

## SOVEREIGNTY FICTIONS IN THE UNITED KINGDOM'S TRADE AGENDA

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**Abstract** This article explores how sovereignty fictions have been used to advance different legal, political and economic aims in the articulation of the United Kingdom's future approach to global regulation. By mapping the transformative shifts in sovereignty paradigms, this article highlights the disconnect between the absolutist sovereignty popularised in the UK government's political rhetoric and the concept of regulatory sovereignty that underpins the UK's future trading strategy. To maintain its status as a global leader in regulation and standards-setting, the UK government will need to diffuse power and delegate autonomy through networked orders of public and private actors. These competing sovereignty paradigms are analysed with reference to European Union (EU) law and practice, to highlight the opportunities and challenges for the UK as an independent trade actor. This article concludes by evaluating how sovereignty fictions can disrupt the objectives of the UK's proposed 'common law' approach to regulatory governance and discusses the policy interventions that may be required to enable the UK to harness its potential as a regulatory leader.

**Keywords:** EU law, Brexit, sovereignty, international trade law, regulatory governance.

### I. INTRODUCTION

In January 2020, Prime Minister, Boris Johnson intimated that the United Kingdom's (UK) 'recaptured sovereignty' marked a pivotal moment to reassert the UK's position in the global economy. Throughout the Brexit process, the UK government has used the notion of absolutist sovereignty to justify its legal and political choices both internally, to its population, and externally, to its future trading partners. While the architecture of international law has been built around the concept of State sovereignty, the accelerating pace of globalisation has disrupted the Westphalian notion of absolute sovereignty. The word 'sovereignty' refers to allocations of power,<sup>1</sup> and the question of 'who governs' in respect of global regulatory governance

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<sup>1</sup> JH Jackson, 'A New Approach to an Outdated Concept' (2003) 97 AJIL 790.

is not a new phenomenon,<sup>2</sup> but there has been a general retreat from the notion of absolute sovereignty in international law. In an interdependent global order, the role of the State in governing itself and others has been called into question. It has long been recognised that the State retains an important function in developing and enforcing international legal frameworks that regulate economic activities across borders, but non-State actors also contribute to the formulation and implementation of regulations. In this article, we use the term ‘regulatory sovereignty’, defined as ‘the right of each member nation to decide on the level of risk that it wishes to tolerate within its jurisdiction’,<sup>3</sup> as an expression to capture the diffusion of power in the UK’s trade and investment agreement negotiations amongst different actors and to reveal interconnected sovereignty fictions that have been used to advance different, contradictory, legal, political and economic aims in the articulation of the UK’s future approach to global regulation.

Sovereignty fictions<sup>4</sup> were explicitly discussed by John H. Jackson almost twenty years ago and this conceptual framework is used to inform this interpretation and analysis of a contemporary puzzle in international law: the UK’s withdrawal from the European Union (EU). In this article, the first sovereignty fiction discussed relates to the UK government’s ‘communication technique’<sup>5</sup> and its popularisation of absolutist sovereignty rhetoric as a rationale for withdrawal from the EU. That rhetoric has since become a core linguistic feature of the ‘Global Britain Agenda’. Since the lead-up to the 2016 Referendum, the UK government has articulated an absolutist version of sovereignty, weaponising this concept as a ‘political emotion’<sup>6</sup> to reinforce nationalist ideals of the British State in the de-integration process. This articulation of sovereignty is about *independence* and *freedom from constraint*—the ability to exclude others from territory—and it has been a prominent feature of the UK’s ‘take back control’ narrative. However, the UK’s future trade law and policy, which seeks both to promote openness and protect its values and interests, is inherently rooted in notions of *cooperation* and *partnership*. The negotiation of trade agreements requires cooperative efforts which ‘take place within a dense and complex web of norms, rules and practices’.<sup>7</sup> This article maps the transformative shifts in sovereignty paradigms to show how the right to be ‘left alone’, to ‘exclude’ and to ‘be free from any external meddling or interference’ now coexists with the ‘right to be recognised as an autonomous agent’ in the international system<sup>8</sup>.

<sup>2</sup> K Jayasuriya, ‘Globalisation, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1999) 6 *Indiana Journal of Global Legal Studies* 425–55.

<sup>3</sup> AO Sykes, ‘Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View’ (2002) 3 *ChicagoJIntL* 354. <sup>4</sup> Jackson (n 1) 784. <sup>5</sup> *ibid.*

<sup>6</sup> J Radon, ‘Sovereignty: A Political Emotion, Not a Concept’ (2004) 40 *StanJIntL* 195.

<sup>7</sup> A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 1.

<sup>8</sup> A Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *HarvIntLJ* 1.

Simply put, it shows that the UK government's absolutist sovereignty rhetoric is straightforwardly incompatible with its self-professed desire to do trade deals with the wider world.

The second sovereignty fiction, which is linked to the first, relates to power and autonomy, and builds on one of the sovereignty fictions identified by many scholars in international law: the idea that power is (not) concentrated in one sovereign actor. In this article, it is submitted that sovereignty is 'relational rather than insular';<sup>9</sup> it is the depth and breadth of one State's links to other public and private actors that enhances and diminishes that State's capacity to act within the international system. Global regulatory frameworks for behind-the-border measures may be determined by a variety of formal and informal rules, soft-law and policy principles, and involve a range of actors, public and private. The relationships between government and other stakeholders involved in regulatory governance operate through networked orders which, in turn, influence and inform relationships with transnational public and private regulatory agencies. International regulatory governance is, therefore, characterised by the 'fragmentation'<sup>10</sup> or 'disaggregation'<sup>11</sup> of sovereignty caused, in part, by the diffusion of power to other non-State actors in trade. The participation of private economic actors and civil society organisations in 'a networked world order'<sup>12</sup> has, therefore, resulted in a shift away from exclusively State-centric modes of governance toward 'new multilateral, non-territorial modes of regulation',<sup>13</sup> which call into question State-centred intergovernmentalist accounts of global regulatory governance.<sup>14</sup>

If it is accepted that sovereignty is relational and that the right to be free from interference coexists with the right to be recognised as an autonomous agent, then the final sovereignty fiction follows: the notion of absolute sovereignty can no longer be used accurately to capture or define State interactions in the contemporary global economy. The specific instance of regulatory governance is used to show how the negotiation of and participation in trade agreements—an expression of regulatory sovereignty—necessitates constraints on absolute State power. The regulation of behind-the-border measures involves the diffusion of power in a networked world order and illustrates that accounts of sovereignty which focus on independence and autonomy are no longer appropriate or accurate. The ongoing challenge for regulatory governance is how best to structure that

<sup>9</sup> A–M Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *StanJIntL* 325.

<sup>10</sup> Jayasuriya (n 2) 426.

<sup>11</sup> A–M Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Governance Networks' (2004) 39 *Government and Opposition* 159.

<sup>12</sup> A–M Slaughter, 'Sovereignty and Power in a Networked World Order' (n 9) 324.

<sup>13</sup> AG Scherer *et al.*, 'Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance' (2006) 16 *Business Ethics Quarterly* 506.

<sup>14</sup> M Zürn, 'Global Governance as Multi-Level Governance' in H Enderlein, S Wälti and M Zürn, *Handbook on Multi-Level Governance* (Edward Elgar 2010).

cooperation between actors so that States can control outcomes and respond to the fundamental needs of the people.

This article evaluates the diverging approaches to regulatory sovereignty adopted by the UK and the EU. The EU has, on the one hand, sought to transform or reimagine sovereignty; while on the other, it has moved ever more decisively towards the pursuit of regulatory sovereignty and global power. The EU has a long history of leading in the sphere of (international) regulatory governance, and the implications of centring ‘open strategic autonomy’ in EU trade policy will be examined. The UK’s ‘common law’ approach, which claims to be less ‘rules-based’ than the EU’s ‘open strategic autonomy’ vision, promises to offer a new way for regulatory governance. However, and while both the EU and the UK aspire to global relevance, and indeed leadership, weaknesses and blind spots can be identified in their strategies that could undermine those aspirations. The purpose of this analysis is to demonstrate the disruptive nature of sovereignty fictions and to reflect on the opportunities that might exist for the UK to emerge as a leader in regulatory governance going forward.

This article is divided into four sections. The first section briefly outlines the ‘long and troubled past’<sup>15</sup> of sovereignty as an international legal and political concept. Section II analyses the conceptual boundaries of regulatory sovereignty. The third section considers the EU’s evolutive relationship with sovereignty and regulatory governance. The final section examines the UK’s proposed ‘common law approach’ to regulatory governance. To conclude, it is argued that the UK must ‘reconcil[e] its autonomy with the wider layer of global governance’<sup>16</sup> because in a networked global order, the very notion of absolutist sovereignty serves as little more than a communication technique and has become redundant.

## II. THE ‘INDEPENDENCE’ SOVEREIGNTY FICTION: COOPERATION IN A NETWORKED GLOBAL ORDER

To understand the UK as an independent trading State and its ambitions of regulatory sovereignty it is important to recognise how sovereignty can constrain, shape and condition legal, economic and political choices. As a concept in want of definition, sovereignty has been the subject of scholarly interrogation across the disciplines of law and international relations for centuries. While there is no agreement among scholars about how best to classify sovereignty, there are competing, but not irreconcilable, categorisations of sovereignty. The fragmented and yet overlapping nature of the different aspects of sovereignty are best understood if viewed through an

<sup>15</sup> J Crawford, *The Creation of States in International Law* (Clarendon 1979) 26.

<sup>16</sup> JSF Wright and D Doukas, ‘Challenges to Sovereign Ambitions: Forces of Convergence and Divergence within the Global Pharmaceutical Sector and the UK’s Withdrawal from the European Union’ (2021) 16 *Health Economics, Policy and Law* 261.

interdisciplinary kaleidoscope<sup>17</sup> drawing insights from international relations, international political economy and international legal theory. In this section, the changing nature of sovereignty will be critiqued to foreground our analysis of regulatory sovereignty in the second section.

Sovereignty 'is not fixed or immutable, but contingent on the underlying structures of economic and social relations',<sup>18</sup> and territorial conceptions of sovereignty are closely connected with capitalist modes of production and private property ownership.<sup>19</sup> As a fundamental principle of international law it has influenced the ways States interact with one another bilaterally and multilaterally for centuries. Sovereignty has developed as 'an essentially European invention'<sup>20</sup> and in its absolute sense is the ultimate expression of power for a State to exclude others from causing interference in its territory.<sup>21</sup>

Absolute conceptions of sovereignty, based on the preservation of independent action at State level, have come under strain as transnational trade has increased and economies have become increasingly interdependent. Over the course of history, the UK has played a prominent role in exercising its sovereign power to promote a liberal market paradigm globally. The UK was a leading actor in the first wave of multilateralism with the passing of the Reciprocity of Duties Act (1823), the repeal of the Corn Laws (1850) and the implementation of the Cobden–Chevalier Treaty (1860), the latter of which contained a Most-Favoured Nation clause.<sup>22</sup> Following the two world wars, the creation of the United Nations and the Bretton Woods Institutions, including the GATT, 'sanctified the concept of State sovereignty, as only recognised States could be members of [these] new global club[s]'.<sup>23</sup>

Furthermore, the process of decolonisation resulted in the liberation of newly sovereign States<sup>24</sup> across the world which fundamentally changed the power dynamics of the global economy. Growing interdependence in the global economy has meant that the 'right to be left alone, to exclude, to be free from any external meddling or interference' now coexists with the 'right to be

<sup>17</sup> I de la Rasilla del Moral, 'Sovereignty through the Inter-Disciplinary Kaleidoscope' (2015) 84 *Nordic JIntlL* 130.

<sup>18</sup> Jayasuriya (n 2) 454.  
<sup>19</sup> S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press 1996) 161–79.

<sup>20</sup> RO Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40 *JCMS* 744 and SD Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press, NJ 1999).

<sup>21</sup> T Hobbes (1588–1679), *Leviathan* (Penguin Books 1968).  
<sup>22</sup> The most comprehensive account of this treaty is AL Dunham, *The Anglo-French Treaty of Commerce* (Ann Arbor, MI 1930). The conventional view holds that the Cobden–Chevalier Treaty marked the beginning of free trade in Europe, although the extent to which liberalisation truly opened up markets is contested. For an overview of the history of MFN clauses in bilateral treaties, see O Accominotti and M Flandreau, 'Bilateral Treaties and the Most-Favoured Nation Clause: The Myth of Trade Liberalisation in the Nineteenth Century' (2008) 60 *World Politics* 147. See also JV Nye, 'The Myth of Free-Trade Britain and Fortress France: Tariffs and Trade in the Nineteenth Century' (1991) 51 *The Journal of Economic History* 23; AA Iliasu, 'The Cobden-Chevalier Commercial Treaty of 1860' (1971) 14 *The Historical Journal* 67.

<sup>23</sup> Radon (n 6) 201.

<sup>24</sup> Anghie (n 8).

recognised as an autonomous agent in the international system, capable of interacting with other States and entering into international agreements'.<sup>25</sup>

Throughout the Brexit debate, the UK government has sought to invoke the traditional Westphalian notion of sovereignty, placing an emphasis on what the late John H Jackson describes as the 'core dimension' of sovereignty—the 'monopoly of power'.<sup>26</sup> This realist conception of sovereignty is associated with an absolute notion of independence and harks back to a time where States engaged in international relationships rather than global relationships, which signal interdependence. It is a departure from the 'pooled sovereignty' of the EU and appears to mimic the American approach to sovereignty, which bridges the notion of absolute control and popular sovereignty. It is, according to Jenik Radon, an 'emotional flag'.<sup>27</sup> It diverges from the emerging pattern of negotiating limits on sovereignty and promotes exceptionalism. This 'independence fiction'<sup>28</sup> of sovereignty fails to place sufficient emphasis on cooperation and on the benefits which States can secure for their populations as a result of that cooperation.

Yet the notion that absolute power is concentrated in a head of State (or government) has become one of many sovereignty fictions. Over time, the constitutive nature of sovereignty in the international order has been transformed as globalisation has changed the ways States interact with one another. Power is no longer centrally situated in an autonomous State; rather, power is diffused among different actors and agencies which operate within and between national and international contexts. International law is in a constant phase of evolution and the rise of international institutions, and State participation in those institutions, represents a distinct threat to the notion of Westphalian sovereignty.<sup>29</sup> The concept of absolute sovereignty in international law has been eroded over time and replaced by models of sovereignty that acknowledge the interdependent and networked nature of the global order.

In the contemporary global economy, the participation in the many regimes that regulate (inter-)State behaviour is itself an expression of sovereignty; a *new sovereignty*.<sup>30</sup> Writing in the late 1990s, Anne-Marie Slaughter was a leading authority on new sovereignty, which is decoupled from territorial control. Slaughter defines new sovereignty in the following way:<sup>31</sup>

If the new sovereignty is the right and the capacity to act in international regimes, networks, and institutions, accompanied by a responsibility to fulfil certain minimum requirements of membership, then becoming or being a sovereign State would mean the participation of as many government officials as possible in plurilateral, regional and global government networks.

<sup>25</sup> W Burke-White and A-M Slaughter, 'The Future of International Law Is Domestic (or, the European Way of Law)' (2006) 47 Faculty Scholarship at Penn Law 328.

<sup>26</sup> JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2011) 57.

<sup>27</sup> Radon (n 6) 203.

<sup>28</sup> Jackson (n 1) 784.

<sup>29</sup> SD Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 MichIntlL 1077.

<sup>30</sup> Chayes and Chayes (n 7) 27.

<sup>31</sup> Slaughter, 'Sovereignty and Power in a Networked World Order' (n 9) 325.

Slaughter explains that new sovereignty is 'relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist'.<sup>32</sup> It follows that the diffusion of power on to ministers, policymakers, legislators and judges operating in a networked global order increases the power of States and enables them to protect and provide for their peoples.

The European Union provides an excellent example of the evolutive concept of sovereignty. The pace of integration among European Member States has been an inspiration for other regional trading blocs since its creation. Rather than seeing the EU as an expression of a loss of sovereignty, States regard membership of the Union as 'an exercise and expansion of their sovereignty'<sup>33</sup> by pooling their common interests and engaging in cooperative activities. The challenges of balancing an intrinsic desire for independence against a need to pursue pooled sovereignty has been recognised by the UK government for decades. Speaking in 1999 on the issue of globalisation, then British Prime Minister, Tony Blair, stated:<sup>34</sup>

Any Government that thinks it can go it alone is wrong ... Only by competing internationally can our companies and our economics grow and succeed. But it has to be an international system based on rules. That means accepting the judgements of international organisations even when you do not like them.

In the following section, we analyse the second sovereignty fiction: that regulatory sovereignty will enable the UK government to recapture a 'monopoly of power' as a global standards-setter. We refer to this as the 'allocation of power' sovereignty fiction. Rather than expanding the UK government's political power through regulatory governance, we show how the exercise of regulatory sovereignty will inevitably result in an even greater diffusion of power away from the internal core of State power.

### III. THE 'ALLOCATION OF POWER' SOVEREIGNTY FICTION: THE TURN TOWARDS REGULATORY SOVEREIGNTY

In the modern political economy, the notion of 'new' or 'disaggregated' sovereignty best captures the diffusion of power amongst State and non-State actors navigating the complex web of economic, social, political and legal relations that characterise governance frameworks. This is particularly the case for the development and implementation of regulations and standards which operate behind-the-border to regulate what can enter the UK's territory. With global tariff levels remaining relatively low and stable, the use of regulation and standards can create new opportunities for competitive

<sup>32</sup> *ibid.*

<sup>33</sup> Radon (n 6) 201.

<sup>34</sup> Cited in JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2011) 67.



advantage. However, regulatory governance involves the delegation of power and autonomy from the government to other actors.

Governments may use different techniques and instruments to achieve economic goals,<sup>35</sup> and it is widely recognised that the development and implementation of regulation involves actors operating through a networked order of governmental and non-governmental agencies.<sup>36</sup> In the 1990s, compliance with international regulatory agreements, like the Kyoto Treaty, was seen to signal a new sovereignty for States<sup>37</sup> and an opportunity to express power through different instruments. Furthermore, and over the past two decades, there has been a notable increase in the amount of private regulation which, in effect, can constrain a State's ability to interact with another State. Regulation is, therefore, best described as a form of contemporary governance,<sup>38</sup> which includes both public and (transnational) private regulation.<sup>39</sup> While States retain the right to decide on the level of risk they wish to tolerate in any sector, regulatory governance often requires States to reconcile their competing interests in order to gain access to markets.

Throughout the EU withdrawal process, the UK has asserted its goal to become a leader in global regulation. In other words, the UK is seeking to articulate its regulatory sovereignty to gain economic and political power. But what does it mean to be a regulatory sovereign? In international economic law, concepts such as 'regulatory sovereignty' and 'regulatory autonomy' are often conflated and used interchangeably. It is argued that the inevitable conflict between regulatory autonomy and trade indicates that regulatory sovereignty must entail not merely autonomy, but instead a relationship between autonomy and cooperation. If one imagines economic activity to operate on a spectrum, then free trade is at one end and regulatory autonomy at the other. Free trade, and the associated removal of trade barriers, cannot be realised to its fullest extent unless it is accepted that regulatory autonomy will, in some respects, be compromised.

Many scholars refer to the term 'regulatory sovereignty' uncritically and without defining the parameters of the concept.<sup>40</sup> Ming Du, who offers a persuasive account of the link between these concepts, asserts that regulatory autonomy is 'part and parcel' of national sovereignty.<sup>41</sup> Du states:<sup>42</sup>

<sup>35</sup> T Prosser, *The Economic Constitution* (Oxford University Press 2014) 4.

<sup>36</sup> C Parker and J Braithwaite, 'Regulation' in P Cane and M Tubner (eds), *Oxford Handbook of Legal Studies* (Oxford University Press 2003).

<sup>37</sup> Jayasuriya (n 2); Chayes and Chayes (n 7).

<sup>38</sup> Prosser (n 35).

<sup>39</sup> C Scott *et al.*, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *JLaw&Soc* 1.

<sup>40</sup> D Henig, 'The UK's Regulatory Sovereignty v Free Trade Dilemma' (UK Trade Forum, 28 July 2020).

<sup>41</sup> M Du, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' (2011) 14 *JIEL* 641.

<sup>42</sup> M Du, 'Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonisation' (2007) 6 *ChineseJIL* 272.



From a domestic perspective, since product standards serve important social objectives, the standard-setting power should remain within the realm of domestic regulatory autonomy, i.e. the decision-making power should be kept under regulatory control. This locus of power is necessary for democratic and accountable government and actually goes to the social and political heart of a member's sovereignty.

Du goes on to argue that there are two interrelated positions that can be identified in the discourse on regulatory autonomy:<sup>43</sup>

First, domestic regulations should reflect domestic social preferences and respond to domestic needs, even if these preferences and needs differ from other Members or international standards. Second, the fulfilment of domestic regulatory purposes reflected in domestic regulations should be honoured despite their adverse trade effects, as long as these regulations reflect genuine preferences and priorities of citizens of the nation State rather than trade protectionism. In other words, a WTO Member should be entitled to national regulatory autonomy as regards the policy objectives it chooses to pursue as well as the means by which it chooses to pursue such policy objectives, so long as they do not constitute protectionism, overt or covert.

However, such an account of exclusionary regulatory autonomy is increasingly difficult to sustain in a networked order where power is diffused among regulatory actors. Traditionally, international trade law has placed only 'a narrow set of limits on national autonomy' but since the creation of the WTO, and the increasing legalisation of trade disciplines, 'trade law has become more intrusive'.<sup>44</sup> Trade disciplines have expanded to include non-tariff barriers, which are typically determined and governed by regulatory agencies rather than the State. With over two-thirds of international trade operating through global value chains,<sup>45</sup> multinational corporations have acquired, or been delegated, a considerable amount of power to act as economic agents operating across borders. This signals a changing or diminishing role for the State in regulating and governing economic transactions and the erosion of absolute sovereignty in international law.

Furthermore, and implicit in Du's account of regulatory autonomy, is the WTO's function to allocate authority to States and regulatory agencies. While the WTO plays a role in the disaggregation of sovereignty, this has been made possible because of the globalisation of economic relations which has 'fracture[d] the internal cohesiveness of the State' and enabled 'islands of sovereignty' to develop within the State.<sup>46</sup> Authority is vested in central financial institutions, regulatory bodies and even private standard-setting agencies to articulate and defend State interests in international institutions.

<sup>43</sup> Du, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' (n 41) 644.

<sup>44</sup> JP Trachtmann, 'Regulatory Jurisdiction and the WTO' (2007) 10 JIEL 632.

<sup>45</sup> WTO *et al.*, 'Global Value Development Chain Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalised World' (2019). <sup>46</sup> Jayasuriya (n 2) 439.

The rising influence of the international institutions—the ‘econocrats’<sup>47</sup> of the global order—means that, for better or worse, power is being reallocated from the State toward other public and private actors.

This suggests that exclusionary regulatory autonomy cannot form the basis for regulatory sovereignty; rather, regulatory sovereignty reflects a combination of both the ability to exclude and the desire to cooperate where common interests exist. As Anne-Marie Slaughter has argued:<sup>48</sup>

However paradoxical it sounds, the measure of a [S]tate’s capacity to act as an independent unit within the international system – the condition that “sovereignty” purports both to grant and describe – depends on the breadth and depth of its links to other [S]tates.

Under both WTO and EU law, regulatory frameworks, based in part on the mutual recognition principle, have developed in order to facilitate trade between nations. Compliance with regulatory frameworks may be motivated by *efficiency* to avoid the high costs associated with deviation, by the common *interests* of the parties, or by *normative* reasons for action.<sup>49</sup> The approach adopted by the WTO can be said to be based on regulatory coherence,<sup>50</sup> while that within the EU single market relies on a deeper form of regulatory cooperation.

When exercising regulatory sovereignty, a State chooses who to include and exclude from access to its markets based on a series of tariff and non-tariff barriers. To enable mutual exchange and the efficient flow of goods and services, trade partners may agree to ‘recognise’ one another’s regulatory standards. Recognition is a ‘choice of law rule’ and ‘at its core, entails an agreement to compromise local regulatory autonomy, by accepting that the exporting State regulation is “good enough”’.<sup>51</sup>

Within the WTO, mutual recognition, a concept that is common in trade and investment agreements, is rooted in the principle of ‘narrow reciprocity’, where both the importing and exporting States recognise one another’s regulation.<sup>52</sup> The aim is to clarify, simplify and harmonise regulation so as to facilitate free trade. Regulatory coherence has the potential to reinforce regulatory sovereignty since ‘good regulatory practices’ can enable a State to achieve its policy interests more effectively.<sup>53</sup> However, regulatory cooperation can also

<sup>47</sup> Strange (n 19).

<sup>48</sup> Slaughter, ‘Sovereignty and Power in a Networked World Order’ (n 9) 286.

<sup>49</sup> Chayes and Chayes (n 7) 4–9.

<sup>50</sup> This concept gained notoriety during the negotiations towards the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP).<sup>51</sup> Trachtman (n 44) 639.

<sup>52</sup> However, the legality of mutual recognition agreements has been scrutinised because of their potentially discriminatory trade effects. See L Bartels, ‘The Legality of the EC Mutual Recognition Clause under WTO Law’ (2005) 8 JIEL 691.

<sup>53</sup> E Sheargold and AD Mitchell, ‘The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?’ (2016) 15 WorldTR 591.

diminish regulatory autonomy, since the State may need to compromise on how to protect its public interests. The risk of arbitration and proceedings through dispute settlement mechanisms can have a 'chilling' effect on regulation, both in respect of trade obligations<sup>54</sup> and investment provisions.<sup>55</sup> The concerns that the UK's existing and future trade agreements could pose a deregulatory threat to the UK are, therefore, valid but perhaps overstated. It seems likelier that these agreements could have a chilling effect on the UK's regulatory decision-making.

While the WTO approach is rooted in the principle of 'narrow reciprocity' and 'regulatory coherence', the EU's internal approach involves a more intensive 'regulatory cooperation'. Mutual recognition in the EU's Single Market, a principle which leading EU law/legal scholar, Stephen Weatherill, argues does not exist,<sup>56</sup> carries a different meaning from mutual recognition agreements in trade agreements. The 'need' for EU level rules, and the nature and extent of the harmonised rules adopted at EU level, are contested. That 'need' is diminished as a result of the existence of the EU principle of mutual recognition, which applies in the absence of harmonised rules, and entails reciprocity on a much broader scale than is found in any other free trade agreement. It entails a *general presumption* that goods lawfully produced and marketed in one Member State can be freely sold in all others. This presumption is rebuttable, with the burden being placed on States to demonstrate that any measures deemed restrictive are suitable and necessary in order to satisfy public interest goals identified in the Treaties and the case law of the Court of Justice.<sup>57</sup>

The creation of the internal market is celebrated as one of the major achievements of European integration. It involves the creation of a dense, shared, regulatory infrastructure. Its outer limits are constantly contested and redefined as the costs and benefits of closer cooperation in a variety of fields are assessed.<sup>58</sup> Physical, technical and fiscal barriers to trade between the EU Member States have been progressively eliminated. The internal market

<sup>54</sup> E Lydgate, 'Biofuels, Sustainability and Trade-Related Regulatory Chill' (2012) 15 JIEL 157.

<sup>55</sup> G van Harten and DN Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 Journal of International Dispute Resolution 92.

<sup>56</sup> S Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist' (2018) 43 ELRev 224. With a focus on the *Noria Distribution SARL* (Case C-672/15) EU: C:2017:310, Weatherill persuasively argues that there is no principle of mutual recognition in EU law and instead there is a conditional or non-absolute principle of mutual recognition. The conditional principle of mutual recognition requires States to adhere to a set of reciprocal commitments but States retain the competence to regulate their own markets. According to Weatherill, this creates a space in which States can justify trade-restrictive practices and prevents the EU's internal market becoming a 'process of remorseless deregulation'.

<sup>57</sup> See P Koutrakos *et al.* (eds), *Exceptions from EU Free Movement Law* (Bloomsbury 2016) and Bartels (n 52).

<sup>58</sup> For an overview, see C Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019) Ch 1, 2 and 15; M Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford University Press 2001) and NN Shuibhne, *The*

endeavour, aptly described by Giandomenico Majone as the creation of a 'regulatory State' in Europe,<sup>59</sup> both reflects and nurtures the interdependence which exists as between the EU Member States, conferring huge advantages upon traders across Europe by affording them close to unfettered access to the European market. It can be said to afford the EU Member States, acting together, a set of powers, whose efficacy is of course contested, to shape regulatory standards across Europe.

Thus, the EU internal market infrastructure has a negative impact on the ability of EU Member States independently to set the regulatory standards which are to apply within each of their own territories, posing real challenges for regulatory autonomy. Nevertheless, the acceptance by EU Member States that they are engaged in a collective project, which rests on the identification of common objectives with powerful enforcement mechanisms to ensure that the relevant presumptions and exceptions are applied consistently, is what enables the benefits of the internal market to be fully realised. Bernard Hoekman and Charles F Sabel argue that the 'scrutiny required by regulatory equivalence creates novel possibilities for transparent and publicly accountable decision-making, and thus for reconciling sovereign self-determination with the stepwise extension of economic exchange and regulatory cooperation'.<sup>60</sup> In this context, the language of 'divided' sovereignty, where 'ultimate authority is split between different jurisdictions or entities in accordance with subject matter areas', or that of 'pooled' or 'shared' sovereignty, which is said to lie 'with the peoples of Europe taken together rather than with each of those peoples separately', is often used.<sup>61</sup>

In the preceding analysis of regulatory sovereignty, the connections between the 'independence' and 'allocation of power' sovereignty fictions, which have come to characterise popular narratives of Brexit, have been brought into sharp focus. We have demonstrated that the reallocation of power and autonomy, which underpins the concept of regulatory sovereignty, places significant limits on the independence of States to act, be that as a single actor or as part of a regional or international institutional arrangement. Moving forward, the effectiveness of the UK's interventions in global regulation governance hinges on *how* the UK exercises its regulatory sovereignty as an independent trade actor.

In the following section, an analysis of the EU's evolutive sovereignty and its relationship to international trade will be presented, with a view to identifying the differences between the EU's more established, and the UK's nascent, attempts to become a leader in regulation and standards-setting.

*Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013).

<sup>59</sup> G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 WEurPol 77.

<sup>60</sup> B Hoekman and C Sabel, 'Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy' (2017) EUI Working Paper RSCAS 2017/36, 2.

<sup>61</sup> N. Walker (ed), *Sovereignty in Transition* (Bloomsbury 2003), 457.

IV. THE EU AS AN EVOLUTIVE SOVEREIGN TRADE ACTOR

Before the strategic orientation of the EU as a trade actor is examined, it is important to reiterate that the key driver of the transformation of sovereignty at the EU level, and through its various processes of enlargement, is an acceptance of the reality of interdependence and of the benefits of trade and cooperation. The more powerful the interlinkages between economies are and become, the harder it is to be both 'independent' and 'sovereign'—at least when sovereignty is, following Locke, understood as the ability to control outcomes and respond to the fundamental needs of the people.<sup>62</sup> In such an interdependent world, peoples' needs increasingly depend on the decisions taken not only within but also outside the territory of each individual sovereign State.

Nevertheless, it is clear that absolute sovereignty retains important currency—legally and politically, idealistically and emotionally—notwithstanding the challenges which it has faced in the academic literature as 'outmoded' and 'incoherent', and 'not least as a normatively unattractive or inadequate as a way of making sense of emergent patterns of legal and political authority and imagining their future'.<sup>63</sup> Given that notions of 'pooled' and 'shared' sovereignty sit uneasily with 'the sense of sovereignty as a unifying and self-identifying claim made on behalf of the polity',<sup>64</sup> it is perhaps unsurprising that responses to it have been characterised by fluidity, instability and resistance.

A further difficulty with the 'pooled sovereignty' narrative is that, across many dimensions of the sovereignty debate within the EU, there is a profound tension between those who favour a State-like structure for the EU and those who see the EU as a community of Member States.<sup>65</sup> The debate can be depicted as one between those who want to replace the sovereignty of the Member States with a new sovereignty which vests in the EU, and those who are trying to reimagine sovereignty (and power) within the context of an interdependent world.<sup>66</sup> One topical illustration is in relation to the long-standing debate about the supremacy of EU law, a key feature of the Court of Justice's case law since the 1960s. Notwithstanding the claim of the Court of Justice that the EU Treaties create a new legal order of international law, in which the whole of European law prevails over the whole of national law, States', and in particular national courts', acceptance of the doctrine of supremacy has, in many cases, only been qualified.

Although national courts have found ways to accord priority to EU law over conflicting provisions of national law in almost all cases, they locate the reasons

<sup>62</sup> M Draghi, 'Sovereignty in a Globalised World, Bologna' (European Central Bank, February 2019). <sup>63</sup> N. Walker (n61), vi. <sup>64</sup> *ibid* 15.

<sup>65</sup> F Mancini, 'Europe: the Case for Statehood' (1998) 4 ELJ 1; and J Weiler, 'Europe: The Case Against the Case for Statehood' (1998) 4 ELJ 43.

<sup>66</sup> See M Kumm, 'Constituent Power, Cosmopolitan Constitutionalism and Post-Positivist Law' (2016) 14 ICON 697.

for so doing not (exclusively) in the ‘new legal order of international law’, but rather (or additionally) within their own domestic constitutional law. In recent years, across a number of Member States, the tensions between the Court of Justice and national courts, and their conception of the EU legal order, have been increasing, with theoretical approaches, such as those grounded in ‘constitutional pluralism’, coming under ever greater strain.<sup>67</sup> It is little surprise that the strongest voices on both sides of the debate—both those insisting on the unqualified supremacy of EU law and those seeking to resist it—are quick to invoke the language of absolutist sovereignty.

In the context of regulatory sovereignty, these tensions have resurfaced. The EU’s approach to regulatory governance has elements both of a response to the perceived need for cooperation among EU Member States for the effective functioning of the single market and of a ‘the pronounced need for self-justification’<sup>68</sup> to observers within and outside the EU. This has implications not only for the relationship between the EU and its Member States, but also for the EU’s ability to cooperate with external partners.

Over the past 30 years, the EU’s approach to regulatory governance across social, economic and cultural policy fields has been aimed at mitigating against risks arising from economic activity and preventing misconduct by economic actors, including businesses of all sizes. Internally, the EU has expressed its regulatory sovereignty by requiring that Member States remove barriers to facilitate the flow of goods and services within the internal market. This, coupled with continuous phases of EU enlargement, has resulted in the legalisation, codification and enforcement of regulations. EU regulatory governance has, therefore, moved beyond legislative practices to include bureaucratic and administrative processes, which operate through multi-actor and multi-level settings.<sup>69</sup>

With the rise of regulatory measures being used as forms of ‘hidden protectionism’<sup>70</sup> and instruments of foreign policy,<sup>71</sup> the role of regulatory governance has become ever more important. A close connection between

<sup>67</sup> For a full discussion, see D Chalmers, ‘National Sovereignty and European Law’ (2021) 46 *ELRev* 285, which advances a theory based on the ‘constitutional structure of the European Union’ that is sensitive to the role of national courts. See also D Kelemen and L Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland’ (2019) 21 *CYELS* 59; and M Wilkinson, ‘Beyond the Post-Sovereign State? The Past, Present and Future of Constitutional Pluralism’ (2019) 21 *CYELS* 6.

<sup>68</sup> V Heyvaert, ‘Governing Climate Change: Towards a New Paradigm for Risk Regulation’ (2011) 74 *MLR* 824.

<sup>69</sup> M Groenleer, ‘Regulatory Governance in the European Union: The Political Struggle over Committees, Agencies and Networks’ in D Levi-Faur, *Handbook on the Politics of Regulation* (Edward Elgar 2011).

<sup>70</sup> R Grundke and C Moshe, ‘Hidden Protectionism? Evidence from Non-Tariff Barriers to Trade in the United States’ (April 2016) Working Papers in Economics No 2016-2; E Yalcin *et al.*, ‘Hidden Protectionism: Non-Tariff Barriers and Implications for International Trade’ (ifo Forschungs-Berichte Study on Behalf of the Bertelsmann Foundation, December 2017).

<sup>71</sup> For an interesting example of how a regulation can be used as a foreign policy instrument, see M Hirsch, ‘Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on

risk regulation and market regulation has developed in the EU, and the 'EU's understanding of risk regulation, and of its role as a regulator, [has] matured in a context of trade and economic competitiveness, which [has] imbued the EU regulatory agenda, strategies and instrumental choices with some profound idiosyncrasies'.<sup>72</sup> The EU has strengthened its approach to 'risk regulation',<sup>73</sup> especially in the health and environment sectors, and it has developed a strong legislative basis for the precautionary principle.<sup>74</sup> To simplify its regulatory environment the EU has implemented its Better Regulation Agenda,<sup>75</sup> which continues to be revised to reflect contemporary concerns.

Inter-State cooperation is fundamental to the sustainability of the EU's single market and its presence as a trade actor on the global stage. President Macron, for example, has said that he believes that the way forward 'is a strong and political Europe. Why? Because I do not believe that Europe waters down France's voice: France ... builds much more useful and stronger action when it does so through Europe.'<sup>76</sup> The focus is less on the role of 'Europe' and of 'France' but instead on the aspiration to build 'useful and stronger action'. In this he echoes Anne-Marie Slaughter's view<sup>77</sup> that structures are needed to enable States to accomplish ends which they once could, but no longer can, accomplish alone. These sentiments, which identify sovereignty closely with power, are echoed in the words of EU Commission President Ursula von der Leyen, in a statement given on the day the Trade and Cooperation Agreement with the UK was agreed:<sup>78</sup>

But we should cut through the soundbites and ask ourselves what sovereignty actually means in the 21st century. For me, it is about being able to seamlessly do work, travel, study and do business in 27 countries. It is about pooling our strength and speaking together in a world full of great powers. And in a time of crisis it is about pulling each other up – instead of trying to get back to your feet alone. The European Union shows how this works in practice. And no deal

Products Manufactured in the Settlements in the West Bank and the Gaza Strip' (2002) 26 *FordhamIntLJ* 572.

<sup>73</sup> Risk regulation is defined as 'the exercise of public authority (however broadly construed) with intent to affect the likelihood and/or magnitude of socially undesirable events'. See Heyvaert (n 68) 823.

<sup>74</sup> GC Leonelli, 'Acknowledging the centrality of the precautionary principle in judicial review of EU risk regulation: Why it Matters' (2020) 57 *CMLRev* 1173.

<sup>75</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Better Regulation: Joining Forces to Make Better Laws' COM(2021) 219 final.

<sup>76</sup> Cited in M Rahman, 'European Sovereignty Has Lost Its Biggest Champion: French President Emmanuel Macron Has Been Quietly Redefining the Terms of the debate' (*Politico*, 7 April 2021). <<https://www.politico.eu/article/european-sovereignty-has-lost-its-biggest-champion-emmanuel-macron/>>.

<sup>77</sup> Slaughter, 'Sovereignty and Power in a Networked World Order' (n 9).

<sup>78</sup> European Commission, 'Remarks by President von der Leyen at the Press Conference on the Outcome of the EU–UK Negotiations' (Speech, 24 December 2020).



in the world can change reality or gravity in today's economy and today's world. We are one of the giants.

It is clear from this statement that the EU is making a strategic choice to prioritise regulatory sovereignty in its trade policy.<sup>79</sup> It would appear that the European Commission recognises internal cooperation among Member States as fundamental to the success of the EU's external trade policy. In its 2021 *Trade Policy Review*,<sup>80</sup> the European Commission outlined that the future trade policy will be modelled on the concept of 'open strategic autonomy', which it declares to be not only a 'policy choice' but a 'mind-set for decision makers' in the context of international trade.<sup>81</sup> Strategic autonomy finds its origins in the common foreign security policy (CFSP) sphere. European policymakers define strategic autonomy as 'the capacity to act'<sup>82</sup> but the meaning of the term differs in the context of defence and trade.

It is worthwhile linguistically unpacking this concept. It comprises three words—'open', 'strategic' and 'autonomy'—which should be analysed individually before being interpreted together. In trade vernacular, the use of the word 'open' signals the liberalisation of markets and stands in opposition to concepts like 'protectionism' and 'discrimination'. Under this model, and in its external relations, at least, the EU should be pursuing the elimination of tariff and non-tariff barriers through cooperative practices with its trade partners. The word 'strategic' means that the EU must act in the way that is in its material and non-material strategic interests. This has been the long-standing practice of the EU and does not mark a departure from past practices. Finally, the word 'autonomy' means that the EU has the capacity to act free from constraint, albeit within the powers designated under EU law and subject to the principle of subsidiarity. Implicit in all three words is the notion that there is tacit or explicit agreement and cooperation internally among the EU Member States. Read together as one concept, 'open strategic autonomy' embodies an approach to trade that will enable the EU to exercise its agency and act in a manner that is strategically in its best economic and social interests while maintaining its commitment to the project of market liberalisation. It is an expression of the EU's regulatory sovereignty.

<sup>79</sup> The same trends are visible across a range of other policy areas. For example, the EU's strategic autonomy and regulatory sovereignty in the technological field. See R Csernaton, 'The EU's Rise as a Defence Technological Power: From Strategic Autonomy to Technological Sovereignty' (Carnegie Europe, 12 August 2021) <<https://carnegieeurope.eu/publications/85134>>.

<sup>80</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy' COM(2021) 66 final of 18 February 2021 (hereinafter 'EU Trade Policy Review 2021'). For an interesting account of the EU's position, see E van den Abeele, 'Towards a New Paradigm in Open Strategic Autonomy' (2021) ETUI Working Paper 2021.03.

<sup>81</sup> EU Trade Policy Review 2021, 4.

<sup>82</sup> R Youngs, 'The EU's Strategic Autonomy Trap' (Carnegie Europe, 8 March 2021) <<https://carnegieeurope.eu/publications/83955>>.

To pursue the model of open strategic autonomy in trade means 'shaping the new system of global economic governance and developing mutually beneficial bilateral relations, while protecting [the EU] from unfair and abusive practices'.<sup>83</sup> The emphasis is on the 'EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values'.<sup>84</sup> In describing what the open strategic autonomy approach entails, the Commission states:<sup>85</sup>

It reflects the EU's fundamental belief that addressing today's challenges requires more rather than less global cooperation. It further signifies that the EU continues to reap the benefits of international opportunities, while assertively defending its interests, protecting the EU's economy from unfair trade practices and ensuring a level playing field. Finally, it implies supporting domestic policies to strengthen the EU's economy and to help position it as a global leader in pursuit of a reformed rules-based system of global trade governance.

It follows that by exercising 'strategic foresight' the EU will be better placed 'to detect strategic dependencies ... to identify existing risks and trends and take appropriate mitigating and strategic actions'.<sup>86</sup> Open strategic autonomy captures the balance that must be struck between the EU's right to exclude and the coexisting right to be recognised as an autonomous agent in an interdependent and networked global economy. It recognises the diffusion of power across different actors operating in multi-level environments both within and outside the EU and its Member States.

The external dimension, emphasised by Ursula von der Leyen in the quote above, is of critical importance to the claim that the EU is 'one of the giants'. The aspiration is to use trade policy so as to increase the EU's global power and to ensure that the EU's power and influence extend beyond its borders. Enhancing its strategic autonomy is now an integral part of the EU reducing its dependency on raw materials and pharmaceuticals, for example.<sup>87</sup> The EU's regulatory governance requires that openness and engagement are 'a strategic choice that also cater for the European Union's well-understood self-interest'.<sup>88</sup> In its external trade relations, the reorientation of trade policy to an open strategic autonomy model signals the importance of asserting regulatory sovereignty in the global economy. The 'strong protectionist approach of EU autonomy'<sup>89</sup> has long been recognised by the Court of

<sup>83</sup> Communication from the Commission to the European Parliament, the European Council, the Council and the European Economic and Social Committee and the Committee of the Regions, 'Europe's Moment: Repair and Prepare for the Next Generation' COM(2020) 456 final of 27 May 2020, 13. <sup>84</sup> EU Trade Policy Review 2021, 4. <sup>85</sup> *ibid.*

<sup>86</sup> F Simonelli and N Jacob, 'Can We Better the European Union Better Regulation Agenda?' (2021) 12 *European Journal of Risk Regulation* 851. <sup>87</sup> COM(2020) 456 final (n 83) 12.

<sup>88</sup> EU Trade Review 2021, 6.

<sup>89</sup> C Contartese and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' in M Andenas *et al.* (eds), 'Opinion 1/17: Between European and International Perspectives' (2021) 6 *European Papers* 625.

Justice<sup>90</sup> and the EU's rhetoric of strategic autonomy overstates the extent to which the EU can dictate the terms of its relationships with external partners. Indeed, international cooperation would be impossible if the EU were to insist that all terms of an agreement must serve the interest of the EU. Much like that of the UK's, the EU's rhetoric is illustrative of the EU's own absolutist sovereignty fiction.

The EU thus accepts one of the core claims of this article: that sovereignty is relational and not insular. By 2024, it is estimated that 84 per cent of the world's gross domestic product (GDP) will be generated from outside the EU, while the EU is expected to grow modestly by 1.4 per cent annually.<sup>91</sup> To retain its position in the global economy as 'one of the giants', the EU will need to harness growth opportunities and this will require cooperation not only between States but among the raft of public and private actors that operate in the networked world order. What is clear is that the effectiveness of the open strategic autonomy model hinges on the compatibility between the internal and external dimensions of EU regulatory sovereignty. There may yet be further sovereignty fictions to be revealed once the model of open strategic autonomy has been implemented over a period of time.

While the EU has, albeit imperfectly, attempted to reconcile political and regulatory sovereignty, and to find ways in which pooled political sovereignty and regulatory power and influence can be combined, the UK now appears to be set on a very different path. In the UK's case, loud assertions of absolutist sovereignty, with references to independence and the freedom from external constraint, are combined with a 'Global Britain Agenda', which aspires not only to global influence but also to global leadership and stewardship. In the final substantive section, we evaluate the UK's new 'common law approach' to regulatory governance.

#### V. THE COMMON LAW APPROACH TO REGULATORY GOVERNANCE: AN EMERGENT SOVEREIGNTY FICTION?

The earlier sections of this article mapped the 'independence' and 'allocation of power' sovereignty fictions that have characterised the UK's withdrawal process from the EU. We have shown that the UK government's

<sup>90</sup> The EU's autonomy in relation to other international legal regimes has been interpreted in the strictest of terms in Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461 and Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454. However, in Opinion 1/17 *Accord ECG EU-Canada* EU:C:2019:341, the position appears to have been somewhat softened in the Court's acknowledgement of the EU as an international actor in the very narrow context of the creation of a multilateral investment court under the Comprehensive Economic and Trade Agreement (CETA). Nevertheless, scholars have persuasively argued that Opinion 1/17 does not undermine or deviate from the Court's earlier interpretation of EU autonomy. See N Lavranos, 'CJEU Opinion 1/17: Keeping International Investment Law and EU Law Strictly Apart' (2019) 4 *European Investment Law and Arbitration Review* 240.

<sup>91</sup> EU Trade Review 2021, 3.

communication technique, which uses absolutist sovereignty as a 'political emotion', is incompatible with the desire to implement trade agreements with other States. Given that cooperation and partnership are core features of the Global Britain Agenda, the UK government, at some levels at least, recognises that the independence sovereignty fiction does not reflect the realities of international trade. Furthermore, the Global Britain Agenda recognises the different and varied roles public actors and private economic actors—transnational corporations, small and medium-sized enterprises, exporters, importers, sole traders—will play in enabling the UK to realise its ambition to become a leader in responding to global challenges. In effect, this reinforces the relational nature of sovereignty. To become a global actor, the UK government recognises that its capacity to act as an autonomous State is determined by the nature of its relationships with other public and private actors in the international system. Thus, the Global Britain Agenda reveals the independence and allocation of power sovereignty fictions.

#### *A. The UK as a Regulatory Sovereign*

In its Global Britain Agenda, the UK Government has expressed its commitment to 'upholding standards and continuing to be a world leader in better regulation'.<sup>92</sup> Its ambition is to develop a 'world class regulatory regime'<sup>93</sup> through its 'vision of an open and outward looking Britain that champions free trade and seeks to tackle the ever-growing proliferation of non-tariff barriers which are impeding growth in the world economy. The UK as a liberal and free trading nation will', we are told, 'continue to be a driving force for good.'<sup>94</sup>

In May 2021, the UK's independent Taskforce on Innovation, Growth and Regulatory Reform (TIGRR), commissioned by the Prime Minister, Boris Johnson, pronounced its vision for the UK's regulatory environment to emerge as a regulatory sovereign on the international stage with a 'common law approach' to regulatory governance. TIGRR has been mandated to articulate the UK's vision as a regulatory innovator on the global stage. Brexit offers the UK an opportunity to project a 'bold new UK regulatory framework based on a set of principles embedded in UK common law, which prioritises innovation, growth and inward investment as part of the UK's new global trading freedom, building on the UK's global reputation for leadership in setting the highest standards of environmental and consumer protection'.<sup>95</sup> The TIGRR Report identifies nine areas of regulation that should be prioritised for

<sup>92</sup> Department for Business, Energy and Industrial Strategy, 'International Regulatory Cooperation for a Global Britain: Government Response to the OECD Review of International Regulatory Cooperation of the UK' (September 2020) CP 249, 6 (hereinafter 'BEIS IRC Report 2020').

<sup>93</sup> BEIS IRC Report 2020, 20.

<sup>94</sup> BEIS IRC Report 2020, 6.

<sup>95</sup> I Duncan Smith *et al.*, 'Taskforce on Innovation, Growth and Regulatory Reform' (May 2021) 5 (hereinafter 'TIGRR Report 2021')

reform: financial services, data, clinical trials, digital health, energy, transport, space and satellites, agri-environment and nutraceuticals.<sup>96</sup> By prioritising these sectors for ‘transformational change’,<sup>97</sup> it is expected that new investment and opportunities for economic growth will be stimulated.

Central to the common law approach to regulation is the diffusion of power, and sovereignty, from the UK government to regulators.<sup>98</sup>

The TIGRR report proposes that this can be achieved by delegating more power and discretion to the UK’s regulatory bodies, removing many of the detailed rules in the existing statutory frameworks to make them less prescriptive (replacing them with outcomes to be achieved), and allowing the regulatory regime to be shaped more by case law.

Under the new regulatory approach, it is proposed that UK regulators will be under a duty to promote and report on competition and innovation.<sup>99</sup> While this marks out a new role for regulators, their increased autonomy will also be met with increased accountability, with scrutiny of their decisions by Cabinet, including the National Economic and Recovery Taskforce (NERT) Cabinet sub-committee on Better Regulation created in 2021.

This ‘sovereign approach’<sup>100</sup> to agile regulation expresses a move away from the EU’s ‘code-based’ approach to a more ‘principles-based’ framework.<sup>101</sup> It introduces a ‘proportionality principle’, which will make ‘regulation proportionate to both the scale of the risk being mitigated and the capacity of the organisation being regulated’.<sup>102</sup> The ‘bold’ approach to regulation envisages the UK ‘leading from the front’ to create new markets by shaping and supporting the development of new technologies and ‘recognising what works’ by enabling the revision of regulatory interventions where appropriate.<sup>103</sup> By reinforcing the commitment to setting high standards domestically and internationally, UK regulators will aim to lead and influence decision-making at all levels. The ability to lead and influence regulatory frameworks is recognised by the EU as an ‘important competitive advantage’<sup>104</sup> and one that the UK is keen to harness. The TIGRR report sets out the rationale for the common law approach:<sup>105</sup>

UK regulation should build on the strengths of the common law being adaptable. It should evolve in a predictable way. There is scope for elements of retained EU regulation to be rewritten using the common law method in clear, simple English. Case law should be welcomed, so as to regain the benefits of precedent-based, incremental regulation making. The common law system would allow

<sup>96</sup> TIGRR Report 2021, 8–9.

<sup>97</sup> TIGRR Report 2021, 11.

<sup>98</sup> Department for Business, Energy and Industrial Strategy, ‘Reforming the Framework for Better Regulation: A Consultation’ (22 July 2021) para 3.1.2.

<sup>99</sup> TIGRR Report 2021.

<sup>100</sup> Department for Business, Energy and Industrial Strategy (n 98) 3–4.

<sup>101</sup> Para 7 of the TIGRR Report 2021, 8.

<sup>102</sup> TIGRR Report 2021, 6.

<sup>103</sup> Department for Business, Energy and Industrial Strategy (n 98) 3–4.

<sup>104</sup> EU Trade Policy Review 2021, 16.

<sup>105</sup> TIGRR Report 2021, 7.

regulators to apply simpler rules, more of which they make themselves, on the delegated authority of Parliament but within defined parameters. This would be inherently more flexible, but will require checks and balances to deliver legal predictability, fairness and accountability.

It is argued that this new approach will 'allow regulations to be made in a more agile and proportionate way'<sup>106</sup> as it marks a shift away from the codified approach to regulation pursued by the EU. To simplify regulation, the UK has used the 'one in, two out' rule.<sup>107</sup> A more integrated approach to regulation is imagined under the common law approach, which will see the development of a single framework for regulatory disciplines with a focus on outcome rather than the process of compliance.<sup>108</sup>

However, the extent of the differences between the common law approach to regulation, and the EU's approach to regulatory governance is overstated. For example, the UK's new regulatory agenda foregrounds the proportionality principle; a principle which has a long and rich history in EU administrative law.<sup>109</sup> Indeed, the EU has been a pioneer in the 'migration of constitutional ideas' to regional and international economic law.<sup>110</sup> While the move away from codification and its associated administrative burdens will inevitably make the process of developing and implementing regulation more straightforward, both the UK and the EU have embedded proportionality in their risk regulation through the precautionary principle and both use strategic foresight to mitigate against risk. Further, while the Global Britain Agenda places significant emphasis on the quality of the UK's new regulatory regime, it does little to indicate how such a regime will translate into a position of global leadership. By embedding the principle of proportionality into its new regulatory agenda, the UK is merely replicating EU practice, thereby reinforcing our claim that sovereignty is not absolute and regulatory frameworks are designed around notions of interdependence. However, and as the UK's regulatory architecture is in the early stages of its development, it is not yet clear whether or to what extent the UK's proportionality principle might diverge from the EU's long-standing proportionality principle. Time will tell whether the UK is able to convince other States of the merits of its new regulatory approach.

An interesting change proposed in the common law approach relates to how the UK proposes to manage compliance. Rather than requiring a 'tick box' exercise to demonstrate compliance with codified rules, the UK is proposing a regulatory approach based on outcomes. This approach draws on non-EU practices from Singapore and Japan, for example, which have respectively

<sup>106</sup> Department for Business, Energy and Industrial Strategy (n 98) 19.

<sup>107</sup> TIGRR Report 2021, 6. <sup>108</sup> TIGRR Report 2021, 7.

<sup>109</sup> PP Craig and G de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020); T Harbo, 'The Function of Proportionality in EU Law' (2010) 16 *ELJ* 158.

<sup>110</sup> V Vadi, 'The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality' (2015) 35 *Northwestern Journal of International Law & Business* 557.

adopted more forward-looking and outcome-focussed regulation.<sup>111</sup> It will also build on existing practice in the UK like regulatory sandboxes, the first of which is the Financial Conduct Authority's sandbox on regulating fintech which has been an important site of experimentalism for financial services. The use of sandboxes where specific conditions are met enables regulators to balance innovation with risk mitigation.<sup>112</sup>

The risk associated with the use of sandboxes has been noted by the UK Department for Business, Energy and Industrial Strategy (BEIS), which has formally opened a consultation on the relevant aspects of the UK's 'better regulation framework'<sup>113</sup> raised in the TIGRR Report. In the consultation paper, BEIS notes that the delegation of power to regulators and the use of regulatory sandboxes may have mixed results:<sup>114</sup>

The pros include the ability for regulators to do more through guidance, decisions and rules that can be adapted quickly outside of legislative frameworks. This could allow them to adapt more quickly to disruptive new technologies or other changes in circumstances ... On the other hand, this approach could lead to more uncertainty in the regulated markets and litigation. It could ultimately lead to more regulation being created overall, through mechanisms which are less responsive to public scrutiny and democratic accountability.

Notwithstanding the UK's absolutist sovereignty rhetoric, the success of the proposed common law approach to regulation is contingent on the delegation of autonomy and power from central government to other actors. As such, this agile regulatory approach serves as a contemporary example of diffused regulatory sovereignty and does not align with the government's proclaimed Brexit ambition to recapture absolutist sovereignty.

### *B. Regulatory Governance in the UK–EU Relationship*

The UK Government takes pride in the fact that it:<sup>115</sup>

... completed our withdrawal from the EU and agreed a Trade and Cooperation Agreement – the broadest and most far-reaching bilateral trade agreement ever. Many said this would take years to complete or could not be done at all. We never believed that. Instead we delivered a platform for a new relationship between this country and the EU in record time.

<sup>111</sup> TIGRR Report 2021, 16

<sup>112</sup> For discussion, see E Brown and D Piroška, 'Governing Fintech and Fintech as Governance: The Regulatory Sandbox, Riskwashing and Disruptive Classification' (2022) 27 *New Political Economy* 19.

<sup>113</sup> Department for Business, Energy and Industrial Strategy (n 98). This consultation opened on 22 July 2021 and closed on 1 October 2021. At the time of writing, the findings of the consultation were not publicly available.

<sup>114</sup> Department for Business, Energy and Industrial Strategy (n 98) paras 3.2.6–3.2.7.

<sup>115</sup> HM Government, 'Northern Ireland Protocol: The Way Forward' (Cabinet Office Policy Paper, 21 July 2021) Foreword by the Prime Minister, 3.



While there are differences between the EU's open strategic autonomy and the UK's Global Britain Agenda, there are also synergies between them. Notwithstanding areas of common interest, the protection of sovereignty has been a primary driver behind the Withdrawal Agreement,<sup>116</sup> the Northern Ireland Protocol,<sup>117</sup> and the Trade and Cooperation Agreement.<sup>118</sup>

For both the EU and the UK, there have been concerns that a future trade deal would undermine their respective high standards on social, health and environmental matters. Protecting regulatory autonomy has been central to the UK–EU trade negotiations. The commitment to maintaining high environmental standards features as part of the level playing field negotiations, which included heated debates about the inclusion of a 'ratchet clause',<sup>119</sup> non-regression clauses and/or the 'dynamic alignment' of regulatory issues. In order to reach agreement on both the Withdrawal Agreement (and the Northern Ireland Protocol) and the Trade and Cooperation Agreement, the UK accepted 'more robust [level playing field] and governance mechanisms than it wanted'. It 'retained the right to diverge, theoretical sovereignty, but that right did not come cost free'.<sup>120</sup>

To ensure that minimum standards are maintained on implementation of the Trade and Cooperation Agreement (TCA), the parties agreed to non-regression clauses in key regulatory areas. Title XI TCA sets out important regulatory provisions under the agreement relating to the level playing field, which aim to enable the parties to 'maintain and improve their respective high standards' in matters relating to the level playing field and sustainable development. However, the title of Chapter XI has been described as 'somewhat of a misnomer' since the obligations set out therein are 'more akin to non-regression clauses than any form of dynamic alignment, or indeed level playing field'.<sup>121</sup> Under Article 356 ('Right to regulate, precautionary approach and scientific and technical information') each party can 'determine the levels of protection it deems appropriate'.<sup>122</sup> The 'precautionary approach' provides that 'where there are no reasonable grounds for concern that there are potential threats of serious or irreversible

<sup>116</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 [2020] OJ L29/7.

<sup>117</sup> Northern Ireland Protocol to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/102.

<sup>118</sup> 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 [2021] OJ L149/10 (hereinafter 'TCA').

<sup>119</sup> J Forsyth, 'How to Solve Brexit's Ratchet Clause Problem' (*Spectator*, 11 December 2020) <<https://www.spectator.co.uk/article/how-to-solve-the-ratchet-clause-problem>>.

<sup>120</sup> B Laffan, 'Sovereignty and Brexit: From Theory to Practice' (2021) DCU Brexit Institute Working Paper 5/21, 12–13.

<sup>121</sup> M Gehring, 'Analysis 5 of the Brexit Deal: Environment and Climate Provisions' (*EU Law Analysis*, 22 January 2021) <<https://eulawanalysis.blogspot.com/2021/01/analysis-5-of-brexit-deal-environment.html>>.

<sup>122</sup> Art 356(1) TCA.

damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a party from adopting appropriate measures to prevent such damage'.<sup>123</sup> The precautionary approach appears to be a weakened version of the EU's precautionary principle, which requires scientific evidence to form the basis of risk regulation. In this instance, the UK's approach to regulatory governance of health and environment might perhaps lead to the lowering of standards in its relations with other States.

Non-regression clauses have been set out in the TCA to protect the regulatory sovereignty of the UK and the EU in relation to labour and social policy (Article 387), the environment and climate (Article 391). In respect of both provisions, there is a clause which stipulates that 'A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its ... levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.'<sup>124</sup> It remains unclear what the scope of the non-regression clauses might be in practice, but the language of these provisions reinforces the importance of preserving regulatory sovereignty in areas of significant national interest. The parties may also seek to rely on exceptions clauses enshrined in the TCA as a defence to otherwise discriminatory trade and regulatory measures.<sup>125</sup>

A further measure to preserve the regulatory sovereignty of each Party is Article 411 TCA, which contains the 'rebalancing' clause.<sup>126</sup> Under Article 411.1 the parties recognise each other's right to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control, in a manner consistent with each party's international commitments, including those under this Agreement. Nevertheless, they acknowledge that significant divergences in these areas can be capable of impacting trade or investment between the parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement, and so allow either Party to take 'appropriate rebalancing measures' to address the situation.<sup>127</sup> In acknowledgment of the potential difficulties here, Article 411.4 states that in order to ensure 'an appropriate balance between the commitments made by the Parties in this Agreement on a more durable basis', either party may request, no sooner than four years after the entry into force of this

<sup>123</sup> Art 356(2) TCA.

<sup>124</sup> Arts 387(2) and 391(2) TCA.

<sup>125</sup> For an overview of the exceptions clauses, see C Gammage, 'General Exceptions and Public Interest Regulation: An Analysis of the EU-UK Trade Cooperation Agreement' (2021) 18 *Manchester Journal of International Economic Law* 101.

<sup>126</sup> See J Stone, 'EU Trade Unions Worried That Barnier Is Letting UK Slash Worker's Rights Too Far in Brexit Deal: "Ratchet Clauses" on Labour Standards Could Be Dropped at UK's Insistence' *The Independent* (London, 7 December 2020) <<https://www.independent.co.uk/news/uk/politics/brexit-uk-workers-rights-unions-etuc-b1767518.html>>.

<sup>127</sup> Art 411.2 TCA. See also A-E Luyten, 'The EU-UK TCA: A Front-Runner in Trade and Sustainable Development' (*Trade Expertes*, 16 March 2021) <<https://www.TheEUUKTCA.com>: A Front-runner in Trade and Sustainable Development — TradeExpertes>.

Agreement, a review of the operation of this part of the Agreement.<sup>128</sup> While there are significant questions about the operation of these clauses, in relation both to the substance of the 'trade' test and to the effectiveness of the enforcement mechanisms, it is clear that the constraints imposed by the TCA 'qualify the control that has been repatriated'.<sup>129</sup>

It is too early in the relationship to speculate on how the UK and EU approaches to regulatory governance may align or diverge from one another. To date, the main focus has been on the implementation of the Northern Ireland Protocol, and fishing quotas.<sup>130</sup> Sovereignty, and the perceived need to protect regulatory autonomy, has created friction between the UK and EU and this has led to a lack of trust. While both parties are committed to a rules-based system, the UK's accusation is that the EU is exhibiting 'legal purism',<sup>131</sup> and sticking too closely to the terms of what was agreed in the Protocol, without showing the imagination and flexibility required to meet UK concerns and to react to developments in Northern Ireland. In the name of pragmatism, the UK is seeking to revisit agreements it has recently signed (and on the back of which a general election victory was obtained), without seeming to be aware of the consequences which an erosion of trust in the UK is likely to have on its ability successfully to pursue its Global Britain Agenda. What is clear is that the notion of absolute sovereignty can no longer be used accurately to capture or define State interactions in the contemporary global economy.

## VI. CONCLUSION

The purpose of this article has been to illustrate three sovereignty fictions associated with the UK's ambition to emerge as a regulatory sovereign through its Global Britain agenda. Absolutist sovereignty is one fiction of the UK's ambition to become a global leader in international trade. It has been shown that the diminishing significance of tariffs and the increasing importance of non-tariff barriers operating behind-the-border as market access tools and instruments of foreign policy have led to a shift in emphasis toward regulatory sovereignty. Sovereignty has been used a discursive tool to justify the legal, economic and social choices made by the UK, and the UK government has popularised the rhetoric of absolutist sovereignty as a

<sup>128</sup> Further details are provided in arts 411.5 to 411.12 TCA.

<sup>129</sup> P Craig, 'Brexit a Drama the Endgame – Part II: Trade, Sovereignty and Control' (2021) 46 *ELRev* 129, 145. For fuller discussion, see P Syrpis, 'The Influence of the EU on UK Labour Law – Before and After Brexit' (2022) 51 *Industrial Law Journal* (forthcoming).

<sup>130</sup> C Grey, 'Fishy Arguments' (*Brexit & Beyond*, 5 November 2021) <<https://chrisingreybrexitblog.blogspot.com/2021/11/fishy-arguments.html>>.

<sup>131</sup> See DA Green, 'Beware Lord Frost's "Legal Purism" Line – For It Means Disregard for the Rule of Law and Is Strategically Unwise' (*The Law and Policy Blog*, 9 June 2021) <<https://davidallengreen.com/2021/06/beware-lord-frosts-legal-purism-line-for-it-means-a-disregard-for-the-rule-of-law-and-is-strategically-unwise/>>.

communication technique to gain public buy-in to the withdrawal process. The independence fiction does not reflect the realities of 'doing business' with the wider world in the modern political economy.

The second sovereignty fiction addressed in this article relates to the allocation of power in governance frameworks. This analysis has been structured on the basis of the arguments put forward by leading scholars<sup>132</sup> that sovereignty is a relational concept: that the capacity to act as an autonomous agent relies on the relationships that have been cultivated with a range of other actors in the international economy. The evolution of sovereignty away from exclusively State-centric modes of governance, towards 'disaggregated' models operating in networked global orders has been charted. Implicit in this 'new sovereignty' are cooperation and partnership with other States and the diffusion of power and autonomy to a range of public and private actors. In an increasingly interdependent and globalised world, cooperation, and participation in international governance networks, increases the power of States, enabling them better to protect and provide for their peoples. It has been shown that within the EU, political sovereignty has been reconceptualised and deprioritised, although absolute conceptions of sovereignty retain significant political salience. The evolutive nature of sovereignty has been analysed in the context of regulatory governance to illustrate how States operate within networked orders of public and private actors to protect and grow their economies. This analysis leads to the third sovereignty fiction, which arises from the interplay between the other two: absolute sovereignty can no longer be used to capture or define State interactions in the contemporary global economy.

With a focus on the EU and UK approaches to regulatory governance, this article has highlighted sovereignty fictions and argued that regulatory governance, as an expression of regulatory sovereignty, necessitates constraints on absolute State power. By charting the evolutive nature of sovereignty, it has been demonstrated that cooperation is a core feature of regulatory sovereignty. Through institutional frameworks, States must structure cooperation between actors so that States can control outcomes and to respond to the fundamental needs of the people. The EU's open strategic autonomy model and the UK's common law approach to regulation have been examined, and opportunities identified for the UK to mark out a new and more innovative path to achieve its regulatory aims. But, in both contexts, sovereignty fictions can be disruptive to the realisation of policy goals. To emerge as leaders in global trade and regulation governance both the UK and EU must address the blind spots in their approaches which are, in large part, driven by an inability to look beyond or resolve sovereignty fictions.

<sup>132</sup> Slaughter, 'Sovereignty and Power in a Networked World Order' (n 9); Chayes and Chayes (n 7).