BEYOND PROTOCOL 3: A RULE-BOOK FOR EU/CHANNEL ISLANDS TRADE

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The ending of Protocol 3, the introduction of a new UK–Crown Dependencies customs union and the extension of WTO membership are landmark developments in the trading relationships of the Bailiwicks of Jersey and Guernsey, as is their participation in the new UK–EU Trade and Cooperation Agreement. As the UK embarks on its own international trade agenda, as an ex-EU member state, the Channel Islands must identify new opportunities, build on their existing relationships, and ensure that their constitutional positions are defended, and international interests promoted.

Introduction

1 1 January 2021 marked the beginning of a new chapter in the history of the Channel Islands. The Brexit "transition period" (provided for in the UK–EU Withdrawal Agreement—"the WA") had come to an end. The UK's new relationship with the EU, and that of the Channel Islands, was now set out in the UK–EU Trade and Cooperation Agreement ("the TCA[1]"), which had been announced on the afternoon of 24 December 2020. The nature and detail of the final text was the result of intense negotiations which had begun earlier in the year. The UK's relationship as a member state under the EU treaties and superintended by the Commission and Court of Justice was replaced by a free trade agreement ("FTA") governed by international law. The Crown Dependencies' relationships with the EU— hitherto governed by Protocol 3 to the UK's Act of Accession— would, with their consent, similarly be underpinned by the applicable provisions of the TCA.

2 New Year's Day 2021 also saw a customs union between the UK and the Crown Dependencies come into being and the extension of the UK's membership of the World Trade Organization to the Channel

[1]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf (accessed 26 April 2021).

Islands. The UK Government intends to pursue FTAs with other countries and trade blocs around the globe. In many, if not all, cases, the Channel Islands will be seeking inclusion in such FTAs when it is in their interests to do so.

3 This article examines the political and legal background to the Channel Islands' new trade rule-book, reviews the TCA's key provisions so far as they apply to the Channel Islands, and highlights those areas where the Channel Islands need to remain vigilant to protect and promote their interests within the new trading context.

Background: Protocol 3 to the UK's Act of Accession 1972

4 Article 355(5)(c)[2] of Treaty on Functioning of the EU (TFEU) provided that the EU Treaties applied to the Channel Islands and the Isle of Man only to the extent necessary for the implementation of Protocol 3. Protocol 3 formed part of the UK's Act of Accession 1972 and provided that EEC measures (later EC and eventually the EU) relating to customs matters, quantitative restrictions, and trade in agricultural products applied to the Islands. This meant that, subject to Protocol 3's requirements and the duty not to discriminate between EU persons,[3] the Islands remained free to pursue their own policies as third countries (including for all aspects of services).

5 In Jersey, the States Assembly implemented the new arrangements by enacting the European Union (Jersey) Law 1973 which brought into effect Protocol 3 and gave legal effect to the rights and obligations of the Island under the EEC treaties. Similar legislation was enacted in Guernsey: the European Communities (Bailiwick of Guernsey) Law 1973, following the approval of the Protocol 3 relationship by the States of Guernsey, the States of Alderney, and the Chief Pleas of Sark in 1971.

6 Whilst the provisions of Protocol 3 were relatively concise, interpreting their application over the years became increasingly challenging. Throughout its 47 years, Protocol 3 was never amended to reflect changes to the EEC/EC/EU institutional models and their competencies. Particularly after the introduction of the Maastricht Treaty, which supported the introduction of the single market, the increased areas of closely related competencies which fell to the EU institutions made it more difficult to discern which aspects of EU law were directly applicable in the Channel Islands. Nonetheless, it

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E355 (accessed 26 April 2021).
[3] See art 4 of Protocol 3.

remained the cornerstone of the Channel Islands' customs and goods relationship with the EU from the early 1970s onwards.

A new foundation: the UK–Crown Dependencies customs union

7 The 2016 UK vote to leave the EU in the Brexit referendum and the subsequent evolution of Brexit policy by HM Government posed an array of policy, legal and operational questions that the Channel Islands would need to answer. This included fundamental questions over their future relationship with the UK as their most important trading partner. Royal Charters[4] and constitutional histories had underpinned these trading relationships for centuries and the Channel Islands were keen to ensure that the UK's withdrawal from the EU did not adversely affect UK–Channel Islands trade or diminish their ancient rights and privileges.

8 Therefore, after the Brexit referendum in 2016, and well before the TCA negotiations began, the Crown Dependencies and the UK looked to enhance the continued free movement of goods by the formal establishment of the UK–CD customs union ("the customs union"). This was, in part, a move anticipated to protect Crown Dependency positions in an unknown trading future.

9 The customs union was negotiated by all three Crown Dependencies and the UK, and finally concluded by three arrangements ("the customs arrangements")[5] signed in 2018. It is against this backdrop that the TCA—and future FTAs—in the Islands in relation to goods must be understood. The customs arrangements expressly recognize that the UK and the CDs are separate customs territories which retain autonomous control of their respective operations and legislation. However, they also provide that customs law, regulations and practices should correspond in several respects to enable the continuation of free trade between the members. In other words, the customs solutions of the different jurisdictions need not mirror each other, but rather there

[4] The Royal Charters were granted by successive English, later British, sovereigns and conferred several rights on Islanders, including their autonomy, their tax sovereignty and the right to export goods that are grown, produced or manufactured in the Islands to the UK. These trade rights are reflected in Customs and Excise (General Exemptions) Act 1979 and by earlier legislation going back to the 18th century. Though there has been no need to enforce the Charters for some considerable time, the rights in the Charters remain in effect. See Bailhache, "Customs matters and the Royal Charters" (2019) 23 *Jersey & Guernsey Law Review* 66

[5] https://www.gov.uk/government/publications/customs-arrangements-with-the-crown-dependencies (accessed 26 April 2021).

should be an equivalence of outcome—a "correspondence" of effect—which both respects the autonomy of member jurisdictions and accords to the relative needs and sizes of the Islands. It is the operation of this balance, both practically and legally, which will be of particular importance to the TCA and its continuing implementation in the Channel Islands; the same will be of equal importance to any future FTAs in which the Channel Islands take part.

10 The key elements of the UK–CD customs union, or indeed any other customs union, are the elimination between its members of tariffs or quotas on imports and exports, and the adoption of a common external tariff in relation to third country (non-member) trade. This means that free movement of goods between the Crown Dependencies and the UK is legally guaranteed without requirements to demonstrate the origin of goods the Islands export to the UK. It also requires the Crown Dependencies to apply the UK's global tariff or preferential rates for qualifying goods in accordance with UK-signed FTAs, such as the "zero tariffs, zero quotas" agreed in the TCA.

11 As the UK–CD customs union begins to function in its new international context, "business as usual" requirements will likely increase resource pressures, for instance, as regards origin assessments, customs valuation, and compliance with various regulatory requirements (although it is important to note that the customs arrangements do not cover regulatory matters). The customs union will also need to ensure continuing respect for the autonomy of its members. In the case of the Channel Islands, express provision is made in the preamble to confirm that they build on, but do not replace, the existing rights of access into the UK market provided for in the Royal Charters. It is pertinent to note that the continuation of the respective arrangements and their implementation remain within each jurisdiction's control, as does the ability to terminate.

An international framework: World Trade Organization extension

12 In readiness for life after Protocol 3, and bearing in mind the UK's stated international trade policy aspirations, the Channel Islands resumed engagement with HM Government about the extension of WTO membership. The Isle of Man had enjoyed extension of the WTO agreements from 1997 but, for the Channel Islands, WTO involvement had never progressed beyond inclusion in the original General Agreement on Tariffs and Trade (GATT) in 1948. The discussions were ultimately successful and, like the customs

arrangements, the UK's extension of the WTO agreements[6] to the Channel Islands came into effect immediately after the end of the transition period.

13 The extension of the UK's membership of the WTO to the Channel Islands means that the entirety of the core WTO agreements, including GATT, the General Agreement on Trade in Services (GATS), the Agreement on Trade-related Intellectual Property Measures (TRIPS) and the Agreement on Trade-related Investment Measures (TRIMS), all now apply. Consequently, the Channel Islands operate from 2021 within a complex rules-based trading system, governed by the requirements of international law. Accordingly, Jersey and Guernsey must comply with the various obligations that flow from this and, in turn, will be afforded the protections that the system offers. WTO extension is also likely to place new "business as usual" resource demands on Island administrations owing to the new review, reporting, and engagement mechanisms that exist within the WTO regime. It follows that it will be crucial in the first few years following this extension to establish and refine ways of working with the UK, including those that ensure representations—or even representatives—from the Channel Islands are appropriately and effectively given a platform within the workings of the UK Mission.

14 Aside from the benefits and burdens of membership itself, the WTO agreements are also the basis for many provisions in FTAs, including the TCA. Specific provisions in the WTO agreements are frequently expressly incorporated into the FTA text as a baseline and then embellished with further commitments, accommodations, easements, or liberalisations negotiated between the parties to the FTA. Moreover, the WTO agreements remain the default for all those matters not expressly covered by an FTA relationship. In this context, it is clear how important it is for the Channel Islands to implement their WTO obligations, since these are the lens through which the broader text of FTAs must be understood, whether in respect of goods or services. This is the case for the TCA, which expressly incorporates

[6]https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm#:~:text=The%20WTO%20agreements%20cover%20goods,and%20keep%20open%20services%20markets (accessed 26 April 2021). As set out in the communication from the UK to the WTO dated 15 October 2019, the UK extended its membership of the Marrakesh Agreement establishing the WTO to Guernsey and Jersey. The UK wrote to the WTO to confirm that this extension was to take effect upon the expiry of the transition period.

and embellishes many obligations from the WTO agreements[7] whose services-related provisions do not extend to the Channel Islands.

Representing the Channel Islands: TCA negotiations in brief

15 In preparation for Brexit and post-Brexit trade, the Channel Islands had established the new customs arrangements and prepared for a new international trading context through WTO extension. The latter was, perhaps, particularly important because the successful negotiation of an FTA with the EU was by no means certain and a "WTO Brexit" (or some such moniker) remained a popular outcome for many in the UK. Whilst what might be called "political Brexit" occurred on 31 January 2020 when the UK withdrew from the EU as a member state, "economic Brexit" was not to take effect until the end of the transition period. This was because the WA provided for the UK's continued participation in the EU Customs Union and Single Market and this included the Islands as provided for in Protocol 3.

16 The UK published its "Approach to Negotiations" on 27 February 2020. As far as the Channel Islands were concerned, the approach said:

> "11. The Government will act in these negotiations on behalf of all the territories for whose international relations the UK is responsible. In negotiating the future relationship between these territories and the EU, the UK Government will seek outcomes which support the territories' security and economic interests and which reflect their unique characteristics."

17 In contrast to the above, the EU's negotiating mandate published on 25 February 2020 was silent on the Channel Islands, although the WA provisions in respect of Northern Ireland and the Sovereign Base areas in Cyprus were noted and Gibraltar was specifically excluded. However, the EU's draft legal text published on 18 March 2020 finally resolved any ambiguity as to the EU's starting point in the negotiations. The EU's draft art FINPROV.1(3): [territorial scope]

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[7] Just one example of this is in art GOODS.10 of the TCA [Import and export restrictions], which provides that—

> "1. A Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its Notes and Supplementary Provisions. To this end, Article XI of GATT 1994 and its Notes and Supplementary Provisions are incorporated into and made part of this Agreement, mutatis mutandis."

stated that "This Agreement shall not apply to: (a) the Channel Islands . . ." It bears noting that, notwithstanding the proposed exclusion of the Channel Islands from the draft agreement, Title V on Fisheries sought to include "the waters adjacent to the Channel Islands" within the definition of "United Kingdom waters" so that the Channel Islands would (notionally) have had obligations under the treaty but no corresponding benefits(!).

18 Negotiations began on 2 March 2020 and lasted until 24 December 2020, with nine formal rounds up to 2 October 2020. Channel Islands officials, including government lawyers, were in regular contact with their UK counterparts throughout the negotiations and were closely involved as policy positions shifted, and requests were made or rebutted. Senior politicians in the Islands were kept briefed so that they were able to take rapid decisions if required.

CI–EU relations: unpacking the TCA

19 The outcome of these negotiations for the Channel Islands and their new relationship with the EU, to which this article now turns, is perhaps similar in scope to that arising under Protocol 3; however, the underlying nature of that relationship is now completely transformed.

Scope of coverage and approach to inclusion

20 In formulating their responses to the outcome of the UK referendum, the broad policy positions of the Crown Dependencies were aligned and, in short, sought to maintain continuity so far as possible and take advantage of any opportunities that might arise from a new relationship between the UK and the EU. As Protocol 3 had largely been limited to customs and goods, and given that financial services are central to the economies of the Channel Islands, exploring a closer relationship in relation to trade in services was of obvious interest.

21 However, owing to the EU's own political mandates and negotiating principles, in particular that new (or even the same) benefits could not arise from Brexit, the scope of the Channel Islands' inclusion in any FTA was likely to be limited. It followed that a "chapter-by-chapter"[8] approach to inclusion in goods-related chapters

[8] Shorthand for an approach that is based on the Channel Islands adopting the same or similar obligations to the parties to the FTA but with specific modifications or limitations. This might be seen as distinct from the relationship under Protocol 3, whereby the Crown Dependencies had a more distinct, unique relationship with the EU.

of an agreed text would be the starting position for developing a specific form of inclusion for the Islands. In addition, the language of any territorial scope provision would, from the outset, need to ensure respect for the constitutional position of the Channel Islands *vis-à-vis* the UK whilst maintaining a sense of proportionality and practicality.

Application to the Crown Dependencies

22 At art FINPROV 1(1)(b) (territorial scope), the TCA states that the agreement applies to the territory of the United Kingdom. Article FINPROV 1(2) (territorial scope) then provides for the Crown Dependency nexus:

> "This Agreement also applies to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man to the extent set out in Heading Five [Fisheries] and Article OTH.9 [Geographical application] of Heading Six [Other provisions] of Part Two of this Agreement."

23 Heading Five (fisheries) will be considered separately below. Article OTH.9 (geographical application) of Heading Six is concerned with the application of certain provisions of the TCA relating to trade in goods to the Crown Dependencies; paras (3)–(5) of art OTH 9 are crucial in this regard. The provisions under the TCA which now apply to the Crown Dependencies are as follows:

(a) Title I (trade in goods), including:

(i) Chapter 1: National treatment and market access ("NTMA")

(ii) Chapter 2: Rules of origin

(iii) Chapter 3: Sanitary and phytosanitary measures ("SPS")

(iv) Chapter 4: Technical barriers to trade ("TBT")

(v) Chapter 5: Customs and trade facilitation.

(b) The protocols and annexes to these chapters, namely:

(i) All annexes of annexes from ORIG-1 to annex TBT-ZZ inclusive; and

(ii) The Protocol on Mutual Administrative Assistance in Customs Matters ("the PMAA").

24 A detailed exploration of these provisions is perhaps unnecessary. However, in summary, the chapter on NTMA contains general principles and requirements concerning trade in goods, including that trade between the parties to the TCA should be tariff free and quota free. The chapter on rules of origin provides criteria for determining

whether products should treated as originating within the parties' territories, including the Channel Islands, and can benefit from the tariff-free access. The chapters on SPS and TBT are concerned with regulatory standards in respect of agri-food and manufactured goods. These require that checks on goods crossing the border should be applied only to the extent necessary, based on international standards or scientific evidence and should not give rise to unjustified restrictions on trade. The customs and trade facilitation chapter sets the terms for administrative and practical cooperation between the customs authorities in the UK, including the CDs, and EU. In this regard, it builds on several international instruments on customs-related issues. It is supplemented by the PMAA.

25 In essence, these obligations are applicable to the Channel Islands to the same extent as to the UK, subject to some specific provisions described below relating to their operation.

Protecting the constitutional position of the Channel Islands

26 To ensure consistency with the UK–CD constitutional positions and the customs union, and at the request of the Crown Dependencies, it was made express in art OTH 9(3) and (5) that the Islands are themselves responsible for the application and implementation of each of these chapters, as well as their protocols and annexes, in their respective territories. This is because the Crown Dependencies have always enjoyed autonomy in the conduct of their internal affairs. Whilst the UK ultimately remains accountable as a matter of international law for compliance by the Crown Dependencies, it is for the Islands to determine how they comply, and the methods, engagement and types of legislation which inform their domestic decisions. Crucially, this approach avoids any implication that the UK, by virtue of its responsibility for the TCA in international law, should have any control over decisions to be taken within the Islands. This is made even more explicit for "customs authority" (a defined term underpinning chapters 1, 2 and 5), which must be read as meaning Island customs authorities only. Such an amplification is not required for the purposes of chapters 3 [SPS] and 4 [TBT] and the annexes to those chapters because provisions therein do not proceed by reference to a single authority; however, the basic position—that respective authorities in the Crown Dependencies are responsible for any application and implementation of these chapters—remains.

27 To reflect the Channel Islands' interests and constitutional position, it was also negotiated that certain provisions in Title I [trade in goods] should expressly *not* apply to the Channel Islands. Accordingly, art CUSTMS.9 [authorised economic operators (AEO)] of Chapter 5 [customs and trade facilitation] and the associated annex

ANNEX CUSTMS-1 [authorised economic operators], as well as the protocol on administrative cooperation and combating fraud in the field of value added tax and on mutual assistance for the recovery of claims relating to taxes and duties, do not apply to the Bailiwicks of Guernsey or Jersey. The Channel Islands do not currently operate AEOs, so that inclusion of these provisions would be unnecessary and, potentially, onerous for the Islands. In addition, as the Channel Islands are fiscally autonomous, any such inclusion of tax-related provisions (which would more usually be dealt with on a bilateral basis under the auspices of the OECD), would clearly be inappropriate. Instead, the UK made a declaration, with the Channel Islands' consent, that the Islands would (i) be open to future inclusion in provisions relating to AEOs, and (ii) endeavour to establish separate bilateral arrangements directly with the EU to co-operate on the tax-related matters.

Fisheries

28 The fisheries-related provisions are contained in Heading Five (fisheries) of the TCA. In many ways, it might be said that this heading provides a form of self-contained code with its own provisions relating to scope of application, access to waters, dispute resolution, and termination. An additional key EU negotiating principle was that satisfactory arrangements would be required for both trade and fisheries if there was to be any agreement overall.

29 As can be appreciated from the above, the Crown Dependencies are largely subject to the same obligations as the UK in relation to customs and goods provisions. This may be contrasted with the position for fisheries where there is some commonality but where the obligations of each Crown Dependency are notably distinct. However, the new fisheries arrangements under the TCA are also very much linked to their predecessor regimes, which were as follows:

Bailiwick of Jersey

30 In Jersey, the Granville Bay Agreement ("GBA") was a treaty made between the Governments of the United Kingdom and the French Republic concerning fishing in the Bay of Granville. The agreement came into force on 1 January 2004 and provided for access to waters within the Granville Bay area on a zoned basis, including to Jersey territorial sea beyond three nautical miles. The regime under the GBA was established on the principle of "joint management" of the fisheries resource in the Granville Bay area. This meant that measures brought into effect in Jersey territorial waters which affected access for French fishermen were also subject to the views of the Joint Management Committee established under the GBA. Under these

arrangements the French fishing authorities were responsible for licensing their vessels to fish in Jersey waters covered by the GBA.

31 It must be noted at this point that the TCA's provisions do not affect any of Jersey's pre-existing maritime boundaries or sovereignty over its neighbouring reefs. This is because the Island's boundaries were addressed in a separate agreement between the UK and France ("concerning the Establishment of a Maritime Boundary between France and Jersey"[9] ("MBA")). While this was concluded at the same time as the GBA, the purposes and effects of the MBA were distinct as it established definitively the maritime borders between the UK and France in the Granville Bay area for all purposes and not just for fisheries access. Further, with regard to Jersey's territorial sovereignty over the rocks of its offshore reefs, it is important to note that art FISH 19(2) does not affect or question Jersey's territorial sovereignty as was determined by the International Court of Justice (Minquiers and Ecrehos) in *France v United Kingdom*,[10] or indeed the effect of the Territorial Seas Act 1987 (Jersey) Order 1997[11] with regard to the extent of the Island's territorial waters.[12]

Bailiwick of Guernsey

32 In contrast, the London Fisheries Convention ("LFC") of 1964 provided for fishing access in Guernsey waters based on historic fishing activity in the period 1953–1962. In practice, this permitted French vessels to fish for crab and demersal species in a designated belt between 6–12n/m from the baseline.

33 The UK denounced the LFC on 3 July 2017, to take effect after two years or the date on which the UK withdrew from the EU (whichever was the later). Therefore, the denunciation took effect on 31 January 2020. Whilst fishing access for EU vessels in UK waters during the transition period was continued by the Withdrawal Agreement, the relevant provisions did not cover the Bailiwick. Therefore, the Bailiwick authorities unilaterally put in place an interim

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[9] Treaty Series No 8 (2004).

[10] .CJ Reports 1953, p 47.

[11] https://www.jerseylaw.je/laws/unofficialconsolidated/Pages/15.800.aspx. As also further amended by the Territorial Sea Act 1987 (Jersey) (Amendment) Order 2002.

[12] The 1997 Order extending Jersey's territorial waters was enacted as a precondition to the GBA being agreed. It was clear from this point that unlike the previous "*mer commune*", Jersey law applied across the whole of its territorial see out to a maximum of 12 n/m.

regime that allowed continued access for French vessels to provide stability and continuity during the transition period.

New arrangements

34 Article FISH 10 of the TCA is the key provision replacing previous fishing access arrangements for EU vessels in Crown Dependency waters (and for Crown Dependency vessels in EU waters), with a regime based on vessels' recent "track record" of fishing activity. Article FISH 10(1) states that the access permitted to territorial waters from 1 January 2021 should reflect the "extent and nature" of fishing activity by "qualifying vessels" (those fishing for more than ten days) that can be "demonstrated" to have taken place under preceding treaty arrangements (such as the GBA for Jersey and the LFC for Guernsey). Only fishing activity during a specific period from 1 February 2017 to 31 January 2020 is relevant to assessing track record (*i.e.* any one of the three-year periods preceding the UK's departure from the EU on 31 January 2020).

35 The effect of these quite nuanced criteria will be the creation of a static "pool of access" which will provide certainty and stability for fishing communities in the Channel Islands, Brittany and Normandy. Once the pool is established, vessels wanting to fish in Channel Islands' waters will require a licence from the relevant jurisdiction. The Channel Islands will be responsible for the licensing regime applicable in their respective territorial waters, as well as taking unilateral but objective, non-discriminatory measures to ensure the sustainable use of their marine resources. For Jersey this is a significant improvement in the level of control over the management of the fishery compared with the arrangements under the GBA.[13]

36 At the time of writing detailed work is ongoing in the Channel Islands to implement the fisheries elements of the TCA in collaboration with the UK Government, EU Commission and French

[13] Jersey recently passed new legislation entitled the Sea Fisheries (TCA—Licensing of Fishing Boats) (Amendment of Law and Regulation (Jersey) Regulations 2021, made under the Sea Fisheries (Jersey) Law 1994 and the European Union Legislation (Implementation) (Jersey) Law 2014 to enable it to give full effect to the requirements of the TCA in relation to fisheries by making licensing amendments the 1994 Law and the Sea Fisheries (Licensing of Fishing Boats) (Jersey) Regulations 2003. These changes provide the requisite powers for the Minister for Environment to licence EU boats in Jersey territorial seas for the first time, as French vessels were previously licenced to fish in the area covered by the GBA by the French authorities.

fishing authorities and a full assessment of the effect of the TCA on fisheries' management in the Channel Islands would be premature.

Constitutional vigilance: securing Channel Islands' interests under the TCA

Governance

37 As noted above in relation to the WTO, particular attention must be paid to securing and maintaining an appropriate representative voice in the institutions established by the TCA and the ability to participate appropriately in any trade disputes which may involve Crown Dependency measures. The Specialised Committees and the Partnership Council are the mechanisms for developing trade policy and practices between the parties to the TCA and these will be key in determining the scope and application of the TCA in the future. In terms of its enforcement mechanisms, the Crown Dependencies will need to work closely with the UK to protect their interests in these Committee structures and in the event of any dispute concerning the application of the TCA. This is a wholly new position for the Islands compared with that under Protocol 3, where relationships gave rise to rights that were enforceable under EU Law in Crown Dependency courts and in the courts of EU Member States, including the UK, as well as before the CJEU.

38 In order to mitigate any risks to their autonomy, the Islands intend to agree and refine effective arrangements with the UK on consultation, engagement and representation to ensure that Crown Dependency interests will be protected and promoted throughout the new TCA relationship. For this purpose, commitments were sought from and given by the Lord Chancellor prior to the Channel Islands giving their consent to extension of the TCA, that the UK would respect the constitutional positions of the Islands and support the development of new arrangements to ensure that their interests are protected. Whilst this is significant, such arrangements or commitments are yet to be tested and, of course, are not legally binding in international law terms. The Crown Dependencies will need to engage positively with the UK government and trading partners, and remain vigilant to ensure that their autonomy and economies are safeguarded.

Legislative and policy development

39 It is worth noting that for both Bailiwicks the transition from their relationship with the EU under Protocol 3 to their new relationship under the TCA has entailed a very substantial legislative exercise, which in some respects will continue beyond 1 January 2021. Implementation of the UK–CD customs union, the TCA, and other

FTAs in due course will require a programme of policy and legislative development to ensure that the Channel Islands fulfil their commitments and maintain their rights of access to foreign markets. The Channel Islands will need to use the new dedicated forums for dialogue with the UK and other trading partners established in the context of these agreements to ensure they provide input in the development of new trade policies by the UK and EU. This will particularly be the case with developments affecting SPS and TBT rules, which are critical to maintaining access to markets. To this end the Islands' governments may need to build on the resources employed through the Brexit process. The Channel Islands have made great progress in laying foundations for constructive dialogue under the TCA; it is now vital that those mechanisms are used to best effect to advance their interests as part of the burgeoning UK trade agenda.

40 It is important to note that TCA's "Chapter-by-Chapter" approach to the application of goods, but not services, will present some challenges for policy makers and legislators. As seen in relation to Protocol 3, distinctions between goods (and now services) that are covered by an agreement and those that are not may not always be easy to distinguish in practice. While the TCA is now applicable to the Channel Islands in respect of trade in all types of goods, trade in many high-value technology goods is closely associated with the supply of services and qualified persons to support the use of those goods. Thus, the Channel Islands exclusion from the services aspects of the TCA, while unavoidable, has the potential to give rise to ambiguities in future if the provisions are not periodically reviewed to keep pace with changes in economic activity.

41 Furthermore, in the context of TCA-related services (and for any other FTAs later entered into), it may become increasingly important to understand where the WTO obligations in relation to services (which extend to the CDs) end, and where the UK's obligations under the TCA or another FTA on services (which do not or may not extend to the CD) begin, particularly when considering the enforcement of obligations and remedies. Accordingly, as the UK–EU relationship in this area develops, the Islands may need to ensure that distinctions between these obligations are clearly understood both domestically, and by the UK and the EU or other trading partners.

Conclusion

42 In light of the result of the UK's 2016 referendum, the Channel Islands had little choice but to engage constructively with the UK and EU to develop new trading relationships with both. However, as subsequent developments illustrate, both jurisdictions have seized the opportunity to develop new relationships that provide a platform for

their trading interests to be advanced, working in close partnership with the UK Government, but in a way that is consistent with their constitutional autonomy. The extension of the WTO agreements to the Bailiwicks is emblematic of their ambition and recognition as modern, global trading nations. One of the additional benefits of the process outlined in this paper has been the clear recognition of the Crown Dependencies' intentions to develop their international identities, and the need for them to give informed consent before any international obligation is extended to them by the UK.[14]

43 It is important that the conclusion of the TCA is recognised as not being the end of a process, but as a point of transition to a new phase in the development of the Channel Islands' trading relationships. To maximise the opportunities and mitigate the risks that these new relationships present, the Islands will need to continue to develop new ways of working with the UK, EU and each other, something that their recent experience means they are well placed to do.

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[14] Pursuant to art FISH 10.3, in view of the speed with which the outcome of the negotiations was brought into force, provision was made for a "cooling off" in which the Crown Dependencies could consider the content of the TCA and trigger their removal if necessary. Both Bailiwicks have since confirmed their intent to remain subject to the TCA and the "cooling off" period expired on 31 March 2021.