCA for the UK, his approach does not carry any weight beyond those shores. So that, when the CJEU is seised of a case from a national court dealing with the TCA, it may interpret it along its own lines without incurring responsibility for the UK. In this respect, the exclusion of the principle of direct effect from the TCA may accordingly become more nuanced. Only with the passage of time will it become clearer how any differences over the meaning of the TCA will come to impact on the effectiveness of that Agreement in practice.

⁶⁷ *Ibid.*, para. 133.

⁶⁸ Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, *Reports of International Arbitral Awards*, v. XXVII (2005): 35, para. 80. The award is dated May 24, 2005 and was made by a distinguished Arbitral Tribunal chaired by Dame Rosalyn Higgins.

⁶⁹ *Ibid.*, para. 84.

⁷⁰ *Lipton*, note 30, para. [83].

⁷¹ *Ibid.*